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October 13, 2009

Re: DT 07-027, TDS Companies  
Petition for an Alternative Form of Regulation  
Admissibility of Exhibits

To the Parties:

At the close of the hearing on October 1, 2009 in the above-captioned proceeding, TDS objected to the admission into evidence of eight exhibits that had been marked for identification as Bailey 67 through 74. New Hampshire Legal Assistance (NHLA) employed the exhibits in its cross-examination of TDS witness Daniel Goulet. The exhibits are described below.

Bailey 67—*Estimating Coverage of Radio Transmission into and within Buildings at 900, 1800, and 2300 MHz*. Fischer de Toledo, Turkmani and Parsons. IEEE Personal Communications (April, 1988)

Bailey 68—*Essential Factors Influencing Building Penetration Loss*. Kakar, Sani and Elahi. 11<sup>th</sup> IEEE International Conference on Communications Technology, 2008.

Bailey 69—*User's Impact on PIFA Antennas in Mobile Phones*. Pelosi, Franek and Pedersen. IEEE Vehicular Technology Conference, 2009.

Bailey 70—*Comparison between Head Losses of 20 Phones with External and Built-in Antennas Measured in Reverberation Chamber*. Kildal and Carlsson. IEEE Antennas and Propagation Society International Symposium, 2002.

Bailey 71—*Body Loss Measurements of Internal Terminal Antennas and Novel Metamaterials*. Lindberg, Kaikkonen and Kochali. IEEE Workshop on Antenna Technology, 2008

Bailey 72—FCC CFR Appendix I to Subpart E of Part 24

Bailey 73—FCC CFR Section 24.5 Terms and Definitions

Bailey 74—New Received Signal Strength Readings with -10dB Correction

TDS argues that NHLA did not lay a proper foundation for Exhibits 67 through 71, that they are not valid learned treatise exceptions to the hearsay rule, and that they are irrelevant and unreliable. NHLA asserts that the five articles are relevant and that they were used to impeach the testimony of Mr. Goulet.

TDS argues that it is not necessary to admit Exhibits 72 and 73 because NHLA could properly cite to the Code of Federal Regulations in its brief. NHLA essentially agrees with TDS but contends that it would be useful to have the subject matter of the regulations as an exhibit.

TDS argues that NHLA did not lay a foundation for Exhibit 74 and that it is irrelevant. NHLA contends that the exhibit is relevant.

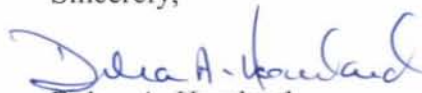
Pursuant to RSA 365:9, Commission proceedings are not "bound by the technical rules of evidence." Moreover, RSA 541-A:33, II provides that the "rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence."

The primary test of admissibility is relevance and each of the exhibits is relevant to determining whether competitive wireless service is available to a majority of the retail customers in the Sutton and Salisbury exchanges. While the exhibits are relevant, and will therefore be admitted into evidence, there is a serious question about the weight to be accorded them, especially the five articles comprising Exhibits 67 through 71.

NHLA asserts that the five articles were presented to impeach the witness but, normally, the "point of impeachment is to impugn a witness's credibility by attacking his ability to perceive the event, recall accurately that which he perceived, or communicate his story accurately, or his desire to testify truthfully." *Courtroom Handbook on Federal Evidence*, Goode and Wellborn. West (2009) p. 369. In this instance, concerning the cross-examination of an expert witness, the five exhibits appear to have been offered more in the nature of substantive evidence than impeachment evidence. As substantive evidence, however, they can be accorded little if any weight because neither the respective authors nor any witness sponsoring the exhibit was available for cross-examination.

As for Exhibits 72 and 73, it may not be necessary to admit them into evidence but there is also no harm in doing so. Finally, with respect to Exhibit 74, this exhibit is basically a reworking of Table 2 of TDS Exhibits E and F, with different values. TDS will not be prejudiced substantially by admitting this exhibit into evidence. However, while the exhibit may be useful for illustrative purposes, little or no weight may be accorded such an exhibit as substantive evidence in the absence of a sponsoring expert witness.

Sincerely,

  
Debra A. Howland  
Executive Director