

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

THE DESTEK GROUP, INC.,)
d/b/a THE DESTEK NETWORKING)
GROUP)

Plaintiff,)

5.)

NEW ENGLAND TELEPHONE AND)
TELEGRAPH COMPANY, d/b/a)
BELL ATLANTIC NEW HAMPSHIRE;)
and NEW HAMPSHIRE PUBLIC)
UTILITIES COMMISSION, and)
Douglas L. Patch, Chairman,)
and Nancy Brockway,)
Commissioner, and)
Susan S. Geiger, Commissioner.)

Defendants.)

Civil No. _____

JURY TRIAL REQUIRED

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES
UNDER THE TELECOMMUNICATIONS ACT OF 1996 AND
UNDER 42 U.S.C. ' 1983

Plaintiff The Destek Group, Inc. (ADestek@), by and through its attorneys, alleges the following:

1. Destek brings this action under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified as amendments to the Communications Act of 1934, 47 U.S.C. ' 151

et seq. Destek seeks a declaration that Orders issued by the New Hampshire Public Utilities Commission (APUC@) approving and supporting an agreement for the sale of telecommunications services by New England Telephone and Telegraph (ABA-NH@) to the University of New Hampshire (AUNH@) are in violation of the TCA, and seeks injunctive relief to halt implementation of the agreement between BA-NH and UNH (Athe BA-NH/UNH agreement@ or Athe agreement@). Plaintiff also brings suit under 42 U.S.C. ' 1983 for violations under color of law of Destek's rights under the TCA and under the Fifth and Fourteenth Amendments to the United States Constitution, seeking injunctive relief and compensatory damages.

PARTIES

2. Plaintiff Destek is a Delaware corporation that sells telecommunications services within New Hampshire, and is a telecommunications carrier as defined by 47 U.S.C. ' 153(44).

Among other products and services, Destek is an internet service provider (AISP@), wholesaler of internet services to other ISPs, and provider of wide-area network services. Destek's principal place of business is One Indian Head Plaza, Nashua, NH 03060.

3. Defendant PUC is a regulatory agency created and existing under the laws of New Hampshire that has jurisdiction

over the intrastate activities of telecommunications companies operating in New Hampshire pursuant to N.H. Rev. Stat. Ann. (ARSA@) 362:2 et seq. The PUC has jurisdiction under the TCA to approve or deny agreements for interconnection, services, or network elements, and to set rates for regulated telecommunications services. See 47 U.S.C. ' 252. The PUC's address is 8 Old Suncook Road, Concord, NH 03301.

4. Defendant Douglas L. Patch is now, and was at the time of the actions which are the subject of this complaint, the chairman of the PUC. His address is 20 Buckingham Drive, Bow, NH 03304.

5. Defendant Nancy Brockway is now, and was at the time of actions which are the subject of this complaint, a commissioner of the PUC. Her address is 30 Rumford Street, Concord, N.H. 03301.

6. Defendant Susan Geiger is now, and was as the time of actions which are the subject of this complaint, a commissioner of the PUC. Her address is RR13, Oak Hill Road, Box 281B, Loudon, NH 03301.

7. Defendant BA-NH is a New York corporation engaging in the business of providing telecommunications services within the State of New Hampshire. BA-NH is an incumbent local exchange carrier (AILEC@) in New Hampshire as defined by 47 U.S.C. '

251(h). BA-NH is also a Bell Operating Company as defined by 47 U.S.C. ' 153(4). BA-NH's principal place of business is located at 185 Franklin Street, Room 1403, Boston, MA 02110.

JURISDICTION AND VENUE

8. This court has jurisdiction over the subject matter of this action pursuant to 47 U.S.C. ' 252(e)(6) and 42 U.S.C. ' 1983, as well as 28 U.S.C. ' ' 1331, and 1337.

9. This court has personal jurisdiction over the defendants in that they conduct business within the District of New Hampshire.

10. Venue is proper in the District of New Hampshire pursuant to 28 U.S.C. ' 1391(b).

BACKGROUND INFORMATION

The Telecommunications Act of 1996

11. The Telecommunications Act of 1996 is a comprehensive federal statute governing the telecommunications industry intended to Aprovide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . .@ *Report of the Committee of Conference of the House and Senate,*

Telecommunications Act of 1996 (January 31, 1996). Regulation of the telecommunications industry has long been premised upon the belief that only monopolies could provide reliable, universal service; the TCA represents a dramatic shift in the nature of telecommunications regulation in that it requires telecommunications carriers to provide potential rivals in the telecommunications market with competitive access to their networks and services. See *Cablevision of Boston v. Public Improvement Commission of the City of Boston, et al.*, Slip Opinion, No. 99-1222, at 20-24 (1st Cir. August 25, 1999). Three central provisions of the TCA, 47 U.S.C. ' ' 251, 252, and 253, put this pro-competitive policy into effect.

