

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2011 TERM

Docket No: _____

Appeal of Comcast Phone of New Hampshire, LLC and
Comcast IP Phone II, LLC

APPEAL BY PETITION PURSUANT TO RSA 541:6 AND
NEW HAMPSHIRE SUPREME COURT RULE 10

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October 28, 2011

**APPEAL BY PETITION PURSUANT TO RSA 541:6 AND
NEW HAMPSHIRE SUPREME COURT RULE 10**

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NOW COME, Comcast Phone of New Hampshire, LLC and Comcast IP Phone, II, LLC (collectively "Comcast"), by and through their attorneys, Orr & Reno, P.A. and Jenner & Block LLP, and, pursuant to RSA 541:6 and New Hampshire Supreme Court Rule 10, appeal to this Honorable Court from the New Hampshire Public Utilities Commission's order on reconsideration, Order No. 25,274 issued on September 28, 2011. In support of this Petition, Comcast states as follows:

1. The parties and counsel are as follows:

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2. The New Hampshire Public Utilities Commission issued a final decision on reconsideration (Order No. 25,274) on September 28, 2011. Copies of that order and the following documents are contained in the Appendix filed with this Petition:

- | | | |
|----|--|--------------------|
| a) | Order Finding Jurisdiction and Requiring Limited Regulation
Order No. 25,262
August 11, 2011 | See Appendix p. 1 |
| b) | Comcast's Motion for Rehearing and Suspension of Order No. 25,262 and Motion to Reopen Record, and Declaration of Beth Choroser in Support
September 12, 2011 | See Appendix p. 61 |
| c) | Objection of the New Hampshire Telephone Association ("NHTA") to Comcast's Motion for Rehearing and Suspension and Motion to Reopen the Record
September 19, 2011 | See Appendix p. 83 |
| d) | Letter from Debra A. Howland to the Parties
September 22, 2011 | See Appendix p. 97 |
| e) | Order Denying Motion for Rehearing and Suspension of Order and Motion to Reopen Record
Order No. 25,274 | See Appendix p. 98 |

September 28, 2011

- f) Motion for Rehearing/Reconsideration of Order No. 25,274 Denying Motion for Suspension of Order No. 25,262 and/or Petition for Waiver of CLEC Rules October 28, 2011 See Appendix p. 109
- g) Motion for Rehearing/Reconsideration of Order No. 25,274 Denying Motion to Reopen Record October 28, 2011 See Appendix p. 123

3. The questions presented for review are:

- A. The Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq*, distinguishes between “information services,” which are exempt from state regulation, and “telecommunications services,” which are subject to state regulation provided that such regulation does not conflict with federal law. Did the New Hampshire Public Utilities Commission (“PUC” or “Commission”) err in holding that Comcast’s interconnected Voice over Internet Protocol (“interconnected VoIP”) service qualifies as a “telecommunications service” rather than an “information service”?
- B. Even assuming that Comcast’s interconnected VoIP service is a “telecommunications service,” did the PUC err in holding that its exercise of jurisdiction over Comcast’s interconnected VoIP service is not preempted by federal law?
- C. Did the PUC err in holding that Comcast’s interconnected VoIP service constitutes the “conveyance of telephone or telegraph messages” under RSA 362:2?
- D. Did the PUC err in denying Comcast’s Motion to Reopen the Record to provide evidence of additional developments with regard to Comcast’s interconnected VoIP service since the close of the evidentiary phase of the proceeding?
- E. Did the PUC err in denying Comcast’s Motion to Suspend the effects of the Order?

4. The following statutes and rules are involved in this case:

- 47 U.S.C. §§ 153(24), 153(50), 153(53) See Appendix p. 131
- RSA 21:2 See Appendix p. 137
- RSA 53-C:3 See Appendix p. 137

RSA 362:2	See Appendix p. 137
RSA 362:6	See Appendix p. 138
RSA 541:6	See Appendix p. 138
N.H. Admin. R. Puc 203.30(a)	See Appendix p. 139
N.H. Admin. R. Puc 432.14(f)(2)	See Appendix p. 141

