

**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 Denying Motion for Rehearing

ORDER NO. 25,194

February 4, 2011

I. FACTUAL AND PROCEDURAL BACKGROUND

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. By *Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co.*, Order No. 24,852 (April 23, 2008), the Commission granted the petitions for WTC and HTC and left open the record for further information from MCT and KTC. Following the submission of further information, the Commission issued *Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co.*, Order No. 25,103 (May 14, 2010), which, at 28, denied the petition for MCT. That order also held open the record for the submission of information about the degree of competition created by the presence of Comcast in KTC's exchanges. *See id.* By *Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co.*, Order No. 25,130

(July 15, 2010) at 3-4, the Commission denied TDS' request to allow further evidence of wireless offerings and limited any further evidence to that concerning Comcast's wireline offerings in KTC's exchanges.

Finally, the Commission issued *Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co.*, Order No. 25,182 (December 22, 2010) (the Order) which, among other things, concluded at 25 that Comcast was providing a competitive alternative to the majority of customers in the relevant KTC exchanges.

Accordingly, the Commission granted KTC's petition for alternative regulation. *See id.* at 30-31. On January 20, 2011, New Hampshire Legal Assistance (NHLA), on behalf of its client Daniel Bailey, filed a motion for rehearing (Motion) pursuant to RSA 541:3 and Puc 203.33 challenging the Order. By that Motion, NHLA contends that: (1) TDS failed to produce sufficient evidence of the availability of Comcast's lowest-priced voice service and that the Commission therefore erred in concluding that TDS had met its burden of proof relative to KTC; and (2) the Commission erred in ruling that an alternative service does not need to be competitive with TDS's unbundled basic phone service.

On January 25, 2011, KTC filed its opposition to NHLA's motion for rehearing. KTC contends that the claims in the Motion are merely restatements of prior arguments that have already been rejected by the Commission. Moreover, KTC argues, as it has done previously, that Mr. Bailey does not have standing to make any argument relative to KTC as he is not a customer of KTC and does not live in KTC's service area.

II. COMMISSION ANALYSIS

To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable. *See* RSA 541:3 and RSA 541:4. Good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence was overlooked or misconstrued. *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (April 2, 2010) at 14 (*citing Dumais v. State*, 118 N.H. 309, 312 (1978)).

NHLA's first argument is that TDS failed to produce evidence sufficient to meet its burden of proof to show that Comcast's lowest priced wireline voice service, at a rate of \$39.95 per month, is actually available to a majority of retail customers in each KTC exchange.

According to NHLA the record:

is devoid of any evidence that a majority of TDS's customers, in each KTC exchange, are able to subscribe to this \$39.95 Comcast Digital Voice offering. . . . In short, no evidence was produced that the \$39.95 Comcast Digital Voice offering is available to a *majority* of TDS retail customers in each KTC exchange.

Motion at 1-2 (emphasis in original). Consequently, NHLA contends, the Commission erred as a matter of law in finding that TDS had met its burden to show that a competitive service is available as required by RSA 374:3-b, III(a).

The Order noted that, in an early phase of this proceeding, TDS provided coverage maps demonstrating that cable television and cable broadband facilities are available in the relevant KTC exchanges. Order at 16. The Order further concluded, based on the coverage maps and other evidence in KTC's original filing, that those cable facilities along roads pass by the location of a majority of customers in each exchange. *Id.* at 16-17. In addition, the Order found

that Comcast has made the necessary alterations to its cable facilities to enable those facilities to carry voice services because there was evidence in the record that Comcast had ported telephone numbers in each KTC exchange to its services. *Id.* at 19-20. Accordingly, the Order found, based on this evidence, that Comcast's voice services, as offered through its cable plant, are available to a majority of retail customers.

Upon finding that there was evidence in the record sufficient to demonstrate that Comcast's voice service is available to a majority of retail customers, the Order then went on to determine whether the services that were available were in fact competitive. The Order analyzed the relative prices of the services offered, as well as their features, to determine whether they were competitive. The Order determined, based upon pricing and features, that Comcast's \$39.95 per month voice service is a competitive offering. Order at 24. While the Order did not expressly state that Comcast's \$39.95 per month voice service is available to a majority of customers, it did find that (1) Comcast's voice service is available to a majority of customers and (2) Comcast's \$39.95 voice service is a competitive offering. While NHLA contends that TDS has not demonstrated that the \$39.95 Comcast package is available to a majority of customers, TDS produced evidence that this offering is available in every one of KTC's exchanges. *See* Exhibit 16P, Attachment 5 at TEM 060 (covering Andover), TEM 078 (covering Boscawen), TEM 095 (covering Chichester), TEM 113 (covering Meriden), TEM 131 (covering New London). Although the Order referenced the offering in Andover, it noted that this was "one example" of the voice services offered by Comcast. Because the Order found that: 1) Comcast's service is available to a majority in each exchange, 2) the \$39.95 offering from Comcast is competitive, and 3) there is evidence in the record that the \$39.95 offering is available in each

