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June 8, 2007

Debra Howland
Executive Director & Secretary
New Hampshire Public Utilities Commission
8 Old Suncook Road
Concord, New Hampshire 03301-7319

NHPUC JUN08'07 PM 4:22

RE: DT 07-027 TDS

Dear Ms. Howland:

Enclosed for filing with the Commission, please find an original and seven copies of New Hampshire Legal Assistance (NHLA) and the Office of Consumer Advocate's Brief in the above captioned matter.

Pursuant to the Puc rules copies have been served on all parties in this docket electronically.

Respectfully,

A handwritten signature in cursive script, appearing to read "MAH".

Meredith A. Hatfield
Consumer Advocate



Before the New Hampshire Public Utilities Commission

DT 07-027

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

**BRIEF OF NEW HAMPSHIRE LEGAL ASSISTANCE
ON BEHALF OF INTERVENOR ROSS PATNODE**

AND

THE OFFICE OF CONSUMER ADVOCATE

REGARDING STATUTORY INTERPRETATION OF RSA 374:3-b

I. Introduction

A. Procedural Posture

On March 1, 2007, Merrimack County Telephone Company (MTC), Kearsarge Telephone Company (KTC), Wilton Telephone Company (WTC), and Hollis Telephone Company (HTC), wholly-owned subsidiaries of TDS Telecommunications Corporation (TDS Telecom), (collectively, “TDS”) filed with the New Hampshire Public Utilities Commission (“Commission”) petitions for an alternative form of regulation (“AFOR”), pursuant to RSA 374:3-b. By Order of Notice dated April 10, 2007, the Commission consolidated its review of these petitions and scheduled a prehearing conference and technical session. On March 6, 2007 the OCA filed its notice to participate in this docket on behalf of residential ratepayers.¹

On May 4, as scheduled, the prehearing conference and technical session were held and resulted in a recommendation of the parties and Commission Staff (“Staff”) that the Commission consider in the first instance written analysis and argument on the statutory interpretation of RSA 374:3-b, to determine how the statute would be applied in its review of the TDS petitions.

On May 15, on behalf of Ross Patnode, a low-income resident of Hillsborough, New Hampshire and TDS customer, New Hampshire Legal Assistance (“NHLA”) filed a petition for late intervention pursuant to Puc 203.17. The Commission granted Mr. Patnode’s petition by secretarial letter dated May 29, 2007.

On May 29, through a secretarial letter, the Commission approved the recommendation and proposed briefing schedule of the parties and Staff. This brief is filed in accord.

¹ The OCA originally filed four separate letters in the four separate dockets established by the Commission. The Commission later consolidated the four cases into one.

B. RSA 374:3-b

The N.H. Legislature originally enacted RSA 374:3-b in 2005.² In 2006, the Legislature amended RSA 374:3-b.³ Neither the Commission or the N.H. Supreme Court has interpreted RSA 374:3-b as originally enacted or as amended. Moreover, the Commission has yet to promulgate rules defining RSA 374:3-b.⁴

In pertinent part, RSA 374:3-b authorizes a small independent local exchange carrier (“small ILEC”) subject to rate of return regulation to request commission approval of an AFOR “providing for regulation of retail services comparable to the regulation applied to competitive local exchange carriers.”⁵ The statute defines a small ILEC as one which serves fewer than 25,000 access lines.⁶

The Commission is authorized to approve a small ILEC’s request for an AFOR if it finds that six conditions are met:

- (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

² 2005 New Hampshire Laws Ch. 263 (H.B. 194).

³ 2006 New Hampshire Laws Ch. 154 (H.B. 1756).

⁴ The Commission has promulgated rules to guide the evaluation of petitions submitted pursuant to RSA 374:3-a, which authorizes alternative forms of regulation and incentive regulation for regulated utilities. *See* Puc 206.

⁵ RSA 374:3-b, II.

⁶ RSA 374:3-b, I.

(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.⁷

C. TDS Petitions

The petitions and exhibits filed by TDS are practically identical. Exhibit 1, the “Alternative Regulation Plan” (“AFOR Plan”), purports to establish “the method and applicable statutes and administrative rules by which the ... Commission will regulate the intrastate services offered by” each company.

The proposed AFOR Plan permits rate increases for basic retail service at any time as long as the rates do not exceed the basic service rates of the state’s largest ILEC and a 10% Rate Cap on annual increases for the first four years.⁸ Additionally, the AFOR Plan permits rates to increase over these limits for “exogenous changes.”⁹ In addition, the AFOR Plan permits TDS to retain its rural exemptions under 47 USC § 251(f).¹⁰

Exhibits 2 and 3 to the petitions are identical testimony of individuals employed by TDS Telecom.

II. Summary of Argument

Under RSA 374:3-b, III, the Commission must find that six major criteria have been fulfilled by a petitioner seeking an AFOR. Because the provision of basic local exchange service is a fundamental function of an ILEC, a central focus of the analysis required under the six criteria is a finding by the Commission that competition for basic local exchange service is

⁷ RSA 374:3-b, III.

