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**

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

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INTRODUCTION

Comcast's Digital Voice service ("CDV") is not, and should not be regulated as, a public utility service under RSA 362:2 for the reasons laid out in Comcast's Opening Brief ("Comcast Br."). Although some of the features of CDV may appear to be the same as those of traditional Plain Old Telephone Service ("POTS"), CDV is delivered using technology that differs in critical respects from POTS and provides integrated advanced features. Most importantly for purposes of regulatory classification, CDV converts the protocol of calls between Internet Protocol ("IP") and Time Division Multiplexing ("TDM") in order to interconnect with the Public Switched Telephone Network ("PSTN"). *See* Comcast Br. at 18-21. This protocol-conversion capability, along with other enhanced communications capabilities offered by CDV, make it an "information service" under federal law – which not only brings the service outside the scope of New Hampshire public utility regulation, but also preempts such regulation under the longstanding federal regulatory framework governing information services. *Id.* at 12, 15-17. In fact, even if CDV were not an information service, state entry and certification requirements would still conflict with federal open-market policies, which have brought immense consumer benefits over the past several years. *Id.* at 30-35.

Petitioners never truly confront these facts. Instead, Petitioners' Brief ("NHTA Br.") devotes most of its energy to contending that cable VoIP providers share architectural similarities with POTS, and to arguing about the preemptive scope of two decisions (the *Vonage Preemption Order* and the *Brand X* decision) – arguments only tangentially related to Comcast's claims. *See, e.g.*, NHTA Br. at 7-16, 17-23, 26-28. Those are not the legal questions on which this case turns. Petitioners never address clear decisions of the federal courts that interconnected VoIP services like CDV are information services under federal law and that state public utility regulation of such services is preempted. *See infra* at n.6. Nor do they address the bedrock FCC

precedent that services performing net protocol conversion, as CDV does, are information services exempt from state public utility regulation. For these reasons, and for the reasons below, Comcast respectfully requests that the Commission find that CDV is not a public utility service under RSA 362:2; that the Comcast entity providing that service (i.e. Comcast IP Phone, II, LLC) is, therefore, not a public utility; and that federal law preempts the Commission from regulating CDV.

I. THE COMMISSION LACKS AUTHORITY TO REGULATE CDV BECAUSE THE SERVICE IS NOT THE "CONVEYANCE OF TELEPHONE . . . MESSAGES" UNDER RSA 362:2.

CDV is not a public utility service under New Hampshire law for the reasons stated in Comcast's Opening Brief. First, CDV offers features and technology that did not exist and therefore could not have been contemplated by the Legislature that drafted the statute to apply to the "conveyance of telephone . . . messages" in 1911. *See* Comcast Br. at 11-12. Second, RSA 362:2's statutory language should be read in harmony with the federal Communications Act's understanding of the term "telecommunications service" – the regulatory classification that has long applied to the type of telephone service jointly regulated by this Commission and the Federal Communications Commission ("FCC"). Because CDV is an "information service," not a "telecommunications service," under federal law (*see* Comcast Br. at 12-13), the phrase "conveyance of telephone . . . messages" under RSA 362:2 should not be interpreted to apply to CDV, thereby avoiding conflict that could not have been intended by the Legislature.

Petitioners offer no real response to these arguments. First, Petitioners argue (in a footnote) that CDV is "telephone message service" under RSA 362:2 based on a particular dictionary definition of "telephone." *See* NHTA Br. at 3 n.2. As explained in Comcast's Opening Brief, this argument is without merit. Under the "common and approved usage" standard of RSA 21:2, the meaning of the term "telephone" must be understood based on what

the language meant in 1911 when RSA 362:2 was enacted. *See* Comcast Br. at 11-12. This plainly did not encompass VoIP, or other information services, which did not exist at that time. *Id.* Moreover, the dictionary definition advanced by Petitioners encompasses any "instrument that converts voice and other sound signals into a form that can be transmitted to remote locations and that receives and reconverts waves into sound signals." NHTA Br. at 3 n.2 (quoting AMERICAN HERITAGE DICTIONARY, (4th ed. 2001)). This definition would apply to intercoms, baby monitors, walkie-talkies, and a host of other devices and services that the Legislature could not have intended this Commission to regulate, and which this Commission, in fact, does not regulate. As explained in Comcast's Opening Brief, CDV does not fall within the definition of a "telephone" under the dictionary considered standard in the industry (i.e. NEWTON'S TELECOM DICTIONARY). *See* Comcast Br. at 12. Accordingly, under a plain meaning analysis, CDV cannot be considered a telephone message service under RSA 362:2.

This conclusion is reinforced by the Legislature's recent consideration of bills, in both the 2010 and 2006 Sessions, which would have amended RSA 106-H:9 to extend E-911 surcharges to "interconnected voice over internet protocol service[s]." *See* House Bill 643, § 2 (N.H. 2009); *see also* House Bill 1232 (N.H. 2006) (applying E-911 surcharges to VoIP providers).[1] Both bills clearly evidence the Legislature's awareness of VoIP providers (termed "interconnected voice over internet protocol services" in the 2009 Bill) and its intent to distinguish them from services provided by telephone companies that file tariffs or rate schedules with the Commission. Indeed, the 2006 Bill explicitly noted that "*[c]urrently VOIP providers are unregulated* and not subject to the 42 cent enhanced 911 surcharge." House Bill 1231 Fiscal Note (N.H. 2006) (emphasis added). It is logical to conclude that the Legislature's failure to include the words

[1] Comcast has attached both bills to this brief as Exhibit 1 and Exhibit 2, respectively.

"interconnected voice over internet protocol services" in RSA 362:2 means that the statute should not be interpreted to include them, given the Legislature's demonstrated awareness of such services and of the fact they "[c]urrently . . . are unregulated." *Id.*

Petitioners focus most of their energies on arguing that CDV "comports in all respects with the federal definition of telecommunications service" (NHTA Br. at 3), apparently conceding that the Legislature intended the telephone services regulated under RSA 362:2 to be commensurate with those that the federal statute subjects to joint state and federal regulation. *See* NHTA Br. at 3-6. Comcast agrees that RSA 362:2 extends state jurisdiction only to "telecommunications services," not "information services" (which did not exist at the time of RSA 362:2's enactment and which the Legislature accordingly could not have intended to regulate). For reasons discussed in Comcast's Opening Brief and expanded upon below, however, CDV is an information service and therefore falls outside the scope of RSA 362:2. *See* Comcast Br. at 15-30.

