

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

OPENING BRIEF OF COMCAST PHONE OF NEW HAMPSHIRE, LLC

AND ITS AFFILIATES

January 15, 2010

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INTRODUCTION AND SUMMARY

Comcast Phone of New Hampshire, LLC, on behalf of itself and its affiliates (collectively “Comcast”), through its undersigned counsel, respectfully submits this Opening Brief in the above-captioned docket.

The Commission’s May 6, 2009 Order of Notice in this matter raised the questions of whether Comcast Digital Voice (“CDV”)¹, a fixed interconnected voice over internet protocol (“VoIP”) service, constitutes the “conveyance of a telephone message” under RSA 362:2 and whether the Comcast entity providing CDV service is a “public utility” under New Hampshire law. Order of Notice (May 6, 2009) at 1-2. Respectfully, the answer to both of these questions is “no.” The legislature enacting this language in 1911 could not have intended it to cover services like CDV, and equally important, New Hampshire law should be read in a manner consistent with federal law. The Federal Communications Commission (“FCC”) and the federal courts have repeatedly made clear that subjecting “information service” providers to state public utility regulation is in direct conflict with federal policies. As detailed below, CDV meets two fundamental characteristics of the federal law definition of “information service.”² Therefore, the answer to the Commission’s third question, which addresses federal preemption, is that the Commission is preempted from regulating CDV and the Comcast affiliate that provides the service.

RSA 362:2 does not define the term “telephone message.” But there is nothing to suggest that the legislature intended to regulate a new technology such as VoIP, which did not exist at the time the statute was enacted, and which differs significantly from traditionally regulated

¹ Comcast also provides a comparable service, “Business Class Voice,” to business customers. Given the technical and regulatory similarity between the services, Comcast will refer to both its residential and business services together as “CDV” for purposes of this Brief.

² See 47 U.S.C. § 153(20).

telephone service (Plain Old Telephone Service, or “POTS”). Reading New Hampshire law to subject VoIP carriers to public utility regulation would put New Hampshire on a crash course with nearly thirty years of express federal policy deregulating “information services,” such as VoIP, which act upon information (such as by information processing, transformation, or storage and retrieval) instead of merely transmitting it. The Commission should interpret New Hampshire law to be harmonious with this federal deregulatory scheme.

VoIP services such as Comcast CDV are subject to exclusive federal regulation. A trio of federal cases have now held that “interconnected” VoIP carriers, *i.e.* VoIP carriers that permit customers to make and receive calls to users of the Public Switched Telephone Network (“PSTN”), are “information services” under the federal Communications Act.³ As such, they may not be subjected to state public utility regulation. Petitioners may dislike that they now face real competition from facilities-based providers who have availed themselves of the possibilities created by new technology and by the federal policy of deregulation. But those policies have brought massive benefits to consumers, including consumers in New Hampshire, in the form of lower prices and enhanced communications options that were unavailable as recently as a few years ago. The Commission should decline Petitioners’ invitation to assert regulatory authority that is contrary to federal law and policy, and does not further the public interest.

I. BACKGROUND

Comcast is the largest provider of cable television services in the United States.⁴ Over the past dozen years, encouraged by federal policies promoting the deployment of broadband

³ Interconnected VoIP services include both “fixed” services, in which customers cannot move their service geographically without the active participation of the provider, and “nomadic” services, which allow customers to unilaterally change their service locations. For business and policy reasons, Comcast provides CDV as a fixed service. *See Prefiled Direct Testimony of David J. Kowolenko and Beth Choroser*, at 21-22 (October 9, 2009) (“*Kowolenko & Choroser Direct Testimony*”).

⁴ *Kowolenko & Choroser Direct Testimony* at 4.

services through a deregulatory environment, Comcast has invested billions of dollars to build a state-of-the-art network capable of providing a variety of advanced services that utilize Internet Protocol (“IP”), including high-speed Internet access service (often called “cable modem” service) and, even more recently, its Comcast Digital Voice and Business Class Voice (collectively “CDV”) interconnected VoIP services.⁵ Comcast first launched its CDV service in 2005, its BCV service in 2007, and now serves seven million customers nationwide.⁶ Comcast’s CDV customers are generally Comcast cable television (“video”) or High-Speed Internet (“HSI”) subscribers who have added on CDV service as part of a “bundle” with one or both of those services. In New Hampshire, Comcast’s video and HSI services are provided through Comcast’s local cable affiliates (which are not regulated by this Commission), and CDV is provided by Comcast IP Phone II, LLC (“Comcast IP Phone”), a separate Comcast affiliate.⁷

A. How CDV Works.

On the surface, CDV bears some similarities in user experience to traditional POTS services, such as those offered by the Petitioners.⁸ For instance, CDV assigns its users 10-digit North American Numbering Plan Administration (“NANPA”)-conforming numbers, and its users can use traditional handsets – or, as described below, with HomePoint™ digital handsets – to place and receive voice calls to and from other CDV users, users of the PSTN, and users of other IP (including VoIP) services.⁹ When utilizing the CDV service, customers hear dial and ring tones similar to those they would hear using POTS.¹⁰

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 5-9.

⁸ *Id.* at 24-25.

⁹ *Id.* at 16.

¹⁰ *Id.* at 24-25.

These similarities, however, are superficial. CDV is remarkably different from POTS in both the user experience and the underlying network technology. And it is becoming more so as Comcast continues to add new features. With respect to the user experience, CDV includes numerous communications features beyond the ability to place and receive voice calls with a handset.¹¹ For example, via the Internet, CDV customers anywhere in the world can: check CDV voice mail messages and forward them via email; review call logs; enable call-forwarding; modify service features; obtain billing information; and perform a variety of functions unavailable through traditional telephone services.¹² Caller ID information for incoming calls can be simultaneously displayed on users' computers and television screens.¹³ Using a mobile phone, iPod Touch, or iPhone, CDV customers can interact with their CDV service, including reviewing call logs, listening to voicemails, synching contact lists, directly returning calls, and directly responding to callers to their CDV numbers via text message.¹⁴ Other features are currently being launched in other markets, including Comcast's new "HomePoint™" service. HomePoint™ uses a cordless, digital home handset device (with a color LCD screen) which permits CDV users to check email, access call and phone directories (and click to dial phone numbers), and access several Internet functionalities.¹⁵ With the appropriate service offering, HomePoint™ users will also be able to send and receive text messages from their CDV handsets.¹⁶ Comcast expects to begin offering HomePoint™ in New Hampshire this year.¹⁷

¹¹ *Id.* at 24-27.

¹² *Id.* at 25-27.

¹³ *Id.*; see also *Prefiled Reply Testimony of David J. Kowolenko*, at 5 (December 4, 2009) ("*Kowolenko Reply Testimony*").

¹⁴ *Kowolenko & Choroser Direct Testimony* at 25-27; see also *Kowolenko Reply Testimony* at 5-6.

¹⁵ *Kowolenko Reply Testimony* at 6.

