THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Petition for Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Service	)	**Docket No. DT 09-044**

SURREPLY BRIEF OF COMCAST PHONE OF NEW HAMPSHIRE, LLC AND ITS AFFILIATES

March 5, 2010

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INTRODUCTION

Pursuant to the Commission's February 19, 2010 Order, Comcast Phone of New Hampshire, LLC, on behalf of itself and its affiliates ("Comcast") submits this Surreply to briefly respond to specific discrete arguments raised for the first time in NHTA's Reply Brief and to bring to the Commission's attention the recent decision in *Paetec Communications, Inc., v. Commpartners, LLC*, No. 08-Civ.-0397(JR) (D.D.C. Feb. 18, 2010) (attached as Exhibit A), holding that interconnected VoIP is an information service, not a telecommunications service.[1]

I. ALTHOUGH THE REGULATORY CLASSIFICATION OF INTERCONNECTED VOIP REMAINS UNDECIDED BY THE FCC, EXISTING LAW REQUIRES IT TO BE CLASSIFIED AS AN INFORMATION SERVICE.

Contrary to NHTA's assertions (*see* NHTA Reply Br. at 5), it is not Comcast's position that the FCC has *already* expressly decided that fixed, interconnected VoIP is an information service and that state regulation of such service is preempted. Rather, it is that existing law requires these conclusions, as an unbroken string of federal cases has held. *See* Comcast Reply at 11 n.6. These courts have flatly rejected NHTA's contention that interconnected VoIP "comports in all respects with the federal definition of telecommunications service". NHTA Reply at 3. In the absence of a definitive FCC decision, the Commission must apply existing law, and, for the reasons Comcast has explained, should reach the same conclusions as every federal court that has considered the matter. *See* Comcast Br. at 28-30. In so doing, the Commission should make the related determinations that because interconnected VoIP is not a telecommunications service, it is not a telephone message service subject to Commission regulation under RSA 362:2, and that state regulation is also preempted by federal law.

NHTA's suggestion that the FCC is leaning towards classifying fixed, interconnected VoIP service as a telecommunications service is both wrong and irrelevant. NHTA bases this

[1] Comcast will not repeat the arguments made in its Opening and Reply briefs.

claim almost entirely on an initial FCC Staff letter questioning whether Comcast's Digital Voice ("CDV") service should be classified as telecommunications service. *See* NHTA Reply at 7. First, this argument overlooks that the views of FCC Staff are in no way binding on the FCC. *See, e.g., Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004). More importantly, NHTA omits the remainder of the dialogue between Comcast and FCC Staff. After Comcast responded to FCC Staff's initial letter,[2] Staff issued a subsequent letter that backed away from the suggestion that it considered CDV to be a telecommunication service.[3] Instead, Staff indicated that questions surrounding the regulatory treatment of VoIP were "complicated subjects," reaffirming that the "classification of Voice over Internet Protocol services . . . remains an open question" at the FCC and "remain[s] the subject[] of pending proceedings at the Commission." *Id.* At most, FCC Staff's actions show only what Comcast has maintained all along – that the FCC has not yet reached a conclusion on the regulatory classification of fixed, interconnected VoIP.

In the absence of an FCC decision on the issue, this Commission must resolve this proceeding based "on existing law."[4] Applying that law, four federal courts – including a decision issued last month in *Paetec Communications*, slip op. at 6-7 – have now uniformly concluded that interconnected VoIP is an information service, not a telecommunications service. NHTA's effort to minimize these court opinions on the basis that the FCC has still "reserve[d]

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[2] Letter from Kathryn A. Zachem, Vice President, Comcast Corporation, to Dana R. Shaffer, Chief, Wireline Bureau, and Matthew Berry, General Counsel, FCC, WC Docket No. 07-52, File No. EB-08-1H-1518 (January 30, 2009) (attached hereto as Exhibit B).

[3] Letter from Julie A. Veach, Acting Chief, Wireline Competition Bureau and Michele Ellison, Acting General Counsel, to Kathryn A. Zachem, Vice President, Comcast Corporation, WC Docket No. 07-52, File No. EB-08-1H-1518 (April 14, 2009) (attached hereto as Exhibit C).

[4] *In the Petition of UTEX Communications Corporation, Pursuant to Section 252(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). *See generally* Comcast Br. at 28-30.

judgment on whether VoIP constitutes an information service," NHTA Reply at 18 n.54, fundamentally misconstrues the role of tribunals in interpreting the law. The four federal courts that have held that VoIP is an information service have not been "purporting to divine the intentions of the FCC" as NHTA claims. *See* NHTA Reply at 19. Instead, they have been applying the plain text of a federal statute. *See* 47 U.S.C. § 153(20). This Commission should do the same, and should follow the holdings of the federal courts which have rejected claims (like those made by NHTA) that interconnected VoIP is a telecommunications service.

