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

Memorandum of Law in Support of
Petitioners' Motion for Partial Reconsideration of Order No. 24,852

Two of the petitioners in the above captioned docket (this "Docket"), Kearsarge Telephone Company ("KTC") and Merrimack County Telephone Company ("MCT" and, together with KTC, the "Petitioners") submit this Memorandum of Law in support of their Motion for Partial Reconsideration/Rehearing of Order No. 24,852 (the "Order") issued by the New Hampshire Public Utilities Commission (this "Commission") on April 23, 2008.

INTRODUCTION

As this Commission and the parties well know, this Docket arose out of the Petitioners' separate requests for an alternative form of regulation permitted under RSA 374:3-b (and the alternative form of regulation plans submitted thereby collectively being the "AFOR Plans", and individually each being an "AFOR Plan"). The Petitioners filed their respective requests on the same day - March 1, 2007 - as Wilton Telephone Company, Inc. ("WTC") and Hollis Telephone Company, Inc. ("HTC")[1] filed similar petitions seeking an alternative form of regulation under the same statute. The Commission held an evidentiary hearing in this Docket over a two day period on December 4 and 5, 2007.

[1] Each of KTC, MCT, WTC, and HTC are wholly owned subsidiaries of Telephone and Data Systems, Inc. Collectively, KTC, MCT, WTC, and HTC are sometimes referred to as the "TDS Companies".

Through the Order, the Commission granted the final relief sought by WTC and HTC in that the Commission approved of their respective AFOR Plans, as modified by that certain Settlement Agreement, dated November 30, 2007 (the "Settlement Agreement"), by and among the TDS Companies, the Commission Staff, the Office of the Consumer Advocate ("OCA") and segTEL, Inc. ("segTEL") (collectively, the Settling Parties") as applicable to WTC and HTC. The Settling Parties entered into the Settlement Agreement in order to attempt to resolve all of the contested issues in this Docket. A customer of MCT named Daniel Bailey intervened through the assistance of New Hampshire Legal Assistance ("NHLA"). Mr. Bailey objected to the terms of the Settlement Agreement.

The Petitioners respectfully submit that the Commission committed reversible error in denying KTC and MCT's respective AFOR Plans, as modified by the terms of the Settlement Agreement.[2] In general, and as more fully set forth below in the Argument section of this Memorandum, the Commission erred in: (i) its application of the burden of proof; (ii) considering the case presented by KTC to be a "contested case" (*see* Order, at p. 26) as Mr. Bailey has no standing to participate in this Docket against KTC's interests or otherwise complain about the terms of the Settlement Agreement as applicable to KTC; and (iii) its statutory interpretation of RSA 374:3-b. As such, the Petitioners submit that good cause exists for the Commission to reconsider the Order as applicable to KTC and MCT or, in the alternative, to grant a partial rehearing as applicable to those entities.

[2] In this regard, the undersigned counsel represent that WTC and HTC do not seek reconsideration of the Order nor do those parties seek rehearing with respect to the terms of the Order.

STANDARD OF REVIEW

The standard of review for this Motion is well established. The governing statute, RSA 541:3, states:

> Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings. *See Dumais v. State*, 118 N.H. 309, 312 (1978). *See also Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136 (Supreme Court noting that the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed). The Petitioners submit that the correct action to be taken in response to this Motion is for the Commission to reconsider its Order as applicable to the Petitioners and to approve the Petitioners AFOR Plans, as amended by the terms of the Settlement Agreement.

ARGUMENT

I. The Order Is Unlawful and Unreasonable In That It Does Not Treat the Settlement Agreement for KTC as a Full Settlement.

A. The Settlement Agreement as it Relates to KTC is Uncontested.

The Commission stated that it considered this case to be a "contested case", and that it viewed the Settlement Agreement to be "...a settlement agreed to by some but not all parties" as "NHLA, on behalf of Mr. Bailey, opposes the agreement." *See* Order, at p. 26. Yet Mr. Bailey's

opposition to the Settlement Agreement, as applicable to KTC, is completely irrelevant to the analysis and the Commission should have disregarded any and all filings, testimony or other evidence submitted on behalf of Mr. Bailey. Mr. Bailey is a customer only of MCT and, therefore, he has absolutely no interest in the outcome of these proceedings as applicable to KTC.[3] As demonstrated below, Mr. Bailey had no standing to intervene in this Docket or the evidentiary hearing as applicable to any of the petitioners other than MCT.

