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VIA HAND DELIVERY

June 20, 2007

Ms. Debra Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street
Concord, NH 03301

Re: DT 07-027 (Petition of Four TDS Telecom Companies for Alternate Regulation)

Dear Ms. Howland:

Enclosed for filing in the above-referenced matter, on behalf of Granite State Telephone, Inc., are an original and eight (8) written copies of the "Reply Brief of Granite State Telephone, Inc.", submitted in accordance with the May 29, 2007 Secretarial Letter as amended by the June 5, 2007 Secretarial Letter.

An electronic copy of the enclosed document has been delivered separately to your office and to all parties of record in the case.

I have included an extra written copy of the enclosed document with this filing. Would you kindly date-stamp the extra copy and return it to my courier?

Thank you for your attention to this matter. Please let me know if you have any questions.

Very truly yours,

Paul J. Phillips
Encls.

cc: Attached Service List, Docket No. DT 07-027 (copies e-mailed where shown)
Susan Rand King, President, Granite State Telephone, Inc.

State of New Hampshire
Before the New Hampshire Public Utilities Commission

DT 07-027

Petition of Kearsarge Telephone Company, Merrimack County Telephone Company, Wilton Telephone Company and Hollis Telephone Company for an Alternate Form of Regulation

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State of New Hampshire
Before the New Hampshire Public Utilities Commission

DT 07-027

Petitions of
Kearsarge Telephone Company, Inc.,
Merrimack County Telephone Company, Inc.,
Wilton Telephone Company, Inc., and
Hollis Telephone Company, Inc.
for an Alternate Form of Regulation

REPLY BRIEF OF GRANITE STATE TELEPHONE, INC.

June 20, 2007

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State of New Hampshire
Before the New Hampshire Public Utilities Commission

DT 07-027

Petitions of Kearsarge Telephone Company, Inc., Merrimack County Telephone Company, Inc., Wilton Telephone Company, Inc., and Hollis Telephone Company, Inc. for an Alternate Form of Regulation

REPLY BRIEF OF GRANITE STATE TELEPHONE, INC.

Granite State Telephone, Inc. (Granite State) by and through the undersigned counsel and in accordance with the Secretarial Letter dated May 29, 2007, from the Executive Director of the Public Utilities Commission (Commission), hereby submits the following Reply Brief.

I. Summary

The parties who oppose the Petitioners' applications[1] would have the Commission rewrite RSA 374:3-b to include multiple limitations and regulatory hurdles to the Petitioners' ability to obtain their requested relief. This statutory rewrite would violate long-established principles of the separation of powers between the executive and legislative branches, and would negate the statute's two-fold purpose to: (1) provide small ILECs the pricing flexibility and opportunity to retain customers who are interested in bundled services, such as

[1] Initial briefs were filed by the four Petitioners jointly and by Granite State, the Commission Staff (Staff), the Office of Consumer Advocate (jointly with New Hampshire Legal Assistance and collectively referred to herein as "OCA") and segTEL, Inc. (segTEL). The Initial Briefs of Staff, OCA, and segTEL argued against the Petitioners' ability to satisfy the statutory requirements of RSA 374:3-b, and so are collectively referred to as the "Opponents' Briefs" and the parties who filed those briefs are referred to as the "Opponents."

wireless and broadband; and (1) protect customers of small ILECs who would otherwise be left behind in light of advancing technologies.

Granite State urges the Commission to advance the statutory purposes of RSA 374:3-b by: (1) rejecting requests by OCA and segTEL to require waiver of the Petitioners' so-called "rural exemptions" as a precondition of obtaining relief under RSA 374:3-b; (2) rejecting efforts to restrict the scope of competitiveness issues to a consideration of local-only service offerings; (3) rejecting, as not ripe for decision at this time, the Opponents' efforts to exclude Petitioners' affiliate businesses from the scope of any competitiveness review; (4) rejecting the OCA's contention that relief under RSA 374:3-b requires an initial determination of the justness and reasonableness both of the Petitioners' existing rates and of the existing rates of Verizon New England, Inc. d/b/a Verizon-New Hampshire (Verizon); (5) rejecting efforts to rewrite the "rate cap" provision of RSA 374:3-b in a manner contrary to the statute's remedial purpose and legislative history; and (6) refusing to be distracted by inapplicable and inapposite arguments concerning the Sherman Antitrust Act.

