

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

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

**Order Denying Motions for Rehearing
and Granting Motion to Waive Certain Rules**

ORDER NO. 25.288

November 10, 2011

I. INTRODUCTION

On August 11, 2011, the New Hampshire Public Utilities Commission (Commission) issued Order No. 25,262 in Docket No. DT 09-044 finding, among other things, that the cable voice service offered by Comcast Phone of New Hampshire, LLC and Comcast IP Phone II, LLC (collectively Comcast) and Time Warner in New Hampshire constitutes the conveyance of telephone messages under RSA 362:2 and that providers of such services, such as Comcast, are public utilities under New Hampshire law, subject to limited regulation as competitive local exchange carriers (CLECs).

On September 12, 2011, Comcast filed concurrent motions for rehearing and suspension of Order No. 25,262 and to reopen the record in the docket. The motions were denied in Order No. 25,274, issued on September 28, 2011. On October 28, 2011, Comcast filed a motion for rehearing or reconsideration of Order No. 25,274 to the extent it denied Comcast's request to reopen the record. That day, Comcast also filed a separate motion seeking rehearing or reconsideration of Order No. 25,274 to the extent the order denied its request for suspension of

Order No. 25,262 and, in the alternative, seeking a general waiver of the Commission's rules governing CLECs. On November 4, 2011, the New Hampshire Telephone Association (NHTA) objected to Comcast's October 28 motions.

II. POSITIONS OF THE PARTIES

A. Comcast

Comcast asserts that it has filed its various motions for rehearing, reconsideration, and/or waiver of Commission rules "out of a surfeit of caution" to preserve for appeal the issue of whether the Commission denied the first round of motions in error. As to its motion for rehearing of the Commission's decision to deny its motion to reopen the record, Comcast argues that the Commission's order is unlawful and unreasonable because it did not apply the proper standard for review as set forth in Puc 203.30(a) for reopening the record. Under that rule, Comcast argues, the Commission "must allow exhibits to be filed after the close of a hearing if it finds 'that late submission of additional evidence will enhance its ability to resolve the matter in dispute.'" Motion for Rehearing/Reconsideration of Order No. 25,274 Denying Motion to Reopen Record (Oct. 28, 2011) at 4 (quoting N.H. Code Admin. R. Puc 203.30(a)). According to Comcast, had the Commission properly applied that standard it would have reopened the record and permitted the submission of new and relevant evidence.

Comcast contends that instead of reopening the record and permitting its submission, the Commission based its decision on the objection's argument that the information it was submitting was untimely, prospective or not persuasive. Comcast contends that nothing in Puc 203.30 requires it to show why the information could not have been produced at an earlier stage, and that by the standards of Puc 203.30 the Commission ought to have reopened the record.

Comcast also argues that because of the pace of evolution in the telecommunications markets, it is unreasonable to deny it the opportunity to supplement the record.

As to Comcast's motion for rehearing on the Commission's denial of its motion to suspend Order No. 25,262, Comcast contends that the Commission did not provide sufficient reason to deny the motion, in violation of RSA 363:17-b, or, to the extent the reasoning is sufficient, it did not fully recognize the time and expense Comcast would expend to comply with the order. In making this argument, Comcast notes that it has appealed Order No. 25,262 to the New Hampshire Supreme Court, that the New Hampshire Legislature will be reviewing the regulatory status of voice over Internet protocol (VoIP) services such as the one offered by Comcast, and that the Commission's rules may expire or be amended soon. In addition, Comcast notes another instance where the Commission suspended its order until the subject utility had exhausted its appellate rights. For these reasons, Comcast contends that the better course would be for the Commission to suspend its order.

Regarding its motion for waiver, Comcast argues that waiving the Puc PART 430 and Puc PART 450 rules with respect to its VoIP services until it has exhausted its appellate remedies is in the public interest and will not disrupt the orderly and efficient resolution of matters before the Commission. Comcast contends that it needs time to consider 70 pages of rules and various state-specific requirements to determine how they fit with its current nation-wide business model. In addition, Comcast contends that the rules do not address telecommunication carriers with integrated platforms such as the one it uses and, therefore, compliance is difficult or impossible in some instances. As a specific example, Comcast, in referring to the new evidence the Commission determined not to accept, avers that its billing and provisioning systems do not allow division of payments and, therefore, it may run afoul of the

Commission's rules on disconnection for non-payment. In brief, Comcast contends that it would be compelled to expend significant amounts of time and money to comply with the Commission's rules and, therefore, a waiver of the rules is appropriate. In the alternative, Comcast requests that the Commission grant a temporary waiver of at least 60 days from the date of its order to allow it to conduct a more comprehensive review of the rules to determine the business and operational impacts of compliance and, if necessary, to file a more particularized request to waive the specific rules that it believes to be onerous, inapplicable, or whose purpose could be satisfied by an alternative method.

