DT12-308

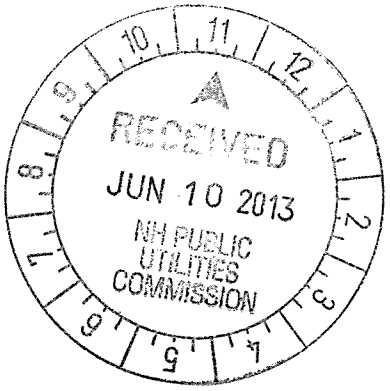
ORR&RENO
ATTORNEYS AT LAW

June 7, 2013

William L. Chapman
George W. Roussos
Howard M. Moffett
James E. Morris
John A. Malmberg
Douglas L. Patch
Steven L. Winer
Peter F. Burger
Lisa Snow Wade
Susan S. Geiger
Jennifer A. Eber
Jeffrey C. Spear
Connie Boyles Lane
Judith A. Fairclough
Maureen D. Smith
Todd C. Fahey
James F. Laboe
Robert S. Carey
John M. Zaremba
Heidi S. Cole
Jeremy D. Eggleton
Rachel A. Goldwasser

Rebecca E. Perkins
(Admitted in New York and Washington, D.C. Not admitted in New Hampshire)

Lawrence A. Kelly
(Of Counsel)



Via U.S. Mail
Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Re: ***Case No. 2011-0762, Appeal of Comcast Phone of New Hampshire, LLC***

Dear Clerk Fox:

This letter is filed on behalf of Appellants Comcast Phone of New Hampshire, LLC et al. ("Comcast") pursuant to the New Hampshire Supreme Court's May 15, 2013 order directing Comcast to provide a copy of the Public Utilities Commission's order on remand within fifteen days of its issuance.

In compliance with the above-referenced order, Comcast respectfully submits the enclosed order ("Remand Order") issued by the New Hampshire Public Utilities Commission ("Commission") on May 28, 2013. Among other things, the Remand Order indicates that the Commission has reconsidered its orders in Docket No. DT 09-044 and found that its fundamental state-law determinations in said docket remain unaffected by Laws of 2012, Ch. 177 (SB 48). *Remand Order* at 24. In addition, the Remand Order states that the Commission continues to hold that its regulation of the services at issue in Docket DT 09-044 is neither explicitly nor implicitly preempted by federal law. *Id.*

In addition to the above-described determinations, the Order makes new substantive findings, including that Comcast is an excepted local exchange carrier ("ELEC") under RSA 362:7, I(c)(3), *Remand Order* at 19, and that Comcast is a provider of IP-enabled service pursuant to RSA 362:7, I(e). *Remand Order* at 21. Comcast disagrees with these determinations, as well as other aspects of the Remand Order, and will be filing a motion for rehearing with the Commission pursuant to RSA 541:3. In the event that the motion for rehearing is denied, Comcast will be filing an appeal with this Court.

Please contact me if there are any questions about this filing. Thank you for your assistance.

Very truly yours

Susan S. Geiger

Enclosure

cc: Harry Malone, Esq.
Samuel L. Feder, Esq.
Luke C. Platzer, Esq.
Stacey Parker, Esq.
Adam G. Unikowsky, Esq.
Robert J. Munnelly, Jr. Esq.
Brian W. Murray, Esq.
Matthew A. Brill, Esq.
Julie P. Laine, Esq.
Vincent M. Paladini, Esq.
Debra Howland
Rorie Hollenberg, Esq.
Darren Winslow
Attorney General Joseph Foster
Lynn H. Fabrizio, Esq.
Lisa M. English, Esq.
NH Internet Service Providers Association
Union Telephone Company
Otel Telekom, Inc.
segTel, Inc.

1017097_1

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 12-308

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

Effect of SB 48 on VoIP and IP-Enabled Services

Order on Remand

O R D E R N O. 25,513

May 28, 2013

APPEARANCES: Susan S. Geiger, Esq., Luke C. Platzer, Esq. and Stacey Parker, Esq. for Comcast Phone of New Hampshire, LLC and Comcast IP Phone II, LLC; Alexander W. Moore, Esq. for Verizon; Harry N. Malone, Esq. for Rural Local Exchange Carriers; Patrick C. McHugh, Esq. for Northern New England Telephone Operations d/b/a FairPoint Communications; Susan W. Chamberlin, Esq. for Office of Consumer Advocate; David J. Shulock, Esq. and Edward N. Damon, Esq. for Commission Staff.

I. BACKGROUND

In Docket No. DT 09-044, the Rural Carriers of the New Hampshire Telephone Association[1] (RLECs) requested an inquiry into the appropriate regulatory status of fixed Internet Protocol (IP)-enabled cable voice service in New Hampshire. The Commission found, in relevant part, that the fixed cable voice service provided by affiliates of Comcast Corporation constitutes the conveyance of telephone messages.[2] Order No. 25,262 at 44. As a result, the Commission held that the cable voice service offered by Comcast is subject to the Commission's jurisdiction under RSA 362:2 (Order No. 25,262 at 48) and that the service itself is regulated as a

[1] Members of the New Hampshire Telephone Association are Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc., Hollis Telephone Company, Inc., Kearsarge Telephone Company, and Wilton Telephone Company.

[2] The Commission made identical findings with regard to fixed cable voice services offered by Time Warner. Time Warner did not appeal from Order No. 25,262 and did not participate in the proceedings on remand. For simplicity sake, we will frame our discussion in terms of Comcast's digital voice (CDV) service to the extent possible.

competitive local exchange carrier (CLEC) service under the Commission's rules. *Id.* at 49. Comcast IP Phone II, LLC and Comcast Phone of New Hampshire, LLC (collectively, Comcast) appealed Order No. 25,262, Order No. 25,274, and Order No. 25,288 to the Supreme Court on October 28, 2011.