The Commission's rules provide that the Commission may allow one or more petitions to intervene in accordance with the standards of RSA 541-A:32. *See*. Puc 203.17. Under the New Hampshire Administrative Procedure Act, RSA 541-A, a petitioner must demonstrate that he has not just a mere interest in the proceeding but rather must set forth a right, a duty, a privilege, an immunity or any substantial interest that may be affected by the proceeding. *See* RSA 541-A:32. The Commission has further explained the standard for permitting intervention as requiring a "legal nexus to the outcome of [the Commission's] decision." *See North Atlantic Energy Corporation, The United Illuminating Company, New England Power Company, New Hampshire Electric Cooperative, Inc. and Canal Electric Company Proceeding to Approve the Sale of Seabrook Station Interests*, DE 02-075; Order No. 24,007, Order Denying Rehearing (N.H. Pub. Util. Comm'n, July 8, 2002).

New Hampshire courts have upheld this legal nexus requirement. The New Hampshire Supreme Court has emphasized that, in order for a party to have standing to participate in administrative agency proceedings, the person or entity must demonstrate that "he has suffered or will suffer an 'injury in fact.'" *See Appeal of Richards*, 134 N.H. 148, 154 (1991) (citation

[3] The Commission's classification of the proceedings pertaining to WTC and HTC as a "contested case", and the standards applied thereto, also is not correct. However, given that the Commission approved of WTC and HTC's respective AFOR Plans, as amended by the Settlement Agreement, these entities do not move for any relief.

and quotation omitted). No individual or group of individuals, moreover, has standing when the administrative agency's action affects the public in general. *See id.* at 156. Protection of residential consumers falls to the Office of Consumer Advocate. *Id. See also* RSA 363:28(II) ("The consumer advocate shall have the power and duty to...intervene in any proceeding...in which the interests of residential utility consumers are involved and to represent the interests of such residential utility consumers.")

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. 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. *See id.* at 155-56.

In the present matter, Mr. Bailey filed his petition to intervene on the basis of being a customer in MCT's Contoocook exchange and the Commission granted his petition. Mr. Bailey, however, is not an adequate representative of those persons who might have an interest in these proceedings who live or otherwise contract for telecommunications services outside of MCT's service territory. The record contains no evidence that Mr. Bailey has any interest in the petition filed by KTC. He does not reside within KTC's exchanges and subscribes to no service - basic or otherwise - within those exchanges. Indeed, in Mr. Bailey's Petition to Intervene, in substitution for Mr. Ross Patnode, Mr. Bailey admitted his interest in this proceeding was limited

to his being a residential customer of MCT. *See* Petition for Intervention and to Substitute Daniel A. Bailey for Intervenor Ross Patnode, October 5, 2007, at para. 4. Mr. Bailey therefore lacks any legitimate allegation of actual or potential "injury in fact" related to the regulation of KTC's service territory that could remotely give him standing on which to challenge the Settlement Agreement or the KTC AFOR Plan.

Moreover, a more suitable representative of all residential customers' interests already is present in this Docket. The OCA has intervened in this proceeding for the purpose of protecting the legal interests of all residential ratepayers who might be impacted by each of the Petitioners' proposed AFOR Plans. Therefore, there is no need or justification to expand Mr. Bailey's participation in this Docket to matters outside of MCT's service territory.

