

State of New Hampshire  
Public Utilities Commission

NHPUC SEP24'10 PM 3:49

DT 07-027

KEARSARGE TELEPHONE COMPANY, WILTON TELEPHONE COMPANY, HOLLIS  
TELEPHONE COMPANY, AND MERRIMACK COUNTY TELEPHONE COMPANY  
PETITIONS FOR APPROVAL OF ALTERNATIVE FORM OF REGULATION.

Phase 3

**Objection to TDS Motion in Limine to Strike Portions of  
Rebuttal Testimony of Ben Johnson, Ph. D.**

Now comes Intervenor Daniel Bailey, pursuant to NH Code Admin. R. Puc 203.07(e), objects to TDS' Motion in Limine, and in support states as follows:

**Introduction.**

1. On September 2, 2010, Ben Johnson, P.h.D. (hereinafter "Dr. Johnson") filed testimony on behalf of Intervenor Daniel Bailey.
2. On September 22, 2010, TDS filed a Motion in Limine seeking to strike essentially all of Dr. Johnson's testimony, and, more specifically, the following portions: p. 3, l. to p. 4, l. 11; p. 6, l. 9 to p. 8, l. 9; p. 8, l. 18 to p. 11, l. 23; p. 13, l. 11 to p. 22, l. 6.

**Summary of Objection.**

3. TDS seeks to strike portions of Dr. Johnson's testimony in four major areas: A.) Whether and to what extent Comcast is actually offering voice services in MCT and KTC, B.) Whether or not the Comcast voice offerings are "competitive," C.) Whether Comcast is competing in the market for higher end customers in bundles, or for TDS' basic phone service customers, and D.) Whether TDS will preserve universal access to affordable basic telephone service in MCT and KTC.

4. TDS' Motion in Limine is premised upon the erroneous assumption that (1) the Commission has already ruled that Comcast services are "competitive" with TDS's basic local exchange service rates (See TDS Motion in Limine, p. 4, para. 7), (2) the erroneous assumption that the Commission has determined that the fact that Comcast is providing some services in the TDS exchange areas means that the majority of TDS retail customers have access to Comcast's stand alone voice service and that the Commission has narrowed the scope of this proceeding to exclude any analysis of whether the majority of TDS customers are in fact being offered Comcast voice services in TDS' exchanges (See TDS Motion in Limine, p. 4, para. 6), and (3) the suggestion that Order No. 25, 103 was a final order that was not appealed (See TDS Motion in Limine, p. 4, para. 10).
5. TDS misreads prior Commission Orders, and misreads RSA 374:3-b, III. The Commission has never made the rulings TDS argues it has. Indeed, the Commission has done quite the opposite.

- 1) The framework for analyzing an AFOR petition is clearly set out by the Commission in Order No. 25,103, dated May 14, 2010.

RSA 374:3-b governs this docket as it applies to the alternative regulation of small incumbent local exchange carriers in New Hampshire. We continue to construe this statute within the framework established in the Initial Order [Order No. 24,852, dated April 23, 2008]. Order No. 25,103, page 19.

To approve a plan for alternative regulation, we must find that "competitive wireline, wireless, or broadband service is available to the majority of retail customers in each of the exchanges served by such small incumbent local exchange carrier." RSA 374:3-b, III(a). Order No. 25,103, page 20.

2) The Commission set forth its statutory analysis of RSA 374:3-b in Order No. 24,852. The Commission made clear that the “availability” of alternatives and whether those alternatives are “competitive” are two separate evaluations.

. . . the use of the word “competitive” in subsection III (a) means that mere availability of alternatives is not sufficient to approve a plan . . .

Order No. 24,852, p. 26.

3) The Commission has consistently made clear that TDS bears the burden of proof in this case and must establish factual propositions by a preponderance of the evidence. See Order 25,103, p. 19; Order No. 24,852, p. 26. There is no language in RSA 374:3-b that “shifts” the burden to other parties. Order No. 24,885, dated August 8, 2008, page 12. TDS has failed to meet that burden.

6. TDS’ Motion in Limine to strike Dr. Johnson’s testimony is an effort to short-circuit a relevant analysis concerning whether TDS met its burden of proof in this case.

## **ARGUMENT**

### **A.) TDS Seeks to Strike Relevant Rebuttal Testimony Relating to Whether and to What Extent Comcast is Actually Offering Voice Services in MCT and KTC.**

7. The Commission has ruled that

...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.

(Emphasis added). Order 25,103, p. 20. The Commission made this ruling on lack of customer access to alternative services based on the entire record as of the date of the Order (May 14, 2010).