5. There are no insurance policies, contracts, or related documents in this case.

6. **Statement of the Case**

This is an appeal from an Order of the New Hampshire Public Utilities Commission (“PUC” or “Commission”) that subjects two of Comcast’s interconnected Voice over Internet Protocol (“interconnected VoIP”) services, known as “Comcast Digital Voice” and “Business Class Voice” (collectively “CDV”),¹ to state public utility regulation in the State of New Hampshire (the “Order”). Order Finding Jurisdiction and Requiring Limited Regulation (Aug. 11, 2011), Appendix (“A.”) at 1 [hereinafter “Order”]. The Commission reached this decision by holding that CDV is a “telecommunications service” under federal law and can therefore be subjected to state telecommunications regulation. *Id.* at 49-53. This holding, as explained below, is contrary to the decisions of every court that has considered the question, a tension the Commission acknowledged. *Id.* at 53. In addition, the Commission also held that federal law did not preempt the imposition of state telecommunications regulations on CDV and that New Hampshire law – which on its face is limited to “telephone” service – even reaches VoIP services such as CDV in the first instance. *Id.* at 40-49, 54-59. As these are substantial issues concerning the scope of state authority over VoIP services and the Commission’s decision

¹At the time briefing was complete before the PUC, Comcast’s residential interconnected VoIP service was known as Comcast Digital Voice. Since then, that service has been rebranded “XFINITY Voice” to better reflect the cross-platform nature of the service. For consistency with the PUC’s order, however, this appeal will refer to Comcast’s services as “CDV.”

conflicts with those of multiple courts, Comcast respectfully requests that the Court grant the Petition so that these questions can receive thorough consideration by the Court.

In addition, Comcast is appealing the portions of Order No. 25,274 that denied Comcast's Motion to Suspend and Motion to Reopen the Record. In moving for rehearing on the merits of the Order, Comcast submitted additional testimony regarding ways in which some of its service offerings had changed since the close of the evidentiary phase of the Commission's proceeding. *See* Declaration of Beth Choroser in Support of Comcast's Motion for Rehearing and Suspension of Order 25,262 and Motion to Reopen Record (Sept. 12, 2011), A. at 79 [hereinafter "Choroser Declaration"]. Comcast also requested that the Commission suspend its order. Motion for Rehearing and Suspension of Order No. 25,262 and Motion to Reopen Record (Sept. 12, 2011), A. at 61 [hereinafter "Motion for Rehearing of Order 25,262"]. The Commission denied both requests. As explained at note 6, *infra*, it is unclear whether these two issues are currently ripe for review or whether they must be raised in motions for rehearing and considered by the Commission before they may be appealed to this Court. In order to insure that the issues have been presented to the Court in a timely fashion, they are submitted herewith. In the alternative, if the issues are not yet ripe for appeal, Comcast has filed motions for rehearing on both issues with the Commission. *See* A. at 109 and 123.

A. Technological Overview

Comcast and its affiliates provide cable television services, high-speed Internet service, and CDV, an interconnected VoIP service. Order, A. at 5. In New Hampshire, CDV is offered by Comcast IP Phone II, LLC, a separate Comcast affiliate. *Id.* at 18.²

²Comcast Phone of New Hampshire, LLC, a party to this proceeding, is regulated by the Commission and offers various telecommunications services within the state, including to Comcast IP Phone II, LLC. Comcast Phone of New Hampshire, LLC does not dispute that the

CDV bears superficial similarities to traditional telephone service (commonly referred to as “Plain Old Telephone Service” or “POTS”). *Id.* at 41-42. CDV, like POTS, provides users with real-time voice services. *Id.* at 6-7. Users are assigned 10-digit numbers, may use traditional telephone handsets, and hear dial and ring tones when they use their handsets. *Id.* at 7, 42-43. However, CDV users have access to a wide range of services unavailable to users of POTS. Users can access and act upon calling information using their televisions, mobile handsets, iPods, iPhones, or Internet connections. *Id.* at 29, 42.

These additional services are enabled, in part, by the different technology that Comcast uses to provide CDV. CDV calls are originated and terminated at users’ premises in Internet Protocol (“IP”), the same protocol used for communications over the Internet. *Id.* at 4. Users plug their handsets or wiring into embedded multimedia terminal adapters (“eMTAs”), located at their premises, which double as cable modems for users who purchase Comcast’s high-speed Internet service. *Id.* at 4-6, 42. The eMTA formats voice communications into IP packets, and IP packets into voice communications so that voice traffic can be carried on Comcast’s IP network. *Id.* at 6-7, 42. POTS carriers, by contrast, use an older technique known as Time Division Multiplexing (“TDM”) to transmit signals over shared connections. *Id.* at 7, 23, n.25. The Public Switched Telephone Network (or “PSTN”), in which different carriers interconnect in order to exchange calls, uses TDM technology. *Id.* at 23 n.25.