12. Section 251 establishes levels of duties for different classes of telecommunications providers. See 47 U.S.C. ' 251.

At the broadest level, all telecommunications carriers¹ have a duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. @ 47 U.S.C. ' 251(a). At the next level, no local exchange carrier² may

¹ AThe term >telecommunications carrier' means any provider of telecommunications services. . . @ 47 U.S.C. ' 153(44). AThe term >telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.@ 47 U.S.C. ' 153(46)

² AThe term >local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access.@ 47 U.S.C. ' 153(26).

prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of its telecommunications services.

See 47 U.S.C. ' 251(b)(1).

13. Additional duties are imposed upon incumbent local exchange carriers.³ An incumbent local exchange carrier must provide to any requesting telecommunications carrier interconnection with its network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, and must provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. See 47 U.S.C. ' ' 251(c)(2)(D) and 251(c)(3).

Furthermore, an incumbent local exchange carrier must offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers, and may not prohibit, or impose

³ At the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that - (A) on February 8, 1996, provided telephone exchange service in such area; and (B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. ' 69.601(b)); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).@ 47 U.S.C. ' 251(h).

unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service. See 47 U.S.C. ' 251(c)(4).

14. Section 252 provides means of enforcement for requirements found in section 251, 252 and elsewhere in the TCA. See 47 U.S.C. ' 252. It sets out procedures for negotiation, arbitration, and approval of interconnection or service agreements between incumbent local exchange carriers and other telecommunications carriers, including procedures for the setting of rates for telecommunications services. See id.; see generally Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd., Slip Opinion, No. 98-2228, at 13-32 (1st Cir. August, 1999) (discussing ' 252).

15. The TCA calls upon the State public utilities commission to approve all interconnection or service agreements between incumbent local exchange carriers and other telecommunications carriers. See 47 U.S.C. ' 252(e)(1). The State commission may reject an agreement or portion thereof if the agreement discriminates against a telecommunications carrier not a party to the agreement, or implementation of such agreement is not consistent with the public interest, convenience, and necessity. See 47 U.S.C. ' 252(e)(2)(A).

16. Under the TCA, the State commission reviews and

approves rates for telecommunications services; determinations by the State commission of just and reasonable rates for the interconnection of facilities and equipment or for network elements shall be based on the cost of providing the interconnection or network element (determined without reference to any rate-based proceeding), shall be nondiscriminatory, and may include a reasonable profit. See 47 U.S.C. ' 252(d)(1). The Federal Communications Commission (AFCC@) has further established an extensive methodology by which incumbent local exchange carriers and State commissions shall establish rates for telecommunications services. See 47 C.F.R. ' ' 51.503(b), 51.507, 51.509; see generally 47 C.F.R. ' ' 51.1 et seq. (setting out FCC regulations for implementation of the TCA).

17. In the instance where an incumbent local exchange carrier has offered a telecommunications service to subscribers at retail under section 251(c)(4), a State commission shall determine wholesale rates on the basis of the retail rates, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier. See 47 U.S.C. ' 252(d)(3). The State commission must also make available to the public within ten days of approval every interconnection or service agreement approved under section 252(e). See 47 U.S.C. ' 252(h).

18. Finally, section 252 provides for federal court review of State commission actions in order to determine whether the commission's order meets the requirements of sections 251 and 252. See 47 U.S.C. 252(e)(6). 47 U.S.C. ' 252(e)(3) affirms the State commission's authority to establish and enforce requirements of State law in its review of interconnection agreements, but subjects that authority to the limitations found in section 253 of the TCA. Reading these two provisions together, a federal court, pursuant to 47 U.S.C. ' 252(e)(6), may pre-empt enforcement of State statutes contrary to section 253. See 47 U.S.C. ' 252(e)(3) and 47 U.S.C. ' 252(e)(6).

19. Section 253 ensures that state and local regulations do not serve as impediments to competition in the telecommunications market. It provides that A[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.@ 47 U.S.C. ' 253(a). Sections 253(b) and (c) reserve to state and local governments the power to regulate telecommunications providers on grounds such as consumer protection and public safety, which are separate from any intent to create or maintain barriers to entry. See 47 U.S.C. ' 253(b), (c). Section 253(d) empowers the FCC to pre-

empt enforcement of State statutes contrary to section 253. See
47 U.S.C. ' 253(d).

