STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 12-308

COMCAST PHONE OF NEW HAMPSHIRE, LLC AND COMCAST IP PHONE II, LLC

Application of Laws of 2012, Chapter 177 (Senate Bill 48) to VoIP and IP-Enabled Services

MOTION FOR REHEARING OF ORDER NO. 25,513

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NOW COMES Comcast Corporation and its affiliates, Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast"), and respectfully moves pursuant to RSA 541:3 and N.H. Admin. R. Puc 203.33 for rehearing of Order No. 25,513 issued May 28, 2013. In support of this Motion, Comcast states as follows:

BACKGROUND

In Docket No. DT 09-044, Order No. 25,262 (Aug. 11, 2011), the New Hampshire Public Utilities Commission ("Commission") concluded that it had jurisdiction under RSA 362:2 to regulate Comcast's Digital Voice service.[1] Comcast appealed that decision to the New Hampshire Supreme Court. While that appeal was pending, the Legislature enacted Senate Bill 48, Laws of 2012, Chapter 177 ("SB 48"), which, *inter alia*, precluded the Commission from "enact[ing], adopt[ing], or enforc[ing], 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.

Following the passage of SB 48, Comcast moved the Supreme Court to vacate the Commission's decision as moot, on the ground that it would have no practical significance in light of SB 48, which now defines the outside bounds of the permissible regulation of VoIP and IP-enabled services. *Appeal of Comcast Phone of New Hampshire, LLC & a.*, No. 2011-0762, Motion to Vacate Orders Under Review as Moot (N.H. Aug. 21, 2012). Rather than itself vacate the Commission's decision, the Supreme Court remanded the case to the Commission "for the

[1] As Comcast has previously explained in this Docket, its voice service is now marketed as "XFINITY Voice" rather than "Comcast Digital Voice." However, for the sake of simplicity and continuity, this motion will continue to refer to Comcast's voice service as "Comcast Digital Voice."

limited purpose of allowing it to reconsider" its orders in light of SB 48. *Appeal of Comcast Phone of New Hampshire, LLC & a.,* No. 2011-0762, Order (N.H. Oct. 12, 2012). The Supreme Court retained jurisdiction of Comcast's appeal and held it in abeyance pending the completion of proceedings on remand. *Id.*

In response to the Court's remand order, the Commission opened the instant docket and issued an Order of Notice on October 24, 2012 directing interested parties to file briefs on or before November 9, 2012 addressing five separate questions and scheduling oral argument for November 16, 2012. The five questions were: (i) whether the cable voice service under review in DT 09-044 falls within the statutory definition of "VoIP service" or "IP-enabled service" in RSA 362:7, I(d) and (e), (ii) whether, in light of the enactment of SB 48, any changes are required to be made or should be made to any of the findings and rulings in Order Nos. 25,262, 25,274 or 25,288, including the question of whether SB 48 affects the definition of "public utility" in RSA 362:2 and whether and to what extent regulatory treatment of Comcast and Time Warner as CLECs in respect to their cable voice services is still appropriate, (iii) what areas of state regulation of CLECs described in such orders no longer apply as a result of the enactment of SB 48, (iv) whether, in light of the nature and purpose of DT 09-044, SB 48 renders the Commission's previous findings and rulings legally insignificant and practically meaningless for the State of New Hampshire or Comcast, Time Warner or other providers of VoIP service or IP-enabled service, and (v) whether SB 48 eliminated the significance of the Commission's determination that fixed IP-enabled cable voice service is a "public utility" service under state law by removing any regulatory obligations that depend on that determination. Oral argument was held as scheduled on November 16, 2012.

On May 28, 2013, the Commission issued its Order on Remand. *See* Order No. 25,513. The Commission adhered to its holding that "Comcast is a public utility," and further held that Comcast Digital Voice "constitutes an IP-enabled service as that term is defined in Senate Bill 48 and RSA 362:7, I(e)," and that "Comcast is an excepted local exchange carrier (ELEC)." *Id.* at 3. In this motion, Comcast respectfully requests that the Commission reconsider each of those decisions.

