THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Application of Laws of 2012, Chapter 177 (Senate Bill 48) to VoIP and IP-Enabled Services	)	**Docket No. DT 12-308**

BRIEF OF AT&T CORP. AND VERIZON IN RESPONSE TO THE COMMISSION'S REQUEST FOR COMMENT

AT&T Corp. ("AT&T") and Verizon[1] each offers a variety of voice and data services, including Voice over Internet Protocol ("VoIP") services, nationwide. As parties with a significant interest in this proceeding, AT&T and Verizon respectfully submit this Brief addressing the questions regarding SB 48[2] that the Public Utility Commission ("Commission") posed in its Order of Notice of October 24, 2012 ("Notice").[3]

SB 48 provides clear answers to the questions in the Notice. First, it makes plain that, contrary to the Commission's prior Orders in DT 09-044,[4] the Commission cannot regulate VoIP providers — including Comcast and Time Warner Cable — as competitive local exchange carriers ("CLECs"). Instead, its authority with respect to VoIP services and providers is now

[1] The Verizon companies participating in this filing are the wholly owned subsidiaries of Verizon Communications Inc. ("Verizon").

[2] Laws of 2012, Chapter 177, codified in relevant part at RSA § 362:7 ("SB 48").

[3] Part I.A of this Brief addresses question (i) of the Notice. Part I.B addresses questions (iii) and (iv). Part II addresses questions (ii) and (v).

[4] Order No. 25,262, DT 09-044 (Aug. 11, 2011) ("Aug. 2011 Order"); Order No. 25,274, DT 09-044 (Sept. 28, 2011) ("Sept. 2011 Order").

limited to the few areas specifically authorized in SB 48. Second, SB 48 renders Comcast's appeal of the Commission's prior Orders moot. The Commission should therefore vacate its Orders, which is the proper outcome when a decision becomes moot before appeals are completed.

ARGUMENT

I. SB 48 PROHIBITS THE COMMISSION FROM REGULATING VOIP PROVIDERS, INCLUDING CABLE VOIP PROVIDERS

A. Cable VoIP Services Satisfy the Definition of Both VoIP and IP-Enabled Services Under SB 48

The unambiguous definitions of "VoIP service" and "IP-enabled service" in SB 48 plainly encompass the Comcast and Time Warner Cable services at issue in DT 09-044 and, indeed, encompass all VoIP services, fixed or nomadic.[5] To qualify as a VoIP service under SB 48, a service must (1) "[e]nable[] real-time, 2-way voice communications that originate from or terminate in the user's location in Internet Protocol or any successor protocol"; (2) "[r]equire[] a broadband connection from the user's location"; and (3) permit users to terminate calls to or receive calls originating on the public switched telephone network ("PSTN"). RSA § 362:7, I(d).

The record established in DT 09-044 makes clear that the Comcast and Time Warner Cable services that the Commission previously sought to regulate satisfy each of these requirements. The Commission previously recognized that cable VoIP services allow real-time, two-way communications transmitted from the user's location through IP packets, *see* Aug. 2011

[5] As the Commission has explained, "fixed" VoIP is a service enabled from a specific broadband connection and generally is transmitted over the service provider's private network; in contrast, "nomadic" VoIP services are accessible from any broadband Internet connection and require transmission over the Internet. *See* Aug. 2011 Order at 4-5.

Order at 6, 44, and enable "interconnection with the PSTN," *id.* at 7-8. Therefore, the first and third conditions plainly are satisfied.

In addition, the record demonstrates that a broadband connection — namely, high-speed packetized IP transport from the subscriber's location — is necessary for a customer to utilize the Comcast and Time Warner Cable VoIP services. *See id.* at 6. That satisfies the second condition. SB 48 requires only that a VoIP service involve "a broadband connection from the user's location." RSA § 362:7, I(d)(2). The statute does not require a connection to "the Internet," which would describe an Internet access service, but instead requires only the use of "Internet Protocol" or a successor protocol. There is no dispute that the VoIP services at issue here use Internet Protocol and are transmitted over a broadband connection, and therefore fall squarely within the statute's definition of VoIP.

Even aside from the fact that cable and other fixed VoIP qualify as VoIP services under SB 48, they meet the statutory definition of "IP-enabled service." SB 48 defines "IP-enabled service" as any "service, capability, functionality, or application," other than VoIP service, that is "provided using Internet Protocol, or any successor protocol," and that "enables an end user to send or receive a communication in Internet Protocol format or any successor format, regardless of technology." RSA § 362:7, I(e). As the Commission has recognized, fixed VoIP services, such as cable VoIP, are provided using Internet Protocol and transmit an end-user's voice communications using IP packets. *See* Aug. 2011 Order at 4-5.

Therefore, fixed VoIP (including cable VoIP) services are either VoIP services or IP-enabled services under SB 48.

