

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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LAW COURT DOCKET NO. PUC 11-1

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**COMCAST PHONE OF MAINE, LLC,**

**Appellant**

v.

**MAINE PUBLIC UTILITIES COMMISSION,**

**Appellee**

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On Appeal from Decision of the Maine Public Utilities Commission

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**BRIEF OF *AMICI CURIAE* VERIZON COMMUNICATIONS INC.  
AND THE VOICE ON THE NET COALITION  
IN SUPPORT OF APPELLANT COMCAST PHONE OF MAINE, LLC**

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**STATEMENT OF INTEREST AND AUTHORITY TO FILE**

On February 25, 2011, this Court issued its “Order Permitting Verizon and Voice on the Net Coalition to File Brief as Amici Curiae,” granting Verizon Communications Inc.’s (“Verizon”) and the Voice on the Net (“VON”) Coalition’s February 14, 2011 motion for leave to file a joint brief as *amici curiae* (“Motion”). Verizon and the VON Coalition are thus authorized to file this brief pursuant to Rule 9(e) of the Maine Rules of Appellate Procedure.

As stated in the Motion, Verizon affiliates and VON Coalition members provide Voice over Internet Protocol (“VoIP”) services in Maine and elsewhere nationwide. In light of this, the question of whether the Maine Public Utilities Commission (“MPUC”) has authority to regulate VoIP services and/or the providers of such services could directly affect Verizon’s and VON Coalition members’ operations in Maine and, as precedent construing federal law and policy, elsewhere throughout the country. *See generally* Motion at 1-3. For these reasons, *amici curiae* have a substantial interest in the outcome of the case.

## **INTRODUCTION AND SUMMARY**

This case involves the MPUC's improper attempt to regulate VoIP services by invoking state telecommunications statutes that only apply to traditional telephone services.

VoIP service, which is provided over a broadband connection, allows customers to manage their voice communications with a fully integrated suite of functions and features not available to customers served over traditional, "circuit-switched" telephone networks. Comcast's VoIP customers can, for example, speak to one person by phone, while listening to a voice mail from someone else on his or her computer, while forwarding another voice mail to someone else via e-mail, all while watching Caller ID information relating to an incoming call pop up on his or her television screen. VoIP customers can also customize their services, controlling how and where they receive calls, and also review and store call information online. And VoIP providers and their customers do not distinguish between "local" and "long distance" calls; the service relies on Internet Protocol addresses that have no identifiable geographic location. As the Federal Communications Commission ("FCC") has observed, the "functionalities" of VoIP service "form an integrated communications service designed to overcome geography, not track it."<sup>1</sup>

Moreover, the FCC has recognized that state attempts to force VoIP services into legacy regulatory regimes based on geography would "severely limit the

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<sup>1</sup> Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning and Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404, 22420, ¶ 25 (2004) ("*Vonage Order*"), *petitions for review denied, Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

development of . . . VoIP services,” which is something the FCC “cannot, and will not, risk,” because VoIP services “facilitate[] additional consumer choice, spur[] technological development and growth of broadband infrastructure, and promote[] continued development and use of the Internet.” *Id.* at 22427, ¶ 37.

The MPUC and other state utility commissions have jurisdiction only over “intrastate” calls – calls that originate and terminate within the state. The FCC has exclusive jurisdiction over all other calls. The FCC has found that the integrated functionalities of VoIP services are inseverable and render it “too multifaceted for simple identification of the user’s location to indicate jurisdiction,” giving the FCC exclusive jurisdiction over VoIP services. *See Vonage Order*, 19 FCC Rcd at 22419, ¶ 23. Contrary to the MPUC’s assertion, this inseverability finding applies to all VoIP services, whether they are “nomadic” (that is, usable from any location), or “fixed,” like Comcast’s service, which is contractually limited to use at a designated location.<sup>2</sup>

The fact that VoIP traffic is jurisdictionally interstate is not the only reason the MPUC lacks jurisdiction over it. In addition, VoIP services are “information services” subject to exclusive federal regulation, rather than “telecommunications services” to which traditional state telecommunications regulations apply. Not only do VoIP services offer the capability for a net protocol conversion, as Comcast demonstrates, but they also independently satisfy the statutory definition of “information service” in the federal Communications Act because they offer customers an integrated suite of

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<sup>2</sup> See Appendix, hereinafter “A,” at 24, 134.

features and capabilities that allow them to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.” 47 U.S.C. ¶ 153(24); *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 977, 987, 1000 (2005) (“*Brand X*”).

