

**BEFORE THE
PUBLIC UTILITIES COMMISSION**

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

**Petition for an Investigation into the Regulatory Status of
IP Enabled Voice Telecommunications Services**

**MOTION FOR REHEARING/RECONSIDERATION OF ORDER NO. 25,274
DENYING MOTION FOR SUSPENSION OF ORDER NO. 25,262**

AND/OR

PETITION FOR WAIVER OF CLEC RULES

NOW COME Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast") and, pursuant to RSA 541:3, respectfully move for rehearing/reconsideration of the portion of Order No. 25,274 issued on September 28, 2011 in the above-captioned docket that denied Comcast's Motion for Suspension of Order No. 25,262 issued on August 11, 2011. In the alternative, pursuant to N.H. Admin. R. Puc 201.05, and pursuant to directives set forth in Order No. 25,274, Comcast respectfully petitions for a waiver of the New Hampshire Public Utilities Commission's ("PUC's" or "Commission's") rules governing Competitive Local Exchange Carriers ("CLECs")¹. In support of these pleadings, Comcast states as follows:

I. INTRODUCTION/PROCEDURAL HISTORY

On August 11, 2011, the Commission issued Order No. 25,262 in the above-captioned docket. The Order found, *inter alia*, that the interconnected Voice over

¹ Comcast's waiver request extends to all Commission rules that may apply to Comcast including CTP rules and utility rules of general applicability, not simply those set forth in N.H. Admin. R. PART Puc 430. For convenience, the term "CLEC rules" used herein is intended to include all of the Commission's rules that may apply to Comcast.

Internet Protocol service (“interconnected VoIP”) service offered by Comcast and Time Warner in New Hampshire constitutes the conveyance of telephone messages under RSA 362:2 and that providers of such services are New Hampshire public utilities subject to the Commission’s CLEC regulations. Order No. 25,262 further directed Comcast and Time Warner to comply with registration and other CLEC requirements for their intrastate interconnected VoIP services pursuant to New Hampshire law and Commission rules. On September 12, 2011, pursuant to RSA 541:3, Comcast filed a timely Motion for Rehearing and Suspension of Order No. 25,262, as well as a Motion to Reopen the Record of this proceeding. The rural local exchange carriers of the New Hampshire Telephone Association (“RLECs”) filed objections to both Motions on September 19, 2011. The Commission issued a Secretarial Letter on September 22, 2011 indicating its determination to suspend Order No. 25,262 pending further consideration of the issues raised in Comcast’s Motions. On September 28, 2011 the Commission issued Order No. 25,274 denying Comcast’s Motion for Rehearing and Suspension and Motion to Reopen the Record. In so doing, the Commission indicated that “to the extent that Comcast believes that it cannot reasonably comply with Puc 432.14(f)...or any other rule, it is free to seek a waiver pursuant to Puc 201.105 or to request that the Commission amend or repeal the rule...” *New Hampshire Telephone Association Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services*, DT 09-044, Order No. 25,274 (Sept. 28, 2011) at 10-11.

Comcast is filing an Appeal by Petition with the New Hampshire Supreme Court seeking a review of the Commission’s determination that Comcast is a New Hampshire public utility and that its interconnected VoIP service is subject to the Commission’s

regulatory authority. RSA 541:4 requires that before an appeal from any order or decision of the Commission may be taken to the New Hampshire Supreme Court, the appellant must first apply to the Commission for rehearing. Thus, while the issues adjudicated in Order No. 25,262 are now ripe for appeal (because Comcast has moved for and been denied a rehearing of them), *see* RSA 541:6, it is unclear whether Comcast may now appeal the portion of Order No. 25,274 that denied Comcast's Motion for Suspension or whether, instead, a Motion for Rehearing on that particular issue is a prerequisite for appealing it to the Court² or for filing a Motion to Stay with the Court under N.H. Supr. Ct. R. 7-A³. Therefore, out of surfeit of caution, Comcast is filing the instant Motion for Rehearing/Reconsideration to preserve for appeal the issue of whether the Commission erred in denying Comcast's request for a suspension of Order No. 25,262.

New Hampshire law is unsettled with respect to whether Comcast must separately move for reconsideration of the denial of its Motion to Suspend in the instant circumstances. In *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001) the New Hampshire Supreme Court held that in order to appeal a PUC order, "one must first file a motion for rehearing with the PUC stating every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." *Id.*

² The same question exists with respect to the portion of Order No. 25,274 that denied Comcast's Motion to Reopen the Record. Comcast is filing a separate Motion for Rehearing dealing with that issue.