Given Mr. Bailey's lack of a legitimate interest in the KTC proceedings, versus the arguably legitimate interests of the stockholders in *Appeal of Richards,* the Commission committed reversible error in determining that these proceedings were a "contested case" (*see* Order, at p. 26) as applicable to KTC. In *Appeal of Richards*, the stockholders arguably had some direct interest in the proceedings as the value of the stock could have fluctuated or outright diminished, assuming the stockholders' claims had merit. Yet, in the present Docket, there was no interested party in these proceedings that contested the proposed KTC AFOR Plan, as amended by the Settlement Agreement. Mr. Bailey absolutely has no interest at stake - direct or indirect - in connection with how or in what manner this Commission regulates KTC. By erroneously viewing the Settlement Agreement as it relates to KTC as being contested, KTC was substantially prejudiced by the Commission's ensuing analysis in the Order. The Petitioners therefore assert that reconsideration of whether these proceedings, as applicable to KTC, were contested due to Mr. Bailey's opposition is warranted in order to conform the Order to applicable

law and the factual record. KTC requests that, upon such reconsideration, the Commission treat the KTC AFOR Plan, as amended, as being uncontested.

B. As an Uncontested Settlement, the Commission should Approve the KTC Settlement Agreement.

Under applicable rules, "[i]f a stipulation is filed and is not contested by any party, the stipulation shall bind the commission as to the facts in question, and the commission shall consider the stipulation as evidence in the decision of the matter." Puc 203.20(d). All parties with a legitimate interest in the terms of the KTC AFOR Plan determined that the conditions and amendments to the plan, as contained in the Settlement Agreement, met the requirements of RSA 374:3-b. Having been presented with no evidence by any interested party to contradict the determinations of fact contained in the KTC AFOR Plan, as amended by the Settlement Agreement, it was error for the Commission to refuse approval of KTC's requested relief and the amended AFOR Plan. On this basis, KTC respectfully requests that the Commission move forward with approving the KTC AFOR Plan, as amended by the Settlement Agreement, as all issues of fact concerning the criteria for approving an alternative regulation plan under RSA 374:3-b have been resolved in favor of KTC.[4]

II. The Order Is Unlawful and Unreasonable In That It Fails To Consider the Substantial Evidence Presented by the Petitioners.

Assuming *arguendo* that the KTC proceedings, through Mr. Bailey's intervention, consisted of a "contested case" (which is not correct), the Petitioners still met their burden of providing sufficient evidence that both of the amended KTC and MTC AFOR Plans met the

[4] As set forth below, KTC also submits that the Commission's findings related to the availability of competitive alternatives pursuant to RSA 374:3-b and its interpretation of that governing statute are erroneous as a matter of law as applied to KTC and not supported by the record evidence.

requirements of RSA 374:3-b to justify approval by the Commission of the relief sought by the Petitioners at the conclusion of the evidentiary hearing.

A. The Standard for the Burden of Proof.

Generally, the burden of proof includes both the burden to go forward with the evidence and the burden of ultimate persuasion. *See* AmJur Adminlaw §355. Certainly, the Petitioners bear the burden of proof to establish the availability of other competitive services in the Sutton and Salisbury exchanges. *See ex.* Puc 203.25. The Petitioners submit that the evidence presented by them met their burden of establishing their prima facie case of meeting all requirements under RSA 374:3-b. Having met this burden, those opposing the Petitioners' case were required to present evidence to rebut the Petitioners' prima facie case. *See* AmJur Adminlaw §355. *See In re Rockingham County Sheriff's Dept.*, 144 N.H. 194, 197 (1999); *Mahoney v. Town of Canterbury*, 150 N.H. 148, 151 (2003)). *See also Appeal of Cote, 139 N.H. 575, 578 (1995)* (holding that once the moving party satisfies its burden of proving its prima facie case, the burden of production shifts to rebut the claims made).

B. Ample Information from a Variety of Sources Supported the Petitioner's Position such that the Petitioners Met their Burden of Proof.

The Commission focused their analysis of the availability of competitive broadband, wireline and wireless service in the Sutton exchange for MCT and the Salisbury exchange for KCT as each of the exchanges were proven to be the most rural exchange in their respective company service territories. In discussing the evidence presented by the Petitioners about the MCT and KCT exchange areas, including Sutton and Salisbury, the Order acknowledges that the Petitioners used "web sites, service area coverage maps, data filed with the FCC, advertisements, customer surveys and information from TDS customer sales and service personnel to estimate

the availability of competitive services." *See* Order, at p. 5. Yet, elsewhere in the Order, the Commission states that the Petitioners only relied on "wireless coverage estimates by wireless providers" as evidence of availability. *See* Order, at p. 29. This conclusion is inconsistent and erroneous.

