STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2008-421

October 27, 2010

PUBLIC UTILITIES COMMISSION
Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Voice" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service.

ORDER

CASHMAN, Chairman; VAFIADES and LITTELL, Commissioners[1]

I. SUMMARY

We find that the voice over internet protocol (VoIP) services offered by Time Warner Cable Digital Phone L.L.C., (TWC) and Comcast IP Phone, L.L.C., (Comcast) are "telephone services" under Maine law and are therefore subject to regulation by the Commission. We also find that these particular VoIP services are "telecommunications services," and not "information services," pursuant to 47 U.S.C. § 153, and that the Commission's authority to regulate these services has not been preempted by federal law.

II. PROCEDURAL BACKGROUND

The Commission commenced this investigation into whether TWC's Digital Phone service and Comcast's Digital Voice services are "telephone services" subject to regulation by the Commission pursuant to 35-A M.R.S.A. § 2102. Following our Notice of Investigation, the Hearing Examiner established a deadline for interventions and, by Procedural Order dated November 12, 2008, directed TWC and Comcast to file technical descriptions of their VoIP services. The Maine Office of the Public Advocate (OPA) intervened as a party, and UniTel Inc. (UniTel), Northern New England Operations LLC, d/b/a FairPoint Communications-NNE (FairPoint), the Telephone Association of Maine (TAM), upon timely petitions, were granted discretionary intervention with leave to participate as limited parties pursuant to Me Pub. Util. Comm'n., 65 407 CMR 110-721.

A technical conference was held on January 15, 2009, following the submission by TWC and Comcast of sworn, written, technical descriptions of their VoIP offerings in Maine and written responses to certain data requests propounded by Commission Staff. By Procedural Order dated January 20, 2009, the parties were afforded an opportunity to seek to further supplement the factual record. On February 4, 2009, Commission Staff circulated to the parties a proposed Statement of Agreed-Upon Facts and provided

[1] This case was deliberated by Chairman Cashman and Commissioner Vafiades on August 17, 2010, prior to Commissioner Littell assuming his seat on the Commission on September 18, 2010.

an opportunity for the parties to submit suggested amendments or corrections to it and to file briefs addressing various legal issues raised in this matter. On February 13, 2009, Comcast and TWC each submitted Proposed Revisions and Amendments to the Statement of Agreed-Upon Facts Consequently, the factual record in this proceeding consists of the following items:

Response of TWC Digital Phone LLC to the November 12, 2008 Procedural Order, dated December 19, 2008.

Comcast Corporation and Affiliates Prefiled Initial Position Statement, dated January 9, 2009, "final" version filed February 3, 2009.

Response of TWC Digital Phone LLC to December 31, 2008 Procedural Order, dated January 9, 2009.

Transcript of Testimony Taken at January 15, 2009 Technical Conference.

Comcast Phone of Maine, LLC's Proposed Revisions to Proposed Statement of Agreed-Upon Facts, filed February 13, 2009.

TWC Digital Phone LLC's Proposed Amendments and Revisions to the Statement of Agreed-Upon Facts, filed February 13, 2009

The parties filed briefs on February 13, 2009 and reply briefs on March 9, 2009. On May 18, 2010, Commission Staff issued a Hearing Examiner's Report recommending that the Commission find that the VoIP services provided by TWC and Comcast are "telephone services" under Maine law subject to regulation by the Commission. Staff also recommended that the Commission abstain from resolving a question of federal law which the FCC has, to date, left unresolved --whether VoIP service is a "telecommunications" service pursuant to 47 U.S.C. §§ 153(43), (46) or an "information" service pursuant to 47 U.S.C. § 153(20) – but that it nonetheless find that the Commission's authority to regulate these particular VoIP offerings as a matter of state law has not been preempted by federal law.

On June 8, 2010, the parties, which by then also included, on a limited basis, the Voice on the Net Coalition (VON Coalition),[2] filed written exceptions to the Examiner's Report. In its exceptions, Comcast asserted that the Commission must analyze whether its Digital Voice offering is an information service as well as the preemptive consequences that follow from that designation. TWC, in contrast, noting that it has taken no position on the question of whether its VoIP service is an information service

[2] On May 27, 2010, the VON Coalition filed a Motion to Intervene in this proceeding. As the petition was untimely, consideration of the request was entirely discretionary pursuant to Section 721 of Chapter 110 of the Commission's administrative rules. The Hearing Examiner, upon consideration of the petition and objections thereto permitted the intervention subject to certain significant limitations including a bar on VON's ability to appeal any final decision in this matter.

as defined by federal law but, asserted that any finding by the Commission that its Digital Phone offering is a telephone service under Maine law would risk a conflict with the FCC's "prerogative" to classify, under federal law, interconnected VoIP as either a "telecommunications" or "information" service in the first instance. In its exceptions, the VON Coalition suggested that the Commission postpone issuing a final decision on this matter until the resolution by the FCC of various proceedings already before it which might definitively classify VoIP as an information or telecommunications service.

At its June 8, 2010 deliberative session the Commission adjourned consideration of the Examiner's Report and instructed Staff to provide its written recommendation, in the form of an Examiner's Report, as to whether, under federal law, the VoIP service offered by Comcast and TWC is a telecommunications or an information service.

On August 3, 2010, the Commission's staff issued a Supplemental Examiners' Report analyzing and applying the controlling federal statutory provisions to the evidence establishing the relevant technical details of the VoIP services provided by TWC and Comcast. The Hearing Examiner concluded that the TWC Digital Phone and Comcast Digital Voice services are "telecommunications services" and not "information services," pursuant to federal law.

The parties filed exceptions to the Supplemental Examiners' Report on August 13, 2010. In its exceptions, Comcast stated that Hearing Examiners' analysis incorrectly interpreted the definitions of "information service" and "telecommunications" in 47 U.S.C. § 153, failed to consider the legal ramifications of the technique by which Digital Voice calls are routed, and incorrectly concluded that any protocol conversion that takes place as a part of the Digital Voice service is performed for the purpose of managing and controlling Comcast's network. TWC, in contrast, objected to the Examiners' consideration of the information service question in the first instance, on the grounds that that such a determination is solely the province of the FCC, and that "any attempt to classify VoIP under federal law would conflict with [the FCC's] prerogative to resolve that question."[3]

III. FACTUAL BACKGROUND

Upon review of the record materials described above, the Commission makes the following findings:

Comcast is not an authorized CLEC in Maine but does provide retail interconnected VoIP services (branded as Digital Voice) to residential and business customers in Maine. Comcast obtains wholesale telecommunications services from its affiliate, Comcast Phone of Maine, L.L.C., which is an authorized Competitive Local Exchange Carrier (CLEC) in Maine. Interexchange traffic to and from Comcast's customers (intrastate and interstate) is handled by third-party Interexchange Carriers (IXCs).

[3] TAM also submitted brief comments on the Supplemental Examiners' Report that stated TAM's agreement with "both the logic and the conclusions" of the Examiners. VON did not submit comments or exceptions to the Supplemental Examiners' Report.

TWC is not an authorized CLEC in Maine, but does provide retail VoIP services (branded as Digital Phone) to residential and business customers in Maine. TWC obtains wholesale telecommunications service from CRC Communications of Maine, Inc. (CRC), which is authorized to operate in Maine as both a CLEC and an interexchange carrier (IXC).