On June 11, 2012, Governor John H. Lynch signed Senate Bill 48, Laws 2012 chapter 177, effective August 10, 2012 (SB 48). SB 48 restructured telephone regulation in the State. Among other things, the bill: (1) clarified that voice over Internet protocol (VoIP) and other IP-enabled services are among the telephone utility services regulated pursuant to RSA 362:2; (2) created two essential classifications of telephone utilities;[3] and (3) established a matrix of regulations that apply differently to each service and to each utility in its provision of each service, and that apply most sparingly to IP-enabled services.

In an order dated October 12, 2012, the New Hampshire Supreme Court directed the Commission to reconsider Order No. 25,262 and Order No. 25,274, and any related orders in DT 09-044, in light of the enactment of SB 48.[4] The Court otherwise retained jurisdiction of Comcast's appeal. The Commission opened this docket in response to the Court's mandate and on October 24, 2012 issued an order of notice stating that the issues to be addressed on remand would not involve fact finding. No party argued that fact finding would be necessary. The Commission directed interested parties to address, in written briefs and oral argument, issues related to:

(i) whether the cable voice service under review in DT 09-044 falls within the statutory definition of "VoIP service" or "IP-enabled service" in RSA 362:7,1(d) and (e),

[3] These two classifications are "incumbent local exchange carriers," also referred to as "ILECs," and "excepted local exchange carriers," also referred to as "ELECs."

[4] None of the parties addressed the issues decided in Order No. 25,274 or Order No. 25,288 on remand. Accordingly, we have limited our review to reconsideration of the issues decided in Order No. 25,262.

(ii) whether, in light of the enactment of SB 48, any changes are required to be made or should be made to any of the findings and rulings in Order Nos. 25,262, 25,274 or 25,288, including the question of whether SB 48 affects the definition of "public utility" in RSA 362:2 and whether and to what extent regulatory treatment of Comcast and Time Warner as CLECs in respect to their cable voice services is still appropriate,

(iii) what areas of state regulation of CLECs described in such orders no longer apply as a result of the enactment of SB 48,

(iv) whether, in light of the nature and purpose of DT 09-044, SB 48 renders the Commission's previous findings and rulings legally insignificant and practically meaningless for the State of New Hampshire or Comcast, Time Warner or other providers of VoIP service or IP-enabled service, and

(v) whether SB 48 eliminated the significance of the Commission's determination that fixed IP-enabled cable voice service is a "public utility" service under state law by removing any regulatory obligations that depend on that determination.

The RLECs, Comcast, and the Office of Consumer Advocate (OCA), all of whom were parties to DT 09-044, submitted briefs. AT&T Corp. (AT&T) and Verizon filed a joint brief and Northern New England Telephone Operations LLC – d/b/a FairPoint Communications – NNE (FairPoint) and New Hampshire Legal Assistance (NHLA) filed comments as interested parties. The Commission held a hearing to receive oral argument on November 16, 2012.

II. SUMMARY OF FINDINGS

In this order, we hold that: (1) Comcast's digital voice service (CDV) constitutes an IP-enabled service as that term is defined in Senate Bill 48 and RSA 362:7, I(e) (West Supp. 2012); (2) CDV constitutes the conveyance of telephone messages to the public; (3) Comcast is a public utility; (4) Comcast is an excepted local exchange carrier (ELEC); and (5) the minimal state regulation imposed on Comcast as a provider of CDV is not preempted by federal law. *See* RSA 362:2 (West 2009); RSA 362:7, I (c) and (e) (West Supp. 2012).

III. POSITIONS OF THE PARTIES AND STAFF

A. RLECs

The RLECs argue that Comcast's voice service is a VoIP service under the newly enacted RSA 362:7, I(d), based upon Comcast's description of its service in DT 09-044. Nonetheless, the RLECs dispute that Comcast's voice service constitutes "interconnected VoIP services" as that term is used in federal law.

The RLECs further argue that no changes are required to any of the findings or rulings made in DT 09-044 because nothing in SB 48 disturbed the Commission's holding that cable voice service is a telephone utility service. The RLECs emphasize that SB 48 did not expressly vacate or overrule the Commission's orders in DT 09-044, alter the status of VoIP as a statutory telephone service, or distinguish VoIP telephone service from "statutory" telephone service aside from certain regulatory exemptions unique to VoIP. The RLECs find it most important that SB 48 did not create a blanket exemption for VoIP from any and all laws related to telecommunications services, but rather exempted VoIP providers only from certain aspects of Commission regulation.

The RLECs assert, therefore, that it was not the Legislature's intent to remove VoIP from all Commission regulation. As an example, the RLEC's point to RSA 362:6, which provides that "[t]he term 'public utility' shall not include any provider of cellular mobile radio communications services. Such services shall not be subject to the jurisdiction of the Public Utilities Commission pursuant to this title." The RLECs suggest that if it were the Legislature's intent to remove VoIP from all utility regulation, it would have done so. The RLECs reason that it is a "rule of statutory interpretation that legislators presume to mean what they say and know how to say it." (Hearing Transcript of November 16, 2012, at 54-55.)

According to the RLECs, because Comcast is a "provider of telecommunications services that is not an incumbent local exchange carrier" Comcast is an ELEC by definition. *See* RSA 362:7, I(c)(3). The RLECs assert that, as an ELEC, Comcast enjoys the regulatory relief that all other ELECs enjoy, that is, relief from many reporting, pricing, and customer service regulations. The RLECs further assert that the VoIP telephone services that Comcast provides are exempt from market entry regulations authorized by RSA 374:22-g, market exit regulations authorized by RSA 374:28, transfer of control regulations authorized by RSA 374:30-33, and regulations regarding rates, terms and conditions as authorized by RSA chapter 378. The RLECs argue that by the terms of the pertinent section of SB 48 (*see* RSA 362:7, II) and consistent with the principles of *expressio unius est exclusio alterius*[5], cable voice service is not exempt from all telecommunications statutes and regulations.

