

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Petition for Investigation into the Regulatory)
Status of IP Enabled Voice Telecommunications)
Service)

Docket No. DT 09-044

**PREFILED REPLY TESTIMONY OF BETH CHOROSER
ON BEHALF OF COMCAST PHONE OF NEW HAMPSHIRE, LLC**

December 4, 2009

1 **I. INTRODUCTION AND PURPOSE OF PREFILED REPY TESTIMONY**

2 **Q. Please state you name, position and business address for the record?**

3 A. Beth Choroser, Executive Director of Regulatory Compliance for Comcast's voice
4 service operations, One Comcast Center, 1701 John F. Kennedy Blvd., Philadelphia, PA
5 19103.

6
7 **Q. Are you the same Beth Choroser who prefiled Direct Testimony in this docket with**
8 **David J. Kowolenko on October 9, 2009?**

9 A. Yes.

10

11 **Q. What is the purpose of your Reply Testimony?**

12 A. The purpose of this Reply Testimony is to provide the Commission with Comcast's
13 rebuttal to inaccurate factual information and legal arguments contained in the prefiled
14 direct testimony submitted by Douglas Meredith and Valerie Wimer on behalf of New
15 Hampshire Telephone Association ("NHTA").

16

17 **II. REPLY TO PREFILED DIRECT TESTIMONY OF DOUGLAS DUNCAN**

18 **MEREDITH**

19 **Q. Have you reviewed the testimony filed in this docket on October 9, 2009 by Douglas**
20 **Duncan Meredith?**

21 A. Yes, I have.

22

1 **Q. Do you agree with the facts recounted in Mr. Meredith's testimony?**

2 A. There are portions of Mr. Meredith's description of the regulatory regime faced by VoIP
3 providers that are incomplete. One of my goals for this reply testimony is to provide
4 additional background to help clarify those issues for the Commission.
5

6 **Q. Do you agree with the conclusions Mr. Meredith reaches in his testimony?**

7 A. No. Mr. Meredith is mostly testifying as to the ultimate legal conclusions in this case.
8 Such arguments are typically made in legal briefs, and therefore are not appropriate
9 subjects for factual testimony. Moreover, I understand that Mr. Meredith is not a lawyer,
10 and thus is not technically qualified to render an expert opinion on the legal questions
11 that are ultimately for this Commission to decide. Nevertheless, to aid the Commission's
12 understanding of the issues in this case, I will respond to Mr. Meredith's testimony and
13 indicate places where Mr. Meredith has misleadingly characterized or omitted
14 consideration of relevant legal authorities. I will also provide the Commission with an
15 outline of Comcast's legal position subject to the caveat that Comcast's legal position
16 will be fully set forth in its post hearing briefs, consistent with the Commission's
17 procedural schedule set forth in its July 2, 2009 secretarial letter. Although I am not an
18 attorney either, my responsibilities as Executive Director of Regulatory Compliance for
19 Comcast require that I be familiar with a number of relevant federal court decisions and
20 FCC orders regarding the regulatory status of VoIP. I am also generally familiar with the
21 legal position of Comcast on those issues. Based on my knowledge and experience, I
22 believe that Mr. Meredith's legal conclusions are misguided.

1
2 **Q. On page 6 of his prefiled direct testimony, Mr. Meredith makes an argument about**
3 **the legal definition of a “telecommunications service.” Specifically, he claims that**
4 **VoIP has all the characteristics of a telecommunications service as the term is**
5 **defined by federal law and does not meet an element of the statutory definition of an**
6 **“information service” because the data is transmitted “without a change in the form**
7 **or content of the information as sent and received.” Do you agree?**

8 A. No. My colleague David J. Kowolenko describes the manner in which Comcast’s
9 interconnected VoIP service (“CDV”/“BCV”) offers the ability to convert the protocol of
10 voice messages between Internet Protocol (“IP”) and time-division multiplexing protocol
11 (“TDM”) in addition to transmitting the voice data, thereby meeting the federal definition
12 of “information service.” Mr. Meredith appears to be arguing that net protocol
13 conversion does not constitute a change in the “form” of the information as the term
14 “form” is used in the Communications Act’s definition of “telecommunications.”¹
15 Likewise, while Mr. Meredith discusses the definition of an “information service”² on
16 page 7 of his prefiled testimony, he ignores that net protocol conversion constitutes
17 “transforming” information under that definition. This is a purely legal disagreement
18 about what the words “form” and “transforming” mean in the statute. Like Mr. Meredith,
19 I am not an attorney, but I am aware of legal authority from the Federal Communications
20 Commission holding that “net” protocol conversion such as the type that occurs in

¹ 47 U.S.C. § 153(43).