⁸ Petitions of MTC, KTC, WTC and HTC, Exhibit 1 (AFOR plan), pp. 2-3, section 4.

⁹ Petitions of MTC, KTC, WTC and HTC, Exhibit 1 (AFOR plan), pp. 2-3, section 4.1. and 4.1.2., and pp. 4-6, section 7.

¹⁰ Petitions of MTC, KTC, WTC and HTC, Exhibit 1 (AFOR plan), p. 2, section 3.6.

available. With its expertise, the Commission can select from various methods available to help determine if competition for basic local phone exchange exists.

The Commission should use a traditional market-based analysis, including defining the relevant product market for basic local exchange service within the particular geographic market. Another part of the analysis could be setting benchmarks for market share and the number of suppliers that must be present within an exchange to result in true competition.

Then, if competition is established, the products in the market should be affordable for low-income customers, in light of RSA 374:3-b, III (e), and accessible to customers such as the elderly who may not be as likely as other customers to adopt new technologies.¹¹ The Commission should also consider the possible anticompetitive implications of RSA 374:3-b.

Finally, the Commission will need to carefully scrutinize the requests for additional upward rate adjustments. As a whole, rates under the TDS plan should be just and reasonable, and the Commission may use Puc 206 as a guidepost in evaluating the plan.

III. Statutory Requirements of RSA 374:3-b

A. TDS's corporate structure and functionality of the individual petitioners must be fully evaluated to determine if they meet the definition of a small ILEC.

The statute applies only to carriers of a certain size: those serving fewer than 25,000 access lines.¹² Although individually, MTC, KTC, HTC and WTC purport to serve fewer than 25,000 access lines,¹³ they are all wholly-owned subsidiaries of the same company, TDS Telecom.¹⁴ Together, the four TDS subsidiaries serve in excess of 33,000 access lines.¹⁵

¹¹ While the petitions were filed pursuant to RSA 374:3-b, the Commission should also evaluate them within the context and consistent with the purpose of the Federal Telecommunications Act of 1996 (47 USC 151 *et seq.*). The Telecommunications Act makes clear that “a State may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.” 47 USC §254(f).

¹² RSA 374:3-b, I.

¹³ Petitions of MTC, KTC, WTC and HTC, p. 1, paragraph 4.

¹⁴ Petitions of MTC, KTC, WTC and HTC, p. 1, paragraph 3.

Moreover, the petitions are practically identical, are supported by practically the same evidence and are being considered within a consolidated docket.

Consequently, prior to performing its analysis under the six-part test presented in the statute, the Commission should investigate and evaluate the arrangement, function and control of the TDS subsidiaries to determine if as structured and functioning they meet the definition of small ILEC. The remainder of this brief assumes for the sake of argument that the TDS subsidiaries meet this definition.

B. The Commission must undertake a fact-specific market-based analysis under RSA 374:3-b, III, using the plain and ordinary meaning of its terms.

The fundamental tenets of statutory interpretation provide, “when a statute’s language is plain and unambiguous, [the tribunal] need not look beyond it for further indication of legislative intent.”¹⁶ For the plain and ordinary meaning of statutory terms, the tribunal may look to lay and legal dictionaries.¹⁷ The tribunal may “also consider the meaning of the terms within the context” of the case.¹⁸

In this case, the statute requires the Commission to apply a test with six criteria, several of which include common terms requiring a fact-specific finding based on the proposed plan within the context of the service territories impacted by the plan.

For example, RSA 374:3-b, III, requires “the commission [to] 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

¹⁵ See Secreterial Letter dated May 26, 2007, p. 2.

¹⁶ *Benedetson v. Killarney, Inc.*, 913 A.2d 756, 760, __ NH __ (2006), citing *In the Matter of Giacomini & Giacomini*, 151 NH 775, 776 (2005).

¹⁷ In *Benedetson*, the Court turned to Webster’s Third New International Dictionary and Black’s Law Dictionary for the definition of terms set forth in the statute at issue in that case.

¹⁸ *Benedetson*, 913 A.2d at 761.

incumbent local exchange carrier” (emphasis added). In other words, the Commission must make a finding of fact of competition in each of the exchanges served. A “finding of fact” includes “[a] determination by a[n] ... administrative agency of a fact supported by the evidence in the record, usually presented at ... hearing.”¹⁹

In interpreting a statute, the Commission must serve as “the arbiter between the interests of the customer and the interests of the regulated utilities.”²⁰ In light of this duty and absent express language to the contrary contained in RSA 374:3-b, the Commission must undertake a market-based analysis to determine whether competition exists within each exchange. It is insufficient to simply accept mere representations of the petitioners.²¹ The first step in assessing the extent of competition is to define competition.

C. As used in RSA 374:3-b, III (a), “Competitive wireline, wireless, or broadband service” means products within the relevant market of basic local exchange service.

