

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 07-027

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

CLOSING STATEMENT OF KEARSARGE TELEPHONE COMPANY

In June, TDS submitted evidence in accordance with Order No. 25,103, dated May 14, 2010 (“Second AFOR Order”) establishing that Comcast, a nationwide company *not regulated by this commission*, was marketing into the Kearsarge Telephone Company (“KTC”) exchanges and converting customers to its telephone service. The Commission held in the Second AFOR Order that evidence establishing that Comcast is actually offering service as a CLEC in the KTC exchanges of Andover, Boscawen, Chichester, Meriden and New London, will be sufficient to demonstrate that a competitive alternative is available, and that, if, within 30 days of the date of that order, TDS filed an affidavit establishing that a voice service “is *currently being offered in those exchanges*” [emphasis original], accompanied by print or other record of such advertisements being made public, “*it will meet its evidentiary burden*” [emphasis supplied].¹ This Order was the result of 3 ½ years of work, during which the Commission considered two rounds of testimony, two rounds of briefing, numerous motions and counter-motions. and held seven hearings. It was a comprehensive order, with extensive analysis of the arguments of the parties, and included tables that unambiguously displayed the Commission’s findings.

¹ Second AFOR Order at 26.

I. This Phase of the Proceeding is Confined to the Single Issue of Whether Comcast is Offering Service in the KTC Exchanges.

The Second AFOR Order, which found that Comcast offers a competitive alternative to traditional telephone service, is consistent with prior Commission decisions. For example, in response to the Comcast application to enter the TDS territory, the Commission separately found that Comcast's proposed services compete with TDS. It found that "Comcast requests permission to offer telephone and other services in competition with the TDS Companies in their service territories,"² and that "[c]urrently, other competitive providers, including a TDS affiliate, offer unregulated cellular telephone services that compete with local exchange service in the TDS service territory."³ It also found that "both regulated and unregulated services already contribute to the competitive market in the TDS Companies' service territories,"⁴ concluding that "the competition proposed by Comcast to be fair and the ILECs have not presented sufficient evidence to rebut that finding."⁵

Accordingly, the Second AFOR Order confined the current inquiry to the single issue of whether Comcast is offering a voice service – period. The Commission held that, in regard to KTC:

[a]s stated above, we recognize that these are evolving markets and that certification as a CLEC is intended in most cases to lead to offerings of service. Evidence establishing that Comcast is offering service as a CLEC in the exchanges of Andover, Boscawen, Chichester, Meriden and New London, will be sufficient to demonstrate that a competitive alternative is available. If, within 30 days of the date of this order, TDS files an affidavit establishing that a voice service is *currently being offered in those exchanges* [emphasis original],

² DT 08-013, Order 24,938 at 18 (administratively noticed by the Commission in the Second AFOR Order at 19).

³ *Id.* at 19.

⁴ *Id.*

⁵ *Id.* at 19-20.

accompanied by print or other record of such advertisements being made public, *it will meet its evidentiary burden* [emphasis supplied].⁶

The Commission further clarified that “[w]e will hold the record open for 30 days to allow the TDS Companies to submit evidence as discussed herein establishing the presence of competitive wireline service *as delineated herein*. . . . If we find that the record supports a finding that Comcast is providing competitive voice offerings in all of the exchanges in question we will grant the petition for an alternative form of regulation for Kearsarge.”⁷ Regarding the due process rights of the other parties, the Commission provided that other parties could respond to the TDS evidence, but only as to whether Comcast was offering a service. “[W]e will . . . afford the parties an opportunity for discovery through a technical session and responsive testimony or evidence *regarding the availability of CLEC offerings in the exchanges in question*.”⁸

TDS has provided indisputable evidence that Comcast is offering, and providing, telephone service in KTC’s Andover, Boscawen, Chichester, Meriden and New London exchanges. Notwithstanding testimony by other parties that are critical of this evidence, it has stood up to examination and challenge. Furthermore, this was the only evidence required to satisfy this inquiry, since all other considerations have been disposed of by the Commission in prior decisions.

