

THE STATE OF NEW HAMPSHIRE



CHAIRMAN
Thomas B. Getz

COMMISSIONERS
Graham J. Morrison
Clifton C. Below

EXECUTIVE DIRECTOR
AND SECRETARY
Debra A. Howland

PUBLIC UTILITIES COMMISSION

21 S. Fruit Street, Suite 10
Concord, N.H. 03301-2429

Tel. (603) 271-2431

FAX (603) 271-3878

TDD Access: Relay NH
1-800-735-2964

Website:
www.puc.nh.gov

June 8, 2007

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429



Re: DT 07-027 Kearsarge Telephone Company, Wilton Telephone Company, Hollis Telephone Company and Merrimack County Telephone Company
Petitions for Alternative Regulation pursuant to RSA 374:3-b

Dear Ms. Howland:

Enclosed for filing is Staff's Memorandum of Law concerning issues identified in the Commission's secretarial letter of May 29, 2007.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "F. Anne Ross".

F. Anne Ross, Esq.
Staff Attorney

Cc: Service List

THE STATE OF NEW HAMPSHIRE
Before the
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Kearsarge Telephone Company,)
Wilton Telephone Company,)
Hollis Telephone Company, and) DT 07-027
Merrimack County Telephone Company)
Petitions for Alternative Regulation)

**MEMORANDUM OF LAW BY THE STAFF OF THE
PUBLIC UTILITIES COMMISSION**

Kearsarge Telephone Company, Wilton Telephone Company, Hollis Telephone Company, and Merrimack County Telephone Company (the Companies), all wholly owned subsidiaries of TDS Telecommunications Corporation, have petitioned pursuant to RSA 374:3-b for alternative regulation of their local exchange service in New Hampshire.¹ On May 29, 2007, the Commission issued a secretarial letter inviting the parties to brief the following issues.

1. Does a service provided by an affiliate of the ILEC qualify as a competitive service for purposes of the statute?

2. Does long distance service qualify as a competitive wireline service for purposes of the statute?

¹ The Companies or their affiliates offer various other services in New Hampshire such as data services, long distance services and cable television services, however, these services are not included in the alternative regulation plan since they are either; not within the Commission's jurisdiction, or not price regulated.

Staff of the Commission submits the following legal analysis of 374:3-b to assist in the Commission's review of the four petitions filed in this docket. RSA 374:3-b Alternative Regulation of Small Incumbent Local Exchange Carriers states in part:

"II. A small incumbent local exchange carrier subject to rate of return regulation may petition the public utilities commission for approval of an alternative form of regulation providing for regulation of such carrier's retail operations comparable to the regulation applied to competitive local exchange carriers, subject to paragraph III, due to its status as carrier of last resort.

III. The commission shall approve the alternative regulation plan if it finds that:

(a) Competitive wireline, wireless, or broadband service is available to a majority of retail customers in each of the exchanges served by such small incumbent local exchange carrier;...."

In this proceeding the Commission must consider for the first time petitions under this new statute.² In this memorandum Staff will focus on the portion of the statute dealing with "competitive wireline, wireless or broadband service," RSA 374:3-b, III (a).

1. Are ILEC Affiliates Competitive Service Providers?

The language of RSA 374:3-b is not ambiguous and should be interpreted consistent with its plain meaning and its overall context. *See, Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 96 (2005) *citing Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 338 (1996) (We begin our inquiry with the examination of statutory language.), and *Appeal of Verizon New Hampshire*, 153 N.H.50, 60 (2005) (The courts begin with the plain meaning of the words unless the statute suggests otherwise.) Turning to the plain meaning of the statutory language, "competitive wireline, wireless or broadband service," RSA 374:3-b, III (a), "competitive" is defined by *Webster's Ninth Collegiate Dictionary* (Merriam-Webster, Inc. 1984) as, "relating to, characterized by, or based on competition." "Competition" is defined by *Webster's Ninth*

² RSA 374:3-b was enacted in 2005 and amended in 2006. 263:7 effective July 22, 2005. 154:1 effective July 21, 2006.

Collegiate Dictionary as “ the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms.”

Working from this definition of competition, there must, at a minimum, be two or more parties acting independently to produce competition. Affiliates owned by a common parent do not act independently because their parent has an interest in maximizing the profits of both affiliates. As a result, decisions about the terms of product offerings will necessarily be made to benefit both parties. The parent will have an interest in keeping prices for services as high as possible and will be able to prevent any reduction in pricing by either affiliate in order to maintain overall profitability.

In this case, based upon the plain meaning of the word “competitive” staff urges the Commission to exclude services provided by any affiliates of the Companies from the statutory definition of “competitive wireline, wireless or broadband service.” Clearly such services are not competitive.

2. Is Long Distance Service Competitive Wireline Service?

Turning again to the statutory language, “competitive wireline, wireless or broadband service” we must next interpret the words “competitive service” as they relate to long distance services. For purposes of this analysis the medium, i.e. wireline, wireless or broadband, is irrelevant since we are focusing upon what attributes make a service, via any transmission medium, competitive. In interpreting the words “competitive service,” it is important to interpret that phrase not in isolation, but in the context of the overall statutory scheme. *See, Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 96 (2005) *citing Appeal of Ashland Elect. Dept.*, 141 N.H. 336, 340 (1996).