B. New Hampshire Telephone Association

With respect to Comcast's request for rehearing on the Commission's decision to deny its request to reopen the record, NHTA counters that, contrary to Comcast's assertions, there was ample support for the Commission's decision to deny Comcast's submission as untimely. NHTA argues that Comcast has not demonstrated why the proffered evidence was unavailable prior to the close of the record. Further, NHTA contends that because the information provided by Comcast concerned prospective offerings, the information "by definition cannot be the record of any proceeding related to the *current* nature of its service offering." *Objection to Motion for Rehearing of Order No. 25,274 Denying Motion to Reopen Record* (Nov. 4, 2011) at 3 (emphasis in original). In addition, NHTA contends that the Commission was within its authority to reject evidence it found to be merely argument on behalf of a contention that it had previously rejected. Thus, NHTA contends that denial of the motion was appropriate.

Referring to the standard under Puc 203.30, NHTA contends that although it did not cite the rule, the Commission's order conformed to the standard articulated in the rule. Specifically, NHTA contends that because the Commission determined that the information offered by

Comcast was prospective, unpersuasive, or argument rather than evidence, the Commission impliedly found that information would not enhance the Commission's ability to resolve the matter in dispute. Accordingly, NHTA contends, the Commission's order satisfied the rule.

With respect to Comcast's motion for rehearing on the Commission's decision to deny its motion to suspend Order No. 25,262, NHTA first contends that Comcast's original request for suspension was insufficient to act as a request for suspension. In particular, NHTA contends that:

Comcast presented no standard of review for its request, and its entire treatment of the requested relief was contained in a footnote in which it requested suspension on account of "difficulties" that Comcast expected to encounter. For all intents and purposes, Comcast did not properly request suspension of the Order, and thus there was no question presented for the Commission's review.

Objection to Motion for Rehearing of Order 25,274 Denying Motion for Suspension at 2.

NHTA then argues that even if the request was sufficient, it was a request for equitable relief that required Comcast to demonstrate a likelihood of success on the merits, the possibility of irreparable harm, that the balance of harms weighed in its favor, and that the public interest would be served by granting the request. According to NHTA, Comcast cannot prevail on any of those factors. First, NHTA contends that because the Commission's order was based on a factual finding and because the Commission's findings are deemed *prima facie* lawful and reasonable, it is unlikely that Comcast would prevail in its appeal of the Commission's ruling. Therefore, Comcast has not shown a likelihood of success on the merits.

As to the potential harm, NHTA contends that Comcast has not identified any irreparable harm, and that the only harm it has identified is the burden of being required to comply with the Commission's rules – a burden borne by all service providers in the state. NHTA also notes that Comcast has offered no persuasive reason why Comcast, as one of the largest telephone

providers in the state, should be permitted to operate outside the Commission's regulation, which "is imposed, in the public interest, on all other service providers." Objection to Motion for Rehearing of Order 25,274 Denying Motion for Suspension at 3.

NHTA also argues that Comcast's request to suspend the Commission's order because of prospective actions in the courts or the legislature, or because of possible revisions to the Commission's rules are irrelevant to its request. Instead, NHTA contends, the Commission must act under current and effective law and any references to future actions should be disregarded. Finally, with regard to this motion, NHTA contends that Comcast's reference to an earlier instance where the Commission granted a suspension of an order for a compliance filing in a rate case is inapposite and, therefore, inapplicable. Objection to Motion for Rehearing of Order 25,274 Denying Motion for Suspension at 4.

