

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 07-027**

**KEARSARGE TELEPHONE CO., WILTON TELEPHONE CO.,  
HOLLIS TELEPHONE CO. and MERRIMACK COUNTY TELEPHONE CO.**

**Petitions for Approval of Alternative Form of Regulation**

**Order Denying Request for Approval of Alternative Regulation Plan for Merrimack  
County Telephone Company and Allowing Additional Time for Evidence Regarding  
Competitive Wireline Service in Kearsarge Telephone Company Exchanges**

**ORDER NO. 25,103**

**May 14, 2010**

**APPEARANCES:** Devine, Millimet & Branch by Frederick J. Coolbroth, Esq. on behalf of Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co., and Merrimack County Telephone Co.; New Hampshire Legal Assistance by Alan Linder, Esq. on behalf of Daniel Bailey; Rorie Hollenberg, Esq. of the New Hampshire Office of Consumer Advocate on behalf of New Hampshire residential ratepayers; and Robert Hunt, Esq. of the Public Utilities Commission on behalf of Staff.

**I. PROCEDURAL HISTORY**

On March 1, 2007, Kearsarge Telephone Company (Kearsarge), Wilton Telephone Company (Wilton), Hollis Telephone Company (Hollis) and Merrimack County Telephone Company (Merrimack), (collectively, the TDS Companies or TDS), each a wholly-owned subsidiary of Telephone & Data Systems, Inc., filed petitions with the New Hampshire Public Utilities Commission (Commission) seeking approval of an alternate form of regulation (AFOR) pursuant to RSA 374:3-b. The proposals would result in regulation of the TDS Companies' retail operations more comparable to the regulation currently applied to competitive local exchange carriers (CLECs). Each of the TDS Companies sought Commission approval of a plan setting maximum basic local rates that were 1) comparable to those of FairPoint

Communications NNE (FairPoint); and 2) increasing by no more than 10 percent per year for the four years following Commission approval.

On April 23, 2008,<sup>1</sup> the Commission issued Order No. 24,852 (Initial Order) finding that the TDS Companies had demonstrated that competitive alternatives were available to a majority of the customers of Wilton and Hollis, and that the plans for such companies, as modified by a settlement among some of the parties, otherwise satisfied the requirements for an alternative form of regulation pursuant to RSA 374:3-b. The Commission further found that the TDS Companies failed to demonstrate that competitive alternatives were available to the majority of customers in each of the exchanges for Kearsarge and Merrimack. The Commission, therefore, approved the alternative regulation plan and settlement for Wilton and Hollis and rejected it for Kearsarge and Merrimack. The Commission also held the record open for one year to allow for the submission of further evidence concerning alternative service availability in the Kearsarge and Merrimack service territories.

On January 29, 2009, the TDS Companies filed supplemental testimony of Michael C. Reed, together with exhibits, consistent with the Initial Order proffering new evidence as to Kearsarge and Merrimack. On February 10, 2009, New Hampshire Legal Assistance (NHLA), on behalf of Daniel Bailey, filed a motion for a prehearing conference in response to the TDS Companies' supplemental filing. On February 11, 2009, Kearsarge and Merrimack objected to Mr. Bailey's participation with respect to Kearsarge, claiming Mr. Bailey lacks standing in that he is not a customer of Kearsarge. On February 18, 2009, NHLA filed a response to that objection noting that the Commission had already determined that Mr. Bailey has standing with regard to Kearsarge. A fully noticed hearing was held on March 26, 2009, during which the Commission requested briefs by the parties regarding the scope of the remainder of the

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<sup>1</sup> For a complete procedural history see Initial Order at 1-4.

proceeding. Comcast and TDS submitted briefs on the proposed scope on April 9 and April 14, 2009, respectively. On June 15, 2009, the Commission issued a Secretarial Letter setting forth the procedural schedule, which allowed parties to file memoranda concerning the scope of this proceeding. The parties filed testimony in mid-July and rebuttal testimony on September 9, 2009.

On September 21, 2009, Comcast filed a notice of withdrawal from the proceeding, also withdrawing the Pre-Filed Testimony of Beth Choroser and all procedural and substantive filings in this docket. On September 28, 2009, the OCA filed a motion *in limine* to strike portions of the rebuttal testimony of TDS witness Daniel L. Goulet, Director of RF Services for C-Squared Systems, LLC.

The Commission held evidentiary hearings on September 29, 2009, and October 1, 2009. On October 13, 2009, the Commission issued a secretarial letter regarding the admission of NHLA "Bailey Exhibits" 67 through 74, ruling that the exhibits will be allowed for their relevance or illustrative purposes, but would be accorded appropriate weight as substantive evidence. Also following the hearing, testimony and rebuttal testimony were filed by NHLA and TDS. On October 20, 2009, the OCA filed comments regarding responses of TDS to oral information requests propounded at the hearing; more specifically, correcting previous information provided during discovery and presenting new evidence. The OCA urged the Commission to be mindful that the new evidence had not been tested through the appropriate process, and reiterated that the burden of proof lies with the TDS Companies. The OCA stated that the TDS Companies' approach is inconsistent with a fair and reliable adjudicatory process.<sup>2</sup>

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<sup>2</sup> See *Re Manchester Gas Co.*, 71 NH PUC 446 (1986).

On November 2, 2009, the TDS Companies filed a motion requesting an extension of time in which to file briefs, which the Commission granted by secretarial letter. NHLA, TDS, and the OCA filed briefs on November 6, 2009.

## **II. OCA MOTION *IN LIMINE* FILED SEPTEMBER 28, 2009**

### **A. OCA**

On September 28, 2009, the OCA filed a motion in limine to strike portions of the TDS Company's rebuttal testimony of TDS witness Daniel L. Goulet filed on September 9, 2009. Specifically, the OCA objected to new evidence regarding the results of a "propagation analysis" for the Sutton and Salisbury exchanges and the attached Exhibits B-E depicting the results of the analysis. The OCA maintained that the new evidence and argument should not be permitted on rebuttal.