In order for its IP network to be able to interface with the PSTN so that CDV users can place and receive calls to and from POTS users, Comcast must convert incoming and outgoing calls between IP and TDM. *Id.* at 7. Accordingly, when a CDV user places a call to a POTS user, the call enters Comcast’s network in IP; Comcast’s network converts the call from IP to

Commission has jurisdiction to regulate its services, and this matter was not in dispute in the proceedings below.

TDM; and Comcast's network hands the call to its local regulated telephone affiliate, Comcast Phone of New Hampshire, LLC, which in turn interconnects with other telephone networks using TDM. *Id.* at 20, 26-27. The same process happens in reverse when a POTS user calls a CDV user – the call enters the local regulated telephone affiliate's network in TDM, is converted by Comcast's network to IP, and exits Comcast's network in IP. *Id.* at 26-27.

B. Regulatory Overview

The Telecommunications Act of 1996 distinguishes between two types of services: telecommunications services and information services. "Telecommunications service" is defined as "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). The term "telecommunications," in turn, is defined as "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). In contrast, "information service" is defined as "the offering of a capability for generating, acquiring, storing, 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). As the PUC recognized, "[u]nder 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." *Order*, A. at 4; *see also In re Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11,501, 11,523, ¶ 43 (1998) (noting that Congress intended "the two categories be separate and distinct, and that information service providers not

be subject to telecommunications regulation”) [A. at 167]³; *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (“[State] regulations that have the effect of regulating information services are in conflict with federal law and must be pre-empted”). The FCC has yet to decide whether interconnected VoIP constitutes an “information service.” As described below, however, four federal courts have concluded that interconnected VoIP is an “information service,” and Comcast is not aware of any court, state or federal, ever reaching a contrary conclusion. *See infra* at 13-14.

Unlike “information services,” which are not subject to state regulation, “telecommunication services” can sometimes be subject to state regulation – but only so long as the state regulation is limited to the “intrastate” portion of the service and does not conflict with federal regulation of interstate communications. The FCC has not hesitated to preempt state regulation that conflicts with federal telecommunications policy, regardless of the classification of the service subject to that state regulation. Most relevant here, in *In re 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) (“*Vonage Preemption Order*”) [A. at 255], the FCC considered whether state regulation of “nomadic” VoIP, a voice service in which users can make calls from any broadband Internet connection, was preempted by federal law. The FCC expressly declined to decide whether nomadic VoIP is a “telecommunications service” or an “information service” under the Telecommunications Act. *Id.* at 22,411-12, ¶ 14 [A. at 262-3]. Instead, it held that regardless of the appropriate regulatory classification of nomadic VoIP, state regulation would “conflict[] with federal rules and policies

³ Federal Communications Commission (“FCC”) orders referenced herein are contained in Volume II of the Appendix to Appeal by Petition submitted herewith.

governing interstate . . . communications,” and was hence preempted. *Id.* at 22,424, ¶ 31 [A. at 275].

Comcast’s interconnected VoIP service, unlike the “nomadic” service at issue in the *Vonage Preemption Order*, is a “fixed” VoIP service – users were, at the time evidence was submitted at the PUC, restricted to making calls from their own premises.⁴ The FCC has yet to decide whether state regulation of fixed VoIP is preempted by federal law. Nevertheless, in the *Vonage Preemption Order*, the FCC indicated that were the issue of whether to preempt state regulation of fixed VoIP before it, it would find regulation to be preempted: It noted that “the provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication and counsels against patchwork regulation,” and concluded that “to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.” *Id.* at 22,424, ¶ 32 (footnote omitted) [A. at 275]. The question has not yet, however, been definitively resolved by the FCC. *See Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 582-83 (8th Cir. 2007) (“The order only suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services. Nonetheless, the order does not purport to actually do so”).

Although the FCC has yet to decide whether fixed VoIP is subject to state regulation, it has asserted its own authority to regulate fixed VoIP. It has issued uniform, national regulations governing all interconnected VoIP providers (fixed and nomadic alike), including universal service fund contributions, 911, number portability obligations, and other requirements. *See, e.g., In re Telephone Number Requirements for IP-Enable Service Providers*, Report and Order,

⁴These facts have somewhat changed since evidence was submitted at the Commission, but the PUC denied Comcast’s Motion to Reopen the Record to update the factual record. Comcast also appeals the PUC’s denial of its Motion to Reopen. *See infra*, at 22-23.

Declaratory Ruling, and Notice of Proposed Rulemaking, 22 FCC Rcd 19,531, 19,540, ¶ 16 (2007) (number portability) [A. at 294]; *In re Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-41, ¶¶ 38-45 (2006), *aff'd in part, vacated in part, Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007) (universal service fund contributions) [A. at 407-410]. Pursuant to those regulations, Comcast contributes to the federal universal service fund and complies with other FCC mandates governing VoIP services.

