

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 07-027

Kearsarge Telephone Company, Wilton Telephone Company, Inc.,
Hollis Telephone Company, Inc. and Merrimack County Telephone Company
Petition for Alternative Form of Regulation

Petitioners' Objection to
segTEL, Inc.'s Motion to Compel
(Group II Data Requests)

NOW COME Kearsarge Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc. and Merrimack County Telephone Company (collectively, the "Petitioners"), by and through their attorneys, Devine, Millimet & Branch, P.A., and object to the Motion to Compel filed by segTEL, Inc. ("segTEL") for the reasons set forth below.

Factual Background

1. This discovery dispute arises out of the competitive relationship between the Petitioners and segTEL, and segTEL's efforts to utilize these proceedings at least in part to obtain highly sensitive and confidential information of the Petitioners, and thereby gain a competitive advantage.

2. segTEL submitted the following facts in support of its Petition to Intervene in this proceeding:

(a) segTEL provides telecommunications service in areas adjacent to those in which TDS Telecom operates;

(b) segTEL provides information services to customers within the areas served by TDS Telecom; and

(c) segTEL is interested in providing telecommunications services in the TDS service areas in the near future.

See segTEL's Petition to Intervene.

3. In short, segTEL is a competitive local exchange carrier in competition with the Petitioners. segTEL is a telecommunications service provider in areas adjacent to the Petitioners' service area with the stated intent to enter the telecommunications service market in the Petitioners' exchange areas. segTEL is an information services provider in areas actually served by the Petitioners.

4. In this docket, the Petitioners seek the Commission's approval of an alternative form of regulation pursuant to RSA 374:3-b. Through two rounds of discovery, Petitioners have responded to data requests propounded by Staff, OCA and the intervenors in this docket, including segTEL.

5. In the first round of discovery, the Petitioners responded to Staff data requests concerning competition in the territories served by the four Petitioners, specifically, Staff 1-37, Staff 1-66, Staff 1-67, Staff 1-70, and Staff 1-72. In response to those data requests, the Petitioners produced highly confidential and competitively sensitive detailed maps of each of the four exchanges at issue (confidential attachments TDS-CONF 0057-0072), as well as a summary of competition for each exchange included in the actual data responses themselves. Petitioners' maps are the product of extensive time and internal resources. Resulting from the painstaking distillation of approximately 500 maps, the information produced to Staff shows the locations of the Petitioners' services, present and potential customers, competitors' services and the types of services competitors provide. This information is extremely sensitive and would be of particular interest to the Petitioners' competitors; indeed, Petitioners' maps would literally guide competitors into Petitioners' market share and guide competitors' efforts to compete for that market share.

6. As mentioned, segTEL is a competitive local exchange carrier who has intervened in these proceedings. As an intervenor in this matter, segTEL received the public data responses, but it did not receive a copy of the confidential attachments TDS-CONF 0057-0072.

7. In the second round of discovery, segTEL propounded data requests in which it requested the production of all documents, maps, and other material referred to as confidential in the aforementioned Staff data responses (segTEL Data Requests 2-1, 2-2, 2-3, 2-4.1, and 2-4.2). Having become aware of the existence of the confidential attachments in the first round of discovery, segTEL used the second round of discovery to try to obtain them.

8. Petitioners objected to segTEL Data Requests 2-1, 2-2, 2-3, 2-4.1, and 2-4.2 on the grounds that they are overly broad, unduly burdensome, and they seek highly confidential and commercial proprietary and strategic information. Petitioners, however, did not shut segTEL out altogether. To the contrary, as segTEL admits in its motion, at a technical session on October 1, 2007, Petitioners permitted counsel for segTEL to review the highly confidential and competitively sensitive maps at issue following counsel's execution of a protective agreement. Petitioners have not provided the maps to segTEL personnel.

9. segTEL now moves to compel the production of these highly confidential and competitively sensitive documents, claiming that it seeks the requested information "solely for the purpose of developing and presenting its position in this case on the issue of whether TDS has met its burden of proving that it meets the competitive criteria set forth in RSA 374:3-b, III(a)." segTEL claims in its motion that it "is not providing competitive telecommunications services in TDS's service territories." What is more, segTEL asks this Commission to compel Petitioners to produce the information to, among others, Jeremy Katz, the President and Owner of segTEL.

Argument

10. segTEL's motion lacks merit. Not only should the Commission refuse to allow any proceeding to become a vehicle for a competitor to gain competitive advantage, but this Commission has routinely refused to do so in the past. segTEL, moreover, can claim no prejudice. The Petitioners have shared the disputed information, sensitive though it is, with segTEL's counsel, attorneys eyes only. As a result, segTEL will have the opportunity to participate fully in these proceedings, including cross examination of the Petitioners' witnesses at the hearing.

I. This Commission Has Repeatedly Refused To Require Production Of Competitively Sensitive Information That Would Result in Harm to a Petitioner.