In addition, the OCA argued that in this proceeding three Ph.D. economists have testified about the meaning and application of the word "competitive" and the issue has been briefed at length by all parties. The OCA asserted that Mr. Goulet is not an economist and is not qualified to express opinions regarding the complex economic subject of competitiveness as his experience is in the design, deployment, optimization, maintenance and other services for wireless providers.

Finally, the OCA claimed that Mr. Goulet's personal preference for using wireless communications for toll calls is immaterial and irrelevant to the issues before the Commission and should not be included in the record. The OCA requested that all portions of Mr. Goulet's rebuttal testimony regarding these issues be stricken from the record. OCA Motion *in Limine*, 9/28/09.

## B. TDS Companies

The TDS Companies responded to the two issues raised by the OCA, whether to allow the propagation model and rebuttal testimony of Daniel L. Goulet into evidence and whether Mr. Goulet was qualified to render testimony regarding competition, as follows.

Regarding the propagation modeling, TDS noted it filed Mr. Goulet's testimony on September 9, 2009, and the OCA's motion was not filed until the day before the hearing on September 28, 2009. TDS stated that it focused on the two exchanges with actual benchmark testing in the territories in question, Sutton and Salisbury. TDS claimed that propagation modeling is a form of unmeasured predictive analysis in which Radio Frequency (RF) engineers develop a model to provide predictive analyses for cellular or wireless companies regarding available signal, followed by conducting a benchmark drive test. According to TDS, the NHLA rebuttal testimony of Ben Johnson, Ph.D., criticized the benchmark analysis in the TDS approach specifically because TDS did not use propagation modeling. In response to Dr. Johnson's testimony, TDS provided propagation modeling for the two exchanges in which Mr. Goulet conducted benchmark tests. TDS asserted that if the OCA's motion were granted, TDS would be denied the opportunity to rebut the testimony of NHLA. TDS argued that its propagation model is proper rebuttal in accordance with *Black's Law Dictionary*<sup>3</sup> and, further, should be allowed because, until the day before the hearing, no one questioned or objected to its submission. TDS also noted that Mr. Goulet was available for cross-examination. Hearing Transcript of September 29, 2009 (9/29/09 Tr.) at pp. 12-16.

Regarding Mr. Goulet's qualifications to address competition, TDS stated that competition is a complex economic topic that has been the subject of prior proceedings. TDS

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<sup>3</sup> "Rebuttal evidence" is defined as "evidence given to explain, repel, counteract or disprove facts given in evidence by the adverse party." *Black's Law Dictionary*, Fourth Edition.

asserted that Mr. Goulet was not being offered as an expert beyond the scope of his qualifications, but rather, his testimony encompasses how wireless telecommunications companies develop wireless systems and networks. According to TDS, Mr. Goulet's testimony consisted of his direct knowledge and experience based on his work in various jurisdictions and before multiple zoning and planning boards and courts of law. 9/29/09 Tr. at pp. 17-18.

### **C. NHLA**

NHLA stated that it has no objection to the introduction into evidence of the map produced by the propagation model. Because it is new information on which discovery was not propounded, filed shortly before the hearing, however, NHLA asked the Commission to give the testimony the weight it deserves. NHLA stated it intended to cross-examine Mr. Goulet regarding the map produced by the propagation model and to identify for the Commission significant problems with the document.

With respect to Mr. Goulet's qualifications, NHLA stated that it did not object to Mr. Goulet expressing a lay opinion regarding competitiveness and markets, but that the weight the Commission affords to the testimony should be congruent with Mr. Goulet's expertise. NHLA alleged that Mr. Goulet does not have the level of expertise in economics held by NHLA's witness, Dr. Johnson, who is a Ph.D. economist. Therefore, NHLA would object if TDS proffered Mr. Goulet's testimony in the area of economics as being "expert" testimony. NHLA conceded that Mr. Goulet has expertise in the area of performing benchmark studies and analyses and does not question his ability to conduct and respond to propagation studies. 9/29/09 Tr. at pp. 18-19.

### **D. Staff**

Regarding TDS's rebuttal testimony, Staff stated that it generally agrees with the OCA's motion *in limine* but added that TDS's statement that parties and Staff could have followed up

with discovery was unrealistic given the procedural schedule and would have resulted in a continuation of the hearing.

With regard to the issue of the propagation model and Mr. Goulet's qualifications to render testimony, Staff agrees with the position of NHLA regarding the weight the testimony should be accorded by the Commission. 9/29/09 Tr. at p. 21.

### **III. POSITIONS OF THE PARTIES**

#### **A. TDS Companies**

On March 6, 20008, TDS sought approval for the AFOR Plans for Kearsarge and Merrimack, under RSA 374:3-b, as each has been modified by the Settlement Agreement dated November 30, 2007. TDS requested that the Commission find that (i) the requisite competitive alternatives specified by RSA 374:3-b, III exist in the TDS Companies' respective service territories, and (ii) the TDS Companies 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 Commission found in the Initial Order that a lack of wireless availability existed in the Sutton exchange (served by Merrimack) and Salisbury exchange (served by Kearsarge) based on Staff's analysis of wireless antenna locations and signal distances. With the new evidence submitted on January 29, 2009, the TDS Companies argued that they have met their burden of proof by demonstrating that alternative telecommunications services are available to a majority of retail customers in the Sutton and Salisbury exchanges. Michael Reed of TDS asserted that there was now ample wireless coverage for customers in the Sutton and Salisbury areas.

