

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
Petition for an Alternate Form of Regulation

**Kearsarge Telephone Company and Merrimack County Telephone Company
Opposition to Motion for Leave to File Proposed Findings and Rulings**

NOW COME Kearsarge Telephone Company (“KTC”) and Merrimack County Telephone Company (“MCT”) (collectively, the “Petitioners”), by and through their attorneys Devine, Millimet and Branch, Professional Association, and oppose the Motion for Leave to File Proposed Findings and Rulings of Daniel Bailey (“Bailey Motion”). In his Motion, Mr. Bailey requests that the Commission grant leave to file proposed findings of fact and conclusions of law, pursuant to the Administrative Procedure Act, RSA 541-A (“APA”) and the Model Rules of Administrative Procedure, NH Code Admin R. Jus Part 800 (“Model Rules”), on the grounds that the issues in this phase of the proceeding are “complex” and that such grant will promote administrative efficiency. For the reasons stated below, the Petitioners oppose the Bailey Motion.

I. The Commission Does not Need nor is it Required to Adopt Jus Rule 812.05.

Mr. Bailey requests leave to file findings of fact and conclusions of law pursuant to Jus Rule 812.05, and asserts that his request is in accordance with RSA 541-A:30-a, which provides, in part, that “an agency shall apply the model rules as necessary in a particular adjudicative proceeding to the extent that the agency's rules or governing statutes do not address the procedures in the model rules” In this case, Mr. Bailey appears to equate the term

“procedure” with “schedule item” and has concluded that because the Commission’s rules do not provide for submission of findings of fact and conclusions of law, then the Model rules support, if not compel, such submissions by the parties. However, such an interpretation of this term is at odds with its usage in the Model Rules.

While neither the APA nor the Model Rules define “procedure,” it appears from the context of the APA and the Model Rules that, as pertinent to the Bailey Motion, the term is a broad one, essentially synonymous with a hearing or proceeding overall. *See* RSA 541-A:1, I, which refers to “the procedure to be followed in contested cases,” and equates this to the full panoply of activities involved in an adjudicative proceeding under Section 31 through 36 of the APA.¹ Thus, when the APA refers to the absence of particular procedure, it is not referring to a schedule item, *e.g.* pre-hearing conference, technical session or brief, but instead to a high-level function of administrative procedure, *e.g.* review of an application or petition, or an adjudicatory proceeding overall.

The Commission already has a comprehensive procedure for adjudicatory proceedings that provides ample opportunity for parties to present evidence and argue their cases. *See* Puc Rules Part 203. In such a situation, the Model Rules recognize that there is no need or requirement for additional procedural steps. “An agency rule that addresses a specific procedure shall control that procedure, and the model rule shall not apply *even if the agency rule conflicts with, is narrower than, or is broader than these model rules.*”²

Moreover, in 1992, the Commission stated that “[t]he Commission is bound by the terms of RSA 363:17-b which establishes more specific standards by which our orders will be judged

¹ “‘Adjudicative proceeding’ means the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.” RSA 541-A:1, I.

² Jus Rule 801.02(b) (emphasis supplied).

for completeness and sufficiency, *thereby superseding RSA 541-A.*”³ As Mr. Bailey admits, the Commission has said nothing in the intervening years to contradict this holding.

II. The Current Issue is not Amenable to Jus Rule 812.05.

As grounds for his request, Mr. Bailey claims that this docket “involves complex issues of fact and law,” but this is not the case at all. At this phase of the proceeding, there is only one fact in dispute and there are no further legal conclusions to be made. In its Second AFOR Order, the Commission held that, in regard to KTC:

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.”⁴

Similarly, in regard to MCT, the Commission reiterated that:

[t]he 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 *is currently being offered in those exchanges.*”⁵

Given that the Commission has already decided that Comcast’s voice service is a competitive alternative within the meaning of the applicable statute,⁶ the single remaining issue is whether

³ Pub. Serv. Co. of New Hampshire, DR 91-001, Order No. 20,594 at 2 (1992) (“PSNH”) (emphasis supplied).

⁴ DT 07-027, Order No. 25,103 at 26-28 (May 14, 2010) (“Second AFOR Order”) (emphasis original).

⁵ *Id.* at 21 (emphasis original).

⁶ *Id.* at 26-28.

Comcast is offering a voice service in the KTC and MCT exchanges. This is a straightforward inquiry that does not require additional procedural steps beyond those that are already in place.

III. Adoption of Jus Rule 812.05 in this Proceeding is Contrary to Principles of Administrative Efficiency.

Mr. Bailey claims that grant of the Bailey Motion “will promote administrative efficiency,” but this is nonsense. Clearly, grant of the Bailey Motion will only delay this proceeding and add to the Commission’s burden without contributing one iota to this inquiry.

Jus Rule 812.05(c) provides that “[i]n any case where proposed findings of fact and conclusions of law are submitted, the decision shall include rulings on the proposals.” The potential burden on the Commission of ruling on each proposal cannot be underestimated. Given his June 24, 2010 request to enlarge the scope of this inquiry and the correspondingly expansive testimony of Dr. Johnson, there can be little doubt that Mr. Bailey’s proposed findings of fact and conclusions of law will, by Petitioners’ count, involve an explication of at least twenty-four separate issues from the June 24th request and the Johnson testimony, and possibly other issues that Mr. Bailey has raised that have already been heard, considered and discounted by the Commission not once, but twice.⁷ Furthermore, as with the *PSNH* case, the Commission will have to parse the submissions to ensure that they are not introducing new testimony that is beyond the limited scope of the final inquiry in this proceeding.⁸ All of this will be a continued waste of resources that will do nothing to serve the public interest.

⁷ DT 07-027, Order No. 24,852 at 18 (Apr. 23, 2008); Second AFOR Order at 13.

⁸ “[W]e believe that many of the requested findings are more in the nature of testimony from [the parties] than findings of fact or rulings of law. . . . lead[ing] us to believe that they were designed to take the place of the testimony which [the parties] were not permitted to file.” *PSNH* at 2.

IV. Conclusion

The Bailey Motion will only result in further unnecessary delay and administrative burden by rehashing issues that the Commission has already considered and decided. The Petitioners respectfully request that the Commission deny the Motion.

Respectfully submitted,

KEARSARGE TELEPHONE COMPANY AND
MERRIMACK COUNTY TELEPHONE
COMPANY

By their Attorneys,
DEVINE, MILLIMET & BRANCH, P.A.

Dated: September 22, 2010

By: 

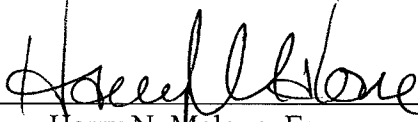
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CERTIFICATE OF SERVICE

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

Dated: September 22, 2010

By: _____


Harry N. Malone, Esq.