

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 OF ORDER 25,274
DENYING MOTION FOR SUSPENSION**

OBJECTION TO PETITION FOR WAIVER OF CLEC RULES

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 of Order No. 25,274 Denying the Motion for Suspension of Order ("New Motion for Rehearing") and/or Petition for Waiver of CLEC Rules ("Petition for Waiver"). In support hereof, they 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. On September 12, 2011, Comcast filed a Motion for Rehearing and Suspension of Order No. 25,262 and Motion to Reopen Record ("Motion for Rehearing"). Notwithstanding the admonishment in Rule Puc 203.07(d) that "[a] motion shall clearly and concisely state . . . [t]he specific relief or ruling requested," the Commission accepted this multi-faceted pleading, the RLECs responded in kind, and the Commission issued an Order denying the various requested relief. To preserve its rights to appeal, Comcast seeks rehearing of the Commission's denial of the request to suspend

Order 25,262, to the extent that the original Motion for Suspension was considered an initial request, and in the alternative has also petitioned for the waiver of all CLEC rules as they might apply to Comcast.

II. THE COMMISSION'S ORDER IS CORRECT AND IN CONFORMANCE WITH APPLICABLE LAW.

A. New Motion for Rehearing

To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable.¹ However, as explained in the following Objection, the Order was in conformance with the applicable law. As such, the New Motion for Rehearing should be denied.

In its New Motion for Rehearing, Comcast begins by asserting that Order 25,274 is unlawful because the Commission failed to articulate the reasoning behind its denial.² This begs the question as to the extent that the Commission was bound to articulate any separate reasoning at all. Comcast's claim for relief was intricately bound up with its request for rehearing, as the pleading was styled as a "Motion for Rehearing *and* Suspension." Indeed, Comcast presented no standard of review for its request, and its entire treatment of the requested relief was contained in a footnote in which it requested suspension on account of "difficulties" that Comcast expected to encounter.³ For all intents and purposes, Comcast did not properly request suspension of the Order, and thus there was no question presented for the Commission's review.

Even if Comcast had articulated a standard and presented an argument, it could not have succeeded. Generally, the type of equitable relief that it requested requires a finding that the petitioner has a likelihood of success on the merits, will suffer irreparable harm without the

¹ See RSA 541:3 and RSA 541:4.

² New Motion for Rehearing at 5.

³ Motion for Rehearing n. 12.

relief, that the balance of harms among the parties disfavors the petitioner, and that the public interest will be served by grant of the request. Comcast cannot prevail on any of these considerations. The Commission's Order was based on a factual finding that Comcast's phone service is not of the type that is preempted by federal law. "[A]ll findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law."⁴ Thus, it is unlikely that it can prevail on the merits of its appeal.

Comcast has not described any harm that will be "irreparable" or for that matter, could reasonably be considered harm at all. It references the "burden" of having to read and understand the CLEC rules, as if no other service provider in the state is subject to this burden, and as if understanding the rules is not the ongoing obligation of any public utility. It also describes the general difficulties in adapting its billing systems, again as if no other service provider has had to contend with this. Further, it provides no explanation of how the Commission could ever prevent any other service providers from evading its rules simply by "integrating" their product offerings as Comcast claims to have done.

As to the relative interests of the parties and the public interest, Comcast has made no persuasive argument as to how it is in the public interest for one of the largest telephone service providers in the state to operate outside of the regulatory scheme that is imposed, in the public interest, on all other service providers.

Other concerns that Comcast raises are irrelevant to this inquiry, as they are consistent with previous arguments regarding what *might* happen or what Comcast *intends* to do. For

⁴ RSA 541:13. *See* Appeal of Verizon New England, 153 N.H. 50, 56 (2005).

example, Comcast requests a suspension in anticipation of possible legislation,⁵ and/or future, unspecified revisions to the Commission's rules.⁶ Comcast also suggests that the Commission forego regulating Comcast until "development of clarity on the applicable legal regime."⁷ However, Comcast does not provide a standard for "clarity," nor does describe when this can ever be achieved. None of these prospective or hypothetical concerns has any bearing on the Commission's duties under *current and effective* law, and should be disregarded by the Commission.

Furthermore, Comcast's reference to a previous case in which the Commission granted suspension of an order pending appeal is inapposite. In the cited case, *Northern Utilities*,⁸ the Commission granted suspension of an order for a compliance filing in a rate case. That relief was nothing like that which Comcast requests, which is to be exempted from an entire statutory regulatory scheme.

B. Petition for Waiver

For the same reasons articulated above, the Commission should deny the Petition for Waiver. The Commission may grant waiver of its rules if it "will not disrupt the orderly and efficient resolution of matters before the commission" *and* it is in the public interest, *i.e.* "compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or the purpose of the rule would be satisfied by an alternative method

⁵ In support of this, Comcast describes how "the Maine Legislature *specifically voided* the Maine Public Utilities Commission's Order regulating VoIP within six months after the Order was issued," New Motion for Rehearing n. 5 (emphasis supplied). However, the referenced bill made no mention of VoIP, specific or otherwise. Instead, it mandates regulatory parity among all telecommunications services providers. Indeed, in that respect, the Maine statute is actually in accord with Order 25,262, which has had the practical effect of improving regulatory parity of all telephone service providers in the state.

⁶ New Motion for Rehearing at 7.

⁷ *Id.* n. 6.

⁸ DG 07-033.

proposed.”⁹

As an initial matter, Comcast is not requesting a waiver of a particular rule; Comcast is requesting waiver of an entire statutory and regulatory scheme. It is hard to imagine how this is not disruptive to orderly and efficient resolution of matters before the Commission. Comcast also maintains that conformance with the Commission’s rules would be onerous, without suggesting an alternative and without explaining why it deserves special relief over and above that of all other service providers in the state.

⁹ Rule Puc 201.05.

III. 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 DENY the request for rehearing and DENY the request for waiver of the CLEC rules.

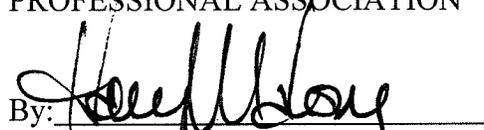
Respectfully submitted,

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By Their Attorneys,

DEVINE, MILLIMET & BRANCH,
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Dated: November 4, 2011

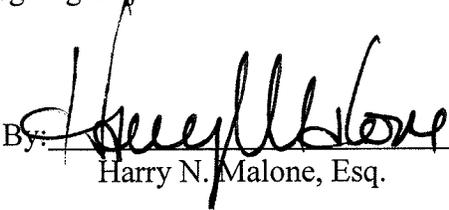
By: 

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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: November 4, 2011

By:  _____
Harry N. Malone, Esq.