THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services

MOTION FOR REHEARING AND SUSPENSION OF ORDER NO. 25,262
and
MOTION TO REOPEN RECORD

NOW COMES Comcast Corporation and its affiliates, Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast") and, (1) pursuant to RSA 541:3 and N.H. Admin. R. Ann. PUC 203.33, respectfully moves for a rehearing and suspension of Order No. 25,262 issued on August 11, 2011 in the above-captioned docket (the "*Order*"), and (2) moves pursuant to N.H. Admin. R. Ann. PUC 203.30 to reopen the record of this proceeding. In support of these Motions, Comcast states as follows:

I. STANDARD FOR REHEARING AND REOPENING THE RECORD.

The Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." RSA 541:3. This includes errors of law, as a motion for rehearing filed with the Commission must specify "every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4; *see Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001). "Good reason" for rehearing may also be shown "by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence

was overlooked or misconstrued." *Kearsarge Telephone Co. et al., Petition for Approval of Alternative Form of Regulation,* DT 07-027, Order No. 25,194, at 3 (Feb. 4, 2011) (citations omitted).

The "purpose of a rehearing 'is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State Pers. Comm'n,* 118 N.H. 309, 311 (1978) (citation omitted). Accordingly, the Commission may reopen the record in a proceeding if it finds that late submission of additional evidence will enhance its ability to resolve the matter in dispute. *See* N.H. Admin. R. Ann. PUC 203.30(a). In determining whether to admit a late-filed exhibit into the record, the Commission must consider the probative value of the exhibit and whether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing shall adequately protect the parties' right of cross examination. *See* N.H. Admin. R. Ann. PUC 203.30(c).

For the reasons discussed below, Comcast respectfully submits that the *Order* is unlawful and unreasonable, and that good cause exists for rehearing and reopening the record in this case, consisting both of errors of law and new evidence.

II. THE ORDER IS UNLAWFUL AND UNREASONABLE.

The *Order* rests on errors of both federal and state law. First, under federal law, the *Order* misapplies the Communications Act, 47 U.S.C. § 153, and precedent of the Federal Communications Commission ("FCC") interpreting the terms of the federal statute with respect to whether Comcast's XFINITY Voice® and Business Class Voice Services (collectively "CDV"[1]) are "information service[s]" under federal law. Second,

[1] At the time briefing was completed in this docket, Comcast offered a residential interconnected VoIP service known as "Comcast Digital Voice." Since then, Comcast

also under federal law, the *Order* misapplies the doctrine of conflict preemption by focusing too narrowly on the effect of New Hampshire state telecommunications regulations on Congressional policy, rather than on the effect of state telecommunications regulations generally, as required by FCC precedent. Third, under state law, the Order disregards the key attributes of CDV that make it different in kind than just another iteration in the evolution of POTS technology, and thus erroneously interprets the term "telephone message" by reading it expansively to include a much broader range of new technologies than the Legislature intended.

A. The Order Misapprehends Federal Law Regarding Information Services.

The Commission's *Order* appears to concede that state public utility regulation of Comcast's CDV service is preempted if the service is an "information service" under federal law. It concludes, however, that CDV is not an information service under the Communications Act. *Order* at 49-53. The reasoning behind that decision misapprehends the nature of the federal statutory requirement and reaches a result that is contrary to law.

1. <u>The Capability To Perform Net Protocol Conversions Makes A Service An Information Service Under The Communications Act Irrespective Of Where In A Provider's Network The Protocol Conversions Occur.</u>

As Comcast's previous briefing in this docket has explained, one reason that CDV is an information service under 47 U.S.C. § 153(24) is that it offers the capability to perform a net protocol conversion between Internet Protocol ("IP") and the Time Division Multiplexing ("TDM") format used on the Public Switched Telephone Network

---

has rebranded its residential interconnected VoIP service as XFINITY Voice® in New Hampshire to reflect the cross-platform nature of the service. The rebranding is illustrative of the integrated nature of the service across all Comcast product platforms. This Motion will refer to Comcast's services as "CDV" for the limited purpose of preserving consistency with the terminology used in the *Order*.

