STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 07-027

Kearsarge Telephone Company, Wilton Telephone Company, Inc.,
Hollis Telephone Company, Inc. and Merrimack County Telephone Company
Petitions for Alternative Form of Regulation

Reply Brief of Petitioners

The Petitioners, Kearsarge Telephone Company ("KTC"), Wilton Telephone Company, Inc. ("WTC"), Hollis Telephone Company, Inc. ("HTC") and Merrimack County Telephone Company ("MCT" and, together with KTC, WTC and HTC, the "Petitioners") submit this reply brief in response to the brief filed by Daniel Bailey ("Bailey").

FACTUAL AND PROCEDURAL BACKGROUND

Each of the Petitioners filed a separate petition with the New Hampshire Public Utilities Commission (the "Commission") dated March 1, 2007 and pursuant to RSA 374:3-b seeking approval of a plan for an alternative form of regulation (each, a "Plan" or collectively the "Plans"). For administrative efficiency, the Petitioners requested that the petitions be addressed in a consolidated proceeding. Prefiled direct testimony and exhibits were included with the initial filings describing the Plans and showing compliance with the terms of the statute for approval of the Plans. The Commission held a prehearing conference on May 4, 2007. Thereafter, the parties briefed certain legal issues under the statute.[1] On July 13, 2007, the Commission determined to defer action on the legal issues pending development of an evidentiary record.

[1] The Petitioners' position regarding the legal issues in this case is set forth extensively in the Initial Brief and Reply Brief of the Petitioners dated June 8, 2007 and June 20, 2007, respectively. These arguments are incorporated herein by reference and are not repeated here.

Following two rounds of discovery, the Commission Staff ("Staff") and intervenors filed testimony on October 12, 2007 generally opposing approval of the Plans. The Petitioners conducted discovery on the Staff and intervenor testimony and filed rebuttal testimony on November 15, 2007. The procedural schedule also included several technical sessions and settlement conferences, as well as three public hearings to receive statements from the public.

On November 30, 2007, the Petitioners, the Staff, the Office of the Consumer Advocate ("OCA") and segTEL, Inc. ("segTEL") entered into a "Settlement Agreement among the Petitioners and the Other Signatories Hereto" (the "Settlement Agreement") to resolve the contested issues in this Docket. The Petitioners amended and revised the Plans and submitted the revised Plans with the Settlement Agreement. The Settlement Agreement has been admitted into evidence as Exhibit 1. Other intervenors in the Docket took no position regarding the Settlement Agreement, with the exception of Bailey, who opposes approval of the Settlement Agreement and the Plans.

While the Petitioners contend that the Plans originally filed already meet the criteria set forth in RSA 374:3-b, the Settlement Agreement enhances the Plans to further assure their compliance with the requirements of RSA 374:3-b; to facilitate more competitive entry while enhancing competition within the Petitioners' exchanges, and to provide greater consumer protections than would have been provided had this matter been fully litigated through a final hearing. First, upon the effective date of the Plans, the Petitioners will waive the rural telephone company exemption under 47 U.S.C. §251(f)(1), and agree to an expedited process for negotiation of interconnection agreements. Also, following Commission approval and implementation of the Plans, the Petitioners agree not to oppose the registration or certification of competitive local exchange carriers seeking to do business in the service territories of the

Petitioners. Thus, the Settlement Agreement provides for enhanced competitive wireline alternatives in addition to the wireless and broadband alternatives shown to be presently available by the evidence submitted by the Petitioners. Second, the Settlement Agreement provides for basic local service rates to be capped at current levels for specified periods and defers for those periods the start of the period during which up to 10% annual increases in basic local service rates are allowed, but capped at the rates charged by the largest ILEC in New Hampshire for similar services. As an additional protection for low income customers eligible for Lifeline rates, the basic service rate cap at current levels will last for at least four years for those customers. In these ways, the Settlement Agreement enhances the already available competition and provides additional protections to consumer access to basic service.

On January 10, 2008, Bailey filed his brief in this Docket, to which this Brief replies.

ARGUMENT

I. Bailey Has No Standing to Challenge the Settlement Agreement With Respect to KTC, HTC and WTC, and The Settlement Agreement Should Be Treated as Uncontested as to Those Companies

In order for Bailey to assert any interest in this proceeding and challenge the Settlement Agreement at issue, he must have standing. The New Hampshire Supreme Court has emphasized that, in order for a party to have standing to participate in administrative agency proceedings, he must demonstrate that "he has suffered or will suffer an 'injury in fact.'" Appeal of Richards, 134 N.H. 148, 154 (1991) (citation and quotation omitted). No individual or group of individuals, moreover, has standing when the administrative agency's action affects the public in general. Id. at 156. Protection of residential consumers falls to the Office of Consumer Advocate. Id. Bailey, therefore, must demonstrate some direct injury to him in order to have standing to challenge the Settlement Agreement.