² 47 U.S.C. § 153(20).

1 Comcast's VoIP service constitutes a change in "form" as well as "transform[ing] . . .
2 information."³ I am also aware of federal court decisions recognizing this authority and
3 determining that interconnected VoIP is an information service which Congress has
4 exempted from regulation.⁴ Comcast's attorneys will explain these authorities in greater
5 detail in Comcast's written briefs in this docket.

6
7 **Q. Mr. Meredith makes a related argument on pages 11-12 of his prefiled testimony,**
8 **where he claims that with VoIP, "what goes into the network is what comes out of**
9 **the network." Do you agree?**

10 **A.** No. Mr. Meredith is focusing on what goes in and out of the handsets on each end of a
11 call (an analog voice signal) instead of on what goes into and comes out of *the network*.
12 Like the traditional ILEC's network, which begins outside the home at the network
13 interface device, Comcast's network begins outside the customer's home, not at the
14 handset. As my colleague Mr. Kowolenko explains, all calls from Comcast VoIP
15 customers to POTS (i.e. plain old telephone service) customers enter Comcast's network
16 in one protocol – IP – and leave it in another – TDM – or vice versa for calls from POTS
17 customers to Comcast VoIP customers. In all instances Comcast's service offers the
18 capability to transform the protocol of the data. On this ground alone, Comcast VoIP

³ E.g., *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21,905 ¶¶ 104-06 (1996).

⁴ *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055, 1073-84 (E.D. Mo. 2006); *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003), *aff'd* 394 F.3d 568 (8th Cir. 2004).

1 meets the definition of an information service under federal law.⁵ Conversely, POTS
2 calls enter and exit the service provider's network in TDM protocol even if IP is used "in
3 the middle" of the call. Because there is no net change in the form of the information
4 sent and received in POTS calls, they meet the definition of telecommunications service
5 under federal law and are therefore regulated under Title II of the Communications Act of
6 1934.

7
8 **Q. On page 6 of his prefiled testimony, Mr. Meredith describes the FCC's regulatory**
9 **treatment of VOIP. Is his description accurate?**

10 A. No, it is incomplete and incorrect. Mr. Meredith's description is accurate insofar as he
11 admits (on page 6, line 15 of his testimony) that the FCC "has not declared that VoIP
12 service is a telecommunications service." Indeed, although not discussed by Mr.
13 Meredith, the FCC has declared one type of VoIP service to be an information service.⁶
14 With respect to interconnected VoIP service like that provided by Comcast, Mr. Meredith
15 overlooks the fact that the FCC does not treat interconnected VoIP as a
16 telecommunications service and does not regulate it as such pursuant to Title II of the
17 Communications Act. Although it is true, as Mr. Meredith notes, that the FCC has
18 applied certain regulations to interconnected VoIP providers, he fails to mention that

⁵ See *Southwestern Bell*, *supra* n. 4.

⁶ *Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

1 every single one of these regulations has been imposed pursuant to the FCC's ancillary
2 Title I authority – not its Title II authority to regulate telecommunications carriers.
3

4 **Q. On page 7 of his prefiled testimony, Mr. Meredith characterizes VoIP as “the basic**
5 **transmission of information.” Do you agree?**

6 A. No. As my colleague Mr. Kowolenko explains, Comcast's interconnected VoIP service
7 involves net protocol conversion, as well as other enhanced features and functionalities.
8 Although it is certainly true that facilities-based VoIP providers transmit voice data, Mr.
9 Meredith fails to mention that the statutory definition of an information service expressly
10 contemplates that such information services are provided “via telecommunications.”⁷ In
11 determining whether fixed VoIP is an information service exempt from FCC regulation
12 under Title II and therefore preempted from state regulation, the focus must be on the
13 service offering as a whole, not on pieces of it which may be superficially similar to
14 POTS.
15

16 **Q. On pages 8-9 of his prefiled testimony, Mr. Meredith opines that the FCC's *Vonage***
17 **order does not preempt regulation of facilities-based VoIP. Do you agree?**

18 A. I (like Mr. Meredith) am not a lawyer, so I don't think it is appropriate for either of us to
19 opine on the legal effect of the *Vonage* order. However, it is apparent that Mr. Meredith
20 is setting up a straw man by asserting that “some in the industry” seek to parlay “the
21 *Vonage* decision into a ubiquitous federal preemption of all VoIP service” (page 9, lines

⁷ 47 U.S.C. § 153 (20).

