

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**

**APPELLANTS' MEMORANDUM
IN RESPONSE TO
COURT'S FEBRUARY 21, 2012 ORDER**

Comcast Phone of New Hampshire, LLC and Comcast IP Phone II, LLC (collectively "Comcast" or "the Appellants") file this Memorandum in response to an Order of this Court issued February 21, 2012 requiring that Comcast address the issue of whether the Court should dismiss the instant appeal without prejudice as an improper interlocutory appeal. For the reasons set forth below, Comcast respectfully submits that the instant appeal is properly before the Court and should not be dismissed.

PROCEDURAL HISTORY¹

This proceeding involves an appeal by Comcast of an order issued by the New Hampshire Public Utilities Commission (the "PUC" or "Commission") on August 11, 2011 that subjects two of Comcast's interconnected Voice over Internet Protocol ("VoIP") services, known as "Comcast Digital Voice" and "Business Class Voice"

¹ The procedural history presented in this memorandum is not intended to be comprehensive; rather, it highlights those events relevant to the Court's consideration of the issue of whether the instant appeal is improperly interlocutory.

(collectively “CDV”),² to state public utility regulation in the State of New Hampshire. See Order Finding Jurisdiction and Requiring Limited Regulation (Aug. 11, 2011), Appendix to Appeal (“App.”) at 1-60 (hereinafter “Order No. 25,262”). Comcast timely sought rehearing of Order No. 25,262 on September 12, 2011 in accordance with RSA 541:3. See Motion for Rehearing and Suspension of Order No. 25,262 and Motion to Reopen Record (Sept. 12, 2011), App. at 61. Consolidated with that motion, Comcast filed two additional motions with the Commission – a Motion for Suspension of Order No. 25,262, and a Motion to Reopen the Record. See *id.* The PUC denied all three motions on September 28, 2011, by means of Order No. 25,274. See Order Denying Motion for Rehearing and Suspension of Order and Motion to Reopen Record (Sept. 28, 2011), App. at 98.

Because New Hampshire law is unclear as to whether Comcast could petition for an appeal from portions of Order No. 25,274 denying Comcast’s Motion to Reopen the Record and the Motion for Suspension of Order No. 25,262 without first seeking rehearing of those portions of Order No. 25,274,³ Comcast sought rehearing/reconsideration of the Commission’s denial of both motions on October 28, 2011. See App. at 109, 123. In addition, Comcast also filed on the same day

²At the time briefing was complete before the PUC, Comcast’s residential interconnected VoIP service was known as Comcast Digital Voice. Since then, that service has been rebranded “XFINITY Voice” to better reflect the cross-platform nature of the service. For consistency with the PUC’s order, however, this appeal will continue to refer to Comcast’s VoIP services collectively as “CDV.”

³ Compare *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674, 677 (2001) (holding that argument not raised in motion for rehearing was waived on appeal) with *McDonald v. Town of Effingham Zoning Board of Adjustment*, 152 N.H. 171, 175 (2005) (holding that party need not seek rehearing of motion denying rehearing in order to preserve additional issues for appeal).

(consolidated with one of its other motions) a petition requesting that the Commission waive application of its CLEC Rules to Comcast.⁴ *Id.*

Pursuant to RSA 541:6 and Supreme Court Rule 10, Comcast timely filed an Appeal by Petition from Order No. 25,262 with this Court on October 28, 2011. Comcast's appeal raises five issues: 1) Did the PUC err in holding that Comcast's interconnected VoIP service qualifies as a telecommunications service rather than an information service?; 2) Did the PUC err in holding that its exercise of jurisdiction over Comcast's interconnected VoIP service is not preempted by federal law?; 3) Did the PUC err in holding that Comcast's interconnected VoIP service constitutes the "conveyance of telephone or telegraph messages" under RSA 362:2?; 4) Did the PUC err in denying Comcast's Motion to Reopen the Record?; and 5) Did the PUC err in denying Comcast's Motion to Suspend the effects of the Order? Appeal at 4. Contemporaneously with filing its appeal, Comcast also filed with this Court a Motion for A Stay Pending Appeal seeking an order staying Commission Order No. 25,262 pending the conclusion of the instant appeal.

