STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 07-027

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

Petitions for Approval of Alternative Form of Regulation

Order Denying Motion for Rehearing

O R D E R N O. 24,885

August 8, 2008

I. INTRODUCTION

This proceeding concerns four petitions, filed on March 1, 2007, by Kearsarge Telephone Company (Kearsarge), Wilton Telephone Company (Wilton), Hollis Telephone Company (Hollis) and Merrimack County Telephone Company (Merrimack), (collectively, the TDS Companies), each a wholly-owned subsidiary of Telephone & Data Systems, Inc. (TDS). The petition sought approval of an alternate form of regulation (AFOR) for the TDS Companies pursuant to RSA 374:3-b, applicable to incumbent local exchange carriers with fewer than 25,000 access lines.

On December 3, 2007, the TDS Companies, segTEL, Office of Consumer Advocate (OCA) and Staff filed a settlement agreement amending the four alternative regulation plans and recommending their approval. Only one party, Merrimack customer Daniel Bailey (represented by New Hampshire Legal Assistance) opposed the settlement.

On April 23, 2008, in Order 24,852, we granted Wilton and Hollis an alternative form of regulation consistent with the Settlement. However, we rejected the settlement to the extent it provided for alternative regulation of Kearsarge and Merrimack. We did not find that the record

supported a requisite finding of available alternative services in each of the exchanges, based on one exchange in each of the two service territories: Salisbury in Kearsarge and Sutton in Merrimack. *See* RSA 374:3-b, III(a) (requiring availability of "[c]ompetitive wireline, wireless or broadband service . . . to a majority of the retail customers in each of the exchanges served" by petitioning company). We determined that we would keep the record open for one year to allow for the submission of further evidence concerning alternative service availability. We also provided for an expedited hearings process should additional facts emerge during the one-year period.

II. MOTION OF KEARSARGE AND MERRIMACK FOR PARTIAL RECONSIDERATION OF ORDER NO. 24,852

On May 23, 2008, Kearsarge and Merrimack filed a motion for partial reconsideration or rehearing of Order No. 24,852 pursuant to RSA 541:3. Kearsarge and Merrimack took the position that the Commission's factual finding that competitive alternatives were not available for Kearsarge and Merrimack customers, pursuant to RSA 374:3-b, II (a), was erroneous. The movants contended that the Commission committed reversible error in: (1) treating the settlement as contested, at least as to Kearsarge, (2) applying the burden of proof incorrectly, and (3) misconstruing RSA 374:3-b.

A. Mr. Bailey's Standing

Kearsarge and Merrimack argued that Order No. 24,852 is unlawful because it does not treat the settlement and AFOR plan for Kearsarge as uncontested. Kearsarge and Merrimack asserted that, as a customer of Merrimack, Mr. Bailey had no standing to oppose the Kearsarge petition. According to Kearsarge and Merrimack, there was no viable party in these proceedings that contested the proposed alternative form of regulation plan for Kearsarge. The movants

contend that the Commission should simply have disregarded all filings, testimony or other evidence submitted by Mr. Bailey in making a determination on the Kearsarge petition.

Kearsarge and Merrimack draw the Commission's attention to RSA 541-A:32, which concerns intervention in administrative proceedings. According to the movants, RSA 541-A:32 requires an intervenor to demonstrate not just a mere interest in the proceeding but that a duty, privilege, immunity or some substantial interest may be affected by the case. Kearsarge and Merrimack noted that in *North Atlantic Energy Corp.*, Order No. 24,007 (2002), 87 NH PUC 455, 456, the Commission characterized standard for intervention as requiring a "legal nexus to the outcome of the Commission's decision. The two companies pointed out that New Hampshire courts have upheld the legal nexus requirement requiring an injury in fact. According to Kearsarge and Merrimack, the New Hampshire Supreme Court adopted a similar standard in *Appeal of Richards*, 134 N.H. 148, 154 (1991).

Further, according to Kearsarge and Merrimack and relying again on *Richards*, the Office of Consumer Advocate is the party charged with the protection of residential customers, *citing Appeal of Richards*, 134 N.H. 148 (1991). The two companies maintained that the OCA is a suitable representative of all residential customers. Conversely, they argued that Mr. Bailey is not an adequate representative of customers who live or contract for telecommunications services outside of the Merrimack service area.

