STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-044

New Hampshire Telephone Association
Petition for an Investigation into the Regulatory Status of
IP Enabled Voice Telecommunications Services

OBJECTION TO
MOTION FOR REHEARING AND SUSPENSION OF ORDER NO. 25,262

OBJECTION TO
MOTION TO REOPEN RECORD

NOW COME the incumbent carriers (excluding affiliates of FairPoint Communications, Inc.) of the New Hampshire Telephone Association, a New Hampshire voluntary corporation (the "RLECs"), and respectfully object to Comcast's Motion for Rehearing and Suspension of Order No. 25,262 and Motion to Reopen Record (the "Motion")[1] and in support hereof, state as follows:

I. INTRODUCTION

On August 11, 2011, the Commission issued Order No. 25,262 ("Order") in which it held that cable voice service such as that provided by Comcast constitutes conveyance of a telephone message that falls within the jurisdiction of the Commission pursuant to RSA 362:2. Comcast seeks rehearing on the grounds that the Commission 1) has misinterpreted federal law in determining that cable voice is a telecommunications service rather than an information service; 2) has misapplied applicable law regarding federal preemption of state authority, and 3) has

[1] The Motion for Rehearing and Suspension was filed by Comcast Corporation and its affiliates, Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC, (collectively "Comcast").

mistakenly applied state public utility law to technologies not intended by the legislature.[2] Comcast also seeks to reopen the record to account for "new developments" in the features of its cable voice service.[3]

To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable.[4] In addition, good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence was overlooked or misconstrued.[5] However, as explained in the following Objection, the Motion meets none of these standards. Instead of analyzing the Commission's reasoning in light of the statutory and precedential guidelines, the Motion simply reiterates Comcast's previous arguments and supporting authority, and faults the Commission's failure to find them persuasive. As such, the Motion should be denied.

II. THE COMMISSION CORRECTLY DETERMINED THAT CABLE VOICE SERVICE IS A "TELECOMMUNICATIONS SERVICE."

Comcast maintains that the Commission erred in finding that cable voice is not an information service. However, in pressing this argument, Comcast does not actually refute the Commission's findings of fact, but simply begs the question that cable voice has the characteristics of an information service. For example, Comcast repeats its previous assertion that "the FCC has held on multiple occasions that services that enable the conversion from one protocol to another, *like CDV*, are information services."[6] This is not quite the case. While the

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[2] Motion at 3.

[3] *Id.* at 15.

[4] *See* RSA 541:3 and RSA 541:4.

[5] *See* Hollis Telephone, Inc., *et al.*, Order No. 25,088 at 14 (Apr. 2, 2010) (citing Dumais v. State, 118 N.H. 309, 312 (1978)).

[6] Motion at 4 (emphasis supplied).

FCC has, over the last thirty years, ruled repeatedly on the subject of protocol conversion as it relates to enhanced and/or information services, it has of course never ruled on Comcast's cable voice service specifically, or fixed VoIP services in general. Thus, the assertion that such services are "like CDV" is one held only by Comcast and, now with the Order, rejected by the Commission. Having thus reframed the issue, Comcast focuses its attention primarily on the issues of protocol conversion and enhanced services.

A. Protocol Conversion

Citing its briefs, Comcast repeats its conclusive statement that a protocol conversion occurs as part of its service and then misleadingly claims that the Commission "conclude[d] that this protocol conversion capability is not determinative under federal law . . . ."[7] This, of course, is not what the Commission concluded. Rather, the Commission, after thorough review of Comcast's arguments, rejected Comcast's contention that a protocol conversion, as defined in federal statutes, occurs at all.[8]

Comcast latches on to the Commission's determination that "the net protocol processing that defines an information service consists of the technological interface between an end user and a communications network of the end user's choice,"[9] stating that "[t]here is no requirement that such protocol conversions be performed only between the end-user and a third-party service provider . . ."[10] But this is a piece of *post hoc* reasoning that directly contradicts Comcast's earlier argument that it is "the nature of functions the end user is offered" that determines regulatory status.[11] As the Commission explained, the essence of a "service" is from the

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[7] *Id.*

[8] *See* Order at 49 – 53.

[9] *Id.* at 51

[10] Motion at 4.