Petitioners' claim that CDV is a telecommunications service for purposes of New Hampshire law is based almost entirely on asserted "functional" and "architectural" comparability between fixed, interconnected VoIP and POTS services. *See* NHTA Br. at 5-6, 7-17. Comcast will not waste the Commission's time refuting Petitioners' mischaracterizations of the facts,[2] because the existence of architectural or functional overlap between POTS and

[2] Although it is irrelevant to the statutory classification, Petitioners' description of the networks contains a number of inaccuracies. For instance, while claiming that the "end user experience in making and receiving calls is the same," NHTA Br. at 6, they neglect the differences in user experience between POTS and the enhanced communications features of CDV. *See* Prefiled Reply Testimony of David J. Kowolenko at 5-7 (December 4, 2009) ("*Kowolenko Reply Testimony*"). Petitioners' contention that soft switches "convert[] the signal into IP packets," NHTA Br. at 11, is also wrong for Comcast's network, where both signaling information and calls themselves are already in IP and the only calls converted into IP are incoming calls from the PSTN. *See Kowolenko Reply Testimony* at 11-12. Petitioners also claim that the eMTA is

interconnected VoIP services is largely irrelevant to the issues in this proceeding. The FCC has "recognize[d] that some enhanced services may do some of the same things that regulated communications services did in the past" and "are not dramatically dissimilar from basic services." *In re Amendment of Section 64.072 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶¶ 130, 132 (1980).

The determination of whether CDV is an information service or a telecommunications service does not depend on an analysis of whether CDV is functionally equivalent to POTS; it turns on one criterion only: whether it satisfies the statutory definition in 47 U.S.C. § 153(20) or the definition in 47 U.S.C. § 153(46). For reasons explained in Comcast's Opening Brief, *see* Comcast Br. at 15-30, as well as explained below, CDV satisfies the statutory criteria for an information service set forth in 47 U.S.C. § 153(20). Because the FCC has made clear that the information service and telecommunications service categories are mutually exclusive,[3] that is the end of the matter. The Commission's authority under RSA 362:2 is limited to telecommunications services and does not confer authority over information services such as CDV.

II. State Regulation Would Conflict With Express Federal Policies Deregulating Information Services.

As explained in Comcast's Opening Brief, public utility regulation of CDV is contrary to federal deregulatory policies governing information services and is therefore preempted. *See* Comcast Br. at 15-17, 30-35. Petitioners make two claims in response – that federal preemption does not apply to regulation of the *intra*state portion of CDV's service, *see* NHTA Br. at 17-23, and that CDV is not an information service. *Id.* at 26-32. Both of these assertions are meritless.

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not "owned or maintained" by the customer, ignoring both the insignificance of this distinction, and the record evidence that Comcast is beginning to offer this exact option. *See id.* at 7.

[3] *See In re Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11523, ¶ 43 (1998).

The first is contrary to well-established law regarding information services, and the second is conclusively resolved by a series of federal cases and clear FCC precedent that Petitioners simply ignore.

A. State Regulation of Information Services Conflicts With the Federal Scheme Regardless Of Whether Intrastate Communications Can Be Isolated.

Petitioners' primary contention is that there can be no federal preemption because their Petition asks the Commission to regulate only *intra*state calls provided by Comcast, which, they claim, cannot conflict with federal authority over interstate regulation. *See* NHTA Br. at 21-22 ("intrastate Cable VoIP lies beyond the reach of the FCC's power of preemption, and therefore remains subject to state regulation."). They argue that the *Vonage Preemption Order* was decided based on Vonage's inability to separate intra- from interstate calls, and that since fixed VoIP providers can discern the end-points of calls, states may properly isolate the intrastate portion of fixed VoIP service and regulate it. *See* NHTA Br. at 17-23. To support this argument, Petitioners rely on dicta in the *2006 Universal Service Order*, where the FCC stated that VoIP providers making universal service contributions on the basis of their actual interstate revenues might no longer qualify for the "preemptive effect" of the *Vonage Preemption Order*. NHTA Br. at 21 (quoting *In re Universal Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7546, ¶ 56 (2006) ("*2006 Universal Service Order*")).

Petitioners' argument fundamentally misunderstands the law of preemption. To begin with, Comcast is not relying on any "preemptive effect" of the *Vonage Preemption Order*. That Order by its terms addressed only a specific nomadic provider of VoIP – it did not rule on fixed services, such as CDV, nor did it decide whether interconnected VoIP services are information services or telecommunications services. The *Vonage Preemption Order* did not *need* to reach the question of whether interconnected VoIP is an "information service" because it found state

regulation preempted, on different grounds, regardless of the regulatory classification. Petitioners' suggestion that this Commission can do the opposite – and rule that regulation is *not* preempted *without* deciding whether CDV is an information service – turns the *Vonage Preemption Order* on its head. As that Order made clear, if the FCC had *not* found state regulation preempted on the grounds decided, it would necessarily have had to reach the question whether the service was an information service: "*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.*" *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, 22416, ¶ 21 (2004) ("*Vonage Preemption Order*") (emphasis added).

Petitioners' claim that there can be preemption *only* where the end points of calls are unknown is simply wrong and flies in the face of decades of precedent. State regulation is preempted whenever the "state's authority over intrastate [communications] . . . negates the exercise by the FCC of its own lawful authority over interstate communications." *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 115 (D.C. Cir. 1989), (quoting *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989)), *see also NARUC v. FCC*, 880 F.2d at 429-31 (FCC may preempt "otherwise legitimate state actions regulating intrastate telephone service" that would negate federal policy). On that issue, CDV's regulatory classification as an information service is dispositive. As the federal courts have repeatedly recognized, "*any* state regulation of an information service conflicts with the federal policy of nonregulation." *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (emphasis added). State "regulations that have the effect of regulating information services are in conflict with federal law and must be

pre-empted." *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003); *see also In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, ¶ 83 n.34 (1981).

Whether it is possible to isolate an intrastate component to CDV is simply irrelevant.[4] The FCC has repeatedly rejected state regulation of the intrastate component of information services as interfering with federal policy. As the FCC explained in the *Pulver Order*, state "regulation of entry and service terms and conditions . . . ostensibly applied to 'intrastate' enhanced services" are preempted because such state regulation "would have a severe impact on federal open entry policies." *In re Petition for a Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3317-18 ¶ 17 n.61 (2004) (quoting *Amendment of Section 64.072 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Memorandum and Order on Reconsideration, 2 FCC Rcd 3035, 3070, n.374 (1987)).

The FCC has made clear that regulating the intrastate component of an information service creates unacceptable interference with the federal policy of nonregulation because "it is

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[4] As the FCC recognized in the *Vonage Preemption Order*, the integration of enhanced features makes it difficult if not impossible to isolate the intrastate components of interconnected VoIP services like CDV. In fact, VoIP services may not have a severable intrastate component due to "the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously." *See Vonage Preemption Order*, 19 FCC Rcd 22404, 22419, ¶ 25. "[T]he provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication" even when "other entities, such as cable companies, provide VoIP services." *Id.* at 22424, ¶ 32. CDV has these exact features, including the ability to access and interact with communications on the service through the Internet, mobile phones, and iPod devices. *See* Prefiled Direct Testimony of David J. Kowolenko & Beth Choroser at 24-27 (October 9, 2009) ("*Kowolenko & Choroser Direct Testimony*") & *Kowolenko Reply Testimony* at 5-6.

not feasible to market interstate and intrastate enhanced services separately." *In re Petition for Emergency Relief and Declaratory Ruling Filed By BellSouth Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1622, ¶ 15 (1992). For example, in preempting state regulation of intrastate voicemail – an information service – the FCC noted that state regulation would necessarily conflict with federal policy: "Most customers want voice mail service for both interstate and intrastate use," and "a customer who wanted both jurisdictional services would find it uneconomical and unnecessary to subscribe to a[n] . . . interstate service and a competitor's service that offered both interstate and intrastate portions." *Id.* These statements are all equally true of other information services, like CDV.

