STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 09-044

NEW HAMPSHIRE TELEPHONE ASSOCIATION

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

Order Finding Jurisdiction and Requiring Limited Regulation

O R D E R N O. 25,262

August 11, 2011

I. INTRODUCTION

On March 6, 2009, the rural carriers of the New Hampshire Telephone Association (the RLECs)[1] filed with the New Hampshire Public Utilities Commission a petition under RSA 365:5 asking the Commission to conduct an inquiry into the appropriate regulatory treatment of Internet protocol (IP)-enabled cable voice service, often referred to as Voice over Internet Protocol or VoIP, in New Hampshire. Because VoIP can describe forms of communications that are not at issue here, we will refer to the service being offered by cable providers as "cable voice." According to the filing, affiliates of Comcast Corporation offer a fixed cable voice service in New Hampshire, under the name Comcast Digital Voice. The RLECs assert that Comcast claims Comcast Digital Voice is an information service under federal law and therefore free from regulation by this Commission. Time Warner offers similar cable voice services known as Digital Phone and Business Class Phone. The RLECs contend that the services offered

[1] The Rural Local Exchange Carriers, or RLECs, include: Bretton Woods Telephone Company, Inc.; Dixville Telephone Company; Dunbarton Telephone Company, Inc.; Granite State Telephone, Inc.; Hollis Telephone Company, Inc.; Kearsarge Telephone Company; Merrimack County Telephone Company; and Wilton Telephone Company, Inc.

by Comcast and Time Warner are not information services subject only to federal regulation, but public utility services that should be regulated under RSA 362:2.

If the RLECs are correct and these competitive offerings are public utility services, state regulation under current law would entail minimal regulatory oversight over cable company affiliates and their voice service offerings, the same as that exercised over other competitive local exchange carriers (CLECs). Such regulation would include registration with the Commission, notice of rates for service offerings, filing of annual reports of sales, number of customers, and infrastructure in New Hampshire as well as updated contact information, and payment of an annual utility assessment. Certain consumer protection rules would also apply, as would the obligation to cooperate with other utilities during emergencies to ensure the orderly restoration of service. There would be no constraints on pricing or product offerings for such providers.

This docket considers whether cable voice service in general, and Comcast Digital Voice and Time Warner's Digital Phone and Business Class Phone, in particular, constitute conveyance of a telephone message under RSA 362:2, whether providers of such services are public utilities, and the extent to which federal law preempts New Hampshire law with regard to such services.

II. PROCEDURAL HISTORY

On May 6, 2009, the Commission issued an Order of Notice scheduling a prehearing conference and technical session for June 24, 2009, and setting a deadline of June 19, 2009 for intervention requests. On June 11, 2009, the Office of Consumer Advocate (OCA) notified the Commission of its participation on behalf of residential ratepayers, consistent with RSA 363:28. Timely requests to intervene were filed by Comcast Phone of New Hampshire, LLC and its affiliates (collectively Comcast); segTEL, Inc. (segTEL); New Hampshire Internet Service

Providers' Association (NHISPA); Union Telephone Company (Union); Otel Telekom (Otel); TWC Digital Phone LLC (Time Warner or TWC Digital Phone); and New England Cable and Telecommunications Association, Inc. (NECTA).

A prehearing conference took place as scheduled on June 24, 2009, during which all petitions to intervene were granted. Comcast proposed a stay of the proceeding pending a decision from the Federal Communications Commission (FCC) regarding the regulatory classification of VoIP. The RLECs noted that ongoing proceedings in Maine and Vermont were not stayed pending FCC action. The Commission denied the stay, finding that there were insufficient assurances that the FCC would rule in the immediate future.

On July 1, 2009, Staff and the Parties filed a proposed procedural schedule, which was approved by secretarial letter on July 2, 2009. The RLECs notified the Commission on September 25, 2009, that the Parties had been unable to reach agreement regarding a stipulation of facts and would proceed to filing testimony on October 9, 2009. Testimony was filed on that date by David J. Kowolenko and Beth Choroser on behalf of Comcast; Valerie Wimer and Douglas Meredith on behalf of the RLECs; and James Medica and Julie Laine on behalf of Time Warner. Reply testimony was filed on December 4, 2009, by the RLECs, Comcast, and Time Warner.

On December 11, 2009, Comcast filed a letter reporting that the Parties had agreed to waive cross-examination, and requested that the official record be deemed to consist of the pre-filed direct and reply testimony, the data requests and responses exchanged among the parties, and the briefs due to be filed in January 2010. By secretarial letter dated December 11, 2009, the Commission canceled the hearing as requested and directed the Parties to file any data requests and responses they wished to be included in the record prior to the filing of initial briefs. On

January 6, 2010, with the consent of all parties, counsel for the RLECs filed data requests and data responses received from Parties for filing in the docket record. On January 15, 2010, initial briefs were filed by the RLECs, Comcast, and Time Warner. Reply briefs were filed on January 29, 2010, by the same Parties. On February 2, 2010, Comcast filed a motion for leave to file sur-reply briefs; which the Commission granted, and on March 5, 2010, sur-reply briefs were filed by Comcast, the RLECs, and Time Warner.

III. FACTUAL BACKGROUND

To understand this case, basic definitions and jurisdictional lines are important. The federal Telecommunications Act,47 U.S.C. §§ 151 et seq.[2] provides the following definitions:

> "Telecommunications" - "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153 (50).
>
> "Telecommunications service" - "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153 (53).
>
> "Information service" - "the offering of a capability for generating, acquiring, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153 (24).

Under the Telecommunications Act, "telecommunications services" are subject to both federal and state regulation; "information services" are not telecommunications services and are exempt from state regulation. *See, generally,* 47 U.S.C. §§ 153, 251, 252, and 253.

VoIP is a voice transmission service that can be "fixed" or "nomadic." Most technology currently deployed to transmit voice traffic uses Internet protocol (IP) and IP packets. Nomadic

[2] The Telecommunications Act was revised in October 2010. As a result, certain existing provisions referred to during the course of this proceeding were renumbered, including the definitions of "telecommunications" [formerly §153(43); now §153(50)]; "telecommunications service" [formerly §153(46); now §153(53)]; and "information service" [formerly §153(20); now §153(24)]. The revised references are used in this order.

VoIP service can be enabled from any broadband connection to the public Internet; while it is associated with a particular account, it is not associated with a particular geographic location. In contrast, fixed VoIP is routed over the provider's network, rather than the public Internet. Fixed VoIP, in contrast, is enabled from a defined geographic location (*e.g.* an end-user's house) and can be enabled only from that location. The cable voice offerings at issue in this case are fixed VoIP services. In December 2010, the FCC confirmed that it had not yet determined whether to classify VoIP as a telecommunications or information service. *See In the Matter of Preserving the Open Internet - Broadband Industry Practices, Report and Order FCC 10-201 (Dec. 23, 2010) ("Net Neutrality Order")* at ¶ 70 and fn. 345.

The FCC and federal courts have found that nomadic VoIP is an interstate service and that state regulation is preempted. The FCC has not ruled on the regulatory status of cable voice service. Some states have found cable voice to be a regulated utility service while others have found it to be subject only to federal regulation; many states are awaiting federal guidance.

In this case we consider whether Comcast Digital Voice [and TWC Digital Phone and Business Class Phone] are public utility services regulated under New Hampshire law. RSA 362:2, I defines a public utility to include an entity "owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages . . . for the public." From the user's perspective, the VoIP services offered by Comcast and Time Warner function in a manner similar to that of traditional telephone service, and the essential conveyance of messages is the same, albeit with the use of different technology at certain points in the process.

Cable companies typically offer three categories of service to residential and business customers: television programming, broadband Internet connections, and telephone service. *See*

Prefiled Direct Testimony of Kowolenko and Choroser at 4. Although the provider may promote and sell bundled packages to retail customers, all three service offerings can be offered separately and are delivered independently over a single coaxial cable reaching the customer's home or workplace. *Id.* at 18.

The cable operator provides telephone-specific hardware to customers subscribing to cable telephone service. This additional hardware, called an "embedded multi-media terminal adapter" or eMTA, includes a standard telephone jack with the same physical and electrical characteristics as a telephone jack from a traditional telephone company such as FairPoint Communications or any one of the RLECs. *See Kowolenko Response to Staff DR 1-8, introduced as Exhibit VW 1-5,* at 99. The customer then plugs in a standard, traditional telephone or a telephone wire that is connected to multiple standard telephones. *See Kowolenko Response to Staff DR 1-2, introduced as Exhibit VW 1-5,* at 95.

When a customer subscribes to multiple cable services, the television signal, Internet connection, and telephone service are isolated from and do not rely on each other. Each service is allocated its own independent portion of bandwidth on the coaxial cable. *See Kowolenko Response to Staff DR 1-3, introduced as Exhibit VW 1-5,* at 96.

The customer uses a telephone handset which converts voice sound waves into electrical signals. The eMTA formats these signals into IP packets that can be routed onto the IP networks utilized by Comcast and Time Warner. *See Prefiled Direct Testimony of Kowolenko and Choroser* at 17. The IP packets travel from (or to) the customer's location via coaxial cable. The cable voice service provider maintains an IP network over which calls are routed. A cable telephone call may be transferred to and transmitted over the public switched telephone network

(PSTN)[3] where the call recipient is a customer served by a traditional wire line telephone carrier, a wireless carrier, or a cable telephone customer served by a different provider. When a call moves from the cable provider's network to the PSTN, it is converted at a Media Gateway from the IP packets the cable provider uses into the Time Division Multiplexing (TDM) format used in the PSTN. *See Prefiled Direct Testimony of Kowolenko and Choroser* at 20.

The customer dials a standard telephone number using a standard telephone handset just as if it were attached to a traditional phone line. *See Prefiled Direct Testimony of Valerie Wimer* at 5. Local calls use seven digits; long-distance calls may use "1" followed by a three-digit area code. The called customer picks up the handset to receive a call, using a traditional telephone line, a cable telephone line, or a cell phone. *See Kowolenko response to Staff DR 1-1, introduced as Exhibit VW 1-5, at 94; Cannon Response to Staff DR 1-1, introduced in Exhibit VW 1-5,* at 118. Cable voice customers may port their existing telephone numbers when they subscribe to a cable telephone service, or the provider can assign new phone numbers corresponding to the NXX codes assigned to the geographic region where the customer is located. *See, e.g., Comcast Br.* at 8 and fn. 34 (VoIP providers are subject to number portability obligations). Thus, in terms of functionality and equipment, cable voice service appears no different from traditional telephone service, although it uses different technologies to provide similar functionality. *See Prefiled Direct Testimony of Kowolenko and Choroser* at 15.

Cable operators often promote telephone service as part of a "bundle" in which the subscriber also purchases television and broadband Internet. The transmission of cable telephone calls, however, does not rely on broadband Internet service. *See Kowolenko Response to Staff DR 1-3, introduced as Exhibit VW 1-5,* at 96. Unlike calls made over a "nomadic" VoIP

[3] Public switched telephone network (PSTN) is the legacy common carrier network and switching system connecting public users throughout the world for the completion of voice calls.

telephone service such as Vonage or Skype, cable voice calls do not require a broadband connection to the Internet, are not transmitted over the Internet, and do not compete for bandwidth space on the Internet with e-mail and video traffic. *See Cannon Response to Staff DR 1-11, introduced as Exhibit VW 1-6,* at 121. Indeed, some cable providers emphasize this in their advertising, noting that the segregation of voice traffic provides greater reliability. *See Petition of Rural LECs* at 3. Furthermore, the cable customer's telephone number is tied to the particular coaxial cable drop and/or eMTA provided by the cable company. *See Prefiled Direct Testimony of Kowolenko and Choroser* at 17. This means the customer enjoys "plug and play" operation when he attaches a traditional telephone handset to the eMTA – and it also means that the customer cannot use the cable telephone service when away from the cable drop (for example, the service is not available using a wireless Internet connection at a coffee shop). *See Kowolenko Response to Staff DR 1-11, introduced as Exhibit VW 1-5,* at 101.

The cable voice services offered by Comcast and Time Warner include voice signals, traditional telephone handsets and interconnection with the PSTN. From a customer's perspective, there is no difference in the experience of dialing through the IP-enabled cable system compared with dialing through a traditional telephone system.