With respect to Comcast's request for a waiver of the Commission's rules, NHTA contends that the request should be denied for the same reasons as Comcast's motion to suspend. NHTA also notes that Comcast has not requested a waiver of a particular rule, but of the "entire statutory and regulatory scheme." Objection to Motion for Rehearing of Order 25,274 Denying Motion for Suspension at 5. NHTA contends that such a waiver would be disruptive to the resolution of the matters before the Commission. Lastly, NHTA argues that Comcast's protestations about the onerous nature of compliance are made without any suggestions of less onerous alternatives, and without any explanation of why Comcast deserves relief not offered to other providers in the state. For these reasons, NHTA contends, the motion should be denied.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or

unreasonable. Good reason may be shown by identifying specific matters that were “overlooked or mistakenly conceived” by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O’Loughlin v. N.H. Personnel Comm’n*, 117 N.H. 999, 1004 (1977) and *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Comcast Phone of New Hampshire*, Order No. 24,958 (Apr. 21, 2009) at 6-7, and *Public Service Company of New Hampshire*, Order No. 25,168 (Nov. 12, 2010) at 10.

First, in support of its motion for rehearing with respect to the denial to reopen the underlying record, Comcast argues that the Commission failed to apply the standard for review set forth in N.H. Code Admin. Rules Puc 203.30. Under that rule, the Commission shall allow exhibits to be filed after the close of a hearing if it finds “that late submission of additional evidence will enhance its ability to resolve the matter in dispute.” N.H. Code Admin. Rules Puc 203.30(a). As noted, Comcast contends that by failing to apply the standard in the rule, the Commission erred.

Regardless of whether Comcast’s arguments relative to Puc 203.30 are accurate, they are inapplicable here. Puc 203.30 (a) allows the Commission to authorize the filing of exhibits “after the close of a hearing.” Similarly, Puc 203.30 (b) sets out the manner in which a request to file a new exhibit will be made “after the close of a hearing.” The rules Comcast relies on, however, apply to matters that have not yet been resolved by the Commission. In this case the record was closed and a written order issued. Hence the proper request for relief is not to reopen the record but to seek rehearing for the purpose of considering new evidence, the basis on which

we considered the request. Finding no good cause why the information could not have been presented in the underlying proceeding, we denied the request in Order No. 25,274. For the reasons stated in our original denial of Comcast's motion, this motion should likewise be denied. There is nothing in Comcast's submission that persuades us the information could not have been provided earlier and nothing in the submission that alters our opinion about the nature of Comcast's service or the prospective nature of its offerings. Accordingly, Comcast's motion for rehearing on its motion to reopen the record is denied.

Next, as to Comcast's request for rehearing on the Commission's denial of its motion to suspend Order No. 25,262, Comcast contends first that the Commission's reasoning for denying the motion was insufficient to comply with RSA 363:17-b, III. RSA 363:17-b, III requires that the Commission, when issuing a final order, include a "decision on each issue including the reasoning behind the decision." Comcast contends that its prior argument for suspension of the order focused on the burden that would be imposed upon it by being forced to comply with Order No. 25,262 and that the Commission's reasoning that Comcast could seek waivers of the rules was insufficient to address Comcast's argument. Assuming, without deciding, that the Commission's prior determination was insufficient, we provide further reasoning.

In the original order in this case, we noted Comcast's statement that it already substantially complies with New Hampshire's CLEC requirements and regulations. *See New Hampshire Telephone Association*, Order No. 25,262 (Aug. 11, 2011) at 59. In its initial request to suspend Order No. 25,262, Comcast's entire argument for suspension was contained in one sentence of a footnote that requested suspension of the order "based in substantial part on the fact that Comcast cannot comply with this requirement on such short notice, or without incurring substantial costs." Comcast Motion for Rehearing and Suspension of Order No. 25,262 and

Motion to Reopen Record (Sept. 12, 2011) at fn. 12. The alleged difficulties of compliance were set out in a document that Comcast sought to enter as a new exhibit, and which the Commission determined it would not accept.¹ We are not convinced, therefore, that suspending our order and thereby relieving Comcast of all obligations, including those it already fulfills, is appropriate. For these reasons, we conclude that the decision not to suspend Order No. 25,262 was not in error.

Comcast also contends that Order No. 25,262 should be suspended because events are taking place in the Commission, the courts, and the legislature that may alter or undo the determinations in that order. We do not agree that because some aspect of the Commission's ruling could change, in some manner, at some point in the indefinite future, we are somehow required to suspend the taking effect of Order No. 25,262. Finally, we agree with NHTA that the prior case cited by Comcast for suspension of a Commission order is inapposite to this case.