The BA-NH/UNH Agreement

20. In August 1998 UNH and BA-NH undertook confidential discussions to explore ways in which UNH could deliver high-speed internet service as well multi-site interactive wide-area network services with educational content (Adistance learning@) throughout the University System of New Hampshire, to New Hampshire primary and secondary schools, to libraries throughout the State, and to other entities, both for-profit and not-for-profit.

21. As a result of these discussions, BA-NH and UNH executed a confidential agreement on March 16, 1999, under which BA-NH would provide Asynchronous Transfer Mode Cell Relay Services (AATM@) to UNH for a period of 60 months, and UNH would use these telecommunications services and facilities to sell internet and networking services to New Hampshire schools, School Administrative Units (ASAUs@), libraries and other entities. BA-NH would provide to UNH 1.5 Mbps user to network interfaces at a rate of \$655.75 per interface per month, provided that UNH employ 30 or more interfaces averaging in total not more than 19.8 miles from the relevant central office.

Each interface is capable of linking a set of users in a local area network with wider networks and the internet, so that one single interface could serve as a data conduit for a single SAU, or several SAUs if they were tied together in a single network.

22. ATM was available from BA-NH in New Hampshire prior to the BA-NH/UNH agreement, but only at prohibitively expensive rates. BA-NH filed a tariff with the FCC to offer ATM in New Hampshire; that rate, however, was far higher than the rate offered to UNH through the agreement, and varied by distance from selected points. Tariffed unbundled elements from which ATM service may be put together are also available to telecommunications carriers in New Hampshire. Combining these tariffed unbundled elements to offer ATM would, however, also far exceed the rate offered by BA-NH to UNH.

23. ATM is considered by many to be state-of-the-art in the field of wide-area networking, and is highly sought after as a means of video-conferencing and other types of high-volume data transfer. ATM enables users to engage in simultaneous two-way voice, video and data transmissions over a single wire among numerous locations so that, for example, corporate officers located around the United States and abroad could, via their computers, see and speak to one another, or so that students in

several remote locations could watch and listen to a live lecture by a distant professor, ask questions, and receive answers. Deployment of ATM involves a significant initial capital outlay for the installation of necessary infrastructure.

24. BA-NH has deployed necessary infrastructure to deliver ATM services in New Hampshire pursuant to the UNH contract. UNH plans to fund its participation in the contract with BA-NH for ATM services through charging fees to entities to which UNH would deliver internet, networking and distance learning services (Arecipient entities@). Some of the recipient entities would fund the purchase of those services through federal grant money from the Universal Service Fund (AUSF@) pursuant to 47 U.S.C. ' 254.

25. From August 1998 to the present, UNH, with BA-NH's assistance or cooperation, has solicited potential recipient entities to purchase internet, networking and distance learning services from UNH. UNH has sought to sell its telecommunications services to schools and SAUs, libraries, government entities, not-for-profit entities, and to numerous private, for-profit, entities. UNH has thus far concluded contracts to provide at least seven ATM interfaces to educational recipients, one to the State library, and two to the National Guard.

26. In essence, UNH has gone into business as an internet and telecommunications services provider, in direct competition with Destek and many other private companies in New Hampshire that offer similar services. UNH has offered ATM and other internet services for a fee to such a large class of potential users as to effectively offer these services for a fee directly to the public. Because it has done so, UNH is a telecommunications carrier within the meaning of 47 U.S.C. ' 153(44).

27. Schools and SAUs make up a substantial percentage of Destek's total client base. The remainder of Destek's client base is made up of private companies, not-for-profit entities, and government entities. UNH's nascent telecommunications business puts it in direct competition with Destek across the board. UNH, however, has an unfair advantage over Destek in that it has for over six months been able to sell ATM service under the BA-NH/UNH agreement at a special low rate to which Destek has no access. During this period of time many schools and other potential customers of both UNH and Destek have made their purchasing decisions for the 1999-2000 or 2000-2001 academic years.

28. Several schools, with which Destek had ongoing contractual relationships for the provision of internet

services, have already ceased or curtailed buying telecommunications services from Destek in favor of services to be provided by UNH. UNH was aware of Destek's ongoing contractual relationships with these schools, and induced these schools to abandon or scale down their contractual relationships with Destek. The loss of these contracts has resulted and will result in the loss of significant income to Destek.