¹⁶ *Id.*

¹⁷ *Id.*

The underlying technology used to operate the network and enable these calling features is quite different for CDV than for POTS providers, both inside the customer's premises and on the network itself. CDV requires specialized customer premises equipment ("CPE"), specifically an embedded multimedia terminal adapter ("eMTA"),¹⁸ which also doubles as the cable modem for users who purchase Comcast's High-Speed Internet ("HSI") service.¹⁹ Customers currently rent the eMTA from Comcast and in the near future will also have the option to purchase the eMTA.²⁰ The eMTA is located inside the customer's premises. Instead of connecting their inside wiring to the Comcast network, customers connect their inside wiring (or directly connect their handset) to the eMTA.²¹ The eMTA is in turn connected to coaxial cable that meets Comcast's network at a demarcation point located outside the customer's premises.²² When the customer uses a traditional analog phone, the eMTA formats outgoing calls from an analog electric signal into IP, and formats incoming calls (which Comcast delivers to customers in IP) from IP into an analog electrical signal for the handset.²³ This reformatting does not convert the protocol of the calls.²⁴

CDV's network also works differently than the POTS network/PSTN. Calls from CDV users enter Comcast's network (at the demarcation point outside the customer's residence) in IP, and calls to CDV customers must also terminate (at the same demarcation point) in IP.²⁵ Although some POTS providers use IP to transport calls within their own networks, they

¹⁸ Kowolenko Reply Testimony at 7-8.

¹⁹ Kowolenko & Choroser Direct Testimony at 17.

²⁰ *Id.*; see also Kowolenko Reply Testimony at 7.

²¹ See Kowolenko & Choroser Direct Testimony at 18 n.13; see also Comcast Response to Staff Data Request No. 1-2.

²² Kowolenko & Choroser Direct Testimony at 18.

²³ *Id.* at 17-18.

²⁴ Kowolenko Reply Testimony at 10-11.

²⁵ Kowolenko & Choroser Direct Testimony at 17-18.

interconnect and carry calls to and from end-users in a different protocol known as Time Division Multiplexing (“TDM”).²⁶ Therefore, in order to offer its users the ability to place and receive calls to and from PSTN users, CDV’s network must convert both outgoing and incoming calls to and from PSTN users between IP and TDM protocols, a technical step it conducts using software and hardware at a “Media Gateway” (in the case of New Hampshire, the relevant media gateway is located in Chelmsford, MA).²⁷ This is known as a “protocol conversion”²⁸; the capability to conduct such protocol conversions is a critical component of what makes CDV an information service.

After CDV converts outgoing calls from IP to TDM, Comcast’s regulated telephone affiliate, Comcast Phone of New Hampshire, LLC (“Comcast Phone”), a CLEC, carries the calls in TDM to interconnect with the PSTN.²⁹ In New Hampshire, this interconnection is with FairPoint.³⁰ Comcast Phone also performs the same function in reverse for incoming calls from the PSTN, accepting such calls in TDM from FairPoint at the interconnection point and transporting the calls in TDM to Comcast’s media gateway, where CDV converts the calls to IP for delivery to CDV end-use customers.³¹

²⁶ Kowolenko Reply Testimony at 2-3, 10-12.

²⁷ Kowolenko & Choroser Direct Testimony at 19-20.

²⁸ “Protocols” are “the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages.” *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 97 n.33 (1980), *aff’d sub nom. Computer and Computer Indus. Ass’n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982); see also Kowolenko Reply Testimony at 10-11 (quoting NEWTON’S TELECOM DICTIONARY).

²⁹ Kowolenko & Choroser Direct Testimony at 20.

³⁰ *Id.*

³¹ *Id.*

B. The Regulatory Regime Governing VoIP Services.

Comcast Phone's telecommunications and local exchange carrier service offerings are regulated by the states, including this Commission.³² As an information service, Comcast IP Phone's CDV service, on the other hand, has been subject exclusively to federal, rather than state, regulation. When interconnected VoIP services were first introduced to the public more than six years ago, the federal courts enjoined efforts by state utility commissions to subject VoIP providers to regulation as public utilities, holding that such services were "information services" under federal law and therefore not subject to state regulation. *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) ("*Vonage v. Minnesota PUC*") and *Vonage Holdings Corp. v. New York Public Serv. Comm'n*, No. 04-Civ.-4306 (DFE), 2004 WL 3398572, Preliminary Injunction Order (S.D.N.Y. July 16, 2004) ("*Vonage v. NYPSC*") (discussed below); *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005).

Following these injunctions by the federal courts, the FCC later explicitly preempted state regulation of so-called "nomadic" interconnected VoIP providers (i.e. VoIP providers where customers are not restricted to making calls from a fixed location). *See In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order*, 19 FCC Rcd 22404 (2004) ("*Vonage Preemption Order*"), *aff'd sub nom. Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). In the *Vonage Preemption Order*, the FCC did not decide whether interconnected VoIP providers are "telecommunications services" subject to joint federal-state regulation or

³² For instance, Comcast Phone, on behalf of its customers (including Comcast IP) pays the utility assessment under RSA 363-A, based on end-user revenues, and remits TRS fees to the Trust Fund Administrator on behalf of Comcast IP. *See Kowolenko & Choroser Direct Testimony* at 12-13.

deregulated “information services” under federal law. Instead, the FCC resolved the case on the more limited basis that state regulation of nomadic VoIP providers would inevitably conflict with the federal policy of deregulation. *Vonage Preemption Order*, 19 FCC Rcd at 22419, ¶ 24. The FCC also stated, however, that were a case brought before it involving comparable interconnected VoIP services offered by “cable companies,” it would similarly preempt state regulation. *Id.* at 22424, ¶ 32.

In lieu of piecemeal state-by-state regulation, the FCC has taken the lead in ensuring a uniform national framework for interconnected VoIP carriers (both nomadic and fixed), using federal regulation to implement consumer protections and further other public interest objectives, while at the same time ensuring that the development and deployment of interconnected VoIP service is not frustrated by the burden of trying to comply with fifty different sets of disparate state regulations. The FCC has issued regulations defining and governing “interconnected VoIP service[s]”³³ and has issued multiple orders promulgating uniform, national regulations applicable to such providers, including universal service fund contributions, CALEA requirements, CPNI regulations, TRS contributions, E911 requirements, and number porting obligations.³⁴ Pursuant to these regulations, Comcast IP contributes to the federal universal

³³ See 47 C.F.R. § 9.3. Comcast is an “interconnected VoIP service” under the federal regulatory definition. Customers access the service using the same broadband connection over which Comcast provides cable modem service; special IP-compatible customer premises equipment (“CPE”) is required; and CDV provides customers with the means of engaging in “real-time, two-way voice communications,” including the ability to receive and place calls to the PSTN. See *Kowolenko & Choroser Direct Testimony* at 8.

³⁴ See *In re Telephone Number Requirements for IP-Enabled Service Providers*, Report and Order, Declaratory Ruling, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19540, ¶ 16 (2007) (number portability); *IP-Enabled Services*, Report and Order, 22 FCC Rcd 11275, 11283-91, ¶¶ 16-30 (2007) (TRS contributions), *petition for partial waiver granted*, *In re IP-Enabled Services*, 22 FCC Rcd 18319 (2007) (waiving requirement that relay center to which 711 calls are transmitted be appropriate relay center); *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary*

service fund,³⁵ and complied with other requirements such as E-911 standards, number portability, CALEA, and CPNI safeguards before the FCC issued mandates.³⁶

These FCC decisions have reflected a conscious policy to encourage rapid, national entry by VoIP providers, and this policy has proved to be one of the agency's greatest successes in effectuating the pro-competitive objectives of the Telecommunications Act of 1996 ("1996 Act"). Nationally, CDV now has more than seven million customers. What makes this success especially impressive is that it has come during a period when other wireline voice service providers are increasingly losing customers to mobile phone providers and other competitors. A significant reason for this success is the fact that CDV is not subject to disparate regulatory obligations around the country. The uniform national deregulatory treatment of VoIP has enabled Comcast to roll-out its services quickly around the country, which has benefited consumers enormously. Indeed, VoIP offerings from competitive providers such as Comcast saved New Hampshire consumers nearly \$62 million in 2007, and saved consumers approximately \$13 billion over the same period nationally.³⁷

Network Information and Other Customer Information, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6954-57, ¶¶ 54-59 (2007) (regulations governing use of CPNI); *In re Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-43, ¶¶ 38-48 (2006), *aff'd in part, vacated in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007) (USF contributions); *In re IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10246, ¶¶ 1-2 (2005), *aff'd sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006) (E911 requirements); *In re Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14991-92, ¶ 8 (2005) (CALEA requirements).

