THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2011 TERM

Docket No: _____

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

APPENDIX TO APPEAL BY PETITION ON BEHALF OF COMCAST PHONE OF NEW HAMPSHIRE, LLC AND COMCAST IP PHONE II, LLC

VOLUME I

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

Petition for an Investigation into the Regulatory Status of
IP Enabled Voice Telecommunications Services

Order Finding Jurisdiction and Requiring Limited Regulation

ORDER NO. 25,262

August 11, 2011

I. INTRODUCTION

On March 6, 2009, the rural carriers of the New Hampshire Telephone Association (the RLECs)[1] filed with the New Hampshire Public Utilities Commission a petition under RSA 365:5 asking the Commission to conduct an inquiry into the appropriate regulatory treatment of Internet protocol (IP)-enabled cable voice service, often referred to as Voice over Internet Protocol or VoIP, in New Hampshire. Because VoIP can describe forms of communications that are not at issue here, we will refer to the service being offered by cable providers as "cable voice." According to the filing, affiliates of Comcast Corporation offer a fixed cable voice service in New Hampshire, under the name Comcast Digital Voice. The RLECs assert that Comcast claims Comcast Digital Voice is an information service under federal law and therefore free from regulation by this Commission. Time Warner offers similar cable voice services known as Digital Phone and Business Class Phone. The RLECs contend that the services offered

[1] The Rural Local Exchange Carriers, or RLECs, include: Bretton Woods Telephone Company, Inc.; Dixville Telephone Company; Dunbarton Telephone Company, Inc.; Granite State Telephone, Inc.; Hollis Telephone Company, Inc.; Kearsarge Telephone Company; Merrimack County Telephone Company; and Wilton Telephone Company, Inc.

by Comcast and Time Warner are not information services subject only to federal regulation, but public utility services that should be regulated under RSA 362:2.

If the RLECs are correct and these competitive offerings are public utility services, state regulation under current law would entail minimal regulatory oversight over cable company affiliates and their voice service offerings, the same as that exercised over other competitive local exchange carriers (CLECs). Such regulation would include registration with the Commission, notice of rates for service offerings, filing of annual reports of sales, number of customers, and infrastructure in New Hampshire as well as updated contact information, and payment of an annual utility assessment. Certain consumer protection rules would also apply, as would the obligation to cooperate with other utilities during emergencies to ensure the orderly restoration of service. There would be no constraints on pricing or product offerings for such providers.

This docket considers whether cable voice service in general, and Comcast Digital Voice and Time Warner's Digital Phone and Business Class Phone, in particular, constitute conveyance of a telephone message under RSA 362:2, whether providers of such services are public utilities, and the extent to which federal law preempts New Hampshire law with regard to such services.

II. PROCEDURAL HISTORY

On May 6, 2009, the Commission issued an Order of Notice scheduling a prehearing conference and technical session for June 24, 2009, and setting a deadline of June 19, 2009 for intervention requests. On June 11, 2009, the Office of Consumer Advocate (OCA) notified the Commission of its participation on behalf of residential ratepayers, consistent with RSA 363:28. Timely requests to intervene were filed by Comcast Phone of New Hampshire, LLC and its affiliates (collectively Comcast); segTEL, Inc. (segTEL); New Hampshire Internet Service

Providers' Association (NHISPA); Union Telephone Company (Union); Otel Telekom (Otel); TWC Digital Phone LLC (Time Warner or TWC Digital Phone); and New England Cable and Telecommunications Association, Inc. (NECTA).

A prehearing conference took place as scheduled on June 24, 2009, during which all petitions to intervene were granted. Comcast proposed a stay of the proceeding pending a decision from the Federal Communications Commission (FCC) regarding the regulatory classification of VoIP. The RLECs noted that ongoing proceedings in Maine and Vermont were not stayed pending FCC action. The Commission denied the stay, finding that there were insufficient assurances that the FCC would rule in the immediate future.

On July 1, 2009, Staff and the Parties filed a proposed procedural schedule, which was approved by secretarial letter on July 2, 2009. The RLECs notified the Commission on September 25, 2009, that the Parties had been unable to reach agreement regarding a stipulation of facts and would proceed to filing testimony on October 9, 2009. Testimony was filed on that date by David J. Kowolenko and Beth Choroser on behalf of Comcast; Valerie Wimer and Douglas Meredith on behalf of the RLECs; and James Medica and Julie Laine on behalf of Time Warner. Reply testimony was filed on December 4, 2009, by the RLECs, Comcast, and Time Warner.

On December 11, 2009, Comcast filed a letter reporting that the Parties had agreed to waive cross-examination, and requested that the official record be deemed to consist of the pre-filed direct and reply testimony, the data requests and responses exchanged among the parties, and the briefs due to be filed in January 2010. By secretarial letter dated December 11, 2009, the Commission canceled the hearing as requested and directed the Parties to file any data requests and responses they wished to be included in the record prior to the filing of initial briefs. On

January 6, 2010, with the consent of all parties, counsel for the RLECs filed data requests and data responses received from Parties for filing in the docket record. On January 15, 2010, initial briefs were filed by the RLECs, Comcast, and Time Warner. Reply briefs were filed on January 29, 2010, by the same Parties. On February 2, 2010, Comcast filed a motion for leave to file sur-reply briefs; which the Commission granted, and on March 5, 2010, sur-reply briefs were filed by Comcast, the RLECs, and Time Warner.

III. FACTUAL BACKGROUND

To understand this case, basic definitions and jurisdictional lines are important. The federal Telecommunications Act,47 U.S.C. §§ 151 et seq.[2] provides the following definitions:

> "Telecommunications" - "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153 (50).
>
> "Telecommunications service" - "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153 (53).
>
> "Information service" - "the offering of a capability for generating, acquiring, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153 (24).

Under the Telecommunications Act, "telecommunications services" are subject to both federal and state regulation; "information services" are not telecommunications services and are exempt from state regulation. *See, generally,* 47 U.S.C. §§ 153, 251, 252, and 253.

VoIP is a voice transmission service that can be "fixed" or "nomadic." Most technology currently deployed to transmit voice traffic uses Internet protocol (IP) and IP packets. Nomadic

[2] The Telecommunications Act was revised in October 2010. As a result, certain existing provisions referred to during the course of this proceeding were renumbered, including the definitions of "telecommunications" [formerly §153(43); now §153(50)]; "telecommunications service" [formerly §153(46); now §153(53)]; and "information service" [formerly §153(20); now §153(24)]. The revised references are used in this order.

VoIP service can be enabled from any broadband connection to the public Internet; while it is associated with a particular account, it is not associated with a particular geographic location. In contrast, fixed VoIP is routed over the provider's network, rather than the public Internet. Fixed VoIP, in contrast, is enabled from a defined geographic location (*e.g.* an end-user's house) and can be enabled only from that location. The cable voice offerings at issue in this case are fixed VoIP services. In December 2010, the FCC confirmed that it had not yet determined whether to classify VoIP as a telecommunications or information service. *See In the Matter of Preserving the Open Internet - Broadband Industry Practices, Report and Order FCC 10-201 (Dec. 23, 2010) ("Net Neutrality Order")* at ¶ 70 and fn. 345.

The FCC and federal courts have found that nomadic VoIP is an interstate service and that state regulation is preempted. The FCC has not ruled on the regulatory status of cable voice service. Some states have found cable voice to be a regulated utility service while others have found it to be subject only to federal regulation; many states are awaiting federal guidance.

In this case we consider whether Comcast Digital Voice [and TWC Digital Phone and Business Class Phone] are public utility services regulated under New Hampshire law. RSA 362:2, I defines a public utility to include an entity "owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages . . . for the public." From the user's perspective, the VoIP services offered by Comcast and Time Warner function in a manner similar to that of traditional telephone service, and the essential conveyance of messages is the same, albeit with the use of different technology at certain points in the process.

Cable companies typically offer three categories of service to residential and business customers: television programming, broadband Internet connections, and telephone service. *See*

Prefiled Direct Testimony of Kowolenko and Choroser at 4. Although the provider may promote and sell bundled packages to retail customers, all three service offerings can be offered separately and are delivered independently over a single coaxial cable reaching the customer's home or workplace. *Id.* at 18.

The cable operator provides telephone-specific hardware to customers subscribing to cable telephone service. This additional hardware, called an "embedded multi-media terminal adapter" or eMTA, includes a standard telephone jack with the same physical and electrical characteristics as a telephone jack from a traditional telephone company such as FairPoint Communications or any one of the RLECs. *See Kowolenko Response to Staff DR 1-8, introduced as Exhibit VW 1-5,* at 99. The customer then plugs in a standard, traditional telephone or a telephone wire that is connected to multiple standard telephones. *See Kowolenko Response to Staff DR 1-2, introduced as Exhibit VW 1-5,* at 95.

When a customer subscribes to multiple cable services, the television signal, Internet connection, and telephone service are isolated from and do not rely on each other. Each service is allocated its own independent portion of bandwidth on the coaxial cable. *See Kowolenko Response to Staff DR 1-3, introduced as Exhibit VW 1-5,* at 96.

The customer uses a telephone handset which converts voice sound waves into electrical signals. The eMTA formats these signals into IP packets that can be routed onto the IP networks utilized by Comcast and Time Warner. *See Prefiled Direct Testimony of Kowolenko and Choroser* at 17. The IP packets travel from (or to) the customer's location via coaxial cable. The cable voice service provider maintains an IP network over which calls are routed. A cable telephone call may be transferred to and transmitted over the public switched telephone network

(PSTN)[3] where the call recipient is a customer served by a traditional wire line telephone carrier, a wireless carrier, or a cable telephone customer served by a different provider. When a call moves from the cable provider's network to the PSTN, it is converted at a Media Gateway from the IP packets the cable provider uses into the Time Division Multiplexing (TDM) format used in the PSTN. *See Prefiled Direct Testimony of Kowolenko and Choroser* at 20.

The customer dials a standard telephone number using a standard telephone handset just as if it were attached to a traditional phone line. *See Prefiled Direct Testimony of Valerie Wimer* at 5. Local calls use seven digits; long-distance calls may use "1" followed by a three-digit area code. The called customer picks up the handset to receive a call, using a traditional telephone line, a cable telephone line, or a cell phone. *See Kowolenko response to Staff DR 1-1, introduced as Exhibit VW 1-5, at 94; Cannon Response to Staff DR 1-1, introduced in Exhibit VW 1-5,* at 118. Cable voice customers may port their existing telephone numbers when they subscribe to a cable telephone service, or the provider can assign new phone numbers corresponding to the NXX codes assigned to the geographic region where the customer is located. *See, e.g., Comcast Br.* at 8 and fn. 34 (VoIP providers are subject to number portability obligations). Thus, in terms of functionality and equipment, cable voice service appears no different from traditional telephone service, although it uses different technologies to provide similar functionality. *See Prefiled Direct Testimony of Kowolenko and Choroser* at 15.

Cable operators often promote telephone service as part of a "bundle" in which the subscriber also purchases television and broadband Internet. The transmission of cable telephone calls, however, does not rely on broadband Internet service. *See Kowolenko Response to Staff DR 1-3, introduced as Exhibit VW 1-5,* at 96. Unlike calls made over a "nomadic" VoIP

[3] Public switched telephone network (PSTN) is the legacy common carrier network and switching system connecting public users throughout the world for the completion of voice calls.

telephone service such as Vonage or Skype, cable voice calls do not require a broadband connection to the Internet, are not transmitted over the Internet, and do not compete for bandwidth space on the Internet with e-mail and video traffic. *See Cannon Response to Staff DR 1-11, introduced as Exhibit VW 1-6,* at 121. Indeed, some cable providers emphasize this in their advertising, noting that the segregation of voice traffic provides greater reliability. *See Petition of Rural LECs* at 3. Furthermore, the cable customer's telephone number is tied to the particular coaxial cable drop and/or eMTA provided by the cable company. *See Prefiled Direct Testimony of Kowolenko and Choroser* at 17. This means the customer enjoys "plug and play" operation when he attaches a traditional telephone handset to the eMTA – and it also means that the customer cannot use the cable telephone service when away from the cable drop (for example, the service is not available using a wireless Internet connection at a coffee shop). *See Kowolenko Response to Staff DR 1-11, introduced as Exhibit VW 1-5,* at 101.

The cable voice services offered by Comcast and Time Warner include voice signals, traditional telephone handsets and interconnection with the PSTN. From a customer's perspective, there is no difference in the experience of dialing through the IP-enabled cable system compared with dialing through a traditional telephone system.

IV. POSITIONS OF THE PARTIES AND STAFF

A. Rural Carriers of the New Hampshire Telephone Association

1. State Regulation

The RLECs' claim that Comcast and Time Warner are offering cable voice services that originate and terminate in New Hampshire over cable facilities, unfairly competing with the RLECs. The RLECs assert that this competition is unfair because they are subject to the full regulation of the Commission while competitors, such as Comcast and Time Warner, provide

identical services but are not regulated. They argue that this regulatory structure is arbitrary, discriminatory, and without statutory or policy justification. The RLECs state that cable voice service constitutes "owning, operating or managing . . . plant or equipment . . . for the conveyance of telephone . . . messages . . . for the public" in accordance with RSA 362:2. The RLECs reason that to the extent such services include real-time voice communications between points in New Hampshire, the provision of the service requires franchise authority from the Commission under RSA 374:22 and RSA 374:22-g. The RLECs argue that this Commission should determine that cable voice service is regulated telephone service, and that providers such as Comcast and Time Warner should be required to obtain certification and comply with New Hampshire's utility statutes and the rules and orders of the Commission.

The RLECs add that cable voice service offers transmission of voice information of the customer's choosing between or among points specified by the end user, and that there is no change in form or content of the voice information sent or received by a cable voice service. The RLECs claim that the end user experience in making and receiving calls is the same for both cable voice and for the regulated local exchange service provided by the RLECs. No additional or different actions are required to place and receive cable voice calls than are required for regulated local exchange calls. The RLECs maintain that while cable voice may differ in the specific technology used to provide it, the service the customer receives is telephone service. Regardless of whether it is a traditional PSTN call or a cable voice call, the RLECs argue, there are five primary functional elements of a telephone call: 1) customer premises equipment (*e.g.*, in the majority of cases, a telephone handset), 2) loop, 3) switching, 4) signaling and 5) transport. The RLECs describe these functional elements as follows:

1) Customer premises equipment for residences include, for example, telephone handsets and modems. Customers purchase and own equipment from any retail outlet or from the service provider. According to the RLECs, the majority of traditional telephone handsets use the same transmission technology and are used interchangeably with cable voice and regulated RLEC service.

2) "Loop" is the term that describes the facilities and equipment located in the field that provide the connection between a customer's location and the associated switching center. In place of the twisted pair of copper wires traditionally used by RLECs (or, alternatively, fiber), cable voice service is provided over a hybrid fiber-coaxial loop facility. Both copper loop and coaxial cable technologies employ connections at intermediate locations between a switching center and the customer. At those intermediate locations, electrical voice signals are converted into optical signals that are carried over fiber. Each of these loop technologies connects to switching and transmission electronics in a centralized location.

3) Just as with loop plant, several technologies can be used for switching voice calls. Comcast and Time Warner use IP-based, packet switching "soft switches." Most telephone companies use digital electronic circuit switches, but some are migrating to soft switches. In either case, the soft switch or digital circuit switch determines where the call needs to be routed to reach the called party and can also be called a router.

4) Most, if not all, interoffice transport is carried on optical fiber, according to the RLECs. While the Internet can be used to provide interoffice transport for voice and data traffic, the carrier has little, if any, control over the quality of the connection and may not be able to give voice traffic priority over data traffic. The RLECs note that Comcast and Time Warner use their own private networks, rather than the public Internet, to transmit traffic.

5) Signaling consists of instructions that monitor the status of a call, alert the user to incoming calls, transmit routing information and change routing of the call using criteria both from the dialed digits and other information. According to the RLECs, cable voice routing and traditional Signaling System 7 networking have some of the same characteristics.

The RLECs assert that these functional elements are the same, although the manner in which the functions are performed at a technical level varies with the particular technology used. Nonetheless, they argue, the overall result is the same: voice calls are originated and terminated in real time across a distance.

The RLECs conclude that cable voice conveys telephone messages as described in RSA 362:2 and has all the characteristics of a telecommunications service as this term is defined by the Telecommunications Act.[4] It is a paid service offered directly to the public, and entails voice transmission among points specified by the user without a change in the form or content of the voice information as sent and received. The RLECs assert that there is nothing about cable voice, architecturally, technically, or practically, that distinguishes it from traditional phone service, and that cable voice is simply an evolution in technology – voice networks have migrated from analog to digital and now the voice network is migrating to IP technologies.

The RLECs emphasize that authority over cable voice service is not an expansion of the Commission's traditional jurisdiction. While it is true that the New Hampshire Supreme Court found that the Commission does not have authority under RSA 362:2 to regulate industries that are merely "related" to utility services, the RLECs assert that cable voice should be regulated, not because it is "somehow related" to telephone service but because it *is* telephone service, no different than the telephone services provided by regulated RLECs, incumbent local exchange carriers and competitive local exchange carriers (CLECs). The RLECs argue that where a

[4] *See* 47 U.S.C.§ 151 *et seq.*, generally, and § 153, specifically.

service "conveys the telephone message for the benefit of its customers," the Commission is fully empowered to assert its jurisdiction. According to the RLECs, the Commission's authority is defined by the characteristics of the companies and services it regulates, not the technology employed to provide those services; the RLECs do not recommend that the Commission expand its powers, but that it exercise the power it has been granted by the legislature.

2. Federal Preemption

The RLECs maintain that Congress has created "a system of dual state and federal regulation over telephone service, grant[ing] to the FCC the authority to regulate 'interstate and foreign commerce in wire and radio communication,' while expressly denying 'jurisdiction with respect to . . . intrastate communication service . . . .'"[5] The RLECs contend that the authority to regulate intrastate communication service is expressly reserved to the states. Because, according to the RLECs, cable voice service has a discernible intrastate component, state law is not preempted.

The RLECs state that, given the dual-jurisdictional boundaries established by Congress, the FCC historically has applied a geographic "end-to-end" analysis based on the physical endpoints of a communication to distinguish interstate from intrastate communications for purposes of establishing and enforcing its jurisdiction. This "end-to-end" analysis poses a problem, the RLECs reason, when the jurisdictional end-points of a call using nomadic VoIP cannot be determined, as in the *Vonage Order,*[6] where the FCC preempted the Minnesota Commission from regulating Vonage's nomadic VoIP service. The RLECs state that the FCC found that the geographic endpoints of communications using Vonage's nomadic "Digital Voice" VoIP service could not be determined with any certainty, thus making it "impossible" to

[5] RLEC Br. at 18, *citing Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 360 (1986).*

[6] *In re Vonage Holdings Corp.,* WC Docket No. 03-211, Memorandum Opinion & Order, 19 FCC Rcd 22404 (2004) *("Vonage Order").*

know whether a specific communication was an intrastate communication subject to state regulation, or an interstate communication subject to federal regulation. As a result, the FCC held that preemption of the Minnesota state regulations was warranted as they were deemed to conflict with "federal rules and policies governing *interstate* Digital Voice communications." The RLECs point out that the FCC also asserted that other VoIP services with "basic characteristics similar to [Vonage's] Digital Voice" would be exempt from state regulation. The RLECs argue, however, that cable voice does not have "basic characteristics similar to [Vonage's] Digital Voice," because it requires the end-user to use a geographically specific telephone number at a fixed location, unlike nomadic VoIP service that does not rely on a fixed location. Like the RLECs, both Comcast and Time Warner offer only fixed service to their end users, so it *is* possible to identify the locations where a call originates and terminates. The RLECs observe that this fundamental character distinction was confirmed in the U.S. Eighth Circuit Court of Appeals' review of the *Vonage Order*. Specifically, the RLECs state, the court observed that when VoIP service is "offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished," holding that the FCC action in *Vonage* focused exclusively on "nomadic VoIP" service and did not address fixed VoIP services.[7] Thus, argue the RLECs, while Comcast and Time Warner would parlay the *Vonage Order* into a federal preemption of all VoIP service, the reach of the *Vonage Order* is actually far less broad.

The RLECs note that, in a post-*Vonage* proceeding concerning universal service funding, the FCC elaborated on the limits of the preemption decreed in the *Vonage Order* as follows:

> [A]n interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state

[7] RLEC Br. at 20, *citing Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

> regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider.[8]

The RLECs contend that the *USF Order* unambiguously recognizes that VoIP providers with the capability to track jurisdictional confines, that is, interstate from intrastate calls, do not qualify for *Vonage* preemption and are therefore subject to traditional state telephone regulation. In the RLECs' view, it necessarily follows that intrastate cable voice service also lies beyond the reach of the FCC's power of preemption and, therefore, is subject to state regulation.

The RLECs allege that Comcast misreads the *Vonage Order* to apply to cable voice service and argue that the order limits preemption to only those services that are comparable to the Vonage service. A comparable service, subsequently labeled "interconnected VoIP," was defined in the *Vonage Order* by the FCC and codified at 47 C.F.R. § 9.3 as "a service that:

> (1) Enables real-time, two-way voice communications;
>
> (2) Requires a broadband connection from the user's location;
>
> (3) Requires Internet protocol-compatible customer premises equipment (CPE); and
>
> (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network."

The RLECs maintain that the cable voice services provided by Comcast and Time Warner do not meet all of these criteria. First, their services are based on fixed interconnection, not the nomadic broadband connection that the FCC envisioned, thus falling short of the second test. The *Vonage Order* stated that, "[i]n marked contrast to traditional circuit-switched telephony . . . however, it is not relevant where that broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service. Rather, Vonage's service is fully portable; customers may use the service anywhere in the world

[8] *Universal Service Contribution Methodology,* WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶ 56 (2006) (USF Order).

where they can find a broadband connection to the Internet."[9] The RLECs allege that Comcast and Time Warner acknowledge that their cable voice services are not portable to "any" broadband connection, and that the same connection must be used every time a subscriber accesses the cable voice service. In other words, their cable voice services are fixed, not nomadic such as that provided by Vonage.

The RLECs assert that cable voice also fails the third test, use of IP-compatible customer premises equipment. In the *Vonage Order,* the FCC observed that:

> [c]ustomers may choose among several different types of specialized [equipment] (1) a Multimedia Terminal Adapter (MTA), which contains a digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and has a standard telephone jack connection; (2) a native Internet Protocol (IP) phone; or (3) a personal computer with a microphone and speakers, and software to perform the conversion (softphone).[10]

In contrast, the RLECs argue, Comcast and Time Warner cable voice services require use of equipment that is provided by Comcast or Time Warner. The customer has no control over the company-owned multimedia terminal adapter (eMTA), and the traditional telephone handset used to originate a call is the only customer equipment required. Furthermore, soft phones and native IP phones, *i.e.*, handsets that convert voice signals into IP, do not work with these services. Therefore, the RLECs assert, the eMTAs provided by Comcast and Time Warner do not meet the specialized customer premises equipment test of an interconnected VoIP provider.

The RLECs further argue that cable voice is not an Information Service, noting that the FCC, despite numerous entreaties, has not declared VoIP, whether fixed or nomadic, to be an information service. Nor, argue the RLECs, has the FCC preempted state authority over fixed VoIP services. Moreover, the RLECs note that the FCC reached its decision to preempt

[9] *Vonage Order* at ¶ 5.
[10] *Vonage Order* at ¶ 6.

Minnesota's regulation of IP-enabled telecommunications irrespective of whether it was a telecommunications or information service.[11]

The RLECs maintain that, in spite of this, Comcast argues that the FCC's *Brand X* decision[12] affirmed that IP-based cable voice offerings are information services not subject to traditional telecommunications regulation. According to the RLECs, however, *Brand X* addressed only whether the underlying cable modem transmission service was so integrated with the associated Internet access service as to make it reasonable to describe the two functions as a single service. As such, the single integrated service was classified as an Internet access service not subject to unbundling requirements. The RLECs claim that the FCC applied this rationale to DSL service and wireless broadband Internet access, as well, but emphasize that *Brand X* was an unbundling case, not a jurisdiction or classification case. Because, the RLECs note, the court did not conclude that cable modem services are, by definition, information services, *Brand X* is irrelevant to this investigation.

The RLECs state that Comcast and Time Warner imply that because their cable voice services may include enhanced features that allow customers to manage their calls dynamically, receive voice mail through e-mail, and manage billing and other account information through web portals, the services are somehow unique to cable voice. The RLECs disagree, noting that Granite State Telephone offers such services, and TDS has a web portal that allows on-line billing and ordering of services. The RLECs state that web portals are unarguably enhanced services that provide customers an interface to the service provider's records and systems, but they are not components of the telephone messaging service itself. The RLECs assert that these

[11] *Vonage Order* ¶ 14 (emphasis added). Two years after issuing the *Vonage Order*, this same issue of "definitional classification" arose in the context of the *USF Order,* where the FCC decided to establish universal service contribution obligations for interconnected VoIP service providers. The FCC chose to decide that case as well without resolving the classification issue with respect to interconnected VoIP. *USF Order* at ¶ 35 .

[12] *Nat'l Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) *("Brand X").*

enhanced features are incidental to voice service and are not required for a customer to originate or terminate calls. The RLECs argue that because such services are not in the actual voice call flow, and cannot be made part of the call, access to web portals and other enhanced services has no impact on whether the voice service provided by Comcast or Time Warner is a telecommunications service. If this were not the case, the RLECs claim, a regulated telephone company could simply add enhanced features to their basic exchange service to avoid regulation.

The RLECs further state that while protocol conversions occur in both traditional telephone service and cable voice networks, there is no end-to-end protocol conversion in a cable voice call that would make it an information service.[13] The RLECs claim that the vast majority of calls are originated or terminated on traditional phones and most networks perform some change in the transmission format of a call between the calling and the called party. A traditional telephone call may change from analog to digital, from digital to IP packets, electrical to optical and back again several times as it is routed through the network. The RLECs state that the routing information may also change; instead of routing based on the actual dialed telephone numbers, a location routing number associated with a carrier's switch or equipment IP address may be used. The exact protocols implemented depend not only on the carrier, but also on the specific vendor equipment used. On the other hand, the RLECs assert, changes in the form of the call are internal to the networks carrying the call. In cases where the call stays within the Comcast or Time Warner network, Comcast and Time Warner change the form only at the calling and receiving ends of a customer's calls. According to the RLECs, both Comcast and Time Warner have stated that this type of in-network or "on-net" call does not have any net

[13] This end-to-end requirement was defined in the Frame Relay Order, which held that the "enhanced service definition applies only to end-to-end communication between or among subscribers. Thus communications between a subscriber and the network itself (e.g., for call setup, call routing, and call cessation) are not considered enhanced services." *Independent Data Communications Manufacturers Association, Inc. and AT&T Petition for Declaratory Ruling,* 10 FCC Rcd 13717 para. 14 (1995).

change in form and does not undergo a net protocol conversion. The RLECs conclude that Comcast and Time Warner are providing a basic telecommunications service for these calls.