In keeping with this argument, the RLECs maintain that, although SB 48 granted additional statutory exemptions from regulation, the exemption was not absolute, and the Commission's findings and rulings in DT 09-044 remain legally significant and practical. As examples of statutes that remain unaffected by the enactment of SB 48, the RLECs point to the regulation of pole attachments under RSA 374:34-a and utility assessments pursuant to RSA 363-A.

The RLECs disagree with Comcast's contention, which is based upon one statement in the legislative history of the bill, that SB 48 prohibits the Commission from enforcing rules and orders that regulate or have the effect of regulating VoIP services and IP-enabled services as telecommunications services. The RLECs argue that such an interpretation of SB 48 is contrary to the plain meaning of the bill's text, and that because the bill is clear, precise, and unambiguous

[5] A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another.

on the subject, the Commission may not look beyond the bill for further indications of legislative intent. The RLECs posit that where the text of a statute and legislative history disagree, the text controls.

At hearing, the RLECs stated an interest in competitive neutrality and a fair and balanced legal and regulatory environment, with no special treatment for Comcast or other VoIP or IP-enabled service providers. The RLECs view DT 09-044 as an investigation that the Commission was empowered to conduct, to answer a basic question about the ground rules on how public utilities conduct themselves in New Hampshire. (Hearing Transcript of November 16, 2012, at 57.) The RLECs also expressed concern that although Comcast assures that it is "voluntarily" paying assessments through its ELEC, it may in fact not be paying its fair share and, under SB 48, Comcast might cease paying at any time. The RLECs further described the obligation of utilities to report revenues pursuant to assessments, and the disputed applicability of this obligation to cable operators, as an active controversy in this docket. (Hearing Transcript of November 16, 2012, at 57-58.) Lastly, the RLECs emphasized that the issue of universal service is critical to them and they believe that if cable companies are found exempt from telecommunications regulation, it will have a huge impact on how universal service and carrier of last resort obligations are handled. (Hearing Transcript of November 16, 2012, at 62-63.)

B. Comcast

Comcast states that it established that CDV meets all of the definitional criteria of VoIP service during the evidentiary phase of Docket DT 09-044. Comcast argues that CDV cannot be an IP-enabled service under RSA 362:7, I(e), even though the definition might otherwise apply, because the statute states that "no service included within the definition of 'Voice over Internet Protocol service' shall be included within" the statutory "IP-enabled service . . . category."

Comcast notes that the Legislature treated VoIP services and IP-enabled services as identical for purposes of SB 48; therefore, under the statute and for regulatory purposes, VoIP providers are treated identically to IP-enabled services. (Hearing Transcript of November 16, 2012, at 30.) Comcast argues that the Legislature intended SB 48 to ensure that VoIP services and IP-enabled services are not subject to regulation as telecommunications services.

Comcast argues that RSA 362:7, II precludes any law that has the effect of "regulating . . . market entry, market exit, transfer of control, rates, terms, or conditions" of its services (Comcast Brief p. 6). According to Comcast, this preclusion is broader than an exception to the RSA 362:2 definition of "public utility" would have been. *Id.* Comcast contends that regulation of its cable voice service is now confined by SB 48 to specific statutes listed in RSA 362:7, III, which Comcast refers to as the "savings clause." Comcast believes that: (1) SB 48 retroactively deprives the Commission of jurisdiction over the issues raised in DT 09-044 by eliminating any trigger for independent inquiry under RSA 365:5; (2) that the Commission should not leave standing orders that have been superseded by legislative changes; and (3) that any jurisdiction the Commission still maintains over these issues is discretionary at best. Comcast argues that, as a consequence, Order Nos. 25,262, 25,274 and 25,288 in DT 09-044 should be vacated as moot.

Comcast further asserts that any CLEC regulations addressed in orders in DT 09-044 that are not encompassed in the savings clause no longer lawfully apply to its CDV service. Comcast maintains that SB 48 has thereby made academic the question of whether Comcast is a "public utility" and CDV service is a telephone service, and has rendered moot the questions posed in DT 09-044. Comcast argues that the exceptions in RSA 362:7, III either do not apply to Comcast to begin with, apply to cable providers in general irrespective of whether or not the providers are offering VoIP services, or turn on independent, regulation-specific criteria rather

than an entity's "public utility" status, "leaving at most a vanishingly small set of regulations with which Comcast's CLEC applies in any event, and concerning which there is no dispute." (Comcast Brief, p. 15)

For example, Comcast argues that because Comcast Phone of New Hampshire imputes revenues from, and pays utility assessment fees on behalf of, Comcast IP Phone, whether Comcast IP Phone has an independent obligation to pay the fees has no relevance. According to Comcast, Comcast IP Phone needs Comcast Phone of New Hampshire for interconnection, number porting, etc.; and that there could be no Comcast IP Phone without Comcast Phone of New Hampshire to provide the functions it serves. Comcast therefore argues that concerns that Comcast Phone of New Hampshire might cease doing business (and therefore cease paying an assessment on behalf of Comcast IP Phone) are speculative. Comcast asserts that it is in compliance with New Hampshire law and, although it does not consider its current assessment mechanism mandatory, has no intention of challenging how it accounts for and pays utility assessments. (Hearing Transcript of November 16, 2012, at 18-25.) Alternatively, Comcast argues that, if the Commission is not inclined to vacate the state law determination that Comcast's VoIP provider is a public utility then, at bare minimum, the Commission should vacate the parts of the orders that address the federal classification of VoIP service. (Hearing Transcript of November 16, 2012, at 18.)