The analysis of whether a party has suffered an injury in fact turns on that party's relation to the issues in the particular proceeding. In Appeal of Richards, for example, shareholders in a corporation lacked standing to challenge this Commission's actions, based on their assertion that the outcome of Commission proceedings would result in a diminution in stock value. See id. at 155. The New Hampshire Supreme Court observed that the corporation's board of directors, and not stockholders, have authority pursuant to corporate law principles to assert that claim. Id. Even though individual stockholders could be characterized as being affected by the agency action, they could not assert a legal interest sufficient to give rise to an injury in fact to confer standing.

Bailey is the only intervenor opposing the Settlement Agreement, and Bailey resides within MCT's Contoocook exchange. The record contains no evidence that Bailey has any interest in the petitions filed by KTC, HTC or WTC. He does not reside within those exchanges and subscribes to no service - basic or otherwise - within those exchanges. Bailey lacks any allegation of injury in fact within those service territories that could remotely give him standing on which to Challenge the Settlement Agreement as to those exchanges. As to KTC, HTC and WTC, the Settlement Agreement should be reviewed as a full settlement by all interested parties who took a position and Bailey's arguments cannot form the basis for denying those customers the benefits of the Plans. See Appeal of Campaign for Ratepayers Rights, 142 N.H. 629, 632 (1998), *citing* Appeal of Richards, 134 N.H. at 157.

II. The Revised Plans Conform to RSA 374:3-b and Should Be Approved.

RSA 374:3-b sets forth the criteria to be met by a small incumbent local exchange carrier seeking an alternative form of regulation. Pursuant to RSA 374:3-b, III, this Commission shall approve an 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.

As described below, the Plans as modified by the Settlement Agreement, clearly meet all of these criteria. Bailey's arguments to the contrary focus on the availability of competitive alternatives under RSA 374:3-b, III(a) and preservation of universal access to affordable basic telephone service under RSA 374:3-b, III(e). The Plans, as amended to reflect the Settlement Agreement, fully satisfy these and the remaining statutory elements, and Bailey's arguments to the contrary should be rejected.

A. Competitive Alternatives Are Available to a Majority of Customers in Each Exchange.

The Legislature provided no definition of "competitive wireline, wireless or broadband service" (referred to as "competitive alternatives") in the statute. Instead, as is often the case, the

Legislature has left it to the Commission, its knowledge of the telecommunications industry and its experience regulating same, to apply the statute in keeping with the policy articulated by the Legislature. The legislative policy reflected in the legislative findings contained in Laws 2005, 263:1, states:

> The general court finds that the growth of unregulated wireless and broadband telecommunications services has provided consumers alternatives to traditional telephone utility services. The policy of this state is to promote competition and the offering of new and alternative telecommunications services while preserving universal access to affordable basic telephone services. The continuation of full utility regulation of small incumbent local exchange carrier telephone utilities is not consistent with these objectives. In light of the rapid changes in the telecommunications industry, these policy objectives will best be achieved by implementing alternative regulation plans for small incumbent local exchange carriers that encourage competition, preserve universal telephone service, and provide incentives for innovation, new technology and new services....

This legislation also provided for a "Regulatory Practices Pertaining to the Telecommunications Industry Study Committee" to be formed pursuant to Laws 2005, 263:2. This committee issued its report issued October 28, 2005 (the "Study Committee Report"). The Study Committee Report stated as follows:

> We strongly encourage small ILECs to proceed with alternative regulation proposals as defined in RSA 374:3-b already in effect. As a state, we cannot gauge the success of alternative regulation until someone tries it and exposes its benefits and/or shortcomings.

In the context of this statement of policy, the Legislature utilized the broad phrase "competitive wireline, wireless or broadband services" in the statutory language, thereby capturing the types of unregulated services to which consumers increasingly turn over traditional telephone services. The Legislature left it to this Commission to apply its knowledge and experience to apply that term so as to advance the policy that underlies the statute.

