

Before the New Hampshire Public Utilities Commission

DT 07-027

Kearsarge Telephone Company, Wilton Telephone Company,
Hollis Telephone Company and Merrimack County Telephone Company
Petition for an Alternate Form of Regulation

**OFFICE OF CONSUMER ADVOCATE'S MOTION IN LIMINE
TO STRIKE PORTIONS OF TDS' REBUTTAL TESTIMONY**

1. On November 15, 2007, TDS filed rebuttal testimony of Michael Reed ("Reed") and Timothy W. Ulrich ("Ulrich").
2. Therein, Reed and Ulrich make numerous references to the legislative history of RSA 374:3-b, the statute pursuant to which the pending TDS petitions were filed. Specifically, these witnesses reference and draw inferences about legislative intent from 2005 New Hampshire Session Laws Ch. 263 and a related legislative Study Committee Report.
3. However, Reed and Ulrich take the position that the language of RSA 374:3-b is plain and unambiguous. *See, e.g.*, Rebuttal Testimony of Ulrich, p. 3, lines 8-9; p. 4, lines 6-9, and lines 12-14; and Rebuttal Testimony of Reed, p. 7, lines 20-21; p. 8, lines 13-14; p. 9, line 6, and lines 17-18; and p. 27, lines 10-11.
4. It is an established maxim of statutory construction that if the language of a statute is plain and unambiguous, then the tribunal need not look beyond it for further indication of legislative intent. *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 22 (2007) (citation omitted). Legislative intent is interpreted from the statute as written and not from what the legislature might have said or from language that the legislature did not see fit to include. *Id.*
5. As such, Reed's and Ulrich's references to the legislative history of RSA 374:3-b, including the legislature's findings and intent in passing that law, are not appropriate for inclusion in the record.
6. Moreover, statutory interpretation is a matter of law not fact. *In re Guardianship of R.A.*, 155 N.H. 98, 99 (2007) (citation omitted).
7. To the extent that Reed and Ulrich purport to interpret RSA 374:3-b, which is a matter of law and not fact, a separate basis exists to strike such portions of their testimony from the record.
8. Specifically, the following portions of Ulrich's rebuttal testimony should be stricken as based upon the legislative history of RSA 347:3-b and not the plain and unambiguous language of that statute or, in the alternative, as legal argument:

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page 1, lines 20-22, “Despite clear legislative findings that (i) consumers already have alternatives and (ii) the objectives of competition and universal service will best be served through the adoption of alternative regulation plans” (references 2005 New Hampshire Laws Ch. 263:1)

page 2, lines 5-10, “notwithstanding the express legislative finding that this result is not consistent with ‘the policy of this state … to promote competition and the offering of new and alternative telecommunications services while preserving universal access to affordable basic telephone service.’ [Laws 2005, 263:1]. Their testimony is nothing short of an express rejection of the legislative findings.”

page 3, lines 11-12, “The Petitioners firmly rely on the legislative findings that formed the basis of RSA 374:3-b in Laws 2005, 263:1 and the subsequent legislative Study Committee Report.” (footnote references omitted)

page 3, lines 14-15, “the General Court’s finding that wireless, broadband, and wireline are services that compete with traditional wireline services.” (references 2005 New Hampshire Laws Ch. 263:1)

page 3, footnote 2 (quoting 2005 New Hampshire Session Laws 263:1)

page 3, footnote 3 (citing the Final Study Commission Report issued pursuant to 2005 New Hampshire Session Laws Ch. 263:2)

page 4, lines 8-9, “together with the expressed legislative findings in Laws 2005, 263:1 and the Study Committee Report”

page 4, lines 13-17, “as it so found in Laws 2005, 263:1. Specifically, the General Court found ‘that the growth of unregulated wireless and broadband telecommunications services has provided consumers alternatives to traditional telephone utility services.’ Given that it has already made this determination,”

page 4, lines 21-22, and p. 5, lines 1-2, “the legislative findings demonstrate that the General Court was fully aware that it was these specific technologies and their offering of bundled services that compete with the small ILEC’s wireline services,”

page 5, lines 15-21, and page 6, line 1, “**Q. Did the General Court consider providing guidance on whether the Commission needed to determine if wireless, wireline or broadband services are ‘competitive’?** A. Yes. During the legislative process relating to the 2006 amendment to RSA 374:3-b, the NHPUC proposed in a letter dated February 8, 2006 to the House Science,