In fact, the Petitioners clearly offered a great deal of evidence in support of their case-in-chief. As Mr. Reed testified:

> **Q. Are any of the competitors operating in the four companies certified as Competitive Eligible Telecommunications Carriers (CETCs) and are they receiving Federal Support?**
>
> A. Yes. RCC Minnesota, Inc. (Unicel) is currently certified and is receiving support. US Cellular has applied to receive Federal support dollars. In FCC Order DA 05-2673 in CC Docket No. 96-45, the FCC granted the petition of RCC to be designated as an ETC in portions of its licensed service area in NH. Appendix B of that Order lists the specific Wire Centers for Inclusion in the RCC NH ETC Service Area. Appendix B includes 25 Wire Centers, 15 of which are Wire Centers served by MCT, KTC, HTC and WTC.
>
> **Q. How is this Order granting ETC status an indicator of competition in the TDS NH serving areas?**
>
> A. FCC Order DA 05-2673 in Docket No. 96-45 ("Attachment F") states "*RCC has demonstrated through the required certification and related filings that it now offers, or will offer upon designation as an ETC, the services supported by the federal universal service mechanisms*". As I understand the requirements of FCC rule 47 CFR § 54.101(a), the nine supported services include (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers.

See Direct Testimony of Michael C. Reed, at p. 10 (Ex. KTC 2 (public) and MCT 2 (public), and the related attachments and appendices thereto).

In addition to wireless coverage estimates, the following evidence (in summary format) was specifically provided about the MCT and KTC exchanges, including the Sutton and Salisbury exchanges:

1. That VoIP services are available to MCT and KTC customers, and VoIP services are offered by unaffiliated competitive providers and are ready substitutes for the local, toll, access, vertical and other services provided by the Petitioners. *See ex.* Direct Testimony of Mr. Reed, at p. 4:12-16 (Ex. KTC 2 (public) and MCT 2 (public)).

2. Through the Settlement Agreement, MCT and KTC are opening their exchanges to entry by competitive local exchange carriers ("CLECs") and that an expedited process for addressing interconnection is contained in the Settlement Agreement. Accordingly, wireline service will be available to customers within the MCT and KTC exchanges, including Sutton and Salisbury, as of the effective times of the alternative regulation plans. *See* Tr. 12/04/07, 37:16-22 and 50:11-24.

3. With waiver of the rural telephone company exemption provided under 47 U.S.C. §251(f)(1), the Petitioners' basic service will be available for resale at a wholesale discount by CLECs and that broadband service will be available to be offered by competitors of MCT and KTC. *See* Tr. 12/04/07, 40:1-12.

4. The Petitioners have suffered the effects of competition which directly and adversely affect their respective business model and financial success as local exchange carriers ("LECs"). Each of the Petitioners, as a LEC, has suffered significant line losses. As stated aptly by Mr. Reed:

> 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. While we are experiencing a decline in access lines, the 2005 Population Estimates of New Hampshire Cities and Towns prepared by the New Hampshire Office of Energy and Planning indicate population growth in the towns we serve between the last U.S. Census in 2000, and 2005. 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.

See ex. Direct Testimony of Mr. Reed, at p. 4:14-23 - 5:1-2 (Ex. KTC 2 (public) and MCT 2 (public)). *See also* Direct Testimony of Mr. Timothy W. Ulrich, at p. 4:18-22 - 5:1-2 (Ex. KTC 3 (public) and MCT 3 (public)).

5. Incredibly, Mr. Bailey's witness, Dr. Benjamin Johnson agrees that the Petitioners incur access line losses due to wireless competition. Dr. Johnson testified during the second day of the evidentiary hearing that:

> And, I wrote about in my testimony, my interpretation of that limited data is consistent with the general industry pattern, which is that the number of customers who are cutting the cord to go wireless is a very small percentage currently. Nationwide, it depends on how you measure it, different studies, but somewhere in the ballpark of 10 percent. So, at most, if, you know, 10 percent of the customers no longer have a wireline service, and if they had previously had one, which is a big "if" that probably doesn't apply, then you've got 10 percent of your lines lost from that.

