

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
Petition for an Alternate Form of Regulation

**Kearsarge Telephone Company and Merrimack County Telephone Company
Motion in Limine to Strike Portions of Rebuttal Testimony of Ben Johnson Ph.D**

NOW COME Kearsarge Telephone Company (“KTC”) and Merrimack County Telephone Company (“MCT”) (collectively, the “Petitioners”), by and through their attorneys Devine, Millimet and Branch, Professional Association, and move to partially strike the September 2, 2010 pre-filed rebuttal testimony of Ben Johnson, Ph.D. In support of this motion, the Petitioners state as follows:

1. On March 1, 2007, the Petitioners, along with certain affiliated companies, filed a petition with the Commission seeking approval of their respective plans for an alternative form of regulation (the “AFOR Plans”) pursuant to RSA 374:3-b. Pursuant to its Order No. 24,852 dated April 23, 2008 (“First AFOR Order”), the Commission approved AFOR Plans (as amended by the terms of a certain joint settlement agreement) for the Petitioners’ affiliated companies, but denied the amended AFOR Plans submitted by MCT and KTC. In the First AFOR Order, the Commission also afforded the Petitioners the opportunity to update their testimony and present additional information to the Commission to support their respective AFOR Plans.¹

¹ See First AFOR Order at 30.

2. The Petitioners updated their testimony and presented the Commission with additional information. In Order No. 25,103, dated May 14, 2010 (“Second AFOR Order”), the Commission again rejected the AFOR plans of the respective companies, but held open the record for 30 days to allow KTC and MCT (affiliates of Telephone & Data Systems, Inc. (“TDS”)), to submit additional evidence on wireline competition for certain exchanges in their respective service territories. Specifically, the Commission held that, in regard to KTC:

[a]s stated above, we recognize that these are evolving markets and that certification as a CLEC is intended in most cases to lead to offerings of service. Evidence establishing that Comcast is offering service as a CLEC in the exchanges of Andover, Boscawen, Chichester, Meriden and New London, will be sufficient to demonstrate that a competitive alternative is available. If, within 30 days of the date of this order, TDS files an affidavit establishing that a voice service is *currently being offered in those exchanges* [emphasis original], accompanied by print or other record of such advertisements being made public, *it will meet its evidentiary burden* [emphasis supplied].²

Similarly, in regard to MCT, the Commission reiterated that:

[t]he presence of Comcast as a CLEC in the exchanges of Antrim, Contoocook, Henniker, Hillsborough and Melvin Village will be sufficient to demonstrate that a competitive alternative is available, on condition that within 30 days TDS submits evidence, such as through an affidavit with supporting documentation such as advertisements, establishing that a voice service *is currently being offered in those exchanges*.³

The Commission later clarified that “[i]f we find that the record supports a finding that Comcast is providing competitive voice offerings in all of the exchanges in question we will grant the petition for an alternative form of regulation for Kearsarge.”⁴

3. Accordingly, on June 11, 2010, TDS submitted an affidavit of Thomas E. Murray describing advertisements for Comcast competitive voice offerings in the KTC exchanges of Andover, Boscawen, Chichester, Meriden and New London, and evidence of telephone number

² *Id.* at 26.

³ Second AFOR Order at 21 (emphasis original).

⁴ *Id.* at 28.

porting requests in Andover, Boscawen, Chichester and New London. The affidavit also included a confirmed service order obtained from Comcast for voice service in Meriden. On June 14, 2010, TDS submitted an additional affidavit of Thomas E. Murray describing advertisements by Comcast for voice service in the MCT exchanges of Antrim, Contoocook, Henniker and Hillsboro as well as evidence of telephone number porting in each of those exchanges. The affidavit also included a copy of an email from Time Warner confirming that Time Warner offers voice service in the Melvin Village exchange.

4. In response to the Petitioners' updated evidence, on September 2, 2010, New Hampshire Legal Assistance, on behalf of intervenor Mr. Daniel Bailey, filed rebuttal testimony of Ben Johnson, Ph.D. (the "Johnson Rebuttal"). In that testimony, Dr. Johnson acknowledged that TDS had provided the information as described in the preceding paragraph.⁵ Further, Dr. Johnson agreed that "Comcast . . . apparently is willing to provide voice service on a stand-alone basis,"⁶ and readily conceded that TDS companies have been losing voice business to Comcast.⁷

5. Nevertheless, Dr. Johnson claimed that the evidentiary bar is not high enough. In addition to the evidence that the Commission has already held to be sufficient, Dr. Johnson insisted that TDS must also provide:

- "information regarding the extent to which consumers are actually switching back and forth between TDS' local exchange service and the "Triple Play" offering or any other service provided by Comcast (or any other firms, for that matter);"⁸
- evidence concerning the prices being charged by Comcast, in comparison with those being charged by TDS;"⁹

⁵ Johnson Rebuttal 4:12-22.

⁶ *Id.* 8:10-16.

⁷ *Id.* 12:1-13:9.

⁸ *Id.* 3:22-4:2.

⁹ *Id.* 3:2-5.

