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Before The Public Utilities Commission

DT 07-027

Kearsarge Telephone Company
Merrimack County Telephone Company

Alternative Form of Regulation

Brief On Behalf Of Daniel Bailey
(Public Version)

Submitted by
New Hampshire Legal Assistance
Attorney For Daniel Bailey

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TABLE OF CONTENTS

I. Introduction.....1-2

a.) Background.....1-2

b.) Summary of Argument 2

II. Legal Standards.....3-7

a.) Each Exchange Must Be Competitive Today.....3

b.) Each Exchange Must Have the Presence of a "Competitive" Alternative Technology.....3-4

c.) The Mere Threat of a Competitive Technology In An Exchange Is Not Sufficient to Meet RSA 374:3-b, III(a).....4

d.) The Technology In Each Exchange That Is Allegedly "Competitive" Must Be Identified.....4-5

e.) The Plans for KTC and MCT Must Preserve Universal Access to Affordable Basic Telephone Service.....5

f.) The Provisions of RSA 374:3-b Are Not Incongruous.....5-6

g.) Fact-Finding Is Required In Each Exchange.....6-7

h.) The Burden of Proof is on TDS to Meet All Requirements of RSA 374:3-b....7

III. TDS Has Not Met Its Burden In Showing the Sufficient Availability of Wireless Coverage To the Majority of Retail Customers in the Sutton and Salisbury Exchanges.....7-13

a.) TDS Did Not Correlate Wireless Signals on Roads with the Actual Signals Received By Customers in their Homes.....7-8

b.) TDS Erroneously Assumes that All of Its Customers Live in Wooden Homes. 8-9

c.) C Squared, LLC Did Not Discuss dB Loss in its Study.....9-10

d.) The Testimony of the C Squared Witness About "RF Link Budget" Should Be Accorded Little Or No Weight Because It Is Inconsistent, Unreliable and Not Credible.....10-12

e.) Assuming the Accuracy of C Squared, LLC's Drive Test Data, TDS Has Not Demonstrated Third-Party Wireless Availability to a Majority of Retail Customers in the Sutton and Salisbury Exchanges.....12-13

IV. TDS Has Not Met Its Burden of Showing the Availability of Competitive Wireless Service to a Majority of Its Retail Customers in the Warner and Bradford Exchanges.....13-15

V. TDS Has Not Met Its Burden of Proof to Demonstrate That Every Exchange in KTC and MCT Is Competitive.....15-23

a.) TDS's Information Regarding Access Line Loss, Loss of Access Minutes and Loss of Access Revenue Does Not Meet Its Burden of Showing that the Exchanges in KTC or MCT Are Competitive.....15-17

b.) TDS' Interconnection Agreement With Comcast Does Not Meet Its Burden of Showing the Exchanges in KTC or MCT Are Competitive.....17-18

c.) TDS Did Not Meet Its Burden To Demonstrate That Its Customers Are Substituting Wireless Service For Basic Local Exchange Service.....18-20

d.) TDS Must Undertake Some Minimal Economic Analysis.....20-22

e.) TDS Failed to Meet Its Burden to Show That Available Alternatives Are Priced Comparable to Its Basic Local Exchange Service.....22-23

VI. TDS Has Not Met Its Burden of Showing Universal Access To Affordable Basic Telephone Service.....24-25

VII. Conclusion.....26

I. Introduction

a.) Background

On March 1, 2007, the four affiliated New Hampshire based Telephone & Data Systems, Inc. ("TDS") companies filed essentially similar petitions for alternative regulation under RSA 374:3-b (hereinafter "Phase I"). On April 23, 2008, the New Hampshire Public Utilities Commission ("Commission") issued an order approving a settlement agreement with respect to Wilton and Hollis, but rejecting a settlement agreement with respect to Kearsarge Telephone Company ("KTC") and Merrimack County Telephone Company ("MCT"). *See* 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, DT 07-027; ORDER NO. 24,852, New Hampshire Public Utilities Commission, 2008 N.H. PUC LEXIS 35, April 23, 2008 (hereinafter "Order 24,852").

The Commission ruled that the Companies failed to demonstrate the availability of third-party wireline, wireless or broadband services in the Sutton and Salisbury exchanges of KTC and MCT. *Id* at 29. The Commission did not reach the question of whether any of the KTC or MCT exchanges are competitive. *Id.* The Commission left the docket open for a period of one year for KTC and MCT to file new information. *Id.* at 30.

On May 30, 2008, shortly following the April 23, 2008 Order, C Squared, LLC performed a drive test for TDS to measure wireless signal strength in the Sutton and Salisbury exchanges of KTC and MCT. *See* Exhibits E & F to TDS Exhibit 6C, Phase II, p. 1 of 22 (hereinafter "Exhibit E" and "Exhibit F"). On January 29, 2009, TDS filed supplemental testimony of Michael Reed, which included the results of the drive tests in Salisbury and

Sutton in support of the petition for alternative regulation for KTC and MCT (hereinafter "TDS"). *See* TDS Exhibit 6C, Phase II.

The parties engaged in discovery and filed testimony. Hearings took place on September 29, 2009 and October 1, 2009 on the new filing (hereinafter "Phase II"). This Brief is submitted in support of Daniel Bailey's position in opposition to TDS' petitions on behalf of KTC and MCT for alternative regulation.

b.) Summary of Argument

The additional "evidence" that TDS provided in Phase II consists of incomplete and inconsistent data concerning the availability of wireless signals on the roads of *only* two of TDS' fourteen exchanges: Sutton and Salisbury. Moreover, TDS provided this information without adequately showing that the signals received on the roads are adequate for customers in their homes.

More revealing is what TDS did not do in Phase II. In Phase II, although TDS makes generalized assertions of competition, such as loss of access lines, it did not identify what alternative technologies, if any, may have caused this impact. Nor did TDS undertake any study, or any economic evaluation of *any* of its fourteen exchanges. Furthermore, TDS did not show how the KTC and MCT plans preserve universal access to affordable basic telephone service.