³⁵ *Kowolenko & Choroser Direct Testimony* at 9.

³⁶ *Id.*

³⁷ See Michael D. Pelcovits and Daniel E. Haar, Microeconomic Consulting and Research Associates, Inc., *Consumer Benefits from Cable-Telco Competition*, Nov. 2007, at 34 (attached as Exhibit 1 to *Kowolenko & Choroser Direct Testimony*), available at http://micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf. A substantial

These consumer savings and benefits would be imperiled if this Commission and other state commissions now tried to remove one of the key ingredients that made VoIP's success possible – a uniform national regulatory structure. Below, we explain that the Commission cannot lawfully impose telephone utility regulation on CDV under New Hampshire or federal law. But even if the Commission believed it *could* impose such regulation, it still *should* not, in order to preserve the enormous competitive, financial and technological benefits that VoIP services bring to New Hampshire consumers. The Commission has recognized that different competitive service offerings have “varying degrees of regulation, including cellular phone service, intralata and interlata toll service, video service, high speed data service and VoIP services.” *Comcast Phone of New Hampshire Application for Authority to Serve Customers in the TDS Service Territories*, DT 08-013, Order No. 24,938 (February 6, 2009) at 19. The Commission has also found that both regulated and unregulated services contribute to the competitive market, *id.*, and that encouragement of competition is state and national policy. *Id.* at 20. The Commission should act consistently with that policy and determine that CDV should not be subject to the Commission's regulatory authority.

II. CDV IS NOT THE “CONVEYANCE OF A TELEPHONE MESSAGE” UNDER RSA 362:2, AND THUS COMCAST IS NOT A PUBLIC UTILITY.

The Commission should conclude that CDV service does not constitute the “conveyance of telephone . . . messages” within the meaning of RSA 362:2, and therefore the Comcast entity providing CDV (i.e. Comcast IP Phone II, LLC) is not a public utility subject to the Commission's regulatory authority. CDV satisfies neither the common nor specialized meanings of the term “telephone,” and such an interpretation of New Hampshire law would unnecessarily conflict with federal law and policy.

portion of these savings result from the lower prices and aggressive promotions offered by the incumbent carriers in response to competitive pressure from VoIP services.

RSA 362:2 does not define “telephone” or “telephone messages.” However, pursuant to RSA 21:2, those terms must be construed according to their “common and approved usage,” or, to the extent they are technical words or have acquired a “peculiar and appropriate meaning in law,” they must be construed and understood according to such peculiar and appropriate meaning. *Id.* CDV is not the “conveyance of telephone . . . messages” under either test.

First, under the “common and approved usage” test, the term “conveyance of telephone . . . messages” should be understood in the context of the service that existed at the time RSA 362:2 was enacted in 1911.³⁸ Statutory language means what it meant to its framers; the mere repassage of the language at various times since 1911 does not alter the original meaning intended by legislature when it first enacted RSA 362:2. *See In re Sarvela*, 154 N.H. 426, 430 (2006). The service contemplated by the enacting legislature, and over which the Commission has now had long-standing regulatory authority, is known as “plain old telephone service” or “POTS.” Although CDV may share superficial similarities with POTS, it is a very different service, both from a network perspective and a user experience perspective, from the “conveyance of telephone . . . messages” that existed at the time the legislature enacted RSA 362:2. *See Kowolenko & Choroser Direct Testimony* at 14-17, and *Kowolenko Reply Testimony* at 5-6. As discussed below, CDV does more than just enable the type of voice communications that comprise POTS: CDV offers the capability to transform the protocol in which calls are transmitted and provides a series of enhanced communications features that augment and complement the calling features. *See infra* Part III.B.2. Such features are not offered as part of POTS and certainly were not envisioned by the legislature when it set out in 1911 to regulate

³⁸ The circumstances under which a statute was enacted are properly considered in connection with the words of the statute in order to ascertain the intention of the legislature. *See Am. Motorists’ Ins. Co. v. Central Garage*, 86 N.H. 362, 370 (1933).

“the conveyance of telephone . . . messages.” This even holds true today. Newton’s Telecom Dictionary, long considered the industry standard for determining the common and approved usage of telecommunications terminology, expressly defines a “telephone” in a manner that would exclude CDV, as, *inter alia*, providing a “dial tone [that] actually comes from the central office, not the phone.”³⁹ This is not the case with respect to CDV, where the dial tone is generated by the eMTA.⁴⁰ And the common usage of the term “telephone” would certainly not extend to enhanced devices such as CDV’s HomePoint™ service, which, as discussed above, uses a color LCD screen from which the CDV customer can do much more than merely place and receive voice calls (e.g., the customer can check email, access Internet functionalities, and, with the appropriate service offering, send and receive text messages).

CDV also does not qualify as the “conveyance of telephone . . . messages” under the “peculiar and appropriate meaning in law” test. *Cf.* RSA 21:2. The term should be understood as commensurate with federal law’s definition of “telecommunications service” – the regulatory classification that has long applied to the type of telephone service regulated by this Commission.⁴¹ As discussed below, under federal law, the technical differences between VoIP and POTS prevent CDV from being classified as a “telecommunications service” at all. *See infra* Part III. There is no reason to think that the legislature intended for RSA 362:2 to conflict with federal law by encompassing “information service[s]”,⁴² which are not subject to the same regulatory regime.

³⁹ NEWTON’S TELECOM DICTIONARY 1103 (25th ed. 2009).

⁴⁰ *See Prefiled Reply Testimony of Beth Choroser*, at 9-10 (December 4, 2009) (“*Choroser Reply Testimony*”).

⁴¹ *See* 47 U.S.C. § 153(46).

⁴² *See* 47 U.S.C. § 153(20).

The New Hampshire Supreme Court has emphasized that the Commission's authority is circumscribed and does not cover services beyond those contemplated by the legislature. As that Court held in rejecting the Commission's authority to regulate mobile paging companies, "the legislature did not intend [through RSA 362:2] to place all companies and businesses somehow related to railroads, telephone, telegraph, light, heat, and power companies under the umbrella of the PUC's regulatory power." *Appeal of Omni Commc'ns, Inc.*, 122 N.H. 860, 863 (1982). Rather, as the Supreme Court held, the statute should be limited to the types of services the legislature intended to cover, with sensitivity to the need for regulation by the Commission. *Id.*

Here, not only is it clear that, as discussed above, the legislature did not intend (and could not have intended) the Commission to regulate VoIP services like CDV, there is no need for such regulation. Comcast Phone is regulated by this Commission as a CLEC,⁴³ files rate schedules with the Commission, posts on Comcast's website the services it provides in New Hampshire which include, *inter alia*, a product designed to serve schools and libraries and another designed for small businesses,⁴⁴ and offers a wholesale Local Interconnection Service in New Hampshire to interconnected VOIP providers (the same service utilized by CDV). Comcast Phone also pays local exchange carriers ("LECs") reciprocal compensation for traffic originated by Comcast IP Phone that terminates within local exchange calling areas or mandatory extended local service areas,⁴⁵ and, for non-local traffic originated by Comcast IP Phone, pays intrastate or interstate terminating switched access charges.⁴⁶ Comcast IP Phone – in accordance with federal regulations – provides Enhanced 911 and Telecommunications Relay Service ("TRS"),⁴⁷ pays

⁴³ See *Kowolenko & Choroser Direct Testimony* at 6 n.1.