As mentioned, this is far from the first time the Legislature has chosen not to define a broad term and instead leave it to the Commission to implement and apply that term in the larger

context of statutory policy. In this way the Legislature appropriately delegates to the Commission (and other administrative agencies) the authority to "fill in" statutory gaps based on knowledge and experience gained through extensive involvement in a particular realm. In the case involving the approval of the reorganization plan of Public Service Company of New Hampshire, for example, the Supreme Court stated:

> In this case, we are dealing with an issue of the delegation of legislative power. Subject to acknowledged constitutional limitations, considered below, the regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. [Citations omitted.] For substantially all of such regulation, the legislature has recognized the need for expertise not readily available as part of legislative resources, and has therefore delegated its power to a standing regulatory commission of the legislature's creation. RSA ch. 363.

Appeal of Richards, 134 N.H. 148, 158. (1991). The Legislature has left to the Commission the interpretation and application of terms far more broad than "competitive wireline, wireless or broadband services," such as "public good" and "public convenience and necessity." Gordon v. Public Service of New Hampshire, 101 N.H. 372, 375-76 (1958). In short, the lack of a specific definition of competitive alternatives places that determination within the Commission, guided by the legislative intent and in the context of this Commission's own experience and expertise.

The record in this Docket demonstrates that alternative wireless and broadband services exist in Petitioners' exchanges and, consistent with the legislative findings underlying RSA 374:3-b, that Petitioners' customers are increasingly turning to those services and away from Petitioners. The record confirms, in other words, that the Petitioners are losing business in each exchange, and this loss results directly from wireless and broadband competitive alternatives presently available to customers in the exchanges served by the Petitioners. In his pre-filed direct testimony, Michael C. Reed described the analysis he had undertaken of the availability of competitive alternatives:

> In accordance with the statutory language [of RSA 374:3-b, III(a)], I have first reviewed whether wireline service from other providers or wireless or broadband service is available to a majority of the customers in each of the exchanges... We have measured the effects of competition on the companies with three key indicators; loss of intrastate access minutes, loss of state switched access revenue and finally the loss of access lines...Loss of access lines is a clear indication of customers "cutting the cord," migrating to all wireless or a combination of wireless and cable modem service, or new residents never having a landline installed at all... I would also point out that historically, prior to the availability of competitive choices, access lines increased in most companies approximately 2-3% each year, making the declines our companies are experiencing even more significant. Finally, the impact of the decline in both minutes of use and access lines has caused a significant reduction in state switched access revenue. Our analysis finds that each exchange in each of the four companies meets this legislative standard for competitive availability. While the competition and competitors vary in each company and in each exchange, customers have alternatives and are using them. The impacts of the competition are significant and measurable.

Pre-Filed Direct Testimony of Michael C. Reed, 3:17 - 5:2. Mr. Reed also submitted Confidential Attachments A-MCT, B-KTC, C-WTC, and D-HTC, as well as Attachment E, which identify the competitive wireline, wireless and broadband alternatives available at each of the four companies, utilizing an impact analysis to determine the competitive nature of those alternatives. Id. at 3:21-27.

Bailey concedes, as he must, that MCT is experiencing a reduction in the number of access lines, minutes of use and state switched access revenues. Bailey Brief, p. 27. Bailey asserts, however, that the Petitioners have "acknowledge[d] that reduction in number of access lines, minutes of use and state switched access revenues is not a measure of competition in their service areas (Tr. Day 2, p. 44, ll. 10-15)." Bailey mischaracterizes the cited testimony. In fact, Mr. Reed testified that the loss of access lines, access minutes and revenues is an indicator that customers are choosing alternatives to the Petitioners' services. Tr. 12/5/07, 44:10-15. No party did -- or could -- identify any reason for the loss in business other than the presence of

competitive alternatives. The record confirms that a majority of the Petitioners' customers have competitive alternatives available to them.

Bailey also contends that access line losses result from customers' discontinuation of second lines. While Bailey may speculate any number of reasons for line losses, this argument finds no support in the record and Bailey cites none. Equally important, Bailey's argument is irrelevant to the statutory inquiry. As Mr. Reed noted in his pre-filed rebuttal testimony, "[i]t is not the purpose of RSA 374:3-b to analyze why customers make certain choices, or why they might retain a landline and a wireless phone. Rather, the purpose of RSA 374:3-b, among other things, is to gauge the availability of alternative wireline, wireless or broadband service." Pre-filed Rebuttal Testimony of Michael C. Reed, 6:5-8. See also id. at 11:5-18.

