

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 07-027

**KEARSARGE TELEPHONE CO., WILTON TELEPHONE CO., INC.,
HOLLIS TELEPHONE CO., INC. AND MERRIMACK COUNTY TELEPHONE CO.**

Petitions for Approval of an Alternative Form of Regulation

Order on Petition of Kearsarge Telephone Co.

ORDER NO. 25,182

December 22, 2010

APPEARANCES: Harry N. Malone, Esq. and Frederick J. Coolbroth, Esq. of Devine, Millimet and Branch, P.A. for Kearsarge Telephone Co., Wilton Telephone Co., Inc., Hollis Telephone Co., Inc. and Merrimack County Telephone Co.; Alan Linder, Esq. and Daniel Feltes, Esq. of New Hampshire Legal Assistance for Daniel Bailey; Meredith A. Hatfield, Esq. and Rorie E.P. Hollenberg, Esq. of the Office of Consumer Advocate on behalf of residential ratepayers; and Matthew J. Fossum, Esq. for the Staff of the Public Utilities Commission.

I. PROCEDURAL HISTORY

The procedural history of this docket has been set out extensively in prior orders. *See Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co., Order No. 24,852 (April 23, 2008) (First AFOR Order) and Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co., Order No. 25,103 (May 14, 2010) (Second AFOR Order).* Accordingly, this procedural history will focus on the history relevant to the remaining issues in the docket.

On March 1, 2007, Kearsarge Telephone Co., (KTC) Wilton Telephone Co., Inc., (WTC) Hollis Telephone Co., Inc. (HTC) and Merrimack County Telephone Co. (MCT), (collectively the TDS Companies or TDS), each a wholly-owned subsidiary of Telephone & Data Systems, Inc., petitioned the Commission for an alternative form of regulation pursuant to RSA 374:3-b. Those petitions were joined in a single docket. The petitions, if approved, would result in

regulation of the TDS Companies in a manner more comparable to that applied to competitive local exchange carriers (CLECs) in New Hampshire.

By the First AFOR Order, the Commission granted the petitions of WTC and HTC, finding that their plans met the relevant statutory standard for alternative regulation. *See First AFOR Order* at 26-28, 31. By that same order the Commission ruled that KTC and MCT had not shown that competitive alternatives were currently available in each of the exchanges within their service territories, as required by RSA 374:3-b, III(a). *Id.* at 29. Rather than deny the petitions for those companies, however, the Commission kept the record open for one year and allowed MCT and KTC to update the record on the availability of competitive alternatives in their territories. *Id.* at 30.

On January 29, 2009, KTC and MCT filed updated testimony containing new evidence relating to competitive alternatives in their exchanges. Following a request by New Hampshire Legal Assistance (NHLA) on behalf of its client, Daniel Bailey, the Commission held hearings on September 29 and October 1, 2009, on the evidence presented by KTC and MCT. Subsequent to the parties' submission of briefs, the Commission issued the Second AFOR Order which denied the petition for MCT. *See Second AFOR Order* at 25. The basis for that determination was the conclusion that even if more information were provided regarding the availability of CLEC offerings in some exchanges, it would still be insufficient to show that a competitive alternative was available to the majority of retail customers in all of MCT's exchanges. *Id.*

The Second AFOR Order concluded that KTC had not shown that a competitive alternative was available to the majority of retail customers in most of its exchanges. *Id.* at 26-28. In the Salisbury exchange, however, the Commission found that there was sufficient

evidence to establish the existence of a competitive wireless service that was available to a majority of retail customers. *Id.* at 26. In all other KTC exchanges, the Commission found that there was not sufficient evidence of a competitive alternative. *Id.* In the KTC exchanges other than Salisbury, however, the Commission noted that Comcast had been certified as a CLEC, *id.*, though there was insufficient evidence to establish that Comcast was, in fact, offering services in those exchanges. *Id.* at 25-26. The Commission, therefore, held open the record for 30 days to allow TDS to submit information to demonstrate that Comcast was currently offering voice service in those exchanges. *Id.* at 28.

On June 11 and 14, 2010, TDS submitted affidavits of Thomas E. Murray, TDS' Manager of State Government Affairs, containing evidence purporting to show that Comcast was offering voice services in numerous MCT and KTC exchanges. In a motion filed with the affidavit on June 14, TDS requested that the record be held open for an additional 90 days to allow it to submit additional evidence on wireless service offerings within the KTC and MCT exchanges. On June 24, 2010, the Office of Consumer Advocate (OCA) filed a motion requesting that the Commission: deem the Second AFOR Order final for purposes of RSA 541:3; open a new proceeding to consider the evidence submitted for KTC and MCT; and make Comcast a mandatory party. Also on June 24, NHLA requested that a hearing be held on the new evidence submitted by TDS.

On July 15, 2010, the Commission issued Order No. 25,130 in this docket granting NHLA's request for an evidentiary hearing on the new evidence submitted by TDS. *Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co.*, Order No. 25,130 (July 15, 2010) at 3. The Commission also denied TDS' request to hold open the record for the submission of wireless information, and limited the hearing to evidence

on wireline offerings. *Id.* The Commission stated that should TDS wish to submit additional information, it was free to file a new petition for alternative regulation. *Id.* at 4. Additionally, the Commission denied the requests of the OCA to deem Order No. 25,103 a final order and to make Comcast a mandatory party. *Id.* The Commission noted that it believed the record could be developed without making Comcast a mandatory party because Comcast had agreed to provide information on a confidential basis. *Id.* The evidentiary hearing on TDS' new evidence was initially scheduled for September 2, 2010, but was later moved to September 27.

On September 13, 2010, Staff issued a series of data requests to Comcast. That same day, the OCA moved to quash the data requests and Staff objected to the motion on September 14. On September 23, 2010, NHLA filed a motion *in limine* to exclude any responses from Comcast from being entered into the record. Also on September 23, Staff voluntarily withdrew the questions sent to Comcast.

On September 3, 2010, in response to Mr. Murray's June affidavits, NHLA submitted the testimony of Ben Johnson, Ph.D., and the OCA submitted the testimony of Steven Eckberg. On September 20, 2010, TDS submitted the rebuttal testimony of Thomas Murray. On September 22, TDS moved to strike various portions of Dr. Johnson's testimony, and NHLA objected on September 24. Also on September 24, the OCA moved to strike various portions of Mr. Murray's rebuttal testimony, to which TDS objected orally during the September 27 hearing. Finally, on September 20, 2010, NHLA submitted a motion requesting that the Commission grant leave to file proposed findings and rulings. TDS objected to this motion on September 22. The hearing was held on September 27, 2010 as scheduled.

