

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Kearsarge Telephone Company, Wilton Telephone Company,
Hollis Telephone Company and Merrimack County Telephone Company

Petition for an Alternate Form of Regulation

DT 07-027, Phase 2

BRIEF OF THE OFFICE OF CONSUMER ADVOCATE

I. INTRODUCTION

The New Hampshire Public Utilities Commission (Commission) re-opened this docket in February 2009, and indicated that the issues for consideration included:

1. Whether MCT and KTC have demonstrated that competitive alternatives are available for the majority of customers in each of their exchanges;
2. Whether the terms of the earlier settlement agreement should apply to MCT and KTC; and
3. Whether MCT and KTC should be granted alternative regulation consistent with RSA 374:3-b.

Order No. 24,943, p. 2 (re-opening proceeding and scheduling prehearing conference). As the petitioners, Merrimack County Telephone Company (MCT) and Kearsarge Telephone Company (KTC) (TDS, collectively) bear the burden of proving those issues by a preponderance of the evidence. *See* N.H. Admin. Rule Puc 203.25.

After a hearing in December 2007, the Commission rejected certain terms of a proposed Settlement Agreement, which terms pertained to revised alternative regulation plans for MCT and KTC. *See* Order 24,852, April 23, 2008 ("Phase 1 Order"), pp. 28-30. In rejecting the revised plans for MCT and KTC, the Commission indicated that RSA 374:3-b, III (a) requires proof that 1) alternatives are *currently* available to a majority of the retail customers within each

exchange served by MCT and KTC; and that 2) these current alternatives are *competitive*. See Phase 1 Order, pp. 29-30.

The supplemental evidence filed by TDS since that time still falls short of these threshold requirements. The evidence, even when taken together with the evidence in the record from the first phase of this docket, is insufficient to prove that alternatives are *currently* available to retail customers in each of MCT's and KTC's exchanges, and that the alternatives that do exist in some of these exchanges are *competitive*. As such, the Commission should deny MCT's and KTC's petitions for alternative regulation.

II. MCT

MCT serves the following exchanges: Antrim, Bradford, Contoocook, Henniker, Hillsboro, Melvin Village, Sutton and Warner. See Confidential OCA Exhibit 1, Phase 2 (Attachment E to Reed Prefiled Direct Testimony dated March 1, 2007). MCT contends that there are competitive wireless, cable broadband, cable television and/or DSL services available to more than 50% of the customers in these exchanges. See, e.g., *Id.* The evidence in the record, however, fails to support this conclusion.

A. Sutton Exchange

For the Sutton exchange, MCT relies upon the analysis of its consultant, C Squared. See Exhibit 6P (Public Supplemental Testimony of Michael Reed), p. 3, line 19, through p. 4, line 2. C Squared measured signal strength of ">-85 dBm" and "-85 dBm to -90 dBm." *Id.* at p. 6, lines 12-14. For several reasons, C Squared's analysis is not sufficient to sustain the Companies' burden of proof that a wireless alternative is available in Sutton.

First, there is no evidence as to what percentage – if any – of C Squared’s signal strength data corresponds to signal strength below -85 dBm, and there is competent evidence in the record that signal strength between -85 dBm and -90 dBm is not sufficient to provide adequate and consistent wireless service. *See, e.g.*, Transcript, Phase 2 hearing, October 1, 2009 (Day 2 Transcript), p. 57, lines 9-12 (Dr. Johnson testified, “that’s at the range where basically [wireless providers have] very little hope of even selling service for the convenience”); p. 56, line 23, through p. 57, line 3 (-95 dBm signal strength inside a home is “absolutely not” satisfactory call quality); p. 51, lines 1-3 (“it’s fair to say the -85 to -90 [dBm] is getting towards the terrible end of the range”); and p. 50, lines 14-16 (“there’s a whole continuum, and that -85 [dBm] is getting towards the far end of the range”). *See also*, Exhibit 10 (Prefiled Direct Testimony of Josie Gage dated October 12, 2007), p. 6, line 8, through p. 7, line 16 (discussing various industry opinions about call quality at different signal strengths).