The evidence submitted by the Petitioners shows the existence of wireless and broadband alternatives for a majority of customers in all exchanges. The Settlement Agreement enhances choices for customers by removing barriers to entry in the Petitioners' exchanges to competing local exchange carriers, such as Comcast and segTEL. The Settlement Agreement provides that CLEC entry may take the form of resale or facility-based service through the use of other carriers' facilities or unbundled network elements purchased from the Petitioners. With the approval of the Settlement Agreement and the Plans, it will be even easier for CLECs to engage in both facility-based and resale-based wireline competition. In fact, in a letter filed with this Commission on or about December 12, 2007, Comcast has sought approval of its registration as a CLEC to offer wireline telephone service in many of the Petitioners' exchanges. Moreover, the Petitioners also offer DSL on a wholesale basis as a regulated interstate service, which allows competitors broadband access to the Petitioners' customers. The Settlement Agreement further enhances the competitive landscape by deferring local rate increases while competitive wireline

carriers avail themselves of these opportunities. Finally, it cannot be over-emphasized that later, after all is said and done, if the Plans do not continue to meet the requirements of the statute, the Commission can initiate proceedings to require the respective Petitioners to amend their Plans or go back to rate of return regulation.

The signatories to the Settlement Agreement other than the Petitioners, all of whom originally took litigation positions in opposition to approval of the Plans, have expressed their support for approval of the Plans, as revised by the Settlement Agreement, and they have acknowledged that the revised Plans benefit the ratepayers. Kenneth Traum of OCA testified that "On balance, the OCA views this Settlement as providing protections to TDS's customers, while taking steps to foster the entry of competitors..." Tr. 12/4/07, 35:18-20. With regard to fostering competition, Mr. Traum noted competitive local exchange carrier segTEL's participation in the Settlement Agreement, which in his view "is evidence of this important step" of "further open[ing] the TDS franchise territories to competition." Id. at 37:4-6.

Kathryn Bailey of the Staff provided insight into Staff's reasons for entering into the Settlement Agreement, outlining the six criteria set forth in RSA 374:3-b, III and pointing out to the Commission the ways in which the Plans as revised by the Settlement Agreement satisfy those criteria. Tr. 12/4/07, 49:15 - 52:5. Importantly, Ms. Bailey testified that Staff believes the revised Plans are in the public interest, and Staff supports them. Id. at 52: 4-5.

For his part, Bailey tries to circumvent the reality -- that Petitioners are losing customers to competitive alternatives -- by contriving an interpretation of RSA 374:3-b, III(a) in a way that would make it virtually impossible for anyone to meet the test. On the one hand, Bailey acknowledges that the phrase "competitive alternatives" is a broad one and urges a plain language interpretation. On the other, he constructs a very narrow test for competitive

alternatives, which he claims is the only test that the Commission can apply. The test proposed by Bailey is contrary to the text of the statute, the legislative findings underlying it and the legislative history. It should be rejected.

Bailey takes the positions that the Commission must determine whether the available competitive wireline, wireless or broadband services consist of basic local service (Bailey Brief, p. 11) and whether there is "effective competition" for that basic local service, i.e. that "(i) [t]he market is free of substantial barriers to entry and exit[;] (ii) [n]o firm or consortium of firms has enough market power to set or strongly influence market prices[; and] (iii)[m]ultiple firms are operating in the market, and they are selling essentially the same product for prices determined by market forces." Bailey Brief, p. 48. Bailey's position finds no support in the statute.

First, RSA 374:3-b, III(a) does not use the term "basic" service in the determination of the existence of competitive alternatives. The statute, in other words, does not require proof of competition (as Bailey defines it) for basic service. To the contrary, the Legislature made clear that it understood the distinction when it used the term "basic local service" in RSA 374:3-b, III(b) to identify specifically the "local" component of "basic service." In RSA 374:3-b, III(e), the Legislature references "basic telephone service," which includes not only the local component, but also service such as access to long distance carriers. Furthermore, if the Legislature intended that alternative regulation plans would not be authorized until the incumbent local exchange carrier had no pricing power for basic service, there would have been no need for the price caps in RSA 374:3-b, III(b). As Mr. Reed noted in his pre-filed rebuttal testimony, "In order to reach a balance between protecting customers and reducing, but still maintaining some regulation of small companies to meet the growing competition, [the Legislature] included protections for basic local service rates during the period of continuing

growing competition as well as a rate cap to ensure the ongoing goal of universally available service at affordable rates." Pre-filed Rebuttal Testimony of Michael C. Reed, 5:9-14. Neither the text nor intent of the statute requires a finding of the extent of competitive alternatives that compete with basic local service.

