

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 11-024

UNION TELEPHONE COMPANY

Petition for Approval of an Alternative Form of Regulation

Order on Petition and Motion for Confidential Treatment

ORDER NO. 25,235

June 15, 2011

APPEARANCES: Primmer, Piper, Eggleston & Cramer, PC by Paul J. Philips, Esq., for Union Telephone Company; Meredith A. Hatfield, Esq., of the Office of Consumer Advocate on behalf of residential ratepayers, and Matthew J. Fossum, Esq., for the Staff of the Public Utilities Commission.

I. PROCEDURAL HISTORY

On February 4, 2011, Union Telephone Company (Union) petitioned for approval of an alternative form of regulation pursuant to RSA 374:3-b. Union, a wholly-owned subsidiary of TDS Telecommunications Corporation (TDS), is a rural incumbent local exchange carrier offering telecommunications services in the exchanges of Alton, Barnstead, Center Barnstead, Gilmanton Iron Works and New Durham, New Hampshire. According to Union's petition, it serves fewer than 25,000 access lines in New Hampshire and the majority of its retail customers in each exchange have competitive wireline services available to them. Accordingly, Union seeks to be regulated in a manner more comparable to that applied to competitive local exchange carriers (CLECs) in New Hampshire.

On February 14, 2011, the Commission issued an order of notice setting a prehearing conference for March 1, 2011. On February 17, 2011, the Office of Consumer Advocate (OCA) notified the Commission of its intent to participate in the docket on behalf of residential

ratepayers consistent with RSA 363:28. There were no intervenors. Following the prehearing conference, Staff and the OCA conducted discovery. On May 6, 2011, Staff and Union filed a stipulation and settlement agreement. The stipulation added provisions for Lifeline and Link-Up customers to the alternative regulation plan proposed by Union and advised the Commission that the signatories believed Union met the statutory requirements for approval of the plan. A hearing on the stipulation was held on May 13, 2011.

II. POSITIONS OF THE PARTIES AND STAFF

A. Union

According to Union's petition, in 2004 Union had nearly 8,000 access lines in its service territory and since that time it has lost approximately 2,500 of those lines. *See* Exhibit 2, Pre-Filed Public Testimony of Thomas Murray (Ex. 2P) at 10 and Corrected Attachment G to Ex. 2P. According to Union, its primary competition is from MetroCast Cablevision of New Hampshire LLC (MetroCast), a CLEC offering telecommunications services in Union's territory. MetroCast provides cable television, internet and telecommunications services in each of the municipalities covered by Union's exchanges. Another CLEC, IDT America Corporation, provides MetroCast with connectivity to the public switched telephone network, local number porting, enhanced 911 interconnection and other services which permit MetroCast to provide local telephone services to end-user customers over its cable wires. Ex. 2P at 5.

According to Union, MetroCast's facilities pass a majority of retail customers in each of its exchanges and MetroCast can offer telecommunications services to any location passed by its facilities. Ex. 2P at 6-7, 9. With the assistance of MetroCast, Union provided maps purporting to show the locations of MetroCast's facilities relative to Union's customers in each exchange. *See* Highly Confidential Ex. D-1 through D-5. According to Union, with the exception of the

Center Barnstead exchange, it is clear from the maps that MetroCast's facilities pass a majority of customers in each exchange. Regarding the Center Barnstead exchange, Union states that since it was not clear from the map that a majority of customers were passed by MetroCast's facilities, it counted the number of homes and businesses passed. Union confirmed that approximately 76 percent of the customers in the exchange could be served by MetroCast. Transcript of May 13, 2011 Hearing (Tr.) at 33. The quantity of retail customers that can be served by MetroCast is corroborated by information in the affidavits of Joshua Barstow and Jeffrey Drapeau, both employees of MetroCast. *See Confidential Attachments C and F to Exhibit 2.*

According to Union, MetroCast's telephone services provide a competitive alternative to Union's services and the amount of numbers ported to MetroCast is proof of that competition. Ex. 2P at 10. According to Union, it has lost approximately 33 percent of its lines over the last few years, with many of those going to MetroCast. Ex. 2P at 10. When questioned why Union has lost a greater number of lines than can be attributed to porting to MetroCast alone, Union stated that it is also facing competition from wireless carriers and customers desire to "cut the cord." Tr. at 27. In the instances where a customer shifts to a wireless carrier, Union stated that it is often the case that the customer will first obtain a wireless number and then later terminate home telephone service so there would be no number to port to another carrier. Tr. at 28-29.

