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STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION  
DT 07-027

Kearsarge Telephone Company, Wilton Telephone Company, Inc.,  
Hollis Telephone Company, Inc. and Merrimack County Telephone Company  
Petitions for Alternative Form of Regulation

November 6, 2009

Brief of Petitioners

Respectfully submitted,

KEARSARGE TELEPHONE COMPANY  
and MERRIMACK COUNTY  
TELEPHONE COMPANY

By their Attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

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**Brief of Petitioners**

The present Petitioners, Kearsarge Telephone Company (“KTC”) and Merrimack County Telephone Company (“MCT” and, together with KTC hereinafter the “Petitioners”) submit this Brief in Docket DT 07-027 (this “Docket”) following 2 days of evidentiary hearings held on September 29 and October 1, 2009.

**I. Introduction**

The telecommunications industry has undergone tremendous change in the last few years. The days when people have relied exclusively on traditional landline telephones for their communications needs have passed. In the last six months of 2008, more than 41 million adults and nearly 14 million children lived in households with only wireless telephones. Bailey Exhibit 55, p. 4. The percentage of wireless-only households has been “steadily increasing”. *Id.* In the same period, another 35 million adults lived in “wireless-mostly” households, that is, households with both landline and wireless telephones that receive all or almost all calls on their wireless telephones. *Id.*, p. 5. This is the context in which the Petitioners have presented their case, and it is in this context - the telecommunications world of today, not the world of ten years ago - that the Petitioners urge the Commission to weigh the evidence in this case.

## **II. Procedural Background**

### **A. General Background Information.**

On March 1, 2007, the Petitioners, along with their affiliated companies (Wilton Telephone Company, Inc. (“WTC”), and Hollis Telephone Company, Inc. (“HTC”)), filed petitions with the New Hampshire Public Utilities Commission (the “Commission”) seeking approval of their respective plans for an alternative form of regulation (the “AFOR Plans”) pursuant to New Hampshire RSA 374:3-b. Pursuant to its order dated April 23, 2008 (Order No. 24,852 and hereinafter the “Initial Order”), the Commission approved AFOR Plans (as amended by the terms of the Settlement Agreement (hereinafter defined)) for WTC and HTC, but denied the respective amended AFOR Plans submitted by the Petitioners.<sup>1</sup> The Commission kept this docket open and further afforded the Petitioners the opportunity to update their testimony and present additional information to the Commission to support the requested relief. *See* Initial Order, p. 30.

The Petitioners updated their testimony and presented the Commission with additional information. The Petitioners updated their case via prefiled supplemental testimony (dated January 29, 2009) from Mr. Michael C. Reed of TDS Telecom. Mr. Reed’s prefiled supplemental testimony was accompanied by wireless signal strength testing data know as Multi-Carrier Benchmarking Reports for the exchanges of Salisbury and Sutton, New Hampshire. In response to the Petitioners’ updated evidence, on July 17, 2009, New Hampshire Legal Assistance, on behalf of Mr. Daniel Bailey<sup>2</sup>, an Intervenor in the above-captioned matter, filed rebuttal testimony of Ben Johnson, Ph.D.

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<sup>1</sup> The Commission denied the Petitioners’ Motion for Partial Reconsideration of Order 24,852 via Order No. 24,885.

<sup>2</sup> NHLA filed initially an intervention petition on behalf of Mr. Ross Patnode, and later substituted Mr. Bailey in place of Mr. Patnode as the named Intervenor.

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(the “Johnson Rebuttal”). The Office of Consumer Advocate prefiled the rebuttal testimony of Mr. Stephen R. Eckberg on the same day as Mr. Bailey. Thereafter, the Petitioners prefiled confidential rebuttal testimony of Mr. Daniel L. Goulet, the Director of RF Services for C Squared Systems, LLC (“C-Squared”), and prefiled rebuttal testimony (confidential and public) of Mr. Reed, of TDS Telecom.<sup>3</sup> Day one of the evidentiary hearing for Phase II<sup>4</sup> of this Docket began on September 29, 2009 and the evidentiary hearing concluded on October 1, 2009.

### B. Nature of Requested Relief.

Stated succinctly, the Petitioners seek approval for their respective AFOR Plans as each has been modified by the Settlement Agreement Among the Joint Petitioners and the Other Signatories Thereto, dated November 30, 2007 (the “Settlement Agreement”), subject to one update clarification noted below. The Petitioners filed their respective amended AFOR Plans via their Motion to Reopen Record for Submission of Amended Plans Reflecting Settlement Agreement, dated March 6, 2008 (the “Motion to Reopen”).<sup>5</sup> KTC’s amended AFOR Plan was submitted as Attachment 1 to the Motion to Reopen. MCT’s amended AFOR Plan was submitted as Attachment 4 to the Motion to Reopen.

One exception exists to the relief requested above. Section 4.1.1 of each of the Petitioners’ respective amended AFOR Plans states as follows:

4.1.1. The Company shall not raise Basic Retail Service rates in any exchange during the first and second years of its Plan. After the two year period, Basic

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<sup>3</sup> The parties to this Docket agreed to afford the Petitioners with the opportunity to prefile a reply to Mr. Bailey’s prefiled rebuttal testimony and the Consumer Advocate’s prefiled rebuttal testimony and the Commission approved of this agreement via Secretarial Letter dated April 9, 2009.

<sup>4</sup> For ease of reference, the Petitioners refer to matters which pre-date the Initial Order as “Phase I” of the Docket and refer to matters which post-date the Initial order as “Phase II” of the Docket.

<sup>5</sup> The Commission did not rule on the Motion to Reopen noting the filings were “... in the nature of a compliance filing and no party has objected to such filing.” *See* Initial Order, at p. 31.

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Retail Service rates will be permitted to increase for an exchange under the Plan when the Company can show that at least one of the tests set forth in Section 4.1.2 shall have been met for that exchange.

