

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 08-130 & DT 09-065

**METROCAST CABLEVISION OF NEW HAMPSHIRE, LLC &
IDT AMERICA, CORP.**

Applications for Certification as Competitive Local Exchange Carriers

Order Approving Stipulation

ORDER NO. 25,193

January 18, 2011

I. FACTUAL AND PROCEDURAL HISTORY

On September 19, 2008, MetroCast Cablevision of New Hampshire, LLC (MetroCast) applied to the Commission to amend its existing certification as a competitive local exchange carrier (CLEC) to include the service territory of Union Telephone Company, Inc. (Union). MetroCast had previously been certified to operate as a CLEC in the service territory of FairPoint Communications. Additionally, MetroCast is the cable television provider to the communities within Union's service territory. On September 30, 2008, the Commission granted MetroCast's request to operate as a CLEC in Union's service territory without conducting an adjudicated proceeding. On October 14, 2008, the Commission received a motion from Union objecting to the certification of MetroCast as a CLEC in its territory. That motion was docketed as Docket No. DT 08-130.

Union argued that the Commission had not complied with various notice and hearing requirements concerning the entry of CLECs into the service territory of a rural incumbent local exchange carrier (RLEC), specifically Union. Accordingly, Union requested that the

Commission rescind the authority granted to MetroCast or grant rehearing on MetroCast's application. By Order No. 24,939 (Feb. 6, 2009), the Commission denied the motion to rescind authority and the request for rehearing. That denial was appealed to the New Hampshire Supreme Court.

On February 23, 2009, IDT America, Corp. (IDT) applied to the Commission to amend its existing CLEC certification to include Union's service territory. IDT, like MetroCast, was previously certified as a CLEC in the service territory of FairPoint Communications. Among other things, IDT provides back office support to MetroCast's customers. Effective March 6, 2009, the Commission granted IDT's request to enter Union's territory without conducting an adjudicated proceeding. On April 3, 2009, Union filed a nearly identical request to that covering MetroCast, to rescind the authority granted to IDT or to grant rehearing. That motion was docketed as Docket No. DT 09-065. By Order No. 24,970 (May 22, 2009) the Commission denied the motion to rescind authority and the request for rehearing. That denial was appealed to the New Hampshire Supreme Court, which consolidated the appeal with that covering MetroCast.

Following briefing and oral argument, the Supreme Court released its opinion in *Appeal of Union Telephone Company d/b/a Union Communications*, 160 N.H. 309 (2010) (*Union Telephone*). By that opinion, the Supreme Court concluded that New Hampshire law required the Commission to adhere to certain notice and hearing requirements and that it had not done so in these instances. *Id.* at 318-19. The Supreme Court, therefore, reversed the decision of the Commission granting authority to MetroCast and IDT to operate as CLECs in Union's service territory. *Id.* at 319. The Supreme Court also determined that federal law may pre-empt the state

law requirements for notice and hearing and remanded the matters to the Commission to determine whether state law is pre-empted by federal law. *Id.* at 319-21.

On June 11, 2010, the Commission issued Order No. 25,110 setting a pre-hearing conference in these matters for the purpose of deciding the issues remanded by the Supreme Court. In the technical session following the July 1, 2010 pre-hearing conference, representatives of Union, IDT and MetroCast indicated that they had begun discussing a settlement of all outstanding issues in these dockets. In its July 6, 2010 Report of Technical Session, Staff requested that further action on these dockets be withheld pending the filing of a settlement.

On December 13, 2010, MetroCast, IDT and Union filed a “Stipulation and Settlement Agreement” (Stipulation), purporting to resolve all issues between them. Through the Stipulation, the parties requested that their agreement be approved and recommended that the two dockets be dismissed, with prejudice.