The VoIP services that are offered by TWC and Comcast allow customers to make voice telephone calls to any other person or entity with an assigned telephone number. Customers switching to TWC or Comcast service can port their existing phone numbers when they transfer their service, or they can obtain from either company a new phone number corresponding to the NXX codes assigned to the geographic region where the customer is located. TWC and Comcast each assert that they participate in this traditional number assignment scheme (by purchasing services from CLECs which, in turn, obtain numbering resources from the North American Numbering Plan Administration) to further their business model but not as a matter of technical or engineering necessity. TWC and Comcast allow the use of their VoIP services only at specific fixed locations, and again, both companies assert that this limitation is driven by business considerations and not technical necessity. This type of location arrangement has been termed as non-nomadic, or "fixed" by the FCC in its orders addressing VoIP services.

Subscribers to these VoIP offerings must have a broadband connection in order to use the service. Subscribers may utilize their own analog telephone devices to make real-time voice calls over the Public Switched Telephone Network (PSTN). Such analog telephone devices are used in conjunction with a piece of IP-enabled equipment, which Comcast and TWC provide, known as an embedded multimedia terminal adapter (eMTA). The function of the eMTA is to format the electrical signal from the customer's analog telephone handset into packets, so that the packets can be routed onto the IP network utilized by Comcast and TWC. The IP packets travel from (or to) the customer's location via coaxial cable to (or from) a node located within the serving area established by TWC or Comcast. These nodes are, in turn, connected to the company's headend equipment by fiber-optic cable. TWC and Comcast have referred to this design as tree and branch architecture or, alternatively, a hybrid fiber-coaxial (HFC) network.

At the headend, which is architecturally analogous to an ILEC or CLEC central office location, cable modem termination system (CMTS) equipment provides the interface between the local HFC network and the IP backbone system managed by the cable company. A soft switch controls the routing of all VoIP packets as they traverse the network. The soft switch performs its routing function by querying a data base in order to correlate ten-digit telephone numbers with IP addresses and reformat packets accordingly and by managing the transfer of the call to other network elements as necessary. In addition, the soft switch communicates with other off-network databases, such as Signaling System No. 7 (SS7) databases, in order to retrieve calling name information and to set up routing instructions for calls which traverse or terminate on the public switched telephone network (PSTN).

The CMTS equipment, which is controlled by the soft switch, distinguishes and separates the VoIP traffic from Internet traffic, based on information contained in the header of each packet. Non-telephonic internet packets are routed to the Public Internet while the VoIP packets are routed either to a Media Gateway Device (if they are to travel over the PSTN), or back to a TW or Comcast customer (if the terminating customer destination is served via the same soft switch).

Where the ultimate destination of a VoIP call is to another VoIP customer served via the same soft switch, the call is not carried over the PSTN. However, where the destination of a call is a customer served by a wireline carrier (ILEC or CLEC, whether in-state or out-of-state), or a wireless carrier, or a VoIP customer served by a different soft switch of the cable company, the call is converted by equipment at the Media Gateway into time division multiplex (TDM) format. Calls converted to TDM format are digital non-packetized electric signals capable of being routed by carriers on the PSTN. VoIP calls that are converted to TDM signals are then handed-off to a telecommunications carrier, from whom the interconnected VoIP service provider purchases services, and this second carrier assumes responsibility for terminating the call on the PSTN.

The utilization by Comcast and TWC of eMTA devices permits these companies to provide service utilizing digital technology that is virtually identical, from a customer's perspective, to that offered through traditional analog "plain old telephone service" (POTS). For instance, the eMTA generates a tone that mimics a dial tone when a customer picks up the phone to place a call. This tone, although not technically necessary to the functionality of the system, is provided in order to simulate for the customer the experience of using a traditional POTS phone. In addition, Comcast and TWC VoIP customers receive operator and directory assistance and E-911 services that are indistinguishable from those provided by wireline carriers.

IV. SUMMARY OF POSITIONS OF INTERESTED PARTIES

A. OPA

1. Application of Statutory Definition of Telephone Service and Telephone Utility

The OPA argues that the non-nomadic VoIP services offered by Comcast and TWC fall within the statutory definition of "telephone service," set forth in 35-A M.R.S.A. § 102(18-A), because those services "transmit communications by telephone." Since each company offers its service for compensation inside the state, each is a "telephone utility" within the meaning of 35-A M.R.S.A. § 102(19), and each must, therefore, obtain authorization to do so from the Commission as mandated by 35-A M.R.S.A. § 2102. In furtherance of its position that Comcast and TWC must obtain authorization from the Commission in connection with their VoIP services, the OPA also points to 35-A M.R.S.A. § 8301, which expressly subjects "cable television companies,"

to Commission authority insofar as the services which they offer are "like those of telephone utilities subject to regulation by the Commission."[4]

2. Federal preemption

The OPA agues that federal law does not preempt the Commission from exercising of its state law authority to regulate "telephone service" with respect to the VoIP services of Comcast and TWC. The OPA argues that there has been no explicit expression by either Congress or the Federal Communications Commission (FCC) of an intent to preempt state regulation of the retail voice services offered by Comcast and TWC. Further, according to the OPA, in the absence of federal licensing or consumer protection regulation of carriers providing IP-based telephone services, regulation of such matters by this Commission would not conflict with the policy goals of Congress or those of the FCC. Finally, according to the OPA, neither Congress nor the FCC has occupied the field of regulation of IP-based telephone services.

The OPA seeks to draw further support for its position from a recent letter signed by the Chief of the FCC's Wireline Competition Bureau (WCB) and the FCC's General Counsel. According to the OPA, this letter demonstrates that senior officials at the FCC view Comcast's VoIP service as a "telecommunications service" subject to regulation by the FCC under Title II of the Communications Act of 1934 and subject to state regulatory authority with respect to licensing, consumer protection and intrastate rates. The OPA also contends that the WCB letter expressly identifies the material characteristics which distinguish Comcast's VoIP service from "information services" that are unregulated by the FCC and not subject to state regulation.

B. TAM

1. Application of Statutory Definition of Telephone Service and Telephone Utility

TAM argues that resolution of the state-law issue in this case requires the Commission to focus on *what* is being offered by these two companies rather than *how* it is being offered. The statutory definition of telephone service – "the offering of a service that transmits communications by telephone," requires this Commission to consider whether Comcast and TWC transmit communications and, if so, whether they do so by telephone. In TAM's view, Comcast and TWC have each conceded that their service offerings meet these criteria. This, claims TAM, is sufficient to support the conclusion that the digital offerings of these companies are "telephone service."

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[4] The full text of Section 8301 provides:

> Cable television companies, to the extent that they offer services like those of telephone utilities subject to regulation by the commission, shall be subject to the commission's jurisdiction over rates, charges and practices, as provided in this Title. 35-A M.R.S.A. § 8301.

TAM cautions that if we were to find that the technological means by which Comcast and TWC offer their VoIP services (the *how* as opposed to the *what*) is material to the question of whether such services are "telephone services," then we must also be prepared to apply that analysis to all carriers in the state. Thus, according to TAM, if we were to find that the use of IP technology by Comcast and TWC leads to the conclusion that their services are not "telephone services," then any IP-enabled voice service that might be offered by a TAM member ILEC would likewise fall outside of the Commission's regulatory authority. According to TAM, such regulatory parity is necessary to ensure a non-discriminatory, competitive playing field.

