STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 07-027

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

Petitions for Approval of Alternative Form of Regulation

Order Regarding Joint Settlement Agreement

O R D E R N O. 24,852

April 23, 2008

APPEARANCES: Devine, Millimet & Branch by Frederick J. Coolbroth, Esq. on behalf of Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co., and Merrimack County Telephone Co.; Orr & Reno by Susan S. Geiger, Esq. on behalf of segTEL, Inc.; Primmer, Piper, Eggleston & Cramer by Paul J. Phillips, Esq. on behalf of New Hampshire Telephone Association; Mintz Levin by Paul Abbott on behalf of Comcast Phone of New Hampshire; New Hampshire Legal Assistance by Alan Linder, Esq. on behalf of Daniel Bailey; Meredith Hatfield, Esq. of the New Hampshire Office of Consumer Advocate on behalf of New Hampshire residential ratepayers; and F. Anne Ross, Esq. of the New Hampshire Public Utilities Commission on behalf of Staff.

I. PROCEDURAL HISTORY

On March 1, 2007, Kearsarge Telephone Company (Kearsarge), Wilton Telephone Company (Wilton), Hollis Telephone Company (Hollis) and Merrimack County Telephone Company (Merrimack), (collectively, the TDS Companies), each a wholly-owned subsidiary of Telephone & Data Systems, Inc. (TDS), filed petitions with the Commission seeking approval of an alternate form of regulation pursuant to RSA 374:3-b. The proposals, if approved, would result in regulation of the TDS Companies' retail operations comparable to the regulation currently applied to competitive local exchange carriers (CLECs). Each of the TDS Companies sought Commission approval of a plan setting maximum basic local rates: (1) comparable to those of FairPoint Communications NNE (FairPoint); and (2) increasing by no more than 10 percent per year for the four years following Commission approval.

On April 10, 2007, the Commission issued an order of notice scheduling a prehearing conference on May 4, 2007. The Office of Consumer Advocate (OCA) filed a letter stating its intent to participate in this docket on behalf of residential utility consumers pursuant to RSA 363:28, II on March 6, 2007. Union Telephone Company d/b/a Union Communications (Union) and segTEL, Inc. (segTEL) filed petitions to intervene on May 1, 2007. Granite State Telephone, Inc. (Granite State) filed a petition to intervene on May 7, 2007. On May 15, 2007, New Hampshire Legal Assistance (NHLA) filed a petition to intervene on behalf of TDS customer Ross Patnode, who was subsequently replaced by Daniel Bailey. On October 1, 2007, Comcast Phone of New Hampshire, LLC (Comcast) filed a motion to intervene. All interventions were granted by secretarial letters on May 29, 2007 and October 16, 2007.

On May 29, 2007, following the prehearing conference, the Commission asked the parties to file briefs regarding two questions related to RSA 374:3-b: (1) whether a service provided by an affiliate of an ILEC qualifies as a competitive service for purposes of the statute; and (2) whether a long distance service qualifies as a competitive wireline service for purposes of the statute.

On June 8, 2007, the TDS Companies, segTEL, Granite State, NHLA, OCA, and Staff filed briefs and, on June 20, 2007, all parties except Staff filed reply briefs. In their briefs and reply briefs the Parties and Staff addressed the two issues suggested by the Commission and raised other issues, including: whether the petitioners should be treated separately or in the aggregate with respect to application of the eligibility standard of 25,000 access lines; whether exogenous changes could allow basic service rates to exceed the caps; what standards should be applied in determining whether services are competitive; and whether the statute should be read to require abandonment of the federal rural exemption in section 251(f) of the federal Telecommunications Act, 47 U.S.C. § 251(f). The Commission issued a secretarial Letter on July 13, 2008, concluding that the questions briefed could not be resolved purely as a matter of law and would require resolution through the full adjudicative process, including the development of a factual record.

On July 23, 2007, OCA, supported by NHLA, requested that the Commission conduct public statement hearings in the TDS Companies' service territories pursuant to N.H. Code Admin. R. Puc 201.02(b)(2).[1] On September 5, 2007, the Commission issued a Secretarial Letter scheduling evening public statement hearings in Wilton, North Sutton, and Contoocook on September 17, October 4, and October 10, respectively.

On October 12, 2007, the following Parties and Staff filed testimony: David J. Kowolenko on behalf of Comcast; Ben Johnson, on behalf of NHLA; Robert Loube, , on behalf of the OCA; and Pradip Chattopadhyay, and Josie Gage on behalf of Staff. On November 15, 2007, the TDS Companies filed rebuttal testimony of Michael C. Reed and Timothy Ulrich. The OCA filed a motion *in limine* to strike portions of the TDS Companies' rebuttal testimony on November 28, 2007.

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[1] Puc 201.02(b)(2) requires a public statement hearing if "[i]t would assist the commission to ascertain the views of the utility's customers by conducting such a hearing in a particular location other than Concord."

On December 3, 2007, TDS, segTEL, OCA, and Staff filed a joint settlement agreement, together with a request that the Commission waive the provisions of Puc 203.20(e)[2] to allow consideration of the settlement during the hearings scheduled for December 4, and 5, 2007. On December 4, 2007, Comcast, Union and Granite State filed letters stating that they did not object to the settlement. The Commission granted the request for waiver of Puc 203.20(e) and held a hearing on the merits of the TDS Companies' petitions and on the settlement on December 4 and 5, 2007. No party objected to Comcast's request that the testimony of Mr. Kowolenko be adopted without his attendance at hearing and the Commission allowed admission of the written testimony.