REHEARING STANDARD

The Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." RSA 541:3. This includes errors of law, as a motion for rehearing filed with the Commission must specify "every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4; *see Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001). The "purpose of a rehearing 'is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State Pers. Comm'n,* 118 N.H. 309, 311 (1978) (citation and internal quotation marks omitted). For the reasons discussed below, Comcast respectfully submits that Order No. 25,513 is unlawful and unreasonable, and that good cause exists for rehearing/reconsideration of that Order.

SUMMARY OF THE ARGUMENT

The Commission erred in reaffirming its prior conclusion that Comcast is a public utility.[2] Because SB 48 defines the outside bounds for the permissible regulation for VoIP- and

[2] Comcast challenges the Commission's classification of its service only insofar as the relevant orders reached holdings as to the classification of Comcast IP Phone II, LLC, which provides retail VoIP services to New Hampshire subscribers. Comcast does not challenge the Commission's holding, in this docket or in any other, that Comcast Phone of New Hampshire, LLC, which provides telecommunications services, is a public utility under RSA 362:2.

IP-enabled services and providers, that determination lacks any prospective significance with respect to Comcast and the Commission should have vacated its previous orders as moot. In addition, the further affirmative rulings in this docket exceed the scope of the Court's limited remand order and are not a proper exercise of the Commission's discretionary authority. Finally, even if it were proper for the Commission to have reached the merits (which it was not given that this proceeding is now moot), the Commission erred in holding that Comcast Digital Voice *is* an "IP-enabled service," *is* an ELEC, and *is not* a VoIP service under RSA 362:7. On the merits, each of those holdings was incorrect. Accordingly, the Commission should grant Comcast's motion for rehearing.

ARGUMENT

I. The Commission Erred In Reaffirming Its Prior Ruling That Comcast Is A Public Utility Without Resolving Whether Its Ruling Had Prospective Significance.

In Order No. 25,262, the Commission determined that Comcast is a public utility under RSA 362:2. In the parties' briefs in this remand docket, the primary disputed issue was whether the public utility determination has any prospective practical significance given the limited regulatory framework envisioned by SB 48. Comcast contended that the public utility determination has no practical significance, because the Commission's authority to regulate Comcast as a provider of interconnected VoIP service can now reach no further than specifically delineated in SB 48, codified as RSA 362:7, II-III. As Comcast explained, there is no longer any real-world circumstance in which the Commission's authority over Comcast will depend on whether Comcast is a 'public utility' under RSA 362:2. Comcast Comm'n Remand Br., at 4-13. In contrast, the NHTA argued that whether Comcast is a public utility remains "legally significant and practical." NHTA Comm'n Remand Br., at 7.

The Commission's Order did not resolve that dispute. The Commission expressed no view on whether there remained any practical significance to whether Comcast is a public utility under RSA 362:2. Instead, it stated that specifying the regulations applicable to Comcast would be "premature . . . because the Commission has not yet adopted rules to implement the changes called for by SB 48." Order No. 25,513, at 19. Nonetheless, the Commission declined to vacate its prior Order, reasoning as follows:

> We also reject Comcast's argument that SB 48 eliminates the regulatory significance of whether cable voice service is a telephone service under RSA 362:2, and the implication that this demonstrates that CDV is not a regulated service or that Comcast is not a telephone public utility. First, Comcast's argument proceeds on the theory that there is no significance to regulating CDV and Comcast IP Phone because the regulations specified in RSA 362:7, III in some cases apply to non-utilities and in some cases apply to Comcast Phone of New Hampshire. We do not recognize this theory as a maxim of statutory construction but instead as an illogical universalization of the particular. Comcast's business model that intertwines affiliated companies in the provision of telephone service is irrelevant to the Legislature's intent in enacting SB 48. Second, the fact that VoIP and IP-enabled services are exempted from some but not all traditional utility regulation does not create a legislative exemption from public utility status, for the service or for the provider.

Id. at 17.

The Commission's analysis misunderstands Comcast's legal position in several respects. First, Comcast contends that SB 48 eliminates the regulatory significance of whether its cable voice service is a telephone service under RSA 362:2. Comcast does not, however, attempt to draw "the implication that this demonstrates that . . . Comcast is not a telephone utility." *Id.* Nor does Comcast argue here in favor of "a legislative exemption from public utility status." *Id.* Rather, Comcast's position is that the Commission need not (and should not) decide whether or not Comcast is a public utility because it is of no significance in light of the fact that SB 48 articulates the outside bounds on how VoIP and IP-enabled services may be regulated.