In addition, the TDS Companies retained the services of C-Squared Systems, LLC (C-Squared), which specializes in providing wireless telecommunications companies with network design services, benchmarking services, Radio Frequency (RF) engineering services and many

other services. Through benchmark testing, TDS asserted, C-Squared demonstrated the availability of wireless telecommunications coverage in the areas of Sutton and Salisbury. The TDS Companies stated that C-Squared measured the strength of the wireless signal available in those exchanges by driving major commuter and secondary roads in the Sutton and Salisbury areas. According to the TDS Companies, C-Squared concluded that the signal strength was in the “good” or “very good” range. In fact, TDS claimed, residents of the Sutton and Salisbury exchanges can make good quality wireless telephone calls from inside their homes. According to TDS, C-Squared verified that the wireless coverage depicted in the CoverageRight map was accurate regarding Salisbury and Sutton, and from that the Commission could assume the CoverageRight map was an accurate representation of wireless availability in the remaining TDS exchanges.

With regard to Kearsarge, the TDS Companies argued that Comcast is an authorized CLEC in the Kearsarge territories. The TDS Companies stated that a majority of retail customers in all of the exchanges within the Kearsarge service territory, except for Salisbury, have access to cable broadband services. As for Merrimack, the TDS Companies argued that retail customers have access to competitive broadband services in all but Bradford, Sutton and Warner and that, based on the CoverageRight map, wireless telecommunications coverage is available to virtually all of the residential customers in the Merrimack service area.

Finally, TDS stated that customers of Kearsarge and Merrimack may obtain Voice over Internet Protocol (VoIP) services to meet their telecommunications needs through their Safety Line service, providing yet another way that a majority of customers in every exchange of the TDS Companies have access to competitive alternatives.

The TDS Companies further submitted that the Commission should not discount U.S. Cellular’s wireless coverage in the Sutton and Salisbury exchanges (or any other exchange)



simply because a majority interest in that company is owned by Telephone and Data Systems, Inc., the parent company of the TDS Companies. They asserted that U.S. Cellular competes with the TDS Companies and is separate and apart from the TDS Companies' business operations. In fact, according to the TDS Companies, U.S. Cellular facilitates competition by providing roaming services and thereby providing wireless carrier choice to the TDS Companies' retail customers. A Kearsarge or Merrimack customer dropping its land line service to use U.S. Cellular is no less a loss than a customer going to another wireless carrier, according to TDS.

The TDS Companies asserted that the alternative telecommunications services they identify are "competitive." TDS pointed out the Commission ruled in its Initial Order that "...a fully functioning competitive market is not necessary in order to approve a plan." Given this finding, the TDS Companies stated that they 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." The TDS Companies submitted that NHLA, through its witness Dr. Johnson, simply sought to re-litigate the definition of "competitive" for purposes of Phase II of this docket. According to the TDS Companies, Dr. Johnson theorized 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 TDS Companies' wireline service. Yet, the TDS Companies argued, the Commission has established that opinions offered concerning the legislature's intent should be accorded "no weight" in its deliberations. Thus, the TDS Companies concluded, Dr. Johnson's opinions with respect to what the legislature envisioned should not be considered persuasive in the present analysis. The TDS Companies noted that RSA 374:3-b does not require a petitioner to demonstrate that wireless or broadband service is a "close substitute" for wireline service and the Commission should disregard Dr. Johnson's interpretations.

The TDS Companies maintained that their networks are being upgraded to provide improved broadband and other services and that they have developed a bundle to market directly to the residents of their exchanges who choose wireless or VoIP phone services. According to the TDS Companies, this evidence supports the finding that competitive alternatives currently are available to a majority of the retail customers in each of the Kearsarge and Merrimack exchanges.

The TDS Companies maintained that their amended AFOR Plans satisfy the remaining conditions of RSA 374:3-b, III. In addition to a finding of adequate competition, TDS argued that the proposed 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 to affordable basic telephone service; and 5) provide that, if Merrimack or Kearsarge fails to meet any of the conditions of RSA 374:3-b, III, the Commission may require TDS to modify the plan or return to rate of return regulation. The TDS Companies contended that their plans, as augmented by the Settlement Agreement, satisfy all of the conditions of RSA 374:3-b.

## **B. NHLA**

NHLA argued that the additional “evidence” that TDS provided in Phase II consists of incomplete and inconsistent data concerning the availability of wireless signals on the roads of only two of TDS’ fourteen exchanges (Sutton and Salisbury). Moreover, NHLA claimed that TDS provided this information without adequately showing that the signals received on the roads are sufficient for customers’ use inside their homes. NHLA stated that TDS did not make an effort to match signals on the road to actual customers and that, while consideration of actual customer locations may not be a factor in “building out” a wireless network, RSA 374:3-b, III(a) requires such analysis in order for petitions for alternative regulation to be approved. RSA

374:3-b, III(a) requires a finding that a technology “. . . is available to a majority of the retail customers in each of the exchanges . . . .” NHLA concluded that the TDS Companies must match wireless coverage in Sutton and Salisbury with actual retail customers, which it failed to do.

In addition, NHLA indicated that the TDS Companies erroneously assumed that all of its customers live in wooden homes. NHLA alleged that wireless signal strength is generally lower inside of a building than outside and that signal strength is reduced when the signal has to penetrate a solid object, such as wood, metal, or concrete. NHLA argued that in C-Squared’s study it was assumed that every retail customer in the Sutton and Salisbury exchanges lives in a “rural” area, and in a home made of “wood.” However, NHLA maintained, building penetration loss is much greater for a house with a brick exterior than one with wood, and even greater for one with aluminum siding. Because it made no connection from signals on roads to signals of actual customers in their homes, NHLA argued, TDS has not met its burden of demonstrating that wireless service is available to a majority of retail customers in the Sutton or Salisbury exchanges.

NHLA argued that TDS has also not met its burden of proof that every exchange in Kearsarge and Merrimack is competitive. NHLA asserted that although TDS made generalized assertions of competition, such as loss of access lines, it did not identify what alternative technologies, if any, may have caused this impact, nor did it undertake any study or economic evaluation of any of its fourteen exchanges. Furthermore, NHLA claimed, TDS did not show how the Kearsarge and Merrimack plans preserve universal access to affordable basic telephone service. NHLA contended that even if TDS had met its burden on the availability of an alternative technology, it must also demonstrate that the technology is competitive, as required by RSA 374:3-b, III(a). NHLA asserted that TDS failed to show that wireless service standing

alone is sufficient to constitute a competitive alternative in Sutton or Salisbury and does not satisfy the statutory requirement. Based on this record, NHLA argued that TDS did not meet its burden to show that third-party alternatives are available to a majority of customers in each exchange, and that those technologies, if available, are in fact “competitive” today.

