

State of New Hampshire  
Public Utilities Commission

DT 07-027

KEARSARGE TELEPHONE COMPANY, WILTON TELEPHONE COMPANY, HOLLIS  
TELEPHONE COMPANY, AND MERRIMACK COUNTY TELEPHONE COMPANY  
PETITIONS FOR APPROVAL OF ALTERNATIVE FORM OF REGULATION.

Phase III

Written Closing Argument of Daniel Bailey

October 19, 2010

## **I. Introduction:**

Mr. Bailey respectfully suggests that the Affidavits and Attachments of Mr. Murray on behalf of KTC, and Mr. Murray's rebuttal testimony, on their face, fail to meet the statutory test for approval of a petition for alternative regulation set forth in RSA 374:3-b. The Companies<sup>1</sup> have not made the necessary showing that "Competitive wireline, wireless, or broadband service is available to a majority of the retail customers in each of the exchanges [of KTC]..." RSA 374:3-b, III (a). Nor has KTC demonstrated that the plan "preserves universal access to affordable basic telephone service." RSA 374:3-b, III(e).

## **II. KTC Did Not Meet its Burden to Show Comcast is Competing in the Market for KTC's Basic Local Exchange Service Customers.**

The entire statutory framework of RSA 374:3-b focuses on basic local exchange phone service. See Brief of Daniel Bailey, Phase 1, January 11, 2008, pp. 10-12. Staff's expert testified basic phone service should be the service of interest. See Dr. Pradip K. Chattopadhyay testimony, Phase 1, Ex. 9, p. 3, ll. 17-28. Dr. Johnson has explained the problems of improperly mixing the separate markets for enhanced services and for bundles with the basic phone service market (Dr. Johnson testimony, Phase 1, Ex. 7, p. 49, l. 8 to p. 51, l. 1), and that the market for basic telephone service is the most important. Phase 3, Tr. p. 163, ll. 1-6. Important to Phase 3, the Commission has ruled: "It [TDS] did not provide sufficient evidence to conclude, however, that cable broadband service, by itself, is a competitive alternative to TDS' local exchange service." (Emphasis added), Order 25,103, p.25. Finally, TDS' own expert witness has conceded that "...basic local exchange service as well as technologies that compete with basic local exchange service..." is the market at issue. See Testimony of Timothy Ulrich, Phase 1, Tr. Day 2, p. 40, ll. 11-14.

Dr. Johnson testified Comcast is competing in and targeting the market for customers in higher end bundles of both KTC, and of satellite providers, but it is not in the market for KTC's basic phone service customers. See Dr. Johnson's September 2, 2010 testimony, Bailey Ex. 77, p. 6, l. 9 to p. 8, l. 9; p. 8, l. 18 to p. 11, l. 23; p. 13, l. 11 to p. 22, l. 6; see also Phase 3, Tr., p. 88, ll. 3-8; p. 90, ll. 2-8; p. 97, ll. 10-19; p. 119, ll. 12-19; p. 138, ll. 10-12. More specifically, in response to cross examination on KTC-MTC Exhibit 19, Dr. Johnson observed that Comcast...

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<sup>1</sup> The Commission has rejected the MCTC petition (Order 25,103, p. 28), and ruled at the September 27, 2010 Phase 3 hearing that the MCTC petition would not be considered any further in this proceeding. See Phase 3, Tr., p. 15, ll. 17-23.

... attempts to avoid competing head-to-head where it can, and to maximize profits as best it can when it has no choice. So, it has no choice but to compete with the satellite providers. And, it has made the decision to compete in the Internet market. Having made that decision, the telephone is sort of an extra element of that overall plan, but it is not the primary thrust of their efforts. I think that's very clear. You could even see it right here in this document [KTC-MTC Exhibit 19], where the activity is primarily when VoIP is purchased as a bundled [sic] with Internet service. But, in general, that's been what I've observed in the marketplace, that what they're advertising are bundles.