Accordingly, the federal courts holding that interconnected VoIP providers are information services and that state regulation of such providers is preempted have reached this conclusion without regard to whether intrastate calls can be isolated. *See* Comcast Br. at 20 (citing *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003); and *Vonage Holdings Corp. v. New York Pub. Serv. Comm'n*, No. 04 Civ 4306(DFE), 2004 WL 3398572 (S.D.N.Y. July 16, 2004), *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005)). At the same time, Petitioners do not cite any federal law for the proposition that states may impose public utility regulations on the intrastate component of jurisdictionally mixed *information* services. The cases they cite stand only for the unremarkable proposition that states may regulate the intrastate component of *telecommunications* services in a manner not inconsistent with federal law.[5]

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[5] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (vacating FCC rules governing depreciation of plant used for intrastate telecommunications); *Puerto Rico Tel. Co. v. Telecomms. Reg. Bd.*, 189 F.3d 1, 14 (1st Cir. 1999) (holding that portions of order of the Puerto Rico Telecommunications Regulatory Board based on Puerto Rico law, rather than federal law, did not arise under federal law and therefore were not reviewable by federal court). The third

Where a provider must comply with state public utility regulations (even if they are purportedly limited to the intrastate component of an information service) in order to provide a jurisdictionally mixed information service, such regulations "defeat[] the FCC's more permissive policy" governing information services and are preempted. *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994). Thus, because CDV is an information service as demonstrated in Comcast Br. at 15-30 and below, whether or not it is possible to isolate an intrastate component has no impact on the preemption analysis.

B. CDV Is An Information Service.

Petitioners' claims that CDV is not an information service are likewise mistaken. As demonstrated in Comcast's Opening Brief, CDV is an information service for at least two reasons: (1) it offers the capability for net protocol conversion, and (2) it provides enhanced communication features tightly integrated into the service it offers to the public. *See* Comcast Br. at 17-26, 26-28.

In response, Petitioners argue three things: (1) that the Supreme Court's *Brand X* decision does not declare all "IP-based service cable offerings" to be information services, (2) that CDV's enhanced features are merely "ancillary information services" rather than components of the CDV service itself, and (3) that there is "no end-to-end protocol conversion" in interconnected VoIP. *See* NHTA Br. at 26-28, 28-30, 30-32.

Petitioners' first argument attacks a straw man. It is not Comcast's position that all "IP-based service cable offerings" are information services, and Comcast's brief does not cite *Brand X* for that proposition. As for the other two arguments, Petitioners ignore a wealth of precedent. The federal courts have held that interconnected VoIP constitutes an information service because

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case cited by Petitioners is completely inapposite. *See Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000) (vacating FCC rule applying end-to-end analysis to analyze intercarrier compensation for calls telecommunications carriers carry to third-party ISPs).

of the conversion of calls between IP and TDM for interconnection with the PSTN, and Petitioners conflate so-called "in-the-middle" or "internetworking" protocol conversions (which are not information services) with "net" protocol conversions (which are). Petitioners' position that enhanced communications capabilities be treated as though they were separate "ancillary" services, moreover, is contrary to the FCC's holding in the *Vonage Preemption Order* itself.

1. CDV Performs "Net" Protocol Conversion, Not "In-The-Middle" Protocol Conversion.

The Commission can resolve this case easily, and simply, on the grounds already relied upon by several federal courts: interconnected VoIP providers, *i.e.* those that interconnect with the PSTN and convert calls between IP and TDM for purposes of that interconnection, are information services because they offer a capability for net protocol conversion. *See* Comcast Br. at 18-21. Petitioners simply ignore the holdings, as well as the analysis, of federal courts that have already reached this exact conclusion.[6] And Petitioners cite no cases to the contrary.

Instead, Petitioners distort the record, asserting (without citation) that "*the changes in the form of the call are internal to the networks carrying the call.*" NHTA Br. at 31 (emphasis in original). This may be true of some POTS providers' networks that use IP,[7] but it is decidedly false as to Comcast's network.[8] A so-called "internetworking" (or 'in-the-middle') protocol conversion is one where "a carrier converts from [protocol A] to [protocol B] formatted data at the originating end within the network, and then converts the data back from [protocol B] to

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[6] *See* Comcast Br. at 18 (citing *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *aff'd*, 530 F.2d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003); and *Vonage Holdings Corp. v. New York Pub. Serv. Comm'n*, No. 04 Civ 4306(DFE), 2004 WL 3398572 (S.D.N.Y. July 16, 2004), *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005)).

[7] Some POTS providers, possibly including some Petitioners, use so-called 'IP-in-the-middle' systems for purposes of transport, but do not originate, terminate, or interconnect traffic in IP. *See* NHTA Br. at 13; *Kowolenko Reply Testimony* at 11-12.

[8] *See Kowolenko Reply Testimony* at 11-12.

[protocol A] at the terminating end," in which case "the protocol conversion is treated as facilitating a basic . . . service, rather than enhanced protocol conversion." *In re Independent Data Communications Manufacturers Ass'n, Inc. and AT&T Petition for a Declaratory Ruling*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719, ¶ 16 (1995) ("*Frame Relay Order*")). But Comcast does not convert call data from one protocol to another and then back again. It converts all calls involving an interconnection with the PSTN from IP to TDM or vice versa.[9] That is a one-time, "net" protocol conversion, not an internetworking protocol conversion. *See* Comcast Br. at 21-24.

Petitioners also repeat their argument that "the vast majority of calls are originated or terminated on analog phones." NHTA Br. at 30. But as explained in Comcast's Opening Brief, both the FCC and the federal courts have rejected this argument; protocol conversion is determined by the entry and exit points to the network, not points *beyond* the network – otherwise, the nature of the service would turn on the CPE being used by the customer rather than the services actually offered and performed by the provider. *See* Comcast Br. at 21-24.[10] Nor is there any relevance to Petitioners' assertion that "from the customer perspective, the analog telephone used to originate the call is the one and only CPE device." NHTA Br. at 25. Comcast's network begins (for outgoing calls) and ends (for incoming calls) at the demarcation

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9 *See Kowolenko Reply Testimony* at 11-12.