At the commencement of the hearing, the Commission clarified with the parties that since Staff had withdrawn its questions to Comcast, both the OCA's motion to strike and NHLA's

motion *in limine* were moot. Transcript of September 27, 2010 Hearing (Tr.) at 5-6, 7-8. The parties confirmed that both motions were moot. Tr. at 6, 8. Also, as noted, TDS was granted the opportunity to respond to the OCA's motion to strike Mr. Murray's testimony, since it had not had time to do so prior to the hearing. Tr. at 8-12. At hearing, the Commission denied the motions to strike Dr. Johnson's and Mr. Murray's testimonies, Tr. at 15-17, and clarified that the hearing would focus only on information regarding KTC. Tr. at 15. At the close of the hearing, the Commission allowed the parties to submit written closing statements on their positions which could, if desired, include requests for findings of fact and rulings of law. Tr. at 178-79.

During the hearing, TDS sought to introduce various exhibits regarding KTC, including the original public, original confidential, and amended affidavits of Mr. Murray, denoted as KTC-MCT 14P, KTC-MTC 14C and KTC-MCT 14A, respectively. The OCA objected to the introduction of exhibit KTC-MCT 14A, the amended affidavit, contending that some of the amendments were more than editorial in nature. More specifically, the OCA contended that at the time the original affidavits were submitted, they reflected Mr. Murray's understanding of the facts, and that the amendments altered that understanding to comport with information he obtained after his affidavit was initially submitted. By Secretarial Letter dated October 12, 2010, the Commission determined that because the original versions of the affidavit were also admitted into the record, and because Mr. Murray stated in his testimony the reasons for the amendments, exhibit KTC-MCT 14A would be admitted into the record and that it would be given the weight to which it was entitled.

As permitted by the Commission, on October 19, 2010, TDS, the OCA, and NHLA filed written closing statements. Staff did not file a closing statement.

II. POSITIONS OF THE PARTIES AND STAFF

A. TDS – Kearsarge Telephone Company

In its closing statement, TDS argued that it understood the Commission's Second AFOR Order to require that TDS demonstrate only that Comcast was offering services in KTC's exchanges, but not that Comcast's services were competitive or that Comcast's services were available to a majority of retail customers because, it believed, those determinations had already been made. KTC Closing at 2-3. According to TDS, it provided evidence that Comcast is offering voice services in each of the KTC exchanges in question, specifically, Andover, Boscawen, Chichester, Meriden and New London. KTC Closing at 3. According to TDS, as a result of the Commission's prior orders, this was the only evidence necessary to satisfy its burden. KTC Closing at 3.

Nevertheless, TDS also argued that Comcast's services are a competitive alternative in the KTC exchanges. KTC Closing at 3. TDS challenged the testimony of Dr. Johnson that Comcast was not offering a competitive alternative. KTC Closing at 3-4. According to TDS, before being able to claim that Comcast is competitive, the scheme envisioned by Dr. Johnson would require TDS to: (1) conduct a substitutability analysis and pricing comparison of the KTC and Comcast products; (2) determine the addresses of actual Comcast customers within each exchange and provide information about the services those customers were purchasing, *i.e.*, the type of video, Internet and voice services they used; (3) determine the availability of voice services for each and every customer in every TDS exchange; and (4) gauge the appeal of Comcast's offerings by surveying customers of KTC. KTC Closing at 4-5. According to TDS, this analysis is "so unworkable as to render KTC's task impossible." KTC Closing at 4. Further,

TDS contends that Dr. Johnson's particular concerns have already been rejected by the Commission or are otherwise unfeasible. KTC Closing at 5.

TDS also argued that Dr. Johnson's testimony about the marketing choices of Comcast, *i.e.*, that Comcast targets only particular, higher-end customers seeking bundled services, is unfounded and contrary to the evidence. KTC Closing at 5-6. TDS contends that the evidence supports the conclusion that the type of voice service offered by Comcast is a large, fast growing and highly profitable sector of its business. KTC Closing at 6. Thus, TDS argues that the use of Comcast's voice service is on the rise generally, not just for "bundle" customers. KTC Closing at 6.

Next, TDS argues that in the First AFOR Order, the Commission adopted a broad definition of "competitive alternative" when it found that the existence of third-party alternatives was sufficient to grant alternative regulation to WTC and HTC. KTC Closing at 6-7. TDS points out that the Federal Communications Commission (FCC) appears to consider Voice over Internet Protocol (VoIP) services, such as those offered by Comcast, to be comparable to traditional access telephone lines when rendering reports on competition for local telephone service. KTC Closing at 7. Therefore, Comcast's voice service may be seen as a viable third-party alternative. KTC Closing at 7.

Finally, in response to Dr. Johnson's criticisms, TDS contends that because of the price protections under RSA 374:3-b, the Commission has found that a fully competitive marketplace is not necessary to approve an alternative regulation plan. KTC Closing at 7. TDS argues that basic local service rates are protected by the universal service provisions of the plan, as well as by the price caps called for in RSA 374:3-b, III(b). KTC Closing at 7. In addition, TDS notes

that the plan allows for the Commission to modify or terminate alternative regulation, which provides a safeguard for ratepayers. KTC Closing at 7.

In response to Mr. Eckberg's testimony challenging the credibility of Mr. Murray's affidavits, TDS contends that those criticisms can be and have been rebutted. KTC Closing at 8. Specifically, TDS contends that it has shown how Mr. Murray derived the information in his affidavits and that both Mr. Murray's and Mr. Eckberg's search methodologies show Comcast is offering services in the KTC exchanges. KTC Closing at 8.

B. OCA

According to the OCA, TDS bears the burden to prove three things: (1) one or more wireline, wireless or broadband voice services are available within each of the KTC exchanges; (2) the availability of those services extends to more than fifty percent of the retail customers in each exchange; and (3) the services that are available to more than fifty percent of the customers are competitive. OCA Closing at 1. The OCA contends that TDS has not carried that burden. OCA Closing at 1.

