State of New Hampshire
Public Utilities Commission

DT 07-027

Kearsarge Telephone Company
Wilton Telephone Company
Hollis Telephone Company
Merrimack County Telephone Company

Petition For Approval of An
Alternative Form of Regulation

BRIEF OF DANIEL BAILEY

Submitted by
New Hampshire Legal Assistance
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January 11, 2008

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The Petitioners' Plan For An Alternative Form Of Regulation

...is a plan which after a few short year's hiatus, you have tremendous freedom to raise prices. And again, my concern is that when that freedom comes in, the people who will be the most hard hit are those who are basically using phone service without a lot of bells and whistles.

(Cross Examination of Dr. Ben Johnson, Transcript, Day 2, page 103, ll. 9-14.)

I. Introduction.

1. History of the Case.

On March 1, 2007 the four affiliated Companies, all subsidiaries of TDS Telecom, Inc., filed petitions for an Alternative Form of Regulation seeking approval of an alternative regulatory plan (See Secretarial Letter dated July 13, 2007).

Legal briefs were filed in June 2007. By Secretarial Letter dated July 13, 2007 the Commission decided that the legal issues must be considered in light of a full development of the facts and an application of the law to those facts.

The parties filed prefiled Direct Testimony on October 12, 2007. The parties engaged in formal discovery. Several technical sessions took place.

The parties met several times to discuss settlement. A Settlement Agreement was reached and filed on December 3, 2007. Intervenor Daniel Bailey declined to join in the Settlement Agreement.

Hearings took place on December 4 and 5, 2007. Intervenor Bailey opposed the Settlement Agreement at the hearings and presented expert testimony by Ben Johnson, Ph. D.

Briefs are due on January 11, 2008 with Reply Briefs due on January 25, 2008. This Brief is submitted in support of Daniel Bailey's position in opposition to the Settlement Agreement and the Companies' revised AFOR Plan.

2. Summary of Argument.

The record shows that competitive wireline, wireless or broadband service is not available to a majority of retail customers in each of the TDS Companies' exchanges. The Company disagrees, but has failed to meet its burden of proof to demonstrate that competition exists today in any of its 16 exchanges.

The Settlement Agreement does not change the fact that the criteria of RSA 374:3-b III (a) has not been met. The hope and belief by certain parties that the Settlement Agreement will help to promote competition in some exchanges in the future does not satisfy the statutory requirement of a showing that competition exists today for a majority of retail customers.

The Settlement Agreement is a trade-off. In return for the Companies' agreement to reduce barriers to entry into their markets, the Companies are given the freedom to raise prices immediately for all services except basic local exchange. Prices for basic local exchange can be raised upon expiration of a one or two year rate freeze period and after one of the tests for the presence of competition has been met on an exchange by exchange basis. Additional increases based on "exogenous" events are permitted if approved by the Commission. Such a trade-off, in the absence of real competition for all residential customers, and particularly for basic local exchange customers, is not in the public interest.

The Settlement Agreement and the Companies' revised AFOR Plan fail to meet the criteria of RSA 374:3-b, III (e) which requires that the Plan preserve universal access to affordable basic telephone service. The Plan would allow substantial increases to basic local

exchange service once the price increases are allowed to go into effect. With the inclusion of increases for exogenous changes, the increases would be permitted to exceed the comparable Verizon rates.

Limited protections are provided for Lifeline customers in that their rate increases are delayed for several more years. However, the record shows that the four TDS Companies have very few Lifeline customers. TDS' agreement to try to increase participation in the Lifeline program is vague at best.

The record shows that there is no competition for basic local exchange service. There are no other wireline Competitive Local Exchange Carriers (CLEC) and no competition by cable companies for voice grade phone service. The record also shows that wireless, broadband and VOIP services, to the extent that they are available, are not competitively priced to basic local exchange service and are not affordable to low income basic local exchange service customers.

TDS wants to be able to provide "bundled" services, which could include local exchange. "Bundled" services, however, are not within the price range of basic local exchange service and are not affordable to low income customers. As more affluent TDS customers move to "bundled" service offerings, low income customers have no place else to go.

By the time the predicted competition arrives in a few years (if it ever does) the rate freeze periods will have ended for basic local exchange service. At that point, the Companies will be free to start raising basic local exchange rates. Low income basic local exchange customers will have two choices at that point: remain on basic local exchange service and try to pay the substantially increased prices, or drop their TDS phone service.

The Settlement Agreement and revised AFOR Plan do not meet the criteria of RSA 374:3-b and are not in the public interest. Mr. Bailey urges the Commission to reject the Settlement Agreement, the Companies' Petition, and the Companies' Alternative Form of Regulation (AFOR) Plans as they fail to adequately protect basic local exchange service customers.

II. Legal Standard.

1. The Applicable Statutes

The Companies' Plan for an Alternative Form of Regulation ("AFOR") requires approval under RSA 374:3-b. The requirements of RSA 374:3-b, including the six requirements in RSA 374:3-b, III, must be met.

In addition to meeting the requirements of RSA 374:3-b, the AFOR Plan must also result in rates that are just and reasonable under RSA 378:7, and the plans must be in the public interest. This Commission is vested with broad statutory authority under RSA 378:7.[1] An RSA 378 analysis of whether rates are just and reasonable should be undertaken with respect to petitions under RSA 374:3-b. Under RSA 374:3-b,III(b), the Commission would be approving and fixing the upper bounds of rates.[2] The fixing of rates is expressly covered under RSA 378:7.

RSA 374:3-b,III(b)'s plain language "...may not exceed..." gives discretion to the Commission to fix the upper bounds of Petitioners' rates at lower than the rate cap articulated.

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[1] *See* Appeal of Granite State Elec. Co., 120 N.H. 536, 539 (1980).
[2] *See* Exhibit 6, p. 5, Item 6.3.

The legislature is presumed to be aware of RSA 378:7 when it enacted RSA 374:3-b.[3] Nothing in RSA 374:3-b precludes a RSA 378:7 analysis. The Commission should therefore undertake a RSA 378:7 analysis for petitions under RSA 374:3-b.

The Commission is legislatively mandated to be the arbiter between the interests of the customer and the interests of the regulated utilities.[4] The Commission must not only perform duties statutorily created (i.e. the findings required in RSA 374:3-b,III), but also exercise those powers inherent within its broad grant of power, which includes a public interest analysis.[5] A public interest analysis must be undertaken in this proceeding, particularly where there is a settlement agreement.

An analysis of whether the AFOR plans are in the public interest takes on further importance because of the language in RSA 374:3-b,V. RSA 374:3-b,V expressly states:

> Following approval of the alternative regulation plan, the small incumbent local exchange carrier shall no longer be subject to rate of return regulation or be required to file affiliate contracts or seek prior commission approval of financings or corporate organizational changes, including, without limitation, mergers, acquisitions, corporate restructurings, issuance or transfer of securities, or the sale, lease, or other transfer of assets or control.

As a result, the Commission will cede significant oversight in the transactions and activities of TDS companies and affiliates if the plan is approved. Specifically, the four petitioners could merge without any Commission approval, thus defeating any real purpose for the plain language requirement of RSA 374:3-b,I that a small ILEC serve less than 25,000 access lines. RSA 374:3-b,V places greater importance on the Commission's careful use of its broad authority in RSA 378 in evaluating whether AFOR plans are in the public interest.

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[3] *See Appeal of Public Service Company of New Hampshire*, 141 NH 13, 26 (1996) (where the Court presumed the legislature was aware of the public good statute in interpreting a separate statute and determined the public good statute and analysis still applied).

[4] *See Appeal of Verizon New England, Inc. d/b/a Verizon New Hampshire,* 153 NH 50, 64-65 (2005)(citing to RSA 363:17-a in evaluating affiliate contracts).

[5] *Id*; *see also Appeal of Granite State Elec. Co.*, 120 NH 536, 539 (1980).

Finally, the petitioners' AFOR plans were modified by a settlement agreement.[6] The Commission is required to determine that the settlement results are just and reasonable and serve the public interest.[7] In *Northern Shores*, the Commission applied RSA 378:7 and the principles of *Eastman Sewer Company, Inc.*, 138 NH 221 (1994), determining it must balance the customers' interest in paying no higher rates than are required with the investors' interest in obtaining a reasonable return on their investment.[8] In doing so, the investors' interest is considered secondary to the customers' interest.[9] With respect to the customers' interest, the Commission should carefully consider, among other things, the risk of higher rates. That risk must be viewed in light of the market and monopoly control over basic residential service, which results in petitioners' ability to raise rates above competitive levels, and residential customers' inability to go elsewhere.[10]

2. The Burden of Proof is on Petitioners

As the petitioning party, the TDS companies bear the burden of proof by a preponderance of evidence on all statutory requirements of its petitions.[11] The petitioners also bear the ultimate burden of demonstrating that the proposed settlement agreement merits Commission approval under the applicable statutes.[12]

Petitioners must show that the allowance of rate increases for basic local service[13] is a necessary part of the petitioners' plans. By asking for an allowance for rate increases, petitioners are seeking the benefit of an order from the Commission allowing them to charge

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[6] *See* Exhibit 6.
[7] See N.H. Code Admin. Rules Puc 203.20(b); *see also Northern Shores Water Company*, 2007 NH PUC LEXIS 43, 10-12; ORDER NO. 24,765 (2007).
[8] *Id* at 10-12.
[9] *See Eastman* at 225.
[10] *See* 2 Areeda & Turner, *Antitrust Law*, p. 501-506, at 322-329 (1978).
[11] *See* N.H. Admin. Code Puc 203.25; *see also* RSA 541-A:22.
[12] *See Public Service Company of New Hampshire, Petitions for Approval of Renegotiated Power Supply Arrangements With Whitefield et al*, 2001 NH PUC LEXIS 155, 20; ORDER NO. 23,763 (2001).
[13] *See* Exhibit 6, p. 5, Item 6.3.

and collect rates higher than what will be charged at the time of the Commission's order. [14] RSA 378:8 places the burden of proving the necessity of allowing a rate increase on the applicant. It is irrelevant whether a rate increase is delayed due to a rate freeze. The mere possibility of raising rates is enough for RSA 378:8 to be triggered. Petitioners are asking the Commission for the authority and sole discretion to raise rates. The plain meaning of "allow"[15] ["...allowing it to charge and collect rates higher..."] in RSA 378:8 calls for Commission review of the plans under RSA 378:7, with the burden of proof on Petitioners.