⁴⁴ *Id.* at 5-6 & n.1.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ *Id.* at 12.

the required 911 fees to the State of New Hampshire, and Comcast Phone remits TRS fees to the Trust Fund Administrator on behalf of Comcast IP Phone.⁴⁸ Comcast IP Phone collects and remits the New Hampshire Communications Service Tax pursuant to RSA 82-A for its CDV service.⁴⁹ Comcast Phone, on behalf of its customers (including Comcast IP Phone) also pays the utility assessment to the Commission under RSA 363-A, based on end-user revenues.⁵⁰

Finally, Comcast works closely and cooperatively with the Staff of the Commission's Telecommunications and Consumer Affairs Divisions to assure that customer complaints or escalations are handled appropriately and works diligently to resolve matters to the customers' and Staff's satisfaction.⁵¹ Accordingly, just as the New Hampshire Supreme Court held in *Omni Communications*, 122 N.H. at 864, that RSA 362:2 should not be extended to wireless pagers because, *inter alia*, "[n]o need apparently exists for the PUC directly to regulate radio-paging services," as "the Federal Communications Commission, through its authority over radio frequencies, has regulatory power over the radio-paging companies that increasingly are involved in interstate commerce," *id.*, the Commission should not extend the meaning of the term "conveyance of telephone . . . messages" to Interconnected VoIP services because "no need . . . exists" for the Commission to make such an extension.

Here, as in *Omni Communications*, the FCC "has regulatory power over" VoIP providers and has exercised it accordingly, thereby obviating the need for state regulation. *See supra* n.34. This Commission has expressly recognized that competitive, unregulated VoIP offerings such as CDV "are consistent with the state and federal policies we are bound to promote and are not unfair to the ILECs." *Comcast Phone of New Hampshire Application For Authority to Serve*

⁴⁸ *Id.* at 13.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 12.

Customers In The TDS Service Territories, DT 08-013, Order No. 24,938 (February 6, 2009) at 19. Consistent with that holding, and for the reasons stated above, the Commission should hold that interconnected VoIP services such as CDV does not constitute the “conveyance of telephone . . . messages” within the meaning of RSA 362:2, and that the Comcast entity providing CDV is not subject to regulation as a public utility under New Hampshire law.

III. CDV IS NOT SUBJECT TO STATE UTILITY REGULATION BECAUSE IT IS AN INFORMATION SERVICE.

Even assuming, *arguendo*, that the Commission did have authority under state law to regulate CDV, any such authority is preempted by longstanding federal law prohibiting states from regulating “information services.” As the discussion below demonstrates, the plain terms of the federal Communications Act establish that CDV is an information service. The federal courts have clearly and repeatedly held that interconnected VoIP providers, such as Comcast IP Phone, are providing information services, and have enjoined state regulation of VoIP providers as public utilities on that basis. The Commission can resolve this proceeding on that ground alone.

A. Federal Law Preempts State Regulation of Information Services.

The Communications Act defines and distinguishes between two sets of services that use telecommunications: “telecommunications services,” such as traditional telephone service, and “information services,” defined as the “offering of a capability for storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” See 47 U.S.C. § 153(20) and (46). To encourage innovation in the information services market, and recognizing that the market for information services is essentially competitive, the FCC has held that Congress intended “the two categories be separate and distinct, and that information service providers not be subject to telecommunications regulation.” *In re Federal-State Joint Board on*

Universal Service, Report to Congress, 13 FCC Rcd 11501, 11523, ¶ 43 (1998). The federal courts have recognized and upheld that “[t]he FCC has promoted a market-oriented policy of allowing providers of information services to ‘burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.’” *Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d at 580 (citing *Vonage Preemption Order*, 19 FCC Rcd 22404, 22416, ¶ 24)).⁵² Accordingly “any state regulation of an information service conflicts with the federal policy of nonregulation.” *Id.*; accord *Vonage v. Minnesota PUC*, 290 F. Supp. 2d at 1002 (“[state] regulations that have the effect of regulating information services are in conflict with federal law and must be preempted”).

The express federal preemption of state regulation of information services is longstanding. The FCC first preempted states from regulating information services nearly thirty years ago and the preemption has been upheld by the federal courts. See, e.g., *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 88 FCC Rcd 512, ¶ 83 n.34 (1981) (finding that “the provision of enhanced service is not a common carrier public offering and that efficient utilization and full exploitation of the interstate telecommunications network would be best achieved if these services are free from public utility-type regulation,” and accordingly “pre-empted the states [from] impos[ing] common carrier tariff regulation on a carrier’s provision of enhanced services”), *aff’d sub nom. Computer and Computer Indus. Ass’n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982); see also *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994) (“*California v. FCC*”) (finding that the FCC had

⁵² See also *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802-03, ¶ 9 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d sub nom. National Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (“*Brand X*”).

demonstrated that legitimate “regulatory goals . . . would be negated” by conflicting state regulation of information services).⁵³

Therefore, because CDV is an information service under federal law, as is demonstrated below, state public utility regulation and entry requirements are in plain conflict with the express federal policy of nonregulation and are preempted under existing law. *See Vonage v. Minnesota PUC*, 290 F. Supp. 2d at 1002.

B. CDV Is An Information Service Because It Offers The Capability For Information Processing, Transformation, Storage, and Retrieval.

The regulatory category of “information service” – originally known as “enhanced service” – was at first an FCC creation. But Congress has since adopted the separate regulatory classification and treatment of information services and embodied it in federal law. *See* 47 U.S.C. § 153(20). The Communications Act defines an information service as an “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing making available information via telecommunications.” *Id.* CDV squarely meets this statutory definition for two independent reasons. First, CDV offers the capability to conduct “net protocol conversions” of data by transforming calls between IP and TDM, which is a “capability” to “process” and “transform” information “via telecommunications.” *Id.* Second, CDV consists of an ever-expanding series of enhanced IP-enabled communications features that augment and complement its calling features, which are “capabilit[ies]” for “generating, acquiring, storing . . . retrieving, utilizing, [and] making available” information “via telecommunications.” *Id.* Either

⁵³ At the time, the services were known as “enhanced services” rather than “information services”; the FCC has since made clear that Congress’ use of the term “information services” at 47 U.S.C. § 153(20) was meant to include all “enhanced services.” *See, e.g., In re Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, First Report and Order, 11 FCC Rcd 21905, 21956, ¶ 102 (1997) (“*Non-Accounting Safeguards Order*”).

of these reasons alone suffices to qualify CDV as an information service under the federal statutory definition.

1. CDV Is An “Offering of a Capability” For “Transforming” And “Processing” Information By Performing Net Protocol Conversion.

A trio of federal cases have held that interconnected VoIP services, like Comcast CDV, are “information services” because they offer the capability for transforming the net protocol in which calls are transmitted between IP and TDM and vice versa. *See Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055 (E.D. Mo. Sept. 14, 2006) (“*Southwestern Bell v. Missouri PSC*”), *aff’d*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009); *Vonage v. Minnesota PUC*, 290 F. Supp. 2d at 999; *Vonage v. NYPSC*, 2004 WL 3398572 at *1 (citing with approval *Vonage v. Minnesota PUC*). Comcast is not aware of any federal authority to the contrary.