On November 2, 2011, the Court denied Comcast's Motion for Stay Pending Appeal, but the denial was without prejudice to Comcast's motion, then still pending at the PUC, for Rehearing/Reconsideration of Order No. 25,274 (insofar as Order No. 25,274 denied Comcast's Motion for Suspension of Order No. 25,262), as well as Comcast's Petition for Waiver of CLEC Rules, also then still pending before the PUC. The Court's order stayed further processing of the appeal until the Commission ruled on

⁴ "CLEC Rules" refer to Commission rules that apply to Competitive Local Exchange Carriers.

Comcast's motion for reconsideration of the denial of its Motion to Suspend. The Court's order directed Comcast to provide the Court with copies of the Commission's order within fifteen days of its issuance and to file a status report on or before December 12, 2011 if the Commission had not issued an order by December 2, 2011.

The Commission denied Comcast's Motions for Rehearing on November 10, 2011, by issuing Order No. 25,288. Order 25,288 did not resolve Comcast's waiver petition, but granted a partial, 60-day waiver of certain CLEC rules while the Commission further considered Comcast's petition. Order No. 25,288 further listed thirty-seven CLEC rules that the Commission did *not* waive, and directed Comcast to review specific sections of the Commission's rules (i.e., PARTs 430 and 450) to determine which rules Comcast believes are onerous, inapplicable, or whose purpose can be satisfied by an alternative proposed alternative method, and to submit its analysis and conclusion to the Commission within 45 days. In accordance with this Court's November 2, 2011 order, Comcast filed copies of the Commission's Order No. 25,288 with the Court on November 23, 2011.

On December 21, 2011, pursuant to Commission Order No. 25,288 and N.H. Admin. R. Puc 201.05, Comcast filed a waiver petition with the Commission requesting the permanent waiver of twelve specific CLEC rules (hereinafter "Waiver Petition"). The Commission's Executive Director issued a letter dated January 10, 2012 indicating that the Commission had determined that it was in the public interest to extend the temporary waiver granted in Order No. 25,288 until the Commission ruled on Comcast's Waiver Petition. The letter reasserted the Commission's determination that Comcast

must continue to comply with the Commission's other applicable rules pending such a decision.

On January 4, 2012, this Court issued an order requiring Comcast to file a brief report with the Court on or before February 3, 2012 concerning the status of the Commission's proceedings and the effect thereof on further processing of this appeal. Comcast filed such a letter, as ordered, on February 3, 2012. Comcast's letter (1) summarized PUC Order No. 25,288 (Nov. 10, 2011); (2) notified the Court that Comcast had filed its Waiver Petition with the Commission; (3) informed the Court of the Commission's letter extending its previous temporary waiver of certain CLEC rules as defined in Order No. 25, 288 pending a ruling on Comcast's Waiver Petition; and (4) indicated that the PUC had not yet ruled on Comcast's Waiver Petition. In addition, Comcast's letter advocated that the Commission's failure to act on the Waiver Petition should not affect further processing of this appeal.

On February 21, 2012, this Court ordered Comcast to file on or before March 12, 2012, a brief memorandum addressing whether this appeal should be dismissed without prejudice as an "improper interlocutory appeal from the public utilities commission." Comcast now submits this memorandum in compliance with the Court's February 21 order.