Competition means “rivalry between two or more businesses striving for the same customer or market.”²² ILECs are carriers of last resort. As such, an ILEC must provide basic local exchange service to all customers within its exchange. In order for a wireline, wireless or broadband service to be competitive to the service provided by the TDS affiliates, it must be substitutable for basic local exchange service.

¹⁹ Black’s Law Dictionary, Second Pocket Edition, West Group 2001.

²⁰ RSA 363:17-a.

²¹ See e.g., Aquarion Water Company of New Hampshire, Order No. 24, 651, 2006 NH PUC LEXIS 86 (2006); Energy North Natural Gas, Inc., 85 NH PUC 361 (2000); and New England Electric System, 84 NH PUC 502 (1999).

²² The American Heritage® Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004.

D. In construing RSA 374:3-b, III (a), the Commission must define the relevant geographic market and product market for basic local exchange service.

Defining the market is essential to a determination of the existence of competition. The Commission must analyze the market and find that other communicative platforms are actually in the same relevant market as basic local exchange service and are competitive with basic local exchange service.

To define a market is to identify producers that provide customers with alternative sources for a company's product or service; a properly defined market excludes other potential suppliers whose product is too different (i.e., product dimension of the market) or too far away (i.e., geographic dimension of the market).²³ Thus, a market is the arena in which significant substitution in consumption or production occurs.²⁴

1. The relevant geographic market is each of the exchanges served by TDS.

RSA 374:3-b, III (a) defines the relevant geographic market: "in each of the exchanges served by such small local incumbent exchange carrier." In other words, "competition" for basic local phone exchange must be evaluated within each individual exchange of TDS. Consequently, the plain and ordinary language excludes long distance service from consideration as competition, as it is not a product within the geographic market outlined in RSA 374:3-b, III (a). In fact, the phrase "each of the exchanges" is a geographic market, that is literally at least two steps removed "long distance." There are numerous exchanges, which are within the area code of New Hampshire, which is an intraLATA geographic market. Long distance service is area-code-to-area-code communication, called interLATA, and does not take place within an

²³ See 2A Phillip Areeda & Herbert Hovenkamp, Antitrust Law P 530a (2006).

²⁴ Id.

exchange. Thus, telecommunication providers that provide long distance service cannot be considered competitors to TDS for basic local exchange service.

Because the relevant geographic market is prescribed by the statute, the real task before the Commission is defining the relevant product market for basic local phone exchange. Defining the relevant product market is by necessity a fact-intensive inquiry.²⁵

2. Basic local exchange service in New Hampshire is in a different product market than cable broadband services, VoIP, cellular service, long-distance service and bundled services.

As a fundamental matter, the Commission should define which products are truly within the relevant product market of basic local exchange service. The regulatory treatment of cable broadband services, VoIP, cellular service, long-distance service and bundled services, the pricing and transaction costs of these products as well as the functionality of these products all indicate the only product that can be considered in the relevant product market with basic local exchange service is basic local exchange service alternatives. The Commission should then undertake the analysis of the relevant product market for basic local exchange service within each of the local exchanges, as prescribed by legislature's clear delineation the geographic markets.

Cable broadband, VoIP, cellular service and long distance²⁶ are treated differently than basic local exchange service. The FCC and the Courts have determined that cable broadband, VoIP and cellular service are "information services," not "telecommunications services."²⁷

²⁵ See 2A Phillip Areeda & Herbert Hovenkamp, Antitrust Law P 530a (2006).

²⁶ See 47 USC §151 *et seq.*

²⁷ See In the Matter of Federal-State Joint Board on Universal Service, 13 F.C.C.R. 11501, 11522-11523 (1998) (finding that cable broadband does not "provide" telecommunications services, rather, they are users of telecommunications services); Nat'l Cable & Telecomm. v. Brand X Internet Serv., 125 S. Ct. 2688, 2710-12, 162 L. Ed. 2d 820, 850-52 (2005) (concluding that the FCC's construction of cable broadband as an "information service" was a reasonable); Vonage Holdings Corp. Petition For Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 FCC Rcd 22404 (2004)(reclassified VOIP "information service" over different characterization by Minnesota based on preemption).

Wireless service is also treated differently than basic local exchange service. Wireless carriers are called commercial mobile radio service or CMRS providers who essentially offer one-way or two-way radio communication services between land stations and mobile receivers.²⁸ In addition, New Hampshire statute excludes regulation of cellular service by the Commission.²⁹

Therefore, cable broadband, VoIP, cellular service and long distance are different products than basic local exchange service and are regulated differently. As a result, these products are not sufficient substitutes for basic local exchange service, which provides a service that should be available to all customers within a carrier's service territory.

The pricing of cable broadband, VOIP, cellular service, bundled services and long distance also indicates these products are in a different market than the market for basic local exchange service. "The more nearly perfect a market is, the stronger the tendency for the same price to be paid for the same thing at the same time in all parts of the market."³⁰ Meaningful competition requires relatively equal pricing across products.