C. AT&T and Verizon

AT&T and Verizon claim that the definitions of VoIP and IP-enabled services contained in SB 48 encompass all VoIP services, whether nomadic or fixed, and that Comcast and Time Warner meet the criteria to qualify as either a VoIP service or an IP-enabled service as defined in the bill. AT&T and Verizon claim that the record in DT 09-044 demonstrates that customers

must have a broadband connection to use Comcast or Time Warner voice services, and that this dependency satisfies the criterion of RSA 362:7, I(d)(2). (AT&T and Verizon Brief, p. 3) AT&T and Verizon further maintain that RSA 362:7, II evidences a legislative intent to confirm that VoIP and IP-enabled services are not regulated as telecommunications services, which they characterize as following the *Vonage Order*.[6] The companies characterize the effect of this provision as reversing the Commission's order holding that VoIP providers are subject to regulation as telecommunications providers.

AT&T and Verizon argue that SB 48 prohibits the Commission from regulating VoIP and IP-enabled voice services as telecommunications services, and therefore the Commission's preliminary finding that providers of cable voice services are a public utility has become academic, the Commission's orders have become unenforceable, and Comcast's appeal has become moot.[7] AT&T and Verizon note that the federal courts have recognized, when faced with orders that have become moot and unreviewable through "circumstances not attributable to the parties," such as intervening legislation, the proper course is to vacate the underlying orders to prevent them from having any precedential effect.[8] AT&T and Verizon urge the Commission

---

[6] *In re Vonage Holdings Corp*., WC Docket No. 03-211, Memorandum Opinion & Order, 19 FCC Rcd 22404, ¶ 20 (2004) ("*Vonage Order*"), *aff'd, Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (finding that state entry requirements and filing and notice requirements for rates, terms, and conditions of service conflict with federal policies).

[7] *See In re Verizon New England, Inc.*, DT 07-011, Order No. 24,780, at 4 (July 25, 2007) ("[A] matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." (quoting *In re Juvenile 2005-212*, 917 A.2d 703, 705 (N.H. 2007))); *Exeter Hosp. Med. Staff v. Board of Trustees of Exeter Health Res., Inc.*, 810 A.2d 53, 58 (N.H. 2002) ("We generally will refuse to review a question that no longer presents a justiciable controversy . . . ."); *McNair v. McNair*, 856 A.2d 5, 15 (N.H. 2004) (declining to address issues that had become moot).

[8] *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 451-52 (1st Cir. 2009) (internal quotation marks omitted); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment."); *American Family Life Assurance Co. of Columbus v. FCC*, 129 F.3d 625, 631 (1997) (same). This practice protects a party from being left unfairly "under the pall of an unreviewed administrative order," *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d 1373, 1382-83 (D.C. Cir. 1979); "preserves both sides'

to vacate its prior orders. Verizon does not see a difference in meaning between the terms "user" and "end-user" in the language of SB 48 (Hearing Transcript of November 16, 2012, at 52.)

D. NHLA

NHLA cautions the Commission to adhere to the scope of issues set forth for remand by the New Hampshire Supreme Court. NHLA contends that the scope of issues should be limited to an evaluation of the impact of SB 48 on Comcast and Time Warner's VoIP and/or IP-enabled services. NHLA asserts that the scope of this docket should not include a broad evaluation of the cable industry in general or the impact of SB 48 on the existing ILECs.

E. FairPoint

FairPoint states that it takes no position on any of the questions posed in the Commission's Order of Notice dated October 24, 2012. Nonetheless, FairPoint objects to the overall scope of this proceeding and alleges that the Order of Notice does not comply with the Supreme Court's limited directive to reconsider orders related to DT 09-044 in light of the recent enactment of SB 48. FairPoint contends that the Supreme Court did not direct the Commission to undertake an expansive interpretation of SB 48. FairPoint states that the Commission "clearly limited intervener participation and abridged the parties' rights to participate in a new docket with far-reaching implications despite the lack of any justiciable controversy." FairPoint challenges that this violates Constitutional due process and the notion of fundamental fairness, which requires that government conduct conform to the community's sense of justice, decency and fair play. FairPoint charges that the Commission exceeded its jurisdiction in this docket and violated the Administrative Procedures Act. FairPoint states that SB 48 is a far-reaching law that

---

chance to litigate the issue in an appeals court in the future," *Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44, 54 (1st Cir. 2002); and avoids the establishment of precedent "untested by appellate scrutiny," *Arevalo v. Ashcroft*, 386 F.3d 19, 21 (1st Cir. 2004) (internal quotation marks omitted).

involves many issues beyond VoIP and IP-enabled services, and affects many other providers. FairPoint contends that SB 48 deregulates ELECs from what it characterizes as old, out-of-date regulations that applied to a monopolistic telecommunications industry and levels the regulatory playing field such that FairPoint, as an ILEC, must be treated from a regulatory perspective the same as CLECs. FairPoint argues that any interpretation of SB 48 and the potential abridgement of ELECs' rights thereunder requires considerable deliberation by the Commission and the affected telecommunications companies, conducted under proper rulemaking procedures.

F. Office of Consumer Advocate

The OCA states that RSA 362:2, which is unchanged by SB 48, defines public utilities, in relevant part, as "corporations, operating plant or equipment for the *conveyance of telephone or telegraph messages."* The OCA contends that in Order No. 25,262 (August 11, 2011), the Commission summarized its analysis of that definition, stating "[t]he language of RSA 362:2 defines a public utility by the service it renders, not by the technology it uses to provide such service," *Id.* at 45. This conclusion is unchanged by the new provisions of SB 48. The OCA hypothesizes that if the definition of a "public utility" depends on technology, then the companies will simply reconfigure their technology so that they get preferable treatment, and that is not fair and equitable regulation. (Hearing Transcript of November 16, 2012, at 70-71.) The OCA argues that sections 7 and 8 of SB 48 add definitions of advanced technologies that did not exist in 1911 when RSA 362 was first enacted, such as definitions for ILEC, ELEC, VoIP, and IP-Enabled services. The OCA further maintains that when the sections of SB 48 are considered together, the overall impact of the legislation is to clarify which regulations apply to the new technologies and which do not. The OCA notes that when interpreting changes that

apply to different pieces of a legislative scheme of regulation, the New Hampshire Supreme Court applies the following canons of statutory construction:

> We interpret statutes not in isolation, but in the context of the overall statutory scheme. *Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 340, 682 A.2d 710 (1996). Our analysis must start with consideration of the plain meaning of the relevant statutes, construing them, where reasonably possible, to effectuate their underlying policies. *Nashua School Dist. v. State,* 140 N.H. 457, 458, 667 A.2d 1036 (1995). Insofar as reasonably possible, we will construe the various statutory provisions harmoniously.

