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Investigation into Regulation of  
Voice over Internet Protocol (VoIP) Services

Docket No. 7316

POST-HEARING REPLY BRIEF OF AT&T SERVICES, INC. AND  
*AMICI CURIAE* VERIZON ACCESS AND THE VOICE ON THE NET COALITION  
IN SUPPORT OF COMCAST PHONE OF VERMONT, LLC

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AT&T Services, Inc. (“AT&T”) — a party to this proceeding — and MCImetro Access Transmission Services LLC, d/b/a Verizon Access (“Verizon”) and the Voice on the Net Coalition (“VON”) — which were invited to participate as *amici curiae*<sup>1</sup> — submit this reply brief in support of Comcast Phone of Vermont, LLC’s (“Comcast”) argument that VoIP services, such as Comcast’s XFINITY Voice, are properly classified as information services under federal law. AT&T, Verizon, and VON jointly filed a brief as *amici curiae* before the Vermont Supreme Court on that question.<sup>2</sup>

### INTRODUCTION AND SUMMARY

The question currently before the Board is whether Comcast’s VoIP service, XFINITY Voice,<sup>3</sup> is an information service under federal law.<sup>4</sup> We file this brief to address the basic propositions of federal law that must guide the Board in answering that question, as well as to identify significant errors of federal law in the Department’s and Independents’ briefs. These basic propositions of law compel the conclusion — as every federal court to consider the question has found — that all VoIP services, including XFINITY Voice, are information services under federal law.

First, VoIP services that offer customers the capability of communicating with, and receiving communications from, people served on the public switched telephone network (“PSTN”) are information services under federal law, because those services offer the capability

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<sup>1</sup> See Order Re: Intervention at 6, 7, Docket No. 7316 (July 29, 2011).

<sup>2</sup> See Entry Order, *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, Docket No. 2012-109 (Vt. May 3, 2012) (granting motion for leave to file brief as *amici curiae*).

<sup>3</sup> Like Comcast, we use XFINITY Voice generically to refer to Comcast’s residential and business VoIP services. See Comcast Br. 1 n.1.

<sup>4</sup> See *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 2013 VT 23, 70 A.3d 997, 1006-08, ¶¶ 24-31 (Vt. 2013).

for a “net protocol conversion” from IP to TDM or from TDM to IP. Contrary to the claims of the Department and the Independents, the ownership or control of the device that allows the VoIP customer to use an ordinary telephone with a VoIP service is irrelevant to the question of whether that VoIP service offers the capability for a net protocol conversion. Equally erroneous are their claims that the net protocol conversion that enables VoIP customers to speak with customers served on the PSTN fits within the three categories of protocol processing services that the Federal Communications Commission (“FCC”) in its *Non-Accounting Safeguards Order*<sup>5</sup> concluded are not information services.

Second, under the test the United States Supreme Court applied in *National Cable & Telecommunications Association v. Brand X Internet Services*,<sup>6</sup> VoIP services are information services because they offer customers a single, integrated suite of 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.”<sup>7</sup> The FCC expressly recognized that the information processing features of all VoIP services are “tightly integrated” into the service that is offered to consumers.<sup>8</sup> Furthermore, VoIP services use databases to convert telephone numbers into IP addresses in the same manner that Internet access providers convert Web site names into IP addresses — an integrated, information processing function that *Brand X* found

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<sup>5</sup> First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996) (subsequent history omitted).

<sup>6</sup> 545 U.S. 967 (2005).

<sup>7</sup> 47 U.S.C. § 153(24).

<sup>8</sup> Memorandum Opinion and Order, *Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶ 32 (2004) (“*Vonage Order*”), *petitions for review denied*, *Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

sufficient to classify broadband Internet access as an information service. In contending that VoIP services consist of discrete telecommunications service and information service components, the Department and the Independents fail to address the FCC's own characterization of VoIP services or the tight integration of information processing necessary to link IP addresses to telephone numbers.