The basic monthly rate for Merrimack County Telephone Co. is \$11.20.³¹ In contrast, the basic monthly cellular plans of some New Hampshire-based providers are approximately \$39.99.³² As such, basic cellular service may well cost almost 400% of the cost of the basic local exchange service of MCT. Therefore, cell phone prices cannot moderate the prices for basic local exchange service, and can not be considered in the same market as basic local exchange service.

²⁸ See 47 CFR § 20.3.

²⁹ See RSA 362:6.

³⁰ See 2A Phillip Areeda & Herbert Hovenkamp, Antitrust Law P 530a (2006), citing A. Marshall, Principles of Economics 385 (1890).

³¹ See NHPUC No. 9, Part II – Local, Section 1, Fourth Revised Sheet 4, issued March 1, 2007, effective April 1, 2007.

³² See Attachment A (Verizon and Sprint Cell Phone Pricing Plans).

Those who use telecommunication products which require access to the internet must first pay for the internet, perhaps even broadband, and also pay for a computer. This increases overall transaction prices, putting so-called “computer communicators” in a much different market. Importantly, many low-income persons cannot afford a computer and the related information services necessary to become “computer communicators.”³³ Differential pricing as well as the increased transaction costs of these internet-based telecommunication products indicate that they cannot be considered part of the relevant product market for basic local exchange service.

Part of the reason the different products mentioned above have higher prices is because consumers are willing to pay more for the different features of these products. Functionally, cellular service, VoIP and cable and cable broadband as well as bundled services are much different than basic local phone exchange service.³⁴ For example, cellular phones provide additional value to customers because they are mobile and often include long distance service. Basic Local exchange service is not mobile outside of one’s home and by definition is not long distance.³⁵ The fact that the products mentioned above are functionally very different than basic local exchange service indicate that the relevant product market for basic local exchange service is limited to only basic local exchange service, provided by CLECs.

³³ See National Telecommunications and Information Administration, *Falling Through the Net: Defining the Digital Divide* 5-9 (1999), available at <http://www.ntia.doc.gov/ntiahome/fttn99/FTTN.pdf> (presenting demographic and geographic traits that are “significant determinants of a household’s likelihood of owning a computer or accessing the Internet from home”); see also Maggie Jackson, *Nonprofit Builds A Bridge Across the Digital Divide*, *Boston Globe*, June 04, 2006, at G1 (“Just 23 percent of households with annual incomes of less than \$ 15,000 have home Internet access”).

³⁴ In fact, bundled services often involve the combination of additional products above and beyond the relevant product of basic local exchange service.

³⁵ It should be noted that if cellular service is considered “competitive,” the Commission must then consider the impact of TDS’s 80% hold of US Cellular on competition. as US Cellular purports to serve areas within one or more of TDS’ exchanges. See e.g., *Merrimack County Telephone*, 2002 N.H. PUC LEXIS 45 (2002).

CLECs, providing basic local phone exchange on the exchanges of TDS, can be the only telecommunications providers considered as potential competitors to TDS in the relevant product market of basic local exchange service. However, because TDS enjoys a rural exemption from unbundling local phone network elements to CLECs under 47 USC 251(f), it is very difficult to see how TDS can demonstrate that such competition actually exists. Nevertheless, TDS bears the burden of showing that it, the dominant firm providing basic local exchange service in each of its exchanges, has competition from CLECs which also provide basic local exchange service in each of TDS' exchanges. TDS should bear a heightened burden in demonstrating that firms providing other very different products/alternative platforms provide a product within the relevant product market of basic local exchange service, within the relevant geographic market boundary of each exchange of TDS.

E. Speculative competition is not “competitive” under RSA 374:3-b, III (a).

As mentioned, in order to find that competition for basic local exchange service is available to a majority of the customers within any of TDS' exchanges, the Commission must undertake an intensive analysis of the telecommunication products presently available.

An outdated line of thinking about markets called the “Chicago School” of economics, which has a strict adherence to price theory and an assumption that the general threat of entry tends to make anticompetitive conduct unprofitable.³⁶ However, this school of thought fails to consider, among other things, significant barriers to entry in traditionally monopolized services and significant transition costs across all customer classes,³⁷ particularly customer classes with low-income.

³⁶ See Ashutosh Bhagwat, *Unnatural Competition?: Applying the New Antitrust Learning to Foster Competition in the Local Exchange*, 50 Hastings L.J. 1479 (1999).

³⁷ Id.

The mere “existence” of alternative telecommunications platforms or products does not constitute evidence of competition.³⁸ The mere “potential for” alternative telecommunications platforms or products does not constitute evidence of competition. For example, the Commission cannot speculate that competition exists within each exchange simply because CLECs *may be* registered or *have applied* to provide basic local exchange service within TDS’ exchanges. CLECs must *actually* provide basic local exchange service customers within each exchange.

Additionally, the ability of the dominant firm, TDS, to foreclose the market not only to basic local exchange service (advanced in large part by retaining its rural exemption), but also to secondary markets must be considered. This is especially true with regard to the impact on residential ratepayers. Therefore, any position based upon the “Chicago School” of thought regarding the existence of competition should be rejected by the Commission.