The Petitioners respectfully submit that the evidence presented in the 2009 evidentiary hearings demonstrates that the requirements of the second sentence have already been met and that this provision/sentence now is moot. Each of the Petitioners presently encounters significant competition from providers of cable broadband services and wireless communication services. All of this evidence is more fully detailed in this Brief in Section IV and V below. Therefore, the Petitioners request that the Commission make a finding that the requirements of the second sentence of Section 4.1.1 for each of the Petitioners' respective amended AFOR Plans have been satisfied. Alternatively, the Petitioners respectfully request that the Commission strike the second sentence of Section 4.1.1 for each of the Petitioners' respective amended AFOR Plans, such that each plan reads:

4.1.1 The Company shall not raise Basic Retail Service rates in any exchange during the first and second years of its Plan.

This change also would be consistent with Mr. Reed's testimony on cross-examination with respect to Section 6.2 of the Settlement Agreement. *See* Tr. Day II, p. 127.1-20 (referencing the pre-filed rebuttal testimony of Mr. Reed and Mr. Reed acknowledging that Section 6.2 of the Settlement Agreement would not be applicable and it should be revised to reflect that the Petitioners have made the requisite showing of competition).

**III. Applicable Legal - Statutory Standards of Review**

**A. Statutory Framework of RSA 374:3-b.**

RSA 374:3-b sets forth the criteria to be met by a small incumbent local exchange carrier seeking an alternative form of regulation. Pursuant to RSA 374:3-b,III this Commission shall approve an alternative regulation plan if it finds that:

- (a) Competitive wireline, wireless, or broadband service is available to a majority of the retail customers in each of the exchanges served by such small incumbent local exchange carrier;
- (b) The plan provides for maximum basic local service rates at levels that do not exceed the comparable rates charged by the largest incumbent local exchange carrier operating in the state and that do not increase by more than 10 percent in each of the 4 years after a plan is approved with the exception that the plan may provide for additional rate adjustments, with public utilities commission review and approval, to reflect changes in federal, state, or local government taxes, mandates, rules, regulations, or statutes;
- (c) The plan promotes the offering of innovative telecommunications services in the state;
- (d) The plan meets intercarrier service obligations under other applicable laws;
- (e) The plan preserves universal access to affordable basic telephone service; and
- (f) The plan provides that, if the small incumbent local exchange carrier operating under the plan fails to meet any of the conditions set out in this section, the public utilities commission may require the small incumbent local exchange carrier to propose modifications to the alternative regulation plan or return to rate of return regulation.

The parties have submitted a great deal of evidence to the Commission on the proper application of the word “competitive” within RSA 374:3-b,III(a). The Commission’s Initial Order established the interpretation of this statute for purposes of the present proceedings. The Commission held in relevant part that “...the use of the word ‘competitive’ in subsection III (a) means that mere availability of alternatives is not



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sufficient to approve a plan but that the inclusion, among other things, of price protections in subsection III (b) *means that a fully functioning competitive market is not necessary in order to approve a plan.*” Initial Order, p. 26 (emphasis added).

The Commission’s interpretation of RSA 374-3b,III is binding upon the parties to this Docket. In New Hampshire, a party can be independently precluded from seeking reconsideration of an issue after he or she acquiesced to the challenged rulings. *See Merrimack Valley Wood Products, Inc. v. Near*, 152 N.H. 192, 202 (2005); *Bailey v. Sommovigo*, 137 N.H. 526, 529 (1993). At least one Supreme Court case has equated the concept of acquiescence with general notions of waiver. *See Arnold v. City of Manchester*, 119 N.H. 859 (1979). In *Arnold*, for example, the court held a plaintiff was not entitled to attorney’s fees because he failed to take exception to the court’s order omitting any such award, and stated in a subsequent pleading that the trial court’s findings and decree were correct. *Id.* at 864.

Further, while the Commission is not rigidly bound to *stare decisis*, *Vautier v. State*, 112 N.H. 193, 195-96 (1972), such adherence is paramount in matters of statutory interpretation. *See State v. Duran*, 158 N.H. 146, 157 (2008) (noting that *stare decisis* generally has more force in statutory interpretation than adjudication); *Petition of Correia*, 128 N.H. 717, 721 (1986) (declining to reinterpret statute because to do so would in effect be rewriting the statute in derogation of legislature’s policymaking authority). It also bears emphasizing that re-litigating matters of statutory interpretation depletes adjudicative resources, and significantly disrupts regulated entities’ interests in finality and certainty. *Cf. Cook v. Sullivan*, 149 N.H. 774, 777 (2003) (noting preclusive doctrines may apply after administrative adjudication).

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Moreover, the Petitioners submit that the Commission's interpretation of the above referenced statute is supported by the accompanying legislative history. The legislative policy reflected in the legislative findings contained in Laws 2005, 263:1, states:

The general court finds that the growth of unregulated wireless and broadband telecommunications services has provided consumers alternatives to traditional telephone utility services. The policy of this state is to promote competition and the offering of new and alternative telecommunications services while preserving universal access to affordable basic telephone services. The continuation of full utility regulation of small incumbent local exchange carrier telephone utilities is not consistent with these objectives. In light of the rapid changes in the telecommunications industry, these policy objectives will best be achieved by implementing alternative regulation plans for small incumbent local exchange carriers that encourage competition, preserve universal telephone service, and provide incentives for innovation, new technology and new services....

This legislation also provided for a "Regulatory Practices Pertaining to the Telecommunications Industry Study Committee" to be formed pursuant to Laws 2005, 263:2. This committee issued its report issued October 28, 2005 (the "Study Committee Report"). The Study Committee Report stated as follows:

We strongly encourage small ILECs to proceed with alternative regulation proposals as defined in RSA 374:3-b already in effect. As a state, we cannot gauge the success of alternative regulation until someone tries it and exposes its benefits and/or shortcomings.

Thus, it is with this interpretation of RSA 374-3b,III that the Petitioners' submit that they have met their burden of proof and the Petitioners respectfully request that the Commission grant the requested relief.

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### B. Legal Standard Applicable to the Commission's Factual Findings.

