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Via Hand Delivery

June 8, 2007

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Debra A. Howland, Executive Director
& Secretary
Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301

Re: DT 07-027 - Kearsarge Telephone Company
~~DT 07-028 - Wilton Telephone Company, Inc.~~
~~DT 07-029 - Hollis Telephone Company, Inc.~~
~~DT 07-030 - Merrimack County Telephone Company~~
Alternative Form of Regulation



Dear Ms. Howland:

Enclosed for filing in the above-referenced matters are an original and seven (7) copies of the Initial Brief by Kearsarge Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc. and Merrimack County Telephone Company Regarding Legal Issues Presented by Petitions.

A compact disk containing the brief is also enclosed.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Frederick J. Coolbroth".

Frederick J. Coolbroth

FJC:kaa

Enclosures

cc: Service List

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STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 07-027 Kearsarge Telephone Company
DT 07-028 Wilton Telephone Company, Inc.
DT 07-029 Hollis Telephone Company, Inc.
DT 07-030 Merrimack County Telephone Company

Petitions for Alternative Form of Regulation Pursuant to RSA 374:3-b

**Initial Brief by Kearsarge Telephone Company, Wilton Telephone Company,
Inc., Hollis Telephone Company, Inc. and Merrimack County Telephone
Company Regarding Legal Issues Presented by Petitions**

The petitions in these four dockets have been filed in accordance with RSA 374:3-b, New Hampshire's alternative regulation statute for small incumbent local exchange carriers. Through the petitions and supporting testimony, each of the above-named petitioners (the "Petitioners") has presented its case in full compliance with the statute, and the Petitioners believe that their respective petitions for alternative regulation should be granted. In accordance with the procedural schedule outlined in the Staff report to the Commission following the technical session on May 4, 2007, this brief addresses the primary legal principle that Petitioners believe is before the Commission in ruling on the petitions for approval of the alternative regulation plans. This brief also addresses the two questions posed in the Commission's Secretarial Letter dated May 29, 2007 approving the procedural schedule.

I. PRIMARY LEGAL PRINCIPLE: AVAILABILITY OF A COMPETITIVE ALTERNATIVE

RSA 374:3-b sets forth the requirements for an incumbent local exchange carrier who seeks an alternative form of regulation. Specifically, the statute provides as follows:

“I. In this section, ‘small incumbent local exchange carrier’ means an incumbent local exchange carrier serving fewer than 25,000 access lines.

II. A small incumbent local exchange carrier subject to rate of return regulation may petition the public utilities commission for approval of an alternative form of regulation providing for regulation of such carrier's retail operations comparable to the regulation applied to competitive local exchange carriers, subject to paragraph III, due to its status as carrier of last resort.

III. The commission shall approve the alternative regulation plan if it finds that:

(a) 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;

(b) The plan provides for maximum basic local service rates at levels that do not exceed the comparable rates charged by the largest incumbent local exchange carrier operating in the state and that do not increase by more than 10 percent in each of the 4 years after a plan is approved with the exception that the plan may provide for additional rate adjustments, with public utilities commission review and approval, to reflect changes in federal, state, or local government taxes, mandates, rules, regulations, or statutes;

(c) The plan promotes the offering of innovative telecommunications services in the state;

(d) The plan meets intercarrier service obligations under other applicable laws;

(e) The plan preserves universal access to affordable basic telephone service; and

(f) The plan provides that, if the small incumbent local exchange carrier operating under the plan fails to meet any of the conditions set out in this section, the public utilities commission may require the small incumbent local exchange carrier to propose modifications to the alternative regulation plan or return to rate of return regulation.

IV. The alternative regulation plan may allow the small incumbent local exchange carrier to offer bundled services that include combinations of telecommunications, data, video, and other services.

V. Following approval of the alternative regulation plan, the small incumbent local exchange carrier shall no longer be subject to rate of return regulation or be required to file affiliate contracts or seek prior commission approval of financings or corporate organizational changes, including, without limitation, mergers, acquisitions, corporate restructurings, issuance or transfer of securities, or the sale, lease, or other transfer of assets or control.”

Each of the Petitioners is an incumbent local exchange carrier that serves fewer than 25,000 access lines pursuant to franchise authority granted by this Commission. The key legal

issue for each Petitioner in its respective docket is whether a majority of its retail customers in each exchange have access to a competitive alternative service.

In order for the Commission to approve an alternative regulation plan under the statute for a small ILEC, at least one competitive wireline, wireless or broadband service must be available to a majority of the retail customers in each of the small ILEC's exchanges. With respect to each Petitioner, therefore, the Commission must find that a majority of the retail customers in each exchange of that Petitioner have access to a wireless, wireline or a broadband alternative service, and that the alternative service is "competitive" with the Petitioner's retail service.