1 12 to 16). As I understand Comcast's legal position, which will be addressed by counsel
2 in detail in post-hearing briefs, Comcast is not arguing that that the FCC's *Vonage* order
3 expressly preempts state regulation of all VoIP services. To begin with, Comcast's
4 primary argument for preemption has nothing to do with the *Vonage* order at all: it is that
5 the net protocol conversion capability of CDV/BCV makes the service an "information
6 service" under federal law and thus brings it within the general prohibition on state utility
7 regulation of information services.⁸

8
9 It is true that Comcast also makes an independent argument based on the FCC's *Vonage*
10 decision, but that argument is based on a part of the decision that Mr. Meredith ignores.
11 In *Vonage*, the FCC recognized that, wholly independent of whether a service is nomadic
12 or not, certain interconnected VoIP services possess a set of basic characteristics – among
13 other things, they tightly integrate a number of communications features into a single
14 communications "suite" – and that this type of service should not be subject to state
15 public utilities regulation. Irrespective of whether it might be possible from an
16 engineering perspective to separate these integrated services into their separate parts, the
17 FCC found that federal "pro-competitive deregulatory rules and policies" would be
18 undermined by "imposition of 50 or more additional sets of different economic
19 regulations."⁹ Such regulation "risks eliminating or hampering . . . [an] innovative

⁸ See cases cited in note 4.

⁹ *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22,404, ¶¶ 20, 37 (2004) ("Vonage Order").

1 advanced service that facilitates additional consumer choice, spurs technological
2 development and growth of broadband infrastructure, and promotes continued
3 development and use of the Internet.”¹⁰

4
5 These arguments and the other arguments supporting preemption will be addressed in
6 detail in Comcast’s post-hearing briefs.

7
8 **Q. On page 10 of his prefiled testimony, Mr. Meredith opines that the fact that the**
9 **FCC “has not yet determined the jurisdictional status of VoIP services . . . does not**
10 **affect this Commission’s ability to regulate intrastate fixed VoIP services offered**
11 **within the state.” Do you agree?**

12 **A.** Again, this is purely a legal opinion. I will defer to Comcast’s counsel to explain in the
13 post-hearing briefs how the pending nature of the FCC’s *IP-Enabled Services* docket
14 affects the instant proceeding. However, my understanding of Comcast’s legal position is
15 that under currently applicable federal statutes, federal case law and FCC decisions, this
16 Commission should conclude that interconnected VoIP is an information service not
17 subject to state regulation. In addition, even if the Commission were to conclude that
18 there is no federal preemption of the states’ ability to regulate VoIP, the Commission
19 would still need to examine whether regulating interconnected VoIP is appropriate under
20 New Hampshire law.

21

¹⁰ *Id.* ¶ 37.

1 **Q. On page 11 of his prefiled testimony, Mr. Meredith states that fixed VoIP services**
2 **are comparable to telephone message service regulated by this Commission. Do you**
3 **agree?**

4 A. No. While some aspects of the VoIP service may be superficially similar to telephone
5 service, the services are factually and legally different. My colleague Mr. Kowolenko
6 explains the factual differences, and I have explained some of the legal differences above.
7 These legal differences will be more thoroughly discussed in legal briefs.

8
9 **Q. On page 12 of his prefiled testimony, Mr. Meredith cites a dictionary definition of**
10 **“telephone” to contend that VoIP is a public utility under New Hampshire law. Do**
11 **you agree?**

12 A. The meaning of the term “telephone . . . messages” under New Hampshire law (RSA
13 362:2) is a question of statutory construction and thus a purely legal question. The phrase
14 appears to be a term of art, and is not susceptible to a colloquial “dictionary” definition in
15 the manner that Mr. Meredith simplistically and incorrectly assumes for purpose of his
16 legal argument. For example, most people would refer to their wireless handsets as
17 “telephones,” and wireless handsets would seem to fit Mr. Meredith’s dictionary
18 definition of “telephones” as well. However, wireless providers are not considered public
19 utilities under RSA 362:2. *See* RSA 362:6. Moreover, Newton’s Telecom Dictionary –
20 long considered the industry standard – expressly defines “telephone” as providing a
21 “dial tone [that] actually comes from the central office, not the phone.”¹¹ This definition

¹¹ NEWTON’S TELECOM DICTIONARY 1103 (25th ed. 2009).

1 would appropriately exclude handsets used with Comcast VoIP services, where the
2 eMTA generates a dial tone.