In light of the above inadequate record, TDS has not met its burden to show third-party alternatives are available to a majority of customers in each exchange, and that those technologies, if available, are in fact "competitive" today. In addition, TDS has not met its burden to show that its alternative regulation plans will preserve universal access to affordable basic telephone service.

II. Legal Standards

In order for a small incumbent local exchange carrier (ILEC) to move from rate-of-return regulation to an alternative form of regulation it must show, among other things, that: "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." (Emphasis added). RSA 374:3-b, III(a). Thus, as the Commission has pointed out: "...if any exchange within either of those companies [KTC and MCT] fails to meet the statutory test, the company may not receive approval for an alternative regulation plan." Order 24,852, pp. 28-29.[1]

a.) Each Exchange Must Be Competitive Today.

RSA 374:3-b, III(a) requires a finding that: "Competitive wireline, wireless, or broadband service **is** available..." (Emphasis added). The Commission has already ruled in Phase I 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." Order 24,852, p. 26.

b.) Each Exchange Must Have the Presence of a "Competitive" Alternative Technology.

RSA 374:3-b, III(a) requires a finding that: "**Competitive** wireline, wireless, or broadband service is available..." (Emphasis added). "It is an elementary principle of statutory construction that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words." *State Emples. Ass'n of N.H. v. N.H. Div. of Pers.*, 158 N.H. 338, 345 (2009)(citations omitted). Thus, the word "competitive" must mean something other than "available," a word found later in the

[1] Mr. Bailey also incorporates by reference the legal standards section in "Brief of Daniel Bailey," Phase I, dated January 11, 2008, pp. 4-15, including an analysis of just and reasonable rates pursuant to RSA 378:7.

sentence of RSA 374:3-b, III(a). Indeed, the Commission made availability and competitiveness two very distinct evaluations when it approved the settlement agreement with respect to Hollis and Wilton. *See* Order 24, 852, p. 27.

Additionally, the Commission determined that "...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)..." (Emphasis added) Order 24,852, p.27.

c.) The Mere Threat of a Competitive Technology In An Exchange Is Not Sufficient to Meet RSA 374:3-b, III(a).

The term "competitive" in RSA 374:3-b, III(a) does not have such words as "**potentially** competitive" or "**possibly** competitive" or "**threat of** competitive" modifying its meaning. We can "neither consider what the legislature might have said nor add words that it did not see fit to include." *N.H. Dep't of Envtl. Servs. v. Marino*, 155 N.H. 709, 713 (2007).

The legislature, in RSA 374:3-b, III(a), requires a finding that a third-party technology is actually competitive and does not merely present a threat of future competition. The third-party technology must actually be "competitive." The absence of a modifier before the word "competitive" in RSA 374:3-b, III(a), read together with the word "is" in RSA 374:3-b, III(a), further reinforces the legislative requirement that a third-party technology actually be "competitive" today.

d.) The Technology In Each Exchange That Is Allegedly "Competitive" Must Be Identified.

RSA 374:3-b, III(a) requires a finding that: "Competitive **wireline, wireless, or broadband** service is available..." (Emphasis added). The plain language of RSA 374:3-b, III(a) requires an identification of the specific technology (i.e. wireline or wireless or

broadband) that is competitive. This requirement would not exist had the legislature written the provision as: "Competitive service is available..." As a result, TDS must link its claim of competition in basic service to a specific technology in each exchange in order to receive approval for its petitions.

e.) The Plans for KTC and MCT Must Preserve Universal Access to Affordable Basic Telephone Service.

RSA 374:3-b, III(e) requires a finding that: "The plan preserves universal access to affordable basic telephone service." If the price cap of the largest ILEC's rates found in RSA 374:3-b, III(b) were viewed by the legislature as *de facto* affordable, then the entire provision of RSA 374:3-b, III(e) would be rendered superfluous. "[T]he legislature is presumed not to have used superfluous or redundant words." *State Emples. Ass'n*, 158 N.H. at 345 (reasoning that if the legislature had intended to treat the term "nonqualified" in Chapter 100-A the same as the term "creditable service" it would not have distinguished it from "creditable service"). Thus, in accordance with RSA 374:3-b, III(e), the Commission must determine whether the TDS' "...plan preserves universal access to affordable basic telephone service."

f.) The Provisions of RSA 374:3-b Are Not Incongruous.

The Commission previously concluded that price restraints and the maintenance of carrier-of-last resort status obligation are "potentially" incongruous with a movement towards CLEC-style regulation, which presumes a competitive market. *See* Order 24, 852, p. 25.

With evolving markets, and the presence of actual competition, there may come a time when RSA 374:3-b, III(a) is much more easily met. The legislature has set forth other provisions and safeguards in RSA 374:3-b that must also be met in *addition to* RSA 374:3-b, III(a). Simply put, additional safeguards and statutory tests are not necessarily "incongruous" with the statutory tests set forth in RSA 374:3-b, III(a).

Each word in each provision in RSA 374:3-b must be given its full effect. *State Emples. Ass'n*, 158 N.H. at 345 ("...all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words..."). Therefore, it cannot be said that the statute must allow full pricing flexibility in order for the word "competitive" in RSA 374:3-b, III(a) to mean "competitive," or that a price cap deflates the meaning of the word "competitive" in RSA 374:3-b, III(a).[2] Nor can it be said that the maintenance of carrier-of-last resort status obligation of universal access to affordable basic telephone service means that the competitiveness requirement in RSA 374:3-b, III(a) has any less force.

Lastly, the Commission has alluded to the "inclusion of a corrective provision," presumably referencing RSA 374:3-b, III(f), as "...arguably suggestive of a legislative preference for approval of alternative regulation plans..." *See* Order 24, 852, p. 25. RSA 374:3-b, III(f) provides, in pertinent part: "...[if 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." If anything, this "corrective provision," along with the other safeguards, may evince legislative caution against premature approval of an alternative regulation plan.

g.) Fact-Finding Is Required In Each Exchange.