NHLA argued that the TDS Companies’ information regarding access line loss, loss of access minutes and loss of access revenue does not meet its burden of showing that the exchanges in Kearsarge or Merrimack are competitive, as required under RSA 374:3-b, III(a). NHLA maintained that TDS identified no specific technology as the cause of its loss of access minutes or access lines. According to NHLA, TDS did not provide a study linking the loss of access minutes to any one particular technology, nor has it produced any evidence linking the loss of access lines to a third-party provider. NHLA asserted that TDS did not provide enough information to meet the mandate of RSA 374:3-b, III(a), which requires an identification of the specific technology that is competitive with basic local exchange service.

In addition, NHLA argued that TDS’ interconnection agreement with Comcast does not meet its burden of showing that the exchanges in Kearsarge or Merrimack are competitive. NHLA asserted that no evidence was provided on whether, or in which exchanges, Comcast will provide voice service (bundled or not). NHLA stated that TDS offered no evidence that Comcast is actually providing voice service in any of its exchanges. NHLA claimed that no evidence was provided concerning whether Comcast has actually used or requested to use TDS’ facilities, or whether TDS received a notice to interconnect from Comcast. NHLA also asserted that no evidence was provided that any of the voice services Comcast may offer are comparably priced to TDS’ basic phone service. NHLA argued that the mere possibility of a competitive technology, or the threat of a competitive technology, is not enough to satisfy the plain language

of RSA 374:3-b, III(a) and urged the Commission to reject any suggestion that the interconnection agreement – on its face – meets the statutory test of RSA 374:3-b, III(a).

NHLA argued that TDS did not meet its burden to demonstrate that its customers are substituting wireless service for basic local exchange service. NHLA maintained that wireless service is not a substitute for wireline service and that the three economists who testified in the first proceeding observed, among other things, that some evaluation of the extent to which wireless service is a substitute for wireline service in TDS territories is needed.

NHLA argued that TDS failed to meet its burden to show that available alternatives are offered at a price comparable to its basic local exchange service. It asserted that the price of available voice alternatives to basic service must be considered in order to determine whether the market is sufficiently competitive, as that word is used in RSA 374:3-b, III(a), yet TDS failed to consider price. NHLA stated that TDS's expert offered a lay opinion that wireless service is competitive with TDS' basic phone service solely because of the "functionality that it offers," but ascribed no importance to pricing considerations. Moreover, NHLA maintained, TDS did not research roaming or the myriad of plans available by carriers, nor did it conduct any analysis of the effect of roaming on the price of wireless plans in Sutton and Salisbury. NHLA claimed that TDS must show that its markets are presently competitive, which it has not done, and that TDS did not meet its burden of proof in explaining why or how the pricing plans of alternative providers of voice services are competitive with TDS' basic service.

NHLA argued that TDS also has not met its burden of showing universal access to affordable basic telephone service. NHLA stated that one of the risks in departing from rate-of-return regulation is unaffordable rates, and the price cap of the largest ILEC does not automatically ensure affordability. According to NHLA, if prices are deregulated, the monthly price of basic phone service may go up by as much as 28% in Merrimack, and some areas of

Kearsarge may experience up to a 60% increase. NHLA contended that these increases would have a particularly severe impact on low-income consumers with no demonstration of a cost-effective substitute being available.

### C. OCA

The OCA turned to the Commission's Initial Order requiring proof that: 1) alternatives are *currently* available to a majority of the retail customers within each exchange served by Merrimack and Kearsarge, and 2) these current alternatives are *competitive* in order to satisfy RSA 374:3-b, III(a). According to the OCA, the supplemental evidence filed by TDS since that time still falls short of these threshold requirements. The OCA further urged that the evidence, even when taken together with the evidence in the record from the first phase of this docket, is not sufficient to prove that alternatives are *currently* available to retail customers in each of Merrimack's and Kearsarge's exchanges, and that the alternatives that do exist in some of these exchanges are *competitive*. In the OCA's opinion, the Commission should deny the Merrimack and Kearsarge petitions for alternative regulation.

The OCA maintained that the evidence in the record fails to support TDS's claim that there are competitive wireless, cable broadband, cable television and/or DSL services available to more than 50% of the customers in the Merrimack exchanges. According to the OCA, C-Squared's analysis is not sufficient to sustain the Companies' burden of proof that a wireless alternative is available in Sutton. C-Squared presented no evidence as to what percentage of its signal strength data was in an acceptable signal strength range, and there was competent evidence in the record that the signal strength is *not* sufficient to provide adequate and consistent wireless service. Further, OCA found no evidence in the record as to how the signal strength levels used in C-Squared's testing relate to the RF link budgets used by the carriers tested. The OCA maintained that TDS provided an insufficient basis to conclude that wireless service is

available to more than 50% of customers in the exchanges tested by C-Squared. Consequently, the OCA argued, Merrimack has not sustained its burden of proving that wireless telecommunications service is available to a majority of customers in the Sutton exchange and, consequently, it also failed to sustain its burden that an alternative exists in at least two other Merrimack exchanges, Bradford and Warner.

The OCA asserted that because Merrimack's evidence of wireless availability is not reliable or sufficient, the Commission must consider the availability of other alternatives to Merrimack's basic local service within its exchanges. TDS suggested that other possible alternatives for Merrimack customers include DSL and cable. According to the OCA, the only DSL available within some of the Merrimack exchanges is provided by Merrimack. Therefore, the OCA reasoned, DSL is not a third party alternative, as the Commission has required. In addition, the OCA claimed that Merrimack is the only provider of cable television in the Bradford and Warner exchanges, and neither Bradford nor Warner has cable broadband available to it or are covered by Comcast's CLEC certification. Therefore, cable is not an alternative to Merrimack's basic service under RSA 374:3-b, III(a) in each exchange.