Also with respect to the sufficiency of the signal strength range used by C Squared, there is no evidence in the record of how the signal strength cut-offs used in C Squared’s testing relate to the “RF link budgets” used by the carriers tested. *See* Day 2 Transcript, p. 141, lines 4-6 (TDS witness Goulet testified, “I’m not going to give out carrier’s link budgets because that’s proprietary”). All we have on this point is TDS’s claim that these cut-offs are “conservative,” and a completely new assertion that the signal-strength data may be lower than it should be. *See* *Id.* at p. 143, line 2, and p. 143, line 13, through p. 144, line 2.¹

¹ MCT and KTC offered the testimony of Daniel L. Goulet to support the signal strength analysis for the Sutton and Salisbury exchange. Mr. Goulet’s professional experience includes work for all of the wireless carriers whose networks C Squared tested for TDS. *See* Day 2 Transcript, p. 136, lines 1-5; and p. 204, line 15, through p. 206, line 15. Also, Mr. Goulet has an interest in future work for these wireless carriers. *See* *Id.* at p. 136, lines 7-10. As

Moreover, setting aside these questions about the appropriateness of the cut-offs used by C Squared, the individual wireless providers' data above these cut-offs paints a bleaker picture of availability than the compilation of all of the data shown together. *See, e.g.*, Day 2 Transcript, p. 41, lines 6-7 (individual wireless carrier maps "look much less robust" than the aggregated maps); p. 178, line 21, through p. 179, line 7 (question and answer concerning signal strength on Roby Road); and *compare* Exhibits C and D to KTC-MCT Exhibit 6C (depicting individual wireless providers' signal strength data) *with* Exhibits A and B to KTC-MCT Exhibit 6C (compilation of all wireless providers' signal strength data). What appears on the "compilation" maps to be a <<<BEGIN CONFIDENTIAL>>>

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Lastly, the Company provided an insufficient basis for its assertion that wireless service is available to more than 50% of customers in the exchanges tested by C Squared. *See, e.g.*, Day 2 Transcript, p. 174, line 8, through p. 175, line 24 (Company's assertion that a majority of customers have access to wireless service is based on "a lot of things" except the number of customers depicted in the exhibits to its Supplemental testimony); and p. 195, line 23, through p.

such, Mr. Goulet has an interest in portraying the networks of these providers in a positive light. Therefore, the Commission should give less weight to Mr. Goulet's testimony, as he is not a disinterested or objective witness.

197, line 16 (similar). In fact, the Company does not know how many customers are depicted in the C Squared “compilation maps.” *Id.*

Consequently, MCT has not sustained its burden of proving that wireless is available to a majority of customers in the Sutton exchange. Because there is insufficient evidence of alternatives in Sutton, the Commission need go no further in its analysis for MCT, as RSA 374:3-b, III (a) requires alternatives in each and every MCT exchange.

B. Other MCT Exchanges

Assuming only for the sake of argument that the evidence did support a wireless alternative in the Sutton exchange, MCT also failed to sustain its burden that an alternative exists in at least two other MCT exchanges, Bradford and Warner. MCT estimated wireless availability in these exchanges based upon a CoverageRight® map. *See, e.g.*, Day 2 Transcript, p. 72, lines 13-18. The Commission, however, rejected the CoverageRight® map as sufficient proof of wireless availability. *See* Phase 1 Order, p. 29 (“wireless coverage estimates by wireless providers [are] not sufficient to demonstrate availability of third party offerings”). Despite this ruling, in its supplemental filing, MCT again relied upon the CoverageRight map for all of the MCT exchanges except Sutton.² *See* KTC-MCT Exhibit 6P, Reed Supplemental Testimony,

