

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

BRIEF OF THE RURAL CARRIERS OF THE
NEW HAMPSHIRE TELEPHONE ASSOCIATION

NOW COME the incumbent carriers (excluding affiliates of FairPoint Communications, Inc.) of the New Hampshire Telephone Association¹ (the “RLECs”), and hereby submit the following Brief in response to the Commission’s Order of Notice dated October 24, 2012 in the subject proceeding. In its Order of Notice, the Commission described how the New Hampshire Supreme Court has remanded the appeal of the Commission’s determinative orders in DT 09-044 “for the limited purpose of reconsidering Commission Order Nos. 25,262 (“VoIP Order”) and 25,274 and related orders (together, the “VoIP Orders”) in DT 09-044 in light of Laws of 2012, Chapter 177 (SB 48).”² According to the Order of Notice, the issues to be investigated include:

- (i) whether 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;

¹ Bretton Woods Telephone Company, Inc.; Dixville Telephone Company; Dunbarton Telephone
² Order of Notice at 1.

- (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.³

In this brief, the RLECs address each of these questions in turn.

(i) Whether 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).

The cable voice service under review in DT 09-044 falls within the statutory definition.

RSA 362:7, I(d) describes VoIP service as any service that:

- (1) Enables real-time, 2-way voice communications that originate from or terminate in the user's location in Internet Protocol or any successor protocol;
- (2) Requires a broadband connection from the user's location; and
- (3) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

In DT 09-044, Comcast described its service as a broadband service that uses a special item of customer premises equipment to interconnect with the public switched telephone network. "Customers access the service using the same broadband connection over which Comcast provides cable modem service; special IP-compatible customer premises equipment ("CPE") is required; and CDV provides customers with the means of engaging in "real-time, two-way voice communications," including the ability to receive and place calls to the PSTN."⁴ Time Warner described its services as "interconnected VoIP services" as defined by the Federal Communications Commission ("FCC"), because they: (i) enable real-time, two-way voice

³ Order of Notice at 3.

⁴ DT 09-044, Comcast Initial Brief n. 33 (Jan. 15, 2010) (citing Kowolenko & Choroser Direct Testimony at 8).

communications, (ii) require use of a broadband connection, (iii) use IP-compatible customer premises equipment, and (iv) permit users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network”⁵

While the RLECs disagreed that the cable VoIP services as described were “interconnected VoIP services” as a matter of law,⁶ they did not dispute the essential technical characteristics of the services, which conform to the statutory definition in SB 48. Both parties’ services enable real-time 2-way voice communication, both use IP-compatible customer premises equipment, *i.e.* originate from or terminate in the user’s location in Internet Protocol, both require use of a broadband connection, and both interconnect with the PSTN.

Consequently, there is no dispute that they conform to the statutory definition of a Voice over Internet Protocol service as described in RSA 362:7, I(d).

(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.

No changes are required to any of the findings and rulings in the VoIP Orders as a result of SB 48. SB 48 has no language that involves changing the definition of a public utility. While it does have provisions that distinguish cable VoIP services from other types of telephone services based on their technical characteristics, those provisions are irrelevant to this proceeding because the Commission’s determinations were not based on the technical characteristics of the services at issue. Instead, they were based on the functional characteristics of those services. In the VoIP Order, the Commission held that:

⁵ DT 09-044, Time Warner Initial Brief at 1 (Jan. 15, 2010) (citing Medica & Laine Direct Testimony at 3-5).

⁶ DT 09-044, RLECs Initial Brief at 23-25 (Jan. 15, 2010).

The fundamental element in common throughout the historical development of telephony technology is the linking of one end user to another between identifiable, geographically fixed endpoints to enable real-time, two-way voice communication over wires. . . . The conversion from analog signals to digitized IP packets is a distinction without a difference and does not alter the practical reality that the fundamental service offered to the public remains telephone service. We find that the services at issue here fit squarely within the language of the statute – that is, the conveyance of telephone messages.⁷

The language of RSA 362:2 defines a public utility by the services it renders, not by the technology that it uses to provide such service. In fact, the language ‘any plant or equipment or any part of the same’ suggests that the drafters intended to encompass any and all technologies and facilities, including future technological improvements, used by a public utility to convey telephone messages for the public. In the case of a telephone utility, the “conveyance of telephone messages” is the determinative characteristic of a telephone utility subject to Commission jurisdiction under RSA 362:2.⁸

