

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 12-308**

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

**Effect of SB 48 on VoIP and IP-Enabled Services**

**Order Denying Motion for Rehearing of Order on Remand and Clarifying that IP-Enabled  
Service Provider is Not a Public Utility**

**ORDER NO. 25,571**

**September 13, 2013**

**I. PROCEDURAL HISTORY**

This docket is complex in that it involves interpretation of statutory provisions that were in effect in 2011, amended in 2012 and amended again in 2013. As a result of the 2013 amendments, the party seeking rehearing is no longer considered a public utility and most of the issues in contention are no longer relevant. The remaining open issue is the request that the Commission vacate its prior orders. This order denies the request. Even though many of the issues are now resolved by the 2013 statutory change, the order considers each of the arguments contained in the pleadings in order to respond to the issues raised therein.

On May 28, 2013, the Commission issued Order No. 25,513 on remand from the New Hampshire Supreme Court (Order on Remand). In an order dated October 12, 2012, the Court directed the Commission to reconsider Order No. 25,262 and Order No. 25,274, and any related orders in DT 09-044, in light of the enactment of Laws of 2012, Chapter 177 (SB 48). The Court otherwise retained jurisdiction of Comcast's appeal of these earlier orders. In the Order on Remand, the Commission held that: (1) Comcast's digital voice (CDV) service constitutes an IP-

enabled service as that term is defined in SB 48 and RSA 362:7, I(e) (West Supp. 2012); (2) CDV service constitutes the conveyance of telephone messages to the public; (3) Comcast is a public utility; (4) Comcast is an excepted local exchange carrier (ELEC); and (5) the minimal state regulation imposed on Comcast as a provider of CDV service is not preempted by federal law. *See* RSA 362:2 (West 2009); RSA 362:7, I(c) and (e) (West Supp. 2012). The background and context of the Order on Remand are discussed at length therein and are not repeated here.

On June 27, 2013, a motion for rehearing of the Order on Remand was filed by Comcast Corporation and its affiliates, Comcast Phone of New Hampshire, LLC<sup>1</sup> and Comcast IP Phone, II, LLC (collectively, Comcast). Comcast argued that the Order on Remand and the Commission's prior orders in DT 09-044 were incorrectly decided and should be vacated based on the enactment of SB 48. On July 3, 2013, the rural incumbent local exchange carrier members of the New Hampshire Telephone Association<sup>2</sup> (RLECs) filed an objection to the motion for rehearing, which filing also contained a motion to temporarily suspend the Order on Remand pursuant to RSA 365:28 pending the signing of recent legislation and its enactment into law. No other objection was received by the Commission within the five-day period specified by Puc 203.07(f).

On July 9, 2013, the Commission issued Order No. 25,542 suspending the Order on Remand for further consideration pursuant to RSA 541:5, and indicating the Commission's intent to reconsider its prior orders, including Order No. 25,513, in light of the passage of House

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<sup>1</sup> Comcast Phone of New Hampshire, LLC did not dispute its status as a public utility, and is registered as such with the Commission.

<sup>2</sup> These members of the New Hampshire Telephone Association are 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, and Wilton Telephone Company.

Bill 542 (HB 542), Laws of 2013, Chapter 279<sup>3</sup>, should it become law, in connection with its decision on the merits of Comcast's motion for rehearing. Order No. 25,542 (July 9, 2013) at 3.

On August 30, 2013, Comcast requested that the Commission establish a procedural schedule that allows parties to file briefs or legal memoranda addressing the effects of the enactment of HB 542 on the issues in this case prior to issuance of the Commission's order on Comcast's motion for rehearing.