Second, as discussed below, the Commission's analysis conflates the abstract question of whether "cable voice service" generally is a public utility service under RSA 362:2 with the narrower question in the present docket: whether *Comcast's* voice service is a public utility service under RSA 362:2. Irrespective of whether the abstract question of the jurisdictional status of "cable voice service" might be practically significant as applied to some other service provider, it has no practical significance as applied to Comcast – and therefore, *this* docket is not the appropriate context within which to resolve the abstract jurisdictional issue if it is to be resolved at all, given that the Commission disfavors deciding abstract questions. *See, e.g., Re: Public Service Company of New Hampshire,* 88 NH PUC 98, 109 (2003).

Thus, Comcast did not ask the Commission, in this remand, to *overturn* its prior ruling and hold that Comcast is not a public utility under state law. Rather, Comcast asked the Commission to *vacate* its prior ruling that Comcast is a public utility and simply leave the issue (as well as the related issues of federal law) undecided because there is no longer a reason to decide them.[3]

In its brief, Comcast gave multiple reasons for why the Commission should vacate its order that Comcast is a public utility, none of which was adequately addressed by the Order. First, Comcast explained that the Commission lacks jurisdiction to determine whether Comcast is a "public utility" unless it can identify a specific act, omission, or proposal by Comcast that would hinge on public utility status. RSA 365:5. The Commission's Order does not address this legal argument; it simply asserts that it does not recognize Comcast's argument "as a maxim of statutory construction." Order No. 25,513, at 17. But Comcast's argument is not based on the

[3] Of course, outside of this remand proceeding, Comcast continues to maintain that it is not a "public utility" under RSA 362:2, for reasons already stated in its briefing on the merits in the Commission's previous orders in this docket and presently on appeal to the New Hampshire Supreme Court.

proper statutory construction of RSA 362:2. Rather, Comcast addresses the antecedent question of whether the Commission has authority to even *decide* the proper statutory construction of RSA 362:2 as it applies to Comcast. Comcast contends that the Commission lacks this authority, because the Commission has not identified any "act or thing having been done" by Comcast "in violation of any provision of law or order of the commission," RSA 365:5, which would trigger the Commission's jurisdiction.

Second, Comcast pointed to prudential considerations for vacating the Orders. Comcast explained that the Orders would "serve no useful purpose and could create confusion," and that this docket is no longer a proper exercise of the Commission's discretionary jurisdiction. Comcast Comm'n Remand Br., at 9-10. Furthermore, Comcast explained that it would be compelled to continue its appeal to the New Hampshire Supreme Court in order to challenge the Commission's rulings on federal law, even though those rulings are part of a decision with no practical significance to the Commission's regulatory authority. *Id.* at 10-11. The Commission's decision does not resolve these concerns; instead, it exacerbates them. The Commission asserted that "the Legislature evidenced a clear and unambiguous intent to regulate these services as telephone public utility services, and to regulate the providers of such services as public utilities, albeit with a low level of regulatory oversight." Order No. 25,513, at 18. But the Commission declined to state what it means, in practical terms, "to regulate these services as telephone public utility services," *id.*, in light of the broad prohibitions on regulation in SB 48, and even in light of the specific regulatory authority granted by RSA 362:7, III. Given that the Commission asserted that "the Legislature evidenced a clear and unambiguous intent" to preserve Comcast's public

utility status, it *appears* that the Commission has some regulations in mind that depend on Comcast's public utility status. However, the Commission has not identified those regulations.[4]