exchange, we reject NHLA's argument that there was insufficient evidence of the availability of the \$39.95 offering to the majority of customers in each exchange. Whether customers sign up for voice service at the \$39.95 monthly rate, or for a similar service at a different rate, or for voice service as part of a bundled package, is not the required analysis. As noted in KTC's opposition, "[w]hile the Commission focused on the \$39.95 offering as an example of the 'most basic' Comcast voice offering, nowhere did it hold that this was the only service that could be considered a competitive alternative." Kearsarge Telephone Company Opposition to Motion for Rehearing (Opposition) at 3. We find that the record regarding the availability of Comcast's services and of the prices for those services, constitutes evidence about the availability of Comcast's \$39.95 offering for a majority of customers in each KTC exchange.

NHLA asserts that TDS witness Thomas Murray acknowledged that a KTC customer would have to contact Comcast to determine which voice offerings were available at a particular address and that he did not know how many TDS customers have Comcast Digital Voice available to them. As a result, NHLA contends that the evidence of availability was lacking. This argument misunderstands Mr. Murray's testimony. In response to a question about whether he knew the percentages of customers with Comcast service available to them without first verifying those customers' addresses, Mr. Murray stated that, although he did not have an exact percentage available, the coverage maps provided by TDS showed where Comcast's footprint was within KTC's exchanges. Transcript of September 27, 2010 Hearing (Tr.) at 39-40; Order at 20. As noted above, and in the Order, the coverage maps show availability to a majority of customers within KTC's exchanges; in these circumstances an exact number is not necessary to conclude that Comcast's voice service is available to a majority of customers.

As to Mr. Murray's other "acknowledgement" that a KTC customer would have to contact Comcast to determine availability, Mr. Murray stated his understanding that Comcast was offering voice service throughout its cable plant, but that an individual customer would have to contact Comcast to see if the service would be available at a particular location. Tr. at 40-42; Order at 20. In that Comcast's cable plant and the boundaries of KTC's exchanges are not coterminous, the fact that an individual customer would need to contact Comcast to determine if the service is available is not inconsistent with the fundamental finding of availability. To meet the standard here, Comcast need only serve a majority of customers in KTC's exchanges, not all customers in the entirety of each exchange. Since it need only serve a majority, it stands to reason that some customers in the exchange may not be served. Because there was evidence that Comcast's facilities pass a majority of customers in each KTC exchange and that Comcast is offering voice service over those same facilities, there is sufficient evidence to conclude that Comcast's voice service is available to a majority of customers in each exchange. Accordingly, we deny rehearing on NHLA's first ground.

NHLA's next contention is that the Commission erred in concluding that an alternative service need not be competitive with TDS' unbundled basic phone service. According to NHLA, the Commission erred in its statutory analysis by rejecting the use of basic service for the competitive analysis required by RSA 374:3-b, III(a) and by failing to impose any limit on the type of incumbent service that provides the basis for the competitive analysis.

As to the first argument, NHLA contends that, although RSA 374:3-b does not identify the specific service of the incumbent against which competitiveness is to be measured, various

other provisions of state and federal law, as well as Commission rules, require that basic voice service be the service of interest. In addition, NHLA asserts that:

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

Motion at 3 (emphasis in original). Thus, NHLA contends that the Commission must find that the competitive alternative competes with the incumbent’s basic service.

Initially, for clarity we point out that while NHLA did not explicitly refer to “stand-alone basic local service,” it did repeatedly reference TDS’ basic service as the relevant service in its analysis. As defined in Puc 412.01 – referenced by NHLA in its motion – “basic service” includes various components, but is, at bottom, a stand-alone basic local service. It does not include long-distance services or other so-called vertical features. Thus, in referring to “basic service” as concerns TDS, NHLA was referring to stand-alone basic local service.

As to the measure of competitiveness, NHLA acknowledges that RSA 374:3-b, III(a) does not spell out a particular type of service against which competition is to be measured. We note, as we did in the Order, that the statute explicitly references “basic service” in other provisions, Order at 22-23, indicating that the Legislature made the choice not to refer only to the market for basic service for purposes of the competitive analysis. *See, e.g., N.H. Motor Transport Assoc. Employee Benefit Trust v. N.H. Ins. Guaranty Assoc.*, 154 N.H. 618, 622 (2005) (“we will not add words to the statute that the legislature did not see fit to include.”); *In Re Estate of Brunel*, 135 N.H. 83, 87 (1991) (It is a “common law maxim of statutory construction that the inclusion of one thing in a statute implies the exclusion of another.”)