29. Destek became fully aware of BA-NH's intention to deploy ATM technology and offer it inexpensively through UNH only after BA-NH and UNH had made significant progress in locking up a large portion of New Hampshire's educational market for internet services. In April, 1999, BA-NH suggested that Destek may be able to buy ATM service at an special low rate through a Aspecial contract.@ Destek declined the suggestion because it was unaware at the time of the scope of UNH's plan to sell telecommunications services with BA-NH's assistance, and also because Destek has in the past publicly argued that BA-NH's practice of concluding such Aspecial contracts@ with individual telecommunications carriers is anti-competitive and illegal.

30. Because of the secret nature of the BA-NH/UNH negotiations and agreement, and because only UNH could offer ATM service inexpensively to recipient entities, Destek never had an opportunity to compete with either BA-NH or UNH on an even

footing. Had Destek been aware that BA-NH intended to deploy ATM under contract to UNH and been able to buy ATM services through a generally available tariff at the special rate given to UNH, Destek could have competed with BA-NH on the contract to deliver ATM services to UNH, or competed with UNH on the delivery of ATM and other services to recipient entities. Furthermore, the extremely low price for ATM offered by BA-NH to UNH has made it difficult for Destek to compete with BA-NH and UNH by offering services Destek had available to it.

Proceedings Before The PUC

31. BA-NH filed a request with the PUC for approval of the BA-NH/UNH agreement on June 4, 1999 (PUC case number DT-99-086).

In its request, BA-NH characterized the contract as a special contract pursuant to RSA ' 378:18. Section 378:18 states that A[n]othing herein shall prevent a public utility from making a contract for service at rates other than those fixed by its schedules of general application, if special circumstances exist which render such departure from the general schedules just and consistent with the public interest and, except as provided in RSA 378:18-b, the commission shall by order allow such contract to take effect. RSA ' 378:18. RSA ' 378:18-b states that A[a]ny special contracts for telephone utilities providing

telephone services shall be filed with the commission and shall become effective 30 days after filing, provided the rates are set not less than . . . [t]he incremental cost of the relevant service . . .@ Id.

32. On June 4, 1999, BA-NH also filed a motion for protective order with the PUC pursuant to RSA 91-A:5(IV) in order to keep details relating to the incremental cost data underlying the BA-NH/UNH agreement confidential. RSA 91-A:5(IV) exempts from disclosure, among other things, records pertaining to confidential, commercial or financial information. The PUC granted the motion for protective order on October 4, 1999, in Order No. 23,309.

33. In its request to the PUC for approval of the agreement with UNH, BA-NH provided the PUC with the terms of the contract, but provided the PUC with insufficient data for the PUC to determine BA-NH's cost in offering ATM service. The PUC itself stated about BA-NH's cost data that:

[t]he BA-NH cost support data . . . does not provide important detail about the method BA-NH used to allocate non-direct, joint and common costs to UNH . . . [T]he sparseness of [BA-NH]'s filing has made it difficult to determine . . . whether the statutory standards [under RSA ' 378:18-b] have been met. The lack of detail in the cost study filing has hampered the Commission in its effort to determine whether the proposed rate exceeds the incremental cost of analogous elements. Because this proposed contract is the first time the Commission has reviewed an ATM service, we cannot

draw on existing applications to determine how Bell Atlantic will construct the network, and Bell Atlantic did not provide complete information on this question in the filing. Based on the filing, it is also difficult to determine exactly which network elements will be used in the provision of this service. As a result, it is difficult to compare the proposed rate to the wholesale cost of analogous unbundled network elements which [competing telecommunications carriers] would have to purchase from BA-NH in order to compete.

PUC Order No. 23,255, pp. 3-4. On June 28, 1999, Destek filed an objection to the BA-NH/UNH contract, and requested intervenor status.

34. On July 7, 1999, the PUC issued Order No. 23,255, approving the BA-NH/UNH contract, without either holding a hearing on the proposed contract or completing its own investigation, on condition that within ninety days BA-NH file a tariff with the PUC making ATM available throughout the State under the same terms as the BA-NH/UNH contract.

35. The PUC approved the BA-NH/UNH contract despite BA-NH having provided the PUC with insufficient evidence that the BA-NH/UNH contract was priced at or above the cost of providing ATM service to UNH. The PUC justified its finding by stating that:

because of the importance of the proposed service to the modernization of the state's educational system, Staff drew on information in the filing and in related

dockets to develop estimates of the appropriate cost floors for RSA 378:18-b analysis. This estimate shows the proposed rate exceeds, by a narrow margin, the cost of providing ATM service under RSA 378:18-b, I and II. RSA 378:18 provides a public utility the authority to make a contract for service at rates other than those fixed by its tariff, if special circumstances exist which render such departure from tariffed rates just and consistent with the public interest. If the petition is determined to be consistent with the public interest, the Commission shall by order allow such contract to take effect.