The Commission cannot merely speculate that competition exists. Additionally, the Commission cannot predict that competition might exist sometime in the future; it clearly must “find” that competition currently exists. The plain and ordinary meaning of the language requires nothing less.

G. **The Commission should create benchmarks for the necessary market share of basic local exchange service taken from TDS in each exchange, as well as the number of firms supplying basic local exchange service in each exchange.**

The Commission should require evidence of the market share of the non-dominant providers’ capture of TDS sales in basic local phone exchange in each exchange. In addition, the

³⁸ Simplistic price theory alone fails to adequately consider game theory, the ability of firms to foreclose the market and the high costs of market entry in traditional monopoly domains. As an example, Vonage, the leading VoIP provider, is having trouble financially. Analyst: Vonage May Go Bankrupt, *Boston Globe*, report from Bloomberg News: http://www.boston.com/business/globe/articles/2007/03/28/analyst_vonage_may_go_bankrupt/

Commission may also need to set a benchmark or use an index³⁹ in determining the number of competitors in each exchange required to result in meaningful competition. In doing the latter, the Commission should consider service quality indices for each product within each exchange in order for a particular service to be considered competitive. In doing the former, a market share analysis should be based on total customers actually using basic local exchange service in each exchange, the relevant product market, not the simply access line loss of the ILEC or the predicted access line loss.

H. To satisfy the requirement of competitive alternatives, the relevant product must be affordable for a majority of customers, including those with low incomes.

If the Commission determines that competition exists for basic local exchange service within the TDS exchanges, it must then determine whether it “is available to a majority of the retail customers.”⁴⁰ In addition, the plan must “preserve universal access to affordable basic local exchange service.”⁴¹ Such service is a life line to the elderly and to those confined to their home, and any competitive alternatives must provide such service. The word “majority” fits clearly within the context of an evaluation of the relevant market in each exchange mandated by RSA 374:3-b, III (a). As such, for the relevant product to be truly “available,” customers must be able to afford the product.⁴²

As a result, the Commission must not only find meaningful competition for basic local exchange service in each exchange, it must also determine that low-income persons can afford the product in each exchange. In other words, a product must be available at an affordable price.

³⁹ See e.g., the Herfindahl and Hirschman Index, utilized by the Federal Trade Commission (FTC).

⁴⁰ RSA 374:3-b, III (a).

⁴¹ RSA 374:3-b, III (e).

⁴² The word “available” in RSA 374:3-b, III (a) precedes and therefore modifies “majority.” Available means “present or ready for immediate use.” See Definition #3 of “Available,” from Merriam-Webster online dictionary: <http://www.merriam-webster.com/dictionary/available>. A product is not “present or ready for immediate use” if it is merely speculated to exist in a market or if it is not readily able to be purchased for immediate use.

This is consistent with the universal service mandate of RSA 374:3-b, III (e), that any “plan preserves universal access to affordable basic telephone service.” Therefore, TDS bears the burden of demonstrating that a majority of customers, including those with low-incomes, can afford a relevant product within the market for basic local exchange service.

IV. The Commission should consider anticompetitive policy considerations and strictly limit rate adjustments.

In assessing TDS’ plan, the Commission must also consider the anticompetitive implications of RSA 374:3-b. Generally, state action is immune from antitrust enforcement.⁴³ Where private actors are granted a degree of private regulatory power, as is possibly the case here, the regulatory scheme may be reviewed under § 1 (of the Sherman Antitrust Act 15 USC § 1).⁴⁴ Additionally, §601(b)(1) of the Telecommunications Act provides that “nothing in this Act ... shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”⁴⁵ Further, states waive their Eleventh Amendment immunity by participating in a regulatory scheme created by Act.⁴⁶

A. RSA 374:3-b, III (b) may amount to a horizontal restraint on trade.

The preamble to the Telecommunications Act of 1996 makes clear that lowering prices for telephone service is a central purpose of the Act, stating: “Act: To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”⁴⁷

⁴³ See *Parker v. Brown*, 317 US 341, 351-352 (1943).

⁴⁴ See *Fisher v. Berkeley*, 475 U.S. 260, 267-268 (1986).

⁴⁵ See Telecommunications Act of 1996, (Feb. 8, 1996), Pub. L. No. 104-104, Title VI, §601(b)(1), 110 Stat. 143.

⁴⁶ See *MCI Telcoms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000).

⁴⁷ See Telecommunications Act of 1996, (Feb. 8, 1996), Pub. L. No. 104-104, 110 Stat. 56, Preamble to the “Act”.

However, contrary to the Act, RSA 374:3-b, III (b) allows ILECs the opportunity to increase prices for basic local phone exchange in relation to the largest ILEC. Moreover, the explicit connection in pricing between a small ILEC and the largest ILEC may well amount to a horizontal restraint on trade in pricing.