C. Procedural Background

On March 6, 2009, the rural carriers of the New Hampshire Telephone Association filed a petition with the New Hampshire Public Utilities Commission (“PUC”), asking the PUC to determine the appropriate regulatory treatment of interconnected VoIP in New Hampshire.

Order, A. at 1. The PUC denied Comcast’s motion to stay the proceeding pending a decision from the FCC regarding the regulatory treatment of interconnected VoIP. *Id.* at 3. The parties agreed to waive cross-examination and requested that the official record be deemed to consist of prefiled direct and reply testimony, as well as data requests and responses exchanged among the parties.

On August 11, 2011, the PUC issued its Order, holding that CDV is a telecommunications service that falls under the jurisdiction of the PUC. The PUC concluded that CDV is a “telecommunications service” rather than an “information service,” reasoning that CDV does not involve “the conversion of information from one form to another.” *Id.* at 52. It further held that state regulation of CDV is not preempted by federal law because New Hampshire’s regulations are not “discriminatory or burdensome.” *Id.* at 59. Finally, it held that CDV constitutes a telephone service under RSA 362:2, finding that any distinction between CDV and POTS is a “distinction without a difference.” *Id.* at 44. It ordered Comcast to comply

with registration and other requirements within 45 days of the date of the Order. *Id.* at 60. The PUC subsequently denied Comcast's motion for reconsideration and motion to reopen the record. *See* Order Denying Motion for Rehearing and Suspension of Order and Motion to Reopen Record (Sept. 28, 2011), A. at 98 [hereinafter "Order on Rehearing"].

7. The jurisdictional basis for this appeal is RSA 541:6.

8. **Reasons to Accept Appeal/Substantial Basis Exists for a Difference of Opinion On the Questions Presented**

Expressly disagreeing with every court to consider the question, the PUC concluded that so-called interconnected VoIP does not qualify as an "information service" under federal law. Order, A. at 49-53. It further held that its regulation of CDV is not preempted, notwithstanding the FCC's strong suggestion in the *Vonage Preemption Order* that state regulation of fixed VoIP conflicts with federal law. *Id.* at 54-59. Finally, the PUC determined that CDV was a "telephone" service subject to regulation under state law. *Id.* at 40-49.

The PUC's decision is worthy of this court's review. It reflects fundamental misunderstandings of pertinent principles of federal telecommunications regulation and statutory construction. Moreover, it creates conflicting authority which will lead to significant regulatory uncertainty for Comcast, hampering the growth of CDV and broadband, both in New Hampshire and nationwide.

A. CDV is an "Information Service" Under 47 U.S.C. § 153(24).

The PUC acknowledged that if CDV constituted an "information service" under 47 U.S.C. § 153(24), then state regulation of CDV would be preempted. Order, A. at 4. It concluded, however, that CDV was not an "information service." *Id.* at 52. That conclusion was incorrect.

1. CDV is an “Information Service” Because Its Protocol Conversion Constitutes the “Transforming” and “Processing” of Information.

“Information service” is defined by federal law as “the offering of a capability for generating, acquiring, storing, 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). CDV straightforwardly qualifies as an “information service” under this definition. When a CDV user places a call to a recipient who is on the PSTN, Comcast’s network converts the call from IP to TDM; likewise, when a CDV user receives a call from a caller who uses POTS, Comcast’s network converts the call from TDM to IP. *See pp. 7-8, supra.* This process constitutes the “transforming” and “processing” of information. Indeed, the “transformation” and “processing” of telephone calls from IP to TDM and back is the central feature that makes CDV attractive to consumers; without that feature, CDV users could not speak to POTS users.

Every court to consider the issue has adopted this reasoning. In *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *aff’d on other grounds*, 530 F.3d 676 (8th Cir. 2008), the court explained that under longstanding FCC precedent, “[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service.” 461 F. Supp. 2d at 1081. Accordingly, it found that when voice traffic that enters a network using the IP protocol and terminates on the PSTN using TDM, the provider offers an information service. *Id.* at 1082. Likewise, in *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F. Supp. 2d 993 (D. Minn. 2003), the court held that that interconnected VoIP carriers “act on the format and protocol of the information,” thus making the service an information service. *Id.* at 999. The Southern District of New York later

relied on this reasoning in preliminarily enjoining the New York Public Service Commission from regulating an interconnected VoIP carrier. *See Vonage Holdings Corp. v. New York Public Serv. Comm'n*, No. 04-Civ.-4306 (DFE), 2004 WL 3398572, at *1 (S.D.N.Y. July 16, 2004), *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005). And most recently, in *Paetec Communications, Inc. v. CommPartners, LLC*, No. 08-Civ.-0397 (JR), 2010 WL 1767193 (D.D.C. Feb. 18, 2010), the court adopted the holding of *Southwestern Bell*, finding that the protocol conversion effectuated by VoIP services renders them information services. 2010 WL 176193, at *3.