("PSTN"). *See* Comcast Opening Brief at 17-26. The *Order*, however, concludes that this protocol conversion capability is not determinative under federal law, resting its decision on two grounds. The first is that the protocol conversion performed by CDV takes place between two communications networks – Comcast's IP network and the PSTN – instead of between the end user and a third-party communications network of the user's choice. *See Order* at 51. The second is that the protocol conversion performed by CDV does not change the "information from one form to another" in the sense of a change from "a voice call to voice mail to pager alert." *Order* at 52. As explained below, both of these grounds are incorrect. Under the plain text of the Communications Act as well as longstanding FCC precedent, a net protocol conversion satisfies the statutory definition of information service in 47 U.S.C. § 153(24), as a net protocol conversion necessarily "transform[s] [or] process[es] ... information via telecommunications." There is no requirement that such protocol conversions be performed only between the end-user and a third-party service provider, nor is there any requirement that any *additional* changes to the form of information above and beyond a protocol conversion take place. Because the Commission's holdings were in error, it should vacate and reconsider them under a correct application of federal law.

a. The benchmark for whether a service is an information service under the federal Communications Act is whether, *inter alia*, it offers the capability for "transforming [or] processing ... information via telecommunications," 47 U.S.C. § 153(24). Accordingly, as Comcast has previously explained, the FCC has held on multiple occasions that services that enable the conversion from one protocol to another, like CDV, are information services. *See, e.g.*, *In re Application of AT&T For Authority*

under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States, Memorandum Opinion, Order, and Authorization, 94 F.C.C.2d 48, 54 ¶ 13 (1983) (services that "support communications among incompatible terminals (and perform code, format and protocol conversion to support this service within their facilities)" are "enhanced offerings") (emphasis added); *see also In re Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072, 3080, ¶ 57 (retaining classification of protocol conversion as enhanced service), *vacated and remanded on other grounds by California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

The *Order* reasons that CDV is different from the protocol processing services the FCC has previously found to be information services because those earlier protocol processing services "consist[] of the technological interface between an end user and a communications network of the end user's choice, not the formatting conversion that is used by the service providers to interface between two different systems, such as the PSTN and the cable network." *Order* at 51. But this reasoning is flawed both factually and legally. As a factual matter, the assertion that the FCC has only found protocol processing services to be information services in cases where the protocol conversion took place between the end user and the communications network, as opposed to between two communications networks, is simply not true. For example, the FCC has acknowledged that services are "enhanced offerings" (the term previously used to describe "information services") where they "support communications among incompatible terminals (and perform code, format and protocol conversion to support this

service *within their facilities*)," i.e., after a different carrier had already transported the communications to the information service provider's premises. *Third Computer Inquiry*, 94 F.C.C.2d at 54-55, ¶ 13 (emphasis added). Indeed, as the Supreme Court affirmed in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 968 (2005), the paradigmatic information service function is a "communicat[ion] between networks that employ[] different data-transmission formats" – precisely the role that the net protocol conversion offered by CDV performs.[2]

Additionally, the *Order's* attempt to draw a distinction based on *where a protocol conversion occurs* has no basis in law. The relevant inquiry under the Communications Act is whether a service offers the capability for "transforming [or] processing ... information via telecommunications." 47 U.S.C. § 153(24). Whether that transformation or processing occurs between an end-user's premises and a communications network, or between two communications providers' networks, is irrelevant to whether it is "transforming [or] processing ... information." *Id.*

b. The *Order*'s second theory – that Comcast's argument "conflate[s] the terms 'formatting' and 'form,' when it equates IP conversion with the conversion of voice messages from IP to TDM format and vice versa, rather than to the conversion of information from one form to another (*e.g.* a voice call to voice mail to pager alert)," *Order* at 52, is also directly contradicted by the precedent discussed above. If changes to

[2] The *Order* did not endorse the theory argued by the Rural Carriers: that no net protocol conversion happens in Comcast's network because the Customer Premises Equipment ("CPE") that formats voice signals into Internet Protocol packets (the embedded multimedia terminal adapter, or "eMTA") is not owned by the customer. *See* Reply Brief of the Rural Carriers at 14-15. In any event, this issue is now moot – the CDV service has changed since the Commission took testimony in this matter, and customers can commercially purchase and use their own eMTA for use in conjunction with the CDV service. *See* Declaration of Beth Choroser at ¶ 2.

the protocol of a communication were insufficient to constitute a change in "form" under 47 U.S.C. § 153(50), or the "transforming [or] processing [of] information" under 47 U.S.C. § 153(24), then a service offering the capability for a protocol conversion would *never* be an information service. The FCC, of course, has squarely held otherwise. *See* cases cited *supra*.