On January 11, 2008, NHLA filed a brief opposing the settlement and on February 8, 2008, TDS, segTEL, the OCA, and Staff filed reply briefs. On February 12, 2008, Staff filed a motion pursuant to N.H. Code Admin. R. Puc 203.30 and 203.27 to reopen the record to take administrative notice that, on December 11, 2007, Comcast filed a CLEC petition to serve the towns of Andover, Antrim, Bennington, Boscawen, Chichester, Deering, Henniker, Hillsboro, Hopkinton, Loudon, New London, Salisbury, Wilmot, and Wilton. All of these towns are in the TDS Companies' service territory.

On February 14, 2008, NHLA, on behalf of Daniel Bailey, filed a motion asking for leave to file a response regarding the Comcast CLEC Application. NHLA asserted that if Mr. Bailey were not afforded the opportunity to comment on the relevance and significance of the Comcast CLEC application, he would be denied his right to due process. NHLA filed its proposed response to the Comcast CLEC application with its motion. The TDS Companies filed amended

[2] N.H. Code Admin. R. Puc 203.20(e) provides that "[s]ettlements and stipulations shall be filed no less than 5 days prior to the hearing."

plans reflecting the terms of the settlement on March 6, 2008, together with a motion to reopen the record to allow that filing.

II. POSITIONS OF THE PARTIES

A. TDS Companies

The TDS Companies presented pre-filed testimony by Michael C. Reed and Timothy W. Ulrich concerning available competitive services and the proposed plans for alternative regulation of each of the four companies. Mr. Reed described the loss of intrastate access minutes, loss of state switched access revenue and the loss of access lines for each of the TDS Companies. Mr. Reed maintained that these losses were key indicators of the effects of competition on the TDS Companies. Mr. Reed described specific wireless and cable providers offering services in each of the four company service territories. Mr. Reed also indicated that the TDS Companies had received requests to port local numbers to wireless carriers. Mr. Reed pointed to a Federal Communications Commission (FCC) order approving the request of RCC Minnesota, Inc. for certification as an eligible telecommunications carrier (ETC) in 15 of the TDS Companies' wire centers as proof of a competitive alternative in those 15 wire centers. Mr. Reed used web sites, service area coverage maps, data filed with the FCC, advertisements, customer surveys and information from TDS customer sales and service personnel to estimate availability of competitive services. Mr. Reed concluded that competitive alternatives were available to a majority of customers in each of the TDS Companies' exchanges. In his rebuttal testimony, Mr. Reed acknowledged that wireless service complemented rather than replicated basic local service, but argued that if customers substituted wireless service for basic local service that was sufficient to show competitive alternatives existed as required by the statute.

Mr. Ulrich described the pricing provisions of the plans. He described rates for basic retail services, non-basic retail services and wholesale services under the plans. Rates for basic services were set at current rates with increases of up to 10 percent per year for four years until reaching a final rate cap at the rates of the largest New Hampshire ILEC, FairPoint (as successor to the franchise formerly held by Verizon). Non-basic retail rates were price-deregulated and treated as CLEC retail rates. Wholesale rates and terms for state and federal intercarrier service obligations, including access services and obligations under the Telecommunications Act, remained unchanged under the plans.

B. Comcast

David Kowolenko, vice president of voice services for Comcast's North Central Division, which includes New Hampshire, Massachusetts, and Vermont, testified that although Comcast provides broadband video and data services in some of the TDS Companies' service areas, customers in those exchanges do not have access to Comcast voice services. He pointed out that Comcast does not have authority to provide telephone service in the TDS Companies' service territories, and it does not have interconnection agreements with any of the TDS Companies. Comcast offers cable television video service and high-speed data service via cable modem in certain areas served by the TDS Companies, namely, Andover, Antrim, Bennington, Boscawen, Chichester, Deering, Henniker, Hillsborough, Hopkinton, Loudon, New London, Salisbury, Sunapee, Wilmot and Wilton, but it does not offer voice service in any of those areas.

C. OCA

Robert Loube, vice president of Rolka, Loube, Saltzer, Associates, filed testimony on behalf of the OCA. Contrary to Mr. Reed's testimony that competitive cable, wireless and broadband service was available to a majority of TDS retail customers, Mr. Loube stated that there were no cable providers offering telephone services to any customers in the TDS Companies' service territories. Mr. Loube also asserted that for approximately 70 percent of customers who subscribe to wireless service, such service is not a substitute for, and does not compete with, wireline service. In addition, Mr. Loube testified that broadband-based VoIP carriers face patent infringement suits and price squeeze strategies by major ILECs. As a result, many broadband based VoIP carriers have closed their operations, and those remaining are not taken seriously by major cable providers, leaving them vulnerable and unable to maintain their presence in the market, and eliminating them as competitors of the TDS Companies' wireline service.

Regarding the inclusion in the plan of the authority to increase basic service rates by up to 10 percent per year for each of four years, Mr. Loube theorized that a carrier that requests such authority must believe that the majority of its customers do not have a competitive alternative available to them. Mr. Loube also pointed out that if the TDS Companies offered unbundled network elements (UNEs) and adopted FairPoint's UNE rates, that would not increase the level of competition in the TDS Companies' service territories because the FairPoint UNE rates are above most of the TDS Companies' basic service rates.

D. NHLA

Ben Johnson, president of Ben Johnson Associates, Inc., presented testimony on behalf of NHLA and its client, TDS customer Daniel Bailey. Mr. Johnson stated that he had evaluated the TDS Companies' petitions from a broad public policy perspective, placing particular emphasis on the potential impact on low-income consumers. He concluded that there were no wireline telephone competitors operating within any of the TDS exchanges, and that there were no cable companies currently offering voice telephone services within the TDS Companies' service territories. In addition, no customers, or very few customers, were substituting wireless or VoIP services for the TDS Companies' basic local exchange services. According to Mr. Johnson, the TDS Companies' own records show that only a very small fraction of their local exchange customers had dropped their landlines to rely entirely on wireless service; instead, most of the dropped lines were secondary or additional lines.

