STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Petition for Investigation into the Regulatory	)	
Status of IP Enabled Voice Telecommunications	)	**DT 09-044**
Service	)	

SUR-REPLY BRIEF OF TWC DIGITAL PHONE LLC

Pursuant to the Commission's February 19, 2010 letter, TWC Digital Phone LLC ("TWCDP") respectfully submits its sur-reply brief in the above-referenced docket, in response to the reply brief filed by the rural local exchange carriers of the New Hampshire Telephone Association ("NHTA"). In its reply, NHTA tweaks some its prior arguments (and raises a few new ones) in the continued hope of convincing the Commission to extend its jurisdiction to encompass the voice-over-Internet Protocol ("VoIP") services at issue. While the result is more strident in tone than its initial brief, it is no more effective. NHTA still fails to explain why the Commission should ignore the Legislature's clear intent to exclude interconnected VoIP services from state regulatory authority (consistent with federal law) and the Federal Communications Commission's ("FCC's") unequivocal ruling that VoIP services such as TWCDP's should not be subject to state economic regulation.

Regarding state law, NHTA appears to have abandoned its prior argument that the "public interest" compels the Commission to regulate TWCDP as a "public utility;" it now states that such considerations are "irrelevant to the legal question" of whether interconnected VoIP results in the "conveyance of telephone . . . messages" under the statute.[1] NHTA then proceeds

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[1] *Compare* NHTA Initial Br. at 34 ("It is in the public interest for the Commission to regulate cable VoIP in the same manner as other competitive local exchange carriers."), *with* NHTA Reply Br. at 22 ("The issue in this case is not one of whether the Commission *should* have regulatory authority over Cable VoIP services, but whether it

to assert that interconnected VoIP "is telephone service" and that the Commission thus must "exercise its authority as directed by the legislature."[2] But the Legislature has confirmed that interconnected VoIP services are *not* currently regulated at the state level and has directed that it should stay that way, as evidenced by its repeated refusal to formally extend E911 surcharges to them.[3] That approach is consistent with the Legislature's longstanding practice (upheld by the New Hampshire Supreme Court) of cabining state regulatory authority to avoid stifling competition.[4] For example, the Legislature relied on that rationale in declining to include "mobile telephone service companies" in the public utility definition—even though such services can be used as a "substitute for existing PSTN service" and thus, under NHTA's broad theory, could be swept within the Commission's regulatory authority.[5]

NHTA contends that the Commission should ignore all evidence of legislative intent because the statute unambiguously covers any service that conveys a "message" using a "telephone."[6] As an initial matter, the statute's reference to "the conveyance of telephone or telegraph messages" is not as clear as NHTA says, as the terms are undefined.[7] In any event, the courts have rejected such a simplistic analysis, holding that even when an entity's activities fall within the "literal words of the statute," it cannot be considered a public utility if the Legislature

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does as a matter of law, under statute.") (emphasis in original). NHTA then proceeds to repeat its policy arguments, which TWCDP has refuted in any event. TWCDP Reply Br. at 14-16.

2 NHTA Reply Br. at 4.

3 TWCDP Reply Br. at 2-4; *see also* Comcast Reply Br. at 3-4.

4 TWCDP Initial Br. at 7-8.

5 N.H.H.R. Jour. 1069 (1977); NHTA Reply Br. at 4.

6 NHTA Reply Br. at 2-3.

7 NHTA thus borrows from the dictionary to craft what it believes would be an acceptable definition of "telephone message." NHTA Initial Br. at 3 & n.2. But Comcast has identified an alternative—and more applicable—definition from the communications context, which would not cover interconnected VoIP services. *See* Comcast Initial Br. at 11-12.

did not intend for it to be one and if the Commission has never regulated it that way.[8] Here, even a literal reading of the statute would not extend to interconnected VoIP, because the key piece of equipment is not a telephone but the IP-compatible embedded multimedia terminal adapter.[9]

NHTA also advances a slightly different framework in arguing that federal law has no preemptive effect.[10] TWCDP has explained that the FCC set forth a three-part test to determine whether a service is entitled to preemption.[11] In its initial brief, NHTA properly recognized that *Vonage* preemption extends to all VoIP services that share certain basic characteristics but then misstated what those characteristics are, relying on criteria (specifically, the elements of the federal definition of "interconnected VoIP service") that, if anything, are broader than those set forth in the *Vonage Order* and thus more likely to lead to preemption.[12] In its reply brief, NHTA does not bother to defend (or even mention) its prior flawed discussion, instead referring generally to the "context" of the *Vonage Order* and homing in on one aspect of Vonage's service—its nomadic nature—as being dispositive.[13] But TWCDP has explained at length that the FCC has never limited its preemption ruling to nomadic VoIP services in this way.[14]

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8 *Allied New Hampshire Gas Co. v. Tri-State Gas & Supply Co.*, 107 N.H. 306, 308, 221 A.2d 251, 253 (1966).