The OCA alleged that TDS argued that its updated intrastate access minutes of use and access line losses prove availability of alternatives within the Merrimack exchanges. However, the OCA maintained, the argument must fail because TDS provided no evidence to tie these losses to alternatives to its basic local telephone services. In addition, the OCA asserted that the minutes of use and line loss data is relevant only to the issue of whether an alternative to TDS' basic local service is *competitive*, not to the issue of whether that alternative is *available*. Consequently, this evidence, according to the OCA, should not be considered unless and until the Commission makes a determination that alternatives are currently available in the Bradford and Warner exchanges. The OCA suggested that because there is insufficient evidence of

alternatives in these areas, the Commission need go no further in its analysis for Merrimack, as RSA 374:3-b, III(a) requires alternatives in each and every Merrimack exchange.

The OCA stated that earlier in this proceeding, the Commission defined “competitive” as used in RSA 374:3-b, III(a) as more than “mere availability of alternatives” but less than “a fully functioning competitive market.” The OCA opined that, in order to qualify as “competitive” the alternative service must, at a minimum, have all of the essential attributes of basic service as outlined in the Commission’s rules, *see* N.H. Admin. Rules Puc 412.01(b) and 432.01(a). In addition, from the OCA’s perspective, to be deemed “competitive,” the alternative service must actually affect TDS’s market power.

The OCA argued that there is insufficient evidence in the record to support TDS’s contention that wireless services available in the Bradford and Warner exchanges are “competitive” within the meaning of RSA 374:3-b, III (a). The record includes testimony of three Ph.D. economists, all of whom have challenged, to some extent, TDS’s claims that wireless service is competitive with basic wireline service. The OCA maintained that wireline telephone services are functionally, and otherwise (including pricing), different than wireless telephone service. The OCA argued that the only remaining evidence offered by TDS on the issue of competitiveness is the data related to access lines, access minutes of use and access revenue. Without more, however, this evidence is not enough to sustain TDS’s burden of proof on the issue of competitiveness.

The OCA asserted with regard to Merrimack that it failed to sustain its burden of proving that an alternative to its basic local service is currently *available* to a majority of the retail customers within the Bradford and Warner exchanges. Furthermore, TDS did not demonstrate that any alternatives available to retail customers within the Bradford and Warner exchanges are



*competitive*, according to the OCA. Therefore, the OCA urged that the Commission deny TDS's petition for alternative regulation in Merrimack.

With regard to Kearsarge, the OCA stated that it disagrees with the company's contention that there are competitive wireless, cable broadband, cable television and/or DSL services available to more than 50% of the customers in the Kearsarge exchanges. In the Salisbury exchange, the OCA alleged that the signal strength cut-off used by C-Squared is insufficient to support a conclusion that wireless service is available to a majority of customers in the Salisbury exchange. The OCA suggested that TDS also failed to sustain its burden of proof that wireless service is available in the Andover exchange. Because the only DSL service available in Andover is provided by Kearsarge, the only potential alternative to Kearsarge's basic service in Andover, for purposes of the Commission's review, is VoIP.

The OCA argued that in determining whether TDS has met its burden for Kearsarge, the Commission must first consider the evidence related to the *availability* of Comcast IP services to customers in Andover. Although Comcast Phone is certified to provide services to Comcast IP within Andover, the OCA stated that TDS has offered no evidence that Comcast Phone is *currently* providing such services to Comcast IP or that Comcast IP is *currently* providing such services to any customers in Andover. The OCA maintained that TDS does not fulfill its affirmative burden of proof under RSA 374:3-b, III(a) by showing only that Comcast Phone is authorized by the Commission to serve Comcast IP in Kearsarge's Andover exchange, or by alleging that there are no "impediments" to Comcast doing so. In addition, the OCA asserted, the availability requirement in RSA 374:3-b, III(a) is not sustained by proof of Comcast Phone's interconnection agreement with TDS. As a result, the OCA suggested, the Commission need not consider whether wireless alternatives in Salisbury are competitive with TDS's basic local

service, and the Commission should deny Kearsarge's petition for alternative regulation pursuant to RSA 374:3-b.

The OCA argued that even if Kearsarge had demonstrated that Comcast IP service is currently *available* to a majority of retail customers within the Andover exchange, Kearsarge must still sustain its burden that the services provided to retail customers by Comcast IP are *competitive*, which they did not. The OCA maintained that there is insufficient evidence in the record to support the contention by TDS that VoIP services of Comcast IP are "competitive" within the meaning of RSA 374:3-b, III(a). According to the OCA, the TDS Companies offered no evidence of the functionalities or features associated with Comcast IP's VoIP services or the associated prices in Kearsarge's exchanges, and TDS provided no data about the number of access lines potentially lost to VoIP providers in its service territories. The OCA asserted that TDS failed to sustain its burden of proving that Comcast IP's VoIP services are competitive with its basic local service; therefore, the Commission should deny TDS's petition for alternative regulation for Kearsarge.

#### **IV. COMMISSION ANALYSIS**

##### **A. OCA Motion *in Limine* Filed September 28, 2009**

At hearing, the Commission ruled regarding the OCA's motion *in limine* that the testimony of Daniel L. Goulet filed on September 9, 2009 (KTC-MCT Exh. 8P and 8C) as it concerns the propagation analysis was filed late in the proceeding, would have been more properly filed as supplemental direct testimony and goes beyond what would normally be considered "rebuttal" testimony. The Commission struck all portions of his testimony regarding propagation analysis, including: page 8, line 20 through page 9, line 12, page 9 lines 18 through 20 that refer to "Exhibits B through E," and the actual exhibits B through E. 9/29/09 Tr. at p. 27.

