STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

REPLY BRIEF OF TWC DIGITAL PHONE LLC

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Pursuant to the Commission's July 2, 2009 letter, TWC Digital Phone LLC ("TWCDP") respectfully submits its reply brief in the above-referenced docket. In support of its request that the Commission impose entry regulation and related requirements on the interconnected Voice-over-Internet-Protocol ("VoIP") services at issue, the New Hampshire Telephone Association ("NHTA") advocates an overly broad interpretation of the "public utility" definition that the Legislature never intended. NHTA also advances an unjustifiably narrow interpretation of the *Vonage Order* that fails to account for the FCC's determination that state economic regulation of interconnected VoIP services provided over cable systems, even if permissible under state law, would conflict with the implementation of important federal policies and is thus preempted. Accordingly, the Commission should reject NHTA's arguments and conclude that it cannot—and in any event, should not—exercise jurisdiction over TWCDP's interconnected VoIP services.

ARGUMENT

I. THE LEGISLATURE DID NOT INTEND FOR THE "PUBLIC UTILITY" DEFINITION TO ENCOMPASS INTERCONNECTED VOIP SERVICES.

Try as it might, NHTA is unable to shoehorn interconnected VoIP providers such as TWCDP into the statutory definition of a public utility. Following a lengthy comparison of interconnected VoIP and traditional telephone service that is flawed in several respects (not to mention irrelevant), NHTA asserts that interconnected VoIP service "is [a] telephone service, no

different than" those provided by traditional telephone companies, which the Commission can regulate simply by "exercis[ing] its authority as directed by the legislature" without any need to "expand its powers."[1]

The fundamental problem with this argument is that the Legislature never intended for the Commission to regulate interconnected VoIP and has never authorized it to do so. TWCDP has explained that the Legislature has consistently declined to expand the scope of the public utility definition in order to avoid stifling competition from emerging services, consistent with the state's strong policy to promote free trade and private enterprise.[2] TWCDP has further explained that this reasoning—which the courts have upheld—is particularly compelling as applied to interconnected VoIP services, which offer a long-awaited competitive alternative to the services provided by traditional telephone companies (including NHTA's members) that have enjoyed sustained dominance since the public utility definition was adopted nearly a century ago.[3]

The Legislature's preference to exclude interconnected VoIP from state regulatory authority is vividly illustrated by its consideration—and rejection—of amendments that would have "extend[ed]" statutory provisions relating to the state's enhanced 911 ("E911") system to

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1 Initial Brief of the Rural Carriers of the New Hampshire Telephone Association, DT 09-044, at 2-17 (filed Jan. 15, 2010) ("NHTA Br.").

2 *See, e.g.*, N.H.H.R. Jour. 1069 (1977) (declining to expand the public utility definition to encompass mobile telephone companies and radio paging service companies, as doing so "might stifle competition in a budding new industry"); *see also* Brief of TWC Digital Phone LLC, DT 09-044, at 6-8 (filed Jan. 15, 2010) ("TWCDP Br."); Opening Brief of Comcast Phone of New Hampshire, LLC and Its Affiliates, DT 09-044, at 13 (filed Jan. 15, 2010) ("Comcast Br.").

3 TWCDP Br. at 7-8.

interconnected VoIP providers.[4] The relevant provisions state, *inter alia*, that "[e]very telephone utility" must provide E911 service, and that the state E911 system will be funded by surcharges assessed on each "telephone exchange line."[5] In 2006, the Legislature considered a proposal to extend these provisions to interconnected VoIP.[6] Of course, if NHTA were correct that interconnected VoIP providers must be considered utilities simply because their services permit the use of a telephone or because they are comparable in limited respects to traditional telephone services, no such amendments would have been required. But as explained in the legislative history of that proposal, the amendment was necessary because "[c]urrently, *VOIP providers are unregulated* and not subject to the . . . enhanced 911 surcharge as the other wireless and wireline providers."[7]

The Legislature then rejected the proposal, following the very approach that TWCDP has urged the Commission to take in this proceeding. As the committee considering the proposal explained, "The Federal Communications Commission (FCC) is currently reviewing the best way to deal with the implementation of Enhanced 911 (E911) services on voice over internet

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4 H.B. 643 (2009 sess.) (a proposal "extending the enhanced 911 system surcharge to voice over internet protocol providers and prepaid wireless telecommunications services"); *see also* H.B. 1232 (2006 sess.) (same).