On the issues of general availability and availability to the majority of customers, the OCA argues that there is "no evidence in the record that a cable wireline or broadband voice service – provided by Comcast as a CLEC or anyone else – is available to more than 50% of the customers in the KTC exchanges of Antrim, Contoocook, Henniker, Hillsborough and Melvin Village." OCA Closing at 2-3.¹ According to the OCA, TDS' information shows, at best, that some specific customers have the ability to inquire about the availability of Comcast service at their addresses. OCA Closing at 3. Further, the OCA contends that the evidence presented in

¹ The referenced exchanges are those served by MCT, not KTC. We presume, however, that the OCA intended to reference the relevant KTC exchanges.

earlier phases of this docket does not include the exact locations of cable facilities and KTC's customers. OCA Closing at 3.

The OCA points out that at the time TDS' initial petition was filed, Comcast was not certified as a CLEC in KTC's exchanges. OCA Closing at 4. The OCA contends, therefore, that the terms "broadband" or "cable modem," as used in the earlier phases of this proceeding, referenced those facilities used for providing cable television or a third-party VoIP service. OCA Closing at 4. According to the OCA, the terms did not at the time relate to wireline voice service provided by a cable company as a CLEC. OCA Closing at 4. The OCA contends that this distinction is relevant because the Commission's May 14, 2010 order required TDS to produce information about Comcast offering services as a CLEC, which would exclude information about actions prior to its certification as a CLEC. OCA Closing at 4. Moreover, the OCA states the Commission should be mindful that there is no information in the record directly from Comcast about the location of its facilities, the functionality of those facilities, or the number of customers currently purchasing Comcast's voice services. OCA Closing at 5.

On the issue of competitiveness, the OCA contends that there is insufficient evidence of the "functionalities" of Comcast's voice service and whether that service has characteristics similar to KTC's basic service. OCA Closing at 7. Further, the OCA contends that the evidence of Comcast's pricing is insufficient to demonstrate that Comcast is, in fact, competing with KTC's basic service. OCA Closing at 8. Accordingly, the OCA requests that the Commission issue a final order denying the petition. OCA Closing at 9.

C. NHLA

NHLA first argues that TDS did not meet its burden to demonstrate that Comcast is competing in the market for KTC's basic local exchange customers. NHLA Closing at 1.

According to NHLA, the focus in this docket is on basic telephone service and an analysis of the basic service market. NHLA Closing at 1. NHLA contends that Comcast is targeting and competing for customers who will purchase higher-end bundled services, rather than those customers seeking basic telephone service. NHLA Closing at 1. NHLA argues that TDS has not met its burden to show competition in the basic service market. NHLA Closing at 1-2.

Next, NHLA contends that TDS has not shown that Comcast's voice service is available to a majority of customers in each KTC exchange. NHLA Closing at 2. NHLA argues that TDS has failed to show both that Comcast's facilities are physically present for a majority of customers in each exchange, and what services Comcast can and does offer in those places where it is physically present. NHLA Closing at 2. Because, according to NHLA, TDS has not calculated or provided information about the percentage of customers with Comcast service available to them, it has, in essence, admitted that it did not meet its burden to show availability to a majority of customers. NHLA Closing at 3.

NHLA argues that the coverage maps submitted by Michael Reed on behalf of TDS in an earlier phase of this proceeding are useful only to demonstrate the general availability of Comcast's services, but are not an exact measure of actual competition. NHLA Closing at 3. Further, NHLA states that because the maps are insufficiently explained, they are difficult to interpret and are of limited usefulness. NHLA Closing at 4. Moreover, NHLA argues that TDS has not provided information about what services are being offered at the locations shown on the maps and, therefore, there is no way to know whether Comcast reaches a majority of customers with its voice services. NHLA Closing at 4-5.

Regarding competitiveness, NHLA argues that TDS has misconstrued prior Commission orders as finding that Comcast's services are competitive with TDS' basic local service. NHLA

Closing at 6. To determine the level of competitiveness, NHLA contends that the single most important measure is the degree to which customers are switching back and forth between the purportedly competing services. NHLA Closing at 6. According to NHLA, TDS has provided little, if any, information on the degree to which customers are switching between it and Comcast. NHLA Closing at 6-7.

NHLA notes that in the absence of information about customers switching, the next most important factor to consider is the price charged by the competitor, in this case Comcast. NHLA Closing at 7. NHLA avers that Comcast's pricing, which involves bundled services and "teaser" rates, is not persuasive evidence supporting a finding of competition. NHLA Closing at 7. Thus, NHLA contends that Comcast is not, in fact, competitive with TDS. NHLA Closing at 7.

Lastly, NHLA argues that TDS has not met its burden to show that it will preserve universal access to basic telephone service. NHLA Closing at 8. According to NHLA, price caps alone will not suffice to preserve universal access. NHLA Closing at 8. This is so, NHLA argues, because to conclude that the price caps created under RSA 374:3-b, III(b) are sufficient would render superfluous the requirement under RSA 374:3-b, III(e) that universal access be preserved. NHLA Closing at 8. Additionally, NHLA argues that TDS' responses to cross examination regarding the steps it has taken to preserve universal access in WTC and HTC since they were granted alternative regulation provide little confidence that TDS will work to preserve universal access should KTC obtain alternative regulation. NHLA Closing at 8.

D. Staff

Staff filed no closing argument and has not taken a position relative to KTC's petition.

III. COMMISSION ANALYSIS

A. Legal Framework

RSA 374:3-b reads, in relevant part:

II. A small incumbent local exchange carrier subject to rate of return regulation may petition the public utilities commission for approval of an alternative form of regulation providing for regulation of such carrier's retail operations comparable to the regulation applied to competitive local exchange carriers, subject to paragraph III, due to its status as carrier of last resort.

III. The commission shall approve the alternative regulation plan if it finds that:

(a) Competitive wireline, wireless, or broadband service is available to a majority of the retail customers in each of the exchanges served by such small incumbent local exchange carrier;

(b) The plan provides for maximum basic local service rates at levels that do not exceed the comparable rates charged by the largest incumbent local exchange carrier operating in the state and that do not increase by more than 10 percent in each of the 4 years after a plan is approved with the exception that the plan may provide for additional rate adjustments, with public utilities commission review and approval, to reflect changes in federal, state, or local government taxes, mandates, rules, regulations, or statutes;

(c) The plan promotes the offering of innovative telecommunications services in the state;

(d) The plan meets intercarrier service obligations under other applicable laws;

(e) The plan preserves universal access to affordable basic telephone service; and

(f) The plan provides that, if the small incumbent local exchange carrier operating under the plan fails to meet any of the conditions set out in this section, the public utilities commission may require the small incumbent local exchange carrier to propose modifications to the alternative regulation plan or return to rate of return regulation.