II. CDV IS AN INFORMATION SERVICE BECAUSE IT OFFERS THE CAPABILITY TO PERFORM A NET PROTOCOL CONVERSION.

As Comcast has explained, CDV[5] is an information service exempt from state public utility regulation, because, among other reasons, it offers the capability to perform a net protocol conversion between IP and TDM, as numerous federal courts have now held. *See* Comcast Brief at 17-26. NHTA, for the first time in its Reply, provides pages of new, post-record engineering evidence and argument concerning whether TDM is properly considered a "protocol" at all. *See* NHTA Reply at 12-13. None of this is relevant, however, as NHTA ultimately concedes that the conversion between TDM and IP "is a 'protocol conversion' as the FCC defines it." *Id.* at 13-14.

NHTA's argument on this point continues to rest on the claim that CDV's protocol conversion is not a "net" protocol conversion, because, NHTA claims, calls are formatted in analog signals at the CPE on both ends of a call. Comcast has already explained why this argument is without merit: protocol conversions are assessed at the entry and exit points of the network and not based on the customer's CPE. *See* Comcast Reply at 10-13.

NHTA now claims that the eMTA is not CPE at all, but rather part of Comcast's network, based on language in the FCC's decision in *Computer II*. *See* NHTA Reply at 15 (citing *In re*

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[5] Comcast will continue to refer to both its residential CDV service and its Business Class Voice service together as "CDV" for purposes of this Brief.

Amendment of Section 64.072 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384, ¶ 144 (1980) *aff'd sub nom. Computer and Computer Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) ("*Computer II*"). The passage NHTA cites, however, does not stand for this proposition. *Computer II* noted the development of a competitive market for CPE in support of the FCC's decision to exempt CPE from Title II regulation, *see* 77 F.C.C.2d 384, ¶¶ 144, 161; it nowhere states that CPE *must* be provided competitively in order to be considered CPE, nor do the FCC's rules so require. *See* Comcast Reply at 13 n.12. Indeed, *Computer II* itself expressly contemplates the existence of "carrier-provided" CPE in the competitive marketplace. *See Computer II*, 77 F.C.C.2d 384, at ¶ 160. Thus, as Comcast has explained and four federal courts have held, interconnected VoIP performs a net protocol conversion and is therefore an information service. As such, it cannot be a telecommunications service, as "[t]he two [service] categories are mutually exclusive." *Paetec Communications*, slip op. at 5.

NHTA also argues that the net protocol conversion performed by CDV falls into an exception to the information service category. As Comcast has explained, NHTA's arguments that the net protocol conversion performed by CDV falls into the "internetworking" and "communications between a subscriber and the network itself" exceptions are meritless. *See* Comcast Reply at 11-13 & 12 n.10. NHTA argues for the first time in its Reply that a different exception – specifically, for net protocol conversions involving "introduction of a new basic network technology . . . to maintain compatibility with existing CPE," NHTA Reply at 16 – removes CDV from the realm of information services. This argument is equally without merit.

The FCC has not considered a service to be an "enhanced" or "information" service if "basic network technology is introduced piecemeal, and appropriate conversion equipment is

used within the network to maintain compatibility between user equipment and the network."[6] The exception is intended to exclude from the information service category protocol conversions that permit customers to use their old CPE when a carrier makes changes to its network.[7]

This exception is inapposite on its face. First, the exception applies only to conversion equipment used "*within the network.*" Comcast does not use protocol conversion "*within* [its] network" at all, but to exchange traffic *between* Comcast's network and the PSTN. Second, the exception covers only protocol conversion used to "maintain compatibility between user equipment and the network."[8] CDV's IP-TDM protocol conversions have nothing to do with maintaining compatibility with CDV customers' CPE. The eMTA, like Comcast's network, is IP-based. CDV performs protocol conversions to enable communications between Comcast's IP-based network and the PSTN. That type of service – the "ability to communicate *between networks* that employ different data-transmission formats" – falls squarely within the definition of an information service. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005) (emphasis added).

CONCLUSION

For all of the foregoing reasons, Comcast respectfully requests that the Commission determine: (1) that CDV does not constitute the conveyance of a telephone message within the context of RSA 362:2; (2) that Comcast IP Phone is not a public utility under New Hampshire law; and (3) that the Commission is preempted by federal law from regulating CDV.

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6 *In re Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof, Communications Protocols under Sections 64.072 of the Commission's Rules and Regulations*, Report and Order, 2 FCC Rcd 3072, ¶ 70 (1987) ("*Computer III*") (brackets and internal quotation marks omitted).

7 *See id.*

8 *Id.*.