B. Comcast Phone of New Hampshire, LLC and its Affiliates

1. State Regulation

Comcast states that its Comcast Digital Voice offering does not entail the "conveyance of telephone . . . messages" under RSA 362:2 and, thus, Comcast IP Phone II, LLC, (Comcast IP Phone) the Comcast entity providing Comcast Digital Voice, is not a public utility subject to the Commission's regulatory authority. Comcast maintains that its cable voice offering does not satisfy the common or specialized meanings of the term "telephone" and that such an interpretation of New Hampshire law would conflict with federal law and policy. Comcast contends that RSA 362:2 does not define "telephone" or "telephone messages." However, according to Comcast, pursuant to RSA 21:2 those terms must be construed according to their "common and approved usage" or, to the extent they are technical words or have acquired a "peculiar and appropriate meaning in law" they must be construed and understood according to such peculiar and appropriate meaning. Cable voice is not the "conveyance of telephone ... messages" under either test, according to Comcast.

Comcast argues that under the "common and approved usage" test, the term "conveyance of telephone . . . messages" should be understood in the context of the service that existed at the time RSA 362:2 was enacted in 1911.[14] Statutory language means what it meant to its framers, according to Comcast; the mere re-enactment of the language at various times since 1911, does not alter the original meaning intended by the legislature when it first enacted RSA 362:2. Comcast asserts that the service contemplated by the enacting legislature, and over which the

[14] The circumstances under which a statute was enacted are properly considered in connection with the words of the statute in order to ascertain the intention of the legislature. *See Am. Motorists' Ins. Co. v. Central Garage,* 86 N.H. 362, 370 (1933).

Commission has had long-standing regulatory authority, is known as "plain old telephone service" or "POTS." Although cable voice may share superficial similarities with POTS, Comcast argues that it is a very different service, from a network perspective as well as the user, from the "conveyance of telephone . . . messages" that existed at the time RSA 362:2 was enacted. Comcast purports that cable voice does more than simply enable the type of voice communications that comprise POTS – it offers the capability to transform the protocol in which calls are transmitted and provides a series of enhanced communications features that augment and complement the calling features. Comcast contends that these features are not offered by POTS and were not envisioned by the legislature when it set out in 1911 to regulate "the conveyance of telephone . . . messages." Comcast maintains that this holds true today, quoting Newton's Telecom Dictionary as defining a "telephone" as providing a "dial tone [that] actually comes from the central office, not the phone,"[15] something cable voice does not provide. According to Comcast, with cable voice the dial tone is generated by the eMTA on the customer's premises.

Comcast argues that cable voice also does not qualify as the "conveyance of telephone ... messages" under the "peculiar and appropriate meaning in law" test under RSA 21:2. The term should be understood as commensurate with the definition of "telecommunications service" under federal law – the regulatory classification that has long applied to the type of telephone service regulated by this Commission.[16] Under federal law, the technical differences between cable voice and POTS prevent it from being classified as a "telecommunications service" at all, according to Comcast.

[15] Newton's Telecom Dictionary 1103 (25th ed. 2009).
[16] *See* 47 U.S.C. § 153(53).

Comcast states that the New Hampshire Supreme Court has emphasized that the Commission's authority is circumscribed and does not cover services beyond those contemplated by the legislature. In rejecting the Commission's authority to regulate mobile paging companies, Comcast argues, the Court found that "the legislature did not intend [through RSA 362:2] to place all companies and businesses somehow related to railroads, telephone, telegraph, light, heat, and power companies under the umbrella of the PUC's regulatory power."[17] Rather, the Court held, the statute should be limited to the types of services the legislature intended to cover, with sensitivity to the need for regulation by the Commission.

Further, Comcast argues, there is no need for such regulation. According to Comcast, Comcast Phone, which provides interconnection service to Comcast IP Phone, abides by the Commission's CLEC regulations, files rate schedules with the Commission, and posts on Comcast's website the services it provides in New Hampshire, which include a product designed to serve schools and libraries, another designed for small businesses, and a wholesale local interconnection service (the same service utilized by ComcastIP Phone). Comcast Phone also pays local exchange carriers reciprocal compensation for traffic originated by Comcast IP Phone that terminates within local exchange calling areas and pays intrastate or interstate terminating switched access charges for non-local traffic originated by Comcast IP Phone. Comcast adds that Comcast Phone, in accordance with federal regulations, provides Enhanced 911 and Telecommunications Relay Service (TRS), and remits the required 911 and TRS fees to the State of New Hampshire and Trust Fund Administrator, respectively. Comcast IP Phone collects and remits the New Hampshire Communications Service Tax pursuant to RSA 82-A for its Comcast Digital Voice service. Comcast Phone, on behalf of its customers (including Comcast IP Phone) also pays the utility assessment to the Commission under RSA 363-A, based on end-user

[17] *Appeal of Omni Comm'ns, Inc.*, 122 N.H. 860, 863 (1982).

revenues. Comcast avows that it works cooperatively with the Commission's Telecommunications and Consumer Affairs Divisions to ensure that customer complaints are handled appropriately, and works diligently to resolve matters to the customer and regulator satisfaction.

Accordingly, Comcast argues, just as the New Hampshire Supreme Court held in *Appeal of Omni* that RSA 362:2 should not be extended to wireless pagers because there was no need to do so, this Commission has no need to extend the meaning of the term "conveyance of telephone . . . messages" to cable voice services. Comcast argues that the FCC has regulatory power over all VoIP providers, thereby obviating state regulation. Comcast alleges that this Commission has expressly recognized that competitive, unregulated cable voice offerings are consistent with the fair competition policies the Commission is bound to promote.[18]

2. Federal Preemption

Comcast states that, even assuming, *arguendo,* the Commission has authority under state law to regulate cable voice, any such authority is preempted by longstanding federal law prohibiting states from regulating information services. According to Comcast, the plain terms of the federal Telecommunications Act establish that a cable voice product such as Comcast Digital Voice is an information service. Comcast purports that federal courts have clearly and repeatedly held that cable voice providers, such as Comcast IP Phone, provide "information services" and have enjoined state regulation of cable voice providers on that basis. Comcast indicates that the Telecommunications Act distinguishes "telecommunications services," such as traditional telephone service, from "information services," defined as the "offering of a

[18] *Comcast Phone of New Hampshire,* Order No. 24,938 in Docket No. DT 08-013 (Feb. 6, 2009) at 19 (finding that bundled regulated and unregulated offerings provided by Comcast and CLECs are consistent with state and federal policies and not unfair to the incumbent local exchange carriers in whose territories the bundled offerings are available).

capability for storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[19] Comcast hypothesizes that to encourage innovation in the information services market, the FCC has held that Congress intended that "the two categories be separate and distinct, and that information service providers not be subject to telecommunications regulation."[20] Comcast maintains that federal courts have recognized that "[t]he FCC has promoted a market-oriented policy of allowing providers of information services to 'burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.'" Accordingly, Comcast quotes, "any state regulation of an information service conflicts with the federal policy of non-regulation."[21] Comcast claims that the FCC first preempted states from regulating information services nearly thirty years ago and that holding has been upheld by federal courts.[22] Therefore, Comcast asserts, because Comcast Digital Voice is an information service under

[19] *See* 47 U.S.C. § 153(24) and §153(53) (formerly § 153(20) and (46)).

[20] *In re Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11523, ¶ 43 (1998).

[21] *Minnesota Pub. Utils. Comm'n* v. *FCC,* 483 F.3d 570, 580 (citing *Vonage Preemption Order,* 19 FCC Rcd 22404; 22416, ¶ 24). *See also In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,'* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802-03, ¶ 9 (2002) *("Cable Modem Declaratory Ruling"), aff'd sub nom. National Cable & Telecomm. Assn. v. Brand X Internet Services,* 545 U.S. 967 (2005) (Brand X).

[22] See, e.g., In re Amendment *of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 88 FCC 2d 512, ¶ 83 fn.34 (1981) (finding that "the provision of enhanced service is not a common carrier public offering and that efficient utilization and full exploitation of the interstate telecommunications network would be best achieved if these services are free from public utility-type regulation," and accordingly "pre-empted the states [from] impos[ing] common carrier tariff regulation on a carrier's provision of enhanced services"), *aff'd sub nom. Computer and Computer Indus. Ass'n* v. *FCC,* 693 F.2d 198, 216 (D.C. Cir. 1982); *see also California v. FCC,* 39 F.3d 919, 933 (9th Cir. 1994) *(California v. FCC)* (finding that the FCC had demonstrated that legitimate "regulatory goals ... would be negated" by conflicting state regulation of information services). At the time, the services were known as "enhanced services" rather than "information services"; the FCC has since made clear that Congress' use of the term "information services" at 47 U.S.C. § 153(20) [now §153(24)] was meant to include all "enhanced services." *See, e.g., In re Implementation of the Non-Accounting Safeguards o/Section* 271 *and* 272 of *the Communications Act,* First Report and Order, 11 FCC Rcd 21905, 21956, ¶ 102 (1997) *(Non-Accounting Safeguards Order)*

federal law, state public utility regulation and entry requirements conflict with the express federal policy of non-regulation and are preempted under existing law.[23]

Comcast argues that the regulatory category of "information service" was an FCC creation originally known as "enhanced service." Congress has since adopted the separate regulatory classification and treatment of information services and embodied it in the Telecommunications Act.[24] Comcast maintains that cable voice meets this statutory definition for two independent reasons. First, Comcast argues, cable voice offers the capability to conduct "net protocol conversions" of data by transforming calls between IP and time division multiplexing (TDM),[25] which is a "capability" to "process" and "transform" information "via telecommunications." Second, according to Comcast, cable voice consists of an ever-expanding series of enhanced IP-enabled communications features that augment and complement its calling features and that these enhanced features are "capabilit[ies]" for "generating, acquiring, storing .. retrieving, utilizing, [and] making available" information "via telecommunications." Comcast argues that either of these reasons alone qualifies cable voice and specifically Comcast Digital Voice as an information service under federal standards.

Comcast supports its argument with a trio of federal court decisions holding that interconnected VoIP services, like Comcast Digital Voice, are information services because they offer the capability for transforming the protocol in which calls are transmitted from IP to TDM and vice versa.[26] Comcast states that the reasoning underlying these cases is based on the plain

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[23] *See Vonage v. Minnesota PUC,* 290 F. Supp. 2d 993, 1002.

[24] *See* 47 U.S.C. § 153(24).

[25] TDM is a technique for transmitting a number of separate voice (as well as data or video) signals simultaneously over one communications medium by interleaving a piece of each signal one after another. TDM is the transmission standard historically used on the PSTN.

[26] *See Southwestern Bell Tel., L.P. v. Missouri Public Service Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. Sept. 14, 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009); *Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 999; *Vonage v. NYPSC*, 2004 WL 3398572 (citing with approval *Vonage v. Minnesota PUC*).

language of the Telecommunications Act, and is dispositive of the issue here. Comcast argues that an information service offers the "capability for ... transforming" or "processing" information,[27] unlike a "telecommunications service," in which information is transmitted "without change in the form or content of the information as sent and received."[28] Comcast states that cable voice offers customers the capability to change the form of incoming or outgoing calls by processing and transforming the protocol of the call – the manner in which the call is represented by the information transmitted on, and understood by, the network.[29]

Comcast contends that the Eastern District of Missouri's analysis in *Southwestern Bell* is squarely on point. As that court recognized, under longstanding FCC precedent, "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service" because it constitutes the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" and "alters the form and content of the information sent and received."[30] Therefore, IP-PSTN traffic, which enters the network in IP and terminates on the PSTN, is an "information service."[31] Comcast also maintains that the *Vonage* court reached an identical conclusion, holding that cable voice carriers "act on the format and protocol of the information" for calls they carry, thus making the service an information service under federal law.[32] The Southern District of New

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[27] 47 U.S.C. § 153(24).

[28] *Id.* at § 153(50) and (53).

[29] *See Second Computer Inquiry,* 77 FCC2d 384, ¶ 97 Fn.33 (defining "[p]rotocols" as "the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages.").

[30] 461 F. Supp. 2d at 1081-82 (citing *Non-Accounting Safeguards Order,* 11 FCC Rcd 21905, 21956-57, ¶¶ 104-106 (Dec. 24, 1996); 47 U.S.C. § 153(20)) [now § 153(24)]; and *In re Universal Service Contribution Methodology,* Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538, ¶ 39 (2006)). *See also, generally, In re Communications Protocols under Section 64.702 of the Commission's Rules and Regulations,* Memorandum Opinion, Order, and Statement of Principles, 95 FCC2d 584 (1983).

[31] 461 F. Supp. 2d 1055, 1082.

[32] *See* 290 F. Supp. 2d 993, 999 (internal citation omitted).

York similarly cited the *Vonage* court's reasoning in preliminarily enjoining the New York Public Service Commission from regulating a cable voice carrier as a public utility.[33]

Comcast also states that any distinction between fixed and nomadic services is irrelevant to the information service determination. Comcast argues that the *Vonage Preemption Order* made clear that a finding that cable voice is an information service would necessarily mean that state public utility regulation of cable voice is preempted: "if [cable voice] were to be classified as an information service, it would be subject to the [Federal Communications] Commission's long-standing national policy of non-regulation of information services."[34] Comcast adds that the *Vonage Preemption Order* never reached the question, and was ultimately decided on entirely different grounds.[35]

Comcast alleges that the RLECs have attempted, through two arguments, to evade the plain language of the Telecommunications Act. First, the RLECs suggest that the federal courts that have addressed the question have been mistaken, and that there is no "net" protocol conversion in cable voice services because there is an electric analog signal and a human voice on both the originating and terminating ends of the call. Second, the RLECs assert that Comcast is not providing an information service with respect to the subset of calls between customers on Comcast's own network, which remain in IP without being transformed to TDM.

Comcast argues that net protocol conversion does not require alteration of the transmitted content. Comcast asserts that the RLEC position was flatly rejected in *Southwestern Bell*, which held that "[i]t does not matter that there is a 'voice' at both ends of an IP-PSTN call."[36] Comcast avers that the RLECs' argument repeats the fallacy that there is no ''transformation'' of the

[33] *See Vonage* v. *NYPSC,* 2004 WL 3398572 at *1.
[34] *Vonage Preemption Order,* 19 FCC Rcd 22404, 22416, ¶ 21.
[35] *See id.* at 22419, ¶ 24; *see also infra* pages 32-34.
[36] 461 F. Supp. 2d 1055, 1082 fn.21.

user's information when the content being transmitted (*i.e.*, ''voice'') remains the same. According to Comcast, however, the FCC addressed and rejected that exact argument in the *Non-Accounting Safeguards Order,* where Bell Atlantic argued that the information service designation should be limited to services ''that transform or process the content of information transmitted by an end-user," and not to protocol processing services that leave the content of the transmission unchanged.[37]

Comcast notes that the FCC disagreed with Bell Atlantic, holding that it does not matter that the *content* of a transmission remains unchanged, because ''the statutory definition makes no reference to the term 'content,' but requires only that an information service transform or process 'information.'"[38] Therefore, the FCC held, "both protocol conversion and protocol processing services are information services" whether they change the content of the user's information or not.[39] Comcast postulates that the RLECs misunderstand the concept of a net protocol conversion, which the FCC has defined as one that enables "an end-user to send information into a network in one protocol and have it exit the network in a different protocol" and thereby "clearly 'transforms' user information."[40] Comcast claims that a service offers and performs net protocol conversion if a net protocol conversion is performed by the network. Comcast challenges the RLECs' exclusive focus on customer handsets, stating that changes to the format of information that occur before the information enters a carrier's network, or after

According to Comcast, the critical consideration is the point where an end-user sends information into the information service provider's network and the point where information exits that network. Comcast states that the court in *Southwestern Bell* held that a "net protocol

[37] *See* 11 FCC Rcd 21905, 21956, ¶ 104.
[38] *Id.*
[39] *Id.*
[40] *Id.*

conversion" occurs where "[t]he communication originates at the caller's location in IP protocol, undergoes a net change in form and content when it is transformed at the [provider's] switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient's location in TDM,"[41] which is precisely what cable voice does. Outgoing calls enter Comcast's network in IP at the demarcation point between the provider's network and the customer's home wiring. When those calls are bound for the PSTN, they exit Comcast Digital Voice's network after being converted from IP to TDM, and are handed off to Comcast IP Phone's CLEC partner. Outgoing calls enter Comcast's network in IP and leave it in TDM; incoming calls from the PSTN do the opposite. That, Comcast contends, is a net protocol conversion.

Comcast states that although it is true that Comcast Digital Voice customer equipment generally reformats the IP signal into an analog electrical signal (at the eMTA) and from an analog signal into human voice (at the handset), the reformatting itself is not a protocol conversion, as electric and analog signals are not "protocols" under the FCC or standard industry definitions. Moreover, Comcast maintains, such reformatting is not performed on or by the cable voice network.

Comcast states that cable voice offers the capability for protocol conversion irrespective of whether that capability is invoked in every call, as inevitably some customers will call one another, with the calls staying on Comcast's network without the protocol change that occurs when Comcast Digital Voice customers call those who are not on Comcast's network. According to Comcast, the fact that not all calls undergo conversion is irrelevant; it is the capability for protocol conversion that is important. The RLECs' argument that Comcast is providing a telecommunications service for these calls because there is no need for Comcast to

[41] *Citing Southwestern Bell* v. *Missouri PSC,* 461 F. Supp. 2d 1055, 1082 (citing *Vonage* v. *Minnesota PUC, 290* F. Supp. 2d 993, 1000).

convert a call to TDM if it is staying on its network is in error because, says Comcast, it ignores the plain text of the Telecommunications Act: an information service is the *"offering* of a *capability* for . . . transforming, [or] processing . . . information via telecommunications."[42] Comcast maintains that the statute contains no requirement that the offered capability be exercised every single time the service is used. Comcast hypothesizes that a person might use his or her broadband Internet connection to transfer a file without invoking any other functionalities, but that does not cause the user's broadband Internet service – the paradigmatic information service – to suddenly turn into a separate telecommunications service for purposes of the file transfer, then revert back to an information service as soon as the user invokes other abilities, such as visiting a web page. Similarly, Comcast contends, although users may place some calls that are IP-to-IP, that does not make Comcast Digital Voice any less of an "offering of a capability" for converting the call protocol, nor should it require Comcast to split the cable voice service into separate plans for calling PSTN users and for calling other Comcast Digital Voice customers. Comcast states that as the FCC has held and the Supreme Court has affirmed, the regulatory status of a service "turns on the nature of the functions the end user is offered," not on each individual element contained within the offering.[43] The focus is on whether the elements are "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering."[44] Comcast states that this is plainly the case with Comcast Digital Voice with respect to a customer's ability to place calls to PSTN users and to other Comcast Digital Voice customers.

Comcast further states that its cable voice service qualifies as an information service because the calling capability is integrated with other computing and information service

[42] 47 U.S.C. § 153(24) (emphasis added).
[43] *Brand X infra.*, 545 U.S. 967, 988.
[44] *Id.* at 990.

functions as a single offering. Where information service features are integrated with transmission features as part of the same service offering and "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering," the combined service will be considered an information service, notwithstanding the presence of telecommunications elements.[45] Comcast claims that its cable voice service offers communications abilities and features that go beyond the ability to place and receive calls, *i.e.*, it combines communications features that use the Internet, television, mobile handsets, iPods and iPhones in conjunction with the user's voice connection, and which permit users to access and act upon their communications information, including their calling information, in a variety of ways from multiple devices. Comcast argues that the ever-growing list of communications features that Comcast is able to offer because of the IP-enabled nature of its service are plainly information services under the statutory definition, as they enable consumers to store, manage, and utilize information, in addition to simply transmitting it.

According to Comcast, the RLECs' claim that Comcast is doing nothing more than bundling an information service with basic exchange service to avoid regulation is also in error. Comcast's cable voice service offers a unified communications platform that customers use to communicate and access information in a manner that transcends either their location or the communications device they are using at any given time. Callers can send and receive information and access their calls and information across a variety of platforms – phone, Internet, video, mobile handset, iPod, or iPhone – in a manner completely foreign to the experience of using POTS. Comcast argues that in the *Vonage Order*, the FCC found (although it ultimately decided the case on other grounds), that a VoIP provider's offering of a "suite of integrated

[45] *Id.* at 990; *see also Southwestern Bell* v. *Missouri Public Service Comm'n,* 461 F. Supp. 2d 1055, 1082-83 (information and telecommunications aspects of VoIP are treated as the same service so long as they are "sufficiently intertwined").

capabilities and features" substantially similar to those offered by Comcast Digital Voice formed "an integrated communications service."[46] Accordingly, Comcast asserts, its integration of comparable enhanced features satisfies the statutory requirement that Comcast Digital Voice be an "offering of the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[47]

Comcast alleges that the RLECs, as well as the OCA, have made much of the fact that the FCC has not declared whether 47 U.S.C. 153(24) would classify either fixed or nomadic VoIP as an information service. Comcast asserts that the absence of FCC action is irrelevant to the question of whether cable voice qualifies under federal law as an information service that cannot be regulated by state utility commissions. Comcast further argues that classifying something as an "information service" turns on whether it meets the statutory definition, and while the FCC has authority to administer the Act, federal statutes do not cease to have force and effect pending interpretation by the agencies responsible for administering them. According to Comcast, the law does not "require[] a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists" for preemption purposes.[48] Comcast maintains that the New Hampshire Supreme Court has itself on more than one occasion recognized that federal law preempts conflicting action by this Commission, even in the absence of a specific federal agency directive.[49] Comcast argues that in the absence of FCC guidance, tribunals such as this Commission,

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[46] *Vonage Preemption Order,* 19 FCC Rcd 22404, 22407, 22419-20, ¶¶ 7, 25; *see also generally id.* 22420, ¶ 25 (holding that Vonage should not be required to change its VoIP service to accommodate state regulation because "[r]ather than encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, molding this new service into the same old familiar shape").

[47] 47 U.S.C. § 153(24).

[48] *See Geier* v. *American Honda Motor Co.,* 529 U.S. 861, 884 (2000).

[49] *See, e.g., Appeal of Conservation Law Foundation, 147* N.H. 89, 95 (N.H. 2001) (finding state law "preempted, either explicitly or implicitly, by federal law" due to conflict with federal regulatory scheme); *Appeal of Sinclair Machine Productions,* 126 N.H. 822, 830 (N.H. 1985) (finding state law preempted where application would frustrate federal regulatory scheme).

whose decisions require interpretation of a federal statute, must apply and interpret the statute based on its text and other applicable means of statutory interpretation.[50] Comcast asserts that, as the FCC recently directed the Texas Public Utilities Commission, to the extent there are regulatory issues surrounding VoIP that the FCC has not yet addressed and which state commissions must resolve to carry out their responsibilities, state commissions should proceed to decide them in the interim by "relying on existing law."[51]

Comcast charges that state utility regulation of cable voice would frustrate federal policy with respect to IP-enabled services and, even if it were not an information service, state utility regulation would undermine and conflict with federal policies promoting deployment of advanced broadband and IP-enabled services through a national policy of deregulation. Comcast states that in Section 230 of the Telecommunications Act, Congress found that "interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," and "to promote [this] continued development," it would be the "policy of the United States" to maintain such services "unfettered by Federal *or State* regulation."[52] Comcast cites the FCC's *Vonage Order* to argue that "section 230 is indifferent to the statutory classification of services that may 'promote its continued development,'" and "plainly embraces" cable voice;[53] "irrespective of the statutory classification of [Vonage's] DigitalVoice it is

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[50] *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (if "Congress has not directly addressed the precise question at issue," it is "necessary in the absence of an administrative interpretation" for the tribunal to reach "its own construction on the statute."); *Southwestern Bell,* 461 F. Supp. 2d 1055, 1077 ("[a]lthough the FCC has not yet issued regulations addressing VoIP, existing rules and orders establish how VoIP and other IP services should be treated in the interim"); *Comcast IP Phone of MO., LLC* v. *Missouri Pub. Serv. Comm 'n,* No. 06-4233-CV-C-NLK, 2007 WL 172359, at *4 (W.O. Mo. Jan. 18,2007) (holding that state public utility commission could decide regulatory classification of interconnected VoIP under the Communications Act because "unless ... faced with a contrary decision from a relevant federal agency, a state agency may interpret a federal statute and apply its dictates").

[51] *In the Petition of UTEX Communications Corporation, Pursuant to Section252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas,* Memorandum Opinion and Order, 24 FCC Rcd 12573, 12578, ¶ 10 (2009).

[52] 47 U.S.C. §§ 230(a)(4), (b) (emphasis added).

[53] *Citing Vonage Order,* 19 FCC Rcd 22404, 22425-26, ¶ 34.

embraced by Congress's policy to 'promote the continued development' and 'preserve the vibrant and competitive free market' for these types of services . . . ."[54] Therefore, according to Comcast, state regulation of cable voice services, "[r]egardless of the definitional classification . . . under the Communications Act . . . directly conflicts with [the FCC's] pro-competitive deregulatory rules and policies . . . ."[55] Comcast argues that the FCC has made clear that IP-enabled services such as cable voice must be permitted to develop free of state utility regulation, explaining that "IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services."[56] Comcast also states that the FCC has declared that its "aim" is to "rely, wherever possible on competition" rather than regulation to foster IP-enabled technologies such as VoIP because "these services are fast-changing and likely to evolve in ways that we cannot anticipate" and "imposition of regulatory mandates, particularly those that impose technical mandates, should be undertaken with caution."[57]

Comcast maintains that the clearest statement of federal policy is the *Vonage Preemption Order* itself, in which the FCC made clear that it, not state commissions, has the responsibility and obligation to decide whether certain regulations apply to Vonage's and other services having the same capabilities.

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[54] *Id.* (The actual quote from the *Vonage Order* is as follows: "Thus, irrespective of the statutory classification of DigitalVoice, it is embraced by Congress's policy to "promote the continued development" and "preserve the vibrant and competitive *free* market" for these types of services.")

[55] *Id.* at 22415, ¶ 20.

[56] *In re IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4867 ¶ 5 (2004).

[57] 19 FCC Rcd 4863,4867, 4894, ¶¶ 5,53. New enhanced features being introduced by Comcast, such as the HomePoint™ service, prove accurate the FCC's prediction that IP-enabled services such as cable voice are "fast-changing."