In the VoIP Order, the Commission arrived at a number of legal conclusions, the central one being that “‘conveyance of telephone messages’ is the determinative characteristic of a telephone utility subject to Commission jurisdiction under RSA 362:2,”⁹ and thus “pursuant to RSA 362:2 . . . the cable voice services offered by Comcast and Time Warner to New Hampshire customers constitute the conveyance of telephone messages and, thus, the providers of such services are subject to Commission jurisdiction.”¹⁰ Nothing in Senate Bill 48 has disturbed this holding that cable voice service is a telephone utility service. Moreover, there are a number of features of Senate Bill 48 that should be emphasized. First, Senate Bill 48 did not expressly vacate or overrule the VoIP Orders in any way, or even reference them. Second, Senate Bill 48 did not alter the status of VoIP as a statutory telephone service or, aside from certain regulatory exemptions unique to VoIP, distinguish it from statutory telephone service. Third, and most importantly, Senate Bill 48 did not create a blanket exemption for VoIP from any and all laws

⁷ VoIP Order at 44.

⁸ *Id.* at 45.

⁹ *Id.*

¹⁰ *Id.* at 48.

related to telecommunications service. As described further in the following section, SB 48 only exempted VoIP providers from certain aspects of Commission regulation. Consequently, Commission regulation of cable voice services continues to be lawful.

(iii) What areas of state regulation of CLECs described in such orders no longer apply as a result of the enactment of SB 48.

Consistent with the RLECs' understanding of the scope of this proceeding, the "CLECs described in such orders" are presumed to be the cable voice providers who were parties to DT 09-044. As a result of SB 48 they are, by definition, excepted local exchange carriers ("ELECs") *i.e.* "[a]ny provider of telecommunications services that is not an incumbent local exchange carrier"¹¹ and thus enjoy the same regulatory relief that all other ELECs do. The exact nature of this regulatory relief will be further developed in the Puc 400 rulemaking in Docket DRM 12-036, and the RLECs refer the Commission to the proposed rules that they joined in submitting in that proceeding.¹² Suffice it to say that cable voice service providers will, like all other ELECs, be relieved of many reporting, pricing, and customer service regulations.

Furthermore, by the terms of SB 48, they are also exempted from certain other aspects of Commission regulation -- but not all. The pertinent section of Senate Bill 48 provides that:

no department, agency, commission, or political subdivision of the state, shall enact, adopt, or enforce, either directly or indirectly, any law, rule, regulation, ordinance, standard, order, or other provision having the force or effect of law that regulates or has the effect of regulating the *market entry, market exit, transfer of control, rates, terms, or conditions* of any VoIP service or IP enabled service or any provider of VoIP service or IP-enabled service. (emphasis supplied).

By its very terms, and consistent with principles of *expresso unius*,¹³ this provision does not exempt VoIP telephone service from *all* telecommunications statutes and regulations. Rather, it

¹¹ RSA 362:7, I(c)(3).

¹² DRM 12-036, Rulemaking Puc 400 - Telephone Service; Proposed Revisions of the New Hampshire Telephone Association (July 6, 2012).

¹³ *Expresso unius est exclusion alterius*: inclusion of one thing indicates the exclusion of the

exempts VoIP telephone service only from the types of laws that are affirmatively described.

Specifically, cable VoIP service is exempt from:

- Market entry regulations, as authorized primarily by RSA 374:22-g;
- Market exit regulations, as authorized primarily by RSA 374:28;
- Transfer of control regulations, as authorized primarily by RSA 374:30-33; and
- Regulations regarding rates, terms and conditions, as authorized primarily by RSA Chap. 378.

However, as explained in the next section, there are still relevant regulations to which cable voice service is subject.

- (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.**

To answer this question, "the nature and purpose of DT 09-044" must first be established.

In its Order of Notice in DT 09-044, the Commission described the nature and purpose of the proceeding to be "an inquiry into the appropriate regulatory treatment of internet protocol (IP) enabled voice service in New Hampshire."¹⁴ This was in response to the RLECs' petition in which they complained that rate of return regulation was more burdensome than unregulated operations and expressed their concern at the prospect of competitors offering similar services on an unregulated basis. The RLECs' request for relief was as follows:

"If the Commission determines that the Comcast Digital Voice service is telephone service requiring a New Hampshire franchise, Comcast should be required to obtain franchise authorization and, upon receipt, comply with New Hampshire's utility statutes and the rules and orders of this Commission. If the Comcast Digital Voice service is not to be deemed a telephone service, fairness dictates that the Commission determine the distinguishing features that separate the fully regulated from the fully unregulated treatment of these virtually identical

other.