Kearsarge and Merrimack further observed that the Commission's own rules require it to accept stipulated facts not contested by any party as evidence in the matter. See N.H. Code Admin. Rules Puc 203.20(d). They contended that all parties with a legitimate interest in the Kearsarge petition support the Settlement and have determined that it is consistent with the controlling statute, RSA 374:3-b.

B. Burden of Proof

Kearsarge and Merrimack also argued that they met their burden of proof by providing sufficient evidence that their AFOR plans meet the requirements of RSA 374:3-b. Specifically, Kearsarge and Merrimack contended that they established a prima facie case for the availability of other competitive services in the Sutton and Salisbury exchanges. According to Kearsarge and Merrimack, no party provided evidence sufficient to rebut the petitioners' prima facie case. The two companies further asserted that the evidence the petitioners presented at hearing overwhelmingly demonstrated and supported a finding of the availability of third-party offerings and a competitive market.

As record evidence on these issues, Kearsarge and Merrimack pointed to Mr. Reed's testimony concerning the designation of RCC Minnesota as an eligible telecommunications carrier (for purposes of receiving federal universal service funds) in 15 wire centers serviced by the TDS Companies. Kearsarge and Merrimack also pointed to the fact that VoIP (voice over internet protocol) services are available by unaffiliated competitive providers over broadband as examples of available competitive offerings. Kearsarge and Merrimack asserted that once the settlement is approved, the Merrimack and Kearsarge exchanges will waive their rural exemption[1] and allow competitive local exchange carriers to do business in their service territories. Kearsarge and Merrimack referenced testimony on line losses and the significant decline of minutes of use and access minutes as evidence that competitive alternatives exist. Finally, Kearsarge and Merrimack stated that the Comcast Phone of New Hampshire, LLC application for CLEC (competitive local exchange carrier) certification, submitted after hearings

[1] "Rural exemption" refers to the exemption certain incumbent local exchange carriers enjoy, pursuant to 47 U.S.C. § 251(f)(1), from otherwise-applicable obligations to interconnect with competing carriers.

in this docket, should have been analyzed by the Commission in these proceedings. Kearsarge and Merrimack took the position that the Comcast CLEC application provides additional evidence of available competitive services.

Relying on *Rockingham County Sheriff's Dept.*, 144 N.H. 194, 197 (1999), *Mahoney v. Town of Canterbury*, 150 N.H. 148, 151 (2003), and *Appeal of Cote*, 139 N.H. 575, 578 (1995), Kearsarge and Merrimack contended that it was the responsibility of opposing parties to present evidence to rebut the TDS Companies' case. Kearsarge and Merrimack contended that Mr. Bailey provided no direct evidence to refute the petitioners' case, and that Staff merely described a supposition of lack of wireless availability without any definitive proof. Kearsarge and Merrimack concluded that, given the totality of the record evidence, the Commission erred in finding a lack of available third-party offerings. Kearsarge and Merrimack asserted that it was unreasonable for the Commission to make a finding of lack of availability of other services after having been presented with insufficient evidence to rebut such evidence. The two companies requested that the Commission reevaluate its findings and rule in favor of alternative regulation for Kearsarge and Merrimack as provided in the settlement.

C. Interpretation of RSA 374:3-b

Kearsarge and Merrimack contended that principles of statutory construction favor the approval of the settlement. They maintained that, in the face of conflicting interpretations of RSA 374:3-b advanced by the parties and Staff, the Commission must choose which interpretation best reflects the intent of the Legislature. The two companies urge the Commission to consult the relevant legislative history, suggesting that it reveals a legislative decision to leave to the Commission's expertise the discernment of what precisely is sufficient to

qualify as "competitive wireline, wireless or broadband service" within the meaning of RSA 374:3-b. But, according to Kearsarge and Merrimack, the Commission must do so in light of explicit legislative findings in 2005 N.H. Laws Ch. 263:1 that favor the abandonment of full regulation of small ILECs as competition-enhancing.

In addition, Kearsarge and Merrimack note that both the Administrative Procedure Act and the Commission's own rules favor the resolution of cases by settlement. See RSA 541-A:38 and N.H. Code Admin. Rules 203.20(b). According to Kearsarge and Merrimack, it is inconsistent with the notion of a settlement for the Commission to determine "which party's litigation position was correct." Kearsarge and Merrimack Memorandum of Law in Support of Motion for Partial Reconsideration at 18.

