

**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 Motion for Rehearing and Suspension of Order
and Motion to Reopen Record**

ORDER NO. 25,274

September 28, 2011

I. INTRODUCTION

On March 6, 2009, the rural local exchange carriers of the New Hampshire Telephone Association (the RLECs)¹ filed with the New Hampshire Public Utilities Commission a petition under RSA 365:5 asking the Commission to conduct an inquiry into the appropriate regulatory treatment of Internet protocol (IP)-enabled cable voice service (cable voice service) in New Hampshire. In *New Hampshire Telephone Association*, Order No. 25,262 (August 11, 2011), the Commission found that the cable voice service offered in New Hampshire, Comcast Digital Voice and Time Warner's Digital Phone and Business Class Phone, in particular, constitute conveyance of a telephone message under RSA 362:2 and that providers of such services are public utilities under New Hampshire law, subject to limited regulation as competitive local exchange carriers (CLECs).

¹ The RLECs include: Bretton Woods Telephone Company, Inc.; Dixville Telephone Company; Dunbarton Telephone Company, Inc.; Granite State Telephone, Inc.; Hollis Telephone Company, Inc.; Kearsarge Telephone Company; Merrimack County Telephone Company; and Wilton Telephone Company, Inc.

On September 12, 2011, Comcast Corporation and its affiliates (collectively, Comcast) filed pursuant to RSA 541:3 and Puc 203.33 a motion for rehearing and suspension of Order No. 25,262, and a motion to reopen the record of this proceeding. In its motion, Comcast argues that the order is unlawful and unreasonable as it misapprehends federal law regarding information services, misapplies federal law regarding preemption, and misapplies state law. Comcast further contends that new evidence confirms that Comcast Digital Voice is an “information service” under federal law and thus not subject to state law.

On September 19, 2011, the RLECs filed an objection to both motions. The RLECs argue that Comcast’s motions fail to demonstrate that the order is unlawful or unreasonable and that Comcast has not produced new evidence unavailable prior to the issuance of the underlying decision or shown that evidence was overlooked or misconstrued. The RLECs further contend that Comcast’s motion simply reiterates previous arguments and supporting authority.

II. POSITIONS OF THE PARTIES

Comcast argues in its motion for rehearing and suspension of order and motion to reopen record that Commission Order No. 25,262 is unlawful and unreasonable for three reasons: (1) the order misapplies federal law – specifically, the Telecommunications Act, 47 U.S.C. § 153, and precedent of the Federal Communications Commission (FCC); (2) the order misapplies the doctrine of conflict preemption; and (3) under state law, the order disregards the key attributes of Comcast Digital Voice (CDV) services. Comcast further contends that new evidence confirms that CDV is an information service under federal law.

The RLECs counter in their objections that Comcast fails to meet the standards required for rehearing and reopening of the record. Namely, they contend that Comcast failed to demonstrate that the order is unlawful or unreasonable, and failed to produce new evidence

unavailable prior to the issuance of the underlying decision or show that evidence was overlooked or misconstrued. The RLECs further contend that Comcast's motions simply reiterate previous arguments and supporting authority, faulting the Commission for failing to find that authority persuasive.

The arguments and counter-arguments are set forth by issue below.

A. Application of federal law

1. Comcast

Comcast argues that the order misapprehends the nature of the federal statutory requirement and reaches a result that is contrary to law when it concludes that CDV is a telecommunications service and not an information service under the Telecommunications Act. *Motion* at 3, *citing Order* at 49-53. To support this argument, Comcast contends that the capability to perform net protocol conversions makes a service an information service under the Telecommunications Act, irrespective of where in a provider's network the protocol conversions occur, adding that the proper benchmark for determining whether a service is an information service is whether, *inter alia*, it offers the capability for "transforming [or] processing...information via telecommunications," *Motion* at 4, *citing* 47 U.S.C. § 153(24). Comcast further contends that the order contradicts the federal statute when it finds that Comcast's underlying argument "conflate[s] the terms 'formatting' and 'form,' when it equates [Internet protocol (IP)] conversion with the conversion of voice messages from IP to [time division multiplexing (TDM)] format and vice versa, rather than to the conversion of information from one form to another (*e.g.*, a voice call to voice mail to pager alert)," *Motion* at 6 *citing Order* at 52. Thirdly, Comcast argues that the order failed to meaningfully respond to the holdings of courts that have addressed the issue and concluded that interconnected VoIP is an

information service. *Motion* at 8. Finally, Comcast contends that its CDV service is a more multifaceted service than a mere bundling of voice service with unrelated features, and that those enhanced functionalities are clearly information services under federal law, contrary to the order's holding. *Motion* at 9. **2. RLECs**

The RLECs counter that when Comcast argues that the Commission erred in finding that cable voice service is not an information service, it does not actually refute the Commission's findings of fact, but simply begs the question that cable voice has the characteristics of an information service. *Objection* at 2. The RLECs add that Comcast misconstrues the Commission's analysis of protocol conversion, noting that the Commission did not find that "protocol conversion capability is not determinative under federal law," as Comcast argues, but rather it rejected Comcast's contention that a protocol conversion occurs at all. *Id.* at 3. The RLECs further contend that Comcast's argument that the Commission erroneously determined that "the net protocol processing that defines an information service consists of the technological interface between an end user and a communications network of the end user's choice" constitutes *post hoc* reasoning that directly contradicts Comcast's earlier argument that it is "the nature of functions the end user is offered" that determines regulatory status. *Id.*, citing *Motion* at 4.

