

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 07-027

**Kearsarge Telephone Company, Wilton Telephone Company,
Hollis Telephone Company and Merrimack County Telephone Company
Petition for an Alternative Form of Regulation**

**STAFF'S OBJECTION TO OFFICE OF CONSUMER ADVOCATE'S
MOTION TO QUASH STAFF DATA REQUESTS TO COMCAST**

1. On September 13, 2010 the Office of Consumer Advocate (OCA) filed a motion to quash certain data requests served by Staff on Comcast Phone of New Hampshire (Comcast) in connection with docket no. DT 07-027, the Petitions for an Alternative Form of Regulation for Kearsarge Telephone Company, Wilton Telephone Company, Hollis Telephone Company and Merrimack County Telephone Company. The OCA's motion should be denied.

2. The OCA's motion is premised upon four arguments: (1) Commission Staff lacks authority under Puc 203.09 to serve requests upon Comcast; (2) the requests are untimely; (3) the OCA would be prejudiced by the requests and responses; and (4) it would be administratively efficient to quash the requests. Each argument is addressed below.

Authority under Puc 203.09.

3. Puc 203.09 reads, in relevant part:

- (a) The petitioner, the staff of the commission, the office of consumer advocate and any person granted intervenor status shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule.
- (b) Unless inconsistent with an applicable procedural order, any person covered by this rule shall have the right to serve upon any party, data requests, which may consist of a written interrogatory or request for production of documents.

4. The OCA contends that the language in Puc 203.09(b) restricts discovery to parties and that sending requests to Comcast violates the rule. Irrespective of how Puc 203.09(b) might otherwise operate, it does not limit discovery in this instance. Puc 203.09(b) on its face states that any person has the right to serve data requests on any party unless it is inconsistent with an applicable procedural order. On July 15, 2010, the Commission issued Order No. 25,130, which was captioned as a procedural order and which, among other things, denied the request of the OCA that Comcast be made a mandatory party to

the docket. The basis for that ruling was the Commission's statement that: "Inasmuch as Comcast has offered to provide competitive information on a confidential basis, we are confident that the record can be developed without requiring Comcast to be a party." Order 25,130 (July 15, 2010) at 4. Thus, an applicable procedural order in this docket specifically contemplated the receipt of information from Comcast, though Comcast was not to be made a party. Accordingly, Puc 203.09(b) should not be read to limit the submission of requests to Comcast in this case.

Timeliness

5. Citing Order No. 25,130, the OCA next contends that the requests are untimely. The OCA's motion quotes the portion of the order which stated that discovery was to be conducted on the information on the TDS affidavits at a July 27, 2010 technical session. This argument is without merit for two reasons.

6. First, Order No. 25,130 did state that discovery on the TDS affidavits was to be conducted at the technical session on July 27, 2010. That discovery was conducted. Any questions now pending before Comcast are not discovery on the TDS affidavits and are not, therefore, bound by the timeframe set out in that order.

7. Second, as is noted in the letter on the procedural schedule filed by Staff on July 28, 2010, in order to accommodate the OCA the hearing date was moved from September 2, 2010, to September 20, and days for responsive testimony and further discovery were added. The hearing date was moved again, to September 27, by the Commission through a Secretarial Letter dated August 5, 2010. Therefore, concerns about timeliness based upon any schedule set out in Order No. 25,130 have been muted by extending the procedural schedule out more than 3 weeks from that contemplated at the time the order was issued.

Prejudice

8. The OCA next contends that it would be prejudiced "by the issuance of and receipt of responses to the Staff information requests, as there is no opportunity for formal discovery pursuant to Commission rules, including the opportunity to move to enforce for failure or refusal of Comcast to fully respond." OCA Motion at ¶8. There is no prejudice to the OCA from the issuance of questions and receipt of responses. While it may be true that the timing of the questions does not present the OCA with the opportunity to conduct formal discovery on any answers ultimately received from Comcast as it would desire, it cites no Commission rules stating that it is entitled to the discovery it seeks. A general reference to "Commission rules" is insufficient to demonstrate that a right to a particular form of discovery would be impinged. Further, since, as noted by OCA, Comcast will not be present at the hearing, it is not clear what further discovery would be necessary.

9. Also, the questions were issued September 13, the same day as the OCA's motion, and no responses have been received. As such, there has not been any attempt to enter any

information from Comcast into the record of this proceeding. It may yet be possible that the responses eventually received are never entered into the record, either because they are not useful or for some other reason. In such an instance there could be no prejudice to the OCA, or anyone else, from having asked the questions.