Finally, Kearsarge and Merrimack ask the Commission to reconsider its denial of Staff's motion to reopen the record to include in it evidence concerning the Comcast application for authority to operate as a CLEC in the service territory of the petitioners. According to Kearsarge and Merrimack, although Order No. 24,852 correctly concluded that the decision on whether to adopt an AFOR turns on the state of competition at the time of the order, the Commission violated this notion by limiting its consideration to evidence adduced at hearing as opposed to evidence that came into existence after the hearing. In the view of Kearsarge and Merrimack, the Commission's refusal to consider Comcast's petition in this docket resulted in a constrained analysis of the phased-in approaches taken in the settlement and violated the Commission's obligation to consider evidence of competitive alternatives in its decision. Kearsarge and Merrimack conclude that the Commission's analysis should be reevaluated to reflect the state of competitive alternatives and to find that there is sufficient availability of competitive alternatives in the Kearsarge and Merrimack service territories.

III. OBJECTION OF MR. BAILEY TO KEARSARGE AND MERRIMACK'S MOTION FOR PARTIAL RECONSIDERATION OF ORDER 24,852

A. Mr. Bailey's Intervention in the Kearsarge Petition

Mr. Bailey argued that he had suffered or would suffer an injury in-fact and that his rights might be directly affected should Order 24,852 be reversed as to Kearsarge even though he is not a Kearsarge customer. According to Mr. Bailey, if the alternative regulation plan for Kearsarge as amended by the settlement is approved, Kearsarge would no longer be subject to Commission oversight or regulatory control as to rates, overall earnings and affiliate agreements. He argued that less regulation of Kearsarge and its affiliate arrangements could affect all of TDS's New Hampshire customers. Mr. Bailey suggested that since the TDS New Hampshire operations are commonly owned and operated there would be an incentive and potential ability to shift costs form unregulated services (i.e., from Kearsarge's operations) to regulated services (e.g., to Merrimack's operations). Mr. Bailey argued that the reduction in oversight and regulatory control associated with Kearsarge's plan could affect the rates and services of other TDS customers like him.

Mr. Bailey also contended that the pricing freedom in the Kearsarge plan could have a negative effect on competition in the area. He theorized that Kearsarge could use its pricing flexibility to manipulate price levels to its own strategic advantage, resulting in an anticompetitive environment, creating instability and uncertainty in the market, and making it more difficult and more risky for other firms to enter. Mr. Bailey suggested that if competition is prevented in the Kearsarge service area it will have a negative impact on the prospects for competition in adjacent areas, since competitors would be denied economies of scale that would be present for serving a larger group of customers.

Finally, Mr. Bailey contended that approval of the Kearsarge plan would allow bundled offerings at more attractive prices. According to Mr. Bailey, as a result of common ownership and efficiency Merrimack would have an incentive to respond with similarly priced bundled offerings. In his view, investments in additional bundled offerings would be difficult to separate from the cost of service of basic local service. According to Mr. Bailey, the risk of cost shifting to basic service in Merrimack from enhanced bundled services affects his interests as a low income customer of Merrimack.

B. Burden of Proof

Mr. Bailey next asserted that neither Kearsarge nor Merrimack had met their burden of proof regarding availability of competitive services in their respective service territories. Mr. Bailey pointed out that there was no evidence in the record that RCC Minnesota was actually serving customers in the Kearsarge and Merrimack service territories. According to Mr. Bailey, there likewise was no evidence that Comcast was offering telephone service in the Kearsarge or Merrimack territories. Further, Mr. Bailey maintained that there was no evidence that any TDS customers have ported their telephone numbers to a VoIP provider in Kearsarge or Merrimack and there is no evidence that any non-TDS company is actually offering broadband service in Kearsarge or Merrimack territories.

C. Interpretation of RSA 374:3-b

Finally, Mr. Bailey argued that the Commission had correctly interpreted and applied RSA 374:3-b to Kearsarge and Merrimack. Mr. Bailey agreed with the assertion of Kearsarge and Merrimack that the Legislature left to the Commission's judgment and expertise the determination of what precisely constitutes the presence of competition sufficient to allow for an

AFOR approval for a small ILEC under the statute. According to Mr. Bailey, the Commission exercised that judgment and expertise appropriately.