For both reasons, the MPUC’s decision is unlawful and must be reversed; state utility commissions such as the MPUC are preempted from regulating VoIP services as though they were traditional, intrastate telecommunications services.

## ARGUMENT

### **I. THE FCC'S FINDINGS IN THE VONAGE ORDER MEAN THAT STATE REGULATION OF ALL VOIP SERVICES IS PREEMPTED**

#### **A. The FCC's Inseverability Finding, Which Led It To Preempt Minnesota's Regulation of Vonage's VoIP Service, Applies To All VoIP Services**

In its *Vonage Order*, the FCC concluded that, because VoIP service is inseverably interstate, the Minnesota utility commission's attempt to regulate Vonage's "DigitalVoice" VoIP service conflicts with federal law and is preempted. The FCC explained 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." *Vonage Order*, 19 FCC Rcd at 22411, ¶ 14. In making this finding, the FCC relied on the integrated nature of Vonage's service – that is, it offered customers any-distance calling without distinguishing between "local" and "long-distance" minutes, along with a "suite of integrated capabilities and features" using Internet protocol technology that "allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities." *Id.* at 22424, ¶ 32. "These functionalities in all their combinations," the FCC explained, "form an integrated communications service designed to overcome geography, not track it." *Id.* at 22420, ¶ 25.

As a result, the FCC found that its traditional, "end-to-end" analysis for determining the jurisdiction of communications services did not readily apply



to IP-enabled communications services. Because VoIP services have the “inherent capability ... to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communications session and to perform different types of communications simultaneously,” they cannot meaningfully be sliced up into individual components and the end points cannot be separately tracked or recorded. *Vonage Order*, 19 FCC Rcd 22419, ¶ 25. Therefore, even if information identifying a VoIP customer’s geographic location were “reliably obtainable,” the *Vonage Order* made clear that this is far from the only information that would matter under an end-to-end analysis; one would also need to know the location of the myriad databases, servers, and websites utilized during the communication session. *Id.* at 22418-19, ¶ 23. These integrated services and functionalities rendered Vonage’s service “too multifaceted for simple identification of the user’s location to indicate jurisdiction.” *Id.* at 22419, ¶ 23.

The FCC did not limit this analysis to Vonage’s service, or even to other “nomadic” VoIP services, which can be used from any broadband connection. Instead, the FCC explained that the “integrated capabilities and features” that render VoIP services inseverable – and, therefore, interstate for jurisdictional purposes – “are not unique to [Vonage’s service], but are inherent features of most, if not all, IP-based services.” *Vonage Order*, 19 FCC Rcd at 22421, ¶ 25 n.93. As the FCC explained, its conclusions about Vonage’s service apply as well to “other types of IP-enabled services having basic characteristics similar to” that service: “to the extent other entities, such as cable companies, provide

VoIP service, we would preempt state regulation to an extent comparable to what we have done in this Order.” *Id.* at 22424, ¶ 32 (footnote omitted); *see also id.* at 22421, ¶ 25. In this regard, the FCC cited an array of submissions from cable providers and their trade associations demonstrating that cable companies’ VoIP offerings share the features and capabilities that the FCC identified as basic characteristics of Vonage’s offering that supported the FCC’s finding of inseparability and its determination that state regulation is preempted. *Id.* at 22424, ¶ 32, n.113. For example, the FCC pointed to Cox Communications’ statement that cable VoIP providers’ network design permits them to “offer a single, integrated service that includes both local and long distance calling and a host of other features that can be supported from national or regional data centers and accessed by users across state lines” and “include generation of call announcements, record-keeping, CALEA, voice mail and other features such as \*67, conferencing and call waiting.” *Id.* The FCC also cited a filing from the National Cable & Telecommunications Association (“NCTA”), which explained that “[c]able VoIP offers consumers an integrated package of voice and enhanced features that are unavailable from traditional circuit-switched service.... Not every cable VoIP service has the same mix of features and functionalities ..., but all cable VoIP offers the types of enhancements that render it an interstate service. Similarly, while the network architecture of each cable VoIP system will not be identical, they share the same centralized network design that imparts an interstate nature.” *Id.* Another NCTA submission the FCC cited explained that “functions integral to