Appeal of Pennichuck Water Works, Inc., 160 N.H. 18 (N.H. 2010) at 27.

The OCA asserts that if the Legislature wished to remove telecommunications from the definition of a public utility, it could have easily done so by striking the phrase *"conveyance of telephone or telegraph messages"* from the statute, but it chose not to do so. The OCA points out that the decisions in this case will affect residential users of telecommunications services. (Hearing Transcript of November 16, 2012, at 70.) In addition, the OCA argues that SB 48 must be read in conjunction with RSA 374:22-p (III), which states "The Commission shall seek to ensure that affordable basic telephone services are available to consumers throughout all areas of the state at reasonably comparable rates." The Legislature chose to leave this provision in place. The OCA maintains that "as the Commission resolves the competitive issues between corporate giants Comcast and Time Warner, the impact on residential consumers remains an important consideration under Commission jurisdiction." (OCA Brief p. 3)

The OCA notes that when interpreting complex provisions, the New Hampshire Supreme Court applies additional canons of statutory construction as follows:

> When construing the statute's meaning, we first examine its language, and where possible, ascribe the plain and ordinary meanings to words used. *1d.* If the language used is clear and unambiguous, we will not look beyond the language of the statute to discern legislative intent. *State v. Leonard,* 151 N.H. 201, 203, 855 A.2d 531 (2004). We will, however, construe all parts of the statute together to effectuate its overall purpose and to avoid an absurd or unjust result.

Formula Development Corporation v. Town of Chester, 156 N.H. 177 (N.H. 2007) at 178-179, citing *Van Lunen,* 145 N.H. at 86. The OCA reasons that regarding SB 48, it is important to look not only at the language passed by the Legislature, but the language that the Legislature preserved. (Hearing Transcript of November 16, 2012, at 71.) The OCA contends that by keeping the provisions of RSA 362:2 and 374:22-p, III intact, the Legislature expressed its overall purpose to preserve basic protections for residential customers of telecommunications services.

SB 48 does not take away the obligations of universal service. The OCA points out that the purpose of the Communications Act of 1934 is for "regulating interstate and foreign commerce in communication, by wire and radio, so as to make available so far as possible to all the people of the United States. . . . Without discrimination on the basis of race, color, religion, national origin or sex, a rapid efficient nationwide and worldwide wire and radio communication service, with adequate facilities at reasonable charges." The OCA asserts that the Telecommunications Act of 1996 preserves the provisions of universal service. The OCA asserts that SB 48 maintains a competitive playing field for all companies. (Hearing Transcript of November 16, 2012, at 72-73.)

The OCA concludes by conceding that SB 48 does make changes to the law, but states that how those changes move forward need to be carefully considered. The OCA states that it supports the position of the RLECs and suggests that the RLECs' interpretation of the statute is consistent with overall goals of competitive equity, along with OCA goals of customer options and affordability. The OCA asserts that customers need to be able to rely on regulatory authority. (Hearing Transcript of November 16, 2012, at 74.)

V. COMMISSION ANALYSIS

In Order No. 25,262 in Docket No. DT 09-044, the Commission determined that; (1) the fixed IP-enabled cable voice services offered by Comcast constitute the conveyance of telephone messages under RSA 362:2; (2) Comcast is a telephone public utility under RSA 362:2 and subject to regulation as a "competitive local exchange carrier" or "CLEC;" (3) New Hampshire's minimal regulation of services offered by CLECs does not conflict with federal law or frustrate federal policy; therefore, state regulation of Comcast's voice services is not implicitly preempted by federal law; and (4) Comcast's voice services are telecommunications services and not information services under federal law; therefore, state regulation of these services is not expressly preempted by federal law. In this remand proceeding, the New Hampshire Supreme Court has directed us to reconsider the first three of these determinations in light of the enactment of SB 48.

Although SB 48 substantially restructures New Hampshire's regulation of telephone public utilities, it does not strip the Commission of jurisdiction to determine the proper regulatory categorization of Comcast's CDV service, does not render moot our decisions that CDV is a telephone service or that Comcast is a public utility, and does not require us to vacate our prior orders. In fact, the bill requires few changes to the Commission's orders in DT 09-044. Our state law-based determinations in DT 09-044 are founded on the statutory definition of "public utility" in RSA 362:2. Pursuant to this statute, the definition of a telephone public utility includes three elements: (1) the ownership, operation or management of plant or equipment or any part thereof; (2) for the conveyance of telephone or telegraph messages; (3) for the public. RSA 362:2; *see also* Order No. 25,262 at 41.

We reasoned that "[t]he 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," and that "the 'conveyance of telephone messages' is the determinative characteristic of a telephone utility subject to Commission jurisdiction under RSA 362:2." *Id.* at 45. Because there is no dispute that Comcast owns, operates, and manages plant and equipment and provides service for the public, our state law-based analysis turned on --whether CDV constitutes the "conveyance of telephone messages."