March 5, 2010

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Surreply Brief has on this fifth day of March, 2010 been sent by electronic mail to persons listed on the Service List.

S. S. Geiger
Susan S. Geiger

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAETEC COMMUNICATIONS, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 08-0397 (JR)
	:	
COMMPARTNERS, LLC,	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

PAETEC Communications, Inc., seeks compensation for telephone calls made to individuals on its network that originated on the network of CommPartners, LLC. Now before the court are the parties' cross-motions for partial summary judgment (as to liability). For the reasons set forth below, PAETEC's motion [#36] is **granted** as to its statutory claim regarding the TDM-originated calls. CommPartners' "counter-motion" [#38] is **granted** as to the statutory claim regarding the VoIP-originated calls and as to the quasi-contractual claims.

Background

PAETEC and CommPartners are telecommunications companies. A long-distance call by a CommPartners customer to a PAETEC customer is completed, or "terminated," using PAETEC facilities. Decl. of John T. Ambrosi ¶ 7, attached to Pl. Mot. as Ex. B. In this action, PAETEC seeks compensation for calls it has terminated on behalf of CommPartners. PAETEC's claim is made pursuant to the "access charge" regime of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 et seq. PAETEC

alternatively asserts unjust enrichment and quantum meruit claims.

Crucial to this action is the distinction between two formats for transmitting calls: Time-Division Multiplexing ("TDM") and Voice over Internet Protocol ("VoIP"). VoIP is newer than TDM, and VoIP calls can be transmitted over either the public Internet or over closed networks. See Decl. of David S. Clark ¶¶ 10-11, attached to Pl. Mot. at Ex. A. Calls initiated in one format can be converted to the other during transmission, and a call may be converted once or multiple times. See Pl. Mot. at 6.

There are two types of calls at issue, to which different compensation regimes may apply: (1) calls that began on CommPartners' network in VoIP before being converted by CommPartners to TDM for transfer to PAETEC (the "VoIP-originated calls"); and (2) calls that both began and were transferred in TDM (the "TDM-originated calls"). PAETEC contends that both types of calls are subject to access charges. CommPartners concedes that access charges apply to the TDM-originated calls, but argues that they do not apply to VoIP-originated calls.

The access charge regime was established in the 1980s to govern compensation for long-distance telephony. See Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm., 461 F. Supp. 2d 1055, 1074 (E.D. Mo. 2006). "Access charges historically have included

significant implicit subsidies and by definition have been well above cost." Id. at 1075 (internal quotation marks omitted).

VoIP-Originated Calls

The central dispute here concerns PAETEC's assertion that its tariffs lawfully require application of access charges to VoIP-originated calls.

A. Tariff

Each carrier must file with the FCC a schedule of its charges for interstate wire communication using its network. See 47 U.S.C. § 203(a). This schedule is known as the carrier's tariff. Tariffs, once approved, "are the law, and not mere contracts." Bryan v. Bellsouth Comm'ns, Inc., 377 F.3d 424, 429 (4th Cir. 2004). The applicable portion of PAETEC's federal tariff provides that access services, to which access charges apply, include:

> all services and facilities provided by [PAETEC] for the origination or termination of any interstate or foreign telecommunications using [PAETEC's] network or origination or termination of other services utilizing the same [PAETEC] network services or functionality **regardless of the technology used in transmission.** This includes, but is not limited to, Internet Protocol or similar services.

PAETEC FCC Tariff No. 3, § 1.2, attached to Def. Cross-Mot. as Ex. 6 (emphasis added).[1]

[1] PAETEC's intrastate tariffs contain similar language.

Relying on the language of its tariff, PAETEC asserts that its termination of VoIP-originated calls is an access service. CommPartners begs to differ, arguing that the words "regardless of the technology used in transmission" refer only to the technology used by PAETEC, the terminating party. CommPartners loses this argument: the tariff contains no express or implied limitation on who is doing the transmitting. The terms of the tariff are unambiguous: access charges apply regardless of the technology used at any point in transmission.

CommPartners' next argument is more substantial. It is that, if PAETEC's tariff does cover VoIP-originated calls, it conflicts with general intercarrier compensation law, as established by the Communications Act and regulations promulgated thereunder. Here, PAETEC relies on the so-called "filed-rate doctrine," arguing that its tariff must prevail over any other consideration. The dispositive question, then, is whether the statutory provisions to which CommPartners avers are trumped by PAETEC's tariff.

B. Communications Act

CommPartners asserts two independent reasons why PAETEC's tariff may not be applied to VoIP-originated calls: (1) that its termination of VoIP-originated calls is an "information service" exempt from access charges; and (2) that

access charges cannot apply to VoIP-originated calls because "reciprocal compensation" applies instead.

