

**THE STATE OF NEW HAMPSHIRE**

**BEFORE THE**

**PUBLIC UTILITIES COMMISSION**

**DRM 12-036**

**RULEMAKING – PUC 400 RULES**

**NECTA’S COMMENTS ON  
INITIAL RULES PROPOSAL**

NOW COMES New England Cable and Telecommunications Association, Inc. (“NECTA”), by and through its undersigned counsel, and respectfully submits this preliminary statement of position/comments on the initial rules proposal issued by the New Hampshire Public Utilities Commission (“Commission” or “PUC”) in the above-captioned docket. These comments are intended to supplement the oral comments provided by NECTA at the public hearing held May 28, 2013 in this docket, and NECTA expressly reserves its rights to supplement, revise or amend these comments as this docket proceeds. In addition, pursuant to the Secretarial Letter issued June 3, 2013, NECTA submits herewith a redlined document containing NECTA’s preliminary suggestions for edits to the initial rules proposal. The redlined document is NECTA’s preliminary position for discussion/illustration purposes only, and NECTA expressly reserves the right to modify its positions and/or revise the document further as the rulemaking process continues.

NECTA appreciates the opportunity to file these comments and commends Commission Staff for the time and effort spent on developing the initial proposal. NECTA recognizes that Staff submitted its suggested revisions to the initial proposal on

June 5, 2013. However, due to the compressed timeline of this docket and the short deadline for filing these comments, NECTA is unable to address Staff's revisions here, and expressly reserves its rights to do so and to address comments filed by other parties at an appropriate time in the future. Notwithstanding Staff's commendable effort in this rulemaking docket, NECTA objects to the initial rules proposal for the reasons discussed below.

**I. THE DRAFT RULES DO NOT COMPORT WITH THE  
LEGISLATURE'S INTENT IN ENACTING SENATE BILL 48**

1. The draft 400 rules are intended to replace the former 400 rules in their entirety in order to implement Senate Bill 48.<sup>1</sup> The intent behind that law is simple and straightforward: it was intended to modify the traditional monopoly era regulation of local exchange carriers and it "confirms that Voice over Internet Protocol services and IP enabled services are not subject to regulation as telecommunications services in New Hampshire."<sup>2</sup>

2. At the public hearing held May 28, 2013 in this docket, Commissioner Harrington characterized SB 48 as extremely complicated and confusing. Where statutory language is ambiguous or where more than one reasonable interpretation exists, the Court looks beyond the words of the statute to determine its meaning. *In the Matter of Baker & Winkler*, 154 N.H. 186, 187 (2006). In such cases, legislative intent and the objectives of the legislation must be examined. *See State v. Smith*, 154 N.H. 113, 115 (2006). The legislative history of SB 48 includes the following report of the House Science,

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<sup>1</sup> See Rulemaking Notice Form submitted by the NH PUC to the Office of Legislative Services (April 25, 2013).

<sup>2</sup> House Calendar, Vol. 34, No. 37 (May 11, 2012), pp. 2046-2047.

Technology and Energy Committee report published in the House Calendar.<sup>3</sup> That report provides as follows:

This bill modernizes the regulation of telecommunications service in four important ways: One, it offers local exchange carriers relief from monopoly era retail regulation, freeing them to compete more effectively. Two, it confirms that Voice over Internet Protocol services and IP enabled services are not subject to regulation as telecommunications services in New Hampshire. Three: it preserves Incumbent local exchange carrier obligations to serve as the carrier of last resort and ensures that all residents have an affordable Basic Service option for phone service. Four: it preserves incumbent local exchange carrier obligations to provide wholesale services to competitors further encouraging competition among providers.

3. Despite the Legislature's clear intent to the contrary, the proposed rules subject providers of VoIP and IP enabled service to virtually the same level of regulation as that which is applied to telecommunications service providers, i.e., excepted local exchange carriers ("ELECs") and incumbent local exchange carriers ("ILECs"). For these reasons, the rules conflict with the Legislature's express intent in enacting SB 48 and therefore must either be withdrawn or revised.

## **II. THE DRAFT RULES ARE UNLAWFUL**

1. The rules impermissibly and unlawfully create new definitions that do not appear in the statute. It is settled law that rules cannot add to, detract from, or in any way modify statutory law. *See Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 252 (2011). An agency must comply with the spirit and letter of a governing statute. *Appeal of Town of Nottingham*, 153 N.H. 539, 555 (2006). Administrative rules that contradict a governing statute exceed the agency's authority and therefore are void. *See In Re Alexis O.*, 157 N.H. 781, 790 (2008).

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<sup>3</sup> *Id.*

2. At least two new definitions in the draft rules expand the Commission's regulatory authority and create new classes of service or providers, which do not exist in the statute. Thus, they are impermissible.