¹⁴ DT 09-044, Order of Notice at 1 (May 6, 2009).

services so that the RLECs can explore reconfiguration of their networks and business plans to migrate their own services and compete.”¹⁵

Consistent with the stated purpose of the proceeding, the Commission eventually found that cable voice service was a public utility service, and that Comcast and Time Warner “both will be subject to the same regulatory rights and obligations that apply to all CLECs.”¹⁶

SB 48 has granted VoIP service further statutory exemptions that are indeed very broad, but they are by no means absolute. The Commission’s previous findings and rulings remain legally significant and practical. There are some significant statutes that have remained unaffected by the enactment of Senate Bill 48. For example, two of the more important ones concern (1) pole attachments and (2) Commission assessments.

The Commission regulates the rates terms and conditions of third party attachments on utility poles pursuant to authority derived primarily from RSA 374:34-a. These rules do not involve market entry or exit, transfer of control, or the rates, terms and conditions of service. Indeed, Senate Bill 48 contains a savings clause related to the VoIP exemption that states that “[t]he prohibitions of paragraph II shall not be construed to . . . [a]ffect the authority of the state or its political subdivisions, as applicable, to manage the use of public rights-of-way, including, but not limited to, *any* requirement for the joint use of poles or other structures in such rights-of-way” Senate Bill 48 Sec. 177:1, new RSA 362:7, III(d) (emphasis supplied). Consistent with Section 224 of the federal Communications Act,¹⁷ the Commission’s current rules, N.H. Code Admin. R. Puc 1304.06, have not foreclosed the possibility of a different rate for telephone company attachments than for cable company attachments, and some pole owners have charged

¹⁵ DT 09-044, Petition of Rural Carrier of NHTA (March 6, 2009).

¹⁶ VoIP Order at 59.

¹⁷ 47 U.S.C. § 224.

different rates.¹⁸ Thus, the Commission retains authority over VoIP service as it pertains to pole attachments, and the classification of cable fixed VoIP as a telephone service, rather than a cable service, is of financial significance to the RLECs and other pole owners in the state.

The Commission also calculates and imposes assessments for the financial support of the Commission's operations pursuant to authority derived primarily from RSA 363-A. Again, this statute does not involve market entry or exit, transfer of control, or the rates, terms and conditions of service. Thus, the Commission retains authority over cable voice service as it pertains to assessments. This statute provides that these assessments are made against *public utilities* only, assessed proportionately among all utilities based on gross utility revenues.¹⁹ Given the relative size and market penetration of the cable companies, classification of their cable VoIP service as public utility telephone service, and their resulting participation in this assessment pool, is of financial significance to the RLECs and other public utilities.

Furthermore, there is a third area in which cable voice service may be subject to Commission regulation. SB 48 does not allow any carrier, including a VoIP provider, to escape any obligations it may have to preserve universal service. As the Commission announced when it established the Puc 400 rulemaking, one of the purposes of the proceeding is to "address additional or modified requirements for the preservation of universal service, protection of public safety and welfare, ensuring the continued quality of telecommunications services and safeguarding the rights of consumers in a competitive environment."²⁰ To the extent that the Commission establishes rules for telephone universal service, all telephone public utilities under

¹⁸ See, e.g. DT 12-084, Petition of Time Warner Cable for Resolution of Dispute with Public Service Company of New Hampshire.

¹⁹ RSA 363-A:1.

²⁰ DRM 12-036, Order of Notice at 2.

the Commission's jurisdiction should be involved. Consequently, the Commission's findings in the VoIP order continue to have legal and practical significance.

- (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.**

As the RLECs have explained in the preceding sections, cable voice service as described in DT 09-044 and SB 48 is a public utility service subject to Commission jurisdiction.