The reasoning of these cases is based on the plain language of the Communications Act, and is dispositive of the issue here. An information service offers the “capability for . . . transforming” or “processing” information, 47 U.S.C. § 153(20), unlike a “telecommunications service,” in which information is transmitted “without change in the form or content of the information as sent and received.” *Id.* § 153(43), (46). CDV offers customers the “capability” for changing the “form” of incoming or outgoing calls by “processing” and “transforming” the protocol of the call – the manner in which the call is represented by the information transmitted on, and understood by, the network.⁵⁴ To complete a call between a CDV customer and a PSTN customer, CDV will transform the call from TDM to IP, or vice versa.⁵⁵ This protocol

⁵⁴ *See Second Computer Inquiry*, 77 F.C.C.2d 384, ¶ 97 n.33 (defining “[p]rotocols” as “the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages.”).

⁵⁵ *See Direct Testimony of David J. Kowolenko & Beth Choroser* at 23-24.

conversion is a crucial element of CDV. It is the technical solution that allows Comcast's users to communicate with users of the PSTN, on which calls interconnect, originate, and terminate in TDM rather than in IP.⁵⁶

The Eastern District of Missouri's analysis in *Southwestern Bell Telephone v. Missouri PSC*, 461 F. Supp. 2d at 1081-83, is squarely on point. As that court recognized, under longstanding FCC precedent, "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service" because it constitutes the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" and "alters the form and content of the information sent and received." 461 F. Supp. 2d at 1081-82 (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21956-57, ¶¶ 104-106; 47 U.S.C. § 153(20)); and *In re Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538, ¶ 39 (2006)).⁵⁷ Therefore, "IP-PSTN traffic," which enters the network in Internet Protocol ("IP") and terminates on the PSTN, is an "information service." 461 F. Supp. 2d at 1082. The Court in *Vonage v. Minnesota PUC* reached the identical conclusion, holding that interconnected VoIP carriers "act on the format and protocol of the information" for calls they carry, thus making the service an information service under federal law. *See* 290 F. Supp. 2d at 999 (internal citation omitted). The Southern District of New York similarly cited with approval the *Vonage v. Minnesota PUC* court's reasoning in preliminarily enjoining the New York Public Service Commission from regulating an interconnected VoIP carrier as a public utility. *See Vonage v. NYPSC*, 2004 WL 3398572 at *1. As these cases recognize, the plain language of the

⁵⁶ *Id.* at 23.

⁵⁷ *See also generally In re Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 F.C.C.2d 584 (1983).

Communications Act conclusively resolves that interconnected VoIP providers offer an information service.

Moreover, although Petitioners have sought to distinguish CDV – which customers use from fixed locations – from the so-called “nomadic” interconnected VoIP addressed in the FCC’s *Vonage Preemption Order*, any distinction between fixed and nomadic services is irrelevant to the information service determination. The *Southwestern Bell v. Missouri PSC*, *Vonage v. Minnesota PUC*, and *Vonage v. New York PSC* decisions are based entirely on the protocol-conversion capability of VoIP, which is common to both fixed and nomadic interconnected VoIP providers. See *Southwestern Bell*, 461 F. Supp. 2d at 1081-83; *Vonage v. Minnesota PUC*, 290 F. Supp. 2d at 999; *Vonage v. NYPSC*, 2004 WL 3398572 at *1 (citing *Vonage v. Minnesota PUC*). Put differently, the scope of preemption provided by the FCC’s decision in the *Vonage Preemption Order*, which Petitioners have argued about at length, is irrelevant to preemption based on the information service determination. The *Vonage Preemption Order* made clear, however, that a finding that interconnected VoIP is an information service would necessarily mean that state public utility regulation of interconnected VoIP is preempted: “if [interconnected VoIP] were to be classified as an information service, it would be subject to the Commission’s long-standing national policy of nonregulation of information services.” *Vonage Preemption Order*, 19 FCC Rcd 22404, 22416, ¶ 21. The *Vonage Preemption Order* never reached the question, and was ultimately decided on entirely different grounds. See *id.* at 22419, ¶ 24; see also *infra* pages 32-34.

Notwithstanding this straightforward authority, Petitioners have attempted to evade the plain language of the Communications Act based on two different arguments. First, Petitioners have suggested that the federal courts that have addressed the question have been mistaken, and

that there is no “net” protocol conversion involved in interconnected VoIP services because there is an electric analog signal, and ultimately a human voice, on both the originating and terminating ends of a VoIP call. *See, e.g. Prefiled Direct Testimony of Valerie Wimer*, at 18-19 (October 9, 2009) (“*Wimer Direct Testimony*”). Second, Petitioners have asserted that Comcast is not providing an information service with respect to the subset of calls on Comcast’s network that are between its own customers, and therefore remain in IP without being transformed to TDM. *See, e.g.,* March 6, 2009 Petition ¶ 11 (stating that the RLECs “believe” that “there is no net change in protocol” in calls between CDV customers and RLEC customers). We address these arguments in turn below.

i. Net Protocol Conversion Does Not Require Alteration Of The Transmitted Content.

In their testimony, Petitioners’ witnesses have taken the position that the seamless interoperation of Comcast’s network with the PSTN means that there is no “net” protocol conversion, since calls both begin and eventually end as an analog voice signal. *See Prefiled Reply Testimony of Duncan Meredith and Valerie Wimer*, at 11 (December 4, 2009) (“*Meredith & Wimer Reply Testimony*”) (contending that “there is no change in protocol” because “the call originates and terminates in an analog voice format”).

This argument was flatly rejected in *Southwestern Bell v. Missouri PSC*. As that court held, “[i]t does not matter that there is a ‘voice’ at both ends of an IP-PSTN call.” 461 F. Supp. 2d at 1082 n.21. Petitioners’ argument repeats the fallacy that there is no “transformation” of the user’s information when the content being transmitted (i.e. “voice”) remains the same. But the FCC addressed, and rejected, that exact argument in the *Non-Accounting Safeguards Order*, where Bell Atlantic argued that the information service designation should be limited to services “that transform or process the content of information transmitted by an end-user,” and not to

protocol processing services that leave the content of the transmission unchanged. *See* 11 FCC Rcd 21905, 21956, ¶ 104. The FCC disagreed, holding that it does not matter that the *content* of a transmission remains unchanged, because “the statutory definition makes no reference to the term ‘content,’ but requires only that an information service transform or process ‘information.’” *Id.* Therefore, the FCC held, “both protocol conversion and protocol processing services are information services” whether they change the content of the user’s information or not. *Id.*

Petitioners misunderstand the concept of a net protocol conversion, which the FCC has defined as one that enables “an end-user to send information into a network in one protocol and have it exit the network in a different protocol” and thereby “clearly ‘transforms’ user information.” *Id.* A service offers and performs net protocol conversion if a net protocol conversion is performed *by the network*. Petitioners’ exclusive focus on the customer handsets, *see Meredith & Wimer Reply Testimony* at 11, not only lacks legal support, it is nonsensical. Changes to the format of information that occur before the information enters a carrier’s network, or after it leaves it, are not performed by the carrier and thus cannot logically be part of the carrier’s “offering.” But Petitioners’ approach would make the question of whether a service offers net protocol conversion (and hence the carrier’s regulatory status) dependent upon what *others* do with the information before it has entered or after it has exited the information service provider’s network.⁵⁸

Rather, as the FCC held in the *Non-Accounting Safeguards Order*, one considers the point where an “end-user send[s] information into the network” and the point where the information “exit[s] the network.” *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21956, ¶ 104. As the court held in straightforward fashion in *Southwestern Bell v. Missouri*

⁵⁸ *See Kowolenko Reply Testimony* at 12-13.

