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STATE OF NEW HAMPSHIRE

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PUBLIC UTILITIES COMMISSION

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4

June 24, 2009 - 10:23 a.m.
Concord, New Hampshire

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RE: DT 09-044

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NEW HAMPSHIRE TELEPHONE ASSOCIATION:
Petition for an Investigation into the
Regulatory Status of IP Enabled Voice
Telecommunications Services.
(Prehearing conference)

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PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
Commissioner Clifton C. Below

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Jody Carmody, Clerk

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APPEARANCES: Reptg. New Hampshire Telephone Association:
Frederick J. Coolbroth, Esq. (Devine...)
Patrick C. McHugh, Esq. (Devine, Millimet...)

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Reptg. Comcast Phone of New Hampshire:
Susan S. Geiger, Esq. (Orr & Reno)
Stacey L. Parker, Esq.

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Reptg. TWC Digital Voice:
Vincent Paladini, Esq.

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21

Reptg. New England Cable & Telecom. Assn.:
Robert J. Munnelly, Jr., Esq. (Murtha Cullina)

22

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COURT REPORTER: Steven E. Patnaude, LCR No. 52

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2 APPEARANCES: (C o n t i n u e d)

3 Reptg. MetroCast Cablevision of N.H.:
4 Josh Barstow5 Reptg. segTEL:
6 Jeremy Katz7 Reptg. Residential Ratepayers:
8 Stephen Eckberg
9 Office of Consumer Advocate10 Reptg. PUC Staff:
11 Robert Hunt, Esq.

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STATEMENTS OF PRELIMINARY POSITION BY:

5

Mr. Coolbroth

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Mr. Katz

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Mr. Munnelly

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Ms. Geiger

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Mr. Paladini

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Mr. Eckberg

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Mr. Hunt

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1 P R O C E E D I N G S

2 CHAIRMAN GETZ: Okay. Good morning,
3 everyone. We'll open the prehearing conference in docket
4 DT 09-044. On March 6, 2009, the rural carriers of the
5 New Hampshire Telephone Association filed a petition
6 asking that the Commission conduct a general inquiry into
7 the appropriate regulatory treatment of Internet Protocol
8 enabled voice service in New Hampshire. The RLECs
9 describe their rate of return regulation as more
10 burdensome than unregulated operations, and they assert,
11 in particular, that affiliates of Comcast offer a fixed
12 service -- voice service using Internet Protocol under the
13 name "Comcast Digital Voice". According to the RLECs,
14 Comcast contends that CDV is an information service exempt
15 from regulation by this Commission. The RLECs, however,
16 contend that CDV is not an information service and should
17 therefore be regulated pursuant to RSA 362:2.

18 We issued a Order of Notice on May 6
19 setting the prehearing conference for today. I'll note
20 for the record that we have a -- an affidavit of
21 publication has been filed. We have Notice of
22 Participation by the Office of Consumer Advocate. We have
23 an appearance filed by Comcast Phone, and Petitions to
24 Intervene by segTEL, New Hampshire Internet Service

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1 Providers Association, Union Telephone Company, Otel
2 Telekom, TWC Digital Phone, MetroCast Cablevision, and New
3 England Cable and Telecommunications Association.

4 So, can we take appearances please.

5 MR. COOLBROTH: Good morning, Mr.
6 Chairman, Commissioners. On behalf of the rural telephone
7 companies within the New Hampshire Telephone Association,
8 I'm Fred Coolbroth, from the firm of Devine, Millimet &
9 Branch. With me today are Patrick McHugh, from our firm;
10 as well as Valerie Wimer, who is a consultant with JSI;
11 William Stafford, from Granite State Telephone; and
12 Deborah Martone from TDS Telecom; and behind is Stephen
13 Nelson from the Dunbarton Telephone Company; and Michael
14 Reed, from TDS Telecom.

15 CMSR. BELOW: Good morning.

16 CMSR. MORRISON: Good morning.

17 CHAIRMAN GETZ: Good morning.

18 MR. COOLBROTH: Good morning.

19 CHAIRMAN GETZ: Other appearances?

20 MR. KATZ: Good morning. I'm Jeremy
21 Katz, the Chief Executive Officer of segTEL.

22 CHAIRMAN GETZ: Good morning.

23 CMSR. MORRISON: Good morning.

24 CMSR. BELOW: Good morning.

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1 MR. MUNNELLY: Robert Munnelly, of the
2 firm Murtha Cullina, LLP. I'm here representing the New
3 England Cable & Telecommunications Association. I should
4 also note that one of my partners is representing
5 MetroCast. He's not here today, but MetroCast does have
6 Josh Barstow from the Company here in the room.