9 TWCDP Initial Br. at 8-9.

10 In its motion to file sur-reply briefs, Comcast observed that NHTA has raised several new points relating to the classification of interconnected VoIP under the Communications Act. Although NHTA claims that TWCDP (in addition to Comcast) has argued that interconnected VoIP is an information service, *see* NHTA Reply Br. at 10, TWCDP has not in fact taken a position on that issue. TWCDP has noted, however, that the Commission has proposed classifying interconnected VoIP as an information service, another factor that counsels restraint here. TWCDP Initial Br. at 22-24.

11 TWCDP Initial Br. at 13-15; TWCDP Reply Br. at 8-9; *see also Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 32 (2004) ("*Vonage Order*").

12 TWCDP Reply Br. at 9-10.

13 NHTA Reply Br. at 6.

14 TWCDP Initial Br. at 13-15; TWCDP Reply Br. at 8-9

NHTA expresses unwarranted skepticism that the FCC intended for its preemption analysis to apply to cable operators,[15] and then tries to skirt the issue altogether by claiming that whatever the FCC might have ruled in the *Vonage Order*, it subsequently developed a "more nuanced understanding of VoIP" and narrowed the scope of preemption such that the *Vonage Order* was reduced to "a product of its time."[16] Fundamentally, as a matter of administrative law the FCC could not narrow, expand, or "clarif[y]" the *Vonage Order* through a letter by its staff or a passing statement made in another context, as NHTA suggests.[17] To the extent the FCC were inclined to do so, it would have to provide proper notice and seek public comment on its intended action. In any event, the FCC has never changed its mind. To show otherwise, NHTA resurrects an argument that it appeared to have abandoned after filing its petition, citing an FCC staff letter suggesting interconnected VoIP is a telecommunications service subject to Title II.[18] But that letter was promptly and unequivocally repudiated.[19] And far from narrowing the scope of the *Vonage Order*, the Commission has repeatedly confirmed its continuing validity.[20]

The coda of NHTA's reply brief is that TWCDP and Comcast are not deserving of the lower barriers of entry normally afforded to new competitors because they are sufficiently wealthy that they "can take care of themselves."[21] NHTA once again misses the point. Both

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15 NHTA scolds Comcast for not quoting any language to this effect, *see* NHTA Reply Br. at 5, but TWCDP has quoted the relevant language at length. TWCDP Initial Br. at 14-15 (quoting *Vonage Order* ¶¶ 32, 46; *id.*, Separate Statement of Commissioner Kathleen Q. Abernathy); TWCDP Reply Br. at 11 (same).

16 NHTA Reply Br. at 6.

17 *Id.* at 9.

18 *Id.* at 7.

19 TWCDP Initial Br. at 23 n.101 (citing Letter from Julie A. Veach and Michele Ellison, Federal Communications Commission, to Kathryn A. Zachem, Comcast, File No. EB-08-IH-1518, at 1 (Apr. 14, 2009)).

20 TWCDP Reply Br. at 10-11 n.37 (quoting FCC decisions).

21 NHTA Reply Br. at 24.

New Hampshire and federal law recognize that subjecting new providers of a particular service to the same economic regulation as incumbents risks making entry more difficult and competition less likely—regardless of the new entrants' balance sheets or ability to provide *other* services. The FCC's preemption ruling was premised on this very conflict between pro-competitive policies and state economic regulation (and not on whether the physical endpoints of a communication can be identified, as NHTA continues to claim).[22] NHTA does not appear to deny that such a conflict exists, it just believes that TWCDP and Comcast have the resources to overcome it. But that is not the law. Service providers are commonly regulated based on their relative competitive positions with respect to the service at issue.[23] NHTA offers no legal or policy reason to depart from that established practice here.

Accordingly, the Commission should conclude that it cannot, consistent with state or federal law, regulate TWCDP as a public utility in connection with its interconnected VoIP services.

Respectfully submitted,

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22 TWCDP Reply Br. at 8-9.

23 *Id.* at 15-16.

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of March, 2010, a copy of the foregoing Sur-Reply Brief of TWC Digital Phone LLC has been sent by electronic mail to persons listed on the Service List.

Brian Murray