Phase 3, Tr. p. 121, ll. 10-22.

Little or no weight should be accorded the cross examination exhibits of KTC-MTC 17-20, not simply because they provide no information on KTC's service area, but also for reasons identified by Dr. Johnson. Phase 3, Tr. p. 131, ll. 8-13; p. 132, ll. 2-14; p. 143 l. 24 to p. 144, l. 17; p. 146, ll. 10-17; p. 158, ll. 16-21. Indeed, after a review, Dr. Johnson explains that KTC-MTC Exhibit 19 only helps to confirm that Comcast and the cable industry are competing in the market for bundles, not basic phone service. Phase 3, Tr., p. 160, l. 5 to p. 162, l. 17. After further reviewing the exhibits, Dr. Johnson's conclusion that Comcast is not competing in the market for basic phone service remained unchanged. Phase 3, Tr., p. 163, ll. 17-23.

The Commission has consistently made clear that TDS bears the burden of proof in this case. See Order 25, 103, p. 19; Order 24, 885, pp. 12-14; Order No. 24, 852, p. 26; see also N.H. Code Admin. R. Puc 203.25. KTC did not provide any testimony rebutting Dr. Johnson's opinion that Comcast is not competing for KTC's basic phone service. KTC did not meet its burden to show Comcast is actually competing in the KTC market for KTC's basic phone service customers.

### **III. KTC Has Not Met Its Burden to Show Comcast is "Available to a Majority of the Retail Customers in Each of the Exchanges [of KTC]"**

KTC did not show that Comcast voice service is physically present to a majority of retail customers in each of KTC's exchanges, nor did KTC show what exactly Comcast offers (if anything) to those KTC customers where Comcast is physically present. To be "available" it must be "such as may be availed of : capable of use for the accomplishment of a purpose : immediately utilizable" and "personally obtainable." Webster's Third New International

Dictionary 150, No. 3 & 4 (unabridged ed. 1966). Both physical presence and the actual present offering of a service to retail customers are necessary to show whether an alternative is “available.” For it to be available to a “majority” it must be available to “a number greater than half of a total.” (i.e. 50% plus one). Webster’s Third New International Dictionary 1363, No. 3a (unabridged ed. 1966).

KTC’s own witness acknowledges that “...to my knowledge, we haven’t calculated the percentage” of customers that have Comcast, nor did KTC have a “percentage handy” of the number of TDS customers that have “Comcast Digital Voice” available to them. Phase 3, Tr., p. 40, l. 12-13; Phase 3, Tr., p. 39, l. 22 to p. 40 l. 1. In essence, KTC has admitted in Phase 3 that it did not meet its burden of proof to show an alternative is “available to a majority of retail customers.”

On this issue Mr. Murray points -- exclusively -- to some maps attached to Michael Reed’s November 15, 2007 supplemental testimony in Phase 1, which were produced by persons other than Mr. Reed. See Mr. Reed supplemental testimony, Phase 1, MCR-1, Confidential Attachments TDS-CONF 0079-0094. Mr. Murray testified the “...maps speak to general availability...” and for which Mr. Murray says “...we feel are compelling...” Phase 3, Tr., p. 24, ll. 23-24; Phase 3, Tr., p. 40, ll. 10-12. But Mr. Reed testified that: “I in no way indicated or would want to indicate that the maps were to be utilized as an exact measure of competition for every road, and every pole.” (Emphasis in original). Michael Reed supplemental testimony, Phase 1, Ex. 4, p. 19, ll. 7-10. In short, the TDS witness with some knowledge of the maps, albeit limited, acknowledged the maps are of limited usefulness.