As to Comcast's request for a temporary waiver of the rules, we are willing to do so, pursuant to Puc 201.05. Though Comcast may substantially comply with the Commission's rules, there is some question about the impact on its business from being required to comply with those few rules it does not already meet. Accordingly, we find that because the application of some of the rules may be onerous or inapplicable, a temporary waiver of 60 days serves the public interest and is appropriate. We note that our intent is to waive only those rules that Comcast may not currently be complying with and with which it could not comply in a reasonable time, or without significant expense. In other words, Comcast shall continue to comply with those rules of the Commission with which it complies at present. For the avoidance of doubt, we make clear that because the Commission's rules contain certain provisions relating

¹ Even if the Commission were to reopen the record or grant rehearing, the factual basis would not be materially different, as the proposed exhibit identified only one rule for which Comcast believed compliance would be difficult. Waiver of this rule and provisions regarding additional waivers are addressed further in this order.

to, among other things, contact and other basic information, public safety, emergency operations, customer protection, and interactions with other carriers, we do not consider those rules appropriate to waive. Accordingly, the following provisions of Puc PART 430, and the analogous provisions of Puc PART 450 are not waived:

- 430.01 Purpose
- 430.02 Application of Rules
- 430.03 Definitions
- 431.09 Annual Report
- 431.10 Assessment
- 431.11 Contact Information
- 431.17 Service Outages
- 431.18 Accident Notifications
- 431.19 Violation of Rules
- 432.02 Telecommunications Relay Service
- 432.03 E911 Surcharge
- 432.07 Notice to Customers of Changes in Rates
- 432.08 Slamming Prohibited
- 432.09 Cramming Prohibited
- 432.12 Confidentiality Requirements
- 432.13 Exit Fees
- 433.01 Construction, Installation and Maintenance of Physical Plant
- 433.02 Restoration of Service
- 433.03 Emergency Operation
- 433.04 Safety Instructions
- 433.05 Commission Inspections
- 434.03 Annual Reports, subparagraphs (a), (b)(1), (b)(2), and (b)(3)
- 434.04 Other Reports
- 434.05 Submitting Reports and Forms
- 434.06 Confidential Treatment
- 437.01 Intercompany Cooperation
- 437.02 Switching and Signaling Obligations
- 437.03 Trouble Reporting and Resolution Obligations
- 437.04 Rights of Way
- 437.05 Exchange of Billing Name and Address Information
- 437.06 Carrier to Carrier Migrations
- 437.07 Intercompany Contact Information
- 437.08 Maintaining and Updating Databases
- 449.01 Availability of Forms
- 449.02 Form CLEC-1 Contact Information
- 449.03 Form CLEC-2 Assessment Report
- 449.04 Form CLEC-3 Annual Report

If Comcast determines that it cannot comply with any of the above-referenced rules, it shall so inform the Commission within 45 days and include the reason or reasons it cannot comply. We also direct Comcast to review the provisions of Puc PART 430 and Puc PART 450 to determine which rules it believes to be onerous, inapplicable, or whose purpose can be satisfied by a proposed alternative method and that it submit its analysis and conclusions, including why such proposed waivers would be in the public interest, also within 45 days. Such a submission will give the Commission information to evaluate whether any waiver should be extinguished or extended prior to the lapse of the 60 days granted herein pursuant to Puc 201.05.

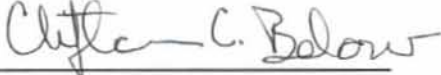
Based upon the foregoing, it is hereby

ORDERED, that the Motions for Rehearing of Order No. 25,274 filed by Comcast Corporation and its affiliates are DENIED, except to the extent further explanation was provided relative to Comcast's motion for suspension; and it is

FURTHER ORDERED, that a 60-day waiver of portions of Puc PART 430 and Puc PART 450 is GRANTED as set out above; and it is

FURTHER ORDERED, that Comcast is directed to review Puc PART 430 and Puc PART 450 to determine which rules it believes to be onerous, inapplicable, or whose purpose can be satisfied by a proposed alternative method, and to submit its analysis and conclusions to the Commission within 45 days of the date of this order.

By order of the Public Utilities Commission of New Hampshire this tenth day of
November, 2011.


Clifton C. Below
Commissioner


Amy Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director



SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:
DEBRA A HOWLAND
EXECUTIVE DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.