

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
DT 12-036

RULEMAKING
Puc 400 – Telephone Service

COMMENTS OF THE
NEW HAMPSHIRE TELEPHONE ASSOCIATION

June 11, 2013

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INTRODUCTION AND SUMMARY

Pursuant to the Commission's Secretarial Letter dated June 4, 2013, the member companies of the New Hampshire Telephone Association ("NHTA")¹ are pleased to comment on the Commission's proposed Chapter Puc 400 Rules for Telecommunications.²

Last year, Title 34 of the New Hampshire Revised Statutes was substantially revised by 2012 N.H. Laws Chap. 177 ("SB 48"). SB 48 was intended to overhaul a regulatory scheme that was a relic of an era when local exchange telephone service was considered a "natural monopoly," and replace it with a scheme that recognizes that robust competition for local telecommunications services abounds in New Hampshire and that all telephone service providers should be free to compete on a level playing field. To that end, SB 48 deregulated end user telephone services to a very great extent, with a few safeguards to ensure that no customer would be completely without access to telephone service, and that competition would continue to develop. By so altering the regulatory landscape in New Hampshire, SB 48 has made it necessary to rewrite and readopt most of the rules by which the Commission regulates telephone service. Accordingly, the Commission released a proposal on April 11, 2013 which, following a series of hearings and technical sessions, it revised on June 4, 2013.

As the following comments explain, NHTA believes that the Commission's proposal contradicts the intent of SB 48 in many respects. Rather than achieving the "light touch" regulatory treatment of end user services that SB 48 envisioned, the Commission has mined new interpretations of state and federal law to support continuing close oversight of end user telephone services in the state. Contrary to the proposal that NHTA submitted in July 2012, the Commission's proposal would continue to subject all telephone companies in the state to a level of regulation that hews closely to the past regime.

Many of the proposed rules draw on laws and policy that are either beyond the Commission's statutory purview or which do not confer the authority that is presumed. For example, the proposed rules reflect a conviction that the Commission has a continuing role in basic network survival of all telephone companies, as if competition is not a factor in ensuring network quality. As another example, the Commission has reassessed the cramming statute so as to reinstate its current billing rules under the auspices of a "safe harbor" against cramming violations. Furthermore, the Commission has altered its interpretation of the distinction between service

¹ NHTA is comprised of 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, Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE, Union Telephone Co. and Wilton Telephone Company, Inc.

² Please note that FairPoint Communications abstains from the comment regarding proposed rule Puc 411.02. FairPoint's territory is already open to competitive entry, and so it takes no position on this issue.

discontinuance and service distinction in order to retain certain rules regarding termination of service. These examples are non-exclusive, and there are others that are explained in greater detail in the following pages.

The following comments are accompanied by recommendations for revisions to the proposed rules that make them conform with the letter and intent of SB 48. The comments are comprised of two parts: 1) a discussion of each rule with which NHTA takes issue and 2) a separate “redline” of the proposed rules as an aid for visualizing how the recommendations are reflected in the rules.

Puc 402.07 Cyber attack

In proposed rule Puc 402.07, the Commission proposes to define a “cyber attack”:

Puc 402.07 “Cyber attack” means a deliberate, unauthorized exploitation of computer systems, technology-dependent enterprises and networks.

As support for its authority to create this definition, the Commission cites:

- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:4 (Duty to keep informed)

This definition is referenced solely in proposed rule Puc 413.03, which requires VSPs to establish plans for various emergencies and make those plans available for Commission inspection. Cyber attacks are included in the list of emergencies:

Puc 413.03 Emergency Operations.

(a) A VSP shall make reasonable provisions to meet emergencies resulting from any of the following:

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(6) Cyber attacks;

DISCUSSION: NHTA disagrees with the establishment of this definition. First, on its face, this definition is vague and insufficient to describe all of the actions that are generally considered to be cyber-attacks, (*e.g.* identity theft, malware, DDOS attacks, slander, stalking) and does not provide an objective standard. Furthermore, this definition exists solely in reference to proposed Rule 413.03, which itself is invalid as to most VSPs and unreasonably burdensome as to non-ELEC ILECs and should be deleted, as explained later in these comments. Consequently, this definition serves no purpose.

RECOMMENDATION: Proposed Rule Puc 402.09 should be deleted in its entirety.

Puc 402.11 Gross utility revenue

In proposed rule Puc 402.11, the Commission proposes the definition of “gross utility revenue” for purposes of calculating the annual utility assessment:

Puc 402.11 “Gross utility revenue” means revenue earned by the utility from New Hampshire customers for voice service. Gross utility revenue includes any payphone revenues. When a utility offers a combination of voice services and non-utility services such as Internet or video for a single price, gross utility revenue portion shall be calculated based on the prices at which the voice services are offered on a standalone basis. If the utility does not offer the voice services on a standalone basis, the calculation shall be based on the prices at which the largest ILEC in the state offers such services.

As support for its authority to create this definition, the Commission cites:

- RSA 363-A:2 (Assessments)
- RSA 363-A:4 (Collection of assessments)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)

This definition is referenced solely in proposed rule Puc 416.03, which describes the Form VSP-2 Assessment Report.

DISCUSSION: This rule should be revised to emphasize that, for purposes of the rule, assessments should be based solely on *intrastate* revenues. This is consistent with proposals that have been floated in IR 13-038, the Commission’s investigation into the utility assessment process.

RECOMMENDATION: Proposed rule Puc 402.11 should be revised as follows:

Puc 402.11 “Gross intrastate utility revenue” means revenue earned by the utility from New Hampshire customers for intrastate voice service. Gross intrastate utility revenue includes any payphone revenues. When a utility offers a combination of voice services and non-utility services such as Internet or video for a single price, gross intrastate utility revenue portion shall be calculated based on the prices at which the voice services are offered on a standalone basis. If the utility does not offer the voice services on a standalone basis, the calculation shall be based on the prices at which the largest ILEC in the state offers such services.

Furthermore, consistent with this recommendation, rule Puc 416.03(b) (Form VSP-2 Assessment Report), should also be revised to refer to “gross intrastate utility revenue.”

Puc 402.12 Incumbent local exchange carrier

In proposed rule Puc 402.12(d), the Commission proposes the definition of a “rural exemption ILEC”:

(d) “Rural exemption ILEC” means an ILEC exempted from the obligations of 47 USC 251(c).

As support for its authority to create this definition, the Commission cites:

- RSA 362:7, I (Definitions)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:22-p (Affordable telephone service)
- 47 U.S.C. § 251(f) (Rural Exemption)
- 47 U.S.C. § 251(h) (ILEC definition)

This definition is referenced solely in proposed rule Puc 411.02(c), which provides that the Commission may entertain proposals that market entry be conditioned on conformance to the requirements of 47 U.S.C. § 253(f):

(c) Rural exemption ILEC territory. If the applicant seeks to provide service in the territory of a rural exemption ILEC as defined in Puc 402.12, such ILEC shall be provided an opportunity to propose to the commission that the VSP be required by the commission to meet the requirements of 47 USC 253(f) regarding eligible telecommunications carrier qualifications. The commission shall determine whether to impose such a requirement through an adjudicative proceeding.

DISCUSSION: The conditions of 253(f) are not dependent on the status of the ILEC’s rural exemption, but instead apply to the market of any “rural telephone company.”³ Therefore, rule PUC 411.02(c) should relate to rural ILECs in general, and not just those with rural exemptions.

³ This section provides, in pertinent part, that “[i]t shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a *rural telephone company* to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service.” (emphasis supplied).

RECOMMENDATION: Proposed Rule Puc 402.12(d) should be revised to read as follows:

(d) "Rural ILEC" means a "rural telephone company" as defined in 47 U.S.C. § 153(37).

In addition, all references to "rural exemption ILEC," *i.e.* in proposed Rule Puc 402.12 (preamble) and 411.02(c) should be revised consistent with this revision.

Puc 402.1X Nonbasic service

DISCUSSION: The proposed rules do not include a definition of “nonbasic” service. This definition should be included in order to reinforce the distinction between basic service and all other services, and to clarify that basic service is not a component of any other services, but is a distinct offering alone. This is particularly important in delineating the Commission’s authority in regard to basic service as opposed to all other end user services.

RECOMMENDATION: An additional rule, consistent with the language of SB 48, should be added as follows:

Puc 402.1X “Nonbasic service” means any telecommunications service that is not basic service as described in Puc 402.02. Any combination of basic service along with any other service offered by the telecommunications service provider is nonbasic service.

Puc 402.15 Reportable accident

In proposed rule Puc 402.15, defining a reportable accident, the Commission retains a number of characteristics from the existing rule, including that the VSP report accidents of “comparable” severity:

Puc 402.15 “Reportable accident” means an accident in connection with the utility’s property, facilities or service which:

- (a) Involves telephone cable clearances;
- (b) Involves aircraft, trains or boats;
- (c) Results in closure of a state highway;
- (d) Is likely to be, or has been, reported on television; or
- (e) Involves consequences of a magnitude or severity comparable to those described in (a) through (d) above.

DISCUSSION: The rule for reporting incidences involving cable clearances is overly burdensome and offers little benefit to Commission oversight. Subsection (e) is vague and ambiguous and, unlike the ones preceding it, does not provide an objective standard. The fact that it is part of the existing rules does not cure this defect.

RECOMMENDATION: Proposed Rule Puc 402.15, subsections (a) and (e), should be deleted in their entirety. The revised rule should read as follows:

Puc 402.15 “Reportable accident” means an accident in connection with the utility’s property, facilities or service which:

- (a) Involves aircraft, trains or boats;
- (b) Results in closure of a state highway;
- (c) Is likely to be, or has been, reported on television; or

Puc 402.17 Significant accident

Proposed rule Puc 402.17 retains the current definition of a “significant accident”:

Puc 402.17	“Significant accident” means a reportable accident in which: <ul style="list-style-type: none">(a) A fatality has occurred;(b) Any person has received an injury which requires in-patient hospitalization, to the extent known by the utility;(c) Any person has received an injury which incapacitates that person from active work for a total of six days or more during the 10 days immediately following the accident, to the extent known by the utility;(d) Property damage over \$25,000 has occurred, to the extent known by the utility;(e) An electrical contact has occurred; or(f) Damage to the utility’s facilities interrupts service to all of the utility’s customers in an entire telephone exchange or municipality for a period of 15 minutes or longer.
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As support for its authority to create this definition, the Commission cites:

- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:37 (Duty to investigate accidents)

This definition is referenced solely in proposed rules Puc 411.07, Accident Notifications.

DISCUSSION: Proposed rule Puc 402.17 is overly burdensome, ambiguous in its standards and more than necessary for providing safe and reliable utility service to end users. In particular, it provides a vague and burdensome standard for the due diligence that the VSP must conduct following an accident, *e.g.* there are numerous places where information is required “to the extent known by the utility.”