**- Voice Service Provider (402.24) ("VSP")**

This definition impermissibly creates a new class of provider which treats ELECs, ILECs and VoIP providers at the same level of regulation, which is clearly contrary to the Legislature's intent.

**- Essential Telephone Service (402.09)**

This definition impermissibly expands the definition of basic service as set forth in statute<sup>4</sup>, and creates regulatory oversight over such service, where it does not exist in the statute. Thus, any rules related to "essential telephone service" are invalid.

3. The rules impermissibly define ELEC, VoIP and IP-enabled service differently than the statutory definitions of those terms. Administrative rules that contradict a governing statute exceed the agency's authority and therefore are void. *See In Re Alexis O.*, 157 N.H. 781, 790 (2008). Where the Legislature has defined a term, the agency rules should adopt those definitions verbatim. Definitions that otherwise expand or change the statutory definition should be stricken and replaced with statutory terms. Examples of rules definitions that are different from the statutory definitions include:

**- ELEC (402.10)** – This definition does not adopt the statutory definition in RSA 362:7, I(c). It is not only inconsistent with the statute, but it impermissibly (and somewhat inexplicably) includes "public utility" language from RSA 362:2. The statutory definition of ELEC does not cross reference RSA 362:2, nor does it include the additional language.

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<sup>4</sup> RSA 374:22-p, I(b).

- **Voice over Internet Protocol service (402.22)**- This definition is inconsistent with RSA 362:7, I(d) because it omits reference to “any successor protocol,” thereby unduly limiting the scope of the term.

- **IP-enabled service (402.14)**- This definition is inconsistent with RSA 362:7, I (e) because it omits reference to “any successor protocol” and “any successor format”, also improperly limiting the scope of this term.

In addition to the definitions noted above, the following terms actually do appear in the statute and in the rules but are not defined in the rules: Cramming (RSA 378:44-48); Slamming (RSA 374:28-a); End User (RSA 362:7, I (a)) and Nonbasic services (RSA 374:22-p, I(c)).

### **III. THE DRAFT RULES MISAPPLY THE STATUTE**

#### **1. The rules unlawfully treat VoIP providers the same as ELECs.**

Both the wording and intent of RSA 362:7 indicate that the Legislature did not intend VoIP providers to be ELECs. The Legislature created separate definitions of ELECs and VoIP providers, with separate regulatory obligations. *See* RSAs 362:7, I (c) and :7, I(d); *see also* RSAs 362:7, II and III, and RSA 365:1-a. Combining these two distinct types of service providers into a single class of service provider, *i.e.* VSP, is unlawful. The provisions of RSA 362:7 must be considered as a whole. *See In re D.B.*, 53 A. 3d 646 (2012). A reading of the entire statutory scheme supports the conclusion that VoIP service providers are not ELECs. Specifically, RSA 362:7 contains a very specific definition of an ELEC on the one hand, RSA 362:7, I (c), and very specific and different definitions of VoIP and IP-enabled services providers on the other, RSA 362, 7, I (d) and (e). Moreover, the statutory definitions of VoIP and IP-enabled services are

consistent with the Legislature's intent and do not reference "telecommunications service." Thus, to the extent that the rules consider VoIP and IP-enabled service providers to fall within the category of ELECs as described in RSA 362:7, I (c)(3), i.e. "any provider of telecommunications service that is not an ILEC," the rules are improper.

The Legislature clearly intended VoIP service and VoIP providers not to be regulated the same as telecommunications service providers. This intent is further illustrated by the fact that the Legislature enacted one statute listing the regulatory areas that do and do not apply to VoIP service providers and enacted a separate and distinct series of statutory amendments governing the regulation of ELECs. *Compare* RSA 362:7, III with, e.g., RSAs 365:1-a; 366:1-a; 369:1-a; 370:1-a; 374:1-a; and 378:1-a. Principles of statutory construction support the position that because VoIP providers are defined and mentioned separately from ELECs in the statute, they are not ELECs and should not be regulated as ELECs. When interpreting a statute, all words must be given effect; the Court presumes that the Legislature did not enact superfluous or redundant words. *State v. Burke*, 162 N.H. 459 (2011). Yet, the proposed rules give no meaning and effect to RSA 362:7, II and III, and effectively render them redundant. This is impermissible.

RSA 362:7, II is clear: "no department, agency, commission or political subdivision of the state, shall enact, adopt or enforce, either directly or indirectly, any law, rule regulation ordinance, standard, order or other provision having the force or **effect** of law that regulates or has the effect of regulating the market entry, market exit, transfer of control, rates, terms or conditions of any VoIP service or IP enabled service or

any provider of VoIP service or IP Enabled service,” unless otherwise excepted under Section III. However, most of the rules as proposed violate this prohibition.