- “addresses of actual [Comcast] customers within each exchange to determine what fraction of its customers are actually able to obtain Triple Play service from Comcast;”¹⁰
- “data which could be used to conclude that Comcast’s Triple Play service is available to a majority of the customers in each exchange;”¹¹
- “information . . . to determine how many customers are purchasing video, broadband and voice services;”¹²
- the “extent to which Comcast voice offerings are actually available to every customer within every TDS exchange;”¹³
- “maps or other evidence . . . concerning the extent of the Comcast ‘footprint’ within each TDS exchange.”¹⁴

6. Bearing in mind that the Order restricted the current inquiry to the single issue of whether Comcast is *currently offering* a voice service at all in the relevant KTC and MCT exchanges, this is an unwarranted expansion of the scope of the final part of this proceeding. Dr. Johnson is essentially advocating that TDS conduct a door-to-door survey of every one of its customers to ensure that Comcast provides a telephone service that is identical to the TDS service in virtually every respect.

7. In reality, the Johnson Rebuttal is a flatly undisguised attempt to relitigate the entire question of whether cable telephone service is a competitive alternative to service provided by the TDS companies. Dr. Johnson contradicts and blatantly argues against the holding of the Second AFOR Order when he asserts that “it is not sufficient to show that

¹⁰ Johnson Rebuttal 5:14-15.

¹¹ *Id.* 5:17-18.

¹² *Id.* 13:18-19.

¹³ *Id.* 15:13-14.

¹⁴ *Id.* 15:18-19. Note that TDS has now provided this information at least *twice* in this proceeding. The petitioners previously provided these maps as Confidential Exhibit MCR-2 to the rebuttal testimony of Michael C. Reed, submitted on November 15, 2007. For the convenience of the parties, a copy of the KTC and MCT maps from Confidential Exhibit MCR-2 were later included in the September 6, 2010 response to Oral Data Request 1 from the July 27, 2010 Technical Session.

Comcast is providing an alternative [I]t must be a relevant, competitive alternative for a majority of the customers in each exchange.”¹⁵ This testimony is reminiscent of previous testimony involving both wireless and cable competition¹⁶ in which Dr. Johnson argued that the Commission’s analysis must consider pricing and marketing of bundled services packages. This argument, which the Commission has so far not found persuasive,¹⁷ does not improve with repetition and should again be rejected in its current guise.

8. The Johnson Rebuttal also veers off on to a brief discussion of whether TDS has demonstrated that its AFOR Plan will preserve universal service.¹⁸ Besides being irrelevant to the current inquiry, it is not even an issue. Upon approving the amended AFOR plans for Wilton Telephone Company and Hollis Telephone Company, the Commission found that Wilton and Hollis met the universal access requirement through the rate freeze (basic local service and Lifeline) elements of their plans.¹⁹ Though the term of the rate freezes may be different, the same rate protections are found in the KTC and MCT modified plans.

9. While the New Hampshire Rules of Evidence do not apply to Commission proceedings, the Commission must exclude evidence, including expert testimony, that is irrelevant or otherwise immaterial to the issues presented. Puc 203.23(c)-(d). In New Hampshire, the standards for governing the admissibility of expert testimony are encompassed in New Hampshire Rule of Evidence 702 and RSA 516:29-a. The overall purpose of Rule 702 and RSA 516:29-a is to ensure that a fact-finder is presented with *reliable* and *relevant* evidence. If

¹⁵ Johnson Rebuttal 19:13-17. *See also id.* 5-18, 19-22.

¹⁶ Johnson Rebuttal Testimony at 18-21 (July 17, 2009); Phase I, Tr. Day 2, 103:11-104:16. *See also* Bailey Brief at 25 (Nov. 6, 2009).

¹⁷ First AFOR Order at 18; Second AFOR Order at 13.

¹⁸ Johnson Rebuttal 18:18-19:5.

¹⁹ First AFOR Order at 28.

the evidence is not reliable and not relevant, then such evidence should be excluded as irrelevant.

See Puc 203.23(d).

10. As described in the foregoing paragraphs, the Johnson Rebuttal is irrelevant and immaterial in large part, as well as an improper request for reconsideration of the Second AFOR Order. Its only purpose is to restart this proceeding and drag it into a *fifth* year of litigation.

11. In light of the nature of the relief requested herein, the Petitioners have not sought the assent of the other parties before filing this motion.

WHEREFORE, the Petitioners respectfully request that the Commission grant this Motion in Limine to Strike Portions of the Prefiled Rebuttal Testimony of Ben Johnson, Ph.D., specifically the following:

Page 3, Line 1 through Page 4, Line 11
Page 6, Line 9 through Page 8, Line 9
Page 8, Line 18 through Page 11, Line 23
Page 13, Line 11 through Page 22, Line 6

Respectfully submitted,

KEARSARGE TELEPHONE COMPANY AND
MERRIMACK COUNTY TELEPHONE
COMPANY

By their Attorneys,
DEVINE, MILLIMET & BRANCH, P.A.

Dated: September 22, 2010

By: 

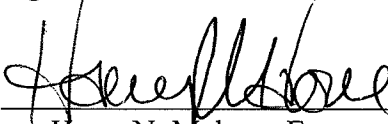
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CERTIFICATE OF SERVICE

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

Dated: September 22, 2010

By: _____


Harry N. Malone, Esq.