IV. POSITIONS OF THE PARTIES AND STAFF

A. Rural Carriers of the New Hampshire Telephone Association

1. State Regulation

The RLECs' claim that Comcast and Time Warner are offering cable voice services that originate and terminate in New Hampshire over cable facilities, unfairly competing with the RLECs. The RLECs assert that this competition is unfair because they are subject to the full regulation of the Commission while competitors, such as Comcast and Time Warner, provide

identical services but are not regulated. They argue that this regulatory structure is arbitrary, discriminatory, and without statutory or policy justification. The RLECs state that cable voice service constitutes "owning, operating or managing . . . plant or equipment . . . for the conveyance of telephone . . . messages . . . for the public" in accordance with RSA 362:2. The RLECs reason that to the extent such services include real-time voice communications between points in New Hampshire, the provision of the service requires franchise authority from the Commission under RSA 374:22 and RSA 374:22-g. The RLECs argue that this Commission should determine that cable voice service is regulated telephone service, and that providers such as Comcast and Time Warner should be required to obtain certification and comply with New Hampshire's utility statutes and the rules and orders of the Commission.

The RLECs add that cable voice service offers transmission of voice information of the customer's choosing between or among points specified by the end user, and that there is no change in form or content of the voice information sent or received by a cable voice service. The RLECs claim that the end user experience in making and receiving calls is the same for both cable voice and for the regulated local exchange service provided by the RLECs. No additional or different actions are required to place and receive cable voice calls than are required for regulated local exchange calls. The RLECs maintain that while cable voice may differ in the specific technology used to provide it, the service the customer receives is telephone service. Regardless of whether it is a traditional PSTN call or a cable voice call, the RLECs argue, there are five primary functional elements of a telephone call: 1) customer premises equipment (*e.g.*, in the majority of cases, a telephone handset), 2) loop, 3) switching, 4) signaling and 5) transport. The RLECs describe these functional elements as follows:

1) Customer premises equipment for residences include, for example, telephone handsets and modems. Customers purchase and own equipment from any retail outlet or from the service provider. According to the RLECs, the majority of traditional telephone handsets use the same transmission technology and are used interchangeably with cable voice and regulated RLEC service.

2) "Loop" is the term that describes the facilities and equipment located in the field that provide the connection between a customer's location and the associated switching center. In place of the twisted pair of copper wires traditionally used by RLECs (or, alternatively, fiber), cable voice service is provided over a hybrid fiber-coaxial loop facility. Both copper loop and coaxial cable technologies employ connections at intermediate locations between a switching center and the customer. At those intermediate locations, electrical voice signals are converted into optical signals that are carried over fiber. Each of these loop technologies connects to switching and transmission electronics in a centralized location.

3) Just as with loop plant, several technologies can be used for switching voice calls. Comcast and Time Warner use IP-based, packet switching "soft switches." Most telephone companies use digital electronic circuit switches, but some are migrating to soft switches. In either case, the soft switch or digital circuit switch determines where the call needs to be routed to reach the called party and can also be called a router.

4) Most, if not all, interoffice transport is carried on optical fiber, according to the RLECs. While the Internet can be used to provide interoffice transport for voice and data traffic, the carrier has little, if any, control over the quality of the connection and may not be able to give voice traffic priority over data traffic. The RLECs note that Comcast and Time Warner use their own private networks, rather than the public Internet, to transmit traffic.

5) Signaling consists of instructions that monitor the status of a call, alert the user to incoming calls, transmit routing information and change routing of the call using criteria both from the dialed digits and other information. According to the RLECs, cable voice routing and traditional Signaling System 7 networking have some of the same characteristics.

The RLECs assert that these functional elements are the same, although the manner in which the functions are performed at a technical level varies with the particular technology used. Nonetheless, they argue, the overall result is the same: voice calls are originated and terminated in real time across a distance.

The RLECs conclude that cable voice conveys telephone messages as described in RSA 362:2 and has all the characteristics of a telecommunications service as this term is defined by the Telecommunications Act.[4] It is a paid service offered directly to the public, and entails voice transmission among points specified by the user without a change in the form or content of the voice information as sent and received. The RLECs assert that there is nothing about cable voice, architecturally, technically, or practically, that distinguishes it from traditional phone service, and that cable voice is simply an evolution in technology – voice networks have migrated from analog to digital and now the voice network is migrating to IP technologies.

The RLECs emphasize that authority over cable voice service is not an expansion of the Commission's traditional jurisdiction. While it is true that the New Hampshire Supreme Court found that the Commission does not have authority under RSA 362:2 to regulate industries that are merely "related" to utility services, the RLECs assert that cable voice should be regulated, not because it is "somehow related" to telephone service but because it *is* telephone service, no different than the telephone services provided by regulated RLECs, incumbent local exchange carriers and competitive local exchange carriers (CLECs). The RLECs argue that where a

[4] *See* 47 U.S.C.§ 151 *et seq.*, generally, and § 153, specifically.

service "conveys the telephone message for the benefit of its customers," the Commission is fully empowered to assert its jurisdiction. According to the RLECs, the Commission's authority is defined by the characteristics of the companies and services it regulates, not the technology employed to provide those services; the RLECs do not recommend that the Commission expand its powers, but that it exercise the power it has been granted by the legislature.

2. Federal Preemption

The RLECs maintain that Congress has created "a system of dual state and federal regulation over telephone service, grant[ing] to the FCC the authority to regulate 'interstate and foreign commerce in wire and radio communication,' while expressly denying 'jurisdiction with respect to . . . intrastate communication service . . . ."[5] The RLECs contend that the authority to regulate intrastate communication service is expressly reserved to the states. Because, according to the RLECs, cable voice service has a discernible intrastate component, state law is not preempted.

The RLECs state that, given the dual-jurisdictional boundaries established by Congress, the FCC historically has applied a geographic "end-to-end" analysis based on the physical endpoints of a communication to distinguish interstate from intrastate communications for purposes of establishing and enforcing its jurisdiction. This "end-to-end" analysis poses a problem, the RLECs reason, when the jurisdictional end-points of a call using nomadic VoIP cannot be determined, as in the *Vonage Order*,[6] where the FCC preempted the Minnesota Commission from regulating Vonage's nomadic VoIP service. The RLECs state that the FCC found that the geographic endpoints of communications using Vonage's nomadic "Digital Voice" VoIP service could not be determined with any certainty, thus making it "impossible" to

[5] RLEC Br. at 18, *citing Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 360 (1986).*

[6] *In re Vonage Holdings Corp.*, WC Docket No. 03-211, Memorandum Opinion & Order, 19 FCC Rcd 22404 (2004) *("Vonage Order").*

know whether a specific communication was an intrastate communication subject to state regulation, or an interstate communication subject to federal regulation. As a result, the FCC held that preemption of the Minnesota state regulations was warranted as they were deemed to conflict with "federal rules and policies governing *interstate* Digital Voice communications." The RLECs point out that the FCC also asserted that other VoIP services with "basic characteristics similar to [Vonage's] Digital Voice" would be exempt from state regulation. The RLECs argue, however, that cable voice does not have "basic characteristics similar to [Vonage's] Digital Voice," because it requires the end-user to use a geographically specific telephone number at a fixed location, unlike nomadic VoIP service that does not rely on a fixed location. Like the RLECs, both Comcast and Time Warner offer only fixed service to their end users, so it *is* possible to identify the locations where a call originates and terminates. The RLECs observe that this fundamental character distinction was confirmed in the U.S. Eighth Circuit Court of Appeals' review of the *Vonage Order*. Specifically, the RLECs state, the court observed that when VoIP service is "offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished," holding that the FCC action in *Vonage* focused exclusively on "nomadic VoIP" service and did not address fixed VoIP services.[7] Thus, argue the RLECs, while Comcast and Time Warner would parlay the *Vonage Order* into a federal preemption of all VoIP service, the reach of the *Vonage Order* is actually far less broad.

The RLECs note that, in a post-*Vonage* proceeding concerning universal service funding, the FCC elaborated on the limits of the preemption decreed in the *Vonage Order* as follows:

> [A]n interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state

[7] RLEC Br. at 20, *citing Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

> regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider.[8]

The RLECs contend that the *USF Order* unambiguously recognizes that VoIP providers with the capability to track jurisdictional confines, that is, interstate from intrastate calls, do not qualify for *Vonage* preemption and are therefore subject to traditional state telephone regulation. In the RLECs' view, it necessarily follows that intrastate cable voice service also lies beyond the reach of the FCC's power of preemption and, therefore, is subject to state regulation.

The RLECs allege that Comcast misreads the *Vonage Order* to apply to cable voice service and argue that the order limits preemption to only those services that are comparable to the Vonage service. A comparable service, subsequently labeled "interconnected VoIP," was defined in the *Vonage Order* by the FCC and codified at 47 C.F.R. § 9.3 as "a service that:

> (1) Enables real-time, two-way voice communications;
>
> (2) Requires a broadband connection from the user's location;
>
> (3) Requires Internet protocol-compatible customer premises equipment (CPE); and
>
> (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network."

The RLECs maintain that the cable voice services provided by Comcast and Time Warner do not meet all of these criteria. First, their services are based on fixed interconnection, not the nomadic broadband connection that the FCC envisioned, thus falling short of the second test. The *Vonage Order* stated that, "[i]n marked contrast to traditional circuit-switched telephony . . . however, it is not relevant where that broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service. Rather, Vonage's service is fully portable; customers may use the service anywhere in the world

[8] *Universal Service Contribution Methodology,* WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶ 56 (2006) (USF Order).

where they can find a broadband connection to the Internet."[9] The RLECs allege that Comcast and Time Warner acknowledge that their cable voice services are not portable to "any" broadband connection, and that the same connection must be used every time a subscriber accesses the cable voice service. In other words, their cable voice services are fixed, not nomadic such as that provided by Vonage.

The RLECs assert that cable voice also fails the third test, use of IP-compatible customer premises equipment. In the *Vonage Order*, the FCC observed that:

> [c]ustomers may choose among several different types of specialized [equipment] (1) a Multimedia Terminal Adapter (MTA), which contains a digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and has a standard telephone jack connection; (2) a native Internet Protocol (IP) phone; or (3) a personal computer with a microphone and speakers, and software to perform the conversion (softphone).[10]

In contrast, the RLECs argue, Comcast and Time Warner cable voice services require use of equipment that is provided by Comcast or Time Warner. The customer has no control over the company-owned multimedia terminal adapter (eMTA), and the traditional telephone handset used to originate a call is the only customer equipment required. Furthermore, soft phones and native IP phones, *i.e.*, handsets that convert voice signals into IP, do not work with these services. Therefore, the RLECs assert, the eMTAs provided by Comcast and Time Warner do not meet the specialized customer premises equipment test of an interconnected VoIP provider.

The RLECs further argue that cable voice is not an Information Service, noting that the FCC, despite numerous entreaties, has not declared VoIP, whether fixed or nomadic, to be an information service. Nor, argue the RLECs, has the FCC preempted state authority over fixed VoIP services. Moreover, the RLECs note that the FCC reached its decision to preempt

[9] *Vonage Order* at ¶ 5.
[10] *Vonage Order* at ¶ 6.

Minnesota's regulation of IP-enabled telecommunications irrespective of whether it was a telecommunications or information service.[11]

The RLECs maintain that, in spite of this, Comcast argues that the FCC's *Brand X* decision[12] affirmed that IP-based cable voice offerings are information services not subject to traditional telecommunications regulation. According to the RLECs, however, *Brand X* addressed only whether the underlying cable modem transmission service was so integrated with the associated Internet access service as to make it reasonable to describe the two functions as a single service. As such, the single integrated service was classified as an Internet access service not subject to unbundling requirements. The RLECs claim that the FCC applied this rationale to DSL service and wireless broadband Internet access, as well, but emphasize that *Brand X* was an unbundling case, not a jurisdiction or classification case. Because, the RLECs note, the court did not conclude that cable modem services are, by definition, information services, *Brand X* is irrelevant to this investigation.

