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One Eagle Square, P.O. Box 3550, Concord, NH 03302-3550
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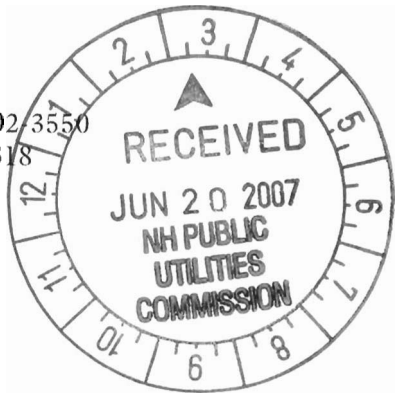
www.orr-reno.com



June 20, 2007

VIA HAND DELIVERY

Ms. Debra A. Howland, Executive Director and Secretary
NH Public Utilities Commission
21 S. Fruit St., Suite 10
Concord, NH 03301-2429

Re: DT 07-027, TDS Telecommunications Corporation- Request for Alternative Form of Regulation

Dear Ms. Howland:

Enclosed please find an original and eight copies of segTEL's reply brief for filing in the above-captioned docket.

Please do not hesitate to contact me if you have any questions. Thank you for your attention to this matter.

Very truly yours,

Susan S. Geiger

Enclosures
cc: Service List

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.

NOW COMES segTEL, Inc., by and through its undersigned attorneys, and respectfully submits this reply brief in response to the initial briefs filed by Kearsarge Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc., Merrimack County Telephone Company ("TDS") and Granite State Telephone, Inc. ("GST"), the jointly filed brief of New Hampshire Legal Assistance ("NHLA"), on Behalf of Intervenor Ross Patnode, and the Office of Consumer Advocate ("OCA"), and the Memorandum of Law filed by the New Hampshire Public Utility Commission Staff ("Staff").

I. Any "competitive wireline, wireless or broadband service" within the meaning of RSA 374:3-b, III. (a) must at least be a basic service as defined by Commission rules, to be a true and suitable substitute for TDS's retail service, must affect TDS's market power, and must be provided by service providers that are unaffiliated with TDS.

TDS states in page 3 of its initial brief that the Commission's analysis under RSA 374:3-b, III. (a) must include an examination of "whether a service is a competitive

alternative to Petitioner's retail service." To the extent that TDS argues that the alternative wireline, wireless or broadband service must be "competitive" with TDS's retail service, segTEL agrees. However, the analysis does not stop there. In order to be found "competitive", any alternative to TDS's retail service must at a minimum have all of the essential attributes of basic service as outlined in the Commission's rules (which are identical for both ILECs and CLECs), *see* N.H. Admin. Rules Puc 412.01 (b) and 432.01 (a), must actually affect TDS's market power and must also be provided by a service provider that is unaffiliated with TDS.

A. True and suitable substitutes for TDS's retail service must include all of the essential attributes of basic service as set forth in the Commission's rules.

TDS argues, without citation to any supporting authority, that "[a] service that is a competitive alternative is one that customers perceive will provide them with similar functional capabilities as those services provided by the small ILEC...". *TDS Initial Brief*, p. 3. TDS further argues that a competitive wireless service "would be one that performs the same generic function of providing local calling capability and access to long distance calling...like an ILEC's traditional basic exchange service does." *Id.* Such a simplistic approach is not supported by the statute or by Commission rules and therefore should not be adopted by this Commission.

Basic service has a distinct meaning under the Commission's telecommunications rules. It is defined in Puc 402.05 as the *minimum* telephone service, as described in Puc 412.01 and Puc 432.01, that the commission requires LECs to provide to voice customers including service attributes and standards mandated by federal and state statutes and rules. *See* N.H. Admin. Rule Puc 402.05. The definition refers to Puc 412.01 (b) and 432.01 (a)

which are identical lists of attributes that are required to meet the definition of basic service, or minimum telephone service. Thus, to the extent any service does not provide a customer with telephone service that includes all of the elements set forth in the above-cited rules, it cannot be considered to be a true or suitable substitute for or alternative to TDS's retail service. To the extent that wireless carriers and providers of telephone-like service over the Internet ("VOIP") do not currently make available to their customers all of the elements of basic service which incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") are required to provide (*e.g.,* the quality of service attributes and network reliability of wireline service[1], presubscription to toll providers[2] or a white pages directory listing[3]), their service offerings cannot be considered a competitive alternative to TDS's retail service.