Mr. Johnson contended that the vast majority of TDS customers viewed wireless and wireline services as distinct services which complement each other. In fact, Mr. Johnson stated that wireless is a complement to wireline service rather than a competitive alternative, and it is inappropriate to view wireless service as being competitive with the basic local exchange services offered by the TDS Companies. The vast majority of consumers who purchase wireless service also purchase wireline service, and customers do not switch back and forth between the two in response to small changes in relative prices.

Mr. Johnson maintained that VoIP technologies are in their infancy and for many customers are still seen as too risky to be viable competitive alternatives to the traditional wireline services. In addition, VoIP technologies are only available to customers who have broadband internet connections. Mr. Johnson testified that both VoIP and wireless were generally priced far higher than the TDS Companies' stand-alone basic exchange service, thus eliminating them as "competitive" options.

Mr. Johnson testified that the TDS Companies had not proven that their proposed alternative regulation plans preserve universal access to affordable basic telephone service.

Capping the TDS Companies' basic local exchange rates at the levels charged by FairPoint is not sufficient, in his view, to prevent TDS from increasing its prices substantially. The rate caps would allow TDS to more than double its local exchange rates over the first four years of the plan in certain exchanges, and would allow TDS to increase rates even further in subsequent years. According to Mr. Johnson, the impact of such severe rate increases on universal access to affordable basic telephone service is unknown.

In conclusion, Mr. Johnson recommended that the Commission reject all of the TDS Companies' alternative regulation plans. Mr. Johnson suggested that extensive deregulation is only appropriate where competition is deeply entrenched and truly effective, and is not appropriate where competition is merely emerging or remains weak.

E. Staff

Mr. Chattopadhyay and Ms. Gage filed testimony for Staff. Ms. Gage evaluated the availability of third party services in the TDS Companies' service territories and found that alternative services, in the form of cable TV broadband access or wireless services, were available to a majority of customers in the Wilton and Hollis exchanges. Ms. Gage then evaluated the Sutton exchange for Merrimack, and the Salisbury exchange for Kearsarge.

In Sutton, the cable TV provider was a TDS subsidiary which does not offer broadband cable modem service and Staff did not consider it competitive. In Sutton, the DSL provider was Merrimack, which only provided DSL in connection with basic local service and Staff did not consider it competitive. No wireline telephone providers were available in any of the TDS Companies' service territories because no CLECs have been authorized to operate in those service territories. Staff then evaluated wireless offerings in Sutton and found, based upon cell tower antenna locations, that wireless alternatives did not exist for a majority of customers in the Sutton exchange.

In Salisbury, the only DSL provider was Kearsarge and it required a purchase of basic local service in order to get DSL. Although, Comcast was a registered cable TV provider in Salisbury, Staff found that cable TV was only available to a few residents on one road in Salisbury. Since no third party wireline telephone provider exists in any of the TDS Companies' exchanges, Staff found none were available in Salisbury. Based upon those findings Staff concluded that wireline and broadband competitors did not exist in Salisbury. Staff then analyzed the availability of wireless services in Salisbury, and based upon cell tower antenna locations, concluded that wireless service was not available to a majority of customers in the Salisbury exchange.

Based upon Ms. Gage's finding of available alternative services in the Wilton and Hollis service territories, Mr. Chattopadhyay analyzed the competitiveness of those alternative services. Mr. Chattopadhyay examined whether market power would be constrained if prices were deregulated. In other words, he considered whether customers were sufficiently able to substitute other services for basic local service in response to price increases. Mr. Chattopadhyay measured the price elasticity of demand for basic local service using econometric models. Based upon his price elasticity analysis, Mr. Chattopadhyay concluded that alternative services were not competitive in the Wilton and Hollis exchanges.

III. SETTLEMENT AGREEMENT

On November 30, 2007, the TDS Companies, segTEL, the OCA, and Staff reached a joint settlement agreement and, on December 3, 2007, filed it with the Commission. Although they were not signatories to the settlement, Granite State, Union and Comcast subsequently filed letters stating that they did not object to the agreement. Only NHLA, on behalf of Mr. Bailey, opposed the settlement.

The settlement acknowledged that the testimony and positions taken by the parties reflected divergent views regarding the interpretation of RSA 374:3-b and the extent of telecommunications competition within the service areas served by the TDS Companies. Notwithstanding these divergent positions, the settling parties reached agreement on additional terms and conditions to modify the plans initially proposed by the TDS Companies. The settling parties agreed that the plans, as modified, meet the requirements of RSA 374:3-b.

The OCA provided a summary of the settlement at hearing and described the varying initial positions of the settling parties. While TDS claimed that it had met the requirements of the statute, and the OCA, other intervenors, and Staff expressed concern that competitive alternatives did not yet exist for basic service in all of the TDS exchanges. The OCA acknowledged that the settlement recognizes many of the issues raised by the parties and endeavors to allow the TDS Companies greater flexibility to compete, while taking concrete steps to protect customers and foster competitive entry.

The OCA highlighted these key aspects of the settlement: (1) it includes important steps that should further open the TDS Companies' franchise territories to competition; (2) it recognizes that the service territories of the four TDS Companies have different levels of competition and, therefore, require different treatment; (3) it includes additional protections for Lifeline customers; and (4) it provides for a reporting mechanism for increases and/or decreases in exogenous costs.[3] In addition, TDS agreed to work with the OCA, NHLA and Staff to improve dissemination of information to eligible customers regarding Lifeline and Link-Up with the objective of increased participation. The TDS Companies also agreed to not raise intraLATA access rates without prior Commission approval.