In Order No. 25,262, we analyzed CDV and found that CDV service falls "squarely within" the "conveyance of telephone messages" language of RSA 362:2. Order No. 25,262 at 44. "From a user's perspective, the . . . services offered by Comcast . . . function in a manner similar to that of traditional telephone service, and the essential conveyance of messages is the same . . ." *Id.* at 5. "In terms of functionality and [customer] equipment, cable voice service appears no different from traditional telephone service . . ." *Id.* at 7. We further found that:

> The technology at issue represents a technological advancement in the conveyance of telephone messages that builds on the legacy "plain old telephone service" (POTS) network. Cable voice technology serves to facilitate the conveyance of telephone messages to and from the traditional public switched telephone network (PSTN) through an IP network, managed and operated by the providers of the services, over wires that end in a fixed customer location. Fixed cable voice service is a direct substitute for traditional landline phone service.
>
> From a user's perspective the fundamental characteristics of cable voice service are essentially identical to those of traditional telephone service. End users of both cable voice service and POTS use a traditional handset, listen for a dial tone, send and receive voice communications converted to and from analog signals, interconnect with the PSTN, are fixed in geographic location, assigned a North American Numbering Plan telephone number, and are provided portability for that number.

Order No. 25,262 at 46. We concluded that "pursuant to RSA 362:2 . . . the cable voice services offered by Comcast . . . to New Hampshire customers constitute the conveyance of telephone

messages and, thus, the providers of such services are subject to Commission jurisdiction." *Id.* at 48.

SB 48 does not alter or amend the operative definition of public utility in RSA 362:2 or, more particularly, define "conveyance of telephone messages" differently than did the Commission in Order No. 25,262. *See* RSA 362:2 (West 2009). Nor does the bill alter the service that Comcast offers. We find no basis, therefore, to change our finding that CDV constitutes the conveyance of telephone messages. Nor are we compelled to change our holding that Comcast IP Phone of New Hampshire is a public utility under RSA 362:2, because there was and remains no dispute that Comcast meets the remaining two elements of a telephone public utility.

We reject Comcast's argument that, by enacting SB 48, the Legislature "emphatically rejected the proposition that VoIP services should be subject to public utility regulation as telephone services." Instead, we find that SB 48 evidences a legislative intent to regulate, to a lesser degree, providers of VoIP and fixed IP-enabled cable voice services as telephone public utilities where the services constitute the conveyance of telephone messages. The bill evidences this intent by adding a new section to chapter 362, titled "Telephone Utilities." Within that section, RSA 362:7, I (d) and (e) define two related services: "Voice over Internet Protocol (VoIP) services" and "IP-enabled services." RSA 362:7, I (d) and (e) (West Supp. 2012). RSA 362:7, II and III then exempt VoIP services and IP-enabled services from some, but not all public utility regulation. RSA 362:7, II and III (West Supp. 2012). In particular, RSA 362:7, II exempts VoIP and IP-enabled services or any provider of those services from the subset of utility regulations regarding market entry, market exit, and transfer of control, and from regulation of the rates, terms, and conditions of service. RSA 362:7, II (West Supp. 2012). Nonetheless, full

application of New Hampshire statutes to VoIP and IP-enabled services is permissible, even where market entry, market exit, transfer of control, and rates, terms, and conditions are concerned, for the types of regulations specified in RSA 362:7, III. RSA 362:7; III (West Supp. 2012).

We also reject Comcast's argument that SB 48 eliminates the regulatory significance of whether cable voice service is a telephone service under RSA 362:2, and the implication that this demonstrates that CDV is not a regulated service or that Comcast is not a telephone public utility. First, Comcast's argument proceeds on the theory that there is no significance to regulating CDV and Comcast IP Phone because the regulations specified in RSA 362:7, III in some cases apply to non-utilities and in some cases apply to Comcast Phone of New Hampshire. We do not recognize this theory as a maxim of statutory construction but instead as an illogical universalization of the particular. Comcast's business model that intertwines affiliated companies in the provision of telephone service is irrelevant to the Legislature's intent in enacting SB 48. Second, the fact that VoIP and IP-enabled services are exempted from some but not all traditional utility regulation does not create a legislative exemption from public utility status, for the service or for the provider.

If the Legislature had intended to exempt Comcast from status as a telephone public utility, it would have done so directly. The Legislature has stated a clear exemption from telephone public utility status in every other circumstance in which it decided certain entities were not public utilities. *See* RSA 362:3-b ("Authorized providers of shared tenant services . . . shall not be deemed to be . . . public utilities . . ."), and RSA 362:6 ("The term 'public utility' shall not include . . . cellular mobile communications services. . . . Such services shall not be subject to the jurisdiction of the public utilities commission . . ."). The Legislature has been

equally clear and direct in exempting electric, gas, and water companies from public utility status when they would otherwise be considered public utilities under RSA 362:2. *See* RSA 362:4 (Water Companies, When Public Utilities), RSA 362:4-a (Electric Companies, When Public Utilities), RSA 362:4-c (Electric Generation Companies, When Public Utilities), RSA 362:5 (Exemption of Manufacturing Establishments Selling Surplus Electricity) and RSA 362:4-b (Gas Companies, When Public Utilities). We reasoned similarly in Order No. 25,262, and nothing in SB 48 causes us to reason differently. *See* Order No. 25, 262 at 45.

We find that by leaving the definition of a telephone public utility under RSA 362:2 intact, by not setting forth a more particular definition of "conveyance of telephone messages" that differs from our published understanding, by defining VoIP and IP-enabled services in the more particular "Telephone Utilities" section of the chapter, and by exempting those services from only a subset of public utility regulation, the Legislature evidenced a clear and unambiguous intent to regulate these services as telephone public utility services, and to regulate the providers of such services as public utilities, albeit with a low level of regulatory oversight. The enactment of SB 48 serves to confirm the Commission's determinations that CDV constitutes the conveyance of telephone messages and that Comcast is a telephone public utility. Where, as here, the language of a statute is plain and unambiguous on the question to be resolved, we need not look further for indications of legislative intent. *Ireland v. Worcester Ins. Co*., 149 N.H. 656, 661 (2003). To the extent that the partial legislative history submitted by Comcast disagrees with the text of SB 48, the text of the bill controls. *See* 2A Sutherland, Statutes and Statutory Construction § 48.2 (7th ed. 2011).