II. Argument

A. Nothing in RSA 374:3-b has any effect on Petitioners' continued ability to invoke the so-called "rural exemption" of 47 U.S.C. § 251(f).

Both the OCA and segTEL attack the Petitioners' express reservation of their rights under the so-called "rural exemption" afforded to rural telephone companies under the Telecommunications Act of 1996.[2] The OCA describes the rural exemption as "the ability of

[2] 47 U.S.C. § 251(f)(1); *see* 47 U.S.C. § 153(37) (defining "rural telephone company").

the dominant firm, TDS, to foreclose the market . . . to basic local exchange service."[3] For this reason, OCA contends that the rural exemption is inconsistent with both the "competitive service" and "bundled service" provisions of RSA 374:3-b.[4] segTEL describes the rural exemption as "exempting [Petitioners] from any competition (for wireline basic exchange service) from other CLECs."[5] Thus, in segTEL's view, preservation of the rural exemption: (1) bars the Petitioners from claiming that sufficient competition exists to warrant relief under RSA 374:3-b; (2) prevents the Petitioners from demonstrating that their alternative regulation plans promote innovative services; and (3) bars the Commission from granting relief to the Petitioners under RSA 374:3-b without violating the prohibition on barriers to competitive entry found in 47 U.S.C. § 253(a).[6] Granite State respectfully disagrees with these arguments and urges the Commission to reject them for the reasons discussed hereafter.

The starting point, in any case involving statutory interpretation, is the statute's plain language. *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 735 (2005). When a statute's language is plain and unambiguous, the Commission should not look beyond the statute to discern legislative intent. *Id.* Legislative intent is to be found not in what the Legislature might have said, but in what the Legislature did say. *In re: Verizon New England, Inc.*, 153

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[3] OCA Initial Brief, at 13.

[4] *Id.*, at 12, 13; *see* RSA 374:3-b, III(a) (Commission shall approve alternative regulation plan if Commission finds, *inter alia*, that "[c]ompetitive 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. . .") and RSA 374:3-b, IV (authorizing small incumbent local exchange carrier under alternative regulation plan to "offer bundled services that include combinations of telecommunications, data, video, and other services.").

[5] segTEL Initial Brief, at 12.

[6] *Id.*, at 11, 12, 15.

N.H. 50, 60 (2005). In particular, the Legislature is presumed to have been aware of the terms of the federal statutes at the time it enacted a parallel state statute. *Batchelder v. Allied Stores Corp.*, 473 N.E.2d 1128, 1130 (Mass. 1985).

In the present case, RSA 374:3-b is entirely silent with respect to any effect of its enactment on a qualifying company's "rural exemption" under federal law. Nonetheless, the New Hampshire General Court was fully aware, both at the time RSA 374:3-b was first enacted in 2005 and at the time it was amended in 2006, that every carrier who is qualified to seek and obtain relief under RSA 374:3-b is also entitled to the benefits accorded to rural telephone companies under 47 U.S.C. § 251(f)(1).[7] In Laws 2005, Chapter 263, of which the provisions that were codified as RSA 374:3-b are a part, the Legislature established a legislative committee to study practices relating to the telecommunications industry in New Hampshire.[8] Among the questions to be examined by the legislative committee is "[w]hether a small incumbent local exchange carrier should be required to agree to relinquish its rural exemption under the federal Telecommunications Act immediately upon approval of an alternative regulation plan."[9] The Legislature plainly considered the question to be an open one and accordingly refrained from including any express requirement in the language of RSA 374:3-b. The clear message from the statute's silence, then, is that the Legislature intended RSA 374:3-b and 47 U.S.C. § 251(f)(1) to operate seamlessly and simultaneously,

[7] Relief is available under RSA 374:3-b to "an incumbent local exchange carrier serving fewer than 25,000 access lines." RSA 374:3-b, I. The benefits of 47 U.S.C. § 251(f)(1) are available to "a rural telephone company," which is defined, in relevant part, as "a local exchange operating entity to the extent that such entity . . . provides telephone exchange service, including exchange access, to fewer than 50,000 access lines . . . ." 47 U.S.C. § 153(37)(B).

[8] Laws 2005, 263:2.

[9] Laws 2005, 263:3, VI.

and that the impact of the federal rural exemption would be reserved for a future legislative determination and was not a matter included in the authority granted to the Commission by RSA 374:3-b as presently enacted.