IV. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when the motion states good reason for such relief. Under RSA 541:3, the petitioner must explain why any proffered new evidence could not have been presented in the underlying proceeding. *Appeal of Gas Service, Inc.*, 121 N.H. 797, 800 (1981), *and O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 380 A.2d 1094 (1977). This may be shown by new evidence that was unavailable at the original hearing, or by identifying specific matters that were either "overlooked or mistakenly conceived" by the deciding tribunal. *Dumais v. State*, 118 N.H. 309, 3286 A.2d 1269 (1978). A successful motion does not merely reassert prior arguments and request a different outcome. *See Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001), and *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003).[2]

A. Mr. Bailey's Standing

We are unable to agree with Kearsarge and Merrimack that because Mr. Bailey is not a customer of the former, he lacked standing to object to the settlement as to Kearsarge and, thus, we were obliged to treat the settlement as uncontested with respect to Kearsarge. At the outset of the case, the TDS Companies made the strategic choice to present its four separate AFOR requests as a consolidated petition. Prior to the hearings, they did not object to, or seek to limit, Mr. Bailey's participation as a party to the entire case, although they could have done so. *See*

[2] To the extent that parties have styled their requests as seeking reconsideration or modification as opposed to rehearing, we apply the same standard, on the assumption that all issues raised here are ones the parties may wish to preserve for appeal. *See* RSA 541:4 (requiring preservation of appellate issues by seeking RSA 541:3 rehearing).

RSA 541-A:32, III(a) (authorizing presiding officer to limit intervenor's participation "to designated issues in which the intervenor has a demonstrated interest") and RSA 541-A:32, V (specifying that the presiding officer "may modify [order granting, denying or limiting intervenor participation] at any time"). In fact, they raised no issue about Mr. Bailey's standing to object to the settlement until they submitted their reply to Mr. Bailey's post-hearing brief on February 8, 2008. In these circumstances, nothing in RSA 541-A:32 required us to limit or condition Mr. Bailey's intervention and it would have been inequitable to take that step in Order No. 24,852 based on the February 8, 2008 request; we decline to do so now.

Moreover, even if it were appropriate for us to have considered RSA 541-A:32 issues post-hearing, we would not limit Mr. Bailey's status as an intervenor or otherwise determine he lacks standing to raise issues as to Kearsarge. As he points out in his opposition to the Kearsarge/Merrimack rehearing motion, it is more than plausible that placing Kearsarge on an AFOR plan could have effects on customers of the other petitioners. Because Mr. Bailey is a customer of Merrimack which is under common ownership with Kearsarge, a change in the rates and regulatory oversight of Kearsarge may impact customers of other affiliates such as Merrimack. Since Merrimack and Kearsarge occupy adjacent service territories we believe that Mr. Bailey's arguments concerning potential competitive impacts on service territories adjoining Kearsarge may also have merit. Although impacts on Mr. Bailey caused by our regulation of Kearsarge are more attenuated than those caused by our regulation of Merrimack, we find the potential impacts are sufficient to maintain a basis for Mr. Bailey's intervention in the Kearsarge petition.

Our final observation on this issue concerns the argument of Kearsarge and Merrimack that the participation of OCA in this case is relevant to the question of Mr. Bailey's status as an

intervenor. OCA is charged with representing the interests of residential utility customers in proceedings before the Commission. *See* RSA 363:28, II. But the Legislature did not specify that this representation be exclusive, nor does it instruct the consumer advocate to advance the specific interests of low-income customers, whose concerns are not always coincident with the interests of residential customers generally. The Administrative Procedure Act clearly contemplates that parties with overlapping and even identical interests will participate in contested cases as parties, authorizing (but not requiring) agencies to direct such parties to combine their efforts. *See* RSA 541-A:32, III(c). The time for raising such a possibility is long since past, for the reasons already stated. We have no authority to exclude outright a party, otherwise meeting the standard for intervention, based on the potentially duplicative nature of the intervenor's participation.