In addition to the information about the availability of competitive alternatives in its service territory, Union contends that it otherwise meets the statutory requirements for alternative regulation. Union first notes that its plan is substantially the same as the plans approved for its sister companies, Wilton Telephone Company, Hollis Telephone Company, and Kearsarge Telephone Company, all subsidiaries of TDS (collectively the TDS Companies). *See*

Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co., Order No. 24,852 (April 23, 2008); Order No. 25,103 (May 14, 2010); and Order No. 25,182 (Dec. 22, 2010). As to the regulation of its rates, Union points out that its plan contains a price cap for basic service so that the rates can never be raised higher than the rates charged by New Hampshire's largest incumbent local exchange carrier, FairPoint Communications. Ex. 2P at 11. Union notes that its current rate for basic service in each of its exchanges is \$13.21, and that the corresponding rate cap for all but the Center Barnstead exchange is \$14.43, with the Center Barnstead exchange being capped at \$15.71. Ex. 2P at 11. In addition, pursuant to Order No. 25,045 (Nov. 20, 2009) in Docket No. DT 09-136, which concerned the transfer of Union to TDS ownership, irrespective of any permission to raise rates in the plan, Union is not permitted to raise its rates until at least September 26, 2011. At the hearing, Union also noted that even if permitted to raise its rates, it currently has no plan to do so because raising rates in the face of competition would be harmful to its business. Tr. at 36. As to rates other than for basic service, the plan provides that they will be regulated in a manner comparable to CLECs in New Hampshire.

Regarding the requirement that the plan promote the offering of innovative telecommunications services, Union notes that under its plan it will waive its federal rural exemption and it will not oppose certification of other providers to operate in its territory. Ex. 2P at 14. Thus, more competitive providers will be able to enter Union's territory and offer new services. Further, in its plan Union has agreed to shorter timeframes for the negotiation of interconnection agreements. Ex 2P at 14-15. As to Union's level of innovation, Union stated that it has been upgrading and improving its systems to offer better services and greater options to customers. Tr. at 29-30. Further, Union has committed to regularly assessing its customers'

satisfaction with its services under the plan. Moreover, Union is committed to providing the Commission a greater level of reporting than would otherwise be required of a competitive carrier, thus allowing the Commission to monitor the services offered under the plan. Ex. 2P at 15; Tr. at 25, 37-38. Union also notes that there is no change to the existing level of regulation regarding wholesale services and related intercarrier obligations and it contends that it will meet its intercarrier obligations under all applicable laws. Ex. 2P at 16.

As to the requirement that the plan preserve universal access to affordable basic telephone service, Union notes that it will continue to act as the carrier of last resort in its service territories. Also, Union notes that it is designated an eligible telecommunications carrier under federal law and thus has certain universal service obligations to maintain. Further, through the stipulation Union signed with Staff, the plan is amended to include a new provision increasing Union's outreach concerning the Lifeline and Link-Up programs for low income customers. Union notes that this requirement is similar to that in the plans previously approved for the TDS Companies, but Union's efforts to increase participation in those programs can be more easily assessed because the stipulation sets forth more objective and verifiable goals. Tr. at 20-21.

Lastly, pursuant to the statute, Union's plan contains a provision for modifying or terminating the plan under certain circumstances. In the event Union fails to meet its obligations under the plan or the conditions in the statute, the Commission can enforce compliance with the conditions or require Union to return to its prior form of regulation.