The PUC did not dispute that its conclusion was inconsistent with this case law; it merely noted that the above cases were “outside the First Circuit” and that it “[t]ook exception” and “disagree[d]” with them. Order, A. at 53. The PUC’s justification for its contrary conclusion was that the term “information service” does not encompass “the formatting conversion that is used by the service providers to interface between two different systems.” *Id.* at 51. It held that “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).” *Id.* at 52.

This reasoning is contrary to the text of the Telecommunications Act. The statute states that a service involving the “processing” or “transforming” of information constitutes an information service; it makes no exception for services that “interface between two different systems,” such as CDV. 47 U.S.C. § 153(24); Order, A. at 51. Accordingly, “[i]t does not matter that there is a ‘voice’ at both ends of an IP-[telephone switch] call.” *Southwestern Bell*, 461 F. Supp. 2d at 1082 n.21. CDV qualifies as an information service because it involves a “net

protocol conversion,” in which “[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 . . . telephones, and ends at the recipient’s location in TDM.” *Id.* at 1082; *see also Vonage*, 290 F. Supp. 2d at 1000 (same).

In addition, the PUC’s reasoning conflicts with FCC precedent, which is entitled to *Chevron* deference⁵ in connection with its interpretation of the Telecommunications Act. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005). In *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 21,905 (1996) [A. at 425], the FCC rejected the view that was the basis for the PUC’s holding in this case – that the information service designation should be limited to services “that transform or process the content of information transmitted by an end-user.” *Id.* at 21,956 ¶ 104 [A. at 476]. The FCC found it irrelevant whether the content of a transmission remains unchanged, because “the statutory definition makes no reference to the term ‘content,’ but requires only that an information service transform or process ‘information.’” *Id.* It therefore held that “both protocol conversion and protocol processing services are information services.” *Id.*; *see also In re Application of AT&T for Authority under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified telephone Company Locations in the United States*, Memorandum Opinion, Order, and Authorization, 94 F.C.C.2d 48, 54, ¶ 13 (1983) (holding that services that “support communications among incompatible terminals (and perform code, format and protocol

⁵ *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (unless a statute is unambiguous, courts defer to responsible agency’s interpretation so long as the “agency’s answer is based on a permissible construction of the statute”).

conversion to support this service within their facilities)” are “enhanced offerings”) [A. at 617]; *Brand X*, 545 U.S. at 976-77 (noting that “information service” under the 1996 Act was “the analog to enhanced service” under the FCC’s prior regulatory regime, and that “communicat[ion] between networks that employ[] different data-transmission formats” qualified as “enhanced services” under the FCC’s rules). The PUC erred in adopting a view of the Telecommunications Act that is inconsistent with the FCC’s reasoning.

2. CDV is Also an “Information Service” Because Its Voice Calling Features Are Intertwined With Other Features That Constitute the “Transforming” and “Processing” of Information.

CDV is an “information service” for a second reason: its calling capability is integrated with other information service functions as a single offering. As discussed *supra*, at 7, CDV’s feature set is far broader than simple voice communication. CDV enables users to integrate the Internet, television, mobile handsets, iPods, and smart phones into their voice service. Order, A. at 29, 42. Such features indisputably constitute the “processing” and “transforming” of information and as such qualify as “information services.”

Moreover, even assuming (contrary to the holdings of the courts) that CDV’s voice calling feature would be a “telecommunications service” in isolation, that feature is so intertwined with CDV’s “information services” that CDV’s offering as a whole should be considered an “information service.” The Supreme Court upheld precisely this reasoning in its seminal *Brand X* decision. That case concerned the regulatory classification of cable modem broadband Internet access. Cable Internet providers combine “telecommunications” (a path to third-party information on the Internet) with information services (such as the provision of a homepage and email address, and “access to DNS” (Domain Name Service), an online database query that “matches the Web site address the end user types into his browser . . . with the IP address of the Web page’s host server”). 545 U.S. at 998-99. The FCC concluded that this

combination of functions makes cable modem service an information service rather than a telecommunications service. The Supreme Court held that this was a reasonable interpretation of the Telecommunications Act, upholding the FCC's determination that the information service features of cable modem service were "sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering." *Id.* at 990. Likewise here: CDV's voice calling feature is so intertwined with its information service functions that they constitute a single, "information service" offering.

