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

KEARSARGE TELEPHONE COMPANY OPPOSITION TO MOTION FOR REHEARING

NOW COMES Kearsarge Telephone Company ("KTC") by and through its attorneys Devine, Millimet and Branch, Professional Association, and opposes the Motion for Rehearing on Behalf of Daniel Bailey of the Commission's Order No. 25,182 in this proceeding ("Bailey Motion").

The Bailey Motion consists of two claims, both of which are merely restyled versions of the same argument that he has made and lost for almost four years now. In the first claim, Mr. Bailey insists that the lowest priced Comcast service package is the only competitive alternative available and then claims that this package has not been demonstrated to be available to a majority of customers. In the second claim, Bailey argues that the alternative regulation statute requires a competitive alternative that is essentially identical to KTC's most basic service offering.

In order to grant the requested rehearing, the Commission must be of the opinion that "good reason for the rehearing is stated in the motion."[1] The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or

[1] RSA 541:3.

mistakenly conceived in the underlying proceedings.[2] The Commission may also look to whether the motion presents new evidence.[3]

By these standards, the Bailey Motion fails in all respects. Mr. Bailey presents no new facts, nor does he make a case that any matters were overlooked or mistakenly conceived. Indeed, both of Mr. Bailey's claims are simply restatements of his singular argument that KTC's alternative regulation plan should be rejected unless a competitor offers a service that is equivalent to KTC's basic service at comparable rates. This argument has failed consistently throughout this proceeding, and the Commission should continue to reject it.

Furthermore, even if there were merit to this argument, Mr. Bailey would not have standing to present it to the Commission. Mr. Bailey is not a customer of KTC and does not live in the KTC service area.

I. The Commission Correctly Found that Competitive Alternative Services are Available to a Majority of Customers in Each KTC Exchange.

Mr. Bailey claims that the Commission found that "the" service that was a competitive alternative to KTC's service was the Comcast $39.95 service (as if there could only be one) and that KTC made no showing that this is available to a majority of customers. However, it is undisputed that Comcast provides its voice services over its existing facilities, and that these facilities serve a majority of customers in the KTC territory. In an analysis covering *five pages* of the Approval Order, the Commission found "that Comcast has in place the infrastructure to provide voice service over its existing facilities"[4] and that "[a]s to whether Comcast's services are available to a majority of retail customers, we find that the evidence in the record is sufficient

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[2] *See Dumais v. State*, 118 N.H. 309, 312 (1978).
[3] *Id. See also Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136 (2002) (the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed).
[4] DT 07-027, Order No. 25,182 at 19 (Dec. 21, 2010) ("Approval Order").

to support the conclusion that Comcast facilities pass a majority of customers in each exchange."[5]

Furthermore, Mr. Bailey mischaracterizes the Commission's holding at pages 21 and 24 of the Approval Order. While the Commission focused on the $39.95 offering as an example of the "most basic" Comcast voice offering, nowhere did it hold that this was the only service that could be considered a competitive alternative. In fact, the Commission prefaced its discussion with the finding that Comcast's offering of a variety of voice services demonstrated that a competitive alternative is available:

> In reviewing the service offerings from Comcast we note that Comcast provides voice service as a stand-alone service, as well as in conjunction with other services, and that the prices for these services vary according to their components. Because Comcast is offering wireline voice *services* in the KTC exchanges, we are persuaded that it is providing a competitive alternative to TDS' voice service.[6]

II. The Commission Correctly Found that Competitive Service Need not be Identical to KTC's.

Mr. Bailey also claims that KTC's basic phone service is the "service of interest" for the Commission's competitive analysis and that this serves as a limit on the Commission's analysis, although he does not describe what this limit should have been or how it affects the analysis. In so many words, Mr. Bailey appears to argue that RSA 374:3-b requires the Commission to establish a "service of interest" as the focus of its analysis, and that this service of interest must be basic service *only*, because RSA 374:3-b applies to small ILECs and small ILECs provide basic service. Furthermore, while Mr. Bailey is careful to avoid claiming outright that the competitive service must be *identical* to TDS's basic service *per se*, he leaves little doubt that it must be functionally equivalent and comparably priced.

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[5] *Id.* at 16.
[6] *Id.* at 23 (emphasis supplied).

This abstruse argument is supported with a convoluted construction of the statute, skipping around within Chapter 374 to borrow one of the defining characteristics of a small ILEC in one subchapter and then grafting it on to the purported definition of a competitive service in another subchapter. Mr. Bailey then begs the question that no Comcast service meets this contrived definition and thus the Commission has erred. KTC is not aware of any principle of statutory construction that can account for this reasoning.

