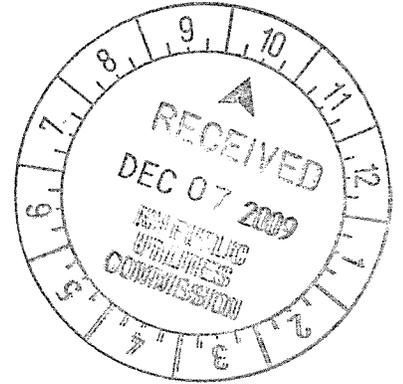


STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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



PREFILED REPLY TESTIMONY OF
JULIE LAINE
ON BEHALF OF TWC DIGITAL PHONE LLC

DECEMBER 4, 2009

1 **INTRODUCTION**

2 Q1. **Please state your name, title, and business address.**

3 A1. My name is Julie P. Laine. I am employed by Time Warner Cable Inc. as Group Vice
4 President and Chief Counsel, Regulatory. My business address is 60 Columbus Circle,
5 New York, New York, 10023.

6 Q2. **Did you previously submit direct testimony in this proceeding?**

7 A2. Yes, James Medica and I submitted joint prefiled direct testimony in this proceeding on
8 October 9, 2009, on behalf of TWC Digital Phone LLC (“TWCDP”).

9 Q3. **What is the purpose of your reply testimony?**

10 A3. The purpose of my reply testimony is to respond to select points made in the prefiled
11 direct testimony of Douglas Meredith and Valerie Wimer, which they submitted on
12 behalf of the New Hampshire Telephone Association (“NHTA”).

13 Q4. **Please summarize your reply testimony.**

14 A4. In this reply testimony, I provide a high-level response to some of the legal arguments
15 made by Mr. Meredith and Ms. Wimer. Specifically, I will explain that: (1) the Federal
16 Communications Commission (“FCC”) has preempted state public utility regulation of
17 *any* interconnected VoIP service—specifically including facilities-based VoIP services
18 offered by cable operators—that meets a three-part test, without regard to whether the
19 service is portable, and that TWCDP’s interconnected VoIP service satisfies this test; (2)

1 Commission classification of TWCDP's interconnected VoIP service for regulatory
2 purposes would conflict with the FCC's prerogative to classify interconnected VoIP at
3 the federal level; and (3) the New Hampshire statutory definition of "public utility" does
4 not, and was never intended to, cover interconnected VoIP service.

5 **Q5. Will you be explaining TWCDP's legal arguments in full in your reply testimony?**

6 A5. No. I understand that the Commission has specifically provided for a briefing schedule
7 in this proceeding, at which time TWCDP will set forth its legal case in detail. TWCDP
8 believes that prefiled testimony is not an efficient or otherwise proper vehicle for making
9 legal arguments, nor is it appropriate for cross-examination—as the Commission itself
10 has stated. *See Verizon New Hampshire*, Order No. 24,236, DT 02-110, 2003 WL
11 23304953, at *2 (Nov. 7, 2003) (rejecting a request for an opportunity to file testimony
12 on legal issues, stating that "legal interpretation is not a factual dispute and therefore any
13 lack of opportunity to cross-examine a witness and to assess credibility is not a
14 procedural infirmity," and that "[p]roviding additional process for testimony and hearings
15 regarding legal interpretation would be wasteful of the resources of the parties and of the
16 Commission, to the detriment of the public interest"). Nevertheless, the NHTA witnesses
17 have testified at length concerning various legal and policy issues. Accordingly, to
18 ensure that the Commission has the benefit of a more balanced record and to avoid any
19 prejudice to TWCDP, I will provide a general response to some of their legal arguments
20 in this testimony, to be followed by a more detailed discussion in TWCDP's briefs.

21 **Q6. Are there any issues you will not be addressing in your reply testimony?**

1 A6. Yes. I will not discuss the statutory classification of interconnected VoIP under federal
2 law, or the similarities and differences between interconnected VoIP services and
3 traditional telephone services as discussed by Ms. Wimer. TWCDP does not believe the
4 Commission needs to address these issues in order to resolve this proceeding.

5 **PREEMPTION OF STATE PUBLIC UTILITY REGULATION OF VOIP**

6 Q7. **Mr. Meredith states that “at present, federal policy and regulation does not preempt**
7 **New Hampshire law” concerning the regulation of VoIP providers such as TWCDP.**
8 **(Meredith at 4:16-17.) Do you agree?**

9 A7. No. In its legal briefs in this proceeding, TWCDP will explain at length that the FCC, in
10 its 2004 *Vonage Order*, preempted the application of state public utility regulation to
11 interconnected VoIP services. Mr. Meredith mischaracterizes that precedent in several
12 crucial respects. I briefly address those misstatements below.