Tr. 12/05/07, 99:9-20. Beyond this ten percent:

> ... what you have is the phenomena that we saw where there was growth in the number of second lines, as people were making dial-up use of the internet, and it showed up in various ways. There were various spikes in local minutes that affected interstate/intrastate jurisdictional issues, a lot of things. It's well understood that that phenomena happened, and it's now fading. It's like a wave going up, and now it's fading back down.

Tr. 12/05/07, 7:14.

6. On December 12, 2007, Comcast Phone of New Hampshire, LLC ("Comcast Phone") filed a Form CLEC-10 Registration Statement seeking authorization to engage in business within the service territories of the TDS Companies as a competitive local exchange carrier. In turn, this Commission established Docket DT 08-013. The Commission should take administrative notice of this filing and consider the filing evidence of competition being

developed in the service territory of KTC and MCT.[5] *See* Puc. 203.27(a)(2). Comcast Phone's application specifically lists the Salisbury exchange as a service territory for the provision of competitive services.

This evidence clearly supports the existence of competition in all of the exchanges served by KTC and MCT and the further development of competition in these areas. The fact that Dr. Johnson, or other witnesses, prefer differing levels of competition or different types of competition, does not negate the fact that other service providers secure business and entire customers from the Petitioners. Why the loss of a "second line", "local minutes" or an overall ten percent (potentially) line loss does not support a finding of competition is never analyzed in the Order. Why the Comcast Phone application does not support a finding of competition is never analyzed. Why the existence of a certified ETC in the applicable service areas does not support a finding of competition is never analyzed. Why the existence of widespread broadband availability and the competitive offerings available through the internet does not support the finding of competition is never analyzed and why the focus must be on the provider of broadband service under the terms of the statute is not explained (*see* Section III *infra).* The failure by the Commission to evaluate and analyze such evidence establishing availability of other competitive services was unreasonable. *See* RSA 541-A:35. The record evidence presented by the Petitioners with respect to the Salisbury and Sutton exchanges fully supports and justifies a finding of the availability of third party offerings.

[5] In advancing this position, the Petitioners are mindful of their intervention in Docket DT 08-013 and their representations to this Commission that they would adhere to the terms of the Settlement Agreement if the Commission approved of the terms of the amended AFOR Plans. *See* Motion by TDS Companies for Suspension of Order No. 24,843, dated April 16, 2008 filed in DT 08-013, at paragraph 12.

C. The Evidence Presented by the Petitioners Was Not Sufficiently Rebutted by Other Parties.

While the Petitioners have provided (i) actual evidence of the availability of wireless and VoIP services via the broadband services available in the Sutton and Salisbury exchanges and (ii) evidence concerning the continued development of competition in all of the Petitioners' service territory, Mr. Bailey provided no direct evidence to refute the Petitioners' case-in-chief and Staff provided a mere supposition of lack of wireless availability without any definitive proof.

Staff provided the prefiled testimony of Ms. Josie A. M. Gage, dated October 12, 2007. *See* Staff Ex. 10. Ms. Gage acknowledges that the Salisbury and Sutton exchanges are covered, but opines that these two exchanges are the "least well covered". *See* Prefiled Testimony of Ms. Gage, at p. 3:5-8. In determining whether she agreed with the evidence submitted by the Petitioners with respect to wireless coverage of the two exchanges at issue, Ms. Gage noted that she relied on information gathered through a telephone call to Wilson Electronics, Inc. and e-mail communications with ConnectME Authority. *See* Prefiled Testimony of Ms. Gage, at p. 7:10-21. In reviewing marketing literature from various carriers, Ms. Gage then concludes that standards from ConnectME in comparison to marketing literature requires nothing less than a "best" coverage area.