C. Time Warner

1. State Regulation

Time Warner claims that its retail entity offering cable voice through a number of affiliated entities, cannot reasonably be classified as a "public utility" under state law. Time Warner argues that the question of whether a particular entity is a public utility "is not a constitutional one nor one of public policy but rather one of statutory interpretation,"[58] and that the New Hampshire Supreme Court has emphasized that the public utility definition "does not apply to industries that the legislature did not intend to be regulated."[59] Thus, according to Time Warner, absent proof of such legislative intent, an entity cannot be found to fall within the Commission's jurisdiction, even if its activities fall within "the literal words of the statute."[60]

Time Warner asserts that there is no plausible argument that the Legislature intended for the Commission to regulate cable voice providers as public utilities. The statutory provision defining a public utility was first enacted in 1911, many decades before the emergence of cable voice and the Internet. Thus, Time Warner argues, for most of its existence, the public utility definition was a product of the monopoly telephone era. As new technologies and services have emerged, contends Time Warner, the Legislature has had numerous opportunities to amend the statute to expand the Commission's jurisdictional reach, but it has consistently declined to do so. Time Warner declares that most analogous to this case, the Legislature rejected proposed legislation in 1977 that would have regulated "all mobile telephone service companies and radio

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

[59] *Appeal of Atlantic Connections, Ltd,* 135 N.H. 510, 514, 608 A.2d 861, 865 (1992).

[60] *Allied New Hampshire Gas Co.*, 107 N.H. at 306, 221 A.2d at 251 (ruling that a distributor of liquefied petroleum gas was not a public utility -- defined to include entities involved in the "furnishing of light, heat, [or] power" -- based on its finding that although this "language, in isolation, is broad enough to include" entities that distribute liquefied petroleum gas, the Commission "has never regulated such activities").

paging service companies" as public utilities.[61] According to Time Warner, the fact that the Legislature considered it necessary to amend the statute to account for such entities demonstrates that the statute was never intended to encompass all services that happen to involve the use of a telephone. Time Warner contends that the Legislature eliminated any doubt on the matter by expressly declining to enact that proposal, determining that the legislation "might stifle competition in a budding new industry."[62] Time Warner claims that the Supreme Court later reversed an effort by the Commission to expand its jurisdiction to encompass radio paging companies by stating unequivocally that the Legislature "did not intend to place all companies and businesses somehow related to . . . telephone . . . companies under the umbrella of the PUC's regulatory power."[63] Time Warner asserts that the Court also determined that permitting the Commission to exercise jurisdiction over radio paging companies would conflict with the State's policy to promote free trade and private enterprise, as established in the state constitution. In fact, according to Time Warner, the Court went so far as to conclude that the Commission, "by attempting to regulate radio pagers, is demonstrating the very behavior it was established to prevent: interference and disruption of free market private enterprise."[64] Finally, Time Warner notes, the Court stated that there was "[n]o need" for the Commission to regulate radio paging services, because (1) the Commission already "regulat[es] telephone lines," such that the "radio-paging industry is not totally unregulated," and (2) the FCC "has regulatory power over" such entities.[65] Time Warner argues that the Court's reasoning applies equally to this case, and that the RLECs' contrary reading would result in a dramatic expansion of the Commission's

[61] N.H.S. Jour. 1854 (1977).

[62] N.H.H.R. Jour, 1069 (1977).

[63] *Appeal of Omni Communications. Inc. d/b/a Page Call (New Hampshire Public Utilities Commission),* 122 N.H. 860, 863, 451 A.2d 1289, 1291 (1982) (ruling that radio paging companies were not covered by public utility definition).

[64] *Id.* at 863, 451 A.2d at 1291.

[65] *Id.* at 864, 451 A.2d at 1291.

authority to regulate entry by any providers using new technologies to offer valuable services to New Hampshire customers simply because they involve the use of a telephone. Time Warner argues that cable voice services do not permit the transmission of communications by telephone alone but, rather, also require a broadband connection and specialized IP-compatible customer premises equipment, the key piece of which is not a telephone, but an eMTA that converts the user's communications to IP format for transmission over broadband facilities without which the telephone handset would be useless. Time Warner argues that it does not matter whether such a communication is comparable to a traditional telephone message, as the RLECs suggest. If that were sufficient, Time Warner maintains, then the Commission would have been free to regulate mobile telephone services, which the Legislature and Supreme Court have confirmed that it cannot do.

According to Time Warner, New Hampshire law has foreclosed the argument that regulating it as a public utility would be in the public interest and, moreover, the potential classification of a particular entity as a public utility is a question of statutory interpretation, not one of public policy. Time Warner argues that the Supreme Court has rejected classification arguments based on public interest considerations where there is "no clear legislative mandate."[66] Even if such considerations were relevant, Time Warner asserts, the outcome the RLECs seek would actually disserve the public interest. Subjecting cable voice to state regulation may erect barriers to entry and impede the development of competition, according to Time Warner, and the law is clear that "legislative grants of authority to the PUC should be interpreted in a manner consistent with the

[66] *Manchester Water Works,* 103 N.H. 505, 507, 175 A.2d 525, 527 (1961) (stating that ""[it may be that the public interest would best be served if the Public Utilities Commission had full control"" of a particular entity as a public utility, but declining to effectuate that result where ""there is no clear legislative mandate to that effect expressed in the statutes"").

State's constitutional directive favoring free enterprise."[67] Regulating cable voice, Time Warner asserts, would run counter to that mandate.

2. Federal Preemption

Time Warner states that federal law preempts state authority over cable voice services such as Digital Phone and Business Class Phone. Even if TWC Digital Phone could be classified as a "public utility" under New Hampshire law, Time Warner maintains, federal law precludes the Commission from subjecting TWC Digital Phone to certification, tariffing, or other public utility requirements in connection with that service. The FCC's *Vonage Order* established that VoIP services sharing certain basic characteristics are not subject to regulation by state public utility commissions.[68] Time Warner argues that the FCC clearly intended in its *Vonage Order* to include fixed, facilities-based services provided by cable operators within the class of services that should be exempted from state regulation. Time Warner elaborates that the FCC's overarching goal was to avoid "patchwork regulation" of IP-enabled services, under which regional and national providers finally challenging incumbent LECs' entrenched dominance would "have to satisfy the requirements of more than 50 jurisdictions with more than 50 different sets of regulatory obligations."[69]

Time Warner argues that in *Vonage*, the FCC relied on its authority to preempt state regulation that would thwart or impede the lawful exercise of federal authority over the interstate component of the communications.[70] According to Time Warner, the relevant question is whether it is possible for federal and state regulation to coexist with respect to a jurisdictionally mixed service without impermissibly interfering with legitimate federal interests. Time Warner

[67] *Appeal of Public Service Co. of New Hampshire,* 141 N.H. 13, 676 A.2d 101 (1996).
[68] *See Vonage Order* at ¶ 1.
[69] *Id.* at ¶¶ 32, 41.
[70] *Id.* at ¶ 19.

argues that when the FCC applied that standard in its *Vonage* decision, it concluded that state utility regulation of Vonage's service would directly conflict with and prevent the lawful exercise of federal policy. Time Warner emphasizes that such regulation was preempted "irrespective of the definitional classification" of the service, which the FCC expressly declined to decide.[71] Time Warner claims that regardless of the classification issue, the FCC explained that it maintains an open entry policy for non-dominant providers that would be undermined by the imposition of state certification and tariffing requirements.[72] Time Warner also claims that the FCC determined that "entry requirements could stifle new and innovative services whereas blanket entry authority, *i. e.,* unconditional entry, would promote competition" and applying for a certificate "can take months and result in denial of a certificate, thus preventing entry altogether."[73] Similarly, Time Warner argues, state requirements to file tariffs for cable voice services would fly in the face of the FCC's determination that *"prohibiting* such tariffs would promote competition and the public interest".[74] Time Warner states that the FCC further recognized that regulating the intrastate component of cable voice services would necessarily encroach on the FCC's exclusive jurisdiction over interstate services because of the "inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously."[75]

Time Warner states that critically for purposes of this proceeding, the FCC made clear that its preemption analysis applied not only to Vonage's service, but to *any* VoIP service that

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[71] *Id.* at ¶ 14.
[72] *Id.* at ¶¶ 20-21.
[73] *Id.* at ¶ 20.
[74] *Id.*, (emphasis added).
[75] *Id.* at ¶ 25.

possesses three basic characteristics:

(1) a requirement for a broadband connection from the user's location;

(2) a need for IP-compatible customer premises equipment; and

(3) a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video.[76]

Time Warner argues that the test of whether a cable voice service is functionally similar to traditional local exchange and long distance voice service is beside the point and that, in any event, Time Warner's phone service satisfies the FCC test set forth in *Vonage*. Time Warner purports that the FCC has never limited its preemption rationale to nomadic VoIP services. To the contrary, according to Time Warner, the FCC expressly recognized that, under the three-part standard, all facilities-based VoIP services, including cable voice, are subject to preemption, irrespective of whether they include any nomadic capabilities. Time Warner argues that because the FCC has made clear its view that cable voice services such as Digital Phone may not be subject to certification, tariffing, or related public utility requirements, any attempt to impose such obligations would thwart federal policy and violate the Supremacy Clause of the Constitution.[77]

Finally, Time Warner states that in addition to triggering preemption under the *Vonage Order,* classifying TWC Digital Phone as a public utility by deeming its cable voice services to involve the conveyance of a telephone message would risk a conflict with the FCC's prerogative

[76] *Id.* at ¶ 32.

[77] *See, e.g., Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 708 (1984) ("[W]hen federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation.") (internal quotation marks omitted).

to classify cable voice services. Time Warner claims the FCC has imposed a series of discrete requirements on VoIP providers but has consistently refrained from resolving the appropriate statutory classification of the service. Instead of relying on the default non-regulation of information services, or the full panoply of regulations applicable to telecommunications services, Time Warner maintains, the FCC has constructed a narrowly tailored regime to achieve particular policy goals. In fashioning a regulatory scheme for cable voice services, Time Warner argues, the FCC has asserted its exclusive authority to determine both how and when to act in order to achieve a delicate balance between competing interests. Time Warner asserts that this approach has worked well for the industry and for consumers, and there is no need for the Commission to seek the imposition of additional state obligations on Digital Phone -- particularly given that TWC Digital Phone already operates in a manner consistent with state CLEC requirements. Moreover, argues Time Warner, classifying it as a "public utility" that conveys "telephone messages" pursuant to New Hampshire law would conflict with the FCC's potential classification of cable voice as an information service. Time Warner argues that the FCC proposed in a recent rulemaking to classify cable voice as an information service. Time Warner concludes that because TWC Digital Phone operates in accord with the requirements applicable to CLECs in New Hampshire, any effort to classify it as a public utility would invite conflicts and costly diversions without tangible benefits.

V. COMMISSION ANALYSIS

The RLECs requested an inquiry into the appropriate regulatory status of fixed Internet Protocol (IP)-enabled cable voice service in New Hampshire. In support of their petition, the RLECs argue that in addition to competition from wireless and computer-based nomadic voice over IP (VoIP) providers in New Hampshire, RLECs also face competition from fixed cable

voice offerings such as those provided by Comcast and Time Warner. The RLECs assert that Comcast's cable voice service is a retail telecommunications service that should be regulated under the public utility laws of New Hampshire. Comcast and Time Warner counter that cable voice services do not fall within this Commission's jurisdiction and, moreover, that state regulation of such services is preempted by federal law. Comcast further argues that cable voice service should be considered an information service subject to federal, not state regulation.

To resolve the issues raised in this proceeding, we consider: (1) whether Comcast and Time Warner are offering telephone service to the public under New Hampshire law; (2) whether the cable voice service provided by Comcast and Time Warner is an information service rather than a telecommunications service pursuant to federal law and thus subject to exclusive federal jurisdiction; and (3) if Comcast and Time Warner are offering telephone service that is a telecommunications service, whether state regulation of such voice services is otherwise preempted by federal law. To date, the FCC has declined to decide whether fixed or nomadic Voice over IP voice services are "telecommunications services" subject to joint federal-state regulation or deregulated "information services" under federal law.

A. Comcast and Time Warner are offering Telephone Service to the Public under New Hampshire Law.

This docket presents issues of first impression in New Hampshire. In order to determine the scope of our regulatory authority, we look first to the plain meaning of the applicable statute. RSA 362:2, I states, in part, that:

> [t]he term 'public utility' shall include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court, except municipal corporations and county corporations operating within their corporate limits, owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages . . . for the public.

Accordingly, if a provider of cable voice services falls within this definition, it is subject to regulation as a public utility under New Hampshire law. The statutory definition of a telecommunications 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, and 3) for the public.

Because there is no real dispute that Comcast and Time Warner – either directly or indirectly through affiliates – own, operate or manage plant or equipment to facilitate the conveyance of "messages" for the public, our determination turns on whether the messages that are transmitted constitute "*telephone* messages." According to Comcast, it is not a "public utility" under the plain meaning of the statute, as its cable voice service is not a "conveyance of a telephone message." Comcast Br. at 10-11, *citing In re Sarvela*, 154 NH 426, 430 (2006) (the law means what it meant to its framers; to determine that meaning, the court first examines the language of the statute and, where possible, ascribes the plain and ordinary meanings to the words used).

Comcast and Time Warner both argue that the New Hampshire Supreme Court has made clear that this Commission may not expand its authority over industries not contemplated in the drafting of the statute, citing *Appeal of Omni*, 122 NH 860, 863 (1982) ("in enacting RSA 362:2 the legislature did not intend to place all companies and businesses somehow related to . . . telephone . . . companies under the umbrella of the PUC's regulatory power"). They argue that the statutory language, written in 1911, could not have been intended to apply to technologies such as IP-enabled cable voice service that had yet to be invented. Further, Comcast and Time Warner argue that the legislature of 1911 intended the term public utility to include only those entities providing telephone service over the traditional landline network, or "plain old telephone

service (POTS)," as understood in the "common and approved usage" of the term. Comcast Initial Br. at 2; Time Warner Initial Br. at 2 and 11, *citing In re Sarvela.*

Comcast argues that today's cable voice technology not only did not exist when RSA 362:2 was enacted, it differs significantly from the POTS technology in existence at that time. Comcast Br. at 2. According to Comcast, cable voice service differs from POTS from a network perspective as well as from a user perspective, because it provides the capability to transform the protocol in which calls are transmitted and includes enhanced communications features that augment and complement basic calling features. Comcast Br. at 11. Such enhanced features, in conjunction with the user's voice connection, permit users to access and act upon their communications information through use of the Internet, television, mobile handsets, iPods and iPhones. *Id.* at 26. The RLECs note, however, that traditional landline service also offers many of the same features. RLEC Direct Testimony of Wimer at 25-27. Comcast further argues that cable voice service requires a specialized embedded multimedia terminal adapter (eMTA), which can also function as an Internet cable modem. Customers connect their inside wiring to the eMTA, which, in turn, is connected to coaxial cable, rather than copper wires, and when the customer uses a traditional analog telephone handset, the eMTA converts analog voice signals to IP and *vice versa*. Comcast Br. at 5. Comcast's network converts calls to and from PSTN users from TDM to IP and back, thus accomplishing a "protocol conversion," according to Comcast. Comcast Br. at 6. The converted messages are carried by a Comcast CLEC affiliate in TDM to interconnect with the PSTN. *Id.*

Comcast recognizes that there are certain similarities between cable voice service and POTS, including the assignment of NANPA-conforming telephone numbers, [78] the use of

[78] The North American Numbering Plan Administration (NANPA) administers a telephone numbering system using a three-digit area code followed by a seven-digit number.

traditional handsets, and dial and ring tones. Comcast Br. at 3. According to Comcast, however, the addition of enhanced communications features, such as voice mail and transfer of telephone calls to email, result in the classification of cable voice service as an information service, not a telecommunications service encompassed under RSA 362:2. Comcast Br. at 4.

Time Warner adds that regulation by this Commission of the cable voice services at issue here would conflict with the State's policy to promote free trade and private enterprise, as established under New Hampshire's Constitution and State law. Time Warner Br. at 7. According to Time Warner, State law prohibits regulation that will "stifle competition in a budding new industry," such as cable voice service, or otherwise interfere and disrupt free market private enterprise. Time Warner Br. at 10, *citing Appeal of Public Svc. Co.*, 141 NH 13, 676 A.2d 101 (1996) (finding that the Commission has statutory authority under RSA 374:26 to grant a competing electric utility franchise within service territory of incumbent, but that the decision "should not be read as expressing a point of view . . . on the desirability of retail competition among electric utilities as a matter of policy") and *Appeal of Omni Communication, supra,* at 863.

The argument that RSA 362:2 can be applied only to technologies in existence or envisioned at the time of legislative drafting is untenable. The words of the statute give no indication that the drafters intended to limit the scope of the term "telephone message" to the technologies in existence in 1911 when the statute was enacted. As the RLECs point out, even a rudimentary outline of the historical development of telephone technologies – from the reliance on switchboard operators, to customer direct dialing with mechanical switching, to electronic and digital switching – supports a broader interpretation of the statute than that proffered by Comcast and Time Warner.

Even though the technology used to provide telephone service has evolved over the years since RSA 362:2 was enacted, the provision of the service remains within the scope of the regulatory authority granted to this Commission. The fundamental element in common throughout the historical development of telephony technology is the linking of one end user to another between identifiable, geographically fixed endpoints to enable real-time, two-way voice communication over wires. The fixed geographic element and the real-time voice communication over wires carry through to the more recent development of cable voice service using IP technology. As the RLECs note, the service we consider today is not merely "somehow related" to telephone service, it is a direct and complete substitute for traditional landline service. RLEC Reply Br. at 4, *citing Appeal of Omni* at 863.

The conversion from analog signals to digitized IP packets is a distinction without a difference and does not alter the practical reality that the fundamental service offered to the public remains telephone service. We find that the services at issue here fit squarely within the language of the statute – that is, the conveyance of telephone messages. The plain dictionary meaning of the word "telephone" supports a conclusion that RSA 362:2 covers the voice services at issue here. Webster's on-line Revised Unabridged Dictionary,[79] for example, includes among the definitions for "telephone" the following: "[e]lectronic equipment that converts sound into electrical signals that can be transmitted over distances and then converts received signals back into sounds; 'I talked to him on the telephone.'" A telephone message is further defined as "[a] message transmitted by telephone."[80] The plain dictionary meaning thus focuses on the use of electronic equipment to convert sound into electrical signals to communicate in real time over

[79] Available at www.websters-dictionary-online.com. Sources: compiled from various sources, (under license) copyright 2008. Webster's Revised Unabridged Dictionary, WordNet 3.0 Copyright © 2006 by Princeton University. Accessed 8/3/11.

[80] *Id.*

distances, without defining the specific equipment or technology used. It is difficult to imagine that when customers of Comcast or Time-Warner cable voice service pick up their telephone[81] and dial the telephone number of a neighbor down the street or across town, that they would describe that action as using an information service on a computer network to "orally instant message" a neighbor in real time rather than describing it as making a telephone or phone call to that neighbor. Of course, in this day and age, even phone calls made over POTS involve computer networks to assist in the conveyance and switching of that call by regulated telephone companies, including RLECs.

The 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. In fact, the language "any plant or equipment or any part of the same" suggests that the drafters intended to encompass any and all technologies and facilities, including future technological improvements, used by a public utility to convey telephone messages for the public. In the case of a telephone utility, the "conveyance of telephone messages" is the determinative characteristic of a telephone utility subject to Commission jurisdiction under RSA 362:2. *See* RLEC Reply Br. at 4. While New Hampshire law has excluded from the scope of RSA 362:2 the services provided by radio pagers, which make use of telephone lines,[82] and cellular (wireless) telephony, which converts sound to electrical and radio signals for communication over distances, and which is expressly excluded from our jurisdiction by RSA 362:6, the cable voice services at issue here have not been so excluded.

We are likewise not persuaded that the technology at issue here is merely "somehow related to telephone companies under the umbrella of the PUC's regulatory power" or creates a

[81] The telephone used could be the same one the customer had when served by an incumbent telephone company, such as an RLEC, with the same 603 telephone number that they ported over when they changed telephone service.

[82] See *Appeal of Omni, infra.*

new industry that requires a completely unregulated market in which to develop. Rather, the technology at issue represents a technological advancement in the conveyance of telephone messages that builds on the legacy POTS network. Cable voice technology serves to facilitate the conveyance of telephone messages to and from the traditional PSTN through an IP network, managed and operated by the providers of the service, 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 NANPA-conforming telephone number, and are provided portability for that number. Comcast Br. at 2-3; RLEC Reply Br. at 3, 6. Moreover, providers of cable voice services can distinguish inter- from intra-state calls for billing purposes, as can POTS providers. RLEC Br at 21; RLEC Reply Br. at 9-10.

Both Comcast and Time Warner argue by extrapolation that just as New Hampshire law has made clear that cellular phones and pagers are not subject to our jurisdiction,[83] neither should our jurisdiction extend to cable voice services. Comcast Br. at 14; Time Warner Br. at 5-10. Time Warner accordingly argues that consumers are adequately protected with respect to the provision of cable voice services in New Hampshire because the Commission has jurisdiction over the conventional network connections from telecommunications carriers that Time Warner relies on to provide its services. Time Warner Br. at 10 and Time Warner Reply Br. at 7, *citing Appeal of Omni* (finding no need for the Commission to directly regulate radio-paging services where it regulates the telephone lines used to transmit pager signals).

[83] *Id.* and *Appeal of Omni, supra.*

We find that Comcast and Time Warner extend the Court's holdings further than is warranted. There is no statutory exclusion of cable voice services as there is for cellular phone service. *See* RSA 362:6 (cellular mobile radio communications exempt from Commission jurisdiction). In addition, interconnection for the purpose of transmitting real-time two-way voice communication, including to and from the PSTN, not to mention the use of telephone poles in the public right-of-way to carry wires and cables for the provision of such service, constitutes a substantially closer relationship to the traditional telephone network and its service providers than does the transmittal of one-way radio pager signals along the PSTN network.

Both Comcast and Time Warner emphasize that the initial and terminal analog signals at either end of a call on their networks are converted to or from a digitized IP packet at the customer's premises on an eMTA, a piece of equipment owned by the cable telephone service provider; that the dial tone is generated at the eMTA rather than at a central office; and that the call is routed through an IP network rather than through the traditional landline network. We are not persuaded, however, that any of those characteristics are of significance to the end user. From the end user's perspective, cable voice service and traditional telephone service are identical. As the RLECs note, to make a call, the customer picks up a phone, listens for a dial tone, dials the number of the person to call, and speaks in real-time to the other party. RLEC Reply Br. at 3. From a customer's perspective, there is no change in the form or content of information sent and received. By signing up for cable voice service, the customer expects to be able to make and receive telephone calls, regardless of the underlying technology used to transmit or receive the calls. Indeed, both Comcast and Time Warner describe their cable voice service as a competitive, facilities-based alternative to traditional landline phone service. Comcast Br. at 2; Time Warner Br. at 1-2.

We therefore find pursuant to RSA 362:2 that the cable voice services offered by Comcast and Time Warner to New Hampshire customers constitute the conveyance of telephone messages and, thus, the providers of such services are subject to Commission jurisdiction.

One additional argument warrants discussion. According to Time Warner, to transmit its cable voice services to the PSTN, it must obtain interconnection service from a wholesale telecommunications provider. In New Hampshire, TWC Digital Phone owns the eMTA at the customer premises and provides the retail cable voice service to the customer. Laine Reply Testimony at 11-12. Affiliate Time Warner Cable (TWC) owns the hybrid fiber coaxial network between the customer premises and the cable head end. *Id.* A third affiliate, TWC Communications LLC, owns switching facilities and the Media Gateway which converts the traffic from IP to the time division multiplexing format used on the public switched telephone network (PSTN). *Id.* TWC Communications purchases wholesale interconnection service to the PSTN from CRC Communications of Maine, Inc. (CRC), a "public utility" under New Hampshire law. *Id.* and Time Warner Br. at 2. Time Warner later argues that because cable voice services rely on regulated telecommunications carriers to exchange traffic with the PSTN, the Commission has jurisdiction over those conventional connections (in this case CRC), "as it did in the context of radio paging companies." Time Warner Br. at 10. This point presumably is intended to support the proposition that the voice service Time Warner provides is not a telecommunications service under RSA 362:2 because the Time Warner affiliates carry only IP traffic and the retail provider, TWC Digital Phone, does not own any of the equipment used to convey the messages. The RLECs allude to a similar point in their petition, suggesting that Comcast has created a corporate structure that effectively skirts regulation as a CLEC by separating the functions the corporation as a whole undertakes to provide voice service. The

RLECs assert that to receive authority to operate as a public utility in New Hampshire, Comcast "caused one of its affiliates to seek authorization to engage in business as a public utility for the stated purpose of providing very limited services, including resale of local business service, e-rate service to schools and libraries and wholesale service to its affiliate that provides Digital Voice service." Petition at 2. That affiliate then provides Comcast with numbering resources and interconnection with the PSTN to facilitate its cable voice service.

In each case, although the cable voice provider hands off various pieces of the conveyance of messages to affiliates and back again, the service itself remains a retail one that is regulated by this Commission as a CLEC. Furthermore, to allow a provider to avoid regulation by transferring an intermediary step to an affiliate would not serve the public interest.

B. Comcast and Time Warner Cable Voice Services are Not Information Services under Federal Law

Both Comcast and Time Warner set forth arguments that their cable voice services are distinguishable from traditional telephone services under federal law and therefore are not subject to state regulation. We disagree with their interpretations of federal law.

Comcast argues that cable voice services are exempt from state regulation because they constitute "information services," which are not regulated, rather than "telecommunications services" which are subject to a mix of state and federal regulation. [84]

Comcast contends that cable voice service provides exactly the capacity to "process and transform" information via telecommunications required by the federal definition of information services. Comcast Br. at 15, and 17. Comcast further argues that calls transmitted through cable

[84] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), 47 U.S.C. 151 *et seq.* *See also* Section III, Factual Background above, setting out the definitions from the Act of "telecommunications," "telecommunications service," and "information services.")

voice services undergo an end-to-end protocol conversion, thereby making the service an "information service" under federal law. Comcast Br. at 18-19.

According to Comcast, it is the entrance and exit of a call to and from the network using IP that is determinative – *i.e.*, it is the reformatting of analog voice signals to IP signals at the eMTA that makes cable voice service an information service. Comcast Br. at 22-23, *citing In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 (finding that protocol processing services constitute information services under the Telecom Act), and *Southwestern Bell v. Missouri PSC*, 461 F.Supp. 2d 1055, 1082 (E.D. Mo. Sept. 14, 2006) ("net protocol conversion" occurs where "[t]he communication originates at the caller's location in IP protocol, undergoes a net change in form and content when it is transformed at the [provider's] switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient's location in TDM" (citations omitted)). Comcast further asserts that it is the "nature of functions the end user is offered" that determines regulatory status. Comcast Br. at 26-27, *citing* the 2005 *Brand X* decision (upholding FCC determination that cable companies providing broadband Internet access do not provide "telecommunications service" under the Telecommunications Act, but merely use telecommunications to provide end users with cable modem service). Thus, according to Comcast, the communication between the PSTN and IP networks makes cable voice an information service not subject to state regulation. Comcast Sur-reply Br. at 5, *citing Brand X*.