Finally, because TDS is classified as a rural carrier, the Commission must also consider how the price increase allowance of the AFOR scheme may impact rural rates in light of obligations of universal service under 47 USCS § 254(b)(3).⁴⁸ TDS bears the burden of showing that the price increase allowance provision of RSA 374:3-b, III (b), with respect to its petitions promotes competition, preserves universal service, and results in just and reasonable rates.⁴⁹ As the Commission is aware, the higher the prices, the more difficult it is for persons on fixed and low incomes to afford basic local exchange service.

B. The rural exemption from unbundling, coupled with RSA 374:3-b, IV, may enable a small ILEC to leverage monopoly power.

Among the proposed terms of its AFOR, TDS retains its rural provider status.⁵⁰ As discussed above, TDS enjoys a broad exemption from the network unbundling requirements of 47 USC §251(c), which were designed to foster local competition in local phone exchange. TDS's plan also allows it to provide bundled services under RSA 374:3-b, IV.⁵¹ If the Commission approves both of these terms, TDS will be in a position to offer bundled services as well as to continue to prevent many competitors from accessing "necessary" elements of TDS' network that competitors may need to compete in TDS's area of service and in emerging technology markets. Importantly, many of the emerging markets do not receive extensive

⁴⁸ See also *Qwest Communs. Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005)(the disparity in rates between rural and urban customers must be considered in light of the goal of universal service).

⁴⁹ See also RSA 378:8.

⁵⁰ See Petitions of MTC, KTC, WTC and HTC, Exhibit 1, p. 2, item 3.6.

⁵¹ See Petitions of MTC, KTC, WTC and HTC, Exhibit 1, p. 2, item 12.

federal pricing oversight.⁵² As a result, bundling, coupled with price deregulation and the retention of a rural exemption, will result in almost no pricing oversight of TDS's service packages.

Without meaningful pricing oversight by the state or the federal government, TDS may be able to leverage the monopoly power of its dominant position in basic local exchange service to cause consumers to have less market power in other markets such as broadband. This would have a particularly damaging impact on low-income consumers who struggle for access to emerging technologies.

Even without monopoly leveraging, because the pricing and transaction costs of alternative platforms appear much higher than basic local exchange service, the Commission should not reasonably expect TDS's basic local exchange service rates to remain near current levels. As a result, the proportion of low-income residential customers able to afford to purchase the "secondary" or "emerging" products, with the increased costs of their basic local exchange service will be dramatically reduced. TDS bears the burden to show that this will not happen.

C. The Commission should strictly confine "rate adjustments" to those directly related to major government regulation post-petition.

The Commission should strictly construe the phrase in RSA 374:3-b, III (b) that "...the plan may provide for additional rate adjustments, with public commission review and approval, to reflect changes in federal, state, or local government taxes, mandates, rules, regulations, or statutes." First, the government action must not be reasonably foreseeable. Second, the additional costs alleged to have been incurred must be shown to be directly related to the government action.

⁵² See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 200 FCC Rcd 14853 (2005)(where the FCC classified ILECs broadband Internet access services as unregulated "information service").

Third, the additional costs alleged to have been incurred cannot be evaluated in a vacuum and without regard to TDS's overall business and finances; the Commission should be assured that the costs can truly be isolated. Fourth, the Commission should set a benchmark of a significant cost impact that might be allowable. Fifth, the consequential rate adjustment in response to the additional alleged costs must be considered in light of the impact on universal service.⁵³

D. The Commission should strictly confine “additional rate adjustments” to a level that does not exceed the rates of the incumbent ILEC.

The plain language of the statute requires the Commission to limit allowances for exogenous changes to those that result in rates that are below that of the largest ILEC. The exogenous costs clause follows the 10% rate cap and no longer follows the clause concerning the largest ILEC.⁵⁴ Therefore, the Commission should interpret the language of RSA 374:3-b, III(b) as limiting any additional cost recovery should not result in exceeding the rates of the largest ILEC.

V. An AFOR pursuant to RSA 374:3-b must also comply with RSA 378.

Although a carrier under an approved plan pursuant to RSA 374:3-b would no longer be subject to traditional rate of return regulation, the Commission must still ensure that rates remain just and reasonable.⁵⁵ In determining just and reasonable rates, the Commission must ensure that the public will not be charged rates which are higher than required, while ensuring that the rates will yield not less than a reasonable return on costs.⁵⁶ RSA 374:3-b does not change the Commission's responsibility to ensure that utilities' rates are just and reasonable.

⁵³ See RSA 374:3-b, III (e).

⁵⁴ Compare RSA 374:3-b, III (d) (2005) as opposed to the same section in 2006.

⁵⁵ See RSA 378:1 *et seq.*

⁵⁶ See New England Telephone & Telegraph Co. v. State, 113 N.H. 920 (1973).

In addition, the New Hampshire Supreme Court has held that “[a] just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation.”⁵⁷ In addition, the New Hampshire Supreme Court has cautioned that “any attempt to judge reasonableness [of rates] apart from [the traditional ratemaking] process would ... risk ... unconstitutionality.”⁵⁸

TDS bears the burden under RSA 378:8 to show their rates under the AFOR plan will be just and reasonable. In assessing whether TDS has met its burden, 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.⁵⁹

Further, because RSA 374:3-b, III (b) explicitly pairs the rates of the small ILEC with the largest ILEC, 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.