RECOMMENDATION: Proposed Rule Puc 402.17 should be revised to read as follows:

Puc 402.17	“Significant accident” means a reportable accident in which a fatality has occurred.
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Puc 402.18 Significant facilities disruption

In proposed rule Puc 402.18, defining a significant service outage, the Commission proposes to revise the current definition by invoking the concept of a “facilities disruption”:

Puc 402.18 “Significant facilities disruption” means the inability of the facilities of a VSP to reliably carry telephone messages in New Hampshire that affects:

- (a) An entire exchange;
- (b) All customers in a similar manner, such as interconnection failures;
- (c) 250 or more access lines and lasts more than 30 minutes;
- (d) 5000 or more access lines; or
- (e) The majority of customers in a municipality.

As support for its authority to create this definition, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:3 (Extent of Commission power)
- 47 U.S.C. § 251(a) (General duty of telecommunications carriers)

This definition is referenced in the following proposed rules:

- Puc 413.04, Facilities Disruptions
- Puc 415.02(d), VSP Reports and Filings, Event driven
- Puc 416.04(c), Accident Reporting

The Commission Staff have explained during technical sessions that the referenced statutes support the Commission’s continuing authority over basic network survival and, therefore, service outages. Specifically, Staff maintain that SB 48 emphasizes the Commission’s authority to enforce the federal Communications Act, particularly sections 251 and 252 which include, among other things, general LEC obligations to interconnect with each other and to provide wholesale services to each other, to varying degrees. Staff maintains that the duty to interconnect implies the duty to maintain the transmission integrity of the network. Likewise, the duty to provide wholesale services also implies the same.

Staff have also explained that SB 48's preservation of the state's authority over 911 and TRS assessments, taxes and fees, and the general public interest in the 911 system, imply another basis for Commission authority over basic network survival.

DISCUSSION: For a complete discussion of the Commission's interpretation of its authority to ensure basic network survival, please refer to the discussion of proposed rule Puc 413.01 (Construction, Installation and Maintenance of Physical Plant), later in these comments.

In regard to this rule, it is unnecessary as it is redundant of the requirements in Part 4 of the FCC rules, 47 CFR § 4.1 - 4.13, describing service outage reporting. Moreover, to the extent that the Commission retains any authority over service outages, this authority only extends to service provided by ILEC-NELECs, consistent with the discussion later regarding rule Puc 413.01. Even in that case, if any part of this rule is retained, the phrase "service outage" should remain. The phrase "Inability to reliably carry telephone messages" is ambiguous and, unlike the terminology in the current rule, does not provide an objective standard.

RECOMMENDATION: Proposed rule Puc 402.18 should be deleted in its entirety.

Furthermore, consistent with this recommendation, rules Puc 413.04 (Facilities Disruptions), Puc 415.02(d) (VSP Reports and Filings, Event driven) and Puc 416.04(c) (Accident Reporting) should also be deleted in their entirety, because they involve reporting of significant facilities disruptions.

Puc 402.20 Transfer of customer base

In proposed rule Puc 402.20, defining the transfer of a customer base, the Commission proposes to retain the definition in current rule Puc 402.57:

Puc 402.20 “Transfer of customer base” means the merger, acquisition, transfer, lease or other change in ownership of the customer base, franchise, works or system, or any part of such customer base, franchise, works or system, of a carrier, which involves a change in the carrier’s name, customer relationships, or terms and conditions of service.

As support for its authority to create this definition, the Commission cites:

- RSA 362:7, III(e) (Savings clause related to slamming statute)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:28-a (Slamming prohibition)

This definition is referenced in the following proposed rules:

- Puc 412.04, Slamming prohibited

DISCUSSION: The phrase “franchise, works or system” and the word “lease” appear to implicate the change in ownership provisions of RSA 374:30-34 and Rule 402.03. This is confusing and not relevant to any customer transfer that falls short of a change in ownership of the corporate entity. RSA 374:28-a defines “slamming” as “any practice that changes a consumer’s telecommunications or energy-related service carrier or provider without the customer’s knowledge or consent.” However, the transfer of control of an intact corporate entity, *e.g.* purchase of controlling shares of outstanding stock or conversion of debt to equity, is not a change in the customer’s subscribed telecommunications carrier and does not implicate the slamming statute, RSA 374:28-a. Therefore, no notification of the Commission or customers is required for such a transaction, *i.e.* proposed Rule 412.04(e).

“Carrier” is undefined and should be replaced by “utility.”

RECOMMENDATION: Proposed Rule Puc 402.20 should be revised to read as follows:

Puc 402.20 “Transfer of customer base” means the merger, acquisition, transfer, or other change in ownership of the customer base, or any part of such customer base, of a utility, which involves a change in customer relationships from one utility to another utility.

Puc 411.02 Authorization required to provide non-IP voice service

[NOTE: FairPoint abstains from the comment on this rule]

In proposed rule Puc 411.02, the Commission proposes to modify and combine existing rules Puc 431.01 and 431.02 pertaining to the authorization required to provide VSP service. Subsections (c) and (e) apply to entry by VSPs into the franchise territory of rural ILECs:

Puc 411.02 Authorization Required to Provide Non-IP Voice Service.

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(c) Rural exemption ILEC territory. If the applicant seeks to provide service in the territory of a rural exemption ILEC as defined in Puc 402.12, such ILEC shall be provided an opportunity to propose to the commission that the VSP be required by the commission to meet the requirements of 47 USC 253(f) regarding eligible telecommunications carrier qualifications. The commission shall determine whether to impose such a requirement through an adjudicative proceeding.

(d) Denial of Registration

(1) The commission shall deny an application for registration if, and only if, it determines that the applicant or its general partners, corporate officers, director of the company, limited liability company managers or officers:

a. Have committed an act that would constitute good cause to find a violation under these rules;

b. Have, within the 10 years immediately prior to registration, had any civil, criminal or regulatory sanctions or penalties imposed against them pursuant to any state or federal consumer protection law or regulation;

c. Knowingly made a material false statement of fact in the application; or

d. Demonstrated on its application such flagrant or repeated violations of the requirements to operate as a utility or a competitive carrier in other state(s) that the commission determines that it is not in the public good to allow registration.

(2) In the event that the commission denies an application for registration, the applicant may, within 30 days, file a request for reconsideration.

(e) Unless the commission denies an application for VSP registration pursuant to (d) above, the commission shall issue a VSP identification number authorizing the applicant to provide voice service in the specified territory. Such authorization may include requirements imposed pursuant to (c) above.

As support for its authority to create this definition, the Commission cites:

- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:22, I (Permission to conduct business)⁴
- 47 U.S.C. § 253(f) (Barriers to entry)

DISCUSSION:

Section 253 of the federal Communications Act provides that:

[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,⁵

but that, still,

[i]t shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214 (e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service.⁶

Proposed Rule 411.02(c) is consistent with section 253(f), in that it provides an opportunity for the Commission to require telecommunications carriers in rural areas to meet the requirements of an eligible telecommunications carrier (“ETC”). It is also consistent with relevant holdings by the New Hampshire Supreme Court, which has held that “Section 253(a) . . . does not evince Congress’s determination that competition in a single service territory always is in the public good” and that the Commission must still make that public good determination under RSA 374:22-g, I.⁷ The Court also affirmed the Commission’s intention to adopt administrative rules

⁴ It should be noted that the Commission relies only on its general authority to approve the commencement of any public utility business, and not on the specific considerations of RSA 374:22-g, II which have been found to be preempted by section 253 of the federal Communications Act. *See* DT 10-183, Order No. 25, 277 (Oct. 21, 2011), *affirmed*

⁵ 47 U.S.C. § 253(a).

⁶ 47 U.S.C. § 253(f).

⁷ Appeal of Bretton Woods Tel. Co. *et al.* 164 N.H. 379, 390 (2012) (emphasis original).

to address govern competitive entry into rural territories, reserving for later as to whether such rules comported with the relevant law.⁸

The Commission has never held that it could not place conditions on market entry. It has only found that the considerations of RSA 374:22-g, II were so burdensome as to represent a material inhibition to market entry. In making this finding, it determined to

commence a rulemaking to address, in a competitively neutral manner, whether additional or modified requirements are necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers in the context of competitive entry.⁹

The proposed rule is the outcome of that process and comports with the law, because it is competitively neutral and applies to all prospective market entrants.

NHTA does, however, believe that the proposed rule can be improved in certain respects. First, it must be modified to apply to the territories of all rural ILECs, not just rural *exemption* ILECs. As explained above in the discussion of proposed Rule 402.12, the conditions of 253(f) are not dependent on the status of the ILEC's rural exemption, but instead apply to the market of any "rural telephone company." Therefore, rule PUC 411.02(c) should relate to rural ILECs in general, and not just those with rural exemptions.

Second, a sub-paragraph should be added to paragraph (d)(1), confirming that the refusal of an applicant to accept the section 253(f) conditions, if imposed by the Commission, is cause for denial of the registration.

⁸ *Id.*

⁹ DT 10-183; Order No. 25,277 at 36.

RECOMMENDATION: Proposed Rule Puc 411.02 should be revised to read as follows:

Puc 411.02 Authorization Required to Provide Non-IP Voice Service.

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(c) Rural ILEC territory. If the applicant seeks to provide service in the territory of a rural ILEC as defined in Puc 402.12, such ILEC shall be provided an opportunity to propose to the commission that the VSP be required by the commission to meet the requirements of 47 USC 253(f) regarding eligible telecommunications carrier qualifications. The commission shall determine whether to impose such a requirement through an adjudicative proceeding.

(d) Denial of Registration

(1) The commission shall deny an application for registration if, and only if, it determines that the applicant or its general partners, corporate officers, director of the company, limited liability company managers or officers:

a. Have committed an act that would constitute good cause to find a violation under these rules;

b. Have, within the 10 years immediately prior to registration, had any civil, criminal or regulatory sanctions or penalties imposed against them pursuant to any state or federal consumer protection law or regulation;

c. Knowingly made a material false statement of fact in the application; or

d. Demonstrated on its application such flagrant or repeated violations of the requirements to operate as a utility or a competitive carrier in other state(s) that the commission determines that it is not in the public good to allow registration.

e. Decline to meet all requirements resulting from any proceeding pursuant to subsection (c) preceding.

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Puc 411.07 Accident Notifications

Proposed rule Puc 411.07 retains current rule Puc 411.08, which provides that:

Puc 411.07 Accident Notifications

(a) A VSP shall notify the commission of reportable accidents as defined in 402.15.

(b) In the event of a significant accident pursuant to Puc 402.17 definitions, the VSP shall notify the commission by telephone as follows:

(1) During regular commission hours, the VSP shall contact the first representative listed for telephone accident notifications on the accident notification roster as defined in Puc 402.01, at the commission telephone number provided, and, if that representative is unavailable, the VSP shall work sequentially through the accident notification roster until it speaks directly with one of the commission representatives listed therein.