[11] Comcast Brief at 25, citing National Cable & Telecommunications Ass'n v. Brand X Internet

perspective of an end user.[12] Otherwise, it is merely internal protocol manipulation which, according to the FCC, is not an information service. As the RLECs described in their Reply Brief, the FCC has determined that there are three varieties of net protocol processing that do not comprise information services: 1) those involving communications between an end-user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; 2) those in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) those involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end-user").[13] The Commission determined, after considerable deliberation that it described in the Order, that cable voice services fall within those exceptions.[14]

Comcast disputes this, stating that, in the *Computer III* inquiry, "the FCC has acknowledged that services are 'enhanced offerings' . . . where they 'support communications among incompatible terminals (and perform code, format and protocol conversion to support this service within their facilities),' *i.e., after a different carrier had already transported the communications to the information service provider's premises.*"[15] While it is true that the FCC did make the statements that Comcast has enclosed within quotations, this citation is not at all on point. First, it comes not from the *Computer Inquiry* proceedings, but from the AT&T Packet

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Services, 545 U.S. 967, 968 (2005) ("*Brand X*").

[12] Order at 46.

[13] RLECs Reply at 16. *See Implementation of the Non-Accounting Safeguards*, CC Docket No. 96-149, Order on Reconsideration, 12 FCC 2297 ¶ 106 (1997).

[14] Order at 51.

[15] Motion at 5-6 (emphasis supplied).

Switching proceeding in the early 1980s.[16] Second, the explanatory phrase in italics is entirely of Comcast's invention. The AT&T proceeding had nothing to do with intermediate carriers or end user distinctions, but simply dealt with the issue of whether AT&T's implementation of packet switching was an enhanced or basic service. Third, not only is Comcast's citation inapposite, it actually supports the Commission's holding. The determination in *AT&T* hinged on the *incompatibility* of the terminals. This case, on the other hand, deals with *compatible*, if not identical, terminals on each end of the call, *i.e.* telephone handsets.

Comcast also refers to various other cases that it relied on in its briefs, *e.g. Southwestern Bell, Brand X, and Vonage v. Minnesota PUC*, and accuses the Commissions of misreading the holdings of those cases.[17] However, it fails to acknowledge that the Commission did review those cases and found them unpersuasive for various reasons, particularly in light of the FCC's unsupportive position on these issues.

For example, Comcast implies that its cable voice service is the "paradigmatic information service" because *Brand X* described an information service as "communicat[ion] between networks that employ[] different data-transmission formats."[18] Notwithstanding that Comcast again begs the question that its service fits this description, this is weak support. First, as the RLECs explained in their briefs, this case had nothing to do with cable voice service. Second, this statement refers merely to the Court's recitation, not endorsement or affirmation, of certain definitions from the FCC's *Computer II* Order.[19]

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[16] *Application of AT&T to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States*, Memorandum Opinion, Order, and Authorization, 94 F.C.C.2d 48, ¶ 13 (1983).

[17] Motion at 7-8.

[18] Motion at 6, citing Brand X, 545 U.S. at 968.

[19] Brand X, 545 U.S at 976 - 977 (reciting that the FCC defined "enhanced service" as "service in which 'computer processing applications [were] used to act on the content, code, protocol, and

Comcast also reaffirms its reliance on *Vonage v. Minnesota PUC*, particularly its holding that "Vonage was exempt from state telecommunications laws because the protocol conversion performed by its service made the service an 'information service' under federal law."[20] However, Comcast fails to note that in a *later* order dealing with the *same facts*, the FCC specifically declined to classify cable voice as an "information service."[21] Given that the FCC originally promulgated the rules regarding enhanced/information services, the RLECs submit that perhaps the FCC remains the best authority for interpretations of those rules, and thus the Commission's holding was well-reasoned and correct.

B. Ancillary Enhanced Services

Comcast also criticizes the Commission's finding that Comcast's ancillary enhanced "abilities"[22] do not themselves render its cable voice service an enhanced service as well. As it did with the subject of protocol analysis, Comcast does not actually examine the record facts and explain how the Commission misinterpreted them. Instead, it merely reiterates its position and then references the *Vonage Order* as purported support for this position. However, the Commission dealt with this at length and determined that the *Vonage Order* applied to nomadic VoIP, not cable phone service.[23]

Comcast attempts to bolster its arguments with promises of new information regarding

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other aspects of the subscriber's information . . .' as well as 'protocol conversion' (i.e., ability to communicate between networks that employ different data-transmission formats).") (citing to *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 420-422 (1980) ("*Computer II*")) (internal citations to *Computer II* omitted.)

[20] Motion at 7-8, citing Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) ("*Vonage v. Minnesota PUC*") .

[21] *Vonage Holdings Corp.*, WC Docket No. 03-211, Memorandum Opinion & Order, 19 FCC Rcd 22404, ¶ 14, n. 46. (2004) ("*Vonage Order*").

[22] Motion at 9.

[23] Order at 56.