PSC, there is a “net protocol conversion” where “[t]he communication originates at the caller’s location in IP protocol, undergoes a net change in form and content when it is transformed at the [provider’s] switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient’s location in TDM.” *Southwestern Bell v. Missouri PSC*, 461 F. Supp. 2d at 1082 (citing *Vonage v. Minnesota PUC*, 290 F. Supp. 2d at 1000). That is precisely what CDV does. Outgoing calls enter Comcast’s network in IP, at the demarcation point between the provider’s network and the customer’s home wiring.⁵⁹ When those calls are bound for the PSTN, they exit CDV’s network after being converted from Internet protocol to TDM protocol, and are handed off to Comcast IP Phone’s CLEC partner.⁶⁰ Based on those end points, CDV plainly performs a net protocol conversion for calls bound to, or from, the PSTN; in fact it performs it at a specific media gateway facility in Chelmsford, Massachusetts.⁶¹ Outgoing calls enter Comcast’s network in IP and leave it in TDM. Incoming calls from the PSTN do the opposite. That is a net protocol conversion.

It is true that CDV customers’ CPE generally reformats the IP signal into an analog electrical signal (at the eMTA) and from an analog signal into human voice (at the handset).⁶² But that reformatting itself is not a protocol conversion, as mere electric and analog signals, or sounds, are not “protocols” under the FCC or standard industry definitions.⁶³ Moreover, that

⁵⁹ See 47 C.F.R. § 76.5(mm)(1); *Kowolenko and Choroser Direct Testimony* at 18; *Choroser Reply Testimony* at 4.

⁶⁰ *Kowolenko and Choroser Direct Testimony* at 19-20.

⁶¹ *Id.* at 19-20.

⁶² *Id.* at 17-18.

⁶³ See *Kowolenko Reply Testimony* at 10-11; see also *Second Computer Inquiry*, 77 F.C.C.2d 384, ¶ 97 n.33 (defining protocols as “the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages”).

reformatting is not performed on or by the CDV network. What customers' CPE does has nothing to do with whether the CDV service is performing a net protocol conversion.

The FCC's Order in *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) ("*IP-in-the-Middle Order*") is instructive. In the *IP-in-the-Middle Order*, the FCC addressed whether telecommunications carriers would be considered information services if they converted calls from TDM to IP, transmitted the calls in IP, and then converted them back to TDM again for termination. Unsurprisingly, the answer was "no" – where protocol conversion is used only within the network for purposes of transit, the FCC held, the customer is not being offered any capability for transforming the form of the information; the protocol conversion is not "net" protocol conversion. See *IP-in-the-Middle Order*, 19 FCC Rcd 7457, 7465, ¶¶ 12-13. If Petitioners' approach were correct, the FCC would not even have needed to discuss this issue. Voice callers using analog telephones were on both ends of the calls, which for Petitioners, is the end of the story. Of course, the FCC did not see the issue that way, focusing instead on the fact that AT&T changed the protocol back to the one in which it received it "*within its network.*" *Id.* at 7465, ¶ 12. Unlike AT&T's service, CDV converts the protocol once, and does not convert calls back to the original protocol before delivering them. CDV uses protocol conversion to enable "communicat[ion] between networks that employ[] different data-transmission formats" – the paradigmatic information service under the FCC's rules. See *Brand X*, 545 U.S. at 968.

ii. CDV Is An Offering Of The *Capability* For Protocol Conversion Irrespective Of Whether That Capability Is Invoked In Every Call.

It is irrelevant that not every single CDV call undergoes a net protocol conversion. It is inevitable that CDV customers will sometimes call one another and that such calls will stay on Comcast's network without the protocol change that occurs when CDV customers call customers

that are not on Comcast's network. From there, however, Petitioners erroneously leap to the argument that "Comcast . . . [is] providing a telecommunications service for these calls" because there is no need for Comcast to convert a call to TDM if it is staying on its network. *Meredith & Wimer Reply Testimony* at 11-12. This argument fails because it ignores the plain text of the Communications Act. An information service is the "offering of a capability for . . . transforming, [or] processing . . . information via telecommunications." 47 U.S.C. § 153(20) (emphasis added). The statute contains no requirement that the offered capability be exercised every single time the service is used. An Internet user might use his or her broadband connection to transfer a file without invoking any other functionalities, but that does not cause the user's broadband Internet service – the paradigmatic information service – to suddenly turn into a separate telecommunications service for purpose of the file transfer, then revert back to an information service as soon as the user invokes other abilities, such as visiting a web page. Similarly, although CDV users may place some calls that are IP-to-IP, that does not make CDV any less of an "offering of a capability" for converting the call protocol, nor should it require Comcast to split the CDV service into separate plans for calling PSTN users and for calling other CDV customers.

As the FCC has held and the Supreme Court has affirmed, the regulatory status of a service "turns on the nature of the functions the end user is offered," and not on each individual element contained within the offering. *Brand X*, 545 U.S. at 988 (quotation marks omitted). The focus is on whether the elements are "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering." *Id.* at 990. That is plainly the case with respect to CDV customers' ability to place calls to PSTN users and to other CDV customers. It would be nonsensical for Comcast to offer the latter as a standalone service. It

would be unmarketable and unviable. Callers do not typically know which providers are used by the parties they are calling. They would have no way of knowing whom they could call using a CDV service lacking protocol conversion capability, and whom they could not. The entire point of CDV's offering the *capability* for protocol conversion is to relieve callers of this difficulty by interconnecting its network with the PSTN seamlessly. The ability to place and receive calls irrespective of the network being used by the other caller is plainly a "single, integrated offering," *id.*, which relies on the "capability" to convert the call protocol wherever necessary to accomplish the goal of allowing customers to call whomever they wish, without having to worry about which network the called party is using.⁶⁴

2. CDV Is An "Offering of a Capability" For "Generating, Acquiring, Storing . . . Retrieving, Utilizing, [and] Making Available" Information Through Enhanced Communications Services.

In addition to the protocol conversion capability, CDV is also an information service because its calling capability is integrated with other computing and information service functions as a single offering. As discussed *supra*, where information service features are integrated with transmission features as part of the same service offering, and "sufficiently integrated with the finished service to make it reasonable to describe the two as a single,

⁶⁴ Moreover, although IP-to-IP calls do not themselves undergo net protocol conversion, such calls are nonetheless information service elements in their own right. To direct such calls, Comcast must take the IP addresses for each customer's eMTA and cross-reference them to databases that match those IP addresses to NANPA-conforming ten-digit numbers Comcast assigns to each customer to make the CDV service feel more familiar, even though CDV does not route calls based on NANPA numbers. See *Kowolenko and Choroser Direct Testimony* at 16-17. IP-to-IP calls, therefore, involve the "retrieving" and "utilizing . . . information via telecommunications," 47 U.S.C. § 153(20), and are therefore themselves information service elements. See *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798, 4821-22, ¶¶ 37-38; *Brand X*, 545 U.S. at 999-1000. The FCC has previously found an IP-to-IP VoIP service to be an information service where one of the functions the service offered to users was "determining . . . the recipient member's Internet address" for purposes of routing IP-to-IP VoIP calls. See *In re Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3313-14 ¶ 11 (2004).

integrated offering,” the combined service will be considered an information service, notwithstanding the presence of telecommunications elements. *Brand X*, 545 U.S. at 990; see also *Southwestern Bell v. Missouri PSC*, 461 F. Supp. 2d at 1082-83 (information and telecommunications aspects of VoIP are treated as the same service so long as they are “sufficiently intertwined”).