2. Federal preemption

TAM argues that no decision of the FCC has preempted state regulation of the "fixed" VoIP services offered by Comcast and TWC. According to TAM, the FCC's preemption decision in *Vonage Holdings Corp.,* WC Docket No. 03-211, FCC 04-267 (Nov. 9, 2004) does not apply to the VoIP services at issue in this case because unlike the "nomadic" VoIP at issue in *Vonage,* the technology used by Comcast and TWC is fully capable of tracking the jurisdictional start and end points of each call.

C. Comcast, TWC, and VON

1. Maine's statutory framework and recent legislation[5]

Comcast and TWC advance similar arguments as to why their VoIP services do not fall within this Commission's jurisdiction under Maine law. To read the statutory definition of "telephone service" so broadly as to include within its meaning VoIP services would be contrary to the text, history and purpose of Maine's regulatory scheme under Title 35-A, according to the companies. In the view of Comcast and TWC, the use of a telephone for transmission is the operative fact in applying the statutory, definitional phrase "transmits communications by telephone." VoIP service does not, according to Comcast and TWC, constitute the transmission of communications by telephone because a VoIP call cannot be transmitted by telephone alone. Rather, the transmission of a VoIP call requires a broadband connection and IP-compatible customer premises equipment. According to Comcast and TWC, without such a connection and equipment "the telephone would be useless."

Comcast and TWC also assert that the legislative history of Maine's statutory definitions of "telephone service" and "telephone utility" demonstrate that the legislature intended a narrower definition than one that encompasses VoIP service. According to Comcast and TWC, revisions to the definitions of "telephone service," and "telephone utility," enacted by the Legislature in 2003, were intended merely to clarify that the Commission's jurisdiction extended to so-called "switchless resellers," that did not own, control, operate, or manage "telephone lines," but that nonetheless offered "telephone service." This legislative revision was accomplished by removing the term

[5] The VON Coalition did not take a position in this proceeding regarding the resolution of the state law issue in this matter.

"telephone line" from the statute altogether, and by adding the phrase "accomplished with or without the use of transmission wires," to the definition of "telephone service." According to TWC, "the current definition of 'telephone service' merely reflects a modest update of the terms and definitions in place many years ago to govern the regulation of traditional circuit-switched telephone services." Further, claims TWC, the legislative revisions of 2003 "built" on the older (and discarded) "definition of 'telephone line' – a term that could not possibly have been intended to cover IP-based services that were developed many years later." Especially telling of the Legislature's intent, according to TWC, is that "when the Legislature updated the statute in 2003, by which time VoIP was quite familiar, it conspicuously omitted any reference to IP-enabled services in the statutory text or legislative history."

Comcast and TWC also argue that enactments of the Legislature as recently as 2007 demonstrate that it does not believe that VoIP service falls within the statutory definition of telephone service. Specifically, Comcast and TWC observe that in 2007 the Legislature amended 25 M.R.S.A. § 2927 so as to explicitly include VoIP service among those which are subject to a surcharge administered by this Commission's E-9-1-1 Bureau. Likewise, a 2007 amendment of 25 M.R.S.A. § 2930 extends the immunity provisions of the E-9-1-1 statute to VoIP providers.[6] These enactments, according to Comcast and TWC, would not have been necessary had the Legislature believed that VoIP service falls within the existing statutory definition of telephone service.

2. Federal preemption

According to Comcast and TWC, even if VoIP services are "telephone services" within the Maine statutory definition of that term, federal law expressly preempts application by this Commission of Maine's regulatory statutes to the Digital Voice/Digital Phone services. In furtherance of this preemption claim, Comcast and the VON Coalition argue that VoIP is an "information service" under the TelAct and thus exempt from state public utility commission regulation.

Comcast points to Section 64.702 of the FCC's rules and regulations as an express statement by the FCC of its intent to preempt state regulation of VoIP. According to Comcast, Section 64.702, which provides that "enhanced services" are not regulated under Title II of the Telecommunications Act, was promulgated by the FCC to effect its determination that "the provision of enhanced services is not a common carrier public utility offering and that the efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation." Comcast Brief at 11, *citing Amendment of Section 64.702 of the Commission's Rules and Regulation,* 88 F.C.C.2d 512, ¶ 83, n.34 (1981). According to Comcast, the FCC has subsequently interpreted the term "information services" to include within its ambit all "enhanced

[6] Comcast also points to the explicit identification of VoIP service in a revenue statute, 36 M.R.S.A. § 2551(20-A), also enacted in 2007, which creates a service provider sales tax on all telecommunications services.

services," and its exercise of its preemptive authority over information services has been upheld by the U.S. Court of Appeals for the D.C. Circuit. *See* Comcast Brief at 11; citing *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, 11 F.C.C. Rcd 21905, ¶ 102 (1997) ("*Non-Accounting Safeguards Order*").

Comcast posits three reasons why its Digital Voice service is, in fact, an information service. First, Comcast asserts that Digital Voice service requires a protocol conversion of voice content at both ends of an IP-PSTN call and that as a result of this so-called "net protocol conversion," the service is an "information service." According to Comcast, the federal courts have "consistently affirmed" the proposition that a "net protocol conversion makes [Digital Voice] an information service." *See* Comcast Brief at 16-17; *citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005), *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F. Supp.2d 993, 999 (D. Minn. 2003)[7]; and *Vonage Holdings Corp. v. New York Public Serv. Comm*., Case No. 04-Civil-4306, Preliminary Injunction Order (S.D.N.Y July 16, 2004).

Second, Comcast asserts that the calling features of its Digital Voice service are inextricably intertwined with other computing and information service functions as part of a single integrated service offering. According to Comcast, the FCC's decision in its *Vonage Order* stands for the proposition that a service, such as VoIP, which permits a customer to check voicemail or reconfigure service options, or otherwise communicate with a computer server so as to enable the user to "store, manage, and utilize information," is a form of "integrated communications service," that goes beyond the mere transmittal of information and therefore falls within the FCC's exclusive jurisdiction over information services. *See* Comcast Brief at 18-20; *citing Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶ 25 (2004) (*Vonage Order*).

The third rationale advanced by Comcast in support of the proposition that Digital Voice is an information service is that subscribers of the service "interact with stored information." Specifically, when a call is placed by a customer on the PSTN to a Digital Voice customer, Comcast's network not only converts the call into IP format, but also identifies the IP address associated with the Digital Voice customer being called and encodes that information onto the IP data stream. According to Comcast, the manipulation of databases that associate IP-addresses with 10-digit "telephone numbers" so that telephone numbers can be "translated" into IP addresses in order to route calls on the Comcast network is a form of information processing that is emblematic of an information service.