Michael Reed of TDS provided a summary of portions of the alternative regulation plans, with particular attention to the amendments resulting from the settlement. As filed, the four plans were identical; however, the plans are now slightly different and reflect changes agreed to in the settlement. Section 3 of the amended plans now contains a very significant change and includes a waiver of the rural exemption under section 251(f)(1) of the Telecommunications Act. Although there are no CLECs currently providing services in TDS service territories, the TDS Companies have agreed not to contest the certification of CLECs in their service territories. Finally, the settlement makes clear that the Companies are not undertaking obligations under the federal statute that are applicable to the "Bell Operating Companies" as that phrase is used in the statute.

Mr. Reed discussed the basic service rate "freezes" for one and two years provided by the settlement and he clarified that the freezes would still allow prices to go lower, but would not allow increases. He went on to state that, at the end of the freeze period, the TDS Companies would not necessarily seek to raise rates. Mr. Reed also confirmed that although the settlement provides that TDS Companies' basic rates are not to exceed those of FairPoint, there are circumstances, such as an exogenous event, that could cause rates to exceed Fairpoint's rates.

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[3] RSA 374:3-b, III(b) allows the plan to provide for rate adjustments, with PUC review and approval, to reflect changes in federal, state, or local government taxes, mandates, rules, regulations, or statutes. Those kinds of changes are referred to as "exogenous changes."

Mr. Reed also indicated that, although the rate of the largest incumbent is the cap, the TDS Companies could choose not to charge rates as high as that cap.

Mr. Reed stated that the TDS Companies believe they have demonstrated compliance with the statutory prerequisites set out by the Legislature and believe that the settlement addresses all the concerns of the parties and Staff. He contends the plans will be beneficial to the TDS Companies and the settlement has protections built in for consumers, with additional safeguards for low-income consumers on Lifeline.

Mr. Reed indicated that in the Commission's rules, there are CLECs and there are ILECs, but no ILECs operating as CLECs. Mr. Reed stated that the TDS Companies' plans are a CLEC-ILEC hybrid, with continued ILEC reporting to the Commission regarding such matters as service quality standards and investments, and CLEC reporting on rates.

Staff witness Josie Gage summarized the terms contained in Sections 5, 6 and 7 of the Settlement, which she described as critical to Staff. Wilton and Hollis will not raise basic service rates for one and two years, respectively, following which rates will be subject to the plans. Kearsarge and Merrimack will not raise basic service rates for two years, after which basic rates may increase on an exchange-by-exchange basis when Kearsarge or Merrimack can provide evidence that at least one of the five tests in Section 6.2 of the settlement is met in an exchange. The rate freeze will not expire if the tests in Section 6.2 are not met.

Staff witness Kathryn Bailey summarized the provisions of the settlement dealing with exogenous changes. The original plans submitted by the TDS Companies proposed that the Companies could file a rate increase for an exogenous change and, if the Commission did not act within 30 days, the new proposed rates would automatically go into effect. RSA 374:3-b does not address the process for reviewing exogenous changes but the settlement provides guidelines and timeframes for such review. If a TDS Company filed a rate change because of an exogenous change, the Commission would issue an order of notice within 30 days, review the rate plan using standards specified in the plans, and decide within five months whether to approve the rate change. Staff did not agree to this provision of the settlement, which would bind the Commission to certain timeframes for review.

Ms. Bailey explained that Staff believed it was appropriate to enter into the settlement and that the settlement is consistent with RSA 374:3-b, III. She asserted that the requirement of RSA 374:3-b, III(a)[4] that a competitive alternative be available to the majority of customers is achieved by section 3.2 of the plans, which provides that the TDS Companies shall continue to provide stand-alone basic service at existing rates effectively until a competitive alternative is available to the majority of customers in the exchange. She also asserted that sections 5, 6 and 8 of the settlement comply with the rate protection requirements of subsection III(b).[5] In the settlement, moreover, the TDS Companies agreed to: give up their rural exemption; not contest any request for CLEC authorization in their service territories; and negotiate interconnection agreements for resale and collocation that offer unbundled network elements. According to Staff, these concessions by the TDS Companies should allow wireline CLECs to compete in TDS territories, which will promote the offering of innovative services as required by subsection

[4](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.

[5](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.

III(c).[6] Staff also affirmed the TDS Companies' agreement to: negotiate interconnection agreements; meet their intercarrier obligations; and not raise access rates without Commission approval, thus fulfilling the requirements of subsection III(d).[7] Furthermore, the settlement preserves and promotes Lifeline, which Staff believes complies with subsection III(e).[8] Finally, the plans provide remedies consistent with subsection III(f)[9] if the TDS Companies are not meeting their statutory obligations.

Mr. Chattopadhyay testified that his analysis of competitiveness in Wilton and Hollis covered the period 2004 to June 2007. Mr. Chattopadhyay observed that, if current trends in wireless pricing continue, his analysis would show competitiveness using the price elasticity test within two years of June 2007 for Wilton and within three years of June 2007 for Hollis. Mr. Chattopadhyay also noted the increased threat of new entry into the TDS markets as a result of the TDS Companies' waiver of the rural exemption and agreement not to oppose CLEC certification contained in the settlement. According to Mr. Chattopadhyay, these changes enhance the ability of the market to constrain pricing.

Mr. Johnson testified that the settlement did not meet the criteria set out in RSA 374:3-b. While he acknowledged that waiving the rural exemption and reducing barriers to entry was an improvement, he concluded that the TDS Companies markets are relatively small and not very attractive to competitors. Mr. Johnson pointed out that the TDS Companies' failure to agree to file tariffs for resale or unbundled network elements constituted barriers to CLEC entry. Mr.

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[6] (c) The plan promotes the offering of innovative telecommunications services in the state.
[7] (d) The plan meets intercarrier service obligations under other applicable laws.
[8] (e) The plan preserves universal access to affordable basic telephone service.
[9] (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.