(2) Outside of regular commission hours, the VSP shall:

a. Call the commission general telephone listing, provided in the accident notification roster, and leave a voice mail message:

1. Identifying the VSP and the name and return telephone number of the individual attempting to report; and

2. Stating that an accident requiring notification has occurred and will be reported when the commission next opens; and

b. Attempt to contact a commission representative listed on the accident notification roster at the after-hours telephone number provided, starting with the representative listed for telephone accident notifications, and working sequentially through the list until the VSP speaks directly with one of the commission representatives listed therein.

(3) The VSP shall provide the commission with the following information:

- a. The name of the VSP;
- b. The name of the person making the report and the telephone number at which they can be reached;
- c. A brief description of the accident or event and location;
- d. The time at which:
 - 1. The accident or event occurred;
 - 2. The VSP was first notified of the accident or event; and
- e. A description of any fatalities, personal injuries, and damages; and
- f. Any other information relevant to the cause of the accident and the extent of the damages.

(4) Notification of a significant accident shall not be deemed complete until a VSP's representative:

- a. Speaks to a commission representative listed on the accident notification roster; and
- b. Communicates to the commission representative the information required by (3) above.

(c) For all other reportable accidents, pursuant to Puc 402.15, a VSP shall notify the commission by telephone during regular business hours as outlined in (b)(1) above:

- (1) On the day of the accident or event, if possible; or
- (2) On the next business day.

(d) In addition to notifying the commission, a VSP shall file Form VSP-3 Utility Accident Report as defined in Puc 416.04, for each reportable accident within 10 business days of the accident.

(e) If the VSP is unable to speak to a commission representative outside of regular commission hours, the VSP shall, as soon as possible on the next business day, contact the commission as outlined in (b)(2)a. above.

DISCUSSION: As with rule Puc 402.17, discussed above, proposed rule Puc 411.07 is overly burdensome, ambiguous in its standards and more than necessary for providing safe and reliable utility service to end users.

RECOMMENDATION: Subsections (b) and (c) of proposed rule Puc 411.07 should be deleted in their entirety. The revised rule should read as follows:

Puc 411.07 Accident Notifications

(a) A VSP shall notify the commission of reportable accidents as defined in 402.15.

(b) In addition to notifying the commission, a VSP shall file Form VSP-3 Utility Accident Report as defined in Puc 416.04, for each reportable accident within 10 business days of the accident.

(c) If the VSP is unable to speak to a commission representative outside of regular commission hours, the VSP shall, as soon as possible on the next business day, contact the commission as outlined in (b)(2)a. above.

Puc 412.04 Slamming Prohibited

Proposed rule Puc 412.04 adds extensively to the current slamming rules by adding a provision in subsection (d) related to mass migrations of customers:

Puc 412.04 Slamming Prohibited

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(d) Transfer of Customer Base

(1) When a VSP proposes a transfer of customer base as defined in Puc 402.21, the VSP shall notify the commission by filing Form VSP-4 Customer Bulk Transfers Report as defined in Puc 416.05.

(2) No fewer than 14 days prior to the effective date of a VSP transfer of customer base, the VSP shall provide written notice pursuant to Puc 412.03 to each affected customer which includes:

- a. Notice that the VSP shall discontinue providing VSP services to the customer;
- b. Notice of the date the VSP shall discontinue providing VSP services to the customer;
- c. Notice that the customer will be assigned to the proposed transferee or lessee carrier unless the customer selects an alternate local exchange service provider;
- a. Notice that the change in carrier shall be without charge to the customer;
- e. A clear statement:
 - 1. Of any difference in the rates, terms and conditions of service of the VSP and the rates, or terms and conditions of service of the proposed transferee or lessee VSP; or
 - 2. That the rates, terms and conditions of service of the VSP and the proposed transferee or lessee VSP are the same;
- f. The name, address and telephone number of the proposed transferee or lessee VSP; and
- g. Notice of the time period within which the customer shall make a selection of any alternate VSP or be assigned to the default or successor carrier, if different than the date the VSP shall cease to provide service to the affected customer.

(3) A VSP shall provide a copy of the notice described in (d)(2) above to the commission at the same time notice is sent to affected customers.

(4) A VSP shall, within 30 days of the effective date of the transfer of customer base, refund to its customers any applicable amounts owed.

(5) The proposed transferee or lessee shall register as a VSP, pursuant to Puc 411.01, if not already so registered.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(e) (Savings clause related to slamming statute)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:28-a (Cramming prohibition)
- RSA 373:41 (Commission action for relief)
- RSA 374:47 (Compensation of counsel)
- 47 CFR Part 64, Subpart K (FCC Slamming rules)

DISCUSSION: None of the statutes that the Commission cites support its authority to issue rules regarding mass customer base transfers. The FCC has established a streamlined process by which carriers may effect mass customer based transfers upon prescribed notice to the customers and the FCC.¹⁰ Proposed subsection (d) conflicts with this process in some respects, is redundant of this process in all respects, and is thus by definition overly burdensome.

RECOMMENDATION: Proposed subsection (d) to rule Puc 412.04 should be deleted in its entirety.

Consistent with this recommendation, proposed rule Puc 415.02(c) (Customer Bulk Transfer Report) should also be deleted in its entirety.

¹⁰ 47 CFR § 64.1120(e).

Puc 412.05 Cramming Prohibited

In proposed rule Puc 412.04, the Commission proposes to significantly expand its cramming rules. In particular, the Commission proposes to create a “safe harbor” with the apparent intent to motivate VSPs to continue to conform to the Commission’s current billing rules, *e.g.* 412.05, 06, 07; 432:05, 06, 07. The safe harbor is contained in subsection (d) and is essentially a verbatim transposition of the existing billing rules:

Puc 412.05 Cramming Prohibited

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(d) In setting the administrative fine in any such proceeding, the commission shall consider adoption by the VSP of the full set of procedures listed below to be a mitigating factor indicative of a corporate policy to prevent cramming:

- (1) Bills are rendered at regular intervals that end on the corresponding day of each month.
- (2) Each bill shows all factors as are necessary, so that the charges may be readily understood from the information appearing on the bill.
- (3) Each bill includes the following:
 - a. The date of the current bill;
 - b. For those utilities which charge interest and/or late charges after the due date:
 1. The due date; and
 2. Any applicable penalty;
 - c. Any applicable discount;
 - d. The charges;
 - e. On the first page, a notice for questions regarding the bill including:
 1. The toll-free customer service telephone number of the utility;
 2. A statement directing customers to contact the utility regarding bill questions; and
 3. A statement that the customer may call the commission for further assistance after first attempting to resolve disputes with the utility, with the commission’s toll-free telephone number listed.

(4) All payments made at an authorized payment agency of the utility are credited to the customer's account and posted effective the date payment is rendered to the authorized payment agency.

(5) Bills are delivered:

- a. Via US postal service; or
- b. Via an electronic billing system when offered by the utility and elected by the customer.

(6) The utility maintains and makes available to the commission upon request an accurate account of all utility charges for service billed to each customer and maintains records showing the information from which each bill may be readily computed.

(7) Notice to Customers of Changes in Rates.

- a. Prior to the effective date of any rate increase, the VSP notifies all affected customers of the rate increase pursuant to Puc 412.03, except if and to the extent that a contract between the customer and the VSP permits increases in rates over the contract term.
- b. The notice in (a) above includes:
 - 1. The new rate;
 - 2. The effective date of the rate increase; and
 - 3. A statement that the customer has thirty days to discontinue the service without incurring the rate increase.
- c. A customer may, at any time up to and including 30 days following the written notice in a. above, request discontinuation of the relevant service.
- d. The customer discontinuing the service pursuant to (c) above automatically receives an adjustment in the amount of the increase, retroactive to the effective date of the rate increase.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(e) (Savings clause related to cramming statute)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 378:44-48 (Cramming prohibition)

DISCUSSION: RSA 378:46 provides that:

No billing aggregator or service provider shall engage in cramming. Any billing aggregator or service provider that engages in cramming shall be subject to an administrative fine in an amount to be determined by the commission, not to exceed \$1,000 per offense. The commission may consider intent as a factor when assessing administrative fines. The commission may prohibit a billing aggregator or service provider that engages in cramming from billing through the utility company.

On its face, then, the cramming prohibition of RSA 378:46 does not apply to local exchange carriers and/or “VSPs”; it only applies to separately and particularly defined third party, non-utility “billing aggregators” and “service providers.” To the extent that any “unauthorized charge” or billing practice by a VSP is considered to implicate this statute, it is outside the scope and beyond the intent of the cramming statute.

By creating a safe harbor related to billing practices by VSPs for end user services, the Commission has implied that *any* billing error by a VSP could constitute a cramming violation under the statute. This interpretation is overbroad and incorrect. RSA 378:1-a provides in pertinent part that:

Except as provided otherwise within this chapter and except for RSA 378:44 through RSA 378:48 [Cramming Prohibited], the provisions of this chapter shall not apply to any end user of an excepted local exchange carrier, nor to any service provided to such end user.

Thus, the Commission may enforce the cramming prohibitions *as they apply to VSPs*, but may not impose billing rules and standards for end user services.

The cramming statute is intended to prohibit actual cramming by third parties. To the extent that it implicates VSPs at all, this pertains to the Commission’s authority to require account blocking and to prohibit termination of service for failure to pay third party charges.¹¹

¹¹ RSA 378:47, I(a), (b).

RECOMMENDATION: All of subsection (d) of proposed rule Puc 412.05 should be deleted and the remaining subsections should be revised to reflect the respective duties and exposure of the relevant actors:

Puc 412.05 Cramming Prohibited

(a) “Cramming” means a submission or inclusion of unauthorized, misleading, or deceptive charges for products or services on a customer’s utility bill. Cramming does not include charges required or explicitly authorized by law.

(b) “Billing aggregator” means a person, other than a service provider, who forwards a charge for a product or service offered by a service provider to the utility company for billing to the customer

(c) “Service provider” means a person that offers a product or service to a customer and directly or indirectly sends the billable charges or credits to the utility company for billing to the customer.

(d) A billing aggregator or service provider shall not engage in cramming.

(e) If, after notice and opportunity for hearing, the commission finds that a billing aggregator or service provider has engaged in cramming, the billing aggregator or service provider shall be subject to an administrative fine not to exceed \$1,000 per offense, pursuant to RSA 378:46.

(f) A VSP must permit a customer to place a block on an account that prevents any non-telecommunications-related charges that do not originate from the customer’s local exchange or long distance carrier from appearing on the customer’s local exchange carrier bill.

(g) A VSP is prohibited from terminating voice local exchange service of any customer for failure to pay charges from a billing aggregator or service provider that are disputed by the customer.

Puc 412.06 Confidentiality Requirements

In proposed rule Puc 412.06, the Commission proposes to impose regarding the confidentiality of various communications with customers and customer information:

Puc 412.06 Confidentiality Requirements.