Finally, TWC asserts that the FCC, in its *Vonage Order*, "established that VoIP services sharing certain basic characteristics—including facilities-

[7] The District Court decision was later appealed by the Minnesota Commission to the U.S. Court of Appeals for the Eighth Circuit. The court affirmed the F.C.C.'s preemption ruling. *Minn. Pub. Utils. Comm'n v. F.C.C.*, 483 F.3d 570 (8th Cir. 2007).

based services like Digital Phone—are not subject to regulation by state public utility commissions." TWC argues that the preemptive effect of the *Vonage Order* is not limited to state regulation of "nomadic" VoIP service (such as that offered by Vonage) where the jurisdictional endpoints of a call cannot be determined. Instead, according to TWC, the preemptive effect of the *Vonage Order* applies to any attempt by a state utilities commission to regulate any VoIP service that requires a broadband connection and the use of IP-compatible equipment at the user's location and which includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications and access other features and capabilities, even video. According to TWC, any reading by the Commission of the *Vonage Order* which restricts its preemptive effect to "nomadic" VoIP, would necessarily "thwart" the federal policy of encouraging competition through deregulation and would therefore create an irreconcilable conflict between federal and state policies in violation of the Supremacy Clause of the Constitution.

V. DISCUSSION AND DECISION

The question of whether TWC's Digital Phone and Comcast's Digital Voice services are subject to regulation by this Commission is a two-part inquiry. First, we must determine whether these services fall within the definition of "telephone service" under Maine law. If so, the next question is whether federal law preempts enforcement by this Commission of Maine's regulatory statutes as they apply to such services. For the reasons discussed more fully below, we believe that the term "telephone service" includes the VoIP offerings of TWC and Comcast and that federal law does not preempt our authority to enforce this state's regulatory scheme as it applies to these services.

A. Are Digital Voice and Digital Phone "Telephone Service" under Maine Law?

The fundamental issue raised in this proceeding – the regulatory status of VoIP service and the companies that offer it – is one of first impression before this Commission, and to resolve it we are called upon to interpret the telecommunications provisions of Title 35-A. The statutory definition of a "public utility" includes every "telephone utility." 35-A M.R.S.A. § 102(13). "Telephone utility" is defined as "every person . . . that provides telephone service for compensation inside this State." 35-A M.R.S.A. § 102(19). "Telephone service" is defined as "the offering of a service that transmits communications by telephone, whether the communications are accomplished with or without the use of transmission wires." 35-A M.R.S.A. § 102(18-A).

These provisions are to be "interpreted and construed liberally," in order to "ensure safe, reasonable and adequate," utility service at rates that are "just and reasonable." 35-A M.R.S.A. §§ 101, 104. We find that the statutory language defining "telephone service" is broad, unambiguous, and readily encompasses VoIP service. We thus reject the contorted arguments, advanced by Comcast and TWC, that the legislative history of Title 35-A, and recent enactments codified in Titles 25 and 36 either create ambiguity in the language of the statute here at hand or compel a finding that VoIP service is not "telephone service." It is through the actual language of its enactments that the Legislature declares its intent, and in our view, the language of the statute is plain. *See Guilford Transp. Indus. v. Pub. Utils. Comm'n*, 2000 ME 31, ¶11,

746 A.2d 910, 913 (2000) (citing *Nat'l Indus. Constrs., Inc. v. Superintendent of Ins.*, 655 A.2d 342, 345 (Me. 1995)); *Central Maine Power, Co., v. Pub. Utils. Comm'n*, 436 A.2d 880, 885 (Me. 1985).

The phrase "transmits communications by telephone" is unambiguous. Moreover, the statute is entirely agnostic with respect to how a call is transmitted or processed. Further, the public policy purposes animating Title 35-A are advanced by applying the regulatory protections and requirements of the statute to this particular technological incarnation of telephone service. Indeed, VoIP service is marketed to consumers as a substitute for traditional, circuit-switched telephone service. The experience of placing or receiving a VoIP call is indistinguishable from that of placing or receiving a circuit-switched call: a consumer picks up a telephone handset, dials a telephone number, and waits until the called party joins the call by picking up the ringing telephone handset. Likewise, the experience of conversing with another person on a call placed or received by a party subscribing to VoIP service is indistinguishable from the experience of conversing on a purely circuit-switched call. In light of these fundamental similarities in service, we are hard-pressed to see how the purposes of the regulatory system created by Title 35-A would be advanced by an interpretation of "telephone service" that did not include VoIP service.

B. Has Congress or the FCC Preempted the Authority of the Commission to Regulate the VoIP Services Offered by Comcast and TWC in Maine ?

Our analysis of the federal preemption issues raised in this matter must adhere to the rulings of the United States Supreme Court construing the Supremacy Clause of the Constitution. A recitation of the Court's preemption doctrine is set forth in the opinion of the Court in *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355 (1986):

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland,* 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc*. v. *Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc*., 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz,* 312 U.S. 52 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings &*

> *Loan Assn*. v. *De la Cuesta,* 458 U.S. 141 (1982); *Capital Cities Cable, Inc*. v. *Crisp,* 467 U.S. 691 (1984).

Louisiana, 476 U.S. at 368-9.

In *Louisiana*, the Court observed that in broad terms the federal Communications Act of 1934 (Act) "itself declares that its purpose is 'regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.'" *Id.* at 369 (quoting 47 U.S.C. § 151). At the same time, noted the Court, the Act "expressly" denies the FCC "jurisdiction with respect to . . . intrastate communication service . . . *47 U.S.C. §152(b)*." *Id.* at 360. The issue presented in *Louisiana* was whether Congress had authorized the FCC to preempt state utility commissions from adopting and enforcing different depreciation treatment for telecommunications carriers than those prescribed by the FCC itself. The FCC made two arguments in support of its preemptive authority. First, it claimed that by enacting 47 U.S.C. § 220, which authorizes the FCC to prescribe depreciation treatment for carriers, "Congress . . . expressly manifested a clear intent to displace state law." *Id.* at 369. Second, and alternatively, the FCC claimed that "the refusal of the States to accept the FCC-set depreciation schedules and rules will frustrate the federal policy of increasing competition in the industry, and thus that state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" as broadly expressed by Congress in 47 U.S.C. § 151. *Id.* at 369.

The Supreme Court rejected each of the FCC's preemption arguments. According to the Court, the policy statement set forth in 47 U.S.C. § 151 does not evidence an intent on the part of Congress to confer the broad preemptive authority sought by the FCC, especially in light of the "express jurisdictional limitations on FCC power contained in *§152(b)*." *Id.* at 370. The Court held that, "[b]y its terms . . . [§ 152] . . . fences off from FCC reach or regulation intrastate matters—indeed, including matters 'in connection with' intrastate service . . . [and] . . . "the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC." *Id.* The Court was unmoved by the contention, advanced by the FCC and adopted by several lower courts, "that the refusal of the States to employ accurate measures of depreciation will have the severe impact on the interstate communications network because investment in plant will be recovered too slowly or not at all, with the result that new investment will be discouraged to the detriment of the entire network." *Id* at 373-4. As the Court explained, 47 U.S.C. § 152(b) "constitutes . . . a congressional *denial* of power to the FCC," and "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it" to do so. *Id.* at 374 (emphasis in original). "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction [such as that expressed by § 152(b)] would be to grant to the agency the power to override Congress," something which the Court was "unwilling and unable to do." *Id.*

The Court also rejected the contention "that the FCC cannot help but preempt state depreciation regulation of joint plant if it is to fulfill its statutory obligation and determine depreciation for plant used to provide interstate service, *i.e.,* that it makes no sense within the context of the Act to depreciate one piece of property two ways." *Id.* at 375. According to the Court, the Communications Act "not only established dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system." *Id.* Although the statutory mechanism by which such tensions are addressed – the Act's "jurisdictional separations" process – might well result in the adoption of different regulatory choices by state regulators than those adopted by federal regulations addressing "such factors as the perceived need to improve the industry's cash flow, spur investment, subsidize one class of customer, or any other policy factor," the Court held that the persistence of such tensions are the result of a statutory scheme which "only Congress can rewrite."[8] *Id.* at 376.