² The Companies’ reliance upon a New York Public Service Commission order, *see* OCA Exhibit 11 (NYPSC Order Adopting Framework, Issued and Effective March 4, 2008) and KTC-MCT Exhibit 6P, p. 13, lines 5-20, to support its reliance upon Coverage Right is misplaced as the threshold requirements and evidence considered by the NYPSC in granting rate relief were much different than the threshold requirements and evidence that the Commission will use to make its decision in this proceeding. The NYPSC required before granting rate relief that competition be measured by the percent, greater than 69%, of cable *and* wireless alternatives, and that a review of the ILEC’s adjusted return on equity be done. *See e.g.*, OCA Exhibit 11 at p. 5. The combination of these requirements, none of which are applicable to this case, was the basis for the relief granted to the TDS New York affiliates. Consequently, the evidence considered by the NYPSC for proof of one part of one requirement (*i.e.*, the percentage of wireless competition) should not be considered in isolation by the Commission for the purpose suggested by the TDS Companies (*i.e.*, that the CoverageRight map is sufficient to prove that wireless service is available to a

January 29, 2009, p. 12, lines 9-13 and Confidential Exhibit G. *See also* Transcript, Phase 2, September 29, 2009 (Day 1 Transcript), p. 164, lines 15-24.

Since the Commission's rejection of the CoverageRight® evidence, new evidence confirms that the CoverageRight® map is neither reliable nor sufficient proof of wireless availability. The map merely reflects "marketed footprints" of wireless providers based upon "patterns" and "predictions of the carriers." *See* OCA Exhibit 8 (TDS Response to OCA 2.9, Phase 2). The Company provided no information about the inputs used to develop this map, including the signal strength cut-off used by the carriers depicted. *See, e.g.,* Day 2 Transcript, p. 102, line 20, through p. 104, line 16; and p. 107, lines 15-18; *see also* OCA Exhibit 7 (Public version of TDS Response to OCA 2.9, Phase 2); and Confidential OCA Exhibit 9 (TDS Response to OCA 1.14, Phase 2). The CoverageRight map® contains no information about call quality. The CoverageRight® map is also not based upon the same type of data as the analysis performed by C Squared. *See* Day 2 Transcript, p. 110, line 13, through p. 111, line 14 (the data used by C Squared is different from the data used by CoverageRight®; C Squared measured dBm at the receiving end for its analysis, and CoverageRight® map is based upon dBu at the source of the signal). Therefore, the CoverageRight map alone is not sufficient to prove that wireless service is available to a majority of retail customers in MCT's exchanges. *See* Day 2 Transcript, p. 228, lines 4-8.

At the hearing, the OCA's witness and one of TDS's witnesses testified that at least one area driven by C Squared in the Sutton exchange contained no, or insufficient, signal strength

majority of retail customers within the TDS exchanges). As TDS witness Mr. Reed acknowledged, the model followed in this NYPSC case is "not the model we're following here." Day 2 Transcript, at p. 123, line 8-9.

data, despite the fact that at least four wireless providers include that same area within their CoverageRight® “marketed footprint.” *See* Day 2 Transcript, p. 218, line 15, through p. 220, line 12; and p. 223, lines 5-10 (revised testimony of Stephen R. Eckberg); and Confidential OCA Exhibit 15 (TDS Response to OCA 2.11, Phase 2) and Confidential OCA Exhibit 16 (Revised Attachment 3 to Eckberg Testimony). *See also* Day 2 Transcript, p. 136, lines 20-24 (Goulet acknowledges that there is an area of I-89 with no signal strength data). After the hearing, however, the Companies stated for the first time, in response to an oral data request at the hearing, that C Squared’s equipment was “turned off” in this area. *See* TDS Responses to ODR 2 dated October 15, 2009.

Notwithstanding this new assertion about C Squared’s testing, the remainder of the Companies’ response to this oral data requests supports the point made by the OCA witness at the hearing – that C Squared’s testing in the Sutton exchange is not consistent with the CoverageRight® map for that area. *See* Day 2 Transcript, p. 223, lines 10-15. Specifically, the Companies stated in response to ODR 2:

Immediately prior to the termination of the calls, the signal strength, on a per carrier basis, for those calls that had been in progress was as follows:

| Carrier | RSSI |
|------------------|---------|
| Verizon Wireless | -69 dBm |
| US Cellular | -86 dBm |

Sprint-Nextel, AT&T Mobility and T-Mobile do not serve this area of I-89 in the Sutton exchange and, therefore, no call was in progress at the time the data collection equipment was turned off.