PUC Order No. 23,255, pp. 4-5.

36. The PUC, to the extent it applied any methodology at all in determining BA-NH's costs in the contract with UNH, did not apply the cost accounting methodology mandated by the TCA and by FCC regulations. In addition, the PUC did not request or consult any of the cost data BA-NH may have with the FCC in support of its establishment of a FCC tariff for ATM in New Hampshire.

37. On July 23, 1999, the New Hampshire Office of the Consumer Advocate (AOCA@) filed a Motion for Reconsideration of the PUC's approval of the BA-NH/UNH contract. In its motion,

OCA argued that BA-NH failed to meet its burden under the TCA to show that the BA-NH/UNH contract was priced at or above the cost of service to UNH and that the PUC's reliance in its decision upon disputed cost analysis without an evidentiary hearing was contrary to Due Process.

38. On August 6, 1999, Both Destek and Vitts Corporation (AVitts@), another New Hampshire based telecommunications carrier, separately moved the PUC to reconsider its July 7, 1999 approval of the BA-NH/UNH contract. Destek at that time argued that the approval was in violation of the TCA. On August 18, 1999, the PUC staff objected to the OCA's, Vitts' and Destek's motions to reconsider. On August 18, BA-NH objected to Destek's August 6, 1999 motion to reconsider. On September 7, the PUC orally rejected the outstanding motions to reconsider its July 7, 1999 approval of the BA-NH/UNH contract.

39. Since receiving PUC approval for the BA-NH/UNH agreement, BA-NH has taken steps, under color of law by virtue of the PUC approval, to implement terms of the BA-NH/UNH agreement.

40. On October 5, 1999, BA-NH filed a tariff with the PUC proposing to make ATM generally available in New Hampshire as of November 4, 1999. BA-NH has proposed a rate of \$655.75 per 1.5 Mbps User-Network Interface per month, with a minimum purchase of 30 interfaces for a period of 60 months with

an average distance for local channels of not more than 19.8 miles. These terms are substantially the same as those definitively given to UNH in March 1999, nine months earlier.

Assuming the tariff is approved by PUC, UNH will have had a decisive time advantage of over nine months to lock up the educational market for advanced telecommunications services, and to make significant inroads into the general market as well. Furthermore, the tariff structure requested by BA-NH is highly discriminatory in that it was tailor made for UNH, which acquired customers for the offered service even before the BA-NH/UNH agreement was approved by the PUC, and the tariff sets an unreasonable set of requirements that must be met before other telecommunications carriers can avail themselves of the same service.

CAUSES OF ACTION

IB Discriminatory Conditions in Resale of Telecommunications Services in violation of 47 U.S.C. ' 251(b)(1)

41. Paragraphs 1-38 are incorporated herein.

42. The BA-NH/UNH agreement violates the requirements of 47 U.S.C. 251(b)(1), and the PUC has approved this agreement in violation of its obligations under 47 U.S.C. ' 252(e).

43. BA-NH has imposed unreasonable and discriminatory conditions upon the resale of its telecommunications services in violation of 47 U.S.C. ' 251(b)(1) by contracting exclusively with UNH for resale of ATM in New Hampshire, keeping knowledge or details of this agreement secret, pricing the service to UNH at a cost far below the price at which it could have been purchased by other telecommunications carriers, and assisting UNH in contracting with a large segment of the New Hampshire educational market before seeking PUC approval of the agreement or allowing details of the agreement to become public. Through its actions, BA-NH effectively ensured that Destek would never have the opportunity to compete with BA-NH and UNH in the delivery of ATM, internet and other networking services to the New Hampshire educational market, and also gave UNH a decisive time advantage in selling ATM-based services to the general public.

44. The PUC under 47 U.S.C. ' 252(e) must review all interconnection agreements for compliance with the TCA. The BA-NH/UNH agreement violates 47 U.S.C. ' 251(b)(1). The PUC approval of the contract, therefore, is not in compliance with 47 U.S.C. ' 251(b)(1) and 47 U.S.C. ' 252(e).

45. Pursuant to 47 U.S.C. ' 252(e)(6), Destek is entitled to a judgment under 28 U.S.C. ' 2201 declaring the PUC's order

number 23,255 violates 47 U.S.C. ' 251(b)(1) and 47 U.S.C. ' 252(e).