SUMMARY OF THE ARGUMENT

For the reasons set forth below, Comcast respectfully submits that this appeal is ripe for adjudication and should not be dismissed as an improper interlocutory appeal. The five questions presented in the Appeal by Petition have been properly preserved for review by this Court as they were raised in timely-filed motions for rehearing, all of

which have been denied by the Commission. Comcast has exhausted its administrative remedies with respect to the questions presented and there is no further action that the Commission can take with respect to those issues. Comcast's pending Waiver Petition does not address the legal questions presented by Comcast's Appeal by Petition, and even if the Waiver Petition were granted, Comcast would remain subject to new regulatory requirements as well as to the effects of the Commission's legal classification of its VoIP services in Order 25,262. In short, the pending Waiver Petition does not affect the ripeness of this appeal.

ARGUMENT

This appeal should not be dismissed as an improper interlocutory appeal because Comcast has met all of the prerequisites for appellate review of the five questions presented in its Appeal by Petition.

Rehearing and appeals from decisions and orders of the PUC are governed by RSA 541. *See* RSA 365:21. Within 30 days after any order or decision issued by the Commission, any party to an action before the Commission may move for a rehearing "in respect to any matter determined in the action or proceeding, or covered or included in the order..." RSA 541:3. Comcast complied with RSA 541:3 by filing timely motions for rehearing addressing all of the issues raised in its Appeal by Petition. *See* App. at 61, 109 and 123.

To give the Commission a chance to correct its "alleged mistakes before time is spent appealing from them," *Appeal of White Mountains Education Association*, 125 N.H. 771, 774 (1984), appellants are required to first move for rehearing before filing an appeal to this Court. *See* RSA 541:4 and Note to Supreme Court Rule 10(1). Here, the

Commission has considered and denied all of Comcast's Motions for Rehearing, i.e. motions seeking rehearing/reconsideration of both the original Order from which Comcast appeals (Order No. 25,262), and the Order denying Comcast's motions to suspend and reopen the record (Order No. 25,274). *See* App. at 98 and PUC Order No. 25,288 (Nov. 10, 2011). Comcast has thus satisfied in full the rehearing requirement.

Far from being premature, Comcast's present appeal was required to be filed when the Commission decided Comcast's motions for rehearing. RSA 541:6 requires that an appeal must be brought within 30 days after an application for rehearing is denied. *In Re Carreau*, 157 N.H. 122, 124 (2008). Had Comcast instead waited until the Commission also ruled on Comcast's Waiver Petition, the appeal would have been subject to denial as untimely.

All the issues presented in Comcast's Appeal are now ripe for adjudication. As explained above, Comcast sought rehearing of Order No. 25,274 at the same time it filed this appeal due to uncertainty as to whether such a rehearing petition was required. App. at 123 and 109. Now that the Commission has denied both Comcast's motion for rehearing of the original Order No. 25,262 (in Order No. 25,274) and Order No. 25,274 (in Order No. 25,288), all prerequisites for hearing this appeal have been satisfied.

The fact that Comcast's Waiver Petition remains pending does not alter this conclusion. A waiver petition is not a motion for rehearing. It does not ask the Commission to revisit the legal determinations already made, but rather assumes that the moving party is subject to the Commission's regulations and requests alternate means of satisfying those regulatory requirements. Even if the Commission were to grant Comcast's Waiver Petition, it would not revisit the legal determinations from which

Comcast seeks relief in this appeal. In particular, the PUC's granting of the Waiver Petition would not undo Order 25,262's classification of Comcast's interconnected VoIP service as a "telecommunications service," rather than an "information service," under federal law. Nor would the PUC's granting of the Waiver Petition relieve Comcast from the Commission's determination, in Order 25,262, that the PUC has jurisdiction to regulate Comcast's interconnected VoIP service and that federal law does not preempt such authority.⁵

Moreover, the Commission's decision currently has significant tangible effects on Comcast, notwithstanding the fact that the Waiver Petition is currently pending. First, the Waiver Petition addresses only a subset of the many CLEC rules to which Comcast is now subject as a result of the Commission's Order. Order No. 25,288 makes clear that there are thirty-seven Commission rules that impose regulatory obligations on Comcast no matter how the Waiver Petition is resolved. For that reason alone, Comcast's appeal is clearly ripe.