Yet the Petitioners clearly refuted this evidence through independently generated evidence. As fully explained by Mr. Reed:

> **Q. Ms. Gage states that TDS did not provide any specific evidence as to the availability of wireless service by exchange [Gage Direct at p. 6]. Do you agree?**
>
> A. No. Again I am disappointed in Ms. Gage's comment. There is no basis for this statement. We provided both maps and data with the Petition, as well as additional information via data responses to Staff and intervener data requests. For example as part of Staff 1-37 we provided a map depicting wireless coverage areas which was based on a product called the CoverageRight map, which was provided by an outside firm and

> tracked the availability of all wireless providers. This map is widely used in the industry. Our company utilizes the CoverageRight map to monitor wireless competition. In response to staff 2-37, additional detail was added at the request of Staff to define exchange boundaries on the maps.

See Prefiled Rebuttal Testimony of Mr. Reed , at p. 20:4-14 (Ex. KTC 4 (public) and MCT 4 (public)). *See also* Order Adopting Framework, dated March 4, 2008, at ps. 8-9, issued by the State of New York, Public Service Commission for the docket labeled "In the Matter of Examining a Framework for Regulatory Relief", Case 07-C-0349 (Public Service Commission noting that it relied on independently produced wireless coverage maps similar to those produced by the TDS Companies in the present Docket). Moreover, without citing confidential information, Mr. Reed presented testimony noting that the overwhelming majority of customers in the Salisbury exchange have access to digital subscriber line ("DSL") service, and overall broadband service was available to a majority of residents in the exchanges at issue. *See* Prefiled Rebuttal Testimony of Mr. Reed , at p. 18:5-11, and 20:16-20 (Ex. KTC 4 (confidential) and MCT 4 (confidential)).

Consequently, given the totality of the record evidence, the Petitioners respectfully submit that the Commission erred in finding a lack of "[available] third party offerings" and the dismissal of the evidence concerning DSL service. It was unreasonable for the Commission to make a finding of lack of availability of other service after having been presented with insufficient evidence to rebut the Petitioners' burden of proof and the Petitioners accordingly request that the Commission re-evaluate its findings in light of the evidence actually presented.

The Commission should reconsider this portion of the Order and continue through the analysis of whether the existing alternatives in fact are competitive (*see* Order, at p. 29; Commission noting that it did not consider this issue). Given the extensive evidence cited above

and in Section II of this Argument, the Petitioners submit that the evidence overwhelmingly demonstrates and supports a finding of such alternatives being competitive within the meaning of RSA 374:3-b.

III. Principles of Statutory Construction Favor the Approval of the Settlement Agreement.

A. The Principles of Statutory Construction.

When examining the language of a statute, the New Hampshire Supreme Court ascribes the plain and ordinary meaning to the words used. *Town of Amherst v. Gilroy*, --- A.2d ----, 2008 WL 2097147 N.H., 2008 citing *ElderTrust of Fla. v. Town of Epsom,* 154 N.H. 693, 697, 919 A.2d 776 (NH 2007). The Supreme Court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* Nonetheless, a statute must be interpreted in the overall context of the applicable statutory scheme and not in isolation. *See State v. Langill,* 945 A.2d 1, 8 (NH, 2008) citing *Bendetson v. Killarney, Inc.,* 154 N.H. 637, 641, 913 A.2d 756 (NH 2006).

Given the conflicting interpretations of RSA 374:3-b advanced by the parties to this Docket, however, the situation leaves this Commission in the position of having to choose which interpretation best reflects what goal the legislature sought to achieve through the statutory language. *See N.H. Assoc. of Counties v. NH Dept. HHS*, 930 A.2d 400, 405 (NH 2007). This Commission has unequivocally stated that when faced with conflicting interpretations of a statute posed by the parties, it will look to "legislative intent as expressed through its legislative history." *See* Re City of Nashua, 90 NH PUC 15 (2005) at p. 11-12. *See also In re Martin*, 943 A.2d 754, 756-757 (NH, 2008) (Supreme Court conducting an analysis of the legislative history for RSA 458-C et seq.)

B. Application of the Principles of Statutory Construction Favor Approval of the Settlement Agreement in its Entirety.

In light of the conflicting interpretation of RSA 374:3-b, it is proper for the Commission to review applicable legislative history. The Legislature provided no definition of "competitive wireline, wireless or broadband service" 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 on October 28, 2005 (the "Study Committee Report"). The Study Committee Report stated:

> 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. 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.