Time Warner adds that digital phone service requires a broadband connection and specialized IP-compatible customer premise equipment that converts analog signals to IP format

for transmission over broadband facilities, without which the phone handset would be useless. Time Warner Br. at 9. Time Warner submits a further argument similar to Comcast's, *i.e.*, that cable telephone service provides a suite of integrated capabilities and features, or "enhanced services." Time Warner Br. at 20-22. According to Time Warner, the FCC relied heavily on the enhanced services capability to distinguish IP-enabled communications services from traditional telecommunications services, and the eMTA is the critical piece of technical distinction between the services. Time Warner Br. at 16; Time Warner Sur-reply Br. at 3.

We agree with the RLECs, however, who argue that the net protocol processing that defines an information service consists of the technological interface between an end user and a communications network of the end user's choice, not the formatting conversion that is used by the service providers to interface between two different systems, such as the PSTN and the cable network. RLEC Reply Br. at 5, 10, and 15 *et seq*. Thus, according to the RLECs, cable voice offerings provide telephone service, not protocol conversion service. RLEC Reply Br. at 17. The RLECs add that the FCC specifically declined to classify cable voice as an "information service" in its *Vonage* order. *Vonage Order* ¶ 14, n. 46.

Although Comcast acknowledges that the FCC did not decide in *Vonage* whether cable voice services are "telecommunications services" subject to joint federal-state regulation or deregulated "information services" under federal law, it posits that several federal court decisions have "uniformly concluded that interconnected VoIP is an information service, not a telecommunications service." Comcast Brief at 7-8 and Sur-reply Br. at 1, *citing PAETEC Communications, Inc. v. Comm. Partners, LLC,* No. 08-Civ.-0397(JR) D.D.C. Feb. 18, 2010) (transmission of information via telecommunications that entails net format conversion from VoIP to TDM is information service exempt from access charges). Accordingly, Comcast

argues that cable voice service is an information service under "existing law" in the absence of an FCC decision holding otherwise.[85] Comcast Sur-reply Br. at 2.

Comcast appears to conflate the terms "formatting" and "form," when it equates IP conversion with the conversion of voice messages from IP to TDM format and *vice versa*, rather than to the conversion of information from one form to another (*e.g.*, a voice call to voice mail to pager alert). In its repeated arguments that enhanced service offerings such as voice mail make cable voice service an "information" rather than a "telecommunications" service, Comcast ignores the fact that similar enhanced service offerings are made with landline phone service packages, as well. *See* RLEC Direct Testimony of Wimer at 25-28. The fact that a provider can add such enhanced services to basic telephone service does not persuade us that the underlying telephone service is thus converted from a telecommunications to an information service that falls outside the scope of our jurisdiction under RSA 362:2. The cable voice customer signs up, first and foremost, for a service that will enable voice communication with other end users, including those using traditional telephone service. The fact that other, enhanced features may be added on to the basic voice communication service does not change the nature of the basic telephone service itself.

Our reading of Congress's definition of "telecommunications" is consistent with the RLECs' interpretation. We find that an end user customer of cable voice service chooses that

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[85] Comcast also cites *Southwestern Bell Tel., LP. v. Missouri Public Service Comm'n*, 461 F.Supp. 2d 1055, 1081-83 (E.D. Mo. Sept. 14, 2006) (state commission preempted from requiring VoIP provider to adhere to 47 U.S.C. 271 unbundling obligations in an arbitrated interconnection agreement), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 971 (2009); *Vonage Holdings Corp. v. Minnesota Public Utilities Comm'n*, 290 F.Supp. 2d 993, 999 (D. Minn. 2003) (as Vonage never provides phone-to-phone IP telephony through its nomadic VoIP service, it is exempt from state telecommunications laws); *Vonage Holdings Corp. v. New York Public Service Comm'n*, No. 04-Civ.-4306 (DFE), 2004 WL 3398572, Preliminary Injunction Order (S.D.N.Y. July 16, 2004); *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005) at 1 (denying Vonage motion to convert preliminary injunction into permanent injunction of state regulation over Vonage's nomadic VoIP services); and *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (affirming FCC preemption of state regulation of nomadic interconnected VoIP providers).

service with the expectation that use of a traditional telephone handset will enable real-time, two-way voice communication with others through "the transmission between or among points specified by the user," without change in the form or content of the voice message itself. We do not find, as Comcast and Time Warner urge, that regulation of cable voice services falls outside our jurisdictional authority. As previously noted, the FCC has not addressed this question and there are no binding federal court decisions that resolve the matter, though there are some cases outside the First Circuit, to which we take exception.[86] We disagree with the court in *PAETEC*, for example, that a telephone call from a cable voice provider changes content when it is converted to TDM. *See PAETEC, supra,* at 6. We recognize that formatting may change when a voice call is transferred between a cable provider's network and the PSTN, but we find that the content transmitted begins and ends as a "telephone message." We also disagree with the courts in *Vonage v. Minnesota PUC* and *Southwestern Bell* that all IP-PSTN traffic and VoIP services "necessarily are information services." *See Vonage v. Minnesota PUC, supra,* at 1002; *Southwestern Bell, supra,* at 1082. As noted above, we find that the FCC has declined to rule that cable voice services such as the ones at issue here are exempt from state regulation. Finally, we read *Vonage v. NYPSC* and *Minnesota PUC v. FCC* decisions as pertaining to nomadic VoIP only, and do not agree that those holdings should extend to cable voice.

We find that the technology utilized in cable voice service to convert analog sound signals to digitized IP packets that can be transmitted through an IP network does not convert the fundamental service offered – that of real-time, two-way voice communication – from "telecommunications" to an "information service" that might fall outside our jurisdiction.

[86] *See fn. 90, supra.*

C. State Regulation of Comcast and Time Warner Cable Voice Service is Not Preempted by Federal Law

The next step in our analysis is to consider whether New Hampshire law regarding regulation of telephone providers is preempted by federal law in this matter. State regulation may be preempted by Congress pursuant to the Supremacy Clause of the U.S. Constitution,[87] or by a federal agency acting within the scope of its congressionally delegated authority. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986). As the First Circuit has stated, federal preemption must be clearly indicated. *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 71 (1st cir. 2006) (federal agency actions may preempt conflicting state regulation, but exercise of preemption must be clear and implied preemption must be supported by clear evidence of a conflict with federal law or policy). Comcast and Time Warner argue that cable voice service falls under the exclusive jurisdiction of the FCC as a result of the *Vonage* decision and a series of federal cases stemming from that decision.

As the New Hampshire Supreme Court has held, "state law is preempted where: 1) Congress expresses an intent to displace state law; 2) Congress implicitly supplants state law by granting exclusive regulatory power in a particular field to the federal government; or 3) state and federal law actually conflict." *Appeal of Union Telephone Company d/b/a Union Communications* (N.H. Public Utilities Commission), Slip Op. Nos. 2009-168 and 2009-432 at 9 (May 20, 2010).

1. State Regulation of Cable Voice is Not Expressly Preempted

The courts acknowledge that Congress recognized a continuing need for both state and local regulation when it enacted the Telecommunications Act. *Appeal of Union Telephone Company,* at 9, *citing Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9, 15-18 (1st Cir.

[87] U.S. Const. art.VI.

2006); and 47 U.S.C. §253(a) (finding that Congress recognized the continuing need for state and local regulation, but that such regulation may not prohibit the ability of any entity to provide interstate or intrastate telecommunications service). Section 253(b) of the Act, for example, expressly allows "a State to impose, on a competitively neutral basis . . . , requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). In addition, Section 152 of the Act acknowledges that states retain jurisdiction over the regulation of intrastate telecommunications services. 47 U.S.C. § 152(b) (exceptions to FCC jurisdiction, recognizing areas subject to state jurisdiction). Nowhere does the Telecommunications Act expressly preempt state regulation over cable voice services, such as those offered by Comcast and Time Warner.

2. State Regulation of Cable Voice Service is Not Implicitly Preempted

We find no implicit preemption of our authority to regulate cable voice in our reading of the Telecommunications Act or FCC actions pursuant to the Act. As discussed above, the Telecommunications Act does not grant exclusive federal jurisdiction over telecommunications service; nor does it limit state jurisdiction over intrastate telecommunications services based on the technology used to provide such services. Furthermore, the FCC has thus far declined to determine that cable voice service is subject to exclusive federal jurisdiction, as it has done with respect to nomadic VoIP.[88] The regulation of cable voice service varies from state to state, ranging from prohibition of state regulation to full regulation of cable voice as a telecommunications service. Within this continuum, some states regulate only those elements of telecommunications carrier obligations the FCC requires of nomadic VoIP and cable voice

[88] We note that Time Warner's arguments that the FCC intended to preempt all VoIP providers, including cable voice providers, from state regulation are based on an erroneous extrapolation of the *Vonage Order* holdings. *See* TWC Br. at 15-17.

service providers. RLEC Br. at 27, fn 88. Those obligations include federal Universal Service Fund contribution requirements, CALEA standards,[89] number porting requirements, regulatory fee obligations, disability access requirements, Customer Proprietary Network Information rules, and E911 capability requirements. *Id.*; *see also Comcast Prefiled Direct Testimony of Kowolenko and Choroser* at 9 (Oct. 9, 2009) and Comcast Initial Br. at 2-3.

As both the RLECs and Comcast point out, the FCC's *Vonage* decision addressed nomadic VoIP services, not cable voice services such as those offered by Comcast and Time Warner. *See* NHTA Reply Br. at 8-9, citing Brief for Respondent FCC, *Min. Pub Utils. Comm'n v. FCC*, No. 05-1069 at 64 (8th Circ. Filed Dec. 1, 2005); and Comcast Initial Br. at 7.[90] Nomadic VoIP differs from the cable voice service we examine here in that, among other things, nomadic VoIP technology currently precludes the capability of identifying intra- versus inter-state communications that would enable jurisdictional designations. In *Vonage*, the FCC recognized the difficulty inherent in pinpointing the physical end points of a nomadic VoIP call because customers are not restricted to making calls from a fixed location. *Id.* at ¶ 31. As a result, the FCC determined that state regulation of nomadic VoIP service is preempted where it is impossible or impractical to separate the intrastate and interstate components of the service at issue. *Id.*

By contrast, here the providers can distinguish intra- and interstate communications, because cable voice calls are originated from fixed locations. Based on our review of the law and the issues at stake in this proceeding, we find no indication that either Congress or the FCC

[89] The Communications Assistance for Law Enforcement Act (CALEA) requires telecommunications carriers to cooperate in the interception of communications for law enforcement purposes and to make call detail records available to law enforcement officials. Pub. L. No. 103-414, 108 Stat. 4279, codified at 47 USC 1001-1010.

[90] *See also Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22,404 (2004), *aff'd sub nom. Minnesota Public Utilities Commission v. FCC,* 483 F.3d 570 (8th Cir. 2007) (holding that NY PSC challenge asserting that state regulation of fixed VoIP (*i.e.* cable voice) should not be preempted was not ripe for review as FCC order did not purport to preempt fixed VoIP).

intended to preempt state regulation of the cable voice services at issue here. Furthermore, we need not await FCC action with regard to cable voice services, but, instead, may rely on applicable "existing law." *See* RLECs Initial Br. at 33, *citing Petition of UTEX Communications Corporation,* WC Docket No. 09-134, Memorandum Opinion and Order, DA 09-2205, 24 FCC Rcd 12573 paras. 8, 10 (2009) (finding that the PUC of Texas should not wait for the FCC to move forward on a determination of regulatory treatment of VoIP, but should proceed to arbitrate interconnection agreement in a timely manner, relying on existing law). We find that, contrary to the arguments proffered by Comcast and Time Warner, state regulation of cable voice services is not implicitly preempted by federal law or action.

3. No Conflict with Federal Law or Policy

The New Hampshire Supreme Court has recognized that a conflict exists where state law stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress. *See Appeal of Union Telephone, supra., citing Carlisle v. Frisbie Mem. Hosp.*, 152 N.H. 762, 770 (2005) (upholding federal preemption claim where conflict between state and federal requirements made it impossible to comply with both). The Federal District Court in New Hampshire has confirmed that State action is preempted by federal law "either when compliance with both state and federal regulations is impossible or when state law interposes an obstacle to the achievement of Congress's discernible objectives." *Verizon New England, Inc. v. N.H. Public Utilities Comm'n,* No. 05-CV-94-PB, 2006 WL 2433249 at 8 (D.N.H.) (Aug. 22, 2006), fn. 33, *citing Global NAPS v. Verizon, supra.*[91] Comcast and Time Warner argue that federal law preempts conflicting action by this Commission even in the absence of a specific

[91] In the *Global NAPS* order, the First Circuit held that the FCC's order preempting state regulation over local calls to Internet Service Providers (ISPs) did not preempt state regulation over *all* calls to ISPs, including non-local calls. The court rejected Global NAPs's argument that the FCC preemption should be interpreted broadly. *See Local Competition Provisions in the Telecommunications Act of 1996 (ISP Remand Order)*, 16 F.C.C.R. 9151 (2001).

federal agency directive. Comcast Br. at 29, *citing Appeal of Conservation Law Foundation*, 147 NH 89, 95 (2001) (upholding Commission finding that its jurisdiction under the rail line preservation statute was preempted by conflicting federal law). Specifically, Comcast and Time Warner argue that state regulation of their cable voice services would conflict with federal policy favoring open entry for providers of new and innovative services, including cable voice, as well as nomadic VoIP. Time Warner Br. at 4; Comcast Br. at 9-10. Comcast and Time Warner interpret the New Hampshire Supreme Court's rulings set forth in the discussion of state law above[92] to further indicate that state regulation should not interfere with the FCC's policy of encouraging free enterprise and investment in the development of technologies such as cable voice services. *See* Time Warner Br. at 6-7, and 10; Comcast Br. at 10. Time Warner adds that federal policy precludes patchwork regulation at the state level. Time Warner Reply Br. at 8. According to Time Warner, both New Hampshire and federal law recognize that the imposition of economic regulation on new providers in the market risks making entry more difficult and competition less likely. Time Warner Sur-Reply Br. at 5. Both Time Warner and Comcast further argue that the imposition of state regulations on cable voice service providers before the FCC's rulemaking is concluded poses the risk of an eventual conflict with federal law. Time Warner Br. at 23. Comcast Br. at 32.

Our determination that cable voice services are "telecommunications services" does not mean that the providers are now subject to extensive or burdensome regulation. They must adhere to our competitive local exchange carrier (CLEC) regulations, under which CLECs file rate sheets that are not reviewed or approved, but are kept on file as information available to consumers, and file annual reports for utility assessment purposes under RSA 363-A. Certain rules apply regarding consumer protections and responding to consumer complaints.

[92] *See, supra, Appeal of Atlantic Connection, Appeal of Omni,* and *Appeal of Public Service.*

Furthermore, inasmuch as CLEC facilities occupy space on telephone and electric utility poles located in public right- of-ways and CLECs may be the telephone service provider to important public safety, health care, and other facilities critically impacted during emergencies, it is reasonable to expect CLECs to cooperate during emergencies and comply with orderly restoration of service obligations. The Commission does not regulate CLEC rates of return, rates, service quality, corporate organizational changes, financings, offerings, or the markets they choose to serve.[93] Such limited regulation is consistent with the New Hampshire State Constitution provisions for free and fair competition[94] and does not conflict with any federal law. Comcast and Time Warner both state that they already substantially comply with New Hampshire CLEC requirements and regulations. Comcast Br. at 13-14; Time Warner Br. at 2 and Reply Br. at 15. Thus, our finding that cable voice services are subject to regulation should have minimal, if any, competitive impact on Comcast or Time Warner services in New Hampshire, and both will be subject to the same regulatory rights and obligations that apply to all CLECs. We therefore conclude that Commission jurisdiction over cable voice service does not involve discriminatory or burdensome economic regulation and will not inhibit the development of a competitive market or conflict with federal law.

D. Conclusion

We find that the cable voice service offered by Comcast and Time Warner constitutes conveyance of a telephone message that falls within the jurisdiction of this Commission pursuant to RSA 362:2. Furthermore, we find that state regulation of Comcast and Time Warner cable voice services is not expressly or implicitly preempted by federal law. Nor does the regulation

[93] *See also,* RSA 374:22-o, Regulation of Competitive Telecommunications Providers Limited.

[94] N.H. Const., Pt. 2, Art. 83 states, in part, "Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof."

of these companies as CLECs involve discriminatory or burdensome economic regulation that would inhibit the development of a competitive market or conflict with federal law. We find that regulation of Comcast and Time Warner as CLECs is fair, consistent with State law, and serves the public interest.

Based upon the foregoing, it is hereby

ORDERED, that the IP-enabled cable voice service offered by Comcast and Time Warner is a utility service that falls under the jurisdiction of this Commission pursuant to RSA 362:2; and it is

FURTHER ORDERED, that Comcast and Time Warner within 45 days of the date of this order comply with registration and other CLEC requirements for their intrastate cable voice services pursuant to New Hampshire law and Commission rules.

By order of the Public Utilities Commission of New Hampshire this eleventh day of August, 2011.

Thomas B. Getz
Chairman

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Lori A. Davis
Assistant Secretary

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services

MOTION FOR REHEARING AND SUSPENSION OF ORDER NO. 25,262
and
MOTION TO REOPEN RECORD

NOW COMES Comcast Corporation and its affiliates, Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast") and, (1) pursuant to RSA 541:3 and N.H. Admin. R. Ann. PUC 203.33, respectfully moves for a rehearing and suspension of Order No. 25,262 issued on August 11, 2011 in the above-captioned docket (the "*Order*"), and (2) moves pursuant to N.H. Admin. R. Ann. PUC 203.30 to reopen the record of this proceeding. In support of these Motions, Comcast states as follows:

I. STANDARD FOR REHEARING AND REOPENING THE RECORD.

The Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." RSA 541:3. This includes errors of law, as a motion for rehearing filed with the Commission must specify "every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4; *see Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001). "Good reason" for rehearing may also be shown "by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence

was overlooked or misconstrued." *Kearsarge Telephone Co. et al., Petition for Approval of Alternative Form of Regulation,* DT 07-027, Order No. 25,194, at 3 (Feb. 4, 2011) (citations omitted).

The "purpose of a rehearing 'is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State Pers. Comm'n,* 118 N.H. 309, 311 (1978) (citation omitted). Accordingly, the Commission may reopen the record in a proceeding if it finds that late submission of additional evidence will enhance its ability to resolve the matter in dispute. *See* N.H. Admin. R. Ann. PUC 203.30(a). In determining whether to admit a late-filed exhibit into the record, the Commission must consider the probative value of the exhibit and whether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing shall adequately protect the parties' right of cross examination. *See* N.H. Admin. R. Ann. PUC 203.30(c).

For the reasons discussed below, Comcast respectfully submits that the *Order* is unlawful and unreasonable, and that good cause exists for rehearing and reopening the record in this case, consisting both of errors of law and new evidence.

II. THE ORDER IS UNLAWFUL AND UNREASONABLE.

The *Order* rests on errors of both federal and state law. First, under federal law, the *Order* misapplies the Communications Act, 47 U.S.C. § 153, and precedent of the Federal Communications Commission ("FCC") interpreting the terms of the federal statute with respect to whether Comcast's XFINITY Voice® and Business Class Voice Services (collectively "CDV"[1]) are "information service[s]" under federal law. Second,

[1] At the time briefing was completed in this docket, Comcast offered a residential interconnected VoIP service known as "Comcast Digital Voice." Since then, Comcast

also under federal law, the *Order* misapplies the doctrine of conflict preemption by focusing too narrowly on the effect of New Hampshire state telecommunications regulations on Congressional policy, rather than on the effect of state telecommunications regulations generally, as required by FCC precedent. Third, under state law, the Order disregards the key attributes of CDV that make it different in kind than just another iteration in the evolution of POTS technology, and thus erroneously interprets the term "telephone message" by reading it expansively to include a much broader range of new technologies than the Legislature intended.

A. The Order Misapprehends Federal Law Regarding Information Services.

The Commission's *Order* appears to concede that state public utility regulation of Comcast's CDV service is preempted if the service is an "information service" under federal law. It concludes, however, that CDV is not an information service under the Communications Act. *Order* at 49-53. The reasoning behind that decision misapprehends the nature of the federal statutory requirement and reaches a result that is contrary to law.

1. <u>The Capability To Perform Net Protocol Conversions Makes A Service An Information Service Under The Communications Act Irrespective Of Where In A Provider's Network The Protocol Conversions Occur.</u>

As Comcast's previous briefing in this docket has explained, one reason that CDV is an information service under 47 U.S.C. § 153(24) is that it offers the capability to perform a net protocol conversion between Internet Protocol ("IP") and the Time Division Multiplexing ("TDM") format used on the Public Switched Telephone Network

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has rebranded its residential interconnected VoIP service as XFINITY Voice® in New Hampshire to reflect the cross-platform nature of the service. The rebranding is illustrative of the integrated nature of the service across all Comcast product platforms. This Motion will refer to Comcast's services as "CDV" for the limited purpose of preserving consistency with the terminology used in the *Order*.

("PSTN"). *See* Comcast Opening Brief at 17-26. The *Order*, however, concludes that this protocol conversion capability is not determinative under federal law, resting its decision on two grounds. The first is that the protocol conversion performed by CDV takes place between two communications networks – Comcast's IP network and the PSTN – instead of between the end user and a third-party communications network of the user's choice. *See Order* at 51. The second is that the protocol conversion performed by CDV does not change the "information from one form to another" in the sense of a change from "a voice call to voice mail to pager alert." *Order* at 52. As explained below, both of these grounds are incorrect. Under the plain text of the Communications Act as well as longstanding FCC precedent, a net protocol conversion satisfies the statutory definition of information service in 47 U.S.C. § 153(24), as a net protocol conversion necessarily "transform[s] [or] process[es] ... information via telecommunications." There is no requirement that such protocol conversions be performed only between the end-user and a third-party service provider, nor is there any requirement that any *additional* changes to the form of information above and beyond a protocol conversion take place. Because the Commission's holdings were in error, it should vacate and reconsider them under a correct application of federal law.

a. The benchmark for whether a service is an information service under the federal Communications Act is whether, *inter alia*, it offers the capability for "transforming [or] processing ... information via telecommunications," 47 U.S.C. § 153(24). Accordingly, as Comcast has previously explained, the FCC has held on multiple occasions that services that enable the conversion from one protocol to another, like CDV, are information services. *See, e.g., In re Application of AT&T For Authority*

under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States, Memorandum Opinion, Order, and Authorization, 94 F.C.C.2d 48, 54 ¶ 13 (1983) (services that "support communications among incompatible terminals (and perform code, format and protocol conversion to support this service within their facilities)" are "enhanced offerings") (emphasis added); *see also In re Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072, 3080, ¶ 57 (retaining classification of protocol conversion as enhanced service), *vacated and remanded on other grounds by California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

The *Order* reasons that CDV is different from the protocol processing services the FCC has previously found to be information services because those earlier protocol processing services "consist[] of the technological interface between an end user and a communications network of the end user's choice, not the formatting conversion that is used by the service providers to interface between two different systems, such as the PSTN and the cable network." *Order* at 51. But this reasoning is flawed both factually and legally. As a factual matter, the assertion that the FCC has only found protocol processing services to be information services in cases where the protocol conversion took place between the end user and the communications network, as opposed to between two communications networks, is simply not true. For example, the FCC has acknowledged that services are "enhanced offerings" (the term previously used to describe "information services") where they "support communications among incompatible terminals (and perform code, format and protocol conversion to support this

service *within their facilities*)," i.e., after a different carrier had already transported the communications to the information service provider's premises. *Third Computer Inquiry*, 94 F.C.C.2d at 54-55, ¶ 13 (emphasis added). Indeed, as the Supreme Court affirmed in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 968 (2005), the paradigmatic information service function is a "communicat[ion] between networks that employ[] different data-transmission formats" – precisely the role that the net protocol conversion offered by CDV performs.[2]

Additionally, the *Order's* attempt to draw a distinction based on *where a protocol conversion occurs* has no basis in law. The relevant inquiry under the Communications Act is whether a service offers the capability for "transforming [or] processing ... information via telecommunications." 47 U.S.C. § 153(24). Whether that transformation or processing occurs between an end-user's premises and a communications network, or between two communications providers' networks, is irrelevant to whether it is "transforming [or] processing ... information." *Id.*

b. The *Order*'s second theory – that Comcast's argument "conflate[s] the terms 'formatting' and 'form,' when it equates IP conversion with the conversion of voice messages from IP to TDM format and vice versa, rather than to the conversion of information from one form to another (*e.g.* a voice call to voice mail to pager alert)," *Order* at 52, is also directly contradicted by the precedent discussed above. If changes to

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[2] The *Order* did not endorse the theory argued by the Rural Carriers: that no net protocol conversion happens in Comcast's network because the Customer Premises Equipment ("CPE") that formats voice signals into Internet Protocol packets (the embedded multimedia terminal adapter, or "eMTA") is not owned by the customer. *See* Reply Brief of the Rural Carriers at 14-15. In any event, this issue is now moot – the CDV service has changed since the Commission took testimony in this matter, and customers can commercially purchase and use their own eMTA for use in conjunction with the CDV service. *See* Declaration of Beth Choroser at ¶ 2.

the protocol of a communication were insufficient to constitute a change in "form" under 47 U.S.C. § 153(50), or the "transforming [or] processing [of] information" under 47 U.S.C. § 153(24), then a service offering the capability for a protocol conversion would *never* be an information service. The FCC, of course, has squarely held otherwise. *See* cases cited *supra*.

The *Order* also fails to come to terms with the various court decisions that are squarely on point. Each of these cases held explicitly that interconnected VoIP is an information service for the exact reasons articulated by Comcast. And yet the *Order* tries to distinguish these cases by focusing on aspects of the opinions that are simply not relevant to their ultimate holdings. For example, the *Order* characterizes the *Southwestern Bell* case[3] as a holding that a "state commission [was] preempted from requiring a VoIP provider to adhere to 47 U.S.C. § 271 unbundling obligations in an arbitrated interconnection agreement," *Order* at 52 n.85, even though the relevant holding of the case was that interconnected VoIP is an information service under 47 U.S.C. § 153(24). *See* 461 F. Supp. 2d at 1077-78.

The *Order* similarly characterizes the Minnesota *Vonage* case[4] as a holding that "as Vonage never provides phone-to-phone IP telephony through its nomadic VoIP service, it is exempt from state telecommunications laws." *Order* at 52 n.85. But the holding of *Vonage v. Minnesota PUC* was that Vonage was exempt from state telecommunications laws because the protocol conversion performed by its service made

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[3] *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. Sept. 14, 2006) ("*Southwestern Bell v. Missouri PSC*"), *aff'd*, 530 F.3d 676 (8th Cir. 2008).