Most of the rules have the effect of regulating – directly or indirectly - the market entry, market exit, transfer of control, rates, terms or conditions of VoIP service providers and IP-enabled service providers, and these rules do not fall within the limited exceptions expressly provided in RSA 362:7, III. The following are a few example of rules (not an exhaustive list) imposed on VSPs that, if imposed on VoIP and IP-enabled service providers, clearly violate the statute:

411.01 – registration of VSPs (a term under the current rules that includes VoIP providers) would violate the statutory prohibition against market entry requirements.

411.05 – wholesale tariff requirements – would violate the statutory prohibition against regulation of the rates, terms of conditions of VoIP service.

411.06 – website requirements – would impose a prohibited regulation of the conditions of service of VoIP providers.

412.06 Directories – would impose a prohibited regulation on the terms of service of VoIP providers.

413.02 Restoration of service – this is another regulation of the prohibited conditions of VoIP service.

412.04(e) – Change in ownership – would violate the prohibition on regulation of the transfer of control of VoIP providers.

In fact, pursuant to 362:7, III, implemented as part of SB 48, the only areas in the proposed rules over which the Commission expressly retains state statutory authority over VoIP and IP enabled providers as applicable, include digsafe (Puc 800); pole

attachments (Puc 1300); notification of accidents on public ways (411.07); TRS charges (411.09); 911 charges; slamming (412.04 as revised) ; and cramming (412.05) but only if the carrier acts as a 3rd party aggregator or “service provider.”

Because the rules conflict with the express provisions of the statute as well as with the Legislature’s intent that VoIP service is not to be regulated as a telecommunications service in New Hampshire, the rules are unlawful. An agency must comply with both the spirit and letter of a governing statute. *Appeal of Town of Nottingham*, 153 N.H. 539, 555 (2006). Administrative rules that contradict a governing statute exceed the agency’s authority and therefore are void. *In Re Alexis O.*, 157 N.H. 781, 790 (2008).

**2. Some rules are overly broad and impermissibly expand the Commission’s statutory authority.** Examples are discussed below:

**a. Network operations.**

The statutes that are listed as the authority for rules 413.01, 413.03, 413.06 and 414.05 do not provide the Commission the necessary authority to dictate network operations procedures as proposed. In particular, the reference in RSA 362:7, III to sections 251 and 252 of the federal Telecommunications Act does not mean that the PUC has authority to regulate network operations or health generally. Although sections 251 and 252 of the federal Act delegate certain limited powers over interconnection to state commissions, those powers are not plenary, and certainly do not constitute an open-ended federal source of authority for state commissions to regulate carriers’ networks.



**b. E911 and Telephone Relay Service (“TRS”)** The Commission has no statutory or delegated authority related to E911 aside from approving any required tariff filings of the E911 surcharge which is remitted directly to the Department of Safety. *See* RSA 106-H. The authority relative to E911 in SB 48 is intended to preserve the Department of Safety’s jurisdiction over VoIP and IP-enabled service, not grant expanded jurisdiction to the Commission. Similarly the only authority the Commission has related to TRS is administering the Telephone Relay Service Trust Fund, which is remitted directly to Citizens Bank on behalf of the Governor’s Commission on Disability.

**c. Cramming (Puc 412.05)**. The cramming prohibition of RSA 378:46 does not apply to voice providers. It only applies to third party, non-utility “billing aggregators” and “service providers.” Any “unauthorized charge” or billing practice by a voice provider for its own service is simply an incorrect bill and is outside the scope and beyond the intent of the statute. The cramming statute does not provide the PUC with authority to establish rules regarding voice providers’ end user billing practices. The Commission’s only authority in this area are the prohibitions of RSA 378:47, I (i.e. requiring LECs to permit a customer to put a block on its account and prohibiting LECs from terminating a customer’s local exchange service for failure to pay disputed charges from a billing aggregator or service provider.)

**d. Slamming (Puc 412.04)** Among other things, this proposed rule speaks to the transfer of control of an intact corporate entity. However, such a transfer would not result in changing the customer’s subscribed telecommunications carrier and therefore would not implicate the slamming statute, RSA 374:28-a. No notification of the Commission or customers is required for such a transaction; it would be pointless and

confusing to customers. In addition, the administrative fine identified in draft rule (\$2,000 per subscriber line) is different from the fine set forth in RSA 374:28-a, II (\$2,000 per offense).

**3. Some rules appear to be overly narrow.** Some of the proposed rules related to registration (Puc 411.01 (b)) appear to narrow the types of New Hampshire providers that are currently eligible for state authorization, unnecessarily limiting such state authority to providers of “voice service” (Puc 402.23) – another definition without origin in statute – and could be construed to be overly narrow by excluding other types of telecommunications services recognized under federal law.