³ N.H. Supr. Ct. R. 7-A provides that a motion to stay an order of a lower tribunal shall not be filed in the New Hampshire Supreme Court unless the movant has first unsuccessfully sought similar relief from the lower tribunal. Thus, if Comcast does not need to move for rehearing of the order denying suspension, Comcast has met the requirements of Rule 7-A and may now file with the New Hampshire Supreme Court a Motion to Stay the Commission's orders.

(internal quotation marks omitted) In that case, the Court also determined that because the appellant failed to make an argument in a motion for rehearing, the issue was not preserved for the Court's review on appeal. *Id. at 677*. Thus, it appears that the instant motion is necessary to preserve for appeal the issue of whether the Commission erred in denying Comcast's motion for a suspension of Order No. 25,262.

However, a contrary view may be inferred from *McDonald v. Town of Effingham Zoning Board of Adjustment*, 152 N.H. 171 (2005). In that case, which dealt with an appeals from decisions of zoning boards of adjustment ("ZBAs"), the Court recognized the potential for wasteful proceedings that the motion for rehearing requirement creates. The Court in *McDonald* found that when a ZBA denies a motion for rehearing and raises new issues, findings or rulings, the aggrieved party need not file a second motion for rehearing to preserve for appeal the new issues arising for the first time in the order denying rehearing. The Court found that a literal reading of the applicable rehearing and appeal statutes (RSAs 677:2 and 677:4) "leads to absurd results" and that "[i]t would be illogical and unduly cumbersome on the parties and the judicial process for a single variance matter to be simultaneously pending before two different tribunals.... Such a circumstance would undercut the policy favoring judicial economy that the legislature sought to promote when designing the rehearing and appellate process." *McDonald*, 152 N.H. at 175.

In light of the disparate judicial opinions described above, and out of an abundance of caution, Comcast is filing the instant motion for rehearing of the portion of Order No. 25,274 that denied its Motion for Suspension of Order No. 25,262. In the

alternative, Comcast petitions for a waiver of the Commission's CLEC rules for the reasons explained more fully in Section IV, *infra*.

II. STANDARD FOR REHEARING

The Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." RSA 541:3. This includes errors of law, as a motion for rehearing filed with the Commission must specify "every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4; *see Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 674. The "purpose of a rehearing 'is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State Pers. Comm'n*, 118 N.H. 309, 311 (1978) (citation and internal quotation marks omitted). For the reasons discussed below, Comcast respectfully submits that Order No. 25,274 is unlawful and unreasonable, and that good cause exists for rehearing/reconsideration of the portion of that Order that denied Comcast's request for a suspension of Order No. 25,262.

III. THE ORDER DENYING COMCAST'S MOTION FOR SUSPENSION IS UNLAWFUL AND UNREASONABLE

The Commission's Order No. 25, 274 denying Comcast's Motion for a Suspension of Order No. 25, 262 focused entirely on Comcast's Motion for Reconsideration of the *merits* of the Commission's decision to regulate Comcast's interconnected VoIP service under state law, as well as on Comcast's Motion to Reopen Record to admit additional evidence relevant to that question. Order No. 25,274, however, provided no reasoning with respect to its concurrent decision to deny Comcast's Motion to Suspend, which was simply denied without analysis. The failure to articulate the reasoning behind this portion of the Order, as required by RSA 363:17-b,

III, renders it unlawful. Instead of explaining why it was requiring Comcast to comply with a multitude of CLEC rules while Comcast pursues an appeal questioning its status as regulated utility in New Hampshire, the Commission (or a majority thereof⁴) merely directed Comcast to seek waivers of the rules with which it cannot reasonably comply. Order No. 25,274 (Sept. 28, 2011) at 10-11. Even assuming, *arguendo*, that this statement constitutes sufficient “reasoning” for purposes of meeting the Commission’s obligations under RSA 363:17-b, III, it is unreasonable because it fails to recognize that Comcast must spend considerable time, money and effort to comply with numerous rules that ultimately may be inapplicable. Requiring Comcast to expend time and the financial and human resources to sift through, at a minimum, 49 pages of “CLEC 430” regulations as well as many others that apply to CLECs, to determine whether it: 1) currently complies with them; 2) is able to take affirmative compliance steps (through filings or adjustments to its business systems and operations); or 3) needs a waiver of a specific rules that are either inapplicable or with which Comcast is unable to comply, is unreasonable for several reasons.