RSA 374:3-b, III provides: "The commission shall approve the alternative regulation plan **if it finds** that..." (Emphasis added). Indeed, the Commission has determined that: "RSA 374:3-b requires that we [the Commission] make specific findings in order to approve an alternative regulation plan." *See* Order 24, 852, p. 26. Thus, the Commission needs to

[2] For a discussion of policy purposes of price caps, see Dr. Johnson's Phase I testimony. Ex. 7P & C, pp. 13-20.

find that the provisions of both RSA 374:3-b, III(a) and :3-b, III(e) are met before it can approve TDS' rate deregulation petition.

h.) The Burden of Proof is on TDS to Meet All Requirements of RSA 374:3-b.

The burden of proof to meet the statutory tests in RSA 374:3-b rest with TDS by a preponderance of the evidence. *See* Order 24, 852, p. 26; *see also* N.H. Code Admin. R. Puc 203.25.

III. TDS Has Not Met Its Burden In Showing the Sufficient Availability of Wireless Coverage To the Majority of Retail Customers in the Sutton and Salisbury Exchanges.

a.) TDS Did Not Correlate Wireless Signals on Roads with the Actual Signals Received By Customers in their Homes.

TDS did not make an effort to match signals on the road to actual customers. While consideration of actual customer locations may not be a factor in "building out" a wireless network, RSA 374:3-b, III(a) requires such analysis in order for petitions for alternative regulation to be approved. RSA 374:3-b, III(a) requires a finding that a technology "...is available to a **majority of the retail customers** in each of the exchanges..." (Emphasis added). The legislature could have said a "majority of road area," but it did not. Thus, TDS must match wireless coverage in Sutton and Salisbury with actual retail customers. It failed to do so.

Indeed, TDS did not even count customer locations (Phase II, Tr. Day 1, p. 97, ll. 14-20). *See also* Bailey Ex. 64, Phase II, Staff Requests 1.12 & 2.11. In fact, "[t]he driving was done, the testing was done prior to us [TDS] plotting the customer locations" (Phase II, Tr. Day 2, p. 176, ll. 12-14). "C Squared, LLC made no attempt to measure signal strength along driveways, or within buildings where customers live." (Phase II, Bailey Ex. 76, p. 9, ll. 18-

20). TDS did not measure any signal (even spot checking) from within any customer location. *See* Bailey Ex. 64, Phase II Bailey Data Requests 1.16 &1.17.

Without some connection between signals and actual customer locations, it cannot be said that TDS met its burden of demonstrating that wireless service is available to a *majority of retail customers* in the Sutton or Salisbury exchanges.

b.) TDS Erroneously Assumes that All of Its Customers Live in Wooden Homes.

Wireless signal strength is generally less inside a building than outside a building. (Bailey 66, *Wireless Communications, Principles and Practice: Second Edition*, Theodore Rappaport, p. 166-167)(hereinafter "Rappaport"). Signal strength is reduced ("dB loss") when the signal has to penetrate a solid object, such as wood, metal, or concrete, etc. *Id.* at 157-159.

In its study, C Squared, LLC assumed that every retail customer in the Sutton and Salisbury exchanges lives in a "rural" area, and in a home made of "wood." (Phase II, Tr. Day 1, p. 118, l. 19 to p. 119 l. 3). However, building penetration loss (measured in dB loss) is much greater for a house with a brick exterior than one with wood (Bailey Ex. 63, Prefiled Direct Testimony of Staff Analyst Josie Gage, Phase I, Exhibit 1, p. 1), and even greater for one with aluminum siding (Bailey 66, Rappaport, p. 158).

Moreover, other factors, such as building height, can also affect building penetration loss. *See* 47 C.F.R. § 24, Subpt. E, App. 1. TDS did not even attempt to estimate the number of customers that reside in wood houses, or multifamily concrete apartment complexes, or brick homes; rather it simply assumed every customer lives in a wood house. Thus, even assuming road area is directly correlated with customer locations (which, the record shows, it

is not), TDS' assumption that everyone lives in a wood house may very well result in TDS overestimating the number of customers with a "good" or "very good" signals.

Because it made no connection from signals on roads to signals of actual customers in their homes, TDS has not met its burden of demonstrating that wireless service is available to a *majority of retail customers* in the Sutton or Salisbury exchanges.

c.) C Squared, LLC Did Not Discuss dB Loss in its Study.

Neither building penetration loss nor dB loss generally is even mentioned in C Squared, LLC's drive test reports. *See* Confidential Exhibits E and F to Mr. Reed's January 29, 2009 testimony, Ex. 6C, Phase II. dB loss is not discussed in TDS' discovery responses, despite questions on building penetration loss. *See* Bailey Ex. 65. Further, dB loss is not discussed in Mr. Goulet's rebuttal testimony. *See* Goulet Rebuttal Testimony, Phase II, KTC-MCT Ex. 8P & 8C.

It is only on cross examination that TDS acknowledged the concept of dB loss (Phase II, Tr. Day 1, p. 93, ll. 3-12), and that there would be dB loss going into a person's home (Phase II, Tr. Day 1, p. 107 ll. 5-8) . Mr. Goulet then claimed that dB loss was accounted for to some extent through something he referred to as a "RF link budget." (Phase II, Tr. Day 1, p. 118, l. 19 to p. 119 l. 3; Phase II, Tr. Day 1, p. 122 ll. 3-9). Mr. Goulet provided this new testimony without documentation, reference or text that mentions "RF link budget."

Mr. Goulet then acknowledged familiarity with the phenomenon of "body loss." (Phase II, Tr. Day 1, p. 129, ll. 13-18). The phenomenon of "body loss" is also missing from discussion in C Squared, LLC's drive test reports (Exhibits E & F of KTC-MCT Ex. 6c, Phase II), and his rebuttal testimony (KTC-MCT Phase II Ex. 8P and 8C). Interestingly, Mr. Goulet is unfamiliar with the related phenomenon of "grip loss." (Phase II, Tr. Day 1, p. 135

ll. 4-9). Mr. Goulet said "body loss" is assumed to be 2 dB in his "RF link budget." (Phase II, Tr. Day 1, p. 129, ll. 13-18). According to Mr. Goulet, "body loss" is taken into account in his "RF link budget." *Id.*

In the end, Mr. Goulet provided no supporting information or data for the "RF link budget," something he first introduced during cross examination. The Commission and the parties are therefore left to rely solely on Mr. Goulet's oral testimony on cross examination at the hearing concerning the "RF link budget."