B. Under SB 48, the Commission Cannot Regulate VoIP Services or Providers

SB 48 commands, in relevant part, that "no . . . commission . . . shall enact, adopt, or enforce, either directly or indirectly, any law, rule, regulation, ordinance, standard, order, or other provision having the force or effect of law that regulates or has the effect of regulating the market entry, market exit, transfer of control, rates, terms, or conditions of any VoIP service or IP enabled service or any provider of VoIP service or IP-enabled service." RSA § 362:7, II.[6] This provision implements the legislature's intent to "confirm[] that [VoIP] services and IP enabled services are not subject to regulation as telecommunications services." House Calendar, Vol. 34, No. 37 (May 11, 2012).[7] In doing so, the legislature followed the *Vonage Order*, in which the Federal Communications Commission ("FCC") preempted the Minnesota commission from regulating Vonage's VoIP service, in specifying the extent of the prohibition on state regulation of VoIP and IP-enabled services and providers. *See* Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶ 20 (2004) ("*Vonage Order*"), *aff'd*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (finding that state entry requirements and filing and notice requirements for rates, terms, and conditions of service conflict with federal policies).

Because cable and other fixed VoIP services qualify as VoIP or IP-enabled services, SB 48 prohibits the Commission from regulating them as telecommunications services and thereby invalidates any such decision in the Commission's prior Orders.[8] Therefore, the clear effect of

[6] SB 48 sets out narrow, specifically enumerated areas in which the Commission may continue to regulate VoIP and IP-enabled services. *See* RSA § 362:7, III.

[7] *Available at* http://www.gencourt.state.nh.us/house/caljourns/calendars/2012/houcal2012_37.html.

[8] For the same reason, SB 48 also renders moot the specific question whether the Commission can regulate VoIP and IP-enabled service providers "as CLECs."

SB 48 is to reverse the Commission's prior Orders holding that cable VoIP providers are subject to regulation as telecommunications providers.

II. THE COMMISSION SHOULD VACATE THE ORDERS

The Commission's remaining questions in the Notice relate to its previous finding that cable VoIP providers constitute public utilities. The Commission made that finding as a preliminary step in its determination whether cable VoIP providers are subject to regulation as CLECs. *See* Aug. 2011 Order at 2 (noting that, if cable VoIP services "are public utility services," the providers would be subject to "the same [regulatory oversight] as that exercised over other [CLECs]"); Sept. 2011 Order at 1 ("[T]he Commission found . . . that providers of [cable VoIP] services are public utilities under New Hampshire law, subject to limited regulation as [CLECs].").

Because SB 48 establishes that the Commission cannot regulate fixed VoIP providers, this preliminary finding has become academic, the Orders are unenforceable, and Comcast's appeal of those Orders has become moot. *See In re Verizon New England, Inc.*, DT 07-011, Order No. 24,780, at 4 (July 25, 2007) ("[A] matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." (quoting *In re Juvenile 2005-212*, 917 A.2d 703, 705 (N.H. 2007))); *Exeter Hosp. Med. Staff v. Board of Trustees of Exeter Health Res., Inc.*, 810 A.2d 53, 58 (N.H. 2002) ("We generally will refuse to review a question that no longer presents a justiciable controversy . . . ."); *McNair v. McNair*, 856 A.2d 5, 15 (N.H. 2004) (declining to address issues that had become moot).

As the federal courts have recognized, when faced with orders that have become moot and unreviewable through "circumstances not attributable to the parties," such as intervening legislation, the proper course is to vacate the underlying orders to prevent them from having any

precedential effect. *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 451-52 (1st Cir. 2009) (internal quotation marks omitted); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment."); *American Family Life Assurance Co. of Columbus v. FCC*, 129 F.3d 625, 631 (1997) (same). This practice protects a party from being left unfairly "under the pall of an unreviewed administrative order," *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d 1373, 1382-83 (D.C. Cir. 1979); "preserves both sides' chance to litigate the issue in an appeals court in the future," *Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44, 54 (1st Cir. 2002); and avoids the establishment of precedent "untested by appellate scrutiny," *Arevalo v. Ashcroft*, 386 F.3d 19, 21 (1st Cir. 2004) (internal quotation marks omitted).

In light of these significant interests, the Commission should — as the FCC has done — follow this rule and vacate the Orders. *See* Order, *Applications of Crystal Communications, Inc.*, 12 FCC Rcd 2149, ¶¶ 3, 5-6 (1997) (following the federal courts' rule based on FCC's finding that the factors considered by the federal courts are "also pertinent for the Commission's assessments of requests for" vacatur).[9]

CONCLUSION

SB 48 confirms that cable VoIP providers cannot be regulated as CLECs, negates the Commission's rulings in the Orders to the contrary, and renders Comcast's appeal of the Orders moot. The Commission should vacate its prior Orders.

[9] To the extent the Commission retains limited authority with respect to cable VoIP services and service providers, the narrow scope of this authority is clearly set out in RSA § 362:7, III. There is no basis to continue this inquiry where the legislature has established by statute the parameters of the Commission's authority. If the Commission declines to vacate its prior Orders, it should, at minimum, close this proceeding.

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Respectfully submitted,

s/ Scott H. Angstreich

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Certificate of Service

I hereby certify that a copy of the foregoing Brief has been sent by electronic mail to all persons listed on the Service List this 9th day of November 2012.

s/ Scott H. Angstreich