RSA 374:3-b,III(b) also covers rate increases. When interpreting two statutes that deal with a similar subject matter, they are to be construed so as to not contradict each other, in order for that construction to lead to reasonable results and effectuate the purpose of the statutes.[16] Nothing in RSA 374:3-b,III(b) mandates that rate increases for basic service be part of plans petitioned for under RSA 374:3-b. Rather, RSA 374:3-b,III(b) only provides for a rate cap in the event that rate increases are requested. In reading the plain language of RSA 374:3-b and RSA 378:8 consistently, it is reasonable to require petitioners to carry the burden of proving the necessity of including rate increase allowances in their AFOR plan.

Lastly, petitioners bear the burden of persuasion that they meet the criteria of RSA 374:3-b,I. RSA 374:3-b,I covers AFOR plans for small incumbent local exchange carriers ("ILEC") serving fewer than 25,000 access lines, not small ILEC "company[ies]". The word "company" is not in the statute and we cannot add words the legislature did not see fit to include.[17] Thus, the Petitioners must persuade the Commission that the Petitioners are four

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[14] *See* Exhibit MTC 1P; *see* Exhibit 6.
[15] *See* Merriam Webster Online Dictionary, at http://www.m-w.com/dictionary/allow1: "to make a possibility : **ADMIT** —used with *of*<evidence that *allows* of only one conclusion>".
[16] *See Maureen Soraghan v. Mt. Cranmore Ski Resort, Inc.* 152 NH 399, 405 (2005).
[17] *See Appeal of Brady*, 145 N.H. 308, 311 (2000); *see also* segTEL Initial Brief pp. 4-6.

separate "carriers", and not TDS Telecom, Inc. Indeed, the record indicates the petitioners may function as one corporation with respect to setting rates, not four separate corporations.[18]

3. The Interpretation of RSA 374:3-b,III

In construing the meaning of RSA 374:3-b, we first examine the language found in the statute and ascribe the plain and ordinary meanings to words used.[19] And in all cases underlying statutory construction, the starting point is the language of the statute.[20]

1.) RSA 374:3-b,III Requires Findings of Fact in the Order of the Commission.

a) Findings of Fact Are Required

RSA 374:3-b,III states: "The commission shall approve the alternative regulation plan if it finds that…". Such findings are required whether the case is a contested one or whether there is a settlement agreement since statutory requirements must still be met.[21]

RSA 374:3-b,III instructs the Commission to make findings of fact. Indeed, the Commission cannot approve an AFOR plan without making the express findings required by statute. We can neither ignore the plain language of the statute nor add words which the lawmakers did not see fit to include.[22]

RSA 374:3-b,III states: "The commission shall approve the alternative regulation plan if it finds that:", and then sets forth findings fact that are required to meet six provisions.[23] The plain and ordinary meaning of the words must be used.[24] Here, the Commission is directed, by the plain meaning of the word "shall", to approve a plan, *if* the Commission

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[18] *See* Bailey Exhibits 26 & 27.
[19] *See Appeal of Public Service Company of New Hampshire*, 141 NH 13, 7 (1996).
[20] *See Pennichuk Corporation & a v. City of Nashua*, 152 NH 729, 735 (2005).
[21] *See Public Service Company of New Hampshire, Petitions for Approval of Renegotiated Power Supply Arrangements With Whitefield et al*, 2001 NH PUC LEXIS 155, 20; ORDER NO. 23,763 (2001).
[22] *See Appeal of Brady*, 145 N.H. 308, 311 (2000).
[23] *See* RSA 374:3-b III *et seq.*
[24] *See Appeal of Public Service* at 7.

"finds" that the six provisions are met.[25](emphasis added). The plain language shows the legislature has not taken authority away from Commission, rather, it requires approval of AFOR plans upon necessary findings. There would be no reason for the legislature to clearly delegate this fact-finding authority to the Commission unless it wanted the Commission to make findings of fact on a case-by-case basis.

b) Findings On the Existence of Competition Today Is Required

The plain meaning of the word "finds" means there must be a current determination.[26] Moreover, the plans go into effect on the first day of the month following possible Commission approval.[27] Accordingly, the six provisions requiring findings of fact in RSA 374:3-b,III must be met now, not at some point down the road. Specifically, a finding under RSA 374:3-b,III(a) of "*competitive* (emphasis added) wireline, wireless, or broadband service..."is required. This cannot be a finding that those technologies may be competitive in the future, or that those technologies are predicted to be competitive in the future, or that a plan may foster competition, or that the Companies are under a competitive threat. As a matter of law, the AFOR Plans cannot be approved unless competition is present today. Therefore, the Order must include the findings of fact required by RSA 374:3-b.[28]

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[25] *See also Public Service Company of New Hampshire, Interim Stranded Cost Charges Order Setting Procedural Schedule and Addressing Motion to Stay*, 1999 NH PUC 250, 20; ORDER NO. 23,137 (1999)(where a statute did not include the word "finds" but the Commission determined it must make findings based on facts and circumstances of a Rate Agreement to determine if it met the statutory requirements).

[26] *See* Merriam Webster Online Dictionary, at http://www.m-w.com/dictionary/finds: "to determine and make a statement about <*find* a verdict> <*found* her guilty>*intransitive verb*".

[27] *See* Bailey Testimony Tr Day 1 page 86 ll 16-21; *see also* Exhibit MTC 1 p 1 at Item 2.1.

[28] *See also* RSA 541-A:35.

2.) RSA 374:3-b,III Statutory Requirements of AFOR Plans

a) Wireline, Wireless, Or Broadband Services Must Be Competitive With Basic Local Exchange Service

RSA 374:3-b,III contains six requirements that AFOR plans must meet. The first requirement is RSA 374:3-b,III(a). It states: "Competitive wireline, wireless, or broadband service is available to a majority of the retail customers in each[29] of the exchanges served by such small incumbent local exchange carrier;"

The starting point in statutory interpretation is the language of the statute itself.[30] The plain language of RSA 374:3-b,III(a) includes the phrase "...retail customers in each of the exchanges served by such small incumbent local exchange carrier". This instructs us that technologies must be determined "competitive" with the service that retail customers receive from a small ILEC, on an exchange basis. TDS witness Ulrich acknowledges that the market at issue in this docket is: "...basic local exchange service as well as technologies that compete with basic local exchange service..."[31] Moreover, the statute contains the phrase: "..retail customers in each of the exchanges..." Clearly, the service that is ordinarily provided in each of a small ILECs exchanges *is* basic local exchange service (emphasis added). DSL, enhanced services, long distance service, etc., are not services traditionally provided by an exchange, or wire center.

RSA 374:3-b,III(a) makes clear the technology of interest is basic local exchange service. This conclusion is bolstered by a reading of the plain language of RSA 374:3-b as a

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[29] The plain meaning of the word "each" requires that a petitioner meet the "available" and "competitive" test for a majority of residential customers in every exchange, otherwise the overall petition does not meet the statutory test of RSA 374:3-b(III)(a). *See* Merriam Webster Online Dictionary, http://www.m-w.com/dictionary/each: "each one <to *each* his own>"; see *also* Josie Gage Prefiled Testimony Ex. 10, p. 3, ll. 1-10; *see also* Dr. Loube Testimony Tr Day 2 page 151, ll 4-10.

[30] *See Hilda Pennelli v. Town of Pelham*, 148 NH 365, 366 (2002)(quotation omitted); *see also Pennichuk* at 735.

[31] *See* Tr Day 2, p. 40, ll. 11-14.

whole as we cannot simply view 374:3-b,III(a) in isolation.[32] RSA 374:3-b,III(b) concerns itself with a rate cap on "...basic local rates..." and RSA 374:3-b,III(e) concerns itself with "...universal access to affordable basic telephone service." Neither provision mentions DSL, enhanced services, long distance, etc. Additionally, RSA 374:3-b,II calls for small ILEC regulation "...comparable to the regulation applied to competitive local exchange carriers ["CLEC"]..." upon approval of an AFOR petition. A CLEC installs or offers basic exchange service.[33] The plain language of all provisions in RSA 374:3-b, including RSA 374:3-b,III(a), lead to the conclusion, as Staff has also made, that the service of interest should be basic local service, given the context of the statute as a whole.[34]

Moreover, RSA 374:3-b, RSA 374:22-f and RSA 374:22-g all deal with the "25,000 access lines" benchmark and regulation of telephone utilities.[35] Both RSA 374:22-f and RSA 374:22-g, I include the phrase "...telephone utility that provides local exchange service..." Thus, RSA 374:22-f and RSA 374:22-g reinforce the interpretation that the focus of RSA 374:3-b is local exchange service.