Furthermore, this jurisdiction, while significantly curtailed by SB 48, still holds legal and practical significance. The only way SB 48 could remove any regulatory obligations on cable VoIP services is if it could reasonably be interpreted in a manner contrary to the plain meaning of its text. In its pleadings before the Supreme Court, Comcast has argued just that, asserting that "Senate Bill 48 expressly prohibits the Commission from enforcing, either directly or indirectly, any rule or order that regulates or has the effect of regulating any VoIP service or any provider of VoIP service."²¹ Comcast's only support for this overly expansive interpretation of Senate Bill 48 is a legislative committee report which contains a summary statement (with no further explanation or analysis) that "Voice over Internet Protocol services and IP enabled services are not subject to regulation as telecommunications services in New Hampshire."²²

However, such reference to legislative history cannot stand against the clear and precise language of the statute. "Unless exceptional circumstances dictate otherwise, judicial inquiry into the meaning of a statute is complete once the Court finds that the terms of the statute are unambiguous."²³ "If the language is plain and unambiguous, we need not look beyond the statute

²¹ Case No. 2011-0762, Appeal of Comcast Phone of New Hampshire, LLC, *et al.*, Comcast Motion to Vacate at 4-5 (Aug. 21, 2012) (attached hereto as Exhibit 1).

²² *Id.* at 5, citing House Calendar, Vol. 34, No. 37 (May 11, 2012), Page 2046-2047.

²³ Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (internal citations omitted).

for further indications of legislative intent.”²⁴ “A frequently encountered rule of statutory interpretation asserts that a statute, clear and unambiguous on its face, need not and cannot be interpreted by a court and that only statutes which are doubtful of meaning are subject to statutory interpretation.”²⁵ “[I]t has been held when the text of the statute and legislative history disagree, the text controls.”²⁶

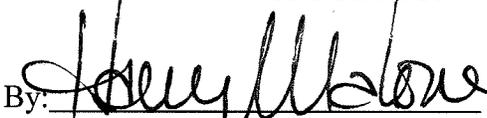
Accordingly, the Commission must interpret the statute consistent with its plain meaning. As explained in previous sections of this brief, while SB 48 exempted cable voice service from much of the Commission’s jurisdiction, it did not alter the Commission’s finding that this is a public utility service which remains subject to Commission regulation in many respects.

Respectfully submitted,

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
WILTON TELEPHONE COMPANY, INC.

By Their Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

By: 

Harry N. Malone
111 Amherst Street
Manchester, NH 03101
(603) 695-8532
hmalone@devinemillimet.com

Dated: November 9, 2012

²⁴ Ireland v. Worcester Ins. Co., 149 N.H. 656, 661 (2003).

²⁵ 2A Sutherland, Statutes and Statutory Construction § 45:2 (7th ed. 2011).

²⁶ *Id.* § 48:2.

EXHIBIT 1

COPY

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2012 TERM

Case No: 2011-0762

**Appeal of Comcast Phone of New Hampshire, LLC and
Comcast IP Phone II, LLC**

**MOTION TO VACATE ORDERS UNDER REVIEW
AS MOOT**

NOW COMES Comcast Corporation and its affiliates, Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast"), and, pursuant to Rule 21 of this Court's rules, respectfully move this Court to vacate the Orders of the New Hampshire Public Utilities Commission ("Commission") currently under review by this Court, in light of the newly-enacted New Hampshire Laws of 2012, Chapter 177 ("Senate Bill 48"). In support of this Motion, Comcast states as follows:

INTRODUCTION AND PROCEDURAL HISTORY

On May 22, 2012, this Court accepted Comcast's appeal of two Orders of the Commission which subjected Comcast's Voice over Internet Protocol ("VoIP") service to the Commission's regulatory jurisdiction. After the Court accepted Comcast's appeal, the New Hampshire legislature enacted a new statute that rendered the Commission's decisions moot. For the reasons explained below, Comcast respectfully requests that the Court issue an order vacating the Commission's decisions. As the U.S. Supreme Court has held, vacatur of a judgment is the proper course where a case becomes moot on appeal through no fault of the appellant, as is the case here, where superseding legislation has mooted the need for the instant appeal – a circumstance that has been universally recognized as warranting vacatur. Comcast is also concurrently filing a separate motion

requesting that the Court stay the briefing schedule in this appeal pending consideration of this motion, given that its disposition could obviate the need for consideration of Comcast's appeal on the merits (and spare the parties and the Court the time and expense of litigating this appeal needlessly).