The Commission's orders in this docket have attempted to harmonize the various and seemingly conflicting portions of this statute. *First AFOR Order* at 24-26. We note that the burden of proof in this case rests, as it always has, with TDS. *Id.* at 26. As such, TDS bears the responsibility to establish the factual propositions in this case by a preponderance of the evidence. *Id.*, N.H. Code Admin. R. Puc 203.25.

We first address the argument from TDS that the only issue for determination in this order is the mere availability or presence of Comcast's services in each KTC exchange, save Salisbury. KTC Closing at 3. TDS bases its argument on the language in the Second AFOR Order that:

Evidence establishing that Comcast is offering service as a CLEC in the exchanges of Andover, Boscawen, Chichester, Meriden and New London, will be sufficient to demonstrate that a competitive alternative is available. If, within 30 days of the date of this order, 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, it will meet its evidentiary burden.

Second AFOR Order at 26 (emphasis in original). TDS reads this language to mean that it need only have produced evidence that Comcast was offering services to clear any remaining legal hurdles to alternative regulation. KTC Closing at 3.

In the Second AFOR Order we found in relation to KTC that "TDS did not clearly demonstrate that the majority of customers in each of its exchanges have a competitive alternative present." *Second AFOR Order* at 25. We also indicated how additional evidence could "clarify the circumstances relating to competitive alternatives." *Id.* We pointed out that establishing the presence of Comcast as a CLEC would demonstrate that a competitive alternative was available but we did not, nor could we, relieve TDS of its burden to demonstrate that competitive service was available to a majority of KTC's retail customers in each exchange. Accordingly, TDS' interpretation of the Second AFOR Order is overly broad in this respect; the OCA correctly observes that TDS has the burden to prove that competitive service is available to more than fifty percent of the retail customers in each exchange. As a result, we look to the record to determine if all factors under RSA 374:3-b, III have been met.

B. Statutory Factors

1. Availability of Competitive Alternatives

In assessing this statutory factor, the initial relevant inquiry is whether there is an alternative, of any kind, available to the majority of customers in each of the subject exchanges. *First AFOR Order* at 28-29. Absent such an alternative, the inquiry need not proceed. *Id.* at 29.

If TDS establishes that an alternative exists, then we must determine whether a competitive service is available to a majority of retail customers in each exchange. We have found that any determination on the existence and state of competitiveness must be made with reference to the state of competition at present and not as it may come to be. *Id.* at 26.

Furthermore, with regard to the term “competitive” as used in RSA 374:3-b, III(a), we have found “that mere availability of alternatives is not sufficient to approve a plan but that the inclusion, among other things, of price protections in subsection III(b) means that a fully functioning competitive market is not necessary in order to approve a plan.” *Id.* Further, the level of competition need not be that which is used in an antitrust analysis or that which would justify complete deregulation of retail rates. *Id.* at 27. Moreover, we have found that in measuring the competitive marketplace, it is third-party offerings that matter, and not simply different offerings from the incumbent provider; specifically, we have found that TDS’ broadband offering is not a competitive alternative to its telephone service. *Id.* at 29. In addition, while evidence of access line or revenue loss, and minutes of use loss is indicative of competition, it is insufficient, standing alone, to find that the market is competitive. *Id.* at 27.

a. Evidence of Alternative Services Available in KTC Exchanges

As to the general availability of Comcast’s voice service in the KTC exchanges, we find that there is sufficient evidence in the record to conclude that Comcast’s service is available in

the exchanges. At the September 29, 2009 hearing, the OCA requested that the Commission take administrative notice of Order No. 24,938 (February 6, 2009). That order granted certification to Comcast to act as a CLEC in WTC, KTC and MCT territories. *See Comcast Phone of New Hampshire*, Order No. 24,938 (Feb. 6, 2009) at 1, 23. Based upon that order, Comcast is authorized to offer its services in KTC's exchanges and therefore an alternative service is legally available in those exchanges.

Based upon the evidence discussed below, that Comcast has facilities in each of the KTC exchanges and has the ability to offer voice service over those facilities, we find that alternative services are physically available in those exchanges. Through Mr. Murray's affidavits and rebuttal testimony, TDS has submitted evidence of numbers having been ported to Comcast in the KTC exchanges of Andover, Boscawen, Chichester, Meriden, and New London. Exhibit KTC-MCT 14P at 2-3; Exhibit 14C, Attachments B and C; Exhibit 16P at 9-10; Exhibit 16C, Attachment 15C. During the September 27 hearing, Mr. Murray acknowledged that the request from a Meriden customer in his affidavit was not an actual customer request, but one that he had produced to validate that voice service could be ordered in Meriden. Tr. at 73. Nevertheless, the request, though not from an actual customer, was for a legitimate and existing address in the Meriden exchange. Tr. at 73. Further, he testified to and provided evidence of actual customer ports in Meriden, which occurred after he filed the affidavit. Exhibit 16P at 10. Thus, the evidence did show that Comcast was willing and able to offer voice service to Meriden in addition to all other exchanges of KTC, except Salisbury.

Both the OCA and NHLA argued before the hearing, and the OCA has maintained through its closing, *see OCA Closing* at 3, that the evidence offered by Mr. Murray in his affidavits and through his rebuttal testimony is untimely. We disagree. Order No. 25,103

provided that TDS could submit additional evidence of competitive offerings in its territories through affidavits due no later than June 14, 2010. Mr. Murray provided such additional evidence in his June 2010 affidavits. In Order No. 25,130, we directed the parties to undertake discovery on the evidence proffered in the affidavits in a technical session. By a Secretarial Letter dated August 5, 2010, the Commission accepted the parties' proposed schedule calling for the submission of testimony responsive to the affidavits, as well as for rebuttal to that testimony. The evidence in the affidavits and the rebuttal testimony was provided consistent with the parties' proposed schedule. Moreover, the scope of the testimony was within the bounds of the Commission's orders and the rebuttal was responsive to the prior testimony. Accordingly, no party has been treated unfairly, and admission of both the affidavits and the rebuttal testimony was proper.