At the Supreme Court, the parties disputed whether SB 48 rendered the appeal moot because the practical significance of the case had been eliminated. Rather than resolving this dispute, the Supreme Court remanded to the Commission the limited question of whether its Orders should be reconsidered in light of SB 48, while retaining jurisdiction over the appeal. Presumably, the purpose of the limited remand was to permit the Commission, in the first instance, to articulate whether there is any practical significance to this case in light of SB 48. But the Commission refused to answer that narrow question, and instead impermissibly expanded its inquiry to a broader interpretation of SB 48. The Commission's failure to address these issues with any specificity is inconsistent with the purpose of the Supreme Court's remand, and will significantly complicate the task of judicial review in two ways. First, it will leave the Court, in ruling on the mootness question when Comcast again presents it on appeal, to determine the practical implications of the Commission's Orders without the benefit of the specific input it sought from the Commission.[5] Second, if the Court were to find that the case is not moot, it will be forced to adjudicate the merits of the appeal of Order No. 25,262 in a vacuum,[6] without any understanding of the practical significance of the Commission's holding that Comcast is a public utility.

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[4] It would be speculative and premature to predicate such a finding of jurisdiction on future contemplated regulations that have not yet been implemented. The Commission does not render declaratory rulings on hypothetical cases. *See, e.g., Re: Public Service Company of New Hampshire,* 88 NH PUC 98, 109 (2003).

[5] Although the Court's October 15, 2012 Remand Order denied Comcast's motion to vacate the Commission's Orders as moot in advance of briefing on the merits, that was presumably so that the Commission could have the opportunity to make any appropriate modifications to those orders before they were considered by the Court in the first instance.

[6] As well as the likely appeal of Order No. 25,513, should this Motion for Rehearing be denied.

Therefore, for both jurisdictional and prudential reasons, the Commission should decide the question presented in the parties' briefing: whether Comcast's public utility status has ongoing practical significance. And for the reasons stated in Comcast's prior filing, the Commission should hold that it does not, and vacate its prior orders as moot. *See* Comcast Comm'n Remand Br., at 4-13.

II. The Commission Erred as a Matter of Law in Deciding Whether Comcast Digital Voice Is a VoIP Service, an IP-enabled Service, or an ELEC.

In Order No. 25,513, the Commission concluded that Comcast Digital Voice is an "IP-enabled Service," and not a "VoIP Service," under RSA 362:7, I(d)-(e). It further held that Comcast is an ELEC under RSA 362:7, I(c). The Commission should not have decided these questions in this proceeding.

The Commission's decision goes far beyond the scope of the Supreme Court's remand. The Court has discretion in prescribing the scope and terms of a remanding order. *State v. Hampton Water Works Co.*, 91 N.H. 278, 283 (1941). The Supreme Court remanded only for the "limited purpose of allowing [the Commission] to reconsider" its prior decisions in this docket. *Appeal of Comcast Phone of New Hampshire, LLC & a.*, No. 2011-0762, Order (N.H. Oct. 12, 2012). The Court has otherwise retained jurisdiction of this matter. Thus, to the extent that the Commission decided issues beyond the scope and terms of the remand order, it erred as a matter of law. For example, the Commission's designation of Comcast as an excepted local exchange carrier (ELEC) under RSA 362:7, I(c) is not a reconsideration of the Commission's prior decisions in this docket. Instead, it is an affirmative and proactive pronouncement on a question that did not exist at the time of the Commission's prior decisions, because SB 48 had not yet been enacted. The Supreme Court held the pre-existing appeal in abeyance and retained jurisdiction over the appeal, presumably remanding to the Commission for the limited purpose of

allowing the Commission to assist the Court in the determination of whether SB 48 mooted the appeal. The Court's Remand Order most certainly did not instruct the Commission to adjudicate new issues that would add to the Court's docket, and were not part of the pending Appeal.

Furthermore, it is clear from the record that no party to this docket disputed that Comcast Digital Voice is a VoIP service. *See, e.g.,* NHTA Comm'n Remand Br. at 3 ("there is no dispute that [the service] conform[s] to the statutory definition of a Voice over Internet Protocol services as described in RSA 362:7, I(d)"). Without the classification issue in dispute, Comcast had no opportunity prior to reading the Order to dispel the Commission's erroneous conclusion that Comcast Digital Voice is an "IP-enabled service" and not a "VoIP service" under the statute.