The Petitioners request that the Commission weigh the parties evidentiary submissions and testimonial submissions (in-person and prefiled) and find that (i) the requisite competitive alternatives specified by RSA 374:3-b,III exist in the Petitioners' respective service territory and (ii) the Petitioners met their burden of proof with respect to demonstrating by a preponderance of the evidence that the amended AFOR Plans meet the requirements of RSA 374:3-b. The New Hampshire Supreme Court has consistently stated its reluctance to substitute its judgment for the expertise of an administrative agency. *See, e.g., In re Town of Bethlehem*, 154 N.H. 314, 321 (2006); *In re Town of Newington*, 149 N.H. 347, 350 (2003). The need for a narrow scope of review is underscored by the fact that "discretionary choices of policy necessarily affect such decisions, and that the legislature has entrusted such policy" to the Commission. *Appeal of Conservation Law Foundation*, 127 N.H. 606, 616 (1986); *see also* N.H. CONST. pt. I, art. 37 ("Separation of Powers"); *e.g., Appeal of Milford Water Works*, 126 N.H. 127, 132-33 (1985) (deferring to Commission orders granting conditional exempts from zoning ordinance where conditions reasonable). Accordingly, although the court reviews *de novo* the PUC's construction of the law, *see In re Verizon New England*, 158 N.H. 693, 695 (2009), the court deferentially reviews other Commission findings. *See* RSA 541:13 (2007).

The legislature commits to an administrative agency resolution of issues and implementation of policy "in light of its subject matter expertise," and agency orders are reversed "only in those rare cases where the agency has clearly exceeded any reasonable limits and abused its discretion." 5 R. Wiebusch, *New Hampshire Practice, Civil*

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*Practice & Procedure* § 64.33, at 644 (1998); *cf. United States v. Mead Corporation*, 533 U.S. 218, 235 (2001) (administrative implementation of particular statutory provisions through adjudicative tariff classification rulings deserved deference, in part, because of “specialized experience and broader investigations and information available to the agency” (quotation omitted)); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (the “well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance” (quotation omitted)).

### **IV. Facts**

#### **A. Facts Related to Availability of Competitive Telecommunication Based Alternatives for the Exchanges of Salisbury and Sutton, New Hampshire.**

The Petitioners offer the following in order to demonstrate that competitive telecommunications alternative services are available to a majority of the retail customers in the exchanges of Salisbury and Sutton, New Hampshire. First, through benchmark testing conducted by C-Squared, the Petitioners demonstrated the availability of wireless telecommunications coverage in the areas of Sutton and Salisbury, New Hampshire. C-Squared specializes in providing to wireless telecommunications companies network design services, benchmarking services, RF engineering services and many other services. *See* Tr. Day II, ps. 204-09. C-Squared provides extensive services to Verizon Wireless, AT&T, Sprint-Nextel, U.S. Cellular, T-Mobile, Metro PCS and Pocket Communications. *Id.* at 204.17-21. On behalf of the Petitioners, this company measured “...the strength of the wireless signal available throughout the Sutton and Salisbury exchanges.” *See* Supplemental Testimony of Mr. Reed, January 29, 2009 (“Reed

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Supplemental”), ps. 3.19 - 4.2, marked as KTC-MCT Exh 6C ps. 003-004. C-Squared undertook this work by driving major commuter and secondary roads in the Sutton and Salisbury areas. *Id.* at KTC-MCT Exh. 6C ps. 030 and 054).

Mr. Daniel L. Goulet provided the following description of C-Squared’s work in his prefiled rebuttal testimony:

We performed the same type of drive test in these two exchanges that we use for wireless carriers to develop and validate their network design plans. These are the kinds of analyses on which carriers rely in making the significant investments required for network coverage expansion projects.

In assisting wireless carriers with their RF design plans, we first develop search areas, which involves an evaluation of existing structures and their availability for use in the current design, ground conditions for raw land builds, and existing wireless tower locations. With the available information, we perform predictive analyses or propagation modeling simulations based upon existing and proposed facilities. Once the predictive design coverage has been approved, a drive test is performed wherever feasible, to “tune” the propagation models and validate the predictive coverage analyses. The type of drive test that we use provides measured data, versus predictive data *and is therefore widely accepted as the most accurate information regarding wireless coverage*. In this case, we drove the majority of the Class I, Class II and Class V roads in these two exchanges. There are no Class III or Class IV roads in these exchanges. We did not drive Class VI roads, as they are not town maintained, are not available for development and in some cases are impassable. The test that we performed was state-of-the-art for these two exchanges.

*See* Rebuttal Testimony of Daniel L. Goulet, September 9, 2009 (“Goulet Rebuttal”), ps. 4.17 - 5.12, marked KTC-MCT Exh. 8P ps. 004-005 (emphasis added). Working with C-Squared, the Petitioners determined that a wireless signal strength of negative 85 dBm or stronger constitutes a “very good” wireless signal and a wireless signal strength of between negative 90 dBm and negative 85 dBm constitutes a “good” wireless signal. *See* Reed Supplemental, p. 8.14-19, marked as exhibit KTC-MCT Exh. 6C p. 008.

Confidential MRC-Exhibit E (attached to Reed Supplemental) is the Multi-Carrier Benchmarking Report from C-Squared for Sutton. C-Squared demonstrated that multiple

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wireless telecommunications carriers provide wireless coverage in this exchange either on the respective carriers home networks or through roaming. Verizon Wireless, for example, provides coverage throughout most of the exchange (approximately **Begin Confidential** **End Confidential** of the recorded measurements) with a signal strength of negative 90dBm or better. *See* Reed Supplemental, p. 10.2-3. Sprint-Nextel CDMA and T-Mobile cover **Begin Confidential** **End Confidential** of the drive route with a good or very good signal, with T-Mobile's coverage being provided via roaming. The test results for U.S. Cellular showed **Begin Confidential** **End Confidential** of the recorded measurements with good or very good signal. *See* Reed Supplemental, p. 10.3-6; *see also* Reed Supplemental at KTC-MCT Exh. 6C p. 032.

Confidential MRC Exhibit F (attached to Reed Supplemental) documents similar findings related to the Salisbury exchange. Verizon Wireless test results demonstrated **Begin Confidential** **End Confidential** of the recorded signal strength being in the good or very good range. Sprint-Nextel CDMA test results demonstrated **Begin Confidential** **End Confidential** of the recorded signal strength being in the good or very good range and U.S. Cellular at **Begin Confidential** **End Confidential**. Even though the T-Mobile and AT&T testing results demonstrated that **Begin Confidential**

**End Confidential** of the recorded signal strength was in the good or very good range, the fact remains that these carriers have some availability in the Salisbury exchange as well. *See* Reed Supplemental at KTC-MCT Exh. 6C p. 056.