7 CHAIRMAN GETZ: Okay. Good morning.

8 CMSR. MORRISON: Good morning.

9 CMSR. BELOW: Good morning.

10 CHAIRMAN GETZ: Others?

11 MS. GEIGER: Yes. Good morning, Mr.
12 Chairman and Commissioner Morrison and Commissioner Below.
13 Susan Geiger, from the law firm of Orr & Reno. I'm
14 appearing today on behalf of Comcast. And, with me from
15 the company are Stacey Parker and James White.

16 CHAIRMAN GETZ: Good morning.

17 CMSR. MORRISON: Good morning.

18 CMSR. BELOW: Good morning.

19 MR. PALADINI: Good morning. I'm
20 Vincent Paladini, Senior Counsel - Regulatory, from Time
21 Warner Cable, appearing on behalf of TWC Digital Phone.

22 CHAIRMAN GETZ: Good morning.

23 CMSR. MORRISON: Good morning.

24 CMSR. BELOW: Good morning.

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1 MR. ECKBERG: Good morning, Mr.
2 Chairman, Commissioners. Stephen Eckberg, for the Office
3 of Consumer Advocate.

4 CHAIRMAN GETZ: Good morning.

5 CMSR. MORRISON: Good morning.

6 CMSR. BELOW: Good morning.

7 MR. HUNT: Good morning. Rob Hunt,
8 Staff attorney, and with me Kate Bailey and Michael LaDam.

9 CMSR. MORRISON: Good morning.

10 CMSR. BELOW: Good morning.

11 CHAIRMAN GETZ: Good morning. Well,
12 before I ask whether there's any objections to any of the
13 Petitions to Intervene, Ms. Geiger, I want to just clarify
14 Comcast's position. The filing indicates an "appearance".
15 Is there any issue about whether Comcast is a mandatory
16 party or it's seeking to intervene or can you clarify just
17 what your stance is?

18 MS. GEIGER: And, Mr. Chairman, I think
19 that's a good question. Comcast read both the petition
20 and the Order of Notice as indicating that Comcast would
21 be afforded party status, and perhaps that was an error on
22 our part. But the Order of Notice specifically talks
23 about a tech session after the prehearing conference,
24 which would include Staff, Comcast, and other intervenors.

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1 So, if there is a need for us to file a
2 Petition for Intervention, I guess I'd make an oral motion
3 to that effect right now. But we interpreted the Order of
4 Notice as dispensing with that requirement.

5 CHAIRMAN GETZ: Okay. Thank you. I was
6 just concerned that perhaps events were going in the
7 opposite direction.

8 MS. GEIGER: Okay.

9 CHAIRMAN GETZ: Okay. Thank you. Well,
10 are there any objections to any of the Petitions to
11 Intervene?

12 (No verbal response)

13 CHAIRMAN GETZ: Okay. Hearing no
14 objection, and recognizing that all the Petitions to
15 Intervene assert rights, duties, privileges, or other
16 interests to be affected by the proceeding, we grant
17 intervention to all of the parties who filed Petitions to
18 Intervene, and also to Comcast, in order to preclude any
19 debate about that issue.

20 So, then, let's I guess begin with Mr.
21 Coolbroth, your statements of positions by the parties.

22 MR. COOLBROTH: Thank you, Mr. Chairman.
23 This petition arises from concerns by NHTA companies
24 regarding a system which, in their eyes, treats businesses

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1 that provide the same service very differently. Whether a
2 customer is served by one of the NHTA companies or the IP
3 affiliate of the cable company, as we see it, the same
4 service is offered. The customer picks up a telephone,
5 the customer receives a dial tone, the customer dials a
6 call to a party using telephone dial numbers, the
7 telephone of the called party rings, the called party
8 answers the telephone, and a conversation ensues. The
9 service is a wireline service. It's between fixed
10 locations, many times within New Hampshire. And, our
11 request really relates to calls that begin and terminate
12 in New Hampshire. It does not use the Internet. And,
13 based upon all of these factors, in our view, this is
14 telephone service under New Hampshire law.

15 The Commission will hear much about what
16 goes on between those two telephones, but the result is
17 the same; an analogue voice signal at each end. Now, if
18 the carrier is the customer of one of the NHTA companies,
19 then the provision of that service results in full rate of
20 return regulation. If the carrier serving the customer is
21 the IP affiliate of Comcast, for instance, right now
22 there's absolutely no regulation in New Hampshire of the
23 provision of that service. The NHTA companies are unable
24 to see the basis for the distinction. This is not

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1 computer-to-computer service, it's phone-to-phone service.
2 Looking at the two ends of the call, there's no net change
3 in protocol. The fixed cable VoIP service is not the same
4 as the service offered by Vonage or Skype or pulver.com.
5 Those companies offer an application which is provided
6 over transmission facilities that are furnished by a third
7 party, and "transmission" is the key issue here.