The RLECs reiterate the position they put forward in the underlying proceeding that the FCC has determined that three varieties of net protocol processing do not comprise information services, namely (1) those involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; (2) those in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and (3) those involving

internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end user). *Id.*, citing *RLECs Reply Brief* at 16.

The RLECs rebut Comcast's line of reasoning by noting: (1) that Comcast mis-cites the FCC discussion regarding enhanced services, as the FCC language comes from the AT&T Packet Switching proceeding in the early 1980s, not the Computer III proceeding; (2) that the explanatory phrase Comcast offers is entirely of Comcast's invention and misconstrues the FCC, which dealt only with the issue of whether AT&T's implementation of packet switching was an enhanced or basic service, not with intermediate carriers or end user distinctions; and (3) that Comcast's citation is inapposite and actually supports the Commission's holding in this proceeding, as the FCC's determination in *AT&T* hinged on the incompatibility of the terminals, not compatible terminals at each end of a call, as in this proceeding. *Objection* at 4-5. Finally, the RLECs note that Comcast's argument that the Commission did not meaningfully respond to court decisions that have found interconnected VoIP to be information services fails to acknowledge that the Commission did review the cases and found them unpersuasive for various reasons, particularly in light of the FCC's unsupportive position on the issues in this proceeding. *Objection* at 5.

B. Doctrine of conflict preemption

1. Comcast

Comcast argues that the order concludes that New Hampshire's state telecommunications regulations are less burdensome than Minnesota's regulations at issue in the *Vonage Preemption Order*, and in doing so misapplies federal preemption law. *Motion* at 11. Comcast contends that state public utility regulation is preempted as conflicting with federal policy regardless of CDV's

regulatory classification because state telecommunications regulations stand in the way of Congress's open-market objectives. *Id.* To support this line of reasoning, Comcast states that it does not have the ability to meet New Hampshire regulatory requirements by prioritizing partial bill payments towards New Hampshire customers' voice services. *Motion* at 13, *citing* Puc 432.14(f)(2).

2. RLECs

The RLECs state that Comcast mischaracterizes the Commission's holding in arguing that the order misapplies the doctrine of conflict preemption. *Objection* at 7. The RLECs contend that neither the FCC nor the Commission based their preemption findings on the relative burdens of state regulation, noting that the FCC declined to determine that cable voice service is subject to exclusive federal jurisdiction and that the Commission merely noted in *dicta* that CLEC regulation in New Hampshire is "conducted with a light touch." *Id.* at 8-9.

C. Application of state law

1. Comcast

Comcast argues that the order misapplies New Hampshire law in classifying CDV as a "public utility" service subject to the Commission's jurisdiction pursuant to RSA 362:2, contrary to the intent of the Legislature that drafted the statute. *Motion* at 14 and 15. Comcast argues, with reference to its prior briefing, that although CDV bears a superficial resemblance to "plain old telephone service" (POTS), it is a "remarkably different service – both in terms of the technological means it uses to transmit real-time voice communications, its federal regulatory status, and numerous other advanced features available to CDV customers that cannot be offered with POTS." *Id.* Comcast further contends that the Commission erred when it examined the

“user’s perspective” when determining that CDV fell within its regulatory authority under RSA 362:2.

2. RLECs

The RLECs rebut Comcast’s contentions regarding the applicability of RSA 362:2 by noting that Comcast simply reiterates its line of argument in its underlying briefs and, moreover, that the Commission addressed those arguments at great length in eight pages of the order and found them to be a “distinction without a difference.” *Objection* at 9. The RLECs further note that the Commission held that “RSA 362:2 defines a public utility ‘by the service it renders, not by the technology that it uses to provide such service’ and that by the ‘linking of one end user to another between identifiable, geographically fixed endpoints to enable real-time, two-way voice communication over wires,’ cable voice service ‘constitute[s] the conveyance of telephone messages and, thus, the providers of such services are subject to Commission jurisdiction.’” *Id.* at 9-10. The RLECs conclude that the Commission’s dissection of Comcast’s arguments was reasonable and grounded in the law.