The FCC attempted to apply the Supreme Court's holding in *Louisiana* to resolve the question presented in *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* 19 FCC Rcd 22404 (Nov. 12, 2004) (*Vonage Order*): whether the FCC should issue a declaratory ruling preempting an order of the Minnesota Public Utilities Commission from requiring that Vonage obtain a certificate of public convenience and necessity, and comply with other state laws and regulations governing telephone companies operating in Minnesota, with respect to its DigitalVoice (VoIP) service. Although Vonage had requested, in its petition for declaratory relief, that the FCC classify VoIP as an "information service" subject to the FCC's exclusive jurisdiction under Title I of the Act, the FCC explicitly declined to do so. *See Vonage Order* ¶ 14, n. 46. Instead, the FCC found, "irrespective of the definitional classification" under the Act (telecommunications or information service) it might eventually place VoIP, preemption of the Minnesota Commission's attempt to regulate Vonage's DigitalVoice service was supported by two rationales. Specifically, the FCC found: (i) "that the characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme," and (ii) "that permitting Minnesota's regulations would thwart federal law and policy." *Id.*

The first basis upon which the FCC grounded its decision in *Vonage* – that it is either impossible or not practical to identify and separate the interstate and intrastate communications of Vonage's DigitalVoice service for the purpose of effectuating the dual federal/state regulatory scheme envisioned by the Act – was dispositive in the *Vonage* case and is wholly in accord with the Supreme Court's decision in *Louisiana*. As the FCC thoroughly explained, in the case of Vonage's

[8] In so holding, the Court distinguished the application of one depreciation method for the portion of equipment costs allocated to interstate service and another method of depreciation for the portion of such costs allocated to intrastate service from cases in which "FCC pre-emption of state regulation was upheld where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation. *Id.* at 375, n.4 (emphasis in original).

nomadic VoIP service, DigitalVoice, it is impractical if not impossible to identify and separate the intrastate from the interstate aspects of the communication. Indeed, the whole point of a nomadic VoIP service is to "enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection." *Vonage Order* ¶ 24. As the FCC observed, "it is the total lack of dependence on *any* geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications." *Id.* ¶ 25 (emphasis in original). Consequently, it cannot be said that the FCC exceeded its statutory authority by impermissibly asserting jurisdiction in a manner expressly denied to it by § 152(b) of the Communications Act (the regulation of matters "with respect to…intrastate communication service") where, as in *Vonage*, it is not possible to separate the intrastate aspects of VoIP communications from the interstate aspects of that service.

The second basis upon which the FCC grounded its decision in *Vonage* – that state regulation of Vonage's VoIP service would "thwart federal law and policy" as articulated in 47 U.S.C. § 230(b) and in Section 706 of the Telecommunications Act of 1996 Act (1996 Act) – bears striking resemblance to the sweeping arguments found insufficient to trump Congress' express limitation of the FCC's authority over intrastate communications by the Supreme Court in *Louisiana.* Specifically, § 230(b) of the 1996 Act declares, in relevant part, that:

> [i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . . [and] to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.

47 U.S.C. § 230(b)(1), (2), (3). Likewise, section 706 of the 1996 amendments to the Act[9] provides that:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap

[9] Section 706 of the 1996 Act, which is not codified in Title 47 U.S.C., is located in the notes to 47 U.S.C. §157.

> regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Pub. L. 104-104, Title VII, § 706, 110 Stat. 153 (1996).

In its decision in *Vonage*, the FCC stated that § 230 and §706 of the 1996 Act, "counsel a single national policy for services like DigitalVoice," and that "we cannot permit more than 50 different jurisdictions to impose traditional common carrier economic regulations such as Minnesota's on DigitalVoice and still meet our responsibility to realize Congress's objective" of "driving consumer demand for broadband connections, and consequently encouraging more broadband investment and deployment," because "to do so would ignore the Act's express mandates and directives with which me must comply, in contravention of the pro-competitive deregulatory policies the Commission is striving to further." *Vonage* ¶¶ 34-37. This rationale is virtually indistinguishable from that advanced by the FCC in *Louisiana* when it sought to preempt the Louisiana commission's depreciation rules on the grounds state-specific depreciation methodologies would frustrate Congress's goal of increasing competition in the telecommunications industry. Indeed, § 230 and §706 of the 1996 Act each echo, in their sweep, the broad language of § 151 upon which the FCC unsuccessfully anchored its preemption argument in *Louisiana. See* 47 U.S.C. § 151 (declaring that the purpose of the Act is "regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable rates").

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The argument that application of depreciation rates set by the state commissions would severely and deleteriously affect the interstate communications network by discouraging investment "to the detriment of the entire network," was found by the Supreme Court in *Louisiana* to misrepresent the dual state/federal "statutory scheme and the basis and test for pre-emption." *Louisiana*, 476 U.S. at 374. Likewise, the FCC's assertion that it must stand guard against "multiple disparate attempts to impose economic regulations," on VoIP providers does not, under *Louisiana,* supply a sustainable basis for the FCC to preempt valid state regulation over jurisdictionally severable VoIP communications (as opposed to "nomadic" VoIP services). For these reasons, we reject the arguments advanced by TWC and Comcast that the FCC's statements in *Vonage* intimating that state regulation of Vonage's "nomadic" VoIP would "thwart" federal policy, constitute a valid exercise of authority by the FCC to preempt state regulation of "fixed" VoIP.

Our conclusion is consistent with, and confirmed by, the decision of the Eighth Circuit Court of Appeals in *Minn. Pub. Utils Comm'n v. FCC,* 483 F.3d 570 (8th Cir. 2007). In that case, the Court affirmed the FCC's decision in *Vonage.* First, the Court held that the FCC's decision in Vonage to leave unresolved the question of the statutory classification of VoIP service as either an information service or a telecommunications service, and to defer that classification until the completion of the FCC's separate *I-P Enabled Services Proceeding*, was not arbitrary or capricious.

Minnesota, 483 F.3d at 577-78. The Court also held that central factual conclusion in *Vonage* – that at the point in time that the FCC was called upon to consider the matter it was impractical to determine the geographic endpoints of Vonage's nomadic VoIP service – was neither arbitrary nor capricious. *Id.* at 579-80. Thus, the Court upheld the FCC's conclusion that, under *Louisiana*, the practical impossibility of severing the intrastate from the interstate aspects of nomadic VoIP service permit it to preempt state regulation of nomadic VoIP service without running afoul of the statutory limitation on the FCC's jurisdiction as set forth in § 152(b). *Id.* at 578-80.