TDS Response to ODR 2 (emphasis added). *See also* Day 2 Transcript, p. 41, lines 6-12 (C

Squared's carrier specific maps reveal that <<<**BEGIN CONFIDENTIAL**>>>

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exchange appears to be marketed by at least four wireless providers. *See* Day 2 Transcript, p.

220, lines 2-12; see also Confidential OCA Exhibit 16 (Revised Attachment 3 to Eckberg

Testimony). The fact that only two providers *actually* serve this area contradicts the Companies'

assertion that the C Squared data is consistent with the CoverageRight® map. Consequently, by

relying solely on the CoverageRight® map, evidence of questionable sufficiency and reliability,

MCT and KTC have not provided sufficient proof of wireless availability for the MCT

exchanges of Antrim, Bradford, Contoocook, Henniker, Hillsboro, Melvin Village, and Warner.

Because MCT's evidence of wireless availability is not reliable or sufficient, the Commission must consider the availability of other alternatives to MCT's basic local service within its exchanges. *See* Phase 1 Order, p. 27 (Commission based its finding of third party service availability in Wilton and Hollis on testimony of "available alternatives to Wilton and Hollis' basic local services"). MCT suggests that other possible alternatives include DSL and cable.

The only DSL available within the MCT exchanges, however, is provided by MCT. *See, e.g.,* Day 2 Transcript, p. 68, lines 8-11. Therefore, DSL is "not an alternative under the statute

to the TDS Companies' basic service." Phase 1 Order, p. 29 ("because DSL can only be purchased in combination with TDS basic service" it is not an alternative).

In addition, MCT is the only provider of cable television in the Bradford and Warner exchanges. *See* Day 2 Transcript, p. 73, lines 17-20; and p. 74, lines 4-7. Also, neither the exchange of Bradford nor the exchange of Warner has cable broadband available. *See* Day 2 Transcript, p. 75, lines 4-9 (Bradford), and p. 74, line 8-10 (Warner). Further, neither of these two MCT exchanges is covered by Comcast Phone of New Hampshire's (Comcast Phone) CLEC-10 certification. *See* OCA Exhibit 2 (Comcast Phone's request for approval of its Form CLEC-10); and Order 24,938 (approving Comcast Phone's CLEC-10 certification). Therefore, cable is not an alternative to MCT's basic service under RSA 374-3:b, III (a).

MCT may argue that its updated intrastate access minutes of use and access line losses, *see* KTC-MCT Exhibit 7C, pp. 6-7, and Exhibit J, prove availability of alternatives within its exchanges. Such an argument, however, must fail. MCT provided no evidence to tie these losses to alternatives to its basic local telephone services. *See, e.g.*, Day 1 Transcript, p. 49, lines 2-5, and lines 15-19 (TDS did no survey of people living in the KTC and MCT exchanges to determine what types of telephone services they are using); p. 174, lines 6-18 (TDS is not aware of and did not provide to the Commission any study directly linking loss in access minutes to a wireless or any other technology); p. 174, lines 19-22 (TDS did not provide any study estimating the number of access lines lost to wireless carriers). *See also* Day 2 Transcript, p. 194, line 5-8 (TDS witness does not know "what people are using instead" of TDS basic service).

Also, the minutes of use and line loss data is relevant only to the issue of whether an alternative to TDS' basic local service is *competitive*, not to the issue of whether that alternative

is *available*. Consequently, this evidence should not be considered unless and until the Commission makes a determination that alternatives are currently available in the Bradford and Warner exchanges. *See* Phase 1 Order, p. 27 (Commission considered evidence of access line loss, minutes of use loss or access revenue loss in its determination of whether the alternatives available in the Hollis and Wilton exchanges were competitive, which determination followed a determination about availability).

For the sake of argument, even if MCT had demonstrated that wireless service is *currently available* to a majority of retail customers within the Bradford and Warner exchanges, MCT must still sustain its burden of proving that the services provided to retail customers by wireless providers are *competitive* with TDS basic local service. This MCT also failed to do.