While U.S. Cellular, a publicly traded corporation, is majority owned by Telephone and Data Systems, Inc.<sup>6</sup>, the Petitioners are operated separately. *See* Tr. Day

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<sup>6</sup> *See* U.S. Cellular's latest 10-Q on file with the Securities and Exchange Commission, located at [http://www.sec.gov/Archives/edgar/data/821130/000082113009000034/form10\\_q.htm](http://www.sec.gov/Archives/edgar/data/821130/000082113009000034/form10_q.htm).

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II, ps. 194.23 - 195.21. U.S. Cellular competes for the Petitioners wireline customers. *Id.*, p. 194.18-22. Several wireless carriers roam on U.S. Cellular's wireless network. *See* Tr. Day II, ps. 82.10 - 84.11. Roaming percentages and related data are not the same for each of the wireless carriers, as home networks exist in these exchanges. *See e.g.*, Tr. DayII, ps. 150.14-16, 156.17-19. *See also*, Tr. 182.10-14 (Mr. Goulet testifying that T-Mobile roams on AT&T's network and AT&T being the fourth server in the Sutton exchange).

Residents of the Salisbury and Sutton exchanges can make good, quality wireless telephone calls from inside their homes. Both exchanges are classified as being in a "rural market" and in-building calls can be made in these exchanges. *See* Tr. Day II, ps. 141.1-3 and 145.2-4; and *see also* at ps. 141.7-17 (Mr. Goulet testifying that an in-building call would be reliable).

In addition, Mr. Goulet explained at length the need to review call quality data in comparison to signal strength. In each benchmark report, Mr. Goulet provided maps with various information and he compared Figure 16 to Figure 19 for the Sutton exchange. *See* Tr. Day II, ps. 182-186.7. With respect to Verizon Wireless alone, Mr. Goulet's explanation of these figures established that "...as far as call quality, you've got to be covering at least 75 to 80 percent of that exchange..." *Id.* at 184.14-16. The same exercise can be undertaken for the Salisbury exchange with respect to Verizon Wireless. *Id.* at p. 184.18-23.<sup>7</sup>

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<sup>7</sup> These same Figures for the Salisbury benchmarking report are located at Reed Supplemental, ps. MRC 0072 and MRC 0075, also referenced as KTC-MCT Exh. 6C ps. 0072 and 0075.

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### B. Facts Related to Availability of Competitive Telecommunication Based Alternatives for a Majority of the Retail Customers in Each of the Exchanges Served by KTC and MCT.

With respect to KTC, the Petitioners submit that the record supports the following factual findings. First, both the Petitioners and the Office of Consumer Advocate recognize that Comcast Phone of New Hampshire, LLC (“Comcast Phone”) has been certified as a competitive local exchange carrier (“CLEC”) in New Hampshire. These parties requested and the Commission granted administrative notice of relevant dockets whereby the Commission granted Comcast Phone permission to operate as a CLEC in the service territories of the Petitioners. *See* Tr. Day I, ps. 37.13 - 39.15. Pursuant to Docket DT 08-13 and Docket DT 08-162, Comcast Phone both has been certified as a CLEC and has entered into with the Petitioners’ parent entity a Commission approved Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 (the “Act”). *See* KTC-MCT Exh. 9P; *see also* Order No. 24,938 issued in Docket DT 08-013 (February 6, 2009) granting Comcast Phone’s application for authority to provide local exchange telecommunications services pursuant to RSA 374:22 in the exchanges of KTC, MCT and WTC, and Order No. 25,005 issued in Docket DT 08-162 (August 13, 2009) holding that (i) Comcast Phone is a telecommunications carrier in the State of New Hampshire entitled to interconnection under Section 251 of the Act and (ii) the proposed interconnection agreement between TDS Telecom and Comcast Phone is approved. No impediments exist to Comcast Phone’s offering of telecommunications services in either of the Petitioners’ service territories. *See* Tr. Day II, ps. 203.10 - 204.6.



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Second, KTC incorporates by reference all of the C-Squared Benchmark Report results provided as MRC-Exhibit F (Confidential) to the Reed Supplemental (marked as KTC-MCT Exh. 6C). Second, the Petitioners attach hereto and incorporate by reference Confidential Attachment E to Mr. Reed's pre-filed rebuttal testimony offered in Phase I of these proceedings, dated November 15, 2007. That document, attached hereto as Attachment A (confidential), establishes that a majority of retail customers within all of the exchanges within the KTC service territory, excluding only Salisbury, have access to cable broadband services. In January 2008, Comcast Phone sought to expand into the Salisbury exchange (*see* Tr. Day II, ps. 69.11 - 70.3) and an Interconnection Agreement is in effect with KTC (*see* KTC-MCT Exh. 9P).

In addition, the Commission can infer from the C-Squared wireless coverage data that the information contained within the State of New Hampshire Cellular Coverage Map (CoverageRight Map), marked as the Petitioners' KTC-MCT Exh. 11C, is accurate and, in addition to the availability of cable broadband, the KTC exchanges have access to wireless telecommunications services. *See e.g.* Tr. Day II , p. 72.13-18. The CoverageRight Map reflects the areas that have reasonable wireless coverage. *See* Reed Supplemental, at p. 13.19, also referenced as KTC-MCT Exh. 6C p. 013, (Mr. Reed quoting from an order issued by the New York Public Service Commission in Case 07-C-0349, at ps. 8-9 thereof). The CoverageRight Map indicates that wireless telecommunications services are available to virtually 100% of KTC's service area. *See* Reed Supplemental, p. 12.13-16, also referenced as KTC-MCT Exh. 6C p. 012. KTC customers also have access to competitive broadband telecommunications services through KTC's Safety Line broadband connection. *See ex.* Tr. Day I, p. 38.1-14

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(Commission taking administrative notice this tariff filing issued as of September 26, 2008, and effective October 26, 2008).