The RLECs state that Comcast and Time Warner imply that because their cable voice services may include enhanced features that allow customers to manage their calls dynamically, receive voice mail through e-mail, and manage billing and other account information through web portals, the services are somehow unique to cable voice. The RLECs disagree, noting that Granite State Telephone offers such services, and TDS has a web portal that allows on-line billing and ordering of services. The RLECs state that web portals are unarguably enhanced services that provide customers an interface to the service provider's records and systems, but they are not components of the telephone messaging service itself. The RLECs assert that these

[11] *Vonage Order* ¶ 14 (emphasis added). Two years after issuing the *Vonage Order*, this same issue of "definitional classification" arose in the context of the *USF Order*, where the FCC decided to establish universal service contribution obligations for interconnected VoIP service providers. The FCC chose to decide that case as well without resolving the classification issue with respect to interconnected VoIP. *USF Order* at ¶ 35 .

[12] *Nat'l Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) *("Brand X").*

enhanced features are incidental to voice service and are not required for a customer to originate or terminate calls. The RLECs argue that because such services are not in the actual voice call flow, and cannot be made part of the call, access to web portals and other enhanced services has no impact on whether the voice service provided by Comcast or Time Warner is a telecommunications service. If this were not the case, the RLECs claim, a regulated telephone company could simply add enhanced features to their basic exchange service to avoid regulation.

The RLECs further state that while protocol conversions occur in both traditional telephone service and cable voice networks, there is no end-to-end protocol conversion in a cable voice call that would make it an information service.[13] The RLECs claim that the vast majority of calls are originated or terminated on traditional phones and most networks perform some change in the transmission format of a call between the calling and the called party. A traditional telephone call may change from analog to digital, from digital to IP packets, electrical to optical and back again several times as it is routed through the network. The RLECs state that the routing information may also change; instead of routing based on the actual dialed telephone numbers, a location routing number associated with a carrier's switch or equipment IP address may be used. The exact protocols implemented depend not only on the carrier, but also on the specific vendor equipment used. On the other hand, the RLECs assert, changes in the form of the call are internal to the networks carrying the call. In cases where the call stays within the Comcast or Time Warner network, Comcast and Time Warner change the form only at the calling and receiving ends of a customer's calls. According to the RLECs, both Comcast and Time Warner have stated that this type of in-network or "on-net" call does not have any net

[13] This end-to-end requirement was defined in the Frame Relay Order, which held that the "enhanced service definition applies only to end-to-end communication between or among subscribers. Thus communications between a subscriber and the network itself (e.g., for call setup, call routing, and call cessation) are not considered enhanced services." *Independent Data Communications Manufacturers Association, Inc. and AT&T Petition for Declaratory Ruling*, 10 FCC Rcd 13717 para. 14 (1995).

change in form and does not undergo a net protocol conversion. The RLECs conclude that Comcast and Time Warner are providing a basic telecommunications service for these calls.

B. Comcast Phone of New Hampshire, LLC and its Affiliates

1. State Regulation

Comcast states that its Comcast Digital Voice offering does not entail the "conveyance of telephone . . . messages" under RSA 362:2 and, thus, Comcast IP Phone II, LLC, (Comcast IP Phone) the Comcast entity providing Comcast Digital Voice, is not a public utility subject to the Commission's regulatory authority. Comcast maintains that its cable voice offering does not satisfy the common or specialized meanings of the term "telephone" and that such an interpretation of New Hampshire law would conflict with federal law and policy. Comcast contends that RSA 362:2 does not define "telephone" or ''telephone messages." However, according to Comcast, pursuant to RSA 21:2 those terms must be construed according to their "common and approved usage" or, to the extent they are technical words or have acquired a "peculiar and appropriate meaning in law" they must be construed and understood according to such peculiar and appropriate meaning. Cable voice is not the "conveyance of telephone ... messages" under either test, according to Comcast.

Comcast argues that under the "common and approved usage" test, the term "conveyance of telephone . . . messages" should be understood in the context of the service that existed at the time RSA 362:2 was enacted in 1911.[14] Statutory language means what it meant to its framers, according to Comcast; the mere re-enactment of the language at various times since 1911, does not alter the original meaning intended by the legislature when it first enacted RSA 362:2. Comcast asserts that the service contemplated by the enacting legislature, and over which the

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

Commission has had long-standing regulatory authority, is known as "plain old telephone service" or "POTS." Although cable voice may share superficial similarities with POTS, Comcast argues that it is a very different service, from a network perspective as well as the user, from the "conveyance of telephone . . . messages" that existed at the time RSA 362:2 was enacted. Comcast purports that cable voice does more than simply enable the type of voice communications that comprise POTS – it offers the capability to transform the protocol in which calls are transmitted and provides a series of enhanced communications features that augment and complement the calling features. Comcast contends that these features are not offered by POTS and were not envisioned by the legislature when it set out in 1911 to regulate ''the conveyance of telephone . . . messages." Comcast maintains that this holds true today, quoting Newton's Telecom Dictionary as defining a "telephone" as providing a "dial tone [that] actually comes from the central office, not the phone,"[15] something cable voice does not provide. According to Comcast, with cable voice the dial tone is generated by the eMTA on the customer's premises.

Comcast argues that cable voice also does not qualify as the "conveyance of telephone ... messages" under the "peculiar and appropriate meaning in law" test under RSA 21:2. The term should be understood as commensurate with the definition of ''telecommunications service" under federal law – the regulatory classification that has long applied to the type of telephone service regulated by this Commission.[16] Under federal law, the technical differences between cable voice and POTS prevent it from being classified as a "telecommunications service" at all, according to Comcast.

[15] Newton's Telecom Dictionary 1103 (25th ed. 2009).
[16] *See* 47 U.S.C. § 153(53).

Comcast states that the New Hampshire Supreme Court has emphasized that the Commission's authority is circumscribed and does not cover services beyond those contemplated by the legislature. In rejecting the Commission's authority to regulate mobile paging companies, Comcast argues, the Court found that "the legislature did not intend [through RSA 362:2] to place all companies and businesses somehow related to railroads, telephone, telegraph, light, heat, and power companies under the umbrella of the PUC's regulatory power."[17] Rather, the Court held, the statute should be limited to the types of services the legislature intended to cover, with sensitivity to the need for regulation by the Commission.

Further, Comcast argues, there is no need for such regulation. According to Comcast, Comcast Phone, which provides interconnection service to Comcast IP Phone, abides by the Commission's CLEC regulations, files rate schedules with the Commission, and posts on Comcast's website the services it provides in New Hampshire, which include a product designed to serve schools and libraries, another designed for small businesses, and a wholesale local interconnection service (the same service utilized by ComcastIP Phone). Comcast Phone also pays local exchange carriers reciprocal compensation for traffic originated by Comcast IP Phone that terminates within local exchange calling areas and pays intrastate or interstate terminating switched access charges for non-local traffic originated by Comcast IP Phone. Comcast adds that Comcast Phone, in accordance with federal regulations, provides Enhanced 911 and Telecommunications Relay Service (TRS), and remits the required 911 and TRS fees to the State of New Hampshire and Trust Fund Administrator, respectively. Comcast IP Phone collects and remits the New Hampshire Communications Service Tax pursuant to RSA 82-A for its Comcast Digital Voice service. Comcast Phone, on behalf of its customers (including Comcast IP Phone) also pays the utility assessment to the Commission under RSA 363-A, based on end-user

[17] *Appeal of Omni Comm'ns, Inc.*, 122 N.H. 860, 863 (1982).

revenues. Comcast avows that it works cooperatively with the Commission's Telecommunications and Consumer Affairs Divisions to ensure that customer complaints are handled appropriately, and works diligently to resolve matters to the customer and regulator satisfaction.

Accordingly, Comcast argues, just as the New Hampshire Supreme Court held in *Appeal of Omni* that RSA 362:2 should not be extended to wireless pagers because there was no need to do so, this Commission has no need to extend the meaning of the term "conveyance of telephone . . . messages" to cable voice services. Comcast argues that the FCC has regulatory power over all VoIP providers, thereby obviating state regulation. Comcast alleges that this Commission has expressly recognized that competitive, unregulated cable voice offerings are consistent with the fair competition policies the Commission is bound to promote.[18]

2. Federal Preemption

Comcast states that, even assuming, *arguendo*, the Commission has authority under state law to regulate cable voice, any such authority is preempted by longstanding federal law prohibiting states from regulating information services. According to Comcast, the plain terms of the federal Telecommunications Act establish that a cable voice product such as Comcast Digital Voice is an information service. Comcast purports that federal courts have clearly and repeatedly held that cable voice providers, such as Comcast IP Phone, provide "information services" and have enjoined state regulation of cable voice providers on that basis. Comcast indicates that the Telecommunications Act distinguishes "telecommunications services," such as traditional telephone service, from "information services," defined as the "offering of a

[18] *Comcast Phone of New Hampshire*, Order No. 24,938 in Docket No. DT 08-013 (Feb. 6, 2009) at 19 (finding that bundled regulated and unregulated offerings provided by Comcast and CLECs are consistent with state and federal policies and not unfair to the incumbent local exchange carriers in whose territories the bundled offerings are available).

capability for storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[19] Comcast hypothesizes that to encourage innovation in the information services market, the FCC has held that Congress intended that "the two categories be separate and distinct, and that information service providers not be subject to telecommunications regulation."[20] Comcast maintains that federal courts have recognized that "[t]he FCC has promoted a market-oriented policy of allowing providers of information services to 'burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.'" Accordingly, Comcast quotes, "any state regulation of an information service conflicts with the federal policy of non-regulation."[21] Comcast claims that the FCC first preempted states from regulating information services nearly thirty years ago and that holding has been upheld by federal courts.[22] Therefore, Comcast asserts, because Comcast Digital Voice is an information service under

[19] *See* 47 U.S.C. § 153(24) and §153(53) (formerly § 153(20) and (46)).

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

[21] *Minnesota Pub. Utils. Comm'n* v. *FCC,* 483 F.3d 570, 580 (citing *Vonage Preemption Order,* 19 FCC Rcd 22404; 22416, ¶ 24). *See also In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,'* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802-03, ¶ 9 (2002) *("Cable Modem Declaratory Ruling"), aff'd sub nom. National Cable & Telecomm. Assn. v. Brand X Internet Services,* 545 U.S. 967 (2005) (Brand X).

[22] See, e.g., In re Amendment *of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 88 FCC 2d 512, ¶ 83 fn.34 (1981) (finding that "the provision of enhanced service is not a common carrier public offering and that efficient utilization and full exploitation of the interstate telecommunications network would be best achieved if these services are free from public utility-type regulation," and accordingly "pre-empted the states [from] impos[ing] common carrier tariff regulation on a carrier's provision of enhanced services"), a*ff'd sub nom. Computer and Computer Indus. Ass'n* v. *FCC,* 693 F.2d 198, 216 (D.C. Cir. 1982); *see also California v. FCC,* 39 F.3d 919, 933 (9th Cir. 1994) *(California v. FCC)* (finding that the FCC had demonstrated that legitimate "regulatory goals ... would be negated" by conflicting state regulation of information services). At the time, the services were known as "enhanced services" rather than "information services"; the FCC has since made clear that Congress' use of the term "information services" at 47 U.S.C. § 153(20) [now §153(24)] was meant to include all "enhanced services." *See, e.g., In re Implementation of the Non-Accounting Safeguards o/Section* 271 *and* 272 of *the Communications Act,* First Report and Order, 11 FCC Rcd 21905, 21956, ¶ 102 (1997) *(Non-Accounting Safeguards Order)*

federal law, state public utility regulation and entry requirements conflict with the express federal policy of non-regulation and are preempted under existing law.[23]

Comcast argues that the regulatory category of "information service" was an FCC creation originally known as "enhanced service." Congress has since adopted the separate regulatory classification and treatment of information services and embodied it in the Telecommunications Act.[24] Comcast maintains that cable voice meets this statutory definition for two independent reasons. First, Comcast argues, cable voice offers the capability to conduct "net protocol conversions" of data by transforming calls between IP and time division multiplexing (TDM),[25] which is a "capability" to "process" and "transform" information "via telecommunications." Second, according to Comcast, cable voice consists of an ever-expanding series of enhanced IP-enabled communications features that augment and complement its calling features and that these enhanced features are "capabilit[ies]" for "generating, acquiring, storing .. retrieving, utilizing, [and] making available" information "via telecommunications." Comcast argues that either of these reasons alone qualifies cable voice and specifically Comcast Digital Voice as an information service under federal standards.