1. Information Service Exception[2]

Information services are not subject to the access charge regime. See In re AT&T Access Charge Petition, 19 F.C.C.R. 7457, 7459-61, ¶¶ 4-7 (2004). Information services are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). They include "protocol conversion (i.e., ability to communicate between networks that employ different data-transmission formats)." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977 (2005) (citing Second Computer Inquiry, 77 F.C.C. 2d 384, 417-23 (1980)). Information services are not telecommunications services, which merely transmit without alteration. See 47 U.S.C. §§ 153(43), 153(46); Brand X, 545 U.S. at 975-76. The two categories are mutually exclusive. See Sw. Bell, 461 F. Supp. 2d at 1078; Stevens Report, 13 F.C.C.R. 11830,

[2] Under law prior to the 1996 Telecommunications Act, this exception was called the enhanced services exception or ESP exception. See Non-Accounting Safeguards Order, 11 F.C.C.R. 21905, 21955-58, ¶¶ 102-07 (1998). The Act essentially codified the pre-existing exception. See Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975-77 (2005) (noting similarity of the Act's terminology to that of pre-Act FCC decisions).

11507, ¶ 13 (1998). But services that combine both telecommunications and information components are treated as information services. See Brand X, 545 U.S. at 989-90; Sw. Bell, 461 F. Supp. 2d at 1078 (citing CALEA Order, 20 F.C.C.R. 14989 (2005)). CommPartners thus contends that VoIP-to-TDM conversion results in an information service.

The telecommunications industry has been "raging for years" with debate about these arguments, Pl. Reply at 7. The FCC, which has had the controversy on its docket for a decade, has been unable to decide it.[3] Two federal district courts have considered the issue. Both have decided that transmissions which include net format conversion from VoIP to TDM are information services exempt from access charges. See Sw. Bell, 461 F. Supp. 2d at 1081-83; Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003). Their reasoning is persuasive. As the Sw. Bell court observed, "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service." 461 F. Supp. 2d at 1081-82

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[3] The FCC has determined that non-net protocol conversions do not constitute information services. See In re AT&T, 19 F.C.C.R. at 7465-66, ¶¶ 12-13. That is, if a company converts a TDM signal to VoIP and then back to TDM before handing it off, no information service is provided. See id. at 7466, ¶ 13 ("This order . . . addresses only AT&T's specific service, and that service does not involve a net protocol conversion. . . . If the service evolves . . . , the Commission could revisit its decision in this order."). It could - but it hasn't.

(citing In re Non-Accounting Safeguards, 11 F.C.C.R. 21905, 21956, ¶ 104 (1996)).

I find that CommPartners' transmission and net conversion of the calls is properly labeled an information service.[4]

2. Reciprocal Compensation

Reciprocal compensation and access charges are mutually exclusive methods of intercarrier compensation.[5] See 47 U.S.C. § 251(b)(5); WorldCom, Inc. v. FCC, 288 F.3d 429, 433-34 (D.C. Cir. 2002). The reciprocal compensation regime was created by the Telecommunications Act of 1996 (the "1996 Act"), which also retained the pre-existing access charge regime, but in a limited fashion. See 47 U.S.C. § 251(g) (retention provision). Under the 1996 Act, reciprocal compensation is the norm; access charges apply only where there was a "pre-Act obligation relating to inter-carrier compensation." WorldCom, 288 F.3d at 433.

There cannot be a pre-Act obligation relating to inter-carrier compensation for VoIP, because VoIP was not developed

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[4] The parties disagree about whether the information service exception applies only to interstate calls, or whether it can reach intrastate traffic as well. See Pl. Reply at 11; Def. Reply at 11-13. I need not decide the issue, as the information service exception is but one of two independent grounds supporting CommPartners.

[5] Unlike access charges, reciprocal compensation can apply to information services. See Sw. Bell, 461 F. Supp. 2d at 1081 n.19.

until the 1996 Act was passed. Accord Sw. Bell, 461 F. Supp. 2d at 1080 ("[B]ecause [VoIP-to-TDM] is a new service developed after the [1996] Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable."). PAETEC's submission that the analysis should turn not on whether companies actually paid access charges for VoIP prior to the Act, but instead whether pre-Act law would have supported such charges -- is not so much an argument as an invitation to speculate. The invitation is declined.

C. Filed-Rate Doctrine

Under the Communications Act, tariffs "are the law, and not contracts"; and PAETEC's tariff imposes access charges on VoIP-originated calls. The FCC accepted PAETEC's tariff for filing, even though the compensation-governing provisions of the Communications Act and interpretive regulatory decisions thereunder point away from the access charges PAETEC purports to impose on VoIP-originated calls.