## ARGUMENT

### I. **VoIP SERVICES ARE INFORMATION SERVICES UNDER FEDERAL LAW BECAUSE THEY OFFER THE CAPABILITY OF A NET PROTOCOL CONVERSION**

A VoIP service that offers customers the capability of communicating with people who are served on the PSTN is an information service because it offers the capability to perform a “net protocol conversion”: namely, from the IP protocol to the TDM protocol used by traditional telephone companies, or *vice versa*. A Missouri federal court relied on this very “net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN” to find that VoIP service “is an information service.”<sup>9</sup> As Comcast notes, all four federal courts to address the issue have held that VoIP services are information services, and none has reached the contrary result.<sup>10</sup>

To avoid this clear federal precedent, both the Department and the Independents assert that voice communications originate on Comcast's network in analog format — not IP format — so there is no net protocol conversion when such a communication is delivered to a customer on

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<sup>9</sup> *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008).

<sup>10</sup> See Comcast Br. 22-23 (discussing federal court precedent); see also *Non-Accounting Safeguards Order* ¶ 104 (“protocol processing services constitute information services under the [Telecommunications Act of] 1996”).

the PSTN.<sup>11</sup> To support this assertion, both rely on Comcast’s ownership or control of the device (the “eDVA”) at the customer’s premises that converts analog voice signals into IP packets, and *vice versa*. As Comcast demonstrates, the FCC has repeatedly held that the eDVA and similar devices are customer premises equipment (“CPE”), irrespective of the extent to which the VoIP provider owns or controls the device.<sup>12</sup> The FCC’s position is, at a minimum, a reasonable interpretation of the statute, which defines CPE based on where it is “employed” — on the “premises of a person (other than a carrier)” — and not on the person’s ownership or control over the equipment.<sup>13</sup> The FCC’s determination that the device that allows ordinary telephones to be used with a VoIP service is “specialized CPE”<sup>14</sup> is therefore binding.<sup>15</sup>

The Department ignores this more recent FCC precedent and relies instead on a 1980 FCC order to claim that a device like Comcast’s eDVA “is a service provider-controlled multiplexer” that is not CPE.<sup>16</sup> The Department does not quote the FCC order, which in fact excluded from CPE “multiplexing equipment to deliver multiple channels to the customer,” without regard to the service provider’s control of the equipment, or lack thereof.<sup>17</sup> Furthermore, as the FCC later explained, such multiplexing equipment is not CPE — despite being employed at a customer’s premises — only when it “allows multiple customers to receive individual telephone service through carrier-provided multiplexing equipment where multiple loops are not

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<sup>11</sup> See Department Br. 11-15; Independents Br. 14-18.

<sup>12</sup> See Comcast Br. 28-30.

<sup>13</sup> 47 U.S.C. § 153(16).

<sup>14</sup> *E.g.*, *Vonage Order* ¶ 6.

<sup>15</sup> See, e.g., *Brand X*, 545 U.S. at 986 (affording *Chevron* deference to the FCC’s interpretation of a definition in the Communications Act of 1934).

<sup>16</sup> Department Br. 13-14.

<sup>17</sup> Memorandum Opinion and Order, *Second Computer Inquiry*, 39 P.U.R. 4th 319, ¶ 28 n.10 (FCC 1980).

available” to a premises.<sup>18</sup> The devices that VoIP providers offer their customers so that ordinary telephones can be used with VoIP service do not meet that standard, as they are used to provide service to an individual customer.

The Department and the Independents also contend that, even if VoIP communications originate on Comcast’s network in IP format, VoIP service is not an information service despite the net protocol conversion. They claim that the protocol processing necessary to let VoIP customers communicate with people served on the PSTN falls within at least one of the three categories of protocol processing the FCC has held are not information services.<sup>19</sup> As Comcast demonstrates, they are wrong.<sup>20</sup>

The first category the FCC identified is where the protocol conversion enables “communications between an end-user and the network . . . *rather than between or among users.*”<sup>21</sup> The second category is where the protocol conversion occurs “to maintain compatibility with existing CPE.”<sup>22</sup> VoIP services fit within neither category, because the relevant net protocol conversion — from IP to TDM or *vice versa* — is one that enables communication between users of VoIP and PSTN services, and occurs after the call enters (or before the call exits) the VoIP provider’s network in IP format. In relying on these first two exceptions, both the Department and the Independents make the mistake of focusing on the “specialized CPE” — here, the eDVA — that lets a VoIP customer use an ordinary telephone

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<sup>18</sup> Memorandum Opinion and Order, *Pacific Bell Request for Authority to Provide Asynchronous/X.25 Protocol Conversion*, 3 FCC Rcd 3082, ¶ 17 (1988).