That said, Mr. Goulet seeks to assure us that: "The values that I reported and the plots that were generated are based on the RF link budget. That's all you should need to know" (Phase II, Tr, Day 2, p. 146, ll. 10-13). Mr. Bailey respectfully suggests that this is not all we should "need to know."

d.) <u>The Testimony of the C Squared Witness About "RF Link Budget" Should Be Accorded Little Or No Weight Because It Is Inconsistent, Unreliable and Not Credible.</u>

Mr. Goulet's testimony on the "RF link budget" was inconsistent and confusing. On Day One, Mr. Goulet testified that "[t]he link budget to 85 [dBm] allows for 10 dB of attenuation, which is the typical number used in this market in New England for wood-frame-structured houses with glass windows and drywall, et cetera." (Phase II, Tr. Day 1, p. 118, l. 21 to p. 119, l. 1; Phase II, Tr. Day 1, p. 162, ll. 9-13). As a result, the signal in the building would be -95 dBm (Phase II, Tr. Day 1, p. 122, ll. 3-9). Mr. Goulet claimed that "...a 95 inside a wooden structure in a home in Salisbury and Sutton is going to be a good-quality call" (Phase II, Tr. Day 1, p. 163, ll. 2-4). On Day Two, Mr. Goulet shifted his testimony on the "RF link budget." He testified that the "RF link budget" assumes a negative 90 dBm signal inside homes, not a negative 95 dBm, and that "...you can live with a neg 90 in a home

in New Hampshire in these markets that we're talking about" (Phase II, Tr. Day 2, p. 145, ll. 2-4).

Mr. Goulet also revealed that the wireless carriers evaluated by C Squared, LLC apparently all have different "RF link budgets" (Phase II, Tr. Day 2, p. 113 l. 19 to p. 114 l. 3; Phase II, Tr. Day 2, p. 138, ll. 8-12; Phase II, Tr. Day 2, p. 141, ll. 3-13). Mr. Goulet could not reference a particular carrier's link budget or produce any documentation to verify what link budgets are used in the industry (Phase II, Tr. Day 2, p. 141, ll. 4-6).

Mr. Goulet used a "nominal value" of negative 85 dBm for the link budgets for all of the carriers tested (Phase II, Tr. Day 2, p. 143, ll. 5-8). And he did so despite a strong implication in the record there may be one carrier that uses a negative 82 dBm link budget for rural areas (Phase II, Tr. Day 2, p. 143, ll. 4-5; Phase II, Tr. Day 2, p. 141, ll. 7-9). This link budget would impact the data presented in Confidential Exhibits E & F for this particular carrier because only signals better than -82 dBm would be consider "very good," or acceptable "In-Building Coverage." Data points of -83, -84 and -85 dBm would no longer be part of the "very good" percentage for this carrier, resulting in a decrease in the percentage of "very good" signals, a shift less pronounced than what was illustrated in Bailey Ex. 74. Nevertheless, Mr. Goulet used a negative 85 dBm "RF link budget" for *all* carriers (Phase II, Tr. Day 2, p. 143, ll. 5-8).

Mr. Goulet's testimony on the "RF link budget" should be given little or no weight. The term "RF link budget" does not appear in Mr. Goulet's written testimony or in the C-Squared, LLC study. We did not learn of this new information and testimony until during the hearing. The parties had no opportunity to conduct discovery or prepare cross examination on this subject. Furthermore, Mr. Goulet's testimony was confusing, inconsistent,

incomplete, and lacked any meaningful supporting data on his assertions regarding the "RF link budget."

e.) Assuming the Accuracy of C Squared, LLC's Drive Test Data, TDS Has Not Demonstrated Third-Party Wireless Availability to a Majority of Retail Customers in the Sutton and Salisbury Exchanges.

"Received Signal Strength Indication" (RSSI) of negative 95 dBm appears to be the outer limit for quality wireless connections. For example, ConnectME Authority, Maine's state eligible telecommunications carrier program, considers any signal weaker than -95 dBm as "unserved." *See* Bailey Ex. 63, p. 7, l. 17 to p. 8 l. 3. Dr. Johnson also views a negative 95 dBm reading as unsatisfactory (Phase II, Tr. Day 2, p. 56, l. 23 to p. 57, l. 4).

Mr. Goulet agreed that C Squared, LLC's use of -85 dBm for signals received on roads equals -95 dBm in the home. (Phase II, Tr. Day 1, p. 118, l. 21 to p. 119, l. 1; Phase II, Tr. Day 1, p. 162, ll. 9-13). The ***Begin Confidential _____ End Confidential*** legends on TDS' maps confirm the use of the -85 dBm break point, with the categories of ***Begin Confidential _____ _____ End Confidential***. (Exhibits C & D of KTC-MCT Ex. 6C, Phase II). Mr. Goulet verifies that "...everywhere you see green, that's in-building. That's the 85 cutoff – meaning, you're going to be 95 inside the house with a 10 dB" (Phase II, Tr. Day 1, p. 163, ll. 14-17).

Thus, the record demonstrates that -85 dBm should be the cutoff for outside received signals that should be used for an analysis of wireless availability. Charts in C Squared, LLC's reports for the Sutton and Salisbury exchanges show the percentage of received signals that meet the -85 dBm cutoff. *See* Table 2, Exhibits E and F of KTC-MCT 6C, Phase II. As illustrated, only one carrier (U.S. Cellular) in one exchange (Sutton) had more than ***Begin

Confidential ____ End Confidential*** (Phase II, Tr. Day 1, p. 88, ll. 15-17) of its signal strength readings at or better than -85 dBm, and that carrier incidentally shares the same parent company as MCT and KTC (Phase II, Tr. Day 2, p. 83 ll. 7-13).