Johnson also expressed concern that, although the Settlement improved rate protection for basic rates, it allowed non-basic rates to increase in all exchanges immediately. With regard to the settlement's additional price freezes for Kearsarge and Merrimack, Mr. Johnson acknowledged that they improved price protections, but he remained concerned that those provisions did not require sufficient competition to constrain pricing for the TDS Companies' services. Mr. Johnson also acknowledged the settlement's additional protection for Lifeline customers, but he did not find those protections sufficient to protect such customers from significant rate increases in the long term. Mr. Johnson objected to the settlement's provisions on exogenous changes because they prevent the Commission from reviewing the TDS Companies' profits when considering the impacts of an exogenous change. In conclusion, Dr. Johnson found that the trade-offs offered by the settlement were not in the public interest.

IV. POST-HEARING BRIEFS

A. TDS Companies

The TDS Companies reiterated their earlier position that competitive alternatives exist in all of the company service territories. The TDS Companies indicated that RSA 374:3-b delegated to the Commission the authority to "fill in" the statutory gaps based on the Commission's knowledge and experience gained through extensive involvement in the realm of telecommunications. The TDS Companies went on to point out that the settlement enhances competitive options by removing barriers to entry in the TDS Companies' service territories.

The TDS Companies objected to the narrow interpretation of competition promoted by Mr. Johnson. The Companies asserted that Mr. Johnson's test requires that competitors offer a product identical to basic local service offered by the TDS Companies. According to the TDS

Companies, Mr. Johnson's test ignores the reality of competitive technologies and the forms they take. In addition, the Companies pointed out that had the Legislature required a finding of competition in the form of stand-alone basic local service, there would be no need to set price caps for basic local service in RSA 374:3-b. The TDS Companies also rejected Mr. Johnson's arguments that competitive alternatives must be affordable to low-income customers, stating that the statute refers only to customers, not to low-income customers. The TDS Companies disagreed with Mr. Johnson's claims that the plans and the settlement do not preserve universal access to affordable basic telephone service.

The TDS Companies maintained that the Commission need not determine which of the various litigated positions would prevail in order to consider and approve the settlement. Referring generally to the encouragement of settlements under the Administrative Procedure Act, *see* RSA 541-A:38, and the Commission's rules, *see* N.H. Code Admin. Rules Puc 203.20(b), the Companies stated that the Commission may approve this settlement based upon a determination that it is just and reasonable and serves the public interest. Finally, the TDS Companies asserted that no analysis of the plans is required under RSA 378:7 because rates subject to an alternative form of regulation plan are not set based upon rate of return or cost of service.

B. NHLA

On behalf of Mr. Bailey, NHLA filed a brief stating that the TDS Companies have not met the criteria of RSA 374:3-b, III (a) which requires that competitive wireline, wireless or broadband service be available to a majority of retail customers in each of the TDS Companies' exchanges. NHLA alleged that the TDS Companies have failed to meet their burden of proof and argued that the hope and belief of the settling parties that the settlement will promote competition in the future does not satisfy the statutory requirement of showing that competition exists currently for a majority of retail consumers. NHLA alleged that the settlement is a trade-off in return for the TDS Companies' agreement to reduce barriers to entry into their markets.

NHLA also asserted that the TDS Companies' revised alternative regulation plans fail to meet the criteria for RSA 374:3-b, III(e), which requires the plans to preserve universal access to affordable basic telephone service. NHLA theorized that the plans allow substantial increases to basic local exchange service and with the inclusion of increases for exogenous changes, the rates may ultimately exceed FairPoint's rates. In addition, although the plans provide limited protections for Lifeline customers, the TDS Companies have very few Lifeline customers. NHLA stated that the TDS Companies' agreement to participate in increasing the Lifeline program is "vague at best."

NHLA also asserted that the TDS Companies have no competition for basic local exchange service inasmuch as there are no wireline CLECs, and no competition by cable companies for voice grade phone service in TDS territories. NHLA further asserts that wireless, broadband, and VOIP services are not competitively priced or affordable to low-income customers. NHLA additionally alleged that, while affluent TDS customers may move to bundled service offerings, low-income customers have no place else to go.

NHLA emphasized that in addition to meeting all of the requirements of RSA 374:3-b, an alternative regulation plan must also result in just and reasonable rates under RSA 378:7 and contended that an analysis of whether rates are just and reasonable should be undertaken in the instant docket. NHLA further maintained that if the alternative regulation plan is approved, the Commission would cede significant oversight in the transactions and activities of TDS

Companies, including a merger among the four petitioners. Finally, it argued that the Commission is required to determine that the settlement results are just and reasonable and serve the public interest.

NHLA asserted that the Commission is required to make findings of fact pursuant to RSA 374:3-b, III regardless of whether there is a settlement agreement. NHLA maintained that a finding of available “competitive wireline, wireless, or broadband service” is required before Commission approval, as distinct from technologies that may be competitive in the future or that a plan may foster competition. NHLA contended that the Commission must determine not only if technologies are “available,” but whether those technologies are “competitive” with basic local exchange service.

C. segTEL

SegTEL maintained that, if approved, the Comcast CLEC application filed post-hearing would form a basis for the Commission to find 374:3-b, III(a) was met. Further, segTEL reasoned that nothing in 374:3-b requires the Commission to reject an alternative regulation plan if all of the prerequisites section 3-b, III were not met. Rather, according to segTEL, the use of “shall” in subsection 3-b, III requires the Commission to approve a plan if it makes all findings, but does not conversely require a rejection if all findings are not met.