Earlier in this proceeding, the Commission defined “competitive” as used in RSA 374:3-b, III (a) as more than “mere availability of alternatives” but less than “a fully functioning competitive market.” Phase 1 Order, at p. 26. For the purpose of determining competition in the Wilton and Hollis exchanges, the Commission also used as a benchmark the TDS Companies’ “local” or “basic” services. *See* Phase 1 Order, at p. 27 (“We find that the level of competition between those third party alternatives and the local services provided by Wilton and Hollis, is sufficient to permit regulation under the amended alternative regulation plans filed by Wilton and Hollis.”); and p. 29 (“We do not find the TDS Companies’ offering of DSL to be an alternative under the statute to the TDS Companies’ *basic service* because DSL can only be purchased in combination with TDS basic service.”).

The OCA agrees with the Commission that, in order to qualify as “competitive” the alternative service must, at a minimum, have all of the essential attributes of basic service as

outlined in the Commission's rules, *see* N.H. Admin. Rules Puc 412.01 (b) and 432.01 (a). In addition, to be deemed "competitive," the alternative service must actually affect TDS's market power.

Further, "the word 'competitive' has a very specific meaning in the economics literature, and it's a word that has a lot of significance here." *See* Day 2 Transcript, p. 25, lines 18-21 (Testimony of Ben Johnson, Ph.D.). When interpreting the evidence for the purpose of ascertaining whether a service is competitive with TDS's basic service, "the key is whether or not ...the majority of the retail consumers ...are treating the alternative technologies or alternative services as competitive." *Id.* at p. 26, lines 6-10. It's a "complex question" requiring the Commission to "drill down" below the Companies' claims. *Id.* at p. 37, lines 8-16.

When considered within this context, there is sufficient evidence in the record to rebut any contention by MCT that wireless services available in the Bradford and Warner exchanges, if any, are "competitive" within the meaning of RSA 374:3-b, III (a). The record includes testimony of three Ph.D. economists, all of whom have challenged to some extent TDS claims that wireless service is competitive with basic wireline service. *See* Exhibits 7C and Bailey Exhibit 76 (Confidential Direct and Public Rebuttal testimony, respectively, of Ben Johnson, Ph.D.), Exhibit 8C (Confidential testimony of Robert Loube, Ph.D.), and Exhibit 9 (Pradip Chattopadhyay, Ph.D.).

Among these experts, Dr. Johnson is a well-qualified expert in the field of economics and its application to public utilities, who has testified in his area of expertise in hundreds of regulatory proceedings. *See* Bailey Exhibit 7C (Confidential Prefiled Direct Testimony of Ben Johnson, Ph.D., dated October 15, 2007), Appendix A. Dr. Johnson's qualifications to testify on

the issues before the Commission, including the issue of whether certain alternatives to TDS's basic service are competitive within the meaning of RSA 374:3-b, III (a), went unchallenged, and his testimony was admitted as evidence without objection.

As noted most recently by Dr. Johnson, wireless service is complementary to, not competitive with, wireline telephone service. *See* Exhibit Bailey 76 (Rebuttal testimony of Ben Johnson, Ph.D., dated July 17, 2009), p. 14, lines 17-19. *See also* Day 2 Transcript, p. 37, lines 16-18 ("I don't believe we're at that point yet where the [wireless and wireline] markets have actually converged"); and p. 37, line 23, through p. 38, line 2 ("we're nowhere near [wireless being per se competitive with wireline] right now"). And wireless service is not only functionally different than wireline. *See* Exhibit Bailey 76 (Rebuttal testimony of Johnson), p. 15, lines 6-8; and p. 23, line 18, through p. 24, line 10. As Mr. Reed testified, "I mean, we all know a cell signal will drop on you when you go around the corner." Day 2 Transcript, p. 198, lines 20-22.