In addition to testimony and evidence of number ports from TDS to Comcast, there is other evidence of physical availability in the KTC exchanges. The service coverage maps provided by Mr. Reed in an earlier phase of this proceeding show that cable television and cable broadband facilities are available in the listed exchanges. Because Comcast owns the cable facilities in these exchanges, *see* Pre-filed Testimony of David Kowolenko at 3 and Attachment A², and has ported numbers from KTC to its services, we find that Comcast voice service is available in the KTC exchanges, other than Salisbury.

As to whether Comcast's services are available to a majority of retail customers, we find that the evidence in the record is sufficient to support the conclusion that Comcast facilities pass a majority of customers in each exchange. First, Staff's analysis of the maps provided by TDS

² We note that in Mr. Kowolenko's testimony he stated that Comcast's facilities were in all KTC exchanges, but did not specifically reference Meriden. His testimony, however, stated that Comcast serves Plainfield. *See* Pre-Filed Testimony of David Kowolenko, Attachment A at 2 of 2. KTC's Meriden exchange primarily serves customers in the town of Plainfield. *See* Tr. at 75-76.

indicated that a majority of customers in the KTC exchanges, except Salisbury, had broadband or cable television access. Exhibit 10, Pre-filed Testimony of Josie Gage (Ex. 10), at 1-2. While it is true that Staff had found certain errors in the maps, it nevertheless concluded that cable service was available to a majority of the population in each of the KTC exchanges served by Comcast. Ex. 10 at 2.

Further, in Attachment E to the original filing on behalf of KTC and Attachment E to Exhibit 2P, the pre-filed testimony of Michael Reed, TDS includes estimates of the availability of Comcast's cable broadband and cable television and concludes that, except for Salisbury and Andover, more than fifty percent of customers in each exchange have such service available to them. There are more specific estimates in the confidential version of Mr. Reed's testimony. *See* Exhibit 2C, Pre-filed Confidential Testimony of Michael Reed at 6-7. Since Salisbury is outside the scope of the considerations here, we do not rely upon that conclusion for any decision in this order. As to Andover, Mr. Reed later testified that the original Attachment E contained an error and that cable and broadband coverage is in place for the majority of customers in Andover. Exhibit 4P, Pre-filed Rebuttal Testimony of Michael Reed (Ex. 4P), at 6. In addition, our review of the map of Andover, *see* Tr. at 151-54, reveals that the cable facilities pass customer locations on nearly every road in the exchange and Dr. Johnson conceded that there are very few roads in the exchange where customers are not passed by cable facilities. Tr. at 152-53. Similar estimates and maps are available for each exchange. The only map where the extent to which the number of customers passed by Comcast's facilities may reasonably be questioned is the one covering the Meriden exchange. Our detailed review of that map, however, shows that the cable facilities do, in fact, pass the majority of customers in the exchange. Therefore, we

find that TDS's assertion that service is available to a majority of customers in each exchange is supported by the TDS coverage maps and the testimony of Ms. Gage.

NHLA contends that the maps upon which TDS relies for determining how many customers are passed by Comcast's facilities should be viewed with skepticism because TDS has stated that they are not an exact measurement of availability and because there is insufficient information upon which a proper interpretation of the maps can be made. As to the first contention, Mr. Reed, on behalf of TDS did state that he "in no way indicated or would want to indicate that the maps were to be utilized as an exact measure of competition for every road, and every pole." Ex. 4P at 19 (emphasis in original). Merely because Mr. Reed indicated that the maps ought not to be used to indicate the status of every road and pole, however, does not by itself mean that the maps are unreliable for the purposes of making the findings required by RSA 374:3-b. They are evidence of the general availability of services in the territories and appear to track the streets and roads of the subject towns. Further, Mr. Reed testified about the manner in which the information was gathered for presentation on the maps, including through field observations by TDS' employees. *See* Ex. 4Pat 13-14. Thus, the failure of the maps to have the degree of precision sought by NHLA does not mean they should be disregarded. We find the maps adequate for making a determination of availability of alternative services in this case.

NHLA's second contention is that the maps are unreadable, and more specifically that the meaning of dots on the maps is not clear; we disagree. In its data request Staff 1-37, Staff asked the Company to demonstrate why it believed competition existed presently in each and every exchange. *See* Ex. 4P at 54 and TDS-CONF 0057-0072. As part of its response, TDS contended that the maps it had provided showed sufficient coverage. *See* Ex. 4P at 54 and TDS-CONF 0057-0072. TDS further clarified the maps by adding dots representing customer locations in

response to data request Staff 2-36. *See* Ex. 4P at 63 and TDS-CONF 0153-0168. Looking at those maps reveals that the original coverage maps lack the dots, but that the dots depicting customer locations exist on the clarified maps. NHLA's objection is that the dots are inadequately explained, not that the information about the coverage of Comcast's facilities is inaccurate. Based upon the evidence submitted, we conclude that the maps have been sufficiently explained and we find that they may be relied upon to demonstrate that cable facilities, and consequently cable services, are available to a majority of TDS' customers.

With regard to the cable facilities, the OCA argues that the terms "broadband" or "cable modem" as used in the earlier phases of this proceeding referenced only those facilities used for providing cable television or a third-party VoIP service. *See* OCA Closing at 4. The OCA asserts that because TDS was to produce information about Comcast offering services as a CLEC, this information on cable modem and broadband availability is of diminished usefulness. At the time the TDS petition was filed, Comcast was not certified as a CLEC in these territories. We do not find, however, that the lack of CLEC certification renders prior information about the coverage of Comcast's facilities invalid. The voice services Comcast provides are carried over the facilities already in place for its other services. There is evidence that Comcast can and has ported numbers in KTC's exchanges. As a result, we find that Comcast has in place the infrastructure to provide voice service over its existing facilities.