B. OCA

In questioning Union, the OCA asked whether it too could receive the notice required to be filed annually relative to Union's efforts to promote Lifeline and Union agreed. Tr. at 23. Additionally, the OCA asked that the notice, though not otherwise required to do so, include the

number of Lifeline customers in Union's territory and Union stated that it could add that information. Tr. at 23. The OCA also questioned Union about its reporting obligations under the plan and Union confirmed that it would still be required to file certain service quality reports required of incumbent carriers rather than those filed by competitive carriers. Tr. at 24-25.

In its closing, the OCA noted that it did not take a position on the stipulation but stated that it had the same concerns in this case as it had in the previous alternative regulation dockets. Tr. at 41-42. Specifically, the OCA expressed concern that the customers of rural carriers do not have genuine competitive alternatives and that the prices of the available alternatives are so high as to make them not competitive. Tr. at 42.

C. Staff

In its closing, Staff stated that it supported Union's request for alternative regulation. Tr. at 43. Staff agreed that Union is facing strong competition from MetroCast and that MetroCast has the ability to serve a majority of customers in each of Union's exchanges. Tr. at 43. Staff noted that Union had lost nearly one-third of its lines in the last few years, including many to MetroCast at the price points noted in Union's filing. Tr. at 43. Thus, Staff stated that it believed that there is presently a competitive alternative for a majority of customers in Union's territory and that the apparent price discrepancies have not been an impediment to customers changing carriers. Tr. at 43.

Staff also stated that it believed the plan meets the other requirements of RSA 374:3-b for obtaining alternative regulation. Tr. at 43. Staff noted specifically that not only does the plan cap basic service rates, but that it includes requirements for the promotion of Lifeline which protects low income customers as well. Tr. at 43-44. Accordingly, Staff recommended that the

Commission approve Union's alternative regulation plan, subject to the plan as amended by the stipulation. Tr. at 44.

III. COMMISSION ANALYSIS

A. Legal Framework for Alternative Regulation

RSA 374:3-b reads, in relevant part:

II. A small incumbent local exchange carrier subject to rate of return regulation may petition the public utilities commission for approval of an alternative form of regulation providing for regulation of such carrier's retail operations comparable to the regulation applied to competitive local exchange carriers, subject to paragraph III, due to its status as carrier of last resort.

III. The commission shall approve the alternative regulation plan if it finds that:

(a) Competitive wireline, wireless, or broadband service is available to a majority of the retail customers in each of the exchanges served by such small incumbent local exchange carrier;

(b) The plan provides for maximum basic local service rates at levels that do not exceed the comparable rates charged by the largest incumbent local exchange carrier operating in the state and that do not increase by more than 10 percent in each of the 4 years after a plan is approved with the exception that the plan may provide for additional rate adjustments, with public utilities commission review and approval, to reflect changes in federal, state, or local government taxes, mandates, rules, regulations, or statutes;

(c) The plan promotes the offering of innovative telecommunications services in the state;

(d) The plan meets intercarrier service obligations under other applicable laws;

(e) The plan preserves universal access to affordable basic telephone service; and

(f) The plan provides that, if the small incumbent local exchange carrier operating under the plan fails to meet any of the conditions set out in this section, the public utilities commission may require the small incumbent local exchange carrier to propose modifications to the alternative regulation plan or return to rate of return regulation.

Because we have before us a stipulation and settlement agreement relative to Union's alternative regulation plan, we review the standards relative to settlement agreements. Pursuant to RSA 541-A:31, V(a), informal disposition may be made of any contested case at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or

default. New Hampshire Code of Administrative Rules Puc 203.20(b) requires the Commission to determine, prior to approving disposition of a contested case by settlement, that the settlement results are just and reasonable and serve the public interest. Even where all parties join a settlement agreement, however, the Commission cannot approve it without independently determining that the result comports with applicable standards. *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 24,972 (May 29, 2009) at 48. The issues must be reviewed, considered and ultimately judged according to standards that provide the public with the assurance that a just and reasonable result has been reached. *Id.* Moreover, we scrutinize settlement agreements thoroughly regardless of whether a party appears at hearing to raise objections. *Id.*

