

State of New Hampshire
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 Alternative Form Of Regulation

Phase 3

Motion in Limine/Motion to Amend Procedural Schedule and Other Relief

Now comes Intervenor Daniel Bailey, and in the event that the Office of Consumer Advocate's (OCA) Motion To Quash Staff Data Requests To Comcast is denied, respectfully submits this Motion in Limine and requests that the Commission rule that the Comcast responses to Staff data requests cannot be offered into evidence in this docket or otherwise be considered by the Commission; and alternatively, if this Motion in Limine is denied, Mr. Bailey requests that the Commission amend the procedural schedule to provide a reasonable opportunity for the parties to conduct meaningful discovery and cross-examination of Comcast:

Introduction:

1. In Order No. 25,103 dated May 14, 2010 in this docket the Commission stated that following a timely request by a party "we will schedule an evidentiary hearing and afford the parties an opportunity for discovery through a technical session and responsive testimony or evidence regarding the availability of CLEC offerings in the exchanges in question." Order, page 28.

2. In Order No. 25,130, dated July 15, 2010 in this docket the Commission granted OCA's and NHLA's request for a hearing on the new evidence presented by both Kearsarge and Merrimack, and stated that "The hearing will be limited to the new evidence submitted [on June 11 and 14, 2010] and whether it fulfills the requirements of RSA 374:3-b." Order, page 3. The Commission further noted that the parties "should undertake discovery on the evidence proffered in the TDS affidavits in a Technical Session on July 27, 2010." Order, page 4.
3. In Order No. 25,130 the Commission denied the OCA's request to designate Comcast as a "mandatory party" to this docket. Order, page 4. The Commission noted that Comcast had withdrawn from this proceeding on September 21, 2009, and stated: "inasmuch as Comcast has offered to provide competitive information on a confidential basis, we are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." Id.
4. No party sought information by or from Comcast at the July 27, 2010 technical session.
5. A second Technical Session took place on September 8, 2010 to provide an opportunity for the parties to conduct discovery on the prefiled Testimony submitted on behalf of Mr. Bailey and the OCA. Comcast participated in that Technical Session by phone.
6. At the September 8, 2010 Technical Session Staff and TDS, for the first time, expressed their interest in obtaining written responses from Comcast to specific information requests from Staff and the parties.
7. When Mr. Bailey's expert witness posed two questions to Comcast at the above Technical Session with respect to the above matter, Comcast's representative stated that Comcast would not respond to certain questions, including on grounds of "relevancy,"

and also stated that Comcast would not voluntarily produce a witness to testify and be cross examined at the hearing in this case.

8. Both the OCA and counsel for Mr. Bailey expressed concern at the September 8th technical session about Comcast providing only limited information that it deemed appropriate and relevant, and not providing a witness for cross examination at the scheduled hearing.
9. Staff made clear at the September 8th technical session its intent to send questions to Comcast for possible use in this proceeding, and offered the parties the opportunity to send questions to Staff which Staff offered to forward to Comcast.
10. Both counsel for Mr. Bailey and the OCA chose not to submit questions to Comcast for the reasons set forth in their emails dated September 9 and September 10, 2010, respectively (see copies attached to letter from Mr. Malone, counsel for TDS, to Debra Howland, dated September 15, 2010). Essentially, Mr. Bailey and the OCA declined to participate in a process whereby a nonparty provides only limited information of the nonparty's choosing, under severe time constraints, and then the nonparty refuses to be present at the hearing for cross examination.
11. Furthermore, the informal and limited discovery process established by Staff offers no opportunity for a party to file a motion to compel the nonparty to produce requested information pursuant to Puc 203.09(i). Specifically, in this case, Comcast pointedly refused to answer Mr. Bailey's questions which may be relevant to these proceedings.
12. On September 13, 2010 Staff sent written information requests, on behalf of Staff and TDS, to Comcast, notwithstanding the above September 9th and 10th email objections of Mr. Bailey and the OCA.

13. On September 13, 2010, the OCA filed a Motion To Quash Staff Data Requests To Comcast. On September 14, 2010 Staff filed Staff's Objection to the OCA's above Motion To Quash, and on September 15, 2010 TDS filed a letter with the Commission objecting to the OCA's above Motion.
14. Both Staff and TDS make clear in their respective Objections that they believe that the Commission should have the opportunity to consider the Comcast responses to Staff's data requests in determining whether the Companies have met their burden of proof under RSA 374:3-b, III. (See, for example, paragraphs 12, 13, and 14 of Staff's September 14, 2010 Objection. See also the next to last paragraph of the letter from Mr. Malone dated September 15, 2010, bottom of page 1 and top of page 2).

Motion in Limine:

15. In the event the OCA's September 13, 2010 Motion To Quash Staff Data Requests To Comcast is denied, Mr. Bailey moves to prohibit admission or consideration of the Comcast responses.
 - A. Failure to Follow Procedural Schedule.
16. TDS bears the burden of proof in demonstrating its petition meets the requirements of RSA 374:3-b, III. See N.H. Code Admin. R. Puc 203.25. From its filing on March 1, 2007, until the technical session held on September 8, 2010, TDS chose not to produce or otherwise pursue the information now requested from Comcast. The Staff data requests do not comply with the procedural schedule in this docket. Accordingly, the Comcast responses should not be admissible.