For example, in the case involving the approval of the reorganization plan of Public Service Company of New Hampshire, 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 Petitioners interpretation of RSA 374:3-b, as well as the Staff and OCA's interpretation of the statute in the context of the Settlement Agreement, is fully supported by the broad statutory scheme which governs the Commission. 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.[6]

> 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).

The Commission is not to apply these statutory directives in a vacuum. Instead, the Commission should have reviewed the evidence together with the Settlement Agreement and the applicable statutes (RSA 374:3-b, RSA 541-A:38 and RSA 542-A:31), and approved of the Petitioners' respective AFOR Plans as amended.

Moreover, the Legislature vested this Commission with 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. Instead, the Commission should afford the Petitioners with the opportunities welcomed by

[6] The Petitioners re-emphasize that the Docket as applicable to KTC was not a "contested case" under current New Hampshire law.

the Legislature (i.e., gauge the success of alternative regulation [when] someone tries it and exposes its benefits and/or shortcomings).

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 the various amended AFOR Plan features as that competition further develops and the backstop of the Commission's authority to call the Petitioners back in if the AFOR Plans do not meet the requirements of the statute at a later date. *See ex.* Tr. 12/04/07, 37:2-24 - 38:1; Tr. 12/04/07, 51:22-24.

C. Application of the Principles of Statutory Construction Favor the Admissibility of Evidence Related to Comcast Phone's Application to Provide Service in the Petitioners' Service territory.

The Commission held that the present tense of the word "is" contained within Subsection III(a) of RSA 374:3-b required it to consider the state of competitiveness at the time of its decision. *See* Order, at p. 26 (Commission holding that "...[w]e agree with NHLA that the present tense used in the statute requires us to consider the state of competitiveness **at the time of our decision** and not as it may develop in the future) (emphasis added)). Yet, the Commission stated later in the Order that its findings are based upon evidence presented "...**at the hearing**..." and the availability of competitive alternatives at that time. *See* Order, at p. 30 (emphasis added). The Petitioners submit that such inconsistent application of statutory construction theories is unlawful and unreasonable. As such, the Commission's denial of the Staff's Motion to Reopen the Record should be reconsidered and the motion should be granted.

In the four month period between the hearing dates on December 4 and 5, 2007 and the date of the Order, important developments occurred that had direct bearing on the issue of availability of competitive alternatives in the Petitioners' service territory. Specifically, Comcast filed a CLEC petition to serve a number of towns in the Petitioners' service territory, including Salisbury. Moreover, Comcast's filing was made just days after the conclusion of the hearings in this matter which gave the Commission ample time and opportunity to consider the weight of that particular development as it relates to these proceedings. Not only did the Commission's refusal to consider Comcast's petition result in a constrained analysis of the phase-in approaches taken in the Settlement Agreement, the refusal violated the Commission's obligation to consider the evidence of competitive alternatives as of the date of its decision. The Commission's analysis therefore should be re-evaluated to reflect the state of competitive alternatives. In doing so, the Commission should find that there is sufficient availability of competitive alternatives in the MCT and KTC service territories as well.

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CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that the Commission:

A. Reconsider those portions of its Order as specified herein, and

B. Approve of the terms of the Settlement Agreement and the amended AFOR Plans of KTC and MCT; or in the alternative to requests A and B

C. Grant a partial re-hearing to address the issues raised in this Motion.

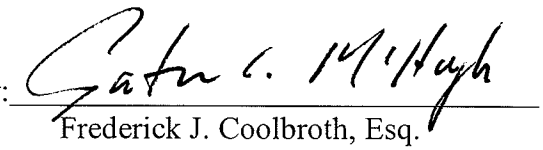
Respectfully submitted,

KEARSARGE TELEPHONE CO., AND
MERRIMACK COUNTY TELEPHONE CO.

By their Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: May 23, 2008

By: 

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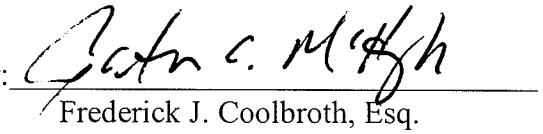
CERTIFICATE OF SERVICE

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

Dated: May 23, 2008

By: 

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