Comcast supports its argument with a trio of federal court decisions holding that interconnected VoIP services, like Comcast Digital Voice, are information services because they offer the capability for transforming the protocol in which calls are transmitted from IP to TDM and vice versa.[26] Comcast states that the reasoning underlying these cases is based on the plain

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[23] *See Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 1002.

[24] *See* 47 U.S.C. § 153(24).

[25] TDM is a technique for transmitting a number of separate voice (as well as data or video) signals simultaneously over one communications medium by interleaving a piece of each signal one after another. TDM is the transmission standard historically used on the PSTN.

[26] *See Southwestern Bell Tel., L.P. v. Missouri Public Service Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. Sept. 14, 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009); *Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 999; *Vonage v. NYPSC*, 2004 WL 3398572 (citing with approval *Vonage v. Minnesota PUC*).

language of the Telecommunications Act, and is dispositive of the issue here. Comcast argues that an information service offers the "capability for ... transforming" or ''processing'' information,[27] unlike a "telecommunications service," in which information is transmitted "without change in the form or content of the information as sent and received."[28] Comcast states that cable voice offers customers the capability to change the form of incoming or outgoing calls by processing and transforming the protocol of the call – the manner in which the call is represented by the information transmitted on, and understood by, the network.[29]

Comcast contends that the Eastern District of Missouri's analysis in *Southwestern Bell* is squarely on point. As that court recognized, under longstanding FCC precedent, "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service" because it constitutes the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" and "alters the form and content of the information sent and received."[30] Therefore, IP-PSTN traffic, which enters the network in IP and terminates on the PSTN, is an "information service."[31] Comcast also maintains that the *Vonage* court reached an identical conclusion, holding that cable voice carriers "act on the format and protocol of the information" for calls they carry, thus making the service an information service under federal law.[32] The Southern District of New

[27] 47 U.S.C. § 153(24).

[28] *Id.* at § 153(50) and (53).

[29] *See Second Computer Inquiry,* 77 FCC2d 384, ¶ 97 Fn.33 (defining "[p]rotocols" as "the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages.").

[30] 461 F. Supp. 2d at 1081-82 (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21956-57, ¶¶ 104-106 (Dec. 24, 1996); 47 U.S.C. § 153(20)) [now § 153(24)]; and *In re Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538, ¶ 39 (2006)). *See also, generally, In re Communications Protocols under Section 64.702 of the Commission's Rules and Regulations,* Memorandum Opinion, Order, and Statement of Principles, 95 FCC2d 584 (1983).

[31] 461 F. Supp. 2d 1055, 1082.

[32] *See* 290 F. Supp. 2d 993, 999 (internal citation omitted).

York similarly cited the *Vonage* court's reasoning in preliminarily enjoining the New York Public Service Commission from regulating a cable voice carrier as a public utility.[33]

Comcast also states that any distinction between fixed and nomadic services is irrelevant to the information service determination. Comcast argues that the *Vonage Preemption Order* made clear that a finding that cable voice is an information service would necessarily mean that state public utility regulation of cable voice is preempted: "if [cable voice] were to be classified as an information service, it would be subject to the [Federal Communications] Commission's long-standing national policy of non-regulation of information services."[34] Comcast adds that the *Vonage Preemption Order* never reached the question, and was ultimately decided on entirely different grounds.[35]

Comcast alleges that the RLECs have attempted, through two arguments, to evade the plain language of the Telecommunications Act. First, the RLECs suggest that the federal courts that have addressed the question have been mistaken, and that there is no "net" protocol conversion in cable voice services because there is an electric analog signal and a human voice on both the originating and terminating ends of the call. Second, the RLECs assert that Comcast is not providing an information service with respect to the subset of calls between customers on Comcast's own network, which remain in IP without being transformed to TDM.

Comcast argues that net protocol conversion does not require alteration of the transmitted content. Comcast asserts that the RLEC position was flatly rejected in *Southwestern Bell*, which held that "[i]t does not matter that there is a 'voice' at both ends of an IP-PSTN call."[36] Comcast avers that the RLECs' argument repeats the fallacy that there is no ''transformation'' of the

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[33] *See Vonage* v. *NYPSC,* 2004 WL 3398572 at *1.

[34] *Vonage Preemption Order,* 19 FCC Rcd 22404, 22416, ¶ 21.

[35] *See id.* at 22419, ¶ 24; *see also infra* pages 32-34.

[36] 461 F. Supp. 2d 1055, 1082 fn.21.

user's information when the content being transmitted (*i.e.*, ''voice'') remains the same. According to Comcast, however, the FCC addressed and rejected that exact argument in the *Non-Accounting Safeguards Order*, where Bell Atlantic argued that the information service designation should be limited to services ''that transform or process the content of information transmitted by an end-user," and not to protocol processing services that leave the content of the transmission unchanged.[37]

Comcast notes that the FCC disagreed with Bell Atlantic, holding that it does not matter that the *content* of a transmission remains unchanged, because ''the statutory definition makes no reference to the term 'content,' but requires only that an information service transform or process 'information.'"[38] Therefore, the FCC held, "both protocol conversion and protocol processing services are information services" whether they change the content of the user's information or not.[39] Comcast postulates that the RLECs misunderstand the concept of a net protocol conversion, which the FCC has defined as one that enables "an end-user to send information into a network in one protocol and have it exit the network in a different protocol" and thereby "clearly 'transforms' user information."[40] Comcast claims that a service offers and performs net protocol conversion if a net protocol conversion is performed by the network. Comcast challenges the RLECs' exclusive focus on customer handsets, stating that changes to the format of information that occur before the information enters a carrier's network, or after

According to Comcast, the critical consideration is the point where an end-user sends information into the information service provider's network and the point where information exits that network. Comcast states that the court in *Southwestern Bell* held that a "net protocol

[37] *See* 11 FCC Rcd 21905, 21956, ¶ 104.
[38] *Id.*
[39] *Id.*
[40] *Id.*

conversion" occurs where "[t]he communication originates at the caller's location in IP protocol, undergoes a net change in form and content when it is transformed at the [provider's] switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient's location in TDM,"[41] which is precisely what cable voice does. Outgoing calls enter Comcast's network in IP at the demarcation point between the provider's network and the customer's home wiring. When those calls are bound for the PSTN, they exit Comcast Digital Voice's network after being converted from IP to TDM, and are handed off to Comcast IP Phone's CLEC partner. Outgoing calls enter Comcast's network in IP and leave it in TDM; incoming calls from the PSTN do the opposite. That, Comcast contends, is a net protocol conversion.

Comcast states that although it is true that Comcast Digital Voice customer equipment generally reformats the IP signal into an analog electrical signal (at the eMTA) and from an analog signal into human voice (at the handset), the reformatting itself is not a protocol conversion, as electric and analog signals are not "protocols" under the FCC or standard industry definitions. Moreover, Comcast maintains, such reformatting is not performed on or by the cable voice network.

Comcast states that cable voice offers the capability for protocol conversion irrespective of whether that capability is invoked in every call, as inevitably some customers will call one another, with the calls staying on Comcast's network without the protocol change that occurs when Comcast Digital Voice customers call those who are not on Comcast's network. According to Comcast, the fact that not all calls undergo conversion is irrelevant; it is the capability for protocol conversion that is important. The RLECs' argument that Comcast is providing a telecommunications service for these calls because there is no need for Comcast to

[41] *Citing Southwestern Bell* v. *Missouri PSC,* 461 F. Supp. 2d 1055, 1082 (citing *Vonage* v. *Minnesota PUC, 290* F. Supp. 2d 993, 1000).

convert a call to TDM if it is staying on its network is in error because, says Comcast, it ignores the plain text of the Telecommunications Act: an information service is the "*offering* of a *capability* for . . . transforming, [or] processing . . . information via telecommunications."[42] Comcast maintains that the statute contains no requirement that the offered capability be exercised every single time the service is used. Comcast hypothesizes that a person might use his or her broadband Internet connection to transfer a file without invoking any other functionalities, but that does not cause the user's broadband Internet service – the paradigmatic information service – to suddenly turn into a separate telecommunications service for purposes of the file transfer, then revert back to an information service as soon as the user invokes other abilities, such as visiting a web page. Similarly, Comcast contends, although users may place some calls that are IP-to-IP, that does not make Comcast Digital Voice any less of an "offering of a capability" for converting the call protocol, nor should it require Comcast to split the cable voice service into separate plans for calling PSTN users and for calling other Comcast Digital Voice customers. Comcast states that as the FCC has held and the Supreme Court has affirmed, the regulatory status of a service "turns on the nature of the functions the end user is offered," not on each individual element contained within the offering.[43] The focus is on whether the elements are "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering."[44] Comcast states that this is plainly the case with Comcast Digital Voice with respect to a customer's ability to place calls to PSTN users and to other Comcast Digital Voice customers.

Comcast further states that its cable voice service qualifies as an information service because the calling capability is integrated with other computing and information service

[42] 47 U.S.C. § 153(24) (emphasis added).
[43] *Brand X infra.*, 545 U.S. 967, 988.
[44] *Id.* at 990.

functions as a single offering. Where information service features are integrated with transmission features as part of the same service offering and "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering," the combined service will be considered an information service, notwithstanding the presence of telecommunications elements.[45] Comcast claims that its cable voice service offers communications abilities and features that go beyond the ability to place and receive calls, *i.e.*, it combines communications features that use the Internet, television, mobile handsets, iPods and iPhones in conjunction with the user's voice connection, and which permit users to access and act upon their communications information, including their calling information, in a variety of ways from multiple devices. Comcast argues that the ever-growing list of communications features that Comcast is able to offer because of the IP-enabled nature of its service are plainly information services under the statutory definition, as they enable consumers to store, manage, and utilize information, in addition to simply transmitting it.

According to Comcast, the RLECs' claim that Comcast is doing nothing more than bundling an information service with basic exchange service to avoid regulation is also in error. Comcast's cable voice service offers a unified communications platform that customers use to communicate and access information in a manner that transcends either their location or the communications device they are using at any given time. Callers can send and receive information and access their calls and information across a variety of platforms – phone, Internet, video, mobile handset, iPod, or iPhone – in a manner completely foreign to the experience of using POTS. Comcast argues that in the *Vonage Order*, the FCC found (although it ultimately decided the case on other grounds), that a VoIP provider's offering of a "suite of integrated

[45] *Id.* at 990; *see also Southwestern Bell* v. *Missouri Public Service Comm'n*, 461 F. Supp. 2d 1055, 1082-83 (information and telecommunications aspects of VoIP are treated as the same service so long as they are "sufficiently intertwined").

capabilities and features" substantially similar to those offered by Comcast Digital Voice formed "an integrated communications service."[46] Accordingly, Comcast asserts, its integration of comparable enhanced features satisfies the statutory requirement that Comcast Digital Voice be an "offering of the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[47]

Comcast alleges that the RLECs, as well as the OCA, have made much of the fact that the FCC has not declared whether 47 U.S.C. 153(24) would classify either fixed or nomadic VoIP as an information service. Comcast asserts that the absence of FCC action is irrelevant to the question of whether cable voice qualifies under federal law as an information service that cannot be regulated by state utility commissions. Comcast further argues that classifying something as an "information service" turns on whether it meets the statutory definition, and while the FCC has authority to administer the Act, federal statutes do not cease to have force and effect pending interpretation by the agencies responsible for administering them. According to Comcast, the law does not "require[] a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists" for preemption purposes.[48] Comcast maintains that the New Hampshire Supreme Court has itself on more than one occasion recognized that federal law preempts conflicting action by this Commission, even in the absence of a specific federal agency directive.[49] Comcast argues that in the absence of FCC guidance, tribunals such as this Commission,

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[46] *Vonage Preemption Order*, 19 FCC Rcd 22404, 22407, 22419-20, ¶¶ 7, 25; *see also generally id.* 22420, ¶ 25 (holding that Vonage should not be required to change its VoIP service to accommodate state regulation because "[r]ather than encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, molding this new service into the same old familiar shape").

[47] 47 U.S.C. § 153(24).

[48] *See Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 884 (2000).