We acknowledge that the *Minnesota* Court also found that the FCC's conclusion that state regulation of VoIP service would interfere with valid federal rules or policies was entitled to "weight," and was not arbitrarily or capricious. *Id.* at 581. However, it is also the case that the Court did not hold that a potential conflict between state regulation of VoIP and the broad federal policies invoked by the FCC would be sufficient, standing alone, to sustain the preemption of state regulation of a VoIP service where the geographic endpoints of the VoIP communications are readily ascertainable. Indeed, the Court was careful to limit the scope of its decision "to the issue [of] whether the FCC's determination was reasonable based on the record existing before it at the time," and further noted that "[i]f, in the future, advances in technology undermine the central rationale of the FCC's decision, its preemptive effect may be reexamined." *Id.* at 580. In this regard, the Court noted that subsequent to its *Vonage* decision, in a case involving VoIP service providers' responsibility to contribute to the universal service fund, the FCC indicated:

> An interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer quality for the preemptive effects of our Vonage Order and would be subject to state 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.

Id. (quoting *Universal Serv. Contribution Methodology,* 21 F.C.C.R. 7518 at 7546 ¶ 56 (2006)).

The FCC has itself declared that its *Vonage Order* is not an expression of preemptive action with respect to state regulation of "fixed" VoIP services. Although, in the *Vonage Order,* the FCC had intimated that "to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to the extent comparable to what we have done in this Order," *Vonage* ¶ 32, it successfully argued before the Eighth Circuit Court of Appeals in *Minnesota*, that it would be premature for the Court to decide whether the agency had exceeded the limits of its statutory authority, as proscribed by § 152(b), in preempting state regulation of "fixed" VoIP because it had not, in fact, attempted to preempt such regulation. The Court, ruling in favor of the FCC on this point, held that the *Vonage 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 and until that day comes it is only a mere prediction. *See U.S. Telecom Ass'n v. FCC, 360 U.S. App. D.C. 202, 359 F.3d 554, 594 (D.C. Cir. 2004)* (holding a general prediction set forth in order does not constitute final agency action). Indeed, as we noted, the FCC has since indicated VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effect of the Vonage order. *See Universal Serv. Contribution Methodology, 21 F.C.C.R. at 7546 ¶ 56.* As a consequence . . . [the] contention that state regulation of fixed VoIP services should not be preempted remains an open issue.

Minnesota, 483 F.3d at 582-3.

A finding that federal law preempts a valid state law is "strong medicine, not casually to be dispensed." *Grant's Dairy-Maine, LLC v. Commissioner of Me. Dep't. of Agriculture, Food & Rural Resources,* 232 F.3d 8, 18 (1st Cir. 2000). Moreover, we are obligated to fulfill our role, as conferred by Maine's legislature, in regulating telecommunications in Maine to ensure safe, reasonable and adequate service at rates that are just and reasonable to customers and public utilities. To refrain from fulfilling this mandate in anticipation of a possible future order by the FCC that may, or may not, have the effect of validly preempting our authority would be to engage in "preemptive-preemption" – a path that we have in the past found inconsistent with our responsibilities. See *Investigation into Verizon's Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* No. 2003-682 Order (Sept. 13, 2005); see also *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004). For all of the foregoing reasons, we find that neither Congress nor the FCC has preempted enforcement by this Commission of its statutory authority to regulate the VoIP services offered by Comcast and TWC as telephone service.

C. Are the VoIP Services Offered by Comcast and TWC in Maine Information Services Pursuant to Federal Law ?

Comcast contends that the particular technological characteristics of its VoIP service are such that it falls within the category of "information services" as defined by federal law and is, for that reason, subject only to the regulatory jurisdiction of the FCC. This argument has as its immediate source the Communications Act of 1934, as amended by the Telecommunications Act of 1996, which defines the terms "telecommunications," "telecommunications service," and "information services."

The term "telecommunications" means "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(43). The term "telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes or users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §

153(46). The term "information service" means "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 operations of a telecommunications network or the management of a telecommunications service." 47 U.S.C. § 153(20).

The classification of the VoIP services offered by Comcast and TWC as either "telecommunications" or "information" services is of significance because of the different characteristics of the federal regulatory regimes that pertain to "telecommunications" versus "information" services. Because a "telecommunications service" is, by definition, offered "for a fee directly to the public," it is subject to the provisions set forth in Title II of the Act governing "common carrier services." 47 U.S.C. §§ 201-276. An "information service," on the other hand, is not a common carrier service and is therefore subject to regulation by the FCC pursuant to Title I of the Act, which does not prescribe any particular obligations or entitlements with regards to providers of such services. Generally, with respect to "information services," the FCC has adopted a policy of "non-regulation." According to Comcast, any attempt by a state utility commission to regulate "information services," would conflict with this federal policy of "non-regulation," and therefore be preempted by federal law.

As noted above however, the FCC has not exercised its Title I authority to declare that VoIP is an information service. On November 12, 2004, the FCC opened a comprehensive rulemaking for the express purpose of determining, among other things, whether IP-enabled services such as VoIP should be categorized as either a "telecommunications" or "information" service and what, if any, federal regulations should govern such services in the future. *See generally IP-Enabled Services Proceeding,* 19 FCC Rcd 4863. To date, no final order, or administrative rule has issued by the FCC in this matter.

In the absence of any action from the FCC, we make the independent finding that the VoIP services offered by TWC and Comcast meet the definition of "telecommunications" which, pursuant to U.S.C. § 153(43), is 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." The record evidence in this case establishes that the networks owned by TWC and Comcast and through which they offer, respectively, their Digital Phone and Digital Voice services, function in essentially the same way.

Specifically, when one TWC Digital Phone subscriber (or Comcast Digital Voice subscriber) calls another such subscriber, the caller specifies the "end" point of the transmission of his digital phone call by entering a telephone number into the touchpad of a phone that is located at his premises (the "beginning" point of the transmission). The signaling multi-frequency tones generated by the touchpad are then "digitized" (converted into a series of 1s and 0s) by a piece of proprietary equipment called an eMTA that TWC (or Comcast) supplies to its customer for this purpose and which is attached to the coaxial ("coax") cable wiring inside the customer's premises. The eMTA then communicates with a "soft switch" located elsewhere on TWC's (or

Comcast's) network by transmitting the "digitized" telephone number to the "soft switch" and obtaining from the "soft switch" the internet protocol (IP) address of the eMTA located at the premises of the intended recipient of the call.[10]

As the caller speaks into the mouthpiece of the phone's handset, the mouthpiece converts the sound waves created by the user's voice into an analog electrical signal whose measurable characteristics and attributes include, among other things, amplitude, frequency, and harmonics. This electrical signal, with its various characteristics and attributes, is then "digitized" by the eMTA and placed into the "payload" of the IP "packets." The eMTA also attaches, as a "header" to each packet containing routing and control information which includes the destination IP address obtained from the "soft switch" and the IP address of the originating eMTA. The eMTA transmits these IP packets onto TWC's (or Comcast's) hybrid fiber-coaxial cable (HFC) network.

The transmission path of the packets along the network is directed by and through various routers, cable modem termination system (CMTS) equipment, soft switches, and/or a "Media Gateway" device, until they finally reach the eMTA located inside the premises of the TWC Digital Phone subscriber (or Comcast Digital Voice subscriber) who is the intended recipient of the call. The recipient's eMTA then converts the digital "payload" information contained in each packet back into an analog electrical signal representation of the caller's voice. This analog signal is then converted by the earpiece of the recipient's phone handset back into sound waves which the recipient can hear as a voice.[11]

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[10] The "soft switch" conducts an internal database inquiry to obtain the IP address.