Since Mr. Bailey remained, and remains, a full intervenor subject to no RSA 541-A:32 limitations on his right to participate and to raise issues, he had standing to challenge the settlement agreement as to Kearsarge and, thus, the Commission was not obliged to treat the settlement agreement as unopposed with respect to that particular TDS affiliate.[3] Even if the situation were otherwise, the argument of Kearsarge and Merrimack on standing overlooks an important and longstanding practice of the Commission. We scrutinize settlement agreements thoroughly regardless of whether a party appears at hearing to raise objections. *See, e.g., Granite State Electric Co.*, 87 NH PUC 302, 306 (2002), and *Concord Electric Co.*, 87 NH PUC 595, 605 (2002). Therefore, Kearsarge and Merrimack cannot and should not assume we would have

[3] In arguing to the contrary, Kearsarge and Merrimack rely in part on *Appeal of Richards*, a case we regard as inapposite. The discussion of standing in *Appeal of Richards* concerned what parties may seek rehearing and, ultimately, appeal under RSA 541:3 and :6. *See Appeal of Richards*, 134 N.H. at 154-58. Although Kearsarge and Merrimack have invoked RSA 541:3 here, Mr. Bailey's standing under that statute is not thereby implicated.

made a different decision about Kearsarge had Mr. Bailey not been permitted to object to the settlement as to that company.

B. Burden of Proof

If Order No. 24,852 were before the New Hampshire Supreme Court for review, an appellant would have the burden of demonstrating that the order is "contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable." *Appeal of Verizon New England, Inc.*, 153 N.H. 50, 56 (2005) (citing RSA 541:13 and Appeal of Pinetree Power, 152 N.H. 92, 95, 871 A.2d 78 (2005)). Our factual findings would enjoy a presumption that they are lawful and reasonable. *Id.* The Court would thus scrutinize the order and not disturb factual findings that have support in the evidentiary record. *See id.* at 58. The rehearing process provides us an opportunity to assure that our findings will survive such review.

Kearsarge and Merrimack posit a somewhat different rubric for consideration of factual findings on rehearing. According to the two companies, we should vacate Order No. 24,852 because the petitioners made a *prima facie* case that they met the requirements of RSA 374:3-b, at which point it fell to the opponents of the petition to present evidence sufficient to rebut their showing. In other words, at least as we understand the Kearsarge and Merrimack argument, regardless of whether the outcome in Order No. 24,852 enjoys adequate support in the record, we erred by imposing an inappropriate burden of proof on them.

Our rules governing contested cases make clear that a petitioner bears the burden of proving the truth of any factual proposition by a preponderance of the evidence unless otherwise specified by law. N.H. Code Admin. Rules Puc 203.25. RSA 374:3-b contains no language that shifts or alters this burden, notwithstanding the six specific factual findings the Commission must make (only one of which, existence of competitive alternatives, is at issue here) before

approving an alternative regulation plan for small incumbent local exchange carriers such as the TDS Companies.

The cases cited by Kearsarge and Merrimack in support of their position are inapplicable. *In re Rockingham County Sheriff's Dep't*, 144 N.H. 194, (1999), and *Appeal of Cote*, 139 N.H. 575, 578 (1995), are workers' compensation cases, in which a burden shifting regime applies to the specific question of whether an injury is work-related. *See Rockingham County*, 144 N.H. at 197. *Mahoney v. Town of Canterbury*, 150 N.H. 148, 151 (2003), concerns the establishment of an easement by prescription, in which the claimant bears the initial burden of proving that the use of the property was not permissive; upon such a showing the burden shifts to the landowner to rebut it. None of these cases establish anything like a general principle of burden shifting that would supersede the requirements of Puc 203.25. Thus, the very premise of the Kearsarge and Merrimack argument is flawed. The real question is whether the findings in Order No. 24,852 are supported by the evidence. We remain convinced that they are.