10 Petitioners misleadingly cite the *Frame Relay Order* for the proposition that protocol conversion is determined on an "end-to-end" basis. NHTA Br. at 30 & n.100 (citing *Frame Relay Order,* 10 FCC Rcd 13717, 13719, ¶ 11). But the *Frame Relay Order* says nothing of the sort. The paragraph Petitioners cite deals with an entirely unrelated issue, namely that "communications between a subscriber and the network itself (e.g. for call setup, call routing, and call cessation) are not considered enhanced services." *Id.* Comcast has never contended that information that CDV users exchange with "the network itself," i.e., the signaling information provided to the soft switch for purposes of "call setup, call routing, and call cessation" make CDV is an information service. It is CDV's conversion of the protocol of the calls themselves – which CDV converts between IP and TDM – that makes CDV an information service. *See* Comcast Br. at 18-21.

point where calls are in IP, not the customer's telephone (which is not part of the Comcast network) where they are an analog electric signal; that much is clear as a matter of law.[11] And contrary to Petitioners' assertion, the eMTA is plainly CPE under the statutory definition[12] – it resides inside the customer premises, exactly as does a Vonage modem.

Nor does it matter that some calls stay on-net and do not undergo a protocol conversion. *See* NHTA Br. 31.[13] As discussed in Comcast's Opening Brief, the statutory definition of an information service turns on whether Comcast is offering the *capability* for net protocol conversion, not whether that capability is invoked every time the service is used. *See* Comcast Br. at 24-26. And, for reasons already stated, it would be a practical impossibility for Comcast to offer a separate regulated service for calling other CDV customers and an unregulated service for calling PSTN users – the practical effect of forcing Comcast to offer the former as a regulated service would be to subject the *entire* service to regulation, contrary to clear federal policy. *See Id.* Moreover, as explained in Comcast's Opening Brief, IP-to-IP calls are properly considered information service elements in their own right. *See id.* at 26 n.64.

2. Removing CDV's Enhanced Communications Features Would Make It A Completely Different Service.

CDV also constitutes an offering of an information service because of the integration of a growing number of advanced communications features, which are themselves plainly

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11 *See* 47 C.F.R. § 76.5(mm)(1); *see also Kowolenko & Choroser Direct Testimony* at 18; Prefiled Reply Testimony of Beth Choroser at 4-5 (December 4, 2009) ("*Choroser Reply Testimony*").

12 *See* 47 U.S.C. § 153(14) (defining CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications"). The statute recognizes that CPE can support either a telecommunications service or, as with the eMTA, an information service, as the statute defines information services as being provided "via telecommunications." 47 U.S.C. § 153(20).

13 Although Petitioners claim that "it is assumed that a high percentage of calls would remain on-net," they point to nothing in the record to support that "assum[ption]" other than the Comcast's aggregate number of cable and VoIP customers nationwide. *See* NHTA Br. 32 n.105 (citing *Kowolenko & Choroser Direct Testimony* at 4:10-11).

information service components under 47 U.S.C. § 153(20). *See* Comcast Br. at 26-28. Petitioners concede that these advanced features are information services, but contend that they are nothing more than "ancillary information services" and are "not components of the telephone messaging service itself." NHTA Br. at 28-29. But this ignores the FCC's decision in the *Vonage Preemption Order*, where – faced with a VoIP service that contained almost identical features (in fact, even fewer features than those now offered by CDV) – the FCC described the service as an "integrated communications service" and "suite of integrated capabilities and features." *Vonage Preemption Order*, 199 FCC Rcd 22404, 22407, 22419-20, ¶¶ 7, 25.[14] Although Petitioners claim that CDV's enhanced features are "not in the actual voice call flow," NHTA Br. at 29, the *Vonage Preemption Order* did not view that distinction as relevant for a series of features that were functionally identical to those offered by CDV. *See Vonage Preemption Order*, 19 FCC Rcd 22404, 22407, 22419-20, ¶¶ 7, 25.

III. STATE REGULATION WOULD CONFLICT WITH EXPRESS FEDERAL POLICIES DEREGULATING BROADBAND AND IP-ENABLED SERVICES.

As explained in Comcast's Opening Brief (Comcast Br. at 30-35), 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. State regulation of interconnected VoIP would be the classic

[14] Petitioners also play up the fact that one Petitioner, Granite State Telephone, offers call forwarding as well as a web portal for accessing billing information and voicemail. *See* NHTA Br. at 29 & n.92. Even if Granite State does provide information services as Petitioners suggest, that is irrelevant to this proceeding. But in any case, the record does not support Petitioners' broad implication that Granite State's features are even close to comparable to the range of advanced abilities offered by CDV. The website to which Petitioners point shows that Granite State users can change account options and listen to voicemails online, and forward calls to other devices. *See id.* CDV has much richer features, including the display of caller ID information on a user's television and computer, the ability to use mobile phones or iPods to access account information and respond to callers by text message or return call, and soon the "HomePoint™" service allowing subscribers to access Internet functionalities and directories, as well as send text messages, from their home handset. *See* Comcast Br. at 4.

case in which exercise of the "state's authority over intrastate [communications] . . . negates the exercise by the FCC of its own lawful authority over interstate communications," *Illinois Bell Telephone Co. v. FCC*, 883 F.2d at 115 (quotation marks omitted), and is therefore preempted as conflicting with federal law. *See* Comcast Br. 30-35.

In response, Petitioners repeat their argument that there can be no preemption because CDV callers can make identifiable intrastate calls, and also contend that CDV is not an "Interconnected VoIP Service" under FCC regulations. *See* NHTA Br. at 17-23, 23-25. The first argument ignores that the nature of CDV's service would cause state regulations to operate as a *de facto* precondition on Comcast's provision of interstate service, in clear violation of federal policy. The second is a complete *non sequitur*.

A. State Public Utility Regulation Would Operate As A Precondition To Comcast's Offering Interstate Service, Contrary to Federal Policy.

Petitioners analogize VoIP to the dual federal-state regulatory regime governing traditional telephone services, and contend that regulation of intrastate VoIP calls "no more conflicts with federal rules and policies than the current scheme for distinguishing intrastate and interstate POTS traffic." NHTA Br. at 22. But this neglects two critical differences between VoIP services and interstate POTS services. First, the FCC has expressly held that economic and entry regulations for VoIP providers "directly conflict[] with [federal] pro-competitive deregulatory rules and policies" pursuant to Section 230 and 706 of the 1996 Telecommunications Act. *See Vonage Preemption Order*, 19 FCC Rcd 22404, 22415, ¶ 20. Second, if a state were to regulate entry (such as by requiring certification) and impose public utility regulations on any claimed 'intrastate component' of CDV, those regulations would in effect become a precondition on Comcast's ability to provide *interstate* service too – in plain contravention of federal policy to open the market for broadband- and IP-enabled services. *See*

Comcast Br. at 30-33. The only way Comcast could avoid state public utility regulation of any claimed 'intrastate component' of CDV would be to offer an interstate-only service. But there would be no meaningful way for Comcast to avail itself of federal open-market policies by offering an interstate-only version of CDV: such a service would not be economically viable in the absence of a capability to place intrastate calls.[15] Thus, to offer service *at all*, Comcast would be forced to comply with the type of state entry and public utility requirements that the federal scheme aims to avoid, irrespective of how the service is classified for regulatory purposes. That is a clear, and simple, conflict with federal law.