8 Here, the cable telephone service
9 provider provides not only the application, but they
10 provide the transmission path. So, again, in terms of the
11 service that's provided to retail end-users of cable
12 telephone VoIP service, it appears to us that that's
13 telephone service. If we're wrong, and the cable VoIP
14 service is not a telephone service, we're also asking the
15 Commission to identify what's the distinguishing feature
16 then that results in this difference in treatment. These
17 companies are building fiber. They're employing soft
18 switches. Over time, they will be using Internet Protocol
19 in their networks. They have investment decisions to
20 make, and the regulatory consequences can well affect
21 those investment choices. And, therefore, we're asking
22 the Commission to address these important regulatory
23 issues.

24 Turning to the, in summary, to the three

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1 issues outlined in the Order of Notice: These companies
2 believe that retail cable VoIP telephone service provided
3 to -- from point-to-point in New Hampshire is telephone
4 service. That the parties providing that service to the
5 retail customer are telephone utilities. And, as we see
6 it, this is not preempted by the FCC. And, again, if
7 we're wrong, we'd like to know what the difference is, so
8 that companies that are seeking to achieve parity in
9 regulatory treatment have an idea of how to go about doing
10 so.

11 So, that's our position.

12 CHAIRMAN GETZ: Okay. Thank you.

13 Mr. Katz.

14 MR. KATZ: SegTEL does not presently
15 offer Voice-over IP or use Voice-over IP for the
16 transmission over its network, even though we do provide
17 voice throughout New Hampshire. The results of this
18 docket might push us in one direction or the other on what
19 technologies we choose to employ. But, as of right now,
20 we have no position on any of the questions in the docket.

21 CHAIRMAN GETZ: Thank you.

22 Mr. Munnelly.

23 MR. MUNNELLY: Sure. NECTA has several
24 members, both in New Hampshire and other states, that

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1 offer services using IP technology. At this point, there
2 are several individual members here who are represented in
3 this case. At this point, we're monitoring the case, and
4 we will participate at some point, as appropriate.

5 CHAIRMAN GETZ: Thank you. Mr. Barstow,
6 did you want to make a statement?

7 MR. BARSTOW: I'll follow NECTA's lead.

8 CHAIRMAN GETZ: Okay. Thank you. And,
9 Ms. Geiger.

10 MS. GEIGER: Thank you, Mr. Chairman.
11 Comcast Phone of New Hampshire, LLC, appreciates the
12 opportunity to present this preliminary statement of
13 position. Comcast's affiliate, Comcast IP Phone, offers
14 interconnected VoIP service to New Hampshire customers
15 throughout the Comcast service territory. Comcast's
16 facilities pass approximately 418,000 New Hampshire homes.
17 Comcast has invested \$220 million since 2003 to expand its
18 networks and bring advanced services and competitive
19 choice to its customers. Comcast's Divisional
20 headquarters is in Manchester, New Hampshire, and its
21 1,500 employees work and live in the communities it
22 serves. It's due to the federal policies encouraging
23 broadband deployment and light regulatory touch that
24 Comcast customers are able to enjoy a broad array of

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1 advanced services and features.

2 Comcast's position in this docket can be
3 summarized as follows: First, Comcast Digital Voice and
4 Business Class Digital Voice, collectively "CDV", or
5 "Comcast Digital Voice", are Comcast's VoIP services, and
6 are information services under the Federal
7 Telecommunications Act. As such, they are subject to
8 federal regulation, but not subject to state utility
9 commission jurisdiction. Comcast IP Phone does not offer
10 any telecommunications services as defined by the federal
11 Telecom Act, nor does it offer any service that
12 constitutes the "conveyance of a telephone message" under
13 RSA 362:2. As the Commission observed, this Commission
14 has observed in Order Number 24,958, at Page 8, "CDV has
15 not been ruled a telecommunications service".
16 Accordingly, Comcast IP Phone is not a public utility
17 under New Hampshire law.

18 While the FCC has thus far declined to
19 classify interconnected VoIP as a telecommunications
20 service, it has, however, issued a series of rulings
21 imposing nationally consistent regulatory obligations on
22 all interconnected VoIP services as defined by the FCC in
23 47 C.F.R. Section 9.3. In light of the fact that the FCC
24 is continuing the process of crafting the national

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1 framework of interconnected VoIP regulation, this
2 Commission should defer further action in this docket
3 until such time as the FCC has resolved all outstanding
4 questions before it. A new administration, along with a
5 new FCC chairman, are poised to consider these important
6 issues. Premature imposition of state utility regulation
7 at this juncture will conflict with the process that's
8 underway at the FCC.