SegTEL also asserted that the Commission could approve the alternative form of regulation set out in the settlement and amended plans under RSA 374:3-a. SegTEL described the Commission’s discretion under RSA 374:3-a as broad and maintained that the Commission could approve the plans under that statute even if the TDS Companies had not submitted plans under RSA 374:3-a. SegTEL pointed out as well that current rates for the TDS Companies have been found by the Commission to be just and reasonable. Since the plans and settlement freeze rates at current levels for certain time periods and then allow rates to approach those of the largest ILEC, segTEL took the position that the Commission could find the rates just and reasonable. Finally, segTEL stated that any rules concerning Commission-initiated proceedings to establish an alternative regulation plan (such as Puc 206.05 and 206.06, requiring specific utility information) could be waived.

D. Staff

Staff noted that RSA 374:3-b uses general terms to describe competitive services and relies upon the Commission's special expertise in applying this general standard to the facts of each case. Staff then described the conflicting pre-filed evidence on competitive service offerings in the TDS Companies' service territories. Staff also summarized the testimony given at hearing, noted that parties with divergent views had reached a settlement, and urged the Commission to find that the settlement meets the statutory standard and serves the public interest. Staff emphasized that the market-opening provisions of the settlement, together with the extended rate caps for basic local service, represents an appropriate balancing of interests and provides sufficient protections for TDS customers.

E. OCA

OCA indicated that it joined the settlement because it would produce a better outcome than the plans originally proposed by the petitioning ILECs. OCA deferred to the Commission the interpretation of whether the settlement satisfied the legal requirements of RSA 374:3-b.

V. OUTSTANDING MOTIONS

A. OCA's Motion *In Limine* To Strike Portions of TDS's Rebuttal Testimony

On November 28, 2007, the OCA filed a motion *in limine* to strike portions of rebuttal testimony of TDS witnesses Reed and Ulrich. OCA stated that the TDS witnesses referenced and drew inferences about legislative intent from Chapter 263 of the 2005 New Hampshire Session Laws and a related legislative Study Committee Report that are not of record in this proceeding. OCA took the position that the language of RSA 374:3-b is plain and relied on *Chase v. Arnerisuest Mortnane Co.*, 155 N.H. 19, 22 (2007), to assert that in such circumstances the tribunal need not look beyond the words in the statute to divine legislative intent. Further, the OCA took the position that the Commission should discern legislative intent with recourse to the statute as written and not from what the legislature might have said or from language that the legislature did not include. *Id*. During the hearing held on December 4, 2007, NHLA supported OCA's motion, suggesting that briefs, as opposed to testimony, are the appropriate vehicle for bringing matters related to statutory interpretation and legislative history to the Commission's attention.

The TDS Companies defended their position, relying on the Commission's secretarial letter of July 13, 2007, in which the Commission determined that issues of statutory interpretation are "more properly answered with the benefit of the full adjudicative process, including development of a factual record," and a thorough exploration which would "rely upon standard rules of statutory construction, and a review of legislative history as well as application of the Commission's own expertise as may be appropriate." The Companies also stated that other parties, including NHLA, have argued that the statutory language is not clear and have discussed legislative intent in detail. The TDS Companies pointed out that the Commission may receive evidence and accord it the weight that it deserves.

Granite State also objected to the OCA's motion for the reasons stated by the TDS Companies. In addition, Granite State maintained that the rebuttal testimony of TDS witnesses responded to testimony offered by NHLA's witness, Mr. Johnson, who based his testimony in part on his own participation in the legislative process.

At hearing on December 4, 2007, we noted that the OCA's motion encompasses a range of issues. Some of the references in the rebuttal testimony appeared to be legitimate responses containing mixed questions of law and fact, while others were more in the nature of argument and were similar to testimony that has been admitted in other proceedings. Some arguments, however, may raise issues of relevance. For the purpose of the orderly conduct of this proceeding, we denied the OCA's motion to strike and stated that we will give the testimony the weight it is due. We pointed out at hearing that there are certain assertions that appear to merit no weight whatsoever, such as what occurred at legislative hearings or assumptions about what legislators or individuals may have been thinking or have assumed about various issues. We noted that in our deliberations, and in preparation of a final order, we may, on our own accord, strike certain portions of the testimony or record.

B. Staff's Motion to Reopen Record and Take Administrative Notice

On February 12, 2008, Staff filed a motion pursuant to N.H. Code Admin. R. Puc 203.30 and 203.27 to reopen the record and take administrative notice that, following the hearing in the instant docket, Comcast Phone of New Hampshire, LLC (Comcast) filed a CLEC petition to serve the towns of: Andover; Antrim; Bennington; Boscawen; Chichester; Deering; Henniker;

Hillsboro; Hopkinton; Loudon; New London; Salisbury; Wilmot; and Wilton, all of which are in the TDS Companies' service territory. Staff asserted that evidence of Comcast's application to be registered as a telephone provider in some of the TDS Companies exchanges is relevant to issues in this docket. Since Comcast made its CLEC filing after the close of hearings in this docket, Staff and other parties were not able to bring the filing to the Commission's attention prior to hearings. No parties objected to Staff's motion to reopen or take administrative notice, although, NHLA requested an opportunity to file a responsive brief.

C. NHLA's Motion to File Brief Response and NHLA's filed Response

On February 14, 2008, NHLA filed a motion to submit a brief response regarding the Comcast CLEC petition filed on December 11, 2008. Although NHLA did not object to opening the record or taking administrative notice of the Comcast petition, it requested the opportunity to file a response, which it filed in conjunction with the motion.

In its response, NHLA pointed out that the briefs of the TDS Companies, segTEL, and Staff each refer to Comcast's CLEC application and describe it as including certain towns served by the TDS Companies. NHLA contended that this information was not in the record and that it was not afforded an opportunity to comment on the relevance and significance of Comcast's CLEC application.

