

Before the New Hampshire Public Utilities Commission

DT 07-027

Kearsarge Telephone Company, Wilton Telephone Company,
Hollis Telephone Company and Merrimack County Telephone Company
Petition for an Alternate Form of Regulation

**OFFICE OF THE CONSUMER ADVOCATE'S
MOTION FOR FINAL ORDER ON PHASE 2,
FOR FORMAL COMMENCEMENT OF PHASE 3,
AND TO MAKE COMCAST PHONE A MANDATORY PARTY**

1. On May 14, 2010 the Commission issued Order No. 25,103 ("Phase 2 Order"). This order culminated more than six months of adjudicative process in Phase 2 of this proceeding, which grew out of nearly a year's worth of Phase 1 adjudication. In pertinent part, the Commission ruled that TDS has still not met the requirements of RSA 374:3-b, the statute for alternative regulation, in the exchanges served by Kearsarge Telephone Company (KTC) and Merrimack County Telephone Company (MCT) (collectively, TDS).
2. Among other factual findings, the Commission found that TDS had "failed to demonstrate that competitive alternatives are currently available to a majority of customers in each [MCT] exchange," Phase 2 Order at p. 21, and that "TDS did not clearly demonstrate that the majority of customers in each of its [KTC] exchanges have a competitive alternative present." Phase 2 Order at p. 25.
3. The Commission also ruled that TDS "bear[s] the burden of proof in this matter and must therefore establish factual propositions by a preponderance of the evidence." Phase 2 Order at 21 and 19. The Phase 2 Order marks the third time since these proceedings began in March 2007 when the Commission has found that TDS has not sustained its burden of proof with regard to KTC and MCT.

4. Notwithstanding these findings and rulings, or the protracted procedural history of this case, the Commission gave TDS another opportunity to file new, additional evidence.

Specifically, the Commission stated:

The presence of Comcast as a CLEC in the [MCT] exchanges of Antrim, Contoocook, Henniker, Hillsborough and Melvin Village will be sufficient to demonstrate that a competitive alternative is available, on the condition that within 30 days TDS submits evidence, such as through an affidavit with supporting documentation such as advertisements, establishing that a voice service is currently being offered in those exchanges.

Phase 2 Order at p. 21 (footnote omitted).¹

The Commission stated the same thing regarding the KTC exchanges of Antrim, Contoocook, Henniker, Hillsborough and Melvin Village:

evidence that Comcast is offering service as a [wireline] CLEC ... will be sufficient to demonstrate that a competitive alternative is available, on condition that within 30 days TDS files an affidavit establishing that a voice service is currently being offered in those exchanges, accompanied by print or other record of such advertisements being made public.

Phase 2 Order at p. 26. The Phase 2 Order marks the second time that the Commission has allowed TDS yet another chance, after issuing an order, to attempt to sustain its burden of proof in these proceedings.

5. In closing its analysis, the Commission also stated that it does “not construe [the Phase 2 Order] as a final order that would trigger rehearing pursuant to RSA 541:3.” Phase 2 Order at p. 28.
6. On June 11, 2010 TDS filed a response to the Phase 2 order. Specifically, TDS filed information about Comcast and its purported services within the KTC exchanges. Then,

¹ Of note, this opportunity for new MCT evidence conflicts with the Commission’s later ruling concerning TDS’ failure to meet the burden of proof for MCT: “If TDS were to demonstrate that CLEC offerings are currently being made in Antrim, Contoocook, Henniker, Hillsborough and Melvin Village, the exchanges of Bradford and Warner would still be in the ‘No’ column and thus we cannot find that the terms of the statute have been met in Merrimack.”

on June 14, 2010 TDS filed a motion to “hold open the record in this proceeding,” so that it might file further information about the availability of competitive alternatives within the MCT exchanges. The OCA reserves the right to respond to the substance of TDS’ June 11 and 14 filings through the adjudicative process to be established by the Commission, preferably as requested by this motion.

7. The OCA expects that the Commission’s consideration of TDS’ new filings and information will be based in part upon its findings and rulings in the Phase 2 order. Similarly, the Commission based its findings and rulings in the Phase 2 Order on Order No. 24,852 (Phase 1 Order), issued on April 23, 2008. The Commission stated in the Phase 2 Order that, “RSA 374:3-b governs this docket as it applies to the alternative regulation of small incumbent local exchange carriers in New Hampshire. We continue to construe this statute within the framework established in the Initial Order.” Phase 2 Order at p. 19 (footnote omitted).
8. To the extent that the findings and rulings in the Phase 2 Order will form a basis for the Commission’s consideration of TDS’ new filings and information, the OCA respectfully requests that the Commission reissue its Phase 2 Order without the language, found on page 28, “we do not construe this order as a final order that would trigger rehearing pursuant to RSA 541:3.” The OCA also respectfully requests that the Commission permit the parties to exercise their rights to rehearing and appeal of the Phase 2 findings and rulings, before considering any new information. The OCA hereby reserves its rights to seek rehearing of the final Phase 2 Order, once such an order is issued by the Commission.
9. The OCA believes that a final order for Phase 2 is necessary and appropriate for several

