

State of New Hampshire
Public Utilities Commission

DT 07-027

KEARSARGE TELEPHONE COMPANY, WILTON TELEPHONE COMPANY, HOLLIS
TELEPHONE COMPANY, AND MERRIMACK COUNTY TELEPHONE COMPANY
PETITIONS FOR APPROVAL OF ALTERNATIVE FORM OF REGULATION.

MOTION FOR REHEARING ON BEHALF OF DANIEL BAILEY

Daniel Bailey, by and through his undersigned counsel, New Hampshire Legal Assistance, requests rehearing of this matter pursuant to RSA 541:3 and Puc 203.33, and sets forth the following in support of this motion:

I. TDS Has Failed to Produce Evidence to Meet its Burden of Proof to Show that Comcast's Lowest Priced Wireline Voice Service (Priced at \$39.95) Is Actually Available to the Majority of TDS's Retail Customers in Each KTC Exchange.

1.) RSA 374:3-b, III (a) requires a finding that: "Competitive wireline, wireless, or broadband service is available to a majority of the retail customers in each of the exchanges..." (Emphasis added). The plain language of the statute has not been met in this proceeding as TDS has not demonstrated the \$39.95 Comcast package "...is available to a majority of the retail customers in each of the exchanges."

2.) The Commission determined the "competitive" service of interest to TDS's basic local exchange service to be the most basic Comcast Digital Voice offering, with a "true" rate of \$39.95." See Order 25,182, p. 21 & p. 24.

3.) The record is devoid of any evidence that a majority of TDS's customers, in each KTC exchange, are able to subscribe to this \$39.95 Comcast Digital Voice offering. Indeed, Mr. Murray acknowledged that a customer would have to contact Comcast to determine which voice offerings were available at a particular address (Phase 3, Tr. p. 41, l. 12 to p. 42,

1. 3). Moreover, Mr. Murray also acknowledged that he did not know how many TDS

customers have Comcast Digital Voice available to them (Phase 3, Tr., p. 39, l. 22 to p. 40, l. 1). In short, no evidence was produced that the \$39.95 Comcast Digital Voice offering is available to the *majority* of TDS retail customers in each KTC exchange.

4.) The Commission erred as a matter of law in concluding TDS met its burden of proof to show the \$39.95 Comcast Digital Voice offering is available to a majority of retail customers in each KTC exchange. With no evidence in the record to support such a conclusion, the Commission also erred in unreasonably concluding that the plain language requirement of availability "...to a majority of the retail customers in each of the exchanges..." (RSA 374:3-b, III (a))(Emphasis added) had been met for the \$39.95 Comcast Digital Voice offering.

II. The Commission Erred in Ruling that an Alternative Service Does Not Need to Be "Competitive" With TDS's Unbundled Basic Phone Service.

1.) RSA 374:3-b, III(a) requires a finding that: "Competitive wireline, wireless, or broadband service is available to a majority of the retail customers in each of the exchanges..." (Emphasis added). However, this provision does not expressly identify the incumbent's specific service of interest that the alternative "wireline, wireless, or broadband" service must be "competitive" with.

2.) The phrase "small incumbent local exchange carrier" appears in several sections of the statute (e.g. RSA 374:3-b, I; 3-b, II; 3-b, III(a); 3-b, III(f); 3-b, IV; 3-b, V). This is significant. A "...small incumbent local exchange carrier" means an incumbent local exchange carrier serving fewer than 25,000 access lines." (Emphasis added), RSA 374:3-b, I. An "Incumbent local exchange carrier (ILEC)" means a telecommunications carrier, and its successors and assigns, authorized under law or by the commission before July 23, 1995, the effective date of RSA 374:22-f and g, to provide basic service in the particular area for which

it was authorized to provide service prior to July 23, 1995.” (Emphasis added). See Puc 402.23; see also 47 U.S.C. § 251 (h)(1)(A). Thus, in the absence of any words to the contrary in RSA 374:3-b, the incumbent’s service of interest must be basic service, which is a voice service provided to voice customers. See also Puc 412.01(a) & (b); Puc 402.05.

3.) The Commission erred in its statutory analysis in rejecting the use of the incumbent service of interest as basic phone service for the “competitive” analysis under RSA 374:3-b, III(a). See Order 25,182, p. 23.

4.) Contrary to Order 25,182, p. 22, Mr. Bailey does not argue that the *alternative* service must be “stand-alone basic local service” to be considered “competitive.” Depending on whether a company has met its burden of proof, a “wireline,” “wireless” or “broadband” alternative service could be considered “competitive” with an incumbent’s basic phone service.

5.) The Commission also erred in its statutory analysis by failing to impose any limit on the incumbent’s service of interest that serves as the basis for the “competitive” analysis under RSA 374:3-b, III(a). See Order 25,182, pp. 21-23.

6.) Unless a limit is imposed on the incumbent’s service of interest, a petition for an alternative form of regulation could be granted where the only available alternative is a high priced “bundle,” such as Comcast’s “Triple-Play” bundle, “...at a starting price of \$99.00 per month” (Order 25,182, p. 21). This would be an unjust and unreasonable result and not supported by the plain language of RSA 374:3-b as a whole.

7.) RSA 374:3-b is directed to competition for basic phone service customers, not competition for bundles that include non-voice elements such as cable, video and/or

data/internet. For example, RSA 374:3-b, IV further shows that the statutory focus of RSA 374:3-b is not on bundles:

The alternative regulation plan may allow the small incumbent local exchange carrier to offer bundled services that include combinations of telecommunications, data, video, and other services.

(Emphasis added). This provision indicates that the Legislature envisioned “small incumbent local exchange carrier(s)” petitioning for alternative regulation *without first* having these “bundled services.”

8.) The Commission erred in its statutory analysis by rejecting the use of basic phone service as the incumbent’s service of interest for the “competitive” analysis under RSA 374:3-b, III(a), and by failing to impose any limit for the incumbent’s service in such an analysis.


III. Positions of the Parties

On January 19, 2011, undersigned counsel sent an advance copy of this Motion to the parties and sought the parties’ positions with respect to the relief requested herein. The position of the party that responded is as follows: TDS opposes this Motion.

WHEREFORE, Daniel Bailey respectfully requests that the Commission grant rehearing in this matter and grant such other relief as is reasonable and just.

Respectfully submitted,

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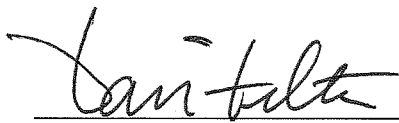


Alan Linder
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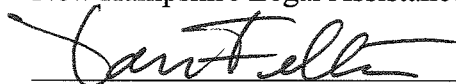


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Certification Of Service

I certify that on this date this Motion was filed with the Commission and copies provided by email to the Commission and all parties to this docket.

New Hampshire Legal Assistance



Attorney for Daniel Bailey

1/20/11

Date