5 R.S.A. 106-H:8, 106-H:9.

6 Pursuant to that proposal, the requirement to provide E911 service, which applied to telephone utilities and providers of commercial mobile radio service, would have been extended to "every entity supplying any other device capable of contacting 911." H.B. 1232 (2006 sess.). Similarly, the E911 surcharge, which applied to "telephone exchange lines" and certain enumerated entities, would have been extended to "provider[s] of any other service capable of contacting 911." *Id.* The preamble to the proposal and pertinent legislative history make clear that this language was intended to encompass "voice over Internet protocol telephone service providers."

7 *Id.* (fiscal note) (emphasis added).

protocol (VoIP) telephone services and has yet to make a determination how fees should be collected at the local level. Since there is no funding crisis for our enhanced 911 system in this state, and the FCC has yet to make a determination on this issue, the committee feels that the implementation of this surcharge is premature at this time."[8] Just a few weeks ago (after the E911 rules were settled at the federal level[9]), the Legislature rejected another proposal to extend the E911 funding statute to interconnected VoIP providers.[10]

The wisdom of that approach is even more apparent here. TWCDP has explained that the FCC already is considering the proper regulatory treatment of interconnected VoIP and has even proposed classifying it as an information service.[11] That outcome would nullify any Commission decision to regulate interconnected VoIP providers as public utilities. The prospect of such a conflict was sufficient to convince the Legislature not to move forward with revisions to the E911 statutes just a few years ago, and it should be equally if not more persuasive to the Commission today. And just as there was no crisis that warranted immediate action on E911 fees, there is no compelling reason for the Commission to reach out and adopt rulings regarding the regulatory classification and treatment of VoIP at this juncture, as explained below.[12]

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8 N.H.H.R. Jour. 785 (Feb. 15, 2006).

9 *See, e.g., IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) ("*VoIP E911 Order*"), *aff'd, Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

10 N.H.H.R. Jour. 85-86 (Jan. 6, 2010). Notwithstanding the Legislature's decisions, TWCDP pays the E911 surcharges in any event. *See* TWCDP Br. at 9-10 (noting that TWCDP operates consistent with state CLEC requirements); *see also* Comcast Br. at 13-14 (noting that Comcast complies with state requirements, including paying 911 fees).

11 TWCDP Br. at 22-24.

12 *See infra* Section III.

NHTA disregards this legislative and judicial guidance, inventing its own analytical framework premised on a functional comparison of interconnected VoIP and plain old telephone service ("POTS") that incorporates and builds on the federal definition of a telecommunications service.[13] But nothing in applicable precedent supports NHTA's approach.[14] If such comparisons were sufficient to trigger the public utility definition, the Legislature would never have needed to amend the statute to encompass mobile telephone service, which as a practical matter likewise permits users to convey voice messages to one another using telephones.[15] Further, NHTA's reliance on the telecommunications service definition conflicts with the FCC's proposed classification of interconnected VoIP as an information service.[16]

In any event, NHTA's comparative study is fatally incomplete. In particular, NHTA fails to note three critical differences between POTS and interconnected VoIP—specifically, that only the latter (1) requires a broadband connection, (2) requires IP-enabled customer premises equipment ("CPE"), and (3) 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

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13 *See generally* NHTA Br. at 2-17.