9 I'd like to speak a little further about
10 the three issues that the Commission has flagged in its
11 Order of Notice. The first point that Comcast would like
12 to make is that CDV, or Comcast Digital Voice, is an
13 information service under federal law and is not subject
14 to state jurisdiction. It qualifies as an information
15 service under the standards defined in federal case law,
16 the Telecom Act, and FCC rules. This is the case for two
17 different but related reasons. The first is that VoIP
18 services, like Comcast Digital Voice, allow for voice
19 calls to go between IP-enabled networks and traditional
20 networks, and therefore involve what the FCC has
21 identified as a "net protocol conversion". A critical
22 feature of the service is that it offers the ability to
23 transform a customer's call from the Internet Protocol on
24 CDV's network to the Time Division Multiplexing, or TDM,

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1 protocol used on the Public Switched Telephone Network,
2 and transform a call from the Public Switched Telephone
3 Network from the TDM protocol to Internet Protocol,
4 thereby allowing users of different, incompatible networks
5 to communicate with one another. The FCC has conclusively
6 determined that a service that provides such net protocol
7 conversion meets the statutory definition of an
8 "information service" under the Telecom Act.

9 Net protocol conversion is precisely the
10 type of information processing service that has been held,
11 repeatedly, to constitute an information service, and
12 serves as a paradigmatic example of the new, innovative
13 technologies that the FCC has long tried to encourage
14 through an express policy of non-regulation.

15 CDV is an information service for a
16 second, independent reason. The statutory definition of
17 "information service" also includes services that have the
18 capability of storing, retrieving, utilizing or making
19 available information via telecommunications. The
20 processing and accessing of stored data is tightly
21 integrated into the Comcast Digital Voice service. For
22 example, unlike a traditional telephone service, CDV
23 functions are part of Comcast's converged Internet
24 Protocol -- Protocol-based network that can be accessed

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1 and managed through a web interface, accessible through an
2 Internet browser, that grants users an unprecedented
3 degree of control over their voice communications,
4 including in real-time. The integration of CDV with
5 web-based features is continuing to grow as the service
6 continues to change and evolve, improvements that are
7 being made possible because CDV can take advantage of the
8 information storage and processing opportunities of
9 IP-based technology. Additionally, CDV includes querying
10 information stored in a Domain Name System, a DNS
11 database, to retrieve IP addresses for call routing. In
12 some cases, CDV calls are routed completely within CDV's
13 IP network based on a DNS look-up, making them akin to
14 peer-to-peer calls.

15 Many enhanced features are made possible
16 by the integration of voice, video and data products on
17 Comcast's converged IP network. For example, Comcast's
18 newly-launched SmartZone Communication Center is an
19 on-line application made possible through IP technology
20 that integrates Comcast's voice, data and video services.
21 Using SmartZone from any Internet connection, CDV
22 customers can send and receive e-mail; check, manage and
23 forward voice mails; manage a single address book; and
24 access personalized information about weather, news and

1 investments. Future enhancements include remote
2 programming of a customer's Digital Video Recorder.

3 Comcast has also developed an enhanced
4 cordless telephone that is compatible with CDV and
5 integrated with SmartZone. CDV customers will be able to
6 use this phone to check e-mail, view/forward and manage
7 voice mail from the phone or PC, read news, access a
8 universal address book and search the Yellow Pages, as
9 well as placing calls. The ECT is in market trials today
10 and Comcast plans on launching it in New Hampshire in
11 2009. Finally, in a few short weeks, New Hampshire
12 customers will be able to enjoy Comcast's Universal Caller
13 ID, which enables Caller ID information to be viewed on
14 televisions and PCs simultaneously. All of these
15 integrated features and functionalities demonstrate the
16 vast differences between Comcast's CDV and "plain old
17 telephone service", or "POTS", over which this Commission
18 has jurisdiction.

19 These dynamic new features are precisely
20 the type of information that federal policy aims to
21 encourage through non-regulation of information services,
22 and highlight why it would be contrary to that policy of
23 non-regulation to hamper the growth and development of
24 such services by subjecting them to a patchwork of

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1 state-by-state regulations designed for traditional
2 telephone systems. For all of these reasons, as an
3 information service, CDV is not subject to state
4 regulatory jurisdiction.

5 In addition, because CDV is an
6 information service, it doesn't fit within the state
7 definition of a service that constitutes the conveyance of
8 a telephone message. Comcast IP Phone is providing CDV,
9 and, as I've indicated, it's an information service. It's
10 not commensurate with conveying "telephone messages" as
11 that term is used in RSA 362:2. The statutory criteria
12 for determining whether an entity is a public utility
13 subject to this Commission's regulatory authority are:
14 The ownership, operation or management of plant and
15 equipment used for the conveyance of telephone messages.
16 As I've explained, Comcast IP Phone provides only an
17 information service to end-users. It, therefore, is not a
18 public utility under 362:2. As the New Hampshire Supreme
19 Court has held in the Omni Communications case, in
20 enacting RSA 362:2, the Legislature did not intend to
21 place all businesses somehow related to telephone
22 companies under the umbrella of the PUC's regulatory
23 power. Comcast and others have been offering VoIP service
24 in New Hampshire for years without any action by the

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1 Legislature indicating that such services should be
2 regulated. Accordingly, there is no basis for this
3 Commission to broadly construe RSA 362:2 to regulate new
4 information services such as VoIP or the entities that
5 provide them.