Second, this interpretation contemplates that competitors will replicate the incumbent's network and services – a proposition that this Commission has rejected with regard to CLECs. See Investigation as to Whether Certain Calls are Local, Order No. 24,080 dated October 28, 2002 in Docket No. DT 00-223, pp. 40-41 (requiring competitor to replicate the legacy network may rise to the level of a barrier to entry). While there have been extensive battles over the years over the inter-carrier compensation issues associated with differences in calling areas, incumbents have not challenged the ability of CLECs to use different local calling areas in their retail service offerings to customers. See, e.g., Global Naps, Inc. Petition for Arbitration Order No. 24,087 dated November 22, 2002 in Docket No. DT 01-107, p. 15. One carrier's "basic local service" can have a completely different local calling area from another's. This Commission has embraced these competitive differences for wireline carriers to foster competition and recognize network infrastructure differences. The differences are even greater with inter-modal wireless and broadband competitors.

Moreover, the Legislature did find that "the growth of unregulated wireless and broadband telecommunications services has provided consumers alternatives to traditional telephone utility services." Laws 2005, 263:1 (emphasis added). As this Commission knows, wireless and broadband services typically are not structured with a standalone basic service component. Thus, the construction urged by Bailey would be contrary to the legislative findings.

Finally, the test urged by Bailey ignores the reality of the competitive technologies and the forms they take, and is one designed to make sure that no small incumbent local exchange carrier will ever qualify for alternative regulation. Competitors simply do not replicate the networks and services (including local calling areas) of the incumbents. Bailey's definition of competitive alternatives runs contrary to legislative policy to encourage alternative regulation as evidenced in the statute, the legislative findings and the Study Committee Report.

What is more, Bailey -- again contrary to the statute -- improperly interchanges the concepts of availability of competitive wireline, wireless or broadband service and the presence of "competition". The statute does not employ the term competition. RSA 374:3-b, III(a) requires only that competitive wireline, wireless or broadband alternatives are available to a majority of the retail customers in each of the exchanges served by a small incumbent local exchange carrier. Nowhere does the statute require Petitioners to make a showing that competition as Bailey defines it is present in the exchanges. The statute simply requires a carrier to demonstrate, as the Petitioners have done in this Docket, that there are competitive alternatives -- "Competitive wireline, wireless or broadband service" -- available to a majority of the retail customers in each of the Petitioners' exchanges.

Bailey, moreover, does not stop with importing the term "competition" into the statute; he then constricts the statute further by arguing that the statute requires Petitioners to demonstrate the existence of competitive alternatives that are affordable to low income retail customers. Plainly the statute contains no such limitation, and the legislative findings confirm that this was intentional. This section of the statute seeks to acknowledge alternatives available to "consumers", not to low income consumers. Laws 2005, 26.3.1. The legislation protects low income consumers through RSA 374:3-6, III(e), which requires alternative regulation plans to

preserve universal access to basic service. The statute merely states that alternatives must be available to "a majority of retail customers." The statute does not speak to the socioeconomic characteristics of that majority. To accept Bailey's interpretation would be to violate one of the most fundamental rules of statutory construction: Statutes may not be construed in a way that would add terms the legislature did not see fit to include. Landry v. Landry, 154 N.H. 785, 788 (2007) (declining to add language to a statute the Legislature did not include)

The Legislature delegated to this Commission the authority to interpret RSA 374:3-b, in the exercise of its expertise based on the policies enunciated by the Legislature. Clearly, the text of the statute does not confine RSA 374:3-b, III(a) to basic local service, nor does it require that the competitive alternatives include specialized offerings for low income retail customers. The statute simply requires the existence of competitive alternatives to a majority of the customers in each of the Petitioners' exchanges. The record in this case more than satisfies this test. Bailey's interpretation to the contrary violates the statute, the policy underlying the statute, and fundamental principles of statutory construction.

B. The Plans Promote Universal Access to Basic Telephone Service at Affordable Rates.

Bailey's second criticism of the Settlement Agreement, that it fails to promote universal access to basic telephone service at affordable rates, similarly finds no support in anything other than the alarmist and entirely unfounded testimony of Bailey's expert witness. The Plans, as amended, maintain basic service availability for all customers. Tr. 12/4/07, 49:24-50:10 and 51:10-20. They also provide extensive limits on basic service rates. Id. at 52:12-19. They ultimately cap basic service rates at the level of the largest ILEC (currently Verizon, but potentially in the future, FairPoint Communications, Inc. ("FairPoint")). (The Settlement Agreement filed in Docket No. DT-07-011 calls for rate caps as long as five years.)