Lastly, there has been some discussion about whether long distance service can compete with basic local service. The Commission has determined, by secretarial letter dated July 13, 2007, that the petitioners bear the burden of production and persuasion on this question.[36] On this question, Dr. Johnson, reviewing the plain language, in his perspective as an economist, said that "...basic local exchange service should be analyzed as a separate

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[32] *See Hilda Pennelli* at 366; *see also Pennichuk* at 735.
[33] *See* N.H. Admin. Code Puc 431.
[34] *See* Dr. Chattopadhyay Prefiled Testimony, Ex. 9, p. 3, ll. 20-24: "The Staff recommends that the service of interest should be basic local service. A local exchange carrier (LEC) is required to make such service available to all customers within its franchise area. Such a treatment is not accorded to any other service. Regulatory relief offered by the statute allows the ILEC to be regulated like a CLEC, which by definition competes for basic local service."
[35] *See* RSA 374:3-b(I), RSA 374:22-f and RSA 374:22-g.
[36] *See* Secretarial Letter Dated July 13, 2007.

product market, distinct from long distance service and enhanced services like caller ID and call waiting. Each of these products has distinct characteristics, including the degree to which they face competitive pressures."[37] In fact, Mr. Reed agrees with Dr. Johnson that long distance and enhanced services should be placed in a separate basket.[38]

b) RSA 374:3-b,III(a) Requirements

i) The Plain Meaning of "Competitive" and "Available" Require That Two Separate and Distinct Tests Be Met for RSA 374:3-b,III(a) to Be Satisfied.

"Basic statutory construction rules require that all words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words".[39] The words "competitive" and "available" within RSA 374:3-b,III(a) must both be given meaning. The word "competitive" cannot be ignored, as the Companies suggest in their testimony. Nor can we conflate the meaning of these two different words.

We must give "competitive" and "available" their plain and ordinary meaning.[40] In doing so, the Commission must determine not only whether technologies are "available", but whether those technologies are "competitive" with basic local exchange service.

"Competitive" and "available" are words that provide two separate and distinct tests within requirement RSA 374:3-b,III(a). Dr. Chattopadhyay, Staff economist, reviewed the plain and ordinary meanings of the words, and agrees that the words "available" and "competitive" mean two different things in RSA 374:3-b,III(a).[41] Moreover, Staff determined "available" is an evaluation of whether a service is physically available in an exchange, including a determination of adequate signal quality when wireless technologies

[37] *See* Dr. Johnson Pre-filed Testimony, Exhibit 7P page 49, ll 18-22.
[38] *See* Mr. Reed Rebuttal Testimony, Exhibit MTC 2P, p. 3 ll 9-13 & p. 4, ll. 1-5..
[39] *See Hilda Pennelli* at 367.
[40] *See Appeal of Public Service* at 7.
[41] *See* Dr. Chattopadhyay Prefiled Testimony, Ex. 9, p.3 ll. 11-14.

are considered.[42] Once availability was determined by Staff, only then did Staff proceed to determine whether the technologies were competitive.[43] Dr. Ben Johnson also reviewed the plain and ordinary meaning of "available" and "competitive" and stated "...the mere existence of more than one provider [other than TDS] in a market is not sufficient to confirm that competition exists..." [44]

> ii) The Generally Accepted Approach to an Evaluation of "Competitive" Conditions Requires Market Definition and Market Share Evaluations.
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> "Assessing **competitive** conditions in a market and determining whether a firm or group of firms has market power requires defining the market in product and geographic terms, determining which producers and consumers are part of the market, measuring market shares and/or other indicators of the competitiveness of the market, and making a determination as to whether the market is or is not workably **competitive**." (emphasis added).[45]

Staff performed a price elasticity of demand analysis to determine whether technologies were competitive with basic local service.[46] There may be different approaches to evaluating whether technologies are "competitive", but it is generally accepted that the word "competitive" requires some economic evaluation.

"T[t]he legislature is presumed to know the meaning of words."[47] The legislature is also presumed to have used the words of the statute advisedly.[48] The legislature used the word "competitive" and the legislature is presumed to know that it requires some economic evaluation.

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[42] *See* Staff Analyst Josie Gage's Prefiled Testimony, Ex. 10, pp. 6-8.
[43] *See* Dr. Chattopadhyay Prefiled Testimony, Ex. 9, p.2, ll. 14-29.
[44] *See* Dr. Johnson Prefiled Testimony, Ex. 7P, p 32-33; ll 22,23 through 1.
[45] See Bailey Exhibit 30, "Assessing Wireless and Broadband Substitution in Local Telephone Markets" Ed Rosenberg, Ph.D. for the National Association of Regulatory Utility Commissioners (NARUC), June 2007, Executive Summary; see also 2A Phillip Areeda & Herbert Hovenkamp, Antitrust Law P 530a (2006)(cited in NHLA/OCA Initial Brief on page 8).

[46] *See* Dr. Chattopadhyay Prefiled Testimony, Ex. 9, p.6, ll. 2-12.
[47] *See Pennichuk* at 735; *see also Caswell v. BCI Geonetics, Inc.*, 121 NH 1048, 1050 (1981)(citations omitted).
[48] *Id.*

Given the field of regulation, the legislature would naturally anticipate that the Commission would ascribe the ordinary meaning to the word "competitive". This is particularly true in a statute that confers authority to the Commission to make findings about plans that are alternative forms of regulation.

iii) RSA 374:3-b,III(a) Requires Some Identification of the "Competitive" Technology.

The plain language of RSA 374:3-b,III(a) also requires identifying which technology is "competitive". The use of the word "or" requires the identification of at least one individual technology that is "competitive" with basic local exchange service.

Thus, in order to approve an AFOR, the Commission must find either "competitive wireline" or "competitive wireless" or "competitive broadband". It need not find that all of the individual technologies available are "competitive" with basic local exchange service, though petitioners must identify which technology is "competitive". The legislature required a finding: "Competitive wireline, wireless, or broadband service is available..." in RSA 374:3-b,III(a) , not that "Competitive alternative service is available..."

We cannot assume that the inclusion of the word "competitive" or the listing of technologies was superfluous.[49] As a matter of law, Petitioners' summary of access lines, intrastate access minutes and intrastate access revenues do not meet the statute.[50] The analysis does not identify any technology that might or might not compete with basic local exchange service. Nor do these summaries measure whether the identified technology[ies] are competitive with basic service.

[49] *See Hilda Pennelli* at 367.
[50] *See* Dr. Chattopadhyay Prefiled Testimony, Ex. 9, p. 5, ll. 20-31.

c) RSA 374:3-b,III(e) Requires Basic Residential Rates to Be Affordable

AFOR plans, under the plain language of the RSA 374:3-b,III(e), must "...preserve access to *affordable* basic telephone service..." (emphasis added). This requires an evaluation of basic residential service rates. The Telecommunications Act of 1996 ("Act") states: "Quality services should be available at just, reasonable, and *affordable rates*." [51](emphasis added). In response to the Act, the first Federal-State Joint Board decision on universal access set forth the following policy: "...we must maintain *rates* for basic residential service at *affordable* levels."[52] (emphasis added). This focus on rates reinforces the plain language of RSA 374:3-b,III(e). RSA 374:3-b,III(e) requires AFOR plans to ensure that basic residential service rates will be at an affordable level.

As a matter of law, the rate cap in RSA 374:3-b,III(b) cannot be said to automatically preserve access to affordable basic residential service. Statutory provisions cannot be read in isolation from one another.[53] The universal access requirement of RSA 374:3-b,III(e) would be superfluous if the legislature thought the rates of the largest ILEC (RSA 374:3-b,III(b)) automatically preserved universal access in every situation. Indeed, the legislature would have simply relied on the rate cap in RSA 374:3-b,III(b). Instead, the legislature added the requirement of RSA 374:3-b,III(e), and the legislature is presumed to not use superfluous words or provisions.[54] When a petitioner asks for a rate cap as part of their plan, that rate cap must be evaluated on a case-by-case basis to determine if the rate cap "...preserve[s] access to affordable basic telephone service..."

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[51] *See* Telecommunications Act of 1996, 47 U.S.C. § 254(b)(1).
[52] *See In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8780; 1997 FCC LEXIS 5786, 3 (1997).
[53] *See Hilda Pennelli* at 367.
[54] *Id* at 366.

III. TDS Failed To Prove That Its Plan Preserves Universal Access To Affordable Basic Telephone Service.

> **...from a low income consumer's point of view...that's as bad as it can possibly get. You raise rates now and convince everybody to start abandoning their phone service... And so, everybody who can afford the bundles and people elsewhere are all sort of leaving the traditional phone company and going to the bundles, and the folks who can't afford the bundles are left with no alternative.**
>
> (Cross Examination of Dr. Ben Johnson, Transcript, Day 2, page 102, ll. 5-17.)

1. The Companies' Plan Would Allow Substantial Price Increases For Basic Local Exchange Service Customers.

In order for the Commission to approve the Companies' Petition and Plan for an Alternative Form of Regulation (AFOR) the Commission must find that

> (e) The plan preserves universal access to affordable basic telephone service...

RSA 374:3-b, III (e).

Under the Companies' Plan and the Settlement Agreement, basic local exchange rates for the Wilton and Hollis exchanges can be immediately increased following the expiration of the one or 2 year respective rate freeze periods in those exchanges. Rates for customers in the Kearsarge and Merrimack County Telephone exchanges may be increased on an exchange by exchange basis after expiration of the 2 year rate freeze period in those exchanges when any one of the 5 tests set forth in paragraph 6.2 of the Settlement Agreement has been met.