6 The last issue raised in the
7 Commission's Order of Notice deals with preemption.
8 Comcast's third point here is that VoIP's status as an
9 information service under present law resolves this
10 question in the Commission's May 6th Order of Notice.
11 Under current law firm, it's clear that state utility
12 regulation is impermissible for services that qualify as
13 "information services" due to the clear federal policy of
14 encouraging competition in such services, including in
15 particular broadband-based services through
16 non-regulation. Indeed, this Commission implicitly
17 recognized in its May 6th Order of Notice that it cannot
18 subject CDV to utility regulation if it's an information
19 service, and that the Commission's regulatory jurisdiction
20 here turns on this particular classification.

21 Finally, as mentioned earlier, this is
22 an issue that belongs at the FCC and is currently being
23 decided there. The FCC has been issuing a string of
24 orders about the regulatory issues surrounding VoIP

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1 services, and the exact question that the Petitioners
2 would have this Commission decide, the appropriate
3 regulatory treatment of VoIP, is before the FCC right now.
4 Indeed, just a few weeks ago, the FCC issued a public
5 letter to Comcast reaffirming that the statutory
6 classification of "Voice over Internet Protocol Services"
7 is "an open question under active consideration", and
8 emphasizing that the FCC has multiple open dockets in
9 which it is grappling with these complex and important
10 open questions regarding the treatment of VoIP services.

11 Comcast would ask the Commission to
12 consider that the FCC is developing a national framework
13 for VoIP issues. The FCC has been developing an extensive
14 record on these issues and will set the national
15 regulatory framework for VoIP services. If this
16 Commission were to prematurely establish a separate set of
17 rules for VoIP in New Hampshire, the Commission's decision
18 would most likely have to be reconsidered or modified when
19 the FCC issues its decisions. It, therefore, would not be
20 a prudent use of this Commission's limited time and
21 resources to engage in a protracted proceeding to decide
22 these questions now. Instead, the more appropriate course
23 of action is to respect the primary jurisdiction of the
24 FCC and defer consideration of the petition until the FCC

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1 has ruled.

2 Also, from a consumer protection
3 standpoint, there's no reason for this Commission to rush
4 to decide these issues before the FCC has had a chance to
5 do so. It's noteworthy that the Rural Carriers' petition
6 here makes no allegations that regulation is necessary to
7 protect consumers. Comcast has been offering CDV in New
8 Hampshire since 2005, with significant benefit to
9 consumers. In fact, based on a recent study, cable based
10 VoIP has saved New Hampshire residential customers
11 \$61 million in 2007 alone, and it's projected to save
12 \$533 million for residential and small business customers
13 through 2012. CDV's presence in New Hampshire -- in New
14 Hampshire's market has enhanced competition, provided
15 benefits to consumers, and has furthered the policy of
16 encouraging broadband deployment. Comcast voluntarily
17 pays all state-based regulatory taxes and fees for CDV,
18 and, unlike the Petitioners, is not a universal service
19 fund recipient. Thus, there's no adverse financial effect
20 upon the state arising from the present regulatory status
21 of CDV services.

22 Significantly, as this Commission
23 recently recognized in approving Comcast's CLEC
24 application to offer service in the Petitioners' service

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1 areas, the fact that VoIP services are not regulated by
2 this Commission is not, despite the Petitioners' repeated
3 protestations to the contrary, unfair to ILECs or harmful
4 to competition. In the Commission's own words, the
5 current non-state regulation of facilities-based VoIP
6 "does not impact the fairness of Comcast's entry into the
7 TDS Companies' territories, because we have found that
8 both regulated and unregulated services already contribute
9 to the competitive market."

10 In sum, CDV is an information service
11 and is not subject to state regulatory jurisdiction. CDV
12 and other types of competitive VoIP services have
13 flourished in a national deregulatory movement, bringing
14 with them customer choice, enhanced services and spurring
15 broadband deployment. The regulatory framework governing
16 interconnected VoIP services, like Comcast Digital Voice,
17 is being decided by the FCC, so there is no compelling
18 reason to impose a patchwork of traditional telephone
19 regulation on a state-by-state basis or for this
20 Commission to rush into the regulatory regime urged by the
21 Petitioners. Thank you.