The Settlement Agreement sets forth a gradual, multi-year series of caps on rates, at the end of which rates can rise to the level of the largest ILEC in New Hampshire. The Plans provide that Petitioners shall not raise rates for basic service for the first two years (the first year in the case of WTC). Thereafter, rates may increase, in the case of KTC and MCT, only if one of a series of tests (set forth in section 4.1.2 of the Plans) has been met. See Plans, § 4.1.1. The Plan further provides that rates shall not increase by more than 10% annually for four years following the minimum two year period (one year in the case of WTC). For all of the Petitioners, basic rates are further capped at the rate charged by the largest ILEC in New Hampshire, with the exception of certain exogenous events. See id. at § 4.1.3.1. Should exogenous events occur, Petitioners must return to the Commission for any additional rate increases.

With respect to Lifeline customers, the Plans (as amended by the Settlement Agreement) provide enhanced rate increase protections. For Lifeline customers, rates for basic service may not increase for four years minimum and then, in the case of KTC and MCT, one of a series of tests has been met. See Id. at 4.1.5. Thereafter, rates may not increase more than 10% per year for the succeeding four years. Id. Under the Plans, basic service rate increases are capped at levels that already provide New Hampshire an exemplary record of universal service. If exogenous factors require further rate adjustments, Commission approval is required. In addition, the Settlement Agreement provides for the Petitioners to work with the OCA, Staff and New Hampshire Legal Assistance to provide information regarding the Lifeline and Link-up programs to increase participation. There is no basis for any assertion that universal service will be adversely affected in any way by the Plans. To the contrary, the Plans are designed to and should enhance universal access to basic service.

Bailey contends that a gradual rate increase to Verizon levels will have a devastating detrimental impact on universal access to basic service. Nothing supports this alarmist viewpoint. New Hampshire enjoys some of the highest telephone penetration rates in the country, based on studies conducted by the Federal Communications Commission. New Hampshire's telephone penetration rate (percentage of housing units with telephone service) was 96.6% as of July, 2007. Belinfante, Telephone Subscribership in the United States, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Division, February, 2008, Table 2. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279997A1.pdf. For the vast majority of customers, incumbent basic telephone service is provided by Verizon, though Petitioners provide that service within each of their exchanges. Not only, therefore, do all carriers receive high marks for universal access, but the majority of that access is achieved at Verizon rates.

Through the testimony of Dr. Johnson, Bailey tried to paint a picture of doom for low income telephone customers. Cross examination, however, revealed Bailey's position to be little more than conjectural hyperbole. Though he argued that the Settlement Agreement would leave Petitioners free to raise rates on their whim, as noted above, Dr. Johnson conceded that increases will be restricted, and also that basic service is "a very substantial portion of the revenue stream." Tr. 12/5/07, 85. Dr. Johnson further conceded that the potential increases for basic service are not significant. Tr. 12/5/07, 94. Moreover, the ability to raise rates does not mean that the Petitioners will raise those rates as Mr. Bailey would have this Commission believe. See, Rebuttal Testimony of Timothy W. Ulrich, Exhibit MCT 5P, p. 14. In fact, the majority of the 72 TDS Telecom companies operating under alternative regulation in the past 5 years have not raised their rates for basic local exchange services even though they were allowed to do so. TDS

Telecom's pricing actions in other states speak much louder than the baseless claims made by Mr. Bailey through the testimony of Dr. Johnson.

With respect to Lifeline customers, the Settlement Agreement imposes even less of a burden. Using Wilton as an example, the ten percent increases, if implemented, would not even commence until year five of the Plans. Tr. 12/5/07, 105-06. Those customers would not see rate increases of any significance until at least year eight. Id. See also Tr. 12/4/07, 43:16-20. Even Dr. Johnson would not characterize this as a doomsday scenario for low income users.

Dr. Johnson further conceded that the potential increases for basic service are not significant. For example, in the Wilton exchange, a ten percent increase in year two of the AFOR would result in an increase of $0.67 cents per month. Tr. 12/5/07, 94. In the subsequent three years under the AFOR, assuming the maximum allowable increases, basic service rates would increase $0.74, $0.81 and $0.89 per month. Id. Dr. Johnson conceded that any significant increase could not occur until six years out, and then the increase would be in the range of $5.40 per month if fully implemented. Id. Dr. Johnson could not state that the AFOR left any customers worse off than under rate of return regulation. Id. at 106.

Dr. Johnson conceded, as he had to, that the rate increases with respect to basic service were not significant and that any "freedom" to raise rates in any significant way lay only with respect to bundled and other non-basic services. RSA 374:3-b, III(e), however, concerns itself with preservation of access to basic telephone service. As Ms. Bailey of the Staff testified, "[T]here's a protection for somebody who doesn't want the bundled wireline service of, say, a Comcast, where you get your local service bundled with your long distance service, and that's your only alternative, we believe that that is a substitute for many customers of TDS wireline basic service. But, for customers who aren't interested in that, they're protected by the rate

freezes. And, for low income customers, they're even further protected by the Lifeline requirements of the Plan." Tr. 12/4/07, 69:9-18.