The Stipulation provides that MetroCast and IDT agree: (1) to provide coverage maps or other data demonstrating that MetroCast’s facilities, with or without the assistance of IDT, pass more than fifty percent of the homes and businesses within the exchanges served by Union; (2) to support Union’s forthcoming petition for alternative regulation pursuant to RSA 374:3-b; and (3) to waive any opportunity for a hearing pursuant to a petition for alternative regulation under RSA 374:3-b. Under the Stipulation, Union agrees: (1) to waive any right to notice and a hearing in the instant dockets and to the legal effectiveness of the Commission’s grants of authority to both MetroCast and IDT to operate as CLECs in Union’s service territory; and (2) that it and its parent company consent to the legal effectiveness of the arbitrated interconnection

agreement between Union and IDT as arbitrated in Docket No. DT 09-048, without further hearings. In other words, IDT and MetroCast will support Union's petition for alternative regulation in exchange for Union no longer contesting their ability to operate as CLECs in Union's service territory.

II. COMMISSION ANALYSIS

We note first that, pursuant to a request from other rural telephone carriers, the Commission has opened Docket No. DT 10-183, which addresses the requirements for CLEC certification into the territory of RLECs and whether the New Hampshire law governing the entry of CLECs into RLEC territory is pre-empted by federal law. Accordingly, it is in that docket that the Commission is addressing the matters remanded by the New Hampshire Supreme Court in the *Union Telephone* decision. Thus, our analysis in this case is confined to the Stipulation and its associated requirements. In reviewing an agreement such as the Stipulation we apply the following standard:

Pursuant to RSA 541-A:31, V(a), informal disposition may be made of any contested case at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default. New Hampshire Code of Administrative Rules Puc 203.20(b) requires the Commission to determine, prior to approving disposition of a contested case by settlement, that the settlement results are just and reasonable and serve the public interest. In general, the Commission encourages parties to attempt to reach a settlement of issues through negotiation and compromise as it is an opportunity for creative problem solving, allows the parties to reach a result more in line with their expectations, and is often a more expedient alternative to litigation.

Public Service Company of New Hampshire, Order No. 25,123 (June 28, 2010) at 28.

Furthermore, because the New Hampshire Supreme Court reversed the Commission decisions

granting CLEC authority to IDT and MetroCast, we must also decide whether MetroCast and IDT meet the relevant criteria to act as CLECs in Union's territory.

In determining whether MetroCast and IDT may act as CLECs in Union's service territory, the New Hampshire Supreme Court instructs:

RSA 374:26 sets the standard by which the PUC may grant or withhold permission to an entity seeking to expand its existing franchise. Pursuant to RSA 374:26, such permission may not be granted unless the PUC finds "that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise." RSA 374:22-g sets forth the numerous factors the PUC must consider when determining whether allowing more than one provider to provide telecommunications services in a single territory is for the "public good."

Union Telephone, 160 N.H. at 319 (citations omitted). The permission to be granted pursuant to RSA 374:26, "may be granted without hearing when all interested parties are in agreement."

Under RSA 374:22-g, II:

In determining the public good, the commission shall consider the interests of competition with other factors including, but not limited to, fairness; economic efficiency; universal service; carrier of last resort obligations; the incumbent utility's opportunity to realize a reasonable return on its investment; and the recovery from competitive providers of expenses incurred by the incumbent utility to benefit competitive providers, taking into account the proportionate benefit or savings, if any, derived by the incumbent as a result of incurring such expenses.

We address each factor in turn, keeping in mind that through the Stipulation Union has agreed to the entry of these competitors. We recently determined, in the context of the entry of another CLEC into the territory of a different RLEC, that allowing new competitors into a territory enhances competition by permitting the entry of new providers who will offer new and different service alternatives. *See CRC Communications of Maine, Inc.*, Order No. 25,165 (Nov. 8, 2010) at 3. We likewise find that allowing MetroCast and IDT to operate in Union's territory will

allow these new competitors to offer their services to customers, thus better serving the interests of competition.

Regarding fairness, it is the case that other, non-regulated companies, specifically cellular and nomadic VoIP providers offer services throughout the state. Similar to our conclusion regarding the interests of competition, we have recently also found that the existence of these competitors makes it fair to allow other competitors the opportunity to compete. *See id.* at 3-4 and *Comcast Phone of New Hampshire (Comcast Phone)*, Order No. 24,938 (Feb. 6, 2009) at 19-20. Thus, we conclude that this factor weighs in favor of granting the petitions.