In Order No. 25,262, after determining that Comcast IP Phone is a telephone public utility, we determined that Comcast IP Phone is a "competitive local exchange carrier " or

"CLEC" subject to minimal utility regulation. SB 48 categorizes telephone public utilities differently than did our State's prior law, and designation as a CLEC under state law is no longer appropriate. SB 48 divides all telephone public utilities into two broad categories: (1) "Incumbent local exchange carriers" or "ILECs," and (2) "Excepted local exchange carriers" or "ELECs." (An ILEC or an ELEC may offer IP-based services, and those services are subject to less regulation than non-IP telephony.)

In Order No. 25,262, we determined, under federal law, that CDV as provided by Comcast is a telecommunications service. We do not revisit that determination here, because SB 48 does not purport to, and cannot, change federal law. Because Comcast is a telecommunications service provider and is not an incumbent local exchange carrier under RSA 362:7, I(b) or 47 U.S.C. section 251(h)(1), we must find that Comcast is an ELEC under the catch-all provision of RSA 362:7, I(c)(3). That finding, made under state law, has no bearing on Comcast's status at the federal level.

It would be premature for the Commission to specify here the regulations that would apply to Comcast as an ELEC, as we did for CLECs in Order No. 25,262, because the Commission has not yet adopted rules to implement the changes called for by SB 48.[9] Such exactitude is not necessary for the Commission to respond to the Court's directive to reconsider its orders in DT 09-044 in light of passage of SB 48. Our primary purpose in describing the CLEC regulations applicable to Comcast under prior law was to demonstrate that the requirements were of the type, and were so minimal that they did not, conflict with nor frustrate

[9] The Commission has opened a rulemaking docket, Docket No. DRM 12-036, to re-adopt its telephone rules with amendments that are consistent with SB 48. Notice of the Commission's adoption of an initial proposal was published in the New Hampshire Rulemaking Register on May 2, 2013. The Commission does not expect this rulemaking process to be completed until at least September 2013.

federal law or policy. This led to our conclusion that New Hampshire's regulation of Comcast and its CDV service was not implicitly preempted by federal law.

SB 48 does not alter our conclusion regarding implicit preemption, because, if anything, SB 48 has reduced even further the state's regulation of ELECs and of VoIP and IP-enabled telephone utility services, and has minimized regulation of telephone utilities to the extent they provide such services. *See* RSA 362:7, II and III, and 362:8. (West Supp. 2012). With some exceptions, VoIP and IP-enabled services are now protected from laws that regulate or would have the effect of regulating market entry, market exit, transfer of control, and rates, terms and conditions of service. *See id.* While these exemptions do not free Comcast from all utility regulation, Comcast is subject to far more limited state regulation in its provision of CDV following the enactment of SB 48 and, as a result, there is even less reason to find implicit preemption by federal law.

VoIP is not a term that is universally defined and different types of VoIP delivery (*i.e* fixed VoIP, nomadic VoIP, interconnected VoIP) give rise to differing regulatory treatment under federal law. In Order No. 25,262, we stressed that the term VoIP is sometimes used to describe forms of communication that are not at issue in this case. We were careful *not* to make a finding that CDV constitutes "interconnected VOIP" as defined in federal law, and instead referred to CDV as a fixed IP-enabled cable voice service. We are now confronted with state statutory definitions of "VoIP service" and "IP-enabled service" in RSA 362:7, I(d) and (e).[10] Comcast argues that its CDV service meets the definition of "VoIP service" in RSA 362:7, I(d), meaning a service that:

> (1) Enables real-time 2-way voice communications that originate from or terminate in the user's location in Internet Protocol or any successor protocol;

[10] Both VoIP service and IP-enabled service" receive the same regulatory treatment under state law.

> (2) Requires a broadband connection from the user's location; and
>
> (3) Permits users generally to receive calls that originate on the public switched telephone network and terminate calls to the public switched telephone network.

More particularly, Comcast argues that CDV meets this definition, claiming that it established during the evidentiary phase of DT 09-044 that its service "requires a broadband connection in the form of a last-mile connection provided by Comcast's locally franchised cable television operating affiliates." Brief of Comcast Phone of New Hampshire, LLC and Comcast IP Phone II, LLC at 3-4 and n.2.[11]

Based on the factual record developed in DT 09-044, however, we find that CDV is an IP-enabled service pursuant to RSA 362:7, I(e). An IP-enabled service is defined as:

> . . . any service, capability, functionality, or application provided using Internet Protocol, or any successor protocol, that enables an end user to send or receive a communication in Internet Protocol format or any successor format, regardless of technology; provided, however, that no service included within the definition of "Voice over Internet Protocol service" shall be included within this definition.

RSA 362:7, I(e) (West Supp. 2012). IP-enabled voice services that do not require a broadband connection fall into this category.

In DT 09-044 we considered and rejected arguments by Comcast and Time Warner that their services require a broadband connection from the user's location to the Internet, albeit in the context of whether their services meet the requirements of nomadic VoIP laid out in the Vonage Order, or the federal definition of "interconnected VoIP" under 47 C.F.R. §9.3.[12] We

[11] The Commission made no finding in Docket 09-044 that CDV requires a broadband connection, in fact, the Commission made the opposite finding--that CDV does not require a broadband connection.