The orders under review in this appeal were issued by the Commission in proceedings that were initiated by petition filed on March 6, 2009, by the rural local exchange carriers of the New Hampshire Telephone Association ("the RLECs") requesting a Commission inquiry into the appropriate regulatory treatment of Voice over Internet Protocol ("VoIP") services. Following discovery, briefing and participation by the various parties, the Commission on August 11, 2011, issued the first of the relevant orders under review, Order No. 25,262 (the "*Order*"). The *Order* found, *inter alia*: 1) that VoIP services offered by Comcast and Time Warner in New Hampshire constitute the "conveyance of telephone ... messages" under RSA 362:2, thus deciding that providers of such services are "public utilit[ies]" subject to the Commission's jurisdiction; 2) that Comcast's and Time Warner's VoIP services are not "information services" under Section 153(24) of the federal Communications Act, 47 U.S.C. § 153(24); and 3) that state regulation of cable voice service is not preempted by federal law. The *Order* further directed Comcast and Time Warner to comply with registration and other competitive local exchange carrier ("CLEC") requirements for their intrastate cable voice services pursuant to New Hampshire law and Commission rules.

Comcast moved for rehearing and suspension of the *Order* on September 12, 2011, and the Commission on September 22, 2011 suspended the *Order* pending consideration of the issues raised in Comcast's motion. However, the Commission

subsequently on September 28, 2011 denied Comcast's Motions in Order No. 25,274 (the "*Reconsideration Order*"). The *Reconsideration Order* reasserted the Commission's "finding that the cable voice service offered by Comcast and Time Warner constitutes the conveyance of a telephone message that falls within the jurisdiction of the Commission pursuant to RSA 362:2, and that state regulation of such services is not expressly or implicitly preempted by federal law." Order No. 25, 275 (Sept. 28, 2011) at 10.

Comcast appealed both the *Order* and the *Reconsideration Order* (collectively, the "*Orders*") to this Court.¹ On May 22, 2012, this Court issued an order accepting Comcast's appeal, and on June 11, 2012, issued an order directing the Commission to file a certified copy of the record in this proceeding with the Court on or before August 10, 2012. The Commission made the required filing with the Court on August 8, 2012. On August 13, 2012, the Court ordered a briefing schedule requiring Comcast's brief to be filed on or before September 12, 2012 and opposing briefs to be filed on or before October 12, 2012.

The proceedings before this Court, however, have been superseded by events in the legislature. On June 11, 2012, Governor Lynch signed Senate Bill 48, Chapter 177 of the New Hampshire Laws of 2012 ("Senate Bill 48"), a copy of which is submitted herewith as Exhibit 1. Among other things, the legislation amends RSA 362 by adding a new section, RSA 362:7, which defines VoIP service, and prohibits, with limited exceptions, any state department, agency, commission or political subdivision from enacting, adopting *or enforcing*, either directly or indirectly "any law, *rule*, regulation,

¹ Comcast has also requested from the Commission a waiver of certain rules and regulations, on which the Commission has yet to issue a final order. The disposition of Comcast's waiver requests (which are likewise mooted by Senate Bill 48) does not affect the issues raised by this motion.

ordinance, standard, *order* or other provision ... 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. (emphasis added). Senate Bill 48 became effective on August 10, 2012.

ARGUMENT

I. SENATE BILL 48 MOOTS THIS APPEAL.

Under New Hampshire law, “a matter is moot when it no longer presents a justiciable controversy because [the] issues involved have become academic or dead.” *New Hampshire Ass’n of Counties v. State*, 158 N.H. 284, 292 (2009). Consistent with this standard, a “challenge seeking only prospective or declaratory relief is generally mooted where intervening legislative activity renders the prior law inapplicable.” *Londonderry Sch. Dist. SAU #12 v. State*, 157 N.H. 734, 736 (2008). As explained below, Senate Bill 48 supersedes the *Orders*, as those rulings cause Comcast to be subject to New Hampshire regulatory requirements that are now unenforceable pursuant to Senate Bill 48. It therefore renders this controversy moot.