Finally, by going to great lengths to reach this odd conclusion, the Commission has further complicated the Supreme Court's review because it is unclear a) why the Commission took this step when the issue was not in dispute by the parties, and b) whether its decision to classify Comcast's service as an "IP-enabled service" rather than a "VoIP service" has any practical significance. The Commission stated in a footnote that "[b]oth VoIP service and IP-enabled service receive the same regulatory treatment under state law." Order No. 25,513, at 20 n.10. In light of this footnote, it is ambiguous whether the Commission intends to distinguish between VoIP services and IP-enabled services at some future point, or whether its analysis of that classification issue is of academic interest only.[7] Again, this ambiguity will complicate the task of judicial review. If Comcast appeals the Commission's ruling, the Supreme Court will not know whether the classification of Comcast Digital Voice as a VoIP or IP-Enabled service or provider presents a live controversy. And even if it reaches the merits of this question – again,

[7] Given the heavy overlap between the "IP-enabled service" category and the "information service" classification under federal law, there is also a high likelihood that any regulation of IP-enabled service providers as "public utilities" may implicate federal preemption issues.

which was not disputed in the underlying remand – the Supreme Court's consideration of this issue would surely be assisted if it had some real-world understanding of the consequences of its ruling.

Accordingly, the Commission should simply hold that in light of SB 48, its prior orders in DT 09-044 regarding the regulatory treatment of Comcast's voice services have been rendered moot and are therefore vacated. The Commission erred in *sua sponte* proposing and resolving the question of whether Comcast Digital Voice is a VoIP service, an IP-enabled service, or an ELEC. The Commission's rules specify the manner in which declaratory rulings are to be made by the Commission, and they do not contemplate *sua sponte* decisions. Instead, they indicate that the Commission's declaratory rulings are to be made in response to properly filed petitions that are verified under oath. N.H. Admin. R. Puc 207.01. Because there was no verified petition seeking the Commission's opinion concerning how Comcast ought to be classified under the new categories created by SB 48, and the scope of the Supreme Court's limited remand (which pertained solely to the reconsideration of the Commission's prior decision as to whether Comcast is a public utility) did not require the resolution of these additional, new classification questions, the Commission erred in ruling on those issues. In addition, such a declaratory ruling is improper unless and until there is a live case or controversy requiring such an adjudication. *See Delude v. Town of Amherst,* 137 N.H. 361, 363 (1993) (declaratory judgment will not be issued unless "plaintiffs have demonstrated a present legal or equitable right… and an adverse claim that is 'definite and concrete touching the legal relations of parties having adverse interests'…) (citation omitted).

III. Comcast Digital Voice Is a "VoIP Service."

Assuming, *arguendo*, that the Court's remand had been broad enough to allow the Commission to reach the question of whether Comcast Digital Voice service is a VoIP or IP-

enabled service, the Commission erred in holding that Comcast Digital Voice is an IP-enabled service under RSA 362:7, I(e). It is undisputed that Comcast Digital Voice service is a VoIP service under RSA 362:7, I(d), and the Commission's contrary decision conflicts with the plain language of SB 48 as well as decisions of the FCC.[8] In fact, as discussed below, the FCC has explicitly concluded that the very service at issue in this proceeding – Comcast Digital Voice – qualifies as Interconnected VoIP under federal law.

A. The Commission erred in holding that a "broadband connection" connotes a broadband connection to the Internet.

The Commission's underlying justification for holding that Comcast Digital Voice is not a "VoIP service" is premised on its erroneous finding that because Comcast Digital Voice does not require a "broadband connection," it does not meet the three-pronged definition of VoIP service under 362:7, I(d). Order No. 25,513, at 21. Thus, the Order reasoned, Comcast Digital Voice is an IP-enabled service pursuant to 362:7, I(e).

In order to reach this classification, the Commission first found that Comcast's Digital Voice service does not require a broadband connection *to the Internet*. Order p. 21. The Commission determined that the term "broadband connection" in RSA 362:7, I(d)(2) connotes a "broadband *Internet* connection." That conclusion, which the Commission derived from unrelated dicta in Order 25,262,[9] is erroneous here as a matter of basic statutory construction. The statute does not say "broadband connection *to the Internet* from the user's location"; it says "broadband connection from the user's location." RSA 362:7, I(d)(2). The Commission may

[8] In this motion, Comcast will refer to the Federal Communications Commission as "the FCC" and the New Hampshire Public Utilities Commission as "the Commission."