First, Comcast is appealing the Commission’s determination that state telephone regulations even apply to its interconnected VoIP service in the first instance. Although the Commission held that Comcast’s interconnected VoIP service is not an “information service” under federal law, it acknowledged that there is substantial authority from federal district courts holding otherwise. Given the substantial weight of the question being presented to the New Hampshire Supreme Court by Comcast’s appeal, as well as the ample support for Comcast’s position, it would not be reasonable to compel Comcast

⁴ Order No. 25,274 was issued by Commissioners Below and Ignatius only.

to comply with CLEC rules now when the Court may very well find those rules inapplicable.

Second, Comcast anticipates that in the upcoming session, the New Hampshire Legislature will be examining the issue of whether interconnected VoIP providers such as Comcast should be subject to the Commission's regulatory authority going forward. It is noteworthy that when confronted with the same issue, nineteen other states, including Massachusetts and Maine⁵, and the District of Columbia, have enacted laws exempting interconnected VoIP services such as Comcast's from state regulation. Given that legislative action could ultimately dispense with the applicability of the CLEC rules to Comcast IP Phone II, the Commission should suspend its order requiring such compliance pending legislative and appellate review.

Third, it is Comcast's understanding that the Commission's 400 rules are set to expire by law in 2013 and it is unclear whether or to what extent they will be adopted in their current form. Compelling Comcast to expend significant resources and to disrupt its business operations to comply with a specific set of rules is unreasonable given that the Commission may intend to modify those rules within a year or so. Lastly, there is no evidence that such compliance is necessary to protect the public or for any reason other than the Commission has determined that Comcast's CDV service is subject to CLEC regulation, a determination with which Comcast disagrees and is appealing. Each of the individual circumstances described above constitutes "good reason for the rehearing" as

⁵ The Maine Legislature specifically voided the Maine Public Utilities Commission's Order regulating VoIP within six months after the Order was issued. *See An Act To Ensure Regulatory Parity among Telecommunications Providers*, Me. L.D. 1466 (125th Legis. 2011), *available at* <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1075&item=1&snum=125>.

required by RSA 541:3. In the aggregate, they clearly warrant a suspension of Order No. 25,262.⁶

Precedent exists for granting the requested suspension. The Commission has previously granted a utility's request to stay a Commission order requiring a compliance filing until such time as the utility had exhausted its appellate rights. *See, e.g., Northern Utilities, Inc. Summer Period Cost of Gas Adjustment*, DG 07-033, Secretarial Letter from Debra A. Howland, Executive Director (Oct. 10, 2007) (attached). The Commission should act accordingly in the instant case and should suspend Order No. 25,262 to relieve Comcast CDV service from any obligations under the CLEC rules until such time as its appellate rights are exhausted.

IV. WAIVER OF THE CLEC RULES SERVES THE PUBLIC INTEREST AND WILL NOT DISRUPT THE ORDERLY AND EFFICIENT RESOLUTION OF MATTERS BEFORE THE COMMISSION

In the event the Commission denies the instant Motion for Rehearing, Comcast respectfully petitions the Commission for a waiver of the CLEC rules until such time as Comcast's appellate remedies are exhausted. The relevant waiver standard is set forth in N.H. Admin. R. Puc 201.05(a) which provides that the Commission "**shall** waive the provisions of any of its rules, except where precluded by statute, upon request by an

⁶ Immediate application of the Commission's rules to Comcast could also cause spillover effects in other areas of the law and would generate regulatory confusion pending judicial review of the Order. For instance, the Commission regulates rates, charges, terms and conditions for pole attachments for "[p]ublic utilities within the meaning of RSA 362...that own, in whole or in part, any pole used for wire communications or distribution." *See* N.H. Admin. R. Puc 1301.01 *et seq.* The Commission's Order could lead to pricing disputes and regulatory uncertainty in this area, potentially triggering the need for further proceedings before the Commission. *See* N.H. Admin. R. Puc 1304.06. Given the complexity of these issues, a suspension of the Commission's Order would allow for the development of clarity on the applicable legal regime before such disputes proliferate.

interested party” upon a finding that the waiver serves the public interest and will not disrupt the orderly and efficient resolution of matters before the Commission (emphasis added). In determining the “public interest,” the Commission “**shall waive a rule**” if compliance with it would be onerous or inapplicable under the circumstances and the rule’s purpose would be satisfied by an alternative proposed method. *See* N.H. Admin. R. Puc 201.05(b) (emphasis added).

The Commission’s “CLEC 430” and “CTP 450” rules together comprise over 70 pages. Many of them impose state-specific, idiosyncratic requirements that would be extremely challenging to reconcile with Comcast’s current national business processes/activities. Comcast has built its systems and conducted business pursuant to and in accordance with federal laws, orders, regulations and policies that are premised on the legal characterization of its interconnected VoIP service as an information service rather than a telecommunications service. The Commission’s telecommunications carrier rules, on the other hand, contemplate the regulation of a single end-user telephone service, not the type of integrated cable, video and voice services using Comcast’s converged platform and supported by Comcast’s complex billing and operational systems.