D. New Evidence

1. Comcast

In support of its motion to reopen record, Comcast proffers “new evidence” and argues that its CDV service “has continued to evolve technologically since briefing in this docket was completed in March of 2010.” *Motion* at 16. According to Comcast, the evolution of new technological enhancements to its CDV service demonstrates that IP-enabled services such as cable voice fit poorly into regulatory models developed for the traditional telephone network and belong properly in the information service category under federal law. *Id.* at 17. To support its proffer of “new evidence,” Comcast includes a declaration from Beth Choroser, Executive

Director of Regulatory Compliance for Comcast's voice service operations. Ms. Choroser's declaration explains that CDV customers may now purchase their own eMTA device, rather than renting from Comcast, and that Comcast now offers a "Managed business Class Voice" (MBCV), which enables a customer to place and receive calls from a Comcast-provided phone number from any of multiple devices, including a desk phone or a handheld device carried by a Commercial Mobile Radio Service (CMRS) carrier. *Declaration* at 1. Ms. Choroser also states that in the near future Comcast will also offer access from a "soft client" (i.e., computer software) on a computer using any broadband connection, including a connection from a third-party internet service provider. *Declaration* at 2. Finally, Ms. Choroser states that Comcast does not currently have the capability to apply partial bill payments to the voice service component of a customer who purchases multiple services from Comcast. Therefore, Ms. Choroser argues, Comcast cannot comply with Puc 432.14(f). *Declaration* at 3.

2. RLECs

With respect to the new evidence proffered by Comcast, the RLECs contend that Comcast failed to provide an explanation as to why the information was not available during the course of the proceeding, noting that the information regarding customer-provided eMTA was by Comcast's own admission available at least eight months before the order was released. *Objection* at 11. The RLECs add that some of the information Comcast provides does not rise to the required standards, as it relates to future plans that may or may not come to fruition and, moreover, establishes only that Comcast may be offering a nomadic VoIP service in addition to its state regulated cable voice offerings. *Id.* Further, according to the RLECs, Comcast's discussion of billing issues is untimely, as it could have been provided during the course of the underlying proceeding.

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 (April 2, 2010) at 14. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Connecticut Valley Electric Co.*, Order No. 24,189, 88NH PUC 355, 356 (2003), *Comcast Phone of New Hampshire*, Order No. 24,958 (April 21, 2009) at 6-7, and *Public Service Company of New Hampshire*, Order No. 25,168 (November 12, 2010) at 10.

In each of its motions, Comcast reiterates the positions it took in the underlying proceeding and simply argues that the Commission made the wrong decision on each point raised. We agree with the RLECs that in several instances, Comcast misconstrues the order’s language in an effort to contest our findings and overlooks the reasoning laid out in the order that does not support its views. Comcast argues, for example, that the Commission erroneously found that “protocol conversion capability is not determinative under federal law” where, in fact, we reached no such conclusion but found that the net protocol processing that characterizes information services does not occur in the provision of CDV services. *See Motion* at 4, compared to *Order* at 51. Similarly, in its preemption argument, Comcast mischaracterizes the Commission’s holding that our jurisdiction over cable voice services “does not involve

discriminatory or burdensome economic regulation” by contending that we simply compared New Hampshire telecommunications regulations to those of Minnesota and determined that New Hampshire’s regulations are “less burdensome than Minnesota’s regulations.” *Motion* at 11, compared to *Order* at 58-59.

With respect to the new evidence proffered by Comcast through Ms. Choroser’s declaration, we agree with the RLECs that Comcast has not demonstrated that the evidence could not have been presented prior to the issuance of our decision in Order No. 25,262. Moreover, the information provided is, at least in part, prospective, to the extent the technologies in question have not yet been introduced in the New Hampshire market. Even if the technologies noted were already offered in the market, we are not persuaded that the addition of such enhancements would transform cable voice service from a telecommunications service to an information service, as Comcast would have us conclude. The “new evidence” is, in effect, more of the same argument Comcast made in its underlying briefs that such enhanced features should qualify CDV as an information service, a conclusion we did not reach.

We therefore reassert our finding that the cable voice service offered by Comcast and Time Warner constitutes conveyance of a telephone message that falls within the jurisdiction of this Commission pursuant to RSA 362:2, and that state regulation of such services is not expressly or implicitly preempted by federal law. Comcast has raised no new arguments in its motions, has failed to explain why it could not have produced in the underlying proceeding the information it now seeks to offer in support of its recast arguments, and how that new information, even if admitted, would lead to a different result.

Finally, we note that to the extent Comcast believes that it cannot reasonably comply with Puc 432.14(f) concerning disconnection of service or any other rule, it is free to seek a

waiver pursuant to Puc 201.05 or to request that the Commission amend or repeal the rule pursuant to Puc 205.03.

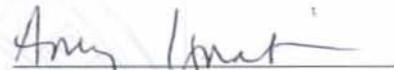
Based upon the foregoing, it is hereby

ORDERED, that the Motion for Rehearing and Suspension of Order No. 25,262 and the Motion to Reopen Record filed by Comcast Corporation and its affiliates are DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of September 2011.

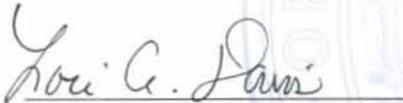


Clifton C. Below
Commissioner



Amy I. Ignatius
Commissioner

Attested by:



Lori A. Davis
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