Furthermore, in rejecting the use of the market for “basic service” as the sole market for making a determination of competitiveness, the Order noted that, under the formulation posited by NHLA, there would be no basis for concluding that any wireless or broadband service could be competitive. Order at 22. That infirmity remains and is noted in KTC’s opposition where it states, “while Mr. Bailey is careful to avoid claiming outright that the competitive service must be *identical* to TDS’s basic service *per se*, he leaves little doubt that it must be functionally equivalent and comparably priced.” Opposition at 3 (emphasis in original). NHLA’s argument is that the alternative service need not be basic service, but if some particular burden of proof is met, the alternative could be determined to be competitive with basic service. Comcast’s voice service, however, even at its lowest rate, includes long distance service and other features. Therefore, it is different from TDS’ basic service. *See* Exhibit 77, Direct Testimony of Ben Johnson, Ph.D. at 6, 8-9 (Dr. Johnson noted that his price comparisons between Comcast and KTC were based on a customer paying only for KTC’s local exchange service, or local exchange service with only the two most common vertical features); and Tr. at 134-137 (Dr. Johnson stated that KTC’s offering does not include unlimited calling or long distance, but Comcast’s has both). NHLA has not provided any basis for determining how this alternative service, which is different from basic service, may be seen as competitive with basic service. It contends only that if the incumbent meets some undefined burden, then that comparison can be made. We do not find this to be a sufficient basis to grant rehearing.

Moreover, as stated in the Order, if the inquiry were limited in the fashion advocated by NHLA, the marketing choices of competitors could render it impossible for an incumbent carrier to achieve alternative regulation. Order at 22. By offering features different from those in TDS’

basic service, a competitor could take substantial numbers of customers from an incumbent like KTC, yet never be seen as offering a competitive alternative to basic service. This would, as noted in the Order, undercut the very purpose of RSA 374:3-b. Order at 22. Thus, we again reject NHLA's argument that the competitiveness analysis under RSA 374:3-b, III(a) must focus solely on basic service.

NHLA further argues that unless the Commission imposes a limit on the services that may be seen as competitive, a petition for alternative regulation could be granted where the only available alternative is a high priced bundle of services. The Commission's analysis in the Order focused on Comcast's lowest price offering for its voice service, but it did not declare that this would be the only service considered in rendering a decision on competitiveness. The Order also did not state that there was no bound to the pricing and structure of competitors' offerings that would be considered competitive. First, as noted previously and acknowledged by NHLA, the statute itself does not define any limits on the services that may be the basis for comparison. Second, and perhaps more important, the Commission has no way of knowing how these markets will develop and how services will be delivered in the future, or at what prices. While NHLA posits that in some future petition seeking alternative regulation an incumbent may reference only a competitor's high priced bundles as being competitive, it is also possible that some future petition may show competition from bundled offerings at very low prices. It is also possible that an incumbent could face competition although its competitors never offer anything akin to basic service due to changes in customer demands and expectations, and not because of a lack of desire to compete for customers. It would seem contrary to the purpose of the statute to create some artificial limitation that, no matter how well intentioned, may stifle innovations offered by

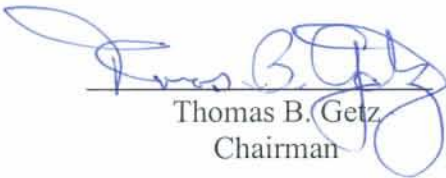
the competitive market. By not defining the limits of the services to be considered, the Commission leaves open the possibility of, for example, rejecting a high priced bundle while supporting a lower priced bundle with identical features as being competitive without forcing carriers to offer particular services at particular prices. As a result, we conclude that the lack of a limitation on which services may be considered competitive is not a basis upon which to grant rehearing.

For the above reasons, NHLA has not shown good cause to demonstrate that the Order is unlawful or unreasonable. Further, NHLA has not demonstrated that the Commission has overlooked or misconstrued the evidence, and instead, NHLA has reargued issues that have previously been decided. Accordingly, the requirements of RSA 541:3 and 541:4 have not been met and NHLA's motion for rehearing is denied.

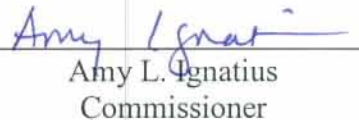
Based upon the foregoing, it is hereby

ORDERED, that the Motion for Rehearing filed by New Hampshire Legal Assistance on behalf of Daniel Bailey is DENIED.

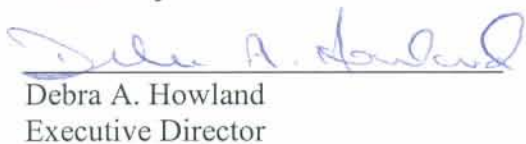
By order of the Public Utilities Commission of New Hampshire this fourth day of February, 2011.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director