[49] *See, e.g., Appeal of Conservation Law Foundation, 147* N.H. 89, 95 (N.H. 2001) (finding state law "preempted, either explicitly or implicitly, by federal law" due to conflict with federal regulatory scheme); *Appeal of Sinclair Machine Productions,* 126 N.H. 822, 830 (N.H. 1985) (finding state law preempted where application would frustrate federal regulatory scheme).

whose decisions require interpretation of a federal statute, must apply and interpret the statute based on its text and other applicable means of statutory interpretation.[50] Comcast asserts that, as the FCC recently directed the Texas Public Utilities Commission, to the extent there are regulatory issues surrounding VoIP that the FCC has not yet addressed and which state commissions must resolve to carry out their responsibilities, state commissions should proceed to decide them in the interim by "relying on existing law."[51]

Comcast charges that state utility regulation of cable voice would frustrate federal policy with respect to IP-enabled services and, even if it were not an information service, state utility regulation would undermine and conflict with federal policies promoting deployment of advanced broadband and IP-enabled services through a national policy of deregulation. Comcast states that in Section 230 of the Telecommunications Act, Congress found that "interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," and "to promote [this] continued development," it would be the "policy of the United States" to maintain such services "unfettered by Federal *or State* regulation."[52] Comcast cites the FCC's *Vonage Order* to argue that "section 230 is indifferent to the statutory classification of services that may 'promote its continued development,'" and "plainly embraces" cable voice;[53] "irrespective of the statutory classification of [Vonage's] DigitalVoice it is

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[50] *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (if "Congress has not directly addressed the precise question at issue," it is "necessary in the absence of an administrative interpretation" for the tribunal to reach "its own construction on the statute."); *Southwestern Bell*, 461 F. Supp. 2d 1055, 1077 ("[a]lthough the FCC has not yet issued regulations addressing VoIP, existing rules and orders establish how VoIP and other IP services should be treated in the interim"); *Comcast IP Phone of MO., LLC* v. *Missouri Pub. Serv. Comm 'n*, No. 06-4233-CV-C-NLK, 2007 WL 172359, at *4 (W.O. Mo. Jan. 18,2007) (holding that state public utility commission could decide regulatory classification of interconnected VoIP under the Communications Act because "unless ... faced with a contrary decision from a relevant federal agency, a state agency may interpret a federal statute and apply its dictates").

[51] *In the Petition of UTEX Communications Corporation, Pursuant to Section252(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).

[52] 47 U.S.C. §§ 230(a)(4), (b) (emphasis added).

[53] *Citing Vonage Order*, 19 FCC Rcd 22404, 22425-26, ¶ 34.

embraced by Congress's policy to 'promote the continued development' and 'preserve the vibrant and competitive free market' for these types of services . . . ."[54] Therefore, according to Comcast, state regulation of cable voice services, "[r]egardless of the definitional classification . . . under the Communications Act . . . directly conflicts with [the FCC's] pro-competitive deregulatory rules and policies . . . ."[55] Comcast argues that the FCC has made clear that IP-enabled services such as cable voice must be permitted to develop free of state utility regulation, explaining that "IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services."[56] Comcast also states that the FCC has declared that· its "aim" is to "rely, wherever possible on competition" rather than regulation to foster IP-enabled technologies such as VoIP because "these services are fast-changing and likely to evolve in ways that we cannot anticipate" and "imposition of regulatory mandates, particularly those that impose technical mandates, should be undertaken with caution."[57]

Comcast maintains that the clearest statement of federal policy is the *Vonage Preemption Order* itself, in which the FCC made clear that it, not state commissions, has the responsibility and obligation to decide whether certain regulations apply to Vonage's and other services having the same capabilities.

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[54] *Id.* (The actual quote from the *Vonage Order* is as follows: "Thus, irrespective of the statutory classification of DigitalVoice, it is embraced by Congress's policy to "promote the continued development" and "preserve the vibrant and competitive *free* market" for these types of services.")

[55] *Id.* at 22415, ¶ 20.

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

[57] 19 FCC Rcd 4863,4867, 4894, ¶¶ 5,53. New enhanced features being introduced by Comcast, such as the HomePoint™ service, prove accurate the FCC's prediction that IP-enabled services such as cable voice are "fast-changing."

C. Time Warner

1. State Regulation

Time Warner claims that its retail entity offering cable voice through a number of affiliated entities, cannot reasonably be classified as a "public utility" under state law. Time Warner argues that the question of whether a particular entity is a public utility "is not a constitutional one nor one of public policy but rather one of statutory interpretation,"[58] and that the New Hampshire Supreme Court has emphasized that the public utility definition "does not apply to industries that the legislature did not intend to be regulated."[59] Thus, according to Time Warner, absent proof of such legislative intent, an entity cannot be found to fall within the Commission's jurisdiction, even if its activities fall within "the literal words of the statute."[60]

Time Warner asserts that there is no plausible argument that the Legislature intended for the Commission to regulate cable voice providers as public utilities. The statutory provision defining a public utility was first enacted in 1911, many decades before the emergence of cable voice and the Internet. Thus, Time Warner argues, for most of its existence, the public utility definition was a product of the monopoly telephone era. As new technologies and services have emerged, contends Time Warner, the Legislature has had numerous opportunities to amend the statute to expand the Commission's jurisdictional reach, but it has consistently declined to do so. Time Warner declares that most analogous to this case, the Legislature rejected proposed legislation in 1977 that would have regulated "all mobile telephone service companies and radio

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[58] *Allied New Hampshire Gas Co.* v. *Tri-State Gas* & *Supply Co.*, 107 N.H. 306, 308, 221 A.2d 251, 253 (1966).

[59] *Appeal of Atlantic Connections, Ltd*, 135 N.H. 510, 514, 608 A.2d 861, 865 (1992).

[60] *Allied New Hampshire Gas Co.*, 107 N.H. at 306, 221 A.2d at 251 (ruling that a distributor of liquefied petroleum gas was not a public utility -- defined to include entities involved in the "furnishing of light, heat, [or] power" -- based on its finding that although this "language, in isolation, is broad enough to include" entities that distribute liquefied petroleum gas, the Commission "has never regulated such activities").

paging service companies" as public utilities.[61] According to Time Warner, the fact that the Legislature considered it necessary to amend the statute to account for such entities demonstrates that the statute was never intended to encompass all services that happen to involve the use of a telephone. Time Warner contends that the Legislature eliminated any doubt on the matter by expressly declining to enact that proposal, determining that the legislation "might stifle competition in a budding new industry."[62] Time Warner claims that the Supreme Court later reversed an effort by the Commission to expand its jurisdiction to encompass radio paging companies by stating unequivocally that the Legislature "did not intend to place all companies and businesses somehow related to . . . telephone . . . companies under the umbrella of the PUC's regulatory power."[63] Time Warner asserts that the Court also determined that permitting the Commission to exercise jurisdiction over radio paging companies would conflict with the State's policy to promote free trade and private enterprise, as established in the state constitution. In fact, according to Time Warner, the Court went so far as to conclude that the Commission, "by attempting to regulate radio pagers, is demonstrating the very behavior it was established to prevent: interference and disruption of free market private enterprise."[64] Finally, Time Warner notes, the Court stated that there was "[n]o need" for the Commission to regulate radio paging services, because (1) the Commission already "regulat[es] telephone lines," such that the "radio-paging industry is not totally unregulated," and (2) the FCC "has regulatory power over" such entities.[65] Time Warner argues that the Court's reasoning applies equally to this case, and that the RLECs' contrary reading would result in a dramatic expansion of the Commission's

[61] N.H.S. Jour. 1854 (1977).

[62] N.H.H.R. Jour, 1069 (1977).

[63] *Appeal of Omni Communications. Inc. d/b/a Page Call (New Hampshire Public Utilities Commission)*, 122 N.H. 860, 863, 451 A.2d 1289, 1291 (1982) (ruling that radio paging companies were not covered by public utility definition).

[64] *1d.* at 863, 451 A.2d at 1291.

[65] *Id.* at 864, 451 A.2d at 1291.

authority to regulate entry by any providers using new technologies to offer valuable services to New Hampshire customers simply because they involve the use of a telephone. Time Warner argues that cable voice services do not permit the transmission of communications by telephone alone but, rather, also require a broadband connection and specialized IP-compatible customer premises equipment, the key piece of which is not a telephone, but an eMTA that converts the user's communications to IP format for transmission over broadband facilities without which the telephone handset would be useless. Time Warner argues that it does not matter whether such a communication is comparable to a traditional telephone message, as the RLECs suggest. If that were sufficient, Time Warner maintains, then the Commission would have been free to regulate mobile telephone services, which the Legislature and Supreme Court have confirmed that it cannot do.

According to Time Warner, New Hampshire law has foreclosed the argument that regulating it as a public utility would be in the public interest and, moreover, the potential classification of a particular entity as a public utility is a question of statutory interpretation, not one of public policy. Time Warner argues that the Supreme Court has rejected classification arguments based on public interest considerations where there is "no clear legislative mandate."[66] Even if such considerations were relevant, Time Warner asserts, the outcome the RLECs seek would actually disserve the public interest. Subjecting cable voice to state regulation may erect barriers to entry and impede the development of competition, according to Time Warner, and the law is clear that "legislative grants of authority to the PUC should be interpreted in a manner consistent with the

[66] *Manchester Water Works*, 103 N.H. 505, 507, 175 A.2d 525, 527 (1961) (stating that ""[it may be that the public interest would best be served if the Public Utilities Commission had full control"" of a particular entity as a public utility, but declining to effectuate that result where ""there is no clear legislative mandate to that effect expressed in the statutes"").

State's constitutional directive favoring free enterprise."[67] Regulating cable voice, Time Warner asserts, would run counter to that mandate.

2. Federal Preemption

Time Warner states that federal law preempts state authority over cable voice services such as Digital Phone and Business Class Phone. Even if TWC Digital Phone could be classified as a "public utility" under New Hampshire law, Time Warner maintains, federal law precludes the Commission from subjecting TWC Digital Phone to certification, tariffing, or other public utility requirements in connection with that service. The FCC's *Vonage Order* established that VoIP services sharing certain basic characteristics are not subject to regulation by state public utility commissions.[68] Time Warner argues that the FCC clearly intended in its *Vonage Order* to include fixed, facilities-based services provided by cable operators within the class of services that should be exempted from state regulation. Time Warner elaborates that the FCC's overarching goal was to avoid "patchwork regulation" of IP-enabled services, under which regional and national providers finally challenging incumbent LECs' entrenched dominance would "have to satisfy the requirements of more than 50 jurisdictions with more than 50 different sets of regulatory obligations."[69]

Time Warner argues that in *Vonage*, the FCC relied on its authority to preempt state regulation that would thwart or impede the lawful exercise of federal authority over the interstate component of the communications.[70] According to Time Warner, the relevant question is whether it is possible for federal and state regulation to coexist with respect to a jurisdictionally mixed service without impermissibly interfering with legitimate federal interests. Time Warner

[67] *Appeal of Public Service Co. of New Hampshire*, 141 N.H. 13, 676 A.2d 101 (1996).
[68] *See Vonage Order* at ¶ 1.
[69] *Id.* at ¶¶ 32, 41.
[70] *Id*. at ¶ 19.

argues that when the FCC applied that standard in its *Vonage* decision, it concluded that state utility regulation of Vonage's service would directly conflict with and prevent the lawful exercise of federal policy. Time Warner emphasizes that such regulation was preempted "irrespective of the definitional classification" of the service, which the FCC expressly declined to decide.[71] Time Warner claims that regardless of the classification issue, the FCC explained that it maintains an open entry policy for non-dominant providers that would be undermined by the imposition of state certification and tariffing requirements.[72] Time Warner also claims that the FCC determined that "entry requirements could stifle new and innovative services whereas blanket entry authority, *i. e.*, unconditional entry, would promote competition" and applying for a certificate "can take months and result in denial of a certificate, thus preventing entry altogether."[73] Similarly, Time Warner argues, state requirements to file tariffs for cable voice services would fly in the face of the FCC's determination that "*prohibiting* such tariffs would promote competition and the public interest".[74] Time Warner states that the FCC further recognized that regulating the intrastate component of cable voice services would necessarily encroach on the FCC's exclusive jurisdiction over interstate services because of 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."[75]

Time Warner states that critically for purposes of this proceeding, the FCC made clear that its preemption analysis applied not only to Vonage's service, but to *any* VoIP service that

[71] *Id*. at ¶ 14.
[72] *Id*. at ¶¶ 20-21.
[73] *Id*. at ¶ 20.
[74] *Id*., (emphasis added).
[75] *Id*. at ¶ 25.

possesses three basic characteristics:

(1) a requirement for a broadband connection from the user's location;

(2) a need for IP-compatible customer premises equipment; and

(3) a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video.[76]

Time Warner argues that the test of whether a cable voice service is functionally similar to traditional local exchange and long distance voice service is beside the point and that, in any event, Time Warner's phone service satisfies the FCC test set forth in *Vonage*. Time Warner purports that the FCC has never limited its preemption rationale to nomadic VoIP services. To the contrary, according to Time Warner, the FCC expressly recognized that, under the three-part standard, all facilities-based VoIP services, including cable voice, are subject to preemption, irrespective of whether they include any nomadic capabilities. Time Warner argues that because the FCC has made clear its view that cable voice services such as Digital Phone may not be subject to certification, tariffing, or related public utility requirements, any attempt to impose such obligations would thwart federal policy and violate the Supremacy Clause of the Constitution.[77]

Finally, Time Warner states that in addition to triggering preemption under the *Vonage Order*, classifying TWC Digital Phone as a public utility by deeming its cable voice services to involve the conveyance of a telephone message would risk a conflict with the FCC's prerogative

[76] *Id*. at ¶ 32.