B. Alternative Regulation Analysis

We note at the outset that the plan put forth by Union as modified in the stipulation is substantially the same as the ones we have already approved for the TDS Companies. We note also that Union is a small incumbent carrier as defined in RSA 374:3-b and is thus eligible to apply for alternative regulation under that statute. As to the elements of Union's plan and their compliance with the various statutory factors, we first consider whether there is a competitive wireline, wireless, or broadband service available to a majority of the retail customers in each of Union's exchanges as required by RSA 374:3-b, III(a). As has been made clear throughout the case, Union believes that MetroCast provides a service sufficient to meet the requirements of the statute.

Regarding the availability of MetroCast's services to a majority of retail customers, Union, with assistance from MetroCast, has produced a number of maps that show the locations of MetroCast's facilities relative to the locations of Union's customers. The maps show that a

clear majority of the customers' locations in each exchange are passed by MetroCast's facilities. Further, the affidavits provided by MetroCast employees confirm that MetroCast's facilities pass a clear majority of the customers. MetroCast also confirmed that it is able to offer telecommunications services in any location passed by its facilities. In view of this information, we conclude that the majority of retail customers in each exchange have an alternative service available to them.

In addition to having an alternative service available, the statute requires that the service be competitive. Any determination on the existence and state of competitiveness must be made with reference to the state of competition at present and not as it may come to be. *Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co.*, Order No. 25,182 (Dec. 22, 2010) at 14. The level of competition in a market need not be that which is used in an antitrust analysis or that which would justify complete deregulation of retail rates. *Id.* In addition, while evidence of access line or revenue loss and minutes of use loss is indicative of competition, it is insufficient, standing alone, to find that a market is competitive. *Id.*

In Order No. 25,182, the Commission concluded that Comcast was offering a competitive alternative to the service provided by Kearsarge Telephone Company despite an apparent price difference between the two companies' services. *Id.* at 24-25. Among the reasons for finding that the products were competitive, despite the difference in price, was that Comcast's more expensive service offered a greater range of features for the price. *Id.* The comparison holds in this instance as well. As noted in Mr. Barstow's affidavit, for \$44.95 MetroCast offers a voice-only service, *i.e.*, not including television or internet services, which includes unlimited local and long distance calling, caller ID, call waiting, call forwarding, anonymous call rejection, selective

call rejection, distinctive ringing, do not disturb, automatic recall, voice mail, speed dialing, three-way calling and other options. Union's less expensive basic service does not provide these options. As such, though priced higher than Union's service, MetroCast's voice service provides a greater range of features. Further, according to the information in Union's response to OCA Supp-1, few customers in each exchange are taking only basic service. *See* Exhibit 3C.

Moreover, as noted in the corrected Attachment G to Exhibit 2, Union has lost a significant number of lines in the last few years, including nearly 1,000 in 2010 alone. While not all lines have moved to MetroCast's services, according to Mr. Murray, a significant number of them have done so. According to Mr. Murray, Union is also losing lines to customers who are choosing to use wireless services. Tr. at 27. Union, however, has not produced any evidence of this and has maintained that the presence of MetroCast alone is sufficient to meet the requirements of the statute. Ex. 2P at 8. Although line loss, by itself, is not sufficient to demonstrate the existence of a competitive alternative, in this instance the line loss coincides to a notable degree with the activities of MetroCast in Union's territory. For the above reasons, we conclude that the majority of retail customers in each of Union's exchanges has access to a competitive alternative service.

