

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 07-027

**KEARSARGE TELEPHONE CO., WILTON TELEPHONE CO.,
HOLLIS TELEPHONE CO., and MERRIMACK COUNTY TELEPHONE CO.**

Petitions for Approval of Alternative Form of Regulation

ORDER NO. 24,802

November 2, 2007

This case concerns a series of petitions, submitted by four incumbent local exchange carriers (ILECs), all subsidiaries of TDS Telecommunications Corp., for approval of an alternative form of regulation pursuant to RSA 374:3-b which would, if approved, result in the retail operation of the companies largely being regulated as if they were competitive local exchange carriers, as opposed to applying cost-of-service ratemaking principles. A technical session and settlement conference is scheduled for November 26, 2007 and three days of hearings commence on December 4, 2007.

This order concerns a motion filed on October 4, 2007 by intervenor segTEL, Inc. to compel the petitioners to provide certain discovery responses without restriction. The petitioners filed an opposition to the motion on October 15, 2007. SegTEL filed a response to the petitioners' pleading on October 24, 2007.

At issue are five data requests, all concerning the pre-filed testimony of petitioners' witness Michael C. Reed. For present purposes, it suffices to note that the data requests all seek evidence to support Mr. Reed's assertion that competitive alternatives are available to retail customers of the petitioners. The issue is important inasmuch as RSA 374:3-b, III requires the Commission to approve such a petition when a series of conditions are met, one of which is that

“[c]ompetitive wireline, wireless or broadband service is available to a majority of retail customers in each of the exchanges” served by the petitioner. In essence, segTEL seeks access to detailed maps and summaries, prepared by the petitioners and furnished to Commission Staff, but not provided to segTEL on the ground that segTEL is a competitive local exchange carrier and thus a competitor of the petitioners.

SegTEL notes that, although the petitioners have refused to give segTEL employees access to the material, they did allow segTEL’s outside counsel to view the maps during a technical session, after she executed a protective agreement with the petitioners. In segTEL’s view, this limited disclosure is inadequate.

According to segTEL, it is seeking the information solely for the purpose of developing its position on the question of whether the petitioners have made the requisite showing about the existence of competition in their service territories. Relying on the Commission’s decision in *North Atlantic Energy Corp.*, 87 NH PUC 396 (2002), and invoking its right to due process, segTEL contends that because it is likely the Commission will rely on the disputed information when it decides the case, segTEL should be granted access to the documents. Moreover, according to segTEL, it is not directly competing for customers in the petitioners’ service territories, largely because the petitioners enjoy the so-called “rural exemption” from the otherwise applicable obligation of ILECs under the federal Telecommunications Act to interconnect with competing local exchange carriers.

In opposition, the petitioners point out that segTEL gained intervenor status by representing that it serves customers in areas adjacent to the petitioners’ service territories, and that segTEL is an information services provider in areas actually served by the petitioners.

According to petitioners, the maps in question “are the product of extensive time and internal resources. Resulting from the painstaking distillation of approximately 500 maps, the information produced to Staff shows the locations of the Petitioners’ services, present and potential customers, competitors’ services and the types of services competitors provide.”

Petitioners’ Opposition at 2. Petitioners characterize this information as highly sensitive and “of particular interest” to their competitors inasmuch as the maps “would literally guide competitors into Petitioners’ market share and guide competitors’ efforts to compete for that market share.”

Id. According to the petitioners, relying on *Freedom Ring Communications, LLC*, 82 NH PUC 454 (1997), *Public Service Co. of New Hampshire*, 89 NH PUC 226 (2004), and *Public Service Co. of New Hampshire*, 90 NH PUC 323 (2005), it is well-established that the Commission will protect parties to its proceedings from being required to disgorge in discovery information that would cause them competitive harm.

Particularly objectionable to the petitioners is the possibility of segTEL official Jeremy Katz gaining access to the information. According to the petitioners, segTEL is a small company and Mr. Katz is intimately involved in all corporate functions. The petitioners describe as “inconceivable” that he could review the information for purposes of these proceedings and then ignore it as he participates in segTEL’s strategic corporate decision making in the future.

According to the petitioners, disclosure to segTEL’s outside counsel, on an “attorneys eyes only” basis, is as far as they ought to be required to go in these circumstances.