[4] *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003) ("*Vonage v. Minnesota PUC*").

the service an "information service" under federal law. *See* 290 F. Supp. 2d at 999. Likewise, the *Order* dismisses the New York *Vonage* case[5] as a case "denying Vonage['s] motion to convert [a] preliminary injunction into [a] permanent injunction of state regulation over Vonage's nomadic VoIP services," *Order* at 52 n.85, even though there the Court had granted a preliminary injunction on precisely the same grounds as those in the Minnesota litigation, *see* 2004 WL 3398572, at *1. The only reason there was no permanent injunction in New York was that the court decided that its preliminary injunction could remain in place pending action by the FCC. *See* 2005 WL 3440708 at *4-5. And the *Order* tries to distinguish the *Paetec* decision[6] as a case that wrongly held "that a telephone call from a cable voice provider changes *content* when it is converted to TDM." *Order* at 53 (emphasis added). But that reasoning appears nowhere in the court's decision. Rather, the *Paetec* court adopted the holding of the *Southwestern Bell* case, which held that the protocol conversion effected by interconnected VoIP services makes it an information service. 2010 WL 176193 at *3 (citing *Southwestern Bell*, 461 F. Supp. 2d at 1081-82).[7]

In sum, the *Order* fails to respond meaningfully to the holdings of every court that has addressed the issue and concluded that interconnected VoIP is an information service.

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[5] *Vonage Holdings Corp. v. New York Pub. Serv. Comm'n*, No. 04-Civ.-4306 (DFE), 2004 WL 3398572, Preliminary Injunction Order (S.D.N.Y. July 16, 2004) ("*Vonage v. NYPSC*"), *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005).

[6] *Paetec Commc'nss, Inc., v. Commpartners, LLC,* Civ. A No. 08-Civ.-0397(JR), 2010 WL 1767193 (D.D.C. Feb. 18, 2010) ("*Paetec*").

[7] The *Order* also notes that the FCC "specifically declined to classify cable voice as an 'information service' in its Vonage order." *Order* at 51. That is a red herring – the FCC did not classify it as a telecommunications service either. It was able to explicitly leave undecided the regulatory classification of interconnected VoIP services in the *Vonage Preemption Order* because it found state regulation preempted *irrespective* of the regulatory classification of the service under federal law. *See* Part II.B *infra*.

As the proper statutory classification of CDV as an information service is alone dispositive, the Commission need go no further to reverse the *Order*.

2. CDV Is A More Multifaceted Service Than A Mere Bundling Of Voice Service With Unrelated Features.

The *Order* also errs in failing to recognize that CDV is an information service for a second, independent reason under federal law: the service incorporates a number of advanced features beyond mere real-time voice communications, such as integration with a customer's cable video and Internet/email services, as well as with mobile devices and iPods. Those enhanced functionalities are clearly information services under federal law, as they allow users to act upon their information in countless ways that satisfy the statutory requirements (i.e. "generating," "storing," "retrieving," "utilizing," and "making available" information via telecommunications, 47 U.S.C. § 153(24)). *See* Comcast Opening Brief at 26-28 (describing various enhanced functionalities).

The *Order* does not dispute that the various enhanced abilities of CDV are information services under federal law. However, it reasons that these features stand separate and apart from the underlying voice service itself. *See Order* at 52 ("[t]he fact that other, enhanced features may be added on to the basic voice communication service does not change the nature of the basic telephone service itself"). The conclusion that CDV's various enhanced features are simply "added on to" voice communications, however, is contrary to the FCC's own findings in the *Vonage Preemption Order*. There, where another VoIP provider provided even *fewer* advanced features than those now offered by CDV, the FCC characterized the service not as voice with other features "added on," but rather as a "suite of integrated capabilities and features" that "in all their combinations form an integrated communications service." *In re Vonage Holdings Corp.*

Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd 22,404, 22,407, 22,419-20, ¶¶ 7, 25 (2005) ("*Vonage Preemption Order*"); *see also generally id.* at 22,421, ¶ 25 (holding that Vonage should not be required to change its VoIP service to accommodate state regulation because "[r]ather than encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, molding this new service into the same old familiar shape.") (footnote omitted). There is no basis for the *Order*'s holding that CDV's enhanced functionalities are separate add-on services, as opposed to integrated parts of an overall communications suite that includes real-time voice communications as one of its many elements.

This conclusion is only enhanced by new features of CDV that have either recently become available in New Hampshire or will soon be publicly available.[8] As discussed in Part III *infra*, the Commission should re-open the record in this docket in order to take into account the rapid technical changes to CDV that have been ongoing since the Commission first opened this proceeding in May of 2009. In particular, as discussed below, various nomadic and mobility-related features have either recently become publicly available, or will soon be publicly available, as part of CDV that further reinforce the conclusion that CDV is much more than a voice service with other features later "added on." Indeed, it is precisely the fast-moving nature of IP-enabled services that highlight the problem with the Commission's approach of subjecting CDV to traditional public utilities regulation. Congress intended advanced services such as CDV to "burgeon and flourish in an environment of free give-and-take of the market place

[8] These new features are discussed in Part III *infra*.

without the need for and possible burden of rules, regulations and licensing requirements." *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d at 580 (quoting *Vonage Preemption Order*, 19 FCC Rcd at 22,416, ¶ 24)).

B. The *Order* Misapplies Federal Law Regarding Preemption.

While the *Order* appears to concede that if CDV is in fact properly categorized as an information service, state public utility regulation is preempted, it misapplies federal law with respect to Comcast's second, independent preemption claim – that state public utility regulation is preempted as conflicting with federal policy regardless of CDV's regulatory classification. Specifically, the *Order* reasons that the type of preemption that came into play in the *Vonage Preemption Order* – where the FCC preempted state telecommunications regulations precisely because they stood in the way of Congress's open-market objectives – does not apply here because New Hampshire's state telecommunications regulations are less burdensome than Minnesota's regulations at issue in the *Vonage Preemption Order*. *Id.* Unlike the tariffing requirements at issue in Minnesota, the *Order* predicts, New Hampshire's "limited" regulations should have "minimal, if any, competitive impact on Comcast," and those regulations "do[] not involve discriminatory or burdensome economic regulation and will not inhibit the development of a competitive market or conflict with federal law." *Order* at 59. Therefore, the *Order* concludes, New Hampshire's telecommunications regulations, unlike Minnesota's, are not impliedly preempted as applied to VoIP.[9]

[9] The Order also discusses express preemption, *see Order* at 54-55, but Comcast has never claimed that it should prevail in this case because of express, as opposed to conflict, preemption.

The reasoning behind the preemption of state telecommunications regulation in the *Vonage Preemption Order*, however, was not just that the Minnesota regulations were burdensome *in isolation*. It was that there would be a *cumulative* impact on the ability of broadband-based competitors to enter the market if every state were to subject them to its own idiosyncratic set of state regulations. *See Vonage Preemption Order*, 19 FCC Rcd at 22,426-27, ¶¶ 36-37. That is why, in the *Vonage Preemption Order*, the FCC properly focused not solely on the isolated effect of the Minnesota regulations narrowly at issue, but more broadly on the effect that would arise from the "imposition of 50 or more additional sets of different economic regulations" on VoIP, concluding that such regulation would be "in contravention of the pro-competitive deregulatory policies the Commission is striving to further" pursuant to Sections 230 and 706 of the Communications Act. *Vonage Preemption Order*, 19 FCC Rcd at 22,415-18, 22,426-27, ¶¶ 20-22, 36-37. The question, properly posed, is not whether New Hampshire's requirements *alone* constitute an undue barrier to competition and market entry,[10] but rather whether broadband-based competitors would be disadvantaged in their attempts to enter the market if *every* state subjected VoIP providers to its own, unique set of telecommunications regulations.[11] That question must be answered in the affirmative, and the *Vonage Preemption Order* has already done so. *See id.*

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[10] Even with respect to this inquiry, the Commission too narrowly focuses on the ability of *Comcast and Time Warner* to comply with state regulations. *See Order* at 59. The purpose of the federal policy is to open the market to new entrants generally, and not just those whose resources from other lines of business may render such compliance more practically feasible.

[11] The *Order* mistakenly presumes that other states currently subject interconnected VoIP services to full state telecommunications regulation. *See Order* at 55 (claiming without citation to any authority that "[t]he regulation of cable voice service varies from state to state, ranging from prohibition of state regulation to full regulation of cable voice as a

Indeed, the New Hampshire regulations that the *Order* dismisses as having "minimal, if any, competitive impact on Comcast," *Order* at 59, highlight this problem. Although Comcast already complies with many of New Hampshire's regulations for competitive telephone utilities, other regulations would impose state-specific, idiosyncratic requirements that would be extremely challenging to square with how Comcast currently conducts its business nationally. For instance, Comcast's billing and provisioning system is currently built around its converged platform – which serves customers across multiple states with multiple services, including high-speed Internet, cable video, and voice. *See* Declaration of Beth Choroser ("Choroser Decl.") at ¶ 6 (submitted concurrently). When a customer pays part of their combined bill, Comcast does not currently have the ability to prioritize such a partial payment towards New Hampshire customers' voice services (as opposed to their High Speed Internet or cable video services) in a manner that would enable Comcast to comply with the Commission's disconnection regulations at N.H. Admin. Rule PUC 432.14(f)(2).[12] *See* Choroser Decl. at ¶¶ 7-9. A requirement that providers engage in burdensome and costly reconfigurations of national systems in order to meet state-by-state requirements of this

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telecommunications service"). This is, insofar as Comcast is aware as it pertains to CDV, not an accurate statement as to the current state of the law. Comcast is not aware of *any* state in which its CDV service is currently subject to "full regulation ... as a telecommunications service," and the *Order* points to none. Although a handful of states may regulate other providers that have not challenged those regulations in court, as far as Comcast is aware, the legality of those states' regulations have never been properly adjudicated.

[12] These difficulties are laid out in greater detail in the declaration of Beth Choroser at ¶¶ 5-9, submitted concurrently. Comcast accordingly requests that the Commission suspend the *Order* pending the rehearing petition based in substantial part on the fact that Comcast cannot comply with this requirement on such short notice, or without incurring substantial costs.

sort is precisely the kind of problem the FCC recognized in the *Vonage Order* as militating in favor of consistent, national rules for IP-enabled services.

C. The Order Misapplies State Law.

The *Order* also misapplies New Hampshire law in classifying CDV as a "public utility" service subject to the Commission's jurisdiction pursuant to RSA 362:2. The statute, enacted in 1911, defines "public utility" to include "every corporation, company, association, joint stock association, partnership and person . . . owning, operating or managing any plant or equipment or any part of the same for the *conveyance of telephone . . . messages. . . .*" RSA § 362:2 (emphasis added). As the *Order* indicates, the phrase "conveyance of telephone messages" "means what it meant to the framers and its mere repassage does not alter the meaning." *In re Sarvela*, 154 N.H. 426, 430 (2006); *Order* at 41. Moreover, "in enacting RSA 362:2, the legislature did not intend to place all companies and businesses somehow related to . . . telephone [messages] . . . under the umbrella of the PUC's regulatory power." *In re Omni Commc'ns, Inc.*, 122 N.H. 860, 863 (1982) (finding that PUC lacked authority to regulate interconnected pager service).

The *Order* nevertheless finds that CDV is subject to regulation under RSA 362:2, reasoning that CDV and other VoIP services are but a more technologically advanced "substitute for traditional landline service." *Order* at 44. The *Order* dubs any difference between CDV and "plain old telephone service" (POTS) "a distinction without a difference . . . [that] does not alter the practical reality that the fundamental service offered to the public remains telephone service." *Id.*

This analysis misperceives both the nature of CDV and the governing law. As explained herein and in Comcast's prior briefing, while CDV bears a superficial resemblance to POTS, it is in fact a remarkably different service – both in terms of the

technological means it uses to transmit real-time voice communications, its federal regulatory status, and the numerous other advanced features available to CDV customers that cannot be offered with POTS. *See* Part II.A.2, *supra*; Comcast Opening Br. at 3-6. Thus, the *Order*'s conclusion that CDV is but a more technologically advanced version of traditional telephone service is simply wrong as a factual matter. Indeed, as VoIP services like CDV continue to offer new functionalities made available by the service's use of IP, any superficial resemblance between CDV and traditional POTS will continue to diminish. *See* Part III, *infra*.

More fundamentally, the *Order*'s conclusion that whether a service constitutes the "conveyance of telephone messages" depends entirely on the end-user's superficial experience also misses the mark. That conclusion finds no support in the statutory text, which refers *only* to "telephone messages" not "telephone service." Moreover, the statute says nothing about the user's experience. Thus, the Commission erred on page 46 of the *Order* in examining the "user's perspective" when determining that CDV fell within its regulatory authority under RSA 362:2. As Comcast has explained, the most widely accepted definitions of the word "telephone" refer to POTS or, at most, some type of "telecommunications" service, which CDV (an information service) is not. *See* Comcast Br. at 11-12.

In sum, CDV does not fall within the ambit of what the Legislature set out to regulate in 1911 when it enacted RSA 362:2. The Commission erred as a matter of law in looking to "the words of the statute" and finding that they do not indicate that its "drafters intended to limit the scope of the term 'telephone message' to the technologies in existence in 1911 at the time the statute was enacted." *Order* at 43. Rather, the

appropriate legal standard is that RSA 362:2 must be interpreted to mean what it meant to its framers. *See In re Sarvela*, 154 N.H. at 430. Since interconnected VoIP services did not exist in 1911 and perform functions very different from those performed by POTS (or subsequent advancements to POTS), "telephone messages" cannot reasonably be interpreted to include them. In recent years, the Legislature has repeatedly declined to extend state telecommunications regulations to VoIP providers. *See* Comcast Reply Br. at 3. This Commission should not read RSA 362:2 in such a way that expands its own regulatory authority where the Legislature itself has declined to do so.

III. NEW EVIDENCE CONFIRMS THAT CDV IS AN INFORMATION SERVICE UNDER FEDERAL LAW.

As discussed in part II.A.2 *supra*, Comcast's CDV service has continued to evolve technologically since briefing in this docket was completed in March of 2010. This fact underscores the fundamental flaw of trying to apply legacy telephone regulations to fast-developing IP-enabled services. The Commission should re-open the record in order to take these new developments into account, as they are directly relevant to the *Order*'s mistaken conclusion that CDV is not an information service but rather a series of enhanced services that have been merely "added on to" a basic voice connection. *See* Part II.A.2 *supra*.

As described in the attached declaration of Beth Choroser, Comcast has recently (through its "Managed Business Class Voice" or "MBCV" service) made mobile functionality publicly available to business customers in New Hampshire, and will soon be offering nomadic functionality as well, allowing customers to use their MBCV service over different (non-Comcast) broadband connections or mobile handsets on other carriers' wireless networks. *See* Choroser Declaration ¶¶ 3-4. There can be no doubt that

these new nomadic and mobile features constitute enhanced service offerings, or that they are functionally integrated into Comcast's service – they are *part of the call path itself*, with calls staying on Comcast's switch even while users access them using third-party mobile or broadband networks. *See* Choroser Declaration ¶ 4. And their rapid evolution in the past two years is further evidence that IP-enabled services such as interconnected VoIP fit poorly into regulatory models developed for the traditional telephone network, and belong properly in the federal information service category. The Commission should therefore re-open the record to consider evidence of CDV's evolution and the impact of those changes to the proper regulatory classification of the service.

CONCLUSION.

For the reasons stated herein, the Commission should suspend the *Order*, re-open the record to admit evidence of how CDV has continued to evolve since this proceeding began, reconsider its decision, correct the errors of law in its holding, and reverse its decision.

WHEREFORE, Comcast respectfully requests that the Commission:

A. Reopen the record in this docket to consider the late-filed exhibit attached hereto (the declaration of Beth Choroser);

B. Issue an order prior to September 23, 2011 suspending Order No. 25,262 until such time as a final, non-appealable judicial decision is issued on the issues raised in this docket;

C. After considering the within motion, attached exhibits and any response(s) thereto, reconsider and reverse Order No. 25,262; and

D. Grant such additional relief as it deems appropriate.

September 12, 2011

Respectfully submitted,

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

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Certificate of Service

I hereby certify that a copy of the foregoing Motion for Rehearing and Suspension and Motion to Reopen the Record has on this twelfth day of September, 2011 been sent by electronic mail to persons listed on the Service List.

_____
Susan S. Geiger

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services

Declaration of Beth Choroser in Support of Comcast's Motion for Rehearing and Suspension of Order No. 25,262 and Motion to Reopen Record

I, Beth Choroser, hereby declare as follows:

1. I am Executive Director of Regulatory Compliance for Comcast's voice service operations. I am submitting this Declaration in Support of Comcast's motion for Rehearing, Suspension, and to Reopen the Record with respect to Order No. 25,262. That order decided that Comcast's interconnected VoIP services in New Hampshire – which consist of Comcast Business Class Voice for enterprise customers and XFINITY Voice® for residential customers[1] – are subject to state telecommunications regulations in New Hampshire. I have personal knowledge of the facts stated herein, either directly or through consulting with colleagues with whom I confer in order to carry out my responsibilities over Comcast's regulatory compliance.

CUSTOMER OWNERSHIP AND COMMERCIAL AVAILABILITY OF EMTAS

2. In Comcast's reply testimony previously submitted in this docket, my colleague David Kowolenko indicated that Comcast would soon be offering its customers in New Hampshire the option of purchasing the embedded multimedia terminal adapter ("eMTA") from

[1] At the time of my previous testimony in this docket, Comcast's residential interconnected VoIP service was known as "Comcast Digital Voice" or "CDV."

Comcast, instead of renting it from Comcast. I can confirm that since Mr. Kowolenko's testimony was submitted, Comcast has begun offering New Hampshire customers the option of purchasing their own eMTA and using it with the XFINITY Voice service rather than renting an eMTA from Comcast. This option has been available to customers since the end of 2010.

MANAGED BCV SERVICE

3. Comcast has already rolled out in several other markets, and has recently rolled out in New Hampshire, an enhanced business service known as "Managed Business Class Voice" ("MBCV"). MBCV adds a number of mobile and nomadic functionalities to Comcast's current BCV service.

4. In particular, MBCV enables a customer to place and receive calls from their Comcast-provided phone number from any of multiple devices: customers can continue to make and receive calls from a desk phone wired to Comcast's network, but can also do so from a handheld device on a third-party Commercial Mobile Radio Service ("CMRS") carrier, and will in the near future also be able to do so from a "soft client" (i.e. computer software) on a computer using any broadband connection (including a broadband connection from a third-party Internet Service Provider). Thus, MBCV allows a user to use a single, Comcast-provided phone number served by a Comcast switch, but to access that number to place and receive calls either using Comcast's network or a third-party CMRS or (soon) third-party broadband network. I would note, moreover, that this is different from call forwarding – MBCV retains the call on Comcast's own soft switch, and the call will register (on the called or calling party's phone) as originating from the Comcast-assigned phone number, no matter how (desk phone, handheld device, or computer) the MBCV user is accessing the service. In addition, calls can be transferred seamlessly from device to device while the call is in progress (i.e. from desk phone to

handheld device or computer, and vice versa) without dropping the call. All in all, MBCV offers a truly "nomadic" experience that makes the location of the user, or the type of device they are on, irrelevant – they can receive and place MBCV calls wherever they are, whether they have a wired connection to Comcast's network or not.

COMCAST'S BILLING SYSTEMS AND SOFTWARE

5. I am familiar with N.H. Admin. Rule PUC 432.14 governing the discontinuation of service by CLECs in New Hampshire. As I understand the requirement at Rule 432.14(f), the rule prohibits a carrier from disconnecting a customer's regulated service based on the customer's failure to pay for non-regulated services.

6. Comcast and its affiliates provide a number of services to customers nationwide, including the XFINITY TV® cable video service, the XFINITY Internet® Broadband Internet service, and the XFINITY Voice® interconnected VoIP service. Customers commonly receive several of these services from Comcast at the same time. In such cases, Comcast provides customers with a single bill.

7. Today, if a customer does not pay their bill in full, all services for which the customer is billed will begin our collections and disconnection processes. In instances where a Comcast customer fails to pay their bill in full, Comcast does not currently have the means, through its billing or provisioning software, of applying the partial payment to the XFINITY Voice service only. The system and software for Comcast nationally were designed around the expectation that a customer would be purchasing multiple services, and Comcast is not currently subject to regulatory requirements in any other jurisdictions that would require it to have the ability to allocate partial payments to specific services, as opposed to the customer's general balance.

8. As a result, Comcast's billing and provisioning systems would not enable it to identify instances in which a New Hampshire customer's bill had not been paid in full, but where the partial payment would be sufficient (if prioritized and allocated first towards the regulated XFINITY Voice portion of the bill) to cover the voice portion of the bill only, and thus designate those customers for the disconnection of XFINITY Internet or XFINITY TV services only while retaining active XFINITY Voice service. At this time, in order to comply with this requirement in New Hampshire, Comcast would need to process all New Hampshire disconnections manually, bypassing the automated functionality of its billing and provisioning systems, which would require extensive training and changes to Comcast's protocols. This would have a significant and costly impact to its current business practices until changes to the billing and provisioning systems (if such changes are feasible) could be accomplished.

9. At present, Comcast is in the process of investigating how it would even begin complying manually with New Hampshire's rules regarding disconnection of regulated telephone utilities. As changes to Comcast's billing system or training its personnel to conduct applicable New Hampshire disconnection operations manually would both involve substantial effort and expense, it would not be feasible for Comcast to effect such compliance within the timeframe contemplated by the *Order*.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 12th day of September 2011, at Philadelphia, PA.

Beth Choroser

Beth Choroser

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-044

New Hampshire Telephone Association
Petition for an Investigation into the Regulatory Status of
IP Enabled Voice Telecommunications Services

OBJECTION TO
MOTION FOR REHEARING AND SUSPENSION OF ORDER NO. 25,262

OBJECTION TO
MOTION TO REOPEN RECORD

NOW COME the incumbent carriers (excluding affiliates of FairPoint Communications, Inc.) of the New Hampshire Telephone Association, a New Hampshire voluntary corporation (the "RLECs"), and respectfully object to Comcast's Motion for Rehearing and Suspension of Order No. 25,262 and Motion to Reopen Record (the "Motion")[1] and in support hereof, state as follows:

I. INTRODUCTION

On August 11, 2011, the Commission issued Order No. 25,262 ("Order") in which it held that cable voice service such as that provided by Comcast constitutes conveyance of a telephone message that falls within the jurisdiction of the Commission pursuant to RSA 362:2. Comcast seeks rehearing on the grounds that the Commission 1) has misinterpreted federal law in determining that cable voice is a telecommunications service rather than an information service; 2) has misapplied applicable law regarding federal preemption of state authority, and 3) has

[1] The Motion for Rehearing and Suspension was filed by Comcast Corporation and its affiliates, Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC, (collectively "Comcast").

mistakenly applied state public utility law to technologies not intended by the legislature.[2] Comcast also seeks to reopen the record to account for "new developments" in the features of its cable voice service.[3]

To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable.[4] In addition, good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence was overlooked or misconstrued.[5] However, as explained in the following Objection, the Motion meets none of these standards. Instead of analyzing the Commission's reasoning in light of the statutory and precedential guidelines, the Motion simply reiterates Comcast's previous arguments and supporting authority, and faults the Commission's failure to find them persuasive. As such, the Motion should be denied.

II. THE COMMISSION CORRECTLY DETERMINED THAT CABLE VOICE SERVICE IS A "TELECOMMUNICATIONS SERVICE."

Comcast maintains that the Commission erred in finding that cable voice is not an information service. However, in pressing this argument, Comcast does not actually refute the Commission's findings of fact, but simply begs the question that cable voice has the characteristics of an information service. For example, Comcast repeats its previous assertion that "the FCC has held on multiple occasions that services that enable the conversion from one protocol to another, *like CDV*, are information services."[6] This is not quite the case. While the

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[2] Motion at 3.

[3] *Id.* at 15.

[4] *See* RSA 541:3 and RSA 541:4.

[5] *See* Hollis Telephone, Inc., *et al.*, Order No. 25,088 at 14 (Apr. 2, 2010) (citing Dumais v. State, 118 N.H. 309, 312 (1978)).

[6] Motion at 4 (emphasis supplied).

FCC has, over the last thirty years, ruled repeatedly on the subject of protocol conversion as it relates to enhanced and/or information services, it has of course never ruled on Comcast's cable voice service specifically, or fixed VoIP services in general. Thus, the assertion that such services are "like CDV" is one held only by Comcast and, now with the Order, rejected by the Commission. Having thus reframed the issue, Comcast focuses its attention primarily on the issues of protocol conversion and enhanced services.

A. Protocol Conversion

Citing its briefs, Comcast repeats its conclusive statement that a protocol conversion occurs as part of its service and then misleadingly claims that the Commission "conclude[d] that this protocol conversion capability is not determinative under federal law . . . ."[7] This, of course, is not what the Commission concluded. Rather, the Commission, after thorough review of Comcast's arguments, rejected Comcast's contention that a protocol conversion, as defined in federal statutes, occurs at all.[8]

Comcast latches on to the Commission's determination that "the net protocol processing that defines an information service consists of the technological interface between an end user and a communications network of the end user's choice,"[9] stating that "[t]here is no requirement that such protocol conversions be performed only between the end-user and a third-party service provider . . ."[10] But this is a piece of *post hoc* reasoning that directly contradicts Comcast's earlier argument that it is "the nature of functions the end user is offered" that determines regulatory status.[11] As the Commission explained, the essence of a "service" is from the

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[7] *Id.*

[8] *See* Order at 49 – 53.

[9] *Id.* at 51

[10] Motion at 4.

[11] Comcast Brief at 25, citing National Cable & Telecommunications Ass'n v. Brand X Internet

perspective of an end user.[12] Otherwise, it is merely internal protocol manipulation which, according to the FCC, is not an information service. As the RLECs described in their Reply Brief, the FCC has determined that there are three varieties of net protocol processing that do not comprise information services: 1) those involving communications between an end-user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; 2) those in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) those involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end-user").[13] The Commission determined, after considerable deliberation that it described in the Order, that cable voice services fall within those exceptions.[14]

Comcast disputes this, stating that, in the *Computer III* inquiry, "the FCC has acknowledged that services are 'enhanced offerings' . . . where they 'support communications among incompatible terminals (and perform code, format and protocol conversion to support this service within their facilities),' *i.e., after a different carrier had already transported the communications to the information service provider's premises.*"[15] While it is true that the FCC did make the statements that Comcast has enclosed within quotations, this citation is not at all on point. First, it comes not from the *Computer Inquiry* proceedings, but from the AT&T Packet

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Services, 545 U.S. 967, 968 (2005) ("*Brand X*").

[12] Order at 46.

[13] RLECs Reply at 16. *See Implementation of the Non-Accounting Safeguards*, CC Docket No. 96-149, Order on Reconsideration, 12 FCC 2297 ¶ 106 (1997).

[14] Order at 51.

[15] Motion at 5-6 (emphasis supplied).

Switching proceeding in the early 1980s.[16] Second, the explanatory phrase in italics is entirely of Comcast's invention. The AT&T proceeding had nothing to do with intermediate carriers or end user distinctions, but simply dealt with the issue of whether AT&T's implementation of packet switching was an enhanced or basic service. Third, not only is Comcast's citation inapposite, it actually supports the Commission's holding. The determination in *AT&T* hinged on the *incompatibility* of the terminals. This case, on the other hand, deals with *compatible*, if not identical, terminals on each end of the call, *i.e.* telephone handsets.