The *Order* also fails to come to terms with the various court decisions that are squarely on point. Each of these cases held explicitly that interconnected VoIP is an information service for the exact reasons articulated by Comcast. And yet the *Order* tries to distinguish these cases by focusing on aspects of the opinions that are simply not relevant to their ultimate holdings. For example, the *Order* characterizes the *Southwestern Bell* case[3] as a holding that a "state commission [was] preempted from requiring a VoIP provider to adhere to 47 U.S.C. § 271 unbundling obligations in an arbitrated interconnection agreement," *Order* at 52 n.85, even though the relevant holding of the case was that interconnected VoIP is an information service under 47 U.S.C. § 153(24). *See* 461 F. Supp. 2d at 1077-78.

The *Order* similarly characterizes the Minnesota *Vonage* case[4] as a holding that "as Vonage never provides phone-to-phone IP telephony through its nomadic VoIP service, it is exempt from state telecommunications laws." *Order* at 52 n.85. But the holding of *Vonage v. Minnesota PUC* was that Vonage was exempt from state telecommunications laws because the protocol conversion performed by its service made

---

[3] *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).

[4] *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003) ("*Vonage v. Minnesota PUC*").

the service an "information service" under federal law. *See* 290 F. Supp. 2d at 999. Likewise, the *Order* dismisses the New York *Vonage* case[5] as a case "denying Vonage['s] motion to convert [a] preliminary injunction into [a] permanent injunction of state regulation over Vonage's nomadic VoIP services," *Order* at 52 n.85, even though there the Court had granted a preliminary injunction on precisely the same grounds as those in the Minnesota litigation, *see* 2004 WL 3398572, at *1. The only reason there was no permanent injunction in New York was that the court decided that its preliminary injunction could remain in place pending action by the FCC. *See* 2005 WL 3440708 at *4-5. And the *Order* tries to distinguish the *Paetec* decision[6] as a case that wrongly held "that a telephone call from a cable voice provider changes *content* when it is converted to TDM." *Order* at 53 (emphasis added). But that reasoning appears nowhere in the court's decision. Rather, the *Paetec* court adopted the holding of the *Southwestern Bell* case, which held that the protocol conversion effected by interconnected VoIP services makes it an information service. 2010 WL 176193 at *3 (citing *Southwestern Bell*, 461 F. Supp. 2d at 1081-82).[7]

In sum, the *Order* fails to respond meaningfully to the holdings of every court that has addressed the issue and concluded that interconnected VoIP is an information service.

---

[5] *Vonage Holdings Corp. v. New York Pub. Serv. Comm'n*, No. 04-Civ.-4306 (DFE), 2004 WL 3398572, Preliminary Injunction Order (S.D.N.Y. July 16, 2004) ("*Vonage v. NYPSC*"), *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005).

[6] *Paetec Commc'nss, Inc., v. Commpartners, LLC,* Civ. A No. 08-Civ.-0397(JR), 2010 WL 1767193 (D.D.C. Feb. 18, 2010) ("*Paetec*").

[7] The *Order* also notes that the FCC "specifically declined to classify cable voice as an 'information service' in its Vonage order." *Order* at 51. That is a red herring – the FCC did not classify it as a telecommunications service either. It was able to explicitly leave undecided the regulatory classification of interconnected VoIP services in the *Vonage Preemption Order* because it found state regulation preempted *irrespective* of the regulatory classification of the service under federal law. *See* Part II.B *infra*.

As the proper statutory classification of CDV as an information service is alone dispositive, the Commission need go no further to reverse the *Order*.

2. CDV Is A More Multifaceted Service Than A Mere Bundling Of Voice Service With Unrelated Features.

The *Order* also errs in failing to recognize that CDV is an information service for a second, independent reason under federal law: the service incorporates a number of advanced features beyond mere real-time voice communications, such as integration with a customer's cable video and Internet/email services, as well as with mobile devices and iPods. Those enhanced functionalities are clearly information services under federal law, as they allow users to act upon their information in countless ways that satisfy the statutory requirements (i.e. "generating," "storing," "retrieving," "utilizing," and "making available" information via telecommunications, 47 U.S.C. § 153(24)). *See* Comcast Opening Brief at 26-28 (describing various enhanced functionalities).

