

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

Phase 3

**OFFICE OF CONSUMER ADVOCATE'S MOTION *IN LIMINE*  
TO STRIKE PORTIONS OF TDS' REBUTTAL TESTIMONY**

1. On May 14, 2010, the Commission issued Order No. 25,103, concluding Phase 2 of this docket ("Second AFOR Order").
2. The Second AFOR Order expressly continued these proceedings<sup>1</sup> and provided Kearsarge Telephone Company ("KTC") with another opportunity to meet its burden in this case. The Second AFOR Order also provided Merrimack County Telephone Company ("MCT") with an opportunity to submit additional evidence on competitive wireline offerings.<sup>2</sup>
3. Specifically, the Second AFOR allowed KTC and MCT (together, "TDS" or "the Companies") to file additional evidence that voice service is currently being offered by Comcast in certain exchanges.<sup>3</sup> On June 11, 2010 KTC filed an Affidavit of Thomas E. Murray, with attachments, and on June 14, 2010 MCT filed an Affidavit of Thomas E. Murray, with attachments ("TDS' Initial Phase 3 Filings").

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<sup>1</sup> Order No. 25, 103 (May 14, 2010), at page 28 ("Second AFOR Order" is not a "final order that would trigger rehearing pursuant to RSA 541:3"); and Order No. 25,130 (July 15, 2010), at page 4 ("Procedural Order" denied requests "to designate Order No. 25,103 as final for purposes of rehearing and appeal under RSA 541:3"; consideration of evidence and statutory standards not complete).

<sup>2</sup> Order No. 25,130 (July 15, 2010), at pages 3-4 ("Procedural Order").

<sup>3</sup> Second AFOR Order, at p. 21 (MCT exchanges of Antrim, Contoocook, Henniker, Hillsborough and Melvin Village) and p. 26 (KTC exchanges of Andover, Boscawen, Chichester, Meriden and New London).

4. On September 2 and 3, 2010, pursuant to the approved “Phase 3” procedural schedule, NH Legal Assistance and the OCA filed testimony in response to TDS’ Initial Phase 3 Filings.
5. On September 20, 2010 TDS filed the rebuttal testimony of Thomas E. Murray, together with attachments numbering more than 200 pages (“Murray Rebuttal”).
6. The Murray Rebuttal includes new information which supplements TDS’ case in chief and should have been provided to the Commission and the parties in TDS’ Initial Phase 3 Filings pursuant to the Second AFOR Order. This new information is not properly provided to the Commission and the parties on rebuttal, and also impermissibly expands the scope of this phase of these proceedings.<sup>4</sup> This information includes:

- a. Specifically, on page 6, at 21 through page 8, line 5, Mr. Murray refers to and describes the process used to conduct new “specific address searches[.]”. The results of these new searches are found in Attachments TEM-5 through TEM-13, at Bates pages 44-203.<sup>5</sup> However, on line 10 of page 6, Mr. Murray acknowledges that this was “not the approach [he] used” in preparing TDS’ Initial Phase 3 Filing.<sup>6</sup>
- b. In addition, on page 9 at lines 14 through 16, Mr. Murray reference the results of TDS’ new “specific address searches” provided in Attachments TEM-5 through TEM-13, to support a new assertion that “Comcast is offering both separate voice service and the bundles that include voice

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<sup>4</sup> Procedural Order, at p. 3 (September 2010 hearing “will be limited to the new evidence submitted [by TDS on June 11 and 14, 2010] and whether it fulfills the requirements of RSA 374:3-b).

<sup>5</sup> Murray Rebuttal, at pages 44 through 203.

<sup>6</sup> See also Murray Rebuttal, page 6, lines 8-9 (Mr. Murray acknowledges that he did not use an “Address Specific Approach” when preparing the TDS Initial Phase 3 Filing).

service.”

- c. Similarly, on page 9, at line 17 through page 10, line 6, Mr. Murray offers a new explanation of the evidence in the TDS Initial Phase 3 Filing, and new evidence related to the Meriden exchange. This new Meriden exchange evidence is also provided in confidential Attachment TEM-15C, which was provided to parties eligible to receive confidential information, and was filed with the Commission on September 20, 2010.
7. All of the attachments to the Murray Rebuttal, including those containing new direct evidence, were created on or after September 7, 2010, well after the Commission’s deadline for TDS’ submission of a response to the Second AFOR Order.<sup>7</sup>
8. These portions of the Murray Rebuttal, including the referenced attachments (totaling over 100 pages), are improper attempts by TDS to supplement TDS’ Initial Phase 3 Filing, and to introduce new evidence after the parties have responded to TDS’ direct Phase 3 case.
9. The Commission should not countenance TDS’ attempt to present its case through rebuttal.<sup>8</sup> The Commission also should not consider this new evidence in determining whether competitive alternatives exist for a majority of TDS’ retail customers in each exchange, as required by RSA 374:3-b.
10. The Commission granted a similar Motion to Strike in Phase 2 of the case, finding that new analysis provided in rebuttal “would have been more properly filed as supplemental direct testimony and goes beyond what would normally be

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<sup>7</sup> See, e.g., Murray Rebuttal, Exhibits TEM-2 and TEM-4, at p. 1 (work “Performed on September 17, 2010). See also TDS Response to Oral Data Request dated September 24, 2010 (attached).