Comcast also refers to various other cases that it relied on in its briefs, *e.g. Southwestern Bell, Brand X, and Vonage v. Minnesota PUC*, and accuses the Commissions of misreading the holdings of those cases.[17] However, it fails to acknowledge that the Commission did review those cases and found them unpersuasive for various reasons, particularly in light of the FCC's unsupportive position on these issues.

For example, Comcast implies that its cable voice service is the "paradigmatic information service" because *Brand X* described an information service as "communicat[ion] between networks that employ[] different data-transmission formats."[18] Notwithstanding that Comcast again begs the question that its service fits this description, this is weak support. First, as the RLECs explained in their briefs, this case had nothing to do with cable voice service. Second, this statement refers merely to the Court's recitation, not endorsement or affirmation, of certain definitions from the FCC's *Computer II* Order.[19]

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[16] *Application of AT&T to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States*, Memorandum Opinion, Order, and Authorization, 94 F.C.C.2d 48, ¶ 13 (1983).

[17] Motion at 7-8.

[18] Motion at 6, citing Brand X, 545 U.S. at 968.

[19] Brand X, 545 U.S at 976 - 977 (reciting that the FCC defined "enhanced service" as "service in which 'computer processing applications [were] used to act on the content, code, protocol, and

Comcast also reaffirms its reliance on *Vonage v. Minnesota PUC*, particularly its holding that "Vonage was exempt from state telecommunications laws because the protocol conversion performed by its service made the service an 'information service' under federal law."[20] However, Comcast fails to note that in a *later* order dealing with the *same facts*, the FCC specifically declined to classify cable voice as an "information service."[21] Given that the FCC originally promulgated the rules regarding enhanced/information services, the RLECs submit that perhaps the FCC remains the best authority for interpretations of those rules, and thus the Commission's holding was well-reasoned and correct.

B. Ancillary Enhanced Services

Comcast also criticizes the Commission's finding that Comcast's ancillary enhanced "abilities"[22] do not themselves render its cable voice service an enhanced service as well. As it did with the subject of protocol analysis, Comcast does not actually examine the record facts and explain how the Commission misinterpreted them. Instead, it merely reiterates its position and then references the *Vonage Order* as purported support for this position. However, the Commission dealt with this at length and determined that the *Vonage Order* applied to nomadic VoIP, not cable phone service.[23]

Comcast attempts to bolster its arguments with promises of new information regarding

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other aspects of the subscriber's information . . .' as well as 'protocol conversion' (i.e., ability to communicate between networks that employ different data-transmission formats).") (citing to *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 420-422 (1980) ("*Computer II*")) (internal citations to *Computer II* omitted.)

[20] Motion at 7-8, citing Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) ("*Vonage v. Minnesota PUC*").

[21] *Vonage Holdings Corp.*, WC Docket No. 03-211, Memorandum Opinion & Order, 19 FCC Rcd 22404, ¶ 14, n. 46. (2004) ("*Vonage Order*").

[22] Motion at 9.

[23] Order at 56.

"new features" that "have either recently become available in New Hampshire or *will soon be* publicly available."[24] However, promises are not "facts," and the Commission cannot be faulted for disregarding "facts" that did not exist at the time of it deliberations and, in some cases, *still* do not exist.

Furthermore, even if the Commission were to consider these "new" features, it would find that they are all in the same vein as those previously touted by Comcast -- ancillary services and call management functions that do not act on the basic call. As the Commission held in its Order,

> [t]he fact that a provider can add such enhanced services to basic telephone service does not persuade us that the underlying telephone service is thus converted from a telecommunications to an information service that falls outside the scope of our jurisdiction under RSA 362:2. The cable voice customer signs up, first and foremost, for a service that will enable voice communication with other end users, including those using traditional telephone service. The fact that other, enhanced features may be added on to the basic voice communication service does not change the nature of the basic telephone service itself."[25]

In the face of the Commissions thorough analysis of the facts and its adherence to applicable law, Comcast has failed to establish that the Order is unlawful or unreasonable, or that any relevant evidence has been overlooked or misinterpreted.

III. THE COMMISSION CORRECTLY DETERMINED THAT STATE REGULATION OF CABLE VOICE IS NOT PREEMPTED.

Comcast's critique of the Commission's preemption analysis is again distinguished by its reframing of the central issue. First, it mischaracterizes the Commission's holding, claiming that its preemption arguments were rejected because the Commission found that "New Hampshire's state telecommunications regulations are less burdensome than Minnesota's regulations at issue

[24] Motion at 10 (emphasis supplied).

[25] Order at 52.

in the Vonage Preemption Order."[26] Then, it proceeds to attack this straw man, using the *Vonage Order* as support, as well as new evidence (related to its "burden") that was available at all times during this proceeding and could have been introduced at any time.[27]

However, the relative burdens of state regulation were *not* the basis for the Commission's decision, nor the FCC's *Vonage Order*. The Commission reviewed the Telecommunications Act and concluded that "[n]owhere does the Telecommunications Act expressly preempt state regulation over cable voice services, such as those offered by Comcast and Time Warner."[28] It then noted that the FCC has declined to determine that cable voice service is subject to exclusive federal jurisdiction, as it has done with respect to nomadic VoIP, and that other states regulate cable voice services to varying degrees.[29] Further, the Commission not only emphasized that the *Vonage Order* addressed nomadic VoIP services, not cable voice services, it also elucidated the FCC's reasoning in that Order, correctly reporting that "the FCC determined that state regulation of nomadic VoIP service is preempted where it is impossible or impractical to separate the intrastate and interstate components of the service at issue."[30] "Burden" was not the basis of the holding.

To the extent that the Commission invoked the burdens of state regulation, this was only dicta, offered perhaps as consolation in response to Comcast's policy arguments.[31] The Commission noted, but did not hold, that, notwithstanding its "determination that cable voice

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[26] Motion at 11.

[27] *Id.* at 11-13. This untimely evidence is discussed further in Section V, *infra.*

[28] Order at 55.

[29] *Id.*.

[30] *Id.* at 56-57.

[31] Motion at 12.

services are 'telecommunications services,"[32] CLEC regulation in New Hampshire is conducted with a light touch. In no way can this be construed as grounds for rehearing of the Commission's preemption determination.

Distilled down, Comcast's preemption argument simply acknowledges a fact that every public utility in the state has known for over a century – that conforming to customer relations rules is more burdensome than not. To date, this has never been a convincing argument that those rules should be ignored or waived. Comcast has failed to establish that the Order is unlawful or unreasonable.

IV. THE COMMISSION CORRECTLY DETERMINED THAT CABLE VOICE IS A PUBLIC UTILITY SERVICE UNDER NEW HAMPSHIRE LAW.

Comcast's arguments regarding the applicability of RSA 362:2 are repetitive of the "original intent" tone of its briefs, in which it argued that because a statute enacted a century ago did not contemplate cable voice service, it is inapplicable to this case. Comcast emphasizes, in general terms, the technical distinctions between its telephone service and traditional POTS and deemphasizes the customer experience as "superficial."[33] The Commission addressed these arguments at great length in eight pages of the Order[34] and found them to be a "distinction without a difference."[35] It held that the 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"[36] and that by "linking of one end user to another between identifiable, geographically fixed endpoints to

[32] Order at 58.
[33] Motion at 15.
[34] Order at 40-48.
[35] *Id.* at 44.
[36] *Id.* at 45.

enable real-time, two-way voice communication over wires,"[37] cable voice service "constitute[s] the conveyance of telephone messages and, thus, the providers of such services are subject to Commission jurisdiction."[38] The Commission's careful dissection of Comcast's arguments was eminently reasonable and grounded in the law, and there are no grounds for rehearing.

V. COMCAST HAS FAILED TO ESTABLISH ANY REQUIREMENT TO REOPEN THE RECORD.

In the Declaration of Beth Choroser that accompanied its Motion, Comcast proffered the following new evidence:

- Comcast began offering its customers the choice of providing their own eMTA "in late 2010";[39]
- Comcast has begun offering a service to its business customers that provides access to its services from a mobile device and "will in the near future" provide access from a third party broadband connection;[40]
- Comcast will need to make changes to its billing systems and/or practices "involv[ing] substantial effort and expense" in order to comply with the Commission's customer relations rules, particularly in regard to disconnection for non-payment.[41]

The Commission has held that "good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision,"[42] and its rules provide that it may reopen the record if "late submission of additional evidence will enhance its ability to resolve the matter in dispute."[43] However, the Commission will not rely on such facts when the proffering party does not provide an explanation as to why the information

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[37] *Id.* at 44.

[38] Order at 48.

[39] Choroser Declaration ¶ 2.

[40] *Id.* ¶ 4.

[41] *Id.* ¶¶ 8-9.

[42] Hollis Telephone, Inc., *et al.*, Order No. 25,088 at 14 (Apr. 2, 2010) (citing Dumais v. State, 118 N.H. 309, 312 (1978)).

[43] Rule Puc 203.30(a).

was not available during the course of the proceeding.[44] By these standards, none of Comcast's proffered evidence supports its request to reopen the record.

Regarding the customer-provided eMTA, this information was, by Comcast's own admission, available in "late 2010." This is at least eight months before the Order was released, and yet Comcast waited until a month after the Order was issued before presenting it. This alone is grounds to reject it. Even if it were not, it should be disregarded because it does nothing to enhance the Commission's ability to resolve the dispute; as Comcast itself noted, facts related to the eMTA are irrelevant at this point because the Commission did not endorse this argument in the Order.[45]

Comcast's information related to the purportedly nomadic features of some of its business services also fails to rise to the necessary standards. Some of this information does not even rise to the level of a "fact," since it relates to future plans that may or may not come to fruition. As to the information that is current, all that it can possibly establish is that in *addition to* its state regulated fixed VoIP offerings, Comcast may also be offering a nomadic VoIP service. This is irrelevant to the cable voice service that is the subject of this proceeding, and again does nothing to enhance the Commission's ability to resolve the dispute.

Suffering most from the issue of timeliness is Comcast's discussion of billing issues. The current version of the Commission rule that Comcast finds burdensome, Puc 432.14, has been in effect since May 2005, and thus Comcast was on notice of it well before and during the pendency of this proceeding. Yet at no time did it raise this issue, and declarant Choroser (who

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[44] *See* Hollis Telephone, Inc., *et al.*, Order No. 25,088 at 14 (Apr. 2, 2010). *See also* Appeal of Gas Service, Inc., 121 N.H. 797 (1981) (Based on motion for rehearing before it, the Public Utilities Commission could properly have found that no good cause was shown by the motion since gas company failed to explain why the "new evidence" it wished to present at a rehearing could not have been presented at the original hearing.)

[45] Motion at 6, n.2.

declared that she is familiar with this rule[46] and has testified to considerable experience in billing compliance and specifications[47]) did not address it in her Direct Testimony of October 9, 2009. Comcast has provided no explanation of why this information could not have been provided during the course of the proceeding, and for this reason alone it should be disregarded. Moreover, as the RLECs have explained above, the proffered evidence is irrelevant in that it merely acknowledges that Comcast must now play on a more level playing field and conform to the same billing rules that other telephone companies do.

The information that Comcast has proffered is untimely, irrelevant and not conducive to enhancing the Commission's ability to resolve this dispute. The Commission should deny Comcast's request to reopen the record.

VI. CONCLUSION

Comcast has failed to establish that the Commission's Order is unlawful or unreasonable, that any evidence was overlooked or misconstrued, or that there is any new and relevant evidence that was unavailable during the course of the proceeding. Consequently, the RLECs respectfully request that the Commission:

a) DENY the request to reconsider and reverse Order No. 25,262;

b) DENY the request to suspend Order No. 25,262; and

c) DENY the request to reopen the record in this docket.

[46] Choroser Declaration ¶ 5.

[47] Prefiled Direct Testimony of David J. Kowolenko and Beth Choroser at 3:6-10 (Oct. 9, 2009).

Respectfully submitted,

BRETTON WOODS TELEPHONE COMPANY, INC.
DIXVILLE TELEPHONE COMPANY
DUNBARTON TELEPHONE COMPANY, INC.
GRANITE STATE TELEPHONE, INC.
HOLLIS TELEPHONE COMPANY, INC.
KEARSARGE TELEPHONE COMPANY
MERRIMACK COUNTY TELEPHONE COMPANY
WILTON TELEPHONE COMPANY, INC.

By Their Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: September 19, 2011

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection was forwarded this day to the parties by electronic mail.

Dated: September 19, 2011

By: _____
Harry N. Malone, Esq.

THE STATE OF NEW HAMPSHIRE

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September 22, 2011

Re: DT 09-044, New Hampshire Telephone Association
Petition for an Investigation into the Regulatory Status of
IP Enabled Voice Telecommunications Services
Suspension of Order

To the Parties:

On September 12, 2011, the Commission received a motion for rehearing of Commission Order No. 25,262 (August 11, 2011) and a motion to reopen the record from Comcast Corporation and its affiliates in the above captioned docket. On September 19, 2011, the incumbent carriers of the New Hampshire Telephone Association filed an objection to both motions.

Pursuant to RSA 541:5, the Commission has determined to suspend Order No. 25,262 pending further consideration of the issues raised in the motions.

Sincerely,

Debra A. Howland
Executive Director

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services

Order Denying Motion for Rehearing and Suspension of Order and Motion to Reopen Record

ORDER NO. 25,274

September 28, 2011

I. INTRODUCTION

On March 6, 2009, the rural local exchange carriers of the New Hampshire Telephone Association (the RLECs)[1] filed with the New Hampshire Public Utilities Commission a petition under RSA 365:5 asking the Commission to conduct an inquiry into the appropriate regulatory treatment of Internet protocol (IP)-enabled cable voice service (cable voice service) in New Hampshire. In *New Hampshire Telephone Association*, Order No. 25,262 (August 11, 2011), the Commission found that the cable voice service offered in New Hampshire, Comcast Digital Voice and Time Warner's Digital Phone and Business Class Phone, in particular, constitute conveyance of a telephone message under RSA 362:2 and that providers of such services are public utilities under New Hampshire law, subject to limited regulation as competitive local exchange carriers (CLECs).

[1] The RLECs include: Bretton Woods Telephone Company, Inc.; Dixville Telephone Company; Dunbarton Telephone Company, Inc.; Granite State Telephone, Inc.; Hollis Telephone Company, Inc.; Kearsarge Telephone Company; Merrimack County Telephone Company; and Wilton Telephone Company, Inc.

On September 12, 2011, Comcast Corporation and its affiliates (collectively, Comcast) filed pursuant to RSA 541:3 and Puc 203.33 a motion for rehearing and suspension of Order No. 25,262, and a motion to reopen the record of this proceeding. In its motion, Comcast argues that the order is unlawful and unreasonable as it misapprehends federal law regarding information services, misapplies federal law regarding preemption, and misapplies state law. Comcast further contends that new evidence confirms that Comcast Digital Voice is an "information service" under federal law and thus not subject to state law.

On September 19, 2011, the RLECs filed an objection to both motions. The RLECs argue that Comcast's motions fail to demonstrate that the order is unlawful or unreasonable and that Comcast has not produced new evidence unavailable prior to the issuance of the underlying decision or shown that evidence was overlooked or misconstrued. The RLECs further contend that Comcast's motion simply reiterates previous arguments and supporting authority.

II. POSITIONS OF THE PARTIES

Comcast argues in its motion for rehearing and suspension of order and motion to reopen record that Commission Order No. 25,262 is unlawful and unreasonable for three reasons: (1) the order misapplies federal law – specifically, the Telecommunications Act, 47 U.S.C. § 153, and precedent of the Federal Communications Commission (FCC); (2) the order misapplies the doctrine of conflict preemption; and (3) under state law, the order disregards the key attributes of Comcast Digital Voice (CDV) services. Comcast further contends that new evidence confirms that CDV is an information service under federal law.

The RLECs counter in their objections that Comcast fails to meet the standards required for rehearing and reopening of the record. Namely, they contend that Comcast failed to demonstrate that the order is unlawful or unreasonable, and failed to produce new evidence

unavailable prior to the issuance of the underlying decision or show that evidence was overlooked or misconstrued. The RLECs further contend that Comcast's motions simply reiterate previous arguments and supporting authority, faulting the Commission for failing to find that authority persuasive.

The arguments and counter-arguments are set forth by issue below.

A. Application of federal law

1. Comcast

Comcast argues that the order misapprehends the nature of the federal statutory requirement and reaches a result that is contrary to law when it concludes that CDV is a telecommunications service and not an information service under the Telecommunications Act. *Motion* at 3, *citing Order* at 49-53. To support this argument, Comcast contends that the capability to perform net protocol conversions makes a service an information service under the Telecommunications Act, irrespective of where in a provider's network the protocol conversions occur, adding that the proper benchmark for determining whether a service is an information service is whether, *inter alia*, it offers the capability for "transforming [or] processing...information via telecommunications," *Motion* at 4, *citing* 47 U.S.C. § 153(24). Comcast further contends that the order contradicts the federal statute when it finds that Comcast's underlying argument "conflate[s] the terms 'formatting' and 'form,' when it equates [Internet protocol (IP)] conversion with the conversion of voice messages from IP to [time division multiplexing (TDM)] format and vice versa, rather than to the conversion of information from one form to another (*e.g.*, a voice call to voice mail to pager alert,)" *Motion* at 6 *citing Order* at 52. Thirdly, Comcast argues that the order failed to meaningfully respond to the holdings of courts that have addressed the issue and concluded that interconnected VoIP is an

information service. *Motion* at 8. Finally, Comcast contends that its CDV service is a more multifaceted service than a mere bundling of voice service with unrelated features, and that those enhanced functionalities are clearly information services under federal law, contrary to the order's holding. *Motion* at 9. **2. RLECs**

The RLECs counter that when Comcast argues that the Commission erred in finding that cable voice service is not an information service, it does not actually refute the Commission's findings of fact, but simply begs the question that cable voice has the characteristics of an information service. *Objection* at 2. The RLECs add that Comcast misconstrues the Commission's analysis of protocol conversion, noting that the Commission did not find that "protocol conversion capability is not determinative under federal law," as Comcast argues, but rather it rejected Comcast's contention that a protocol conversion occurs at all. *Id.* at 3. The RLECs further contend that Comcast's argument that the Commission erroneously determined that "the net protocol processing that defines an information service consists of the technological interface between an end user and a communications network of the end user's choice" constitutes *post hoc* reasoning that directly contradicts Comcast's earlier argument that it is "the nature of functions the end user is offered" that determines regulatory status. *Id.*, *citing Motion* at 4.

The RLECs reiterate the position they put forward in the underlying proceeding that the FCC has determined that three varieties of net protocol processing do not comprise information services, namely (1) those involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; (2) those in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and (3) those involving

internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end user). *Id, citing RLECs Reply Brief* at 16.

The RLECs rebut Comcast's line of reasoning by noting: (1) that Comcast mis-cites the FCC discussion regarding enhanced services, as the FCC language comes from the AT&T Packet Switching proceeding in the early 1980s, not the Computer III proceeding; (2) that the explanatory phrase Comcast offers is entirely of Comcast's invention and misconstrues the FCC, which dealt only with the issue of whether AT&T's implementation of packet switching was an enhanced or basic service, not with intermediate carriers or end user distinctions; and (3) that Comcast's citation is inapposite and actually supports the Commission's holding in this proceeding, as the FCC's determination in *AT&T* hinged on the incompatibility of the terminals, not compatible terminals at each end of a call, as in this proceeding. *Objection* at 4-5. Finally, the RLECs note that Comcast's argument that the Commission did not meaningfully respond to court decisions that have found interconnected VoIP to be information services fails to acknowledge that the Commission did review the cases and found them unpersuasive for various reasons, particularly in light of the FCC's unsupportive position on the issues in this proceeding. *Objection* at 5.

B. Doctrine of conflict preemption

1. Comcast

Comcast argues that the order concludes that New Hampshire's state telecommunications regulations are less burdensome than Minnesota's regulations at issue in the *Vonage Preemption Order*, and in doing so misapplies federal preemption law. *Motion* at 11. Comcast contends that state public utility regulation is preempted as conflicting with federal policy regardless of CDV's

regulatory classification because state telecommunications regulations stand in the way of Congress's open-market objectives. *Id.* To support this line of reasoning, Comcast states that it does not have the ability to meet New Hampshire regulatory requirements by prioritizing partial bill payments towards New Hampshire customers' voice services. *Motion* at 13, *citing* Puc 432.14(f)(2).

2. RLECs

The RLECs state that Comcast mischaracterizes the Commission's holding in arguing that the order misapplies the doctrine of conflict preemption. Objection at 7. The RLECs contend that neither the FCC nor the Commission based their preemption findings on the relative burdens of state regulation, noting that the FCC declined to determine that cable voice service is subject to exclusive federal jurisdiction and that the Commission merely noted in *dicta* that CLEC regulation in New Hampshire is "conducted with a light touch." Id. at 8-9.

C. Application of state law

1. Comcast

Comcast argues that the order misapplies New Hampshire law in classifying CDV as a "public utility" service subject to the Commission's jurisdiction pursuant to RSA 362:2, contrary to the intent of the Legislature that drafted the statute. *Motion* at 14 and 15. Comcast argues, with reference to its prior briefing, that although CDV bears a superficial resemblance to "plain old telephone service" (POTS), it is a "remarkably different service – both in terms of the technological means it uses to transmit real-time voice communications, its federal regulatory status, and numerous other advanced features available to CDV customers that cannot be offered with POTS." *Id.* Comcast further contends that the Commission erred when it examined the

"user's perspective" when determining that CDV fell within its regulatory authority under RSA 362:2.

2. RLECs

The RLECs rebut Comcast's contentions regarding the applicability of RSA 362:2 by noting that Comcast simply reiterates its line of argument in its underlying briefs and, moreover, that the Commission addressed those arguments at great length in eight pages of the order and found them to be a "distinction without a difference." *Objection* at 9. The RLECs further note that the Commission held that "RSA 362:2 defines a public utility 'by the service it renders, not by the technology that it uses to provide such service' and that by the 'linking of one end user to another between identifiable, geographically fixed endpoints to enable real-time, two-way voice communication over wires,' cable voice service 'constitute[s] the conveyance of telephone messages and, thus, the providers of such services are subject to Commission jurisdiction.'" *Id.* at 9-10. The RLECs conclude that the Commission's dissection of Comcast's arguments was reasonable and grounded in the law.

D. New Evidence

1. Comcast

In support of its motion to reopen record, Comcast proffers "new evidence" and argues that its CDV service "has continued to evolve technologically since briefing in this docket was completed in March of 2010." *Motion* at 16. According to Comcast, the evolution of new technological enhancements to its CDV service demonstrates that IP-enabled services such as cable voice fit poorly into regulatory models developed for the traditional telephone network and belong properly in the information service category under federal law. *Id.* at 17. To support its proffer of "new evidence," Comcast includes a declaration from Beth Choroser, Executive

Director of Regulatory Compliance for Comcast's voice service operations. Ms. Choroser's declaration explains that CDV customers may now purchase their own eMTA device, rather than renting from Comcast, and that Comcast now offers a "Managed business Class Voice" (MBCV), which enables a customer to place and receive calls from a Comcast-provided phone number from any of multiple devices, including a desk phone or a handheld device carried by a Commercial Mobile Radio Service (CMRS) carrier. *Declaration* at 1. Ms. Choroser also states that in the near future Comcast will also offer access from a "soft client" (i.e., computer software) on a computer using any broadband connection, including a connection from a third-party internet service provider. *Declaration* at 2. Finally, Ms. Choroser states that Comcast does not currently have the capability to apply partial bill payments to the voice service component of a customer who purchases multiple services from Comcast. Therefore, Ms. Choroser argues, Comcast cannot comply with Puc 432.14(f). *Declaration* at 3.

2. RLECs

With respect to the new evidence proffered by Comcast, the RLECs contend that Comcast failed to provide an explanation as to why the information was not available during the course of the proceeding, noting that the information regarding customer-provided eMTA was by Comcast's own admission available at least eight months before the order was released. *Objection* at 11. The RLECs add that some of the information Comcast provides does not rise to the required standards, as it relates to future plans that may or may not come to fruition and, moreover, establishes only that Comcast may be offering a nomadic VoIP service in addition to its state regulated cable voice offerings. *Id.* Further, according to the RLECs, Comcast's discussion of billing issues is untimely, as it could have been provided during the course of the underlying proceeding.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. Good reason may be shown by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977) and *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.,* Order No. 25,088 (April 2, 2010) at 14. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Connecticut Valley Electric Co.*, Order No. 24,189, 88NH PUC 355, 356 (2003), *Comcast Phone of New Hampshire*, Order No. 24,958 (April 21, 2009) at 6-7, and *Public Service Company of New Hampshire*, Order No. 25,168 (November 12, 2010) at 10.

In each of its motions, Comcast reiterates the positions it took in the underlying proceeding and simply argues that the Commission made the wrong decision on each point raised. We agree with the RLECs that in several instances, Comcast misconstrues the order's language in an effort to contest our findings and overlooks the reasoning laid out in the order that does not support its views. Comcast argues, for example, that the Commission erroneously found that "protocol conversion capability is not determinative under federal law" where, in fact, we reached no such conclusion but found that the net protocol processing that characterizes information services does not occur in the provision of CDV services. *See Motion* at 4, compared to *Order* at 51. Similarly, in its preemption argument, Comcast mischaracterizes the Commission's holding that our jurisdiction over cable voice services "does not involve

discriminatory or burdensome economic regulation" by contending that we simply compared New Hampshire telecommunications regulations to those of Minnesota and determined that New Hampshire's regulations are "less burdensome than Minnesota's regulations." *Motion* at 11, compared to *Order* at 58-59.

With respect to the new evidence proffered by Comcast through Ms. Choroser's declaration, we agree with the RLECs that Comcast has not demonstrated that the evidence could not have been presented prior to the issuance of our decision in Order No. 25,262. Moreover, the information provided is, at least in part, prospective, to the extent the technologies in question have not yet been introduced in the New Hampshire market. Even if the technologies noted were already offered in the market, we are not persuaded that the addition of such enhancements would transform cable voice service from a telecommunications service to an information service, as Comcast would have us conclude. The "new evidence" is, in effect, more of the same argument Comcast made in its underlying briefs that such enhanced features should qualify CDV as an information service, a conclusion we did not reach.

We therefore reassert our finding that the cable voice service offered by Comcast and Time Warner constitutes conveyance of a telephone message that falls within the jurisdiction of this Commission pursuant to RSA 362:2, and that state regulation of such services is not expressly or implicitly preempted by federal law. Comcast has raised no new arguments in its motions, has failed to explain why it could not have produced in the underlying proceeding the information it now seeks to offer in support of its recast arguments, and how that new information, even if admitted, would lead to a different result.

Finally, we note that to the extent Comcast believes that it cannot reasonably comply with Puc 432.14(f) concerning disconnection of service or any other rule, it is free to seek a

waiver pursuant to Puc 201.05 or to request that the Commission amend or repeal the rule pursuant to Puc 205.03.