II. Comcast’s Telephone Service is a Competitive Alternative.

Notwithstanding the narrowness of the inquiry established in the Second AFOR Order, Mr. Bailey submitted testimony from his expert witness, Dr. Johnson, that was devoted almost entirely to his contention that the Commission has not determined that Comcast’s service is a

⁶ Second AFOR Order at 26.

⁷ *Id.* at 28 (emphasis supplied).

⁸ *Id.* (emphasis supplied).

competitive alternative. He rehashed most of his arguments about how competitiveness should be determined and reiterated his conclusion that Comcast's bundled offerings are not comparable to the telephone service offered by KTC.⁹

Dr. Johnson's testimony contradicts the holding of the Second AFOR Order when he asserts that "it is not sufficient to show that Comcast is providing an alternative [I]t must be a relevant, competitive alternative for a majority of the customers in each exchange."¹⁰ To that end, he has proposed an analysis so unworkable as to render KTC's task impossible. In his rebuttal testimony, he advised that KTC must conduct a service substitutability analysis¹¹ and a pricing comparison¹² (notwithstanding that he finds such a comparison "complicated"),¹³ determine the addresses of actual Comcast customers within each exchange,¹⁴ supply information on how many customers are purchasing video, broadband and voice services¹⁵ and the extent to which Comcast voice offerings are actually available to every customer within

⁹ Dr. Johnson noted in particular at pages 7-9 of his testimony that Comcast does not offer an economical low-end rate similar to what is available from KTC (oddly implying that KTC is not facing competition if Comcast is only picking off the high margin customers). However, Attachments TEM-5 through 13 of Mr. Murray's rebuttal testimony, Exhibit KTC-MTC 16P, provide evidence of a Comcast rate of \$19.99 per month. Furthermore, it appears that Dr. Johnson cherry-picked among various KTC rates in order to exaggerate the difference between KTC's rates and Comcast's rates. *See* Tr. 145:7-146:9. He was also inconsistent in his use of national studies, finding them reliable when they supported his opinion, *e.g.* FCC Video Competition Report, *see also* Tr. 91:23-92:2 ("We know, based on national statistics, that only about . . . 60 percent of those are even buying cable TV service"), but unreliable when they supported KTC, *see* Tr. 158:15-21 ("[T]he very heterogeneity of the numbers we're seeing on this [FCC] table limits the amount of weight I suggest you put on this sort of nationwide/statewide data.")

¹⁰ Johnson Rebuttal 19:13-17. *See also id.* 5-18, 19-22.

¹¹ *Id.* 3:22-4:2.

¹² *Id.* 3:2-5.

¹³ Tr. 136:12-137:11.

¹⁴ Johnson Rebuttal 5:14-15.

¹⁵ *Id.* 13:18-19.

every TDS exchange.¹⁶ He supplemented this advice at the hearing, where he added that KTC must also gauge the appeal of possible Comcast offerings by surveying the popularity of KTC's current phone and data services.¹⁷ Dr. Johnson also suggested that KTC produce maps of the Comcast footprint within each KTC exchange,¹⁸ but, as has been noted, this evidence has indeed been submitted and found by the Commission Staff to establish that Comcast does serve a majority of customers in the relevant KTC exchanges.¹⁹

Dr. Johnson has made these arguments previously in this proceeding in regard to both cable and wireless competition,²⁰ asserting that the Commission's analysis must consider pricing and marketing of bundled services packages. The Commission has never found this argument persuasive²¹ and should reject it once again.

Furthermore, without explaining how he developed this knowledge, Dr. Johnson testified in regard to Comcast's voice services marketing strategies, concluding that "Comcast isn't making much of an effort to compete in the market for telephone service."²² In particular, he testified that "Comcast's decision not to compete head-to-head with TDS in the voice telephone market, its decision not to aggressively promote stand-alone voice service, and its decision not to

¹⁶ *Id.* 15:13-14.