Second, the Commission's legal classification of Comcast's services in Order 25,262 – which will be unaffected regardless whether the Waiver Petition is granted – directly impacts Comcast's legal rights and obligations in dealings with third parties. For instance, although Comcast believes that the rates it pays for pole attachments should not

⁵ Indeed, even if the Waiver Petition were deemed a supplemental motion for rehearing of the Commission's legal determinations (which it is not), Comcast would remain subject to the procedural rule that neither a waiver petition nor a supplemental motion for rehearing extends the time for filing an appeal from a Commission order. *See Petition of Ellis*, 138 N.H. 159, 161 (1993). If Comcast petitioned for an appeal to this Court *after* the PUC decided its Waiver Petition, the appeal would be subject to dismissal as untimely with respect to the legal classification decided by the Commission in Order 25,262.

vary based on how the PUC has classified Comcast's VoIP service, the PUC's classification has caused some third parties to contend that Comcast should be treated as a telephone company, rather than as a cable company, for purposes of those rates. Given that third parties can invoke CDV's regulatory status in litigation and that the Waiver Petition will have no effect on third parties' ability to do so, an appeal from Order 25,262 cannot be considered "interlocutory."

Third, the Commission's rulings in Order 25,262 regarding the legal classification of Comcast's service and the PUC's own regulatory authority – neither of which would be undone by the Waiver Petition – create costs and operational difficulties for Comcast. Those rulings expose Comcast's interconnected VoIP service to obligations in New Hampshire that are different from all of the other states in which Comcast offers interconnected VoIP. Comcast is required by those rulings to institute processes and procedures in New Hampshire that are different from everywhere else in the country, as the rulings currently leave New Hampshire as the only state in which Comcast's interconnected VOIP service is subject to state-level public utility rules.

For all of these reasons, the Court should proceed to hear Comcast's appeal. To do otherwise would subject Comcast to continued harm for an indefinite duration, as there is no indication when the Commission might act on the Waiver Petition. Unlike motions for rehearing, which must be ruled upon within ten days, *see* RSA 541:5, there is no statutory or regulatory deadline for the PUC to act on waiver petitions. Comcast's appellate rights should not be prejudiced by being forced to wait indefinitely to appeal from the PUC's legal determinations in Order 25,262, particularly given the amount of time by which this appeal has already been delayed.

The Commission has considered Comcast's arguments concerning the issues raised in the Appeal by Petition. It has denied Comcast's requests for rehearing. Comcast has timely appealed those orders to this Court. Accordingly, this appeal is ripe and should proceed.

CONCLUSION

For all of the reasons set forth above, the questions presented in Comcast's Appeal by Petition are properly before this honorable Court. The appeal, therefore, should not be dismissed as an improper interlocutory appeal.

Respectfully submitted,

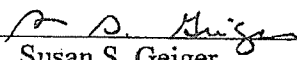
COMCAST PHONE OF NEW
HAMPSHIRE, LLC
AND COMCAST IP PHONE, II, LLC

By their Attorneys,

ORR & RENO, P.A.

JENNER & BLOCK, LLP

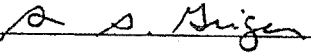
March 9, 2012

By: 
Susan S. Geiger
N.H. Bar No. 925
James P. Bassett
N.H. Bar No. 358
Orr & Reno, P.A.
One Eagle Square
Concord, NH 03301
Phone: (603) 224-2381
Email: sgeiger@orr-reno.com
jbassett@orr-reno.com

Samuel L. Feder
Luke C. Platzer
Adam G. Unikowsky
JENNER & BLOCK, LLP
1099 New York Avenue, N.W.,
Suite 900
Washington, D.C. 20001
Telephone: (202) 639-6000

Certification of Compliance

I hereby certify that a copy of the foregoing Memorandum has on this 9th day of March, 2012 been sent by first class mail, postage prepaid, to the parties of record.



Susan S. Geiger

859882_1