IIB Discrimination in Interconnection in violation of 47

U.S.C. ' 251(c)(2)(D).

46. Paragraphs 1-38 are incorporated herein.

47. The BA-NH/UNH agreement violates 47 U.S.C. ' 251(c)(2)(D), and the PUC has approved this agreement in violation of its obligations under 47 U.S.C. ' 252(e).

48. BA-NH has imposed unreasonable and discriminatory conditions upon interconnection with the BA-NH network for the provision of ATM services in violation of 47 U.S.C. ' 251(c)(2)(D) by contracting exclusively with UNH for resale of ATM in New Hampshire, keeping knowledge or details of this agreement secret, pricing the service to UNH at a cost below the price at which it could previously have been purchased by other telecommunications carriers, and assisting UNH in contracting with a large segment of the New Hampshire educational market before seeking PUC approval of the agreement or allowing details of the agreement to become public. Through its actions, BA-NH effectively ensured that Destek would never have the opportunity to compete with BA-NH and UNH in the delivery of ATM, internet and other networking services to the New Hampshire educational market, and also gave UNH a decisive time advantage in selling

ATM-based services to the general public.

49. The PUC under 47 U.S.C. ' 252(e) must review all interconnection agreements for compliance with the TCA. The BA-NH/UNH agreement violates 47 U.S.C. ' 251(c)(2)(D). The PUC approval of the contract, therefore, is not in compliance with 47 U.S.C. ' 251(c)(2)(D) and 47 U.S.C. ' 252(e).

50. Pursuant to 47 U.S.C. ' 252(e)(6), Destek is entitled to a judgment under 28 U.S.C. ' 2201 declaring the PUC's order number 23,255 violates 47 U.S.C. ' 251(c)(2)(D) and 47 U.S.C. ' 252(e).

IIIB Discrimination in Access to Network Elements on an Unbundled Basis in violation of 47 U.S.C. 251(c)(3).

51. Paragraphs 1-38 are incorporated herein.

52. The BA-NH/UNH agreement violates 47 U.S.C. ' 251(c)(3), and the PUC has approved this agreement in violation of its obligations under 47 U.S.C. ' 252(e).

53. BA-NH has imposed unreasonable and discriminatory conditions upon access to network elements on an unbundled basis in violation of 47 U.S.C. ' 251(c)(3) by contracting exclusively with UNH for resale of ATM in New Hampshire, keeping knowledge or details of this agreement secret, pricing the service to UNH at a cost below the price at which it could previously have been

purchased by other telecommunications carriers, and assisting UNH in contracting with a large segment of the New Hampshire educational market before seeking PUC approval of the agreement or allowing details of the agreement to become public. Through its actions, BA-NH effectively ensured that Destek would never have the opportunity to compete with BA-NH and UNH in the delivery of ATM, internet and other networking services to the New Hampshire educational market, and also gave UNH a decisive time advantage in selling ATM-based services to the general public.

54. The PUC under 47 U.S.C. ' 252(e) must review all interconnection agreements for compliance with the TCA. The BA-NH/UNH agreement violates 47 U.S.C. ' 251(c)(3). The PUC approval of the contract, therefore, is not in compliance with 47 U.S.C. ' 251(c)(3) and 47 U.S.C. ' 252(e).

55. Pursuant to 47 U.S.C. ' 252(e)(6), Destek is entitled to a judgment under 28 U.S.C. ' 2201 declaring the PUC's order number 23,255 violates 47 U.S.C. ' 251(c)(3) and 47 U.S.C. ' 252(e).

IV B (Alternative Count) BA-NH Failure to Offer ATM Services to Telecommunications Carriers at Wholesale Rate Violates 47 U.S.C. ' 251(c)(4), and PUC Failure to Set a Wholesale Rate for ATM Available to Telecommunications Carriers Violates 47

U.S.C. ' 252(d)(3)

56. Paragraphs 1-38 are incorporated herein.

57. This count is argued in the alternative, and is offered as an alternative count should the court find that UNH is not a telecommunications carrier within the meaning of the TCA.

58. Under 47 U.S.C. 251(c)(4), BA-NH must offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers, and may not prohibit, or impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service. Assuming that UNH is not a telecommunications carrier, BA-NH has, through the BA-NH/UNH agreement, offered ATM service to UNH at a retail price without offering the same service at a wholesale rate to Destek, in violation of 47 U.S.C. 251(c)(4).