10. Lastly, Staff allowed all parties the opportunity to send requests to Comcast through Staff, and the OCA declined that opportunity. The OCA, therefore, had the opportunity to ask any questions it saw fit to obtain the information it believed relevant. Any claim of prejudice is thus diminished by the OCA's decision not to engage in a generally available opportunity to question Comcast.

11. The OCA next contends that "TDS's use, if any, of the Staff information requests as a vehicle for garnering support for its filing and case in chief has no lawful basis and is patently unfair and prejudicial to the OCA, who has already filed testimony in response to TDS's case in chief as required by the Commission's schedule." OCA Motion at ¶9. TDS's potential use of this information to support its filing is not without lawful basis and would not be patently unfair and prejudicial to the OCA.

12. In its July 6, 2010 letter opposing the OCA's motion to be made a mandatory party, Comcast stated that it: "understands it is in possession of information regarding the availability and competitiveness of its voice services in the TDS territories at issue. Comcast Phone's affiliate Comcast Digital Voice, did launch competitive voice service in several TDS service areas beginning in February of 2010." Therefore, "In lieu of party status, Comcast Phone would propose to work with Commission Staff to provide targeted information, in a format that is acceptable to the parties and on a confidential basis (if necessary) — either through stipulated facts, affidavit, or limited discovery — in order to assist the Commission in making the competitiveness determination required pursuant to RSA 374:3-b." It was on the basis of the representations that: (1) Comcast had exclusive access to information on availability and competitiveness of its voice services; (2) Comcast was in fact offering those services in TDS's territories; and (3) Comcast would work with Staff to provide information to assist the Commission in making its findings under RSA 374:3-b, that the Commission declined to make Comcast a mandatory party. In light of the fact that Comcast had spelled out the nature of the information in its possession and that it would provide such information through Staff, it would be fair to permit its gathering. In fact, given that the inability to cross-examine or conduct discovery is due to the Commission's determination that Comcast would provide information to Staff without it being made a party, it would appear to be more unfair to deny the ability to obtain the information in the first place.

13. The unfairness that would result from granting the OCA's motion is made more apparent by the Commission's order that the hearing now set for September 27 is on the issue of competitive wireline offerings only. Order No. 25,130 at 3. As such, it appears that information from Comcast about its wireline offerings is an issue upon which the Commission intended to take evidence. Whether the evidence ultimately submitted is sufficient to allow TDS to meet its burden is not yet ready for determination. But, to deny the ability to gather information that the Commission understood to be necessary for

possible presentation at a hearing – a hearing addressing little other than the very type of information about competitive offerings considered relevant by the Commission – would be more unfair than to allow the gathering of information in the first instance.

Administrative Efficiency

14. Finally, the OCA contends that granting its motion would be administratively efficient in that “the production of responses to the information requests will almost certainly prompt additional motions and filings.” OCA Motion at ¶10. Whether that is true, it is just as likely that granting the motion to quash would generate additional motions and filings on the ground that the Commission contemplated the inclusion of this information previously. Therefore, the threat of additional motions and filings should not be a basis to conclude that the OCA’s motion should be granted. Further, given the profound length of the proceedings in this case, it would seem that any further delay occasioned by such motions would be of little consequence.

15. In addition, it would be more administratively efficient to allow the information to be gathered and to allow the opportunity to challenge any of the information that may ultimately be entered into the record. In that way, the Commission will have the best available information and evidence upon which to make its decision and may give whatever weight to that evidence it deems prudent in light of any arguments made for or against it. Thus, the Commission can decide, at one time, whether to reject the evidence if it ultimately determines it is deficient, or to rely on it as useful information in making its ruling.

Accordingly, for the above reasons, the Commission Staff requests that the Commission deny the OCA’s Motion to Quash Staff’s Data Requests to Comcast.

Respectfully,

Staff of the New Hampshire Public Utilities Commission
By its attorney,

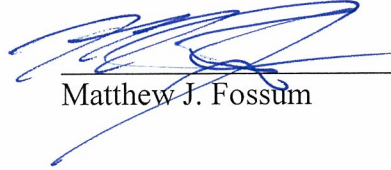


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing objection was delivered this day to the parties by electronic mail.

September 14, 2010



Matthew J. Fossum