The mandate of the Commission’s *Orders* that Comcast comply with (or seek waivers from) various Commission regulations has been clearly superseded by Senate Bill 48’s directive that prohibits application or enforcement of “any law, rule, regulation, ordinance, standard, order or other provision ... 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. Because Senate Bill 48 expressly prohibits the Commission from enforcing, either directly or indirectly, any rule or order that regulates or has the

effect of regulating any VoIP service or any provider of VoIP service, the *Orders* no longer have any legal effect on Comcast. As the statute's legislative history emphasizes, "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 (website copy attached hereto as Exhibit 2).²

Moreover, although Senate Bill 48 does not directly speak to the legal analysis the Commission conducted in the *Order* concerning the federal regulatory classification of Comcast's (and Time Warner's) VoIP services as "telecommunications service[s]" rather than "information service[s]" under the federal Communications Act, it has rendered that analysis moot as well. The *purpose* of the Commission's federal legal analysis was to determine whether New Hampshire state regulatory requirements were preempted by federal law. Now that the Commission is prohibited by Senate Bill 48 from imposing its rules or regulations relating to telephone service to VoIP services in New Hampshire (with the exceptions noted in footnote 2, below), the question of how those services should be *federally* classified in New Hampshire has ceased to be relevant to the Commission's present treatment of Comcast and its interconnected VoIP service.

² RSA 362:7, III contains a savings clause providing that "[t]he prohibitions of paragraph II shall not be construed to" affect certain other provisions of New Hampshire law. But that savings clause preserves provisions that are either (1) laws of general applicability that apply regardless of "public utility" status, or (2) apply equally to cable video services, such that Comcast is already subject to them in its capacity as a cable video provider. The Commission's determination as to whether the provision of VoIP service by a cable video provider renders a provider a "public utility," therefore, is irrelevant to the enforceability of those provisions to the provider. Indeed, Comcast has been unable to identify any currently-existing statute or regulation having any present effect on its VoIP service, the enforceability of which would turn on the Commission's decision.

Finally, Comcast seeks purely prospective relief in this appeal – i.e., to prevent the application of certain of the Commission’s rules to its VoIP service. Because the new legislation took effect as of August 10, 2012, the prospective application of those regulations is now impossible. There is therefore no remaining controversy between Comcast and the Commission, and the case is moot.

II. BECAUSE THIS CASE IS MOOT, THE COURT SHOULD NOT HEAR THIS APPEAL ON THE MERITS.

This Court “generally will refuse to review a question that no longer presents a justiciable controversy because issues involved have become academic or dead.” *Exeter Hosp. Medical Staff v. Board of Trustees of Exeter Health Resources, Inc.*, 148 N.H. 492, 498 (2002). Although this Court has the discretion to “review a question that has become moot if it involves a significant constitutional question or an issue of significant public concern,” *id.*, there is no reason for the Court to so exercise its discretion here. With the enactment of Senate Bill 48, this case now concerns only whether the Commission may exercise its regulatory jurisdiction under a statutory scheme that is no longer applicable to VoIP providers. As such, this appeal involves neither a “significant constitutional question” nor a matter of “significant public concern” that would warrant the Court’s review.

In *Londonderry School District*, for example, the Court declined to hear a constitutional challenge to a statute concerning educational funding, on the ground that the statute had been amended. The Court acknowledged that it had “previously decided disputes that are moot when the matter involves a pressing public interest.” 157 N.H. at 737 (internal quotation marks omitted). But it found that because “the relevant statutory provisions at issue in this case are no longer in effect,” the public interest in hearing the

controversy no longer existed. *Id.* For the same reason, no public interest exists in resolving this controversy on the merits.

Moreover, to the extent legal issues presented in this case (e.g. whether Comcast's VoIP service is an "information service" or "telecommunications service" for federal regulatory purposes) have any significance whatsoever, it would only be with respect to their potential impact on other controversies not before the Court, such as among different parties or in other jurisdictions. But it is well established that resolution of such issues should occur, if at all, in the context of those concrete controversies, rather than in the context of issues that are "academic or dead." *Londonderry*, 157 N.H. at 736 (quotation marks omitted). Indeed, the federal legal classification of interconnected VoIP services remains unresolved by the Federal Communications Commission ("FCC"), which is best situated to resolve questions of interpretation of the Communications Act. This Court should not reach out to decide legal questions unnecessarily, in a moot case, that the FCC may resolve differently and on a national scale.