**B. Administrative Notice**

Acting on a request by TDS at hearing, the Commission took administrative notice, pursuant to N.H. Code Admin. Rules Puc 203.27, of: 1) the Commission's Order No. 25,005 approving the interconnection agreement in Docket No. DT 08-162 (August 13, 2009), the Comcast Phone of New Hampshire/TDS arbitration docket; and 2) the TDS Companies' tariff filings regarding Safety Line service issued September 26, 2008, and effective October 26, 2008. At hearing the Commission also granted the OCA request to take administrative notice of Order No. 24,938 (February 6, 2006) in DT 08-013, approving the Comcast CLEC-10 certification. 9/29/09 Tr. at pp. 37-39.

**C. Applicable Law**

RSA 374:3-b governs this docket as it applies to the alterative regulation of small incumbent local exchange carriers in New Hampshire. We continue to construe this statute within the framework established in the Initial Order.<sup>4</sup> The TDS Companies bear the burden of proof in this matter and must therefore establish factual propositions by a preponderance of the evidence in order to prevail. NH Code Admin. R. Puc 203.25.

**D. Availability and Competitiveness**

In the Initial Order, the Commission kept this docket open for one year and permitted TDS to update its testimony regarding Kearsarge and Merrimack on the availability and level of competition in the exchanges served by those companies. The Commission also allowed for rebuttal testimony to be presented in the event that the TDS Companies filed supplemental testimony, and indicated that it would expedite a hearing on issues of availability and

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<sup>4</sup> For a more complete discussion of the statutory framework, see Initial Order at 24-26.

competitiveness under such circumstances. The TDS Companies filed supplemental testimony within the prescribed time frame.

To approve a plan for alternative regulation, we must find that “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.” RSA 374:3-b, III(a) (emphasis added) After hearing and briefing in this docket, we find that third-party competitive alternatives are present or appear to be developing in some of the exchanges of both Merrimack and Kearsarge. However, the statutory requirement that the majority of customers in each Merrimack exchange have access to a competitive alternative has not been met. The circumstances in Kearsarge are less clear and, thus, we will provide an opportunity for further evidence on the availability of competitive alternatives in the Kearsarge exchanges.

We were presented with some evidence of erosion of earnings and loss of access lines experienced by the TDS Companies, with the suggestion that such indices demonstrate competitive alternatives are present. We disagree. Losses such as presented by the TDS companies indicate changes in use by customers, but such changes can be the result of many factors beyond the existence of competitive alternatives – a drop in fax lines due to the availability of e-mail, a reduction in second lines in a faltering economy and use of cell phones for some calls while driving or at home. Even if the changes suggested by the TDS companies were all the result of competition, it would not satisfy the statutory requirement that competitive alternatives be available to a majority of customers *in each exchange* as TDS’s information regarding access lines and earnings was presented in the aggregate and could not be traced to particular exchanges. Our detailed analysis for each company is below.

## **E. Competitive Analysis for Merrimack**

Merrimack serves multiple exchanges: Antrim, Bradford, Contoocook, Henniker, Hillsborough, Melvin Village, Sutton and Warner. Upon consideration of the facts presented relative to these exchanges, we find that TDS failed to demonstrate that competitive alternatives are currently available to a majority of customers in each exchange.

### **1. Wireline Service in Merrimack**

The TDS Companies presented no evidence that a CLEC is offering wireline service in any of the exchanges served by Merrimack. When questioned at the hearing on the availability of wireline service offerings in the exchanges served by Merrimack and Kearsarge, the TDS Companies' witness, Michael Reed, stated that he did not know whether any CLEC was offering wireline service in any of these exchanges. (10/1/09 Tr. at p. 67, line 12- p. 68, line 3) Mr. Reed testified that Comcast was a registered CLEC in the Merrimack exchanges in Antrim, Contoocook, Henniker, Hillsborough and Melvin Village, and that TDS has entered into an interconnection agreement with Comcast for areas including the Merrimack service territory. Mr. Reed could not state, however, that Comcast was actually providing in these exchanges a voice service that was competitive with TDS voice service.

We recognize that these are evolving markets and that certification of a CLEC is intended in most cases to lead to offerings of service. The presence of Comcast as a CLEC in the exchanges of Antrim, Contoocook, Henniker, Hillsborough and Melvin Village will be sufficient to demonstrate that a competitive alternative is available, on condition that within 30 days TDS submits evidence, such as through an affidavit with supporting documentation such as advertisements, establishing that a voice service<sup>5</sup> is *currently being offered in those exchanges*.

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<sup>5</sup> We make no finding here as to whether the voice service offered by Comcast throughout the state is "utility service."

Absent such evidence, we cannot conclude competitive wireline service is currently available in the Merrimack exchanges. Such evidence, however, will not change the determination that the Bradford, Sutton and Warner exchanges have no competitive wireline alternative because Comcast is not certified in those exchanges. The parties and Staff may request a hearing to evaluate the evidence of competitive wireline service that the TDS Companies may submit.

## **2. Wireless Service in Merrimack**

The TDS Companies presented updated evidence on the availability of wireless service in Sutton, but did not provide evidence on all of the exchanges served by Merrimack. C-Squared's Multi-Carrier Benchmarking Report filed with Mr. Reed's testimony on January 29, 2009 shows various indicators of signal strength and quality of wireless carrier signals along most of the publicly maintained roads in the Sutton exchange by means of a drive test of the same kind used to validate coverage by wireless carriers (KTC-MCT Exh. 6C, Attachment E).<sup>6</sup> A summary of wireless signal strength along the roads driven was then mapped against customer locations, most of which are in close proximity to the roads driven (KTC-MCT Exh. 6C, Attachment A, labeled by TDS as Exhibit A). While this issue was the subject of rebuttal testimony and extensive cross-examination, including questions about how wireless signals reach inside buildings, we conclude that the preponderance of the evidence supports a conclusion and finding that a majority of TDS's customers in the Sutton exchange have access to wireless telephone service at their premises that is at least adequate in strength and quality to provide a competitive alternative to TDS wireline service. In particular, we found the testimony of Mr. Goulet to be credible with regard to his assertion that the indicators of signal strength and quality that he measured along most of the roads in Sutton (and Salisbury), which correspond to the locations of