Contrary to the contentions advanced by the OCA and segTEL, it is clear that the Legislature expressly refrained from a determination that the parallel benefits of RSA 374:3-b and 47 U.S.C. § 251(f)(1) are mutually exclusive or in any way inconsistent or inharmonious.

The OCA and segTEL, however, would have the Commission view Petitioners' requests for relief under RSA 374:3-b as implicitly waiving, terminating, or otherwise voiding Petitioners' entitlement to the benefits of 47 U.S.C. § 251(f)(1). segTEL in particular contends that the continued availability of the federal rural exemption not only bars Petitioners from satisfying (or even invoking) the "competitive" and "innovative telecommunications services" elements of RSA 374:3-b, but actually bars the Commission from approving the Petitioners' applications for relief because to do so would place the Commission in violation of 47 U.S.C. § 253(a).[10] The New Hampshire Legislature's enactment of RSA 374:3-b, however, was remedial in purpose: the new statute created a new right of action to seek new relief previously unavailable in the law. *See Southwestern Bell Tel. Co. v. Kansas Corp. Comm'n*, 29 P.3d 424, 429 (Kan. App. 2001) ("A remedial statute is legislation providing the means or method whereby causes of action may be effectuated, wrongs redressed, and relief obtained."). Remedial statutes should be construed broadly to effectuate their remedial purpose. *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott*

[10] 47 U.S.C. § 253(a) provides: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Laboratories, 460 U.S. 150, 159 (1983). The OCA and segTEL contend that the remedy available to Petitioners from RSA 374:3-b is available only if the Commission will curtail a parallel benefit available to Petitioners under federal law. The Commission should firmly reject any such constraints on its own authority or on the scope of relief available to Petitioners under RSA 374:3-b.

Essentially, the OCA and segTEL have misread the effect of the "rural exemption" in 47 U.S.C. § 251(f)(1). The OCA and segTEL contend that the rural exemption "foreclose[s] the market . . . to basic local exchange service" or "exempt[s] [Petitioners] from any competition (for wireline basic exchange service) from other CLECs." A 2004 decision of the Ohio Supreme Court effectively refutes the parties' contentions. *Stephens v. Pub. Utils. Comm'n of Ohio*, 806 N.E.2d 527 (Ohio 2004). In *Stephens*, the Ohio Supreme Court affirmed the Ohio Public Utilities Commission's order granting a rural Ohio telephone company's application for approval of an alternative form of regulation while maintaining the applicant's entitlement to the rural exemption under 47 U.S.C. § 251(f)(1). *Stephens*, 806 N.E.2d at 530. In rejecting arguments advanced by the Ohio Consumers' Counsel (OCC) that are analogous to those advanced here by the OCA and segTEL, the Ohio Supreme Court made clear:

> [W]hile Section 251(f)(1) provides an exemption for certain rural telephone companies, *it is not an exemption from competition, as claimed by OCC*. Rather, it is an exemption solely from the extraordinary duties of Section 251(c) and is by its very terms revocable at the behest of a competitor and upon the decision of the commission. In addition, it provides no exemption from the competitive obligations of Section 251(a), which compels traffic exchange and technical compatibility, and it provides no exemption from the competitive duties of Section 251(b), involving resale by competitors, local number portability, dialing parity, access to rights of way, reciprocal compensation, etc. *The exemption of Section 251(f)(1) as it bears on Section 251(c) simply is not an exemption from competition as claimed by OCC*.

Id., 806 N.E.2d at 530-31 (emphasis added); *accord Ronan Telephone Co. v. Alltel Communications, Inc.*, 2007 WL 433278, at *3 (D. Mont. Feb. 2, 2007) ("the rural exemption relates to *the method* of establishing reciprocal compensation arrangements, *not the underlying obligation* to do so") (emphasis added).

The Commission should follow the Ohio Court's lead and reject the suggestion that the federal rural exemption is an "exemption from competition," or that retention of the rural exemption after obtaining relief under RSA 374:3-b creates an unlawful "barrier to competitive entry." Instead, the Commission should view the Legislature's enactment of RSA 374:3-b as supplementary and complementary to the benefits of 47 U.S.C. § 251(f)(1) and should accordingly apply RSA 374:3-b without impairment or curtailment of any benefits that Petitioners may enjoy under federal law.