The *Order* does not dispute that the various enhanced abilities of CDV are information services under federal law. However, it reasons that these features stand separate and apart from the underlying voice service itself. *See Order* at 52 ("[t]he fact that other, enhanced features may be added on to the basic voice communication service does not change the nature of the basic telephone service itself"). The conclusion that CDV's various enhanced features are simply "added on to" voice communications, however, is contrary to the FCC's own findings in the *Vonage Preemption Order*. There, where another VoIP provider provided even *fewer* advanced features than those now offered by CDV, the FCC characterized the service not as voice with other features "added on," but rather as a "suite of integrated capabilities and features" that "in all their combinations form an integrated communications service." *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 22,404, 22,407, 22,419-20, ¶¶ 7, 25 (2005) ("*Vonage Preemption Order*"); *see also generally id.* at 22,421, ¶ 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.") (footnote omitted). There is no basis for the *Order*'s holding that CDV's enhanced functionalities are separate add-on services, as opposed to integrated parts of an overall communications suite that includes real-time voice communications as one of its many elements.

This conclusion is only enhanced by new features of CDV that have either recently become available in New Hampshire or will soon be publicly available.[8] As discussed in Part III *infra*, the Commission should re-open the record in this docket in order to take into account the rapid technical changes to CDV that have been ongoing since the Commission first opened this proceeding in May of 2009. In particular, as discussed below, various nomadic and mobility-related features have either recently become publicly available, or will soon be publicly available, as part of CDV that further reinforce the conclusion that CDV is much more than a voice service with other features later "added on." Indeed, it is precisely the fast-moving nature of IP-enabled services that highlight the problem with the Commission's approach of subjecting CDV to traditional public utilities regulation. Congress intended advanced services such as CDV to "burgeon and flourish in an environment of free give-and-take of the market place

[8] These new features are discussed in Part III *infra*.

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 (quoting *Vonage Preemption Order*, 19 FCC Rcd at 22,416, ¶ 24)).

B. The *Order* Misapplies Federal Law Regarding Preemption.

While the *Order* appears to concede that if CDV is in fact properly categorized as an information service, state public utility regulation is preempted, it misapplies federal law with respect to Comcast's second, independent preemption claim – that state public utility regulation is preempted as conflicting with federal policy regardless of CDV's regulatory classification. Specifically, the *Order* reasons that the type of preemption that came into play in the *Vonage Preemption Order* – where the FCC preempted state telecommunications regulations precisely because they stood in the way of Congress's open-market objectives – does not apply here because New Hampshire's state telecommunications regulations are less burdensome than Minnesota's regulations at issue in the *Vonage Preemption Order*. *Id.* Unlike the tariffing requirements at issue in Minnesota, the *Order* predicts, New Hampshire's "limited" regulations should have "minimal, if any, competitive impact on Comcast," and those regulations "do[] not involve discriminatory or burdensome economic regulation and will not inhibit the development of a competitive market or conflict with federal law." *Order* at 59. Therefore, the *Order* concludes, New Hampshire's telecommunications regulations, unlike Minnesota's, are not impliedly preempted as applied to VoIP.[9]

[9] The Order also discusses express preemption, *see Order* at 54-55, but Comcast has never claimed that it should prevail in this case because of express, as opposed to conflict, preemption.

The reasoning behind the preemption of state telecommunications regulation in the *Vonage Preemption Order*, however, was not just that the Minnesota regulations were burdensome *in isolation*. It was that there would be a *cumulative* impact on the ability of broadband-based competitors to enter the market if every state were to subject them to its own idiosyncratic set of state regulations. *See Vonage Preemption Order*, 19 FCC Rcd at 22,426-27, ¶¶ 36-37. That is why, in the *Vonage Preemption Order*, the FCC properly focused not solely on the isolated effect of the Minnesota regulations narrowly at issue, but more broadly on the effect that would arise from the "imposition of 50 or more additional sets of different economic regulations" on VoIP, concluding that such regulation 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. *Vonage Preemption Order*, 19 FCC Rcd at 22,415-18, 22,426-27, ¶¶ 20-22, 36-37. The question, properly posed, is not whether New Hampshire's requirements *alone* constitute an undue barrier to competition and market entry,[10] but rather whether broadband-based competitors would be disadvantaged in their attempts to enter the market if *every* state subjected VoIP providers to its own, unique set of telecommunications regulations.[11] That question must be answered in the affirmative, and the *Vonage Preemption Order* has already done so. *See id.*

---

[10] Even with respect to this inquiry, the Commission too narrowly focuses on the ability of *Comcast and Time Warner* to comply with state regulations. *See Order* at 59. The purpose of the federal policy is to open the market to new entrants generally, and not just those whose resources from other lines of business may render such compliance more practically feasible.