Regarding economic efficiency, in our decision in *Comcast Phone* we noted that, as a general matter, competition leads to efficiency and that a means to achieve economic efficiency is to eliminate barriers to competitive entry. *Comcast Phone*, Order No. 24,938 at 20. We find similar forces at work here. Accordingly, we conclude that the interests of economic efficiency favor allowing MetroCast and IDT to enter Union's service territory.

On issues relating to universal service, carrier of last resort obligations and Union's ability to earn a reasonable return, Union raises no concerns that it would not be capable of meeting its obligations to serve the public while still earning a reasonable return. Moreover, as is evident from the Stipulation, Union intends to seek alternative regulation pursuant to RSA 374:3-b. As a condition of achieving alternative regulation, an alternative regulation plan is to provide for the preservation of universal access to affordable basic telephone service. RSA 374:3-b, III(e). As such, at the time Union seeks alternative regulation, its plan will be required to contain terms meant to ensure its continued provision of universal service as the carrier of last resort.

Therefore, we find that this factor favors the granting of MetroCast and IDT's petitions to offer CLEC services in Union's territory.

Lastly, as to the recovery of expenses, we note that Union does not provide unbundled elements to MetroCast and therefore does not incur expenses for its benefit. Further, Union and IDT have in place an arbitrated interconnection agreement, which, pursuant to the Stipulation, Union supports. Accordingly, there is a method in place for the recovery of expenses incurred by Union for the benefit of its competitor. *See CRC Communications of Maine, Inc.*, Order No. 25,165 (Nov. 8, 2010) at 5.

For the above reasons, we conclude that MetroCast and IDT's petitions to offer CLEC services in Union's service territory are in the public good. Further, because Union has agreed to the entry of these competitors no hearing is necessary to reach this conclusion. Accordingly, the petitions to offer CLEC services in Union's service territory as contained in Docket Nos. DT 08-130 and 09-065 are granted. The requirements for competitors to become certified as CLECs in RLEC territories and the extent, if any, of federal pre-emption, remain open issues to be resolved in Docket No. DT 10-183.

Having granted the petitions of MetroCast and IDT, we turn to the remainder of the Stipulation to determine if it is in the public interest. As noted, in exchange for Union not contesting the entry of MetroCast and IDT, those companies have agreed to provide material support to Union in its planned petition for alternative regulation. They will provide this support by making available certain information about the scope and features of their services that would generally not be available to an RLEC seeking to obtain alternative regulation. Specifically, MetroCast and IDT will be providing information about the degree to which their facilities pass

customer locations in Union’s service territory, voice customer counts and details on the types of services they offer. In that providing this information will make the petition for alternative regulation more readily reviewable and it will enable the Commission to make a decision based upon a more complete record than could be developed by Union on its own, we conclude that the requirements of the Stipulation are in the public interest.

For the above reasons, we approve the Stipulation and Settlement Agreement filed in Docket Nos. DT 08-130 and 09-065 on December 13, 2010. Further, we grant permission to MetroCast and IDT to operate as CLECs in Union’s service territory. .

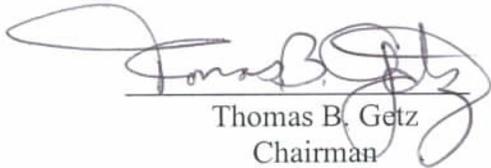
Based upon the foregoing, it is hereby

ORDERED, that the Stipulation and Settlement Agreement filed in Docket Nos. DT 08-130 and 09-065 on December 13, 2010 is approved; and it is

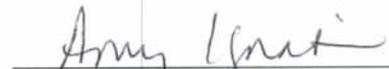
FURTHER ORDERED, that MetroCast and IDT are granted authority to operate as competitive local exchange carriers in Union’s service territory; and it is

FURTHER ORDERED, that Docket Nos. DT 08-130 and 09-065 are closed.

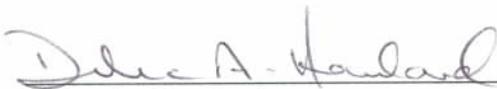
By order of the Public Utilities Commission of New Hampshire this eighteenth day of January, 2011.


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01/18/11 Order No. 25,193 issued and forwarded to all parties. Copies given to PUC Staff.

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