## **II. SUMMARY OF CONCLUSIONS**

The central issues in this proceeding and in Comcast's appeal to the New Hampshire Supreme Court are whether Comcast IP Phone II, LLC offers a telephone service that is subject to public utility regulation under RSA 362:2 and whether Comcast IP Phone, II, LLC is a public utility. A recent change in law has resolved these central issues, making it clear that Comcast IP Phone II, LLC is not a public utility. Under HB 542, effective on July 27, 2013, VoIP services and IP-enabled services are no longer public utility services and providers of such services are no longer public utilities under RSA 362:2. As discussed herein, however, we continue to believe that the Order on Remand and our earlier orders in DT 09-044 were correctly decided under the law in effect at the time and that it is neither necessary nor advisable to vacate these prior orders. The Commission, therefore, will deny Comcast's motion for rehearing.

## **III. POSITIONS OF THE PARTIES**

### **A. Comcast**

In its motion for rehearing Comcast claims that the Commission erred in reaffirming its prior determinations of public utility status in light of the enactment of SB 48, which Comcast maintains eliminated any "prospective practical significance" of the public utility determination.

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<sup>3</sup> HB 542 became law on July 27, 2013 without the Governor's signature in accordance with Article 44, Part II of the New Hampshire Constitution. *See* Laws of 2013, Chapter 279.

Comcast asserts that the Commission should have found that its prior orders were rendered moot by SB 48 and should have vacated these prior orders based on their mootness.

Comcast maintains that the Order on Remand failed to resolve the question of the prospective practical significance of the Commission's prior determinations in light of SB 48, despite the fact that this issue was addressed in parties' briefs and had been argued before the Court. Comcast claims that the failure to resolve this issue has both jurisdictional and prudential implications. Comcast argues that the Commission lacks jurisdiction to determine public utility status under RSA 365:5 unless it "can identify a specific act, omission, or proposal by Comcast that would hinge on public utility status." Comcast further argues that the process of judicial review of the Commission's prior orders will be significantly complicated as a result of the failure to address their ongoing practical significance under SB 48, considerations which Comcast characterizes as "prudential."

Comcast also maintains the Commission erred in determining in the Order on Remand that CDV is an IP-enabled service and not a VoIP service and that Comcast IP Phone is an excepted local exchange carrier (ELEC) under SB 48. According to Comcast, these determinations both; (i) exceed the limited scope of the Court's remand order and represent an improper exercise of the Commission's discretionary authority, and (ii) were incorrect on the merits, even assuming the Commission had the authority to decide them.

In support of its argument on the merits of the Commission's classifications under SB 48, with respect to the definition of "VoIP service" Comcast quotes at length from several orders of the Federal Communications Commission (FCC) to argue that the Commission incorrectly found it provided IP-enabled service as opposed to VoIP service as defined in SB 48. Further, with respect to the ELEC definition, Comcast cites an apparent inconsistency between the statutory

savings clause provisions of RSA 362:7, III (applicable to VoIP and IP-enabled services) and RSA 362:8 (applicable to ELECs).

Although Comcast did not base its argument for mootness on the recent passage by the legislature of HB 542, it noted this development in footnote 12 to its motion for rehearing. In addition, it stated in its cover letter that it “expressly reserves the right to supplement the enclosed Motion, if necessary, in light of the adoption” of HB 542.

#### **B. RLECs**

The RLECs’ objection to Comcast’s motion for rehearing argues that the Commission’s inquiry as to whether CDV service is a public utility service as defined in RSA 362:2 is a straightforward one, correctly decided in the Commission’s prior orders and unaffected by SB 48, and that Comcast has provided no new reasons as to why this determination is erroneous or unlawful. The RLECs characterize Comcast’s argument regarding the “prospective practical significance” of the public utility determination as a “manufactured” dispute intended to “distract” from the primary inquiry into whether Comcast’s CDV service is a public utility service.

The RLECs also argue that the Commission acted well within its limited authority under the Supreme Court’s remand order in determining that Comcast provides an IP-enabled service and is an ELEC under SB 48. The RLECs characterize these determinations as necessary in order for the Commission to reconsider its prior orders in light of the enactment of SB 48.