14 In fact, in the *Vonage Order*, the FCC rejected the argument that public utility regulation should apply to VoIP services in light of any alleged "functional similarities" with traditional telephone service. *Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 22 (2004) ("*Vonage Order*"), *aff'd*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

15 TWCDP Br. at 7.

16 *Id.* at 23; *see also* Comcast Br. at 12.

communications and access other features and capabilities, even video.[17] In the FCC's words, these are "fundamental differences" between interconnected VoIP and POTS—so fundamental, in fact, that the FCC decided to preempt state entry regulation of any service that has these characteristics, as discussed below and at length in TWCDP's opening brief.[18] While it makes perfect sense to apply different rules to competitive VoIP providers and dominant incumbent local exchange carriers ("ILECs") such as NHTA's members in any event,[19] these key differences between their services further justify exempting VoIP services from state economic regulation.

As to NHTA's reliance on the fact that interconnected VoIP uses a telephone,[20] TWCDP has explained that a telephone is not the defining feature of its interconnected VoIP services; indeed, the telephone would be useless without the IP-enabled embedded multimedia terminal adapter ("eMTA") that converts the user's communications to or from IP format for transmission over a broadband connection.[21] Moreover, NHTA's approach would lead to absurd results. For example, if the use of a telephone were the dispositive factor in triggering the public utility definition, then TWCDP or any other provider could simply design the service to use a

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17 Although NHTA attempts to analogize the CPE used with interconnected VoIP to certain CPE used with traditional telephone services when provided over a fiber-to-the-home network, NHTA Br. at 8-9, it does not claim that the latter is IP-capable, and this critical distinction thus remains.

18 *Vonage Order* ¶ 4; *see also infra* Section II.B; TWCDP Br. at 13-14.

19 Indeed, NHTA fails to note the significant competitive differences that exist between incumbent providers and new entrants, which, as noted below, consistently compel different regulatory treatment at both the federal and state levels. *See infra* Section III.

20 NHTA Br. at 3.

21 TWCDP Br. at 9; *see also* Comcast Br. at 11-12.

computer-based "soft phone" option and thereby circumvent regulation as a public utility. Conversely, the mere fact that TWCDP has configured its services to permit the use of a telephone as a convenience to customers cannot convert an IP-based, broadband-dependent voice service into a regulated telephone service. Indeed, under that theory, any home intercom system or information service that is accessible through a telephone, such as the provision of information relating to weather, sports, or stock quotes, could be classified as permitting the conveyance of "telephone messages" and thus trigger regulation as a public utility under New Hampshire law.

For all of these reasons, there is no basis under state law for regulating TWCDP as a public utility, and the Commission should reject NHTA's request that it do so.

II. THE FCC PREEMPTED STATE REGULATION OF INTERCONNECTED VOIP SERVICES SUCH AS THOSE OFFERED BY TWCDP.

TWCDP has explained at length that the FCC, in its *Vonage Order*, made clear its intent to preempt states from imposing certification, tariffing, and other public utility requirements on VoIP services that share certain basic characteristics—specifically including facilities-based VoIP services provided by cable operators.[22] Rather than allow state commissions to apply traditional "economic regulations" to VoIP, the FCC ruled that their role would be limited to addressing consumer protection issues of particular applicability.[23] To overcome this precedent, NHTA advances an interpretation of the FCC's decision that does not withstand scrutiny.

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22 *See generally* TWCDP Br. at 10-18.

23 *Id.* at 11.

A. The FCC Has Ruled That State Entry Regulation of VoIP Conflicts With Federal Law, Regardless of Whether the Physical Endpoints of the Communications Can Be Identified.

NHTA labors under a fundamental misunderstanding concerning the FCC's rationale for preemption. It states throughout its brief that the FCC's preemption ruling was premised entirely on Vonage's purported inability to identify the physical endpoints of a call, and that a conflict between state and federal interests can arise only when an interconnected VoIP provider is unable to separate the intrastate and interstate components of its service.[24] That is wrong.