This direct evidence submitted on behalf of KTC further is supported by the circumstantial evidence of the companies' line loss data and access line loss data. KTC lost overall **Begin Confidential** **End Confidential** of its access lines during the period 2004 through April 2009, and every exchange lost access lines during this period. KTC's intrastate access minutes of use have declined **Begin Confidential** **End Confidential** during the same time period. *See* Reed Rebuttal, p. 6.10-18 and 7.12-16, also referenced as KTC-MCT Exh. 7C ps. 006, 007 and 020. It is clear to Mr. Reed that "...customers are using their wireless phones for long distance." Tr. Day II, p. 191.2-3. Customers also are porting their numbers to other telecommunications carriers, as evidenced by KTC having ported **Begin Confidential** **End Confidential** phone numbers to competitors during the period 2007 through September 2009. *See* Petitioners' Response to Oral Data Request #1, issued October 1, 2009 (Exh. OCA 12 being reserved for that response per Tr. Day II, p. 126.14-18).

With respect to MCT, the Petitioners submit that the record supports the following factual findings. First, MCT incorporates by reference all of the C-Squared Benchmark Report results provided as MRC-Exhibit E (Confidential) to the Reed Supplemental (marked as MTC-MCT Exh. 6C). Second, the Petitioners attach hereto and incorporate by reference Confidential Attachment E to Mr. Reed's pre-filed rebuttal testimony offered in Phase I of these proceedings, dated November 15, 2007. That document, attached hereto as Attachment A (confidential), establishes that a majority of

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retail customers within all of the exchanges within the MCT service territory - excluding only Bradford, Sutton and Warner - have access to cable broadband services.

As with KTC, the Commission can infer from the C-Squared wireless coverage data that the information contained within the State of New Hampshire Cellular Coverage Map (CoverageRight Map), marked as KTC-MCT 11C, is accurate with respect to wireless telecommunications availability within MCT's service territory. In addition to the availability of cable broadband in many MCT exchanges, all of the MCT exchanges have access to wireless telecommunications services. *See e.g.* Tr. Day II , p. 72.13-18. *See also* Reed Supplemental, p. 12.13-16, KTC-MCT Exh. 6C p. 012. MCT customers also have access to competitive broadband telecommunications services through MCT's Safety Line broadband connection. *See ex.* Tr. Day I, p. 38.1-14 (Commission taking administrative notice this tariff filing issued as of September 26, 2008, and effective October 26, 2008).

Again, the direct evidence submitted on behalf of MCT further is supported by the circumstantial evidence of the companies line loss data and access line loss data. MCT lost **Begin Confidential** **End Confidential** of its access lines during the period 2004 through April 2009, and every exchange lost access lines during this period. MCT's intrastate access minutes of use have declined **Begin Confidential** **End Confidential** during the same time period. *See* Reed Rebuttal, p. 6.10-18 and 7.12-16, also referenced as KTC-MCT Exh. 7C ps. 006, 007 and 017. Customers also are porting their numbers to other telecommunications carriers, as evidenced by MCT having ported **Begin Confidential** **End Confidential** phone numbers to competitors during the period 2007 through September 2009. *See* Petitioners' Response to Oral Data Request

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#1, issued October 1, 2009 (OCA Exh. 12 being reserved for that response per Tr. Day II, p. 126.14-18).

It is important to explain in more detail that each of the Petitioners offers broadband service to a majority of customers in each exchange. The Commission declined to consider this broadband service as a competitive alternative in the Initial Order. *Id.*, p. 29. The Commission's reasoning was that the broadband service offered by the Petitioners required the purchase of basic telephone service. *Id.* However, subsequent to the issuance of the Initial Order, KTC and MCT introduced their "Safety Line" service, which is specifically made available to customers who have moved to other carriers for their telecommunication needs, but who still wish to receive broadband service. The Safety Line service couples a 1.5 Mbs DSL service (or greater) with a very limited basic service product that is not expected to be generally used for telecommunications by customers. It provides customers with the safety of wireline E-911 service and service that remains available during power outages. Customers thus may obtain competitive telecommunications services such as voice over internet protocol ("VoIP") to meet their telecommunications needs. This service offering provides yet another way that a majority of customers in every exchange of the Petitioners have access to competitive alternatives.

### C. The Petitioners Submitted Additional Evidence that Wireless Telecommunications Providers and Cable Broadband Providers Compete with the Petitioners' Wireline Business.

Mr. Goulet has been in the wireless communications business since 1986. Tr. Day II, p. 206.22-23. Mr. Goulet worked for three (3) wireless carriers as an RF Manager – namely, Verizon Wireless, Sprint PCS (now known as Sprint-Nextel) and

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AT&T. *Id.* at 206.18-20. Mr. Goulet presently works as the Director of RF Services for C-Squared. *See* Tr. Day I, 43.15. Based on this extensive experience, Mr. Goulet has learned first hand from the various wireless carriers that their business objective "...is, and it has been since I came in the business...to replace the landline phone. And they're doing it." Tr, Day II, p. 206.22-24. The wireless carriers authorize Mr. Goulet to testify before various planning boards, zoning boards of adjustment and other regulatory agencies (such as the Connecticut Siting Council) and represent that the wireless carrier seeks to "...provide competitive wireless service as an alternative to landline service." Tr. Day II, ps. 205.17 – 207.8.

Mr. Goulet also has direct knowledge of wireless carriers network investment strategies. Mr. Goulet knows that wireless customers want functionality and portability wherever they may be. *See* Tr. Day II, p. 208. To support this demand, the wireless carriers are "spending huge". *Id.* at 208.22-23. As stated by Mr. Goulet:

There is so much—there is more funding now in an economic crisis from the wireless carriers than I have ever seen before. Our business, when everyone else was cutting back, we're—I can't hire people fast enough because there is so much work for wireless.

Tr. Day II, ps. 208.23 – 209.5.