The PUC rejected Comcast's argument that CDV constitutes such an "intertwined" information service, finding that "[i]n 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." Order, A. at 52. But CDV is not like a traditional telephone service that uses voice mail; its advanced features are much further integrated with the voice calling abilities of the service. The FCC acknowledged this point in the *Vonage* preemption order (which it ultimately resolved on other grounds): it concluded that the VoIP provider in that case, which offered remarkably similar features to those that are part of CDV now, offered a "suite of integrated capabilities and features" which "in all their combinations form an integrated communications service." *Vonage Preemption Order*, 19 FCC Rcd at 22407, 22419-20, ¶¶ 7, 25 [A. at 258, 270-71]. The PUC's holding that interconnected VoIP is comparable to a telephone service with voicemail reflects a failure to consider the evidence placed into the record.

B. Even if CDV Were a "Telecommunications Service," the PUC's Exercise of Jurisdiction Over CDV Conflicts With Federal Policy Over Interstate Communications and is Preempted.

The Commission's decision was wrong even if CDV were not an information service. In the *Vonage* preemption order, the FCC concluded that regardless of whether "nomadic" VoIP

was considered an “information service” or a “telecommunications service” under the Telecommunications Act, state regulation of nomadic VoIP was preempted on the ground that it conflicted with federal law. *Vonage Preemption Order*, 19 FCC Rcd at 22,415-16, 22425-26, ¶¶ 20, 34 [A. at 266-67, 276-77]. It observed that “to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.” *Id.* at 22,424, ¶ 32 (footnote omitted) [A. at 275]. Comcast argued to the PUC that it should follow the FCC’s lead and declare New Hampshire’s regulation of CDV to be preempted by federal law. But the PUC rejected Comcast’s contention, finding that New Hampshire’s regulation of CDV “does not involve discriminatory or burdensome economic regulation and will not inhibit the development of a competitive market or conflict with federal law.” Order, A. at 59. That reasoning was factually and legally flawed.

First, the PUC’s conclusion that New Hampshire’s regulation is not “discriminatory or burdensome” is erroneous. Comcast’s billing system, provisioning system, installation practices, network operations and customer care are built around its converged platform, which – in view of the uniform holdings of the courts that fixed VoIP is an “information service” – is not currently compatible with New Hampshire’s (or other states’) regulatory requirements. For instance, Comcast does not have the ability to prioritize partial payments towards New Hampshire customers’ voice services in a manner that would enable Comcast to comply with the Commission’s disconnection regulations at N.H. Admin. Rule PUC 432.14(f)(2). *See* Choroser Declaration ¶¶ 7-9, A. at 81-82.

Second, and more fundamentally, the PUC used the wrong legal standard in assessing whether its regulation is preempted. The FCC has explained 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.” *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4867, ¶ 5 (2004) [A. at 637]. Consistent with that view, the FCC held in the *Vonage Preemption Order* that state regulation of nomadic VoIP services was preempted because the “imposition of 50 or more additional sets of different economic regulations” on VoIP would be “in contravention of the pro-competitive deregulatory policies the Commission is striving to further.” *Vonage Preemption Order*, 19 FCC Rcd at 22,415-18, 22,426-27, ¶¶ 20-22, 36-37 [A. at 266-69, 277-78]. As the FCC’s analysis illustrates, the preemption inquiry does not turn on whether one particular state’s regulation of a telecommunications service is burdensome; rather, it is whether the aggregate effect of “50 or more additional sets of different economic regulations” would be burdensome. *Id.* Likewise, the Supreme Court has repeatedly aggregated the cumulative effect of state regulation in considering questions of preemption. *See, e.g., Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 76 (2008) (holding that preemption of state regulation was necessary to avoid “a 50-state patchwork of inconsistent labor policies”); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 (2008) (finding preemption in light of consequences that would ensure if “if juries were allowed to apply the tort law of 50 States to all innovations”); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 149-50 (2001) (“Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of ‘minimizing the administrative and financial burdens’ on plan administrators” (alterations omitted)).

Had the Commission conducted the proper analysis, it would have found that its regulation of interconnected VoIP was preempted. If the provision of VoIP service were subjected to 50 different regulatory frameworks (not to mention the FCC’s own regulations), then its rapid development and deployment to customers nationwide – the policy outcome that

federal law seeks to further through its express policy of nonregulation – could be frustrated. The court should grant review to correct the PUC’s erroneous understanding of federal preemption law.

C. CDV Does Not Involve the “Conveyance of Telephone . . . Messages” Under RSA 362:2.

Finally, the PUC’s decision is contrary to state law. The PUC found that CDV was a public utility subject to state regulation because it involved the “conveyance of telephone . . . messages” within the meaning of RSA 362:2. Order, A. at 59. It reasoned that CDV was a mere “substitute for traditional landline service,” and any distinction between CDV and POTS was a “distinction without a difference.” *Id.* at 44. This reasoning was misconceived.

RSA 362:2 does not define “telephone” or “telephone messages.” Accordingly, under RSA 21:2, these terms must be construed according to their “common and approved usage,” or, if they are technical words or have acquired a “peculiar and appropriate meaning in the law,” they must be construed according to that meaning. Under either test, CDV does not qualify as “telephone service.” When RSA 362:2 was enacted in 1911, the “common and approved usage” of a “telephone” involved the use of a standard switched network – similar to the network used in POTS today. Services such as CDV, which involves utterly different technology and a feature set inconceivable in 1911, would not have qualified as “telephone messages” as that term was understood at that time. *See In re Sarvela*, 154 N.H. 426, 430 (2006) (noting that statutory language must be construed as it was understood at the time of enactment).

Moreover, “telephone messages” have acquired a “peculiar and appropriate meaning in the law.” RSA 21:2. For 100 years, the sole “telephone messages” that have been regulated by the PUC have been messages conveyed over traditional networks. This is an “appropriate meaning,” insofar as the regulation addresses the problem the Legislature was attempting to

solve in 1911 – monopoly control over switched telephone networks. Never has the PUC regulated technology as far removed from traditional telephony as CDV. *See, e.g.*, RSA 53-C:3 (cable television service franchised and regulated by municipalities), and RSA 362:6 (cellular mobile radio communications expressly exempt from PUC regulation). For the PUC to construe “telephone messages” to encompass unique innovations such as CDV is contrary to basic principles of statutory construction. *See Appeal of Omni Commc’ns, Inc.*, 122 N.H. 860, 863 (1982) (holding that RSA 362:2 should be limited to the types of services that the Legislature intended to cover).

D. The Questions Presented are Worthy of Review.

The Court should exercise its discretion to hear Comcast’s appeal. First, there is little doubt that “a substantial basis exists for a difference of opinion on the question.” N.H. Sup. Ct. R. 10(1)(h). The PUC acknowledged that its decision conflicted with the decisions of four federal courts, stating that it “t[ook] exception” and “disagree[d] with” those rulings. Order, A. at 53. This conflict of authority demonstrates that the PUC’s decision is at least debatable.

Moreover, “acceptance of the appeal would protect a party from substantial and irreparable injury.” N.H. Sup. Ct. R. 10(1)(h). As explained in Comcast’s Motion for a Stay (filed concurrently with this petition), CDV’s converged, any-distance services are not compatible with the PUC’s regulations; trying to reconfigure Comcast’s service to comply with those requirements involves substantial difficulty, and the Commission’s Order is likely to generate confusion and regulatory uncertainty. In order to plan its investments, it is very important for Comcast – as well as other companies providing or considering providing similar services – to know what kinds of regulations, if any, their services will be expected to abide by.

Finally, acceptance of this appeal would “present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice.” *Id.* Interconnected VoIP

represents a growing alternative to traditional telephone service. The division of regulatory authority over such services between the states and the federal government is of fundamental importance to the future of telecommunications regulation in the United States. Given that the PUC answered that question in a manner inconsistent with every court to have considered it, the PUC's decision is worthy of this Court's review.

E. The PUC Erred in Denying Comcast's Motion to Reopen the Record.

In the same filing as its Motion for Rehearing, Comcast filed a Motion to Reopen the Record. The Motion explained that Comcast's CDV service had evolved technologically since briefing had been completed in early 2010. In particular, Comcast has added additional functionalities for some business customers allowing them to make and receive CDV calls, as well as transfer CDV calls to and from, their mobile phones – and soon also any computer connected to the Internet. Motion for Rehearing of Order 25,262, A. at 70-71, 76-77. The PUC denied Comcast's Motion, holding that (1) "Comcast has not demonstrated that the evidence could not have been presented prior to the issuance of our decision," that (2) "the information provided is, at least in part, prospective, to the extent the technologies in question have not yet been introduced in the New Hampshire market," and that (3) "[e]ven if the technologies noted were already offered in the market, we are not persuaded that the addition of such enhancements would transform cable voice service from a telecommunications service to an information service." Order on Rehearing, A. at 107. This was error.⁶

⁶ It is unclear, under New Hampshire law, whether Comcast must separately seek rehearing of the PUC's denial of its Motion to Suspend and Motion to Reopen the Record, and then appeal from any denial of such motion, or whether the PUC's denial of Comcast's Motion for Rehearing on the merits of the Order *itself* is sufficient to satisfy the jurisdictional prerequisite to seek appellate review of the PUC's denial of Comcast's motions. Compare *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674, 677 (2001) (holding that argument not raised in motion for rehearing was waived on appeal) with *McDonald v. Town of Effingham Zoning Board of Adjustment*, 152 N.H. 171, 175 (2005) (holding that party need not seek rehearing of motion

With regard to its first justification, Comcast explained in its Motion for Rehearing of Order 25,262 that its service was constantly evolving, and that the changes in question had occurred after the designated period for the submission of evidence had concluded at the PUC. Motion for Rehearing of Order 25,262, A. at 70-71, 76-77. In any event, the PUC's rules contain no requirement that all evidence pertinent to a Motion to Reopen must arise after the PUC's decision date. *See* N.H. Admin. R. Puc 203.30(a) (requiring only a finding by the PUC that "that late submission of additional evidence will enhance its ability to resolve the matter in dispute.") With regard to the Commission's second justification, while the addition of computer-based nomadic features is still forthcoming, Comcast has already introduced mobile functionality for its business consumers. Choroser Declaration ¶¶ 3-4, A. at 80. Finally, with regard to the PUC's third justification, Comcast's new services are highly relevant to its regulatory classification. The PUC's original decision relied in substantial part on its belief that Comcast's integration of enhanced communications abilities into CDV did not matter because "similar enhanced service offerings are made with landline phone service packages, as well." Order, A. at 52. But there was no suggestion in the record that traditional landline telephone service offers anything like mobile or nomadic broadband functionality. Given that the PUC's decision was based in part on information that is now outdated, the PUC should have reopened the record.

denying rehearing in order to preserve additional issues for appeal). Given this uncertainty regarding the proper forum, Comcast is, out of a surfeit of caution, both seeking appellate review of the PUC's denial of Comcast's motions and seeking rehearing at the PUC of the PUC's denial of Comcast's motions. *See* Motion for Rehearing/Reconsideration of Order No. 25,274 Denying Motion for Suspension of Order No. 25,262 and/or Petition for Waiver of CLEC Rules (Oct. 28, 2011), A. at 109; Motion for Rehearing/Reconsideration of Order No. 25,274 Denying Motion to Reopen Record (Oct. 28, 2011), A. at 123.

F. The PUC Erred in Denying Comcast's Motion to Suspend.

The PUC also erred in denying Comcast's request for suspension of Order 25,262. Order on Rehearing, A. at 98, 108. As explained in Comcast's accompanying Motion for Stay, which is incorporated herein by reference, the PUC erred in failing to suspend its order pending this court's disposition of the appeal.⁷

In addition, the PUC should have suspended its order in light of anticipated legislative developments surrounding CDV. Comcast anticipates that the New Hampshire Legislature will examine CDV's regulatory status in its upcoming session. The PUC should have suspended its order for at least long enough for the issue to receive proper consideration. Moreover, Comcast notes its understanding that the Commission's current rules for competitive local exchange carriers (which the Order would apply to Comcast's interconnected VoIP service) are set to expire in 2013 by operation of law and it is unclear whether or to what extent they will be readopted in their current form. Given that the PUC's exercise of jurisdiction will cause irreparable harm to Comcast and that the public interest in immediately subjecting Comcast to the PUC's regulations is minimal, the PUC should have granted Comcast's Motion to Suspend. *See* Comcast's Motion for Stay Pending Appeal (Oct. 28, 2011) (submitted to this Court contemporaneously herewith). The Court should review the PUC's denial of the Motion to Suspend alongside its review of the other issues presented in this appeal.

9. Every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

⁷ Comcast's appeal on this point is subject to the same procedural caveat discussed in note 6, *supra*.

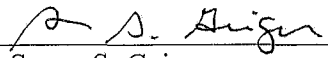
Respectfully submitted,

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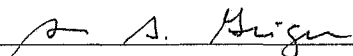
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Certification of Compliance

I hereby certify that a copy of the foregoing Appeal by Petition has on this 28th day of October, 2011 been either hand delivered or sent by first class mail, postage prepaid, to the parties of record, and the Attorney General of the State of New Hampshire.


Susan S. Geiger