

**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**

**MOTION FOR REHEARING/RECONSIDERATION OF ORDER NO. 25,274
DENYING MOTION TO REOPEN RECORD**

NOW COME Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast") and, pursuant to RSA 541:3, respectfully move for rehearing/reconsideration of the portion of Order No. 25,274 issued on September 28, 2011 in the above-captioned docket that denied Comcast's Motion To Reopen Record. In support of this Motion, Comcast states as follows:

I. INTRODUCTION/PROCEDURAL HISTORY

On August 11, 2011, the Commission issued Order No. 25,262 in the above-captioned docket. The Order found, *inter alia*, that the interconnected Voice over Internet Protocol ("VoIP") service ("interconnected VoIP") service offered by Comcast and Time Warner in New Hampshire constitutes the conveyance of telephone messages under RSA 362:2 and that providers of such services are New Hampshire public utilities subject to the Commission's CLEC regulations. Order No. 25,262 further directed Comcast and Time Warner to comply with registration and other CLEC requirements for their intrastate interconnected VoIP services pursuant to New Hampshire law and Commission rules. On September 12, 2011, pursuant to RSA 541:3, Comcast filed a timely Motion for Rehearing and Suspension of Order No. 25,262, as well as a Motion to Reopen the Record of this proceeding. The rural local exchange carriers of the New

Hampshire Telephone Association (“RLECs”) filed objections to both Motions on September 19, 2011. The Commission issued a Secretarial Letter on September 22, 2011 indicating its determination to suspend Order No. 25,262 pending further consideration of the issues raised in Comcast’s Motions. On September 28, 2011 the Commission issued Order No. 25,274 denying, *inter alia*, Comcast’s Motion to Reopen the Record.

Comcast is filing an Appeal by Petition with the New Hampshire Supreme Court seeking review of the Commission’s determination that Comcast is a New Hampshire public utility and that its interconnected VoIP service is subject to the Commission’s regulatory authority. RSA 541:4 requires that before an appeal from any order or decision of the Commission may be taken to the New Hampshire Supreme Court, the appellant must first apply to the Commission for rehearing. Thus, while the issues adjudicated in Order No. 25,262 are now ripe for appeal (because Comcast has moved for and been denied a rehearing of them), *see* RSA 541:6, it is unclear whether Comcast may now appeal the portion of Order No. 25,274 that denied Comcast’s Motion to Reopen Record, or whether, instead, a Motion for Rehearing on that particular issue is a prerequisite for appealing it to the Court.¹ Therefore, out of a surfeit of caution, Comcast is filing the instant Motion for Rehearing/Reconsideration to preserve for appeal the additional issue of whether the Commission erred in denying Comcast’s Motion to Reopen Record.

New Hampshire case law is unsettled with respect to whether Comcast must separately move for reconsideration of the denial of its Motion to Reopen Record in the

¹ The same question exists with respect to the portion of Order No. 25,274 that denied Comcast’s Motion for Suspension of Order No. 25,262. Comcast is filing a separate Motion for Rehearing dealing with that issue.

instant circumstances. In *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001) the New Hampshire Supreme Court held that in order to appeal a PUC order, “one must first file a motion for rehearing with the PUC stating every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” *Id.* (internal quotation marks omitted). In that case, the Court also determined that because the appellant had failed to make an argument in a motion for rehearing, the issue was not preserved for the Court’s review on appeal. *Id.* at 677. Thus, it is at least arguable that Comcast must separately move for reconsideration with respect to the Commission’s denial of Comcast’s Motion to Reopen Record before filing an appeal regarding that issue.

However, a contrary view may be inferred from *McDonald v. Town of Effingham Zoning Board of Adjustment*, 152 N.H. 171 (2005). In that case, which dealt with an appeal from decisions of zoning boards of adjustment (“ZBAs”), the Court recognized the potential for wasteful proceedings that the motion for rehearing requirement creates. The Court in *McDonald* found that when a ZBA denies a motion for rehearing and raises new issues, findings or rulings, the aggrieved party need not file a second motion for rehearing to preserve for appeal the new issues arising for the first time in the order denying rehearing. The Court found that a literal reading of the applicable rehearing and appeal statutes (RSAs 677:2 and 677:4) “leads to absurd results” and that “[i]t would be illogical and unduly cumbersome on the parties and the judicial process for a single variance matter to be simultaneously pending before two different tribunals.... Such a circumstance would undercut the policy favoring judicial economy that the legislature

sought to promote when designing the rehearing and appellate process.” *McDonald*, 152 N.H. at 175.

In light of the disparate judicial opinions described above, and out of an abundance of caution, Comcast is filing the instant Motion for Rehearing/Reconsideration.