Pricing information also reflects a competitive marketplace. Basic rates do not include a wireline telephone service with extensive functionality. Basic rates may be in the \$12.00 - \$14.00 range with EAS calling. *See* Tr. Day II, p. 189.11-14. Add in the subscriber line charge ("SLC") at \$6.50, plus all of the additional features that might come with a cell phone and the wireline basic rate increases. *Id.* at p. 189.14-16. Additional features would include voice mail, regional long distance and/or nationwide long distance. *Id.* at p. 189.16-20. Once aggregated, the landline costs for telephony

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with features “become very, very close” to costs for wireless services. *Id.* at p. 189.22-23. In addition, TracFone offers a wireless Lifeline service comparable to the Petitioners’ wireline based Lifeline service. *See* Tr. 189.24 - 190.3.

In response to cable based competition and wireless competition, the Petitioners’ parent entity continues to invest in the New Hampshire network. Fiber to the home is under construction in New Hampshire. **Begin Confidential** **End Confidential** of dollars have been invested in New Hampshire since this Docket has commenced and the investment includes high speed Internet service. Wireless phone service and the “Comcast’s of the worlds” are taking from the Petitioners both access minutes and access lines. To compete, the Petitioners are planning to invest in broadband, fiber to the home and intend to fight to keep their customers. *See* Tr. Day II, ps. 200-01. For example, the Petitioners also have developed their Safety Line service, which has been “...targeted right directly at wireless customers who want a modem, a broadband service.” Tr. Day II, p. 190.7-10. The goal of this offering is to entice wireless customers to go forward with their wireless services, keep their landline based telephone for very limited use and purchase the Petitioners’ DSL offering. *Id.* at p. 190.12-15.

## V. Argument

A. The Petitioners have Met their Burden of Proof and have Demonstrated that Alternative Telecommunications Services are Available in the Salisbury and Sutton Exchanges.

The Commission found in the Initial Order that a lack of wireless availability exists in the Sutton and Salisbury exchanges based upon the Staff’s analysis of wireless antenna locations and signal distances. *See* Initial Order, p. 34. Therefore, the

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Petitioners first address the issue of availability. Mr. Reed addressed the Staff's analysis of wireless antenna locations and signal distances in detail in his pre-filed Supplemental testimony. *See* Reed Supplemental, ps. 14-15 (marked as KTC-MCT 6C). Yet the Petitioners did not want to present their cases-in-chief with respect to wireless coverage issues based solely on information from in-house representatives. At significant time, effort and expense, the Petitioners retained C-Squared to measure the strength of the wireless signals in these exchanges. C-Squared's Multi-Carrier Benchmarking Reports combined with Mr. Goulet's expert rebuttal testimony and his testimony during the two (2) days of evidentiary hearings should establish with finality that such coverage exists in these exchanges. The evidence presented through Mr. Goulet is significant in quantity and detailed in its quality.

The compilation of Mr. Goulet's evidence is reflected in MRC-Exhibit A (Confidential) and MRC-Exhibit B (Confidential) attached to Reed Supplemental (KTC-MCT Exh. 6C). A review of these maps shows that a majority of the customers in each exchange has access to a good or very good wireless signal. Mr. Goulet testified on several occasions that the measured signal strength in a rural market such as Sutton and Salisbury, New Hampshire, allows for a quality call inside the home.

For example, Mr. Goulet testified on cross-examination that:

This is a rural market that we're working in. So we used the link budget for each carrier. Now, for example -- and I'm not going to give out carrier's link budgets because that's proprietary. But let's assume you have Carrier A, and their bottom-line threshold for rural is neg 82. Carrier B, their bottom-line link budget might be neg 85. C, D and E, their bottom-line link budget may be minus 90. That link budget means that's for in-building. That link budget means at minus-90 link budget that has already -- you can have 10 dB of loss for a typical wooden-structured home in a rural area, and you would still have a reliable call.

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Tr. Day II, p. 141.2-17. Mr. Goulet further explained in extensive detail how the carriers link budgets take into consideration various signal strength loss caused by building structures and other factors (*see* Tr. Day II, ps. 138-145), but that C-Squared's raw data did not account for in-vehicle loss which typically in a link budget amounts to 5 to 8 dBm loss in signal strength (*id.*, p. 143.9-20).

The Petitioners further submit that the Commission should not discount U.S. Cellular's wireless coverage in the Sutton and Salisbury exchanges (or any other exchange) simply because that company is majority owned by Telephone and Data Systems, Inc. The uncontroverted evidence is that U.S. Cellular competes with the Petitioners and is operated separate and apart from the Petitioners' business operations. In fact, U.S. Cellular facilitates competition by providing roaming services and thereby providing wireless carrier choice selection to the Petitioners' retail customers.

The Petitioners therefore respectfully submit that they met their burden of proving by a preponderance of the evidence that alternative services to the Petitioners' wireline telephone services are available to a majority of the retail customers in the Salisbury and Sutton exchanges.

B. The Petitioners have Met their Burden of Proof and have Demonstrated that Alternative Telecommunications Services are Available in All of the Petitioners' Exchanges.

The Petitioners submit that New Hampshire recognizes two kinds of evidence, direct and circumstantial. *See Hancock v. R.A. Earnhardt Textile Mach. Div.*, 139 N.H. 356, 360 (1995). There is no recognized distinction in weight to be accorded each. *See State v. Newcomb*, 140 N.H. 72, 80 (1995). Thus, it is a "well established principle[] . . . that it is within the province of the trier of facts . . . to draw reasonable inferences from



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[the evidence]” and arrive at a conclusion. *American Asbestos Textile Corp. v. Ryder*, 111 N.H. 282, 284 (1971). Thus, well settled New Hampshire law supports the Petitioners’ requested findings and conclusions.

The Petitioners respectfully submit that their extensive evidence supports factual findings related to alternative services being available to a majority of retail customers in all of the Petitioners’ exchanges. First, for many exchanges, the Petitioners have submitted as an evidentiary exhibit their Interconnection Agreement with Comcast Phone. *See* KTC-MCT Exh. 9P. Comcast now has the legal ability to offer its cable telephone service in all exchanges of the Petitioners and a platform of cable broadband facilities to actually offer such service in every KTC exchange, exclusive of Salisbury, and in most of the MCT exchanges. *See* Tr. Day II, ps. 69.11 – 70.3; KTC-MCT Exh. 9P.