[11] In addition to calls made between customers of the cable companies, known as "on network" calls, fixed-VoIP subscribers can place calls to or receive calls from customers served by local exchange carriers (LECs) and wireless (a/k/a cellular) carriers. LECs provide traditional circuit switched service over a network of switches and copper wires and/or fiber cables that is generally referred to as the public switched telephone network (PSTN). Wireless carriers usually use the transport services of the PSTN to assist in routing voice traffic to and from the cell towers and switches that provide service to the wireless callers. In order for a TWC or Comcast digital phone customer to communicate with a customer on the PSTN, a physical connection must be established between the two networks. To establish the connection that allows traffic to flow between the cable companies' networks and the PSTN, the cable companies employ a "Media Gateway" device, which essentially functions as a conversion mechanism between the IP packets of the cable networks and the TDM protocol used most generally on the PSTN. The Media Gateway is managed by the soft switch, and it contains both the hardware and software to converts the data from IP to TDM or vice versa, depending on the destination of the call. From the PSTN's point of view, a call to or from a cable company's network appears no different from a call that originates or terminates on the PSTN. Nearly all calls on the PTSN undergo a form of protocol conversion in that the analog signal produced by the customer's phone is almost always converted to a digital signal. This conversion generally occurs either at the central office or the remote terminal that serves the customer's location.

Plainly, such calls satisfy the first part of the definition of "telecommunications" – the "user" specifies the points "between or among" which the transmission is made. The beginning point of the call, which is established as the IP address of the eMTA at the user's premises, is specified when the user picks up his phone and begins dialing. The destination point is specified when the user enters the telephone number assigned to the intended recipient of the call into the keypad.

The second part of the definition of "telecommunications" is also satisfied – the "user" chooses the information that is to be transmitted. The language of the statutory definition of "telecommunications" focuses on the perspective of the user ("between or among points *specified by the user"; "*information *of the user's choosing"),* 47 U.S.C. § 153(43)(emphasis added), and from that perspective it is difficult to conclude that the information that a user chooses to have transmitted is anything other than his or her voice transmitted in a fashion so that the recipient of the information hears a voice at the other end of the call through the use of an ordinary telephone device.

The third part of the statutory definition of "telecommunications" requires that the information be transmitted such that there is "no change in the form or content of the information *as sent and received.*" § 153(43) (emphasis added). Traditional "switched" telephone service falls within this definition of telecommunications because, even though such a call requires the conversion of the sound waves generated by a user's voice into analog electrical signals, that conversion is reversed when the recipient of the call picks up the handset of the telephone. Likewise, in the case of fixed VoIP calls, the information begins and ends as sound waves with no net change in form or content. It is immaterial that in addition to the conversion from sound waves to analog electrical signals the information "of the user's choosing" is also converted in "form" to digitized information placed into IP packets because those conversions are also reversed. As the FCC itself found when confronted with the question of whether the conversion by AT&T of transmitted information into IP format resulted in a change of the form of that information such that it was no longer telecommunications as defined by the statute, a conversion to IP packets is not a "net protocol" conversion when, as in the case of the AT&T service at issue, the form of the information, "voice", is the same when sent and received. *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges ("AT&T IP Telephony Order")*, WC Docket No. 02-361, FCC 04-97, *Order,* ¶ 12 (April 14, 2004).

Comcast takes pains to highlight the fact that, in order for its Digital Voice customers to place calls, they must use the proprietary eMTA device that the Company supplies because the eMTA "is deployed by Comcast" to connect the user to the Company's network, reformat analog voice signals into IP packets, and supply the home IP address of the caller. Comcast also insists that the "customer's eMTA" is not a part of Comcast's network because it is placed inside its customer's premises. In Comcast's view, the initial conversion of voice information occurs *before* that information reaches Comcast's network (which, according to Comcast, begins at a "point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises." According to Comcast, the significance of the placement of the eMTA on the

customer's side of this demarcation point is that the call information enters Comcast's network in the form of IP packets.[12]

Even if Comcast were correct to characterize the eMTA as a type of customer premises equipment (CPE) that stands apart from its network (a conclusion with which we do not concur), such a characterization does not lead to the conclusion that VoIP calls are not "telecommunications." Even if the "protocol" by which the user's voice is taken by Comcast at the point of demarcation and is transmitted from one point to another (in this case, IP packets) constitutes the "form or the content" of the "information of the user's choosing," the fact remains that a call from one Comcast Digital Voice (or TWC Digital Phone) subscriber to another is sent and received in precisely the same form and content (as digital information contained in an IP packet). Assuming that the eMTA device is not a part of the TWC (or Comcast) network, and that the "information of the user's choosing" is an IP packet containing a digitized conversion of the user's voice and an IP address for routing purposes, it is plain that the transmission satisfies the third element of the definition of telecommunications – that the transmission of such information be accomplished "without change in the form or content of the information as sent" – because the IP packet, including the payload information containing the digitized voice information, that is ultimately "received" by the intended recipient's eMTA is of precisely the form and content as when it was sent.

Having determined that the fixed VoIP services offered by Comcast and TWC are "telecommunications" under federal law, we also made the corollary finding that they are not "information services" under the Act. As noted above, in order to assemble and transmit the IP packet, the eMTA first digitizes the telephone number entered by the user and transmits that information to a soft switch which, in turn, queries a database to obtain (and then transmit back to the eMTA) the IP address associated with the called telephone number. Although this series of transactions undoubtedly involves, at the least, the "acquiring," "retrieving," "transforming," or "making available information via telecommunications," and thus appears, at first blush, to fit comfortably within the statutory definition of "information service" as set forth in forth in 47 U.S.C. § 153(20), this is not the case. This is so because the statutory definition of "information service" excludes any such capability that would otherwise fall within its meaning when that capability is used "for the management, control, or operation of a telecommunications system." Thus, the "pre-transmission" activities of the user's eMTA and, indeed, the activities of the soft switch, routers, CMTS equipment, and Media Gateway devices which participate in the routing of the IP packets over their transmission path to the recipient's eMTA, are all activities which are used "for the management, control, or operation of a telecommunications system," and are therefore not the sort of activities that can be relied upon to characterize TWC's Digital Phone (or Comcast's Digital Voice) service as an information service.

In the same matter in which the FCC found that the intermediary conversion by AT&T of information into IP packets does not change the form or content of information such that a voice call that is transmitted in IP fails the third prong of the definition of "telecommunications" (no change in form or content), the FCC also found

[12] TWC also requires the use of an eMTA at the customer's premises.

that transformation of the voice call information into digitalized IP packets so that the information could traverse AT&T's "internet backbone" for a portion of its transmission path is a transformation undertaken for the purpose of "internetworking" in order to facilitate the provision of basic voice service and thus are information service capabilities used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." Consequently, according to the FCC, the conversion by AT&T of voice call information into digitized IP packets to facilitate their transmission over the telecommunications system is not an "information service." See *AT&T IP Telephony Order*, ¶ 12 (noting that "internetworking" protocol conversions are telecommunications services), citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21957-58, ¶ 106 (*Non-Accounting Safeguards Order")* ("protocol processing services are information service capabilities used 'for the management, control, or operation of a telecommunications system or the management of a telecommunications service,' they are excepted from the statutory definition of information service. Thus, 'no-net' protocol conversion services constitute telecommunications services, rather than information services, under the 1996 Act").