Mr. Murray also testified that “...the way we read the order was that the Commission felt like the maps showed strong availability.” Phase 3, Tr., p. 40, ll. 13-15. Mr. Bailey cannot locate

that Commission conclusion. To Mr. Bailey's knowledge, the Commission has not made any specification ruling with respect to these maps, and has not ruled Comcast voice service is "available to a majority of retail customers in each of the exchanges [of KTC]." To the contrary, the Commission stated that "...we find that TDS did not clearly demonstrate that the majority of customers in each of its exchanges have a competitive alternative present." (Emphasis added). Order 25,103, p. 25.

And as Dr. Johnson notes, on each map "[t]here's little black dots. And, it's not completely clear what those represent..." Phase 3, Tr., p. 152, ll. 17-18. Different black marks (e.g. small and large black dots, black squares with one or more dots inside, black triangles, etc.) appear throughout the maps, but there is no indication what they mean in terms of number of customers. Moreover, on all of the maps, black marks appear very close to some marked roads, very far from others, perhaps indicating side roads that are not marked on the maps, but in no way providing any confidence as to the customer's location in relation to an actual particular service. Even assuming we can adequately interpret each black mark and its actual relationship with a green line, Dr. Johnson explains [**Begin confidential**

**End confidential**] Phase 3, Tr., p. 155, ll. 2-20. In short, a review of the maps with a naked eye confirms we should heed Mr. Reed's warning that we should not use the maps "...as an exact measure of competition for every road, and every pole." Michael Reed supplemental testimony, Phase 1, Ex. 4, p. 19, ll. 7-10. KTC has not established by a preponderance of the evidence that Comcast is physically present to "a number greater number than half of the total" retail customers "in each of the exchanges [of KTC]."

Even where the physical presence of Comcast allegedly exists, KTC did not provide information on the numbers of people being offered what types of voice service by Comcast (i.e. “Comcast Digital Voice” versus Comcast “Triple Play” bundle, etc.). As Dr. Johnson has noted, “...even if Comcast serves a particular street or neighborhood, voice telephone service may still be unavailable to some customers.” Bailey Exh. 77 p. 14, ll. 17-18. And no evidence was provided to suggest that either separate voice service, or bundles with voice service, is available to a majority of retail customers in each exchange.

In none of its exchanges did KTC provide *any* count of the number of KTC customers where Comcast is physically present, or for what percentage of customers are *actually offered* what service by Comcast where Comcast is physically present. KTC could have even inputted a legitimate random sample of KTC customer addresses in Comcast’s website to see what is offered in each of its exchanges. Phase 3, Tr., p. 147, l. 17 to p. 148, l. 17. It chose not to do that.

KTC did not meet its burden to show Comcast is “available to a majority of the retail customers in each of the exchanges [of KTC].” Accordingly, on its face, KTC’s petition for an alternative form of regulation should be denied.

#### **IV. KTC Has Not Met Its Burden to Show that Possible Comcast Offerings Are “Competitive”**

The Commission has determined:

We conclude with respect to the competitiveness test the Legislature would have us apply, that the use of the word “competitive” in subsection III (a) means that mere availability of alternatives is not sufficient to approve a plan but that the inclusion, among other things, of price protections in subsection III(b) means that a fully functioning competitive market is not necessary in order to approve a plan.

Order No. 24, 852, p. 26. 5. TDS has misconstrued prior Commission Orders, and misreads RSA 374:3-b, III, in its position that Comcast has already been determined *de facto* “competitive” in any and all circumstances.<sup>2</sup> Had the Legislature determined Comcast was *de facto* “competitive,” it would not have used the word “competitive” before the word “wireline” in RSA 374:3-b, III(a). “We must give effect to all words in a statute, and presume that the legislature did not enact legislation with superfluous or redundant words.” Smith v. City of Franklin, 159 N.H. 585, 589 (2010)(citation omitted). Comcast cannot be *de facto* “competitive.” See also Phase 3, Tr., p. 138, ll. 9-19.