Once rates are allowed to increase, the Companies' Plan allows the Companies to increase rates up to 10% per year for the first four years. After the 4th year the Companies can increase rates up to the comparable Verizon rates pursuant to RSA 374:3-b, III (b) (Tr. Day 2, p. 25, l. 23 to p. 26, l. 4).

Dr. Johnson demonstrated that residential rates would increase up to the Verizon levels by the following percentages:

Company	% increase
MCTC	28%
WTC	114%
HTC	7%
KTC (low)	60%
KTC (high)	4%

(Ex. 7 P, p. 27, ll. 13-14). The actual dollar increases are set forth in Bailey Exhibit 23 (OCA 2-11). The chart in OCA 2-11 (Ex. 23) assumes that the comparable rates charged by Verizon do not change over the next five years. These illustrative amounts also do not include possible additional increases due to "exogenous events" described in the Settlement Agreement and Plan. (Tr. Day 2, p. 28, l. 17 to p. 29, l. 16).

In addition to the above allowed rate increases, the Companies may adjust rates either up or down, following Commission approval, based on the occurrence of certain "exogenous events" defined in the statute. These additional increases (or decreases) can take place during, as well as after, the rate freeze periods. As a result of any exogenous increases the Companies' rates are allowed to exceed the comparable Verizon rates (Tr. Day 2, p. 26, ll. 6-13).

The decision to adjust rates is not necessarily made at the local level. Those pricing decisions could be made at the TDS Company level (Tr. Day 2, p. 29, l. 17 to p. 30, l. 2).

Dr. Johnson testified that "capping" TDS' basic local exchange rates at the levels charged by Verizon is not sufficient to prevent TDS from "substantially" increasing its prices (Ex. 7 P, p. 102, ll. 10-12). For example, Dr. Johnson points out that the "caps" would allow TDS to "more than double" its local exchange rates over the first 4 years in certain exchanges once the increases are permitted to go into effect under the Plan. TDS would also be allowed to increase rates further in subsequent years (Ex. 7 P, p. 102, ll. 12-16).

2. <u>"Severe Impact On Low Income Basic Local Exchange Customers".</u>

Dr. Johnson noted that TDS has not offered any evidence concerning the impact of such severe rate increases on universal access to affordable basic telephone service (Ex. 7 P, p. 102, ll. 16-18). Mr. Reed confirmed that the Companies have not performed an impact study with respect to what impact the Plan might have on their customers by income level (Tr. Day 2, p. 30, ll. 10-17).

Dr. Johnson testified that in his opinion these rate increases would have a particularly "severe impact" on low income customers, and that "some" of these customers "may feel compelled to drop their telephone service" (Tr. Day 2, p. 107, l. 20 to p. 108, l. 21). When asked why some people would actually give up their telephone service over an increase of $3 per month, Dr. Johnson explained that

> ...low income customers have always been known to have lower participation...less use of the phone than other socioeconomic groups. It is a well understood pattern and quite significant...But the fact is, they're very price-sensitive. For them, even $10 or

> $15 a month, by the time you add in the federal charges and the taxes and so on, is a serious issue. And, they say "well, I'll try to get by with using my neighbor's phone" or "I'll try to find a payphone" which used to be a solution that's much less viable than it is as payphone service goes away. But, to the extent there's still payphones, and they can figure "I'll use a payphone, go done (sic) the street." That is the sort of alternative that people in that income group have to deal with. That those of us who are in the upper income or middle class income simply have trouble relating to.

(Tr. Day 2, p. 108, l. 22 to p. 109, l. 18.)

3. Limited Protections for Lifeline Customers.

The Company states that under the Settlement Agreement Lifeline customers (low income customers who are enrolled in the federal Lifeline program, which entitles them to receive a discount on their monthly telephone bill) have a four year "deferral" from those 10 percent rate increases (Tr. Day 2, p. 109, ll. 20-24).

Dr. Johnson acknowledged that paragraph 7 of the Settlement Agreement provides some "limited protection" for Lifeline customers, "since these are some of the customers who would be the most adversely affected by a substantial increase in rates" (Tr. Day 2, p. 76 ll. 18-24). However, Dr. Johnson points out that this protection is "not very long lasting" (Tr. Day 2, p. 76, l. 24 to p. 77, l. 3). Indeed, he notes that "at some point, this protection goes away", and "it could go away as little as four years into the Plan" (Tr. Day 2, p. 77, ll. 9-13).

Dr. Johnson also reminded the parties that "some low income customers are not on Lifeline" (Tr. Day 2, p. 110, ll. 4-5). Dr. Johnson explained

> And, it may be a matter of pride, when you think of someone who's a senior citizen and they have never taken welfare and they don't intend to take welfare, there are various reasons that we've had that the phenomena that the take up rate on Lifeline has never been anywhere near 100 percent of those qualified for. So, you can't generalize and assume that only low income customers are – that all low income customers are only, you know, part of the Lifeline program. The fact is, many of them are not, they pay the regular rate.

(Tr. Day 2, p. 110, ll. 5-15.)

The record in this case shows that a very small number of TDS customers are enrolled in the federal Lifeline program. Out of approximately 33,600 access lines for the four Companies as of September 4, 2007 (See Secretarial letter in this docket dated May 29, 2007, page 2) there are only **Begin Confidential** ** ** **End Confidential** Lifeline customers (Bailey Confidential Exhibit 22C) (Patnode 1 – 42) (Tr. Day 1, Confidential, p. 82, ll. 4-21).

4. Inadequate Protections For Basic Local Exchange Service Customers.

1) Overview.

If the Commission were to approve the Companies' AFOR Plan the Companies, for the most part, will have total freedom to raise rates for any service, at any time, without prior notice to the Commission, and without need for Commission

approval. The only limitations on the above are with respect to exogenous costs and the delayed increases to basic local exchange and Lifeline customers.

If effective competition ever takes hold it is unlikely to be for basic local exchange service. By that time it is likely that there will be fewer basic local exchange customers as more and more non-low income customers move to the more attractive bundled services. Among the remaining basic local exchange customers will be low income customers who cannot afford to purchase the enhanced and bundled services.

By the time the rate freeze periods end the Companies will enjoy almost complete freedom to raise prices for basic local exchange service customers. Low income basic local exchange customers will have no where to go. Many of them will be unable to afford the rate increases and also unable to afford any alternatives.

2) The "Worst Case Scenario".

Dr. Johnson described the difficult position that basic local exchange service customers are being placed in under the Companies' Plan for an Alternative Form of Regulation.

> ...a plan in which after a few short year's hiatus, you have tremendous freedom to raise prices. And again, my concern is that when that freedom comes in, the people who will be the most hard hit are those who are basically using phone service without a lot of bells and whistles.

(Tr. Day 2, p. 103, ll. 9-14.)

Dr. Johnson explained what he believes will eventually happen under the Companies' Plan:

> I'm suggesting to you that the end result, from a low income consumer's point of view, can't be any worse than giving the Company total freedom to raise rates now. I mean that's as bad as it can possibly get. You raise rates now and convince everybody to start abandoning their phone service, so you get this downward spiral or a "death spiral," it's sometimes described, as soon as possible. And so, everybody who can afford the bundles and people elsewhere are all sort of leaving the traditional phone company and going to the bundles, and the folks who can't afford the bundles are left with no alternative. That's the "worst case" scenario.

(Tr. Day 2, p. 102, ll. 5-17.)

3) Unlimited Pricing Freedom for the Company Is Not Necessary.

Dr. Johnson agrees that the Settlement Agreement and Plan delay the rate increases for basic local exchange and Lifeline customers for several years (Tr. Day 2, p. 95, ll. 6-8). However, this only postpones things.

> ...but the pain is still there. And again, the question is, is the pain justified? Is there some reason why the Company needs this increase?... I haven't seen a showing of any sort of need...I haven't seen a showing there's going to be adequate alternatives for consumers if they're not pleased

with paying that rate. If they want to go somewhere else, is there anywhere for them to go?

(Tr. Day 2, p. 95, ll. 6-20.)

Dr. Johnson rejects the Company's "false choice" as justification for its Plan for unlimited freedom to raise basic local exchange rates.

> ...you seem to be juxtaposing a choice which I think is a false choice, between continue with regulation and have disaster fall, okay? That there will be some sort of death spiral that somehow, because the Company doesn't have the freedom to do something, it's not clear what they need freedom for, but because of that lack of freedom, we're going to have this terrible doomsday scenario. Versus a plan in which, after a few short year's hiatus, you have tremendous freedom to raise prices.

(Tr. Day 2, p. 103, ll. 1-11.)

4) Lack of Alternatives.

Dr. Johnson agrees that the Companies should be offering "bundled" services. Indeed, he thinks "bundling" is a "good idea"; "it's attractive in marketing things, and it's certainly wise". (Tr. Day 2, p. 111, ll. 13-15.) Dr. Johnson does not agree that the "choice" is between "deregulating basic rates"... "vs. bundling". He notes that "you can have bundling while still continuing to protect customers" (Tr. Day 2, p. 111, ll. 15-19).

Dr. Johnson's concern with respect to "bundled" services is that the "pattern" that he has seen from the cable companies is that they "tend to target the $100 a month customer" (Tr. Day 2, p. 103, ll. 17-18). "And they say you'll get some basic television and some basic broadband and some basic phone, plus a bunch of other things, like Call Waiting or Caller ID for around $100" (Tr. Day 2, p. 103, ll. 18-22). Dr. Johnson observes that $100 dollars a month "is a plausible alternative for somebody who can afford $100 a month. But for somebody that's used to spending $15 a month or $12...that's a huge difference" (Tr. Day 2, p. 103, l. 18 to p. 104, l. 2).

Dr. Johnson explains the dilemma.