Based upon the foregoing, it is hereby

ORDERED, that the Motion for Rehearing and Suspension of Order No. 25,262 and the Motion to Reopen Record filed by Comcast Corporation and its affiliates are DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of September 2011.

Clifton C. Below
Commissioner

Amy I. Ignatius
Commissioner

Attested by:

Lori A. Davis
Assistant Secretary

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

Petition for an Investigation into the Regulatory Status of
IP Enabled Voice Telecommunications Services

MOTION FOR REHEARING/RECONSIDERATION OF ORDER NO. 25,274 DENYING MOTION FOR SUSPENSION OF ORDER NO. 25,262

AND/OR

PETITION FOR WAIVER OF CLEC RULES

NOW COME Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast") and, pursuant to RSA 541:3, respectfully move for rehearing/reconsideration of the portion of Order No. 25,274 issued on September 28, 2011 in the above-captioned docket that denied Comcast's Motion for Suspension of Order No. 25,262 issued on August 11, 2011. In the alternative, pursuant to N.H. Admin. R. Puc 201.05, and pursuant to directives set forth in Order No. 25,274, Comcast respectfully petitions for a waiver of the New Hampshire Public Utilities Commission's ("PUC's" or "Commission's") rules governing Competitive Local Exchange Carriers ("CLECs")[1]. In support of these pleadings, Comcast states as follows:

I. INTRODUCTION/PROCEDURAL HISTORY

On August 11, 2011, the Commission issued Order No. 25,262 in the above-captioned docket. The Order found, *inter alia*, that the interconnected Voice over

[1] Comcast's waiver request extends to all Commission rules that may apply to Comcast including CTP rules and utility rules of general applicability, not simply those set forth in N.H. Admin. R. PART Puc 430. For convenience, the term "CLEC rules" used herein is intended to include all of the Commission's rules that may apply to Comcast.

Internet Protocol service ("interconnected VoIP") service offered by Comcast and Time Warner in New Hampshire constitutes the conveyance of telephone messages under RSA 362:2 and that providers of such services are New Hampshire public utilities subject to the Commission's CLEC regulations. Order No. 25,262 further directed Comcast and Time Warner to comply with registration and other CLEC requirements for their intrastate interconnected VoIP services pursuant to New Hampshire law and Commission rules. On September 12, 2011, pursuant to RSA 541:3, Comcast filed a timely Motion for Rehearing and Suspension of Order No. 25,262, as well as a Motion to Reopen the Record of this proceeding. The rural local exchange carriers of the New Hampshire Telephone Association ("RLECs") filed objections to both Motions on September 19, 2011. The Commission issued a Secretarial Letter on September 22, 2011 indicating its determination to suspend Order No. 25,262 pending further consideration of the issues raised in Comcast's Motions. On September 28, 2011 the Commission issued Order No. 25,274 denying Comcast's Motion for Rehearing and Suspension and Motion to Reopen the Record. In so doing, the Commission indicated that "to the extent that Comcast believes that it cannot reasonably comply with Puc 432.14(f)...or any other rule, it is free to seek a waiver pursuant to Puc 201.105 or to request that the Commission amend or repeal the rule..." *New Hampshire Telephone Association Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services*, DT 09-044, Order No. 25,274 (Sept. 28, 2011) at 10-11.

Comcast is filing an Appeal by Petition with the New Hampshire Supreme Court seeking a review of the Commission's determination that Comcast is a New Hampshire public utility and that its interconnected VoIP service is subject to the Commission's

regulatory authority. RSA 541:4 requires that before an appeal from any order or decision of the Commission may be taken to the New Hampshire Supreme Court, the appellant must first apply to the Commission for rehearing. Thus, while the issues adjudicated in Order No. 25,262 are now ripe for appeal (because Comcast has moved for and been denied a rehearing of them), *see* RSA 541:6, it is unclear whether Comcast may now appeal the portion of Order No. 25,274 that denied Comcast's Motion for Suspension or whether, instead, a Motion for Rehearing on that particular issue is a prerequisite for appealing it to the Court[2] or for filing a Motion to Stay with the Court under N.H. Supr. Ct. R. 7-A[3]. Therefore, out of surfeit of caution, Comcast is filing the instant Motion for Rehearing/Reconsideration to preserve for appeal the issue of whether the Commission erred in denying Comcast's request for a suspension of Order No. 25,262.

New Hampshire law is unsettled with respect to whether Comcast must separately move for reconsideration of the denial of its Motion to Suspend in the instant circumstances. In *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001) the New Hampshire Supreme Court held that in order to appeal a PUC order, "one must first file a motion for rehearing with the PUC stating every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." *Id.*

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[2] The same question exists with respect to the portion of Order No. 25,274 that denied Comcast's Motion to Reopen the Record. Comcast is filing a separate Motion for Rehearing dealing with that issue.

[3] N.H. Supr. Ct. R. 7-A provides that a motion to stay an order of a lower tribunal shall not be filed in the New Hampshire Supreme Court unless the movant has first unsuccessfully sought similar relief from the lower tribunal. Thus, if Comcast does not need to move for rehearing of the order denying suspension, Comcast has met the requirements of Rule 7-A and may now file with the New Hampshire Supreme Court a Motion to Stay the Commission's orders.

(internal quotation marks omitted) In that case, the Court also determined that because the appellant failed to make an argument in a motion for rehearing, the issue was not preserved for the Court's review on appeal. *Id. at* 677. Thus, it appears that the instant motion is necessary to preserve for appeal the issue of whether the Commission erred in denying Comcast's motion for a suspension of Order No. 25,262.

However, a contrary view may be inferred from *McDonald v. Town of Effingham Zoning Board of Adjustment*, 152 N.H. 171 (2005). In that case, which dealt with an appeals from decisions of zoning boards of adjustment ("ZBAs"), the Court recognized the potential for wasteful proceedings that the motion for rehearing requirement creates. The Court in *McDonald* found that when a ZBA denies a motion for rehearing and raises new issues, findings or rulings, the aggrieved party need not file a second motion for rehearing to preserve for appeal the new issues arising for the first time in the order denying rehearing. The Court found that a literal reading of the applicable rehearing and appeal statutes (RSAs 677:2 and 677:4) "leads to absurd results" and that "[i]t would be illogical and unduly cumbersome on the parties and the judicial process for a single variance matter to be simultaneously pending before two different tribunals.... Such a circumstance would undercut the policy favoring judicial economy that the legislature sought to promote when designing the rehearing and appellate process." *McDonald,* 152 N.H. at 175.

In light of the disparate judicial opinions described above, and out of an abundance of caution, Comcast is filing the instant motion for rehearing of the portion of Order No. 25,274 that denied its Motion for Suspension of Order No. 25,262. In the

alternative, Comcast petitions for a waiver of the Commission's CLEC rules for the reasons explained more fully in Section IV, *infra.*

II. STANDARD FOR REHEARING

The Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." RSA 541:3. This includes errors of law, as a motion for rehearing filed with the Commission must specify "every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4; *see Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 674. The "purpose of a rehearing 'is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State Pers. Comm'n,* 118 N.H. 309, 311 (1978) (citation and internal quotation marks omitted). For the reasons discussed below, Comcast respectfully submits that Order No. 25,274 is unlawful and unreasonable, and that good cause exists for rehearing/reconsideration of the portion of that Order that denied Comcast's request for a suspension of Order No. 25,262.

III. THE ORDER DENYING COMCAST'S MOTION FOR SUSPENSION IS UNLAWFUL AND UNREASONABLE

The Commission's Order No. 25, 274 denying Comcast's Motion for a Suspension of Order No. 25, 262 focused entirely on Comcast's Motion for Reconsideration of the *merits* of the Commission's decision to regulate Comcast's interconnected VoIP service under state law, as well as on Comcast's Motion to Reopen Record to admit additional evidence relevant to that question. Order No. 25,274, however, provided no reasoning with respect to its concurrent decision to deny Comcast's Motion to Suspend, which was simply denied without analysis. The failure to articulate the reasoning behind this portion of the Order, as required by RSA 363:17-b,

III, renders it unlawful. Instead of explaining why it was requiring Comcast to comply with a multitude of CLEC rules while Comcast pursues an appeal questioning its status as regulated utility in New Hampshire, the Commission (or a majority thereof[4]) merely directed Comcast to seek waivers of the rules with which it cannot reasonably comply. Order No. 25,274 (Sept. 28, 2011) at 10-11. Even assuming, *arguendo*, that this statement constitutes sufficient "reasoning" for purposes of meeting the Commission's obligations under RSA 363:17-b, III, it is unreasonable because it fails to recognize that Comcast must spend considerable time, money and effort to comply with numerous rules that ultimately may be inapplicable. Requiring Comcast to expend time and the financial and human resources to sift through, at a minimum, 49 pages of "CLEC 430" regulations as well as many others that apply to CLECs, to determine whether it: 1) currently complies with them; 2) is able to take affirmative compliance steps (through filings or adjustments to its business systems and operations); or 3) needs a waiver of a specific rules that are either inapplicable or with which Comcast is unable to comply, is unreasonable for several reasons.

First, Comcast is appealing the Commission's determination that state telephone regulations even apply to its interconnected VoIP service in the first instance. Although the Commission held that Comcast's interconnected VoIP service is not an "information service" under federal law, it acknowledged that there is substantial authority from federal district courts holding otherwise. Given the substantial weight of the question being presented to the New Hampshire Supreme Court by Comcast's appeal, as well as the ample support for Comcast's position, it would not be reasonable to compel Comcast

[4] Order No. 25,274 was issued by Commissioners Below and Ignatius only.

to comply with CLEC rules now when the Court may very well find those rules inapplicable.

Second, Comcast anticipates that in the upcoming session, the New Hampshire Legislature will be examining the issue of whether interconnected VoIP providers such as Comcast should be subject to the Commission's regulatory authority going forward. It is noteworthy that when confronted with the same issue, nineteen other states, including Massachusetts and Maine[5], and the District of Columbia, have enacted laws exempting interconnected VoIP services such as Comcast's from state regulation. Given that legislative action could ultimately dispense with the applicability of the CLEC rules to Comcast IP Phone II, the Commission should suspend its order requiring such compliance pending legislative and appellate review.

Third, it is Comcast's understanding that the Commission's 400 rules are set to expire by law in 2013 and it is unclear whether or to what extent they will be adopted in their current form. Compelling Comcast to expend significant resources and to disrupt its business operations to comply with a specific set of rules is unreasonable given that the Commission may intend to modify those rules within a year or so. Lastly, there is no evidence that such compliance is necessary to protect the public or for any reason other than the Commission has determined that Comcast's CDV service is subject to CLEC regulation, a determination with which Comcast disagrees and is appealing. Each of the individual circumstances described above constitutes "good reason for the rehearing" as

[5] The Maine Legislature specifically voided the Maine Public Utilities Commission's Order regulating VoIP within six months after the Order was issued. *See* An Act To Ensure Regulatory Parity among Telecommunications Providers, Me. L.D. 1466 (125th Legis. 2011), *available at* http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1075&item=1&snum=125.

required by RSA 541:3. In the aggregate, they clearly warrant a suspension of Order No. 25,262.[6]

Precedent exists for granting the requested suspension. The Commission has previously granted a utility's request to stay a Commission order requiring a compliance filing until such time as the utility had exhausted its appellate rights. *See, e.g., Northern Utilities, Inc. Summer Period Cost of Gas Adjustment,* DG 07-033, Secretarial Letter from Debra A. Howland, Executive Director (Oct. 10, 2007) (attached). The Commission should act accordingly in the instant case and should suspend Order No. 25, 262 to relieve Comcast CDV service from any obligations under the CLEC rules until such time as its appellate rights are exhausted.

IV. WAIVER OF THE CLEC RULES SERVES THE PUBLIC INTEREST AND WILL NOT DISRUPT THE ORDERLY AND EFFICIENT RESOLUTION OF MATTERS BEFORE THE COMMISSION

In the event the Commission denies the instant Motion for Rehearing, Comcast respectfully petitions the Commission for a waiver of the CLEC rules until such time as Comcast's appellate remedies are exhausted. The relevant waiver standard is set forth in N.H. Admin. R. Puc 201.05(a) which provides that the Commission "**shall** waive the provisions of any of its rules, except where precluded by statute, upon request by an

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[6] Immediate application of the Commission's rules to Comcast could also cause spillover effects in other areas of the law and would generate regulatory confusion pending judicial review of the Order. For instance, the Commission regulates rates, charges, terms and conditions for pole attachments for "[p]ublic utilities within the meaning of RSA 362…that own, in whole or in part, any pole used for wire communications or distribution." *See* N.H. Admin. R. Puc 1301.01 *et seq.* The Commission's Order could lead to pricing disputes and regulatory uncertainty in this area, potentially triggering the need for further proceedings before the Commission. *See* N.H. Admin. R. Puc 1304.06. Given the complexity of these issues, a suspension of the Commission's Order would allow for the development of clarity on the applicable legal regime before such disputes proliferate.

interested party" upon a finding that the waiver serves the public interest and will not disrupt the orderly and efficient resolution of matters before the Commission (emphasis added). In determining the "public interest," the Commission "**shall waive a rule**" if compliance with it would be onerous or inapplicable under the circumstances and the rule's purpose would be satisfied by an alternative proposed method. *See* N.H. Admin. R. Puc 201.05(b) (emphasis added).

The Commission's "CLEC 430" and "CTP 450" rules together comprise over 70 pages. Many of them impose state-specific, idiosyncratic requirements that would be extremely challenging to reconcile with Comcast's current national business processes/activities. Comcast has built its systems and conducted business pursuant to and in accordance with federal laws, orders, regulations and policies that are premised on the legal characterization of its interconnected VoIP service as an information service rather than a telecommunications service. The Commission's telecommunications carrier rules, on the other hand, contemplate the regulation of a single end-user telephone service, not the type of integrated cable, video and voice services using Comcast's converged platform and supported by Comcast's complex billing and operational systems.

For example, Comcast's billing and provisioning system is currently built around its converged platform – which serves customers across multiple states with multiple services, including high-speed Internet, cable video, and voice. *See* Declaration of Beth Choroser ("Choroser Decl.") ¶ 6 (submitted with Comcast's prior Motion for Rehearing). When a customer pays part of their combined bill, Comcast does not currently have the ability to prioritize such a partial payment towards New Hampshire customers' voice

services (as opposed to their High Speed Internet or cable video services) in a manner that would enable Comcast to comply with the Commission's disconnection regulations at N.H. Admin. R. Puc 432.14(f)(2).[7] *See* Choroser Decl. ¶¶ 7-9.

Another example is that Comcast currently lacks the intercarrier relationships and processes contemplated by N.H. Admin. R. Puc 432.01(a)(4) and (5) which require a CLEC to offer customers the opportunity to presubscribe to another carrier for interstate and intra-state long distance service. Requiring Comcast to engage in burdensome and costly reconfigurations of its national business systems in order to meet requirements of this sort, as well as the full panoply of New Hampshire-specific CLEC rules, would be quite onerous and would immediately and adversely impact Comcast's business operations and product offerings. In addition, trying to comply with these rules could saddle Comcast, and its customers, with contracts and third-party obligations that could be difficult to unwind in the event Comcast were to prevail on appeal or the legislature were to deregulate VoIP services in New Hampshire. And given the pending judicial appeal concerning whether interconnected VoIP services are subject to the Commission's current regulatory authority, as well as anticipated legislative activity in this same area, the applicability of current or future CLEC rules to Comcast remains uncertain.

The above-described circumstances as well as those described in Section III, *supra*, demonstrate that Comcast has met the requirements of N.H. Admin. R. 201.05 and therefore qualifies for a waiver of the CLEC rules. The Commission must grant the waiver if it finds that the waiver serves the public interest and will not disrupt the orderly efficient resolution of matters before the Commission. The public interest will be served

[7] These difficulties are described in greater detail in the Declaration of Beth Choroser ¶¶ 5-9, submitted with Comcast's prior Motion for Rehearing.

by granting Comcast a waiver of the CLEC rules because it will avoid a costly and time-consuming compliance effort that will result in business disruption, customer confusion, and may ultimately be unnecessary if either the New Hampshire Supreme Court or the Legislature determines that such compliance is unnecessary. Additionally, because a waiver of the CLEC rules will not disrupt any proceedings before the Commission, it should be granted.

In the alternative, if the Commission denies the foregoing waiver request, for the reasons and uncertainty discussed above, Comcast respectfully urges the Commission to grant a temporary waiver for at least 60 days from the date of an order on the within Motion and Petition. Such a waiver would enable Comcast to continue to conduct a more comprehensive evaluation of all potentially applicable rules to determine their business and operational impacts. As drafted, the current rules contemplate implementation by a provider of a single end-user service: telephone. The rules do not contemplate the integrated nature of Comcast's products and the complex billing and operational systems used to provide additional, unregulated services such as video and broadband over the same platform. For this reason, a more comprehensive and detailed review is required to determine whether proposed implementation would have unintended, overly burdensome or business-impacting consequences.

Finally, the additional time would permit Comcast to file, if necessary, a more particularized request to waive the specific rules that are onerous, inapplicable or whose purpose could be satisfied by an alternative method.

V. CONCLUSION

For the reasons stated above, the Commission should either immediately suspend Order No. 25,262 or grant Comcast a waiver of the Commission's CLEC rules until such

time as a final, non-appealable judicial order is issued mandating Comcast's compliance with them.

WHEREFORE, Comcast respectfully requests that the Commission:

A. Issue an order suspending Order No. 25,262 until such time as a final, non-appealable judicial order is issued mandating Comcast's compliance with the Commission's CLEC rules;

B. In the alternative, issue an order granting Comcast a waiver of the Commission's rules until such time as a final, non-appealable judicial order is issued mandating Comcast's compliance with the Commission's CLEC rules, or granting Comcast at least 60 days to conduct a comprehensive review of the Commission's rules and to file a more particularized request for waivers of specific rules; and

C. Grant such additional relief as it deems appropriate.

October 28, 2011

Respectfully submitted,

Comcast Phone of New Hampshire, LLC
and Comcast IP Phone, II, LLC
By their Attorneys

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Certificate of Service

I hereby certify that a copy of the foregoing Motion and/or Petition has on this 28th day of October, 2011 been sent by electronic mail to persons listed on the Service List.

S. S. Geiger
Susan S. Geiger

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THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION
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October 10, 2007

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Re: DG 07-033, Northern Utilities, Inc.
Summer Period Cost of Gas Adjustment
Motion to Stay

Dear Ms. Geiger:

On October 1, 2007, Northern Utilities, Inc. (Northern) filed a Motion to Stay Order Adopting Revised Rates in the above referenced proceeding. In its Motion, Northern states that the Commission entered Order No. 24,786 in the instant docket which requires that Northern make a compliance filing in its 2007-2008 Winter cost of gas (COG) proceeding. Northern notes that it filed for its 2007-2008 Winter COG adjustment on September 17, 2007 and the deadline for filing a motion for rehearing on Order No. 24,786 is October 15, 2007. Northern requests that, because of the overlap in dates and other unresolved matters, it be relieved of the compliance filing requirement until such time as Northern has exhausted its appellate rights.

Please be advised that at its October 4, 2007 public meeting, the Commission granted Northern's Motion to Stay Order Adopting Revised Rates.

Sincerely,

Debra A. Howland

Debra A. Howland
Executive Director

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services

MOTION FOR REHEARING/RECONSIDERATION OF ORDER NO. 25,274 DENYING MOTION TO REOPEN RECORD

NOW COME Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast") and, pursuant to RSA 541:3, respectfully move for rehearing/reconsideration of the portion of Order No. 25,274 issued on September 28, 2011 in the above-captioned docket that denied Comcast's Motion To Reopen Record. In support of this Motion, Comcast states as follows:

I. INTRODUCTION/PROCEDURAL HISTORY

On August 11, 2011, the Commission issued Order No. 25,262 in the above-captioned docket. The Order found, *inter alia*, that the interconnected Voice over Internet Protocol ("VoIP") service ("interconnected VoIP") service offered by Comcast and Time Warner in New Hampshire constitutes the conveyance of telephone messages under RSA 362:2 and that providers of such services are New Hampshire public utilities subject to the Commission's CLEC regulations. Order No. 25,262 further directed Comcast and Time Warner to comply with registration and other CLEC requirements for their intrastate interconnected VoIP services pursuant to New Hampshire law and Commission rules. On September 12, 2011, pursuant to RSA 541:3, Comcast filed a timely Motion for Rehearing and Suspension of Order No. 25,262, as well as a Motion to Reopen the Record of this proceeding. The rural local exchange carriers of the New

Hampshire Telephone Association ("RLECs") filed objections to both Motions on September 19, 2011. The Commission issued a Secretarial Letter on September 22, 2011 indicating its determination to suspend Order No. 25,262 pending further consideration of the issues raised in Comcast's Motions. On September 28, 2011 the Commission issued Order No. 25,274 denying, *inter alia*, Comcast's Motion to Reopen the Record.

Comcast is filing an Appeal by Petition with the New Hampshire Supreme Court seeking review of the Commission's determination that Comcast is a New Hampshire public utility and that its interconnected VoIP service is subject to the Commission's regulatory authority. RSA 541:4 requires that before an appeal from any order or decision of the Commission may be taken to the New Hampshire Supreme Court, the appellant must first apply to the Commission for rehearing. Thus, while the issues adjudicated in Order No. 25,262 are now ripe for appeal (because Comcast has moved for and been denied a rehearing of them), *see* RSA 541:6, it is unclear whether Comcast may now appeal the portion of Order No. 25,274 that denied Comcast's Motion to Reopen Record, or whether, instead, a Motion for Rehearing on that particular issue is a prerequisite for appealing it to the Court.[1] Therefore, out of a surfeit of caution, Comcast is filing the instant Motion for Rehearing/Reconsideration to preserve for appeal the additional issue of whether the Commission erred in denying Comcast's Motion to Reopen Record.

New Hampshire case law is unsettled with respect to whether Comcast must separately move for reconsideration of the denial of its Motion to Reopen Record in the

[1] The same question exists with respect to the portion of Order No. 25,274 that denied Comcast's Motion for Suspension of Order No. 25,262. Comcast is filing a separate Motion for Rehearing dealing with that issue.

instant circumstances. In *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001) the New Hampshire Supreme Court held that in order to appeal a PUC order, "one must first file a motion for rehearing with the PUC stating every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." *Id.* (internal quotation marks omitted). In that case, the Court also determined that because the appellant had failed to make an argument in a motion for rehearing, the issue was not preserved for the Court's review on appeal. *Id.* at 677. Thus, it is at least arguable that Comcast must separately move for reconsideration with respect to the Commission's denial of Comcast's Motion to Reopen Record before filing an appeal regarding that issue.

However, a contrary view may be inferred from *McDonald v. Town of Effingham Zoning Board of Adjustment*, 152 N.H. 171 (2005). In that case, which dealt with an appeal from decisions of zoning boards of adjustment ("ZBAs"), the Court recognized the potential for wasteful proceedings that the motion for rehearing requirement creates. The Court in *McDonald* found that when a ZBA denies a motion for rehearing and raises new issues, findings or rulings, the aggrieved party need not file a second motion for rehearing to preserve for appeal the new issues arising for the first time in the order denying rehearing. The Court found that a literal reading of the applicable rehearing and appeal statutes (RSAs 677:2 and 677:4) "leads to absurd results" and that "[i]t would be illogical and unduly cumbersome on the parties and the judicial process for a single variance matter to be simultaneously pending before two different tribunals.... Such a circumstance would undercut the policy favoring judicial economy that the legislature

sought to promote when designing the rehearing and appellate process." *McDonald,* 152 N.H. at 175.

In light of the disparate judicial opinions described above, and out of an abundance of caution, Comcast is filing the instant Motion for Rehearing/Reconsideration.

II. STANDARD FOR REHEARING

The Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." RSA 541:3. This includes errors of law, as a motion for rehearing filed with the Commission must specify "every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4; *see Appeal of Campaign for Ratepayers Rights*, 145 N.H. at 674. The "purpose of a rehearing 'is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State Pers. Comm'n,* 118 N.H. 309, 311 (1978) (citation and internal quotation marks omitted). For the reasons discussed below, Comcast respectfully submits that Order No. 25,274 is unlawful and unreasonable, and that good cause exists for rehearing/reconsideration of the portion of that Order that denied Comcast's Motion to Reopen Record.

III. THE ORDER DENYING COMCAST'S MOTION TO REOPEN RECORD IS UNLAWFUL AND UNREASONABLE

The Commission must allow exhibits to be filed after the close of a hearing if it finds "that late submission of additional evidence will enhance its ability to resolve the matter in dispute." N.H. Admin. R. Puc 203.30(a). In determining whether to admit a late-filed exhibit into the record, the Commission must consider the exhibit's probative value and whether the opportunity to submit a document impeaching or rebutting the late-

filed exhibit without further hearing adequately protects the parties' rights of cross-examination under RSA 541-A:33, IV. N.H. Admin. R. Puc 203.30(b). None of the standards articulated in the above-cited rules was referenced or applied in Order No. 25,274. The Order, therefore, is unlawful.

Instead of examining whether Comcast met the standards established in N.H. Admin. R. Puc 203.30 for reopening the record, the Commission denied Comcast's motion based upon the RLECs' argument that Comcast had not demonstrated that the new evidence (i.e. Ms. Choroser's Declaration) could not have been presented prior to the issuance of Order No. 25,262, and upon findings that the new evidence is prospective, and not persuasive on the point that new enhancements to Comcast's interconnected VoIP service transform it from a telecommunications service to an information service. The Order concludes that the information in Ms. Choroser's Declaration is "more of the same argument Comcast made in its underlying briefs that such enhanced features should qualify CDV as an information service, a conclusion we did not reach." Order No. 25,274 at 10.

Comcast respectfully submits that the foregoing analysis contained in Order No. 25,274 is flawed and should therefore be reconsidered. Nothing in N.H. Admin. R. Puc 203.30 requires Comcast to demonstrate why it could not have provided Ms. Choroser's Declaration before Order No. 25,262 was issued. Rather, the rule simply provides three criteria for reopening the record: 1) a finding that such filing will enhance the Commission's ability to resolve the matter in dispute; 2) a consideration by the Commission of the probative value of the exhibit; and 3) whether the opportunity for the

filing of rebuttal documents without further hearing adequately protects the parties' right of cross-examination.

Comcast has satisfied the above-stated criteria. The Commission should have allowed Ms. Choroser's Declaration into the record, as it bears directly on the issue of whether Comcast's interconnected VoIP service is so intertwined with advanced features such that they cannot be meaningfully separated for purposes of the service's regulatory classification. The Declaration therefore enhances the Commission's ability to resolve a central issue in this docket. It also has probative value in that it updates stale information that was presented to the Commission over a year and a half ago.