In arguing to the contrary, Kearsarge and Merrimack allege that we made a finding in Order No. 24,852 that is inconsistent with our summary earlier in the order of the evidence presented by the TDS Companies. This reflects a misreading or a misinterpretation of our order. As noted by Kearsarge and Merrimack, we referred in our summary of the TDS Companies' pre-filed testimony to Mr. Reed's references to web sites, service area coverage maps, data filed with the FCC, advertisements, customer surveys and information from TDS sales and service personnel. *See* Order No. 24,852 at 5. Referring to the factual analysis in Order No. 24,852, Kearsarge and Merrimack allege that the Commission made a finding that is "inconsistent and erroneous" by stating "that the Petitioners only relied on 'wireless coverage estimates by wireless providers' as evidence of availability." Kearsarge and Merrimack Memorandum at 9,

quoting Order No. 24,852 at 29. The quoted phrase from Order No. 24,852 has been stripped of its appropriate context. We were discussing the discrete issue of wireless availability and it was with respect to that specific question that we noted the reliance of the TDS Companies on the coverage estimates of wireless companies. As Kearsarge and Merrimack pointed out, and as we noted at page 5 of Order No. 24,852, Mr. Reed made a wide variety of relevant assertions; our characterization was limited to the issue of the physical availability of wireless coverage.

Another general issue raised by Kearsarge and Merrimack concerns line losses. They point out that Mr. Reed's testimony – that the TDS Companies have been experiencing a decline in access lines even as the population in its service territories has been growing – is unrebutted and, to some extent, even confirmed by the testimony of Mr. Bailey's witness. This general assertion does not undermine our specific determinations that competitive alternatives exist in some exchanges and not others.

1. Wireless Offerings in Sutton and Salisbury

TDS points to RCC Minnesota, Inc. (which does business in New Hampshire as Unicel) which is a wireless carrier currently certified by the Federal Communications Commission as an eligible telecommunication carrier in the relevant TDS service territories, as evidence of available wireless alternatives. Staff witness Josie Gage produced information from the RCC website indicating that wireless service is not available in areas covered by the Salisbury and Sutton zip codes. *See* Exh. 10 at 60-61. The evidence in Exhibit 10 from Unicel's website provides an ample evidentiary basis for rejecting the assertion that Unicel is an available competitive alternative in Sutton and Salisbury. As discussed in Order No. 24,852, we also found Staff's evidence of antenna location and likely signal distances to be an effective rebuttal of the TDS Companies' proffered evidence of wireless availability in the Sutton and Salisbury

exchanges. Having weighed the evidence produced at hearing, and referenced in the TDS motion, we reaffirm our finding that alternative wireless services are not currently offered to a majority of customers in the Sutton and Salisbury exchanges.

2. Broadband and VoIP Offerings in Sutton and Salisbury

The TDS Companies further contend that their evidence on VoIP providers meets their burden of proof regarding broadband providers. They reference the statement of TDS witness Michael Reed in Exhibit 2 p.4 that access line loss, access minutes loss and access revenue loss all indicate available alternatives in the Salisbury and Sutton exchanges. Mr. Reed went on to refer to Comcast, or its predecessor Adelphia, as the available broadband provider. Exhibit 2P, p. 5-6. Comcast filed testimony on October 12, 2007, stating that it does not offer any service in Sutton. Comcast Testimony, p. 3. Further, Staff offered evidence that the service offered by Comcast, formerly Adelphia, was limited to a small number of residences on one street and did not include a majority of customers in the Salisbury exchange. Exhibit 10 at p.4-5. We find Comcast's testimony and Staff's testimony to be persuasive regarding the availability of Comcast and Adelphia broadband offerings in the Salisbury and Sutton exchanges. The TDS Companies offered no evidence of other cable or broadband providers in either town. Having weighed the evidence produced at hearing, and referenced in the TDS motion, we reaffirm our finding that alternative broadband services are not currently offered in the Sutton and Salisbury exchanges.

The assertions of Kearsarge and Merrimack about DSL (digital subscriber line) service are likewise unavailing. According to Kearsarge and Merrimack, relying on confidential information in the record, "[t]he overwhelming majority of customers in the Salisbury exchange have access to digital subscriber line . . . service." Kearsarge and Merrimack Memorandum at

14. However, the record also establishes that DSL is available only from TDS itself, which offers the service only in conjunction with basic telephone service. Thus, even if a majority of the customers in the Salisbury exchange could access a VoIP service via a DSL connection, this is not a competitive alternative within the meaning of RSA 374:3-b.