[11] The *Order* mistakenly presumes that other states currently subject interconnected VoIP services to full state telecommunications regulation. *See Order* at 55 (claiming without citation to any authority that "[t]he regulation of cable voice service varies from state to state, ranging from prohibition of state regulation to full regulation of cable voice as a

Indeed, the New Hampshire regulations that the *Order* dismisses as having "minimal, if any, competitive impact on Comcast," *Order* at 59, highlight this problem. Although Comcast already complies with many of New Hampshire's regulations for competitive telephone utilities, other regulations would impose state-specific, idiosyncratic requirements that would be extremely challenging to square with how Comcast currently conducts its business nationally. For instance, Comcast's billing and provisioning system is currently built around its converged platform – which serves customers across multiple states with multiple services, including high-speed Internet, cable video, and voice. *See* Declaration of Beth Choroser ("Choroser Decl.") at ¶ 6 (submitted concurrently). When a customer pays part of their combined bill, Comcast does not currently have the ability to prioritize such a partial payment towards New Hampshire customers' voice services (as opposed to their High Speed Internet or cable video services) in a manner that would enable Comcast to comply with the Commission's disconnection regulations at N.H. Admin. Rule PUC 432.14(f)(2).[12] *See* Choroser Decl. at ¶¶ 7-9. A requirement that providers engage in burdensome and costly reconfigurations of national systems in order to meet state-by-state requirements of this

---

telecommunications service"). This is, insofar as Comcast is aware as it pertains to CDV, not an accurate statement as to the current state of the law. Comcast is not aware of *any* state in which its CDV service is currently subject to "full regulation ... as a telecommunications service," and the *Order* points to none. Although a handful of states may regulate other providers that have not challenged those regulations in court, as far as Comcast is aware, the legality of those states' regulations have never been properly adjudicated.

[12] These difficulties are laid out in greater detail in the declaration of Beth Choroser at ¶¶ 5-9, submitted concurrently. Comcast accordingly requests that the Commission suspend the *Order* pending the rehearing petition based in substantial part on the fact that Comcast cannot comply with this requirement on such short notice, or without incurring substantial costs.

sort is precisely the kind of problem the FCC recognized in the *Vonage Order* as militating in favor of consistent, national rules for IP-enabled services.

C. The Order Misapplies State Law.

The *Order* also misapplies New Hampshire law in classifying CDV as a "public utility" service subject to the Commission's jurisdiction pursuant to RSA 362:2. The statute, enacted in 1911, defines "public utility" to include "every corporation, company, association, joint stock association, partnership and person . . . owning, operating or managing any plant or equipment or any part of the same for the *conveyance of telephone . . . messages. . . .*" RSA § 362:2 (emphasis added). As the *Order* indicates, the phrase "conveyance of telephone messages" "means what it meant to the framers and its mere repassage does not alter the meaning." *In re Sarvela*, 154 N.H. 426, 430 (2006); *Order* at 41. Moreover, "in enacting RSA 362:2, the legislature did not intend to place all companies and businesses somehow related to . . . telephone [messages] . . . under the umbrella of the PUC's regulatory power." *In re Omni Commc'ns, Inc.*, 122 N.H. 860, 863 (1982) (finding that PUC lacked authority to regulate interconnected pager service).

The *Order* nevertheless finds that CDV is subject to regulation under RSA 362:2, reasoning that CDV and other VoIP services are but a more technologically advanced "substitute for traditional landline service." *Order* at 44. The *Order* dubs any difference between CDV and "plain old telephone service" (POTS) "a distinction without a difference . . . [that] does not alter the practical reality that the fundamental service offered to the public remains telephone service." *Id.*

This analysis misperceives both the nature of CDV and the governing law. As explained herein and in Comcast's prior briefing, while CDV bears a superficial resemblance to POTS, it is in fact a remarkably different service – both in terms of the

technological means it uses to transmit real-time voice communications, its federal regulatory status, and the numerous other advanced features available to CDV customers that cannot be offered with POTS. *See* Part II.A.2, *supra*; Comcast Opening Br. at 3-6. Thus, the *Order*'s conclusion that CDV is but a more technologically advanced version of traditional telephone service is simply wrong as a factual matter. Indeed, as VoIP services like CDV continue to offer new functionalities made available by the service's use of IP, any superficial resemblance between CDV and traditional POTS will continue to diminish. *See* Part III, *infra*.

