

DT 01-221

KEARSARGE TELEPHONE COMPANY

Petition for Approval of Alternative Form of Regulation

Order on Motion for Reconsideration

O R D E R N O. 24,307

April 12, 2004

Pursuant to RSAs 541:3 and 541:4, Kearsarge Telephone Company (KTC) filed a motion with the New Hampshire Public Utilities Commission (Commission) on March 22, 2004 for reconsideration of Order No. 24,281.¹ The order, issued on February 20, 2004, denied KTC's petition for an alternative form of regulation pursuant to RSA 374:3-a and established new permanent rates for the Company. For the reasons that follow, KTC's motion is granted in part and denied in part.

I. BACKGROUND

The extensive procedural history of this case is recited in Order No. 24,281 and will not be repeated here. In brief, the Commission issued Order No. 23,925 (March 1, 2002), ruling that in order to consider the merits of KTC's alternative regulation plan it would be necessary to conduct a full rate case so as to ascertain the appropriate starting point for any alternative form of regulation for the Company. Following a hearing on temporary rates, the Commission issued Order No.

¹ Although the KTC motion is styled as a "Motion for Reconsideration", an RSA 541:3 "rehearing" motion is a prerequisite to appeal. Thus, we will treat the KTC filing as such a motion since it involves the rehearing statute and was presumably made to preserve the Company's appellate rights.

24,056 (September 19, 2002) setting temporary rates for KTC at the Company's then-current rates, effective for service rendered on or after March 1, 2002. Hearings on both permanent rates and KTC's alternative regulation plan followed. Thereafter, on February 20, 2004, the Commission ruled on the merits of both aspects of the proceeding. KTC filed its Motion for Reconsideration on March 22, 2004, to which there were no responses.

II. SUMMARY OF THE KTC MOTION

The first argument in the KTC motion is that the Commission erred in Order No. 24,056 by establishing March 1, 2002 as the effective date for temporary rates. According to KTC, this transgressed the principles articulated in *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980) because March 1, 2002 was the date the Commission issued a procedural order directing KTC to make a full rate case filing and not the date on which KTC initiated the rate proceeding.

KTC notes that the Court in *Pennichuck* held that "the earliest date on which the PUC can order temporary rates to take effect [is the date] on which the utility files its underlying request for a change in its permanent rates." *Id.* at 567. Implicitly conceding that this precise language is not directly applicable here because KTC did not seek to change its permanent rates, the Company nonetheless argues that the analogous date in

this proceeding was June 7, 2002 -- the date on which KTC submitted its rate case filing as directed by the Commission.

Next KTC takes up the Commission's decision in Order No. 24,281 to impute a capital structure to the Company for rate making purposes consisting of 50 percent equity and 50 percent debt, as opposed to KTC's actual capital structure of approximately 85 percent equity and 15 percent debt. KTC does not challenge this determination but, rather, argues that it should be applied prospectively only. According to KTC, at the time the Commission heard the rate case portion of this proceeding it had not taken such an action since 1953.² KTC invokes the objectives of regulatory consistency and fairness in asking the Commission to make this aspect of its decision effective on a prospective basis only, pointing out that it is too late for KTC to make any policy changes with respect to its actual capital structure that would address this issue with respect to past service.

KTC next takes up an issue directly arising out of the fact that Order No. 24,281 will have the effect of reducing the

² As KTC notes, however, the Commission imputed a capital structure to another telephone company just weeks before deciding the instant case. See *Verizon New Hampshire*, Order No. 24,265 (January 16, 2004), slip op. at 47-48. Although Verizon is presently challenging this order in federal court, the Commission's state-law authority to impute a capital structure to a utility in appropriate ratemaking circumstances is not at issue in the federal proceedings.

Company's permanent rates and thus triggering a refund consisting of the difference between the temporary rates already paid and the permanent rates that should have applied to this service. The Commission ruled that this refund -- and, indeed, all rate relief arising out of the decision -- should be credited to intrastate access rates as opposed to rates for basic service. This involves rate relief provided to interexchange carriers (IXCs) which, presumably, provide indirect benefits to retail customers purchasing intrastate long-distance service from the IXCs.

KTC does not request a revision of this overall determination as to rate reductions. Rather, the Company requests that the refund of temporary rates be credited, in part, to users of basic telephone service rather than entirely to the IXCs. Specifically, KTC has four requests.

