

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

**Merrimack County Telephone Company and Kearsarge Telephone Company's
Motion to Partially Strike Prefiled Rebuttal Testimony of Ben Johnson Ph.D**

NOW COME Merrimack County Telephone Company ("Merrimack") and Kearsarge Telephone Company ("Kearsarge") (collectively, the "Petitioners"), by and through their attorneys Devine, Millimet and Branch, Professional Association, and move to partially strike the pre-filed rebuttal testimony of Ben Johnson, Ph.D. In support of this motion, the Petitioners state as follows:

1. On March 1, 2007, the Petitioners, along with certain affiliated companies, filed a petition with the Commission seeking approval of their respective plans for an alternative form of regulation (the "AFOR Plans") pursuant to RSA 374:3-b. Pursuant to its order dated April 23, 2008, the Commission approved AFOR Plans (as amended by the terms of a certain joint settlement agreement) for the Petitioners' affiliated companies, but denied the respective amended AFOR Plans submitted by Merrimack and Kearsarge respectively. In the order, the Commission also afforded the Petitioners the opportunity to update their testimony and present additional information to the Commission to support their respective AFOR Plans. *See* Order, at p. 30.

2. The Petitioners updated their testimony and presented the Commission with additional information. In response to the Petitioners' updated evidence, on July 17, 2009, New

Hampshire Legal Assistance, on behalf of Mr. Daniel Bailey¹, an intervenor in the above-captioned matter, filed rebuttal testimony of Ben Johnson, Ph.D. (the “Johnson Rebuttal”). Day one of the evidentiary hearing for Phase II of this Docket began on September 29, 2009.

3. Through the present motion practice, the Petitioners now seek to exclude a portion of the Johnson Rebuttal, specifically the testimony beginning at page 10, line 20 through page 12, line 9. Although Dr. Johnson is a consulting economist, he nevertheless attempts to undertake an expert analysis of wireline communication signal strength modeling. *See* Johnson Rebuttal at ps. 10.20-22 – 12.1-9. Specifically, Dr. Johnson’s rebuttal testimony details at length the benefits of utilizing propagation models and points out that the Petitioners did not provide the Commission with such information. *Id.* at ps. 11.2-27 - 12.1-9; *see also* Johnson Rebuttal, at p. 11.24-25 (Dr. Johnson stating that “[h]owever, no evidence has been provided concerning the results of such propagation models”). Dr. Johnson utilizes this information as the basis for his opinion that:

None of the evidence offered describes a change in conditions since the Commission made its findings. In effect [the Petitioners have] taken ‘another bite of the apple’ in an attempt to more persuasively describe the same factual situation that was presented in the earlier hearing, rather than submitting evidence of fundamental changes in the factual situation... [Johnson Rebuttal, at p. 12.17-20.]²

¹ 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.

² During the first day of the evidentiary hearing in Phase II of this proceeding, based upon a motion filed less than one business day before the start of the hearing, the Commission struck a portion of the Petitioners’ prefiled testimony of Mr. Daniel Goulet, an individual eminently qualified in the field of RF Engineering and who provides propagation models as part of his work for wireless telecommunications carriers. Such stricken testimony directly rebutted Dr. Johnson’s criticisms. The Petitioners noted their exception to this ruling during the proceedings of September 29, 2009. Absent the granting of the present motion, an economist’s unsupported testimony with respect to RF engineering issues is un-rebutted even though the parties agreed upon a procedural schedule (as affirmed by the Commission in a Secretarial Letter dated April 9, 2009) which afforded the Petitioners with the opportunity to “Reply to Rebuttal Testimony”.

4. Dr. Johnson admits that he is “*not an engineer*”, yet goes on to state that it is his “... *understanding* that engineers use ‘propagation models’ during the planning process that is used to develop a wireless system.” *Id.* at ps. 10.20-22 - 11.1 (emphasis added). Since Dr. Johnson is not an engineer nor an expert in propagation modeling, his conclusions are not supported, not reliable and are, therefore, not admissible under this Commission’s rules and other applicable New Hampshire law.

5. While the New Hampshire Rules of Evidence do not apply to Commission proceedings, the Commission must exclude evidence, including expert testimony, that is irrelevant or otherwise immaterial to the issues presented. Puc 203.23(c)-(d). In New Hampshire, the standards for governing the admissibility of expert testimony are encompassed in New Hampshire Rule of Evidence 702 and RSA 516:29-a. The overall purpose of Rule 702 and RSA 516:29-a is to ensure that a fact-finder is presented with *reliable* and *relevant* evidence. If the evidence is not reliable and not relevant, than such evidence should be excluded as irrelevant. *See* Puc. 203.23(d).