In addition to its objection to the motion for rehearing, the RLECs moved the Commission to suspend the Order on Remand under RSA 365:28, pending the signing of HB 542 and its final enactment into law. If and when such enactment occurs, the RLECs asserted

the Commission should reopen the record in this proceeding to consider the views of interested parties as to whether it should reconsider its prior orders in light of HB 542.

#### **IV. COMMISSION ANALYSIS**

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. *See Rural Telephone Companies*, 96 N.H. P.U.C. 646, 651 (2011). Good reason may be shown by identifying specific matters that were “overlooked or mistakenly conceived” by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O’Loughlin v. N.H. Personnel Comm’n*, 117 N.H. 999, 1004 (1977) and *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, 95 N.H. P.U.C. 116, 124 (2010).

The recent enactment of HB 542 has changed the law such that the central issues in this proceeding and the related appeal have been resolved. From and after the effective date of HB 542, VoIP and IP-enabled services are not public utility services and providers of such services are not public utilities under RSA 362:2.

##### **A. Comcast’s Arguments for Rehearing**

###### **1. Commission’s Reaffirmation that Comcast is a Public Utility**

Comcast argues that the Commission erred in reaffirming its prior determination that Comcast IP Phone II, LLC is a public utility without resolving whether this determination had “prospective practical significance.” Comcast maintains the Commission should have found there was no such prospective practical significance of its prior orders following the enactment of SB 48 and should have vacated these prior orders based on this finding. Comcast asserts that

the failure to make this finding has both jurisdictional and prudential implications. Motion at 4-9.

These arguments lack merit. Our task under the Court's remand order was to reconsider our prior orders and the determination of public utility status made in these orders in light of the enactment of SB 48 and the revised regulatory structure imposed by its statutory amendments. We do not understand the scope of this reconsideration to have been limited to the "prospective practical significance" of the change in law and regulatory treatment applicable to VoIP and IP-enabled services and the providers of such services. We believe a major impetus for the Court's remand order was its interest in knowing whether the Commission would continue to deem Comcast IP Phone II, LLC a public utility under RSA 362:2 and other statutes within our jurisdiction following the enactment of SB 48. Such an inquiry necessarily focusses on statutory construction of the language actually used by the legislature in this new law. The Order on Remand met this expectation by concluding that the language of SB 48 had no effect on our prior determinations of Comcast's public utility status.

Comcast's jurisdictional argument claims that the Commission lacks authority to determine Comcast's public utility status in an investigation under RSA 365:5 unless "it can identify a specific act, omission, or proposal by Comcast that would hinge on public utility status." Motion at 6-7. We do not understand our jurisdiction to be restricted in this manner and Comcast has cited no authority in support of its argument other than a strained reading of RSA 365:5. We therefore reject this argument as a basis for rehearing of the Order on Remand. It must be noted, however, that under the law now in effect, with the enactment of HB 542, VoIP and IP-enabled services and the providers of those services are not public utilities. As of July 27, 2013, therefore, Comcast IP Phone II, LLC is not a public utility.

Comcast's "prudential" arguments focus on its claim that significant complications in the process of judicial review of the Commission's prior orders will result from the Commission's failure to address the ongoing practical significance of these orders following enactment of SB 48. Comcast asserts that these prudential considerations warrant vacatur of the Commission's prior orders in the interest of judicial economy. We do not believe that any such considerations compel us to take the extraordinary action of vacating our prior orders, as discussed below.

2. Commission's Authority to Determine Comcast's Regulatory Status under SB 48

Comcast argues that the Commission exceeded its authority under the Court's remand order in determining that Comcast IP Phone II, LLC is an ELEC providing IP-enabled service rather than VoIP service, and that such determinations were an unlawful exercise of the Commission's discretion. This argument lacks merit in view of the scope of inquiry required pursuant to the Court's remand order to properly evaluate the regulatory status of Comcast IP Phone II, LLC and the CDV service it provides following the enactment of SB 48. Here we agree with the RLECs that the "full panoply of issues decided in [our prior orders] were available for the Commission to address and, indeed, were required to be addressed by the broad dictates" of the Court's remand order. RLECs' Objection at 2. Comcast's argument to the contrary does not provide grounds to grant rehearing.