59. The PUC, under 47 U.S.C. 252(d)(3), has a duty, where BA-NH has offered ATM service to UNH at retail pursuant to section 251(c)(4), to set wholesale rates on the basis of the retail rates, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier. The PUC has not set a wholesale rate for ATM service but nonetheless permitted the sale of ATM to UNH to go forward, in violation of its duty under

47 U.S.C. 252(d)(3).

60. The PUC violated its duty under 47 U.S.C. 252(d)(3) to set a wholesale price for the service being offered at retail to UNH. Pursuant to 47 U.S.C. ' 252(e)(6), Destek is entitled to a judgment under 28 U.S.C. ' 2201 declaring that the PUC's order number 23,255 violates 47 U.S.C. ' 252(d)(3).

V B PUC Approval of Contract Price Violates 47 U.S.C. ' 252(d)(1).

61. Paragraphs 1-38 are incorporated herein.

62. The PUC violated its duty under 47 U.S.C. ' 252(d)(1) to set just and reasonable prices for interconnection and network elements by approving the prices for services provided pursuant to the BA-NH/UNH contract without first determining the cost to BA-NH of providing the network element or interconnection by an appropriate costing methodology, and without determining whether the price structure is discriminatory.

63. Pursuant to 47 U.S.C. ' 252(e)(6), Destek is entitled to a judgment under 28 U.S.C. ' 2201 declaring the PUC's order number 23,255 violates 47 U.S.C. ' 252(d)(1).

VI B Application of RSA 378:18 and RSA 378-18:B by the PUC Violates 47 U.S.C. 252(e)(3) and 253(a).

64. Paragraphs 1-38 are incorporated herein.

65. By approving the BA-NH/UNH contract upon the basis of RSA 378:18 and RSA 378-18:B, the PUC violated 47 U.S.C. 252(e)(3) and 47 U.S.C. 253(a).

66. 47 U.S.C. 252(e)(3) subjects the PUC's authority to establish and enforce requirements of State law in its review of interconnection agreements to the limitations found in section 253 of the TCA. Section 253(a) states that in general A[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.@ 47 U.S.C. 253(a). RSA 378:18 and RSA 378:18-b, through the creation of A special contracts@ exempting the incumbent local exchange carrier from otherwise applicable tariff schedules and costing requirements, have the effect of prohibiting the ability of competing telecommunications carriers to provide any interstate or intrastate telecommunications service.

67. Pursuant to 47 U.S.C. 252(e)(6), Destek is entitled to a judgment under 28 U.S.C. 2201 declaring the PUC's order number 23,255 violates 47 U.S.C. 252(e)(3) and 47 U.S.C. 253(a).

VII B The PUC's Granting of a Protective Order under RSA 91-

A:5(IV) and Failure to Make Public the Full Text of the BA-NH/UNH Agreement is in Violation of 47 U.S.C. ' 252(h).

68. Paragraphs 1-38 are incorporated herein.

69. 47 U.S.C. ' 252(h) required the PUC to make available to the public the full text of the BA-NH/UNH agreement within ten days of the agreement's approval. The PUC has not done so to date. The PUC is, therefore, in violation of 47 U.S.C. ' 252(h).

70. Pursuant to 47 U.S.C. 252(e)(6), Destek is entitled to a judgment under 28 U.S.C. 2201 declaring the PUC's Order No. 23,309, deciding to withhold from the public details of the BA-NH/UNH agreement violates 47 U.S.C. ' 252(h).

71. RSA 91-A:5(IV), by permitting an incumbent local exchange carrier to withhold from the public critical information that must be disclosed under 47 U.S.C. ' 252(h), has the effect of prohibiting the ability of Destek to compete with BA-NH and UNH in the provision of telecommunications services.

RSA 91-A:5(IV) is, therefore, in violation of 47 U.S.C. 253(a).

72. Pursuant to 47 U.S.C. 252(e)(6), Destek is entitled to a judgment under 28 U.S.C. 2201 declaring the PUC's application of RSA 91-A:5(IV) violates 47 U.S.C. 252(e)(3) and 47 U.S.C. 253(a).

VIII - Approval and Implementation of the BA-NH/UNH Contract

is a Deprivation without Compensation Under Color of Law of Destek's Property Interests under the TCA in Violation of the 5th and 14th Amendments to the United States Constitution.

73. Paragraphs 1-69 are incorporated herein.

74. The Takings Clause of the Fifth Amendment, which is applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for public use, without just compensation. Const. amend. V; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980)).