NHLA maintained that Comcast's application should be given little or no weight in this docket for several reasons. First, according to NHLA, a CLEC provider is allowed, under Puc 431.12(a), up to two years in which to begin providing service to customers following the Commission's issuance of a CLEC authorization number. Second, the Comcast application does not appear to cover all 16 exchanges served by TDS. Third, protections for CLEC Lifeline customers are less than for ILEC Lifeline customers. Fourth, basic local service to a CLEC Lifeline customer can be terminated for non-payment of toll service if the customer receives service under a bundled offering pursuant to Commission rules, *see* Puc 432.15(b). Fifth, CLEC retail rates are not regulated by the Commission. Sixth, Comcast's service offerings are not priced comparably to the TDS Companies' basic local exchange rates.

D. TDS's Motion to Reopen Record for Submission of Amended Plans

On March 3, 2008, the TDS Companies filed a motion, pursuant to Rule 203.30, to reopen the record to allow for the filing of amended alternative regulation plans for each of the four petitioners showing the changes that result from the settlement. The TDS Companies stated that no substantive changes were made to the revised plans from the presentation made by the settling parties to the Commission at the hearings. The filing presented no new factual evidence or change in the positions of the parties. According to the TDS Companies, the amended plan merely reflect the terms of the settlement in the plans themselves. No party objected to the TDS Companies' motion.

VI. COMMISSION ANALYSIS

A. Statutory Framework

In this docket, we are asked to decide for the first time whether to grant a small ILEC's request for an alternative form of regulation under RSA 374:3-b. At the outset we note that the term "alternative form of regulation" is inapt insofar as that term has traditionally applied to cost-based forms of regulation. Cost-based regulation, however, is expressly precluded by RSA 374:3-b, V. A better description of the form of regulation the Legislature created under RSA 374:3-b is price deregulation subject to an extrinsic cap, i.e., the basic local service rate charged by the State's largest ILEC.

RSA 374:3-b is a challenging statute to interpret because it incorporates a number of potentially incongruous and arguably incompatible elements. For instance, subsection II provides that a small ILEC may petition for an alternative form of regulation comparable to the regulation applied to CLECs, except that the small ILEC would be subject to certain conditions due to its status as a carrier of last resort. The primary incongruity in this statute is between: (1) the movement towards CLEC-style regulation, which presumes a competitive market, and (2) the retention of customer protections including price restraints and carrier-of-last-resort obligations, which presumes a market that is not competitive.

In addition to the conflicting underlying assumptions regarding competition, subsection III presents a timing incongruity. The subsection is prospective in that it requires that the small ILEC must continue to meet all conditions of its plan in the future, while incorporating what appears to be a precondition concerning the availability of competitive services at a set point in time, *see* RSA 374:3-b, III(a). Also, the inclusion of a corrective provision is arguably suggestive of a legislative preference for approval of alternative regulation plans, while recognizing that parts of a plan may not come to fruition or circumstances may change.

Finally, with respect to subsection III(a) the Legislature appears to have created a regulatory environment that would permit some measure of pricing flexibility, irrespective of a determination of whether rates are cost-based, within a somewhat competitive market, which may or may not be constrained by market forces but is subject to a price cap. In our effort to apply the law to the facts of this case, we will attempt to harmonize the various elements of the statute in a way that we are hopeful accomplishes what we discern to be the Legislature's overall intent. *See Appeal of Pinetree Power, Inc*., 152 N.H. 92, 96 (2005). 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 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.

B. Standard for Approving a Settlement and Burden of Proof

Our rules provide that we may approve a contested case by settlement if we determine that the result is just, reasonable and serves the public interest. N.H. Code Admin. R. Puc 203.20. In this case we are considering a settlement agreed to by some but not all parties. NHLA, on behalf of Mr. Bailey, opposes the agreement. We must review the terms of the settlement against the governing statute and in that context determine whether the settlement serves the public interest. In addition, as we apply the facts in this record to the statutory standards, we note that the TDS Companies bear the burden of proof and must therefore establish factual propositions by a preponderance of the evidence. NH Code Admin. R. Puc 203.25.

C. Competitive Analysis for Wilton and Hollis

RSA 374:3-b requires that we make specific findings in order to approve an alternative regulation plan. Subsection III (a) requires that we find that "[c]ompetitive 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." (emphasis added) We agree with NHLA that the present tense used in the statute requires us to consider the state of competitiveness at the time of our decision and not as it may develop in the future.

First, we consider the facts presented concerning the Wilton and Hollis service territories. Each of these companies serves a single exchange. We find that third-party alternatives are available currently to the majority of the customers in each of the Wilton and Hollis exchanges. We base this finding of third party service availability on testimony by the Wilton and Hollis witnesses and on Staff witness Gage's testimony on available alternatives to Wilton and Hollis' basic local services.

Having found availability, we turn to whether the available alternatives in Wilton and Hollis are competitive. We find that the level of competition between those third party alternatives and the local services provided by Wilton and Hollis, is sufficient to permit regulation under the amended alternative regulation plans filed by Wilton and Hollis. As noted above, we conclude that the Legislature did not intend to require a level of competitiveness as would be used in an antitrust analysis or would justify complete deregulation of retail rates, which is the stricter standard of competitive market analysis Mr. Chattopadhyay performed initially. In relation to the Legislature's lesser standard of competitiveness, 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. Furthermore, while the TDS Companies' evidence of access line loss, minutes of use loss, or access revenue loss, standing alone, is not sufficient to demonstrate the level of competition required under RSA 374:3-b, III (a), such evidence is indicative of competition. When the line loss, minutes of use loss and revenue loss evidence is viewed in combination with the rest of the evidence, we find that the standard under RSA 374:3-b, III(a) is met currently for Wilton and Hollis.

D. Other Findings for Wilton and Hollis

We find that the plans submitted for Wilton and Hollis as amended by the settlement meet the minimum requirements of 374:3-b, III(b) and we commend the parties for the additional rate protections provided by the one- and two-year rate freezes for these companies.