22 CHAIRMAN GETZ: Thank you.

23 Mr. Paladini.

24 MR. PALADINI: Yes. Similar to

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1 Cablevision, Time Warner Cable appreciates this
2 opportunity to present its positions to the Commission.
3 This proceeding broadly encompasses a variety of issues
4 relating to the status of interconnected Voice over
5 Internet Protocol Services in New Hampshire. As a
6 provider of facilities-based interconnected VoIP services
7 in this state, Time Warner Cable will be affected by the
8 outcome of this proceeding. Time Warner Cable's
9 interconnected VoIP service for residential subscribers is
10 branded as "Digital Phone", and its service for commercial
11 subscribers is "Business Class Phone". These services are
12 interconnected VoIP services as defined by the FCC,
13 because they (1) enable real-time two-way voices
14 communications; (2) require use of a broadband connection;
15 (3) use IP-compatible customer premises equipment; and (4)
16 permit users to generally receive calls that originate
17 from the Public Switched Telephone Network and to
18 terminate calls to the PSTN.

19 TWC obtains interconnection and other
20 wholesale telecommunications services from a separate
21 entity that is authorized to do business in New Hampshire
22 as a public utility, enabling Time Warner Cable customers
23 to communicate with users served by the PSTN. In
24 connection with our residential and commercial

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1 interconnected VoIP offerings, although the FCC has
2 preempted state jurisdiction, TWC pays the regulatory fees
3 and assessments in response to consumer complaints and
4 cooperates with the Commission and Staff, information
5 requests, including providing detailed real-time outage
6 information, such as during last year's ice storm.

7 The Commission's decisions regarding the
8 regulatory classification and treatment of
9 facilities-based VoIP services, as well as preemption
10 issues, will directly and substantially impact Time Warner
11 Cable's operations in New Hampshire, just as they will
12 impact Comcast or any other similar provider.

13 But to lay out our four positions:
14 First, in relation to its VoIP services, TWC cannot
15 reasonably be clarified as a "public utility" under state
16 law. As counsel for Comcast has mentioned, a public
17 utility includes a corporation that owns, operates or
18 manages any plant or equipment or any part of the same for
19 the conveyance of telephone and telegraph messages. The
20 Legislature could not have intended for this language to
21 encompass VoIP, which did not exist during the monopoly
22 era when the statute was enacted. And, the New Hampshire
23 Supreme Court has ruled, in response to similar questions
24 that arose in the context of radio paging, that the

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1 Legislature did not intend to place all companies and
2 businesses that are somehow related to telephone companies
3 under the PUC's regulatory power.

4 Our second item is federal law precludes
5 the Commission from subjecting Time Warner Cable to public
6 utility requirements because it provides interconnected
7 VoIP services. The FCC's Vonage order established that
8 interconnected VoIP services, including those provided by
9 Time Warner Cable, are not subject to regulation by state
10 public utility commissions. With that ruling, the FCC
11 sought to establish a uniform national regulatory
12 framework that is free from economic regulations and to
13 avoid patchwork regulation of VoIP services. The Vonage
14 order concluded that subjecting such VoIP services to
15 state certification and tariff requirements would conflict
16 with and frustrate federal support for increased market
17 entry by non-dominant service providers.

18 The FCC made clear that its preemption
19 analysis, which I've already described, applies to all
20 interconnected VoIP services, including facilities-based
21 interconnected VoIP services provided by cable companies.
22 Also, the FCC's preemption analysis does not exclude VoIP
23 services that are functionally similar to traditional
24 local exchange and long distance voice service.

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1 Time Warner Cable is entitled to reply
2 on a separate carrier to obtain wholesale
3 telecommunications services. Time Warner Cable obtains
4 interconnection and other wholesale telecommunications
5 services from a separate certified CLEC. And, the RLECs
6 are wrong to claim that this kind of arrangement is not
7 contemplated by the federal Telecom Act. To the contrary,
8 the FCC has specifically and repeatedly endorsed this type
9 of arrangement, highlighting that it is an effective means
10 for interfacing with PSTN, provisioning E-911, and
11 enabling local number portability. The D.C. Circuit has
12 also confirmed the interconnection rights of wholesale
13 carriers that provide such wholesale and
14 telecommunications services to affiliated and unaffiliated
15 VoIP service providers.

16 Finally, the Commission should not seek
17 to impose interLATA -- intraLATA access charges on VoIP
18 calls. The RLECs state that VoIP calls that traverse an
19 RLEC's local calling area should be subject to intraLATA
20 access charges. As a practical matter, the Commission
21 should not attempt to address this question. The
22 intercarrier compensation rulings -- rules applicable to
23 interconnected VoIP calls are an open issue in ongoing FCC
24 proceedings. And, in any event, the wholesale carriers,

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1 from which Time Warner Cable obtains interconnection
2 services to transmit calls from Time Warner Cable's
3 customers and pay intercarrier compensation in the same
4 manner that applies to traditional telephone calls.

5 In closing, I'd like to say that Time
6 Warner Cable looks forward to working with the Commission
7 on this proceeding, and believes that the Commission
8 should take its time to develop the factual record and
9 allow the parties to brief the legal issues based on that
10 record. Thank you.