In considering the remaining statutory factors under RSA 374:3-b, we look next at whether the plan provides for rates set at a maximum not to exceed the rates of the state's largest incumbent carrier for comparable rate groups, and whether it caps rate increases at no more than ten percent per year for the first four years, subject to the occurrence of various defined exogenous events. RSA 374:3-b, III(b). In the proposed plan, section 4.1 explicitly sets out what is required by this provision of the statute. Union's rates and rate increases are capped in precisely the manner called for in the statute. Further, pursuant to Order No. 25,045 (November

20, 2009) and section 4.1.3 of Union's plan, any rate increases, should Union desire them, may not begin prior to September 26, 2011. In addition, section 4.1.2 states that various rate adjustments may be made for exogenous events as defined in section 7 of the plan. Section 7 defines the qualifying exogenous events and permits Union to adjust its rates for those events, subject to the Commission's approval. Thus, the plan adopts the requirements of RSA 374:3-b, III (b) and adheres to its terms. Accordingly, we find that section III (b) has been met.

Next, RSA 374:3-b, III(c) provides that the Commission shall approve an alternative regulation plan if it "promotes the offering of innovative telecommunications services in the state" As with the plans covering the TDS Companies, Union's plan provides in section 5 that it maintain a network sufficient to offer state-of-the-art, innovative services. Also, as noted by Union at the hearing, Union is aware that to stay relevant to its customers it must continue to innovate and offer the kinds of services that its customers desire. Tr. at 29. To that end, Union has recently made substantial investment in upgrading its facilities to provide the kinds of services customers need and want. Tr. at 29-30. Further, pursuant to section 3.6 of the plan, Union will not oppose the entry of new competitive providers and has agreed to a reduced timeframe for negotiating interconnection agreements. We have previously found this condition to be in furtherance of the requirement to promote innovative services. *Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co.*, Order No. 24,852 (April 23, 2008) at 28. Moreover, in section 5.1.2, Union commits to regularly assess its customers' satisfaction. In that Union has committed to maintaining a network sufficient to provide innovative services and that it will, with the same goal, be assessing the satisfaction of its customers, we find that the plan promotes the offering of innovative telecommunications services as required by RSA 374:3-b, III(c).

As to the requirement under RSA 374:3-b, III(d), it provides that the Commission shall approve the plan if it, “meets intercarrier service obligations under other applicable laws”

As stated above, Union has agreed to various conditions concerning the entry of competitive providers. We note, as we have previously, that by this concession Union has also enhanced its intercarrier service obligations, which responds to the requirements of RSA 374:3-b, III(d).

Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co., Order No. 24,852 (April 23, 2008) at 28. As with the plans covering the TDS Companies, we conclude that this plan conforms to the requirements of RSA 374:3-b, III(d).

Next, RSA 374:3-b, III(e) requires that the “plan preserve[] universal access to affordable basic telephone service” Here, the plan calls for caps on basic service rates, which will aid in preserving access to affordable service. We have previously concluded, however, that these rate caps, by themselves, are insufficient to ensure universal access to affordable service.

Kearsarge Telephone Co., Wilton Telephone Co., Hollis Telephone Co. and Merrimack County Telephone Co., Order No. 25,182 (Dec. 22, 2010) at 27. Union’s plan provides other protections to ensure the availability of universal access going forward, as called for in RSA 374:3-b, III(e). First, the plan does not allow any increase to basic rates until at least September 26, 2011. While this is not a lengthy freeze on rates, it is nonetheless a restriction on Union’s ability to raise rates under the plan. Also, under section 4.1.4. of the plan, Union is required to continue to offer unbundled, *i.e.*, stand-alone, Basic Retail Service as a condition of being permitted to offer any other bundled services. Additionally, pursuant to section 4.1.7. of the plan, which was added by the stipulation in this case, the plan freezes the rates for Lifeline for the four years following the effective date of the plan. Thereafter, Lifeline rates are permitted to be increased at a rate of ten

percent per year up to the rates of the State's largest incumbent carrier for comparable Lifeline customers.

In addition to the above restrictions on rate changes we also note that the plan, as amended by the stipulation, contains provisions aimed at increasing awareness of and enrollment in the Lifeline program. We commend the parties for including these provisions and for ensuring that there are specific requirements for the dissemination of information and for reporting adherence with the provisions. In this manner, the plan will not be subject to the same questions about Lifeline related requirements as was the case with the TDS Companies. *Id.* at 29-30. Including these provisions offers both rate protections and a potential increase in Lifeline enrollment which, in combination, are sufficient to preserve universal access to affordable basic telephone service.