> And again, that is a real concern, that we have to remember, we're not just talking about the customer who is of the most interest to competitors, those who buy the bundles. We also have to be concerned about senior citizens on low income, people who, you know, need a phone, they use a phone, but they're not a candidate for the kind of bundled opportunities that we often think about when we think about competitive offerings.

(Tr. Day 2, p. 104, ll. 8-16.)

Dr. Johnson notes that like cable bundles, broadband technologies are also out of the price range for low income basic local exchange customers. He explains.

> Well, broadband, for example, is typically $40 a month, plus your phone service. So you have to be a customer who values broadband or is already spending something

like $50 a month, or $60, where that becomes a cheap alternative. If you're used to paying 14 or 15, then, any way you cut it, $50 is not solving your problem if the price is going up.

(Tr. Day 2, p. 105, ll. 4-13.)

Dr. Johnson testified that with respect to competition from wireless and cable "We're not there yet" (Tr. Day 2, p. 81, l. 12). Dr. Johnson then explained his concern with respect to the lack of competitive wireline, wireless or broadband services for basic local exchange customers.

> And, again, maybe the situation will surprise me, but I would not expect to see massive entry into these markets, particularly for residential customers, particularly for customers my client is most concerned about, those who can't afford to buy a lot of bells and whistles, and they pretty much buy basic phone service.

(Tr. Day 2, p. 82, ll. 1-7.)

Dr. Johnson testified that basic local exchange service could be subject to "severe" rate increases under the Companies' Plan (Ex. 7 P, p. 103, ll. 4-5). Dr. Johnson also testified that the Company has not proven that competitive wireline, wireless or broadband services are available for the majority of customers in each of the Companies' exchanges (Tr. Day 2, p. 70, l. 24 to p. 71, l. 4; Ex. 7 P, p. 96, l. 5 to p. 100, l. 16). Dr. Johnson further testified that any alternatives that might exist are

not affordable to low income basic local exchange customers (Tr. Day 2, p. 103, l. 1 to p. 105, l. 13).

As more and more customers move from basic local exchange service to bundled and other enhanced service offerings, they leave behind those who cannot afford to leave and who have no where else to go. The customers, including low income customers, who remain behind will either be subject to substantial price increases at the sole discretion of TDS, or will be compelled to drop their telephone service because it is no longer affordable. This is indeed the "worst case scenario" for basic local exchange service customers (Tr. Day 2, p. 102, ll. 16-17).

IV. The Record Shows that the Companies Have Not Met Their Burden To Demonstrate the Availability of Competitive Wireline, Wireless or Broadband Services Today.

> **The Commission shall approve the alternative regulation plan if it finds that: Competitive wireline, wireless or broadband service is available... RSA 374:3-b, III (a).**
>
> **"We're not there yet."**
>
> (Cross examination of Dr. Ben Johnson, Transcript Day 2, p. 81, l. 12)

1. The Companies' Case.

Before the Commission can grant the Companies' Petitions for an Alternative Form of Regulation, the Companies have the burden to prove that they meet all of the statutory criteria of RSA 374:3-b, including the following:

> Competitive wireline, wireless or broadband service is available to a majority of the retail customers in each of the exchanges served by [the TDS Companies].

RSA 374:3-b, III (a).

The record shows that the Companies have failed to meet their burden of proof. Instead, the case presented by the Companies is simply that they are experiencing a reduction in the number of access lines, minutes of use and state switched access revenues. See Reed Prefiled Direct Testimony, Exhibit MCT, 2P, page 4, ll. 3-5; p. 8, ll. 1-2.

The Companies acknowledge that reduction in number of access lines, minutes of use and state switched access revenues is not a measure of competition in their service areas (Tr. Day 2, p. 44, ll. 10-15). See also Bailey Exhibits 10, 11, and 12. Rather, Mr. Reed says that this reduction in the number of access lines, minutes of use, and state switched access revenues illustrates the "impacts" and "effect" of competition on the Companies. See Exhibit MCT 2P, p. 3, l. 21; p. 4, ll. 3-5; p. 5, l. 2. Mr. Reed says that the Companies are not "seeing that growth" in lines and minutes of use, and the Companies "attribute" this loss to "competition". Exhibit MCT 2P, p. 5, ll. 19-20.

What the Companies have failed to do, however, is to demonstrate that the reduction in the number of access lines, minutes of use and state switched access revenues is due to the presence of competitive wireline, wireless or broadband service which is available to a majority of retail customers in each of the TDS Companies' exchanges. Absent such a demonstration, the Companies' Petitions for Alternative Form of Regulation cannot be approved.

2. The Record Shows that Competition Does Not Exist Today in Each of the Companies' Exchanges.

1) Staff.

Staff acknowledges that competition does not exist today in TDS' exchange areas (Tr. Day 1, p. 91, ll. 1-5). Competitive wireline, wireless or broadband services are not available to a majority of customers in each and every exchange of TDS today (Tr. Day 1, p. 97, ll. 1-5). For example, there are no facilities-based CLEC's providing voice service in any of TDS's service exchanges (Tr. Day 1, p. 85, ll. 18-21). Cable providers, like Comcast, are not providing voice service in TDS exchange areas (Tr. Day 1, p. 61, ll. 21-23). Wireline, wireless or broadband is not available in the Sutton and Salisbury exchanges other than that provided by TDS itself (Tr. Day 2, p. 162, ll. 17-23).

Based on a price elasticity of demand study conducted by Dr. Chattopadhyay, he determined that in both the Hollis and Wilton exchanges consumers were not effectively reacting to changes in basic local exchange prices (Tr. Day 2, p. 164, l. 1 to p. 165, l. 8). Thus, he concluded that to the extent that technologies other than basic local exchange service may exist in these two exchanges they are not competitive at this time (Tr. Day 1, p. 87, ll. 12-19). Specifically, in the Wilton and Hollis exchanges, where competition is expected earlier than in the Merrimack County and Kearsarge exchanges, Staff witness Chattopadhyay does not expect the market for basic local service to be sufficiently competitive for 2 or 3 years from June 2007 (Tr. Day 2, p. 166, l. 1 to p. 168, l. 7). The mere availability of broadband and wireless therefore does not mean that they are competitive (Tr. Day 2, p. 163, ll. 16-19).

2) Office of Consumer Advocate.

The Office of Consumer Advocate (OCA) agrees with Staff that there are no competitive wireline, wireless or broadband services available to a majority of customers in each and every exchange of TDS today (Tr. Day 1, p. 97, ll. 1-5 and 11-12). Mr. Traum acknowledges that there are no exchanges in the TDS service areas today that include competitive wireline, wireless or broadband service (Tr. Day 1, p. 97, ll. 19-23). Mr. Traum further agreed that there are no exchanges today in TDS's service territories that have competitive wireline, wireless or broadband service available to a majority of retail customers (Tr. Day 1, p. 97, l. 23 to p. 98, l. 4).

Dr. Loube, on behalf of the OCA testified that competitive broadband is not available to the majority of retail customers in each exchange in every TDS service territory for all four Companies (Tr. Day 2, p. 151, ll. 10-19). Similarly, Dr. Loube testified that competitive wireless service is not available for the majority of retail customers in each exchange in every TDS service territory for each of the four Companies (Tr. Day 2, p. 152, ll. 1-5). Dr. Loube expanded this statement to note that wireless is actually considered by the majority of customers to be a "compliment", and not a "substitute" for wireline service (Tr. Day 2, p. 152, ll. 6-8).

3) The Companies.

Mr. Reed testified that he is not aware of any wireline CLECs operating in any of the franchise areas that are the subject of these Petitions (Tr. Day 2, p. 23, ll. 20-24; p. 51, l. 18 to p. 52, l. 1; p. 58, ll. 7-17). He agrees that there are no CLEC's that provide service in the TDS territories at this time (Tr. Day 2, p. 24, ll. 11-18; p. 25, ll. 4-8).

Mr. Reed confirmed that there are no communities within the TDS serving area where a cable provider is offering voice telephone service at this time (Tr. Day 2, p. 24, ll. 19-23). He also confirmed that Comcast Digital Voice is not being offered in the TDS service territories at this time (Tr. Day 2, p. 24, l. 24 to p. 25, l. 3).

TDS does not have any studies showing the extent to which its customers are using alternatives, or any studies showing the percentage of households in each exchange that are using any particular alternative (Tr. Day 2, p. 25, ll. 9-16). The Companies did not prepare any price elasticity of demand study to determine the presence of competitive alternatives in their exchanges (Tr. Day 2, p. 25, ll. 18-22).

Mr. Ulrich agreed that a cross price elasticity analysis is an "indicator" that one would look at to help measure the ease with which a customer can shift in and out of certain products (Tr. Day 2, p. 39, ll. 1-6). Mr. Ulrich acknowledged, however, that TDS did not look at such indicators or perform either a price elasticity of demand study or a cross price elasticity study (Tr. Day 2, p. 39, ll. 7-13).

Mr. Reed also acknowledged that TDS did not receive any "porting requests" from VOIP providers in 2004, 2005 or 2006 (Tr. Day 2, p. 46, ll. 7-15). Mr. Reed further acknowledged that TDS is the only provider of wholesale and retail DSL service to TDS customers in TDS' service territories (Tr. Day 2, p. 46, ll. 20-22).

Testimony from Staff, OCA and the Companies demonstrates that there is no competitive wireline, wireless, or broadband service available to the majority of retail customers in each of TDS' exchanges.

3. Fostering Future Competition Is Not Competition Today.

RSA 374:3-b, III(a) allows the Commission to approve an AFOR petition only if the Commission finds that competitive wireline, wireless or broadband service is available in each of the Companies exchanges.