<sup>8</sup> Re Public Service Co. of New Hampshire, 71 N.H. P.U.C. 547, 549 (1986).

considered ‘rebuttal’ testimony.”<sup>9</sup> As the Commission noted in that Order, “‘rebuttal evidence’ is defined as ‘evidence given to explain, repel, counteract or disprove facts given in evidence by the adverse party.’”<sup>10</sup>

11. Consistent with this earlier Commission decision, the Commission should strike page 6 line 21 through page 8 line 5, of the Murray Rebuttal, as well as Attachments TEM-5 through TEM-13. In its recent testimony, the OCA pointed out that the TDS Initial Phase 3 Filing did not appear to contain the results of specific address searches.<sup>11</sup> Although TDS claims in the Murray Rebuttal to be addressing this “concern[ ],”<sup>12</sup> creating new evidence to support the Companies’ case in chief is simply not proper rebuttal of the OCA’s point. Specific address searches conducted in September 2010, which do not correspond to any searches conducted in the preparation of TDS’ Initial Phase 3 Filing, are improperly introduced on rebuttal.
12. The Commission should also strike page 9 lines 14 through 16 of the Murray Rebuttal. This portion of the Murray Rebuttal relates to Attachments TEM-5 through TEM-13, which should be stricken as discussed above. This portion of the Murray Rebuttal also attempts to use these new internet search results to support a new assertion about the types of services Comcast offers. This testimony is an improper attempt to fill in a gap in TDS’ direct evidence and does not refute the OCA’s assertion that the TDS Initial Phase 3 Filing does not

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<sup>9</sup> Second AFOR Order, at page 18.

<sup>10</sup> Id., at footnote 3 (citation omitted).

<sup>11</sup> See, e.g., Testimony of Stephen R. Eckberg, dated September 3, 2010, at page 10, lines 20-22 (“neither the Antrim-related printout in Attachments A to the MCT Affidavit nor any of the other printouts attached to the TDS Affidavits shows any address information”); and page 13, lines 7-9 (“If Mr. Murray had used [an “Address Specific Approach] approach, his Attachments A would have also shown address specific information which the printouts in the Attachments A did not”).

<sup>12</sup> Murray Rebuttal, page 6, lines 21-23.

provide specific plan or price information.<sup>13</sup>

13. Similarly, page 9, line 17, through page 10, line 6, of the Murray Rebuttal, as well as the referenced attachment TEM-15C, should be stricken. This portion of testimony is specifically offered for the purpose of “explain[ing] why [the TDS Initial Phase 3 Filing] provided the results of address searches for some exchanges, *e.g.* Meriden, but not others” as well as to provide “updated information” on the status of customer porting in the Meriden exchange. Because this new testimony and evidence is not related to and does not “explain, repel, counteract, or disprove” any factual assertions of the OCA in its recent testimony, it is not proper for rebuttal.
14. There may be other areas of Mr. Murray’s testimony that include impermissible new evidence, but due to time constraints the OCA has focused on the sections identified in this Motion.
15. Therefore, the Commission should strike the following portions of Mr. Murray’s rebuttal testimony :
  - a. Page 6, line 21, through page 8, line 5 and the corresponding Attachments TEM-5 through TEM-13;
  - b. Page 9, lines 14 through 16; and
  - c. Page 9, line 17 through page 10, line 6 and the corresponding Attachment TEM-15C.

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<sup>13</sup> See Eckberg Testimony, p. 11, lines 8-11 (“neither the Antrim-related print-out in the MCT Affidavit Attachment A nor any of the other printouts attached to the TDS Affidavits shows any specific plan with its pricing information. The TDS Affidavits only show general information about “Comcast Triple Play Deals” starting at \$99 — nothing specific at all”).

Wherefore, the OCA respectfully requests that the Commission provide the following relief:

- A. Strike these improper portions of Mr. Murray's rebuttal testimony;
- B. Or, in the alternative, give the sections described above no weight during the Commission's consideration of issues in Phase 3 of these proceedings; and
- C. Grant such other relief as justice requires.

Respectfully submitted,



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Meredith A. Hatfield  
Rorie E.P. Hollenberg  
Office of Consumer Advocate  
21 S. Fruit St., Ste. 18  
Concord, N.H. 03301  
(603) 271-1172  
[meredith.a.hatfield@oca.nh.gov](mailto:meredith.a.hatfield@oca.nh.gov)  
[rorie.e.p.hollenberg@oca.nh.gov](mailto:rorie.e.p.hollenberg@oca.nh.gov)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

September 24, 2010



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Meredith A. Hatfield

DEVINE  
MILLIMET

ATTORNEYS AT LAW

September 24, 2010

HARRY N. MALONE  
603.695.8522  
HMALONE@DEVINEMILLIMET.COM

**VIA ELECTRONIC MAIL**

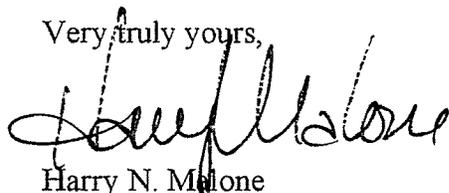
Meredith A. Hatfield, Esq.  
Office of Consumer Advocate  
21 S. Fruit Street, Suite 10  
Concord, NH 03301

Re: DT 07-07-027 Kearsarge Telephone Company, Wilton Telephone Company, Inc.,  
Hollis Telephone Company, Inc. and Merrimack County Telephone Company  
Petition for an Alternate Form of Regulation; Responses to Oral Data Requests

Dear Ms. Hatfield:

Enclosed is the response by Merrimack County Telephone Company and Kearsarge  
Telephone Company to the Oral Data Request issued during the technical session in the  
above captioned docket on September 23, 2010.

Very truly yours,



Harry N. Malone

HNM:kaa

Enclosure

cc: Electronic Service List

1. In regard to the Rebuttal Testimony of Thomas E. Murray, dated September 20, 2010, when were the attachments prepared?

**Response**

All attachments were prepared on or after September 7, 2010.

Thomas Murray is responsible for this response.