Lastly, RSA 374:3-b, III(f) states that a plan shall be approved if it provides for modifications or termination if the carrier fails to meet any of the conditions set out in the statute. Section 2.3 of the plan provides that, subject to the opportunity for a hearing, the Commission may require Union to propose modifications to its plan or return to its prior form of regulation. Thus, it complies with RSA 374:3-b, III(f).

In sum, because Union has shown that there is a competitive alternative available to a majority of customers in each of its exchanges, and because its alternative regulation plan otherwise adheres to the terms of RSA 374:3-b, III, we grant the petition for alternative regulation for Union.

C. Motion for Confidential Treatment

With its petition, Union submitted the public and confidential testimonies of Thomas Murray, the Manager of State Government Affairs for Union's corporate parent. Also, as part of

its petition Union submitted five items labeled as confidential: (1) Confidential Attachment C, the affidavit of Jeffrey Drapeau, General Manager of MetroCast ; (2) Confidential Attachment F, the affidavit of Joshua Barstow, Vice President of Advanced Services for MetroCast; (3) Confidential Exhibit 1 to Mr. Drapeau's affidavit, six maps depicting the locations of MetroCast's facilities in each of the municipalities served by Union; (4) Highly Confidential Attachment D to Mr. Murray's testimony, five maps overlaying the data from MetroCast's maps onto maps of the exchanges served by Union; and (5) Confidential Attachment E, a report of the amount of numbers ported from Union to MetroCast. On March 21, 2011, Union filed a new, redacted version of Mr. Barstow's affidavit. Thus, for purposes of this order, Union's motion is deemed to cover only the portions of Mr. Barstow's affidavit that were redacted in the March 21, 2011 filing rather than the entire document.

According to Union, the above-named items contain confidential, proprietary and commercially sensitive information which, if disclosed, would result in commercial and economic harm. Union, therefore, seeks confidential treatment for the confidential version of Mr. Murray's testimony as well as the other items described above pursuant to RSA 91-A:5, IV and New Hampshire Code of Administrative Rules Puc 203.08. Each item is more fully described as follows.

According to Mr. Murray's public testimony, Confidential Exhibit 1 to Mr. Drapeau's affidavit is a set of maps of the locations of MetroCast's facilities in each of the municipalities served by Union and shows detailed information about the locations of MetroCast's cable telecommunications plant as well as counts of the homes and businesses not passed by MetroCast's cables. Ex. 2P at 6. Confidential Attachment C, Mr. Drapeau's affidavit, uses the information from the maps and expands upon it by identifying the number of homes and

businesses that are passed and the percentage of those homes and businesses out of the total numbers of homes and businesses in the municipalities served by MetroCast. Ex. 2P at 6.

Using this information, Union prepared Highly Confidential Attachment D to Mr. Murray's testimony, the five maps on which the exchange boundaries served by Union are overlaid onto the maps of MetroCast's facilities. Ex. 2P at 6; Tr. at 30-32. These maps plot the locations of the homes and businesses within the exchanges to demonstrate the locations of those places in comparison to the locations of MetroCast's facilities.

Confidential Attachment F, Mr. Barstow's affidavit, describes the voice service offerings from MetroCast in Union's territory. Ex. 2P at 9. The affidavit explains the service availability as well as pricing and marketing information about the voice offerings. Ex. 2P at 9. The amended version of this attachment blocks out only the information about the amount of Union's territory covered by MetroCast and the number of homes and businesses passed. Lastly, Confidential Attachment E shows the number of lines that have been ported from Union to MetroCast between January 2010 and January 2011. Ex. 2P at 8.

According to Union, these items, and the portions of Mr. Murray's confidential testimony where he discusses these items, contain confidential, proprietary and commercially sensitive information. Union contends that the owners of this information would be injured by disclosure because it would reveal to competitors "proprietary information about the locations and types of competitive telecommunications facilities deployed within [Union's] service territory and the extent and ability of competitive services provided thereby." Motion for Confidential Treatment at 2. It would further cause harm, according to the motion, because it would reveal information about the numbers, locations and types of customers presently served by Union.