According to Staff, one of the "goals" of the Settlement Agreement is to "foster or encourage competition" (Tr. Day 1, p. 86, ll. 11-15). The OCA sees the Settlement Agreement as "taking steps to foster the entry of competitors" (Tr. Day 1, p. 35, ll. 18-23). It is the Staff's "hope and belief" that there will be competition in the Hollis and Wilton exchanges in either "one or two years" (Tr. Day 1, p. 77, ll. 9-22), or in approximately "two" or "three years" (Tr. Day 2, p. 166, l. 11 to p. 168, l. 7).

In discussing the goal of the Settlement Agreement to reduce barriers to entry, Dr. Johnson agrees that "the perspective of trying to reduce barriers to entry into the TDS markets" represents "small changes in a good direction", thereby making it "easier for a competitor to enter" the market (Tr. Day 2, p. 67, ll. 3-23). Nevertheless, Dr. Johnson points out that the Companies "do not, in fact, face any competition at this point" (Tr. Day 2, p. 70, l. 24 to p. 71, l. 2). Available wireless and broadband are not "competitive" (Tr. Day 2, p. 71, ll. 2-7).

The goal to encourage competition and the hope for competitive technologies does not meet the statutory standard that competitive wireline, wireless or broadband service is available to the majority of retail customers in each of the exchanges served by the Companies. Accordingly, Dr. Johnson concludes that to "speculate" that someday there will be competitive entry into the TDS markets so as to justify raising prices now is not in "the public interest" (Tr. Day 2, p. 82, ll. 7-22).

4. The Settlement Agreement And The Companies' Revised Plans For An Alternative Form of Regulation Do Not Meet the Requirements of RSA 374:3-b.

1) The "Compromise".

The parties filed a Settlement Agreement (Exhibit 6) shortly before the hearings and after the parties filed their prefiled direct testimony. Staff believes that the Settlement Agreement addresses all of the requirements of RSA 374:3-b (Tr. Day 1, p. 49, ll. 15-20). Staff also believes that the Settlement represents a "very reasonable compromise to all of the issues" and that it is in the public interest (Tr. Day 1, p. 52, ll. 1-4).

The OCA originally took the position that the Companies' petition "should be denied" because competitive wireline, wireless or broadband services "do not yet exist at least for basic service or POTS in all of the TDS territories" (Tr. Day 1, p. 36, ll. 12-18). The OCA now takes the position that the Settlement is a "fair compromise" within the context of this case (Tr. Day 1, p. 38, ll. 19-20). The OCA believes that the Settlement provides "protections" to TDS's customers (Tr. Day 1, p. 35, ll. 18-23). Finally, the OCA says that the Settlement "endeavors to allow the TDS companies more flexibility to compete, while taking concrete steps to move the TDS franchise territories further along the line to competition consistent with the statute" (Tr. Day 1, p. 36, ll. 19-24).

2) Dr. Johnson's Prefiled Direct Testimony.

Dr. Johnson reached the following conclusions in his prefiled Direct Testimony (Exhibit 7 P and 7 C):

a) Fact Finding Process.

RSA 374:3-b contemplates a "fact finding process", in which the Commission must determine, among other things, whether "competitive" wireline, wireless or broadband services are available to a majority of retail customers in each of the exchanges served by TDS. The Commission must also determine whether the proposed Plan preserves "universal access to affordable basic local telephone service" (Ex. 7 P, p. 97, l. 33 to p. 98, l. 3).

b) Failure to Meet Burden of Proof.

TDS has not proven that competitive wireline, wireless or broadband services are available to a majority of the retail customers in each of its exchanges (Ex. 7 P, p. 98, ll. 5-7).

Specifically,

i) The record indicates that there are no wireline competitors operating within any of TDS' exchanges (Ex. 7 P, p. 98, ll. 7-8).

ii) No cable companies are currently offering voice telephone services within TDS' service territories (Ex. 7 P, p. 98, ll. 8-10; p. 89, ll. 8-18).

iii) TDS is the only provider of DSL service in its serving areas, and does not offer "naked" DSL (Ex. 7 P, p. 98, ll. 10-11). Dr. Johnson explained that customers who purchase TDS' DSL service must also purchase basic local exchange service from TDS. Thus, DSL service is not "competitive" with the Company's basic local exchange service (Ex. 7 P, p. 83, ll. 8-15).

iv) "Very few (or no) customers" in the TDS exchanges are "actively substituting" wireless or VOIP services for TDS' basic local exchange services or visa versa (Ex. 7 P, p. 98, ll. 12-14).

(1) Only a small fraction of TDS's local exchange customers have "dropped" their landline to rely on their wireless service. The vast majority of customers view wireless and wireline services as distinct services which "compliment" each other (Ex. 7 P, p. 98, ll. 14-19).

(2) The small number of lines that have been dropped in favor of DSL were "secondary" or additional lines (Ex. 7 P, p. 98, ll. 20-21).

(3) TDS has received no requests to "port" any numbers over to VOIP providers (Ex. 7 P, p. 98, ll. 21-23).

v) Wireless service, although it has "grown enormously", is not yet competitive with TDS' services, particularly TDS' basic local exchange services (Ex. 7 P, p. 99, ll. 1-10).

(1) Wireless service is "functionally so different" from wireline; in addition, wireless customers primarily use wireless for "different purposes" (Ex. 7 P, p. 99, ll. 11-19).

vi) VOIP technologies are in their "infancy" and these offerings are still seen as "too risky" to be viable competitive technologies to TDS' traditional wireline service (Ex. 7 P, p. 99, l. 22 to p. 100, l. 1).

(1) VOIP technology is also only available to customers who have a "broadband internet connection" (Ex. 7 P, p. 100, ll. 1-5). Not all customers have or can afford an internet connection. This is particularly true for low income customers (Ex. 7 P, p. 90, ll. 11-14).

vii) The TDS petitions "fall farthest short" of meeting the statutory criteria with regard to basic local exchange services (Ex. 7 P, p. 100, ll. 6-7).

(1) Both wireless and VOIP services are typically provided as a "package offering", which includes "enhanced" services and long distance. They are generally priced "far higher" than TDS' "stand alone" basic exchange service (Ex. 7 P, p. 100, ll. 7-11). For example, TDS residential customers can purchase basic local exchange service for less than $15 to $25 per month, including taxes and surcharges. In contrast, for Verizon Wireless access, charges range from $39.99 to $199.99 per month, depending on the number of minutes included in the calling plan. The cost per additional minutes ranges from $.20 to $.45. Wireless service clearly does not offer a cost effective alternative to basic local exchange service (Ex. 7 P, p. 78, l. 14 to p. 79, l. 10). Furthermore, the Companies provided no evidence that the above prices and costs could moderate the price for the Companies' basic stand-alone service offering.

(2) In the case of VOIP provided over a DSL line, customers still need to purchase basic local exchange service from TDS. Customers also need to purchase DSL service from TDS. VOIP can hardly be considered "competitive" with TDS' basic local exchange service (Ex. 7 P, p. 100, ll. 12-16).

viii) Long distance service is not a competitive technology to basic local exchange service. Long distance, by its nature, is between exchanges, whereas the focus of RSA 374:3-b is on intra-exchange services (Tr. Day 2, p. 145, l. 4 to p. 146, l. 14). Basic local exchange should be analyzed as a separate product market from long distance. Each of these products has different characteristics, including the degree to which they face competitive pressures (Ex. 7 P, p. 49, ll. 18-22).

c) Declines in Lines, Minutes of Use, and Revenues.

The declines in the number of access lines, basic area revenue, access minutes, and switched access revenues cited by TDS as "indicators" of the "impact" that competition is having on its operations are not necessarily attributable to the presence of other services (Ex. 7 P, p. 100, l. 18 to p. 101, l. 3).

i) Many incumbent phone carriers have experienced a loss in access lines because customers have been dropping second lines that were previously used for internet access and/or fax service. Many customers are simply replacing a second phone line with DSL service that is also provided by TDS. The reduction in basic local revenues from dropped

lines is "more than offset" by additional revenues from TDS' DSL service (although the revenue is not classified as regulated revenues) (Ex. 7 P, p. 101, ll. 3-15).

ii) Some customers are placing long distance calls over wireless or using other modes of communication, such as email, thereby reducing some access minutes and access revenues (Ex. 7 P, p. 101, ll. 16-23).

(1) Accordingly, the long distance market should be viewed separately from the basic local exchange service market. Greater pricing flexibility should then be provided to the long distance category (Ex. 7 P, p. 101, l. 23 to p. 102, l. 6).

d) Affordable Telephone Service.

TDS has not proven that its proposed Plan preserves universal access to affordable telephone service (Ex. 7 P, p. 102, ll. 8-10).

i) "Capping" TDS' basic local exchange rates at the levels charged by Verizon, pursuant to RSA 374:3-b, is "not sufficient" to prevent TDS from "substantially increasing" its prices (Ex. 7 P, p. 102, ll. 10-12).

ii) Dr. Johnson prepared a chart showing the percentages of increases in TDS rates up to the comparable Verizon rates. The results reveal that residential rates for Merrimack County Telephone customers could increase by up to 28%. Similarly, the residential rates for Kearsarge customers could increase between 4% and 60%, depending on the exchange. Residential rates for Wilton customers could increase by up to 114%, while Hollis residential rates could increase up to 7%.