In addition, the pricing of and the features associated with wireless service are not comparable to TDS basic wireline service. *See* Exhibit Bailey 76 (Rebuttal testimony of Johnson), p. 18, lines 6-7; and Day 2 Transcript, p. 187, lines 15-23 (In response to a questions about why cell packages "tend to be quite a bit higher than" TDS's basic exchange rates, Mr. Reed testified that "almost all include unlimited long distance or some long distance piece"). *See also* Exhibits OCA 3 and Confidential Exhibit OCA 4 (summarizing prices of some of the wireless plans tested by C Squared); Exhibit OCA 5 and Confidential Exhibit OCA 6 (summarizing prices of the remaining two wireless plans tested by C Squared); and Bailey Exhibit 57 (Maine OPA Ratewatcher as referenced in Bailey Exhibit 58, Companies' response to

OCA 1.11, Phase 2). As Mr. Reed so aptly put it, “[w]hen we start comparing these wireless packages, they’re all over the place.” Day 2 Transcript, p. 188, lines 7-8. As Dr. Johnson testified, “[t]he TDS basic local exchange rates could be increased by 50%, 75% or more before reaching the vicinity of most wireless plans.” See Exhibit Bailey 76 (Rebuttal testimony of Johnson), p. 21, lines 14-15.

Even TDS extols the virtues of wireline service over other telephone technologies on its website. See Bailey Exhibit 60 (Print-out from TDS’ website, “To Cut The Cord - or Not. Nine Reasons To Keep Your Landline”). Specifically, the record includes statements by TDS regarding reasons why its customers should keep their wireline telephone. These reasons include: a more reliable connection to 911; a higher quality voice transmissions; a more dependable technology (i.e., no worries about having minutes of use left, a dead battery in your wireless phone, or a power outage); more privacy; and the fact that wireline service is more cost effective. *Id.* The OCA agrees with TDS’s opinion that wireline telephone services are functionally, and otherwise, different than wireless telephone service.

The only remaining evidence offered by MCT on the issue of competitiveness is the data related to access lines, access minutes of use and access revenue. Without more, however, this evidence is not enough to sustain TDS’s burden of proof on the issue of competitiveness. As the Commission recognized in its order on Phase 1, “the TDS Companies’ evidence of access line loss, minutes of use loss, or access revenue loss, standing alone, is not sufficient to demonstrate the level of competition required under RSA 374:3-b, III (a). See Phase 1 Order, p. 27 (“line loss, minutes of use loss and revenue loss evidence [must be] viewed in combination with the rest of the evidence” in determining whether petitioners met burden of RSA 374:3-b, III (a)).

In conclusion, MCT has failed to sustain its burden of proving that an alternative to its basic local service is currently *available* to a majority of the retail customers within the Bradford and Warner exchanges. Furthermore, MCT has not demonstrated that any alternatives available to retail customers within the Bradford and Warner exchanges are *competitive*. Therefore, the Commission should deny MCT's petition for alternative regulation.

III. KTC

KTC serves the following exchanges: Andover, Boscawen, Chichester, Meriden, New London and Salisbury. *See* Confidential OCA Exhibit 1, Phase 2 (Attachment E to Reed Prefiled Direct Testimony dated March 1, 2007). Like MCT, KTC contends that there are competitive wireless, cable broadband, cable television and/or DSL services available to more than 50% of the customers in these exchanges. *Id.* The OCA disagrees with this assertion.

A. Salisbury Exchange

As discussed above, the signal strength cut-off used by C Squared, at or below -85 dBm, is not sufficient to support a conclusion that wireless service is available to a majority of customers in the Salisbury exchange. As a result, the Commission need not consider whether wireless alternatives in Salisbury are competitive with TDS's basic local service, and the Commission should deny KTC's petition for alternative regulation pursuant to RSA 374:3-b.

B. Other KTC Exchanges

To the extent that the Commission disagrees with the conclusion above, it is the OCA's position that KTC has still failed to sustain its burden of proof that wireless service is available in at least one other exchange, Andover. KTC relies upon the CoverageRight® map to prove

availability of wireless service in Andover. As discussed above, this reliance is misplaced as this map is neither reliable nor sufficient proof of wireless availability. Because of this, and because the only DSL service available in Andover is provided by KTC, see Day 2 Transcript, p. 75, line 23, the only potential alternative to KTC's basic service in Andover, for purposes of the Commission's review, is Voice over Internet Protocol (VoIP) service from Comcast IP. See Day 2 Transcript, p. 71, line 11, through p. 72, line 3.