As TWCDP has explained in detail, the FCC based its preemption analysis on its conclusion that state entry regulation of VoIP would directly conflict with—and thus undermine—the federal policy in favor of open entry for non-dominant providers.[25] In particular, the FCC cited its precedent establishing that state entry requirements (such as those advocated by NHTA here) "could stifle new and innovative services whereas blanket authority, *i.e.*, unconditional entry, would promote competition."[26] The FCC further determined that its goal of precluding "patchwork regulation" of VoIP through the application of more than 50 disparate state regulatory schemes was consistent with the "express mandates and directives" of the Telecommunications Act of 1996 as well as "the pro-competitive deregulatory policies the Commission is striving to further."[27] In upholding the FCC's preemption ruling, the Eighth Circuit confirmed that the FCC properly considered the conflict between state and federal regulation in this context and protected the federal interests in competition and deregulation by

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24 *See, e.g.*, NHTA Br. at 18-19, 25.

25 *See generally* TWCDP Br. at 9-15; Comcast Br. at 30-35.

26 *Vonage Order* ¶ 20; *see generally id.* ¶¶ 20-22.

27 *Id.* ¶ 37; *see generally id.* ¶¶ 33-37.

preempting state entry requirements.[28] Thus, it does not matter whether an interconnected VoIP provider can identify the physical endpoints of voice communications made using its service, as state entry regulation will thwart the advancement of federal policy either way.

B. The FCC Expressly Extended Its Preemption Ruling to Fixed VoIP Services Offered Over Cable Systems.

NHTA concedes that the FCC's preemption ruling in the *Vonage Order* encompasses not just Vonage's VoIP service but also "other types of IP-enabled services having basic characteristics similar to" Vonage's service.[29] It errs, however, by asserting that TWCDP's interconnected VoIP services do not share those characteristics.

As an initial matter, NHTA misstates the relevant criteria. As noted above and discussed in TWCDP's opening brief, the *Vonage Order* set forth a three-pronged test for determining which services qualify for its preemption ruling—specifically, the service must: (1) require a broadband connection from the user's location, (2) require IP-compatible CPE, and (3) offer a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including the ability to originate and receive voice communications and access other features and capabilities, even video.[30] TWCDP already has demonstrated that its Digital Phone and Business Class Phone interconnected VoIP services satisfy these criteria.[31]

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28 TWCDP Br. at 15 (citing *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 579-80 (8th Cir. 2007)).

29 NHTA Br. at 19 (citing *Vonage Order* ¶ 32).

30 *Vonage Order* ¶ 32; *see also* TWCDP Br. at 13-14.

31 TWCDP Br. at 19-22.

NHTA, however, ignores this test and proceeds from the mistaken premise that the preemption standard consists of the federal definition of an "interconnected VoIP service."[32] NHTA then compounds the confusion by misapplying that definition, leading it to the absurd conclusion that "cable VoIP is not 'interconnected VoIP.'"[33] The definition on which NHTA relies was not adopted to identify the services that are eligible for preemption; it was promulgated for the distinct goal of determining the class of VoIP services that would be subject to targeted obligations the FCC believed necessary to advance certain public policy objectives.[34] The FCC has worked for several years to craft an entire regulatory framework applicable to such interconnected VoIP services, a framework that without question includes VoIP services offered by cable operators as well as other entities.[35] The FCC—and for that matter, the entire industry—would be quite surprised to learn that the VoIP services offered by cable operators fall outside that regime, which was specifically designed to include them.[36] And while services that qualify as "interconnected VoIP" under the federal definition are also likely to satisfy the *Vonage* criteria for preemption, the fact remains that these are different tests.[37]

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32 NHTA Br. at 23-24 (citing 47 C.F.R. § 9.3).

33 *Id.* at 23.

34 *VoIP E911 Order* ¶ 24.