[9] The passage in Order 25,262 upon which the Commission relied for this finding addressed the unrelated issue of the distinction between nomadic and fixed VoIP services, not the classification under state or federal law.

not "insert words that the legislature did not see fit to include." *Lambert v. Belknap Cnty. Convention*, 157 N.H. 375, 381 (2008).

The term "broadband" standing alone, has a distinct definition, one that is not reliant on access to the Internet. In fact, the New Hampshire Legislature has made clear that "broadband" does not mean broadband *Internet*, but simply means a connection that can operate at broadband speeds. *See* RSA 38:38, I(c) (defining "broadband" as "the transmission of information, between or among points specified by the user, with or without change in the form or content of the information as sent and received, at rates of transmission defined by the Federal Communications Commission as 'broadband'"); RSA 12-A:46, III(a) (same).

The Commission's sole support for equating "broadband" with "broadband Internet" appears to consist of two FCC webpages that generally discuss broadband Internet for the benefit of general public information and understanding. Order No. 25,213, at 22. Those webpages do not specifically discuss the regulatory definition of or legal interpretation of Interconnected VoIP; they simply discuss broadband Internet in colloquial terms. In contrast, when the FCC *has* specifically discussed a "broadband connection" in the context of Interconnected VoIP, it has made absolutely clear that this term *does* encompass services that do not involve a connection to the public Internet.

The FCC's definition of Interconnected VoIP includes the identical requirement of a "broadband connection" as in RSA 362:7, I(d)(2), as the Commission acknowledged. *See* Order No. 25,513, at 21-22 n.12; 47 C.F.R. § 9.3. The FCC has held on multiple occasions that that this element does not require a connection to the public Internet. In the *Outage Reporting Order*, for example, the FCC explained:

> Facilities-based interconnected VoIP service providers own and operate the broadband access communications infrastructure

> required to deliver VoIP services. . . . Unlike Vonage or several other non-facilities-based VoIP services, facilities-based VoIP is not an application that is issued "over-the top" of a high-speed Internet access service purchased by a consumer. ***Significantly, facilities-based VoIP customers do not need to subscribe to broadband Internet service, and their providers do not route their respective traffic over the public Internet.*** Rather, the facilities-based VoIP service is based on specifications that typically involve the use of a managed IP network. Many companies offer IP-enabled services over these managed networks, including voice and video services that are distinct from the high-speed Internet access service.

In re Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice over Internet Protocol Services Providers and Broadband Internet Services Providers, Report and Order, 27 FCC Rcd 2650, 2679, ¶ 69 n.151 (2012) ("*Outage Reporting Order*") (emphasis added). The FCC just recently re-affirmed its view that, contrary to this Commission's determination, facilities-based VoIP services that are not accompanied by broadband Internet qualify as "interconnected VoIP." *See In re Numbering Policies for Modern Communications,* Notice of Proposed Rulemaking, Order and Notice of Inquiry, 28 FCC Rcd 5842, 5846, ¶ 7 n.9 (2013) ("Facilities-based interconnected VoIP providers own and operate the broadband access communications infrastructure required to deliver VoIP services. . . . Facilities-based VoIP customers do not need to subscribe to broadband Internet service for the VoIP service to function."). As noted above, the FCC has explicitly concluded that *the very service at issue in this proceeding* – Comcast Digital Voice – qualifies as Interconnected VoIP under federal law. *See Outage Reporting Order*, 27 FCC Rcd at 2653-54, ¶ 6 (referencing Comcast's service in New Hampshire as an example of Interconnected VoIP); *see also id.* (referencing Comcast Digital Voice service in Tennessee and Georgia). These rulings are irreconcilable with the Commission's decision.

B. The Commission erred in holding that Comcast Digital Voice did not "require[] a broadband connection" because it operates at 90 kbps.