Importantly, pursuant to applicable regulations and the Plans themselves, the Petitioners can be called back before this Commission as necessary. Pursuant to RSA 374:3-b, III(f), the Plans must and do provide that if the Petitioners operating under the Plans fail to meet any of the conditions set out in section III, this Commission may require them to propose modifications to the Plans or return to rate of return regulation. As Mr. Reed testified, "[w]ith the reporting, ongoing reporting to the Commission regarding service quality standards, investment, and so on, that the Commission will be able to oversee this going forward." Tr. 12/4/07, 53:17-24.

The testimony of Dr. Johnson should be rejected. It is based on Bailey's faulty interpretation of the statute. In addition, it lacks the independence of objective judgment that you might expect from such a witness. Dr. Johnson's analysis needlessly takes high percentages of small numbers meant to inflame rather than inform. He speaks of a "tremendous freedom to raise prices," while freely admitting that the freedom of which he speaks does not apply to basic service, intraLATA access service and interLATA access service (Tr. 12/5/07, p. 85), which currently comprise most of the revenue base. This flexibility only applies to other services, such as call waiting, call forwarding, Caller ID, etc. and to bundles and packages of services, which no customer is required to buy.

Elsewhere, Dr. Johnson describes the Plans to be "...as bad as it can possibly get. You raise rates now and convince everybody to start abandoning their phone service...." He makes these inflammatory statements even though basic rates are capped at current levels for years, allow potential increases in up to 10% increments thereafter, and are limited to an ultimate cap at the comparable rates of the largest ILEC in the State (except for changes due exogenous events,

subject to Commission review and approval). This testimony is utter nonsense; it is hyperbole, and it is not useful for Commission decision-making.

In short, Bailey cannot point to a single, record-supported basis for any conclusion that the Plans and Settlement Agreement fail to preserve universal access to basic service. To the contrary, the Plans not only preserve, they enhance universal access.

III. The Commission Need Not Determine Which Litigated Position Of The Parties Would Prevail In Order To Approve The Settlement Agreement.

Bailey contends that the Commission must make findings pursuant to RSA 374:3-b -- that is, adjudicate this proceeding to decision -- in order to approve the Settlement Agreement. Once again, Bailey seeks to tie the Commission's hands in a way the statute and legislature do not permit.

The Petitioners, the Staff and the OCA had different views regarding the interpretation of RSA 374:3-b. They were able to come together notwithstanding difficult and complex issues and fashioned a settlement that conforms to the statute and serves the public interest, while also providing benefits to ratepayers above and beyond the protection afforded by the statute, which benefits would not have flowed from a fully litigated action. The Commission need not determine which litigation position of the settling parties was correct in order to approve the settlement, thereby allowing the ratepayers to reap these benefits.

Settlements are encouraged in New Hampshire. New Hampshire's Administrative Procedures Act, RSA 541-A includes the following provisions:

> Except to the extent precluded by law, informal settlement of matters by nonadjudicative processes is encouraged. This section does not require any party or other person to utilize informal procedures or to settle a matter pursuant to informal procedures. RSA 541-A:38.

> Unless precluded by law, informal disposition may be made of any contested case, at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default. RSA 541-A:31, V(a).

Additionally, the Legislature vested this Commission with a broad rulemaking authority pursuant to RSA 365:8, including the authority to adopt rules regarding alternate processes in hearings and other forms of alternative dispute resolution. RSA 365:8, I. The Commission has adopted rules providing procedures and standards for approval of settlements. Puc 203.20(b) provides:

> The commission shall approve a disposition of any contested case by stipulation, settlement, consent order or default, if it determines that the result is just and reasonable and serves the public interest.

In this case, the Commission has before it not only the Settlement Agreement, but also the testimony of all of the witnesses, exhibits and the hearing record. It is inconsistent with the notion of a settlement that the Commission be required to determine which party's litigation position was correct. Nothing in the statute even remotely suggests that the Legislature sought to abrogate the Commission's authority or ability to approve a stipulated alternative regulation plan.