Even accepting the C Squared, LLC data and measurements on their face, and assuming roads are somehow directly correlated with retail customers, the C Squared Table 2 in Exhibit F shows that the Salisbury exchange is without a single carrier serving a majority of its retail customers.

Under the same assumptions, the C Squared Table 2 in Exhibit E, shows that only one carrier (U.S. Cellular), has over ***Begin Confidential ____ End Confidential*** of signal readings at acceptable "in-building coverage" readings in Sutton. TDS has not produced persuasive evidence indicating U.S. Cellular is a "third party" that is truly in competition with TDS.

Using TDS' own data, TDS has not met its burden of demonstrating that wireless service is available to a *majority of retail customers* in the Sutton or Salisbury exchanges.

IV. TDS Has Not Met Its Burden of Showing the Availability of Competitive Wireless Service to a Majority of Its Retail Customers in the Warner and Bradford Exchanges.

Wireless is the only third party alternative technology claimed for the Bradford and Warner exchanges (Phase II, Tr. Day 2, p. 74, l. 11 to p. 75, l. 9). TDS therefore relies solely on the CoverageRight map (Ex. G to KTC-MCT Ex. 6C, Phase II) to try to prove wireless availability in the Bradford and Warner exchanges (Phase II, Tr. Day 2, p. 72 ll. 13-18). TDS asks the Commission to assume that if the CoverageRight map is correct for the Sutton and Salisbury exchanges, then it must also be correct for the Bradford and Warner exchanges (Phase II, Tr. Day 2, p. 73 ll. 4-7; Phase II, Tr. Day 1, p. 164, ll. 19-24). This requested "leap of faith" does not follow. Logically, even if the drive tests "confirm" the CoverageRight map

for the Sutton and Salisbury exchanges, this does not mean that the CoverageRight map is therefore correct for every exchange, in every other place. *See* Phase II, Prefiled Testimony of Stephen Eckberg, OCA Ex. 13, p. 16, l. 22 to p. 18, l. 5.

Even if the proposition that the CoverageRight maps are accurate for every exchange in every other place is correct, TDS has still made no attempt to overlay customer locations on the CoverageRight maps for any exchange, including the Bradford and Warner exchanges. By contrast, in the New York proceeding cited by TDS:

> The Department of Public Service's Geographic Information Service (GIS) unit overlaid GIS versions of the American Roamer maps with maps in the GIS system which show ILEC service territory boundaries and residential household locations. The GIS unit then counted the number of households in each ILEC service territory which are also contained within areas which the American Roamer maps indicate have reasonable cellular coverage.

In the Matter of Examining a Framework For Regulatory Relief, CASE 07-C-0349, 2008 N.Y. PUC LEXIS 88, 14-15 (March 4, 2008). No similar effort was undertaken by TDS for any exchange. Again, as explained earlier, matching customers with availability is required under RSA 374:3-b, III(a).

In the end, "CoverageRight is a unique map database featuring the coverage patterns **marketed** by each wireless carrier." (Phase II, OCA Ex. 8; Bailey Ex. 75) (Emphasis added). Mr. Goulet concedes that marketing materials from wireless carriers are not a solid source of information (Phase II, Tr, Day 2, p. 148, ll. 1-9). And the Commission has already determined that: "The TDS Companies' reliance on wireless coverage estimates by wireless providers is not sufficient to demonstrate availability of third party offerings." Order 24,852, p. 29.

For the above reasons, TDS has not met its burden of showing that wireless coverage is available to a majority of customers in the Bradford and Warner exchanges, or any other exchange of KTC or MCT. Further, even if TDS met the "availability" test in these exchanges, for the reasons set forth below, TDS has not met its burden to show that this technology is competitive with TDS' basic local exchange service.

V. TDS Has Not Met Its Burden of Proof to Demonstrate That Every Exchange in KTC and MCT Is Competitive.

Even if TDS has met its burden on the "availability" of an alternative technology, it must also demonstrate that the technology is "competitive," as required by RSA 374:3-b, III(a). Dr. Johnson testified in Phase II that: "It is not appropriate to simply assume that wireless service is competitive with the wireline services offered by TDS – particularly not with respect to its basic local exchange services" (Phase II, Bailey Ex. 76, p. 29, ll. 17-19). Dr. Johnson further testified that TDS has failed to show that wireless service standing alone is sufficient to constitute a "competitive" alternative in Sutton or Salisbury (Phase II, Bailey Ex. 76, p. 29, ll. 12-14).

The very limited additional information that TDS provided in Phase II does not satisfy the statutory test of RSA 374:3-b, III(a).

a.) <u>TDS's Information Regarding Access Line Loss, Loss of Access Minutes and Loss of Access Revenue Does Not Meet Its Burden of Showing that the Exchanges in KTC or MCT Are Competitive.</u>

TDS must present the Commission with *something more than* access line loss, minutes of use loss, or access revenue loss in order to show the level of competition required under RSA 374:3-b, III(a). *See* Legal Standards Section II(b).

TDS identifies no specific technology as the cause of its loss of access minutes, or its loss of access lines.[3] TDS has not provided a study linking the loss of access minutes to any one particular technology (Phase II, Tr. Day 1, p. 174, ll. 15-18). Nor has TDS produced any evidence linking the loss of access lines to a third-party provider (Phase II, Tr. Day 1, p. 175, l. 24 to p. 176 l. 3). Indeed, TDS has not provided any study or any information linking the loss of access lines to a third-party provider of voice service (Phase II, Tr. Day 1, p. 176 ll. 6-11). We are left, in the words of Mr. Reed, to "...draw your own conclusion as to where these people are going" (Phase II, Tr. Day 1, p. 176 ll. 15-17). However, this is not enough to meet the mandate of RSA 374:3-b, III(a), which requires an identification of the specific technology that is competitive with basic local exchange service. *See* Legal Standards Section II(d).