Union also points out that there is a protective agreement between it, MetroCast and IDT regarding this information (the AFOR Protective Agreement). Union's request for an order of confidential treatment seeks to bar public access to all of the items identified above, and an even greater level of protection for Highly Confidential Attachment D and the related testimony. With regard to the maps in Highly Confidential Attachment D and the testimony relating to them, Union seeks an order "that will recognize the highly confidential nature" of this information and which "will bar access to such information by any party to this proceeding, including, without limitation, by any signatory to the AFOR Protective Agreement, who is employed by a competitor of the Petitioner." Motion for Confidential Treatment at 3-4. In essence, Union seeks a two-tiered approach whereby most information would be available to the parties, as well as MetroCast and IDT, but not the public, and the remaining information would not be disclosed to MetroCast and IDT or the public.

RSA 91-A:5, IV states, in relevant part, that records of "confidential, commercial, or financial information" are exempted from disclosure and the New Hampshire Supreme Court has interpreted this exemption to require an analysis of both whether the information sought is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy. *Unitil Corporation and Northern Utilities, Inc.*, Order No. 25,014 (Sept. 22, 2009) at 2 (*quoting Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552 (1997)).

In determining whether commercial or financial information should be deemed confidential, we apply the three-part analysis employed by the New Hampshire Supreme Court. *See EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 25,119 (June 25, 2010) at 6 (*quoting Lamy v. N.H. Pub. Utilities Commn.*, 152 N.H. 106, 109 (2005)). First, we consider whether there is a privacy interest at stake that would be invaded by the disclosure. *Northern*

Utilities, Inc., Order No. 25,085 (Mar. 25, 2010) at 8. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. *Id.* Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.* This is similar to the Commission's rule on requests for confidential treatment. *See* N.H. Code Admin. Rules Puc 203.08; *see also* *Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 (Sept. 22, 2009) at 3. Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations. *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 25,119 (June 25, 2010) at 6.

As described previously, Mr. Drapeau's affidavit and the maps accompanying it identify the locations of MetroCast's facilities within various municipalities. In combination, the affidavit and the maps provide substantial information about the extent of MetroCast's facilities, the degree of coverage, the homes and businesses passed and not passed by the facilities, and the services offered on those facilities. According to the motion for confidential treatment, disclosure would harm MetroCast because it would reveal to competitors "proprietary information about the locations and types of competitive telecommunication facilities deployed within Union's service territory and the extent and availability of competitive services provided thereby." Motion for Confidential Treatment at 2. In reviewing whether there is a privacy interest at stake, we conclude that there is a significant privacy interest in this information. MetroCast has developed its facilities to benefit its business and competitive harm could befall it should the extent and capabilities of its facilities be revealed in such an explicit manner. *See e.g., N.H. Housing Fin. Auth.*, 142 N.H. at 554 (in determining the existence of a privacy

interest, the Court found instructive the federal test for confidential information under which a privacy interest could be found if disclosure was likely to cause substantial harm to the competitive position of the person from whom the information was obtained); *Unitil Corporation and Northern Utilities, Inc.*, Order No. 25,014 (Sept. 22, 2009) at 3, fn. 2.

Turning to the public interest in the information, we conclude that it is low. As noted, the purpose of disclosure is to inform the public about the conduct of government. While the Commission has reviewed the extent of MetroCast's facilities to determine the availability of MetroCast's services in the context of Union's petition for alternative regulation, revealing the exact extent of those facilities will do little, if anything, to aid the public understanding of the Commission's activities. Further, because knowledge of the availability of competitive alternatives is a factor to consider in petitions such as this, *see* RSA 374:3-b, III(a), the information provided by MetroCast is relevant to the Commission's analysis. Irrespective of the harm that might result to MetroCast's business, permitting disclosure would do great harm to the Commission's ability to obtain similar information in future petitions if the entity providing such information could not be assured of confidentiality. *N.H. Housing Fin. Auth.*, 142 N.H. at 554; *Unitil Corporation and Northern Utilities, Inc.*, Order No. 25,014 (Sept. 22, 2009) at 3, fn. 2. Accordingly, we grant the motion relative to Confidential Attachment C, Mr. Drapeau's affidavit, and Confidential Exhibit 1 to that affidavit.