"new features" that "have either recently become available in New Hampshire or *will soon be* publicly available."[24] However, promises are not "facts," and the Commission cannot be faulted for disregarding "facts" that did not exist at the time of it deliberations and, in some cases, *still* do not exist.

Furthermore, even if the Commission were to consider these "new" features, it would find that they are all in the same vein as those previously touted by Comcast -- ancillary services and call management functions that do not act on the basic call. As the Commission held in its Order,

> [t]he fact that a provider can add such enhanced services to basic telephone service does not persuade us that the underlying telephone service is thus converted from a telecommunications to an information service that falls outside the scope of our jurisdiction under RSA 362:2. The cable voice customer signs up, first and foremost, for a service that will enable voice communication with other end users, including those using traditional telephone service. The fact that other, enhanced features may be added on to the basic voice communication service does not change the nature of the basic telephone service itself."[25]

In the face of the Commissions thorough analysis of the facts and its adherence to applicable law, Comcast has failed to establish that the Order is unlawful or unreasonable, or that any relevant evidence has been overlooked or misinterpreted.

III. THE COMMISSION CORRECTLY DETERMINED THAT STATE REGULATION OF CABLE VOICE IS NOT PREEMPTED.

Comcast's critique of the Commission's preemption analysis is again distinguished by its reframing of the central issue. First, it mischaracterizes the Commission's holding, claiming that its preemption arguments were rejected because the Commission found that "New Hampshire's state telecommunications regulations are less burdensome than Minnesota's regulations at issue

[24] Motion at 10 (emphasis supplied).

[25] Order at 52.

in the Vonage Preemption Order."[26] Then, it proceeds to attack this straw man, using the *Vonage Order* as support, as well as new evidence (related to its "burden") that was available at all times during this proceeding and could have been introduced at any time.[27]

However, the relative burdens of state regulation were *not* the basis for the Commission's decision, nor the FCC's *Vonage Order*. The Commission reviewed the Telecommunications Act and concluded that "[n]owhere does the Telecommunications Act expressly preempt state regulation over cable voice services, such as those offered by Comcast and Time Warner."[28] It then noted that the FCC has declined to determine that cable voice service is subject to exclusive federal jurisdiction, as it has done with respect to nomadic VoIP, and that other states regulate cable voice services to varying degrees.[29] Further, the Commission not only emphasized that the *Vonage Order* addressed nomadic VoIP services, not cable voice services, it also elucidated the FCC's reasoning in that Order, correctly reporting that "the FCC determined that state regulation of nomadic VoIP service is preempted where it is impossible or impractical to separate the intrastate and interstate components of the service at issue."[30] "Burden" was not the basis of the holding.

To the extent that the Commission invoked the burdens of state regulation, this was only dicta, offered perhaps as consolation in response to Comcast's policy arguments.[31] The Commission noted, but did not hold, that, notwithstanding its "determination that cable voice

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[26] Motion at 11.

[27] *Id.* at 11-13. This untimely evidence is discussed further in Section V, *infra.*

[28] Order at 55.

[29] *Id.*.

[30] *Id.* at 56-57.

[31] Motion at 12.

services are 'telecommunications services,"[32] CLEC regulation in New Hampshire is conducted with a light touch. In no way can this be construed as grounds for rehearing of the Commission's preemption determination.

Distilled down, Comcast's preemption argument simply acknowledges a fact that every public utility in the state has known for over a century – that conforming to customer relations rules is more burdensome than not. To date, this has never been a convincing argument that those rules should be ignored or waived. Comcast has failed to establish that the Order is unlawful or unreasonable.

IV. THE COMMISSION CORRECTLY DETERMINED THAT CABLE VOICE IS A PUBLIC UTILITY SERVICE UNDER NEW HAMPSHIRE LAW.

Comcast's arguments regarding the applicability of RSA 362:2 are repetitive of the "original intent" tone of its briefs, in which it argued that because a statute enacted a century ago did not contemplate cable voice service, it is inapplicable to this case. Comcast emphasizes, in general terms, the technical distinctions between its telephone service and traditional POTS and deemphasizes the customer experience as "superficial."[33] The Commission addressed these arguments at great length in eight pages of the Order[34] and found them to be a "distinction without a difference."[35] It held that 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"[36] and that by "linking of one end user to another between identifiable, geographically fixed endpoints to

[32] Order at 58.
[33] Motion at 15.
[34] Order at 40-48.
[35] *Id.* at 44.
[36] *Id.* at 45.

enable real-time, two-way voice communication over wires,"[37] cable voice service "constitute[s] the conveyance of telephone messages and, thus, the providers of such services are subject to Commission jurisdiction."[38] The Commission's careful dissection of Comcast's arguments was eminently reasonable and grounded in the law, and there are no grounds for rehearing.