At the hearing, a record request was made for all telephone number porting requests by TDS customers since Phase I (Phase II, Tr. Day 2, p. 126). The response, without identifying the substituted technology, showed over the last three years a total of *only* ***Begin Confidential ____ End Confidential*** MCT customers ported their phone number to another telecommunications provider, and *only* ***Begin Confidential ____ End Confidential*** did so in KTC (Phase II, OCA Ex. 12). Moreover, based on information provided in Phase I, Dr. Johnson concluded that a mere ***Begin Confidential ___ End Confidential***% of TDS' lines were dropped for wireless in 2006 (Phase I, Bailey, Ex. 7C, p. 67, ll. 2-4). In Phase II, Dr. Johnson testified "...it is noteworthy that TDS hasn't submitted any new evidence concerning the extent to which customers in its exchanges

[3] Interestingly, Mr. Reed seems to concede TDS' customers are keeping their basic service lines: "They're keeping their – they may keep their landline, but they're keeping the very basic landline, for whatever reason. Maybe – I don't know – emergencies. I'm not sure why they keep it" (Phase II, Tr. Day 2, p. 191, ll. 4-8).

are replacing their wireline service with a wireless offering, or vice versa" (Phase II, Bailey Ex.76, p. 17, ll. 20-23).

Finally, the record indicates there is no evidence of a third-party cable broadband company providing voice service in any exchange in KTC or MCT (Phase I, Tr. Day 1, p. 61, ll. 21-23; Phase II, Tr. Day 1, pp. 178-179). And there are no facilities-based wireline CLECs providing voice service (Phase I, Tr. Day One, p. 85, ll. 18-21; Phase II, Tr. Day 1, pp. 178-179).

Thus, there is no evidence supporting the proposition that either broadband, or wireline, or wireless is "competitive" with TDS' basic local exchange service.[4]

b.) TDS' Interconnection Agreement With Comcast Does Not Meet Its Burden of Showing the Exchanges in KTC or MCT Are Competitive.

On September 9, 2009, TDS and Comcast entered into an interconnection agreement. *See* KTC-MCT, Exh. 9P, p. 54. No evidence has been provided on whether Comcast might provide voice service (bundled or not), or in which exchange it might provide it in. TDS has offered no evidence Comcast is actually providing voice service in any of its exchanges (Phase II, Tr. Day 1, p. 178). No evidence has been provided whether Comcast has actually used or requested to use TDS' facilities, or whether TDS received a notice to interconnect from Comcast, per the "Responsibilities of the Parties" under the agreement. *See* KTC-MCT, Exh. 9P, pp. 78-79 ("Responsibilities of the Parties"). No evidence has been provided that any of the voice services Comcast may offer are comparably priced to TDS' basic phone

[4] TDS' economist, Timothy Ulrich, testified in Phase I that the market at issue in this docket is basic local exchange service as well as technologies that compete with local exchange service (Phase I, Tr. Day 2, p. 40, ll. 9-14).

service. As set forth in Commission rules, Comcast has two years before it must enter TDS' markets. *See* N.H. Code Admin. R. Puc 431.12(a).[5]

After a review of the record in Phase II, Dr. Johnson concludes: "...TDS has not presented any evidence that "additional competitors" have entered these exchanges." *See* Phase II, Bailey Ex. 76, p. 29, ll. 9-10); *see also* (Phase II, Tr. Day 2, p. 18. l. 24 to p. 19, l. 6)(Dr. Johnson concluding at hearing that his rebuttal testimony would remain the same). The mere possibility of a competitive technology, or the threat of a competitive technology, is not enough to satisfy the plain language of RSA 374:3-b, III(a). *See* Legal Standards Section II(c). Accordingly, the Commission should reject any suggestion that the interconnection agreement -- on its face -- meets the statutory test of RSA 374:3-b, III(a).

c.) <u>TDS Did Not Meet Its Burden To Demonstrate That Its Customers Are Substituting Wireless Service For Basic Local Exchange Service.</u>

Generally speaking, wireless service is not a substitute for wireline service. All three Ph.D. level economists testifying in the first proceeding observed, among other things, that some evaluation of the extent to which wireless service is a substitute for wireline service in TDS territories is needed (Phase I, Prefiled Testimony of Dr. Chattopadhyay, Ex. 9, p. 4, ll. 1-10; Phase I, Prefiled Testimony of Dr. Loube. Ex. 8, p. 13 l. 16 to p. 14 l. 6; Phase I, Prefiled Testimony of Dr. Johnson, Ex. 7P, pp. 55-56, & 60-61). Dr. Johnson elaborated on the importance of such an evaluation:

> ...most consumers view wireline and wireless service as largely complementary services, which can be substituted to a limited degree under some circumstances. The fact is, few consumers today rely solely on a cell phone, and even fewer consumers switch back and forth between wireless and wireline services due to fluctuations in their respective prices...The fact that so many

[5] It does not appear as though Comcast even sought CLEC authorization to serve the Bradford, Contoocook, Melvin Village, Meriden, Sutton or Warner exchanges. *See* Phase II, OCA Ex.2, p. 1.

> consumers continue to use both wireless and wireline services strongly suggests there services are not competitive...

(Phase I, Ex. 7P, p. 67, ll. 6-22).

The lack of functional equivalence between wireless service and wireline service cannot go unnoticed. Dr. Johnson lays out numerous functional differences between wireline and wireless service, including mobility, call quality and 911 service (Phase I, Ex. 7P, pp. 68-74)(Phase II, Bailey Ex. 76, pp. 23-24). TDS echoes some of Dr. Johnson's concerns; namely, it considers wireline service the most reliable connection to 911, as well as offering the "highest voice quality transmissions .... anywhere in the comfort of your home." *See* Bailey Ex. 60, pp. 1-3. Mr. Goulet, on the other hand, considers wireless a "superior" technology (KTC-MCT, Ex. 8P, Phase II, p. 12, ll. 16-17).

These general functional distinctions reinforce the need, as Dr. Johnson as pointed out, to "drill down" and actually study TDS' markets (Phase II, Tr. Day 2, p. 37, ll. 14-16). This is something TDS has not done. TDS did not survey persons in the MCT and KTC markets (Phase II, Tr, Day 1, p. 49, ll. 18-19). Nor did TDS survey its customers to determine what types of services they use (Phase II, Tr, Day 1, p. 49, ll. 2-10).