Landline retail service is superior to, and thus cannot be adequately replaced by, cellular service or VOIP service, owing to substantial differences in quality of service and network reliability. Dropped calls and inconsistent transmission are hallmarks of cellular phone service and Internet-based VOIP. Therefore, one test for determining whether a wireless or broadband service is competitive within the meaning of RSA 374:3-b, III (a) is to assess whether a majority of similarly-situated retail customers of TDS would be subjected to substantial differences among those services. segTEL submits that no fire department, police department, bank, or residential subscriber with a serious medical condition would take the risk of substituting cellular or VOIP service for landline service with its traditional quality of service and network reliability characteristics. TDS errs

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[1] *See* N.H. Admin. Rule Puc 412.01(b)(1) and 432.01(a)(1).
[2] *See* N.H. Admin. Rule Puc 412.01(b)(4 & 5) and 432.01(a)(4 & 5).
[3] *See* N.H. Admin. Rule Puc 412.01(b)(11) and 432.01(a)(11).

when it argues that consumer perception of services being equivalent is the proper test. It is the Commission's role, as protector of the public good with regard to utility services, to evaluate the quality of service and network reliability component of each service to determine whether each could meet the Commission's definition of "the minimum telephone service" that must be provided as an alternative to TDS's retail service.

The lack of directory listings is another area where non-parity exists between TDS's retail service and services provided by non-LECs. Wireless carriers and VOIP providers do not routinely submit directory listings to the white pages publisher. In fact, many cellular and VOIP carriers submit no directory listings at all. The lack of directory listings alone is enough to indicate that wireless and broadband/VOIP services are not suitable substitutes for (*i.e.,* competitive service to) TDS's retail service.

Additionally, since Internet-based VOIP does not include fully-functional enhanced 911 services[4], it cannot be considered a competitive alternative to TDS's retail service. The lack of parity between VOIP and landline services with respect to e911 service is well known. Thus VOIP cannot, at this time, be considered a competitive alternative to TDS's retail service.

Finally, TDS takes the absurd position that long distance service is competitive service within the meaning of the statute. Long distance service is a component of telephone service, to which basic service must provide access. Long distance service is in no way comparable to or substitutable for basic service,[5] and therefore cannot be

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[4] *See* N.H. Admin. Rule Puc 412.01(b)(8) and 432.01(a)(8).

[5] As Staff pointed out in its Memorandum of Law, toll services do not meet the requirements of RSA 374:3-b, because they do not substitute for basic exchange (as reflected in various Commission rules that distinguish between basic and toll services). *See* Staff Memorandum of Law, p. 5, ftnt. 3.

considered a competitive service within the meaning of the statute. Had the legislature intended that long distance service constitute a competitive service for purposes of enabling a small ILEC to qualify for an AFOR, it would have so stated. Instead, the legislature provided that the pervasive availability of competitive wireline or intermodal service would be the test for determining whether a small ILEC could qualify for an AFOR under RSA 374:3-b. In construing statutes, the New Hampshire Supreme Court "...will neither consider what the legislature might have said nor add words that it did not see fit to include." *In Re Guardianship of Kapitula*, 153 N.H. 492, 494 (2006). Accordingly, this Commission should not read into the statute words that the legislature has plainly not included and therefore should not consider long distance to be a competitive service within the meaning of RSA 374:3-b, III (a).

In view of the foregoing, neither TDS's arguments concerning the existence of wireless or broadband telephone service providers in the TDS service territories, nor its arguments that the provision of long distance service is competitive to its retail service, establishes the availability of competitive service within the meaning of RSA 374:3-b, III. (a).

B. To be considered "competitive" within the meaning of the statute, a service must affect TDS's market power.

For purposes of determining whether a service is competitive "'[t]he correct inquiry is not whether two different products can do a similar task for some consumers some of the time, but rather whether the use of one product will restrain adequately the exercise of market power for the other.'" "Intermodal Competition in Telecom: A Vision, not a Reality" by CompTel/Ascent, p. 3 *quoting* "Intermodal Competition in

Telecommunications: Fact or Fiction?", Phoenix Center, March 30, 2004. Accordingly, the Commission must examine the extent, if any, to which competitive wireline, wireless or broadband service is *actually* affecting TDS's market power with respect to retail service in each TDS exchange. Even if services that share some characteristics with TDS's retail service are available[6] within TDS's service territories, in order to be considered "competitive" they must be actually affecting TDS's market power. As the Petitioner, TDS bears the burden of proving those issues by a preponderance of the evidence. *See* N.H. Admin. Rule Puc 203.25.