Technology and Energy Committee an amendment to the statute that would have required small ILECs to demonstrate the availability of a substitute for basic local exchange service in order to depart from rate of return regulation. This proposed language was not adopted, which is indicative of the General Court's desire that it is not necessary." (emphasis in original)

page 6, lines 3-13, "**Q. What other guidance did the General Court provide when enacting this statute?** A. In reviewing the legislative history, the purposes of the statute are to: (1) provide small ILECs pricing flexibility and the opportunity to compete for customers who are interested in bundled services, such as wireless and broadband; and (2) protect customers of small ILECs who would otherwise be left behind in light of advancing technologies. Moreover, the General Court wanted a small ILEC to be regulated under an alternative form of regulation in order for the legislature to be able to gauge whether it was a better and more efficient means of regulating a small ILEC, i.e., "expose its benefits and shortcomings". (footnote reference omitted) Acting upon the General Court's stated policy and intent," (emphasis in original)

page 6, footnote 5 (citing the Study Committee Report)

page 7, lines 9-10, "to redetermine what the General Court has already found"

page 10, line 5, "Given the General Court's direction,"

page 14, lines 19-20, "As the General Court prefers to observe theories proved out in practice," (reference to Study Committee Report, see footnote 5 on page 6)

page 15, lines 5-6, "Given the extent of competition that the General Court recognized that a small ILEC already faces," (reference to 2005 New Hampshire Session Laws Ch. 263:1)

page 15, lines 13-22, and page 16, lines 1, "As required under the statute, the Study Committee addressed '[w]hether a small incumbent local exchange carrier should be required to agree to relinquish its rural exemption under the federal Telecommunications Act immediately upon approval of an alternative regulation plan.' Within its report, the Study Committee did not adopt such a requirement but instead determined that it would 'prefer to see the results of small ILEC alternative regulation plans under RSA 374:3-b, before adding additional requirements to current law'. The General Court plainly considered the question and indicated its preference to observe the effects of a small ILEC under an alternative form of regulation before making such a mandate." (footnote omitted)

page 15, footnote 8 (citing 2005 New Hampshire Session Laws Ch. 263)

page 16, lines 2-3, “adoption of the (sic.) Dr. Loube’s recommendations would deny the General Court the opportunity to see these results.” (reference to Study Committee Report)

page 21, lines 6-10, “As discussed in the General Court’s Study Committee Report, it believes that ‘in theory and in general, competition will keep prices affordable and result in more innovation.’ The General Court further stated that it would ‘prefer to see this theory proved out in practice by following the progress of small ILEC alternative regulation plans under RSA 374:3-b.’ TDS Telecom hopes the General Court will get such an opportunity.”

9. The following portions of Reed’s rebuttal testimony should be stricken as based upon the legislative history of RSA 347:3-b and not the plain and unambiguous language of that statute or, in the alternative, as legal argument:

page 4, lines 9-17, **“As part of the process of providing information to the legislative committees, do you have an opinion as to what they might have been ‘thinking’? A.** I know that the committee sessions I attended and testified at, and in discussions with many individual legislators, our group provided the exact type of data included in the Petition. Availability of alternatives was very important, as were the impacts of competition on our companies. The legislation was based on exactly the same competition and competitors included in our Petition--wireless, cable, and VoIP. The same issues were addressed: losses in access lines, minutes of use and revenue.” (emphasis in original)

page 5, lines 5-9, “The Legislature recognized that all or nearly all of the products offered by a small telephone company are offered by competitors including, for example, local, long distance, broadband and calling features. They also understood that competition is not completely built out to every customer in every location at this time and that most other providers do not break out a fixed local service offering as a part of their service.”

page 15, line 23, and page 16, line 1, “It is exactly the same type of data that legislators relied on when they passed RSA 374:3-b,”

page 16, lines 10-11, “in the legislative findings, and the Study Committee Report referenced in Mr. Ulrich’s testimony.”

page 18, lines 17-19, “as the Legislature understood, access to broadband means access to alternatives to local service including features, long distance calling and local calling from VoIP providers,”

page 23, lines 19-23, and page 24, lines 1-6, **“Q. You participated in the legislative process that resulted in RSA 374:3-b. Does the Plan filed by the**

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Company meet the expectations of that process from your point of view? A. Yes, it certainly does. The Legislature or committees within the Legislature heard testimony from many parties, including many parties involved in this case. In my testimony on behalf of both the TDS Companies and the New Hampshire Telephone Association, I described the competition we were facing, the inter-modal nature of the competition and our losses as a result of the increased competition. The Legislature recognized the existing competition, our need to be able to compete and have less regulation while limiting the exposure to consumers through rate caps; and the overall ability of the PUC to monitor the Companies and take action if necessary.” (emphasis in original)

page 25, lines 15-17, “I also agree with their analysis that competition is still growing. Legislators were very thorough in their research and very careful in the questions they asked during hearings.”

Page 26, line 9, “understood the effects of competition on a small company and”

Page 30, lines 8-9, “and the policy embodied in the legislative findings and the legislative Study Committee Report.”

10. The OCA respectfully requests that the Commission grant its requests to strike these improper portions of Reed’s and Ulrich’s rebuttal testimony and for other relief as justice requires.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

November 28, 2007



Meredith A. Hatfield