THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2012 TERM

Case No: 2011-0762

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

REPLY TO OBJECTIONS TO MOTION TO VACATE ORDERS UNDER REVIEW AS MOOT

NOW COME Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast" or "Appellants"), by and through their undersigned attorneys, and pursuant to this Court's Order dated September 17, 2012, submit this Reply to Objections filed by the New Hampshire Public Utilities Commission ("the Commission") and the New Hampshire Telephone Association ("NHTA") in opposition to Comcast's Motion to Vacate Orders Under Review as Moot.

Introduction

Because there is no live controversy in this case, the Commission's two Orders on Appeal[1] should be vacated as moot. Neither the Commission nor the NHTA have identified any remaining controversy in this case. At most, they point to *another proceeding* where they believe the two now-moot Commission Orders might later be cited as precedent. That is not enough to maintain the vitality of the dispute that led to the instant appeal – a dispute concerning whether Comcast's retail VoIP affiliate, Appellant Comcast IP Phone II, LLC, should be required to submit to regulation as a

[1] Order No. 25,262 (Aug. 11, 2011) (subjecting Comcast's VoIP service to telecommunications regulation in New Hampshire) and Order No. 25,274 (Sept. 28, 2011) (denying reconsideration of Order No. 25,262) (collectively "Orders" or "Orders on Appeal").

"public utility" in New Hampshire. The very purpose of the mootness doctrine is to avoid the unnecessary exercise of deciding legal issues in the abstract. If there are other cases in which the legal classification of Comcast's VoIP service becomes relevant to the resolution of some concrete controversy, then it should be in those cases where the issue is addressed, decided, and appealed – not here, in this case, where no dispute between the parties remains. Moreover, the legal issues in this case are complicated ones, involving the interplay of federal preemption, the construction of both state and federal statutes, and the interpretation of federal agency decisions. The Court need not reach out to decide those issues absent some concrete dispute between the parties. For these reasons, the Orders on Appeal should be vacated.

I. The Savings Clause in SB 48 Does Not Create a Live Controversy.

First, the NHTA, echoed by the Commission, argues that the Commission's two Orders on Appeal should not be vacated as moot because Laws of 2012, Chapter 177, ("SB 48") did not expressly disturb the Orders, or otherwise expressly state that VoIP is not a "telephone utility service" or that Comcast's VoIP affiliate not is a "public utility" under New Hampshire law. *See* NHTA Obj. at 2-3; Commission Obj. at 2-3. These arguments are misplaced, and focus on whether SB 48 undermines the substance of the Commission's orders, not whether SB 48 renders them moot.

Comcast does not contend in its Motion to Vacate that the Court should *reverse* the Orders on Appeal because SB 48 has substantively changed whether its VoIP affiliate is a "public utility" under state law. Rather, Comcast contends simply that SB 48 has eliminated the significance of the classification by removing any regulatory obligations that turn on whether Comcast's VoIP affiliate is such a "public utility." Thus, SB 48

renders the Commission's reasoning in those Orders irrelevant – and therefore moot.[2] As explained in Comcast's Motion to Vacate, SB 48 exempts VoIP services from numerous regulations. Those regulations from which SB 48 does not exempt VoIP services either do not apply to Comcast's VoIP service in the first place, or apply to Comcast's VoIP service regardless of how it is classified under state or federal law. *See* Mot. to Vacate at 5 n.2. Thus, the questions presented by this appeal – whether Comcast falls within the statutory definition of "public utility" under New Hampshire state law, and whether VoIP is a "telecommunications service" under federal law – no longer have any bearing on the regulatory obligations attaching to Comcast's VoIP service in New Hampshire. These questions have become "academic," and accordingly, under New Hampshire law, they "no longer present[] a justiciable controversy." *New Hampshire Ass'n of Counties v. State*, 158 N.H. 284, 292 (2009).