CDV offers communications abilities and features that go far beyond the mere ability to place and receive calls. As described *supra*, CDV combines communications features that use the Internet, television, mobile handsets, iPods and iPhones in conjunction with the user’s voice connection, and which permit users to access and act upon their communications information, including their calling information, in a variety of ways from multiple devices. See *supra* p. 4. These advanced communications features, moreover, are not static, but continue to evolve as Comcast rolls out new products and features, such as the HomePoint™ device and associated service enhancements. See *supra* p. 4. The ever-growing list of communication features – which Comcast is able to offer because of the IP-enabled nature of its service – are plainly information services under the statutory definition, as they enable consumers to store, manage, and utilize information, in addition to simply transmitting it. 47 U.S.C. § 153(20). Moreover, they easily meet the requirement that they be “sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering,” *Brand X*, 545 U.S. at 990, and “intertwined” with its calling features. *Southwestern Bell*, 461 F. Supp. 2d at 1082-83.

Petitioners have claimed that Comcast is doing nothing more than “bundl[ing] an information service with basic exchange service to avoid regulation,” as though Comcast had done nothing more than priced a package of voicemail with POTS. See *Meredith & Wimer Reply Testimony* at 8-9. That is simply wrong. CDV offers a unified communications platform

the customer can use to communicate and access information in a manner that transcends either their location or the communications device which they are using at any given time. Callers can send and receive information and access their calls and information across a variety of platforms – phone, Internet, video, mobile handset, iPod, or iPhone – in a manner completely foreign to the experience of using POTS. The calling ability is an input that is “part and parcel” of this information service and “integral to . . . [the service’s] other capabilities.” *See Brand X*, 454 U.S. at 997 (quotation marks omitted). As the FCC recognized in the *Vonage Preemption Order* (although it ultimately decided the case on other grounds), where another VoIP provider provided substantially similar features to those offered by CDV, they formed a “suite of integrated capabilities and features” and “[t]hese functionalities in all their combinations form an integrated communications service.” *Vonage Preemption Order*, 19 FCC Rcd 22404, 22407, 22419-20, ¶¶ 7, 25; *see also generally id.* 22420, ¶ 25 (holding that Vonage should not be required to change its VoIP service to accommodate state regulation because “[r]ather than encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, molding this new service into the same old familiar shape”). CDV’s integration of comparable enhanced features thus satisfies the statutory requirement that CDV be an “offering of the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20).

3. The Absence Of A Regulatory Classification of VoIP By The FCC Is Irrelevant.

Petitioners, as well as the Office of Consumer Advocate, have also made much of the fact that the FCC has not yet itself issued an interpretation of 47 U.S.C. 153(20) classifying interconnected VoIP as an information service. *See, e.g., Meredith Direct Testimony* at 9

(arguing that “FCC action . . . has not addressed a fixed VoIP service”), *see also* Letter from Rorie E.P. Hollenberg to Debra Howland (Jan. 12, 2010) (citing recent FCC Order noting that “the Commission has not yet determined the regulatory classification of interconnected VoIP”). But the absence of FCC action is irrelevant to the question of whether CDV qualifies under federal law as an information service that cannot be regulated by state utility commissions. Whether or not something is an “information service” turns on whether it meets the definition in 47 U.S.C. § 153(20). The FCC has authority to administer the Act, but federal statutes do not cease to exist pending interpretation by the responsible agencies. The law does not “require[] a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists” for preemption purposes. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000). In fact, the New Hampshire Supreme Court has itself on more than one occasion recognized that federal law preempts conflicting action by this Commission, even in the absence of a specific federal agency directive. *See, e.g., Appeal of Conservation Law Foundation*, 147 N.H. 89, 95 (N.H. 2001) (finding state law “preempted, either explicitly or implicitly, by federal law” due to conflict with federal regulatory scheme); *Appeal of Sinclair Machine Productions*, 126 N.H. 822, 830 (N.H. 1985) (finding state law preempted where application would frustrate federal regulatory scheme).

In the absence of FCC guidance, tribunals like this Commission, whose decisions require interpretation of a federal statute, must apply and interpret the statute based on the statutory text and other applicable means of statutory interpretation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (if “Congress has not directly addressed the precise question at issue,” it is “necessary in the absence of an administrative interpretation” for the tribunal to reach “its own construction on the statute.”); *Southwestern Bell*,

461 F. Supp. 2d at 1077 (“[a]lthough the FCC has not yet issued regulations addressing VoIP, existing rules and orders establish how VoIP and other IP services should be treated in the interim”); *Comcast IP Phone of Mo., LLC v. Missouri Pub. Serv. Comm’n*, No. 06-4233-CV-C-NLK, 2007 WL 172359, at *4 (W.D. Mo. Jan. 18, 2007) (holding that state public utility commission could decide regulatory classification of interconnected VoIP under the Communications Act because “unless . . . faced with a contrary decision from a relevant federal agency, a state agency may interpret a federal statute and apply its dictates”).⁶⁵ Indeed, as the FCC recently directed the Texas Public Utilities Commission, to the extent there are regulatory issues surrounding VoIP the FCC has not yet addressed and which state commissions must resolve to carry out their responsibilities, state commissions should proceed to decide them in the interim “relying on existing law.”⁶⁶ Here, for the reasons stated, “existing law” requires this Commission to recognize that CDV is an information service not subject to state regulation.

IV. STATE UTILITY REGULATION OF CDV WOULD FRUSTRATE FEDERAL POLICY WITH RESPECT TO IP-ENABLED SERVICES.

Even if CDV were not an information service, state utility regulation of CDV would undermine and conflict with federal policies promoting deployment of advanced broadband and IP-enabled services through a national policy of deregulation. In Section 230 of the 1996 Act, Congress found that “interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation,” and directed that in order “to promote [this] continued development,” it would be the “policy of the United States” to maintain such

⁶⁵ The court in *Comcast IP Phone of Missouri, LLC v. Missouri Public Service Comm’n* was not itself presented with, and was not asked to decide, the regulatory status of VoIP. See 2007 WL 172359, at *1.

⁶⁶ *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).

services “unfettered by Federal *or State* regulation.”⁶⁷ Similarly, Section 706 of the Act directs the FCC to “promote competition in the local telecommunications market” and remove “barriers to infrastructure investment.”⁶⁸ CDV is precisely the sort of service covered by these dual policies, and state-by-state public utility regulation would impermissibly conflict with Congress’ goals.

Such a conflict exists irrespective of whether CDV is classified as an information service or as a telecommunications service. As the FCC held in the *Vonage Preemption Order*, “section 230 is indifferent to the statutory classification of services that may ‘promote its continued development,’” and “plainly embraces” interconnected VoIP. *Vonage Preemption Order*, 19 FCC Rcd 22404, 22425-26, ¶ 34. “[I]rrespective of the statutory classification of [interconnected VoIP], it is embraced by Congress’s policy to ‘promote the continued development’ and ‘preserve the vibrant and competitive free market’ for these types of services.”⁶⁹ Therefore, state regulation of interconnected VoIP services, “[r]egardless of the definitional classification . . . under the Communications Act . . . directly conflicts with our pro-competitive deregulatory rules and policies. . . .” *Id.* at 22415, ¶ 20.