B. Nothing in RSA 374:3-b limits the scope of competitive services to only local basic exchange service.

The Opponents contend that a competitive service under RSA 374:3-b, III(a) includes only those services that are local and that provide the same basic service as the small ILEC provides under N.H. Admin. Rule Puc 412.01. Based on this interpretation, the Commission would exclude from its consideration all wireless, broadband, and wireline services to the extent that such services do not have a basic local exchange component. While these parties claim to read the statute as a whole, as required under New Hampshire case law, they actually ignore the statute's plain language, which explicitly states, without limitation, that wireless, broadband, and wireline are competitive services. The Opponents' interpretation would insert limiting language that negates the statute's purpose, when the Commission instead should

broadly construe the statute to effectuate its remedial purpose. *Jefferson County Pharmaceutical Ass'n,* 460 U.S. at 159; *Mailloux v. Town of Londonderry*, 151 N.H. 555, 558 (2004) (explaining that the primary goal is to discern legislative intent as evidenced by the statute's plain language).

By enacting RSA 374:3-b, the Legislature was responding to the on-the-ground reality that providers of bundled services, such as wireless and broadband, are threatening the very survival of small ILECs.[11] In light of technological advancements within the past decade that allow one provider to bundle services such as local and long-distance calling and Internet access, there is no question that customers are increasingly looking for basic exchange service to be bundled with other services in a single package.[12] As carriers of last resort, however, small ILECs continue to have the legal obligation to offer standalone basic service to all customers within their service areas. This creates a tension: the small ILEC must serve a class of customers who cannot afford or do not want bundled services, while simultaneously striving to retain customers who prefer the type of bundled services offered by wireless, broadband, and competitive wireline companies.

The Legislature, being aware of this tension, enacted RSA 374:3-b to meet two goals. The first goal is to free the small ILEC from the traditional regulatory constraints on stand-

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[11] *Hearing on H.B. 194 Before the Senate Energy and Econ. Dev. Comm.*, 2005 Leg., at 5 (statement of William R. Stafford, Chief Operations Office of Granite State Telephone) (explaining that Granite State's "customer base in terms of access is declining as customers find alternatives to the traditional land line they utilized in the past").

[12] *Hearing on H.B. 194 Before the Senate Energy and Econ. Dev. Comm.*, 2005 Leg., at 2 (statement of Don D'Ambruoso, New Hampshire Telephone Association) ("In order to compete in this environment while preserving universal service, (which is their legal responsibility) the small incumbent local exchange carriers need to be able to adjust quickly to the changing competitive environment and to be in a position to provide completely priced packaged services, including telephone, internet, and in the very near future, video services.").

alone basic service by allowing those carriers the pricing flexibility and opportunity to offer bundled services. This goal is evidenced by the statute's express recognition that wireless, broadband and wireline services are competitive services, and that the only way for a small ILEC to compete with such services is to offer similar bundled services that include "combinations of telecommunications, data, video, and other services." RSA 374:3-b, III(a), IV.

The second goal is to protect customers who cannot afford, or do not want, bundled services. This goal is evidenced by statutory provisions that: (1) limit the amount by which basic local service rates can increase, RSA 374:3-b, III(b); and (2) require the small ILEC to continue to preserve universal access to affordable basic telephone service, RSA 374:3-b, III(e).

The Opponents assume that the phrase "[c]ompetitive wireline, wireless, or broadband service" requires a threshold determination of whether these types of services pose a threat to a small ILEC, and they also would limit what constitutes "competitive" to only the local components of those three types of service. The statute's plain language refutes these arguments. The statute's placement of the term "competitive" before identifying the specific services unequivocally demonstrates that the Legislature has already determined that these services, by their very nature, pose a threat to the rates and services of small ILECs.[13] The Legislature did not leave room to dispute whether these types of services compete with small

[13] While there is no need to refer to legislative history because the statute is very clear on this issue, any doubt is resolved in favor of the Petitioners by reference to such history. Representatives from the telephone industry provided extensive testimony on the different forms of competition they face, including cable, VoIP telephony, cell phone service, and wireless service. The Legislature had these services in mind when it enacted RSA 374:3-b. See *Hearing on H.B. 194 Before the Senate Energy and Econ. Dev. Comm.* (2005), Statement of Dom D'Ambruoso, New Hampshire Telephone Association; Statement of William R. Stafford, Chief Operations Officer of Granite State Telephone, Inc.; Statement of Timothy Ulrich, Manager of Regulatory Affairs, TDS Telecommunications Corp.; and Statement of Frederick J. Coolbroth on behalf of Granite State Telephone, Inc.