every call, such as CALEA compliance, voicemail recording, storage and retrieval, call record-keeping, 3-way calling and other functions are provided from these central facilities ... often located in a state different from the origin of the call.” *Id.*

Comcast’s VoIP service, like the other cable VoIP providers’ services to which the FCC pointed, has each of the basic characteristics the FCC identified in the *Vonage Order*, making it an inseverable, interstate service that is subject to the FCC’s exclusive jurisdiction. As Comcast’s witnesses testified, the calling features of its Digital Voice service (“CDV”) are inextricably intertwined with other computing and information service functions as part of a single integrated service offering. Comcast’s SmartZone™ offering, for example, allows CDV customers to access their voicemail through a secure website and forward digitized voice messages to any e-mail address; route Caller ID information through a traditional Caller ID device, their personal computer or television, and receive notifications of incoming CDV calls through instant messages or on their television screen; enable, disable and customize voice and video features over the Internet; enable distinctive rings for different callers; and establish rules for the selective handling of incoming calls. A135-136. CDV’s integrated features, functions and capabilities also allow subscribers to conduct multiple simultaneous voice communications sessions and perform different types of simultaneous actions over Comcast’s broadband network. A136.

Moreover, the centralized design of Comcast's network means that many of the components used to provide CDV's integrated, IP-enabled features and capabilities are located *outside* of Maine. For example, the "headends" of the Comcast hybrid fiber-coaxial ("HFC") network over which Maine customers' CDV calls travel are located in New Hampshire. A131. The switch that controls the routing of all VoIP packets that traverse the Comcast HFC network, and which performs the database query that correlates 10-digit numbers with IP addresses and reformats CDV packets in order to provide CDV service to Maine customers, is located in Massachusetts. *Id.*

The MPUC did not dispute Comcast's account of the integrated nature of its VoIP service, and acknowledged that the FCC's preemption finding was rooted in the integrated, jurisdictionally inseparable nature of Vonage's service. A33-34. The MPUC nevertheless concluded that the *Vonage Order* was inapplicable, because Vonage's DigitalVoice service was nomadic and Comcast's Digital Voice service was fixed. But this is a distinction without a difference, and the MPUC's attempt to use it as a jurisdictional hook does not survive even a cursory review of the *Vonage Order*. In the *Vonage Order*, the FCC expressly stated that *all* VoIP services – including fixed services offered by "cable companies" – are interstate so long as they share a set of the same "basic characteristics." *Vonage Order*, 19 FCC Rcd at 22424, ¶ 32. As the FCC recognized, fixed VoIP services, such as Comcast's, share all of the "basic characteristics" listed by the FCC in the *Vonage Order*. *See id.*; *see also id.* at 22421, ¶ 25 n.93. Furthermore, the MPUC's claim that "portability" was

dispositive to the FCC's analysis ignores that, when the FCC itself identified the "basic characteristics" that render a VoIP service inseverable and subject to the FCC's exclusive jurisdiction, it did *not* include "portability" in that list. *Id.* at 22424, ¶ 32.

In sum, the fact that Comcast, as a business matter, chose to require its customers to use their VoIP service at a designated location, rather than allowing them to use it from any broadband connection, does not give the MPUC a basis for asserting jurisdiction.<sup>3</sup>

**B. Preemption Does Not Require an Express Order by the FCC**

In rejecting challenges to the *Vonage Order*, the Eighth Circuit found that, because the FCC was not faced "with the precise issue" of whether to preempt state regulation of a fixed VoIP service, the question of whether state regulation of such services are preempted was "not ripe for review." *Minnesota Pub. Utils. Comm'n*, 483 F.3d at 582. The MPUC interprets this statement as an invitation for the states to regulate fixed VoIP services. A36-37. But the Eighth Circuit was simply recognizing a limitation on its jurisdiction.