11 CHAIRMAN GETZ: Thank you. Mr. Eckberg.

12 MR. ECKBERG: Thank you, Mr. Chairman.
13 The OCA has no initial position to articulate in this
14 docket. We are generally interested in matters that are
15 raised by NHTA's petition, as well as issues related to
16 the variety of telecom and information services that are
17 offered throughout the state.

18 We look forward to participating in this
19 docket with the parties. And, that's all we have at the
20 moment.

21 CHAIRMAN GETZ: Thank you. Mr. Hunt.

22 MR. HUNT: Thank you, Mr. Chairman.
23 Staff's position is that the Commission has jurisdiction
24 pursuant to 374:3 to make a determination of the issues in

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1 this docket, and that federal law does not preempt such a
2 determination. The FCC has not clearly indicated that it
3 intends to exclude states from determining whether
4 particular services are telecommunications or information
5 services, or whether the provision of a particular service
6 establishes a company as a public utility subject to state
7 regulation. Staff takes no position on the other two
8 issues outlined.

9 CHAIRMAN GETZ: Thank you. Well, let me
10 start here, because it seems we've got -- we may run into
11 a number of procedural issues. I'll give you an
12 opportunity to respond, Mr. Coolbroth, and we may go
13 further than that. But, Ms. Geiger, the assertion that
14 "this issue is currently being decided, it's an open
15 question under active consideration at the FCC", and that,
16 I guess, constitutes the basis for your request that we
17 defer consideration. I guess I'd like to see, you know,
18 the documents that you're citing to, if we can get copies
19 of those.

20 MS. GEIGER: May I approach?

21 CHAIRMAN GETZ: Please.

22 MS. GEIGER: Yes, Mr. Chairman. This is
23 the letter that I was speaking about in our preliminary
24 position of statement. It's a letter from the FCC to

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1 Comcast. And, if you'll note, in the footnotes appearing
2 at the bottom of the pages of that letter, there are
3 several dockets referenced, all of which deal with issues
4 relating to matters associated with VoIP. So, those are
5 the dockets that we were alluding to, in terms of pending
6 matters at the FCC that will have a bearing on the issues
7 that have been raised by the Petitioners in this docket.

8 CHAIRMAN GETZ: Mr. Coolbroth, you're
9 familiar with this letter or would you like an opportunity
10 to respond?

11 MR. COOLBROTH: Mr. Chairman, I'm seeing
12 the letter for the first time. But I think that there is
13 so much uncertainty about the timing of FCC action that
14 it's difficult to see when this docket would ever go
15 forward. And, I would cite, for example, the length of
16 time it has taken the FCC to deal with intercarrier
17 compensation. The time that the -- I read today, the
18 latest FCC brief that has been filed in the D.C. Circuit
19 relating to the issue of how to treat internet-bound calls
20 that use a dial-up modem, that issue has not been
21 resolved. I think it seems inappropriate to try to wait.
22 I think it would simply stall and delay the resolution of
23 this important issue. So, I don't think that the
24 Commission should stay.

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1 In addition, the, you know, the utility
2 statutes remain in effect. They require prior Commission
3 approval, not subsequent Commission approval, but prior
4 Commission approval to offer a utility service. This
5 service is ongoing. It seems to us, that it's, as a
6 matter of regulatory policy, important for the Commission
7 to address this issue.

8 I did want to say one thing relating to
9 the -- I just don't know quite how the Commission should
10 take the issue about the location of Comcast's
11 headquarters in New Hampshire. I'm not quite sure what
12 Comcast was trying to say. That is irrelevant to the
13 legal issue, if it was to apply some sort of inappropriate
14 pressure, I think it was a very inappropriate comment to
15 make. In response, I would point out that these rural
16 telephone companies have histories that go back over 100
17 years in New Hampshire. Their contribution to New
18 Hampshire, to its telecommunications infrastructure, and
19 to its communities just goes back for over a century.
20 And, I think perhaps that's adequate response.

21 I think that the Commission has heard
22 that there are a number of factual and legal questions
23 that are involved here. Certainly, there will need to,
24 and certainly a point with which I agree with Time Warner,

1 there needs to be an appropriate way to develop a factual
2 record and have parties brief the issues to the
3 Commission. That's what we're asking for, and I think we
4 should go forward.

5 CHAIRMAN GETZ: Well, I wanted to
6 inquire about Mr. Paladini's remark about the factual
7 record and then briefing. Is this something that's, and
8 I'm thinking procedurally, is this something that could be
9 susceptible to stipulations of fact or is this going to
10 have to be a full-blown adjudicative process? Do you have
11 any thoughts on how to proceed in that matter?

12 MR. COOLBROTH: I think we could take
13 that up in a technical session. There are some issues
14 that lend themselves I think to agreement; there are some
15 issues that won't. But I think a general process to
16 present the Commission with a factual record, and perhaps
17 simultaneous presentations of briefs on the legal issues
18 raised by that would be something that could be worked out
19 in technical session. I think an inquiry-type approach is
20 appropriate, an appropriate way to do this, because this
21 is sort of a generic issue, I think.