In addition to access line loss, loss of access minutes, and the Comcast interconnection agreement, TDS refers to a study published by the Centers for Disease Control, entitled "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008"(hereinafter "NHIS survey") (KTC-MCT, Ex. 8C, Phase II, pp. 12); *see also* Bailey Ex. 55. The NHIS survey was first cited by Dr. Loube in Phase I. (Phase I, Ex.8, p. 12-13). This is TDS' only support for Mr. Goulet's lay opinion that wireless carriers are "competing for the same market" as wireline service (Phase II, Tr. Day 1, p. 76, ll. 12-23). However, Mr. Goulet was unaware that the survey actually showed a substantially

smaller percentage of wireless only homes in the Northeast as compared to the national trend (11.4% to 20.2.% respectively)(Phase II, Tr. Day 1, p. 46, l. 22 to p. 47, l. 4).

The fact that the NHIS survey resulted in such different numbers for the Northeast (11.4%) than nationally (20.2%)[6] only reinforces the need to *actually* study a service territory, and not simply rely on generalized assertions of competition based on national or regional reports. As Dr. Johnson points out, TDS could have done a survey in its exchange territories similar to the NHIS survey (Phase II, Tr. Day 2, p. 46 ll. 6-15). However, it did not.

In the end, TDS did not in any way study whether its own markets are "workably competitive," even though it has done so in other states. *See* Testimony of TDS Witness Timothy Ulrich, Phase I, Tr. Day 2, p. 38, ll. 3-24. National or regional survey information, FCC-based or otherwise, is insufficient evidence to show that customers in TDS' exchanges are substituting wireless for wireline, or switching back and forth between the two technologies. As a result, TDS has not met its burden of showing wireless is "competitive" with basic local exchange service in its service territories.

d.) TDS Must Undertake Some Minimal Economic Analysis.

The word "competitive" in RSA 374:3-b, III(a), combined with the requirement of findings in RSA 374:3-b, III, compels at least a minimal economic analysis be undertaken in order to demonstrate the existence of competition in each exchange. The Commission has previously concluded it would not "...require a level of competitiveness as would be used in an antitrust analysis or would justify complete deregulation of retail rates..." *See* Order 24,

[6] Presumably the national number would be even higher if it excluded the data from the Northeast, resulting in an even greater contrast in the numbers of persons having only wireless in the Northeast as compared with the rest of the nation.

852, p. 27. As explained in Legal Standards II(f), other provisions of RSA 374:3-b do not deflate or reduce the force of the word "competitive" in RSA 374:3-b, III(a).

The record supports a finding that some economic evaluation is required. "In staff's view whether or not the market for basic local service is actually competitive would require understanding how retail customers respond to the change in price of basic local service." Prefiled Testimony of Dr. Chattopadhyay, Phase I, Ex. 9, p. 3, l. 30 to p. 4, l. 3. "In judging whether two services are correctly viewed as "competitive" with each other, it is helpful to consider whether the providers of those alternatives have been able to wrest a significant share of the market away from the incumbent." Prefiled Testimony of Dr. Johnson, Ex. 7C & 7P, p. 40, l. 22 to p. 41 l. 2. Indeed, even Mr. Ulrich, TDS' economist who testified in Phase I, when asked about the appropriateness of measuring market shares and the use of other indicators of competitiveness, testified that: "I would agree to that, this is what you would do if you were doing a typical analysis of the competitive nature of a market..." (Phase I, Tr. Day 2, p. 37, l.15 to p. 38, l. 6).[7]

In the end, there must be some analysis of whether or not a technology is "competitive," otherwise the word "competitive" in RSA 374:3-b, III(a) would be rendered superfluous. *See also* Legal Standards II(b). Moreover, if we were to simply assume competition exists, then there would be no need for the legislature to mandate fact-finding in RSA 374:3-b, III. *See also* Legal Standards II(f). While an economic analysis at the level of a rigorous "antitrust" approach may not be necessary in reviewing a petition for rate deregulation (Order 24, 852, p. 27), Mr. Bailey asks the Commission re-revisit its earlier analysis and determine that a minimal economic analysis is necessary.

[7] TDS did not do any economic analysis because it believed it was not required to by the state (Phase I, Tr. Day 2, p. 38, ll. 7-10).

Because TDS completed no economic evaluation in any of TDS' fourteen exchanges, it cannot be said that TDS met its burden of proof.

e.) TDS Failed to Meet Its Burden to Show That Available Alternatives Are Priced Comparable to Its Basic Local Exchange Service.

The price of available voice alternatives to basic service must be considered in order to determine whether the market is sufficiently "competitive," as that word is used in RSA 374:3-b, III (a).

TDS fails to consider price in Phase II with respect to the petition of KTC and MCT. Mr. Goulet offers a lay opinion that wireless service is "competitive" with TDS' basic phone service solely because of the "functionality that it offers," but ascribes no importance to pricing considerations and he has no knowledge of wireless pricing plans (Phase II, Tr. Day 1, p. 57, l. 12 to p. 58, l. 8).

Moreover, Mr. Reed confirms TDS did not research "roaming" or the myriad of plans available by the carriers (Phase II, Tr. Day 1, p. 61, ll. 16-20). Nor did he conduct any analysis of the effect of "roaming" on the price of wireless plans in the Sutton and Salisbury exchanges (Phase II, Tr. Day 1, p. 62, ll. 7-10). This, despite the fact that ***Begin Confidential _____ End Confidential*** of the Verizon calls and ***Begin Confidential _____ End Confidential*** Sprint-Nextel CDMA calls in Sutton were "roaming," along with ***Begin Confidential _____ End Confidential*** of the Verizon calls and ***Begin Confidential _____ End Confidential*** of the Sprint-Nextel CDMA calls in Salisbury were "roaming." (Table 2 of Exhibits E and F of KTC-MCT 6C, Phase II, p. 3 of 22). Overall, neither Mr. Reed nor Mr. Goulet provided *any* information or testimony which consider the impact of price on whether wireless is "competitive" with basic local exchange service.