As an alternate basis for its decision, the Commission held that Comcast Digital Voice does not "[r]equire[] a broadband connection" under RSA 362:7, I(d)(2), because a call using its voice service requires a minimum of only 90 kilobits per second – not the full speeds of "broadband connection" of no less than 760 kilobits per second. Order No. 25,513, at 23. That holding is also inconsistent with FCC authority and incorrect. VoIP must only *operate* on a broadband connection; there is no additional requirement that it also use the entire data transfer speed which is offered by that connection, which in some cases can now be measured in gigabits, not kilobits. In *In re of Amending the Definition of Interconnected VoIP Service In Section 9.3 of the Commission's Rules, Notice of Proposed Rulemaking,* Third Report and Order and Second Further Notice of Proposed Rulemaking, 26 FCC Rcd 10,074 (2011), the FCC explained that a service does not "require[] a broadband connection from the user's location" only when it *can actually operate* using non-broadband connections. For instance, a VoIP service that can operate using dial-up Internet access does not "require[] a broadband connection from the user's location" because the user is capable of accessing the service using a non-broadband connection. *Id.* at 10,092, ¶ 49 ("We seek comment on whether we should modify the second prong of the existing definition, which requires a broadband voice connection from the user's location. Some interconnected VoIP service providers have asserted that VoIP services that are capable of functioning over a dial-up connection as well as a broadband connection fall outside this definition.").[10] But Comcast Digital Voice cannot operate on a dial-up connection: It operates

[10] In that Order, the FCC suggested altering the definition of Interconnected VoIP to specify an "Internet connection." 26 FCC Rcd at 10,092, ¶ 49. But the FCC never instituted that change. Furthermore, that Order was issued prior to the *Outage Reporting Order*, which affirmed that the

exclusively on Comcast's network, which is a broadband network. *See, e.g., In re Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership,* Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9693, ¶ 5 (describing "cable companies" as "facilities-based providers of broadband connections to end users"); *id.* at 9699, ¶ 19 (noting that FCC categorizes broadband connections in terms of "maximum speeds of connection offered to customers"); *id.* at 9702, ¶ 22 (retaining this regulatory categorization). Irrespective of whether a Comcast Digital Voice customer purchases high-speed Internet or cable video services from Comcast affiliates, Comcast Digital Voice requires the Comcast broadband network in order to function. Therefore, Comcast Digital Voice "requires a broadband connection" under RSA 362:7, I(d)(2).

Furthermore, if the Commission's decision were correct, VoIP service would simply not exist under New Hampshire law or Interconnected VoIP under federal law. Voice service does not require the bandwidth necessary for more data-intensive services, such as streaming video. Thus, to Comcast's knowledge, *all* VoIP services are capable of operating at speeds of less than 760 kilobits per second. For instance, Vonage, the nomadic VoIP provider at issue in the seminal *Vonage Order*, can operate at 90 kilobits per second.[11] The Commission should not construe RSA 362:7, I(d)(2) to nullify the entire category of VoIP services (as well as the federal category of Interconnected VoIP services). *See generally Pennelli v. Town of Pelham*, 148 N.H. 365, 367–68 (2002) ("Basic statutory construction rules require that all of the words of a statute

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term "Interconnected VoIP" encompasses services that do *not* include an Internet connection. *Supra*, at 13-15.

[11] https://support.vonage.com/app/answers/detail/a_id/1060/~/check-your-internet-speed

must be given effect and that the legislature is presumed not to have used superfluous or redundant words." (quotation marks omitted)).

IV. The Commission Erred In Holding That Comcast Was An ELEC.

The Commission concluded that "SB 48 divides all telephone public utilities into two broad categories": ILECs and ELECs. Order No. 25,513, at 19. It further held that "Comcast now falls into the broader category of telecommunications providers referred to in SB 48 as 'ELECs.'" Again, as discussed above, the Commission should not have even reached this question – but were it proper to decide, the Commission reached the wrong conclusions. First, SB 48 creates more than just two categories of providers. In addition to ELECs, SB 48 refers to providers of VoIP services and IP-enabled services, *see* RSA 362:7, II, and defines those services. RSA, 362:7, I (d) and (e). When interpreting a statute, all of its provisions must be considered as a whole, *see In re D.B.*, 164 N.H. 46 (2012), and all words must be given effect, as the Legislature is presumed not to have enacted superfluous or redundant words. *State v. Burke,* 162 N.H. 459 (2011). Thus, the categories of ELEC, VoIP service, and IP-enabled service, *see* RSA 362:7, I (c), (d), (e), must be viewed separately and as mutually exclusive. If Comcast's service is a VoIP service under RSA 362:7, I(d) (as Comcast contends), or an IP-enabled service under RSA 362:7, I(e) (as the Commission concluded), then it necessarily cannot be an ELEC under RSA 362:7, I(c).