13 Q8. **Please summarize the preemption ruling in the FCC’s *Vonage Order*.**

14 A8. The FCC’s *Vonage Order* (upheld by the Eighth Circuit) established that VoIP services
15 sharing certain basic characteristics—including facilities-based VoIP services provided
16 by cable operators—are not subject to state public utility regulation. *See Vonage*
17 *Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minn. Pub.*
18 *Utils. Comm’n*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (“*Vonage*
19 *Order*”), *aff’d*, *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007)).

1 Q9. **What was the FCC’s goal in the *Vonage Order*?**

2 A9. In the *Vonage Order*, the FCC sought to establish a uniform national regulatory
3 framework for VoIP services and to avoid “patchwork regulation,” under which regional
4 and national providers finally challenging the dominance of incumbent local exchange
5 carriers would have to satisfy more than 50 different sets of regulatory obligations.
6 While the FCC noted that states would continue play a vital role in protecting
7 consumers—including protecting them from fraud, enforcing fair business practices, and
8 responding to consumer inquiries and complaints—it sought to eliminate “economic
9 regulations” such as tariffing and certification requirements.

10 Q10. **On what basis did the FCC preempt application of state economic regulation to**
11 **VoIP?**

12 A10. The FCC concluded that subjecting such VoIP services to state certification and tariffing
13 requirements would directly conflict with—and thus prevent the lawful exercise of—
14 federal policy, which supports open entry for non-dominant providers of interstate
15 service. Accordingly, it ruled that such regulation is preempted under longstanding FCC
16 and judicial precedent stating that preemption is proper when state regulation would
17 negate federal policy and rules.

18 Q11. **Mr. Meredith states that the *Vonage Order* was based “principally” on the fact that**
19 **the *Vonage* VoIP service at issue was portable, and that the FCC’s preemption**
20 **ruling does not apply to fixed VoIP services. (Meredith 8:16-20, 9:11-12.) Is he**
21 **correct?**

1 A11. No. Mr. Meredith's position appears to be based on the mistaken view that the FCC's
2 preemption ruling was based on whether it is possible to determine the physical endpoints
3 of a VoIP call, and thus whether the interstate and intrastate components of a VoIP call
4 can be segregated. However, as I just explained, the FCC's preemption ruling was
5 actually based on the conflict between state entry regulation and the federal policy in
6 favor of open entry.

7 **Q12. Has the FCC ever limited its preemption rationale to portable VoIP services?**

8 A12. No. The FCC made clear in the *Vonage Order* that its preemption analysis applied to *any*
9 VoIP service that: (1) requires a broadband connection from the user's location; (2)
10 requires IP-compatible customer premises equipment ("CPE"); and (3) includes a suite of
11 integrated capabilities and features, able to be invoked sequentially or simultaneously,
12 that allows customers to manage personal communications dynamically, including
13 enabling them to originate and receive voice communications and access other features
14 and capabilities, even video.

15 **Q13. What types of integrated capabilities and features would satisfy the third prong of**
16 **that test?**

17 A13. The FCC noted that such capabilities and features could include (but not be limited to)
18 voicemail, three-way calling, and online account and voicemail management that are
19 offered with the voice service.

20 **Q14. Did the FCC state whether this analysis applies to cable operators?**

1 A14. Yes. The FCC specifically confirmed that its preemption analysis applies to cable
2 operators and any other facilities-based provider of a VoIP service that satisfies the three-
3 part test set forth above. The FCC recognized that state entry regulation of any service
4 with those basic characteristics risked negating federal policy and rules, which it stated
5 includes VoIP services “offered or planned by facilities-based providers.” *Vonage Order*
6 ¶¶ 23, 25 n.93. Accordingly, the FCC stated that “to the extent other entities, *such as*
7 *cable companies*, provide VoIP services, we would preempt state regulation to an extent
8 comparable to what we have done in this Order.” *Id.* ¶ 32 (emphasis added). Similarly,
9 FCC Commissioner Kathleen Abernathy emphasized in a separate statement that the
10 FCC’s intention in the *Vonage Order* was to make clear that “all VoIP services that
11 integrate voice communications capabilities with enhanced features and entail the
12 interstate routing of packets—whether provided by application service providers, cable
13 operators, LECs, or others—will not be subject to state utility regulation.” *Id.*, Separate
14 Statement of Commissioner Kathleen Q. Abernathy.

15 Q15. **Ms. Wimer discusses at great length the similarities and differences between**
16 **interconnected VoIP services and the traditional telephone services offered by**
17 **members of the NHTA. Is that comparison relevant to the issues presented here?**

18 A15. No. For purposes of the preemption analysis, it does not matter whether a VoIP service is
19 functionally similar to traditional local exchange and long distance voice service in
20 certain respects. All that matters is that the service in question satisfies the FCC’s three-
21 part test noted above.