Although Mr. Reed's prefiled testimony at page 4 indicates that TDS is experiencing a decline in access lines, a decline in the count of access lines is not, in and of itself, proof of loss of market power. Other measures indicate that TDS's market power may be on the rise. The National Exchange Carrier Association ("NECA") tariff statistics for 2004-2006 for Kearsarge, Wilton and Merrimack County (Hollis was not listed as a reporting company) show an increase in the total minutes of use ("MOUs") for these TDS companies over these years. Specifically MOUs increased steadily for these companies as follows: 72,232,614 in 2004; 75,758,305 in 2005; and 78,988,061 in 2006. Moreover, on an individual basis, all three companies show an increase in each of these three years. The Commission should take this information into consideration when it examines whether TDS is experiencing a loss of its incumbent market power as the result of competition within each of its service territories.

[6] The meaning of "available" is discussed elsewhere herein.

C. Services offered by TDS affiliates cannot be considered "competitive" within the meaning of RSA 374:3-b, III.(a).

TDS essentially argues that services provided by TDS affiliates qualify as competitive services under RSA 374:3-b, III. (a) because they have an effect on the ILEC's regulated business. TDS asserts that because "customers of an affiliate use the affiliate's wireless or broadband service to bypass the small ILEC", the impact on the ILEC of such bypass is the same whether the bypass results from an affiliate service offering or a third-party offering. *TDS Initial Brief*, p. 8. TDS's affiliate argument focuses solely on the impacts to the regulated business of the ILEC and does not consider the fact that if the TDS ILEC revenues are "lost" to an affiliated carrier, there is no adverse impact upon the ILEC shareholder. TDS admits that its parent company owns 80% of the voting stock of U.S. Cellular. *Id.* TDS nonetheless argues that services provided by U.S. Cellular should qualify as competitive alternatives to its retail service because "the bottom line is that U.S. Cellular and the Petitioners compete for the same body of customers". *Id.* What this argument fails to consider is the *real* bottom line: revenues from both the TDS ILEC companies and U.S. Cellular flow to the same parent company and its shareholders. TDS's argument also implies that consumers must make an "either-or" choice between the ILEC and US Cellular; segTEL does not accept this contention, nor has TDS provided any evidence to support it. Therefore, for all of the reasons set forth in segTEL's initial brief and Staff's Memorandum of Law, the Commission should conclude that services offered by TDS's affiliates are not "competitive" within the meaning of RSA 374:3-b, III. (a).

In addition to TDS's erroneous interpretation of "competitive" as that term is used in RSA 374:3-b, III (a), GST also misconstrues RSA 374:3-b when it states that the

legislature intended for services provided by affiliates to be counted as competitive alternatives. GST argues that because the legislature did not expressly state that services provided by TDS affiliates were exempt from qualifying as competitive services under RSA 374:3-b, III. (a), that the Commission should not read words into the statue so as to limit TDS's "remedy" of an alternative form of regulation provided by RSA 374:3-b. GST Initial Brief, p. 13. However this argument is unavailing because it ignores the basic principle of statutory construction that undefined words that **do** appear in a statute are to be given their plain and ordinary meaning. *See City of Rochester v. Corpening*, 153 N.H. 571, 573 (2006).

As segTEL and Staff both established in their respective initial filings, the plain and ordinary meaning of the word "competitive" as used in RSA 374:3-b, III. (a) does not permit the Commission to consider services provided by affiliates of TDS in making a determination of whether the requirements of the above-referenced statute have been met. Rather, the Commission must provide a complete and accurate interpretation of the word "competitive" and in so doing, must examine more than just whether a service is a suitable substitute for TDS's retail service. The Commission must also examine whether the service is provided in a competitive market, *i.e.,* one where nonaffiliated carriers are competing with TDS to provide true alternatives.

II. As used in RSA 374:3-b, III (a), the term "available" means that a service must be immediately utilizable; the mere presence of a wireless ETC or broadband service provider does not meet this standard.

A. TDS's claim that a majority of its subscribers have access to competitive wireline, wireless or broadband service is not valid.