In this case RSA 374:3-b allows, under certain circumstances, small incumbent local exchange carriers (ILECs) to be regulated as competitive local exchange carriers (CLECs).

“II. A small incumbent local exchange carrier subject to rate of return regulation may petition the public utilities commission for approval of an alternative form of regulation providing for regulation of such carrier’s retail operation comparable to the regulation applied to competitive local exchange carriers, subject to paragraph III, due to its status as carrier of last resort.” 374:3-b, II.

Both ILECs and CLECs are required to offer basic service. *See*, N.H. Admin. Rule Puc 412.01 (b) and 432.01 (a). Puc 402.05 defines basic service, as “the minimum telephone service, as described in Puc 412.01 and Puc 432.01, that the commission requires LECs [local exchange carriers] to provide to voice customers including service attributes and standards mandated by federal and state statutes and rules.” The attributes of basic service for both ILECs and CLECs are set out in Puc 412.01 (b) and 432.01 (a), and include:

“all of the following as part of basic service: (1) Safe and reliable single-party voice service; (2) The ability to receive all non-collect calls, at telephone lines capable of receiving calls, without additional charge; (3) The ability to complete calls to any other telephone line, which is capable of receiving calls, in the state; (4) the opportunity to presubscribe to interLATA toll carriers; (5) the opportunity to presubscribe to intraLATA toll carriers; (6) Dialing parity; (7) Number portability; (8) Enhanced 911, pursuant to the requirements of the department of safety bureau of emergency communications or its successor agency;....”

Thus, the definition of basic service is identical for both ILECs and CLECs. There are, however, two major regulatory differences between ILECs and CLECs in New Hampshire. First, ILECs are carriers of last resort, therefore they must offer basic local service to all customers in their service territory. CLECs, on the other hand, have no such obligation and may choose their customers. Second, ILECs rates for basic service are regulated, while CLECs may offer basic service at any rate they choose. RSA 374:3-b establishes the circumstances under which small ILECs may be regulated as if they were CLECs. Since the RSA 374:3-b deals with the regulation of basic service, it follows that in the overall context of the statute “competitive ...

service” must be a service competitive with basic service. Those competitive services may be offered via wireline, wireless or broadband and must provide the elements of basic service. *See*, Puc 412.01(b) and 432.01(a).

InterLATA and intraLATA toll services have been competitive in all New Hampshire telephone exchanges for more than 10 years. If long distance service fulfills the “competitive service” finding for alternative regulation of basic service under RSA 374:3-b, then all small ILECs in New Hampshire already qualify for alternative regulation under 374:3-b, III. (a). If the legislature had intended to relieve all ILECs of rate of return regulation, it would have done so explicitly.

InterLATA and intraLATA toll services do not meet the requirements of RSA 374:3-b, as they do not substitute for basic local exchange service.³ RSA 374:3-b is designed to allow small ILECs to price deregulate basic service. In order to price deregulate, however, the small ILEC must show that “competitive services” are available to a majority of customers in each exchange. This requirement is clearly designed to allow competition to limit the price of basic service, just as competition has been allowed to control long distance rates for many years. The fact that long distance service alone cannot substitute for basic local service, means that it cannot constrain the price of basic service.

Or put another way, 374:3-b allows ILECs to be regulated like CLECs if they face competition as CLECs do. CLECs by definition are competitive local exchange carriers authorized by the Commission to provide telecommunications service in a particular area which

³ Under Commission rules basic service providers are required to allow customers to presubscribe to toll carriers. Puc 402.01(b) and 432.01 (a) “Toll call” is defined by Commission rules as “a call to any location outside the local service area.” Puc 402.56 A competitive intraLATA toll provider, or CTP, is defined as “any carrier authorized to provide intraLATA toll service, except for an ILEC that provides toll service exclusively to its local service customers in New Hampshire.” Puc 402.10.

an ILEC already serves.⁴ They are separate entities from the ILEC competing to provide local exchange service to ILEC customers.

Considering RSA 374:3-b as a whole the statute can only be interpreted to mean that ILEC basic local exchange service can be regulated like CLEC basic local exchange service, i.e. price deregulated, when the majority of retail customers in each exchange have a competitive alternative to basic local exchange service. The only reason to require a showing of competition would be to demonstrate that the services provided by the small ILEC will be price constrained by competitive providers. Such price constraints can be triggered only by the offering of services equivalent to basic local exchange service. Long distance or toll service cannot be considered a competitive wireline service in this context.

CONCLUSION

Staff urges the Commission to define competitive wireline, wireless and broadband service in this docket to exclude offerings of long distance service and offerings by small ILEC affiliates. Long distance service does not compete with, or substitute for, basic local exchange service and services provided by an affiliate are, by definition, not competitive. As a result, Staff urges the Commission to answer both questions in the negative.

Respectfully submitted:

⁴ CLECs may serve an area which an ILEC was authorized to serve prior to July 23, 1995.

STAFF OF THE PUBLIC UTILITIES COMMISSION

By its Attorneys



F. Anne Ross, Esq.
Lynn Fabrizio, Esq.
21 South Street Suite 10
Concord, NH 03301
603-271-2431
603-271-4033 fax

Date: 6/8/07