VI. The Commission’s analysis of RSA 374:3-b may be guided by Puc 206.06

In addition to the aforementioned market analyses, the Commission may consider Puc 206.06 in its analysis of TDS’s AFOR plan. First, as a matter of statutory interpretation, RSA 374:3-b allows small ILECs to seek an AFOR and its placement next to RSA 374:3-a, a sister AFOR provision, may lend itself to the same rules of interpretation. Second, because the Commission has yet to adopt rules for the interpretation of RSA 374:3-b, the rules governing RSA 374:3-a may help guide the evaluation of TDS’s petition.⁶⁰

⁵⁷ Petition of Public Service Co. of New Hampshire, 130 N.H. 265, at 274 (1988)

⁵⁸ Appeal of Richards 134 N.H. 148, 160 (1991) quoting Appeal of Conservation Law Foundation, 127 N.H. 606 (1986).

⁵⁹ Kearsarge Telephone Company, 87 NH PUC 110, 111-112 (2002).

⁶⁰ See Puc 206.

TDS must show that affordable basic local exchange service will be provided under its proposed AFOR plan. Puc 206.06 can as a minimum serve as a guidepost for the Commission. Under Puc 206.06(b)(6), the petitioner must “describe in detail,” among other things, how the plan will affect “access to basic utility service to residents throughout the state, also known as universal service.”⁶¹

VII. RSA 541-A:33 and RSA 541-A:34 mandate discovery and a hearing.

DT 07-027 is a contested adjudicatory case. Market definition, market share, corporate structure as well as the other issues discussed above require fact-intensive evaluations on a case-by-case basis for each petition. The Commission should proceed to investigate these issues, set benchmarks, and make requisite findings after reviewing evidence provided by the petitioner. Pursuant to RSA 541-A:33 and RSA 541-A:34, the Commission must proceed with discovery and receive evidence from participants in the proceeding in order to adequately make findings on these very fact-intensive issues.

VIII. CONCLUSION

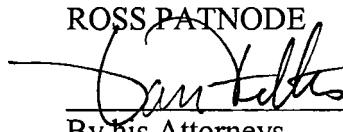
While regulated (*i.e.*, basic local exchange service) and unregulated (*e.g.* cable broadband, cellular service, etc.) cannot be viewed in isolation, CLECs providing basic local exchange service are the only real competitors to small ILECs in the relevant product market of basic local exchange service. Before making a finding that competition for basic local exchange service exists, the Commission first must define the relevant product of basic local exchange service and evaluate competition in each exchange on a case-by-case basis. The Commission must also set benchmarks for competition within each exchange. Importantly, as part of its assessment, the Commission must undertake to ensure that affordable universal phone service remains available to all customers at just and reasonable rates and that a majority of low-income

⁶¹ See Puc 206.06.

persons can afford the technology. This market-based analysis of competition for basic local exchange service is critical, as low-income customers, the elderly and the significant percentage of residential consumers who live and/or work in rural areas could be disproportionately and negatively impacted by approval of this plan.

Respectfully submitted,

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Date: June 8, 2005



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America's Choice Single Line Calling Plans


All Plans Include:

- Unlimited National  Calling Minutes (mobile to mobile)
- No Domestic Roaming or Long Distance Charges
- Unlimited Night & Weekend Minutes

Monthly Anytime Minutes	Select Plan ✓Unlimited Messaging* to anyone on any network in the U.S.		Per-Minute Rate After Allowance
	Basic Plan	Monthly Access	
450	\$39 ⁹⁹	\$59 ⁹⁹	45¢
900	\$59 ⁹⁹	\$79 ⁹⁹	40¢
1350	\$79 ⁹⁹	\$99 ⁹⁹	35¢
2000	\$99 ⁹⁹	\$119 ⁹⁹	25¢
4000	\$149 ⁹⁹	\$169 ⁹⁹	25¢
6000	\$199 ⁹⁹	\$219 ⁹⁹	20¢

America's Choice Family SharePlan® Calling Plans

All Plans Include:

- Unlimited National  Calling Minutes (mobile to mobile)
- No Domestic Roaming or Long Distance Charges
- Unlimited Night & Weekend Minutes

Shared Monthly Anytime Minutes	Select Plan ✓Unlimited Messaging* to anyone on any network in the U.S.		Per-Minute Rate After Allowance
	Basic Plan	Monthly Access—for the first two lines	
700	\$69 ⁹⁹	\$99 ⁹⁹	45¢
1400	\$89 ⁹⁹	\$119 ⁹⁹	40¢
2100	\$109 ⁹⁹	\$139 ⁹⁹	35¢
3000	\$149 ⁹⁹	\$179 ⁹⁹	25¢
4000	\$199 ⁹⁹	\$229 ⁹⁹	20¢
6000	\$299 ⁹⁹	\$329 ⁹⁹	20¢

Add a Line for \$9⁹⁹ Up to 3 Additional Lines.