B. Petitioners' Claim That CDV Is Not an "Interconnected VoIP Service" Is Wrong.

Curiously, Petitioners also devote extensive argument to contending that CDV is not an "Interconnected VoIP" service pursuant to 47 C.F.R. § 9.3. *See* NHTA Br. 23-26. Petitioners' arguments are meritless.

As Comcast explained in its Opening Brief, the FCC has taken the lead in using its ancillary authority to implement uniform, national regulations for interconnected VoIP providers. These include contributions to the USF and TRS funds, E-911 and CALEA requirements,

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[15] Among other things, if Comcast were to offer an interstate-only service, it would require customers to use different CPE for their intrastate and interstate calls. Customers would have to use the eMTA and associated equipment for interstate CDV calls and use the POTS network and equipment for their intrastate calls. As the federal courts have repeatedly found, such a setup is simply not viable as a means of separating a federally-regulated service from a state-regulated one. *See California v. FCC*, 39 F.3d at 933 (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"); *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); *see also BellSouth Corp.*, 7 FCC Rcd 1619, 1622, ¶ 15 (preempting state regulation of ostensibly intrastate portion of voicemail service because, *inter alia*, "[m]ost customers want . . . service for both interstate and intrastate use," and "a customer who wanted both jurisdictional services would find it uneconomical and unnecessary to subscribe to a . . . interstate service and a competitor's service that offered both interstate and intrastate portions.")

number porting obligations, and restrictions on the use of CPNI.[16] When the FCC first began implementing this series of regulations, it also issued 47 C.F.R. § 9.3 to define the services that would be subject to this uniform, federal system of regulation.[17] Section 9.3's definition is similar to the criteria the FCC announced in the *Vonage Preemption Order* of features that "would likewise preclude state regulation" of an interconnected VoIP service. *Vonage Preemption Order*, 19 FCC Rcd 22404, 22424, ¶ 32. Pursuant to Section 9.3's definition, Comcast registers with the FCC as an Interconnected VoIP service, as do countless other cable companies providing VoIP service, and complies with the series of federal regulations that turn on being an "Interconnected VoIP Service."[18]

Petitioners' arguments for why CDV is not an "Interconnected VoIP Service" strain credibility. Comcast has been registering and filing with the FCC as an "Interconnected VoIP Service" for years. If Petitioners' argument had any merit, one would expect the FCC to have objected to those filings (as well as countless similar filings by other cable companies). And CDV plainly meets all of the regulatory requirements. Although Petitioners argue that CDV does not "[r]equire[] a broadband connection from the user's location" and does not "[r]equire[] Internet protocol-compatible customer premises equipment (CPE)," NHTA Br. at 23-25, both contentions are flatly contradicted by the record. CDV can be accessed only by means of a

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16 *See* Comcast Br. at 8-9 n34. Although Petitioners claim that the FCC has "'nibbled' at the edges" by "extending traditional Title II common carrier requirements to interconnected VoIP providers," NHTA Br. at 27, the FCC has consistently made clear that it has used its Title I ancillary authority, and *not* its Title II authority over telecommunications services, to implement regulations affecting interconnected VoIP carriers. *See Choroser Reply Testimony* at 5-6. This scheme allows for uniform national regulations and avoids patchwork state regulation.

17 *See E911 Requirements for IP-Enabled Services*, Final Rule, 70 Fed. Reg. 37273 (June 29, 2005).

18 *See Kowolenko & Choroser Direct Testimony* at 9.

broadband connection, and requires an eMTA – which is IP-compatible CPE[19] – in order to operate.[20]

47 C.F.R. § 9.3 does not even suggest that an "Interconnected VoIP Service" must be offered over "any" broadband connection, or suggest that the broadband connection must be "fully portable," NHTA Br. at 24. Nor does § 9.3 require that the customer must be able to "choose among several different types of CPE." NHTA Br. at 25. Rather, these were merely features of the particular broadband and CPE used by the service at issue in the *Vonage Preemption Order*. These features were never discussed in the *Vonage Preemption Order*'s list of features that "would likewise preclude state regulation" of an interconnected VoIP service (*Vonage Preemption Order*, 19 FCC Rcd 22404, 22424, ¶ 34), and, more importantly for Petitioners' argument, they are nowhere mentioned in 47 C.F.R. § 9.3, which sets out the federal definition of interconnected VOIP providers. Indeed, the FCC made clear in implementing 47 C.F.R. § 9.3 that its definition of interconnected VoIP service encompassed "services that mimic traditional telephony." *E911 Requirements for IP-Enabled Services*, 70 Fed. Reg. 37273, 37373, ¶ 4 (June 29, 2005). Thus CDV is an Interconnected VoIP Service pursuant to federal law.

IV. ACTIONS BY OTHER STATES COUNSEL AGAINST, NOT IN FAVOR OF, REGULATING VOIP SERVICES.

The overwhelming majority of States do not regulate VoIP providers in the manner requested by Petitioners. CDV is not currently subject to public utility regulation in the 37 States and the District of Columbia in which Comcast offers its CDV service. To justify the action they ask this Commission to take, Petitioners point to developments in three states – Vermont,

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19 Pursuant to 47 U.S.C. § 153(14), a device is CPE if it is "employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." The eMTA plainly meets the congressional definition of CPE, which nowhere requires that the device be owned or controlled by the customer. Moreover, Comcast will allow customers to purchase the eMTA in the near future. *See Kowolenko Reply Testimony* at 7-8.

20 *See Kowolenko & Choroser Direct Testimony* at 17-18.

Massachusetts, and Texas – to suggest that other states are adopting similar regulation. *See* NHTA Br. at 32-33. But they are not. In fact, the Vermont decision is a *Proposal* for Decision by a Hearing Officer, which has not yet been accepted by the Vermont Public Service Board, much less survived review in the federal courts.[21] The referenced developments in Massachusetts and Texas do not hold water either. With regard to Texas, Petitioners' citation of a recent FCC Order, directing the state utility commission to decide an arbitration involving a telecommunications carrier that provides wholesale interconnection services to VoIP providers, is misleading. Petitioners assert that the FCC directed the Texas commission to decide issues concerning VoIP under "the 'existing law' *of the state*." NHTA Br. at 33 (emphasis added). But the FCC's order nowhere contains the words "law of the state," nor does it exclude issues arising under federal law from the scope of the proceeding.[22] To the contrary, the Texas order stands for the proposition that state commissions must apply current law, including current federal law, to decide VoIP-related issues if they arise in the context of interconnection agreement arbitrations between state-certificated common carriers. As discussed *infra* and in Comcast's Opening Brief, such "current law" makes clear that state regulation is preempted.