- (a) A VSP shall treat all communications between and with customers as confidential unless, and to the extent, authorized by the commission, or state or federal law.
- (b) No VSP operators, employees or agents shall, except when a technical necessity exists:
 - (1) Listen to any telephone conversation between customers;
or
 - (2) Monitor the content of non-voice communication such as data.
- (c) Employees, including operators and agents of a VSP, shall not repeat, divulge or use to any personal advantage or in any improper or illegal manner, any communication overheard or intercepted in any way, from or regarding, any telephone communication, including non-voice communication, to or from a customer of the VSP, unless, and to the extent, authorized by the commission or by state or federal law.
- (d) A VSP shall develop and enforce written methods and procedures to establish strict compliance with customer confidentiality rules on the part of their employees and agents.
- (e) A VSP shall protect Customer Proprietary Network Information (CPNI) as defined in the Communications Act of 1934, as amended, 47 U.S.C. 222(h)(1) at least to the level required by FCC regulations.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, I(c) (Definition of ELEC)
- RSA 362:8, I (Obligations imposed by the federal Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 378:44-48 (Cramming prohibition)
- 47 U.S.C. § 251(b) (General obligations of all local exchange carriers)
- 47 U.S.C. § 222(h) (Definition of Customer Proprietary Network Information)

DISCUSSION: Only one of the cited statutes, 47 U.S.C. § 222(h), touches on the confidentiality of information in any way, and even then it only defines a particular subset of this information, so called “customer proprietary network information” (“CPNI”). The Communications Act defines CPNI as information related only to the *usage* of telecommunications service:

(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

The Communications Act protects the confidentiality of usage information, primarily to prevent it from being used inappropriately in a marketing context. Neither this statute nor any other statute imposes the broad protection on “all communications between and with customers” that the proposed rule would require. While VSPs should be sensitive to the general rights of customers, there is no statutory requirement at the state or federal level that all communications with customers are confidential, which is too broad a measure that would be extremely burdensome, if not impossible, for VSPs to police. Other aspects of this proposed rule *e.g.* intercept provisions, may be subject to federal law (*e.g.* CPNI rules, CALEA, etc.), but not Commission rules.

RECOMMENDATION: Proposed rule Puc 412.06 should be deleted in its entirety, including subsection (e), with is duplicative of federal rules.

Puc 412.07 Cessation of Service

In proposed rule Puc 412.07, the Commission proposes to impose a 14 day notice for the termination of any VSP service and to advise customers on how to port their telephone numbers:

Puc 412.07 Cessation of Service. Before terminating any customer's voice service as defined in Puc 402.24 for any reason other than customer request, a VSP shall provide 14 days' notice to the customer. This notice shall include a description of the process by which the customer may transfer the telephone number to another provider.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, I(c) (Definition of ELEC)
- RSA 362:8, I (Obligations imposed by the federal Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:59 (Number conservation and area code implementation)
- RSA 378:44-48 (Cramming prohibition)
- 47 U.S.C. § 251(b)(2) (Duty to provide number portability)

DISCUSSION: This rule pertains to end users and end user services, over which the Commission has no authority except as it pertains to ILEC-NELECs. Therefore, the Commission may not impose a notice period on any other carrier.

Furthermore, the Communications Act confers no authority to the Commission in this regard. The number portability statute, § 252(b)(2), as implemented by the FCC, 47 CFR §§ 52.1 – 52.111, imposes no affirmative duty on carriers to aid individual customers (as opposed to other carriers) in implementing the number porting process. Moreover, customers have no rights to port a number for service that has been terminated, and there is no process in place by which a customer may execute a number port on their own; only LECs can do this. The only initiative customers may take on their own is to switch providers before their service is terminated.

No independent authority is conferred on the Commission by RSA 374:59, IV either. This statute provides that:

The commission should adopt measures, *to the maximum extent allowable by federal law* and availability of technology, to provide for local number portability by all suppliers of local exchange service. (emphasis supplied).

As discussed in the preceding paragraph, federal law does not provide for as broad an implementation of the number portability rules as are represented in proposed rule Puc 412.07.

RECOMMENDATION: Proposed rule Puc 412.07 should be deleted in its entirety.

Puc 412.08 Lifeline customers

In proposed rule Puc 412.08, the Commission describes how payment and disconnection rules for customers receiving a discount from the federal Lifeline Assistance Program:

Puc 412.08 Lifeline customers. When a VSP has customers who participate in the federal Lifeline Telephone Assistance program for its services:

(a) The VSP shall apply payments on the customer account first to basic telephone service as defined in 402.02, and then to any remaining customer balance.

(b) The VSP may not disconnect the customer's basic telephone service except at the request of the customer when payment for basic telephone service is current.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:8, I (Obligations imposed by the federal Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:22-p, III (Affordable telephone service)
- 47 CFR § 54.400 (Lifeline Program)

DISCUSSION: This rule is contrary to controlling federal case law, which holds that carriers may disconnect Lifeline local exchange service for failure to pay other charges, *e.g.* toll.¹² Furthermore, pursuant to RSA 378:1-a, the Commission has no independent authority to establish end user payment and service disconnection rules for any VSP other than an ILEC-NELEC.

RECOMMENDATION: Proposed rule Puc 412.08 should be deleted in its entirety.

¹² Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 421-24 (5th Cir. 1999) (holding that the FCC lacked jurisdiction under the Communications Act to impose a “no disconnect” requirement on carriers.)

Puc 412.09 Complaints

Proposed rule Puc 412.09 describes the Commission's authority to accept and resolve complaints:

Puc 412.09 Complaints. The commission shall accept and resolve complaints from VSP customers regarding:

- (a) Basic telephone service; and
- (b) Alleged violations of the requirements of Puc 412.01 through 412.08.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:1-a (Exceptions to application of Chapter 365)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)

DISCUSSION: RSA 374:22-p defines “basic telephone service” and in subsection VIII expressly confines the Commission’s jurisdiction to (a) discontinuance of basic service and (b) caps on basic service rate increases. Title 34, as amended by SB 48, provides the Commission with no jurisdiction over end user services of ELEC’s other than the two aspects of basic service described above. Thus jurisdiction is not preserved by RSA 365:8, which is qualified by RSA 365:1-a, which provides in pertinent part that “this chapter shall not apply to any end user of an excepted local exchange carrier, nor to any service provided to such end user.” Similarly, RSA 374:22-p is qualified by RSA 374:1-a, which provides in pertinent part the “the provisions of this chapter shall not apply to any end user of an excepted local exchange carrier, nor to any service provided to such end user.”

RSA 365:1-a does go on to provide that “[s]uch end users may, however, make complaints to the commission regarding the provision of basic service by excepted local exchange carriers.” However, this provision does not expand the Commission’s jurisdiction over basic service, but merely clarifies that it has the authority to accept consumer complaints over those aspects of basic service that it has express authority over. Furthermore, this provision does not refer to a different form of “basic” service than that defined in RSA 374:22-p, I(b). Even though the lead-in to this section states that the definition is “for the purposes of this section,” it does not state that this is *only* for this section, and principles of statutory interpretation dictate that this definition governs all references to “basic service” that are contained in SB 48. In discussing this “whole statute” interpretation, the main treatise on the subject explains that “[a] statute is

passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole.”¹³ The treatise continues to explain that “[t]he same words used twice in the same act are presumed to have the same meaning”¹⁴ and that “[i]t is commonly understood that such definitions establish meaning where the terms appear in that same act”¹⁵

Accordingly, the Commission has the jurisdiction to entertain Rule 200 complaints as to these two aspects delineated in subsection VIII, but not customer complaints regarding service quality, billing, payment or the like. Furthermore, it should be clarified that basic service bundled or combined with any other service is “nonbasic service,” is expressly *not* basic service and is not subject to Commission jurisdiction in any form. To the point, the legislative intent was to ensure access to basic service by a carrier of last resort, not to preserve continuing Commission oversight of a set of feature common to all telephone services. This means that there is no “basic service” component in any nonbasic service to which any aspect of the Commission’s investigatory authority applies.

RECOMMENDATION: Proposed Rule Puc 402.09 should be revised as follows.

Puc 412.09 Complaints. The commission shall accept and resolve complaints from VSP customers regarding:

(a) The availability of basic service and rate increases for basic service that are alleged to be above the prescribed yearly cap described in Puc 421.01; and

(b) Alleged violations of the requirements of Puc 412.01 through 412.08.

¹³ Singer and Singer, *Sutherland Statutes and Statutory Construction* s § 46:5 (7th ed.).

¹⁴ *Id.* §46:6.

¹⁵ *Id.* §46:7.

Puc 413.01 Construction, Installation and Maintenance of Physical Plant

Proposed rule Puc 413.01 contains rules for network construction:

Puc 413.01 Construction, Installation and Maintenance of Physical Plant.

(a) A VSP shall construct, install and maintain its plant, structures, equipment, and lines in a manner that enables such facilities to reliably carry telephone messages, including messages that also traverse the facilities of other VSPs.

(b) A VSP shall construct, install and maintain its plant, structures, equipment, and lines in accordance with the National Electrical Safety Code, 2012 edition.

(c) A VSP shall construct, install and maintain its plant, structures, equipment, and lines to prevent interference with service furnished by other carriers and by other public service facilities, such as cable, fire alarm, electric, water, sewer, gas, or steam facilities .

(d) A VSP shall, at regular intervals, test, inspect, and perform preventive maintenance designed to achieve efficient, safe, adequate, and continuous operation of its system, repairing, adjusting, and replacing any equipment and facilities as needed.

(e) A VSP shall preserve records of any and all tests and inspections, required by (b) through (d) above, pursuant to Puc 411.10, regarding preservation of records.

(f) The records preserved pursuant to (e) above shall be made available to the commission, on a confidential basis, upon request, and shall contain:

- (1) The equipment tested or inspected;
- (2) The reason for the test or inspection;
- (3) The general conditions under which the test or inspection was made;
- (4) The general result of the test; and
- (5) Any corrections which were made subsequent to the test or inspection.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:1 (Safe and adequate service)
- RSA 374:4 (Duty to keep informed)
- RSA 374:34-a (Equipment in public right of way and lands)
- 47 U.S.C. § 251(a) (General duty of telecommunications carriers)

The Commission Staff have explained during technical sessions that the referenced statutes support the Commission's continuing authority over basic network survival and, therefore, service outages. Specifically, Staff maintain that SB 48 emphasizes the Commission's authority to enforce the federal Communications Act, particularly sections 251 and 252 which include, among other things, general LEC obligations to interconnect with each other and to provide wholesale services to each other, to varying degrees. Staff maintains that the duty to interconnect implies the duty to maintain the transmission integrity of the network. Likewise, the duty to provide wholesale services also implies the same.

Staff have also explained that SB 48's preservation of the state's authority over 911 and TRS assessments, taxes and fees, and the general public interest in the 911 system, imply another basis for Commission authority over basic network survival.