3. Wireline Telephone Offerings in Sutton and Salisbury

The TDS Companies additionally contend that wireline alternatives will be available once the Merrimack and Kearsarge plans and settlement are approved because the TDS Companies will then waive their rural exemption. The companies also point to the pending competitive local exchange (CLEC) carrier application of Comcast as proof that alternatives will soon be available. We affirm our earlier determination that RSA 374:3-b requires us to consider currently available services and not future ones. We must make our determination based upon the record in order to protect all parties' due process rights. If the TDS Companies waive their rural exemption or Comcast receives a CLEC registration at some point in the future, our prior order keeps this docket open so that we may consider such developments once they actually occur.

4. Interpretation of RSA 374:3-b

Kearsarge and Merrimack ask us to reconsider our interpretation of RSA 374:3-b, which we previously characterized as "challenging" in light of "potentially incompatible and arguably incongruous" elements. Order No. 24,852 at 25. Kearsarge and Merrimack concede that the Legislature left to the Commission the task of determining what precisely comprises "competitive wireline, wireless or broadband service" sufficient to justify approving an AFOR under RSA 374:3-b. But they contend that, in the exercise of that delegated authority, we erred by failing to seek, and then apply, certain insight available in the legislative history.

We do not agree that the legislative history invoked by Kearsarge and Merrimack compels us to reach a result different than the one set forth in our previous order. The sources referenced by the companies involve (1) the legislative findings that accompanied the 2005 measure enacting RSA 374:3-b, and (2) the subsequent report of a study committee authorized by the same bill. Even assuming that a post-enactment source, such as the study committee report, could shed light on what the Legislature intended when it adopted RSA 374:3-b, the argument made by Kearsarge and Merrimack is unpersuasive. In essence, they rely on statements to the effect that alternative regulation plans would promote competition and innovation. Even assuming that this accurately summarizes the primary objective of the statute, merely invoking it is not sufficient to compel a result different than the one we reached. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice-and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. U.S.*, 480 U.S. 522, 526 (1987) (emphasis in original). Had the Legislature wished simply to require us to end traditional, cost-of-service regulation for small ILECs, it could have done so.

Finally, Kearsarge and Merrimack contend that we misunderstood what the meaning of the word "is" is in RSA 374:3-b, III(a), which requires a finding that "competitive wireline, wireless, or broadband service is available" to a majority of customers in each affected telephone exchange. According to Kearsarge and Merrimack, when we declined in Order No. 24,852 to consider post-hearing evidence related to the Comcast application for CLEC status, we improperly determined what the state of competitive availability *was* at the time of hearing as opposed to what it *is* on the date of decision. This logic, if allowed to prevail, would turn notions

of finality and due process on their head because no party to an RSA 374:3-b hearing could ever be confident, prior to decision, that the record had truly closed and that the body of evidence on which the Commission must make its decision was truly defined. We are required to presume that the Legislature would not have intended to pass a statute with that kind of effect. *See Simpson v. Young*, 153 N.H. 471, 475 (2006) (referencing interpretive presumption "that the legislature would not pass an act that would lead to an absurd or illogical result"). The better course, which we previously adopted, is to base our decision on the record as it was adduced at hearing but leave the petitioners with the option of reopening the question in the future, when other parties would have a full opportunity to present countervailing argument and evidence.[4]

Based upon the foregoing, it is hereby

ORDERED, that the motion for partial reconsideration or, alternatively, rehearing is DENIED.

[4] This analysis is fully consistent with the statement in the underlying order 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 No. 24,852 at 26. Read in context, this determination reflects a conclusion that the statute does not call upon is to predict future developments but, rather, to base our ruling solely on the record before us about the actual state of competition. Likewise, our decision on rehearing is not intended as a departure from our observation in Order No. 24,852 that RSA 374:3-b is "generally prospective in nature." *Id.* at 30. As discussed, *supra*, the Legislature was clearly adopting a public policy that favors the ongoing development of competitive alternatives as the best means of assuring that customers of small ILECs have access to the telecommunications services they need. But it nevertheless requires us to base our decision on a snapshot taken at a specific point in time. Keeping the docket open, and thus rendering a decision that is, in this sense, without prejudice to additional showings by Kearsarge and Merrimack, reflects our best judgment about how to harmonize the somewhat conflicting imperatives of the statute. *See id.* at 24-26 (describing those imperatives and the importance of harmonizing them).

By order of the Public Utilities Commission of New Hampshire this eighth day of August, 2008.

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