More fundamentally, the *Order*'s conclusion that whether a service constitutes the "conveyance of telephone messages" depends entirely on the end-user's superficial experience also misses the mark. That conclusion finds no support in the statutory text, which refers *only* to "telephone messages" not "telephone service." Moreover, the statute says nothing about the user's experience. Thus, the Commission erred on page 46 of the *Order* in examining the "user's perspective" when determining that CDV fell within its regulatory authority under RSA 362:2. As Comcast has explained, the most widely accepted definitions of the word "telephone" refer to POTS or, at most, some type of "telecommunications" service, which CDV (an information service) is not. *See* Comcast Br. at 11-12.

In sum, CDV does not fall within the ambit of what the Legislature set out to regulate in 1911 when it enacted RSA 362:2. The Commission erred as a matter of law in looking to "the words of the statute" and finding that they do not indicate that its "drafters intended to limit the scope of the term 'telephone message' to the technologies in existence in 1911 at the time the statute was enacted." *Order* at 43. Rather, the

appropriate legal standard is that RSA 362:2 must be interpreted to mean what it meant to its framers. *See In re Sarvela*, 154 N.H. at 430. Since interconnected VoIP services did not exist in 1911 and perform functions very different from those performed by POTS (or subsequent advancements to POTS), "telephone messages" cannot reasonably be interpreted to include them. In recent years, the Legislature has repeatedly declined to extend state telecommunications regulations to VoIP providers. *See* Comcast Reply Br. at 3. This Commission should not read RSA 362:2 in such a way that expands its own regulatory authority where the Legislature itself has declined to do so.

III. NEW EVIDENCE CONFIRMS THAT CDV IS AN INFORMATION SERVICE UNDER FEDERAL LAW.

As discussed in part II.A.2 *supra*, Comcast's CDV service has continued to evolve technologically since briefing in this docket was completed in March of 2010. This fact underscores the fundamental flaw of trying to apply legacy telephone regulations to fast-developing IP-enabled services. The Commission should re-open the record in order to take these new developments into account, as they are directly relevant to the *Order*'s mistaken conclusion that CDV is not an information service but rather a series of enhanced services that have been merely "added on to" a basic voice connection. *See* Part II.A.2 *supra*.

As described in the attached declaration of Beth Choroser, Comcast has recently (through its "Managed Business Class Voice" or "MBCV" service) made mobile functionality publicly available to business customers in New Hampshire, and will soon be offering nomadic functionality as well, allowing customers to use their MBCV service over different (non-Comcast) broadband connections or mobile handsets on other carriers' wireless networks. *See* Choroser Declaration ¶¶ 3-4. There can be no doubt that

these new nomadic and mobile features constitute enhanced service offerings, or that they are functionally integrated into Comcast's service – they are *part of the call path itself*, with calls staying on Comcast's switch even while users access them using third-party mobile or broadband networks. *See* Choroser Declaration ¶ 4. And their rapid evolution in the past two years is further evidence that IP-enabled services such as interconnected VoIP fit poorly into regulatory models developed for the traditional telephone network, and belong properly in the federal information service category. The Commission should therefore re-open the record to consider evidence of CDV's evolution and the impact of those changes to the proper regulatory classification of the service.

CONCLUSION.

For the reasons stated herein, the Commission should suspend the *Order*, re-open the record to admit evidence of how CDV has continued to evolve since this proceeding began, reconsider its decision, correct the errors of law in its holding, and reverse its decision.

WHEREFORE, Comcast respectfully requests that the Commission:

A. Reopen the record in this docket to consider the late-filed exhibit attached hereto (the declaration of Beth Choroser);

B. Issue an order prior to September 23, 2011 suspending Order No. 25,262 until such time as a final, non-appealable judicial decision is issued on the issues raised in this docket;

C. After considering the within motion, attached exhibits and any response(s) thereto, reconsider and reverse Order No. 25,262; and

D. Grant such additional relief as it deems appropriate.

September 12, 2011

Respectfully submitted,

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

Orr & Reno, P.A.
One Eagle Square
Concord, NH 03301

By: _____
Susan S. Geiger
Phone: (603) 223-9154
Email: sgeiger@orr-reno.com

Jenner & Block, LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001

By: _____
Samuel L. Feder
Phone: (202) 639-6092

By: _____
Luke C. Platzer
Phone: (202) 639-6094

Certificate of Service

I hereby certify that a copy of the foregoing Motion for Rehearing and Suspension and Motion to Reopen the Record has on this twelfth day of September, 2011 been sent by electronic mail to persons listed on the Service List.

_____
Susan S. Geiger