The OCA points to Dr. Johnson's testimony where he states that "additional hardware and software" are necessary to provide voice service over cable facilities. OCA Closing at footnote 16; Exhibit 77, Testimony of Ben Johnson (Ex. 77), at 14-15. From this, the OCA contends that the existence of cable television facilities does not necessarily mean cable voice service is available. The portion of Dr. Johnson's testimony referenced by the OCA, however,

goes on to state that circumstances have changed and that Comcast is offering voice services in the TDS exchanges. Ex. 77 at 15. Further, as previously noted, Comcast is offering voice services at present. Based on this evidence, it is reasonable to conclude that the necessary hardware and software have been installed.

Furthermore, Dr. Johnson criticizes TDS by stating that “TDS has not provided detailed information about the extent to which Comcast voice offerings are actually available to every customer within every TDS exchange.” Ex. 77 at 15. Based upon this testimony, it appears that Dr. Johnson may have been looking for information regarding the services being offered to every customer in every exchange, which goes beyond the statute’s mandate. We are concerned under the statute with whether the *majority* of customers have access, not whether *every* customer has access to alternative services.

NHLA contends that because Mr. Murray stated that TDS had not calculated the percentage of customers who have Comcast’s voice service available to them, TDS has essentially admitted that it has not shown that the service is available to a majority. We do not agree. At the beginning of this proceeding, TDS supplied information supporting its estimate that Comcast’s facilities reach more than fifty percent of the customers in the KTC exchanges. Exhibit 2P, Testimony of Michael Reed, Attachment E. At hearing, Mr. Murray stated that he understood Comcast to be offering voice service throughout its cable plant. Tr. at 40-41. Also, during the questioning where Mr. Murray admitted that TDS had not calculated the percentage, he stated that the maps provided by TDS showed that more than fifty percent of TDS customers have Comcast Digital Voice available to them. Tr. at 39-40. Considering the testimony of Mr. Reed and Mr. Murray together, we find that TDS has met its burden regarding availability of alternative services to the majority of customers in each KTC exchange.

b. Competitiveness of Alternative Services

Finally, we address whether the services available to a majority of customers are in fact competitive. In Mr. Murray's rebuttal testimony he provided numerous screenshots of a Comcast website depicting the services offered. Mr. Murray contended that this showed the existence of a competitive offering provided by Comcast. To take one example, the screenshots included by Mr. Murray for Andover showed the existence of a "Triple Play" bundled service of voice, video and Internet, at a starting price of \$99.00 per month. Exhibit 16P, Rebuttal Testimony of Thomas Murray (Ex. 16P), Attachment 5 at Bates TEM 055. Other bundles were offered at higher prices. Ex. 16P, Attachment 5 at Bates TEM 055-58. When looking at voice service alone, there was an offering for "Comcast Unlimited" service at \$19.99 per month for an initial six-month period, after which time the rate moves to \$39.95. Ex. 16P Attachment 5 at Bates TEM 059. That exhibit also showed Comcast's "Local with More" voice service offering at \$24.95 per month. Ex. 16P Attachment 5 at Bates TEM 059-60. That "starting price", however, is only available to customers already subscribing to either or both of Comcast's television or Internet services. Ex. 16P Attachment 5 at Bates TEM 060. The remaining voice service offerings are all at higher prices and the listed "starting prices" require that a customer already be purchasing another Comcast service. Ex. 16P Attachment 5 at Bates TEM 060. It thus appears that the only stand-alone voice offering is Comcast's "Comcast Unlimited" service at what Mr. Murray agreed was the promotional rate of \$19.99 per month, until it moves to \$39.95 per month after six months.

NHLA argues that the relevant market for determining competitiveness is the market for basic local telephone service. RSA 374:3-b, however, makes no such declaration. We do not limit our inquiry to the market for basic local exchange when determining the existence of

competitive services pursuant to RSA 374:3-b, III(a). We note that RSA 374:3-b, III(a) allows for broadband and wireless service to be considered as competitive services, yet we are not aware of any broadband or wireless service that could be deemed competitive under NHLA's narrow formulation. Additionally, we have previously concluded that wireless service is competitive in the WTC and HTC territories. *First AFOR Order* at 9, 27. NHLA has consistently argued that wireless service is not a competitive alternative. We have already rejected that argument, and we likewise reject the argument that TDS must demonstrate that there is competition in the specific market for stand-alone basic local exchange service.

If services considered competitive for purposes of RSA 374-3b, III(a) were limited to stand-alone basic services, an incumbent carrier might never achieve alternative regulation depending upon the marketing choices of its competitors. Should a competitor never offer a stand-alone "basic" service it could well be taking substantial numbers of customers from the incumbent without ever entering the market NHLA considers relevant. In those circumstances, the incumbent might be jeopardized by substantial losses in its customer base and market share without ever having faced a "competitor" under NHLA's definition. In such a case, the statute intended to allow an incumbent to gain pricing and offering flexibility along with decreased regulation so as to compete more effectively and continue to meet its carrier of last resort obligations, would be rendered ineffectual. We do not believe that the Legislature would countenance such a result. *See Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511-512 (2006) ("The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute.")

Lastly, if only stand-alone basic local service were considered "competitive," there would be no need for the other provisions of RSA 374:3-b, III relating to the pricing of basic service

and the preservation of universal access to affordable basic service. *See* RSA 374:3-b, III(b) and (e). Because basic service is protected by other portions of the statute, we do not agree that in a competitive analysis it is only the market for basic service that should be considered. *N.H. Ins. Guar. Ass'n v. Pitco Frialator*, 142 N.H. 573, 578 (1998) (It is a fundamental principle of statutory construction that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words.)

With regard to the service offerings from Comcast, the competitive analysis that we undertake is not that which is used in an antitrust analysis nor that which would justify complete deregulation of retail rates. *First AFOR Order* at 27. Further, as to this lesser standard the Legislature would have us apply, we have understood the word “competitive” in subsection III(a) to mean that mere availability of alternatives is not sufficient to approve a plan, but that the inclusion, among other things, of price protections in subsection III(b) means that a fully functioning competitive market is not necessary in order to approve a plan. *Id.* at 26. Furthermore, we have rejected attempts to define “competitive” by reference to price elasticity of demand modeling, wherein the movement of customers from one service provider to the other in response to pricing changes is measured. *Id.* at 10 and 27. This was so because we found such an analysis to be stricter than that contemplated by the Legislature. *Id.* at 27. In reviewing the service offerings from Comcast we note that Comcast provides voice service as a stand-alone service, as well as in conjunction with other services, and that the prices for these services vary according to their components. Because Comcast is offering wireline voice services in the KTC exchanges, we are persuaded that it is providing a competitive alternative to TDS’ voice service.