[77] *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) ("[W]hen federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation.") (internal quotation marks omitted).

to classify cable voice services. Time Warner claims the FCC has imposed a series of discrete requirements on VoIP providers but has consistently refrained from resolving the appropriate statutory classification of the service. Instead of relying on the default non-regulation of information services, or the full panoply of regulations applicable to telecommunications services, Time Warner maintains, the FCC has constructed a narrowly tailored regime to achieve particular policy goals. In fashioning a regulatory scheme for cable voice services, Time Warner argues, the FCC has asserted its exclusive authority to determine both how and when to act in order to achieve a delicate balance between competing interests. Time Warner asserts that this approach has worked well for the industry and for consumers, and there is no need for the Commission to seek the imposition of additional state obligations on Digital Phone -- particularly given that TWC Digital Phone already operates in a manner consistent with state CLEC requirements. Moreover, argues Time Warner, classifying it as a "public utility" that conveys "telephone messages" pursuant to New Hampshire law would conflict with the FCC's potential classification of cable voice as an information service. Time Warner argues that the FCC proposed in a recent rulemaking to classify cable voice as an information service. Time Warner concludes that because TWC Digital Phone operates in accord with the requirements applicable to CLECs in New Hampshire, any effort to classify it as a public utility would invite conflicts and costly diversions without tangible benefits.

V. COMMISSION ANALYSIS

The RLECs requested an inquiry into the appropriate regulatory status of fixed Internet Protocol (IP)-enabled cable voice service in New Hampshire. In support of their petition, the RLECs argue that in addition to competition from wireless and computer-based nomadic voice over IP (VoIP) providers in New Hampshire, RLECs also face competition from fixed cable

voice offerings such as those provided by Comcast and Time Warner. The RLECs assert that Comcast's cable voice service is a retail telecommunications service that should be regulated under the public utility laws of New Hampshire. Comcast and Time Warner counter that cable voice services do not fall within this Commission's jurisdiction and, moreover, that state regulation of such services is preempted by federal law. Comcast further argues that cable voice service should be considered an information service subject to federal, not state regulation.

To resolve the issues raised in this proceeding, we consider: (1) whether Comcast and Time Warner are offering telephone service to the public under New Hampshire law; (2) whether the cable voice service provided by Comcast and Time Warner is an information service rather than a telecommunications service pursuant to federal law and thus subject to exclusive federal jurisdiction; and (3) if Comcast and Time Warner are offering telephone service that is a telecommunications service, whether state regulation of such voice services is otherwise preempted by federal law. To date, the FCC has declined to decide whether fixed or nomadic Voice over IP voice services are "telecommunications services" subject to joint federal-state regulation or deregulated "information services" under federal law.

A. Comcast and Time Warner are offering Telephone Service to the Public under New Hampshire Law.

This docket presents issues of first impression in New Hampshire. In order to determine the scope of our regulatory authority, we look first to the plain meaning of the applicable statute. RSA 362:2, I states, in part, that:

> [t]he term 'public utility' shall include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court, except municipal corporations and county corporations operating within their corporate limits, owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages . . . for the public.

Accordingly, if a provider of cable voice services falls within this definition, it is subject to regulation as a public utility under New Hampshire law. The statutory definition of a telecommunications public utility includes three elements: 1) the ownership, operation or management of plant or equipment or any part thereof, 2) for the conveyance of telephone or telegraph messages, and 3) for the public.

Because there is no real dispute that Comcast and Time Warner – either directly or indirectly through affiliates – own, operate or manage plant or equipment to facilitate the conveyance of "messages" for the public, our determination turns on whether the messages that are transmitted constitute "*telephone* messages." According to Comcast, it is not a "public utility" under the plain meaning of the statute, as its cable voice service is not a "conveyance of a telephone message." Comcast Br. at 10-11, *citing In re Sarvela*, 154 NH 426, 430 (2006) (the law means what it meant to its framers; to determine that meaning, the court first examines the language of the statute and, where possible, ascribes the plain and ordinary meanings to the words used).

Comcast and Time Warner both argue that the New Hampshire Supreme Court has made clear that this Commission may not expand its authority over industries not contemplated in the drafting of the statute, citing *Appeal of Omni*, 122 NH 860, 863 (1982) ("in enacting RSA 362:2 the legislature did not intend to place all companies and businesses somehow related to . . . telephone . . . companies under the umbrella of the PUC's regulatory power"). They argue that the statutory language, written in 1911, could not have been intended to apply to technologies such as IP-enabled cable voice service that had yet to be invented. Further, Comcast and Time Warner argue that the legislature of 1911 intended the term public utility to include only those entities providing telephone service over the traditional landline network, or "plain old telephone

service (POTS)," as understood in the "common and approved usage" of the term. Comcast Initial Br. at 2; Time Warner Initial Br. at 2 and 11, *citing In re Sarvela*.

Comcast argues that today's cable voice technology not only did not exist when RSA 362:2 was enacted, it differs significantly from the POTS technology in existence at that time. Comcast Br. at 2. According to Comcast, cable voice service differs from POTS from a network perspective as well as from a user perspective, because it provides the capability to transform the protocol in which calls are transmitted and includes enhanced communications features that augment and complement basic calling features. Comcast Br. at 11. Such enhanced features, in conjunction with the user's voice connection, permit users to access and act upon their communications information through use of the Internet, television, mobile handsets, iPods and iPhones. *Id.* at 26. The RLECs note, however, that traditional landline service also offers many of the same features. RLEC Direct Testimony of Wimer at 25-27. Comcast further argues that cable voice service requires a specialized embedded multimedia terminal adapter (eMTA), which can also function as an Internet cable modem. Customers connect their inside wiring to the eMTA, which, in turn, is connected to coaxial cable, rather than copper wires, and when the customer uses a traditional analog telephone handset, the eMTA converts analog voice signals to IP and *vice versa*. Comcast Br. at 5. Comcast's network converts calls to and from PSTN users from TDM to IP and back, thus accomplishing a "protocol conversion," according to Comcast. Comcast Br. at 6. The converted messages are carried by a Comcast CLEC affiliate in TDM to interconnect with the PSTN. *Id.*

Comcast recognizes that there are certain similarities between cable voice service and POTS, including the assignment of NANPA-conforming telephone numbers, [78] the use of

[78] The North American Numbering Plan Administration (NANPA) administers a telephone numbering system using a three-digit area code followed by a seven-digit number.

traditional handsets, and dial and ring tones. Comcast Br. at 3. According to Comcast, however, the addition of enhanced communications features, such as voice mail and transfer of telephone calls to email, result in the classification of cable voice service as an information service, not a telecommunications service encompassed under RSA 362:2. Comcast Br. at 4.

Time Warner adds that regulation by this Commission of the cable voice services at issue here would conflict with the State's policy to promote free trade and private enterprise, as established under New Hampshire's Constitution and State law. Time Warner Br. at 7. According to Time Warner, State law prohibits regulation that will "stifle competition in a budding new industry," such as cable voice service, or otherwise interfere and disrupt free market private enterprise. Time Warner Br. at 10, *citing Appeal of Public Svc. Co.*, 141 NH 13, 676 A.2d 101 (1996) (finding that the Commission has statutory authority under RSA 374:26 to grant a competing electric utility franchise within service territory of incumbent, but that the decision "should not be read as expressing a point of view . . . on the desirability of retail competition among electric utilities as a matter of policy") and *Appeal of Omni Communication, supra*, at 863.

The argument that RSA 362:2 can be applied only to technologies in existence or envisioned at the time of legislative drafting is untenable. The words of the statute give no indication that the drafters intended to limit the scope of the term "telephone message" to the technologies in existence in 1911 when the statute was enacted. As the RLECs point out, even a rudimentary outline of the historical development of telephone technologies – from the reliance on switchboard operators, to customer direct dialing with mechanical switching, to electronic and digital switching – supports a broader interpretation of the statute than that proffered by Comcast and Time Warner.

Even though the technology used to provide telephone service has evolved over the years since RSA 362:2 was enacted, the provision of the service remains within the scope of the regulatory authority granted to this Commission. The fundamental element in common throughout the historical development of telephony technology is the linking of one end user to another between identifiable, geographically fixed endpoints to enable real-time, two-way voice communication over wires. The fixed geographic element and the real-time voice communication over wires carry through to the more recent development of cable voice service using IP technology. As the RLECs note, the service we consider today is not merely "somehow related" to telephone service, it is a direct and complete substitute for traditional landline service. RLEC Reply Br. at 4, *citing Appeal of Omni* at 863.

The conversion from analog signals to digitized IP packets is a distinction without a difference and does not alter the practical reality that the fundamental service offered to the public remains telephone service. We find that the services at issue here fit squarely within the language of the statute – that is, the conveyance of telephone messages. The plain dictionary meaning of the word "telephone" supports a conclusion that RSA 362:2 covers the voice services at issue here. Webster's on-line Revised Unabridged Dictionary,[79] for example, includes among the definitions for "telephone" the following: "[e]lectronic equipment that converts sound into electrical signals that can be transmitted over distances and then converts received signals back into sounds; 'I talked to him on the telephone.'" A telephone message is further defined as "[a] message transmitted by telephone."[80] The plain dictionary meaning thus focuses on the use of electronic equipment to convert sound into electrical signals to communicate in real time over

[79] Available at www.websters-dictionary-online.com. Sources: compiled from various sources, (under license) copyright 2008. Webster's Revised Unabridged Dictionary, WordNet 3.0 Copyright © 2006 by Princeton University. Accessed 8/3/11.

[80] *Id.*

distances, without defining the specific equipment or technology used. It is difficult to imagine that when customers of Comcast or Time-Warner cable voice service pick up their telephone[81] and dial the telephone number of a neighbor down the street or across town, that they would describe that action as using an information service on a computer network to "orally instant message" a neighbor in real time rather than describing it as making a telephone or phone call to that neighbor. Of course, in this day and age, even phone calls made over POTS involve computer networks to assist in the conveyance and switching of that call by regulated telephone companies, including RLECs.

The language of RSA 362:2 defines a public utility by the services it renders, not by the technology that it uses to provide such service. In fact, the language "any plant or equipment or any part of the same" suggests that the drafters intended to encompass any and all technologies and facilities, including future technological improvements, used by a public utility to convey telephone messages for the public. In the case of a telephone utility, the "conveyance of telephone messages" is the determinative characteristic of a telephone utility subject to Commission jurisdiction under RSA 362:2. *See* RLEC Reply Br. at 4. While New Hampshire law has excluded from the scope of RSA 362:2 the services provided by radio pagers, which make use of telephone lines,[82] and cellular (wireless) telephony, which converts sound to electrical and radio signals for communication over distances, and which is expressly excluded from our jurisdiction by RSA 362:6, the cable voice services at issue here have not been so excluded.

We are likewise not persuaded that the technology at issue here is merely "somehow related to telephone companies under the umbrella of the PUC's regulatory power" or creates a

[81] The telephone used could be the same one the customer had when served by an incumbent telephone company, such as an RLEC, with the same 603 telephone number that they ported over when they changed telephone service.