Under the filed-rate doctrine, customers are "charged with notice of the terms and rates set out in the filed tariff and may not bring an action against a carrier that would invalidate, alter, or add to the terms of the filed tariff." Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000). "The filed-rate doctrine precludes courts from deciding whether a tariff is reasonable, reserving the evaluation of tariffs to the

FCC." Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1171 (9th Cir. 2002).

In this case, nevertheless, PAETEC's tariff must give way. "A tariff filed with a federal agency is the equivalent of a federal regulation." Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir. 1998). As such, a tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated. At least one circuit has reached a similar conclusion. In that case, Iowa Network Services ("INS") filed state and federal tariffs that purported to apply access charges to transmission of certain wireless traffic. See INS v. Qwest Corp, 466 F.3d 1091, 1093-95 (8th Cir. 2006). However, the statutory framework for the wireless traffic, combined with state and federal regulatory processes pursuant to that framework, established that access charges could not apply. See id. at 1095-97. After considering the conflict, the court held that the tariffs must yield. See id. at 1097. The court found that its decision did not improperly invalidate the tariffs, in violation of the filed-rate doctrine, because they could still be applied to traffic which the statutory and framework allowed them to reach. See id. Similarly, the decision did not alter the terms of the tariff; the disputed terms were simply ultra vires and lacked legal force.

The Eighth Circuit decision in Qwest may appear to be an inventive piece of legal legerdemain, but it applies the tools that are available to courts (the FCC has much better ones, but will not use them), and it is supported by sound policy considerations. The FCC sometimes has as few as fifteen days to consider whether to object to a tariff that contains a rate increase before it goes into effect. See 47 U.S.C. § 204(a)(3). To treat tariffs as inviolable would create incentives to bury within tariffs provisions that expand their rates beyond statutory allowance in the hope that the FCC will not notice. See INS v. Qwest Corp., 385 F. Supp. 2d 850, 899 (S.D. Iowa 2005) (characterizing the tariffs in that case as an attempt to "sidestep" the applicable legal framework and "a strategic attempt to thwart the impact of the 1996 Act"). The purposes of the filed-rate doctrine -- to prevent discrimination among consumers and preserve the rate-making authority of federal agencies, see Bryan v. Bellsouth Comm'ns, Inc. 377 F.3d 424, 429 (4th Cir. 2004); Hill v. BellSouth Telcomms., Inc., 364 F.3d 1308, 1316 (11th Cir. 2004) -- are not undercut by the Eighth Circuit's decision, or by mine.

There are differences between Qwest and this case, to be sure, but they do not justify a different outcome here. First, in the background of the Qwest case were rulings of the Iowa Utilities Board that access charges were inapplicable to the

traffic at issue. See Qwest, 385 F. Supp. 2d at 863. Those regulatory decisions were not dispositive, however; indeed, earlier in the case the Eighth Circuit reversed the district court for treating them as preclusive and ordered it instead to "decide for itself whether the traffic at issue is subject to access charges pursuant to INS's tariffs." INS v. Qwest Corp., 363 F.3d 683, 695 (8th Cir. 2004). Second, the court's refusal to apply the filed-rate doctrine in Qwest was supported both by the compensation-governing provisions of 47 U.S.C. § 251 and by the provision governing the scope of tariffs located at 47 U.S.C. § 203(a). See Qwest, 466 F.3d at 1095-97. My decision turns only on § 251, yet the Qwest decision could stand alone on its persuasive holding that tariffs cannot be applied inconsistently with the Communications Act, which is where § 251 resides.

Because the access charge regime is inapplicable to VoIP-originated tariff, and because a filed tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated, the filed-rate doctrine must yield in this case.

TDM-Originated Calls

CommPartners concedes its duty to pay access charges for TDM-originated calls. See Def. Cross-Mot. at 1 n.1. PAETEC suggests that this concession should entitle it to an award of attorneys fees and costs based on the terms of its tariff. See PAETEC Tariff F.C.C. No. 3 at § 2.4.6 (requiring such fees if

PAETEC "substantially prevails" in litigation). CommPartners disputes PAETEC's assertion. The parties urge an immediate determination of that question, but at this point I am ruling only on liability. The question of what it means to "substantially prevail" must await the damages phase, when the factual record will be more complete.

Quasi-Contractual Claims

Injecting common law claims into intercarrier compensation would undermine the complex scheme Congress and the FCC have established. Because the Communications Act establishes the exclusive methods of intercarrier compensation for the calls at issue, PAETEC's unjust enrichment and quantum meruit claims are statutorily barred. See Qwest, 466 F.3d at 1098; MCI WorldCom Network Servs., Inc. v. PAETEC Comm'ns, Inc., 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005).