*Minnesota Pub. Utils. Comm'n*, 483 F.3d at 582 (citing Article III of the United

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<sup>3</sup> It is beyond dispute that the standard for determining whether traffic is "interstate" or "intrastate" in nature is not whether it is somehow technologically possible to carve out a purely intrastate service. Rather, the dispositive question is whether it is "economically feasible," in light of "practical and economic considerations," to separate interstate traffic from intrastate traffic. *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994); *Vonage Order*, 19 FCC Rcd at 22418-19, ¶¶ 23. That focus on economic and practical considerations reflects the long-standing rule that carriers are not required to expend resources and to modify their services "merely to provide state commissions with an intrastate communication they can then regulate." *Minnesota Pub. Utils. Comm'n*, 483 F.3d at 578. Nothing in the record suggests that, as an economic or practical matter, Comcast's fully integrated VoIP service can be broken apart into separate federal and state services.

States Constitution). The fact that the Eighth Circuit did not have jurisdiction to review the New York Public Service Commission's challenge to one aspect of the *Vonage Order* does not, as the MPUC believed, leave state commissions free to regulate fixed VoIP services.

State law is preempted not merely where Congress or the FCC has stated expressly that state action is preempted; preemption also occurs where there "is an actual conflict between state and federal law." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008); *see also Robards v. Cotton Mill Assocs.*, 677 A.2d 540, 544 (Me. 1996) (recognizing both types of preemption). The United States Supreme Court has rejected the view that "a formal agency statement of preemptive intent [is] a prerequisite to concluding that a conflict exists." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000). On the contrary, the Court stated that it would "assume that . . . an agency ordinarily would not intend to permit a significant conflict." *Id.* at 885.

Therefore, even if the *Vonage Order* is not treated as an express statement that states are preempted from regulating fixed VoIP services – because the agency was not confronted with a state attempting to do precisely that – the preemption inquiry is not at an end. The question is whether state regulation of Comcast's CDV service *conflicts with* federal law. That is because, as this Court has recognized, it "is through operation of the supremacy clause of the United States Constitution that federal law preempts conflicting state law." *Robards*, 677 A.2d at 543 (internal quotation marks omitted).

The *Vonage Order* makes clear that the MPUC's order conflicts with federal law. As shown above, the record establishes that Comcast's VoIP service is "practical[ly] inseverab[le]" under the FCC's analysis. *Vonage Order*, 19 FCC Rcd at 22424, ¶ 32. Moreover, "because of the impossibility of separating" Comcast's VoIP service into separate federal and state services, state regulation such as the MPUC's "*outright conflicts* with federal rules and policies governing interstate" VoIP services. *Id.* at 22424, ¶ 31 (emphasis added). Those policies promote the introduction of innovative services and the deployment and development of broadband. *See, e.g., id.* at 22426-27, ¶ 36. Indeed, the Eighth Circuit specifically upheld the FCC's determinations that state regulation – like the MPUC's here – may "*harm consumers by impeding the development of vigorous competition*" and "conflicts with the federal policy of nonregulation" of broadband and information services, which permits those services to "flourish in an environment of free give-and-take of the market place." *Minnesota Pub. Utils. Comm'n*, 483 F.3d at 580 (internal quotation marks omitted; emphasis in original).

The MPUC acknowledges the FCC's "assertion that it must stand guard against 'multiple disparate attempts to impose economic regulations'" on VoIP (A35), but nevertheless proceeds to impose state-specific regulation on Comcast's VoIP service, without offering any justification for its apparent view that the FCC's policy of non-regulation of information services applies to some VoIP services, but not others. There can be no such justification. The conflict with federal law that preempts state regulation of VoIP service is exactly the

same, whether a VoIP provider makes the business decision to offer its service at a designated location or whether it allows a customer to use the VoIP service at other locations.