For the purposes of this proceeding, the Commission will need to determine whether a service is a competitive alternative to a Petitioner's retail service. A service that is a competitive alternative is one that customers perceive will provide them with similar functional capabilities as those services provided by the small ILEC, e.g., the customers find it to be a substitute for a small ILEC's service. A competitive wireless service would be one that performs the same generic function of providing local calling capability and access to long distance calling to the customer like an ILEC's traditional basic exchange service does. All wireless service offerings provide these functions and therefore are substitutes. Broadband telephone services make these same generic functions available through Voice over Internet Protocol ("VoIP") and therefore are substitutes as well. While many of the services provided by wireline, wireless, and broadband competitors may not be the exact equivalent of an ILECs traditional wireline service, they are substitutable services, and are services which are increasingly attractive to customers at the prices at which they are offered.

As detailed in the Petitioners' prefiled direct testimony, cable companies, broadband providers and wireless companies already offer the Petitioners' customers a substitute to the incumbent's retail services. These competitive providers are competing for the Petitioners' customers over new technologies that do not rely on the small ILEC's wireline network, e.g., wireless uses its own network and cable companies are now able to offer quality telephony service over their expansive cable network. Also, the growth of the Internet, and the growth of broadband providers, is driving down measured minutes of use from access. An increasing number of users are simply dropping off the small ILEC's network altogether and instead relying on wireless, VoIP, and cable phones.

Given these technological changes, the analysis of competitive alternatives to the Petitioner's retail service must not be confined simply to basic local exchange service. The communications services offered by small ILECs include much more, such as access services enabling customers to reach long distance carriers, vertical features such as call waiting, call forwarding and three-way calling, Caller ID and DSL access. Without such services, a small ILEC could not survive, and for the Commission to confine its view of a competitive service to nothing more than an identical basic local exchange service would be to ignore the reality of conducting business as a small ILEC. Competition and competitive services must be viewed more broadly if the intent of the statute is to have any effect.

Competitive telecommunications providers generally have not followed the traditional service and pricing model used by incumbents with a separate basic local service offering. Instead, wireless and broadband providers have combined and packaged

multiple service offerings. Packages include local and long distance calling, as well as value-added features, such as Caller ID. These services often are offered by competitors on either an unlimited basis or as packages with fixed prices up to a certain number of minutes and usage charges for additional minutes. All of these services bypass the small ILEC's access service, and the wireless and cable services bypass the small ILEC entirely. As such, these services are substitutes and constitute competitive alternatives.

Whether customers perceive these services as substitutes for small ILEC wireline services is best demonstrated by the effect of the alternative services on the usage of the small ILEC's network. This effect is reflected in the reduction in use of the Petitioners' network including reduction in access minutes, loss of access lines, and loss of revenues. Any retail consumer with access to cellular service or a broadband connection can buy the wireless and broadband telecommunications packages. By using a wireless or broadband network, customers can now place and receive local and long distance calls without using the ILEC for access to the public switched telephone network. If utilization of the ILEC's network is decreasing, and if there is no reasonable ground to believe that people are simply not using telecommunications, then consumers are using substitutes, and competitive alternatives are available.

The form of the competitive alternatives does not make them any less of a substitute for the services the small ILECs offer. Thus, competitive alternatives may take the form of wireless telecommunications being used instead of long distance service utilizing the ILEC network. For consumers with broadband connections, whether by cable modem or DSL service, the substitutes may take the form of VoIP services,

including packages of unlimited long distance calling as well as vertical services through carriers such as Vonage.

The availability of competitive wireless alternatives is also shown by the presence of a competing “eligible telecommunications carrier” (“ETC”) within the exchanges of each of the Petitioners. In an Order dated October 7, 2005 in CC Docket 96-45, attached as Attachment F to the prefiled testimony of Michael C. Reed, the Federal Communications Commission granted the petition of RCC Minnesota, Inc. and RCC Atlantic, Inc. (together, “RCC”) to be designated an ETC within all of the exchanges served by the Petitioners. In order to receive ETC status, the applicant “must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.”¹ *Id.* at 2. This Order alone shows the existence of a competitive wireless alternative in all of the exchanges of the Petitioners.

Whether a competitive service is available to “a majority of the retail customers in each of the exchanges served by such small incumbent local exchange carrier” is another criterion that the Commission will need to determine within this proceeding. As the term “majority” is used within the statute, the Commission will need to find that more than fifty percent of each Petitioner’s customers within an exchange have access to either a competitive wireline, wireless or broadband service besides the Petitioner’s retail services, which the Petitioner’s prefiled testimony conclusively demonstrates.

¹ Under 47 CFR § 54.101, supported services include voice grade access to the public switched network, local usage, dual tone multi-frequency signaling or its functional equivalent, single party service or its functional equivalent, access to emergency services, access to operator services, access to interexchange service, access to directory assistance and toll limitation for qualifying low income customers. An ETC must offer all of them throughout the designated area. In its order, the FCC found that RCC had made this demonstration. *Id.* at 5. All of the exchanges of the Petitioners are listed in Appendix B to the FCC’s Order.