**4. Although SB 48 does not disturb wholesale obligations, portions of the previous interconnection rules have been omitted from the draft rules.** The underlying wholesale and interconnection obligations of Sections 251 and 252 of the Telecom Act, are explicitly reserved by RSA 362:8, III. Some of the prior interconnection rules that are unaffected by SB 48 have been omitted from the draft rules, including ILEC interconnection obligations set forth in the prior rules at or about Puc Rule 421.

**5. The proposed forms must be revised.**

To the extent that the proposed 400 rules forms apply to “all Voice Service Providers” and require the same information from all entities, including VoIP providers, they are impermissible for the reasons discussed above. The forms must be revised to insure that they do not have the effect of regulating, directly or indirectly, market entry, market exits, transfer of control, rates, terms or conditions of any VoIP service, VOIP service provider or IP-enabled service or provider. RSA 362:7, II.

**VI. THE COMMISSION SHOULD EXTEND THE DEADLINES IN THIS DOCKET AND/OR THE RSA 541-A DEADLINES TO AFFORD THE STAKEHOLDERS, STAFF AND THE COMMISSION SUFFICIENT TIME TO COLLABORATE ON A SET OF RULES THAT PROPERLY IMPLEMENT SB 48.**

These rules implement significant regulatory changes that affect an entire industry. They must address the specific and nuanced differences among providers and the manner in which they are to be regulated (or not regulated) under SB 48. Unlike other Commission rulemakings, there was no robust process that included meaningful stakeholder input or collaboration with Staff on the specific wording or structure of the draft rules prior to the commencement of the RSA 541-A rulemaking process. For example, the NH Telephone Association filed with the Commission proposed revisions to the 400 rules on July 6, 2012. The Commission did not respond to that filing or provide NHTA or others an opportunity to address those proposed rules. Approximately 9 months elapsed between the time of NHTA's filing and the posting of the Commission's proposed rules on April 11, 2013. Because stakeholders were not involved in drafting the initial rules proposal, they have been placed in a "reactive" mode and have spent the last few weeks attempting to understand how the new rules differ from the old rules and whether they correctly implement SB 48.

At the May 15, 2013 technical session with Staff it became clear that many industry and other stakeholders have strong disagreements with Staff over the interpretation of SB 48 that is reflected in the wording and structure of the draft rules. NECTA was hopeful that further discussions among Staff and stakeholders could resolve

some areas of disagreement and that such avenues of potential settlement should be explored. Since that technical session, the Commission issued Order 25, 513 in DT 12-308 articulating its interpretation of various aspects of SB 48, and Staff has provided its comments on and revisions to the initial rules proposal. Unfortunately, the time frames established in this docket for commenting on the draft rules do not afford the parties sufficient time to evaluate Order No. 25, 513 or Staff's redlined version of the initial rules proposal circulated on June 5, 2013, or to work collaboratively on revisions to the draft rules. Nonetheless, NECTA remains hopeful that at the technical session scheduled for June 18, 2013, Staff and interested parties can work together to resolve some of the issues identified above.

**VII. THE RULES ARE IN SUBSTANTIAL PART PREEMPTED BY FEDERAL LAW INsofar AS THEY APPLY TO INTERCONNECTED VOIP AND IP-ENABLED SERVICES.**

Lastly, it should be noted that there is a pending Supreme Court appeal involving DT 09-044 and an open proceeding in DT 12-308 which ultimately may have an impact on the implementation of the proposed rules as they pertain to interconnected VoIP providers. Comcast has contended in both dockets that interconnected VoIP services are "information services" under federal law, and as such, the imposition of state public utility regulation on such services is preempted under federal law. Rather than repeating those arguments here, Comcast incorporates them by reference. Many of the proposed rules continue to apply to VoIP providers precisely the sorts of public utility regulations that may not lawfully be imposed by state Commissions on information service providers. Although the Commission has taken the position that VoIP services are "telecommunications services" under federal law and that its authority is therefore not

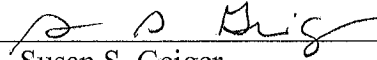
preempted, Comcast disagrees with that conclusion and is appealing it to the New Hampshire Supreme Court. Thus, for the reasons stated, Comcast and NECTA oppose the rules as federally preempted insofar as they continue to apply public utility regulations to interconnected VoIP providers.

For all of the foregoing reasons, good cause exists for providing the parties and Staff with more time to work on these rules.

Respectfully submitted,

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Dated: June 11, 2013

Certificate of Service

I hereby certify that on this 11th day of June, 2013, a copy of the within Comments was sent by electronic or U.S. mail to persons listed on the Service List.

  
Susan S. Geiger