**C. The FCC's Federal VoIP USF Order Does Not Sanction State Utility Regulation of VoIP Services**

The MPUC claims that an FCC order issued in 2006 – addressing contributions by VoIP providers to the federal Universal Service Fund (“USF”) – cut back on the *Vonage Order*'s conclusion that state commissions are preempted from regulating *all* VoIP services. A36. Here, too, the MPUC is wrong.

The MPUC relies on the FCC's statement in its *Federal VoIP USF Order*<sup>4</sup> that “an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation.” A36. (*quoting Federal VoIP USF Order*, 21 FCC Rcd at 7546, ¶ 56). But nothing in the record here suggests that Comcast – or any other provider of VoIP service, fixed or nomadic – has that capability. Nor was the FCC stating that fixed VoIP services are *categorically* severable for jurisdictional purposes and, therefore, subject to state regulation.<sup>5</sup> In case there was any doubt about

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<sup>4</sup> Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) (“*Federal VoIP USF Order*”).

<sup>5</sup> In describing a hypothetical VoIP provider with the “capability to track the jurisdictional confines” of a call, the FCC was referring to the capability to assemble *all* of the information necessary to make a jurisdictional finding, not simply the capability to identify a customer's geographic location. Indeed, in the *Vonage Order*, the FCC had stressed that the customer's “geographic location” was only “one clue to a



that, the FCC's more recent *State VoIP USF Order*<sup>6</sup> – in which the FCC for the first time authorized states to require VoIP providers to make USF contributions – stresses that “nothing in” the FCC's decision to allow states to require such contributions “affects our conclusion in the *Vonage Preemption Order* concerning preemption of rate regulation, tariffing, or other requirements that operate as ‘conditions to entry’” with regard to VoIP services. *State USF VoIP Order*, 25 FCC Rcd at 15661, ¶ 23.

In all events, the FCC's two *VoIP USF* orders confirm the FCC's exclusive authority to determine the regulations, if any, that will apply to all VoIP services. Indeed, when Nebraska initially sought to require state USF contributions, the Eighth Circuit held that Nebraska was preempted from doing so, because the *Vonage Order* confirms that “[the FCC], and not state commissions, has the responsibility to decide if such regulations will be applied.” *Vonage Holdings Corp. v. Nebraska Pub. Svc. Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009). Only after the FCC issued its *State VoIP USF Order* in 2010, in which the FCC expressly authorized states to collect universal service fees from VoIP providers, did states obtain the authority to regulate VoIP providers in that way. The MPUC points to nothing from the FCC authorizing it to regulate fixed VoIP providers.

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jurisdictional finding,” not the dispositive piece of information. *Vonage Order*, 19 FCC Rcd 22419, ¶ 25.

<sup>6</sup> *Universal Service Contribution Methodology*, Declaratory Ruling, 25 FCC Rcd 15651 (2010) (“*State VoIP USF Order*”).

## **II. COMCAST'S VOIP SERVICE IS AN INFORMATION SERVICE UNDER FEDERAL LAW, SO STATES CANNOT REGULATE IT**

There is no dispute that information services are subject to exclusive federal regulation. As Comcast demonstrates, the FCC has long preempted states from regulating information services, and federal courts have upheld those decisions.<sup>7</sup> The MPUC explicitly acknowledged that the “FCC has adopted a policy of ‘non-regulation’” of information services. A38.

If the Court determines, as it should, that the *Vonage Order* means that the MPUC is preempted from regulating VoIP service, whether as a matter of express or conflict preemption, the Court need not reach the question of whether VoIP is an information service or a telecommunications service under federal law. If the Court does reach this question, however, it should find that VoIP is an information service, not a telecommunications service (as the MPUC held), and that the MPUC is preempted from regulating VoIP services for that reason.

### **A. VoIP Is an Information Service**

Although the FCC has not yet addressed the classification of VoIP services, federal courts have found that VoIP services are information services under federal law. *See PAETEC Communications, Inc. v. CommPartners, LLC*, Civ. A. No. 08-0397(JR), 2010 WL 1767193, \*2 (D.D.C. Feb. 18, 2010) (“PAETEC”); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006); *Vonage Holdings Corp. v. Minn. Pub.*

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<sup>7</sup> See March 8, 2011 “Brief of Appellant Comcast Phone of Maine, LLC and Its Affiliates” (“Comcast Br.”) at 19-21.