ILECs, but instead requires an applicant to show that one or more of these services is "available," as opposed to being only a speculative threat, in a specific exchange area. For example, the mere assertion that a wireless carrier may enter the small ILEC's service area would not satisfy this statutory requirement.[14]

This interpretation is further supported by the actual relief granted by the statute. If the small ILEC meets the statutory requirements and proves that actual competition from wireless, broadband, or wireline providers exists, it can offer those same bundled services with price flexibility (RSA 374:3-b, IV). It is no coincidence that the relief granted to the small ILEC ("bundled services that include combinations of telecommunications, data, video, and other services") mirrors the nature of the competitive services set forth in RSA 374:3-b, III(a); the Legislature wanted to provide the small ILEC with an equal opportunity to deploy the same services as the providers of the services set forth in RSA 374:3-b, III(a) in order to level the playing field. *Asmussen v. Comm'r of Public Safety*, 145 N.H. 578, 586 (2000) ("We will construe statutes so as to effectuate their evident purpose, and will not apply a construction that nullifies . . . that purpose."). This demonstrates that the "competitive" services listed in RSA 374:3-b, III(a) include the same services identified in RSA 374:3-b, IV. The mirroring of the statutory showing that Petitioners must make in RSA 374:3-b, III(a) and the statutory relief that Petitioners can obtain upon that showing reflects the reality that

[14] The OCA argues that the statute should be expanded to include a requirement that Petitioners and the Commission conduct an elaborate market share analysis and create a benchmark for determining the number of competitors in each exchange that are required to make a finding that "competition" exists. The absence of any such requirement in the statute demonstrates that the Legislature did not intend to make a petitioner jump through such regulatory hurdles to obtain satisfactory relief under the statute. The statute explicitly states that wireline, broadband, *or* wireline services are "competitive" and requires only that such competition, in any form, be "available." RSA 374:3-b, III(a).

consumers consider wireless, broadband, and wireline services as complete substitutes for the Petitioners' services. Reading RSA 374:3-b, III(a) and IV together, as a statutory whole, refutes any notion that the "competitive service" requirement is limited to a "local-only" service comparison.

C. The question of whether services provided by a petitioner's affiliates constitute "competitive . . . service" under RSA 374:3-b is not ripe for resolution by the Commission.

Granite State respectfully submits that, based on the response by the Petitioners, the question of whether a service provided by an affiliate of a small ILEC qualifies as competitive service for purposes of the statute is not ripe at this point in the proceeding. The Petitioners have asserted that, even excluding its affiliates, it faces competition from RCC Minnesota, Inc. and RCC Atlantic, Inc. (jointly, "RCC") and potentially from other service providers. If so, then the resolution of whether an affiliate qualifies as a competitor will not affect the outcome of the case. *See State v. Fischer*, 152 N.H. 205, 210 (2005) (an issue is not ripe if it does not have a direct and immediate impact on the parties); *Asmussen*, 145 N.H. at 586 (explaining that the determination of a legal issue cannot be based on a hypothetical set of facts, but must be a "useful decision to be made through a degree of a conclusive character"). At this point, a resolution of this issue would be purely academic. *In re Juvenile*, 917 A.2d 703, 705 (N.H. 2007) (an issue is not justiciable if it is merely academic).

Rather than expend the Commission's resources in addressing the affiliate issue, the question for the Commission is whether, even leaving aside the services of affiliated providers, the Petitioners face competition from wireline, wireless, or broadband services in their exchange area. No party can dispute that RCC is designated as an eligible

telecommunications carrier in all of the exchanges served by the Petitioners.[15] As explained above in Section II(B), this form of competition is actual and thus satisfies RSA 374:3-b, III(a). Any threshold question of the Petitioners' eligibility to seek relief under the statute should be resolved in favor of Petitioners, and the proceeding should go forward to a development of the Petitioners' case-in-chief.

D. RSA 374:3-b does not require the Commission to review existing rates as a precondition to approving Petitioners' alternate regulation plans.