¹⁷ Tr. 148:18-23.

¹⁸ Johnson Rebuttal 15:18-19.

¹⁹ Tr. 80:18-81:2 (citing Rebuttal Testimony of Michael Reed) ("Ms. Gage included in her testimony that . . . 'the Kearsarge Telephone Company exchanges of Andover, Boscawen, Chichester, Meriden, and New London have broadband or cable television service to a majority of the customers.' Do you agree? And, the answer is 'Yes. Her analysis concurs with the information filed in our petition.'")

²⁰ Johnson Rebuttal 18-21 (July 17, 2009); Phase I, Tr. Day 2, 103:11-104:16. *See also* Bailey Brief at 25 (Nov. 6, 2009).

²¹ Order No. 24,852 at 18 (April 23, 2008) ("First AFOR Order"); Second AFOR Order at 13.

²² Johnson Rebuttal 12:1-2.

undercut or at least match TDS's prices for phone service are consistent with the long standing historical practices of most cable television providers.”²³

However, documentary evidence entered during the cross examination of Dr. Johnson showed that this is not the case. Evidence shows that adoption of the type of VoIP service provided by Comcast (which it characterizes and presumably reports as “Interconnected VoIP”) is increasing steadily while the number of traditional PSTN lines is decreasing.²⁴ Furthermore, VoIP service like Comcast's accounts almost entirely for the 44% of New Hampshire telephone lines that are served by competitors,²⁵ – a percentage that even Dr. Johnson volunteered is among the highest of any state.²⁶ Finally, evidence from Comcast's most recent Form 10-Q report establishes that its phone service is a large, fast growing, and highly profitable segment of its business, with gross margins of 84%, and that Comcast management is strongly committed to maintaining these results.²⁷ In fact, it has characterized the addition of 500,000 subscribers and a 13% increase in revenues as a development that falls short of expectations and requires steps to remedy.²⁸

In its First AFOR Order, the Commission adopted a broad definition of “competitive alternative” for purposes of RSA 374:3-b when it found, in respect to Wilton Telephone Company (“Wilton”) and Hollis Telephone Company (“Hollis”), that the third party alternatives

²³ Johnson Rebuttal 17:11-14. However, he cast doubt on his actual understanding of the New Hampshire telephone market by referring to the dominant ILEC as “New England Telephone, the Bell” rather than FairPoint, Tr. 100:8-9, and suggesting that Comcast's success in New Hampshire is primarily in “New England Telephone's” territory, Tr. 142:7-10.

²⁴ Tr. 111:11-20.

²⁵ Tr. 118:12-119:12.

²⁶ Tr. 142:1-2.

²⁷ Tr. 131:19-23

²⁸ Tr. 127:17-19; 129:12-14; 133:1-7.

were sufficient for those companies to operate under the alternative regulatory structure of their AFOR plans – which, it should be stressed, *do not entail full deregulation*. The Commission rejected the notion that fully competitive markets or competitiveness in an antitrust sense needed to be shown, finding that the wireless and broadband alternatives available were sufficient to meet that test. Likewise, as shown in Exhibits KTC-MCT 17 and 18, the FCC now considers VoIP subscriptions as comparable to traditional PSTN access lines when reporting on competition for local telephone service.²⁹

Moreover, even if the Comcast competition does not rise to the level of Dr. Johnson's standards (which we dispute), the Commission has ruled that because of the price protections in RSA 374:3-b, a fully functioning competitive market is not necessary to approve an AFOR plan.³⁰ Basic local service rates are protected by the universal service provisions of the plan as well as the statutory price protections in RSA 374:3-b, III(b) which cap those rates. The Commission applied this construction to the Wilton and Hollis companies, and is applying this to the KTC exchanges, directing that it is only necessary to establish that Comcast is offering voice service in those exchanges.