*Utils. Comm'n*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003), *aff'd*, 394 F.3d 568 (8th Cir. 2004). “Information service’ and ‘telecommunications service’ are mutually exclusive categories” under federal law. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007).

“Information service” is defined in 47 U.S.C. § 153(24)<sup>8</sup> as:

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

As Comcast explains in detail in its brief, and *amici* agree, under long-standing federal precedent, a service that offers the capability to perform a “net protocol conversion” – in this case, the conversion from IP to Time Division Multiplexing (“TDM”) protocol or *vice versa* – satisfies the definition of information service. *See* Comcast Br. at 16-17; 21-33. Because Comcast’s CDV service includes a net protocol conversion (the “offering of a capability for...transforming or processing...information via telecommunications”), that fact alone makes it an information service under federal law.

But, as Comcast also notes, CDV service qualifies as an information service for a second reason, independent of the fact that it includes a protocol conversion.<sup>9</sup> CDV is a hallmark example of an information service because it

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<sup>8</sup> As Comcast explains, prior to the 2010 amendments to 47 U.S.C. § 153, the “information service” definition appeared at 47 U.S.C. § 153(20). *See* Comcast Br. at 6, n.5.

<sup>9</sup> *See* Comcast Br. at 22 n.14.

offers a “suite of integrated capabilities and features,”<sup>10</sup> allowing customers to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.” 47 U.S.C. § 153(24).

In *Brand X*, the United States Supreme Court addressed the question of whether an offering with multiple components is a single, integrated information service or contains a separable service that can be regulated as a telecommunications service. There, the Court affirmed the FCC’s decision that cable modem service, which included both a data transport element (telecommunications) and Internet access (information service), was a single information service – an integrated whole -- rather than a separate telecommunications service sold alongside a separate information service. The Court explained that the test for determining whether such a service is an information service, and not two distinct services, is to look at what the customer perceives as the finished product. If the various features are offered as a single, integrated service, without a “transparent transmission path” to provide telephone service separate from any information processing – as was the case in *Brand X* – the service is properly classified as an information service. *Brand X*, 545 U.S. 967, 990-91, 998-1000.

Here, too, Comcast’s CDV offers customers a single, integrated service, many features of which indisputably meet the definition of information service; there is no separate offering of a pure transmission capacity “without change in the form or content of the information as sent and received” (47 U.S.C. §

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<sup>10</sup> See, e.g., *Vonage Order* at 22407, ¶ 7.

153(50)), as this Court must find to affirm the MPUC's classification of CDV as a telecommunications service. 47 U.S.C. § 153(53).

As Comcast showed, and as explained above, CDV enables customers to take full advantage of the benefits of IP technology by providing them with integrated calling and messaging features and capabilities that allow them to manage their communications preferences and functions using their phone, computer or television, thereby capitalizing upon the information service capabilities offered by CDV.

In addition, the record below demonstrates that CDV makes extensive use of information stored in various electronic databases – such as the databases that associate IP addresses with 10-digit telephone numbers (permitting the “translation” of telephone numbers into IP addresses in order to route CDV calls over the Comcast network) and the off-network SS7 databases that house the Caller ID information used to show CDV customers who is calling them – in order to populate the data fields in the CDV IP data packets and route IP traffic. A130; A132. Such ability to access, retrieve and use the information housed in such databases constitutes the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” that defines an information service under federal law. Indeed, in *Brand X*, the Supreme Court upheld the FCC's conclusion that the similar use of the Domain Name System (“DNS”) database – which “matches the Web page addresses that end users type into their browsers (or ‘click’ on) with the Internet Protocol addresses of

the servers containing the Web page the users wish to access” – renders the broadband Internet service that Comcast and other cable companies provide an information service. *Id.* at 987, 990-91, 998-1000 (footnote omitted).