The OCA asserts that "TDS bears the burden under RSA 378:8 to show their rates under the AFOR [alternate form of regulation] plan will be just and reasonable," and that, as a result, "the Commission should consider the cost-of-service of TDS under the proposed AFOR plan compared with those under rate-of-return regulation to determine if rates will be just and reasonable."[16] The OCA also contends that, under the "comparable rates" provision of RSA 374:3-b, III(b), "the Commission may need to look at the cost of service of the largest ILEC, pursuant to RSA 363:22, to establish the statewide benchmark in these types of cases."[17] Moreover, the OCA asserts that the Commission's Rule Puc 206.06 may also "help guide the evaluation of TDS's Petition."[18]

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[15] *In re Federal-State Joint Board on Universal Service: Petition of RCC Minnesota, Inc., and RCC Atlantic, Inc., for Designation as an Eligible Telecommunications Carrier in the State of New Hampshire*, CC Docket No. 96-45, Order DA 05-2673 (Wireline Competition Bureau, Oct. 7, 2005), at ¶11.

[16] OCA Initial Brief, at 19.

[17] *Id.*

[18] *Id.*

Granite State respectfully disagrees that RSA 378:8, RSA 363:22 or N.H. Admin. Rule 206.06 applies to the present proceedings. While the Commission can and should apply RSA 374:3-b within its relevant statutory framework, the Commission should not read unrelated statutes or rules into RSA 374:3-b in a manner that impedes its effective remedial purposes.

RSA 363:22, by its terms, applies only to proceedings involving *interstate* rates.[19] By contrast, a proceeding under RSA 374:3-b focuses on "basic local service rates," for which the Legislature provided important protections from an otherwise-competitive marketplace.[20] The OCA's focus on the Commission's authority under RSA 363:22 is therefore misplaced and is at odds with the plain language of the statute. The Commission should reject the OCA's attempt to integrate RSA 363:22 into the requirements for RSA 374:3-b. Moreover, the Commission should refuse the OCA's invitation to read RSA 374:3-b as requiring an examination of the cost of service of Verizon New England, Inc. d/b/a Verizon-New Hampshire as part of the present proceeding.

In similar fashion, the Commission should reject the OCA's attempt to read RSA 378:88 into the requirements of RSA 374:3-b. RSA 378:88, by its terms, applies only to requests by a utility to approve a rate increase.[21] A petition under 374:3-b, by the plain language of the statute, is a request for alternative regulation, and cannot be read as a request to increase

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[19] "**363:22 Investigations.** – The commission may investigate all existing or proposed *interstate* rates, fares, charges, classifications and rules and regulations relating thereto, where any act thereunder may take place within this state." RSA 363:22 (emphasis added)."

[20] *See* RSA 374:3-b, III(b).

[21] "**378:8 Burden of Proof.** – When any public utility shall seek the benefit of any order of the commission allowing it to charge and collect rates higher than charged at the time said order is asked for, the burden of proving the necessity of the increase shall be upon such applicant." RSA 378:8.

existing rates under 378:88. Although the Commission may approve an alternative regulation plan that provides some pricing flexibility, there is nothing in RSA 374:3-b that requires a petitioner to increase its rates, and so a statutory requirement that addresses "the burden of proving the necessity of the increase" (RSA 378:8) is inapposite. The Commission should not read requirements into RSA 374:3-b that serve only to impair a petitioner's ability to obtain the relief intended by the Legislature.

Finally, the OCA contends that the Commission "may consider Puc 206.06 in its analysis of TDS's AFOR Plan."[22] N.H. Admin. Rule Puc 206.06 establishes the Commission's rule for filing requirements for alternative regulation plans submitted under RSA 374:3-*a*.[23] The Legislature must be presumed to have been aware of the Commission's existing rules at the time RSA 374:3-b was enacted, and if the Legislature had so chosen, it could have included its legislative language within RSA 374:3-a, in which case the Commission's Rule Puc 206.06 would have plainly applied. The Legislature, however, chose to enact a separate provision, RSA 374:3-b, which means that Rule Puc 206.06 does not plainly apply. The Commission should refrain from second-guessing the Legislature's choices in its legislative activities, and particular when such second-guessing will result in the imposition of additional legal standards and requirements that the Legislature omitted from RSA 374:3-b itself. The Legislature's intent must be found in what the Legislature *did* say, not in what the Legislature *might have* said. *Verizon New England, Inc.*, 153 N.H. at 60.

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[22] OCA Initial Brief, at 19.

[23] *See* N.H. Admin. Rule Puc 206.6 (establishing filing requirements for "a utility seek[ing] an alternative form of regulation"); *see* N.H. Admin. Rule Puc 206.01(a) (defining "alternative form of regulation" as a method of utility rate regulation pursuant to RSA 374:3-*a* . . ." (emphasis added).