Taking wireless as an example, TDS has not brought forth evidence that wireless is priced comparably with its basic local exchange service. Dr. Johnson notes that TDS' basic local exchange rates could be increased by 50%, 75% or more before reaching the vicinity of most wireless plans. (Bailey Ex. 76 p. 21, ll. 14-15). Indeed, "[d]epending upon the number of minutes included in the plan, at that time [Phase I] access charges [for wireless plans] range from $39.99 to $199.99 per month" (Bailey Ex. 76, p. 20, ll. 2-3), as compared with TDS' basic local exchange rates, with the highest rates being $14.59 per month (Bailey Ex.76, p. 19. ll. 19-20). On its face, wireless prices are not comparable to the price of TDS' basic local exchange service.

Additionally, Dr. Johnson concludes that:

> ...one cannot simply compare the price of the least costly wireless offering to a wireline service that offers unlimited calling. Rather, one needs to compare the price of the wireless offering customers actually purchase, including enough bundled minutes to serve their needs without undue fear of paying a penalty rate for excess minutes.

(Bailey Ex. 76, p. 19, ll. 11-15). TDS has not provided any evaluation or analysis of wireless pricing plans or what plans customers in its territories may or may not be using.

TDS must show that its markets are presently competitive. *See* Legal Standards Section, II(a). It has not done so. TDS did not meet its burden of proof in explaining why or how the pricing plans of alternative providers of voice services are "competitive" with TDS' basic service.

VI. TDS Has Not Met Its Burden of Showing Universal Access To Affordable Basic Telephone Service.

One of the risks in departing from rate-of-return regulation is unaffordable rates, and the price cap of the largest ILEC does not automatically ensure affordability. *See* Legal Standards Section II(e).

If prices are deregulated, the monthly price of basic phone service may go up by as much as 28% in MCT, and some areas of KTC may experience up to a 60% increase (Phase I, Bailey Ex. 7P & 7C, p. 28, ll. 1-9). These increases would have a particularly "severe impact" on low-income consumers (Phase I Bailey Ex. 7P & 7C, p. 28, ll. 15-18). Dr. Johnson noted that low-income persons may actually give up their telephone service in response to an increase of $3 per month:

> ...low income customers have always been known to have lower participation...less use of the phone than other socioeconomic groups. It is well understood pattern and quite significant...But the fact is, they're very price-sensitive. For them, even $10 or $15 a month, by the time you add in the federal charges and the taxes and so on, is a serious issue. And, they say "well, I'll try to get by with using my neighbor's phone" or "I'll try to find a payphone" which used to be a solution that's much less viable than it is as payphone service goes away. But, to the extent there's still payphones, and they can figure "I'll use a payphone go done [sic] the street." That is the sort of alternative that people in that group have to deal with. That those of us who are in the upper income or middle class income simply have trouble relating to.

(Phase I, Tr. Day 2, p. 108, l. 22 to p. 109, l. 18). Dr. Johnson has previously highlighted the importance of preventing the above scenario:

> ...it should never be forgotten that from the standpoint of value of service—as well as in acknowledgement of the positive externalities involved—society, ratepayers, and telecommunication carriers all benefit when nearly everyone participates on a universal, fully interconnected telephone network.

(Phase I, Bailey Ex. 7P & 7C, p. 9, ll. 15-19).

Lifeline alone cannot provide adequate protection to prevent the above scenario from happening. Notably, as of May 29, 2007, TDS had only ***Begin Confidential _____ End Confidential*** Lifeline customers (Phase I, Bailey Ex. 22C).[8] Additionally, TDS has done little or nothing to improve the dissemination of information regarding Lifeline to potentially eligible persons in Wilton and Hollis after the settlement agreement in Wilton and Hollis was approved (Phase II, Tr. Day 2, p. 134, ll. 2-18).

Moreover, there is no evidence that basic local exchange customers have a cost-effective place to go if TDS raises rates. There is *no* evidence to suggest that "...wireless services provide a cost-effective substitute for wireline basic local service for most TDS customers." (Bailey Ex. 76, p. 21, ll. 16-18). Additionally, the pricing pattern seen by cable companies is the "bundled" services at about $100 per month, which may be "...a plausible alternative for somebody who can afford $100 a month...[b]ut for somebody that's used to spending $15 a month or $12...that's a huge difference" (Phase I, Tr. Day 2, p. 103 l. 17 to p. 104, l. 2). In short, there is no evidence that a comparably priced voice alternative is there for persons who cannot afford the possible TDS price increase.

TDS has not presented any evidence or testimony in Phase II describing how KTC or MCT meet the requirements of RSA 374:3-b, III(e). Nor has TDS provided an analysis indicating that the level of "competition" present today will act as an effective regulator of TDS' prices such that prices will in fact remain affordable. As a result, TDS has not met its burden of proof to show that the KTC and MCT alternative regulation plans preserve universal access to affordable basic telephone service.

[8] This includes Lifeline customers for Wilton and Hollis, companies with significantly less access lines.

VII. Conclusion

TDS' new filing only really goes to the availability of wireless in the Sutton and Salisbury exchanges, and that, in itself, is questionable. TDS has provided almost no other information to demonstrate that competition exists for the majority of its retail customers in every one of its fourteen exchanges in compliance with the requirements of both RSA 374:3-b, III(a) and RSA 374:3-b, III(e). As a result, TDS has not met its burden of proof. Mr. Bailey respectfully requests that the Commission reject the petitions of KTC and MCT.

Respectfully submitted,
Daniel A. Bailey
By His Attorney,

New Hampshire Legal Assistance
117 North State Street
Concord, NH 03301
603-223-9750

Alan Linder (DF)
Alan Linder
alinder@nhla.org

Daniel Feltes
Daniel Feltes
dfeltes@nhla.org

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Certificate of Service

I certify that on this date the original and 7 copies of the Public Version of this Brief were filed with the Commission and copies were sent by email to all persons on the service list in this docket.

New Hampshire Legal Assistance

Alan Linder

Alan Linder

Date: November 6, 2009