Moreover, the Commission's decision is inconsistent with the entire statutory scheme set forth in SB 48. First, the definition of ELEC only encompasses providers of "telecommunications services." RSA 362:7, I(c). In contrast, the definitions of VoIP service and IP-enabled service say nothing about "telecommunications services," which, as discussed below, is appropriate and consistent with the Legislature's intent that VoIP and IP-enabled

services not be classified as telecommunications services. Thus, the definitions contained in RSA 362:7 clearly support the position that ELECs and providers of IP-enabled and VoIP services are separate and distinct categories. RSA:362:7, I(d), (e). Second, SB 48 expressly *prohibits* the Commission from imposing any regulation on "the market entry" of VoIP services or IP-enabled services (except as set forth in RSA 362:7, III) but at the same time, SB 48 specifically *requires* the Commission to approve the market entry of ELECs. *Compare* SB 48, Laws of 2012, Ch.177:1 (RSA 362:7, II and :7, III) with Ch. 177:10 (amending RSA 374:22, I to read: "No person or business entity, ***including any person or business entity that qualifies as an excepted local exchange carrier,*** shall commence business as a public utility within this state . . . without first having obtained the permission and approval of the commission" (emphasis in original, reflecting addition to statute)). Thus, if, as the Order suggests, the category of ELECs encompasses the subcategories of IP-enabled service providers and VoIP service providers, the implication is that the Legislature simultaneously enacted two mutually contradictory statutes. Such an interpretation is impermissible. "One section of a statute should not be interpreted so as to contradict what has been clearly expressed elsewhere in the statute." *Appeal of Meunier,* 147 N.H. 546, 549 (2002). The Commission, therefore, must reconsider this portion of its order and hold that the category of ELECs is distinct from the categories of VoIP services and IP-enabled services.

Finally, any doubt on this issue is resolved by the legislative history of SB 48 which states that the purpose of SB 48 was to confirm that "Voice over Internet Protocol services and IP enabled services *are not subject to regulation as telecommunications services* in New Hampshire." House Calendar Vol. 34, No. 37 (May 11, 2012), Page 2046-2047 (emphasis

added).[12] Because Comcast is not an incumbent local exchange carrier within the meaning of the first two categories of ELECs, Comcast, if it were an ELEC, would have to fall within RSA 362:7, I(c)(3), which defines an ELEC as "[a]ny *provider of telecommunications services* that is not an incumbent local exchange carrier" (emphasis added). (RSA 362:7, I(c)(1) and (2) state that certain types of ILECs can qualify as ELECs, but Comcast is not an ILEC.). Given that the Legislature sought to prevent Comcast Digital Voice from being regulated as a telecommunications service, it would not have enacted a new statute which defined that very service as a telecommunications service. Thus, as the foregoing discussion illustrates, the Commission erred in determining that Comcast is an ELEC.

CONCLUSION

For the reasons stated herein, Comcast respectfully requests that the Commission reconsider and vacate Order No. 25,513 and vacate its orders in DT 09-044.

[12] Recent legislative developments bolster further the conclusion that the Legislature did not intend VoIP- or IP-enabled services to be considered ELECs. On June 26, 2013, both the House and the Senate passed HB542, which, *inter alia*, states that "a provider of VoIP service or IP enabled service is not a public utility under RSA 362:2, or an excepted local exchange carrier..." HB542 (passed House and Senate June 26, 2013). Although HB542 has as of the time of this petition not yet been signed into law, it confirms that the Legislature did not intend in SB48 to designate VoIP and IP-enabled service providers as ELECs.

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Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Motion for Rehearing has on this twenty-seventh day of June, 2013 been sent by electronic mail to persons listed on the Service List.

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Susan S. Geiger