B. Denial of Opportunity to Conduct Formal Discovery.

17. N.H. Code Admin. R. Puc 203.09(a) provides that "...any person granted intervenor status shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule." N.H. Code Admin. R. Puc 203.09(b) further provides a "...right to serve upon any party, data requests, which may consist of a written interrogatory or request for production of documents." (Emphasis added).
18. At the September 8, 2010 technical session, Comcast indicated it would not answer certain questions posed by Mr. Bailey. Because Comcast is not a party, Mr. Bailey had no right to serve Comcast data requests or compel a response from Comcast. Additionally, Staff's September 13, 2010 information requests were sent only two weeks before the September 27, 2010 hearing, leaving no reasonable opportunity for meaningful follow-up of discovery or resolution of likely discovery disputes.
19. Accordingly, the admission of the Comcast responses without a meaningful discovery process is contrary to Mr. Bailey's right to conduct discovery pursuant to N.H. Code Admin. R. Puc 203.09(a).

C. Denial of Opportunity to Conduct Meaningful Cross Examination.

20. RSA 541-A:33, IV and N.H. Code Admin. R. Puc 203.24 provide all parties with the right of cross-examination "...for a full and true disclosure of the facts."
21. At the September 8, 2010 technical session, Comcast indicated it would not provide a witness for the September 27, 2010 hearing. Mr. Bailey is thereby deprived of the opportunity to conduct cross-examination of Comcast. Cross-examination would help develop a full and true disclosure of the facts concerning whether TDS has met its burden under RSA 374:3-b, III.

22. The Comcast responses involve technical information. To the extent the Comcast responses are relevant to any of the requirements set forth in RSA 374:3-b, III, Mr. Bailey would be materially prejudiced by their admission without the ability to conduct meaningful discovery and cross-examination.
23. Accordingly, the admission of the Comcast responses without the opportunity for discovery and cross-examination would be a violation of RSA 541-A:33, IV and N.H. Code Admin. R. Puc 203.24.
- D. Denial of Due Process.
24. In addition, the admission of the Comcast responses, to the extent that they are relevant, without the opportunity for meaningful cross examination would be a violation of Mr. Bailey's right to due process of law. Wheeler v State, 115 NH 347 (1975), cert. denied 423 US 1075 (1976).
25. The Comcast responses should not be offered into evidence in this docket or considered by the Commission.

Motion to Amend Procedural Schedule and Other Relief:

26. In the event the Commission denies Mr. Bailey's Motion in Limine, Mr. Bailey moves in the alternative for Commission modification of the procedural schedule as described herein.
27. A full record cannot be developed without making Comcast a mandatory party or requiring Comcast's attendance at a deposition and hearing.
28. The Commission has the authority to make Comcast a mandatory party herein.
29. The Commission has the authority to issue a subpoena pursuant to RSA 365:10 and Puc 203.09(j).

30. RSA 541-A:33, IV provides that "...a party may conduct cross examinations required for a full and true disclosure of the facts..." Under somewhat similar circumstances, the Commission chose to "suspend" proceedings to provide the opportunity to conduct discovery when "simple procedural fairness" dictates, thereby providing the parties an opportunity to prepare their cases. Re: Public Service Co. of New Hampshire, Order No. 21,860, DR 95-068, 80 NH PUC 640, 643, 644 (1995), 1995 WL 875243 (October 12, 1995), at 3, 4. Due process requires some minimal procedural fairness if the Comcast responses are admitted into evidence or otherwise considered by the Commission.
31. Scheduling a second hearing day, in addition to the hearing scheduled for September 27, 2010, and providing a reasonable opportunity for the parties to conduct formal discovery on Comcast prior to said hearing, will enable the parties to develop a full and complete record and will better enable the Commission to determine whether the requirements of RSA 374:3-b have been met by the Companies.
32. Resolution of this matter is in the interests of justice and administrative efficiency.
33. Counsel for Mr. Bailey provided Staff, TDS, and OCA with a copy of this motion on September 22, 2010.

WHEREFORE, Mr. Bailey requests that, in the event the OCA's September 13, 2010 Motion To Quash Staff Data Requests To Comcast is denied, the Commission grant the following relief:

- A. Rule that the Comcast data responses cannot be offered into evidence in this docket or be otherwise considered by the Commission, or, in the alternative,
- B. Make Comcast a mandatory party to these proceeding, and/or issue a subpoena to compel the attendance of Comcast at a deposition and at the hearing referenced above.
- C. Amend the procedural schedule as follows:
 - 1.) Provide for a schedule to allow the parties an opportunity to conduct formal discovery on Comcast pursuant to the Commission's discovery rules, including Puc 203.09, and,
 - 2.) Schedule a hearing date, in addition to the September 27, 2010 hearing date, for cross examination of Comcast.
- D. Grant such other relief as may be reasonable and just.

Respectfully submitted,

Daniel A. Bailey,
By His Attorney,

New Hampshire Legal Assistance
117 North State Street
Concord, NH 03301
603-223-9750

9/23/10
Date

Alan Linder
Alan Linder
alinder@nhla.org

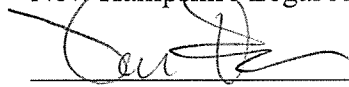
9/23/2010
Date

Daniel Feltes
Daniel Feltes
dfeltes@nhla.org

Certification of Service

I certify that on this date, the original and 7 copies of this motion were hand delivered to the Commission, and copies were sent via email to the Commission and to all parties on the service list in this docket.

New Hampshire Legal Assistance



Attorney for Daniel Bailey

9/23/2010

Date