CDV customers also have the capability to generate, acquire, store, transform, process, retrieve, utilize and make available information by accessing Comcast’s on-line “Digital Voice Center” (a Comcast web portal available through any Internet connection) to control their communications interactively, setting up the features and functionalities of their CDV service – for example, call forwarding, call screening, incoming/outgoing call logs, voicemail and address book management. A103-04. In the future, CDV subscribers will be able to use such integrated capabilities to program their digital video recorders remotely. A104. Features such as interactive video, conference calling (both with and without video) and integrated computing are not far behind. A136.

These features, functions, and capabilities go well beyond those available with traditional circuit-switched telephone services and are tightly integrated and intertwined with the other capabilities enabled by Comcast’s IP network (A103-04), thereby offering a wide array of capabilities for “generating, acquiring, storing, transforming, processing, retrieving, utilizing and making available information via telecommunications.” Just as there was no pure telecommunications function separable from the information service components in the cable modem service under review in *Brand X*, the transmission component of CDV is “sufficiently integrated with the finished

service to make it reasonable to describe the two as a single, integrated offering.” *Brand X*, 545 U.S. at 990.

Indeed, while the FCC did not need to reach the issue in its *Vonage Order*, its description of the VoIP services offered by cable companies and others, likewise, makes clear that it does not view VoIP services as offering transmission separate from information processing, but as an integrated whole – a “suite of integrated capabilities and features” that includes aspects that are information services under the statutory definition.

Because VoIP services such as CDV are information services under 47 U.S.C. § 153(24) – both because they include a net protocol conversion and because they offer the end user an integrated finished product, without a separable offering of a pure transmission capability – federal law preempts the MPUC’s Order.

**B. The MPUC Erred in Concluding That CDV Does Not Satisfy the Statutory Definition of an Information Service**

In finding that CDV is a telecommunications service, rather than an information service, the MPUC focused almost entirely on the question of whether CDV involves a “net protocol conversion.” A41-44. As Comcast correctly explains, the MPUC’s bases for ignoring the capability for a net protocol conversion that CDV offers all of its subscribers are erroneous. Comcast Br. at 16-17; 21-33.

With respect to the question of whether CDV satisfies the statutory definition of “information service” independent of whether it offers a capability

for a net protocol conversion, the MPUC offered only two responses. As shown below, neither has merit.

1. The MPUC stated that it was “not persuaded” that the various features and capabilities included with Comcast’s CDV service “are materially different from similar services” that the MPUC claimed the FCC had “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.” A44. As support, the MPUC cited only a 1998 report by the FCC to Congress, in which the FCC stated, among other things, that 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.”<sup>11</sup>

As an initial matter, the MPUC engages in question begging, because it presumes that Comcast’s CDV service – even if offered as an IP-based voice service only, without any additional features<sup>12</sup> – would be a telecommunications service. But that is wrong for two reasons. First, as Comcast explains, even that voice-only service would offer the capability for a

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<sup>11</sup> Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11530, ¶ 60 (1998).

<sup>12</sup> At hearing, various counsel and the hearing examiner asked a number of questions regarding whether Comcast could strip CDV down to a voice-only VoIP offering. A59-65; 69-70. However, there was no record evidence that consumers wish to purchase such an offering, and the FCC has stated that it will not require VoIP providers to break apart their service offerings simply to make it easier to force those services into legacy regulatory categories, particularly where – as here – there is “no service-driven reason” to do so. *Vonage Order*, 19 FCC Rcd at 22422-23, ¶ 29 (emphasis in original).



net protocol conversion, which would be sufficient to render a voice-only CDV service an information service. Second, a voice-only CDV service would also require database queries to associate telephone numbers with IP addresses, which the MPUC recognized “undoubtedly involve[], at the least, the ‘acquiring,’ ‘retrieving,’ ‘transforming,’ or ‘making available information via telecommunications,’” which “fit comfortably within the statutory definition of ‘information service.’” A41. As shown above, the similar database queries necessary to associate web page names (*e.g.*, www.courts.state.me.us) with IP addresses (*e.g.*, 24.39.63.76) are sufficient to render broadband Internet access service an information service. *Brand X*, 545 U.S. at 987, 990-91, 998-1000.