Moreover, notwithstanding Petitioners' implication that Massachusetts regulates VoIP providers, *see* NHTA Br. at 33, no such formal order has been issued. Petitioners point only to FCC comments in which the Massachusetts Department of Telecommunications and Cable urged the FCC to hold that states can regulate fixed VoIP providers – comments the FCC has not acted

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21 *See Investigation Into Regulation of Voice over Internet Protocol ("VoIP") Services,* VPSB Docket No. 7316, Proposal for Decision (December 8, 2009). Petitioners also neglect to mention that the Vermont statute in question is worded differently than RSA 362:2, containing a specific definition of "telecommunications services" which is "very broad[]." *Id.* at 19.

22 *See 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).

upon.[23] Although the Massachusetts Department of Telecommunications and Cable may have made public statements taking the position that cable VoIP ought to be subject to state regulation, those statements lack the force of law. The reality is that the regulation Petitioners are asking this Commission to impose – classifying interconnected VOIP as a telecommunications service – would make New Hampshire an outlier among the states.

V. THE PUBLIC INTEREST WOULD BE ILL-SERVED BY DISPARATE REGULATORY REQUIREMENTS FOR VOIP PROVIDERS ACROSS STATES.

Congress and the FCC have determined that disparate regulatory requirements across the states would pose barriers to entry for IP-enabled services, such as VoIP, and that such regulatory burdens are contrary to the public interest in encouraging both broadband deployment and competition in IP-enabled services. *See* Comcast Br. at 9-10. Indeed, this regulatory regime has been successful and has brought immense benefits to consumers through product innovation and savings, including in New Hampshire. *Id.* at 10.

Petitioners contend that the "Commission needs to carefully consider the potential consequences to consumers" from declining to subject VoIP providers to regulation as public utilities. NHTA Br. at 35. But that is already the status quo, in New Hampshire and nationwide, and it has been since VoIP services were first made available to the public. There is not a shred of evidence in the record that New Hampshire consumers are crying for increased regulation on Comcast Digital Voice, or that consumer needs are not being met in any way due to lack of public utility regulation for CDV. Contrary to Petitioner's claims, the success of CDV calls for the exact opposite conclusion. Indeed, that is the entire point of the FCC's deregulatory policy. The adverse consequences Petitioners fear have obviously not come to pass; customers

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[23] *See* NHTA Br. at 33.

nationwide, including in New Hampshire, have benefited from both lower prices and innovative new service offerings. *See* Comcast Br. at 9-10.

Nor are Petitioners any more convincing when they complain that it is "arbitrary" and "discriminatory" for them to be subject to regulatory requirements while services such as VoIP are not. NHTA Br. at 1-2. The Commission has recognized that both regulated and unregulated services contribute to competition that benefits New Hampshire customers.[24] Moreover, Comcast is not "unregulated" but is subject to federal regulatory requirements governing interconnected VoIP providers. *See* Comcast Br. at 8-9. Nor does Comcast receive any federal subsidies to offer its CDV service, such as those received by Petitioners,[25] such that any claimed interest by Petitioners in regulatory parity is illusory.

Comcast has no objection to Petitioners' request that the Commission "determine the distinguishing features" separating the regulatory treatment of POTS from interconnected VoIP services, so that Petitioners can evaluate their own ability to offer interconnected VoIP services. NHTA Br. at 36. Although Petitioners have tried to imply that Comcast is seeking a regulatory advantage over its competitors, *see* NHTA Br. at 1-2, Comcast is interested only in availing itself of the federal policy encouraging market entry for advanced, IP-enabled services. Petitioners should be entitled to the same benefits of the federal deregulatory policies to the extent they decide to offer information services, such as interconnected VoIP, in the future.

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

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[24] *See 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 19-20.

[25] *See* NHTA Response to Comcast Data Request 1-2(c).

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.

January 29, 2010

Respectfully submitted,

Comcast Phone of New Hampshire, LLC
And Its Affiliates
By its Attorneys

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Certificate of Service

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

_____
Susan S. Geiger

EXHIBIT 1

NH General Court - Bill Status System
Search Results

Bills Found : 1
Sorted by Bill Number

HB643 -FN
Session Year 2010

Title: extending the enhanced 911 system surcharge to voice over internet protocol providers and prepaid wireless telecommunications services.

G-Status:	HOUSE
House Status:	INEXPEDIENT TO LEGISLATE
Senate Status:	
Next/Last Comm:	HOUSE SCIENCE, TECHNOLOGY AND ENERGY
Next/Last Hearing:	02/03/2009 at 02:30 PM LOB 304

HB 643-FN - AS INTRODUCED

2009 SESSION

09-0542

09/04

HOUSE BILL ***643-FN***

AN ACT extending the enhanced 911 system surcharge to voice over internet protocol providers and prepaid wireless telecommunications services.

SPONSORS: Rep. J. Flanders, Rock 8

COMMITTEE: Science, Technology and Energy

ANALYSIS

This bill extends the enhanced 911 system surcharge to voice over internet protocol providers and prepaid wireless telecommunications services.

This bill was requested by the department of safety.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

09-0542

09/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nine

AN ACT extending the enhanced 911 system surcharge to voice over internet protocol providers and prepaid wireless telecommunications services.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Definitions. Amend RSA 106-H:2 to read as follows:

106-H:2 Definitions. In this chapter:

I. ***"Active prepaid wireless telecommunication service user account" means a prepaid wireless service account which has a sufficient positive balance as of the last day of any month and is issued to a person who resides in a zip code within the state, or purchases the service within the state.***

[~~I.~~] ***II.*** "Automatic location identification" or "ALI" means the system capability to identify automatically the geographical location of the telephone being used by the caller and to provide a display of that location at the public safety answering point.

[~~II.~~] ***III.*** "Automatic number identification" or "ANI" means the system capability to identify automatically the calling telephone number and to provide a display of that number at the public safety answering point.

[~~III.~~] ***IV.*** "Bureau" means the bureau of emergency communications within the division of emergency services and communications, in the department of safety, established pursuant to RSA 21-P:36.

[~~IV.~~] ***V.*** "Commission" means the enhanced 911 commission established in RSA 106-H:3.

[~~V.~~] ***VI.*** "Commissioner" means the commissioner of the department of safety.

[~~VI.~~] ***VII.*** "Emergency services" means fire, police, ambulance, rescue and other service of an emergency nature identified by the bureau.

[~~VII.~~] ***VIII.*** "Enhanced 911 system" and "enhanced 911 services" means a system consisting of selective routing with the capability of automatic number and location identification at a public safety answering point, which enables users of the public telecommunications system to request emergency services by dialing the digits 911.

[~~VIII.~~] ***IX.*** "Enhanced ANI/ALI" means the capability of a municipality or other political subdivision to receive ANI and ALI displays from 911 calls routed from the public safety answering point.