Replying to the petitioners, segTEL complains that it cannot participate fully in the proceedings without the information in question. According to segTEL, its outside counsel must rely on employees of the company because they, rather than counsel, possess the technical

expertise and field experience to evaluate the data the petitioners will proffer at hearing. While disputing the petitioners' characterization of Mr. Katz's role within the company, segTEL nevertheless proposes, as a compromise, that access be limited to outside counsel and another segTEL employee, Kath Mulholland. As an alternative, segTEL also proposes that TDS, at its expense, hire an independent expert acceptable to segTEL to review and analyze the data and act as an advisor to segTEL and its attorneys.

We agree with the petitioners that, in the particular circumstances of the case, they are entitled to withhold the requested, competitively sensitive information from segTEL. In the North Atlantic Energy Corporation case relied upon by segTEL, the Commission agreed with a citizens' advocacy group, the Campaign for Ratepayers' Rights (CRR), that it was entitled to confidential information of the asset sales manager and auction advisor that assisted the Commission with overseeing the sale of a majority interest in the Seabrook nuclear power plant. The Commission described as "credible" the assertion that the information in question was commercially sensitive, but was persuaded by CRR that "in order for that organization to meaningfully participate in the docket it should have access to the same information as does the Commission." *North Atlantic Energy Corp.*, 87 NH PUC at 399, citing *Society for Protection of N.H. Forests v. Water Supply and Pollution Control Comm'n*, 115 NH 192 (1975). Access was strictly limited to CRR's counsel, also serving as its chair, at a specified location where the documents were being maintained.

The situation here differs from the CRR situation in several key respects. First, CRR was in no sense a commercial competitor of any Seabrook owner or anyone with a pecuniary interest in the outcome of the auction. Second, the purpose of CRR's participation was to vindicate the

interests of New Hampshire electric consumers who, in the view of CRR, had been ill-served by Seabrook's owners since the facility was first proposed. Third, CRR was apparently content to limit access to its counsel, rather than insisting that others with technical expertise needed to be involved in the review. Finally, segTEL's role in the instant case is not analogous to that of CRR in the Seabrook sale; here, the Office of Consumer Advocate appears as the statutorily authorized advocate for residential customer interests. Moreover, in the context of telephone proceedings, the Legislature has decided as a matter of public policy to grant enhanced protection of information that "[p]ertains to the provision of competitive services," or sets "forth trade secrets that required significant effort and cost to produce, or other confidential, research, development, financial, or commercial information, including customer, geographic, market, vendor or product-specific data, such as pricing, usage, costing, forecasting, revenue, earnings, or technology information not reflected in tariffs of general application." RSA 378:43, II (a) and (b).

It is well-established in the context of administrative proceedings that due process is a flexible concept, varying with the nature of the governmental and private interests that are implicated. *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). According to its intervention petition, segTEL's interest in this case lies in assuring that the ultimate decision does not impair competition in markets where the petitioners operate and in which segTEL hopes to operate. In a case where (1) other parties also have the same objective – assuring that the competition-related prerequisites exist if the petition is to be granted, (2) segTEL's access to the information, though limited, is not insignificant, particularly because the firm's outside counsel has extensive background in utility regulation, (3) the movant is a small company, seeking to gain access to

competitively sensitive materials for key decision makers as opposed to technical experts who can be isolated from such decision makers, and (4) the petitioners have persuasively alleged that unfettered disclosure to segTEL would likely cause competitive harm, it is a reasonable exercise of our discretion to deny the motion to compel discovery.

Finally, we would expect that to the extent the documents in question are relied upon for purposes of testimony and cross-examination, segTEL's outside counsel should continue to have review access to the documents on an eyes only basis and subject to appropriate protective agreement. With regard to segTEL's proposed alternative resolution of having TDS pay for an independent expert to review the disputed documents and advise them, the proposal is neither reasonable nor necessary.

Based upon the foregoing, it is hereby

ORDERED, that the motion of intervenor segTEL, Inc. to compel petitioners Kearsarge Telephone Company, Wilton Telephone Company, Hollis Telephone Company and Merrimack County Telephone Company to provide certain discovery responses on an unrestricted basis is **DENIED**.

By order of the Public Utilities Commission of New Hampshire this second day of
November, 2007.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary