Decision No. R23-0337

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22D-0293T

IN THE MATTER OF THE VERIFIED PETITION OF TRIAL STAFF OF THE COMMISSION FOR A DECLARATORY ORDER REGARDING THE APPLICABILITY OF C.R.S. § 17-42-103 AND CONSTRUING THE DEFINITION OF THE TERM "PENAL COMMUNICATION SERVICES."

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MELODY MIRBABA GRANTING PETITION

Mailed Date: May 23, 2023

TABLE OF CONTENTS

I. STATEMENT, SUMMARY, AND BACKGROUND

A. Summary

1. In this Declaratory Order case, the Colorado Public Utilities Commission Trial Staff (Staff) asks the Commission to find and declare that the requirements of § 17-42-103, C.R.S., (2022) apply to voice-over-internet-protocol (VoIP) service providers; to define how the term "penal communication services" in the same statute should be construed; and to declare that HomeWAV, LLC (HomeWAV) is subject to the statutory requirements in § 17-42-103, C.R.S.[1] For the reasons discussed below, the ALJ grants the Petition.[2] In doing so, this Decision rejects arguments that federal law preempts § 17-42-103, C.R.S.

B. Procedural History[3] and Background

2. Staff initiated this matter by filing the above-captioned Petition for Declaratory Order (Petition) on June 22, 2022.

[1] *See* Staff's Petition for Declaratory Order and Motion to Compel Joinder (Petition).

[2] In reaching this Decision, the ALJ has considered the entire record, all arguments presented, including those discussed briefly or not at all. To the extent that a specific argument is not addressed, it has been considered and rejected. Headings are for ease of reference only. In reaching this Decision, the ALJ considers pleadings on file in this Proceeding consistent with Rule 1400(f), 4 *Code of Colorado Regulations* (CCR) 723-1 and Colorado Rule of Civil Procedure (C.R.C.P.) 56(c).

[3] Only the procedural history necessary to understand this Decision is included.

3. On July 19, 2022, the Commission accepted the Petition as permitted by Rule 1304(f) and referred this matter to an Administrative Law Judge (ALJ) for disposition.[4]

4. In addition to Staff, the parties to this proceeding are HomeWAV and Global Tel*Link Corporation, doing business as ViaPath Technologies and its subsidiary Telmate, LLC, doing business as ViaPath Technologies (collectively, ViaPath).[5]

5. Since the parties agreed that an evidentiary hearing is unnecessary, the ALJ did not schedule one, instead establishing a procedural schedule, including deadlines to file stipulated facts, motions for summary judgment and responses thereto.[6]

6. Both HomeWAV and ViaPath filed briefs responding to the Petition.[7]

7. On October 4, 2022, the parties filed a Joint Statement of Stipulated Facts (Stipulated Facts).

8. On October 21, 2022, HomeWAV filed a Motion for Summary Judgment (HomeWAV's Motion), and Staff filed a Motion for Summary Judgment Pursuant to C.R.C.P. 56 (Staff's Motion).

9. On November 4, 2022, HomeWAV filed a Response to Staff's Motion (HomeWAV's Response) and Staff filed a Response to HomeWAV's Motion (Staff's Response).

[4] Rule 1304(f) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1; Decision No. C22-0419-I at 5 (mailed July 19, 2022).

[5] Decision Nos. R22-0493-I at 4 (mailed August 18, 2022); R22-0518-I at 4-5 (mailed September 6, 2022).

[6] *See* Decision No. R22-0518-I at 3-5.

[7] ViaPath's Responsive Brief filed August 8, 2022 (ViaPath's Brief); HomeWAV's Responsive Brief filed September 15, 2022 (HomeWAV's Brief). ViaPath's Brief purports to be submitted by out-of-state counsel, but such counsel never submitted a motion seeking *pro hac vice* admission, contrary to Rule 1201(a), 4 CCR 723-1. However, its Brief is signed by in-state counsel licensed to practice in Colorado. The same is true of all of ViaPath's filings in this Proceeding. Given that in-state counsel signed all of ViaPath's pleadings, the pleadings are accepted as submitted by in-state counsel only. ViaPath's out-of-state counsel is not authorized to practice in this tribunal and must comply with Rule 1201(a), 4 CCR 723-1 should counsel wish to be afforded *pro hac vice* status and practice in this tribunal.

II. FACTUAL FINDINGS

10. As an initial matter, the ALJ finds that there are no material facts in dispute.

11. HomeWAV provides an inmate communication platform that enables inmates to communicate with their friends and family using HomeWAV's application (HomeWAV app) and hardware.[8] HomeWAV platform allows inmates to place voice calls using non-interconnected voice over internet protocol (IP) (VoIP), video calls, and send "e-messages" from detention centers using HomeWAV's app.[9]

12. All of HomeWAV's inmate communication offerings at issue here (voice and video calls and e-messaging) are transmitted over the Internet using the HomeWAV app.[10]

13. HomeWAV provides its inmate communications solutions to the following correctional facilities in Colorado: Adams County Detention Facility in Brighton; Alamosa County Jail in Alamosa; Bent County Jail in Las Animas; Jackson County Jail in Walden; Moffat County Jail in Craig; Morgan County Jail in Fort Morgan; Prowers County Jail in Lamar; and Saguache County Jail in Saguache.[11]

14. Generally, HomeWAV's service allows users (family and friends of inmates) to create an online account, select an inmate and facility, and add funds[12] to the account to enable the inmate to initiate outbound communication.[13] For video calls and e-messaging, a visitor must

[8] Stipulated Facts at 1 and 3.

[9] *Id.* at 1. HomeWAV's platform also offers emoji/stock photos/gifs, games, movies, and music. *Id.* at 2.

[10] *Id.* at 1-3.

[11] *Id.* at 2-3. HomeWAV does not provide inmate communications solutions to any correctional facility run by or overseen by the Colorado Department of Corrections. *Id.* at 3.

[12] Inmates can fund their own accounts if correctional facility has integrated call time purchasing with HomeWAV. *Id.* at 3, fn. 2.

[13] *Id.* at 3.

register on the HomeWAV app and add the inmate to the visitor's account.[14] Inmates must set up their own account via the HomeWAV app to make calls or send e-messages.[15]

15. HomeWAV's voice service allows inmates to place voice calls to any valid 10-digit U.S. phone number (including landlines, mobile, and VoIP phones).[16] Inmates place calls from an application on a Windows PC or tablet.[17] To initiate a voice call, inmates log in to their HomeWAV account, select the contact with whom the inmate would like to communicate or manually enter the phone number, and click on or phone icon for voice calls; the called party answers the call like any other voice call. [18] Voice traffic originates from the web browser or android application and are transmitted to HomeWAV's suppliers' servers using various protocols.[19] All HomeWAV voice calls originate in IP format via the public internet, and its suppliers perform any protocol conversion needed for termination of voice traffic.[20]

16. The process to place video calls is similar, except that the inmate choses the video icon in HomeWAV's app; the called party must be logged in to HomeWAV's app to receive a video call; and the called party must accept the call through HomeWAV's app.[21]

17. To send e-messages, the inmate must log into their HomeWAV account, select the e-message icon, select an icon to open a virtual keyboard, and then can type and send e-messages to visitors who must also have the HomeWAV app to receive messages.[22]

[14] *Id.* at 3, fn. 3.
[15] *Id.*
[16] *Id.* at 3.
[17] *Id.*
[18] *Id.* at 3, fn. 3.
[19] *Id.* at 3.
[20] *Id.*
[21] *Id.* at 3, fn. 3.
[22] *See id.* at 2-3, fn. 1.

18. HomeWAV's voice offering enables one-way real-time voice communications that originate from or terminate to the user's location (the application on the PC or tablet at the correctional facility) using IP for transmission and requires IP-compatible customer premises equipment, that is, the web application on the PC or tablet.[23] HomeWAV's voice service is interconnected with the public switched telephone network (PSTN) on one end (the terminating end).[24]

19. HomeWAV's voice service qualifies as a non-interconnected VoIP service under the Federal Communications Commission's (FCC) rules, and HomeWAV is registered with the FCC as a non-interconnected VoIP service provider.[25]

III. PARTIES' ARGUMENTS

A. Staff's Arguments

20. Staff argues that the plain language of § 17-42-103, C.R.S. demonstrates that the terms "penal communication services" is expansive and general.[26] Citing to the dictionary definition of "communications," Staff argues that the term means "the technology of the transmission of information (as by print or telecommunication)" or "a system (as of telephones or computers) for transmitting or exchanging information."[27] Based on the this, Staff asserts that VoIP providers such as HomeWAV plainly provide communications services for transmitting or exchanging information and are thus included in the statutory definition under § 17-42-103, C.R.S.

[23] *Id.* at 4.
[24] *Id.*
[25] *Id.*
[26] Petition at 6.
[27] *Id.* quoting https://www.merriam- webster.com/dictionary/communications.

21. Staff also argues that the terms "penal communication services" in § 17-42-103(2)(e), C.R.S., is intended to be construed broadly. Staff explains that under Colorado case law and the basic canons of statutory construction, the word "including" in a statute is ordinarily used as a word of enlargement, rather than limitation.[28] Staff submits that the use of "including telephone services" in the definition of "penal communication services" under § 17-42-103(2)(e), C.R.S., evinces the General Assembly's intent that telephone services and other types of communication services, such as VoIP, are subject to regulation under the statute.[29]

22. Staff submits that its interpretation of "penal communication services" finds support in other provisions in the statute, such as the requirement in § 17-42-103(3)(a)(IX), C.R.S., for providers to report the number of consumer complaints "related to video quality." Staff argues that this requirement clearly illustrates that the statute applies broadly to communications, and not just to telephone communications.[30]

23. Staff asserts that its interpretation of "penal communication services" in § 17-42-103(2)(e), C.R.S., is bolstered by the legislative history of House Bill (HB) 21-1201.[31] In support, Staff asserts that the General Assembly made deliberate linguistic modifications to the original statute and to HB 21-1201 during the legislative process to strike language limiting "penal communications services" to traditional telecommunications providers. Staff explains that prior to the 2021 legislative session, § 17-42-103, C.R.S., was a single paragraph prohibiting the Department of Corrections from receiving "any commission from the phone provider except as necessary" to recover costs.[32] HB 21-1201 deliberately replaced the word "phone" with "penal

[28] *Id.* at 7, citing, *People v. Hayes*, 490 P.3d 1056, 1059, *cert. denied*, No. 21SC39, 2021 WL 2769832 (Colo. June 28, 2021).
[29] *Id. See* Staff's Motion at 3.
[30] Petition at 7, quoting § 17-42-103(3)(a)(IX), C.R.S. *See* Staff's Motion at 3.
[31] Petition at 8. *See* Staff's Motion at 3-4.
[32] Petition at 8, quoting § 17-42-103, C.R.S., (2020).

communications services," thereby demonstrating that the General Assembly favored the broader "penal communications services" terminology over the more narrow "phone" and "phone provider" language in the prior statutory language.[33] Staff asserts that this is consistent with the overall statutory design.

24. Staff also argues that the introduced version of HB 21-1201 included the term "telecommunications" prolifically but was revised to change "telecommunications" to "communications."[34] Staff submits that these deliberate revisions could only have been made to bring the bill in harmony with the overall statutory design, and to prevent the terms "penal communications services" from being narrowly construed to only apply to telecommunication carriers.[35]

25. Based on the above, and the stipulated fact that HomeWAV provides an inmate communications platform to eight county jails in Colorado, Staff asserts that HomeWAV is subject to § 17-42-103, C.R.S., as a penal communications service provider.[36]

[33] Petition at 8-9. *See* Staff's Motion at 3-4.
[34] Petition at 9, citing Attachment B to Petition (introduced version of HB 21-1201) and Attachment C to Petition (engrossed version of HB 21-1201).
[35] *Id. See* Staff's Motion at 3-4.
[36] *See* Staff's Motion at 2-4.

B. HomeWAV's and ViaPath's Arguments[37]

26. HomeWAV presents state and federal law arguments. Starting with HomeWAV's state law arguments, HomeWAV argues that HB 21-1201's legislative history does not include any discussion as to what the General Assembly intended when it changed "telephone" service and "prison telecommunications services" language in prior bill versions to "penal communications services."[38] HomeWAV also suggests that because HB 21-1201 removed restrictions on the Commission's authority over telephone or telecommunication services at correctional facilities, the General Assembly's decision not to amend other statutory restrictions on the Commission's authority over VoIP services, information services, and IP-enabled services speaks more to HB 21-1201's reach than the statutory changes on which Staff relies.[39]

27. In support, HomeWAV explains that HB 21-1201 did not modify provisions in § 40-15-401, C.R.S., that exempt information services, IP-enabled services, and VoIP services and the providers of such services from regulation under article 15, title 40, Colorado Revised Statutes, and the Public Utilities Law of the state of Colorado.[40] While the statute at issue here (§ 17-42-103, C.R.S.,) is not in title 40 at all, HomeWAV argues that the jurisdiction limits in title 40, article 15 extend beyond that article.[41] In support, HomeWAV argues that an administrative agency has no power to act beyond the authority granted in the statute creating the agency. Because the Commission draws its authority from title 40, HomeWAV asserts that its jurisdiction

[37] For administrative efficiency, this Decision describes HomeWAV's and ViaPath's arguments under the above header, including responses to Staff's arguments, and Staff's responses to HomeWAV's and ViaPath's arguments under a separate header below.
[38] HomeWAV's Response at 6.
[39] *See id.* at 7.
[40] *See id.* at 6-7, citing § 40-15-401(1)(i), (q), (r); and §§ 40-1-103(1)(b)(VI); and 40-15-107(3), C.R.S.
[41] HomeWAV's Brief at 8.

is limited to the authority provided in title 40.[42] HomeWAV argues that when the General Assembly enacted HB 21-1201, it must have intended for the term "penal communications provider" to exclude providers over which the Commission lacks jurisdiction under title 40.[43]

28. Similarly, HomeWAV argues that the Commission lacks authority over it because it is not a public utility as defined in § 40-1-103(1)(a)(I), C.R.S, and the Commission only has the power to regulate public utilities.[44] In support, HomeWAV argues that the Colorado Supreme Court recently held in *Danks v. Colorado Public Utilities Commission*, (*Danks*), that the Commission's jurisdiction extends only to public utilities.[45] Because it is not a public utility under in § 40-1-103(1)(a)(I), C.R.S., HomeWAV concludes that the Commission lacks jurisdiction over it.[46]

29. Turning to the federal law arguments, HomeWAV and ViaPath argue that the federal Communications Act of 1934 (the Act)[47] preempts § 17-42-103, C.R.S.[48] ViaPath argues that federal law governs the regulatory treatment of information and broadband-enabled services, which have been historically free from state regulation under federal law.[49]

[42] *See id.* citing *O'Bryant v. Pub. Utilis. Comm'n*, 778 P.2d 648, 655 (Colo. 1989); *Miller Bros., Inc. v. Pub. Utils. Comm'n*, 525 P.2d 443, 451 (Colo. 1974); *Flavell v. Dep't of Welfare, City and County of Denver*, 355 P.2d 941, 943 (Colo. 1960).

[43] HomeWAV's Motion at 8-9, citing *Martin v. People*, 27 P.3d 846, 851-52 (Colo. 2001); *Allen v. Bailey*, 91 Colo. 260, 267 (1932).

[44] *Id.* at 7-8. *See* HomeWAV's Response at 7-8, citing § 40-1-103(1)(a)(I), C.R.S., and *Danks v. Colo. Pub. Utilis. Comm'n,* 512 P.3d 692, 699 (Colo. 2022).

[45] *See* HomeWAV's Response at 8, citing *Danks v. Colo. Pub. Utilis. Comm'n.* 512 P.3d 692, 699 (Colo. 2022).

[46] HomeWAV's Response at 8.

[47] References to the Act are to 47 USC §§ 151-646, as amended.

[48] HomeWAV's Brief at 4-7 and Motion at 6-7; ViaPath's Brief at 3-12. To the extent that ViaPath makes the same arguments as HomeWAV, those are not repeated.

[49] ViaPath's Brief at 7, citing *Nat'l Cable & Telecommc's. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005) (*Brand X*); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

30. HomeWAV argues that the FCC has classified videoconferencing services, and text and e-messaging as unregulated "information services."[50] ViaPath generally agrees, adding that any form of video communication, whether offered through dedicated hardware or multipurpose electronic devices, are a form of interoperable video conferencing deemed by the FCC as an "information service" and that broadband internet access service is an "information service" under the Act.[51]

31. HomeWAV acknowledges that its voice service is interconnected with the PSTN on the terminating end, but since its service does not enable real-time, two-way voice communications, HomeWAV submits that its service is not "interconnected VoIP" under the Act.[52]

32. Both HomeWAV and ViaPath heavily rely on the FCC's decision preempting state regulations in *The Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) (Vonage Order or 2004 Vonage Order), *aff'd sub nom. Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). HomeWAV asserts that the Vonage Order preempts state regulation of IP-enabled services that require a broadband connection and specialized customer premises equipment, route traffic over the internet, enable voice communications, and offer additional features.[53] HomeWAV argues that its services meet these criteria and qualify as "non-

[50] HomeWAV's Brief at 4, citing *In the Matter of Framework for Broadband Internet Serv.,* 25 FCC Rcd. 7866, 7909–10 (2010); *In the Matter of Petitions for Declaratory Ruling on Regul. Status of Wireless Messaging Serv*., 33 FCC Rcd. 12075 (2018); *In the Matter of Commc'ns Assistance for L. Enf't Act & Broadband Access & Servs*., 20 FCC Rcd.14989, 15000 (2005); *In the Matter of Implementation of Sections 716 & 717 of the Commc'ns Act of 1934*, 26 FCC Rcd. 14557, 14574 (2011).

[51] ViaPath's Brief at 4-5, citing *Restoring Internet Freedom,* 33 FCC Rcd 311, ⁋ 22 (2018); *Framework for Broadband Internet Service*, 25 FCC Rcd 7866, ¶ 107 (2010).

[52] HomeWAV's Brief at 4-5 citing 47 C.F.R. §§ 9.3; *In the Matters of IP-Enabled Servs. & E911 Requirements for IP-Enabled Serv. Providers*, 20 F.C.C. Rcd. 10245, 10257–58 (2005).

[53] HomeWAV's Brief at 4, citing 47 CFR § 64.601(28); *Vonage Order*, 19 FCC Rcd at 22406-08.

interconnected VoIP" under the FCC's definition of that term.[54] HomeWAV also argues that under the Vonage Order, the FCC, not the state commissions have the responsibility to decide whether certain regulations apply to VoIP service and other IP-enabled services having the same capabilities.[55] HomeWAV asserts that while the FCC has authorized states to exercise limited oversight over interconnected VoIP providers (which does not include market entry requirements), the FCC extended no such authority to regulate non-interconnected VoIP.[56] Likewise, HomeWAV argues that the FCC has preempted state commissions from exercising jurisdiction over providers of "information services."[57]

33. For all these reasons, HomeWAV argues that federal law preempts the Commission's regulation of its services, including any market entry or licensing requirements, universal service contribution obligations, or reporting responsibilities.[58]

34. While HomeWAV acknowledges the Vonage Order's specific recognition that states "will play their vital role" in preventing fraud and policing business practices, it asserts that policing fraud and other abuses is reserved for other offices in Colorado's government and that it is inappropriate for the Commission to take on this role.[59]

35. ViaPath argues that the FCC has jurisdiction when a service is used to complete interstate communications, and also has jurisdiction over services that have both interstate and intrastate components when it is impossible or impracticable to separate the interstate and

[54] *Id.*
[55] *Id.* at 7, citing *Vonage Order*, 19 FCC Rcd 22404.
[56] *Id.* at 6-7, citing *In the Matter of Universal Serv. Contribution Methodology,* 21 FCC Rcd. 7518, 7537 (2006); *In the Matter of Universal Serv. Contribution Methodology*, 25 FCC Rcd. 15651, 15658 (2010).
[57] *Id.* at 7, citing *Vonage Order* at fn.78.
[58] *See id.* at 5-7.
[59] *See* HomeWAV's Response at 9, citing §§ 6-1-103, and 111(2); 40-1-103(1)(a)(I); 44-1-101 *et seq*; 24-35-108, C.R.S.; *Danks*, 512 P.3d at 699; *Vonage Order,*19 FCC Rcd at 22405.

intrastate components of the service.[60] ViaPath submits that for the FCC to regulate the intrastate portion of a jurisdictionally mixed service, the matter to be regulated must have both interstate and intrastate aspects; FCC preemption or regulation must be necessary to protect a valid federal regulatory objective; and state regulation must negate the FCC's exercise of its own lawful authority because the interstate aspects cannot be unbundled from the intrastate aspects.[61]

36. ViaPath argues that even if broadband-enabled services include an intrastate component, there is no practical way for the Commission to regulate only that component of the service, noting that broadband-enabled services rely on internet functionality to operate, and can be accessed from any location in the world.[62] ViaPath argues that based on this, the FCC has found it would be impossible to separate the intrastate component of internet-based services that have the following characteristics: a requirement for a broadband connection from the user's location; a need for IP-compatible customer premises equipment; and includes a suite of integrated capabilities and features.[63] ViaPath argues that the FCC concluded it would preempt state regulation of these types of services because such regulation would conflict with federal rules and policies governing interstate communications.[64]

37. ViaPath submits that subsequent court decisions in *Mozilla v. FCC* (*Mozilla*) and *ACA Connects-America's Commc'n. Ass'n*, *et al. v. Bonta*, (*ACA Connects*) do not invalidate or upset the above proposition.[65] ViaPath explains that the *Mozilla* Court only invalided the portion

[60] ViaPath's Brief at 7-8, citing *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 375 (1986); *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *Vonage Order,* 19 FCC Rcd 22404, at ¶ 17.

[61] *See Id.* at 8, citing *Rates for Interstate Inmate Calling Services*, 35 FCC Rcd 8485, ¶ 30 (2020); *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 103 (D.C. Cir. 1989); *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

[62] *Id.* at 8-9.

[63] *Id.* at 9, citing *Vonage Order,* 19 FCC Rcd 22404, at ⁋ 32.

[64] *Id.* citing *Vonage Order,* 19 FCC Rcd 22404 at ⁋⁋ 31-32.

[65] *Id.* citing *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (*Mozilla*); *ACA Connects-America's Commc'n. Ass'n, et al. v. Bonta*, 24 F.4th 1233 (9th Cir. 2022) (*ACA Connects*).

of the FCC's decision that found that all state or local measures that impose rules or requirements on broadband service that are not imposed by the FCC's 2018 *Restoring Internet Freedom* decision are preempted.[66] ViaPath submits that the *Mozilla* Court only invalidated this because there was no specific state or local law at issue, and therefore, it could not make a conflict-preemption determination.[67] ViaPath argues that the *Mozilla* Court expressly concluded that a state law that undermines the FCC's regulation of broadband could give rise to conflict preemption.[68]

38. For all these reasons, ViaPath submits that broadband-enabled services offered by those who provide inmate communication services are information services governed by federal, and not state regulatory law.

39. ViaPath also argues that regulating information and broadband-enabled services would stifle the growth of such services, which have flourished under a policy of "light-touch regulation."[69] It submits that doing so is contrary to the public interest, and that the General Assembly's decision to "exempt from regulation" information services, IP-enabled services, and VoIP services demonstrates this.[70] ViaPath argues that similar to Colorado, the FCC has adopted a "national policy of nonregulation of information services" because such services "flourish" when free from unnecessary and harmful economic regulation at the federal and state levels.[71] ViaPath argues that departing from this "light-touch" regulatory approach would stifle innovation and diminish the development and availability of "these literally life-changing and lifesaving

[66] *Id.* at 10, citing *Mozilla*, 940 F.3d at 74; *Restoring Internet Freedom,* 33 FCC Rcd 311, ⁋ 195 (2018).
[67] *Id.* citing *Mozilla*, 940 F.3d at 82.
[68] *Id.* citing *Mozilla*, 940 F.3d at 85.
[69] *Id.* at 13-15.
[70] *Id.* at 13, citing § 40-15-401(1)(e), (i), (k), (q) and (r), C.R.S.
[71] *Id.* at 14, citing *Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecomm's Nor a Telecomm's Serv.*, 19 FCC Rcd 3307, ¶ 1 (2004) (*Pulver*); *Restoring Internet Freedom,* 33 FCC Rcd 311, at ¶¶ 3, 49.

technologies to the detriment of the incarcerated, their friends and family, and correctional facilities alike."[72]

1. Staff's Response

40. Staff urges the Commission to reject arguments that it lacks authority over HomeWAV and other similar providers. First, Staff argues that the limits on the Commission's jurisdiction in § 40-15-401(1), C.R.S., plainly and unequivocally do not apply to § 17-42-103, C.R.S., because § 40-15-401(1), C.R.S., only applies to the Commission's authority under title 40, and does not speak to the Commission's authority to regulate VoIP and information services under any other title of the Colorado Revised Statutes.[73] Staff asserts that the statutory language in § 40-15-401(1), C.R.S., demonstrates that the General Assembly intended to preserve the authority to regulate VoIP and information services under other titles of the Colorado Revised Statutes.[74]

41. Staff also argues that by amending title 17 (through HB 21-1201), the General Assembly expressed its intent that penal communication service providers be monitored based on very real concerns about protecting vulnerable inmate populations in Colorado.[75] Staff asserts that HomeWAV's statutory interpretation would subvert the General Assembly's manifest intent in § 17-42-103, C.R.S., that the Commission regulate such providers, which is plainly not in the public interest.[76] Staff adds that HomeWAV's construction would limit the Commission's jurisdiction to authority delegated to it in title 40 of the Colorado Revised Statutes, which would also defeat the General Assembly's intent to delegate authority to the Commission in numerous

[72] *Id.* at 15.
[73] Staff's Response at 3. *See* Staff's Motion at 4.
[74] Staff's Motion at 4, 7-8.
[75] Staff's Response at 3.
[76] *Id.*

other areas of governance.[77] In support, Staff points to the General Assembly's delegation of authority to the Commission in titles 6, 24, 27, 39, and 42, Colorado Revised Statutes.[78] Staff argues these examples show that such delegation of authority is well within the General Assembly's discretion, and is a common practice, particularly when the subject of delegation is of public significance, tied to protecting the public interest, or is within the Commission's unique expertise.[79]

42. Staff submits that HomeWAV's position that an entity must be a fully regulated public utility for the Commission to have jurisdiction is without merit.[80] Staff argues that the *Danks* case (upon which HomeWAV relies) does not stand for the proposition that an entity must be a fully regulated public utility before the Commission has any jurisdiction, but, instead, that the case offers a contextualized analysis of what may constitute a public utility as that term is used in the Colorado Constitution, and as it pertains to gas-gathering systems and operations upstream from gas processing facilities.[81] Staff explains that in *Danks*, the Colorado Supreme Court affirmed the Commission's focus on the distinguishing characteristics that make an entity a public utility, with particular emphasis on the language from § 40-1-103, C.R.S., "operating for the purpose of supplying the public."[82] At no point in *Danks* did the Colorado Supreme Court make an all-or-nothing distinction that an entity must be subject to the entirety of the Colorado public utility regulatory framework, or none at all.[83] Staff also appears to argue that inmate communications providers like HomeWAV fall under the definition of a public utility because

[77] Staff's Motion at 5.
[78] *Id.* at 5-6, citing §§ 24-60-2211; 39-32-103 and 104; and 6-1-905, C.R.S.
[79] *See id.* at 5-7.
[80] *Id.* at 8.
[81] *Id.* citing *Danks v. Colo. Pub. Util. Comm'n.*, 512 P.3d 692 (Colo 2022).
[82] *Id.*
[83] *Id.* at 9.

they operate for the purpose of supplying the public, consistent with the *Danks* decision, and § 40-1-103, C.R.S.[84]

43. As to federal preemption arguments, Staff asserts that while HomeWAV and ViaPath both rely on numerous examples of FCC and court decisions prohibiting state and federal regulation of VoIP, information services and broadband services, they omit the circumstances under which laws or regulations have been imposed on such services in order to protect vulnerable populations.[85] Examples include: 47 USC § 616, which requires that interconnected and non-interconnected VoIP service providers participate in and contribute to the Telecommunications Relay Services Fund; § 615c(c),[86] which tasks an advisory committee with developing deadlines by which interconnected and non-interconnected VoIP service providers must achieve specific actions that ensure individuals with disabilities have access to emergency services.[87] Staff argues that like any vulnerable population whose needs and circumstances warrant regulating otherwise lightly regulated services, inmate populations similarly call for specific regulation.[88]

[84] *Id.* at 9-10.
[85] *Id.* at 19.
[86] This Decision includes short citations to Act provisions as in the above example. Such short citations are to the cited section within Title 47, of the United States Code (USC).
[87] *Id.* at 18-19
[88] *Id.* at 19.

44. Staff argues that the FCC's inmate calling services rules attempt to correct abuses and potential abuses in this field, and specifically allow for state regulation in areas which it cannot regulate. Staff submits that the regulation at issue in § 17-42-103, C.R.S., is a permissible exercise of legislative power to provide limited regulation to benefit the public good.[89] Staff explains that penal communication services are unlike any other communication service both practically and legally and that the distinct complexities associated with such a vulnerable population requires that the traditional hands-off regulatory approach cannot and should not apply.[90] The functionality provided to inmates is different than those received by end-users who are not inmates given that unlike the general population, inmates cannot access free messaging services provided by companies such as Google.[91] Nor do they have the option of paying for an unlimited text and calling plan, but instead face a series of charges that they or their family or friends must pay or forego communicating with the outside world entirely.[92] Staff urges the Commission to reject arguments that the classification as a penal communication service provider somehow warrants exemption from regulation in such a critical space, as contrary to the public interest. Staff suggests that doing so would realize the concerns that the FCC feared could result if providers exploit the dual regulatory environment and evade oversight entirely.