reasons, including those illustrated by the following examples. In the Phase 1 Order, the Commission ruled: “We conclude with respect to the competitiveness test the Legislature would have us apply, that the use of the word ‘competitive’ in subsection III (a) means that *mere availability* of alternatives is *not sufficient* to approve a plan.” Phase 1 Order at p. 25 (emphasis added). However, the Phase 2 Order, which the Commission states incorporates this statutory analysis of the word “competitive,” contains the following ruling: “The *presence* of Comcast as a CLEC in the [KTC] exchanges of Andover, Boscawen, Chichester, Meriden and New London *will be sufficient* to demonstrate that a *competitive* alternative is available.” The view of the OCA is that these two rulings conflict, and that the Commission’s statutory interpretation in the Phase 2 Order, conflating the requirements of competitiveness and availability, is an error of law, and/or is contrary to the evidence in the record about the functional and other qualities that an alternative service must possess to qualify as competitive to TDS’ basic local exchange service.

10. Another example follows. In the Phase 2 Order, the Commission found that despite the fact that “Comcast was a registered CLEC in the Merrimack exchanges in Antrim, Contoocook, Henniker, Hillsborough and Melvin Village, and that TDS has entered into an interconnection agreement with Comcast for areas including the Merrimack service territory, TDS did not provide evidence “that Comcast was actually providing in [the MCT] exchanges a voice service that was *competitive* with TDS voice service.” Phase 2 Order at p. 21 (emphasis added). Yet, two sentences later, the Commission ruled, “The *presence* of Comcast as a CLEC in the exchanges of Antrim, Contoocook, Henniker, Hillsborough and Melvin Village *will be sufficient* to demonstrate that a *competitive*

alternative is available.” Id. (emphasis added). If the party with the burden of proof did not provide evidence that Comcast’s services are competitive, a ruling by the Commission that the mere presence of Comcast in these MCT exchanges constitutes competition is an error of law and/or an abuse of discretion. Issues like these are ripe for rehearing at this time, before the Commission considers the new evidence filed for KTC and, if permitted, the new evidence filed for MCT. Therefore, the Commission should issue a final order in Phase 2 to allow for a rehearing process that would include these issues.

11. With respect to these new filings and information, the OCA respectfully requests that the Commission begin a new phase of this proceeding, Phase 3, by issuing a supplemental order of notice and scheduling a prehearing conference at which the parties can devise a procedural schedule for discovery, the filing of testimony, and a merits hearing for consideration of yet more new information. In addition, because of the time that has passed since TDS’ original petitions for alternative regulation, more than three years ago now, the OCA also asks that the Commission require TDS to provide individual notice directly to customers of its recent filings, the fact that it continues to seek alternative regulation, and notice of the Commission’s initiation of Phase 3.
12. The OCA also respectfully requests that the Commission make Comcast Phone of New Hampshire, LLC (Comcast Phone), a mandatory party to Phase 3 of this docket as the availability and competitiveness of Comcast Phone’s telecommunications services within the TDS exchanges will be central issues. Additionally, the Commission’s finding of competition within the KTC and MCT exchanges may depend upon evidence that TDS has “waiv[ed] ...the rural exemption,” and “remov[ed] ... the obstacle on the certification

process” within these exchanges. *See* Phase 1, Day 2 Transcript dated December 5, 2007, pp. 166-167, referred to in the Phase 1 Order, p. 27 (“we base our factual finding of sufficient competitiveness in part upon Staff witness Chattopadhyay's analysis of competitive alternatives as presented at hearing on the settlement”). Comcast Phone would have knowledge of and information about this, as well as other information about the functioning of its interconnection with TDS in these exchanges, and its offerings to customers. *See* Letter of F. Anne Ross, Esq. to Debra A. Howland, Executive Director and Secretary of the Commission, dated October 2, 2007 (stating, in response to Comcast Phone’s motion to intervene filed in Phase 1, “In fact Comcast's participation in this docket should provide additional information concerning competitive offerings in the TDS Companies' service territories”). Further, Comcast Phone, which was a full intervenor in Phase 1 and most of Phase 2 of this proceeding, is a certified CLEC within some of the exchanges served by TDS. Therefore, the Commission may properly exercise jurisdiction over Comcast Phone to make it a mandatory party to Phase 3 of this proceeding.

13. Lastly, the OCA respectfully requests that Phase 3 encompass a review of both TDS’ response to the Phase 2 Order related to KTC, as well as a review, to the extent that the Commission permits it, of the filing and new information related to MCT’s exchanges.

Wherefore, the OCA respectfully requests that the Commission provide the following relief:

- A. Issue a final order on Phase 2 for purposes of RSA 541:3;
- B. Issue a supplemental order of notice scheduling a prehearing conference and technical session to formally begin Phase 3;

- C. Require TDS to publish the supplemental order of notice as well as to provide notice directly to its customers served by KTC and MCT;
- D. Make Comcast Phone a mandatory party to Phase 3; and
- E. Grant such further relief as is just and reasonable.

Respectfully submitted,



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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.

June 24, 2010



Meredith A. Hatfield