DISCUSSION: To start with, the Commission has no authority to regulate end user service other than service provided by ILEC-NELECs. Title 34, as amended by SB 48, provides the Commission with no jurisdiction over end user services of ELECs other than the two aspects of basic service discussed above regarding proposed rule Puc 402.09. Chapter 365 is qualified by RSA 365:1-a, which provides in pertinent part that "this chapter shall not apply to any end user of an excepted local exchange carrier, nor to any service provided to such end user." Similarly, Chapter 374 is qualified by RSA 374:1-a, which provides in pertinent part the "the provisions of this chapter shall not apply to any end user of an excepted local exchange carrier, nor to any service provided to such end user."

As to the references in SB 48 to provisions of the federal Communications Act, these references are only savings clauses related to *existing* Commission authority and do not enlarge this authority in any way. In particular, the Commission has no "enforcement" power under the Communications Act. Its authority is limited to:

- Designating an ETC for a service area under §214(e)
- Numbering administration under §251(e)(1)

- Approving rural exemptions under §251(f)
- Arbitrating interconnection agreements under §252(b)
- Approving interconnection agreements and, arguably, resolving interconnection disputes under §252(e)
- Approving SGATs under §252(f)

Accordingly, the Commission only has the authority to adjudicate a complaint for breach of an interconnection agreement, wholesale tariff, or performance plan. It has no independent authority under the Communications Act's interconnection provisions to police the operations of a telecommunications carrier. These would hold even if the Commission did have authority over the quality of interconnection, because the Federal Communications Commission has held that the interconnection obligations pertain only to the *physical* connections between networks, and not the actual transmission and termination of traffic.¹⁶ Consequently, network integrity and service quality are issues over which the Commission has no statutory jurisdiction as it concerns end user services, and which are contract issues, not regulatory violations, as they concern wholesale customers.

Furthermore, Commission authority over ELEC end user services is not preserved by any statutes or policies related to 911 or TRS. The Commission has no statutory or delegated authority related to 911 aside from approving any required tariff filings of the 911 surcharge, which is remitted directly to Department of Safety.¹⁷ SB 48 does not grant any new authority to the Commission. In fact, new RSA paragraph 362:7, III(c) makes no reference to the Commission at all. Instead, it is intended to preserve existing Department of Safety jurisdiction over 911 funding¹⁸ notwithstanding any provisions related to VoIP and IP-enabled service in the previous sub-section II. Likewise, the Commission has no statutory or delegated authority related to TRS aside from monitoring and overseeing the ILEC-established Telephone Relay

¹⁶ “We conclude that the term “interconnection” under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.” Local Competition Order ¶ 176. Furthermore, the Communications Act does not specify an objective level of quality for this interconnection, only that it be nondiscriminatory, *i.e.* “at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.” Local Competition Order ¶ 221. Thus, section 251(c)(2) implies no quality of service obligations for a carriers’ own network, but only that the interconnection service it offers an interconnector be no worse than that provided to its own customers.

¹⁷ RSA 106-H:9, I(b) (“In the case of local exchange telephone companies, the surcharge shall be contained within tariffs or rate schedules filed with the public utilities commission and shall be billed on a monthly basis by each local exchange telephone company.”)

¹⁸ See 106-H:9, I(e) (“Each local exchange telephone company, VoIP service provider, or entity which provides commercial mobile radio service shall remit the surcharge amounts on a monthly basis, as prescribed by the commissioner [of the department of safety], to the enhanced 911 services bureau . . .”).

Service Trust Fund, which is administered by Citizens Bank¹⁹ and awarding the franchise (held by Sprint since initially granted in 1991) to operate the state TRS.²⁰ As with 911, new paragraph RSA 362:7, III(c) makes no reference to the Commission and merely preserves the *status quo* pertaining to TRS funding.

To now invoke 911 and TRS to derive plenary Commission authority over basic network operations is contrary to many years of Commission practice and amounts to the “tail wagging the dog,” as it implies that the telecommunications network exists for the overriding purpose of connecting end users to emergency services. This is much too narrow a view. The purpose of the telecommunications network is to provide call routing and completion services to end user customers so that they may make and receive calls of their choice, *i.e.* “transmission, between or among points specified by the user, of information of the user’s choosing”²¹ Access to 911 is no doubt an important call routing service, but so are calls to doctors, pharmacies, plumbers, and grandmothers. “Access to 911” means that dialing those particular digits will result in routing of the call to the proper Public Service Answering Point. It does not, however, imply a quality of service over and above any other call completion service. The Commission simply cannot single out one type of end user call completion service as so important that it overrides SB 48’s express withdrawal of the Commission’s authority over all end user services. Furthermore, there is no need for the Commission to do so. Call completion is the essence of any telephone company’s business; otherwise it is not in business at all, especially in a marketplace with many competitive alternatives. The legislature has made a policy decision that it will rely on such free market incentives, rather than Commission oversight, to ensure that telephone companies perform up to their customers’ expectations.

Finally, the Commission authority conferred by RSA 374:34-a pertains *only* to plant and equipment located in public rights of way and on, over, or under state lands and water bodies. As an express provision, it is much too narrow to support any interpretation conferring the plenary authority that the Commission proposes to adopt in this and similar proposed rules.

¹⁹ See DT 07-019, Order No. 24,731 at 1 (Feb. 16, 2007).

²⁰ See DT 90-225, Order No. 20,236, 76 NHPUC 593 (Sep. 10, 1991).

²¹ 47 U.S.C. § 153(43) (definition of “Telecommunications”).

RECOMMENDATION: Proposed Rule Puc 413.01 should be revised as follows:

Puc 413.01 Construction, Installation and Maintenance of Physical Plant.

(c) An ILEC-NELEC shall construct, install and maintain its plant, structures, equipment, and lines in a manner that enables such facilities to reliably carry telephone messages, including messages that also traverse the facilities of other VSPs.

(d) An ILEC-NELEC shall construct, install and maintain its plant, structures, equipment, and lines in accordance with the National Electrical Safety Code, 2012 edition.

(c) An ILEC-NELEC shall construct, install and maintain its plant, structures, equipment, and lines to prevent interference with service furnished by other carriers and by other public service facilities, such as cable, fire alarm, electric, water, sewer, gas, or steam facilities .

(d) An ILEC-NELEC shall, at regular intervals, test, inspect, and perform preventive maintenance designed to achieve efficient, safe, adequate, and continuous operation of its system, repairing, adjusting, and replacing any equipment and facilities as needed.

(e) An ILEC-NELEC shall preserve records of any and all tests and inspections, required by (b) through (d) above, pursuant to Puc 411.10, regarding preservation of records.

(f) The records preserved pursuant to (e) above shall be made available to the commission, on a confidential basis, upon request, and shall contain:

- (1) The equipment tested or inspected;
- (2) The reason for the test or inspection;
- (3) The general conditions under which the test or inspection was made;
- (4) The general result of the test; and
- (5) Any corrections which were made subsequent to the test or inspection.

Puc 413.02 Repair of Facilities

Proposed rule Puc 413.02 is a rule related to service restoration:

Puc 413.02 Repair of Facilities. When a VSP's facilities are reported or found to be incapable of reliably carrying telephone messages, the VSP shall repair the facilities as promptly as possible.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:1 (Safe and adequate service)
- RSA 374:4 (Duty to keep informed)
- RSA 374:34-a (Equipment in public right of way and lands)
- 47 U.S.C. § 251(a) (General duty of telecommunications carriers)

DISCUSSION: As with proposed rule Puc 413.01, this proposed rule derives from the Commission's perceived authority to ensure basic network survival. For the reasons explained in the comment to proposed rule Puc 413.01, the Commission has no authority to oversee the facilities for providing end user service other than service provided by ILEC-NELECs. Title 34, as amended by SB 48, provides the Commission with no jurisdiction over end user services of ELECs other than the two aspects of basic service discussed above regarding proposed rule Puc 402.09. There is no authority in the cited statutes or any other state or federal statute that confers on the Commission the authority to establish or enforce this provision as it pertains to VSPs in general.

Furthermore, the phrase "restoration of service" should remain. The phrase "reliably carry telephone messages" is ambiguous and, unlike the terminology in the current rule, does not provide an objective standard.

RECOMMENDATION: Proposed Rule Puc 413.01 should be revised as follows:

Puc 413.02 Restoration of Service. When an ILEC-NELEC's telephone service is reported or found to be out of order or degraded, the ILEC-NELEC shall repair the facilities as promptly as possible.

Puc 413.03 Emergency Operations

Proposed rule Puc 413.03 contains rules for network construction:

Puc 413.03 Emergency Operations.

(a) A VSP shall make reasonable provisions to meet emergencies resulting from any of the following:

- (1) Failures of commercial power service;
- (2) Sudden and prolonged increases in traffic;
- (3) Illness, strike, or labor unrest of employees;
- (4) Failure of a supplier to deliver materials or supplies;
- (5) Civil unrest;
- (6) Cyber attacks; or
- (7) Any other significant disasters, including, but not limited to, fire, storms, floods, or other “acts of God” causing loss of communication to a large population or area of the state to the extent that the magnitude or duration is foreseeable.

(b) A VSP shall establish plans and procedures and issue instructions to its employees and agents to be followed in the event of an emergency in order to prevent or mitigate interruptions or impairment of the ability of its facilities to reliably carry telephone messages.

(c) The preparations required by (b) above shall include plans and procedures for operations under extreme, severe or adverse conditions, such as natural disasters, strike, labor unrest, civil unrest or supplier disruption.

(d) The plans and procedures established under (c) above shall be made available to the commission, on a confidential basis, upon request.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:1 (Safe and adequate service)
- RSA 374:4 (Duty to keep informed)

- RSA 374:34-a (Equipment in public right of way and lands)
- 47 U.S.C. § 251(a) (General duty of telecommunications carriers)

DISCUSSION: As with proposed rule Puc 413.01, this proposed rule derives from the Commission's perceived authority to ensure basic network survival. For the reasons explained in the comment to proposed rule Puc 413.01, the Commission has no authority to oversee the facilities for providing end user service other than service provided by ILEC-NELECs. Title 34, as amended by SB 48, provides the Commission with no jurisdiction over end user services of ELECs other than the two aspects of basic service discussed above regarding proposed rule Puc 402.09. There is no authority in the cited statutes or any other state or federal statute that confers on the Commission the authority to establish or enforce this provision as it pertains to VSPs in general.

Furthermore, as explained in the comment to proposed rule Puc 402.07, the term "cyber attack is vague and insufficient to describe all of the actions that are generally considered to be cyber-attacks. It does not provide an objective standard and should be deleted.

Finally, the phrase "reliably carry telephone messages" is ambiguous and, unlike the terminology in the current rule, does not provide an objective standard.