Comcast IP is not a regulated CLEC, see Day 2 Transcript, p. 72, lines 4-7, but its affiliate, Comcast Phone, was certified by the Commission as a CLEC in early 2009. See Order 24,938 (approving Comcast Phone's CLEC-10 certification). An interconnection agreement between Comcast Phone and TDS was filed in September 2009. See KTC-MCT Exhibit 9P.

In determining whether KTC has met its burden, the Commission must first consider the evidence related to the *availability* of Comcast IP services to customers in Andover. Although Comcast Phone is certified to provide services to Comcast IP within Andover, KTC has offered no evidence that Comcast Phone is *currently* providing such services to Comcast IP or that Comcast IP is *currently* providing such services to any customers in Andover. See Day 1 Transcript, p. 178, lines 21-23 (Reed testifies, "Whether [Comcast has] begun to offer service [within TDS territories], I couldn't tell for sure"); and p. 179, lines 10-20 (Reed testified, "I can only tell you that [Comcast Phone is] authorized by this Commission and they have an interconnection agreement in place. I can't confirm whether they've sold anything there or not"). See also Day 2 Transcript, p. 67, lines 16-18 (Reed testified, "Comcast is now certified as a CLEC, and I don't know if they sold anything"). TDS does not fulfill its affirmative burden of proof under RSA 374:3-b, III (a) by showing only that Comcast Phone is authorized by the

Commission to serve Comcast IP in KTC's Andover exchange, or by alleging that there are no "impediments" to Comcast doing so. *See* Day 2 Transcript, p. 204, lines 2-6.

In addition, the availability requirement in RSA 374:3-b, III (a) is not sustained by proof of Comcast Phone's interconnection agreement with TDS. It has only been a matter of weeks that an interconnection agreement has existed. Before then, Comcast Phone was not even able to receive calls that originated on or terminate calls to TDS' public switched telephone network, and, as KTC acknowledged, Comcast Phone has two years from the date of its CLEC certification to begin serving customers within its exchanges. *See* Day 1 Transcript, p. 178, line 24, through p. 179, line 9; *see also* N.H. Admin. Rules Puc 431.12 (a). Further, even with the interconnection agreement, the Commission is left without sufficient evidence upon which to base a finding that Comcast Phone's unregulated affiliate, Comcast IP, is *currently* offering services within the KTC exchanges.

Even if KTC had demonstrated that Comcast IP service is currently *available* to a majority of retail customers within the Andover exchange, a fact which the OCA does not concede, KTC must still sustain its burden that the services provided to retail customers by Comcast IP are *competitive*. This KTC also did not do.

As discussed above, for an alternative to be deemed competitive, as that word is used in RSA 374:3-b, III (a), KTC must prove that it is competitive with KTC basic or local service. To be competitive with basic or local service, an alternative service must, at a minimum, have all of the essential attributes of basic service as outlined in the Commission's rules, *see* N.H. Admin. Rules Puc 412.01 (b) and 432.01 (a). Also, to be deemed "competitive," the alternative service must actually affect KTC's market power.

Within this context, there is insufficient evidence in the record to support the contention by KTC that VoIP services of Comcast IP are “competitive” within the meaning of RSA 374:3-b, III (a). The Petitioners offered no evidence of the functionalities or features associated with the Comcast IP’s VoIP services or the associated prices in KTC’s exchanges. Comcast IP is not a regulated telephone utility; therefore, there is no tariff on file with the Commission to consider for this purpose.

Further, TDS provided no data about the number of access lines potentially lost to VoIP providers in its service territories. *See* Day 1 Transcript, p. 175, lines 4-7. Instead, TDS suggests that the Commission “can draw [its] own conclusion as to where these people are going.” *Id.* at p. 176, lines 15-17. Without this type of information, the Commission can not make an informed decision as to whether or not Comcast IP’s VoIP service is competitive with KTC’s basic local service. As stated previously, the burden is on TDS in this case, not on the Commission.