<sup>19</sup> See Department Br. 22-27; Independents Br. 18-21; see also *Non-Accounting Safeguards Order* ¶ 106.

<sup>20</sup> See Comcast Br. 24-27.

<sup>21</sup> *Non-Accounting Safeguards Order* ¶ 106 (emphasis added).

<sup>22</sup> *Id.*

with a VoIP service.<sup>23</sup> Neither addresses the conversion between IP and TDM that enables communications between VoIP and PSTN users, which falls outside these two categories.

The third category is where the “conversion[] tak[es] place *solely within* the carrier’s network,” so that there is “no net conversion to the end-user.”<sup>24</sup> The FCC has found that protocol processing falls within this category where a call between two people served on the PSTN is converted — by a carrier in the middle of the call path, for its own convenience — from TDM to IP, and then back to TDM format.<sup>25</sup> VoIP services, in contrast, involve a “net conversion to the end-user” — that net protocol conversion is what transforms a VoIP service from one that would only permit communications among VoIP users into one that enables the VoIP customers also to communicate with people served on the PSTN. The Department, therefore, is wrong in claiming that Comcast performs protocol conversions “so Comcast can route the voice messages over its network.”<sup>26</sup>

In sum, VoIP services, including XFINITY Voice, offer the capability of a net protocol conversion and are information services under federal law for that reason alone.

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<sup>23</sup> See Department Br. 25-26; Independents Br. 20-21.

<sup>24</sup> *Non-Accounting Safeguards Order* ¶ 106 (emphasis added).

<sup>25</sup> See Order, *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 12 (2004) (“To the extent that protocol conversions associated with AT&T’s specific service take place within its network, they appear to be ‘internetworking’ conversions . . . .”); Comcast Br. 26-27 (citing FCC precedent).

<sup>26</sup> Department Br. 27. The Independents rely only on the first two categories. See Independents Br. 19.

## II. VoIP SERVICES ARE INFORMATION SERVICES UNDER FEDERAL LAW BECAUSE THEY OFFER INFORMATION PROCESSING AS PART OF A SINGLE, INTEGRATED SERVICE OFFERING

VoIP services qualify as information services under federal law for a second, and independent, reason: they offer consumers a suite of integrated capabilities and features that allow customers to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.”<sup>27</sup> In the *Vonage Order*, the FCC expressly found that *all* VoIP services — including those offered by facilities-based providers, such as cable companies — offer consumers a “tightly integrated” package of “communications capabilities” and that these “integrated capabilities and features, able to be invoked sequentially or simultaneously, . . . allow[] customers to manage personal communications dynamically.”<sup>28</sup> Although the FCC did not need in the *Vonage Order* to classify VoIP services as information services in order to preempt the state regulations at issue there, the FCC’s conclusion that VoIP services “tightly integrate[]” information processing and telecommunications into a single offering leads inexorably to the conclusion — reached by every federal court to consider the question — that all VoIP services are information services under federal law.<sup>29</sup>

The Department disputes this conclusion, asserting (without citing evidence) that consumers “perceive[]” VoIP services “as a telecommunications service that has certain other ancillary services” bundled with it.<sup>30</sup> The Department’s *ipse dixit* provides no basis for the

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<sup>27</sup> 47 U.S.C. § 153(24).

<sup>28</sup> *Vonage Order* ¶ 32; *see id.* ¶ 25 n.93 (recognizing that “these integrated capabilities and features” are “inherent features” in VoIP services offered “by facilities-based providers,” as well as by providers such as Vonage).