Notwithstanding the OCA's reliance on inapposite statutes and rules, the thrust of the OCA's argument is that the Commission should conduct an initial examination of the Petitioners' existing rate of return before evaluating the proposed cost-of-service under the AFOR plan.[24] However, RSA 374:3-b is entirely silent with respect to imposing such a precondition to a small carrier's AFOR plan. Requiring a petitioner to justify its existing rates as a prerequisite to obtaining relief under RSA 374:3-b places significant costs and significant delays on a petitioner's ability to pursue an RSA 374:3-b remedy. The prospect of undertaking the time and expense of a rate investigation as a requirement of obtaining relief from regulation will dissuade most small ILECs from using the new mechanism established in RSA 374:3-b. Such a result is contrary to the Commission's obligation to give a broad application to RSA 374:3-b to accomplish its remedial purposes.

For these reasons, Granite State respectfully urges the Commission to reject the impediments advanced by the OCA, and instead to apply the provisions of RSA 374:3-b as written.

E. The plain language and the policy of N.H. RSA 374:3-b, III(b) support reading the rate adjustments provision as pertaining to both the comparables-rates rate cap and the ten-percent-increase rate cap.

The OCA offers little support for its position that RSA 374:3-b, III(b) allows rate adjustments to be made only to the "10% increase" component of the rate cap, and not to the "comparable rates" component of the rate cap. The OCA contends that the 2006 amended language of RSA 374:3-b, III(b) is materially different from the original statutory language in

[24] *See* OCA Initial Brief, at 19 ("[T]he Commission should consider the cost-of-service of TDS under the proposed AFOR plan compared with those *[sic]* under rate-of-return regulation to determine if the rates will be just and reasonable.").

that the adjustment provision "no longer follows the [comparable-rate] clause" but instead "follows the 10% rate cap."[25] The OCA concludes that the change in placement means that the adjustment clause applies only to the 10% increase component instead of applying only to the "comparable rates" component, as it did in the original 2005 enactment.[26] But this is not a fair characterization of the 2006 amendment. The statute as amended does not simply list the rate-cap elements and then provide a rate adjustment clause at the end of the list. Instead, the amendment made clear that, as an exception to the usual requirement that the plan must abide by both elements of the rate cap, the plan as a whole may also provide for rate adjustments.

The statute's plain language states that the "additional rate adjustments" provision of RSA 374:3-b, III(b) apply to the rate plan as a whole, including to both elements of the rate cap, because the provision begins with the words "*the plan* may provide for additional rate adjustments." *Id.* (emphasis added). Certainly, the main purpose of RSA 374:3-b, III(b) is to ensure that all alternative regulation rate plans will conform to the two rate caps. But in creating an exception for adjustments that results from changes in federal, state, or local law, the Legislature made clear that those adjustments could affect the plan as a whole and that, as a consequence, adjustments might need to be made to both the comparable rates themselves as well as to the 10% allowable flexibility in those comparable rates. Indeed, if RSA 374:3 allowed a petitioner, during the term of an alternate regulation plan, to adjust rates in a way that affected only one of the rate-cap elements but not the other, then the statute could very well prevent the kind of rate adjustments that a company may need to cover the costs of

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[25] *Id.*, at 18.

[26] *See* RSA 374:3-b, III(b) (as originally enacted in 2005).

complying with changes in the law. For example, under the OCA's reading of the statute, if a new regulation caused a small ILEC's costs to rise by twelve percent in a given year, but the regulation only caused the largest ILEC's costs to rise by eight percent that year, or if the largest ILEC simply chose not to pursue a rate adjustment for that year despite rising costs, then the small ILEC could not adjust its rates to cover the full cost increases. In this scenario, the rate-adjustment provision would not serve its intended purpose because the constrained reading would prevent the small ILEC from being able to cover its full costs.

The OCA's argument does not comport with the plain language of RSA 374:3-b, III(b) or with the purpose of the statutory exception to the rate caps, which is to allow companies to adjust their rates to cover the costs of complying with changes in the law. The Commission should reject a reading of RSA 374:3-b that is contrary to the statute's plain language and that impedes the ability of Petitioners to achieve the full measure of relief intended by the statute.

F. The OCA's facial attack on the statute based on antitrust grounds is not properly before the Commission and lacks a sufficient legal basis.