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<sup>6</sup> For clarification, Exhibit E, which was struck by the Commission at hearing, was included with subsequent testimony of Mr. Goulet filed on September 9, 2009 (as an attachment to KTC-MCT Exh. 8C).

a majority of TDS customers in those exchanges, were sufficient to provide wireless telephone service at and in most of those homes that could substitute for TDS wireline telephone service. (See e.g. KTC-MCT Exh. 6C, Attachment A; Exh. 8C, p.4, lines 6-12 and 17-20; p. 5, l. 5-9; p. 8, l. 17-20; 9/29/09 Tr. at 118, line 19 through line 8 at 119; *id* at 162, line 9 through line 17 at 163; 10/1/09 Tr. at 142 line 22 through line 4 at 145.)

With regard to other exchanges served by Merrimack, in his pre-filed testimony dated January 29, 2009, Mr. Reed posited that the evidence produced regarding wireless coverage in Sutton could be used to verify the accuracy of the CoverageRight maps previously provided as evidence of wireless coverage in each of the exchanges.<sup>7</sup> Nevertheless, the generalized CoverageRight map showing the marketing coverage areas of wireless providers gives no indication of signal strength and appears to indicate that all of the Sutton exchange is served by at least two wireless carriers. Notwithstanding the CoverageRight map, there are sections of roads along which TDS customers are located and that were driven by C-Squared in its survey (such as Roby Road and Old Newbury Road) where no wireless carrier was identified as having a nominal signal strength better than -90dBm, which is below the -85dBm threshold used by C-Squared to indicate good competitive coverage. If one were to extrapolate from the Sutton evidence, it may be that some of the area indicated as served by wireless carriers in the CoverageRight map does not have adequate signal strength to provide competitive wireless alternatives. Furthermore, TDS has not provided any evidence as to where its customers are located relative to the density of cellular coverage suggested by the CoverageRight map. Because there was no supporting data on wireless service directed to each of these other exchanges, we are left with only the wireless data that was presented in the first phase of this docket, which we find to be insufficient. Accordingly, the TDS Companies have failed to

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<sup>7</sup> See MCT Exh. 6P at p. 12 line 21 – p.13 line 5.

present evidence sufficient to show the necessary availability of wireless service in any Merrimack exchange other than Sutton.

### 3. Broadband Service in Merrimack

The TDS Companies presented evidence that cable broadband service is available in the Antrim, Contoocook, Henniker, Hillsborough and Melvin Village exchanges, but not in the Bradford, Sutton and Warner exchanges. Supplemental Testimony of Michael Reed, MCT Exh. 6P at p. 16, lines 17-21. It did not provide sufficient evidence to conclude, however, that cable broadband service, by itself, is a competitive alternative to TDS local exchange service. While the presence of a broadband provider is significant, the inquiry must go further – does the broadband service provide a competitive alternative to TDS local exchange service, *i.e.* can the customer choose a provider other than TDS for phone service? For example, one would look to evidence regarding available voice service with the capability to provide access to E911 service and number portability when assessing whether an alternative service is truly competitive. There was no such evidence produced in this hearing.

### 4. Conclusion Regarding Competitive Alternatives in Merrimack

The evidence for the Merrimack exchanges can be summarized as follows:

Exchange	Competitive Wireline	Competitive Wireless	Competitive Broadband	Meets Test
Antrim	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
Bradford	No	No	No, only TDS broadband available	No
Contoocook	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
Henniker	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive	Unclear



			alternative	
Hillsboro	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
Melvin Village	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
Sutton	No	Yes	No, only TDS broadband available	Yes
Warner	No	No	No, only TDS broadband available	No

For TDS to prevail, it must provide evidence sufficient for a “Yes” designation in at least one column for each exchange. If TDS were to demonstrate that CLEC offerings are currently being made in Antrim, Contoocook, Henniker, Hillsborough and Melvin Village, the exchanges of Bradford and Warner would still be in the “No” column and thus we cannot find that the terms of the statute have been met in Merrimack.

#### **F. Competitive Analysis for Kearsarge**

Kearsarge serves multiple exchanges: Andover, Boscawen, Chichester, Meriden, New London and Salisbury. Upon consideration of the facts presented at hearing relative to these exchanges, we find that TDS did not clearly demonstrate that the majority of customers in each of its exchanges have a competitive alternative present. As discussed below, however, additional evidence could clarify the circumstances relating to competitive alternatives.

##### **1. Wireline Service in Kearsarge**

Our analysis regarding the availability of wireline service in the Kearsarge exchanges parallels that done for the Merrimack exchanges above. The TDS Companies assert that a competitive alternative exists for the majority of customers in Andover, Boscawen, Chichester, Meriden, and New London by virtue of the CLEC certification held by Comcast. TDS did not,

however, introduce evidence that Comcast was actually providing a competitive voice offering in any of those exchanges.

As stated above, we recognize that these are evolving markets and that certification as a CLEC is intended in most cases to lead to offerings of service. Evidence establishing that Comcast is offering service as a CLEC in the exchanges of Andover, Boscawen, Chichester, Meriden and New London, will be sufficient to demonstrate that a competitive alternative is available. If, within 30 days of the date of this order, TDS files an affidavit establishing that a voice service is *currently being offered in those exchanges*, accompanied by print or other record of such advertisements being made public, it will meet its evidentiary burden. Absent such evidence, we conclude there is no competitive wireline service currently available in these Kearsarge exchanges. Such evidence, however, will not change the determination that the Salisbury exchange has no competitive wireline alternative because Comcast is not certified in that exchange. The parties and Staff may request a hearing to evaluate the evidence of competitive wireline service that the TDS Companies may submit.