3
4 My understanding of Comcast's legal position, which our lawyers will describe in more
5 detail in our briefs, is that the meaning of the term "telephone . . . messages" in RSA
6 362:2 must be informed by the legislature's intent and the circumstances that existed
7 when the law was enacted. In the instant matter, there is no reason to conclude that the
8 legislature intended to bring within the Commission's regulatory authority a technology
9 (VoIP) that didn't even exist at the time the statute was enacted. I would also note that,
10 for the reasons explained by my colleague Mr. Kowolenko, there are factual differences
11 between interconnected VoIP providers and POTS providers, and, for the reasons I have
12 explained, there are legal differences in the way those providers have been treated under
13 federal law.

14
15 **Q. On page 12-13 of his prefiled testimony, Mr. Meredith also opines that regulating**
16 **VoIP as a telephone service is in the public interest. Do you agree?**

17 **A.** No. Quite the opposite. In the context of broadband and IP-enabled services, the FCC
18 has been very wary of the way in which state-by-state regulation can squelch innovation.
19 Although any one State's particular regulatory requirements might on their own not be
20 too difficult to comply with, application of 50 States' different regulatory requirements
21 would impose confusing, inefficient, and possibly even contradictory requirements. In a
22 variety of contexts, the FCC has deemed state-by-state regulation of information and IP-

1 enabled services to be against the public interest because of the effect such regulation can
2 have on innovation and broadband deployment.¹² That same reasoning should hold true
3 here.

4
5 Also, as a basis for his public interest argument, Mr. Meredith asserts that it would serve
6 the public interest for all providers of voice services to be subjected to identical
7 regulations. But this policy argument overlooks that this is not how the communications
8 market in New Hampshire is regulated now. Both wireless carriers, including affiliates
9 of an NHTA member, and nomadic VoIP providers provide services that, from a
10 colloquial viewpoint, may be viewed as “telephone” services. However, the service
11 providers that offer those types of services are not subject to the regulations that NHTA is
12 trying to have the Commission impose on facilities-based interconnected VoIP providers
13 in this docket. And although CLECs are subject to the Commission’s regulatory
14 authority, they are not regulated in the same manner as incumbent carriers. Moreover,

¹² See *Amendment of Section 64.702 of the Board’s Rules and Regulations*, 88 F.C.C.2d 512, ¶ 83, n.34 (1981) (“the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation”). The U.S. Court of Appeals for the D.C. Circuit affirmed this decision. See *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982) (“[f]or the federal program of deregulation to work, state regulation of . . . enhanced services had to be circumscribed.”). This policy has been recognized by other courts as well. As the Eighth Circuit Court of Appeals noted in *Public Utilities Commission v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007), “[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” (internal citation omitted); see also *Vonage Order* at ¶¶ 36-37 (holding that state regulation would yield “multiple disparate attempts to impose economic regulations on DigitalVoice that would thwart its development” and preempting on that basis).

1 some voice service providers (like the NHTA companies) receive universal service
2 subsidies, and others (like Comcast) do not. Accordingly, the sort of superficial
3 regulatory parity that Mr. Meredith is urging is simply not possible or appropriate under
4 the regulatory structure that applies to the communications industry in New Hampshire,
5 where competitive voice services have indeed flourished without the imposition of
6 additional regulation.

7
8 **III. REPLY TO PREFILED DIRECT TESTIMONY OF VALERIE WIMER**

9 **Q. Have you reviewed the testimony filed in this docket on October 9, 2009 by Valerie**
10 **Wimer?**

11 A. Yes, I have.

12
13 **Q. Do you agree with the facts recounted in Ms. Wimer's testimony?**

14 A. On the majority of points I will defer to my colleague Mr. Kowolenko on the factual
15 accuracy of Ms. Wimer's assertions. However, there are a few items on which Ms.
16 Wimer is mistaken with regard to specific regulatory matters concerning Comcast's
17 service. I will address those inaccuracies below.

18
19 **Q. Do you agree with the conclusions Ms. Wimer reaches in her testimony?**

20 A. No. Toward the end of her testimony, Ms. Wimer testifies as to some of the ultimate
21 legal issues in this case, just as Mr. Meredith does. Like Mr. Meredith, Ms. Wimer is not
22 a lawyer, and her conclusions are similarly mistaken.

1

2 **Q. On page 20 of her prefiled testimony, Ms. Wimer states that the Comcast Service**
3 **offerings constitute a telecommunications service. Do you agree?**

4 A. For reasons discussed above in response to Mr. Meredith's testimony, no.

5

6 **Q. On page 22 of her prefiled testimony, Ms. Wimer contends that Comcast's cable**
7 **affiliate is the one offering voice service and is acting as a public utility. Is that**
8 **statement correct?**

9 A. No. Comcast's cable affiliate offers cable video service and high-speed Internet service.
10 Comcast Digital Voice is provided by a separate affiliate, Comcast IP Phone II of New
11 Hampshire, LLC. Ms. Wimer points to language in a Comcast customer service
12 agreement that appears to suggest that CDV is provided by the cable affiliate. Prior to
13 the initiation of this docket, however, Comcast had identified the cited language as
14 requiring correction to reflect the correct identity of the entity providing voice service.
15 Comcast is in the process of correcting the service agreement to clarify that CDV is
16 offered by Comcast's IP Phone entities.