First, KTC asks that the refund be used to offset costs associated with local number portability that would otherwise be paid via a monthly charge on local customer bills. Second, KTC requests that it be permitted to devote a portion of this refund to the expenses associated with improving and ensuring the survivability of the KTC network in the event of a major disaster. Specifically, KTC seeks to apply an estimated \$225,000 to the addition of certain fiber cable that would allow for a fully redundant ring network between New London, Boscawen,

Salisbury, Andover and Contoocook. Third, KTC suggests that an unspecified portion of the refund be allocated to local customers to reimburse them for the higher long distance rates they paid (via their IXCs). According to KTC, while prospective reductions in rates paid by IXCs indirectly benefit retail customers, the same cannot be said of retroactive rate relief. Finally, KTC contends that a portion of the refund should be allocated to IXCs via a bill credit based on their relative intrastate access billings.

The next issue raised by KTC concerns the Commission's rejection, in its cost-of-capital analysis, of KTC's proposed adjustment for the so-called "ex dividend" costs. According to KTC, the Commission incorrectly described the nature of this adjustment and, therefore, the Commission should reconsider its rejection of it.

The penultimate issue raised by KTC concerns the so-called "rural exemption" set forth in the relevant provision of the Telecommunications Act, 47 U.S. C. § 251(f), which exempts rural telephone companies such as KTC from the otherwise-applicable obligation under federal law to provide competitors with unbundled and non-discriminatory access to its facilities. As noted in Order No. 24,281, the exemption is not absolute and KTC also could waive its protections but did not propose to do so as a part of its alternative regulation plan. The Commission

concluded that KTC's decision not to include such a waiver in its alternative regulation proposal negatively affects the extent to which the proposal would promote competition in the KTC service territory. KTC contends that the Commission should reconsider what KTC characterizes as an "implicit requirement" that an independent telephone company waive its rural exemption in order to move to an alternative form of regulation.

Finally, KTC asks the Commission to correct what it characterizes as certain errors in Order No. 24,281. To that end, KTC has appended an "errata sheet" to its motion. According to KTC, the order is incorrect in the way it describes the Company's \$10 million Cash Management Fund, summarizes KTC's asserted reason to adjust its revenue requirement upward to account for the increased risk of bad debts owed by IXCs, states that KTC has admitted it is at a lower risk than other telecom utilities operating in larger urban areas, summarizes KTC's proposed alternative regulation plan, states the factor weights in the plan with respect to service quality, summarizes the KTC view of whether competition or alternative regulation must come first in its service territory, states that KTC's alternative regulation plan did not contain a cap on rates for non-basic services, states that KTC produced no evidence that bad debts from IXC failures would be recurring and states that KTC has no stock or debt.

III. COMMISSION ANALYSIS

RSA 541:3 provides that, "[w]ithin 30 days after any order or decision has been made by the commission," any party or person directly affected by the decision may seek rehearing "in respect to any matter determined in the action or proceeding, or covered or included in the order," in which instance "the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion." Various aspects of KTC's motion raise three distinct issues under RSA 541:3, to wit: whether the motion was made within the requisite 30 days of the decision, whether the motion concerns a "matter" actually decided by the Commission and whether KTC has stated good cause for rehearing.

We begin with the timeliness issue. The KTC motion is timely, with one exception. In arguing that the Commission erred by choosing March 1, 2002, as opposed to June 7, 2002, as the effective date for temporary rates, KTC is challenging a decision made by the Commission on September 19, 2002 - more than 30 days ago. The 30-day requirement in RSA 541:3 is clearly stated and mandatory. *Cf.* Supreme Ct. Rule 8 (providing for interlocutory appeals on a discretionary basis). It does not require that the entire proceeding in question be reduced to final judgment. For this reason, we conclude that KTC has waived its rights under RSA

541:3 to seek rehearing with respect to the effective date of the temporary rates ordered in this proceeding.³

Next we take up the extent to which KTC's list of "errata" comprise a challenge to any "matter" that was "determined," "covered" or "included" in Order No. 24,281. We have previously concluded that, to press a rehearing motion under RSA 541:3 successfully, the movant must do more than simply request a differently worded order - it must "state why the previously entered order is unlawful or unreasonable." *Connecticut Valley Elect. Co.*, Order No. 24,189 (July 3, 2003), slip op. at 3 (citations omitted). Some of the errata alleged by KTC do indeed merit correction in the interest of providing future readers with an accurate account of what transpired in this case and, accordingly, appropriate corrected pages of Order No. 24,281 will be issued as appropriate. Others are a question of nuance or word choice that do not require a correction for the reasons stated in the *Connecticut Valley* decision. More significantly, all but one of the items on KTC's errata list do not comprise grounds for rehearing under RSA 541:3 because a mistake in an order cannot be a ground for rehearing absent some

³ There is a separate statute that authorizes the Commission, after notice and hearing, to "alter, amend, suspend, annul, set aside or otherwise modify any order made by it." RSA 365:28. We do not understand KTC's motion, which includes no reference to RSA 365:28, as a request that we revisit the effective date of temporary rates after notice and hearing. Moreover, the Commission in its September 2002 order fully considered the applicability of the *Pennichuck* case relied upon here.

suggestion that the mistake had outcome-determinative significance and was, in that sense, a "matter" within the meaning of the statute. The only exception is the alleged error with respect to the ex dividend adjustment, because KTC argues that the Commission should not have rejected this adjustment in determining the Company's cost of capital. Fairly read on this issue, KTC's motion alleges that we rejected this adjustment because we did not understand it, which is not the case.