In determining whether competitive alternatives are available to customers, the Petitioners urge the Commission to take a practical approach to the analysis. Is at least one alternative telecommunications service available to the majority of each Petitioner's retail customers in each exchange? If so, is it reasonable to expect that customers can use this alternative as a substitute for the Petitioner's services? As demonstrated in the prefiled direct testimony, the answer to both of these questions is a resounding "yes."

II. RESPONSES TO SPECIFIC COMMISSION QUESTIONS

In the Secretarial Letter issued on May 29, 2007, the Commission posed two questions for the parties to address. The Petitioners address them in turn below.

A. Question 1: Does a service provided by an affiliate of the ILEC qualify as a competitive service for purposes of the statute?

First of all, the Petitioners point out that the answer to this question is not dispositive with respect to the alternative regulation plan of any of the Petitioners. The evidence furnished by each of the Petitioners demonstrates that at least one competitive alternative furnished by a non-affiliate is available to a majority of customers in each of the respective Petitioner's exchanges. Nevertheless, the Petitioners will address the question as directed. The position of the Petitioners is that the answer to the question posed is "Yes".

A service provided by an affiliate qualifies as a competitive service for purposes of the statute because nothing about an entity's status as an affiliate alters the effect of the competitive service on the small ILEC's regulated business. An affiliate pays the same price to use the small ILEC's network, and the effect of competitive bypass on the small ILEC is the same, whether the competition comes from an affiliate or someone else.

An affiliate of a small ILEC is required to deal at arm's length with the ILEC. For example, a non-regulated Internet service provider (either within the small ILEC or as an affiliate) must pay the regulated small ILEC for DSL connectivity pursuant to the small ILEC's interstate tariff. Affiliates and non-affiliates have the same access to this tariffed service.

Moreover, an entity's status as an affiliate in no way insulates the ILEC from competition from the affiliate. To the contrary, customers of an affiliate use the affiliate's wireless or broadband service to bypass the small ILEC. The impact of this bypass on the small ILEC's regulated business is the same. This establishes that an affiliate provides competitive alternatives to customers.

In the case of the Petitioners, to the extent that U.S. Cellular Corporation ("U.S. Cellular) can be considered an affiliate for purposes of the Commission's question, the service offered should be considered to be a competitive service. Although the ultimate parent company of the Petitioners, Telephone & Data Systems, Inc. ("TDS") owns approximately eighty percent (80%) of the voting stock of U.S. Cellular, U.S. Cellular is a separate publicly held company and is operated as a separate business with separate management. The operations of the Petitioners and U.S. Cellular in New Hampshire are not combined in any sense. These companies have developed their own customer bases and their own product offerings separately. Moreover, nothing in the text of the statute or the policy underlying it provides any indication that a competitor with the presence of U.S. Cellular should be excluded from the analysis of competitive alternatives. The bottom line is that U.S. Cellular and the Petitioners compete for the same body of customers.

B. Question 2: Does long distance service qualify as a competitive wireline service for purposes of the statute?

The answer to the Commission's second question depends on the specific factual scenario presented. In order for such long distance service to be considered a competitive service pursuant to the statute, it would need to be a substitute for services offered by the small ILEC Petitioners in this case. Since the question refers to "wireline service", the Petitioners assume that the Commission is referring to service provided by a traditional toll provider utilizing the public switched telephone network on both ends. Such a carrier would be purchasing switched access services from the small ILEC.

If the small ILEC does not offer retail long distance service itself and if the toll provider purchases switched access from the ILEC, then substitution of a small ILEC service for one offered by another provider would not occur and the presence of a long distance service provider would not meet the competitive alternative requirement of the statute in this scenario.

If the long distance provider offers a service that bypasses the small ILEC's basic service or switched access service, such a service would constitute a competitive alternative. An example is a special access connection from a retail customer's premise to an alternative provider which provides basic and/or long distance service to the retail customer.

IV. CONCLUSION

In order for a small incumbent local exchange carrier to be eligible to receive approval of an alternative form of regulation pursuant to RSA 374:3-b, the Commission must find that a majority of the retail customers in each exchange of that Petitioner has access to a wireless, wireline or broadband alternative service, and that alternative service

is “competitive” with the Petitioner’s retail service. In determining whether competitive alternatives are available to customers, the Petitioners urge the Commission to take a practical approach by considering whether a competitive service provides customers with the same functional telecommunications capabilities whereby customers will use those alternatives as substitutes for the Petitioner’s services.

The Petitioners believe that the statutory requirements for alternative regulation plans are met by each of the Petitioners, and that the alternative regulation plans meet the requirements of the statute. Therefore, each of the Petitioners respectfully requests that its alternative regulation plan be approved.

Respectfully submitted,

Kearsarge Telephone Company
Wilton Telephone Company
Hollis Telephone Company
Merrimack County Telephone Company, Inc.

By their attorneys,

**DEVINE, MILLIMET & BRANCH
PROFESSIONAL ASSOCIATION**

Dated: June 8, 2007

By:



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