[~~VIII-a.~~] ***X.*** "Master street address guide" or "MSAG" means an alphabetical listing of all streets and house number ranges within a municipality. House number ranges shall consist of the beginning number and highest possible number on each public or private way with multiple structures.

XI. "Prepaid wireless telecommunications service" means any wireless telecommunications service that is activated in advance by payment for a finite dollar amount of service or for a finite number of minutes that terminate either upon use by any person or within a certain period of time following the initial purchase or activation, unless an additional payment is made.

[~~IX.~~] ***XII.*** "Private safety agency" means a private entity which provides emergency police, fire, ambulance, or medical services.

[~~X.~~] ***XIII.*** "Public agency" means the state government and any unit of municipal or county government located within the state which provides or has authority to provide firefighting, law enforcement, ambulance, medical or other emergency services.

[~~XI.~~] ***XIV.*** "Public safety agency" means a functional division of a public agency which provides firefighting, law enforcement, ambulance, medical, rescue or other emergency services.

[~~XII.~~] ***XV.*** "Public safety answering point" means a facility with enhanced 911 capability, operated on a 24-hour basis, assigned the responsibility of receiving 911 calls and transferring or relaying emergency

911 calls to other public safety agencies or private safety agencies.

[~~XIII.~~] *XVI.* "Relay routing" means the method of responding to a telephone request for emergency service whereby a public safety answering point notes pertinent information and relays it by telephone to the appropriate public safety agency or private safety agency for dispatch of an emergency service unit.

XVII. "Service user" means any person who purchases telecommunications service, wireless telecommunications service, prepaid wireless telecommunications service, or interconnected voice over internet protocol service in this state.

[~~XIII-a.~~] *XVIII.* "Street address guide" or "SAG" means a listing of all numbered structures on each public or private way with multiple structures within the municipality.

XIX. "Sufficient positive balance" means an account for which the balance is equal to or greater than the amount of the surcharge.

[~~XIV.~~] *XX.* "Transfer routing" means the method of responding to a telephone request for emergency service whereby a public safety answering point transfers the call directly to the appropriate public safety agency or private safety agency for dispatch of an emergency service unit.

2 Funding; Fund Established. Amend RSA 106-H:9 to read as follows:

106-H:9 Funding; Fund Established.

I. The enhanced 911 system shall be funded through a surcharge to be levied upon each residence and business telephone exchange line, including PBX trunks and Centrex lines, each individual commercial mobile radio service number, and each semi-public and public coin and public access line. No such surcharge shall be imposed upon more than 25 business telephone exchange lines, including PBX trunks and Centrex lines, or more than 25 commercial mobile radio service exchange lines per customer billing account. In the case of local exchange telephone companies, the surcharge shall be contained within tariffs or rate schedules filed with the public utilities commission and shall be billed on a monthly basis by each local exchange telephone company. In the case of an entity which provides commercial mobile radio service ***or interconnected voice over internet protocol service***, the surcharge shall be billed to each customer on a monthly basis and shall not be subject to any state or local tax; the surcharge shall be collected by the commercial mobile radio service provider, and may be identified on the customer's bill. Each local exchange telephone company or entity which provides commercial mobile radio service shall remit the surcharge amounts on a monthly basis to the enhanced 911 services bureau, which shall be forwarded to the state treasurer for deposit in the enhanced 911 system fund. The state treasurer shall pay expenses incurred in the administration of the enhanced 911 system from such fund. Such fund shall not lapse. If the expenditure of additional funds over budget estimates is necessary for the proper functioning of the enhanced 911 system, the department of safety may request, with prior approval of the fiscal committee of the general court, the transfer of funds from the enhanced 911 system fund to the department of safety for such purposes. The moneys in the account shall not be used for any purpose other than the development and operation of enhanced 911 services, in accordance with the terms of this chapter. Surcharge amounts shall be reviewed after the budget has been approved or modified, and if appropriate, new tariffs or rate schedules shall be filed with the public utilities commission reflecting the surcharge amount.

II.(a) Notwithstanding any other provision of law, all prepaid wireless telecommunications service providers shall remit the applicable surcharge for each active prepaid wireless telecommunications service user account in the state. Collection of the wireless surcharge under this section shall not

reduce the sales price for any tax collected at the point of sale.

(b) The prepaid wireless telecommunication service provider may seek reimbursement from its service users through whatever means are available to the provider.

(c) Notwithstanding any provision of this chapter, no retailer purchasing prepaid wireless telecommunication services or devices for resale shall be required to collect or remit any surcharge.

[~~II.~~] ***III.*** Imposition of the enhanced 911 services surcharge shall begin not later than 4 months from the approval of the budget, in order to provide adequate funding for the development of the enhanced 911 data base and other operations necessary to the development of the enhanced 911 system.

[~~III.~~] ***IV.***(a) Notwithstanding any other provision of law, and except as otherwise provided in RSA 82-A, the records and files of the department, related to this section, are confidential and privileged. Neither the department, nor any employee of the department, nor any other person charged with the custody of such records or files, nor any vendor or any of its employees to whom such information becomes available in the performance of any contractual services for the department shall disclose any information obtained from the department's records, files, or returns or from any examination, investigation, or hearing, nor may any such employee or person be required to produce any such information for the inspection of any person or for the use in any action or proceeding except as provided in this paragraph.

(b) The following exceptions shall apply to this paragraph:

(1) Delivery to the surcharge collector or its representative of a copy of any return or other papers filed by the surcharge collector.

(2) Disclosure of department records, files, returns, or information in a New Hampshire state judicial or administrative proceeding pertaining to administration of the surcharge where the information is directly related to an issue in the proceeding regarding the surcharge under this section, or the surcharge collector whom the information concerns is a party to such proceeding, or the information concerns a transactional relationship between a person who is a party to the proceeding and the taxpayer.

(3) Disclosure to the department of revenue administration of records, files, and information required by the department of revenue administration to administer the communications services tax pursuant to RSA 82-A.

(4) Disclosure of department records, files, and information to the legislative budget assistant, when requested by the legislative budget assistant pursuant to RSA 14:31, IV.

3 Effective Date. This act shall take effect January 1, 2010.

LBAO

09-0542

Revised 01/29/09

HB 643 FISCAL NOTE

AN ACT extending the enhanced 911 system surcharge to voice over internet protocol providers and prepaid wireless telecommunications services.

FISCAL IMPACT:

The Department of Safety states this bill will increase state restricted revenues by an indeterminable amount in FY 2010 and each year thereafter. There will be no fiscal impact on county and local revenues or state, county, and local expenditures.

METHODOLOGY:

The Department of Safety states this bill extends the enhanced 911 system surcharge to voice over internet protocol providers and prepaid wireless telecommunication services. The Department assumes to the extent these services will be required to pay the surcharge starting January 1, 2010, revenues to the e-911 revolving fund will increase. However, as the Department cannot estimate the number of service providers subject to the surcharge, the fiscal impact cannot be determined at this time.