Additionally, “[a]s a general principle of statutory construction, we presume that the legislature knew the meaning of the words it chose, and that it used those words advisedly.” DaimlerChrysler Corp. v. Victoria, 153 N.H. 664, 667 (2006)(citation omitted). As Dr. Johnson noted, from an economist’s perspective:

[t]he fact that they [the legislature] inserted the word “competitive” to me implies that they were concerned about the impact of that availability, and was that impact sufficient to protect customers from monopoly power? Was it going to serve the purpose that this Commission has historically served? And, given that structure and the insertion of that word, I think the -- some sort of analysis of what's really going on becomes important.

Phase 3, Tr., p. 103, ll. 7-15.

In determining whether an alternative is “competitive,” Dr. Johnson explains that the single most important evidence to consider is the extent which consumers are switching back and forth between the two products. Bailey Exh. 77, p. 3, ll. 3-8. Dr. Johnson points out that “...it [TDS] has provide[d] little or no information regarding the extent to which consumers are actually switching back and forth between TDS’s local exchange service and the “Triple Play”

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<sup>2</sup> See Daniel Bailey’s Objection to TDS’ September 22, 2010 Motion in Limine to Strike Portions of Rebuttal Testimony of Ben Johnson, filed September 24, 2010, pp. 2-3.

offering or any other service provided by Comcast...” *Id.*, p. 3, l. 22 to p. 4, l. 2. Note that Attachment KTC-MTC Exh. 14C [Begin confidential

end confidential].<sup>3</sup> “In

the absence of this sort of data [on switching back and forth], the next best option is to focus on evidence concerning the prices being charged by Comcast...” Bailey Exh. 77, p. 4, ll. 3-5. Dr. Johnson concludes that “...to the extent it [Comcast] does reach the [TDS] customers, they’re clearly not attempting to match the TDS prices.” Phase 3, Tr., p. 140, ll. 9-11. “A \$99 teaser rate [for “Triple Play”][referenced in Attachment A of KTC-MTC 14C] is hardly persuasive evidence in support of the contention that Comcast is offering a service that is “competitive” with the voice grade telephone service provided by TDS.” Bailey Exh. 77, p. 8, ll. 6-8. And that “...the only prices that are reasonable in a Comcast range, the only things that are really you could see as competitive, from an economist’s perspective, are those that are bundled together with these other offerings.” Phase 3, Tr., p. 88; ll. 15-19.

Even though the focus of RSA 374:3-b is the market for basic phone service, Dr. Johnson provided perspective of the potential relevancy of the KTC market for bundles. However, TDS provided no information on the number of KTC customers who purchase video or cable, nor any information relating to the number of customers who have “bought up” Comcast cable television, all of which is necessary to help evaluate the significance of the Comcast’s bundled offerings. Bailey Exh. 77 p. 15, l. 21 to p. 16, l. 4; p. 18, ll. 2-16; p. 21, ll. 14-16. Dr. Johnson reiterated the importance of this information in testifying that: “...the degree to which the discounted rates are relevant is a function of how many people are already Comcast customers or are capable of

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<sup>3</sup> Given the minimal numbers of one or more exchanges, and given the lack of specificity of this information, this information should be given little weight. To the extent it is given any weight, it only shows that not all of exchanges meet the test “of each of the exchanges [of KTC],” as required by RSA 374:3-b, III(a).



being a Comcast customer.” Phase 3, Tr., p. 95, l. 22 to p. 96, l. 1. None of this information was provided by KTC.

KTC has not met its burden of proof under RSA 374:3-b, III(a) to show that Comcast is “competitive” in KTC’s exchange territories.