In response to an oral data request, TDS did provide an update on porting requests. *See* OCA Exhibit 12 (TDS Response to ODR 1). In considering this new information, it is important to keep in mind that it does not include a breakdown of the types of telecommunications providers to which the numbers were ported. In addition, as the Commission may recall, the Companies’ witness Michael Reed testified at that hearing that the Company had received no requests to port a number to a VoIP provider. *See* Transcript of Hearing held on December 5, 2007, p. 45, line 22, through p. 46, line 12; and p. 56, line 21, through p. 57, line 1. Certainly, given the end date of the information provided in OCA Exhibit 12, September 1, 2009, as well as the date of the interconnection agreement between TDS and Comcast Phone, September 21,

2009, these more recent porting requests could not have included requests from Comcast Phone or Comcast IP.

In sum, KTC has failed to sustain its burden of proving that Comcast IP's VoIP services are competitive its basic local service. Therefore, the Commission should deny KTC's petition for alternative regulation.

IV. SETTLEMENT AGREEMENT AND REVISED PLANS FOR MCT AND KTC

The Commission should not consider the Settlement Agreement as it pertains to MCT and KTC, or the revised plans for MCT and KTC, unless it determines that MCT and KTC have sustained their burdens of proving that it meets the requirements of RSA 374:3-b, III, including that competitive alternatives are available to a majority of retail customers with all the MCT and KTC exchanges. As discussed above, the OCA takes the position that MCT and KTC have not sustained their burdens. In the event that the Commission disagrees with the OCA, and finds that MCT and KTC have met the requirements of RSA 347:3-b, III, the OCA offers the following comments about the Settlement Agreement and revised alternative regulation plans for these companies presented during the first Phase of this proceeding.

First, the OCA disagrees with the TDS Companies' assertion that section 6.2 of the Settlement Agreement no longer applies following a ruling by the Commission on RSA 374:3-b, III (a). *See* KTC-MCT Exhibit 7P (Public Rebuttal Testimony of Michael Reed, September 9, 2009), p. 3, lines 11-20; and p. 4, lines 3-4. *See also*, Day 2 Transcript, p. 128, lines 18-20. Instead, it is the OCA's position that only subsection (v) of Section 6.2 should be deleted if the

Commission approves the Companies' petitions and revised plans. The terms of the Settlement Agreement were carefully crafted and should not be revised as the Company suggests.

Second, the basic rate freeze required by section 6.1 of the settlement agreement should begin upon the Commission's approval of the Settlement Agreement, if it should take such action. The TDS Companies do not disagree with this interpretation of section 6.1. See KTC-MCT Exhibit 7P, p. 3, line 22, through p. 4, line 3; and Day 2 Transcript, p. 130, line 14, through p. 131, line 8.

Third, section 9 of the proposed settlement agreement requires MCT and KTC, as well as Wilton and Hollis, to work with representatives of the Commission's Staff, the OCA and NHLA to improve dissemination of information regarding the Lifeline and Link-Up programs to eligible persons to increase participation in programs. Despite the fact that the Commission has already approved this Agreement, and the associated revised plans, for Wilton and Hollis, the Company has done little, if anything, to comply with this requirement. Day 2 Transcript, p. 134, lines 2-12. If the settlement agreement and plans for KTC and MCT are approved with this provision intact, the OCA asks that the Commission expressly require that these Companies take immediate action to carry out this requirement.

V. CONCLUSION

For the foregoing reasons, the OCA respectfully request that the Commission deny MCT's and KTC's Petitions for Alternative Regulation. However, if the Commission approves the Petitions and the Revised Plans for MCT and KTC, the OCA respectfully requests that the Commission strike only subsection (v) of section 6.2 of the Settlement Agreement filed in Phase

1 of this case, and to include clear language in its Order requiring immediate compliance with section 9 of the Agreement.

Respectfully submitted,
OFFICE OF CONSUMER ADVOCATE



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Certification of Service

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Date: November 6, 2009



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