(Ex. 7 P, p. 27, l. 2 to p. 28, l. 9).

iii) If rates increased to the above levels, they would have a particularly "severe impact" on low income consumers (Ex. 7 P, p. 28, ll. 13-17).

iv) TDS has not offered any evidence concerning the "impact" of such "severe" rate increases on universal access to affordable basic telephone service (Ex. 7 P, p. 102, ll. 16-18).

e) Recommendations.

i) Dr. Johnson recommends that the Commission reject all of the TDS Petitions and Plans (Ex. 7 P, p. 102, l. 23 to p. 103, l. 6).

(1) TDS has not proven that competitive wireline, wireless or broadband services are available to a majority of customers in each exchange (Ex. 7 P, p. 103, ll. 1-2).

(2) TDS has not proven that its Plan would preserve universal access to affordable basic telephone service (Ex. 7 P, p. 103, ll. 2-4). This is particularly true with regard to basic local exchange service which could be subject to "severe" rate increases (Ex. 7 P, p. 103, ll. 4-5).

3) Significant Concerns Regarding The Settlement Agreement And Revised Plan.

At the hearing Dr. Johnson testified that the Settlement Agreement did not cause him to change his prefiled testimony, conclusions and recommendations in any way (Tr. Day 2, p. 66, ll. 5-8). Dr. Johnson further concluded that the Settlement Agreement and the Companies' revisions to their Alternative Regulation Plans do not

comply with the statutory criteria that competitive wireline, wireless or broadband services be available to the majority of retail customers in each exchange any more than did the originally filed plans (Tr. Day 2, p. 66, ll. 9-15). Dr. Johnson proceeded to explain his concerns with the Settlement Agreement and revised AFOR Plans, and why, in his opinion, they do not comply with the statutory criteria of RSA 374:3-b.

a) Paragraphs 1-4 Of The Settlement Agreement. CLEC Certification And The Rural Exemption.

While Dr. Johnson acknowledges that the Companies' waiver of the rural exemption under Section 251 of the Federal Telecommunications Act, and similar concessions, are "small changes in a good direction", he points out that the barriers to entry "still exist" (Tr. Day 2, p. 67, ll. 1-23).

In particular, Dr. Johnson notes that the Settlement Agreement "does not require the filing of a tariff for either resale or unbundled elements" (Tr. Day 2, p. 67, l. 24 to p. 68, l. 2). Thus, a CLEC would not know "what will the costs be". Therefore, the reduction in barriers to entry is actually "quite modest" (Tr. Day 2, p. 68, l. 5 to p. 69, l. 1).

Dr. Johnson explained in his prefiled Direct Testimony (Ex. 7 P) that even if legal barriers to entry have been eliminated, and economic and technical barriers reduced, this does not mean that barriers to entry have been eliminated. The new entrant may still have little or no "market share" (Ex. 7 P, p. 41, ll. 18-22). New entrants often have to incur very high costs and are often forced to operate with very low, or negative, profit margins. The "telling evidence" of successful market entry is the extent to which the new firm has

gained "market share" and generated profits and "positive cash flows" (Ex. 7 P, p. 42, ll. 1-23).

In Dr. Johnson's opinion it is "not a good trade off" to create the freedom to raise rates immediately for all services except basic service solely on the basis of making it a little bit easier for traditional wireline competitors to enter the market (Tr. Day 2, p. 80, l. 11 to p. 81, l. 1). "To speculate" that the market will change sufficiently is not in "the public interest" (Tr. Day 2, p. 82, ll. 18-23).

b) Paragraph 5 Of The Settlement Agreement. Wilton And Hollis Exchanges.

Except for basic local exchange rates, the rates for all services could be increased immediately in the Hollis and Wilton exchanges as soon as the AFOR Plan is approved (Tr. Day 2, p. 69, l. 6 to p. 70, l. 10). Indeed, Staff acknowledged that the AFOR Plan would go into effect the first of the month following Commission approval (Tr. Day 1, p. 86, ll. 16-21). Secondly, the Company can raise basic local exchange rates in Wilton and Hollis as soon as the one year and two year respective rate freeze periods end. There is no requirement that any one of the tests for competition in paragraph 6.2 have to be met (Tr. Day 1, p. 76, l. 19 to p. 77, l. 7). Yet, as Dr. Johnson notes, the Company does not face any competition at this point; the wireless and broadband technologies are not "competitive" (Tr. Day 2, p. 70, l. 24 to p. 71, l. 4).

c) Paragraph 6 Of The Settlement Agreement. Kearsarge And Merrimack County Exchanges.

Dr. Johnson testified that the concerns he expressed with respect to paragraph 5 also apply to the Kearsarge and Merrimack County Telephone Companies in paragraph 6, with the understanding that at the end of the 2-year rate freeze period for basic service, rates will not be increased until one of the five tests for competition in paragraph 6.2 is met (Tr. Day 2, p. 71, ll. 15-19).

In addition to the above general concerns regarding paragraph 6, Dr. Johnson has specific concerns regarding "weak points" in the language of paragraph 6.2 (Tr. Day 2, p. 72, ll. 19-22).

i) Paragraph 6.2 (i). "Collocation".

A "specialized carrier" could target and offer service to a handful of large business customers. This would be enough to trigger the test for rate increases for residential customers. Dr. Johnson testified that there is a "lack of linkage" between "whether it is a true competitive alternative to the customers in question" (Tr. Day 2, p. 72, l. 24 to p. 73, l. 16).

An additional concern with respect to the test in 6.2 (i), as well as the tests in 6.2 (ii) and 6.2 (iii), is that basic "stand-alone" service need not be offered (Tr. Day 1, p. 67, l. 10 to p. 68, l. 14). Instead, the carrier need only offer a "bundled" telephone service. The parties to the Settlement Agreement believe this service would include a "basic service-like offering", but not necessarily on a "stand-alone" basis (Tr. Day 2, p. 12, l. 8 to p. 13, l. 4).

ii) Paragraph 6.2 (iv). "Resale".

As drafted, this provision allows the test for competition to be met as long as a "non-affiliated CLEC "is providing basic service through "resale". This is a concern because there are "specialized carriers" who focus on the resale market and the type of competition that they offer is of "extremely limited relevance" (Tr. Day 2, p. 74, ll. 8-19). In these cases the discount off the retail price is likely to be very small. In Dr. Johnson's opinion, this is unlikely to provide "downward price competition" (Tr. Day 2, p. 74, l. 19 to p. 75, l. 1).

Dr. Johnson notes that sometimes a discount is not even offered by the carrier. Instead, what is offered may be a "prepayment plan" for people with poor credit (Tr. Day 2, p. 75, ll. 2-8). Dr. Johnson testified that this is a market "niche" that is "not appealing" to a majority of customers (Tr. Day 2, p. 75, ll. 8-10).

The basic concern expressed by Dr. Johnson is that there are "quick" "triggers" in paragraph 6.2 which "removes the price protections", even though the type of competition being measured may be of "very limited relevance" to the majority of customers (Tr. Day 2, p. 75, ll. 11-16).

Dr. Johnson's concern about the type of competition which is of limited relevance to the majority of customers is underscored by the Staff's position "that the service that is the subject of a competitive analysis be basic local service" (Tr. Day 2, p. 163, ll. 11-14). Dr.

Johnson concurs. He testified that in his opinion, the phrase in RSA 374:3-b that "competitive wireline, wireless or broadband service is available to a majority of retail customers" means

> "that the services in question are competitive with the voice grade communication that customers actually use in a substantial way..."

(Tr. Day 2, p. 145, ll. 10-23).

iii) Paragraph 6.2 (v). Demonstration Of Availability Of "Competitive" Wireless or Non-Affiliated Broadband Service To A Majority Of Retail Customers.

Dr. Johnson observes that the test set forth in 6.2 (v), as to whether wireless or non-affiliated broadband is "competitive, doesn't really resolve the question that's before [the Commission]" (Tr. Day 2, p. 75, ll. 17-22). Rather than the parties actually proposing a set of "specific criteria" that would be a reasonable test in a "fresh proceeding", the parties "leave it to the imagination" as to whether or not the service is "competitive" (Tr. Day 2, p. 75, l. 22 to p. 76, l. 15).

Staff acknowledges that this "puts the issue off to a future date", especially for wireless and broadband service (Tr. Day 2, p. 11, l. 18 to p. 12, l. 6). The Commission, at that time, would then have to determine what "competitive" means if none of the tests under 6.2, (i), (ii), (iii) and (iv) had been met and a filing is made under 6.2 (v) (Tr. Day 1, p. 64, ll. 1-21).

d) Paragraph 7 Of The Settlement Agreement. Lifeline Rates.

Dr. Johnson agrees that the "limited protection" for Lifeline customers during the first four years is a "good thing" since "these are some of the customers who would be most adversely affected by a substantial increase in rates" (Tr. Day 2, p. 76, ll. 19-24). However, Dr. Johnson points out that the protection "is not very long lasting" because ultimately after 4 years "it then falls back to the same set of tests that we were just talking about" in paragraph 6.2 above (Tr. Day 2, p. 77, ll. 1-3). Staff acknowledges that this is the case on an exchange by exchange basis (Tr. Day 1, p. 72, l. 24 to p. 73, l. 8). Dr. Johnson observes that at some point the limited Lifeline rate protection "goes away", and "it could go away as little as four years into the Plan" (Tr. Day 2, p. 77, ll. 10-13).

e) Paragraph 9 Of The Settlement Agreement. Lifeline Outreach Efforts.