[82] See *Appeal of Omni, infra.*

new industry that requires a completely unregulated market in which to develop. Rather, the technology at issue represents a technological advancement in the conveyance of telephone messages that builds on the legacy POTS network. Cable voice technology serves to facilitate the conveyance of telephone messages to and from the traditional PSTN through an IP network, managed and operated by the providers of the service, over wires that end in a fixed customer location. Fixed cable voice service is a direct substitute for traditional landline phone service.

From a user's perspective, the fundamental characteristics of cable voice service are essentially identical to those of traditional telephone service. End users of both cable voice service and POTS use a traditional handset, listen for a dial tone, send and receive voice communications converted to and from analog signals, interconnect with the PSTN, are fixed in geographic location, assigned a NANPA-conforming telephone number, and are provided portability for that number. Comcast Br. at 2-3; RLEC Reply Br. at 3, 6. Moreover, providers of cable voice services can distinguish inter- from intra-state calls for billing purposes, as can POTS providers. RLEC Br at 21; RLEC Reply Br. at 9-10.

Both Comcast and Time Warner argue by extrapolation that just as New Hampshire law has made clear that cellular phones and pagers are not subject to our jurisdiction,[83] neither should our jurisdiction extend to cable voice services. Comcast Br. at 14; Time Warner Br. at 5-10. Time Warner accordingly argues that consumers are adequately protected with respect to the provision of cable voice services in New Hampshire because the Commission has jurisdiction over the conventional network connections from telecommunications carriers that Time Warner relies on to provide its services. Time Warner Br. at 10 and Time Warner Reply Br. at 7, *citing Appeal of Omni* (finding no need for the Commission to directly regulate radio-paging services where it regulates the telephone lines used to transmit pager signals).

[83] *Id*. and *Appeal of Omni, supra.*

We find that Comcast and Time Warner extend the Court's holdings further than is warranted. There is no statutory exclusion of cable voice services as there is for cellular phone service. *See* RSA 362:6 (cellular mobile radio communications exempt from Commission jurisdiction). In addition, interconnection for the purpose of transmitting real-time two-way voice communication, including to and from the PSTN, not to mention the use of telephone poles in the public right-of-way to carry wires and cables for the provision of such service, constitutes a substantially closer relationship to the traditional telephone network and its service providers than does the transmittal of one-way radio pager signals along the PSTN network.

Both Comcast and Time Warner emphasize that the initial and terminal analog signals at either end of a call on their networks are converted to or from a digitized IP packet at the customer's premises on an eMTA, a piece of equipment owned by the cable telephone service provider; that the dial tone is generated at the eMTA rather than at a central office; and that the call is routed through an IP network rather than through the traditional landline network. We are not persuaded, however, that any of those characteristics are of significance to the end user. From the end user's perspective, cable voice service and traditional telephone service are identical. As the RLECs note, to make a call, the customer picks up a phone, listens for a dial tone, dials the number of the person to call, and speaks in real-time to the other party. RLEC Reply Br. at 3. From a customer's perspective, there is no change in the form or content of information sent and received. By signing up for cable voice service, the customer expects to be able to make and receive telephone calls, regardless of the underlying technology used to transmit or receive the calls. Indeed, both Comcast and Time Warner describe their cable voice service as a competitive, facilities-based alternative to traditional landline phone service. Comcast Br. at 2; Time Warner Br. at 1-2.

We therefore find pursuant to RSA 362:2 that the cable voice services offered by Comcast and Time Warner to New Hampshire customers constitute the conveyance of telephone messages and, thus, the providers of such services are subject to Commission jurisdiction.

One additional argument warrants discussion. According to Time Warner, to transmit its cable voice services to the PSTN, it must obtain interconnection service from a wholesale telecommunications provider. In New Hampshire, TWC Digital Phone owns the eMTA at the customer premises and provides the retail cable voice service to the customer. Laine Reply Testimony at 11-12. Affiliate Time Warner Cable (TWC) owns the hybrid fiber coaxial network between the customer premises and the cable head end. *Id.* A third affiliate, TWC Communications LLC, owns switching facilities and the Media Gateway which converts the traffic from IP to the time division multiplexing format used on the public switched telephone network (PSTN). *Id.* TWC Communications purchases wholesale interconnection service to the PSTN from CRC Communications of Maine, Inc. (CRC), a "public utility" under New Hampshire law. *Id.* and Time Warner Br. at 2. Time Warner later argues that because cable voice services rely on regulated telecommunications carriers to exchange traffic with the PSTN, the Commission has jurisdiction over those conventional connections (in this case CRC), "as it did in the context of radio paging companies." Time Warner Br. at 10. This point presumably is intended to support the proposition that the voice service Time Warner provides is not a telecommunications service under RSA 362:2 because the Time Warner affiliates carry only IP traffic and the retail provider, TWC Digital Phone, does not own any of the equipment used to convey the messages. The RLECs allude to a similar point in their petition, suggesting that Comcast has created a corporate structure that effectively skirts regulation as a CLEC by separating the functions the corporation as a whole undertakes to provide voice service. The

RLECs assert that to receive authority to operate as a public utility in New Hampshire, Comcast "caused one of its affiliates to seek authorization to engage in business as a public utility for the stated purpose of providing very limited services, including resale of local business service, e-rate service to schools and libraries and wholesale service to its affiliate that provides Digital Voice service." Petition at 2. That affiliate then provides Comcast with numbering resources and interconnection with the PSTN to facilitate its cable voice service.

In each case, although the cable voice provider hands off various pieces of the conveyance of messages to affiliates and back again, the service itself remains a retail one that is regulated by this Commission as a CLEC. Furthermore, to allow a provider to avoid regulation by transferring an intermediary step to an affiliate would not serve the public interest.

B. Comcast and Time Warner Cable Voice Services are Not Information Services under Federal Law

Both Comcast and Time Warner set forth arguments that their cable voice services are distinguishable from traditional telephone services under federal law and therefore are not subject to state regulation. We disagree with their interpretations of federal law.

Comcast argues that cable voice services are exempt from state regulation because they constitute "information services," which are not regulated, rather than "telecommunications services" which are subject to a mix of state and federal regulation. [84]

Comcast contends that cable voice service provides exactly the capacity to "process and transform" information via telecommunications required by the federal definition of information services. Comcast Br. at 15, and 17. Comcast further argues that calls transmitted through cable

[84] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), 47 U.S.C. 151 *et seq.* *See also* Section III, Factual Background above, setting out the definitions from the Act of "telecommunications," "telecommunications service," and "information services.")

voice services undergo an end-to-end protocol conversion, thereby making the service an "information service" under federal law. Comcast Br. at 18-19.

According to Comcast, it is the entrance and exit of a call to and from the network using IP that is determinative – *i.e.*, it is the reformatting of analog voice signals to IP signals at the eMTA that makes cable voice service an information service. Comcast Br. at 22-23, *citing In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 (finding that protocol processing services constitute information services under the Telecom Act), and *Southwestern Bell v. Missouri PSC*, 461 F.Supp. 2d 1055, 1082 (E.D. Mo. Sept. 14, 2006) ("net protocol conversion" occurs where "[t]he communication originates at the caller's location in IP protocol, undergoes a net change in form and content when it is transformed at the [provider's] switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient's location in TDM" (citations omitted)). Comcast further asserts that it is the "nature of functions the end user is offered" that determines regulatory status. Comcast Br. at 26-27, *citing* the 2005 *Brand X* decision (upholding FCC determination that cable companies providing broadband Internet access do not provide "telecommunications service" under the Telecommunications Act, but merely use telecommunications to provide end users with cable modem service). Thus, according to Comcast, the communication between the PSTN and IP networks makes cable voice an information service not subject to state regulation. Comcast Sur-reply Br. at 5, *citing Brand X*.

Time Warner adds that digital phone service requires a broadband connection and specialized IP-compatible customer premise equipment that converts analog signals to IP format

for transmission over broadband facilities, without which the phone handset would be useless. Time Warner Br. at 9. Time Warner submits a further argument similar to Comcast's, *i.e.*, that cable telephone service provides a suite of integrated capabilities and features, or "enhanced services." Time Warner Br. at 20-22. According to Time Warner, the FCC relied heavily on the enhanced services capability to distinguish IP-enabled communications services from traditional telecommunications services, and the eMTA is the critical piece of technical distinction between the services. Time Warner Br. at 16; Time Warner Sur-reply Br. at 3.

We agree with the RLECs, however, who argue that the net protocol processing that defines an information service consists 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. RLEC Reply Br. at 5, 10, and 15 *et seq*. Thus, according to the RLECs, cable voice offerings provide telephone service, not protocol conversion service. RLEC Reply Br. at 17. The RLECs add that the FCC specifically declined to classify cable voice as an "information service" in its *Vonage* order. *Vonage Order* ¶ 14, n. 46.

Although Comcast acknowledges that the FCC did not decide in *Vonage* whether cable voice services are "telecommunications services" subject to joint federal-state regulation or deregulated "information services" under federal law, it posits that several federal court decisions have "uniformly concluded that interconnected VoIP is an information service, not a telecommunications service." Comcast Brief at 7-8 and Sur-reply Br. at 1, *citing PAETEC Communications, Inc. v. Comm. Partners, LLC,* No. 08-Civ.-0397(JR) D.D.C. Feb. 18, 2010) (transmission of information via telecommunications that entails net format conversion from VoIP to TDM is information service exempt from access charges). Accordingly, Comcast

argues that cable voice service is an information service under "existing law" in the absence of an FCC decision holding otherwise.[85] Comcast Sur-reply Br. at 2.

Comcast appears to conflate 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). In its repeated arguments that enhanced service offerings such as voice mail make cable voice service an "information" rather than a "telecommunications" service, Comcast ignores the fact that similar enhanced service offerings are made with landline phone service packages, as well. *See* RLEC Direct Testimony of Wimer at 25-28. The fact that a provider can add such enhanced services to basic telephone service does not persuade us that the underlying telephone service is thus converted from a telecommunications to an information service that falls outside the scope of our jurisdiction under RSA 362:2. The cable voice customer signs up, first and foremost, for a service that will enable voice communication with other end users, including those using traditional telephone service. The 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.

Our reading of Congress's definition of "telecommunications" is consistent with the RLECs' interpretation. We find that an end user customer of cable voice service chooses that

[85] Comcast also cites *Southwestern Bell Tel., LP. v. Missouri Public Service Comm'n*, 461 F.Supp. 2d 1055, 1081-83 (E.D. Mo. Sept. 14, 2006) (state commission preempted from requiring VoIP provider to adhere to 47 U.S.C. 271 unbundling obligations in an arbitrated interconnection agreement), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 971 (2009); *Vonage Holdings Corp. v. Minnesota Public Utilities Comm'n*, 290 F.Supp. 2d 993, 999 (D. Minn. 2003) (as Vonage never provides phone-to-phone IP telephony through its nomadic VoIP service, it is exempt from state telecommunications laws); *Vonage Holdings Corp. v. New York Public Service Comm'n*, No. 04-Civ.-4306 (DFE), 2004 WL 3398572, Preliminary Injunction Order (S.D.N.Y. July 16, 2004); *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005) at 1 (denying Vonage motion to convert preliminary injunction into permanent injunction of state regulation over Vonage's nomadic VoIP services); and *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (affirming FCC preemption of state regulation of nomadic interconnected VoIP providers).

service with the expectation that use of a traditional telephone handset will enable real-time, two-way voice communication with others through "the transmission between or among points specified by the user," without change in the form or content of the voice message itself. We do not find, as Comcast and Time Warner urge, that regulation of cable voice services falls outside our jurisdictional authority. As previously noted, the FCC has not addressed this question and there are no binding federal court decisions that resolve the matter, though there are some cases outside the First Circuit, to which we take exception.[86] We disagree with the court in *PAETEC*, for example, that a telephone call from a cable voice provider changes content when it is converted to TDM. *See PAETEC, supra*, at 6. We recognize that formatting may change when a voice call is transferred between a cable provider's network and the PSTN, but we find that the content transmitted begins and ends as a "telephone message." We also disagree with the courts in *Vonage v. Minnesota PUC* and *Southwestern Bell* that all IP-PSTN traffic and VoIP services "necessarily are information services." *See Vonage v. Minnesota PUC, supra*, at 1002; *Southwestern Bell, supra*, at 1082. As noted above, we find that the FCC has declined to rule that cable voice services such as the ones at issue here are exempt from state regulation. Finally, we read *Vonage v. NYPSC* and *Minnesota PUC v. FCC* decisions as pertaining to nomadic VoIP only, and do not agree that those holdings should extend to cable voice.