RECOMMENDATION: Proposed rule Puc 413.03 should be revised as follows:

<p style="text-align: center;">Puc 413.03 <u>Emergency Operations.</u></p> <p style="text-align: center;">(a) An ILEC-NELEC shall make reasonable provisions to meet emergencies resulting from any of the following:</p> <p style="text-align: center;">(1) Failures of commercial power service;</p> <p style="text-align: center;">(2) Sudden and prolonged increases in traffic;</p> <p style="text-align: center;">(3) Illness, strike, or labor unrest of employees;</p> <p style="text-align: center;">(4) Failure of a supplier to deliver materials or supplies;</p> <p style="text-align: center;">(5) Civil unrest; or</p> <p style="text-align: center;">(6) Any other significant disasters, including, but not limited to, fire, storms, floods, or other "acts of God" causing loss of communication to a large population or area of the state to the extent that the magnitude or duration is foreseeable.</p> <p style="text-align: center;">(b) An ILEC-NELEC shall establish plans and procedures and issue instructions to its employees and agents to be followed in the event of an emergency in order to prevent or mitigate interruptions or impairment of the ability of its telephone service.</p> <p style="text-align: center;">(c) The preparations required by (b) above shall include plans and procedures for operations under extreme, severe or adverse conditions, such as natural disasters, strike, labor unrest, civil unrest or supplier disruption.</p> <p style="text-align: center;">(d) The plans and procedures established under (c) above shall be made available to the commission, on a confidential basis, upon request.</p>
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Puc 413.05 Safety Instructions

Proposed rule Puc 413.05 concerns accident prevention:

Puc 413.05 Safety Instructions. A VSP shall instruct its employees engaged in line construction, where pole facilities are used jointly with an electric utility, in the practice and use of accepted rules for resuscitation from electric shock.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:1 (Safe and adequate service)
- RSA 374:4 (Duty to keep informed)
- RSA 374:34-a (Equipment in public right of way and lands)

DISCUSSION: For the reasons explained in the comment to proposed rule Puc 413.01, the Commission has no authority to oversee the facilities for providing end user service other than service provided by ILEC-NELECs. Title 34, as amended by SB 48, provides the Commission with no jurisdiction over end user services of ELECs other than the two aspects of basic service discussed above regarding proposed rule Puc 402.09. There is no authority in the cited statutes or any other state or federal statute that confers on the Commission the authority to establish or enforce this provision as it pertains to VSPs in general.

RECOMMENDATION: Proposed Rule Puc 413.05 should be revised as follows:

Puc 413.05 Safety Instructions. An ILEC-NELEC shall instruct its employees engaged in line construction, where pole facilities are used jointly with an electric utility, in the practice and use of accepted rules for resuscitation from electric shock.

Puc 413.06 Commission Inspections

Proposed rule Puc 413.06 concerns the duty of VSPs to cooperate with the Commission in conducting inspections of the VSP's network:

Puc 413.06 Commission Inspections. A VSP shall allow and assist the commission when it shall, from time to time, inspect the works and system of a VSP and the manner in which each such VSP has conformed to statutes, rules, and orders.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, IX (Debt burden relative to plant investment)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:1 (Safe and adequate service)
- RSA 374:4 (Duty to keep informed)
- RSA 374:34-a (Equipment in public right of way and lands)
- 47 U.S.C. § 251(a) (General duty of telecommunications carriers)

DISCUSSION: For the reasons explained in the comment to proposed rule Puc 413.01, the Commission has no authority to oversee the facilities for providing end user service other than service provided by ILEC-NELECs. Title 34, as amended by SB 48, provides the Commission with no jurisdiction over end user services of ELECs other than the two aspects of basic service discussed above regarding proposed rule Puc 402.09. There is no authority in the cited statutes or any other state or federal statute that confers on the Commission the authority to establish or enforce this provision as it pertains to VSPs in general.

RECOMMENDATION: Proposed Rule Puc 413.06 should be revised as follows:

Puc 413.06 Commission Inspections. An ILEC-NELEC shall allow and assist the commission when it shall, from time to time, inspect the works and system of an ILEC-NELEC and the manner in which each such ILEC-NELEC has conformed to statutes, rules, and orders.

Puc 413.07 [Complaints regarding network failure]

Proposed rule Puc 413.07 concerns the Commission's authority to accept complaints regarding network failures:

Puc 413.07 The Commission shall accept and resolve complaints from the public, including other VSPs, regarding alleged failures of the facilities of a VSP to reliably carry telephone messages.

This rule is added in the Commission's revised proposal of June 4, 2013, which as yet has no updated Table of Proposed Rulemaking Authority. It is presumed, however, that this rule draws on the same support for the Commission's purported authority over basic network survival as described in the immediately preceding proposed rules. (The annotation for this rule states that it "provid[es] a possible remedy for an illegal failure of a VSP to keep adequate facilities, but not targeting billing or other service disputes when the network is functional.")

DISCUSSION: This rule has the practical effect of nullifying much of the intended effect of SB 48, in that it confers authority on the Commission to investigate all service quality issues of all services of all VSPs. The phrase "alleged failures of the facilities of a VSP to reliably carry telephone messages" is enormously broad, and the subjective qualifiers "alleged" and "reliable" grant the Commission the authority to hear and investigate essentially all service quality complaints that any and all customers may have.

For the reasons explained in the comment to proposed rule Puc 413.01, the Commission has no authority to oversee the facilities for providing end user service other than service provided by ILEC-NELECs. Title 34, as amended by SB 48, provides the Commission with no jurisdiction over end user services of ELECs other than the two aspects of basic service discussed above regarding proposed rule Puc 402.09.

Furthermore, this rule should not create a special case for complaints involving "other VSPs." These issues are governed by the dispute resolution provisions of service agreements, interconnection agreements, and/or tariffs, which may or may not involve the Commission.

RECOMMENDATION: When all is said and done, there is little left to this rule, even as it applies to ILEC-NELECs. However, if the Commission still believes that it is necessary, proposed Rule Puc 413.07 should be revised as follows:

Puc 413.07 The Commission shall accept and resolve complaints regarding the quality of ILEC-NELEC telephone service.

Puc 414.03 Network Changes.

Proposed rule Puc 414.03 requires a VSP to take affirmative steps to maintain compatibility with interconnecting carriers:

Puc 414.03 Network Changes.

(a) Network changes made by a VSP that affect direct interconnection shall be backward compatible for 3 years from the introduction of the change.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- 47 U.S.C. § 251(a) (General duty of telecommunications carriers)

DISCUSSION: As explained previously in the comment to proposed rule Puc 413.01, the Commission has no independent authority under the Communications Act's interconnection provisions to police the operations of a telecom carrier. Rules related to coordination among telecommunication providers for interconnectivity are the province of the FCC, pursuant to 47 U.S.C. § 256. Those rules, found primarily at 47 CFR §§ 51.325 – 51.335 (and which apply only to ILECs), require a telecommunications carrier to provide notice of network changes, to publish specifications, and to permit physical linking. However, none of them impose an affirmative duty on a carrier to design its network to accommodate any differences in the network technology of a requesting carrier. Such a requirement would hinder innovation and impede competition by requiring a carrier to maintain obsolete equipment and facilities, and to absorb the costs created by another.

RECOMMENDATION: Proposed rule Puc 414.03 should be deleted in its entirety.

Puc 414.05 Trouble Reporting and Resolution Obligations

Proposed rule Puc 414.05 concerns the duty of VSPs to report trouble to the Commission:

<p style="text-align: center;">Puc 414.05 <u>Trouble Reporting and Resolution Obligations.</u></p> <p>(a) A VSP that receives a trouble report from its customer shall coordinate the trouble response in a timely manner.</p> <p>(b) A VSP providing voice service as defined in Puc 402.24 to an end user is responsible for accepting, reporting and coordinating the resolution of troubles that involve interruption of such service, regardless of who makes the report.</p> <p>(c) A VSP that receives a trouble report from its customer regarding the non-completion of an outgoing call shall accept, report, and coordinate the resolution of that trouble.</p> <p>(d) A VSP shall rectify customer troubles reported by another VSP in a prompt and nondiscriminatory manner.</p>

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XI (Standards and procedures for conduct of investigations)
- RSA 365:8, XII (Procedures for proper administration)
- 47 U.S.C. § 251(a) (General duty of telecommunications carriers)

DISCUSSION: For the reasons explained in the comment to proposed rule Puc 413.01, the Commission has no authority to oversee the operations for providing end user service other than service provided by ILEC-NELECs. Title 34, as amended by SB 48, provides the Commission with no jurisdiction over end user services of ELECs other than the two aspects of basic service discussed above regarding proposed rule Puc 402.09. There is no authority in the cited statutes or any other state or federal statute that confers on the Commission the authority to establish or enforce this provision as it pertains to VSPs in general. In particular, RSA 365:8, XI is inapplicable because it *only* concerns “investigations authorized under this title.”

RECOMMENDATION: Proposed Rule Puc 414.05 should be revised as follows:

Puc 414.05 Trouble Reporting and Resolution Obligations.

- (a) An ILEC-NELEC that receives a trouble report from its customer shall coordinate the trouble response in a timely manner.
- (b) An ILEC-NELEC providing voice service as defined in Puc 402.24 to an end user is responsible for accepting, reporting and coordinating the resolution of troubles that involve interruption of such service, regardless of who makes the report.
- (c) An ILEC-NELEC that receives a trouble report from its customer regarding the non-completion of an outgoing call shall accept, report, and coordinate the resolution of that trouble.
- (d) An ILEC-NELEC shall rectify customer troubles reported by another VSP in a prompt and nondiscriminatory manner.

Puc 414.07 Carrier to Carrier Migrations

Proposed rule Puc 414.07 revises current rule 418.06 to apply it to all VSPs, rather than just ILECs, and eliminates the “winback” prohibition in the current rule:

Puc 414.07 Carrier to Carrier Migrations.

- (a) A VSP shall not release confidential customer information, including customer usage data and customer payment information, without written authorization from the customer, unless otherwise required by law.
- (b) A VSP shall accept and respond to requests for customer information, service and feature information, and migration and installation orders without regard to whether the service is being resold or migrated.
- (c) When acquiring a new customer, a VSP shall schedule the events of a migration and notify the customer of the timing and impact of those events.
- (d) When migrating end users, a VSP shall work together in good faith with other carriers to minimize or avoid any problems, including, but not limited to, service interruptions and billing problems.
- (e) When porting a customer’s number to another carrier, a VSP shall release the number without delay or consideration of any issue such as the customer’s account balance.
- (f) A VSP shall be responsible for updating any equipment or information systems as needed to direct inbound calls to the migrated customer, at least 1 business day prior to a cutover.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(e) (Savings clause related to slamming statute)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:28-a (Slamming prohibition)
- RSA 378:44-48 (Cramming prohibition)

DISCUSSION: Subsection (c), requiring customer notification, dictates end user customer service standards, rather than intercarrier obligations, and is exempted from Commission oversight by RSA 365:1-a, RSA 374:1-a, and RSA 378:1-a. This oversight is not saved by the exception related to the slamming and cramming statutes, because neither of these statutes

establish any customer notice requiring the timing of an approved customer transfer. The Commission has no authority over end user services.