17

18 **Q. On pages 24-25 of her prefiled testimony, Ms. Wimer opines that Comcast meets the**
19 **definition of a "public utility" under New Hampshire law. Do you agree?**

20 A. Like Mr. Meredith, Ms. Wimer provides her opinion about what the term "telephone . . .
21 messages" means under New Hampshire law, which as noted above, is a legal question
22 for the lawyers to address in their briefs and for the Commission to ultimately decide. As

1 to the substance of Ms. Wimer's arguments, my response is the same as my response to
2 Mr. Meredith on pages 9 to 10 above.

3
4 In addition, Ms. Wimer (on page 24, lines 19-21) asserts that Comcast is a provider of
5 retail voice service because it owns, operates and maintains HFC plant in New
6 Hampshire. She goes on to opine that this meets the definition of a public utility. While
7 this may be her "opinion" as to the definition of a public utility, this is not how "public
8 utility" is defined under state law. Moreover, to the extent that HFC plant is used for
9 video and high-speed Internet service, neither those facilities nor Comcast's cable
10 affiliate that provides them are subject to the Commission's regulation.

11
12 **Q. On pages 25-27 of her prefiled testimony, Ms. Wimer opines that Comcast is**
13 **providing separate information services, such as Caller ID and voicemail, in**
14 **addition to its telecommunications service transmitting voice messages. Is this an**
15 **accurate characterization of CDV?**

16 **A.** I will defer to my colleague Mr. Kowolenko to describe the technical details of how the
17 various communications features of CDV and BCV are integrated into a single
18 communications suite. What Ms. Wimer appears to be arguing, however, is more of a
19 legal conclusion than a factual one. She is essentially contending that Comcast *could*
20 offer a separate service that offers nothing more than the ability to place a single voice
21 call without any of the additional features that constitute CDV or BCV, and that such a
22 "stand-alone" service would be a telecommunications service. However, Ms. Wimer's

1 argument overlooks several points. First, Comcast offers no such service, as such a
2 service would eliminate the very feature-rich and innovative benefits that accrue from
3 using Comcast's IP-based network to provide voice service. Second, as I have discussed
4 above, even such a hypothetical "stand-alone" service would involve converting the
5 protocol of the information, thereby disqualifying the service from the definition of
6 telecommunications under federal law. Third, Ms. Wimer neglects that in the *Vonage*
7 *Order*, the FCC described Vonage's service, which contains substantially the same set of
8 feature-rich offerings as CDV/BCV, as a "tightly integrated" communications suite,
9 rather than an aggregation of separate different services that can be classified and
10 regulated separately. In that same Order, the FCC also held that Vonage should not be
11 forced to disaggregate its service into different elements just so that there would be
12 something the State of Minnesota could then regulate. Those same considerations should
13 apply in the instant case.

14
15 **Q. On page 6 of her prefiled testimony, Ms. Wimer makes much of the fact that the**
16 **eMTA used with CDV/BCV is not owned by the customer. Is this in any way**
17 **relevant to the regulatory classification of the service?**

18 **A.** No. While I am unclear on what Ms. Wimer means to imply in her testimony, the FCC's
19 definition of Interconnected VoIP Service does not include any reference to ownership of
20 CPE, only that the service "Requires Internet protocol-compatible customer premises
21 equipment (CPE)." Furthermore, the definition of Customer Premises Equipment found

1 in the 25th edition of *Newton's Telecom Dictionary* only makes reference to CPE as
2 residing on the customer's premises; it makes no reference to the ownership of the CPE.¹³
3

4 **Q. Has Ms. Wimer made any incorrect statements regarding CPE in her prefiled**
5 **testimony?**

6 A. Yes. Ms. Wimer claims that Comcast provides the eMTA without a separate charge.
7 That is inaccurate.
8

9 **Q. Does this conclude your Reply Testimony?**

10 A. Yes.

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12

¹³ NEWTON'S TELECOM DICTIONARY 322 (25th ed. 2009) (although CPE "[o]riginally . . . referred to equipment on the customer's premises which had been bought from a vendor who was not the local telephone company," it "now . . . simply refers to telephone equipment . . . which live[s] on the customer's premises.")