8. The plain language of RSA 374:3-b, III (a) requires a finding 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.” (Emphasis added).
9. A service cannot be “available,” as that term is used in RSA 374:3-b, III(a), if the technology is not offered.
10. In this docket, including Order No. 25, 103, the Commission *has not* ruled that Comcast is offering voice service to a “majority of retail customers in each exchange” of either MCT or KTC.
11. Dr. Johnson’s September 2, 2010 testimony (p. 14 l. 9 to p. 15 l. 19; p. 18 ll. 2-10) analyzes whether and to what extent TDS has shown that Comcast is actually offering voice service to TDS customers. Dr. Johnson’s testimony in this regard is relevant and material, as it relates to whether TDS has met its burden to show Comcast voice service is “...available to a majority of the retail customers in each exchange...”

**B.) TDS Seeks to Strike Relevant Rebuttal Testimony Relating to Whether the Information Provided by Mr. Murray Shows that Comcast’s Voice Offerings Are “Competitive.”**

12. The plain language of RSA 374:3-b, III (a) requires a finding 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.” (Emphasis added).
13. In this docket, the Commission *has not* ruled that the mere existence of *any* bundled offering of Comcast that includes voice service is *de facto* “competitive” with TDS’s

basic local exchange service, as the term “competitive” is used in RSA 374:3-b, III(a).

14. The Commission *has* ruled as follows:

We conclude with respect to the competitiveness test the Legislature would have us apply, that the use of the word “competitive” in subsection III (a) means that mere availability of alternatives is not sufficient to approve a plan but that the inclusion, among other things, of price protections in subsection III(b) means that a fully functioning competitive market is not necessary in order to approve a plan.

Order No. 24,852, p. 26. Thus, mere “availability” of Comcast services (assuming Comcast voice services are offered to a “majority of residential customers” in each exchange), is not enough to satisfy RSA 374:3-b, III(a). Those voice services must also be “competitive.”

15. Additionally, the Commission ruled that:

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.

(Emphasis added). Order No. 25,103, p. 28.

16. The above passage from Order No. 25,103, p. 28, does not suggest the Commission had already concluded that *any* Comcast voice offering is *de facto* “competitive.” To the contrary, it suggests the Commission would review whether “...the record supports a finding that Comcast is providing competitive voice offerings in all of the exchanges in question...” (Emphasis added).

17. Moreover, TDS further confuses previous Orders by asserting the Commission has ruled out any consideration of the “...pricing and marketing of bundled services packages.” See TDS Motion in Limine, p. 5, para. 7. The Commission never made

such a ruling. In support of the above assertion, TDS cites the summary of the arguments presented by Mr. Bailey, not any Commission analysis. Id., at footnote 17.

18. The Commission, however, *did* conclude that:

...the Legislature did not intend to require a level of competitiveness as would be used in an antitrust analysis or would justify complete deregulation of retail rates, which is the stricter standard of competitive market analysis Mr. Chattopadhyay performed initially.

Order No. 24,852, p. 27. Dr. Chattopadhyay performed a number of regression analyses concerning the price elasticity of demand. See Dr. Pradip K. Chattopadhyay testimony, Phase 1, p. 7-11. Dr. Johnson *does not* offer a similar high level price elasticity of demand analysis in this portion of his testimony (p. 3, l. to p. 4, l. 11). Rather, Dr. Johnson explains the economic importance of a review of whether two products substitute for each other and are therefore “competitive.” Dr. Johnson points out that “...it [TDS] has provide[d] little or no information regarding the extent to which consumers are actually switching back and forth between TDS’s local exchange service and the “Triple Play” offering or any other service provided by Comcast...” See Dr. Johnson September 2, 2010 testimony, p. 3, l. 22 to p. 4, l. 2).

19. TDS had an opportunity for rebuttal testimony in response to Dr. Johnson’s September 2, 2010 testimony regarding whether Comcast’s services are “competitive,” but it chose not to do so.

20. All portions of Dr. Johnson’s September 2, 2010 testimony that TDS wishes to strike, save for those portions mentioned in paragraphs 11 and 31 of this Objection, relate to whether or not the Comcast voice offerings are “competitive.” Dr. Johnson’s testimony in this regard is relevant and material, as it relates to whether TDS has met its burden to show Comcast is providing “competitive” voice offerings.

21. Moreover, as has been previously stated, “[a]s a general principle of statutory construction, we presume that the legislature knew the meaning of the words it chose, and that it used those words advisedly.” DaimlerChrysler Corp. v. Victoria, 153 N.H. 664, 667 (2006)(citation omitted). The word “competitive” in RSA 374:3-b, III(a) is placed before “...wireline, wireless, or broadband service...” Had the Legislature determined Comcast was *de facto* “competitive,” it would have never used the word “competitive” before the words “wireline” or “broadband service” in RSA 374:3-b, III(a).