22 CHAIRMAN GETZ: Then, let me just throw
23 it open then and go around the room, because I want to
24 address procedural issues and make sure we've got all of

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1 the procedural arguments on the record before we make any
2 decisions.

3 Anyone else want to address any of these
4 procedural issues? Ms. Geiger.

5 MS. GEIGER: Yes, Mr. Chairman. By way
6 of clarification, Comcast was not suggesting an indefinite
7 stay of this docket until such time as the FCC might act
8 well into the future. To clarify, I think we'd be willing
9 to allow or to suggest that the Commission give the FCC a
10 period of time to act, perhaps by the end of the year, the
11 next six months or so, now that a new chairman is coming
12 on board, give them an opportunity to resolve some of
13 these outstanding dockets, perhaps schedule a status
14 conference in January. And, if nothing has happened at
15 that point in time, then we can all sit down here and
16 hammer out a procedural schedule for the duration of the
17 docket.

18 We just think there are too many open
19 issues at the FCC that will have a bearing on things that
20 this Commission is being asked to decide. And, it doesn't
21 make sense to move ahead now and develop a full-blown
22 factual record right now, with briefs, etcetera, to only
23 have the FCC issue some decision that's dispositive and
24 that up-ends all the work that we've done. So, we think

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1 that it makes sense, for some limited period of time, for
2 the next six months or so, that the Commission wait to see
3 what happens at the FCC, and then convene a status
4 conference of the parties in January of next year to
5 address the fact that the FCC has not ruled yet, if that's
6 the case, and then work out a procedural schedule for the
7 duration of this docket.

8 CHAIRMAN GETZ: Okay. Anyone else want
9 to address those issues? Give you the last chance, Mr.
10 Coolbroth, then.

11 MR. COOLBROTH: Mr. Chairman, I just
12 might point out that there are ongoing proceedings very
13 much like this in both Maine and Vermont, and those have
14 not been stayed pending FCC action.

15 CHAIRMAN GETZ: Okay. You also, Mr.
16 Coolbroth, mentioned something about "conducting this in
17 the matter of an inquiry". Are there any issues I should
18 be concerned about? Are there any debates about burden of
19 proof, burden of persuasion, burden of going forward that
20 we're going to have to deal with? Or you won't know until
21 you've sat down in a technical session and talked to all
22 the parties?

23 MR. COOLBROTH: I think we can try to
24 work that out in technical session. To the extent that

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1 those issues are a problem, we are willing to take on the
2 burden of proof. If the only way parties think that this
3 can be handled is through an adjudicative process, we're
4 willing to take that on. We don't think so. We think
5 that a process to provide for discovery, either statements
6 of fact or presentations of factual issues through
7 witnesses, if there are contested factual issues,
8 opportunities for cross-examination, and simultaneous
9 briefing, in the nature of an investigation, promptly
10 handled with the Staff at the center of it, with the
11 Commission Staff at the center. If that's problematic, as
12 I say, we're willing to do it the other way and to take on
13 the burden of petitioner and pursue it to conclusion.

14 (Chairman Getz, Commissioner Morrison
15 and Commissioner Below conferring.)

16 CHAIRMAN GETZ: We're going to take a
17 short recess to address some of these issues, and we'll
18 return shortly.

19 (Whereupon a recess was taken at 11:04
20 a.m. and the prehearing conference
21 resumed at 11:17 a.m.)

22 CHAIRMAN GETZ: Okay. We're back on the
23 record in 09-044. I will address first the request that
24 we defer consideration pending FCC action on cases before

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1 it. And, for our purposes today, we do not find that
2 there are sufficient assurances that the FCC will rule on
3 open proceedings before it in the near future. So, we
4 would proceed with the technical session today and ask the
5 parties to propose a procedural schedule. I'm not going
6 to try and micromanage that schedule at this point, give
7 the parties an opportunity to see if you can come to some
8 agreement about what such a procedural schedule would look
9 like. But we will note that, to the extent that the FCC
10 takes any action in the near future that indicates or
11 would provide us some assurance that they would act on
12 these issues pending before it in such a way that might
13 preempt our consideration of the issues, then, of course,
14 we would entertain any information or filings about such
15 activities from any of the parties.

16 So, I think that addresses all of the
17 open procedural issues we have before us. But, before we
18 close the prehearing conference and the parties tend to
19 the technical session, are there any other issues that we
20 need to address today?

21 (No verbal response)

22 CHAIRMAN GETZ: Okay. Hearing nothing,
23 then we will close the prehearing conference and await a
24 recommendation of the parties as to a procedural schedule

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1 in this docket. Thank you, everyone.

2 (Whereupon the prehearing conference
3 ended at 11:19 a.m. and the PUC Staff
4 and the Parties convened a technical
5 session thereafter.)

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