We find that the technology utilized in cable voice service to convert analog sound signals to digitized IP packets that can be transmitted through an IP network does not convert the fundamental service offered – that of real-time, two-way voice communication – from "telecommunications" to an "information service" that might fall outside our jurisdiction.

[86] *See fn. 90, supra.*

C. State Regulation of Comcast and Time Warner Cable Voice Service is Not Preempted by Federal Law

The next step in our analysis is to consider whether New Hampshire law regarding regulation of telephone providers is preempted by federal law in this matter. State regulation may be preempted by Congress pursuant to the Supremacy Clause of the U.S. Constitution,[87] or by a federal agency acting within the scope of its congressionally delegated authority. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986). As the First Circuit has stated, federal preemption must be clearly indicated. *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 71 (1st cir. 2006) (federal agency actions may preempt conflicting state regulation, but exercise of preemption must be clear and implied preemption must be supported by clear evidence of a conflict with federal law or policy). Comcast and Time Warner argue that cable voice service falls under the exclusive jurisdiction of the FCC as a result of the *Vonage* decision and a series of federal cases stemming from that decision.

As the New Hampshire Supreme Court has held, "state law is preempted where: 1) Congress expresses an intent to displace state law; 2) Congress implicitly supplants state law by granting exclusive regulatory power in a particular field to the federal government; or 3) state and federal law actually conflict." *Appeal of Union Telephone Company d/b/a Union Communications* (N.H. Public Utilities Commission), Slip Op. Nos. 2009-168 and 2009-432 at 9 (May 20, 2010).

1. State Regulation of Cable Voice is Not Expressly Preempted

The courts acknowledge that Congress recognized a continuing need for both state and local regulation when it enacted the Telecommunications Act. *Appeal of Union Telephone Company*, at 9, *citing Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9, 15-18 (1st Cir.

[87] U.S. Const. art.VI.

2006); and 47 U.S.C. §253(a) (finding that Congress recognized the continuing need for state and local regulation, but that such regulation may not prohibit the ability of any entity to provide interstate or intrastate telecommunications service). Section 253(b) of the Act, for example, expressly allows "a State to impose, on a competitively neutral basis . . . , requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). In addition, Section 152 of the Act acknowledges that states retain jurisdiction over the regulation of intrastate telecommunications services. 47 U.S.C. § 152(b) (exceptions to FCC jurisdiction, recognizing areas subject to state jurisdiction). Nowhere does the Telecommunications Act expressly preempt state regulation over cable voice services, such as those offered by Comcast and Time Warner.

2. State Regulation of Cable Voice Service is Not Implicitly Preempted

We find no implicit preemption of our authority to regulate cable voice in our reading of the Telecommunications Act or FCC actions pursuant to the Act. As discussed above, the Telecommunications Act does not grant exclusive federal jurisdiction over telecommunications service; nor does it limit state jurisdiction over intrastate telecommunications services based on the technology used to provide such services. Furthermore, the FCC has thus far declined to determine that cable voice service is subject to exclusive federal jurisdiction, as it has done with respect to nomadic VoIP.[88] The regulation of cable voice service varies from state to state, ranging from prohibition of state regulation to full regulation of cable voice as a telecommunications service. Within this continuum, some states regulate only those elements of telecommunications carrier obligations the FCC requires of nomadic VoIP and cable voice

[88] We note that Time Warner's arguments that the FCC intended to preempt all VoIP providers, including cable voice providers, from state regulation are based on an erroneous extrapolation of the *Vonage Order* holdings. *See* TWC Br. at 15-17.

service providers. RLEC Br. at 27, fn 88. Those obligations include federal Universal Service Fund contribution requirements, CALEA standards,[89] number porting requirements, regulatory fee obligations, disability access requirements, Customer Proprietary Network Information rules, and E911 capability requirements. *Id.*; *see also Comcast Prefiled Direct Testimony of Kowolenko and Choroser* at 9 (Oct. 9, 2009) and Comcast Initial Br. at 2-3.

As both the RLECs and Comcast point out, the FCC's *Vonage* decision addressed nomadic VoIP services, not cable voice services such as those offered by Comcast and Time Warner. *See* NHTA Reply Br. at 8-9, citing Brief for Respondent FCC, *Min. Pub Utils. Comm'n v. FCC*, No. 05-1069 at 64 (8th Circ. Filed Dec. 1, 2005); and Comcast Initial Br. at 7.[90] Nomadic VoIP differs from the cable voice service we examine here in that, among other things, nomadic VoIP technology currently precludes the capability of identifying intra- versus inter-state communications that would enable jurisdictional designations. In *Vonage*, the FCC recognized the difficulty inherent in pinpointing the physical end points of a nomadic VoIP call because customers are not restricted to making calls from a fixed location. *Id.* at ¶ 31. As a result, the FCC determined that state regulation of nomadic VoIP service is preempted where it is impossible or impractical to separate the intrastate and interstate components of the service at issue. *Id.*

By contrast, here the providers can distinguish intra- and interstate communications, because cable voice calls are originated from fixed locations. Based on our review of the law and the issues at stake in this proceeding, we find no indication that either Congress or the FCC

[89] The Communications Assistance for Law Enforcement Act (CALEA) requires telecommunications carriers to cooperate in the interception of communications for law enforcement purposes and to make call detail records available to law enforcement officials. Pub. L. No. 103-414, 108 Stat. 4279, codified at 47 USC 1001-1010.
[90] *See also Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22,404 (2004), *aff'd sub nom. Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007) (holding that NY PSC challenge asserting that state regulation of fixed VoIP (*i.e.* cable voice) should not be preempted was not ripe for review as FCC order did not purport to preempt fixed VoIP).

intended to preempt state regulation of the cable voice services at issue here. Furthermore, we need not await FCC action with regard to cable voice services, but, instead, may rely on applicable "existing law." *See* RLECs Initial Br. at 33, *citing Petition of UTEX Communications Corporation,* WC Docket No. 09-134, Memorandum Opinion and Order, DA 09-2205, 24 FCC Rcd 12573 paras. 8, 10 (2009) (finding that the PUC of Texas should not wait for the FCC to move forward on a determination of regulatory treatment of VoIP, but should proceed to arbitrate interconnection agreement in a timely manner, relying on existing law). We find that, contrary to the arguments proffered by Comcast and Time Warner, state regulation of cable voice services is not implicitly preempted by federal law or action.

3. No Conflict with Federal Law or Policy

The New Hampshire Supreme Court has recognized that a conflict exists where state law stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress. *See Appeal of Union Telephone, supra., citing Carlisle v. Frisbie Mem. Hosp.,* 152 N.H. 762, 770 (2005) (upholding federal preemption claim where conflict between state and federal requirements made it impossible to comply with both). The Federal District Court in New Hampshire has confirmed that State action is preempted by federal law "either when compliance with both state and federal regulations is impossible or when state law interposes an obstacle to the achievement of Congress's discernible objectives." *Verizon New England, Inc. v. N.H. Public Utilities Comm'n,* No. 05-CV-94-PB, 2006 WL 2433249 at 8 (D.N.H.) (Aug. 22, 2006), fn. 33, *citing Global NAPS v. Verizon, supra.*[91] Comcast and Time Warner argue that federal law preempts conflicting action by this Commission even in the absence of a specific

[91] In the *Global NAPS* order, the First Circuit held that the FCC's order preempting state regulation over local calls to Internet Service Providers (ISPs) did not preempt state regulation over *all* calls to ISPs, including non-local calls. The court rejected Global NAPs's argument that the FCC preemption should be interpreted broadly. *See Local Competition Provisions in the Telecommunications Act of 1996* (*ISP Remand Order*), 16 F.C.C.R. 9151 (2001).

federal agency directive. Comcast Br. at 29, *citing Appeal of Conservation Law Foundation*, 147 NH 89, 95 (2001) (upholding Commission finding that its jurisdiction under the rail line preservation statute was preempted by conflicting federal law). Specifically, Comcast and Time Warner argue that state regulation of their cable voice services would conflict with federal policy favoring open entry for providers of new and innovative services, including cable voice, as well as nomadic VoIP. Time Warner Br. at 4; Comcast Br. at 9-10. Comcast and Time Warner interpret the New Hampshire Supreme Court's rulings set forth in the discussion of state law above[92] to further indicate that state regulation should not interfere with the FCC's policy of encouraging free enterprise and investment in the development of technologies such as cable voice services. *See* Time Warner Br. at 6-7, and 10; Comcast Br. at 10. Time Warner adds that federal policy precludes patchwork regulation at the state level. Time Warner Reply Br. at 8. According to Time Warner, both New Hampshire and federal law recognize that the imposition of economic regulation on new providers in the market risks making entry more difficult and competition less likely. Time Warner Sur-Reply Br. at 5. Both Time Warner and Comcast further argue that the imposition of state regulations on cable voice service providers before the FCC's rulemaking is concluded poses the risk of an eventual conflict with federal law. Time Warner Br. at 23. Comcast Br. at 32.

Our determination that cable voice services are "telecommunications services" does not mean that the providers are now subject to extensive or burdensome regulation. They must adhere to our competitive local exchange carrier (CLEC) regulations, under which CLECs file rate sheets that are not reviewed or approved, but are kept on file as information available to consumers, and file annual reports for utility assessment purposes under RSA 363-A. Certain rules apply regarding consumer protections and responding to consumer complaints.

[92] *See, supra, Appeal of Atlantic Connection, Appeal of Omni,* and *Appeal of Public Service.*

Furthermore, inasmuch as CLEC facilities occupy space on telephone and electric utility poles located in public right- of-ways and CLECs may be the telephone service provider to important public safety, health care, and other facilities critically impacted during emergencies, it is reasonable to expect CLECs to cooperate during emergencies and comply with orderly restoration of service obligations. The Commission does not regulate CLEC rates of return, rates, service quality, corporate organizational changes, financings, offerings, or the markets they choose to serve.[93] Such limited regulation is consistent with the New Hampshire State Constitution provisions for free and fair competition[94] and does not conflict with any federal law. Comcast and Time Warner both state that they already substantially comply with New Hampshire CLEC requirements and regulations. Comcast Br. at 13-14; Time Warner Br. at 2 and Reply Br. at 15. Thus, our finding that cable voice services are subject to regulation should have minimal, if any, competitive impact on Comcast or Time Warner services in New Hampshire, and both will be subject to the same regulatory rights and obligations that apply to all CLECs. We therefore conclude that Commission jurisdiction over cable voice service does not involve discriminatory or burdensome economic regulation and will not inhibit the development of a competitive market or conflict with federal law.

D. Conclusion

We find that the cable voice service offered by Comcast and Time Warner constitutes conveyance of a telephone message that falls within the jurisdiction of this Commission pursuant to RSA 362:2. Furthermore, we find that state regulation of Comcast and Time Warner cable voice services is not expressly or implicitly preempted by federal law. Nor does the regulation

[93] *See also,* RSA 374:22-o, Regulation of Competitive Telecommunications Providers Limited.

[94] N.H. Const., Pt. 2, Art. 83 states, in part, "Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof."

of these companies as CLECs involve discriminatory or burdensome economic regulation that would inhibit the development of a competitive market or conflict with federal law. We find that regulation of Comcast and Time Warner as CLECs is fair, consistent with State law, and serves the public interest.

Based upon the foregoing, it is hereby

ORDERED, that the IP-enabled cable voice service offered by Comcast and Time Warner is a utility service that falls under the jurisdiction of this Commission pursuant to RSA 362:2; and it is

FURTHER ORDERED, that Comcast and Time Warner within 45 days of the date of this order comply with registration and other CLEC requirements for their intrastate cable voice services pursuant to New Hampshire law and Commission rules.

By order of the Public Utilities Commission of New Hampshire this eleventh day of August, 2011.

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Chairman

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Commissioner

Amy L. Ignatius
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Attested by:

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