In all events, the MPUC draws the wrong conclusion from the FCC’s statement that a local exchange carrier cannot transform a traditional (non-IP-based) telephone service from a telecommunications service into an information service by packaging it with voice mail (which is an information service). The FCC began its discussion by explaining that “hybrid services” – which include one or more information services as “an inseparable part” of the offered service – “are information services, and are not telecommunications services.” Report, 13 FCC Rcd at 11529, ¶¶ 56-57. Although the FCC recognized that it “may not always be straightforward” whether a provider is offering an integrated service or “two distinct services, one of which is a telecommunications service,” the FCC explained that the key inquiry is “whether, functionally, the consumer is receiving two separate and distinct services.” Report, 13 FCC Rcd at 11530, ¶ 60.

The record here makes clear that Comcast's CDV customers are receiving what is functionally a single service, unlike a traditional carrier's package of standard telephone service and voice mail. Indeed, CDV does not simply "package" together distinct Comcast service offerings that can also be purchased *a la carte*. To the contrary, a Comcast customer *cannot* elect to purchase only a subset of CDV's features and capabilities. A64. Although a CDV subscriber may choose not to *use* each and every one of those features and capabilities, CDV is, at its core, a single, integrated product offering that is unavailable as separate components. A63-64.

In other words, unlike traditional local telephony offerings, which a customer can purchase either with or without voice mail, CDV is an integrated offering of an array of features and capabilities that are inextricably intertwined with, and inseverable from, one another. CDV, therefore, cannot be characterized as "a 'stand-alone,' transparent offering of [a] telecommunications" service that has been bundled with stand-alone information services. *Brand X*, 545 U.S. at 988. It is, instead, a single, integrated offering that is properly treated as a "hybrid service" and, therefore, an "information service[], . . . not [a] telecommunications service[]." Report, 13 FCC Rcd at 11529, ¶ 57. Because CDV's inseverable and intertwined features and capabilities are offered as part of a single, integrated service – and cannot practically be broken apart into component pieces – CDV "combine[s] both telecommunications and information components" and must accordingly be "treated as [an] information service[]." *PAETEC*, 2010 WL 1767193 at \*2.

2. The MPUC also relied on the Communications Act's exclusion of the "use of an[] [information processing] capability for the management, control, or operation of a telecommunications system" from the statutory definition of information service in concluding that CDV was not an information service. 47 U.S.C. § 153(24) (quoted at A41). The MPUC, however, relied on that exclusion only with respect to the database queries necessary to associate telephone numbers and IP addresses. A41. As Comcast explains, the United States Supreme Court and the FCC have rejected the argument that such database-querying activities fall within the "management and control" exception.<sup>13</sup> Comcast Br. at 30, n.20.

Moreover, the MPUC does not claim that any of the wide array of *other* integrated features and capabilities of CDV, detailed above, are excluded by the "management, control, or operation" language. Nor could it. These integrated features are not used by *Comcast* to manage or operate a telecommunications system, but instead are used by Comcast's *customers* to implement *for themselves* their personal preferences for using CDV. The FCC recognized this in its *Vonage Order*, noting that, "[t]ogether, these integrated features and capabilities allow *customers to control* their communications needs by determining for themselves how, when, and where communications will be sent, received, saved, stored, forwarded, and organized." *Vonage Order*, 19 FCC Rcd at 22408, ¶ 8 (emphasis added). The statutory definition of

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<sup>13</sup> Comcast also explains that the "management and control" exception is inapplicable in the "net protocol conversion" context in which the MPUC invoked it. Comcast Br. at 30-33.

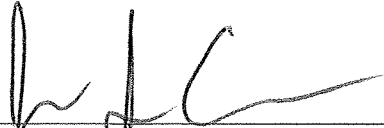
information service is clear that the “management, control, or operation” exclusion applies only to features that the *provider* offers and uses itself to manage a telecommunications system, and that an information service does not lose its characterization as such simply because *customers* use those features to manage their service preferences.

**CONCLUSION**

For the foregoing reasons, and those in Comcast's brief, the Court should overturn the MPUC's Order.

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**CERTIFICATE OF SERVICE**

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