JAMES ROBERTSON
United States District Judge

EXHIBIT B

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January 30, 2009

VIA ELECTRONIC MAIL AND ECFS

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Mr. Matthew Berry
General Counsel
Federal Communications Commission
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Re: **In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518**

In the Matter of Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling That Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," WC Docket No. 07-52

Dear Ms. Shaffer and Mr. Berry:

We are in receipt of your letter of Sunday, January 18, 2009. In this response, we try to clear up any misunderstanding you may have about our September 19, 2008 filing on our congestion management practices.

As you know, we fully complied with the Commission's August 20, 2008 Order[1] by submitting the mandated filings on September 19, 2008,[2] and transitioning from our old congestion management practices by December 31, 2008.[3] As our letter of January 5, 2009 made clear, our new congestion management techniques have been instituted throughout Comcast's High-Speed Internet ("HSI") network.[4] We are pleased that the response to our

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1 *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling That Degrading an Internet Application Violates the FCC's Internet Policy Statement & Does Not Meet an Exception for "Reasonable Network Management,"* Mem. Op. and Order, 23 FCC Rcd. 13028 (2008) ("*August 20 Order*").

2 *See* Ex Parte Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, File No. EB-08-IH-1518 (Sept. 19, 2008) ("*September 19 Disclosures*").

3 *See* Ex Parte Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, File No. EB-08-IH-1518 (Jan. 5, 2009).

4 *Id.*

September 19 Disclosures has been overwhelmingly positive, and that the transition to our new protocol-agnostic congestion management practices was completed successfully and on time. Throughout this transition, during which we also upgraded over 20% of our network to wideband DOCSIS 3.0 technology, our highest priority has been to continue to offer the best possible high-speed Internet service for our customers, and we have done so. American consumers continue to choose Comcast HSI in ever-greater numbers.

Your letter asks about an "apparent discrepancy" between the September 19 Disclosures and one of the answers to the Frequently Asked Questions ("FAQs") published on the Comcast.net website.[5] There is, in fact, no discrepancy. The network management techniques at issue in this proceeding affected solely traffic that is delivered to and from our subscribers as part of our HSI service. Our response to the Enforcement Bureau's informal inquiry on January 25, 2008, and every filing we have made in the "Network Management" proceeding from February 12, 2008 to January 5, 2009, reflects this common understanding. The August 20 Order, which focused exclusively on Comcast in its role as "a provider of *broadband Internet access* over cable lines," also reflected this understanding.[6]

The language from the September 19 Disclosures that you have quoted in your letter clearly disclosed the experience that certain subscribers potentially could have when using their Voice-over-Internet-Protocol ("VoIP") applications with Comcast's HSI service. This might occur during the limited times when the HSI network in a given area is experiencing congestion, and would in all likelihood affect only a subscriber who has temporarily triggered congestion management thresholds due to his or her own bandwidth consumption.

In contrast, the language you have quoted from our FAQs webpage refers to our Comcast Digital Voice ("CDV") service. CDV is a service separate from Comcast's HSI service; it does not run over Comcast's HSI service. Because it is a separate service, it was not implicated in any way by Free Press's original "Complaint" or Petition for Declaratory Ruling, by the Commission's August 20 Order, or by Comcast's September 19 Disclosures. CDV, like Vonage or Skype, is an *IP-enabled* voice service (i.e., it uses Voice-over-Internet-Protocol to deliver the service). However, unlike Vonage, Skype, or several other VoIP services, CDV is *not* an application that is used "over-the-top" of a high-speed Internet access service purchased by a consumer. Significantly, CDV customers do not need to subscribe to Comcast HSI service, and Comcast does not route those CDV customers' traffic over the public Internet. Rather, as the Commission is aware, our CDV service is based on PacketCable™ specifications that "mandate[] the use of a managed IP network, in that services are not delivered over the Internet."[7] Many companies offer IP-enabled services over their networks, including voice and video services that are distinct from their high-speed Internet access service.

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5 *See* Letter from Dana R. Shaffer & Matthew Berry, FCC, to Kathryn A. Zachem, Comcast Corp., WC Docket No. 07-52, File No. EB-08-IH-1518, at 1 (Jan. 18, 2009) ("*January 18 Letter*").

6 *August 20 Order* ¶ 1 (emphasis added).

7 *See IP Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 ¶ 11 & n.42 (2004) ("*IP Enabled Services NPRM*"). PacketCable™ is a suite of Technical Reports and Specifications that have been

With the express encouragement of Congress and the Commission, Comcast and other cable companies have invested tens of billions of dollars of private risk capital over the past decade to develop and deploy the broadband networks that make a full range of IP-enabled services possible. CDV, competing directly against the dominant local Bell telephone companies, has been a great consumer success.[8] And by rolling out Comcast HSI service over a decade ago, we proved the skeptics wrong by demonstrating that there is strong demand for cable modem broadband Internet service. We built a platform for innovation that empowers huge numbers of Internet-based applications and services, from VoIP to video to cloud computing and beyond.[9] The economic and societal return on this investment in innovation has accrued not just to Comcast, but to tens of millions of American consumers, businesses, and entrepreneurs. We are now proceeding rapidly with the deployment of DOCSIS 3.0, making world-class Internet speeds available to millions of households and ushering in a new era of innovation.