Next, we address the maps presented in Highly Confidential Exhibit D, which overlay the information in the MetroCast maps with information about the boundaries of Union's exchanges. For reasons similar to those described above, we conclude that the privacy interest in this information is high. Not only do these maps detail information about MetroCast's facilities, but they also reveal information about Union and its services and customers. As to the public

interest, we again conclude that it is low. Balancing the interests, we conclude that the interests in confidentiality outweigh the interest in disclosure and grant the motion as to Highly Confidential Attachment D. We also note here that the AFOR Protective Agreement to which Union, MetroCast and IDT are signatories provides various protections among the signatories. We trust that the parties to that agreement will honor its terms and, to the extent they do not, the injured party will pursue proper recourse.

Turning to the amended version of Confidential Attachment F, Mr. Barstow's affidavit, the confidential portions of that document contain information about the amount of Union's territory covered by MetroCast and the number of homes and businesses passed. This information is taken directly from the affidavit of Mr. Drapeau, which, as noted above, we have already concluded is entitled to confidential treatment. Accordingly, for the same reasons given relative to Mr. Drapeau's affidavit, we conclude that the redacted portions of Mr. Barstow's affidavit are entitled to confidential treatment.

Next, we review Confidential Attachment E, the report of lines ported from Union to MetroCast. In this instance the privacy interest is relatively high. Revealing this information would show the impact on Union's business from the presence of MetroCast. While this information is certainly known by Union and MetroCast, the information could be used by other competitors to understand the business potential of operating in Union's territory thereby causing potential harm to both Union and MetroCast.

As to the public interest, there is some public interest in knowing the degree of competition posed by MetroCast because that information is relevant to the Commission's determination regarding the availability of competitive alternatives under RSA 374:3-b, III(a). In balancing these interests, however, we conclude that the privacy interest outweighs that of the

public. The harm to the business of Union and MetroCast could be substantial, while the enlightenment to the public would be small. Accordingly, we grant the motion relative to Confidential Attachment E.

Finally, with regard to Mr. Murray's testimony, he makes various, specific references to information in the above attachments. As such, any analysis in this order relative to those attachments likewise applies to the testimony about the attachments. Accordingly, we grant the motion for confidential treatment relative to the portions of Mr. Murray's pre-filed testimony that discuss the confidential attachments and will treat the information consistent with the Commission's rules for confidential documents.

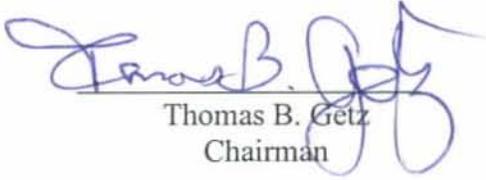
Based upon the foregoing, it is hereby

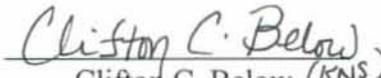
ORDERED, that subject to the amendment regarding the Lifeline Program as set out in the stipulation and settlement agreement, Union's alternative regulation plan is granted; and it is

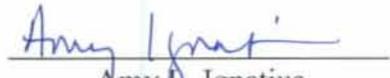
FURTHER ORDERED, that within 20 days of the date of this order a final version of the plan incorporating the changes identified in the stipulation and settlement agreement shall be filed with the Commission; and it is

FURTHER ORDERED, that Union's motion for confidential treatment is granted as set out above.

By order of the Public Utilities Commission of New Hampshire this fifteenth day of June,
2011.


Thomas B. Getz
Chairman


Clifton C. Below (KNS)
Commissioner


Amy D. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director