3. Commission's Determination that Comcast Provides an IP-Enabled Service

Comcast argues that the Commission erred in determining that it provides an IP-enabled service rather than a VoIP service, as these terms are defined in SB 48, quoting at length from several FCC orders. We are not persuaded by these arguments that we incorrectly classified CDV service as an IP-enabled service under SB 48. More importantly, however, whether a telephone service provider is classified as a VoIP service provider or an IP-enabled service

provider does not affect its regulatory treatment under SB 48, which is the same in either case. Further, under HB 542 which as of July 27, 2013 now governs this question, Comcast IP Phone II, LLC is not regulated as a public utility. We therefore decline to re-examine this issue in considering the motion for rehearing.

4. Commission's Determination that Comcast is an ELEC

Comcast's arguments regarding the merits of the classifications made in the Order on Remand also address our statutory interpretation of the definition and regulatory treatment of ELECs and VoIP and IP-enabled service providers, i.e., whether it is possible to be both an ELEC and an IP-enabled service provider as determined in the Order on Remand. Comcast claims that statutory construction of the various definitions of service providers under RSA 362:7, I, as adopted in SB 48, renders these definitions mutually exclusive such that a single provider cannot simultaneously be both a VoIP or IP-enabled service provider and an ELEC. We reject as overly narrow and restrictive Comcast's approach to statutory interpretation of these definitions. Of course, with the enactment of HB 542 in 2013, Comcast IP Phone II, LLC is not considered an ELEC and is not regulated as a public utility.

Comcast also claims there is a mutual contradiction between the regulatory savings provisions of RSA 362:7, III, applicable to VoIP and IP-enabled services and providers of such services, and RSA 362:8, applicable to ELECs, and that this contradiction means it is impossible for a single service provider to be regulated under both provisions. This argument presumes there is no reasonable means to reconcile the language of the two statutory provisions, but we find this presumption to be unwarranted and believe the two provisions may be reconciled. A provider of telephone services may provide both traditional landline services and VoIP or IP-enabled services. RSA 362:7, III may be interpreted as applicable to providers of VoIP and IP-

enabled services only to the extent they provide such services, while RSA 362:8 applies to and is intended to level the regulatory treatment of all telephone utilities qualified as ELECs. This leveling would have taken the form of regulating all ELEC telephone services in a manner consistent with the exemptions applicable to VoIP and IP-enabled services under RSA 362:7, III. Therefore there exists no contradiction compelling the conclusion that the Commission erred in determining in the Order on Remand under the law at the time that Comcast IP Phone II, LLC was both a provider of IP-enabled service and an ELEC. Under current law, however, Comcast IP Phone, LLC is no longer considered an ELEC and is not regulated as a public utility.

**B. Vacatur of Prior Orders**

Comcast argues in its motion for rehearing that the Commission should have found that its prior orders were rendered moot by SB 48 and should have vacated these prior orders based on their mootness. Under RSA 541:13, a Commission order “shall not be set aside *or vacated* except for errors of law, unless . . . such order is unjust or unreasonable.” RSA 541:13 (emphasis supplied). The party seeking to set aside an order of the Commission has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, is unjust or unreasonable. *Appeal of Northern New England Telephone Operations, LLC d/b/a/ FairPoint Communications-NNE*, \_\_\_ N.H. \_\_\_, No. 2012-398 slip op. at 3 (August 21, 2013). Vacatur is an extraordinary remedy grounded in equitable principles and considerations. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). It is an equitable remedy designed to prevent unfairness to the losing party, which would otherwise have to continue complying with an adverse judgment notwithstanding a subsequent event rendering the judgment moot and unreviewable. *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 451 (1st Cir. 2009).