EXHIBIT 2

NH General Court - Bill Status System
Search Results

Bills Found : 1
Sorted by Bill Number

HB1232 -FN
Session Year 2006

Title: applying the enhanced 911 system surcharge to voice over Internet protocol telephone service providers.

G-Status:	HOUSE
House Status:	INEXPEDIENT TO LEGISLATE
Senate Status:	
Next/Last Comm:	HOUSE SCIENCE, TECHNOLOGY AND ENERGY
Next/Last Hearing:	01/10/2006 at 10:00 AM RM 304 LOB

HB 1232-FN – AS INTRODUCED

2006 SESSION

06-2229

09/01

HOUSE BILL *1232-FN*

AN ACT applying the enhanced 911 system surcharge to voice over Internet protocol telephone service providers.

SPONSORS: Rep. S. L'Heureux, Merr 9

COMMITTEE: Science, Technology and Energy

ANALYSIS

This bill applies the enhanced 911 system surcharge which currently applies to landline and cellular telephone service providers to voice over Internet protocol telephone service providers.

This bill was requested by the department of safety.

Explanation: Matter added to current law appears in ***bold italics.***

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

06-2229

09/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Six

AN ACT applying the enhanced 911 system surcharge to voice over Internet protocol telephone service providers.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Statement of Purpose. Amend RSA 106-H:1 to read as follows:

106-H:1 Statement of Purpose. The general court of the state of New Hampshire declares that the interests of the state's citizens will be served by a coordinated statewide enhanced 911 system, utilizing 911 as the primary emergency telephone number, which will develop and improve emergency

communication procedures and facilities with the objective of reducing the response time to emergency calls for law enforcement, fire, medical, rescue, and other emergency services. ***Any service that provides a device capable of calling 911 must connect to the state of New Hampshire's 911 public safety answering point, using protocols as required by the New Hampshire statewide enhanced 911 system as defined in RSA 106-H:8.***

2 New Paragraph; Definitions; Provider. Amend RSA 106-H:2 by inserting after paragraph IX the following new paragraph:

IX-a. "Provider" means a person, firm, or corporation that makes or supplies a device that can contact the 911 public safety answering point.

3 Definitions; Service Provider. Amend RSA 106-H:2, XIII-a to read as follows:

XIII-a. ***"Service provider" means a supplier of a device that meets the public need to access the 911 public safety answering point.***

XIII-b. "Street address guide" or "SAG" means a listing of all numbered structures on each public or private way with multiple structures within the municipality.

4 Coordination by Provider of Telephone Service. Amend RSA 106-H:8 to read as follows:

106-H:8 Coordination by Provider of Telephone Service. Every telephone utility authorized to do business in the state pursuant to RSA 374:22, I and every entity which provides commercial mobile radio service, as defined in 47 C.F.R. ***section*** 20.3, and required by the Federal Communications Commission to provide 911 service, ***and every entity supplying any other device capable of contacting 911,*** shall make available the universal emergency telephone number 911 for use by the public in seeking assistance from fire, police, and other related safety agencies through a single public safety answering point. Each telephone service provider shall assure that [~~all requests for~~] ***a person requesting*** police, fire, medical, or other emergency services received by the provider or the provider's operator services shall be transferred to the public safety answering point. Such transfer shall include the calling party's telephone number ***and location*** in American Standard Code for Information Interchange (ASCII) in a format recommended for data exchange by the National Emergency Number Association (NENA). For purposes of implementing this chapter, any provider of commercial mobile radio service shall be entitled to reimbursement from the bureau of the reasonable expenses incurred to accomplish the provision of enhanced 911 service to the extent authorized by the Federal Communications Commission and approved by the enhanced 911 commission. The bureau may utilize the services of any other state agency or a consultant to assist in reviewing the requested reimbursement to insure that it is reasonable and may seek recovery of the expense of that review from the provider.

5 Funding; Surcharge. Amend RSA 106-H:9, I to read as follows:

I. The enhanced 911 system shall be funded through a surcharge to be levied upon each residence and business telephone exchange line, including PBX trunks and Centrex lines, each individual commercial mobile radio service number, ***or provider of any other service capable of contacting 911,*** and each semi-public and public coin and public access line. No such surcharge shall be imposed upon more than 25 business telephone exchange lines, including PBX trunks and Centrex lines, or more than 25 commercial mobile radio service exchange lines per customer billing account. In the case of local exchange telephone companies, the surcharge shall be contained within tariffs or rate schedules filed with the public utilities commission and shall be billed on a monthly basis by each local exchange telephone company. In the case of an entity which provides commercial mobile radio service, ***or any other access to 911,*** the

surcharge shall be billed to each customer on a monthly basis and shall not be subject to any state or local tax; the surcharge shall be collected by the commercial mobile radio service provider ***or the provider of any other device capable of contacting 911***, and may be identified on the customer's bill. Each local exchange telephone company or entity which provides commercial mobile radio service ***or provider of any other service capable of contacting 911*** shall remit the surcharge amounts on a monthly basis to the enhanced 911 services bureau, which shall be forwarded to the state treasurer for deposit in the enhanced 911 system fund. The state treasurer shall pay expenses incurred in the administration of the enhanced 911 system from such fund. Such fund shall not lapse. If the expenditure of additional funds over budget estimates is necessary for the proper functioning of the enhanced 911 system, the department of safety may request, with prior approval of the fiscal committee of the general court, the transfer of funds from the enhanced 911 system fund to the department of safety for such purposes. The moneys in the account shall not be used for any purpose other than the development and operation of enhanced 911 services, in accordance with the terms of this chapter. Surcharge amounts shall be reviewed after the budget has been approved or modified, and if appropriate, new tariffs or rate schedules shall be filed with the public utilities commission reflecting the surcharge amount.

6 Effective Date. This act shall take effect July 1, 2006.

LBAO

06-2229

11/10/05

HB 1232-FN - FISCAL NOTE

AN ACT applying the enhanced 911 system surcharge to voice over Internet protocol telephone service providers.

FISCAL IMPACT:

The Department of Safety determined this bill will have an indeterminable fiscal impact on state restricted revenue. There will be no fiscal impact on county and local revenue or state, county and local expenditures.

METHODOLOGY:

The Department of Safety (DOS) stated this bill intends to apply the enhanced 911 surcharge to voice over Internet protocol telephone (VOIP) service providers. Currently VOIP providers are unregulated and not subject to the 42 cent enhanced 911 surcharge as the other wireless and wireline providers. The DOS cannot estimate the impact on state restricted revenue, because the bureau does not know the number of VOIP providers. Even with that information, there would not necessarily be an increase in restricted revenue of 42 cents times the number of VOIP provider customers who choose to switch to VOIP, because the customers could drop their other provider(s), which would translate into a negative revenue, positive revenue, or neutral situation. There will be no impact on state expenditures.