II. STANDARD FOR REHEARING

The Commission may grant a motion for rehearing if “good reason for the rehearing is stated in the motion.” RSA 541:3. This includes errors of law, as a motion for rehearing filed with the Commission must specify “every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:4; see *Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 674. The “purpose of a rehearing ‘is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision...’” *Dumais v. State Pers. Comm’n*, 118 N.H. 309, 311 (1978) (citation and internal quotation marks omitted). For the reasons discussed below, Comcast respectfully submits that Order No. 25,274 is unlawful and unreasonable, and that good cause exists for rehearing/reconsideration of the portion of that Order that denied Comcast’s Motion to Reopen Record.

III. THE ORDER DENYING COMCAST’S MOTION TO REOPEN RECORD IS UNLAWFUL AND UNREASONABLE

The Commission must allow exhibits to be filed after the close of a hearing if it finds “that late submission of additional evidence will enhance its ability to resolve the matter in dispute.” N.H. Admin. R. Puc 203.30(a). In determining whether to admit a late-filed exhibit into the record, the Commission must consider the exhibit’s probative value and whether the opportunity to submit a document impeaching or rebutting the late-

filed exhibit without further hearing adequately protects the parties' rights of cross-examination under RSA 541-A:33, IV. N.H. Admin. R. Puc 203.30(b). None of the standards articulated in the above-cited rules was referenced or applied in Order No. 25,274. The Order, therefore, is unlawful.

Instead of examining whether Comcast met the standards established in N.H. Admin. R. Puc 203.30 for reopening the record, the Commission denied Comcast's motion based upon the RLECs' argument that Comcast had not demonstrated that the new evidence (i.e. Ms. Choroser's Declaration) could not have been presented prior to the issuance of Order No. 25,262, and upon findings that the new evidence is prospective, and not persuasive on the point that new enhancements to Comcast's interconnected VoIP service transform it from a telecommunications service to an information service. The Order concludes that the information in Ms. Choroser's Declaration is "more of the same argument Comcast made in its underlying briefs that such enhanced features should qualify CDV as an information service, a conclusion we did not reach." Order No. 25,274 at 10.

Comcast respectfully submits that the foregoing analysis contained in Order No. 25,274 is flawed and should therefore be reconsidered. Nothing in N.H. Admin. R. Puc 203.30 requires Comcast to demonstrate why it could not have provided Ms. Choroser's Declaration before Order No. 25,262 was issued. Rather, the rule simply provides three criteria for reopening the record: 1) a finding that such filing will enhance the Commission's ability to resolve the matter in dispute; 2) a consideration by the Commission of the probative value of the exhibit; and 3) whether the opportunity for the

filing of rebuttal documents without further hearing adequately protects the parties' right of cross-examination.

Comcast has satisfied the above-stated criteria. The Commission should have allowed Ms. Choroser's Declaration into the record, as it bears directly on the issue of whether Comcast's interconnected VoIP service is so intertwined with advanced features such that they cannot be meaningfully separated for purposes of the service's regulatory classification. The Declaration therefore enhances the Commission's ability to resolve a central issue in this docket. It also has probative value in that it updates stale information that was presented to the Commission over a year and a half ago.

Information technology is rapidly evolving. Information products and services that were considered state-of-the-art a year or two ago are continuously being altered and improved by more advanced technologies. Foreclosing Comcast's ability to supplement the record in this case with more accurate and up-to-date information about a pivotal factual issue (i.e. the technical features of services whose regulatory classification is in dispute) is unreasonable.

Lastly, because this case was decided on the papers and without a hearing, none of the witnesses who have prefiled testimony have been subject to cross examination. Therefore, the Commission could have concluded, pursuant to N.H. Admin. R. 203.30(c) that the parties' cross-examination rights would not be impaired by reopening the record and entering Ms. Choroser's Declaration and rebuttal documents from other parties.

V. CONCLUSION

For the reasons stated above, the Commission should rehear/reconsider its Order denying Comcast's Motion to Reopen Record and should reopen the record in this proceeding to carefully review and consider Ms. Choroser's Declaration which, among

other things, describes additional, enhanced features of Comcast's interconnected VoIP service that have evolved since the inception of this docket, and that support a determination that Comcast's interconnected VoIP service is an information service that is not subject to the Commission's regulatory authority.

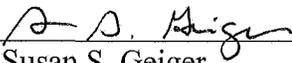
WHEREFORE, Comcast respectfully requests that the Commission:

- A. Reopen the record in this docket to consider the information in Ms. Choroser's Declaration; and
- B. Grant such additional relief as it deems appropriate.

October 28, 2011

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Motion has on this 28th day of October, 2011 been sent by electronic mail to persons listed on the Service List.

Susan S. Geiger
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