III. THE COURT SHOULD VACATE THE COMMISSION'S ORDERS.

Because, as explained above, there is no longer a live controversy concerning the Commission's authority to regulate VoIP in the manner previously decided by the Commission in the *Orders*, the Court should vacate the Commission's *Orders*. As the U.S. Supreme Court has stated, when a case becomes moot pending appeal, "vacatur must be decreed for those judgments whose review is . . . prevented through happenstance – that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties." *U.S. Bancorp. Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (internal quotation marks omitted); accord *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 427-29 (Colo. 1990); *District*

of *Columbia v. Am. Univ.*, 2 A.3d 175, 181-82 (D.C. 2010); *State v. Barclay*, 232 P.3d 327, 330 (Idaho 2010); *City of Eugene v. State, PERB*, 137 P.3d 1288, 1291 (Or. 2006); *Byerly v. South Carolina Nat'l Bank Corp.*, 438 S.E.2d 233, 233 (S.C. 1993); see also *Panterra Corp. v. Am. Dairy Queen*, 908 S.W.2d 300, 300-01 (Tex. App.-San Antonio 1995) (noting that under Texas law, when a case becomes moot while on appeal, all previous orders of lower courts must be vacated regardless of reason case became moot).³ This rule serves the salutary interest of ensuring that “[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.” *U.S. Bancorp.*, 513 U.S. at 25; see also *In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005) (noting that “collateral estoppel engenders legal consequences from which a party may continue to suffer harm after a claim has been rendered moot,” and that vacatur is warranted “because of the unfairness of the enduring preclusive effect of an unreviewable decision in the case of a civil action that has become moot on appeal”).⁴

Courts have uniformly held that when an appeal is mooted due to intervening legislation, that legislation qualifies as “circumstances unattributable to any of the parties,” and the decision under review must therefore be vacated. *Diffenderfer v.*

³ Comcast is unaware of any New Hampshire case squarely addressing the issue, but as noted in the text, many state courts follow the U.S. Supreme Court’s view and vacate an order when the case becomes moot on appeal through no fault of the appellant. States that do not follow this rule make clear that such an order, although not vacated, has no collateral estoppel effect. See, e.g., *Personhood Nevada v. Bristol*, 245 P.3d 572, 576 (Nev. 2010). Thus, if the Court were not to vacate the Commission’s decision despite the mootness in this case, Comcast respectfully asks that the Court rule that the Commission’s *Orders* are without any collateral estoppel or other legal effects.

⁴ The concern regarding the collateral effects of the Commission’s *Orders* is not academic; the federal regulatory classification of VoIP service is an issue that is currently pending at the FCC and has also arisen in unrelated disputes with private parties and in other jurisdictions.

Gomez-Colon, 587 F.3d 445, 451-52 (1st Cir. 2009) (“[V]acatur is generally appropriate’ when mootness results from intervening events outside the losing party’s control All circuits to address this issue have held that such legislation is generally considered an intervening, independent event”) (quoting *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 53-54 (1st Cir. 2002)); *Chem. Producers & Distribs. Ass’n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006) (holding that lower-court decision that becomes moot due to intervening legislation must be vacated, and citing authority from U.S. Supreme Court and Third, Fourth, and D.C. Circuits); accord *Lewis v. Hotel & Rest. Employees Union, Local 25, AFL-CIO*, 727 A.2d 297, 299-302 (D.C. 1999); *West Virginia Educ. Ass’n v. Consol. Pub. Ret. Bd.*, 460 S.E.2d 747, 757, 761 n.37 (W. Va. 1995). Accordingly, this Court should vacate the Commission’s *Orders* as moot.

WHEREFORE, for the reasons stated above, Comcast respectfully requests that this honorable Court:

- A. Issue an order vacating the Commission’s *Orders* because the case is now moot; and
- B. Grant such further relief as it deems just and appropriate.

Date: August 21, 2012

Respectfully submitted,

Comcast Phone of New Hampshire, LLC
And Its Affiliates
By its Attorneys

Orr & Reno, P.A.
One Eagle Square
Concord, NH 03301

By: *S S Geiger*
Susan S. Geiger
Phone: (603) 223-9154
Email: sgeiger@orr-reno.com

Jenner & Block, LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001

By: *Samuel L. Feder (sog)*
Samuel L. Feder
Phone: (202) 639-6092

By: *Luke C. Platzer (sog)*
Luke C. Platzer
Phone: (202) 639-6094

Certificate of Service

I hereby certify that a copy of the foregoing Motion has on this 21st day of August, 2012 been sent by first class mail, postage prepaid, to persons listed on the Service List.

S S Geiger
Susan S. Geiger