We thus turn, to the extent it is appropriate, to the merits of KTC's rehearing motion.

We do not agree with KTC that it is appropriate to make the imputed capital structure described in our previous order applicable on a prospective basis only. This argument is inconsistent with the basic principles of cost-of-service ratemaking that we used to determine the rate-case phase of this proceeding. The relevant issue is not, as KTC suggests, whether the Commission in setting rates has imposed a policy change on the utility and, thus, whether it is fair or appropriate to apply such a policy change retrospectively. Rather, the relevant issue is whether the new rates are "reasonable," the object of the ratemaking process being "to strike a fair balance between recognizing the interests of the customer and those of the investor" rather than to "guarantee bondholders their interest or stockholders their dividends." *Appeal of Conservation Law*

Foundation, 127 N.H. 606, 635-36 (1986) (citations omitted). Assuming no change in the Company's circumstances between the effective date of the temporary rates and the date of the Commission's order establishing permanent rates (and thus setting aside any potential effects of regulatory lag), the balance was the same on both dates.

Though KTC alleges the Commission has not applied any capital structure other than the actual, that is not the case. The Commission has applied hypothetical capital structure for ratemaking purposes. See, e.g. *Re Concord Electric Company*, 87 NHPUC 694, 704 (2002). Adjustments to capital structure has been found to be within the Commission's authority. *Appeal of Conservation Law Foundation*, 127 N.H. at 636. ("The Commission may set the 'sufficient' rate of return by reference to a capital structure that it finds appropriate, rather than the actual capital structure of the Company.")

As we stressed in our previous order, there is no "policy change" in the sense alleged by KTC because our ratemaking oversight is indifferent to what capital structure the Company actually maintains. The answer might be different if the Commission had somehow approved KTC's actual capital structure in the context of a financing proceeding under RSA 369, but there is no such allegation here.

We agree with KTC that there is good reason within the meaning of RSA 541:3 to modify Order No. 24,281 and adopt the Company's proposals to provide certain end-user benefits out of the temporary rate refund. It is reasonable and fair to use a portion of these funds to offset the costs of local number portability to KTC customers.⁴ Likewise, improving the survivability of the KTC system is an appropriate objective that can be reasonably financed through the refund. We also agree with KTC that a portion of the refund should be allocated to basic service customers to compensate them for access rates indirectly paid by them in toll rates. We direct KTC to divide the remainder of the refund evenly, between IXCs and basic service customers.

KTC's argument with respect to the ex-dividend adjustment is unavailing. As we noted in Order No. 24,281, this is an adjustment the Commission has consistently rejected in establishing utility cost of capital for ratemaking purposes. Nothing has been advanced here, either at hearing or in the rehearing motion, that justifies a different determination even assuming that KTC's description of the adjustment in its reconsideration motion is more accurate than the description contained in the order.

⁴ The KTC motion enumerates the estimated costs of local number portability for both KTC as well as three other affiliated independent telephone companies in New Hampshire. Obviously, our authorization here is limited to costs incurred by KTC.

Finally, we reject the basic premise of KTC's reconsideration argument with respect to the rural exemption under the Telecommunications Act. We did not, as KTC suggests, impose an implicit requirement that an independent telephone company waive its rural exemption as a condition of moving to an alternative form of regulation. Rather, our decision involved a weighing of all relevant factors. In another case, a form of alternative regulation conceivably could be justified, based on other benefits, even if the rural exemption persisted in the petitioner's service territory and any resulting impediments to competition persisted. The rural exemption was but one of the factors indicating a paucity of competition present.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Kearsarge Telephone Company for reconsideration of Order No. 24,281 is GRANTED so as to adopt certain of the Company's proposals for allocating temporary rate refund money to basic service customers; and it is

FURTHER ORDERED, that the Motion of Kearsarge Telephone Company is GRANTED to the extent that substitute pages are issued to correct certain drafting concerns; and it is

FURTHER ORDERED, that in all other respects, the Motion of Kearsarge Telephone Company is DENIED.

By order of the Public Utilities Commission of New
Hampshire this twelfth day of April, 2004.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary