

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2011 TERM

Docket No: _____

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

MOTION FOR A STAY PENDING APPEAL

ORR & RENO, P.A.

Susan S. Geiger, Esquire
N.H. Bar No. 925
sgeiger@orr-reno.com
James P. Bassett, Esquire
N.H. Bar No. 358
jbassett@orr-reno.com
P.O. Box 3550
One Eagle Square
Concord, NH 03302-3550
(603) 224-2381

JENNER & BLOCK, LLP

Samuel L. Feder, Esquire
sfeder@jenner.com
Luke C. Platzer, Esquire
lplatzer@jenner.com
Adam G. Unikowsky
aunikowsky@jenner.com
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001
(202) 639-6000

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NOW COME Comcast Phone of New Hampshire, LLC and Comcast IP Phone II, LLC (collectively “Comcast”) and, pursuant to RSA 541:18 and N.H. Sup. Ct. R. 7-A, respectfully move for a stay of New Hampshire Public Utilities Commission Order No. 25,262 (the “Order”) pending the disposition of Comcast’s appeal of that Order. In support of this Motion, Comcast states as follows:

PROCEDURAL HISTORY

On August 11, 2011, the New Hampshire Public Utilities Commission (the “PUC” or “Commission”) issued Order No. 25,262 which subjects two of Comcast’s interconnected Voice over Internet Protocol (“VoIP”) services, known as “Comcast Digital Voice” and “Business Class Voice” (collectively “CDV”),¹ to state public utility regulation in the State of New Hampshire (the “Order”). *See* Order Finding Jurisdiction and Requiring Limited Regulation

¹At the time briefing was complete before the PUC, Comcast’s residential interconnected VoIP service was known as Comcast Digital Voice. Since then, that service has been rebranded “XFINITY Voice” to better reflect the cross-platform nature of the service. For consistency with the PUC’s order, however, this appeal will continue to refer to Comcast’s services collectively as “CDV.”

(Aug. 11, 2011), A. at 1-60 [hereinafter "Order"].² The Commission ordered Comcast to comply with various registration and regulatory requirements under state law within 45 days of the date of the Order. *Id.* at 60. Comcast subsequently filed with the Commission a timely, consolidated Motion for Rehearing, to Reopen Record, and for Suspension of the Commission's Order. *See* Motion for Rehearing and Suspension of Order No. 25,262 and Motion to Reopen Record (Sept. 12, 2011), A. at 61. The New Hampshire Telephone Association filed Objections to the consolidated Motions. *See* Objection of the New Hampshire Telephone Association ("NHTA") to Comcast's Motion for Rehearing and Suspension and Motion to Reopen the Record (Sept. 19, 2011), A. at 83. On September 28, 2011, the PUC issued Order No. 25,274 which denied Comcast's Motions. Order Denying Motion for Rehearing and Suspension of Order and Motion to Reopen Record (Sept. 28, 2011), A. at 98 [hereinafter "Order on Rehearing"]. Comcast is filing an Appeal by Petition in this Court simultaneously with this Motion for a Stay pending disposition of the appeal.³

² All citations to "A." are to the Appendix to Comcast's Appeal by Petition filed herewith.

³ It is unclear, under New Hampshire law, whether Comcast must separately seek rehearing of the Commission's denial of its Motion to Suspend, and then appeal from any denial of such Motion for Rehearing, or whether the Commission's denial of Comcast's Motion for Rehearing on the merits of the Order *itself* is sufficient to satisfy the jurisdictional prerequisite to bring this present Motion for a stay. *Compare Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674, 677 (2001) (holding that argument not raised in motion for rehearing was waived on appeal) *with McDonald v. Town of Effingham Zoning Board of Adjustment*, 152 N.H. 171, 175 (2005) (holding that party need not seek rehearing of motion denying rehearing in order to preserve additional issues for appeal). Given this uncertainty regarding the proper forum in which to request a stay pending appeal, Comcast is, out of a surfeit of caution, bringing both this Motion and seeking rehearing at the Commission of the Commission's denial of Comcast's Motion to Suspend. Motion for Rehearing/Reconsideration of Order No. 25,274 Denying Motion for Suspension of Order No. 25,262 and/or Petition for Waiver of CLEC Rules (Oct. 28, 2011), A. at 109.

ARGUMENT

RSA 541:18 provides that this Court “may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension.” The Court has been “reluctant to exercise the discretion conferred by this statute unless the plaintiff has demonstrated two conditions are present. First, there must be a showing that the plaintiff will suffer irreparable harm, occasioned by circumstances beyond his control, if the order is given immediate effect. Second, it must be clear that the harm to the plaintiff outweighs the public interest in enforcing the order for the duration of the appeal.” *Union Fidelity Life Ins. Co. v. Whaland*, 114 N.H. 549, 550 (1974). Both criteria are satisfied here.

I. COMCAST WOULD SUFFER IRREPARABLE HARM ABSENT A STAY.

Comcast would suffer irreparable harm from the enforcement of the PUC’s decision pending the resolution of Comcast’s appeal. The list of regulations to which Comcast’s CDV service would be subject under the *Order* is extensive; over 70 pages of rules are implicated. *See* N.H. Admin. R. Puc PART 431 and Puc PART 456. Despite the Order’s characterization of New Hampshire’s regulations as “limited” and not “burdensome,” Order, A. at 59, the practical reality of the impact is more significant.

Comcast’s CDV service is provided over a national backbone network and provisioned by an integrated billing and operations system that supports multiple product lines, including Comcast’s interconnected VoIP service, its cable video service, and its high speed Internet service. *See* Declaration of Beth Choroser in Support of Comcast’s Motion for Rehearing and Suspension of Order 25,262 and Motion to Reopen Record (Sept. 12, 2011), A. at 81 [hereinafter “Choroser Declaration”]. The latter two services are not regulated by the Commission, and

Comcast's interconnected VoIP services are not subject to comparable state regulation in any other states in which Comcast operates.

Comcast has been diligently reviewing the many state telecommunications and utility regulatory requirements that apply to carriers subject to the Commission's jurisdiction and to which the Order subjects it. Given the integrated nature of Comcast's systems, it is not yet clear how extensive the impact of those many regulations and rules on Comcast's regulatory compliance and existing business practices would ultimately be.

What is already apparent, however, is that at least some of the Commission's many requirements would pose immediate and substantial difficulties for Comcast. For instance, certain New Hampshire regulations require a competitive local exchange carrier ("CLEC") to allocate partial payments to regulated services and prohibit disconnection for a customer's failure to pay for unregulated services. *See* N.H. Admin. R. Puc 432.14(f)(2). Comcast's current billing software and processes, however, were not designed to handle billing for different services (such as Internet, cable video, and voice) separately or to assign different payment priorities. They treat a customer's entire bill on a single collections timeline, and do not differentiate between regulated and unregulated services. *See* Choroser Declaration ¶¶ 7-9, A. at 81-82. To comply with regulations of the sort at issue would force Comcast to make substantial changes to national business practices for customers in one state only – changes that would impact how Comcast provides its integrated services, how it bills and collects, and how it disconnects customers. *Id.* In addition, these changes would require Comcast to process manually, for New Hampshire customers only, disconnections that are generally handled by its national automated software and systems – and as such would introduce the opportunity for human error that would ultimately work to the detriment of Comcast's New Hampshire customers. *Id.* The additional training,

manual intervention, and billing system enhancements required for Comcast to comply with this rule could be significant – particularly if immediate compliance were required as per the short timeline stated in the Order. *Id.*⁴

These difficulties, moreover, are not even the natural outgrowth of complying with the rule. They are a function of the fact that Comcast, unlike traditional telephone service providers, is also a provider of High Speed Internet and cable video services. This causes the Commission's rules to sweep far further than designed. The Commission's disconnection rules are aimed at preventing telephone service disconnection due to unpaid charges for ancillary, "unregulated services" that are traditionally offered by telephone companies, such as "directory advertising or telephone merchandise or equipment sales." *See* N.H. Admin. R. Puc 432.14(f)(2). But because Comcast is a different type of provider, the rule's reference to "unregulated services" would now also sweep in unrelated services such as Internet access and cable video, far beyond what the rules were intended to reach.

The converged nature of Comcast's systems and facilities makes compliance with other public utility regulations equally challenging. For instance, the Commission's definition of "basic service," *see* N.H. Admin. R. Puc 432.01(a)(4)-(a)(5), could force Comcast to enter into new relationships with other companies and establish processes by which Comcast's customers

⁴ In its Order denying Comcast's Motion to Suspend, the Commission invited Comcast to seek a waiver under N.H. Admin. R. Puc 201.05 of any rules with which Comcast believes it cannot comply. *See* Order on Rehearing, A. at 107-108. As described in note 3, *supra*, Comcast is also seeking rehearing of the Motion to Suspend, as well as waiver of the Commission's telecommunications regulations, while this appeal is pending. *See* Motion for Rehearing/Reconsideration of Order No. 25,274 Denying Motion for Suspension of Order No. 25,262 and/or Petition for Waiver of CLEC Rules (Oct. 28, 2011), A. at 109-122. The Commission has not yet ruled on these requests. Because Comcast is theoretically subject to the Commission's regulatory requirements while the waiver request is pending, and because it is unclear whether Comcast would be time-barred if it does not seek full relief from the Commission's decision within 30 days of the Order, Comcast requests this Court to issue a stay in order to avoid irreparable harm.

would be permitted to presubscribe to a different long distance provider – something Comcast does not do today, would entirely change Comcast’s CDV current product offerings, and could lock Comcast (and its customers) into contractual relationships⁵ that would be difficult to unwind were Comcast to prevail in its appeal.⁶

II. STAYING THE ORDER IS IN THE PUBLIC INTEREST.

Staying the Commission’s order would be consistent with the public interest. Comcast has operated its retail interconnected VoIP services in New Hampshire since 2005 outside of the PUC’s regulatory framework, without any identifiable public harm. The Commission’s Order did not cite, and the record below did not contain, any evidence of frequent complaints regarding Comcast’s service in New Hampshire, either to the Public Utilities Commission or to the Attorney General. Indeed, Comcast has been offering identical voice services throughout the country, for years, without comparable regulation by *any* state public utility commission.

Comcast further notes its understanding that the Commission’s current rules for competitive local exchange providers (which the Order would apply to Comcast’s interconnected VoIP service) are set to expire in 2013 by operation of law and it is unclear whether or to what extent they will be readopted in their current form. There is little public interest in requiring

⁵ Comcast’s interconnected VoIP services are “all-distance” and do not involve the user’s choosing a different company for long-distance calls. *See* <http://comcast.usdirect.com/comcast-digital-voice-.html> (“Unlimited local calling and long-distance calling--Don't worry about your minutes.”).

⁶ Immediate application of the Commission’s rules to Comcast could also cause spillover effects in other areas of the law and would generate regulatory confusion while this appeal is pending. For instance, the Commission regulates rates, charges, terms and conditions for pole attachments for “[p]ublic utilities within the meaning of RSA 362 . . . that own, in whole or in part, any pole used for wire communications or distribution.” *See* N.H. Admin. R. Puc 1301.01 *et seq.* The Commission’s Order could lead to pricing disputes and regulatory uncertainty in this area, potentially triggering the need for further proceedings before the Commission. *See* N.H. Admin. R. Puc 1304.06. Given the complexity of these issues, a stay of the Commission’s order would allow for the development of clarity on the applicable legal regime before such disputes proliferate.

Comcast to comply, during the pendency of this appeal, with regulations that may soon no longer exist.

CONCLUSION

Comcast respectfully submits that it has a strong argument on the merits that the Commission's decision was erroneous. *See Comcast's Appeal by Petition*, filed herewith. In view of the harm to Comcast in complying with the Commission's mandate, and the absence of any public interest in ensuring Comcast's immediate compliance before this Court has an opportunity to review the Commission's Order, staying the requirements of the Order pending appeal would be in the interests of justice.

WHEREFORE, Comcast respectfully requests that this honorable Court:

- A. Issue an order staying Commission Order No. 25,262 pending the conclusion of the instant appeal;
- B. Grant such further relief as it deems appropriate.

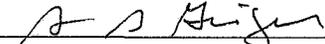
Respectfully submitted,

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

By their Attorneys,

ORR & RENO, P.A.
JENNER & BLOCK, LLP

October 28, 2011

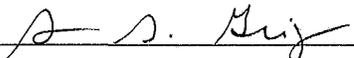
By:  _____

Susan S. Geiger
N.H. Bar No. 925
James P. Bassett
N.H. Bar No. 358
Orr & Reno, P.A.
One Eagle Square
Concord, NH 03301
Phone: (603) 224-2381
Email: sgeiger@orr-reno.com
jbassett@orr-reno.com

Samuel L. Feder
Luke C. Platzer
Adam G. Unikowsky
JENNER & BLOCK, LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C.20001
Telephone: (202) 639-6000

Certification of Compliance

I hereby certify that a copy of the foregoing Motion for Stay Pending Appeal has on this 28th day of October, 2011 been either hand delivered or sent by first class mail, postage prepaid, to the parties of record, and the Attorney General of the State of New Hampshire.

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Susan S. Geiger