22. Dr. Johnson’s testimony regarding the word “competitive” is relevant to the inquiry in this proceeding of whether TDS has met its burden of proof to show Comcast is a “competitive” “wireline” or “broadband service.”

**C.) TDS Seeks to Strike Relevant Rebuttal Testimony that Comcast is Competing in the Market for Higher End Bundles, but not for TDS’ Basic Phone Service Customers.**

23. In this docket, including Order No. 25,103, the Commission *has not* ruled whether the alternative technology (...wireline, wireless, or broadband service...) should be “competitive” with the small ILEC’s basic local exchange phone service, or whether being “competitive” with a small ILEC’s “bundles” are sufficient alone for approval of the alternative regulation plan.

24. The entire statutory framework of RSA 374:3-b focuses on basic local exchange phone service. See Brief of Daniel Bailey, Phase 1, January 11, 2008, pp. 10-11.

25. Staff’s expert, Dr. Chattopadhyay, testified that basic phone service should be the service of interest. See Dr. Pradip K. Chattopadhyay testimony, Phase 1, p. 3, ll. 17-28.

26. TDS' own expert witness, Mr. Ulrich, testified that "...basic local exchange service as well as technologies that compete with basic local exchange service..." is the market at issue. See Testimony of Timothy Ulrich, Phase 1, Tr. Day 2, p. 40, ll. 11-14.

27. Dr. Johnson's September 2, 2010 testimony (p. 6, l. 9 to p. 8, l. 9; p. 8, l. 18 to p. 11, l. 23; p. 13, l. 11 to p. 22, l. 6) explains that Comcast is competing in the market for customers in higher end bundles, but not for TDS' basic phone service customers.

28. Dr. Johnson's evaluation of what market Comcast is actually competing in is highly relevant.

**D.) TDS Seeks to Strike Relevant Rebuttal Testimony on Whether TDS has Shown It Will Preserve Universal Access to Affordable Basic Telephone Service in MCT and KTC.**

29. The plain language of RSA 374:3-b, III(e) requires a finding that: "The plan preserves universal access to affordable basic telephone service.

30. In this docket, including Order No. 25,103, unlike the Wilton and Hollis Companies, the Commission has not ruled that TDS will preserve universal access to affordable basic telephone service in MCT and KTC.

31. Dr. Johnson's September 2, 2010 testimony (p. 18 l. 18 to p. 19 l. 5) analyzes to what extent TDS has shown it will preserve universal to affordable basic telephone service in MCT and KTC. Dr. Johnson's testimony in this regard is relevant and material, as it relates to whether TDS has met its burden to show it "...preserves universal access to affordable basic telephone service."

**Conclusion.**

32. The plain language of RSA 374:3-b, III(a) requires a finding 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.” (Emphasis added). These required findings cannot be read out of the statute. The Commission has not made a final determination on the underlined required findings with respect to Comcast’s offerings in each of the exchanges in MTC or KTC.
33. The Commission has not made any determination that MTC or KTC will preserve “...universal access to affordable basic telephone service,” as required by RSA 374:3-b, III(e).
34. Additionally, the Commission has “...note[d] that we do not construe this order as a final order that would trigger rehearing pursuant to RSA 541:3.” Order No. 25, 103, p. 28. The record remains open and a final ruling has not been made regarding Comcast’s offerings.
35. The TDS filed information concerning Comcast’s offerings, or lack thereof, must be reviewed in light of whether TDS met its burden of proof under N.H. Code Admin. R. Puc 203.25 to meet the requirements of RSA 374:3-b, III(a) and RSA 374:3-b, III(e) by a preponderance of the evidence.
36. Since Dr. Johnson’s testimony is highly relevant to these inquiries, TDS’ Motion in Limine should be rejected.

WHEREFORE Daniel Bailey respectfully requests that the Commission:

- A. Deny TDS' Motion in Limine, and
- B. Grant such other relief as is just.

Respectfully submitted,  
On Behalf of Daniel Bailey  
By His Attorney,

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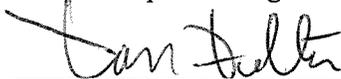
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Dated: September 24, 2010

**Certification of Service**

I certify that a copy of this document was sent to staff and all parties to this docket by email on this date and that the original and 7 copies of this Objection was delivered to the Commission on this date.

New Hampshire Legal Assistance



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Dated: September 24, 2010