## **2. Wireless Service in Kearsarge**

Salisbury was not among the areas for which Comcast was certified. Nonetheless, the TDS Companies presented evidence relevant to the availability of wireless service in the Salisbury exchange. Upon review, we find that there is sufficient evidence to establish that competitive wireless service is available to a majority of customers in that exchange. The TDS Companies did not present updated evidence on the availability of wireless service in the other exchanges served by Kearsarge and, for the reasons expressed in our analysis of wireless availability in Merrimack, we find TDS has failed to present evidence sufficient to show the necessary availability of wireless service in any Kearsarge exchange other than Salisbury.

### 3. Broadband Service in Kearsarge

TDS presented evidence that cable broadband service is available in Andover, Boscawen, Chichester, Meriden and New London but not in Salisbury. The record however does not support a finding that cable broadband service, by itself, is a competitive alternative to TDS local exchange service. As in Merrimack, while the presence of a broadband provider is significant, the inquiry must go further, to assess whether the service offering is a competitive alternative for local exchange service. TDS has not submitted evidence to draw such a conclusion.

### 4. Conclusion Regarding Competitive Alternatives in Kearsarge

The evidence for the Kearsarge exchanges can be summarized as follows:

<b>Exchange</b>	<b>Competitive Wireline</b>	<b>Competitive Wireless</b>	<b>Competitive Broadband</b>	<b>Meets Test</b>
Andover	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
Boscawen	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
Chichester	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
Meriden	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
New London	Unclear if service is being offered	No	Cable broadband available though not proven to be competitive alternative	Unclear
Salisbury	No	Yes	No	Yes

For TDS to prevail, it must provide evidence sufficient for a “Yes” designation in at least one column for each exchange. The presence of Comcast as a CLEC in the exchanges of

Andover, Boscawen, Chichester, Meriden and New London will be sufficient to demonstrate that a competitive alternative is available, on condition that within 30 days TDS submits evidence, through an affidavit with supporting documentation such as advertisements, establishing that a voice service is currently being offered in those exchanges. Because TDS has demonstrated that Salisbury has competitive wireless service available, Kearsarge would have a “Yes” in at least one column for each exchange and would meet the terms of the statute.

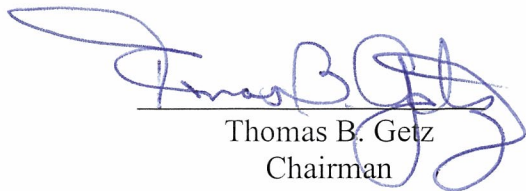
We will hold the record open for 30 days to allow the TDS Companies to submit evidence as discussed herein establishing the presence of competitive wireline service as delineated herein. If any party to this proceeding requests a hearing within 15 days of the filing of such evidence, we will schedule an evidentiary hearing and afford the parties an opportunity for discovery through a technical session and responsive testimony or evidence regarding the availability of CLEC offerings in the exchanges in question. If we find that the record supports a finding that Comcast is providing competitive voice offerings in all of the exchanges in question we will grant the petition for an alternative form of regulation for Kearsarge. Absent such evidence and finding, we will deny the petition. Finally, we note that we do not construe this order as a final order that would trigger rehearing pursuant to RSA 541:3.


**Based upon the foregoing, it is hereby**

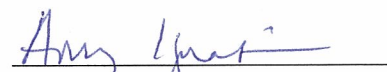
**ORDERED**, that the request for approval of an alternative regulation plan for Merrimack is denied; and it is

**FURTHER ORDERED**, that the record is held open for 30 days during which the TDS Companies may submit evidence regarding competitive wireline availability as delineated herein.

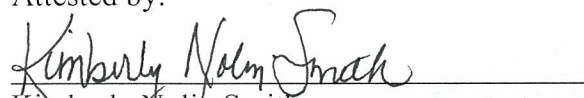
By order of the Public Utilities Commission of New Hampshire this fourteenth day of  
May, 2010.

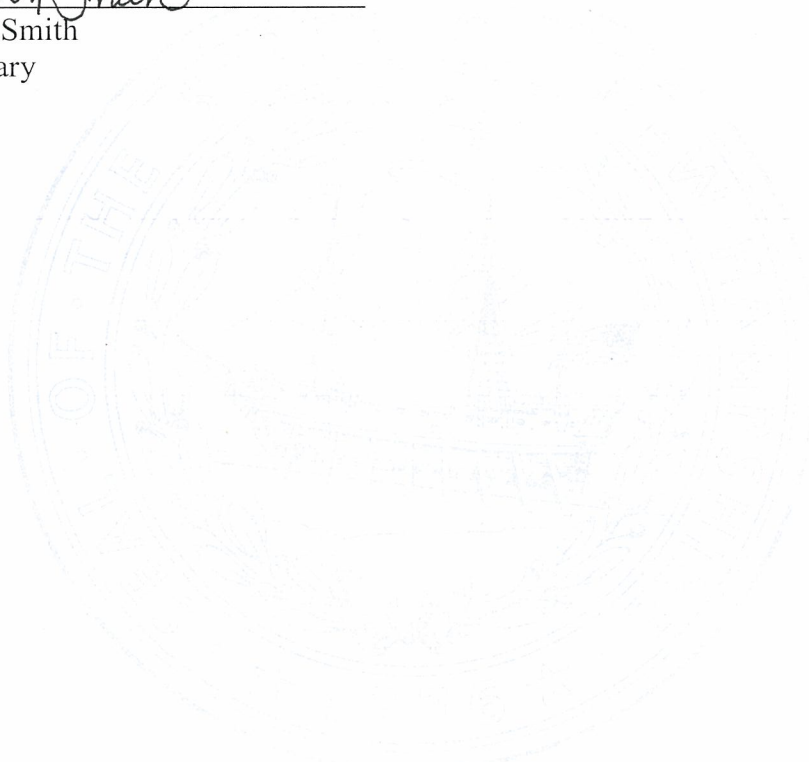
  
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Docket #: 07-027 Printed: May 17, 2010

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