6. To that end, under New Hampshire law, “expert testimony must rise to a threshold level of reliability to be admissible.” *Baxter v. Temple*, 157 N.H. 280, 284 (2008) (citing *Baker Valley Lumber v. Ingersoll-Rand*, 148 N.H. 609, 613 (2002)). New Hampshire Rule of Evidence 702 states that a qualified expert may testify if the expert’s “scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue ...” N.H. R. Evid. 702. Indeed, even qualified experts should not be allowed to testify as to matters which fall outside of their particular expertise and experience. *See e.g., Chase v. Mary Hitchcock Memorial Hospital*, 140 N.H. 509 (1995).

7. Further, in 2004, the New Hampshire Legislature adopted RSA 516:29-a, which further restricts the admissibility of expert testimony. Under the statute, the trier of fact must conduct an adequate investigation of the expert's qualifications and also must determine that any proffered testimony is within the scope of such qualifications. *See Milliken v. Dartmouth Hitchcock Clinic*, 154 N.H. 662, 667-69 (2006). In essence, the statute codifies the so-called *Daubert* rule, and provides that a witness shall not be allowed to offer expert testimony unless the trier of fact finds that such testimony is based upon sufficient facts and data, such testimony is the product of reliable principle and methods, and the witness has applied the principles and methods reliably to the facts of this case. *See* RSA 516:29-a, I (a)-(c). To be sure, RSA 516:29-a, I(c) requires that the trier of fact "examine whether a witness has in actuality reliably applied the methodology to the facts of the case before admitting the witness' testimony." *State v. Langill*, 157 N.H. 77, 87 (2008).

8. Adjudicatory bodies, such as this Commission, (among other things) are gatekeepers of evidence and must ensure that evidence is reliable before being admitted in legal proceedings. For many years, admissibility of expert testimony was governed by the standard set forth in *Frye v. United States*, which held that an expert opinion must "have gained general acceptance in a particular field in which it belongs to be admissible." *Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 148 N.H. 609, 614 (2002) (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1993)). In 1995, after the passage of the Federal Rules of Evidence, the United States Supreme Court abandoned the *Frye* standard for the test set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 586-89 (1995).

9. Essentially, under *Daubert*, three factors must be analyzed before permitting an expert witness to testify. The first consideration is whether the expert is qualified by

“knowledge, skill, experience, training, or education.” *Bogosian v. Mercedes-Benz*, 104 F.3d 472, 476 (1st Cir. 1997). Next, it must be determined whether the subject matter about which the expert will testify concerns “scientific, technical or other specialized knowledge.” *Id.* Finally, in its so-called “gatekeeper” function, an analysis must be undertaken as to whether “the testimony is helpful to the trier of fact, *i.e.*, whether it rests on a reliable foundation and is relevant to the facts of the case.” *Bogosian*, 104 F.3d at 476. Importantly, under the *Daubert* test, “the focus [of the reliability analysis] ... must be solely on principles and methodology, not on the conclusions they generate.” *Baker Valley*, 148 N.H. at 615 (quoting *Daubert*, 509 U.S. at 595)). The United States Supreme Court later extended its holding in *Daubert* to include testimony concerning technical or other specialized knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (“We conclude that *Daubert*’s general holding -- setting forth the trial judge’s general ‘gatekeeping’ obligation -- applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge”).

10. In short, as the proponent of Dr. Johnson’s testimony, Mr. Bailey must show that Dr. Johnson: (i) is qualified to render his opinions concerning the quality (or lack thereof) of the C-Squared based evidence and (ii) that Dr. Johnson’s assumptions and conclusions are valid and supported by theories and techniques that can be demonstrated or subject to peer review or other methods of evaluation, or are otherwise generally accepted in appropriate scientific literature. *See* RSA 516:29-a(II). The Petitioners submit that Mr. Bailey can not meet that burden.

11. Dr. Johnson makes 2 significant admissions: (i) that *he is not* an engineer and (ii) that he only *understands* that engineers use propagation models when planning to develop a wireless system. *See* Johnson Rebuttal, at ps. 10.20-22 - 11.1 (emphasis added). As stated in response to Petitioners’ Data Request Bailey 2-5, “Dr. Johnson has not conducted any

propagation modeling, or reviewed the results of any such modeling.” See Johnson Response to Data Request TDS-Bailey 2-5 [[Attachment A](#)]. There is no legal basis to allow an economist to provide testimony in an area for which the witness admittedly has no qualifications and merely “understands” what efforts engineers might undertake when planning a wireless telecommunications network.