75. Destek has independent property rights under the TCA insofar as the TCA entitles Destek as a telecommunications carrier to nondiscriminatory conditions in the resale of telecommunications services pursuant to section 251(b)(1), interconnection with BA-NH's facilities on terms that are just, reasonable and nondiscriminatory pursuant to section 251(c)(2)(d), nondiscriminatory unbundled access to BA-NH's network elements pursuant to section 251(c)(4), and access to wholesale pricing for services offered at retail by BA-NH pursuant to section 251(c)(4), as well as other rights.

76. By approving the BA-NH/UNH agreement, the PUC has, under color of law, deprived without compensation Destek of its property rights under the TCA. By implementing the BA-NH/UNH

agreement with PUC approval , BA-NH has, under color of law, deprived without compensation Destek of its property rights under the TCA. In the alternative, BA-NH, by not offering Destek a wholesale rate for ATM service, and the PUC by approving the BA-NH/UNH agreement without setting a wholesale rate, have, under color of law, deprived Destek of its rights under the TCA without compensation.

77. The deprivation of Destek's rights under the TCA by the PUC and BA-NH has had a significant economic impact on Destek and resulted in substantial lost income and opportunities. The deprivation has also interfered with Destek's ability to make future plans based upon reasonable, investment-backed expectations of what Destek is entitled to under the TCA.

78. Pursuant to 42 U.S.C. ' 1983, Destek is entitled to a judgment for injunctive relief and damages from the PUC and its commissioners, and from BA-NH for their deprivation under color of law of Destek's rights under the TCA.

IX B PUC's Approval of BA-NH/UNH Agreement without granting Destek's request for a hearing is a violation of Destek's Right to Due Process under Fourteenth Amendment to the United States Constitution.

79. Paragraphs 1-75 are incorporated herein.

80. AThe Fourteenth Amendment places procedural constraints

on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause.@ Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978). By approving the BA-NH/UNH agreement without granting Destek's repeated requests for a hearing and without requiring BA-NH to fully disclose information concerning the cost of providing ATM to UNH, the PUC has deprived Destek of its property interests under the TCA without due process of law.

81. Pursuant to 42 U.S.C. ' 1983, Destek is entitled to a judgment against the PUC and its commissioners for injunctive relief and damages due to their deprivation of Destek's property without due process.

PRAYER FOR RELIEF

82. WHEREFORE, Destek prays that this Court grant it the following relief:

- a. enter judgment in favor of Plaintiff and against Defendants declaring the Defendant PUC, acting through its Commissioners, has violated 47 U.S.C. 252(e) by approving the BA-NH/UNH agreement;
- b. enter judgment in favor of Plaintiff and against Defendants declaring that RSA ' ' 378:18 and 378:18-b, on their faces and as applied, are

inconsistent with and pre-empted by 47 U.S.C. ' 253(a) and 47 U.S.C. ' 252(d)(3);

- c. Permanently enjoin Defendants from applying or enforcing PUC Order No. 23,255, the terms of the BA-NH/UNH agreement, and RSA ' ' 378:18 and 378:18-b;
- d. enter judgment in favor of Plaintiff and against Defendants declaring that Defendant PUC, acting through its Commissioners has violated 47 U.S.C. ' 252(e) by withholding portions of the BA-NH/UNH agreement from the public;
- e. enter judgment in favor of Plaintiff and against Defendants declaring that RSA ' 91-A:5(IV), on its face and as applied, is inconsistent with and pre-empted by 47 U.S.C. ' 253(a) and 47 U.S.C. ' 252(h)
- f. permanently enjoin Defendants from enforcement or application of RSA ' 91-A:5(IV), and enjoin defendants to release in full the BA-NH/UNH agreement and all supporting data;
- g. enter judgement in favor of Plaintiff and against Defendants finding that Defendants, under color of law, have violated Plaintiff's rights under

- the TCA and the United States Constitution;
- h. enjoin Defendants from further violations of Plaintiff's rights, and award to plaintiff consequential damages for losses due to the negotiation and implementation of the BA-NH/UNH agreement;
 - i. award plaintiff reasonable attorneys' fees pursuant to 42 U.S.C. 1988; and
 - j. such other and further relief as this Court deems just and proper.

Respectfully submitted,
DESTEK GROUP, INC.,
d/b/a DESTEK NETWORKING GROUP

By and through its attorneys,

Eugene F. Sullivan, III, Esquire
N.H. Bar No. 5607
Merrill Lynch Building
Two Eagle Square, Suite 400
Concord, N.H. 03301
T: (603) 227-0600

Email: efsullivan@mediaone.net

Phillip James Walker, Esquire
N.H. Bar No. 13789
301 Stark Highway North
Dunbarton, N.H. 03045
T: (603) 774-3909
Email: phil@rushingwalker.com