As a prerequisite for approving an alternative form of regulation ("AFOR") plan, the Commission must find, among other things, that "[c]ompetitive wireline, wireless or broadband service is **available** to a majority of the retail customers in each of the exchanges served" by the small ILEC petitioner. RSA 374:3-b, III. (a) (emphasis added). The term "available" is not defined in RSA 374:3-b, thus we must look to the plain and ordinary meaning of the word. One of the meanings of available contained in Webster's Third New International Dictionary (unabridged) © 1986 is: "immediately utilizable".

As used in the statute, "available" means that something is ready for immediate use. The word "access" carries a different meaning, *i.e.,* the "freedom or ability to obtain or make use of something." *See* Webster's Third New International Dictionary (unabridged) © 1986. Therefore, a competitive service cannot be viewed as "available" within the meaning of the statute unless the service is capable of being immediately used.

No one is disputing that consumers in the TDS exchanges could obtain a cellular phone. But the offering of cellular service in an exchange is a very different concept than offering cellular service as a substitute for landline service in a home or business. Simply because cellular service may work in certain places within a service territory, for example on Main Street in Wilton or Hollis, does not make cellular a competitive alternative for those retail customers whose cellular phones are not able to receive a signal throughout

the service territory and who would have to travel several miles in order to make a local call.

The burden for TDS is to show that competitive (as explained in section I. above) wireline, wireless or broadband service is not just present in each of its exchanges but that such service is **available** for immediate use as a true or suitable substitute for its retail service to a majority of its customers in each of its exchanges. Given the lack of any competitive wireline carriers providing basic service in the TDS service territories, and in light of TDS's intent to retain its rural exemption[7], TDS has a presumptive burden to show that other competitive services exist. TDS cannot meet this burden by simply claiming its subscribers have "access to" alternatives.

Interpreting the statute in the manner suggested by TDS means that a small ILEC could qualify for an AFOR in the absence of any meaningful competition. Such an absurd result could not possibly be consistent with the legislature's intent as expressed in the statute, which when read as a whole, clearly contemplates that a small ILEC will qualify for regulatory treatment as a CLEC when sufficient local exchange competition is found to actually exist in its service territories. When interpreting a statute, the Court will "...look to the plain meaning of the words when possible but assume that the legislature would not enact statutory language that leads to an absurd result." *Appeal of Morgan*, 144 N.H. 44, 51 (1999) (citation omitted). Thus, the Commission should accord the word "available" its plain and ordinary meaning and, consistent with the overall

[7] segTEL respectfully directs the Commission's attention to segTEL's initial brief at pp. 10-14 in support of the argument that a rural exemption should disqualify an ILEC from obtaining an AFOR.

statutory scheme of RSA 374:3-b, should reject TDS's position that mere "access to" competitive alternatives is sufficient for meeting the test set forth in RSA 374:3-b, III (a).

B. TDS's claim that a wireless ETC is evidence of competitive wireless service in each exchange is erroneous.

TDS argues that the "availability" of competitive wireless service is shown by the presence of a competing eligible telecommunications carrier or ETC (*i.e.,* "eligible" to receive federal universal service funding) within the TDS exchanges. *See* TDS Initial Brief, p. 6. However, this argument is unpersuasive because the ETC designation in question here does not carry with it the requirement that the designated carrier immediately serve customers in the designated service territories.

The Federal Communications Commission (FCC) designates ETCs for two distinct reasons. A rural ILEC receives an ETC designation as a result of its status as carrier of last resort, and can avail itself of health care, education, high cost and low-income support that are funded by the Universal Service Fund. On the other hand, a wireless carrier may be designated as an ETC only to obtain high-cost support for deployment, which the FCC believes will encourage build-out of cellular systems to underserved areas. Thus a rural ILEC's designation as an ETC is not the same as a wireless carrier's designation as an ETC.

One difference between wireless ETC and rural ILEC ETC designations is how the FCC determines that each carrier complies with section 214(e)(1) of the Telecommunications Act of 1996 which requires an ETC to "offer" the services supported by the federal universal service support mechanisms. In contrast to its rules for ILECs, the FCC has determined that Section 214(e)(1) does not require a wireless carrier

to actually provide the supported services throughout the designated service area before designation as an ETC. *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168, 15172-75, paras. 10-18 (2000), recon. pending (*Section 214(e) Declaratory Ruling*). In fact, unlike rural ILECs, wireless ETCs have five years to build out within their designated area, and there is no penalty for not doing so: "In the cellular service, any areas not built out within five years of licensing become 'unserved areas' that may be licensed to another applicant." *See* 47 C.F.R. §§ 22.911, 22.947, 22.949." and *In the Matter of Federal-State Joint Board on Universal Service* CC Docket No. 96-45 REPORT AND ORDER Adopted: February 25, 2005 Released: March 17, 2005.