35 TWCDP Br. at 22-24.

36 *See, e.g.*, *VoIP E911 Order* ¶¶ 1, 25 n.80 (stating that the FCC's E911 requirements, which by their terms apply to "interconnected VoIP providers," apply to cable operators that provide "fixed" services).

37 As the FCC has imposed substantive obligations on interconnected VoIP providers, it has been careful to confirm that its approach to preemption as set forth in the *Vonage Order* remains intact. *See, e.g.*, *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039 ¶ 15 n.9 (2009) ("We also note that the extension of discontinuance obligations to providers of interconnected VoIP services has no effect on the Commission's preemption determinations in the *Vonage*

That confusion aside, the basic point that NHTA presumably intends to make—that the interconnected VoIP services at issue here do not fall within the intended scope of the *Vonage* ruling—is clearly wrong. NHTA incorrectly claims that TWCDP's interconnected VoIP services do not qualify for preemption because they are not mobile or "nomadic."[38] But TWCDP has already explained that at no time—either in the *Vonage Order* or afterwards—has the FCC limited the scope of preemption in this manner.[39] Rather, the FCC recognized that state entry regulation of any service with the basic characteristics identified above risked "'negating' federal policy and rules,"[40] including VoIP services "offered or planned by facilities-based providers."[41] Accordingly, the FCC ruled that "to the extent other entities, *such as cable companies*, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order."[42] And TWCDP has explained that neither the FCC's *2006 USF Order* nor the Eighth Circuit's decision, both of which NHTA cites, are to the contrary.[43]

Order."); *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 ¶ 59 n.188 (2007) (stating that the imposition of customer proprietary network information obligations on interconnected VoIP providers was consistent with the *Vonage Order*); *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶ 49 n.166 (2006) (stating that the imposition of universal service contribution requirements on interconnected VoIP providers was consistent with the *Vonage Order*) (subsequent history omitted).

38 NHTA Br. at 24.

39 TWCDP Br. at 14-15; *see also* Comcast Br. at 33-34.

40 *Vonage Order* ¶ 23 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986)).

41 *Id.* ¶ 25 n.93.

42 *Id.* ¶ 32 (emphasis added); *id.* ¶ 46 (same). Similarly, in its brief filed with the Eighth Circuit, the FCC reiterated what is already clear from the *Vonage Order* itself—that fixed VoIP

NHTA also erroneously states that the interconnected VoIP services at issue do not involve the sort of IP-compatible CPE contemplated by the *Vonage Order*. But TWCDP already has explained that the eMTA its customers use is precisely what the FCC had in mind.[44] TWCDP also has noted that the ownership of the eMTA is irrelevant, as neither the *Vonage Order* nor applicable federal definitions require that a device be owned by the customer in order to be considered "customer premises equipment."[45] What matters is that the device be located at the customer premises and that it be IP-compatible. That is true with respect to TWCDP's eMTAs, and NHTA cannot show otherwise.

For these reasons, the Commission should adhere to the FCC's finding that imposing state certification requirements on the interconnected VoIP services at issue would conflict with federal law, rather than provoking a needless conflict by regulating them as NHTA requests.[46]

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providers would be entitled to preemption. *See* TWCDP Br. at 16 (citing Br. for Respondent, *Minn. Pub. Utils. Comm'n v. FCC*, No. 05-1069, at 64 (8th Cir. filed Dec. 1, 2005)).

[43] NHTA Br. at 20-21. Regarding the former decision, TWCDP has explained that the dicta in the FCC's *2006 USF Order* does not (and cannot) undermine the case for preemption. TWCDP Br. at 17-18. Regarding the latter decision, TWCDP has explained that notwithstanding the Eighth Circuit's description of the specific facts before it (including the fact that Vonage's service happened to be a nomadic one), the FCC's preemption ruling constitutes binding policy concerning how it would address state regulation of any VoIP service that satisfies the relevant criteria and remains fully intact. *Id.* at 15-16.