Moreover, with respect to KTC, C-Squared’s Multi Carrier Benchmarking Report established the existence of wireless coverage in the Salisbury exchange. Coupled with the access to cable broadband in all other KTC exchanges, the Petitioners submit that for KTC, the Commission need not make a further inquiry in terms of the evidence which supports the assertion that KTC met the test required by RSA 374:3-b,III(a).

Nonetheless, the Petitioners submit that additional evidence supports the above requested factual findings. KTC now offers its Safety Line service to its customers. Additionally, on behalf of KTC, the Petitioners have submitted a CoverageRight Map with overall service territory boundary lines plotted thereon. This map demonstrates that multiple wireless telecommunications carriers provide wireless communications services to a majority of the retail customers who live within KTC’s foot print. C-Squared’s

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results for Salisbury support the information contained within the CoverageRight Map for the Salisbury area. As with the New York Public Service Commission, this Commission can find the CoverageRight Map to be reliable. The Petitioners further cite to KTC's extensive access line losses and its lost intrastate access minutes of use since 2004 to support the requested factual finding that wireless or broadband service is available to a majority of retail customers in all of KTC's exchanges. Also supporting this request, the Petitioners have established during Phase I of this Docket that KTC's basic area revenue and state switched access revenue have declined since 2004. *See* Direct testimony of Mr. Reed, submitted March 1, 2007 at p. 6.6-8 (and marked as KTC Exh. 1P and KTC Exh. 1C during the hearing held on December 4, 2007). While Mr. Bailey and the Consumer Advocate may dispute this evidence, the Commission may legally infer and may logically infer that services, other than KTC's wireline services, are available to a majority of the retail customers in each exchange of KTC's service territory based upon a totality of the evidence presented in this Docket.

As for MCT, the Petitioners submit that the same analysis applies to the evidence presented on behalf of MCT and leads to the same conclusions. First, with respect to MCT, C-Squared's Multi Carrier Benchmarking Report established the existence of wireless coverage in the Sutton exchange, which the Commission found to be the most rural of MCT's exchanges. The CoverageRight Map shows the availability of wireless coverage throughout MCT's service territory. C-Squared's results for Sutton support the information contained within the CoverageRight Map for the Sutton area. The Petitioners submit that the Commission therefore may find the CoverageRight Map to be reliable based upon C-Squared's test results and Mr. Goulet's testimony. Thus, the

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Commission may legally infer and may logically infer that such wireless services are available to the residents of MCT's service territory based upon this evidence.

Additional circumstantial evidence exists to support such a finding. Again, the Petitioners' cite to the fact that MCT has ported telephone numbers to other telecommunications carriers during the past 2 3/4 years. MCT's access line losses and lost intrastate access minutes of use have been substantial since 2004. As referenced in Phase I of this Docket, MCT's basic area revenue and state switched access revenue have declined since 2004. *See* Direct testimony of Mr. Reed, submitted March 1, 2007 at p. 5.13-15 (and marked as MCT Exh. 1P and MCT Exh. 1C during the hearing held on December 4, 2007). Pursuant to Mr. Bailey's Exhibit 55 - Center for Disease Control Survey - it has been established that up to 11.4% of adults living in the Northeast live in households with only wireless phones - *see* Tr. Day I, ps. 47.19 - 48.9 - and that New Hampshire is located in this area of the United States - *see id.* at p. 22-24.

Multiple MCT exchanges - exclusive of Bradford, Sutton and Warner - have access to cable broadband services. The evidence submitted on behalf of MCT demonstrates that a majority of the residents within the exchanges of Antrim, Contoocook, Henniker, Hillsborough, and Melvin Village have access to cable broadband. MCT also now provides its Safety Line service to its customers. All of this evidence supports the Petitioners' assertion that services, alternative to MCT's wireline services, are available to a majority of retail customers within each of MCT's exchanges.

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C. The Petitioners have Demonstrated that the Alternative Telecommunication Services are “Competitive”.

As the Commission has ruled, “...*a fully functioning competitive market is not necessary in order to approve a plan.*” Initial Order, p. 26 (emphasis added). Given this finding, the Petitioners saw no need to challenge the assertions made during the second day of Phase II of the hearing with respect to the definition of “competition” as made by Dr. Ben Johnson. While Dr. Johnson has “...an opportunity to monitor and be aware of the marketplace in many ways...” (see Tr. Day II, p. 21.12-14), Dr. Johnson has not offered any evidence of his knowledge with respect to wireless telecommunications carriers’ business plans or network expansion plans. Similarly, Dr. Johnson has not offered testimony with respect to his qualifications to measure wireless signal strength or to determine whether a quality wireless call may be made in rural New Hampshire markets such as Salisbury or Sutton.

Instead, the Petitioners submit that Mr. Bailey, through Dr. Johnson, simply sought to re-litigate the definition of “competitive” for purposes of Phase II of this Docket. Dr. Johnson attempted to include in his testimony his understanding that through the use of the word “competitive” in RSA 374:3-b,III(a) “...the Legislature was envisioning alternatives that are sufficiently close substitutes...” to the Petitioners wireline service. See Tr. Day II, p. 23.12-14. Yet the Commission has established that opinions offered concerning the Legislature’s intent should be accorded “no weight” in its deliberations. See Initial Order, p. 30. Thus, Dr. Johnson’s opinions with respect to what the legislature did or did not envision should not be considered persuasive in the present analysis.

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Indeed, the Petitioners note that RSA 374:3-b does not include a test wherein the Petitioners *must* demonstrate that wireless or broadband service is a “close substitute” for wireline service. The Legislature never included the words “close” or “substitute” within the statute. In addition, the Legislature did not specify in the statute that small ILECs must establish through an economist or through economic studies that alternative services are “competitive”. Therefore, the Petitioners urge the Commission to disregard Dr. Johnson’s preferences with respect to how to interpret the word “competitive” within RSA 374:3-b,III(a).