Subsection (f) differs from the FCC rules in that it emphasizes process rather than results, and it establishes a deadline based on a the “cutover” date, which can only be reliably ascertained after the fact and involves burdensome coordination among all parties. 47 CFR § 52.35 provides, in part, that “[a]ll telecommunications carriers required by the Commission to port telephone numbers must complete a simple wireline-to-wireline or simple intermodal port request within one business day unless a longer period is requested by the new provider or by the customer.” The Commission’s rules should read the same.

RECOMMENDATION: Proposed Rule Puc 414.07 should be revised as follows:

Puc 414.07 Carrier to Carrier Migrations.

- (a) A VSP shall not release confidential customer information, including customer usage data and customer payment information, without written authorization from the customer, unless otherwise required by law.
- (b) A VSP shall accept and respond to requests for customer information, service and feature information, and migration and installation orders without regard to whether the service is being resold or migrated.
- (c) When migrating end users, a VSP shall work together in good faith with other carriers to minimize or avoid any problems, including, but not limited to, service interruptions and billing problems.
- (d) When porting a customer’s number to another carrier, a VSP shall release the number without delay or consideration of any issue such as the customer’s account balance.
- (e) A VSP shall port a customer’s number to another carrier within one business day of the request, unless a longer period is requested by the new provider or by the customer.

Puc 414.10 Directory Obligations

Proposed rule Puc 414.10 extends the obligation to all VSPs to include other carriers' listings in their published directory and to provide directory listing information to other parties for publishing their own directories:

Puc 414.10 Directory Obligations.

- (a) A VSP shall permit any carrier to list its customers' telephone numbers in the VSP's published white and yellow pages telephone directory or directories.
- (b) A VSP shall provide subscriber listing information to publishers for the purpose of publishing telephone directories and/or offering directory assistance on a nondiscriminatory basis.
- (c) A VSP shall not publish or list numbers for which other VSPs request non-directory listed or non-published status.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- 47 CFR Part 64, Subpart X (Subscriber list information)

DISCUSSION: None of the authority cited by the Commission requires any VSP, including ILECs, to publish another carrier's listings, so subsection (a) is invalid. Federal law (47 U.S.C. § 222(e) and FCC rules) does require carriers to provide directory listing information to others, but these laws emphasize that the information, besides being offered on a nondiscriminatory basis, may also be offered at "reasonable rates, terms, and conditions."²² The Commission's rules should thus clarify that carriers may charge for access to these listings.

²² 47 U.S.C. § 222(e); 47 CFR § 64.2325.

RECOMMENDATION: Proposed Rule Puc 414.10 should be revised as follows:

Puc 414.10 Directory Obligations.

(a) A VSP shall provide subscriber listing information to publishers for the purpose of publishing telephone directories and/or offering directory assistance on a nondiscriminatory basis and at reasonable rates, terms and conditions.

(b) A VSP shall not publish or list numbers for which other VSPs request non-directory listed or non-published status.

Puc 416.04 Form VSP-3 Utility Accident Report

Rule 416.04 retains the current Utility Accident Report:

Puc 416.04 Form VSP-3 Utility Accident Report. The “Utility Accident Report” required by Puc 415.02(b) shall include:

- (a) Utility filing information as defined in Puc 402.22;
- (b) Date of the report; and
- (c) Information regarding each reportable accident for the period, to include:
 - (1) The date of the accident;
 - (2) The location of the accident;
 - (3) An indication of whether the accident resulted in a significant facilities disruption;
 - (4) A description of the cause of the accident;
 - (5) A description of the extent of any property damage;
 - (6) The name of any injured person;
 - (7) The injured person’s relationship to the utility, if any;
 - (8) A description of the nature of injuries;
 - (9) An indication of whether any injury was fatal;
 - (10) The date of death of any person, if applicable;
 - (11) An indication of whether the accident involved electric contact;
 - (12) An indication of whether any pole involved in the accident was licensed and properly located; and
 - (13) An indication of whether any pole anchor involved in the accident was licensed and properly located.
- (d) In the event the VSP answers negatively to (c)(12) or (c)(13) above, the VSP shall provide:
 - (1) A copy of the relevant pole license; and
 - (2) A diagram showing the locations of the pole or anchor(s) as they are licensed and as they are actually located.
- (e) The VSP shall attach the following:
 - (1) A diagram of the accident; and
 - (2) A police report of the accident, if available

As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(e) (Savings clause related to slamming statute)²³
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XI (Standards and procedures for conduct of investigations)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:1 (Safe and adequate service)
- RSA 374:3 (Extent of Commission power)
- RSA 374:4 (Duty to keep informed)
- RSA 374:34-a (Equipment in public right of way and lands)
- RSA 374:37-39 (Duty to investigate accidents)

DISCUSSION: NHTA does not disagree that the Commission has the authority to investigate accidents “in connection with the operation of public utilities in the state.”²⁴ However, the level of detail that this rule requires is unduly burdensome to accumulate and report. It goes beyond the amount of information that is required to notify the Commission of the scope of the accident and, indeed, may be beyond the amount of information that the Commission is staffed to review on a routine basis. Furthermore, it should not include information regarding “significant facilities disruptions,” as this definition has been recommended for deletion.

RECOMMENDATION: Proposed Rule Puc 416.04 should be shortened to only four items in subsection (c) and nothing following. It should be revised as follows:

Puc 416.04 Form VSP-3 Utility Accident Report. The “Utility Accident Report” required by Puc 415.02(b) shall include:

- (a) Utility filing information as defined in Puc 402.22;
- (b) Date of the report; and
- (c) Information regarding each reportable accident for the period,
to include:
 - (1) The date of the accident;
 - (2) The location of the accident;
 - (3) A description of the cause of the accident; and
 - (4) A description of the extent of any property damage.

²³ This may be a typographical error.

²⁴ RSA 374:37.

Puc 421.01 Basic Service

Proposed Rule 421.01 is a new rule that describes obligations regarding the offering of basic service in its territory:

Puc 421.01 Basic Service.

- (a) An ILEC must offer basic service as defined in Puc 402.02 throughout its service territory.
- (b) An ILEC shall not impose any additional contractual requirements as a condition for purchasing basic service.
- (c) An ILEC shall not impose exit fees on a customer who cancels basic service.
- (d) When a customer subscribes to basic service and one or more other services, the ILEC shall be permitted to impose additional contractual requirements on such additional services.
- (e) Basic service rate increases. An ILEC–ELEC shall change its rates for basic service only through the following process:
 - (1) After August 10, 2020, the ILEC–ELEC may increase its rates to any level without commission review or approval;
 - (2) Without commission review or approval, the ILEC–ELEC shall limit increases to its rates for basic service subject to the following cap in each twelve-month period beginning August 10, 2012;
 - a. For customers who are enrolled in the Lifeline Telephone Assistance program, the cap is 5%;
 - b. For all other customers, the cap is 10%.
 - (3) The ILEC–ELEC shall seek commission approval for additional rate increases in the event of changes in federal, state, or local government taxes, mandates, rules, regulation, or statutes.
- (f) When a customer subscribes to basic service and one or more other services, the ILEC–ELEC shall be permitted to change it rates for the other services without commission review or approval.

(g) Change to basic service coverage area.

- (1) An ILEC which seeks to change geographic boundaries or other policies that would change the number of end users with whom a basic service customer can connect using a local call, shall petition the commission for review and approval of the change.
- (2) Such petition may include a proposed rate adjustment to reflect the change in coverage.
- (3) In deciding whether to approve the proposal, the commission shall consider whether the proposed change and rate help ensure that basic service is available to consumers throughout all areas of the state.

(h) Information Required When Basic Service Cannot Be Provisioned.

- (1) An ILEC shall keep a record as to each instance in which it is not able to supply basic service to prospective customers within 10 days following the customer's application for service.
- (2) The record required by (1) above shall be provided to the commission on request.
- (3) The record shall include:
 - a. The name, address, and telephone number of each applicant who was not provided service within 10 days;
 - b. The date of application for service;
 - c. The class of service applied for; and
 - d. The reason the ILEC was unable to provide service within 10 days of the customer's application.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:8, IV (Savings clause for obligations under RSA 374-22-p and RSA 374:30, II)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:22-p (Affordable telephone service)

DISCUSSION: It should be emphasized that basic service is an end user service which, as it concerns all but ILEC-NELECs, the Commission has no oversight other than 1) discontinuing basic service throughout the service territory and 2) rate increases above the statutory cap. Subsection (b) of this proposed rule, however, imposes a contractual requirement on an end user service that has no support in the statutes that the Commission has cited or in any other law. Furthermore, even in the case of ILEC-NELECs, this rule is invalid because it is vague and ambiguous. All services, including basic service, will be provided under some sort of service contract, with contract requirements including rates, terms and conditions of service. “Additional” contract requirements are not defined and provide no objective standard by which this rule can be interpreted. Likewise, subsection (c) imposes a contract requirement on all VSPs, not just ILEC-NELECs, that is beyond the Commission’s authority in regard to end user services and is also invalid as it concerns any VSP other than an ILEC-NELEC.

Subsection (e) should be revised to clarify that the caps apply only to increases in the rate for basic service.

In paragraph (g)(3), the Commission seeks to establish a standard for approving changes to basic service rates that result from a change to the service territory. Specifically, the rule provides that one factor it may consider is whether “the proposed change and rate help ensure that basic service is available to consumers *throughout all areas of the state.*” (emphasis supplied) This standard is too broad. While Title 34 provides that the Commission “shall seek to ensure that affordable basic telephone services are available to consumers throughout all areas of the state at reasonably comparable rates,” no statute or agreement imposes a duty on any single VSP to ensure the achievement of this aspiration. Service availability throughout the state is an irrelevant consideration in regard to a *local* calling area boundary. This paragraph should be revised to be consistent with the limits of Commission authority regarding basic service: the preservation of basic service, and caps on increases in the rate for that service.

Finally, subsection (h) imposes a “self-investigation” requirement that is unduly burdensome and incongruous with the process for discontinuing basic service. This subsection requires an ILEC to record all instances of when basic service cannot be provided on request. This rule, however, serves no purpose. ILECs have a statutory obligation not to discontinue offering basic service within their territories without petitioning the Commission for authorization to do so. Consistent with the Commission’s procedural rules, the Commission may then inquire of the ILEC as to the facts supporting the request, to which the ILEC may respond based on information that it has collected and organized as best serves the purposes of the petition. The Commission has no authority to impose what is, in effect, a preemptive data request regarding a proceeding that may never occur.

RECOMMENDATION: Although not discussed above, subsection (a) of the rule should be revised to conform to the language of the statute pertaining to discontinuance of basic service. The contract related provisions of subsections (b) and (c) should be deleted or revised as discussed above. Paragraph (g)(3) should be revised to narrow the standard for Commission approval of rate changes. Finally, subsection (h) should be deleted in its entirety. The revised rule should appear as follows:

Puc 421.01 Basic Service.