We continue to believe that our earlier orders were correctly decided under the law in effect at the time of their issuance, both before and after the enactment of SB 48. Comcast's arguments for rehearing have not persuaded us that these decisions were based on errors of law. Nor has Comcast provided sufficient grounds to support a finding that these orders are otherwise unjust and unreasonable, compelling us to take the extraordinary action of vacating our prior orders. Our earlier orders at the time of their issuance had current and retrospective effect which may be significant even if the determinations could be considered moot on a prospective basis; these orders clarified the regulatory status, rights and obligations of Comcast and its customers under the law in effect until July 27, 2013. Further, Comcast has demonstrated no prejudice that it would suffer from the prior orders remaining in place, given the clear statement in this order and the law now in effect, that it is no longer considered a public utility and is not regulated by the Commission as a public utility. These considerations alone counsel against vacating these orders. If, as we conclude here, our earlier orders and the determinations of Comcast's public utility status contained therein were correct under the law effective when they were issued, then we see no reason to vacate these orders now. That we would reach a different result today, under current law, does not require us to vacate orders that were decided under prior law.

**C. Prospective Effect of House Bill 542**

As noted above, HB 542 was enacted into law effective on July 27, 2013. This new law amends RSA 362:7, II to now include the following language:

VoIP services and IP-enabled services are not public utility services and a provider of VoIP service or IP-enabled service is not a public utility under RSA 362:2, or an excepted local exchange carrier under RSA 362:7, I(c) and shall not be regulated as a public utility in any manner other than as set forth in paragraph III.

We acknowledge the enactment of this new legislation and its exemption of VoIP and IP-enabled service providers from the definition of a public utility under RSA 362:2 and the

definition of an ELEC under RSA 362:7, I(c), from and after July 27, 2013.<sup>4</sup> We do not believe, however, that this recent statutory amendment affecting the regulatory status of VoIP and IP-enabled service providers requires us to vacate our prior orders in this docket or in Docket DT 09-044. As noted above, these prior orders were consistent with the law as it existed at the time the orders were issued, both before and after the enactment of SB 48, even if these determinations no longer apply after July 27, 2013. We see no reason to vacate these prior orders as a result of the enactment of HB 542.

Finally, with respect to Comcast's request to file briefs or legal memoranda addressing the effect of HB 542, we have concluded that, given the clarity of HB 542, additional briefing is not necessary for us to understand the prospective effect of this new legislation on the public utility status of companies such as Comcast IP Phone II, LLC, which provide solely VoIP or IP-enabled services; therefore, we deny Comcast's request for briefs.

**Based upon the foregoing, it is hereby**

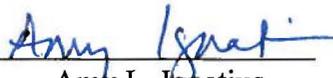
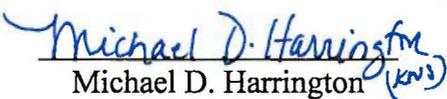
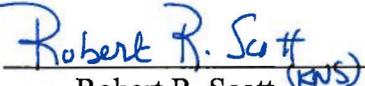
**ORDERED**, that Comcast's Motion for Rehearing of the Commission's Order on Remand and its request therein that our prior orders be vacated are hereby DENIED; and it is

**FURTHER ORDERED**, that, from and after July 27, 2013, Comcast IP Phone II, LLC is not a public utility under RSA 362:2 or an excepted local exchange carrier under RSA 362:7, I(c).

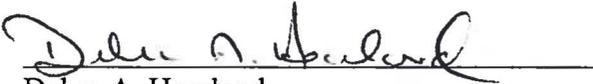
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<sup>4</sup> VoIP and IP-enabled service providers remain subject to state regulation to the extent provided under RSA 362:7, III.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of  
September, 2013.

 _____ Amy L. Ignatius Chairman	 _____ Michael D. Harrington Commissioner	 _____ Robert R. Scott Commissioner
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Attested by:

  
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Debra A. Howland  
Executive Director