45. Staff argues that the Vonage Order specifically contemplates continued state legislative and regulatory oversight over certain aspects of VoIP service, particularly as it relates to protecting consumers from fraud and enforcing fair business practices.[93] Staff submits that the

[89] *Id.* at 19-20.
[90] *Id.* at 20.
[91] *Id.*
[92] *Id.* at 20-21.
[93] Staff's Response at 4 citing *Vonage Order,* 19 FCC Rcd. at 22404.

FCC began regulating inmate calling services about a decade after the Vonage Order, and that in various later decisions enacting and modifying inmate calling services regulations, the FCC relies on the Vonage Order.[94] This, Staff asserts, demonstrates the FCC's full awareness of the Vonage Order, and the FCC's conclusion that the inmate calling services rules apply only to interstate aspects of the service, with states retaining a role in regulating certain intrastate aspects of such services.[95] Staff submits that the FCC did so as a part of a group of broader regulatory solutions aimed at correcting and preventing abuses by inmate communication providers, and to avoid situations where providers attempt to exploit the dual state and federal regulatory framework over inmate communications services to evade oversight.[96]

46. Staff argues that ViaPath's reliance on *Glob. Tel*Link v. Fed. Commc'ns Comm'n*, 866 F.3d 397, 401 (D.C. Cir. 2017), supports, rather than undermines Staff's position. Staff explains that in that case, the D.C. Circuit court found that the FCC does not have jurisdiction to require reporting on video calling services.[97] Staff argues that if the FCC does not have statutory authority to require reporting on video calling service, then there is no federal law that can preempt Colorado's video calling reporting requirement under § 17-42-103(3)(a)(IX), C.R.S.[98]

[94] *Id.* citing *In the Matter of Rates for Interstate Inmate Calling Servs.,* 35 FCC Rcd. 8485, ¶ 47 (2020).
[95] *Id.* citing *In the Matter of Rates for Interstate Inmate Calling Servs.,* 35 FCC Rcd. 8485, ¶ 47 (2020).
[96] *Id.* at 4-5.
[97] *Id.* at 5, fn. 12; Staff's Motion at 18-19, citing ViaPath's Brief at 6.
[98] Staff's Response at 5, fn. 12; Staff's Motion at 18-19.

IV. RELEVANT LAW, FINDINGS, ANALYSIS, AND CONCLUSIONS

A. Declaratory Order Authority, Standard of Review, Burden of Proof, and Rules of Statutory Construction

47. The Commission has authority to issue a declaratory order to terminate a controversy or remove uncertainty as to any tariff, statute, or Commission rule, regulation or order.[99] In accepting to the Petition, the Commission determined that evaluating the questions presented therein will remove uncertainty as to whether the reporting obligations contained in § 17-42-103(3), C.R.S., apply to HomeWAV, and uncertainty as to the scope of "penal communication services" under the same statute.[100] As such, the Commission has authority to issue a declaratory order in this Proceeding.

48. The Commission may consider motions for summary judgment filed consistent with Colorado Rule of Civil Procedure (C.R.C.P) 56.[101] Summary judgment is appropriate where there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law.[102] In deciding whether there is a genuine issue of material fact, the Commission may consider the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits.[103] In the context of summary judgment, a material fact is one that will affect the case's outcome.[104]

49. The moving party bears the initial burden to establish the lack of any genuine dispute as to any material fact, but once this burden is met, the burden shifts to the nonmoving

[99] Rule 1304(f), 4 CCR 723-1.
[100] Decision No. C22-0419-I at 4 (mailed July 19, 2022).
[101] Rule 1400(f), 4 CCR 723-1.
[102] C.R.C.P. 56(c).
[103] *See* C.R.C.P. 56(c).
[104] *City of Aurora v. ACJ Partnership,* 209 P.3d 1076, 1082 (Colo. 2009).

party to demonstrate that a triable issue of fact exists.[105] This is demonstrated through relevant and specific facts, supported by evidence, showing that a real controversy exists.[106] In determining whether summary judgment should be granted, all doubts must be resolved against the moving party.[107]

50. The proponent of an order bears the burden of proof by a preponderance of the evidence.[108] The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence.[109] A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.[110] Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion; it must be enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.[111]

51. The primary goal in interpreting a statute is to give effect to the legislature's intent, and there is a presumption that the legislature intends a just and reasonable result which favors the public interest over the private interest.[112] Thus, a statutory interpretation that defeats the legislative intent or leads to an absurd result should not be followed.[113] To give effect to the legislature's intent, words and phrases should be given effect according to their plain and