For example, Comcast’s billing and provisioning system is currently built around its converged platform – which serves customers across multiple states with multiple services, including high-speed Internet, cable video, and voice. *See* Declaration of Beth Choroser (“Choroser Decl.”) ¶ 6 (submitted with Comcast’s prior Motion for Rehearing). When a customer pays part of their combined bill, Comcast does not currently have the ability to prioritize such a partial payment towards New Hampshire customers’ voice

services (as opposed to their High Speed Internet or cable video services) in a manner that would enable Comcast to comply with the Commission's disconnection regulations at N.H. Admin. R. Puc 432.14(f)(2).⁷ See Choroser Decl. ¶¶ 7-9.

Another example is that Comcast currently lacks the intercarrier relationships and processes contemplated by N.H. Admin. R. Puc 432.01(a)(4) and (5) which require a CLEC to offer customers the opportunity to presubscribe to another carrier for interstate and intra-state long distance service. Requiring Comcast to engage in burdensome and costly reconfigurations of its national business systems in order to meet requirements of this sort, as well as the full panoply of New Hampshire-specific CLEC rules, would be quite onerous and would immediately and adversely impact Comcast's business operations and product offerings. In addition, trying to comply with these rules could saddle Comcast, and its customers, with contracts and third-party obligations that could be difficult to unwind in the event Comcast were to prevail on appeal or the legislature were to deregulate VoIP services in New Hampshire. And given the pending judicial appeal concerning whether interconnected VoIP services are subject to the Commission's current regulatory authority, as well as anticipated legislative activity in this same area, the applicability of current or future CLEC rules to Comcast remains uncertain.

The above-described circumstances as well as those described in Section III, *supra*, demonstrate that Comcast has met the requirements of N.H. Admin. R. 201.05 and therefore qualifies for a waiver of the CLEC rules. The Commission must grant the waiver if it finds that the waiver serves the public interest and will not disrupt the orderly efficient resolution of matters before the Commission. The public interest will be served

⁷ These difficulties are described in greater detail in the Declaration of Beth Choroser ¶¶ 5-9, submitted with Comcast's prior Motion for Rehearing.

by granting Comcast a waiver of the CLEC rules because it will avoid a costly and time-consuming compliance effort that will result in business disruption, customer confusion, and may ultimately be unnecessary if either the New Hampshire Supreme Court or the Legislature determines that such compliance is unnecessary. Additionally, because a waiver of the CLEC rules will not disrupt any proceedings before the Commission, it should be granted.

In the alternative, if the Commission denies the foregoing waiver request, for the reasons and uncertainty discussed above, Comcast respectfully urges the Commission to grant a temporary waiver for at least 60 days from the date of an order on the within Motion and Petition. Such a waiver would enable Comcast to continue to conduct a more comprehensive evaluation of all potentially applicable rules to determine their business and operational impacts. As drafted, the current rules contemplate implementation by a provider of a single end-user service: telephone. The rules do not contemplate the integrated nature of Comcast's products and the complex billing and operational systems used to provide additional, unregulated services such as video and broadband over the same platform. For this reason, a more comprehensive and detailed review is required to determine whether proposed implementation would have unintended, overly burdensome or business-impacting consequences.

Finally, the additional time would permit Comcast to file, if necessary, a more particularized request to waive the specific rules that are onerous, inapplicable or whose purpose could be satisfied by an alternative method.

V. CONCLUSION

For the reasons stated above, the Commission should either immediately suspend Order No. 25,262 or grant Comcast a waiver of the Commission's CLEC rules until such

time as a final, non-appealable judicial order is issued mandating Comcast's compliance with them.

WHEREFORE, Comcast respectfully requests that the Commission:

A. Issue an order suspending Order No. 25,262 until such time as a final, non-appealable judicial order is issued mandating Comcast's compliance with the Commission's CLEC rules;

B. In the alternative, issue an order granting Comcast a waiver of the Commission's rules until such time as a final, non-appealable judicial order is issued mandating Comcast's compliance with the Commission's CLEC rules, or granting Comcast at least 60 days to conduct a comprehensive review of the Commission's rules and to file a more particularized request for waivers of specific rules; and

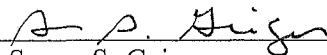
C. Grant such additional relief as it deems appropriate.

October 28, 2011

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Motion and/or Petition has on this 28th day of October, 2011 been sent by electronic mail to persons listed on the Service List.

Susan S. Geiger
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