<sup>29</sup> *See Comcast Br.* 34.

<sup>30</sup> Department Br. 18; *see id.* at 16 (“To the end-user of Comcast’s service, the voice component stands as a separately identifiable service.”).

Board to question the FCC's conclusion, which deserves deference as a matter of federal law.<sup>31</sup>

The FCC's conclusion also refutes the Department's and Independents' contention that the "integrated capabilities and features" of VoIP services that "allow[] customers to manage personal communications dynamically"<sup>32</sup> are mere add-ons — akin to packaging voice mail with POTS service.<sup>33</sup> These features are, instead, "inherent" parts of the VoIP services themselves, inextricable from the ability to place or receive voice communications.<sup>34</sup>

One such feature is the use of a database to convert from the IP address to the telephone number assigned to a VoIP customer. That conversion is necessary every time a VoIP customer places or receives a call. On outbound calls, the conversion is necessary to provide a telephone number — rather than an IP address — on the called party's Caller ID display. It is necessary every time a VoIP customer receives a call, because callers dial the telephone number, not the IP address assigned to the VoIP customer. This database is used in the same manner as the Domain Name Server ("DNS") database, which "matches the Web site address the end user types into his browser" — such as <http://www.vermont.gov> — with the "IP address" — 206.16.212.90 — that actually identifies "the Web page's host server."<sup>35</sup> In the same way that broadband Internet access customers use the broadband transmission "always in connection with the information-processing capabilities provided by" the integrated DNS service, VoIP customers use the voice

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<sup>31</sup> See *Brand X*, 545 U.S. at 986 (deferring, under *Chevron*, to the FCC's conclusion that cable modem service is a single, integrated offering of information processing and telecommunications).

<sup>32</sup> *Vonage Order* ¶ 32.

<sup>33</sup> See Department Br. 20-22; Independents Br. 23-26.

<sup>34</sup> *Vonage Order* ¶ 25 n.93.

<sup>35</sup> *Brand X*, 545 U.S. at 999.

transmission “always in connection” with the information processing necessary to associate IP addresses with telephone numbers.<sup>36</sup>

The Independents note that carriers providing service on the PSTN also use databases when routing telephone calls.<sup>37</sup> But they do not acknowledge either the Supreme Court’s conclusion that the integrated DNS functionality renders broadband Internet access an information service or that VoIP services utilize an identical, integrated functionality to convert IP addresses into a format (here, telephone numbers rather than Web site names) more readily accessible to users. Equally erroneous is the Department’s contention that a VoIP service cannot be an information service if it utilizes a private IP network rather than the public Internet.<sup>38</sup> The statutory definition of information services makes no mention of using the public Internet to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.”<sup>39</sup> Nor did the FCC draw such a distinction in the *Vonage Order*, when it recognized that VoIP services from “cable companies” are a single, “tightly integrated” offering, no different from VoIP services offered by companies, like Vonage, that rely on the public Internet.<sup>40</sup> And, although *Brand X* involved an Internet access service, it was the information processing tightly integrated into that offering — not the access to the public Internet (rather than a private IP network) — that led the Supreme Court to uphold the FCC’s classification.

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<sup>36</sup> *Id.* at 988; *see id.* at 990-91, 999; Comcast Br. 37-39.

<sup>37</sup> *See* Independents Br. 21.

<sup>38</sup> *See* Department Br. 19-20.

<sup>39</sup> 47 U.S.C. § 153(24).

<sup>40</sup> *Vonage Order* ¶ 32.

In sum, VoIP services, including XFINITY Voice, offer consumers a tightly integrated package of communications and information processing, and are information services under federal law for this reason as well.

### CONCLUSION

Applying the principles of federal law set forth above, the answer to the question the Vermont Supreme Court directed the Board to address is clear: XFINITY Voice, like all VoIP services, is an information service under federal law.

Respectfully submitted,



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March 31, 2014

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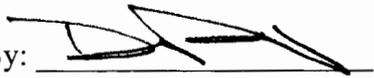
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