12. Moreover, the Johnson rebuttal contains no citations to scientific literature addressing C-Squared’s analysis. Indeed, for the Johnson Rebuttal related to propagation models, the sole cited “article” contains the following notation at the conclusion thereof:

Some of this material was taken from *Antenna Theory: Analysis and Design* (2nd edition), Constantine A. Balanis, John Wiley and Sons, Inc. (1997)

Freely adapted from a portion of Jean-Paul M. G. Linmartz's ***Wireless Communication, The Interactive Multimedia CD-ROM***, Baltzer Science Publishers, P.O.Box 37208, 1030 AE Amsterdam, ISSN 1383 4231, Vol. 1 (1996), No.1

See Radio Propagation Models, at http://people.seas.harvard.edu/~jones/es151/prop_models/propagation.html.

13. The Petitioners question how “freely adapted” material from a 1996 publication mixed with “some ... material” taken from a 1997 publication bears any relevance to specific work undertaken by C-Squared utilizing its state of the art equipment in May 2008 for the present Docket. There is no evidence before the Commission that the “article” was subject to the peer review process or even qualifies to be submitted to such a process. There is no evidence tending to demonstrate that the article qualifies as “appropriate scientific literature”. The Petitioners further question how such material can be reliably assessed at the present time given advances in technology over the past 11-12 years. Even if it is possible to reliably assess the article in the context of Dr. Johnson’s statements, Dr. Johnson’s rebuttal testimony contains no such analysis.

14. The proffered expert testimony is not reliable and should be excluded because Dr. Johnson's opinions lack sufficient foundation to be considered reliable and are not relevant to these proceedings under to New Hampshire law and Puc. 203.23(c)-(d). Therefore, those portions of the Johnson Rebuttal designated below should not be considered in connection with these proceedings and should be stricken.

15. In light of the nature of the relief requested herein, the Petitioners have not sought the assent of the other parties before filing this motion.

WHEREFORE, the Petitioners respectfully request that the Commission:

A. Grant this Motion to Partially Strike the Prefiled Rebuttal Testimony of Ben Johnson, Ph.D; and

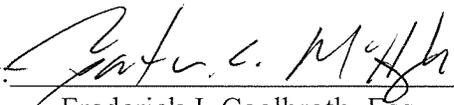
B. Strike the Prefiled Rebuttal Testimony of Dr. Johnson beginning at page 10, line 20, extending through page 12, line 9.

Respectfully submitted,

KEARSARGE TELEPHONE COMPANY AND
MERRIMACK COUNTY TELEPHONE
COMPANY

By their Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: September 30, 2009

By: 
Frederick J. Coolbroth, Esq.
Patrick C. McHugh, Esq.
43 North Main Street
Concord, NH 03301
(603) 226-1000
fcoolbroth@devinemillimet.com
pmchugh@devinemillimet.com

CERTIFICATE OF SERVICE

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

Dated: September 30, 2009

By: 

Frederick J. Coolbroth, Esq.
Patrick C. McHugh, Esq.

Kearsarge Telephone Company
Merrimack County Telephone Company

Docket No. DT 07-027

Kearsarge Telephone Company
Wilton Telephone Company, Inc.,
Hollis Telephone Company, Inc., and
Merrimack County Telephone Company's
Set 2 Data Requests to Daniel Bailey

Request Received: 7/31/09

Date of Response: 8/14/09

Request No. TDS-Bailey 2-5

Witness: Ben Johnson

REQUEST:

TDS-BAILEY 2-5. On pages 11-12 of his testimony, Mr. Johnson states that "it would have been feasible to use a propagation model to evaluate likely differences between signal strength along prime commuter routes and major roads in comparison with smaller roads that are not the focus of the wireless network design, as well as differences in signal strength along these major roads and inside customer homes."

Please state if Mr. Johnson has conducted such propagation modeling in the past, or has reviewed the results of such modeling.

Please also explain briefly how such a model could have been used to measure signal strength in the Kearsarge and Merrimack calling areas. In particular, please explain how TDS would have obtained data on tower placement, effective radiated power, directivity, and signal tuning characteristics of all of the wireless antennas in the Kearsarge and Merrimack calling areas.

REPLY:

2-5. Dr. Johnson has not conducted any propagation modeling, or reviewed the results of any such modeling. This statement was based upon Dr. Johnson's general knowledge and information, gained during more than 25 years in the telecommunications field, the Harvard article cited in his testimony, and discovery responses on this topic provided by C Squared. In particular, C Squared, in response to OCA data request 2.5, stated: [T]here are fairly accurate propagation models that take into account topography, clutter and the factors noted above..." C Squared further explained that standard industry practice is to use both measured drive data and propagation models, and that drive data is typically used to validate the results of the models. Dr. Johnson has no reason to doubt the validity of C Squared's statement, and thus concluded that such a study would have been feasible, and might have been useful in resolving the disputed factual issues in this case.