[44] *Id.* at 19-20 (citing *Vonage Order* ¶ 6 & n.16). NHTA states that TWCDP's customers do not have a choice of CPE, NHTA Br. at 24, but that was not a relevant factor in the *Vonage* decision.

[45] TWCDP Br. at 20.

[46] Notably, the New Hampshire Office of Consumer Advocate has long advised consumers in the state that the Commission does not regulate VoIP, per the FCC's *Vonage* ruling. *See The New Hampshire Rate Watcher*, Summer 2005, Vol. 5, at 3, *available at* http://www.oca.nh.gov/Newsletters/SummerRatewatcher2005.pdf ("In November 2004, the FCC ruled that VoIP services provided via the public-switched telephone network fall within its jurisdiction and outside of the jurisdiction of state regulators (i.e., N.H. Public Utilities Commission).").

That approach would be consistent with how the overwhelming majority of states have addressed the issue. NHTA itself cites decisions from four states that deemed it prudent to wait for an FCC determination on the regulatory treatment of VoIP, and from four more states whose legislatures have expressly prohibited state commissions from regulating VoIP.[47] In fact, even this list is incomplete—for example, the Missouri Legislature revised its statutory scheme to overrule a decision by the Missouri Public Service Commission to regulate a VoIP service as a telecommunications service.[48] Given the New Hampshire Legislature's views on the scope of the public utility definition as discussed above, a similar fate is likely to befall any comparable decision from this Commission—if the FCC does not preempt it first.[49]

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47 NHTA Br. at 32.

48 Mo. H.B. 1779 (2008); V.M.S.A. § 386.020(54)(j) (exempting interconnected VoIP from the definition of " telecommunications service"); *id.* § 392.550(4) (specifically limiting Missouri Commission authority over VoIP).

49 In an apparent effort to suggest that the tide is changing, NHTA notes that several other states have initiated proceedings to investigate VoIP and claims that several recent decisions support state regulation in this regard—but it mischaracterizes these limited examples. For example, the Massachusetts Department of Telecommunications and Cable ("DTC") has not "determined" that facilities-based VoIP providers are subject to telecommunications service regulation in the state. NHTA Br. at 33. Rather, the director of the DTC's Competition Division has merely expressed an "opinion" to this effect in correspondence with some providers, and the state has not attempted to impose any such regulation as a result. *See, e.g.*, Letter from Michael A. Isenberg, Director, Competition Division, Massachusetts Department of Telecommunications and Cable, to John L. Conroy, Verizon, at 1 (Sept. 22, 2009), *at* http://www.mass.gov/Eoca/docs/dtc/telecom/9-22-09%20Letter%20to%20John%20Conroy.pdf. And the recent denial by the FCC's Wireline Competition Bureau of a petition for arbitration involving a VoIP provider was in no way a signal that "states need not await [FCC] action with regard to VoIP issues." NHTA Br. at 33. Rather, the Bureau simply instructed the state commission to arbitrate the *interconnection agreement* at issue—with a focus on its intercarrier compensation provisions—consistent with its statutory responsibilities. *Petition of UTEX Communications Corp.*, Memorandum Opinion and Order, 24 FCC Rcd 12573 ¶ 10 (2009). Indeed, the FCC's point was that VoIP regulation is irrelevant to such issues.

III. THE PUBLIC INTEREST DOES NOT SUPPORT SUBJECTING INTERCONNECTED VOIP SERVICE TO STATE REGULATION.

NHTA's last resort is to argue that whatever the law may require, the "public interest" compels the Commission to subject interconnected VoIP to state regulation.[50] But TWCDP already has explained that such considerations have no place in the analysis—the Supreme Court has made clear that the question of whether to regulate a particular entity as a public utility is a question of statutory interpretation, not one of public policy.[51]

TWCDP has also explained that NHTA's view of what would serve the public interest is exactly backwards, since extending entry regulation to interconnected VoIP services would harm the public interest (by limiting entry by competitive providers) without offering any additional protections for consumers (since TWCDP already complies with various federal rules and operates consistent with state CLEC requirements).[52] Further, as noted, the FCC confirmed in its *Vonage Order* that state commissions would continue to have authority to address consumer protection issues.[53] Thus, consumers in New Hampshire are at no risk of being afforded "differing protections" based on their choice of service provider; rather, all consumers already

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50 NHTA Br. at 34.