The Commission's observation that Senate Bill 48 contains a savings clause consisting of a "list of areas in which regulation by the Commission must be continued," Commission Obj. at 2, is therefore a red herring. The applicability of the regulations in SB 48's savings clause is completely unrelated to the legal questions presented in the Orders on Appeal and is therefore unaffected by the outcome of this case. Many of the savings clause regulations concern laws of general applicability that do not even fall within the purview of the Commission, such as criminal statutes and laws governing the assessment of taxes. *See* RSA 362:7, III. (a) and (b). Others, although administered by

[2] The NHTA overstates the effect of the relief that Comcast seeks, contending that if this Court vacates the orders on appeal, "Comcast ...would not be subject to Commission authority in any manner." NHTA Obj. at 1. This is not so. As explained in Comcast's original motion, SB 48 leaves in place the Commission's authority with respect to regulatory and statutory obligations that do not turn on whether or not the service in question is classified as one provided by a "public utility." Mot. to Vacate at 5 n.2.

the Commission, apply based on criteria that are completely independent of whether a public utility or a VoIP service is involved, *see, e.g.*, RSAs 371:17-24 (requiring *all* corporations and individuals to secure Commission approval before installing facilities over/under public water and land); *see also* RSA 374:28-a (banning "slamming" practices, applicable to VOIP providers and public utilities alike). Others have no application to Comcast's service. *See, e.g.*, RSA 374:30, II (concerning leases by *incumbent* local exchange carriers). The Commission is no doubt correct that regulation in this area is "complex" and should be done "carefully," Commission Obj. at 2. However, the Commission's generic statements about its continued authority over VoIP services pursuant to SB 48 are no substitute for a specific example of why the "public utility" designation in the Commission's Orders on Appeal confers any additional or different authority with respect to Appellant Comcast's VOIP service than what would exist absent those Orders.

The NHTA's related contention that "the effect of the VoIP order is not only prospective," NHTA Obj. at 5-6, adds nothing to its argument that the savings clause in SB 48 prevents this case from becoming moot. The NHTA points to no dispute between Comcast and the Commission during the time between the issuance of the Orders on Appeal and the passage of SB 48 that is indicative of a live controversy. In fact, as indicated in the Appellants' Memorandum in Response to Court's February 21, 2012 Order (Mar. 9, 2012), the Commission has substantially waived or suspended regulation of Comcast's VoIP service while various motions in this case were evaluated, such that there is no dispute as to Comcast's compliance with the Commission's Orders on Appeal.

II. The Separate Pole Attachment Proceeding Does Not Create a Live Controversy in this Appeal.

The NHTA, but not the Commission, attempts to identify a live controversy by pointing to an unrelated, pending Commission proceeding, Docket DT 12-084, concerning pole attachment rates. Even if the classification of Comcast's VoIP service were relevant to some proceeding other than the one on appeal, that would not make the Commission's Orders in *this* proceeding any less moot. The purpose of the mootness doctrine is to ensure that actual, rather than abstract, controversies are decided. If there are other proceedings where the state and federal regulatory classification of Comcast's VoIP service might become relevant, then that is all the more reason the issue should be litigated – and if necessary, appealed – in *those* cases, not this one, so that the Court can decide the issues in the context of an actual dispute. Neither judicial economy nor a full and fair presentation of the issues are well-served by artificially requiring the parties here to litigate abstract legal questions in the context of a case that has been rendered moot by legislation, simply to create precedent that the Commission or the NHTA might wish to rely upon in a separate, unrelated matter.[3]

Moreover, it is unclear how the legal issues on appeal in this case are even related to the Commission's pole attachment proceeding. Although the NHTA maintains that the "classification of VoIP as a telephone service, rather than a cable service," is relevant to

[3] Significantly, the NHTA is alone in arguing that this case is not moot because of its impact on pole attachments rates. The Commission makes only the vague statement that "the effect of SB 48 on the Commission's authority regarding . . . pole attachments discussed by the RLECs in their objection are among the areas that need to be carefully considered as SB 48 is implemented through rulemaking and Commission adjudication." Commission Obj. at 3. But as this statement makes clear, any legal issues associated with pole attachments can be properly vetted in further "rulemaking and Commission adjudication," and in judicial review of such proceedings. There is no need to adjudicate such issues prematurely in this case.

