THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 07-027

PETITIONS OF KEARSARGE, WILTON, HOLLIS AND MERRIMACK COUNTY TELEPHONE COMPANIES FOR AN ALTERNATIVE FORM OF REGULATION

REPLY BRIEF OF segTEL, INC.

I. Introduction

segTEL, Inc. ("segTEL") is a signatory to the Settlement Agreement that was presented to the New Hampshire Public Utilities Commission ("the Commission") at the hearings in the above-captioned matter held on December 4, 2007 and December 5, 2007. At the conclusion of those hearings, Commissioner Below asked those parties that support the Settlement Agreement to address in post-hearing briefs the legal basis for the Commission's authority to approve the Settlement Agreement in the absence of the findings specified in RSA 374:3-b, III. For the reasons discussed more fully below, segTEL submits that the Commission has the authority to approve the Settlement Agreement and respectfully requests that such approval be granted because the Settlement Agreement is just, reasonable and serves the public interest.

II. The Commission Is Authorized to Approve the Settlement Agreement

Kearsarge Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc. and Merrimack County Telephone Company (collectively

"TDS") filed petitions with the Commission requesting approval of their plans for an alternative form of regulation ("AFOR") pursuant to RSA 374:3-b. Subsection III of that statute provides that "[t]he [C]omission ***shall*** approve the alternative regulation plan if it finds that..." (emphasis added). Thus, the wording of the foregoing statute makes clear that the Commission is **required**[1] to approve an AFOR plan if the Commission makes the findings specified in RSA 374:3-b, III. (a) through (f). Those findings include: (a) the availability of competitive services to a majority of the customers in the petitioning carrier's local exchanges; and that the AFOR plan contains provisions regarding: (b) maximum basic local rates, (c) promoting the offering of innovative services, (d) intercarrier service obligations, (e) preservation of universal access to affordable basic service, and (f) modifications to the plan or a return to rate of return regulation if the petitioning carrier fails to meet any of the conditions set out in RSA 374:3-b, III.

In the instant case, testimony was prefiled by Commission Staff, the Office of Consumer Advocate and New Hampshire Legal Assistance ("NHLA") (on behalf of Daniel Bailey) and presented orally at the hearings (by NHLA's witness) indicating that competitive wireline, wireless or broadband service is not available to a majority of the retail customers in each of the exchanges served by TDS. Thus, based upon that information, the Commission may determine that the weight of the evidence does not warrant a finding that competitive services are available within the meaning of RSA 374:3-b, III.

However, the above-referenced evidence in this case is not the only information that bears on the issue of whether competitive services are available to a majority of TDS

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[1] When interpreting statutes, "[t]he use of the word 'shall' is generally regarded as a command; although not controlling, it is significant as indicating the intent that the statute is mandatory. " *McCarthy v. Wheeler,* 152 N.H. 643, 645 (2005).

customers. On December 12, 2007, Comcast Phone of New Hampshire, LLC ("Comcast") filed with the Commission a Form CLEC-10 in which Comcast seeks authority to provide competitive local exchange service in the service territory of TDS. This posthearing filing, if granted, would enable the Commission to make the finding under RSA 374:3-b, III. (a) regarding the availability of competitive basic exchange service thereby rendering moot claims by NHLA to the contrary. Thus, the Commission is not, as NHLA asserts, barred from issuing its approval of the Settlement Agreement and implementing the TDS AFOR plans developed under that Agreement. Moreover, even if the Commission determined that it was not able to make all of the findings listed under RSA 374:3-b, III., the Commission may nonetheless approve the Settlement Agreement, for all of the reasons set forth below.

First, nothing in RSA 374:3-b requires that the Commission reject an AFOR plan if the Commission does not make the findings listed in subsection :3-b, III. Had that been the intent of the legislature, the statute would have been written as follows: "The commission shall not approve the alternative regulation plan unless it finds that...". Thus, although the wording of RSA 374:3-b is mandatory in the sense that it requires that the Commission approve an AFOR plan if it makes all of the findings in :3-b, III., the statute does not conversely require that the Commission reject the AFOR plans created by the Settlement Agreement in the absence of those findings.

Second, RSA 374:3-a grants the Commission broad authority to approve an alternative form of regulation for any utility, including the AFOR plans created by the Settlement Agreement. That statute enables the Commission, "upon its own initiative" to approve alternative forms of regulation "provided that any such alternative results in just

and reasonable rates and provides the utility the opportunity to realize a reasonable return on its investment." RSA 374:3-a. This broad grant of discretionary authority by the legislature allows the Commission to approve an AFOR plan upon the Commission's own initiative. The fact that TDS originally petitioned the Commission for approval of an AFOR plan under the provisions of RSA 374:3-b does not preclude the Commission from exercising its authority under RSA 374:3-a, and, on its own initiative, to approve the AFOR plans created by the Settlement Agreement under that statute (which does not contain the findings listed in RSA 374:3-b, III.). No further notice or proceedings are necessary in order for the Commission to approve the Settlement Agreement. Hearings on the Settlement Agreement have been held and all interested parties have had an opportunity either through testimony, cross examination or briefs to comment on it. Further adjudicative proceedings in this docket would serve no useful purpose. Accordingly, the Commission may invoke the provisions of RSA 374:3-a and approve the Settlement Agreement upon a finding that the AFOR plans result in just and reasonable rates and provide TDS with the opportunity to realize a reasonable return on its investment. Those findings are supported by the testimony presented in this case as well as by the terms of the Settlement Agreement.