Thus, the mere existence of a wireless ETC is not commensurate with the "availability of competitive wireless service" under RSA 374:3-b, III(a). The Commission, therefore, should not accept TDS's argument on this issue.

C. TDS erroneously attempts to equate the availability of broadband Internet service with competitive broadband service within the meaning of the statute.

Broadband Internet service offers subscribers high-speed access to the Internet. Internet service is not a substitute for telephone service. While there are companies that offer telephone-like service over the Internet, or VOIP (discussed earlier herein) TDS has not met its burden of proof that any, much less a majority, of its subscribers use such services. segTEL suggests that TDS has the burden to (a) distinguish between broadband Internet access, broadband telephone service, and telephone-like service provided over the Internet, (b) provide legal support for why any of those three broadband services

should be considered a competitive service within the meaning of the statute, and (c) provide proof that a competitive service meeting that test is available to a majority of its retail subscribers in each exchange.

III. In making its determination regarding an alternative form of regulation for TDS, the Commission must consider its rules and other applicable state and federal law, including the Telecommunications Act of 1996.

In determining whether the TDS plan meets the requirements of the state AFOR statute, the Commission must undertake both a factual and a legal investigation. Not only must the Commission ascertain facts concerning the type and level of competition TDS is actually facing, the Commission must also interpret the AFOR statute in accordance with applicable regulations and law. As segTEL argued in its initial brief, one of the most important legal considerations for the Commission is the issue of whether its approval of an AFOR that maintains a rural exemption is pre-empted by section 253 (a) of the Telecommunications Act of 1996 ("Telecom Act"). segTEL respectfully submits that an AFOR plan that preserves an ILEC's rural exemption is inconsistent with TDS's factual and legal assertions regarding the existence of competition and is also inconsistent with section 253 (a) of the Telecom Act.

The Commission should not read the provisions of RSA 374:3-b in a vacuum; the Commission must consider the regulatory and statutory provisions under which it operates to ensure that a level playing field exists within the competitive telecommunications market in New Hampshire and to protect customers. In essence, TDS's AFOR petition constitutes a request for permission to operate under a new set of regulatory terms and conditions. To the extent that those terms and conditions differ from the orders authorizing TDS to operate in New Hampshire, they may be viewed as

amendments to such grants of authority which the Commission may impose pursuant to its authority under RSAs 365:28 (alteration of orders) and 374:26 (permission to conduct business as a public utility). Under RSA 374:26, the Commission, in granting franchise approval to a public utility, "may prescribe such terms and conditions for the exercise of the privilege granted...as it shall consider for the public interest." In the instant case, segTEL submits that the public interest requires that the Commission examine not just whether TDS meets the criteria of RSA 374:3-b in a literal sense, but to examine the overall effect of whether granting the AFOR petition would be consistent with the public interest. In this regard, segTEL respectfully asserts that approving an AFOR plan that preserves an ILEC's rural exemption would be contrary to the public interest and therefore must be rejected.

IV. Conclusion

In evaluating TDS's AFOR petition, the Commission must carefully parse the words used in RSA 374:3-b and consider them in accordance with the overall statutory scheme enacted by the legislature, as well as the Commission's own rules and other applicable statutes. In so doing, the Commission must find that "competitive wireline, wireless or broadband service" within the meaning of RSA 374:3-b, III (a) must at least be a basic service as defined by Commission rules, to be a true a suitable substitute for TDS's retail service, must affect TDS's market power and must be provided by carriers unaffiliated with TDS. In addition, the Commission must find that the mere presence of a wireless ETC or broadband service provider does not establish that a competitive service is available within the meaning of the statute. Lastly, for all of the reasons set forth in segTEL's initial brief, the Commission should not approve an AFOR plan which allows

an ILEC to retain its rural exemption. The public interest requires that the Commission consider the anti-competitive effects of such a plan and also consider that such exemption is inconsistent with the notion that TDS is exposed to actual competition (which is a prerequisite for an AFOR) and is also likely preempted under section 253 (a) of the Telecommunications Act of 1996.

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

June 20, 2007

Certificate of Service

I hereby certify that on this 20th day of June, 2007 a copy of the foregoing brief was sent by electronic mail or first class mail, postage prepaid to the Service List.

Susan S. Geiger