(a) An ILEC may not discontinue residential basic service as defined in Puc 402.02 within its service territory without Commission approval.

(b) An ILEC-NELEC shall not impose exit fees on a customer who cancels basic service.

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(e) Basic service rate increases. An ILEC-ELEC shall change its rates for basic service only through the following process:

(1) After August 10, 2020, the ILEC-ELEC may increase its rates to any level without commission review or approval;

(2) Without commission review or approval, the ILEC-ELEC shall limit increases to its rates for basic service subject to the following cap in each twelve-month period beginning August 10, 2012;

a. For customers who are enrolled in the Lifeline Telephone Assistance program, the cap on rate increases for basic service is 5%;

b. For all other customers, the cap on rate increases for basic service is 10%.

(3) The ILEC-ELEC shall seek commission approval for additional rate increases in the event of changes in federal, state, or local government taxes, mandates, rules, regulation, or statutes.

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*
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(f) Change to basic service coverage area.

(1) An ILEC which seeks to change geographic boundaries or other policies that would change the number of end users with whom a basic service customer can connect using a local call, shall petition the commission for review and approval of the change.

(2) Such petition may include a proposed rate adjustment to reflect the change in coverage.

(3) In deciding whether to approve the proposal, the commission shall consider whether the proposed change and rate result in a basic service offering comparable to the existing offering.

Puc 421.02 ILEC Discontinuations of Basic Service

Proposed rule Puc 421.02 perpetuates the current rules regarding disconnection of service to an individual customer:

Puc 421.02 ILEC Discontinuations of Basic Service.

(a) An ILEC shall not discontinue basic service to a customer without commission authorization unless:

- (1) The ILEC has notified the customer that basic service will be discontinued unless prompt payment is received;
- (2) Fourteen days have passed since the notice was given; and
- (3) The customer's balance includes at least two months of basic service charges.

(b) If an ILEC has received notification within the past 60 days from a licensed physician or mental health professional that a medical emergency exists at the location, or would result from the service discontinuation, the ILEC shall not discontinue service to the customer without commission authorization unless the customer has failed to enter into or comply with an arrangement for repayment of the outstanding balance.

(c) Nothing in (a) or (b) above shall prevent an ILEC from discontinuing basic service to a customer without commission authorization or notice to the customer when:

- (1) A customer or resident in the customer's household has undertaken an action or a situation has been created with respect to the customer's utility service which results in conditions dangerous to the health, safety, property or utility service of the customer or others and disconnection will lessen or eliminate the risk or danger;
- (2) The customer has clearly abandoned the premises;
- (3) The customer refuses to provide access to his premises for a necessary inspection of utility property; or
- (4) A customer or resident in the customer's household has participated in or created the following:
 - a. Fraudulent use or procurement of the utility service; or
 - b. Tampering with the connections or other equipment of the utility.

(d) When a customer subscribes to basic service and one or more additional services, Puc 421.02(a) and (b) shall not apply to discontinuance by the ILEC of such additional services.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:8, IV (Savings clause for obligations under RSA 374:22-p and RSA 374:30, II)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:22-p (Affordable telephone service)

DISCUSSION: This rule inappropriately conflates the terms “discontinuance” and “disconnection” with the effect of bringing the Commission’s current service disconnection rules within the ambit of RSA 374:22-p, VIII(a), which provides that ILECs “may not discontinue residential basic service, regardless of technology used, in any portion of their franchise area unless the commission determines that the public good will not be adversely affected by such withdrawal of service.”

This represents an abrupt shift in the Commission’s use of the pertinent language. In the current rules, the Commission distinguishes between “discontinuance” and “disconnection.” “Discontinuance” refers to cessation of operations²⁵ *entirely*, as distinguished from “disconnection,” which means “a technological function which occurs when a customer is physically or effectively separated or shut off from a utility service,”²⁶ *i.e.* termination of an *individual* customer’s service. Principles of statutory interpretation explain that guidance can be found in the way a statute, *i.e.* Title 34, was traditionally been construed following enactment.²⁷ The respective usage described above, as reflected in the current rules, is the usage that was contemplated in the drafting of SB 48 regarding discontinuance of basic service. There is no support in the statutes, current rules or past Commission practice for now conflating the two terms. Thus, the basic service *discontinuation* prohibition in SB 48 cannot be construed to authorize any service *disconnection* rules.

Consequently, this proposed rule is invalid at least as to VSPs that are not ILEC-NELECs. Commission jurisdiction over ILEC-ELEC basic service is limited to only two aspects of that service: 1) discontinuing basic service *throughout the service territory* and 2) rate increases above the statutory cap. The Commission has no jurisdiction under this statute to hear customer complaints regarding service quality, billing, payment, disconnection procedures, or the like.

²⁵ See *e.g.* rule Puc 431:14, “Discontinuance of Operations” (a CLEC must “notify the commission of its intent to cease operations;” “An ILEC providing wholesale services to a CLEC may petition the commission to initiate an involuntary discontinuance of operations against the CLEC.”)

²⁶ Rule Puc 1202.08.

²⁷ Singer and Singer, Sutherland Statutes and Statutory Construction § 49:1 (7th ed.).

RECOMMENDATION: This rule should be revised to reflect that it only applies to ILEC-NELECs. Furthermore, the term “discontinuance” should be changed to “disconnection” to clarify the meaning of the rule, consistent with the intent of SB 48, and any requirements of Commission authorization should be deleted. The rule should now read as follows:

Puc 421.02 ILEC-NELEC Disconnections of Basic Service.

(a) An ILEC-NELEC shall not disconnect basic service to a customer unless:

- (1) The ILEC-NELEC has notified the customer that basic service will be disconnected unless prompt payment is received;
- (3) Fourteen days have passed since the notice was given; and
- (3) The customer’s balance includes at least two months of basic service charges.

(b) If an ILEC-NELEC has received notification within the past 60 days from a licensed physician or mental health professional that a medical emergency exists at the location, or would result from the service disconnection, the ILEC-NELEC shall not disconnect service to the customer unless the customer has failed to enter into or comply with an arrangement for repayment of the outstanding balance.

(c) Nothing in (a) or (b) above shall prevent an ILEC-NELEC from disconnecting basic service to a customer without notice to the customer when:

- (1) A customer or resident in the customer’s household has undertaken an action or a situation has been created with respect to the customer’s utility service which results in conditions dangerous to the health, safety, property or utility service of the customer or others and disconnection will lessen or eliminate the risk or danger;
- (2) The customer has clearly abandoned the premises;
- (3) The customer refuses to provide access to his premises for a necessary inspection of utility property; or
- (4) A customer or resident in the customer’s household has participated in or created the following:

- c. Fraudulent use or procurement of the utility service; or
- d. Tampering with the connections or other equipment of the utility.

(d) When a customer subscribes to basic service and one or more additional services, Puc 421.02(a) and (b) shall not apply to disconnection by the ILEC-NELEC of such additional services.

Puc 421.03 Complaints regarding basic service

Proposed rule Puc 421.03 purports to clarify the extent to which end users may complain about basic service.

Puc 421.03 Complaints regarding basic service. The commission shall accept and resolve complaints from ILEC customers regarding basic service as described in Puc 421.01.

As support for its authority to impose this rule, the Commission cites:

- RSA 362:8, IV (Savings clause for obligations under RSA 374:22-p and RSA 374:30, II)
- RSA 365:1 (Complaints against public utilities)
- RSA 365:1-a (Exceptions to application of Chapter 365)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- RSA 374:22-p (Affordable telephone service)

DISCUSSION: This rule is overbroad, because it refers to “complaints” in an unqualified manner. Commission jurisdiction over ILEC-ELEC basic service is limited to only two aspects of that service: 1) discontinuing basic service throughout service territory 2) rate increases above the statutory cap.

RECOMMENDATION: Proposed rule PUC 421.03 should be revised as follows to clarify the extent of Commission authority to investigate complaints.

Puc 421.03 Complaints regarding basic service. The commission shall accept and resolve complaints from ILEC customers regarding violations of Puc 421.01 and 421.02.

Puc 422.01 Resale Service

Proposed rule Puc 422.01 establishes ILEC resale obligations:

<p style="text-align: center;">Puc 422.01 <u>Resale Service</u>.</p> <p>(a) All ILEC telecommunications services shall be available for purchase for resale by other telecommunications carriers.</p> <p>(b) If an ILEC desires to make a telecommunications service available only to a limited group of customers that have purchased such a service in the past, in effect grandfathering the service, the ILEC shall:</p> <p style="padding-left: 40px;">(1) Demonstrate to the commission that the action is not anti-competitive;</p> <p style="padding-left: 40px;">(2) Make the service available at existing resale rates to requesting carriers to offer on a resale basis to the same limited group of customers; and</p> <p style="padding-left: 40px;">(3) Continue to provide the service at existing resale rates to carriers in support of their existing customers.</p> <p>(c) Pricing for resale services shall be non-discriminatory.</p>
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As support for its authority to impose this rule, the Commission cites:

- RSA 362:7, III(c) (Savings clause related to 911, TRS, LEC obligations under 47 U.S.C. §§ 251 and 252)
- RSA 365:8, I (Savings clause related to Communications Act)
- RSA 365:8, VII (Standards and procedures for safe and reliable utility service and service termination)
- RSA 365:8, XII (Procedures for proper administration)
- 47 U.S.C. § 251(b) (General obligations of all local exchange carriers)
- 47 U.S.C. § 251(c) (Obligations of all incumbent local exchange carriers)

DISCUSSION: Section 251(b) of the Communications Act provides that *all* local exchange carriers have the “duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.” SB 48, consistent with its intent to level the playing field states that (subject to exception that are not relevant here) “the commission shall have no authority to impose or enforce any obligation on any excepted local exchange carrier that is not also applicable to all other excepted local exchange carriers”²⁸ Accordingly proposed rule 422.01 should reflect that it applies to all LECs, not just ILECs.

²⁸ RSA 362:8

RECOMMENDATION: Proposed rule PUC 422.01 should be revised as follows to clarify that it applies to all VSPs.

Puc 422.01 Resale Service.

- (a) All VSP telecommunications services shall be available for purchase for resale by other telecommunications carriers.
- (b) If a VSP desires to make a telecommunications service available only to a limited group of customers that have purchased such a service in the past, in effect grandfathering the service, the VSP shall:
 - (1) Demonstrate to the commission that the action is not anti-competitive;
 - (2) Make the service available at existing resale rates to requesting carriers to offer on a resale basis to the same limited group of customers; and
 - (3) Continue to provide the service at existing resale rates to carriers in support of their existing customers.
- (c) Pricing for resale services shall be non-discriminatory.

Puc 424.01 Form ILEC-1 Annual Report

The ILEC-NELEC members of NHTA suggest that a number of schedules in the ILEC annual report can be modified or eliminated as unduly burdensome, redundant, or unnecessarily detailed. Please refer to the redlined version of the proposed rules that accompanies these comments for further details.