**V. KTC Has Not Met Its Burden to Show that It Will “Preserve Universal Access to Basic Telephone Service”**

The price caps in RSA 374:3-b, III(b) do not, by themselves, preserve universal access to affordable basic telephone service. The entire RSA 374:3-b, III(e) requirement of KTC to “preserve universal access to affordable basic telephone service” would be rendered superfluous if the RSA 374:3-b, III(b) rate caps preserved universal access to affordable basic telephone service on its own. As stated earlier, we must “...presume that the legislature did not enact legislation with superfluous or redundant words.” Smith, at 589. Thus, the inquiry must go further. And because the price caps set forth in RSA 374:3-b, III(b) do not preserve universal access to affordable basic telephone service, clearly the much higher priced bundled offerings (of either TDS or Comcast) do not preserve universal access to affordable basic telephone service. Senior citizens and low-income people are not candidates for bundles priced at \$100 per month. See Cross examination of Ben Johnson, Phase 1, Tr. Day 2, p. 104, ll. 2 to 15; see also Bailey Exh. 77, p. 19, ll. 1-6. Additionally, the Office of Consumer Advocate’s cross examination (See Phase 3, Tr. p. 66, l. 22 to p. 69, l. 9) provides little confidence that KTC will take any other steps to help preserve universal access to affordable basic telephone service.

KTC has not met its burden to show it will preserve universal access to basic telephone services. Accordingly, KTC’s petition should be denied.

**VI. Rulings of Law:**

Mr. Bailey respectfully requests that the Commission make the following rulings of law:

- a. CLEC certification and presence in an exchange of a petitioner does not automatically mean a “competitive” wireline service is being provided.
- b. The word “available” in RSA 374:3-b, III(a) requires that a voice service is actually available to “a majority of retail customers” in the exchange, rather than just offered in the exchange in general.
- c. Mere availability of a service to the majority of retail customers does not mean that the service is “competitive.”
- d. That the statutory framework RSA 374:3-b requires that the product be “competitive” with the petitioner’s basic local exchange service.
- e. A determination that a product is “competitive” requires consideration of whether customers are switching back and forth between the product and the incumbent’s basic local exchange service.
- f. A determination that a product is “competitive” requires consideration of the product’s price as compared with the incumbent’s basic local exchange service rates.
- g. The burden of proof on all matters is on the incumbent.
- h. In Phase III of this case, the burden of proof that a wireline service is “available” and “competitive” includes a showing of the following:
  - i. Wireline [Comcast] is physically available and offering voice service to the majority of KTC retail customers in each exchange,
  - ii. A significant amount of customers are switching back and forth between the wireline service [Comcast] and KTC’s basic local exchange service in each exchange in order for the wireline service [Comcast] to be “competitive,”

- iii. The wireline [Comcast] prices for the voice service(s) that are offered and physically available to the majority of customers are “competitive” with KTC basic local exchange service,
- i. KTC must demonstrate that its proposed prices (or those of a purported alternative) will preserve universal access to affordable basic telephone service.
- j. KTC must demonstrate that it will take steps to preserve universal access to affordable basic telephone service, including, but not limited to, increased outreach and enrollment in the Lifeline program.

The Commission should find KTC has not met its burden proof under (h., i. through h., iii.), i. and j.

## **VII. Conclusion**

What this case is really about is a Company that wants to be freed of rate of return regulation, and to move its customers into its much higher priced bundles. At the same time, those customers who cannot afford bundles will remain on the Company’s basic local exchange service, but without a meaningful affordable alternative. As a result, these customers, many of whom are low-income and elderly, will be left holding the bag when KTC decides to increase its rates.

Daniel Bailey requests that the Commission deny KTC’s Petition for an Alternative Form of Regulation.

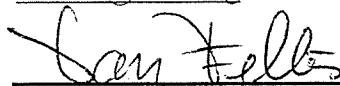
Respectfully submitted,  
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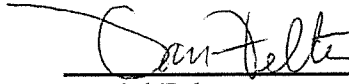
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Dated: October 19, 2010

**Certification of Service**

I certify that this document was hand delivered to the Commission and that a copy of this document was sent to staff and all parties to this docket by email on this date.

New Hampshire Legal Assistance

A handwritten signature in black ink, appearing to read "Dan Feltes", is written over a horizontal line.

Daniel Feltes

Attorney for Daniel Bailey

Dated: October 19, 2010