[12] Although our state definition of VoIP service and the federal definition of interconnected VoIP differ somewhat, both definitions demand that the service require a broadband connection from the user's location. Cf. 47 C.F.R.

found that "[u]nlike calls made over a "nomadic" VoIP telephone service such as Vonage or Skype, cable voice calls do not require a broadband connection to the Internet . . . " Order No. 25,262 at 7-8. This is a two-part finding: first that CDV does not involve a connection to the Internet, and secondly, that CDV does not require broadband to complete a call.

We recognize that our finding is stated in terms of a broadband connection to the Internet while the definition of VoIP service under SB 48 "requires a broadband connection from the user's location." At first blush, our finding in Order No. 25,262 and the legislative language may appear to be at odds, but they are not because a broadband connection connotes a connection to the Internet. According to the FCC, "[t]he term broadband *commonly refers to high-speed Internet access* that is always on and faster than the traditional dial-up access."[13] Emphasis supplied. The FCC has also answered the question "What is Broadband?" by stating "Broadband or high-speed Internet access allows users to access the Internet and Internet-related services at significantly higher speeds than those available through "dial-up" Internet access services."[14] When we found that CDV does not require a broadband connection to the Internet we also considered that the broadband connection had to be from some location. We believe that a finding that Comcast provides voice service only through a fixed coaxial cable connection to the user's premises is necessarily implied in our finding in Order No. 25,262 that CDV does not require a broadband connection to the Internet. To the extent that a finding that CDV does not

---

§9.3 and RSA 362:7, I(d) (West Supp. 2012); *see also,* Opening Brief of Comcast Phone of New Hampshire, LLC and its Affiliates at 8 and n.33 (Jan. 15, 2010) (arguing that CDV meets the federal definition of interconnected VoIP service because customers access service over the same broadband connection over which it delivers cable services); Brief of TWC Digital Phone LLC at 1 (Jan. 15, 2010) (arguing that TWC's service meets the federal definition of VoIP because it requires use of a broadband connection); *id.* at 21 (arguing that TWC's service required a broadband connection to the subscriber's location). Neither Comcast nor Time Warner's evidence in DT 09-044 convinced us that their services require such a broadband connection for the provision of cable voice service.

[13] http://www.broadband.gov/about_broadband.html

[14] http://www.fcc.gov/guides/getting-broadband

require a broadband connection *from the user's location* to the Internet was implicit in Order No. 25,262, we make that finding explicit here.

The second part of our finding in Order No. 25,262 is that CDV does not *require* broadband. We reaffirm that finding. According to Verizon, the term broadband is defined solely in terms of a data transfer speed of no less than 760 kilobits per second. Transcript 11-16-12 at 107. According to Comcast, a call using its voice service requires a minimum of only 90 kilobits per second. Comcast Response to NHTA Data Request 1-4a. Clearly, to the extent that broadband is defined in terms of data transfer speed, a broadband connection is not required to complete a call using CDV.

Additionally, we find that the statutory definition of VoIP service is unambiguous that it is the service itself, and not the service provider, that must require a broadband connection. RSA 362:7, I(e)(2) ("'Voice over Internet Protocol ('VoIP') service' means any *service* that . . . requires a broadband connection . . ."). Mere utilization of a cable that is also capable of a high-speed connection to the Internet does not meet the definitional requirements of VoIP service set forth in our statute. Comcast may choose, for many reasons not relevant to the construction of our statutes, to utilize its affiliate's coaxial cable to provision telephone service, but the evidence remains clear that CDV service does not require a broadband connection, whether in terms of Internet connectivity or data transfer speed as discussed above.[15]

CDV does not require a broadband connection regardless whether the term "broadband connection" is defined under RSA 362:7, I(d)(2) as a high speed connection from the user's location to the Internet, or a connection with a minimum speed of 760 kilobits per second. Because CDV does not require a broadband connection from the user's location, we find that

[15] *See also* Comcast reply to Staff Data Request 1-37 where Comcast confirms end users can purchase voice service without buying Internet access and Comcast's response to Staff Data Request 1-3 where Comcast states its voice service and Internet service are provided over a common facility from the customer's premise.

CDV constitutes an IP-enabled service under RSA 362:7, I(e) which categorizes IP-enabled services as telephone utility services "regardless of technology."

V. CONCLUSION

The Commission has reconsidered its orders in Docket No. DT 09-044 in light of the Legislature's enactment of SB 48, Laws 2012 chapter 177. Our fundamental state-law determinations remain unaffected by SB 48. We continue to find that Comcast's fixed- IP-enabled cable voice services constitute the conveyance of telephone messages, and that Comcast is therefore a public utility pursuant to RSA 362:2. We also continue to hold that New Hampshire's regulation of these voice services is neither explicitly nor implicitly preempted by federal law. Given the enactment of SB 48, however, we must alter our finding that Comcast is a "CLEC." Comcast now falls into the broader category of telecommunications providers referred to in SB 48 as "ELECs." We believe that it is neither necessary nor prudent to specify the exact regulations with which an ELEC must comply at this time, because development of the rules to implement the regulatory changes called for by SB 48 is being conducted with stakeholder input and pursuant to the state's administrative rulemaking standards. Nonetheless, the Legislature has decided to relieve fixed IP-enabled cable voice services, such as those provided by Comcast, from the subset of regulations specified in RSA 362:7, II, as modified by RSA 362:7, III.

Based upon the foregoing, it is hereby

ORDERED, that Order No. 25,262 is hereby modified to designate Comcast as an excepted local exchange carrier rather than a competitive local exchange carrier, consistent with the above; and it is

FURTHER ORDERED, that in all other respects the orders in Docket No. DT 09-044 remain unchanged except as clarified herein.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of May, 2013.

Amy L. Ignatius
Chairman

Michael D. Harrington
Commissioner

Robert R. Scott
Commissioner

Attested by:

Debra A. Howland
Executive Director