Although it appears that this is the first time that Mr. Bailey has proposed this particular construction of the statute, the general argument it supports is essentially identical to the previous one involving wireless competition in which Mr. Bailey argued that the Commission's analysis must consider pricing and marketing of bundled services packages.[7] The Commission considered this argument in the past[8] and found it unpersuasive, and did so again in the Approval Order. Far from overlooking this issue, it addressed it head-on when it observed that:

> "NHLA argues that the relevant market for determining competitiveness is the market for basic local telephone service. RSA 374:3-b, however, *makes no such declaration.* We do not limit our inquiry to the market for basic local exchange when determining the existence of competitive services pursuant to RSA 374:3-b, III(a). . . . NHLA has consistently argued that wireless service is not a competitive alternative. We have already rejected that argument, and we likewise reject the argument that TDS must demonstrate that there is competition in the specific market for stand-alone basic local exchange service."[9]

The Commission accurately characterized Mr. Bailey's position when it observed that:

> If services considered competitive for purposes of RSA 374-3b, III(a) were limited to stand-alone basic services, an incumbent carrier might never achieve alternative regulation depending upon the marketing choices of its competitors. Should a competitor never offer a stand-alone "basic" service it could well be taking substantial numbers of customers from the incumbent without ever entering the market NHLA considers relevant. In those circumstances, the

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[7] *See, e.g.* DT 07-027, Bailey Brief at 25 (Nov. 6, 2009).
[8] *See* DT 07-027, Order No. 24,852 at 18 (Apr. 23, 2008); DT 07-027, Order No. 25,103 at 13 (May 14, 2010).
[9] Approval Order at 21-22 (emphasis supplied).

> incumbent might be jeopardized by substantial losses in its customer base and market share without ever having faced a "competitor" under NHLA's definition.[10]

Mr. Bailey's persistent arguments in this vein are nothing more than collateral attacks on the rulings made by this Commission in its prior orders in this proceeding. The Commission rejected Mr. Bailey's arguments at that time and Mr. Bailey did not appeal the Commission's rulings. Those rulings are *res judicata* and are not subject to further review.

Moreover, Mr. Bailey's conclusion "that the Legislature envisioned 'small incumbent local exchange carrier(s)' petitioning for alternative regulation *without first* having these 'bundled services'" is incorrect as well. Small incumbent local exchange carriers operating under rate of rReturn regulation have had the ability to bundle telecommunications, data, video, and other services together upon Commission approval. The Legislative intent of RSA 374:3-b, IV was to enable the offering of bundles without prior Commission approval. This diminishes the competitive disadvantage faced by the regulated entity.

III. Mr. Bailey Lacks Standing to Pursue this Matter.

On at least two occasions, KTC has formally objected to Mr. Bailey's participation in this proceeding as it pertains to KTC[11] and KTC continues to do so. Mr. Bailey has no connection with KTC. He is not a customer of the company, and he cannot credibly claim reasonable basis upon which he will suffer an injury in fact as a result of the determinations that the Commission makes with regard to KTC. There is no substantive basis to conclude that the services that he wishes to buy from the telephone company in his area and the price that he will have to pay for

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[10] *Id.* at 22.

[11] *See* Memorandum of Law in Support of Petitioners' Motion for Partial Reconsideration of Order No. 24.852 at 3-7 (May 23, 2008); Response by Kearsarge Telephone Company and Merrimack Telephone Company to Motion by Daniel Bailey for Pre-Hearing Conference at 1 (Feb. 11, 2009).

them will be affected in any manner by the result of the adjudication of the issues in this case with respect to KTC. KTC has never waived its right to object to Mr. Bailey's standing and respectfully preserves its objection to his participation in any further proceedings involving KTC.

IV. Conclusion

Mr. Bailey has no standing to pursue this matter and in any event has failed to provide or reference any facts or arguments that were not available to him prior to the Commission's Approval Order, nor has he presented any argument that the Commission did not correctly understand and thoroughly consider in the Approval Order. Accordingly, KTC respectfully requests that the Commission deny Mr. Bailey's Motion for Rehearing.

Respectfully submitted,

KEARSARGE TELEPHONE COMPANY

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

Dated: January 26, 2011

By: _____

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CERTIFICATE OF SERVICE

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

Dated: January 26, 2011

By: _____
Harry N. Malone, Esq.