Significantly, the Commission has reviewed evidence presented during Phase I of this Docket which parallels evidence submitted by the Petitioners during Phase II. In Phase I, the Petitioners affiliates (HTC and WTC) offered evidence of access line losses, losses of access minutes of use and revenue loss. In reviewing this evidence, the Commission held that:

Furthermore, while [HTC and WTC’s] evidence of access line loss, minutes of use loss, or access revenue loss, standing alone, is not sufficient to demonstrate the level of competition required under RSA 374:3-b ,III(a), *such evidence is indicative of competition*. When the line loss, minutes of use and revenue loss evidence is viewed in combination with the rest of the evidence, we find that the standard under RSA 374:3-b,III(a) is met currently for Wilton and Hollis.

Initial Order, p. 27 (emphasis added). The very same circumstances exist for KTC and MCT.

By way of additional evidence on wireless services being competitive, the Petitioners provided the pre-filed rebuttal testimony of Mr. Goulet. Mr. Goulet has direct knowledge of wireless carriers business plans and network expansion plans. He knows first hand that the wireless carriers have a goal which bears directly on the present

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analysis. That is, the wireless carriers want to replace the landline telephone. As Mr. Goulet stated:

The goal of every wireless carrier with which [Mr. Goulet works] is to provide as good or better service than the landline and eventually to replace the landline. In assisting the wireless carriers in their zoning and permitting process, the affidavits submitted state that the carrier is seeking to provide a competitive alternative wireless service to landline service.

Goulet Rebuttal, at p. 11.8-12 (also referenced as KTC-MCT Exh. 8P p. 011). To achieve this goal, the wireless carriers are “spending huge” and investing in their networks.

Moreover, the Petitioners and their parent company are not sitting idly by watching the competition take their customers, their access lines, and their access minutes of use and related revenues. Instead, the Petitioners’ parent entity is investing heavily in its New Hampshire service territories to compete with wireless carriers and cable broadband providers such as Comcast. The Petitioners networks are being upgraded to provide improved broadband and other services. The Petitioners even have developed a bundle to market directly to the residents of their exchanges who choose wireless or VoIP phone services. All of this evidence supports the findings that *competitive alternatives* currently are available to a majority of the retail customers in each of the Petitioners’ exchanges.

### D. The Petitioners Amended AFOR Plans Satisfy the Remaining Conditions of RSA 374:3-b,III.

In addition to a finding of adequate competition, RSA 374:3-b,III requires that the Commission find that the AFOR Plans (1) provide for a limit on basic local service rates and control of rate increases, (2) promote the offering of innovative telecommunications services, 3) meet applicable intercarrier service obligations, (4) preserve universal access

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to affordable basic telephone service, and (5) provide that, if Petitioners fail to meet any of the conditions of RSA 374:3-b,III, the Commission may require them to modify plan or return to rate of return regulation.

Although the Petitioners believe that the AFOR Plans as originally filed fully satisfied the criteria set forth in RSA 374:3-b, the Settlement Agreement enhances those plans to further ensure their compliance with the requirements of RSA 374:3-b,III to facilitate more competitive entry while enhancing competition within the Petitioners' exchanges, and to provide greater consumer protections than even the statutory criteria require. First, upon the effective date of the Plans, the Petitioners will waive the rural telephone company exemption under 47 U.S.C. §251(f)(1), and agree to an expedited process for negotiation of interconnection agreements. Also, following Commission approval and implementation of the amended AFOR Plans, the Petitioners agree not to oppose the registration or certification of competitive local exchange carriers seeking to conduct business in the service territories of the Petitioners. Thus, the amended AFOR Plans provide for enhanced competitive wireline alternatives in addition to the wireless and broadband alternatives shown to be presently available by the evidence submitted by the Petitioners. Second, the amended AFOR Plans (i) provide for basic local service rates to be capped at current levels for specified periods and (ii) defer the start of the period during which up to 10% annual increases in basic local service rates are allowed, and caps them at the rates charged by the largest ILEC in New Hampshire for similar services. As an additional protection for low income customers eligible for Lifeline rates, the basic service rate cap at current levels will last for at least four years for those customers. In these ways, the AFOR Plans, as amended by the Settlement Agreement,

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enhance the already available competition and provides additional protections to consumer access to basic service.

In the Initial Order, the Commission approved the Settlement Agreement and, by extension, the amended AFOR Plans for HTC and WTC, finding that it fulfilled the conditions of RSA 374:3-b,III (b)–(f). Regarding subpart (b), the Commission commended the Petitioners for the rate protections provided by Settlement Agreement. Initial Order, p. 28. It further found that the Petitioners satisfied the conditions of subparts (c) and (d) “[b]y reducing barriers to competitive wireline entry, . . . thereby promot[ing] the offering innovative telecommunications services.” *Id.* Moreover, the rate protections in the Settlement Agreement, particularly for low-income customers, “meet the statutory requirement of subpart III(e).” *Id.* Finally, “the plans . . . provide for continuing Commission oversight as required by RSA 374:3-b, III(f).” *Id.* Accordingly, the Plans as augmented by the Settlement Agreement satisfy all of the remaining conditions of RSA 374:3-b.

## **VI. Conclusion**

The Petitioners respectfully submit that, as required by RSA 374:3-b,III(a), they have made the requisite showing of (i) competition and (ii) the availability to a majority of the retail customers in each exchange of alternative services. In addition, the Petitioners submit their respective AFOR Plans as amended by the Settlement Agreement should be approved, subject to the single revision to each plan referenced above in Section II.B of this Brief.



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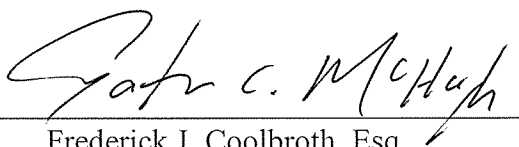
Respectfully submitted,

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and MERRIMACK COUNTY  
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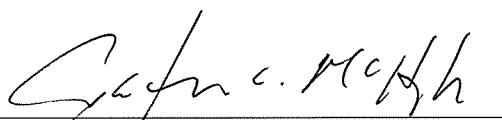
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief (public version) was forwarded this day to the parties by electronic mail and that a copy of the foregoing Brief (confidential version) was forwarded this day to the parties via United States Mail, postage pre-paid.

Dated: November 6, 2009

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