III. Thomas Murray's Affidavit and Rebuttal Testimony are Fully in Accord with the Directive of the Second AFOR Order.

TDS provided affidavits with evidence establishing that Comcast is offering its voice services in the relevant KTC exchanges, followed with Mr. Murray's rebuttal testimony that validated this information. The testimony of OCA's expert, Mr. Eckberg, criticized Mr. Murray's method of providing printouts from the websites of Comcast Authorized Dealers as evidence of Comcast's offerings in the KTC exchanges and challenged the credibility of Mr.

²⁹ See also Tr. 105:11-108:13.

³⁰ First AFOR Order at 26.

Murray's results, particularly in regard to the fact that Mr. Murray's results did not conform to the approach that Mr. Eckberg recommended. Mr. Eckberg made a number of statements in his testimony that can only be construed to allege that the information that Mr. Murray provided is not as reliable, not as accurate, and not as current as screenshots taken directly from the Comcast.com website, and may in fact be "nonsensical."³¹ Mr. Eckberg's claims were fully rebuttable.

Mr. Murray's rebuttal testimony responded to Mr. Eckberg's criticism by explaining how he performed his research. Mr. Murray's testimony shows that, indeed, his work can be duplicated whether using his search method or Mr. Eckberg's. He also showed that Mr. Eckberg's focus on screenshots as opposed to printouts was a non-issue.³² Thus, whether one uses Mr. Murray's search method or Mr. Eckberg's, and whether one uses screenshots or printouts, the result is the same: Comcast is providing voice service in each of the KTC exchanges delineated in the Commission's Second AFOR Order.

IV. The KTC AFOR Plan Ensures Universal Access to Affordable Basic Telephone Service.

In his testimony, Dr. Johnson also veered off on to a brief discussion of whether TDS has demonstrated that its AFOR Plan will preserve universal service.³³ Besides being irrelevant to the current inquiry, it is not even an issue. Upon approving the amended AFOR plans for Wilton and Hollis, the Commission found that Wilton and Hollis met the universal access

³¹ Eckberg Rebuttal 10:20.

³² As to OCA's observation regarding the volume of pages depicting the screenshots, this is the only way to properly represent those web pages if printouts are not acceptable particularly if, in the interest of thoroughness, every exchange is represented.

³³ Johnson Rebuttal 18:18-19:5.

requirement through the rate freeze (basic local service and Lifeline) elements of their plans.³⁴

Though the term of the rate freezes may be different, the same rate protections are found in the KTC modified plan. Furthermore, their basic local service rates are capped at the corresponding FairPoint rate.

In addition, Section 2.3 of the KTC Plan contains safeguards protecting ratepayers:

After providing the Company an opportunity for a hearing and in the event that the Commission determines that the Company does not meet the criteria for eligibility for an alternative regulation plan under RSA 374:3-b, the Commission may require the Company to propose modifications to the Plan or return to its prior form of regulation.

V. Conclusion

KTC is facing strong and aggressive competitors in the form of cable and wireless companies. KTC is not asking to be fully deregulated, as these competitors are, but only to be given the tools to more effectively respond to this competition. Given indisputable evidence that Comcast is providing a voice service in the KTC exchanges of Andover, Boscawen, Chichester, Meriden and New London, the Commission should approve the Plan for Alternative Regulation of Kearsarge Telephone Company.

³⁴ First AFOR Order at 28.

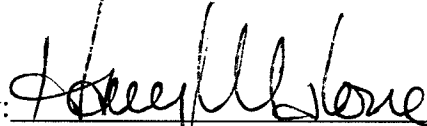
Respectfully submitted,

KEARSARGE TELEPHONE COMPANY

By its Attorneys,
DEVINE, MILLIMET & BRANCH, P.A.

Dated: October 19, 2010

By:

A handwritten signature in black ink, appearing to read "Frederick J. Coolbroth", written over a horizontal line.

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