The 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). By reducing barriers to competitive wireline entry, the TDS Companies have clearly enhanced competition and thereby promoted the offering of innovative telecommunications services. By these concessions the TDS Companies have also enhanced their intercarrier service obligations in support of 374:3-b, III(d).

We find that the plans for Wilton and Hollis as amended by the settlement provide additional rate protections through the one and two year rate freezes which preserve universal access to affordable basic telephone service as required by RSA 374:3-b, III(e). In addition, the settlement amends the plans to provide a four-year rate freeze for Lifeline customers as well as a commitment to increase enrollment in that program. These added protections for low-income customers, who are most vulnerable to affordability concerns, meets the statutory requirement of subpart III(e). Finally, the plans for Wilton and Hollis provide for continuing Commission oversight as required by RSA 374:3-b, III(f).

E. Competitive Analysis for Kearsarge and Merrimack

RSA 374:3-b, III(a) provides that we must find that a majority of customers in each exchange currently have a competitive alternative. Kearsarge and Merrimack each have multiple exchanges. As a result, if any exchange within either of those companies fails to meet the statutory test, the company may not receive approval for an alternative regulation plan. We begin our analysis by examining the availability of alternative broadband, wireline or wireless service in the Sutton exchange for Merrimack and in the Salisbury exchange for Kearsarge. We focus on these two exchanges because evidence indicated they were the most rural exchanges in their respective company service territories.

We accept Staff's assessment that the TDS Companies' broadband offering was the only broadband available to a majority of customers in Sutton and Salisbury. We do not find the TDS Companies' offering of DSL to be an alternative under the statute to the TDS Companies' basic service because DSL can only be purchased in combination with TDS basic service. Further, the record indicates that there were no third party cable companies available to a majority of customers in the Sutton and Salisbury exchanges. Finally, there was no evidence that any CLECs were offering wireline service in either the Sutton or Salisbury exchanges.

Next we examine the availability of wireless services in the Sutton and Salisbury exchanges. The TDS Companies' reliance on wireless coverage estimates by wireless providers is not sufficient to demonstrate availability of third party offerings. We find that Staff's analysis of antenna locations and likely signal distances in the Salisbury and Sutton exchanges supports a finding of lack of availability.

Absent evidence of availability in all exchanges, and in light of the TDS Companies' burden of proof, we cannot find available alternatives for all of the exchanges in either Kearsarge or Merrimack. We need not reach an analysis of whether the alternatives are competitive in the Kearsarge and Merrimack service territories, because we do not find sufficient availability. As a result, for Kearsarge Telephone Company and Merrimack County Telephone Company the record does not support a finding that competitive services are available to a majority of customers in each exchange.

Nevertheless, while we conclude that subsection III(a) focuses on whether competitive alternatives are currently available, the statutory scheme is generally prospective in nature. Therefore, we will keep the docket open in the Kearsage and Merrimack petitions for one year and encourage those companies to reduce market barriers by not opposing CLEC registrations, waiving the rural exemption and expediting interconnection negotiations, as proposed in the settlement. At any time during that year, Kearsarge and Merrimack may update their testimony on availability and the level of competition, if, for example, additional competitors enter those service territories, or if existing competitors increase their market presence. In the event that the TDS Companies file supplemental testimony we will allow rebuttal testimony and will expedite a hearing on issues of availability and competitiveness consistent with the competitiveness test discussed in this order.

F. Outstanding Motions

With respect to the OCA Motion *in limine,* we find that the TDS Companies' rebuttal testimony, to the extent it expresses opinions as to legislative intent, should be accorded no weight in our deliberations. We do not find it necessary, however, to strike such testimony.

As for Staff's motion to reopen the record and to take administrative notice of the Comcast CLEC application, our findings in this order are based upon the evidence presented at hearing and the availability of competitive alternatives at that time. We therefore deny the motion. If the TDS Companies wish to supplement their testimony as to competitive alternatives in the Kearsarge and Merrimack service territories, we will consider additional competitive developments as part of our ongoing procedure on those two petitions. At that time, other parties may also respond to the significance of the Comcast CLEC application. Having denied Staff's motion to reopen and to take administrative notice, we need not consider NHLA's response to the Comcast CLEC registration and consider the motion moot. Finally, we conclude that it is not necessary to reopen the record to accept the filing of amended plans conforming to the settlement because they are in the nature of a compliance filing and no party has objected to such filing.

G. Conclusion

We find that the TDS Companies have demonstrated that competitive alternatives are currently available for a majority of the customers of the Wilton and Hollis companies and that the plans for such companies otherwise satisfy the requirements for an alternative form of regulation pursuant to RSA 374:3-b. With respect to the Merrimack and Kearsarge companies, we find that the TDS Companies have failed to demonstrate that competitive alternatives are currently available for the majority of customers in each of the exchanges. Accordingly, we find that the settlement is just and reasonable and serves the public interest only insofar as it relates to the Wilton and Hollis companies. We do not approve the settlement to the extent it would constrain in any way the Commission's ability to review exogenous changes pursuant to RSA 374:3-b. Finally, as discussed above, we will not close the docket in this case but hold it open in the event the TDS Companies seek to present new evidence as to Merrimack and Kearsarge.

Based upon the foregoing, it is hereby

ORDERED, that the amended alternative regulation plans for Wilton and Hollis are approved; and it is

FURTHER ORDERED, that the amended alternative regulation plans for Merrimack and Kearsarge are denied and the docket will remain open on the terms discussed in this order.

By order of the Public Utilities Commission of New Hampshire this twenty-third day of April, 2008.

Thomas B. Getz Chairman	Graham J. Morrison Commissioner	Clifton C. Below Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary