

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 09-044

New Hampshire Telephone Association
Petition for an Investigation into the Regulatory Status of
IP Enabled Voice Telecommunications Services

DIRECT TESTIMONY OF
DOUGLAS DUNCAN MEREDITH
ON BEHALF OF
THE NEW HAMPSHIRE TELEPHONE ASSOCIATION

1 **I. INTRODUCTION**

2 **Q: PLEASE STATE YOUR FULL NAME, PLACE OF EMPLOYMENT AND**
3 **POSITION.**

4 A: My full name is Douglas Duncan Meredith. I am employed by John Staurulakis, Inc.
5 (“JSI”) as Director – Economics and Policy. JSI is a telecommunications consulting
6 firm headquartered in Greenbelt, Maryland. My office is located at 547 Oakview
7 Lane, Bountiful, Utah 84010. JSI has provided telecommunications consulting
8 services to rural local exchange carriers since 1963.

9
10 **Q: PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE AND**
11 **EDUCATIONAL BACKGROUND.**

12 A: As the Director of Economics and Policy at JSI, I assist clients with the development
13 of policy pertaining to economics, pricing and regulatory affairs. I have been
14 employed by JSI since 1995. Prior to my work at JSI, I was an independent research
15 economist in the District of Columbia and a graduate student at the University of
16 Maryland – College Park.

17
18 In my employment at JSI, I have participated in numerous proceedings for rural and
19 non-rural telephone companies. These activities include, but are not limited to, the
20 creation of forward-looking economic cost studies, the development of policy
21 related to the application of federal safeguards for rural local exchange carriers, the

1 determination of Eligible Telecommunications Carriers pursuant to the
2 Communications Act of 1934, as amended (“Act”), and the sustainability and
3 application of universal service policy for telecommunications carriers.
4

5 In addition to assisting telecommunications carrier clients, I have served as the
6 economic advisor for the Telecommunications Regulatory Board of Puerto Rico
7 since 1997. In this capacity, I provide economic and policy advice to the Board
8 commissioners on all telecommunications issues that have either a financial or
9 economic impact. I have participated in numerous Arbitration panels established by
10 the Board to arbitrate interconnection issues under Section 252(b) of the Act.
11

12 I am participating or have participated in numerous national incumbent local
13 exchange carrier and telecommunications groups, including those headed by NTCA,
14 OPASTCO, USTA, and the Rural Policy Research Institute. My participation in
15 these groups focuses on the development of policy recommendations for advancing
16 universal service and telecommunications capabilities in rural communities and
17 other policy matters.
18

19 I have testified or filed regulatory testimony in various states including New
20 Hampshire, Vermont, Maine, New York, Michigan, Wisconsin, Indiana, North
21 Dakota, South Dakota, South Carolina, Texas, Kentucky, Utah, and Tennessee. I

1 have also participated in regulatory proceedings in many other states that did not
2 require formal testimony, including Florida, Louisiana, Mississippi, North Carolina,
3 Puerto Rico and Virginia. In addition to participation in state regulatory
4 proceedings, I have participated in federal regulatory proceedings through filing of
5 formal comments in various proceedings and submission of economic reports in an
6 enforcement proceeding.

7
8 I have a Bachelor of Arts degree in economics from the University of Utah, and a
9 Masters degree in economics from the University of Maryland – College Park.
10 While attending the University of Maryland – College Park, I was also a Ph.D.
11 candidate in Economics. This means that I completed all coursework,
12 comprehensive and field examinations for a Doctorate of Economics without
13 completing my dissertation.

14
15 **Q: ON WHOSE BEHALF ARE YOU TESTIFYING?**

16 A: I am testifying on behalf of the members of the New Hampshire Telephone
17 Association, excluding any affiliates or subsidiaries of FairPoint Communications,
18 Inc. ("RLEC Representatives").
19

1 **Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

2 A: My purpose in providing this testimony to the New Hampshire Public Utilities
3 Commission (“Commission”) is to respond to the Petition for Investigation into the
4 Regulatory Status of IP Enabled Voice Telecommunications Service filed on March
5 6, 2009 (“Petition”). This petition raises the following primary issues: (1) whether
6 fixed voice over internet protocol (“fixed VoIP”) service constitutes conveyance of a
7 telephone message as this term is used in the New Hampshire Code (RSA 362:2);
8 (2) whether entities providing such service are public utilities; and (3) the extent to
9 which federal law preempts New Hampshire law with regard to fixed VoIP services.
10 I offer my professional opinion concerning these and other issues raised in this
11 proceeding. Specifically, I review the applicable federal policies and regulations
12 that currently govern fixed VoIP services. This testimony, together with that of Ms.
13 Valerie Wimer, provide a robust record on which the Commission can conclude that
14 entities providing fixed VoIP services are offering a service that constitutes a
15 telephone message service and that these entities are indeed public utilities. I
16 provide guidance to the Commission that, at present, federal policy and regulation
17 does not preempt New Hampshire law in the regulation of these entities. Finally, I
18 demonstrate it is in the public interest of New Hampshire to regulate these entities as
19 public utilities and the fixed VoIP service they offer as telephone message service.

20

1 **II. VOIP SERVICE AND FEDERAL REGULATION**

2

3 **Q: SINCE THIS PROCEEDING REQUIRES AN UNDERSTANDING OF THE**
4 **DIFFERENCE BETWEEN TELECOMMUNICATIONS SERVICE,**
5 **INFORMATION SERVICE AND VOICE-OVER-THE-INTERNET-**
6 **PROTOCOL (“VOIP”) SERVICE, AS THESE TERMS ARE DEFINED IN**
7 **FEDERAL REGULATION, PLEASE DESCRIBE THESE SERVICES.**

8 A: Telecommunications service is a specific communications service governed under
9 Title II of the Act. Information service, on the other hand, is distinct from
10 telecommunications service and is generally subject to different and less
11 burdensome regulations found under Title I of the Act.

12

13 **Q: WHAT IS A TELECOMMUNICATION SERVICE?**

14 A: The Act defines a telecommunications service as:

15 the offering of telecommunications for a fee directly to the public, or to
16 such classes of users as to be effectively available directly to the public,
17 regardless of the facilities used.¹

18 The term telecommunications is also defined as:

19 the transmission, between or among points specified by the user, of
20 information of the user's choosing, without change in the form or content
21 of the information as sent and received.²

¹ 47 U.S.C. §153(46).

² 47 U.S.C. §153(43).

1 **Q: ISN'T FIXED VOIP SERVICE A TELECOMMUNICATIONS SERVICE**

2 ***PER SE?***

3 A: Fixed VoIP service certainly has all the characteristics of a telecommunications
4 service as this term is defined by the Act. It is a paid service that is offered directly
5 to the public. It is a transmission among points (plural) as specified by the user
6 without a change in the form or content of the information as sent and received. For
7 example, an end user picks up a traditional analog telephone handset, dials her
8 desired telephone number and communicates with the end user — who could be
9 using another traditional analog telephone handset. There is no change in the form
10 or content of the information as sent and received. I have used a fixed VoIP
11 telephone service in my home state and affirm that this is exactly the scenario I have
12 experienced.

13

14 I also note that despite this seemingly clear application of the definition from the
15 Act, the FCC has not declared that VoIP service is a telecommunications service —
16 thereby sparing VoIP service from complete Title II regulation for the present. (I
17 note, however, that despite this lack of Title II classification, many Title II
18 regulations have been imposed on VoIP services by the FCC, such as regulations
19 regarding access by law enforcement, access to emergency services and
20 contributions to federal universal service, all of which are originated with and are
21 applicable to telecommunications services.)

1 **Q: WHAT IS AN INFORMATION SERVICE?**

2 A: The Act defines the term information service as:

3 the offering of a capability for generating, acquiring, storing,
4 transforming, processing, retrieving, utilizing, or making available
5 information via telecommunications, and includes electronic publishing,
6 but does not include any use of any such capability for the management,
7 control, or operation of a telecommunications system or the management
8 of a telecommunications service.³

9 Information service can be described as an additional layer of processing
10 information in addition to an underlying telecommunications service. The basic
11 telecommunications service exists and information service is added to this
12 telecommunications component. A recognizable example of this is voice mail
13 service. Voice mail is a component service added to a basic underlying
14 telecommunications service that provides a means to acquire, store and process
15 information received via the basic telecommunications service.

16

17 **Q: IS FIXED VOIP SERVICE AN INFORMATION SERVICE?**

18 A: As I understand the deployment of fixed VoIP service in New Hampshire, this
19 service is not an information service. While a fixed VoIP service provider can
20 certainly provide information services, the basic transmission of information is not,
21 or should not be, classified as an information service.

22

³ 47 U.S.C. §153(20).

1 **Q: TURNING NOW TO VOIP SERVICE ITSELF, PLEASE DESCRIBE VOIP**
2 **SERVICE AND THE FCC’S ACTIONS ASSOCIATED WITH THIS**
3 **SERVICE.**

4 A: The provision of voice-over-Internet-protocol (“VoIP”) service has caused federal
5 regulators to examine the nature of VoIP Service and how it compares with
6 telecommunications service. The FCC has undertaken an investigation on IP-
7 enabled Services, of which VoIP is part, and has an open proceeding addressing how
8 IP-enabled Services are to be regulated. While this proceeding continues, the
9 deployment of VoIP technology has caused the FCC to examine various types of
10 VoIP services to judge whether they are telecommunications services.

11
12 The FCC has determined, for instance, that “Digital Voice” service offered by
13 Vonage, and offerings from other providers possessing the same characteristics as
14 Vonage, are not subject to state regulation. Specifically, the FCC determined that
15 state regulators are preempted from regulating Vonage-type service due to the
16 inseparability of state and interstate service. This decision is based principally on
17 one of the salient features of Digital Voice – that it is “fully portable” with the only
18 requirement that the end-user customers have a broadband connection upon which
19 they may use an “over-the-top” application. This portability led the FCC to

1 conclude there is no “practical way to sever Digital Voice into interstate and
2 intrastate communications.”⁴

3
4 The character of “nomadic VoIP” (like Vonage) versus a “fixed VoIP” service, such
5 as those offered in New Hampshire and subject to this investigation, is clear. Under
6 fixed VoIP service, customer locations are fixed to the end of a cable connection.

7 This fundamental character distinction received attention in the U.S. Eighth Circuit
8 Court of Appeals review of the FCC’s Vonage decision. Specifically, the court
9 observed that when VoIP service is “offered as a fixed service rather than a nomadic
10 service, the interstate and intrastate portions of the service can be more easily
11 distinguished.”⁵ The Court held that the FCC action focused exclusively on
12 “nomadic VoIP” service and has not addressed a fixed VoIP service. Thus, while
13 some in the industry attempt to parlay the Vonage decision into a ubiquitous federal
14 preemption of all VoIP service, the court’s pointed opinion of this decision should
15 weigh against the implementation of regulatory policies designed or intended to
16 prematurely extend the Vonage preemption to somehow cover fixed VoIP service.⁶

⁴ *Vonage Holding Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 31 (2004) (“*Vonage Order*”).

⁵ *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

⁶ The court was asked specifically by the New York Public Service Commission to overturn the Vonage Decision because it believed the decision preempted its ability to regulate fixed VoIP services. The FCC replied to the court stating the issue of fixed VoIP was not ripe for judicial review. The FCC reasoned that because the order states “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 576 (citing *Vonage Order* ¶ 32). The FCC further

1 **Q: BASED ON THIS INFORMATION, DOES THE NEW HAMPSHIRE**
2 **PUBLIC UTILITIES COMMISSION HAVE THE JURISDICTION TO**
3 **REGULATE FIXED VOIP SERVICES OFFERED WITHIN THE STATE?**

4 A: Yes. Based on the information I have provided concerning the Vonage Decision, it
5 is clear that there is no federal preemption of the Commission to regulate fixed VoIP
6 if the Commission determined that such service constitutes a regulated telephone
7 service within New Hampshire law and regulation. Furthermore, the fact that the
8 FCC has not yet determined the jurisdictional nature of fixed VoIP services —
9 whether they are telecommunications services regulated under Title II of the Act or
10 information services regulated under Title I of the Act — does not affect this
11 Commission’s ability to regulate intrastate fixed VoIP services offered within the
12 state. To conclude otherwise would be an inappropriate extension of the FCC’s
13 regulatory treatment of nomadic VoIP.
14

argued that “because the order only addresses services ‘having basic characteristics similar to Digital Voice,’ and does not specifically address fixed VoIP service providers,” then the NYPSC's appeal was premature. *Id.* at 581. Based on the FCC’s representation, the court concluded the NYPSC's challenge to the FCC's order was not ripe for review. *Id.* at 582.

1 **III. VOIP SERVICE UNDER NEW HAMPSHIRE LAW**

2 **Q: FOR PURPOSES OF PREPARING YOUR TESTIMONY, HAVE YOU**
3 **REVIEWED THE APPLICABLE NEW HAMPSHIRE LAW ADDRSSING**
4 **TELEPHONE MESSAGE SERVICE?**

5 A: Yes.

6
7 **Q: PLEASE IDENTIFY THE APPLICABLE SECTIONS YOU REVIEWED.**

8 A: RSA 362:2 defines a public utility and specifically identifies telephone service. The
9 pertinent part states:

10 The term “public utility” shall include every corporation, company,
11 association, joint stock association, partnership and person, their lessees,
12 trustees or receivers appointed by any court, except municipal
13 corporations and county corporations operating within their corporate
14 limits, owning, operating or managing any plant or equipment or any part
15 of the same for the conveyance of telephone or telegraph messages

16
17 **Q: DO YOU CONSIDER THE PROVISION OF FIXED VOIP TO BE**
18 **EQUIPMENT USED FOR THE CONVEYANCE OF TELEPHONE OR**
19 **TELEGRAPH MESSAGES?**

20 A: Yes. Based on the description provided by Ms. Wimer, fixed VoIP services are
21 comparable to telephone message service that is regulated by this Commission. The
22 transmission of voice messages is a basic transmission service that does not affect or
23 change what is sent by the sender and received by the receiving party. In essence,

1 what goes into the network is what comes out of the network without alteration of
2 form or content. This service comports favorably with the federal definition of
3 telecommunications service and telecommunications I described earlier.⁷

4
5 **IV. PUBLIC INTEREST CONSIDERATIONS**

6 **Q: WHY IS IT IN THE INTEREST OF THE CITIZENS OF NEW HAMPSHIRE**
7 **FOR THE COMMISSION TO REGULATE FIXED VOIP SERVICES AS**
8 **PUBLIC UTILITIES OFFERING TELEPHONE MESSAGE SERVICE?**

9 A: Equity among providers advances the public interest. All providers of telephone
10 message service should be treated equally by the state of New Hampshire.

11
12 What I have observed in other states is something of a shell game among fixed VoIP
13 service provider affiliates. In these instances, the question of who controls what
14 facilities is played to try to avoid state regulation. These efforts are not good for the
15 public interest and ultimately thwart efforts to establish a competitive playing field
16 where all providers compete as fairly as possible.

17

⁷ The American Heritage Dictionary, Fourth Edition defines the term “telephone” as “[a]n instrument that converts voice and other sound signals into a form that can be transmitted to remote locations and that receives and reconverts waves into sound signals.” Since there is no New Hampshire specific definition of “telephone message,” this standard understanding of the term adequately describes the fixed VoIP service under investigation.

1 I recommend that the Commission determine: (1) that fixed VoIP service constitutes
2 conveyance of a telephone message as this term is used in the New Hampshire Code
3 (RSA 362:2); (2) that any entity providing such service is a public utility; and (3)
4 that federal law does not preempt New Hampshire law with regard to fixed VoIP
5 services under investigation in this proceeding.

6

7 **Q: DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

8 A: Yes.