Although not discussed by Dr. Johnson, the record shows that there is also a "weak point" with respect to paragraph 9 of the Settlement Agreement which pertains to Lifeline outreach efforts to low income customers. While the Company agrees in paragraph 9 to "work with" certain parties to improve the "dissemination of information" regarding the Lifeline and Link-Up programs, the Company is not required to take the following actions:

i) Work directly with the Community Action Programs. The Community Action Programs are the non-profit, anti-poverty programs that administer and process applications for Fuel Assistance, Weatherization, and the Gas and Electric Assistance Discount Programs (Tr. Day 1, p. 75, l. 2 to p. 76, l. 6).

ii) Require the Company to enter into a contract with the Community Action Programs to market the Lifeline and Link-Up programs to their clients, and assist their clients with applications for Lifeline (Tr. Day 1, p. 76, ll. 2-17).

Without the above efforts, it does not appear likely that the Company will be able to significantly increase its low number of Lifeline customers reflected on Bailey Confidential Exhibit 22C.

f) Paragraph 8 Of The Settlement Agreement. Exogenous Changes.

The Plan permits Commission authorized rate increases for certain "exogenous" events as defined in RSA 374:3-b III and the Companies' revised AFOR Plans. These increases, however, are in addition to the 10% cap on rate increases for basic local exchange service (Tr. Day 1, p. 65, ll. 1-14). These rate increases can actually exceed the Verizon rates if there is an exogenous event that causes rates to exceed the rate cap (Tr. Day 1, p. 65, ll. 15-21). Indeed, rate-increases due to exogenous events apply even during the rate freeze periods (Tr. Day 1, p. 73, ll. 10-14).

Dr. Johnson expressed several concerns regarding rate increases based on exogenous events.

i) Public hearings are not required. The language of the Settlement Agreement and AFOR Plans is such that the Commission has "discretion" both whether and how to approve a request for an increase in rates based upon the occurrence of an exogenous event (Tr. Day 2, p. 77, l. 16 to p. 78, l. 14).

ii) The Settlement Agreement and AFOR Plans put a "limitation" on the Commission's discretion because the Commission's investigation is limited to "the financial impact" of the proposed change (Tr. Day 2, p. 78, ll. 4-10). This means that the Commission is not able to examine the company's "return on equity" or "profits" to determine whether the Company can actually afford to "absorb" this exogenous change (Tr. Day 2, p. 78, l. 14 to p. 79, l. 3). Indeed, Staff acknowledges that there is no cost analysis of any service under the Plan (Tr. Day 1, p. 96, ll. 13-24).

g) The Companies' Revised Plans For An Alternative Form Of Regulation.

Mr. Bailey has several specific concerns regarding the Companies' revised AFOR Plans in addition to the concerns that have already been discussed in this Brief.

i) Affiliates.

The Alternative Regulation Plan presented by each of the Companies does not address safeguards regarding transactions between and amongst affiliates (Tr. Day 1, p. 91, ll. 4-16). The Plan also does not address safeguards against coordinated pricing decisions between and amongst affiliates for products and services that may be in the market for basic local exchange service (Tr. Day 2, p. 92, ll. 3-10). Nor does the Plan safeguard against comparable pricing between and amongst affiliates for products and services that may be in the market for basic local exchange service (Tr. Day 1, p. 93, ll. 1-7). In short, the Plan does not include

protections for customers with respect to the interactions between and among the four TDS Petitioners and their affiliates.

ii) Cost Shifting.

The Plan does not address safeguards against the shifting of costs from unregulated services to regulated services (Tr. Day 1, p. 95, ll. 1-10). Under the Alternative Regulation Plan the prices are no longer regulated (Tr. Day 1, p. 95, ll. 6-10). Further, since a cost analysis is not filed with the Commission the Plan does not address any possible shifting of costs from basic local exchange service to the costs of other services and transactions (Tr. Day 1, p. 95, l. 23 to p. 96, l. 24). Accordingly, the Plan does not include protections for customers against inappropriate cost shifting.

iii) Impact Of Competitively Priced "Bundles" On Prices For Basic Local Exchange Service.

Under the Plan it is "possible" that providing competitively priced bundles could create pressure on the Companies to increase prices for basic local exchange service (Tr. Day 1, p. 93, ll. 10-19). Dr. Loube testified that very few competitors provide a service offering that competes with the basic local exchange rate (Tr. Day 2, p. 152, ll. 10-15). The Companies' Plan allows the Companies to increase rates for basic services and decrease rates for "bundles". Prefiled Direct Testimony of Robert Loube, Ex. 8 P, p. 20, ll. 6-9.

Dr. Loube explains that increases in basic service rates means that TDS customers, who will have no alternative for that service when

competitors enter the market, pay a lot more for their services, while TDS customers interested in purchasing bundles would receive "discounts" (Tr. Day 2, p. 152, ll. 16-22). Dr. Loube testified that this "shift in prices" requires basic service customers, who are not purchasing bundles, "to provide the cash to support the carrier", while the "burden" of supporting the carrier is "removed" from other customers (Ex. 8 P, p. 20, ll. 16-18).

h) Recommendation Of Dr. Johnson Concerning The Settlement Agreement And The Companies' Revised AFOR Plan.

After review of the Settlement Agreement and the Companies' revised AFOR Plans, Dr. Johnson recommends "rejecting" the Settlement Agreement and Plans. Dr. Johnson further recommends that the Commission provide "guidance" to the parties on the interpretation of the statute as to whether the services in question are "competitive alternatives" for a majority of customers (Tr. Day 2, p. 82, l. 23 to p. 83, l. 12).

In his prefiled Direct Testimony, Dr. Johnson provided the following suggestions for how to analyze and determine whether "effective competition" exists in the market (Ex. 7 P, p. 36, l. 6):

i) The market is free of substantial barriers to entry and exit.

ii) No firm or consortium of firms has enough market power to set or strongly influence market prices.

iii) Multiple firms are operating in the market, and they are selling essentially the same product for prices determined by market forces.

(Ex. 7 P, p. 36, ll. 7-17).

iv) Competitive pressures are strong enough to effectively regulate prices.

v) Product homogeneity. There are enough customers who are sufficiently indifferent to brand-specific differences that they willingly switch back and forth between brands.

(Ex. 7 P, p. 37, ll. 14-21).

Dr. Johnson explained that "market dominance" and the ability to exercise "market power" – not the mere presence of alternative suppliers of other services that serve a similar purpose – are the "key issues" to consider (Ex. 7 P, p. 40, ll. 1-17). Thus, in determining whether alternative services are effectively competitive, the Commission should evaluate the extent to which competitive entry has occurred into the specific geographic and product markets served by TDS, and the extent to which these entrants have been successful in gaining a significant share of those specific markets (Ex. 7 P, p. 40, ll. 18-22).

TDS witness Ulrich agrees that, as set forth in Bailey Exhibit 30 (National Regulatory Research Institute article dated June 2007), an "acceptable way" to look at determining the level of competition in the market and determining whether a firm or group of firms has market power first requires "defining" the market in "product" and "geographical" terms (Tr. Day 2, p. 37, ll. 2-14). Mr. Ulrich also agrees with Bailey Exhibit 30 that if one were doing a "typical analysis" of the competitive nature of a market or the level of competition in the market one would next determine which producers and consumers are part of the market, then measure "market shares" and/or other "indicators" of competitiveness of the market, and then make a determination as to whether the market is "workably competitive" (Tr. Day 2, p. 37, l. 15 to p. 38, l. 6).

Mr. Ulrich acknowledged that TDS did not perform such an analysis in any of its New Hampshire exchanges even though it has performed such an analysis in other states in which it does business (Tr. Day 2, p. 38, ll. 7-10 and ll. 18-24). The reason that TDS did not perform such an analysis in New Hampshire was because "we were not required to do so by the statute" (Tr. Day 2, p. 38, ll. 9-10).

V. Conclusion.

Petitioners have failed to meet their burden of proof under RSA 374:3-b. The Commission should find that competitive wireline, wireless or broadband service is not available to the majority of retail customers in each of the exchanges served by the Petitioners as required by RSA 374:3-b, III (a). The Commission should further find that Petitioners' Plan does not preserve universal access to affordable basic telephone service as required by RSA 374:3-b III (e).

The settling parties' trade-off to provide the Companies with unrestrained pricing flexibility in return for the Companies' agreement to reduce barriers to entry into their markets is not in the public interest. Similarly, the Companies' revised Plan, which gives the Companies the ability to significantly increase prices to basic local exchange service customers, is not in the public interest. Moreover, the Companies have not demonstrated the necessity of including a provision for substantial rate increases to basic local exchange service in their Plan.

The Settlement Agreement and Petitioners' revised Plan should be rejected because they do not meet the requirements of RSA 374:3-b III (a) and III (e) and further fail to

adequately protect basic local exchange customers. The settling parties' hope that the Settlement Agreement will foster competition in the future does not meet the statutory requirement that competitive wireline, wireless or broadband service be available today.

> **...we have to remember, we're not talking about the customer who is of the most interest to competitors, those who buy bundles. We also have to be concerned about senior citizens on low income, people who, you know, need a phone, they use a phone, but they're not a candidate for the kind of bundled opportunities that we often think about when we think about competitive offerings.**
>
> (Cross examination of Dr. Ben Johnson, Transcript Day 2, p. 104, ll. 8-16).

For the foregoing reasons, the Settlement Agreement and the Companies' Plan For An Alternative Form of Regulation should be rejected by the Commission.

Respectfully submitted,
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Certification Of Service

I certify that on this date the public version of this Brief was served electronically with the Commission and all parties.

I further certify that on this date the Confidential version of this Brief was filed with the Commission and copies were served by mail or delivered to Staff, Office of Consumer Advocate, Susan Geiger, Esquire, and Frederick Coolbroth, Esquire, Attorney for Petitioner TDS Companies (3 copies).

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January 11, 2008
Date