51 TWCDP Br. at 6, 9-10; *see also Allied New Hampshire Gas Co. v. Tri-State Gas & Supply Co.*, 107 N.H. 306, 308, 221 A.2d 251, 253 (1966).

52 TWCDP Br. at 2, 9-10; *see also* Comcast Br. at 13-15 (explaining that there is "no need" to regulate VoIP).

53 *Vonage Order* ¶ 1 (noting that "states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices . . . and generally responding to consumer inquiries and complaints"); *see also* TWCDP Br. at 11.

have "equal access to the remedies that the Commission can provide"—thereby mooting a stated purpose of NHTA's petition.[54]

Ultimately, NHTA's core complaint is really that it should not be subject to greater regulation than interconnected VoIP providers. It claims that NHTA's members are unjustifiably subject to "full regulation" while interconnected VoIP providers are "fully unregulated," resulting in what NHTA proclaims to be an "unworkable regulatory framework."[55] As an initial matter, NHTA dramatically overstates any disparity—indeed, given that TWCDP complies with a range of federal rules applicable to interconnected VoIP providers and operates consistent with state CLEC requirements (including paying taxes and assessments[56]), it cannot plausibly be deemed to be "fully unregulated."

More fundamentally, the notion that NHTA's ILEC members and competitive new entrants like TWCDP should be subject to the same regulatory treatment—and that there is something arbitrary or otherwise unfair in treating them differently—makes no sense, because they are not similarly situated from a competitive standpoint. Indeed, such differentials are common at both the federal and state levels, and they having nothing to do with the technology that a given provider chooses to employ; rather, they are premised on competitive realities. Most notably, CLECs are generally subject to less regulation than ILECs because the latter, by definition, are dominant, while the former, by definition, are not. And wireless carriers are subject to their own distinct regulatory framework. Thus, there is nothing improper about

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54 NHTA Br. at 34-35.

55 *Id.* at 2, 35

56 TWCDP Br. at 2 n.4 (citing TWCDP's discovery responses identifying fees and assessments paid by or on behalf of TWCDP).

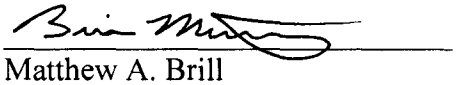
likewise maintaining a distinct regulatory framework for interconnected VoIP providers that takes into account their competitive position vis-à-vis entrenched incumbents like NHTA's members. That point has been established repeatedly, and the FCC both explicitly and implicitly recognized it in the *Vonage Order*.[57] NHTA offers no reason for the Commission to depart from that established practice here.

CONCLUSION

For the foregoing reasons, the Commission should rule that TWCDP is not a "public utility" under New Hampshire law; any ruling to the contrary would be preempted by clear federal precedent.

Respectfully submitted,

TWC DIGITAL PHONE LLC



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[57] *See, e.g.*, *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Commc'ns Act of 1934, as Amended, to Provide Wholesale Telecomms. Servs. To VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 ¶ 15 n.43 (WCB 2007) ("[W]e do not read the [Communications] Act [of 1934, as amended] or have any policy reason to impose a requirement that telecommunications carriers seeking to interconnect must have obligations or business models parallel to those of the party receiving the interconnection request."); *Vonage Order* ¶ 20 (noting deregulatory approach for nondominant providers).

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of January, 2010, a copy of the foregoing Reply Brief of TWC Digital Phone LLC has been sent by electronic mail to persons listed on the Service List.

Brian Murray