*Applies when sending and receiving Text, Picture, and Video Messages with Verizon Wireless and non-Verizon Wireless customers in the United States, plus Instant Messages, and Text, Picture, and Video Messages sent via email. International Text Messaging is 15¢ per message received and 25¢ per message sent. Airtime charges apply when sending/receiving Picture and Video Messages. Premium Messaging programs not included. Messaging is available from within the National Enhanced Services Rate and Coverage Area, and is not available throughout the America's Choice Rate and Coverage Area.

Coverage Area

Anytime Minutes, National IN Calling Minutes, Night & Weekend Minutes, and Per-Minute Rate are for use from within the America's Choice Rate and Coverage Area.

Minimum Term, Activation & Early Termination Fees:

One- or two-year minimum term required per line. Activation Fee/line: \$35, except \$25 for secondary Family SharePlan lines with two-year minimum term. Early Termination Fee: up to \$175 per line.

Taxes, Surcharges & Fees:

- Taxes, surcharges, and fees, such as E911 and gross receipt charges, vary by market and as of April 1, 2007, add between 4% and 34% to your standard monthly access and other charges.
- Monthly Federal Universal Service (11.7% of interstate and international telecom charges, as of April 1, 2007; varies quarterly based on FCC rate), Regulatory (4¢/line) and Administrative (70¢/line) charges are Verizon Wireless charges, not taxes, and are subject to change. For more details on these Verizon Wireless charges, call 1.888.684.1888.

For included features, see page 7. For additional details, see the Important Information and Coverage Maps section in the back of this brochure.

Service Plans & Rates



All Power Pack plans include:

Night calling
starting at
7PM

No Roaming
Charges

Unlimited
Night & Weekend
Minutes

Nationwide
Long Distance

Key:

△ For Sprint phones
□ For Nextel phones

▲ ■ Sprint Power Pack Plans

Anytime Minutes	Monthly Rate*	Unlimited Night & Weekend Minutes	Unlimited Sprint Mobile to Mobile	Unlimited Nationwide Nextel Walkie-Talkie	Additional Anytime Minutes
450	\$39 ⁹⁹				45¢/min.
900	\$59 ⁹⁹				40¢/min.
1350	\$79 ⁹⁹	Nights Start at 7PM	Included on Sprint Phones	Included on Nextel Phones	35¢/min.
2000	\$99 ⁹⁹				25¢/min.
4000	\$149 ⁹⁹				25¢/min.
UNLIMITED	\$199 ⁹⁹				N/A

Two-year subscriber agreement required with all plans.

Power Pack Add-ons

Unlimited
Night Calling at
6PM

50 Add-on
Minutes

\$5/month

\$5/month

Add-on minutes limited one per plan.

▲ ■ Sprint Power Pack Family Plans

Share your minutes between two phones.

Shared Anytime Minutes for Two Phones	Monthly Rate*	Unlimited Night & Weekend Minutes	Unlimited Sprint Mobile to Mobile	Unlimited Nationwide Nextel Walkie-Talkie	Additional Anytime Minutes
▲ 550	\$59 ⁹⁹				45¢/min.
700	\$69 ⁹⁹				45¢/min.
1400	\$89 ⁹⁹	Nights Start at 7PM	Included on Sprint Phones	Included on Nextel Phones	40¢/min.
2100	\$109 ⁹⁹				35¢/min.
3000	\$149 ⁹⁹				25¢/min.

▲ Sprint Add-a-Phone each additional line \$9.99/mo. (lines 3-5)

Two-year subscriber agreement required with all plans.
Plans available for sharing between Sprint or Nextel phones.

Power Pack Add-ons

Unlimited
Night Calling at
6PM

100 Add-on
Minutes

Not Available for the 550 plan

\$10/month

\$10/month

Nextel Add-a-Phone each additional line \$20/mo. (lines 3-5)

Add-on minutes limited one per plan.

*Rates exclude taxes & Sprint Fees (including USF charge of up to 2.26% that varies quarterly, cost recovery fees up to \$2.83 per line, & state/local fees that vary by area). Sprint Fees are not taxes or government-required charges. See Terms of Service section for complete plan details.

Coverage is not available everywhere — see our mapping brochure for details.

Plans also include:

while on the Nationwide Sprint PCS Network reaching more than 250 million people and the Nextel National Network reaching more than 263 million people:

> Numeric Paging > Three-Way Calling > Voicemail
> Call Waiting > Caller ID > Call Forwarding — 20¢/min.

△ Get the largest wireless voice calling area reaching more than 295 million people in the U.S., Puerto Rico, the U.S. Virgin Islands and Guam with your Sprint phone and a plan that includes roaming.

Night & Weekend Hours:

7PM
7PM-7AM Mon. - Thurs.
7PM Fri. - 7AM Mon.

6PM
6PM-7AM Mon. - Thurs.
6PM Fri. - 7AM Mon.