In our view, the rationale underlying the FCC's conclusion in the *AT&T IP Telephony Order* -- that the protocol conversion from analog electrical signal to digitized IP packets and then back to analog electrical signal when employed in the context of voice service is a conversion used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service," and therefore is not an information service -- applies with equal force to the conversion of digitized IP packets to analog electrical signals that TWC Digital Phone (or Comcast Digital Voice) performs when one of its users place a call to a person who receives phone service from a traditional circuit switched provider. In both cases, protocol conversion is used for the "management, control, or operation of a telecommunications system," because without the conversion within the telecommunications system, interconnected carriers would be incapable of completing the voice calls between all of the users of the system.[13] Indeed, if the rationale of *AT&T IP Telephony Order* is not construed as to establish a rule of general applicability focusing on the purpose of the protocol conversion, such a cramped reading of that decision would create the anomalous result whereby a conversion from analog electrical signal to digitized IP packets (but not back to analog electric signal) could be considered an "information service." If that were the case, the placement of a call by a customer of a traditional circuit switched provider to a TWC or Comcast VoIP customer could be classified as an information service (and not a telecommunications service) merely because the eMTAs

[13] Other transformations of information may occur in the course of a telephone call regardless of whether the call is ever transformed into IP. For example, analog electric signals and digitized IP packets are routinely converted by carriers from electrical impulses (travelling over wires or coaxial cables) into light waves which traverse fiber optical cables. When utilized for the purpose of the "management, control, or operations of a telecommunications system," such transformations are also not information services.

deployed by TWC and Comcast are incapable of accepting incoming analog electrical signals.

We recognize and appreciate that in its *AT&T IP Telephony Order* the FCC sought to resolve the "telecommunication / information services" characterization question narrowly and as applied to the specific attributes of the AT&T service at hand, and that the term "no-net" accurately describes the fact that AT&T was converting analog electrical signals to digitized IP packets and then back to analog electrical signals within its network. See *AT&T IP Telephony Order*, ¶ 10 (noting that that the FCC has commenced a comprehensive rulemaking proceeding to address IP services generally – the still pending matter *IP-Enabled Services,* WC Docket No. 04-36, FCC 04-28 – and that the *AT&T IP Telephony Order* "represents [its] analysis of one specific type of service under existing law based on the record compiled in this proceeding [which] . . . in no way precludes the [FCC] from adopting a fundamentally different approach when it resolves the IP services rulemaking"). Here, however (and in the absence of a ruling by the FCC in the *IP-Enabled Services* docket), this Commission is called upon to consider whether the characterization of a protocol conversion as a "no-net" conversion is a necessary consideration in applying the statutory definition of "information service" in the context of protocol conversions performed by TWC and Comcast to provide their VoIP services. We find that the performance of a protocol conversion, regardless of whether the conversion is a "net" or "no-net" conversion, constitutes the "transforming" of information and that the offering of a capability for conducting such a transformation falls within the operative portion of the statutory definition of "information services." *See* 47 U.S.C. § 153(20) ("the term 'information service' means the offering of a capability for . . . transforming . . . information"). However, we also find that the use to which both TWC and Comcast put this capability to transform information (by converting digitized IP packets into analog electrical signals so that a call from a Digital Phone or Digital Voice user can be received by a customer who's service is provided by a circuit-switched telephone carrier) is "for the management, control, or operation of a telecommunications system or the management of a telecommunications service," and thus falls within the carve-out, or exception, set forth in the statutory definition of "information service." *See* 47 U.S.C. § 153(20) ("the term 'information service' means the offering of a capability for . . . transforming . . . information . . . *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*") (emphasis added).

In short, we find that the correct way to construe the text of the statutory term "telecommunications" is to construe it literally, as Congress wrote it, and that a voice call is telecommunications because: (1) the user specifies the end points of the transmission by picking up the phone and dialing the number of the person he wishes to call; (2) the user selects the form of the information to be transmitted by using his voice to speak into his phone and selects the content of the information by deciding what, through his voice, he wishes to say; and (3) the form and content of what the user speaks into the phone is unchanged when it is received and heard by the recipient of the call. We likewise find that the correct way to construe the text of the statutory term "information service" is to construe it literally, as Congress wrote it, and that the VoIP services offered by TWC and Comcast are not information services because even

though they do employ the capability of transforming information, such as the conversion of information to or from digitized IP packets, and they route transmissions by employing the capability of "acquiring," "retrieving," or "making available information via telecommunications," such capabilities are all used to "manage, control, or operate a telecommunication system or manage a telecommunications service."

Finally, we are not persuaded that the various features and capabilities that are bundled as part of the packages which TWC and Comcast offer to their VoIP customers, such as the ability to access voicemail over an internet web portal and to receive caller-id information over a television set or computer screen upon activation of that service via an internet web portal, to establish distinctive rings for different callers, and to establish different "rules" for handling different incoming calls, are materially different from similar services which the FCC has recognized do not so contaminate voice service when it is offered in service bundles that include information service capabilities as to change the essential "telecommunications service" characterization of the offering. See *In the Matter of Federal-State Joint Board on Universal Service,* FCC 98-67, CC Docket No. 96-45, 13 FCC Rcd. 11501, ¶ 60, Report to Congress (released April 10. 1998) ("It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail").

VI. CONCLUSION

We conclude that Time Warner Cable Digital Phone L.L.C., and Comcast IP Phone, L.L.C. are both "telephone utilities" as defined by 35-A M.R.S.A. § 102(19), that their digital VoIP offerings constitute "telephone services" pursuant to 35-A M.R.S.A. § 102(18-A) and that, therefore, both are subject to our jurisdiction.

With respect to federal preemption over VoIP services, we further conclude that state regulation of the fixed VoIP services offered by Time Warner Cable Digital Phone L.L.C., and Comcast IP Phone, L.L.C. has not been preempted by Congress or by the FCC. In the absence of such preemption, this Commission is obligated to exercise its regulatory authority to regulate the VoIP services offered by these companies as "telephone services" pursuant to Maine law.

Accordingly, we

O R D E R

1. That Time Warner Cable Digital Phone L.L.C., and Comcast IP Phone, L.L.C are public "telephone utilities" as defined by 35-A M.R.S.A. § 102(19) and are therefore subject to our jurisdiction;

2. That Time Warner Cable Digital Phone L.L.C., and Comcast IP Phone, L.L.C. must file with the Commission a petition, pursuant to 35-A M.R.S.A. § 2102 and

Me. Pub. Util. Comm'n., 65 407 CMR 280-4, within ninety (90) days requesting authority to offer competitive local exchange and interexchange service in the State.

Dated at Hallowell, Maine, this 27th day of October, 2010.

BY ORDER OF THE COMMISSION

_____

Karen Geraghty
Administrative Director

COMMISSIONERS VOTING FOR: Cashman
Vafiades

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 21 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.