Since the Commission has already found that TDS's current rates are just and reasonable, the rates established under the AFOR plans are also just and reasonable because they are frozen at current levels for certain periods of time and thereafter may not exceed the rates of the state's largest incumbent carrier. Also, there is no evidence on the record that the AFOR plans deny TDS the opportunity to realize a reasonable return

on its investment. Therefore, the Commission can find that the criteria of RSA 374:3-a have been met.

Finally, the Commission "...is vested with broad statutory powers." *Appeal of Granite State Electric Co.*, 120 N.H. 536, 539 (1980). "[I]t must not only perform those duties statutorily created, but also exercise those powers inherent within its broad grant of power." *Id.* One of those inherent powers is the authority to approve settlement agreements. This authority has been codified and is set forth in N.H. Admin. Rule Puc 203.20 (b) which expressly states that "[t]he commission ***shall***[2] approve a disposition of any contested case by stipulation, settlement, consent order or default, if it determines that the result is just and reasonable and serves the public interest." (Emphasis added.) Thus, the Commission has specific authority under the foregoing rule to approve a settlement agreement to dispose of any case when the Commission determines that the result is just and reasonable and serves the public interest. The public policy favoring settlements is also embodied in RSA 541-A:31, V. (a) which authorizes an administrative body that conducts adjudicative proceedings to resolve them "...by stipulation, agreed settlement, consent order or default" unless such disposition is precluded by law. Because there is no law prohibiting the Commission from approving the Settlement Agreement before it in this case, and for the reasons discussed below in section III., the Settlement Agreement should be approved.

Although Commission-initiated proceedings to establish an AFOR are governed by Admin. Rule Puc 206.03 which, *inter alia*, requires the utility to provide certain information listed in Puc 206.05 and 206.06, the Commission has the authority to waive any of those provisions if it determines that the waiver will not disrupt the orderly and

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[2] *Id.*

efficient resolution of matters before the Commission and the waiver serves the public interest, *i.e.*, the waiver is appropriate because compliance with the rule would be onerous or inapplicable given the circumstances of the affected person, or the purpose of the rule would be satisfied by an alternative method proposed. N.H. Admin. Rule Puc 201.05 (a) and (b).

Here, the orderly and efficient resolution of this docket will be accomplished by approving the Settlement Agreement without further proceedings. The public interest will be served through waiver of any rules that are either inapplicable, onerous or that are satisfied by virtue of the Settlement Agreement having been filed and thoroughly vetted in an adjudicative proceeding. Nothing in RSA 374:3-a or any other statute precludes the Commission from waiving any of the rules contained in Puc 206. Moreover, many of the substantive and procedural provisions contained in Puc 206 have been met either by TDS's initial filing, the Settlement Agreement, or the hearings thereon. However, to the extent that the Commission determines that it must waive some of the provisions of Puc 206 and also determines that a written request from an interested party is a prerequisite for such waiver, segTEL respectfully makes that request here.

III. The Settlement Agreement Should Be Approved Because The Result is Just and Reasonable and Serves the Public Interest

A comparison of the originally-filed AFOR plans with those proposed by the Settlement Agreement reveals that the Settlement Agreement calls for plans that place many more restrictions upon TDS than did the originally-filed AFOR plans. Basic service rates under the Settlement Agreement will be just and reasonable because they are initially frozen and ultimately cannot exceed rates charged by the largest incumbent local

exchange carrier operating in New Hampshire. Lifeline rates charged to TDS's low income customers will be frozen at current levels for at least four years and until such time as certain competitive criteria have been met in each affected exchange. Thus, the AFOR plans under the Settlement Agreement protect customers and result in just and reasonable rates.

The Settlement Agreement also contains several provisions that are intended to promote competition. For example, TDS has agreed not to oppose Commission certification or registration of any company seeking to do business as a competitive local exchange carrier in TDS's service territories. In addition, TDS has agreed to waive the rural telephone company exemption created by Section 251(f)(1) of the Telecommunications Act of 1996, which could otherwise pose a significant barrier for a competitive carrier wishing to do enter the market in TDS's service territories. TDS has also agreed to shortened time periods for seeking arbitration of interconnection agreement disputes.

Therefore, the Settlement Agreement is just and reasonable and serves the public interest because it: (1) protects TDS's customers from immediate rate increases that might otherwise occur if TDS were to file a "traditional" rate case; (2) promotes competition by minimizing the regulatory barriers that have the effect of either preventing or deterring competitive local exchange carriers from conducting business in TDS's service territories; and (3) affords TDS some regulatory relief by allowing the company pricing flexibility.

IV. Conclusion

For all of the foregoing reasons, segTEL respectfully requests that the Commission approve the Settlement Agreement in the above-captioned matter.

Respectfully submitted,

segTEL, Inc.
By Its Attorneys
ORR & RENO, P.A.
One Eagle Square
Concord, NH 03302-3550
Telephone: (603) 223-9154
e-mail: sgeiger@orr-reno.com

Susan S. Geiger

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Certificate of Service

I hereby certify that on this 8th day of February, 2008, a copy of the foregoing brief was sent by electronic mail to the Service List.

Susan S. Geiger

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