1 Q16. **Does TWCDP’s interconnected VoIP service satisfy the FCC’s test for preemption?**

2 A16. Yes. The facts set forth in TWCDP’s prefiled direct testimony and discovery responses
3 demonstrate that TWCDP’s interconnected VoIP service satisfies the FCC’s three-part
4 preemption test.

5 *First*, customers of TWCDP’s interconnected VoIP customers must have a
6 physical broadband connection with a minimum speed of 200 kilobits per second in order
7 to use the service.

8 *Second*, such customers must also have specialized IP-compatible equipment—an
9 embedded multimedia terminal adapter or “eMTA”—that is installed at their premises by
10 a TWCDP technician. In the *Vonage Order*, the FCC found that this same type of
11 equipment satisfied this prong of the preemption analysis, and it did not adopt a
12 requirement that the customer own or lease the equipment from the service provider.

13 *Third*, TWCDP’s interconnected VoIP service offers a suite of integrated
14 capabilities and features that can be invoked sequentially or simultaneously and that
15 allows customers to manage their personal communications dynamically, including by
16 originating and receiving voice communications and accessing other features and
17 capabilities. These capabilities and features are or soon will be available (in the second
18 quarter of 2010, as described in TWCDP’s discovery responses) to TWCDP’s
19 interconnected VoIP customers. I note that Ms. Wimer concedes on behalf of the NHTA
20 that TWCDP’s interconnected VoIP service “ha[s] features that allow the customer to
21 manage their calls dynamically” including the ability to “receive voice mail messages on

1 their email and manage their features, billing and other account information via their
2 respective web portals.” (Wimer at 4:16-5:1.)

3 **Q17. Does the fact that TWCDP provides the eMTA to its customer without a separate**
4 **charge impact this analysis?**

5 A17. No. Ms. Wimer states that TWCDP customers do not purchase the eMTA. To the extent
6 this fact is offered to suggest that the eMTA does not satisfy the first prong of the FCC’s
7 preemption test, it is irrelevant to the analysis. The Communications Act of 1934, as
8 amended by the Telecommunications Act of 1996, defines “customer premises
9 equipment” as “equipment employed on the premises of a person.” 47 U.S.C. § 153(14).
10 In the *Vonage Order*, the FCC did not in any way rely on the actual ownership of the
11 specialized IP-compatible device. Thus, the fact that the customer may not *own* the
12 equipment does not mean that the equipment is not “customer premises equipment.”
13 What matters is where the device is located.

14 **Q18. Would state regulation of interconnected VoIP conflict with any other aspect of**
15 **federal policy?**

16 A18. Yes. Regulating an interconnected VoIP provider as a public utility under New
17 Hampshire law risks a conflict with the FCC’s prerogative to classify interconnected
18 VoIP service. In its *IP-Enabled Services* proceeding, the FCC has asserted exclusive
19 authority to achieve a delicate balance between competing interests in fashioning a
20 regulatory scheme for VoIP services, imposing a series of discrete requirements on
21 interconnected VoIP providers but refraining from resolving definitively their appropriate

1 statutory classification. Thus, it remains an open question how interconnected VoIP
2 should be classified at the federal level. However, unless and until the FCC affirmatively
3 rejects an information service classification for VoIP services like TWCDP's, the
4 imposition of any public utility regulations by the Commission would pose a significant
5 risk of creating a conflict.

6 **STATE LAW DEFINITION OF A PUBLIC UTILITY**

7 **Q19. Mr. Meredith asserts that the New Hampshire definition of a "public utility"**
8 **encompasses entities that provide interconnected VoIP service. (Meredith 11:20-**
9 **12:3.) Do you agree?**

10 A19. No. Under the statutory definition, a "public utility" includes a corporation that "own[s],
11 operat[es] or manag[es] any plant or equipment or any part of the same for the
12 conveyance of telephone or telegraph messages." R.S.A. 362:2. This language was
13 enacted during the monopoly telephone era, and thus, it could not have been intended to
14 encompass VoIP.

15 **Q20. Has the New Hampshire legislature expressed a view concerning the proper scope of**
16 **the public utility definition?**

17 A20. Yes. When wireless telephone services were developed, the New Hampshire legislature
18 rejected an attempt to amend the statute to cover wireless carriers, determining that doing
19 so "might stifle competition in a budding new industry." N.H.H.R. Jour. 1069 (1977).
20 That the legislature believed an amendment would be necessary to expand the scope of

1 the public utility definition to cover wireless services underscores that the definition was
2 not intended to encompass every new service that involves the “conveyance” of a voice
3 communication—as Mr. Meredith suggests. (Meredith at 11:20-21.) And the
4 legislature’s decision to refrain from regulating wireless services—by rejecting that
5 proposed amendment—underscores its intent to preserve existing limits on the
6 Commission’s jurisdiction, particularly where doing so could impede development of a
7 competitive new service (such as VoIP).