To succeed in a competitive marketplace, our HSI service must provide a hospitable environment for the full range of Internet-based applications and services, including over-the-top VoIP and video. We devote enormous resources to that end. To the extent our HSI service becomes congested at times of very high demand, our new congestion management practices *treat all Internet-based applications and services the same*, whether they are affiliated with Comcast (e.g., Fancast) or not (e.g., Hulu, YouTube).

As we painstakingly developed our new congestion management techniques, we consulted with many Internet engineering experts, Internet applications providers, and Internet advisory bodies. We were particularly mindful of latency-sensitive applications. For example, last July, Comcast and Vonage agreed to collaborate to ensure that, on an ongoing basis, congestion management techniques are chosen that effectively balance the need to avoid network congestion with the need to ensure that over-the-top VoIP applications work well for consumers.[10]

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accepted as standards by several North American and International standards organizations, including the Society of Cable Telecommunications Engineers, the American National Standards Institute, and the International Telecommunications Union. *See, e.g.*, Press Release, CableLabs, *ITU Standardizes on PacketCable™ 1.5 Suite* (Jan. 26, 2006), *available at* http://www.cablelabs.com/news/pr/2006/06_pr_itu_pc15_012606.html.

[8] An economic report by MiCRA calculated that the consumer benefits directly from cable voice competition would amount to over $17.2 billion over the course of 5 years from 2008 to 2012, and over $111 billion in consumer benefits over the same period after factoring in the likely ILEC competitive response. *See* Dr. Michael D. Pelcovits & Daniel E. Haar, MiCRA, *Consumer Benefits from Cable-Telco Competition*, at iii-iv (Nov. 2007) *available at* http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

[9] The term "Internet-based applications and services" refers to applications and services that send or receive traffic over the public Internet.

[10] *See* Ex Parte Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, at 2 (July 10, 2008) (noting that "Comcast and Vonage announced a collaborative effort to ensure that any network management technique Comcast chooses to deploy effectively balances the need to avoid network congestion with the need to ensure that VoIP services like Vonage work well for consumers").

Finally, your letter poses several questions that are completely outside the scope of the Network Management proceeding, and your discussion of these matters contains numerous factual and legal flaws. For example, any analogy of CDV service to the AT&T service at issue in the *IP-In-The-Middle* proceeding is inapt.[11] In contrast to the service the Commission examined in that proceeding, CDV is an "interconnected VoIP service" as that term is defined in the Commission's rules,[12] and, as we have explained in other proceedings where these questions are relevant, CDV is properly classified as an information service.[13] Your suggestion that services that use "telecommunications" are necessarily "telecommunications services" because "the 'heart of "telecommunications" . . . is transmission'" is directly contrary to multiple Commission rulings (and one Supreme Court decision), all of which emphatically refute that notion.[14] For example, the Commission said in the *Cable Modem Ruling* that, "[a]lthough the transmission of information . . . may constitute 'telecommunications,' that transmission is not necessarily a separate 'telecommunications service,'"[15] and no Bureau or Office has delegated authority to countermand a Commission decision.

In other words, simply because an information service such as CDV uses transmission does not make it a "telecommunications service." Instead, the Commission must engage in an analysis of the services provided to determine the applicable regulatory classification.[16] In that regard, as you know, there are several industry-wide rulemaking proceedings awaiting Commission action that are relevant here. For example, many of the issues raised by your questions have been fully briefed in the *IP-Enabled Services* proceeding, in which the Commission issued a Notice of Proposed Rulemaking ("NPRM") and has heard from numerous parties about the vast panoply of services that can be provided using the Internet Protocol.[17]

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[11] See *January 18 Letter* at 2. As we explained in our comments in the *IP-Enabled Services* docket, "one can readily identify numerous distinctions" between CDV and the AT&T services at issue in that proceeding. *See* Comments of Comcast Corp., WC Docket No. 04-36, at 13-14 (May 28, 2004) (highlighting at least seven differences between VoIP services such as Comcast's CDV and the AT&T services at issue in that proceeding).

[12] *See* 47 C.F.R. § 9.3.

[13] *See, e.g.*, Comments of Comcast Corp., WC Docket No. 05-337, at 17-21 (Nov. 26, 2008).

[14] *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), *aff'g In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Ruling*").