Information technology is rapidly evolving. Information products and services that were considered state-of-the-art a year or two ago are continuously being altered and improved by more advanced technologies. Foreclosing Comcast's ability to supplement the record in this case with more accurate and up-to-date information about a pivotal factual issue (i.e. the technical features of services whose regulatory classification is in dispute) is unreasonable.

Lastly, because this case was decided on the papers and without a hearing, none of the witnesses who have prefiled testimony have been subject to cross examination. Therefore, the Commission could have concluded, pursuant to N.H. Admin. R. 203.30(c) that the parties' cross-examination rights would not be impaired by reopening the record and entering Ms. Choroser's Declaration and rebuttal documents from other parties.

V. CONCLUSION

For the reasons stated above, the Commission should rehear/reconsider its Order denying Comcast's Motion to Reopen Record and should reopen the record in this proceeding to carefully review and consider Ms. Choroser's Declaration which, among

other things, describes additional, enhanced features of Comcast's interconnected VoIP service that have evolved since the inception of this docket, and that support a determination that Comcast's interconnected VoIP service is an information service that is not subject to the Commission's regulatory authority.

WHEREFORE, Comcast respectfully requests that the Commission:

A. Reopen the record in this docket to consider the information in Ms. Choroser's Declaration; and

B. Grant such additional relief as it deems appropriate.

October 28, 2011

Respectfully submitted,

Comcast Phone of New Hampshire, LLC
and Comcast IP Phone, II, LLC
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Certificate of Service

I hereby certify that a copy of the foregoing Motion has on this 28th day of October, 2011 been sent by electronic mail to persons listed on the Service List.

Susan S. Geiger

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substantial local control over siting of towers. Wireless Towers, LLC v City of Jacksonville (2010, MD Fla) 712 F Supp 2d 1294.

10. Relationship to state or local laws and proceedings

Intermediaries that take active role in staging auction and exchanging goods for money are resellers' agents as defined in Chicago, Ill., Municipal Code § 4-156-010, no matter what technology they employ; because ordinance applies equally to ticket resales at physical auction houses, Chicago Board of Trade, and venues such as Internet auction sites, tax is not "discriminatory" under § 1105(2)(B)(ii) of Internet Tax Freedom Act, 47 USCS § 151 note. City of Chicago v StubHub!, Inc. (2010, CA7 Ill) 624 F3d 363.

II. FEDERAL COMMUNICATIONS COMMISSION

20. Jurisdiction of FCC

Respondent Federal Communications Commission's (FCC) "ancillary" authority under 47 USCS § 154(i) had to be reasonably ancillary to effective performance of its statutorily mandated responsibilities, and 47 USCS §§ 151, 230(b), were statements of policy that themselves delegated no regulatory authority, and since nothing granted such authority to regulate petitioner Internet Service Provider's (ISP) peer-to-peer networking applications, FCC's order regulating ISP's network management practices failed. Comcast Corp. v FCC (2010, App DC) 600 F3d 642.

§ 152. Application of Act

RESEARCH GUIDE

Forms:

15A Fed Procedural Forms L Ed, Telecommunications (2010) § 62:392.

Corporate and Business Law:

9 Kintner, Federal Antitrust Law (Matthew Bender), ch 67, Exemptions for Communications Companies § 67.7.

Other Treatises:

1 Computer Law (Matthew Bender), ch 2A, Data Protection § 2A.03.

INTERPRETIVE NOTES AND DECISIONS

4. Interstate or foreign communications

Under 28 USCS § 1447(c), local telephone company was unsuccessful in its attempt to remand its suit against long-distance telecommunications providers to state court after it had been removed because whether or not local company could collect intrastate access charges under state tariff on phone calls that comprised first leg of international calls was issue that arose under federal law, specifically, 47 USCS § 15(a). McClure Tel. Co. v AT&T Communs. of Ohio, Inc. (2009, ND Ohio) 650 F Supp 2d 699.

§ 153. Definitions

For the purposes of this Act, unless the context otherwise requires—

(1) Advanced communications services. The term 'advanced communications services' means—

(A) interconnected VoIP service;

(B) non-interconnected VoIP service;

(C) electronic messaging service; and

(D) interoperable video conferencing service.

(2) Affiliate. The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

(3) Amateur station. The term "amateur station" means a radio station operated by a duly authorized person interested in radio technique solely with a personal aim and without pecuniary interest.

(4) AT&T Consent Decree. The term "AT&T Consent Decree" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(5) Bell operating company. The term "Bell operating company"—

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia,

The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

(B) includes any successor or assign of any such company that provides wireline telephone exchange service; but

(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).

(6) Broadcast station. The term ''broadcast station'', ''broadcasting station'', or ''radio broadcast station'' means a radio station equipped to engage in broadcasting as herein defined.

(7) Broadcasting. The term ''broadcasting'' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

(8) Cable service. The term ''cable service'' has the meaning given such term in section 602 [47 USCS § 522].

(9) Cable system. The term ''cable system'' has the meaning given such term in section 602 [47 USCS § 522].

(10) Chain broadcasting. The term ''chain broadcasting'' means simultaneous broadcasting of an identical program by two or more connected stations.

(11) Common carrier. The term ''common carrier'' or ''carrier'' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(12) Connecting carrier. The term ''connecting carrier'' means a carrier described in clauses (2), (3), or (4) of section 2(b) [47 USCS § 152(b)].

(13) Construction permit. The term ''construction permit'' or ''permit for construction'' means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act for the construction of a station, or the installation of apparatus, for the transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

(14) Consumer generated media. The term ''consumer generated media'' means content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content.

(15) Corporation. The term ''corporation'' includes any corporation, joint-stock company, or association.

(16) Customer premises equipment. The term ''customer premises equipment'' means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

(17) Dialing parity. The term ''dialing parity'' means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).

(18) Disability. The term ''disability'' has the meaning given such term under section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).

(19) Electronic messaging service. The term ''electronic messaging service'' means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks.

(20) Exchange access. The term ''exchange access'' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

(21) Foreign communication. The term ''foreign communication'' or ''foreign transmission'' means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

(22) Great Lakes Agreement. The term ''Great Lakes Agreement'' means the Agreement for the Promotion of Safety on the Great Lakes by Means of Radio in force and the regulations referred to therein.

(23) Harbor. The term ''harbor'' or ''port'' means any place to which ships may resort for shelter or to load or unload passengers or goods, or to obtain fuel, water, or supplies. This term shall apply to such places whether proclaimed public or not and whether natural or artificial.

(24) Information service. The term ''information service'' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not

include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(25) Interconnected VoIP service. The term ''interconnected VoIP service'' has the meaning given such term under section 9.3 of title 47, Code of Federal Regulations, as such section may be amended from time to time.

(26) InterLATA service. The term ''interLATA service'' means telecommunications between a point located in a local access and transport area and a point located outside such area.

(27) Interoperable video conferencing service. The term ''interoperable video conferencing service'' means a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing.

(28) Interstate communication. The term ''interstate communication'' or ''interstate transmission'' means communication or transmission (A) from any State, Territory, or possession of the United States (other than the [Philippine Islands and] the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than [the Philippine Islands and] the Canal Zone), or the District of Columbia, (B) from or to the United States to or from [the Philippine Islands or] the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act [47 USCS §§ 201 et seq.] (other than section 223 thereof [47 USCS § 223]) include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(29) Land station. The term ''land station'' means a station, other than a mobile station, used for radio communication with mobile stations.

(30) Licensee. The term ''licensee'' means the holder of a radio station license granted or continued in force under authority of this Act.

(31) Local access and transport area. The term ''local access and transport area'' or ''LATA'' means a contiguous geographic area—

(A) established before the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996] by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

(32) Local exchange carrier. The term ''local exchange carrier'' means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) [47 USCS § 332(c)], except to the extent that the Commission finds that such service should be included in the definition of such term.

(33) Mobile service. The term ''mobile service'' means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled ''Amendment to the Commission's Rules to Establish New Personal Communications Services'' (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

(34) Mobile station. The term ''mobile station'' means a radio-communication station capable of being moved and which ordinarily does move.

(35) Network element. The term ''network element'' means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

(36) Non-interconnected VoIP service. The term ''non-interconnected VoIP service''—

(A) means a service that—

(i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and

(ii) requires Internet protocol compatible customer premises equipment; and

(B) does not include any service that is an interconnected VoIP service.

(37) Number portability. The term ''number portability'' means the ability of users of telecom-

munications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

(38) Operator. (A) "Operator" on a ship of the United States means, for the purpose of parts II and III of title III of this Act [47 USCS §§ 351 et seq. and 381 et seq.] a person holding a radio operator's license of the proper class as prescribed and issued by the Commission.

(B) "Operator" on a foreign ship means, for the purpose of part II of title III of this Act [47 USCS §§ 351 et seq.], a person holding a certificate as such of the proper class complying with the provisions of the radio regulations annexed to the International Telecommunication Convention in force, or complying with an agreement or treaty between the United States and the country in which the ship is registered.

(39) Person. The term "person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(40) Radio communication. The term "radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(41) Radio officer. (A) "Radio officer" on a ship of the United States means, for the purpose of part II of title III of this Act [47 USCS §§ 351 et seq.], a person holding at least a first or second class radiotelegraph operator's license as prescribed and issued by the Commission. When such person is employed to operate a radiotelegraph station aboard a ship of the United States, he is also required to be licensed as a "radio officer" in accordance with the Act of May 12, 1948 (46 USC 229a–h) [46 USCS §§ 7101 et seq.].

(B) "Radio officer" on a foreign ship means, for the purpose of part II of title III of this Act [47 USCS §§ 351 et seq.], a person holding at least a first or second class radiotelegraph operator's certificate complying with the provisions of the radio regulations annexed to the International Telecommunication Convention in force.

(42) Radio station. The term "radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

(43) Radiotelegraph auto alarm. The term "radiotelegraph auto alarm" on a ship of the United States subject to the provisions of part II of title III of this Act [47 USCS §§ 351 et seq.] means an automatic alarm receiving apparatus which responds to the radiotelegraph alarm signal and has been approved by the Commission. "Radiotelegraph auto alarm" on a foreign ship means an automatic alarm receiving apparatus which responds to the radiotelegraph alarm signal and has been approved by the government of the country in which the ship is registered: *Provided,* That the United States and the country in which the ship is registered are parties to the same treaty, convention, or agreement prescribing the requirements for such apparatus. Nothing in this Act or in any other provision of law shall be construed to require the recognition of a radiotelegraph auto alarm as complying with part II of title III of this Act [47 USCS §§ 351 et seq.], on a foreign ship subject to such part, where the country in which the ship is registered and the United States are not parties to the same treaty, convention, or agreement prescribing the requirements for such apparatus.

(44) Rural telephone company. The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity—

(A) provides common carrier service to any local exchange carrier study area that does not include either—

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996].

(45) Safety convention. The term "safety convention" means the International Convention for the Safety of Life at Sea in force and the regulations referred to therein.

(46) Ship. (A) "Ship" or "vessel" includes every description of watercraft or other artificial contrivance, except aircraft, used or capable of being used as a means of transportation on water, whether or not it is actually afloat.

(B) A ship shall be considered a passenger ship if it carries or is licensed or certificated to carry more than twelve passengers.

(C) A cargo ship means any ship not a passenger ship.

(D) A passenger is any person carried on board a ship or vessel except (1) the officers and crew actually employed to man and operate the ship, (2) persons employed to carry on the business of the ship, and (3) persons on board a ship when they are carried, either because of the obligation laid upon the master to carry shipwrecked, distressed, or other persons in like or similar situations or by reason of any circumstance over which neither the master, the owner, nor the charterer (if any) has control.

(E) "Nuclear ship" means a ship provided with a nuclear powerplant.

(47) State. The term "State" includes the District of Columbia and the Territories and possessions.

(48) State commission. The term "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

(49) Station license. The term "station license", "radio station license", or "license" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

(50) Telecommunications. The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(51) Telecommunications carrier. The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 [47 USCS § 226]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(52) Telecommunications equipment. The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

(53) Telecommunications service. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(54) Telephone exchange service. The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(55) Telephone toll service. The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(56) Television service. (A) Analog television service. The term "analog television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(a) of its regulations (47 C.F.R. 73.682(a)).

(B) Digital television service. The term "digital television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(d) of its regulations (47 C.F.R. 73.682(d)).

(57) Transmission of energy by radio. The term "transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(58) United States. The term "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include [the Philippine Islands or] the Canal Zone.

(59) Wire communication. The term "wire communication or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(As amended Oct. 8, 2010, P. L. 111-260, Title I, § 101, 124 Stat. 2752.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

2010. Act Oct. 8, 2010, added paras. (53)–(59), relating to advance communications services,

consumer generated media, disability, electronic messaging service, interconnected VoIP service, non-interconnected VoIP service, and interoperable video conferencing service.

Such Act further redesignated paras. (1)–(12) as paras. (2)–(13), respectively, paras. (13)–(15) as paras. (15)–(17), respectively, paras. (16)–(20) as paras. (20)–(24), respectively, para. (21) as para. (26), paras. (22)–(29) as paras. (28)–(35), respectively, (30)–(52) as (37)–(59), para. (53) as para. (1), para. (54) as para. (14), paras. (55) and (56) as para. (18) and (19), respectively, para. (57) as para. (25), para. (58) as para. (56), and para. (59) as para. (27).

Other provisions:

Limitation on liability. Act Oct. 8, 2010, P. L. 111-260, § 2, 124 Stat. 2751, provides:

"(a) In general. Except as provided in subsection (b), no person shall be liable for a violation of the requirements of this Act (or of the provisions of the Communications Act of 1934 that are amended or added by this Act) [for full classification, consult USCS Tables volumes] with respect to video programming, online content, applications, services, advanced communications services, or equipment used to provide or access advanced communications services to the extent such person—

"(1) transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of advanced communications services by a third party; or

"(2) provides an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such video programming, online content, applications, services, advanced communications services, or equipment used to provide or access advanced communications services.

"(b) Exception. The limitation on liability under subsection (a) shall not apply to any person who relies on third party applications, services, software, hardware, or equipment to comply with the requirements of this Act (or of the provisions of the Communications Act of 1934 that are amended or added by this Act) [for full classification, consult USCS Tables volumes] with respect to video programming, online content, applications, services, advanced communications services, or equipment used to provide or access advanced communications services.".

Proprietary technology. Act Oct. 8, 2010, P. L. 111-260, § 3, 124 Stat. 2752, provides: "No action taken by the Federal Communications Commission to implement this Act or any amendment made by this Act [for full classification, consult USCS Tables volumes] shall mandate the use or incorporation of proprietary technology.".

Title II of Twenty-First Century Communications and Video Accessibility Act of 2010; definitions. Act Oct. 8, 2010, P. L. 111-260, Title II, § 206, 124 Stat. 2776, provides:

"In this title [for full classification, consult USCS Tables volumes]:

"(1) Advisory committee. The term 'Advisory Committee' means the advisory committee established in section 201 [47 USCS § 613 note].

"(2) Chairman. The term 'Chairman' means the Chairman of the Federal Communications Commission.

"(3) Commission. The term 'Commission' means the Federal Communications Commission.

"(4) Emergency information. The term 'emergency information' has the meaning given such term in section 79.2 of title 47, Code of Federal Regulations.

"(5) Internet protocol. The term 'Internet protocol' includes Transmission Control Protocol and a successor protocol or technology to Internet protocol.

"(6) Navigation device. The term 'navigation device' has the meaning given such term in section 76.1200 of title 47, Code of Federal Regulations.

"(7) Video description. The term 'video description' has the meaning given such term in section 713 of the Communications Act of 1934 (47 U.S.C. 613).

"(8) Video programming. The term 'video programming' has the meaning given such term in section 713 of the Communications Act of 1934 (47 U.S.C. 613).".

RESEARCH GUIDE

Federal Procedure:

1 Administrative Law (Matthew Bender), ch 5, Officers and Employees § 5.02.

Forms:

15A Fed Procedural Forms L Ed, Telecommunications (2010) §§ 62:343, 351, 395.

Corporate and Business Law:

9 Kintner, Federal Antitrust Law (Matthew Bender), ch 67, Exemptions for Communications Companies § 67.6.

Annotations:

Validity, Construction, and Application of State Taxes on Revenues and Income from Communications Satellite Services. 51 ALR6th 257.

RSA 21:2 Common Usage.

Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such peculiar and appropriate meaning.

Source. GS 1:2. GL 1:2. PS 2:2. PL 2:2. RL 7:2.

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RSA 53-C:3 Authority to Grant Franchises.

Municipalities are hereby authorized to grant, renew, amend or rescind for cause franchises for the installation and operation of cable television systems in accordance with the provisions of this chapter within the geographical limits of its respective town or city.

Source. 1974, 23:1. 1996, 72:2, eff. July 12, 1996.

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RSA 362:2 Public Utility.

I. The term "public utility" shall include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court, except municipal corporations and county corporations operating within their corporate limits, owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public, or owning or operating any pipeline, including pumping stations, storage depots and other facilities, for the transportation, distribution or sale of gas, crude petroleum, refined petroleum products, or combinations of petroleum products, rural electric cooperatives organized pursuant to RSA 301 or RSA 301-A, and any other business, except as hereinafter exempted, over which on September 1, 1951, the public utilities commission exercised jurisdiction.

II. For the purposes of this title only, rural electric cooperatives for which a certificate of deregulation is on file with the public utilities commission pursuant to RSA 301:57 shall not be considered public utilities; provided, however, that the provisions of RSA 362-A, 363-B, 371, 374:2-a, 374:26, 374-A, 374-C, 374-F, and 378:37-39 shall, unless otherwise provided herein, be applicable to rural electric cooperatives, without regard to whether a certificate of regulation or deregulation is on file with the public utilities commission. The provisions of RSA 374-A and the provisions of RSA 374-F:3, V(b) and (f) and RSA 374-F:7 shall be applicable to rural

electric cooperatives for which a certificate of deregulation is on file with the public utilities commission to the same extent as municipal utilities.

Source. 1911, 164:1. 1913, 145:1. 1917, 76:1. PL 236:4. 1935, 114:1. 1941, 197:1. RL 285:4. 1951, 203:9 par. 2. RSA 362:2. 1985, 402:15. 1986, 70:2. 1997, 229:6. 2001, 29:2. 2002, 268:2. 2007, 25:11, eff. May 11, 2007.

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RSA 362:6 Cellular Mobile Radio Communications Exempt.

The term "public utility" shall not include any individual, partnership, corporation, company, association, or joint stock association, including any trustee, administrator, executor, receiver, assignee, or other personal representative who provides, purchases or sells cellular mobile radio communication services. Such services shall not be subject to the jurisdiction of the public utilities commission pursuant to this title.

Source. 1988, 49:2, eff. May 30, 1988.

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RSA 541:6 Appeal.

Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

Source. 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

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RSA 541:18 Suspension of Order.

No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension; but no order of the public utilities commission providing for a reduction of rates, fares, or charges or denying a petition for an increase therein shall be suspended except upon conditions to be imposed by the court providing a means for securing the prompt repayment of all excess rates, fares, and charges over and above the rates, fares, and charges which shall be finally determined to be reasonable and just.

Source. 1913, 145:18. PL 239:18. 1937, 107:31; 133:92. RL 414:20. 1951, 203:16, eff. Sept. 1, 1951.

Puc 201.05 Waiver of Rules.

(a) The commission shall waive the provisions of any of its rules, except where precluded by statute, upon request by an interested party if the commission finds that:

(1) The waiver serves the public interest; and

(2) The waiver will not disrupt the orderly and efficient resolution of matters before the commission.

(b) In determining the public interest, the commission shall waive a rule if:

(1) Compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or

(2) The purpose of the rule would be satisfied by an alternative method proposed.

(c) Any interested party seeking a waiver shall make a request in writing, except as provided in (d) below.

(d) The commission shall accept for consideration any waiver request made orally during a hearing or pre-hearing conference.

(e) A request for a waiver shall specify the basis for the waiver and proposed alternative, if any.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97
New. #6559, eff 8-19-97, EXPIRED: 8-19-05
New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06
New. #8657-B, eff 6-10-06

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Puc 203.30 Reopening the Record.

(a) The commission shall, on its own motion or at the request of a party, authorize filing of exhibits after the close of a hearing if the commission finds that late submission of additional evidence will enhance its ability to resolve the matter in dispute.

(b) Any party requesting authorization to file an exhibit after the close of a hearing shall make its request:

(1) Orally before the close of the hearing; or

(2) If the hearing has concluded, by motion, pursuant to Puc 203.06.

(c) In determining whether to admit the late filed exhibit into the record, the commission shall consider:

(1) The probative value of the exhibit; and

(2) Whether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing shall adequately protect the parties' right of cross examination pursuant to RSA 541-A:33, IV.

Source. *#8657-A, eff 6-10-06*

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Puc 432.01 Provision of Basic Service.

(a) A CLEC shall, directly or indirectly, make available to its customers all of the following as part of basic service:

(1) Safe and reliable single-party voice service;

(2) The ability to receive all non-collect calls, at telephone lines capable of receiving calls, without additional charge;

(3) The ability to complete calls within the state to any other telephone line capable of receiving calls;

(4) The opportunity to presubscribe to interLATA toll carriers;

(5) The opportunity to presubscribe to intraLATA toll carriers;

(6) Dialing parity;

(7) Number portability;

(8) Enhanced 911, pursuant to the requirements of the department of safety bureau of emergency communications or its successor agency;

(9) Access to statewide directory assistance;

(10) Telecommunications Relay Service (TRS), pursuant to Puc 432.02 below;

(11) A white pages directory listing;

(12) A non-electronic telephone directory;

(13) A caller identification blocking option, on a per-call basis;

(14) A caller identification line blocking option that:

a. Is available to all customers without a recurring charge;

b. Is provided upon customer request without charge to customers who have elected onpublished telephone numbers;

c. Is available without a non-recurring charge to customers who certify that Caller ID threatens their health or safety; and

d. Is available without a non-recurring charge when requested with installation of basic service;

(15) A blocking option for pay-per-call calls, such as blocking all 900 or all 976 calls;

(16) The ability to report service problems to the customer's basic service provider on a 24 hour basis, 7 days a week; and

(17) Automatic Number Identification (ANI) to other carriers which accurately identifies the telephone number of the calling party.

(b) A CLEC shall make its services available on a nondiscriminatory basis to all similarly situated customers within their operating area.

Source. #8348, eff 5-10-05 (See Revision Note at chapter heading for Puc 400)

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Puc 432.14 Disconnection of Service.

(a) A utility may require, pursuant to Puc 1203.10, that a residential customer shall:

(1) Give notice of up to 4 business days of his intention to discontinue service; and

(2) Be responsible for all charges until expiration of such notice period.

(b) Except as provided for in Puc 432.15, a utility may provide notice of disconnection of service, pursuant to Puc 432.16, to a residential customer, and may subsequently disconnect such service in conformance with this section, only if:

(1) The customer has failed to pay any bill or deposit request, not disputed in good faith, within 30 days of the bill date, unless the customer has established payment arrangements pursuant to Puc 1203.07;

(2) The customer has failed to abide by the terms of a payment arrangement entered into pursuant to Puc 1203.07;

(3) The customer has failed to pay the bill for service or enter into a payment arrangement for the bill for service on or before the due date printed on the bill; or

(4) The customer refuses access to his premises for a necessary inspection of utility property.

(c) When a customer has received a disconnection notice pursuant to (b) above, the utility may require payment at less than monthly intervals in lieu of disconnection or upon reconnection without deposit.

(d) If service is disconnected for non-payment, a utility may charge for reconnection as provided in its approved tariff or rate schedule.

(e) A utility may disconnect service to a residential customer without notice only if:

(1) A customer or a resident in the customer's household has undertaken an action or a situation has been created with respect to the customer's utility service which results in conditions dangerous to the health, safety, property or utility service of the customer or others and disconnection will lessen or eliminate the risk or danger;

(2) A customer or resident in the customer's household has participated in or created the following:

a. Fraudulent use or procurement of the utility service; or

b. Tampering with the connections or other equipment of the utility; or

(3) The customer has:

a. Clearly abandoned the premises; or

b. Failed to abide by the terms of a payment arrangement, of which the customer has previously received notice, entered into pursuant to Puc 1203.07.

(f) A utility shall not disconnect a customer if:

(1) The customer's unpaid bill for regulated services is less than $25.00, unless it includes an arrearage in whole or in part outstanding for more than 60 days;

(2) The customer's unpaid bill results from charges for unregulated services including, but not limited to, charges for telephone directory advertising or telephone merchandise or equipment sales;

(3) The utility bills for service in advance and the service has not yet been provided; or

(4) The utility has, within the preceding 60 days, received notification, in accordance with (g) below, from a licensed physician or mental health practitioner as defined in RSA 330-A:2,VII that a medical emergency exists at the location or would result from the disconnection.

(g) In order to avoid disconnection pursuant to (f)(4) above, a licensed physician's or mental health practitioner's certification of medical emergency shall be provided to the utility according to the following:

(1) The initial notification may be made by the physician or mental health practitioner by telephone and shall be deemed valid for 7 days;

(2) The certification shall continue in force if a licensed physician or mental health practitioner provides written notice of the medical emergency to the utility within 7 days of certification by telephone; and

(3) Written certification shall be renewable every 60 days as necessary provided that the customer enters into and complies with the terms of a payment arrangement pursuant to Puc 1203.07.

(h) A utility which intends to terminate service of a customer with a medical emergency currently certified pursuant to this section for failure to enter into or comply with the terms of a payment arrangement pursuant to (g)(3) above, shall notify the commission no fewer than 5 business days prior to termination.

Source. #8348, eff 5-10-05 (See Revision Note at chapter heading for Puc 400)

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Puc 1301.01 Purpose.

The purpose of Puc 1300, pursuant to the mandate of RSA 374:34-a, is to ensure rates, charges, terms and conditions for pole attachments that are just and reasonable. Nothing in this rule shall be construed to supersede, overrule, or replace any other law, rule or regulation, including municipal and state authority over public highways pursuant to RSA 231:159 et seq.

Source. #9073, INTERIM, eff 1-17-08; ss by #9614, eff 12-12-09

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Puc 1304.06 Rate Review Standards.

(a) 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 under this chapter, the commission shall consider:

(1) Relevant federal, state or local laws, rules and decisions;

(2) The impact on competitive alternatives;

(3) The potential impact on the pole owner and its customers;

(4) The potential impact on the deployment of broadband services;

(5) The formulae adopted by the FCC in 47 CFR § 1.1409(c) through (f) in effect on July 16, 2007; and

(6) Any other interests of the subscribers and users of the services offered via such attachments or consumers of any pole owner providing such attachments, as may be raised.

(b) In determining just and reasonable rates for all other attachments under this chapter, the commission shall consider:

(1) Relevant federal, state or local laws, rules and decisions;

(2) The impact on competitive alternatives;

(3) The potential impact on the pole owner and its customers;

(4) The potential impact on the deployment of broadband services; and

(5) Any other interests of the subscribers and users of the services offered via such attachments or consumers of any pole owner providing such attachments, as may be raised.

Source. #9614, eff 12-12-09