NHLA contends that Comcast’s pricing is structured in such a fashion as to make it competitive only in the market for bundles or for higher-end customers. Dr. Johnson has also

testified that it is in Comcast's marketing plan to market its voice services primarily to those persons in the cable television market because its true competition is with satellite television providers and that Comcast views voice service as an "add-on". Ex. 77 at 15-18; Tr. at 97, 121-23. As an initial issue there is no information in the record from Comcast about its marketing plans or decisions. Tr. at 121. As such, we can give little weight to Dr. Johnson's conclusions about Comcast's choice to compete in the voice market as an afterthought. In fact, the information presented by TDS about Comcast having added phone customers at a time it was losing video customers is evidence to the contrary. See Exhibit KTC-MCT 20, Form 10-Q for Comcast Corporation for the Quarterly Period ended June 30, 2010 at 26, 29.

As to the pricing of Comcast's offerings, looking at the most basic of its offerings, we do not place great weight on the \$19.99 price appearing in some of the information as it appears that this is a promotional rate and that the "true" rate is \$39.95. In reviewing this offering, we note that the Comcast website indicates that it includes not only basic local exchange service, but also unlimited long distance service to the United States, Canada and Puerto Rico, additional "vertical services" such as caller ID and call waiting, as well as other features. As such, its service offering, while priced higher than KTC's basic local exchange service, offers more features. Moreover, once long distance service and other costs are added to KTC's basic local service price, the difference in the pricing shrinks. See Tr. at 134-137; Ex. 77 at 8-9. The inclination of customers to switch to Comcast's services may thus be driven not only by price, but also by the availability of other features.

There is also evidence of Comcast gaining customers from KTC as demonstrated by the number porting KTC has done. Therefore, Comcast is, at some level, competing with TDS regardless of the relative prices of the products that they offer. There is no requirement in the

statute that TDS lose a majority of its customers before an alternative regulation plan can be approved. Further, although Dr. Johnson's focus on low-income customers and their needs as regards price is instructive, it is not the underlying consideration when determining whether the plan meets the requirements of RSA 374:3-b, III(a). Instead the statute is concerned with whether there is a competitive alternative available to a majority of retail customers. There has been no evidence presented that low-income customers make up the majority, or even a significant minority, of the customers in any exchange. Comcast is offering a service that is drawing some of KTC's customers away, which is evidence that this alternative is competitive, as the term is used in the statute.

Finally, as pointed out by TDS at the hearing, the FCC has noted that Interconnected VoIP, the type offered by Comcast, is increasing at a time when the number of traditional switched access lines, like those offered by KTC, are decreasing. *See* Exhibits KTC-MCT 17 and KTC-MCT 18. Thus, on a national level there is competition. In these circumstances we conclude that the voice service offered by Comcast is competitive to the extent required by RSA 374:3-b.

2. Basic Service Rates

Though we have found that a majority of the retail customers in each KTC exchange have access to a competitive wireline alternative, we must yet determine if the remaining portions of KTC's plan for alternative regulation comply with the requirements of RSA 374:3-b.

RSA 374:3-b, III(b) states that a plan for alternative regulation should provide:

for maximum basic local service rates at levels that do not exceed the comparable rates charged by the largest incumbent local exchange carrier operating in the state and that do not increase by more than 10 percent in each of the 4 years after a plan is approved with the exception that the plan may provide for additional rate adjustments, with public utilities commission review and approval, to reflect

changes in federal, state, or local government taxes, mandates, rules, regulations, or statutes . . .

The KTC plan has not been amended since the plans for WTC and HTC were approved in 2008. That plan, in section 4.1.3, contains a provision allowing KTC to alter its rates for basic retail service so long as those rates do not exceed the rates for basic retail service for comparable customers in comparable rate groups as charged by the State's largest incumbent local exchange carrier (ILEC).³ That provision, as well as a following provision, section 4.1.3.1, allows KTC to increase its rates in the first four years, following the initial two year rate cap, by no more than ten percent per year. Finally, under sections 4.1.3, 4.1.3.2 and 7 of the plan, KTC is allowed, subject to Commission approval, to adjust its rates for certain defined exogenous changes, including those to taxes and accounting rules, and those changes are not included in the calculation of the rate increases permitted by section 4.1.1. Thus, the plan adopts the requirements of RSA 374:3-b, III (b) and adheres to its terms. Accordingly, we find that this requirement has been met.

3. Innovative Service Obligations

RSA 374:3-b, III(c) provides that the Commission shall approve an alternative regulation plan if it "promotes the offering of innovative telecommunications services in the state" The plan specifically provides, in section 5.1, that KTC will commit to maintain its network in such a manner that it will be able to offer state-of-the-art, innovative services to its customers, either through itself or its wholesale providers. Moreover, in section 5.1.2, KTC commits to assess its customers' satisfaction. In that KTC has committed to maintaining a network sufficient to provide innovative services and that it will, with the same goal, be assessing the

³ The state's largest ILEC is FairPoint Communications.

satisfaction of its customers, we find that the plan promotes the offering of innovative telecommunications services as required by RSA 374:3-b, III(c).

4. Intercarrier Service

RSA 374:3-b: III(d) provides that the Commission shall approve the plan if it, “meets intercarrier service obligations under other applicable laws” As noted in the Commission’s order granting the petition of WTC and HTC, “[t]he TDS Companies’ agreements in the settlement: not to oppose CLEC registration, to waive the rural exemption, and to agree to shorter time frames for negotiating interconnection agreements, fulfill both 374:3-b, III(c) and (d).” *First AFOR Order* at 28. The plan for KTC shares these characteristics. In that these provisions have not been subsequently amended or removed, we find that this plan, like those for HTC and WTC, meets the requirements of RSA 374:3-b, III(d).

5. Universal Access to Affordable Basic Service

RSA 374:3-b, III(e) requires that the “plan preserves universal access to affordable basic telephone service” As noted, NHLA contends that the price caps called for in RSA 374:3-b, III(b) do not, by themselves ensure universal access to affordable basic service. NHLA Closing at 8. This is so, according to NHLA, because if they did, there would be no need for the universal access protections of RSA 374:3-b, III(e). NHLA Closing at 8. Further, NHLA contends that, based on the cross examination conducted by the OCA during the September 27, 2010 hearing regarding the efforts of WTC and HTC to address issues relating to Lifeline and Link-Up, there is little confidence that KTC will, in fact, attempt to ensure universal access to affordable basic telephone service. NHLA Closing at 8.