The OCA contends, without fully briefing the issue, that the connection in pricing under RSA 374:3-b, III(b) between a small ILEC and the largest ILEC "may well amount to a horizontal restraint on trade in pricing."[27] The OCA also asserts, without citation to any legal authority, that if a small ILEC can retain its rural exemption and also offer bundled services, it will result in "almost no pricing oversight of TDS's service packages . . . and TDS may be able to leverage . . . monopoly power."[28] Thes e facial and/or as-applied attacks on the

[27] OCA Initial Brief at 16.

[28] *Id.* at 17.

statute's legality are not within the scope of this proceeding and, in any event, are not supported by antitrust law.

The OCA essentially asks the Commission to invalidate RSA 374:3-b, III(b) on antitrust grounds because it "may" result in a horizontal restraint on trade in pricing, and that the retention of the rural exemption "may" result in monopoly power. First, these issues are not ripe because the OCA has not identified actual harm that would result from these provisions; the alleged harm is purely speculative. *Asmussen*, 145 N.H. at 587, 766 A.2d at 689 (refusing to address issues that are based on a hypothetical set of facts). Second, the OCA's attempt in this proceeding to have the Commission declare certain statutory provisions invalid should be brought in a declaratory judgment action pursuant to RSA 491:22 or by filing a petition for a declaratory ruling from the Commission under N.H. Admin. Rule Puc 207.02. The purpose of the present briefing process is to provide the Commission with guidance from the parties as to interpretation of certain statutory provisions; the Commission did not invite parties to throw in every possible and speculative argument regarding the statute's overall validity.

Nonetheless, with respect to the OCA's argument that the retention of the rural exemption may result in illegal monopoly power, OCA has not come close to alleging a monopoly claim under § 2 of the Sherman Act, 15 U.S.C. § 2, which states that firms shall not "monopolize" or "attempt to monopolize." Even assuming that a small ILEC's rural exemption would result in a monopoly, which Granite State does not concede,[29] the mere possession of a monopoly alone is not only lawful; rather, "it is an important element of the free-market system." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,

[29] *See* Section II(A), *supra.*

540 U.S. 398, 407 (2004). The Sherman Act requires, in addition to possessing monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* The ability to charge monopoly prices for a short period is not unlawful unless it is accompanied by the element of anticompetitive conduct. *Id.* The OCA's antitrust claims have no legal or factual support because any harm is purely speculative and there is no allegation of anticompetitive conduct.

With respect to OCA's claim under § 1 of the Sherman Act regarding a possible restraint on trade, the OCA's conclusory analysis does not even begin to unfold the multiple layers involved in a § 1 complaint.[30] *See Texaco Inc. v. Dagher*, 547 U.S. 1, _, 126 S.Ct. 1276, 1279 (2006) (explaining the different layers of analysis involved in analyzing a § 1 complaint). A preliminary issue, which is not even addressed by OCA, is whether a state statute can create a restraint of trade under the Sherman Act. In any event, the Sherman Act does not outlaw all restraints of trade, but only unreasonable restraints. *Id.* The OCA has the burden to prove that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found to be unlawful. OCA certainly has not met that burden through its summary treatment of this issue in its Initial Brief. The Commission should not be distracted by such unformed and unsupported contentions.

[30] Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1.

III. Conclusion

The New Hampshire Legislature, in enacting RSA 374:3-b, intended to create a mechanism that would give small carriers the flexibility to offer bundled services to meet the challenges of competition while protecting customers who prefer to keep their standalone basic local service. The Opponents insist that the Commission should look beyond the plain language and remedial purposes of RSA 374:3-b and impose additional preconditions or barriers to the relief available in RSA 374:3-b. Granite State respectfully urges the Commission to reject arguments that are intended to impede the ability of Petitioners to obtain their requested relief, and to apply RSA 374:3-b as written to the petitions in this proceeding.

WHEREFORE Granite State Telephone, Inc., submits this Reply Brief in accordance with the Procedural Order of the Commission.

DATED at Montpelier, Vermont, this 20th day of June, 2007.

Respectfully submitted,

GRANITE STATE TELEPHONE, INC.

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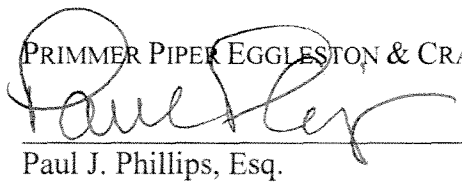
By: 

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