11. The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. That right, however, is not unfettered. The New Hampshire Supreme Court has unequivocally held that the law does not require disclosure of information that would cause substantial harm to the competitive position of the person or entity from whom the information is obtained. See RSA 91-A:4, I and RSA 91-A:5, IV; Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 N.H. 540 (1997).

12. In that context, this Commission has routinely recognized the importance of protecting a party against the competitive harm that would result from disclosure to competitors of trade secrets and other competitively sensitive information and has refused to allow parties' status as intervenors provide them with a competitive advantage. See, e.g., Re PSNH, 90 NH PUC 323 (2005) (holding that the public's interest in having access to the terms of agreements with coal providers was outweighed by the effects of public disclosure of such competitively

sensitive information); Re PSNH, 89 NH PUC 327 (2004) (holding that the benefits of public disclosure of specific data as to the revenue of paper companies did not outweigh the harm in allowing competitors to derive information about the paper companies' energy usage, information that is competitively sensitive).

13. In Re Freedom Ring Communications, LLC, 82 NH PUC 454 (1997), this Commission noted that “[d]isclosure [of confidential and highly confidential information] would compromise the business plans of NYNEX and provide competitors with information that NYNEX has invested time and resources to develop, thereby unfairly advantaging competitors and jeopardizing ongoing commercial relationships that NYNEX has nurtured.” In that decision, this Commission accepted NYNEX’s contention that disclosure of highly confidential information, “such as... competitive analysis of competition in New Hampshire and NYNEX’s assessment of its own and its competitors’ specific competitive strengths and weaknesses” should be limited to the Commission, its Staff and the OCA, and should not be disclosed to the other parties to the docket. See id. See also Re PSNH, 89 NH PUC 226 (2004) (declining to compel production of sensitive and confidential pre-contract negotiations).

14. The information segTEL seeks in these proceedings is equally sensitive, confidential and proprietary. The information reveals the Petitioners’ analyses of where they provide services, where customers are located, where other competitors provide services, who the competitors are, and what kinds of services they provide. The maps at issue are the product of extensive data compilation and internal analysis representing a significant amount of time and financial resources. Pared to its essence, the information is nothing short of a road map for segTEL to enter into the Petitioners’ market.

15. Even worse, among the people at segTEL to whom segTEL seeks to compel access is Jeremy Katz. Mr. Katz is segTEL's proprietor and holds the title of President. segTEL is a small company and Mr. Katz is intimately involved in all corporate functions. It is inconceivable that Mr. Katz could review this information for purposes of these proceedings and then ignore the information when he makes marketing decisions and maps out competitive strategy. The information cannot be produced to Mr. Katz and other segTEL personnel without the expectation that it will be used competitively against the Petitioners.

16. In short, the information in dispute would be a competitive treasure trove to segTEL, and it cannot be produced to segTEL personnel in a manner that will prevent segTEL from making competitive use of it. As in the Re Freedom Ring Communications decision, segTEL, a local exchange carrier in competition with the Petitioners, who admittedly seeks to increase its competition with the Petitioners, demonstrates no basis on which to obtain the confidential and competitively sensitive documents at issue, disclosure of which would give segTEL an unfair competitive advantage while simultaneously harming the competitive position of the Petitioner. segTEL's motion to compel must be denied.

II. segTEL Has Already Received The Information It Needs Through its Counsel, and it Can Not Demonstrate Any Prejudice.

17. Despite the highly sensitive nature of the information segTEL seeks, the Petitioners have not refused all access. To the contrary, the Petitioners have produced the information in a way that should accommodate segTEL's and the Petitioners' concerns. Recognizing that segTEL may find the information relevant and necessary to its full participation in these proceedings, the Petitioners have produced the information to segTel's counsel, attorneys eyes only. Production in this manner allows segTEL full participation in these proceedings, including cross examination by segTEL counsel. Production in this manner also

protects the Petitioners' interest in their own confidential and sensitive commercial information. Despite that reasonable approach, segTEL seeks access by its business people, including Mr. Katz, proprietor of this small company. segTel's rejection of the Petitioners' reasonable approach only heightens Petitioners' concern about the real motive behind segTel's motion.

18. segTEL has already received the benefit of having its counsel review the disputed documents, and cannot contend that the Petitioners' refusal to produce in any way hampers segTEL's participation in these proceedings. segTEL's claim that it seeks the requested information "solely for the purpose of developing and presenting its position in this case on the issue of whether TDS has met its burden of proving that it meets the competitive criteria set forth in RSA 374:3-b, III(a)," therefore, rings hollow. Disclosure to its counsel has accomplished this goal. Any benefit segTEL could derive by further disclosure of the documents is a competitive benefit, something intervenors should not use Commission proceedings to gain. segTEL's motion to compel must be denied.

Conclusion

19. For the above stated reasons, the Petitioners respectfully request that segTEL's motion to compel be denied.

Respectfully submitted,

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

By their Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: October 15, 2007

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: October 15, 2007

By: _____
Frederick J. Coolbroth, Esq.