As to the first point raised by NHLA, we agree that the price caps called for in RSA 374:3-b, III(b), standing alone, are not sufficient to ensure universal access. We note, however,

that, although NHLA contends that the inquiry must go beyond the rate caps of RSA 374:3-b, III(b), it does not argue for any particular requirement that would meet the conditions of the statute. In the order granting alternative regulation to WTC and HTC, one of the bases upon which the Commission concluded that universal access would be preserved was that the plans called for freezing of rates for one or two years following the effective date of the plan. Those rate freezes are likewise included in KTC's plan. Section 4.1.1 specifically states that a company "shall not raise Basic Retail Service rates in any exchange during the first and second years of its Plan." Though the circumstances allowing for the eventual termination of the rate freezes in section 4.1.2 appear to have already been met, the existence of those circumstances does not override the freeze provided for in section 4.1.1. Thus, KTC's Basic Retail Service rates will be frozen for two years following approval of this plan.

Further, KTC's plan provides other protections to ensure the availability of universal access going forward, as called for in RSA 374:3-b, III(e). In section 4.1.3.3, KTC is required to continue to offer unbundled, *i.e.*, stand-alone, Basic Retail Service as a condition of being permitted to offer any other bundled services. Additionally, the plan freezes the rates for Lifeline for the four years following the effective date of the plan, regardless of the conditions in 4.1.2 having been met. Thereafter, Lifeline rates are permitted to be increased at a rate of ten percent per year up to the rates of the State's largest ILEC for comparable Lifeline customers. Thus, KTC is committed to continuing to offer Basic Retail Service at a rate that may increase at up to ten percent per year in each of the four years after the two-year freeze is lifted, but which is capped at the comparable rate for the State's largest ILEC. In addition, KTC is obligated to maintain Lifeline rates at their current level for four years, and may then increase them in the

same manner as the Basic Retail Service rates. We find that such rate protections are sufficient to preserve universal access to affordable basic telephone service.

In addition to the above protections, in section 4.1.4.1 the plan requires that KTC work with OCA, NHLA and Commission Staff to “improve the dissemination of information regarding Lifeline and Link-up programs to eligible persons to increase participation in the programs.” This provides further protection for low-income customers to find affordable basic telephone services. During the hearing, the OCA questioned TDS about its adherence to an identical provision in the plans governing HTC and WTC. Tr. at 67-69. TDS stated that though alternative regulation had been granted in 2008, its first meeting with the OCA on the matter was held in late 2010. Tr. at 67. Both NHLA and the OCA contend that this demonstrates that KTC will not make appropriate efforts to preserve universal access to affordable basic retail service. OCA further contends that the Commission should formally inquire about the status of compliance with the terms of those alternative regulation plans. OCA Closing at 9.

First, we do not believe that a formal inquiry is called for in this instance. While we are troubled that TDS has been slow to follow through on this requirement, we also note that there is no express timing requirement in the plan. Further, as stated by Mr. Murray at the hearing, the companies have complied with the “standard Lifeline procedures” by mailing initial and reminder letters to customers, and that it has undertaken other actions to recertify Lifeline customers. Tr. at 68. In addition, though it had done so only recently, TDS had met with other interested parties on ways to improve Lifeline participation. Tr. at 67. We do agree, however, that TDS must diligently adhere to the terms of the plan insofar as Lifeline customers are concerned. We direct TDS to fulfill its obligations under the terms of the plans, and take the

measures described below, or risk modifications to, or revocation of, its plans pursuant to section 2.3 of the plans.

6. Changes to Plan

Finally, RSA 374:3-b, III(f) states that a plan shall be approved if it:

provides that, if the small incumbent local exchange carrier operating under the plan fails to meet any of the conditions set out in this section, the public utilities commission may require the small incumbent local exchange carrier to propose modifications to the alternative regulation plan or return to rate of return regulation.

As noted above, section 2.3 of the plan provides that, subject to the opportunity for a hearing, the Commission may require KTC to propose modifications to its plan or return to its prior form of regulation. Thus, it complies with RSA 374:3-b, III(f). Furthermore, we use this opportunity to clarify that we are particularly concerned about TDS' continuing interest in securing universal access to affordable basic telephone service, through Lifeline or otherwise. Accordingly, we direct TDS to meet with OCA, NHLA and Commission Staff within 60 days of the date of this order to begin improving the dissemination of information regarding Lifeline and Link-up programs.

IV. CONCLUSION

Because TDS has shown that the relevant factual circumstances exist, *i.e.*, that there is a competitive alternative available to a majority of customers in each of the KTC exchanges, and because the alternative regulation plan for KTC adheres to the terms of RSA 374:3-b, III, we grant the petition for alternative regulation for KTC. To the extent the requests for findings and rulings are consistent with this narrative order they are granted, otherwise they are denied. *See Harrington v. Town of Warner*, 152 N.H. 74, 86 (2005).

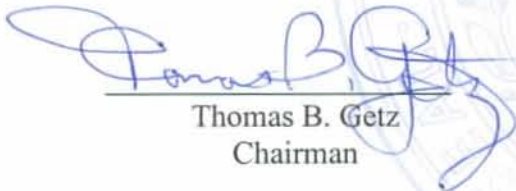
Based upon the foregoing, it is hereby


ORDERED, the petition for alternative regulation for Kearsarge Telephone Company is granted; and it is

FURTHER ORDERED, that a copy of the plan for alternative regulation for Kearsarge Telephone Company, without markups, be filed with the Commission with 20 days of the date of this order; and it is

FURTHER ORDERED, that within 60 days of the date of this order Kearsarge Telephone Company must meet with Staff, OCA and NHLA on ways to improve the dissemination of information on Lifeline as provided in the alternative regulation plans for Kearsarge Telephone Company, Wilton Telephone Company and Hollis Telephone Company.


By order of the Public Utilities Commission of New Hampshire this twenty-second day of December, 2010.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Kimberly Nolin Smith
Assistant Secretary