The FCC has made clear that IP-enabled services such as VoIP must be permitted to develop free of state utilities regulation, explaining that “IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services.”⁷⁰ To that end, the FCC declared that its “aim” is to “rely[] wherever possible on competition” rather than regulation to foster IP-

⁶⁷ 47 U.S.C. §§ 230(a)(4), (b) (emphasis added).

⁶⁸ 47 U.S.C. § 1302(a).

⁶⁹ *Id.* (quoting 47 U.S.C. § 230(b)(1), (2) (emphasis added by FCC)).

⁷⁰ *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4867, ¶ 5 (2004).

enabled technologies such as VoIP because “these services are fast-changing and likely to evolve in ways that we cannot anticipate,” and “imposition of regulatory mandates, particularly those that impose technical mandates, should be undertaken with caution.”⁷¹ The FCC has thus acted to eliminate specific barriers to the development and availability of VoIP technology where it has encountered them, such as by holding that wholesale telecommunications providers carrying VoIP traffic enjoy interconnection rights, because, among other reasons, doing so “advance[s] the Commission’s goals in promoting facilities-based competition as well as broadband deployment.”⁷²

The clearest statement of federal policy is of course the *Vonage Preemption Order* itself, in which the FCC “ma[de] clear that th[e] Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice [Vonage’s VoIP service] and other IP-enabled services having the same capabilities.” 19 FCC Rcd 22404, 22405, ¶ 1. In the *Vonage Preemption Order*, the FCC preempted state utility regulation of nomadic VoIP services, holding that “[r]egardless of the definitional classification of [Vonage’s VoIP service] under the Communications Act,” the imposition of state common carrier regulations “directly conflicts with our pro-competitive deregulatory rules and policies.” *Id.* at 22415, ¶ 20. Since the *Vonage Preemption Order* arose in the context of an adjudication concerning a specific attempt by Minnesota to regulate a nomadic VoIP provider, the FCC did not purport in that Order to issue final industry-wide rules governing the regulatory status of all

⁷¹ 19 FCC Rcd 4863, 4867, 4894, ¶¶ 5, 53. New enhanced features being introduced by Comcast, such as the HomePoint™ service, prove accurate the FCC’s prediction that IP-enabled services such as VoIP are “fast-changing.”

⁷² *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3519, ¶ 13 (2007).

VoIP providers. Nevertheless, the *Vonage Preemption Order* stands as a clear statement of federal policy: that state regulation of interconnected VoIP providers “directly conflicts with our pro-competitive deregulatory rules and policies,” that such conflict exists irrespective of whether VoIP is classified as an information service or as a telecommunications service, and that “imposition of 50 or more additional sets of different economic regulations” on VoIP would be “in contravention of the pro-competitive deregulatory policies the Commission is striving to further” pursuant to Sections 230 and 706 of the Communications Act. *Id.* at 22415-18, 22426-27, ¶¶ 20-22, 36-37.

Despite these statements of federal policy, Petitioners focus on the fact that the *Vonage Preemption Order* addressed a nomadic VoIP provider, and based on this fact claim that state utilities regulation of fixed VoIP services like CDV should not be preempted. *See, e.g., Prefiled Direct Testimony of Duncan Meredith*, at 10 (October 9, 2009) (contending that “it is clear that there is no federal preemption of the Commission to regulate fixed VoIP providers” because fixed providers were not before the FCC in *Vonage*). That interpretation misreads the *Vonage Preemption Order* and governing law.

It is a longstanding rule of preemption that states may not regulate intrastate communications in a manner that “negate[s] the exercise by the FCC of its own lawful authority” over interstate communications. *See Pub. Serv. Comm’n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); *California v. FCC*, 39 F.3d at 931. In the specific case of the nomadic VoIP service at issue in the *Vonage Preemption Order*, this rule was triggered in part because the difficulty in determining the endpoints of the nomadic communications would have the inevitable effect of causing state regulation of purportedly intrastate communications to regulate interstate communications as well, contrary to federal policy. *See Vonage Preemption Order*,

199 FCC Rcd 22404, 22419, ¶ 24 (“making jurisdictional determinations about particular . . . communications based on an end-point approach [is] difficult, if not impossible”); *see also id.* at 22419-20, ¶ 25 (noting same difficulties determining end-points for enhanced communications features such as voicemail, call-forwarding features, and “access[ing] different websites or IP addresses during the same communication session”). The *Vonage Order*, however, *does not* suggest that difficulty in identifying the endpoints of traffic is the *only* instance in which state regulation of VoIP providers will negate the federal “pro-competitive deregulatory rules and policies” for VoIP. *Id.* at 22416, ¶ 20. Quite the contrary. The FCC’s statement of federal policy (that VoIP services not be subject to regulation from fifty different states) was not tied in any way to the nomadic nature of Vonage’s service. Rather, it was based on “Congress’s policy [in Section 230] to promote the continued development and preserve the vibrant and competitive *free* market for these types of services,” as well as Congress’ policy in Section 270 of the Act to “encourage the deployment of advanced telecommunications capability to all Americans by using measures that promote competition in the local telecommunications market and removing barriers to infrastructure investment.” *Id.* at 22425-27, ¶¶ 34, 36 (internal quotation marks omitted) (emphasis in original). These policies are applicable to all VoIP providers, nomadic or fixed. As the FCC itself indicated, although fixed providers were not before it in the *Vonage Preemption Order*, “to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.” *Id.* at 22424, ¶ 32 (footnote omitted).

In fact, state regulation impermissibly conflicts with, and is preempted by, federal law in any circumstance in which the state regulation (even if nominally confined to the intrastate portion of a jurisdictionally mixed service) has the effect of regulating an interstate service in a

manner contrary to the federal scheme.⁷³ Here, there is simply no practical way for Comcast to offer a competitive, deregulated interstate CDV service using specialized CPE in accordance with federal policy unless it combines it with a service capable of making and receiving local calls over the same device. As the Ninth Circuit recognized in *California v. FCC*, although “customers could have one telephone for interstate use and one for intrastate use,” it is “highly unlikely, due to practical and economic considerations, that customers would maintain two separate phones.” *California v. FCC*, 39 F.3d at 933. Subjecting CDV to the “imposition of 50 or more additional sets of different economic regulations” in each state in this manner, *cf. Vonage Preemption Order*, 19 FCC Rcd 22402, 22427, ¶ 37, would negate clearly stated federal policies regarding VoIP.

V. 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.

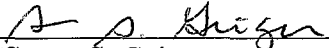
⁷³ See, e.g., *California v. FCC*, 39 F.3d at 933 (state rule requiring carriers to offer intrastate portion of information services through a separate entity preempted where it would “defeat[] the FCC’s more permissive policy” of allowing companies to offer interstate services on an integrated basis); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 n.7 (D.C. Cir. 1989) (affirming federal regulation of marketing for Centrex services, where as a practical matter intrastate uses of the service could not be marketed separately from interstate uses); *In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1622, ¶ 15 (1992) (state regulation of intrastate voicemail preempted as defeating federal policy because “it is not feasible to market interstate and intrastate enhanced services separately”); *North Carolina Utils. Comm’n v. FCC*, 552 F.2d 1036 (4th Cir. 1977) (state rule forbidding customers from using own CPE for intrastate calls preempted, where federal policy permitting such CPE for interstate calls would be frustrated, given that customers use same CPE for both interstate and intrastate calls).

January 15, 2010

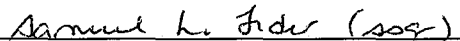
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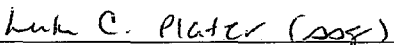
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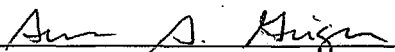
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Certificate of Service

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


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