pole attachment rates under N.H. Code Admin. R. Puc 1304.06, NHTA Obj. at 4, the regulation upon which the NHTA relies for this proposition says nothing of the sort. N.H. Code Admin. R. Puc 1304.06 on its face does not state that public utilities must pay different pole attachment rates than other attaching entities; indeed, the regulation never mentions the term "public utility" at all. Rather, Puc 1304.06 states that the Commission should consider six factors in "determining just and reasonable rates for the attachments of competitive local exchange carriers and cable television service providers to poles owned by incumbent local exchange carriers or electric utilities," but should consider only five of those six factors in "determining just and reasonable rates for all other attachments under this chapter."[4] The regulation most certainly does not state that a "competitive local exchange carrier" must as a matter of law pay higher or different rates than a "cable television service provider" (*i.e.* the regulatory classification that governs Comcast's pole attachment rates). Accordingly, the Commission's determinations concerning the regulatory status of Comcast's VoIP affiliate and its retail VoIP services are not implicated by the above-referenced pole attachment rules.[5]

The argument that the Orders on Appeal might have applied for a few months before the passage of SB 48, as the NHTA emphasizes, *see* NHTA Obj. 5-6, is again of no consequence. The scope of the Commission's pole attachment proceeding, Docket DT 12-084, is purely prospective. *See Time Warner Entertainment Company L.P. d/b/a*

---

[4] The only additional factor the Commission may consider for "attachments of . . . cable television service providers" and not for "other attachments" is a set of formulas adopted by the Federal Communications Commission. N.H. Code Admin. R. Puc 1304.06(a)(5).

[5] Rather than make any substantive argument that the regulatory treatment of Comcast's VoIP services is relevant to pole attachments rates, the NHTA cites a snippet of testimony in DT 12-084 by Comcast witnesses referencing Senate Bill 48 as supporting a policy argument for imposing lower pole attachment rates on VoIP. NHTA Obj. at 6. The testimony would be equally true whether the Orders on appeal were vacated or not.

Time Warner Cable, Petition for Resolution of Dispute with Public Service of New Hampshire, DT 12-084, Order No. 25,387 (July 3, 2012) at 10 ("[W]e decline to accept jurisdiction over the entirety of the parties' dispute and limit our inquiry to the prospective rate setting aspects of this docket"). Accordingly, the existence of the Commission's pole attachment proceeding (which will decide *prospective* pole attachment rates) does not support the NHTA's argument the instant appeal should proceed because it is not moot.

III. The Commission's Fee Assessment Authority Does Not Create A Continuing Controversy.

Finally, the NHTA (but again, not the Commission) maintains that the Commission's Orders are relevant to whether the Commission may impose assessments for the financial support of its operations under RSA 363-A. *See* NHTA Obj. at 5. But this does not create a controversy, because Comcast has never challenged the payment of such assessments. Comcast's regulated affiliate Comcast Phone of New Hampshire, LLC, which provides telecommunications services in New Hampshire (and whose status as a regulated public utility has never been in question) has always paid those assessments based on Comcast's VoIP revenues in the state, even before the Commission decided in the Orders on Appeal that Comcast IP Phone II, LLC, Comcast's retail VOIP provider affiliate, was also a public utility subject to the Commission's regulatory authority. Comcast will not alter its longstanding practice of making the assessment payment regardless of whether the Orders on Appeal are vacated.

Conclusion

For the foregoing reasons, as well as those presented in Comcast's Motion to Vacate, which is incorporated into the within Reply by reference, the Court should vacate the Commission's Orders because the case is now moot.

Date: September 27, 2012

Respectfully submitted,

Comcast Phone of New Hampshire, LLC
And Its Affiliates
By its Attorneys

Orr & Reno, P.A.
One Eagle Square
Concord, NH 03301

By: _____
Susan S. Geiger
N.H. Bar No. 925
Phone: (603) 223-9154
Email: sgeiger@orr-reno.com

Jenner & Block, LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001

By: _____
Samuel L. Feder
Phone: (202) 639-6092

By: _____
Luke C. Platzer
Phone: (202) 639-6094

Certificate of Service

I hereby certify that a copy of the foregoing Motion has on this 27th day of September, 2012 been sent by first class mail, postage prepaid, to persons listed on the Service List.

_____
Susan S. Geiger

922682_1