This is particularly so with the questions regarding competitive wireline, wireless and broadband services. Staff and the OCA have different rationales for supporting the Settlement Agreement. The Petitioners have made clear their interpretation of the statute. The Staff and OCA have relied on the provisions of the Settlement Agreement that promote competition, with a phase-in of Plan features as that competition further develops and the backstop of the Commission's authority to call the Petitioners back in if the Plans do not meet the requirements of the statute later. An approval by the Commission with conditions after full litigation could have produced a similar result.

As described above, the Legislature entrusted this issue to the expertise of the Commission with an identification of the general policy directives. The Settlement Agreement is a compromise of positions that is well within the range of likely outcomes if the case was fully litigated. The Settlement Agreement finds support in the record, which is to say that the record supports whatever statutory findings the Commission need make in order to approve the Settlement Agreement and Plans. That evidence in the record, even if disputed, supports Petitioners' entitlement to the Plans pursuant to RSA 374:3-b provides the Commission with the basis on which to approve the Plans. The Commission need not select one party's litigated position over the rest as part of the Settlement Agreement approval process. The terms of the Settlement Agreement fall well within the range of likely outcomes in a litigated case. As such, the Commission can use it as the basis for the required statutory findings under RSA 374:3-b, III.

IV. The Settlement Agreement Need Not Undergo Rate Of Return Analysis.

Bailey contends that, because the Settlement Agreement contains rate increase caps, in addition to having to satisfy RSA 374:3-6, the Settlement Agreement and Plans must also satisfy the "just and reasonable" requirement of RSA 378:7, which is to say that the Plans must satisfy the test applicable to a rate of return analysis under the rate statute. See Appeal of Conservation Law Foundation, 127 N.H. 606, 633-636 (1986). Bailey's argument, even more so than his others, seriously tests the outer limits of credulity's elasticity. Under this approach, alternative regulation would be no alternative at all.[2]

[2] In support of his argument in favor of importing other statutes into the analysis of RSA 374:3-b, Bailey cites Appeal of Public Service Company of New Hampshire, 141 N.H. 13 at p. 26. Bailey Brief, p. 5, n. 3. However, the PSNH case does exactly the opposite of what Bailey suggests. In PSNH, the Court spends ten pages rejecting a scatter-shot attempt by PSNH to interpret one statute by reference to others. The Court then refers to the public good standard contained within the statute it was interpreting, RSA 374:26. "In sum, PSNH's attempt to find an implicit limitation in other statutes on the PUC's unambiguous franchising authority under RSA 374:26 must fail." PSNH at 26. The similar effort here by Bailey should also fail.

At the outset, RSA 374:3-b states that an alternative form of regulation shall be approved if a Petitioner satisfies the statutory requirements of RSA 374:3-b. Rate of return analysis is not among the requirements of RSA 374:3-b, nor is there any reference to RSA 378:7. The absence of rate of return principles from RSA 374:3-b derives from the legislative findings that the full utility regulation of small ILECs is inconsistent with legislative objectives of promoting competition and the offering of new and alternative telecommunications services. Laws 2005, 263:1.

Bailey seeks to have the Commission determine whether the Plans are in the public interest by reference to RSA 378. However, the Legislature has defined the public interest as supporting alternative regulation plans on the basis of the criteria in RSA 374:3-b. Again, Bailey fashions an argument designed to frustrate the purpose and policy of RSA 374:3-b.

What is more, the Settlement Agreement advances the public interest beyond merely meeting the requirements of RSA 374:3-b by bringing ratepayers benefits which they would not receive had this action been fully litigated to conclusion. For example, the Petitioners have agreed to waive the rural telephone company exemption under 47 U.S.C. §251(f)(1), and to an expedited process for negotiation of interconnection agreements. The Petitioners have also agreed not to oppose the registration or certification of competitive local exchange carriers seeking to do business in their service territories. The Settlement Agreement also provides for basic local service rates to be capped at current levels for specified periods and defers for those periods or longer the start of the period during which up to 10% annual increases in basic local service rates are allowed, but capped at the rates charged by the largest ILEC in New Hampshire for similar services. In the case of low income customers eligible for Lifeline rates, the basic

service cap at current levels will last for at least four years. These additional benefits provide the public with enhancements they would not have received in a fully litigated proceeding.

CONCLUSION

The Plans submitted by the Petitioners, as modified by the November 30, 2007 Settlement Agreement, fully conform to RSA 374:3-b and should be approved. Therefore, the Petitioners respectfully request that the Commission enter an order approving the Plans and the Settlement Agreement.

Respectfully submitted,

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

By their Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: February 8, 2008

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief was forwarded this day to the parties by electronic mail.

Dated: February 8, 2008

By: _____
Frederick J. Coolbroth, Esq.