V. COMCAST HAS FAILED TO ESTABLISH ANY REQUIREMENT TO REOPEN THE RECORD.

In the Declaration of Beth Choroser that accompanied its Motion, Comcast proffered the following new evidence:

- Comcast began offering its customers the choice of providing their own eMTA "in late 2010";[39]
- Comcast has begun offering a service to its business customers that provides access to its services from a mobile device and "will in the near future" provide access from a third party broadband connection;[40]
- Comcast will need to make changes to its billing systems and/or practices "involv[ing] substantial effort and expense" in order to comply with the Commission's customer relations rules, particularly in regard to disconnection for non-payment.[41]

The Commission has held that "good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision,"[42] and its rules provide that it may reopen the record if "late submission of additional evidence will enhance its ability to resolve the matter in dispute."[43] However, the Commission will not rely on such facts when the proffering party does not provide an explanation as to why the information

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[37] *Id.* at 44.

[38] Order at 48.

[39] Choroser Declaration ¶ 2.

[40] *Id.* ¶ 4.

[41] *Id.* ¶¶ 8-9.

[42] Hollis Telephone, Inc., *et al.*, Order No. 25,088 at 14 (Apr. 2, 2010) (citing Dumais v. State, 118 N.H. 309, 312 (1978)).

[43] Rule Puc 203.30(a).

was not available during the course of the proceeding.[44] By these standards, none of Comcast's proffered evidence supports its request to reopen the record.

Regarding the customer-provided eMTA, this information was, by Comcast's own admission, available in "late 2010." This is at least eight months before the Order was released, and yet Comcast waited until a month after the Order was issued before presenting it. This alone is grounds to reject it. Even if it were not, it should be disregarded because it does nothing to enhance the Commission's ability to resolve the dispute; as Comcast itself noted, facts related to the eMTA are irrelevant at this point because the Commission did not endorse this argument in the Order.[45]

Comcast's information related to the purportedly nomadic features of some of its business services also fails to rise to the necessary standards. Some of this information does not even rise to the level of a "fact," since it relates to future plans that may or may not come to fruition. As to the information that is current, all that it can possibly establish is that in *addition to* its state regulated fixed VoIP offerings, Comcast may also be offering a nomadic VoIP service. This is irrelevant to the cable voice service that is the subject of this proceeding, and again does nothing to enhance the Commission's ability to resolve the dispute.

Suffering most from the issue of timeliness is Comcast's discussion of billing issues. The current version of the Commission rule that Comcast finds burdensome, Puc 432.14, has been in effect since May 2005, and thus Comcast was on notice of it well before and during the pendency of this proceeding. Yet at no time did it raise this issue, and declarant Choroser (who

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[44] *See* Hollis Telephone, Inc., *et al.*, Order No. 25,088 at 14 (Apr. 2, 2010). *See also* Appeal of Gas Service, Inc., 121 N.H. 797 (1981) (Based on motion for rehearing before it, the Public Utilities Commission could properly have found that no good cause was shown by the motion since gas company failed to explain why the "new evidence" it wished to present at a rehearing could not have been presented at the original hearing.)

[45] Motion at 6, n.2.

declared that she is familiar with this rule[46] and has testified to considerable experience in billing compliance and specifications[47]) did not address it in her Direct Testimony of October 9, 2009. Comcast has provided no explanation of why this information could not have been provided during the course of the proceeding, and for this reason alone it should be disregarded. Moreover, as the RLECs have explained above, the proffered evidence is irrelevant in that it merely acknowledges that Comcast must now play on a more level playing field and conform to the same billing rules that other telephone companies do.

The information that Comcast has proffered is untimely, irrelevant and not conducive to enhancing the Commission's ability to resolve this dispute. The Commission should deny Comcast's request to reopen the record.

VI. CONCLUSION

Comcast has failed to establish that the Commission's Order is unlawful or unreasonable, that any evidence was overlooked or misconstrued, or that there is any new and relevant evidence that was unavailable during the course of the proceeding. Consequently, the RLECs respectfully request that the Commission:

a) DENY the request to reconsider and reverse Order No. 25,262;

b) DENY the request to suspend Order No. 25,262; and

c) DENY the request to reopen the record in this docket.

[46] Choroser Declaration ¶ 5.

[47] Prefiled Direct Testimony of David J. Kowolenko and Beth Choroser at 3:6-10 (Oct. 9, 2009).

Respectfully submitted,

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Dated: September 19, 2011

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection was forwarded this day to the parties by electronic mail.

Dated: September 19, 2011

By: _____
Harry N. Malone, Esq.