8 Q21. **Has the Supreme Court of New Hampshire addressed the scope of the “public**
9 **utility” definition?**

10 A21. Yes, and it has confirmed that this language should be construed narrowly. Specifically,
11 based on the history noted above relating to the regulation of wireless carriers, the New
12 Hampshire Supreme Court ruled that the legislature “did not intend to place all
13 companies and businesses somehow related to . . . telephone . . . companies under the
14 umbrella of the PUC’s regulatory power.” *Appeal of Omni Communications, Inc. d/b/a*
15 *Page Call (New Hampshire Public Utilities Commission)*, 122 N.H. 860, 863, 451 A.2d
16 1289, 1291 (1982) (ruling that radio paging companies were not covered by public utility
17 definition). Thus, it does not matter whether interconnected VoIP services are
18 “comparable to telephone message service,” as Mr. Meredith states. (Meredith at 11:20-
19 11.) Indeed, the New Hampshire legislature and the New Hampshire Supreme Court
20 long ago rejected the position that any service that permits the conveyance of anything

1 comparable to a telephone message is covered by the statutory definition of a “public
2 utility.”

3 **Q22. Do you agree with Mr. Meredith’s assertion (Meredith at 12:5-16) that it is in the**
4 **public interest to regulate interconnected VoIP providers such as TWCDP as public**
5 **utilities under state law?**

6 A22. No. In fact, that result is contrary to the public interest, to the extent it makes it more
7 difficult for providers of competitive services to enter and challenge the dominant
8 position of incumbent carriers. That is precisely why the FCC preempted state entry
9 regulation. Moreover, there are no public interest harms that would result if TWCDP is
10 not classified as a public utility. As I explained in my prefiled direct testimony, TWCDP
11 already operates consistent with the regulations that apply to competitive local exchange
12 carriers in New Hampshire and also complies with the numerous federal requirements
13 applicable to interconnected VoIP. Moreover, as a non-dominant provider, TWCDP
14 lacks market power. Thus, the interests of New Hampshire consumers are already
15 protected.

16 **Q23. In response to Ms. Wimer’s testimony, can you clarify what entity provides**
17 **TWCDP’s interconnected VoIP service at retail and what entities own the**
18 **equipment, plant, and facilities used to provide the service?**

19 A23. Yes. There seems to be some confusion in Ms. Wimer’s testimony concerning which
20 entities perform which functions in connection with TWCDP’s interconnected VoIP
21 service. Regarding the retail provider of service, TWC Digital Phone LLC (“TWCDP”),

1 a subsidiary of Time Warner Cable Inc., provides interconnected VoIP service to retail
2 consumers in New Hampshire. At one point in her testimony, Ms. Wimer correctly states
3 that “TWC Digital Phone . . . offer[s] customers the ability to make and receive calls.”
4 (Wimer at 4:7-8.) But Ms. Wimer also suggests that a single entity both (1) owns “the
5 eMTA, the HFC [hybrid fiber-coaxial] loop plant, the media gateway, and the managed
6 IP network” used to provide interconnected VoIP service, and (2) “contracts with” and
7 “effectively manages the relationship with” CRC Communications of Maine, Inc.
8 (“CRC”), which provides wholesale telecommunications used in connection with
9 TWCDP’s interconnected VoIP service. (Wimer at 23:33-24:2.) That is incorrect. There
10 is no single entity that performs all of the functions and serves all of the roles that she
11 describes. TWCDP has explained in its discovery responses which of its affiliates own
12 the equipment and plant used in connection with its interconnected VoIP service.
13 Specifically, TWCDP owns the eMTA; TWCDP’s franchised cable operator affiliate for
14 the franchise area in question (Time Warner Cable LLC, Time Warner NY Cable LLC, or
15 Time Warner Entertainment Company, L.P.) owns the coaxial cable to the node, the node
16 itself, the fiber to the cable modem termination system (“CMTS”) located at the head
17 end, and the CMTS equipment itself; and TWC Communications, LLC owns the soft
18 switch, any intermediate routers, and the Media Gateway Device. In addition, TWCDP’s
19 affiliate TWC Communications, LLC purchases wholesale telecommunications from
20 CRC. Finally, although it is not clear what facilities Ms. Wimer intends to encompass in
21 her use of the term “managed IP network,” TWCDP generally relies on IP transport
22 facilities leased from third parties.

1 Q24. **Does this conclude your testimony?**

2 A24. Yes.