[15] *Cable Modem Ruling* ¶ 40 (internal citations omitted). Notably, your suggestion that CDV is not an information service is directly contrary to one of the proposals put forward by the Commission less than three months ago to reform the Universal Service Fund and the intercarrier compensation regime. *See High-Cost Universal Service Support; Universal Service Contribution Methodology; Developing a Unified Intercarrier Compensation Regime; et al,* Order on Remand and Report & Order and Further Notice of Proposed Rulemaking, FCC-08-262, app. C ¶ 204 (2008) ("*USF/ICC Reform NPRM*") (proposing to classify as an information service "those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit switched networks and terminate them on IP networks").

[16] *Cable Modem Ruling* ¶ 35 ("None of the [relevant] statutory definitions rests on the particular types of facilities used. Rather, each rests on the function that is made available.").

[17] *See IP Enabled Services NPRM* ¶ 1 ("In this [NPRM], we examine issues relating to services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services....").

Moreover, there is a separate proceeding on intercarrier compensation that has been fully briefed and which is awaiting Commission action.[18] Those would be the appropriate proceedings, on issues of general applicability to providers of IP-enabled services, in which to address your closing questions, and it would be inappropriate and in excess of delegated authority for any Bureau or Office to decide the answers to those questions before the full Commission has done so.

We hope this letter clarifies the "apparent discrepancy" you perceived, as well as the related questions in your letter.

Sincerely,

/s/ Kathryn A. Zachem
Kathryn A. Zachem
Vice President,
Regulatory and State Legislative Affairs
Comcast Corporation

cc: Acting Chairman Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Rick Chessen
Scott Bergmann
Nick Alexander
Kris Monteith
Scott Deutchman

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18 *See USF/ICC Reform NPRM* ¶¶ 38-41.

Federal Communications Commission
Washington, D.C. 20554

EXHIBIT C

April 14, 2009

VIA ELECTRONIC MAIL
AND FIRST CLASS MAIL

Kathryn A. Zachem
Vice President, Regulatory
and State Legislative Affairs
Comcast Corporation
2001 Pennsylvania Ave. NW, Suite 500
Washington, D.C. 20006

Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press *et al.* for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-1H-1518, WC Docket No. 07-52.

Dear Ms. Zachem:

We have received your response[1] to the January 18, 2009 letter seeking clarification of Comcast's network management practices.[2] We recognize that these are complicated subjects, and appreciate the additional information you provided.

As you stated, certain of the topics addressed in the January 18 Letter remain the subjects of pending proceedings at the Commission. The statutory classification of Voice over Internet Protocol services (VoIP), with limited exceptions, remains an open question,[3] and the intercarrier

[1] Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast Corp., to Dana R. Shaffer, Chief, Wireline Competition Bureau, and Matthew Berry, General Counsel, FCC, WC Docket No. 07-52, File No. EB-08-IH-1518 (Jan. 30, 2009) (Comcast January 30 Response).

[2] Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau and Matthew Berry, General Counsel, FCC, to Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, File No. EB-08-IH-1518, WC Docket No. 07-52 (Jan. 18, 2009) (January 18 Letter).

[3] *See, e.g., IP Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4886, para. 35 (2004) (seeking comment on what regulatory scheme the Commission should apply to IP-enabled services) (*IP-Enabled Services NPRM*); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3311, para. 8 (2004) (declaring pulver.com's Free World Dialup VoIP offering to be an information service); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457,7466-67, para. 15 (2004) (holding that access charges apply to AT&T's IP-in-the-middle telephony, given that "[e]nd users place calls using the same method" as they would otherwise, that the service provides no "enhanced functionality," and that the service "imposes the same burdens on the local exchange as do circuit-switched interexchange calls").

compensation issues with regard to many kinds of VoIP likewise are under active consideration.[4] Thus, we are placing a copy of the January 18 Letter, the Comcast January 30 Response, and this letter in the dockets of these proceedings so that the Commission can take your views into consideration there as it grapples with these complex and important open questions regarding the treatment of VoIP services.

We look forward to working with you in the future on these important matters, and will contact you if additional information is needed.

Sincerely,

Julie A. Veach

Julie A. Veach
Acting Chief, Wireline Competition Bureau

P. Michele Ellison

Michele Ellison
Acting General Counsel

[4] *See, e.g., High Cost Universal Service Reform; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, para. 40 & Appendix A, paras. 208-11, Appendix C, paras. 203-06 (rel. Nov. 5, 2008) (seeking comment on several intercarrier compensation reform proposals, including proposals that would address the regulatory classification of calls exchanged between IP-based and circuit-switched networks); *see also IP-Enabled Services NPRM*, 19 FCC Rcd at 4904-05, paras. 61-62 (seeking comment on the appropriate intercarrier compensation for IP-enabled services).