[105] *Id.*
[106] *Id*. Conclusory statements on ultimate issues without specific facts do not establish that genuine issues of material fact exist. *Olson v. State Farm Mut. Auto Ins. Co.,* 174 P.3d 849, 858 (Colo. App. 2007).
[107] *Jones v. Dressel,* 623 P.2d 370, 373 (Colo. 1981).
[108] §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500, 4 CCR 723-1.
[109] *Swain v. Colorado Dep't of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).
[110] *Schocke v. Dep't of Revenue,* 719 P.2d 361, 363 (Colo. App. 1986).
[111] *City of Boulder v. Public Utilities Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000).
[112] *Kerns v. Kerns,* 53 P.3d 1157, 1160 (Colo. 2002); *People v. Bowman,* 812 P.2d 725, 728 (Colo. App. 1991). *See* § 2-4-201(1)(c) and (e), C.R.S.
[113] *Conte v. Meyer,* 882 P.2d 962, 965 (Colo. 1994).

ordinary meaning.[114] In the absence of a statutory definition of a term, courts may determine an undefined term's plain and ordinary meaning by considering its dictionary definition.[115] A statute must be construed as a whole, and given consistent, harmonious, and sensible effect to all its parts.[116] Along these same lines, the several parts of a statute reflect light upon each other.[117] And, statutes on the same subject should be reconciled when possible to avoid inconsistent or absurd results.[118] If a statute is clear and unambiguous, it must be interpreted as written, and only when a statute is unclear or ambiguous may courts look beyond the plain language of the statute to the legislative history.[119]

52. With these legal principles in mind, the ALJ turns to the substantive issues raised here.

[114] *In re Marriage of Davisson,* 797 P.2d 809, 810 (Colo. App. 1990).
[115] *People v. Harrison,* 465 P.3d 16, 20 (Colo. 2020); *Welch v. Colo. State. Plumbing Bd.,* 474 P.3d 236, 242 (Colo. App. 2020).
[116] *People v. Bowman,* 812 P.2d 725, 728 (Colo. App. 1991); *see* § 2-4-201(1)(b), C.R.S.
[117] *People ex rel. v. Dunbar,* 493 P.2d 660, 665 (Colo. 1972).
[118] *In re Marriage of Chalat,* 94 P.3d 1191, 1194 (Colo. App. 2004).
[119] *People v. Goodale,* 78 P.3d 1103, 1107 (Colo. 2003); *PDM Molding, Inc., v. Stanberg,* 898 P.2d 542, 545 (Colo. 1995). *See* § 2-4-203, C.R.S

B. Scope and Applicability of § 17-42-103, C.R.S., Under State Law

1. Meaning of Penal Communications Services Under § 17-42-103(2)(e), C.R.S.

53. Section 17-42-103, C.R.S., governs policies concerning inmates' use of telephones and communication services in correctional facilities. HB 21-1201's changes to § 17-42-103, C.R.S., include: replacing references to "phone" with "penal communications service;" adding definitions, including one for "penal communications services" and "penal communications service provider;" adding requirements for penal communications service providers to submit quarterly reports to the Commission; requiring the Commission to publish reported information; imposing the FCC's rate caps on intrastate communications; requiring the Commission to perform trial tests to ensure accountability for potential predatory practices and determine the quality of calls to and from a correctional facility and publicly report on the same; and other changes.[120]

54. As noted, under § 17-42-103(3), C.R.S., penal communications service providers are subject to reporting obligations. Such providers must file quarterly reports with the Commission that include: copies of existing contracts between the provider and the government entity to provide penal communications services to persons in custody; the total number of calls made from the correctional facility using the service; the total minutes for calls made from the correctional facility using the service; the revenue collected by the penal communications service provider for the services; a summary of all commissions paid to the correctional facility or any other government entity by the penal communications service provider; a copy of the penal

[120] § 17-42-103(1) to (5), C.R.S.

communications service provider's unclaimed funds policy; the rates and fees charged by the penal communications service provider to persons in custody making telephone calls to persons not in custody; and the total number of consumer complaints related to video quality.[121] Given the nature of the reporting obligations and § 17-42-103, C.R.S., as a whole, the ALJ concludes that the primary obligation imposed under § 17-42-103, C.R.S., on penal communications service providers is quarterly reporting obligations.

55. Section 17-42-103(2)(e), C.R.S., defines "penal communications service," as "communications services, including telephone services provided to a correctional facility for use by end users." Because "communications" is not defined in statute, the ALJ starts by considering the dictionary definition to determine the plain and ordinary meaning of "communications."[122] The common dictionary definition of "communications" is "a system (as of telephone or computers) for transmitting or exchanging information."[123] Applying this common definition, the plain and ordinary meaning of penal communications services in § 17-42-103(2)(e), C.R.S., is a service providing a system for transmitting or exchanging information, including telephone services provided to a correctional facility for use by end users.[124]

56. While the plain statutory language explicitly includes telephone services, it does not do so to the exclusion of other systems or technologies used to transmit or exchange

[121] § 17-42-103(3)(a)(I) to (IX), C.R.S.

[122] *People v. Harrison,* 465 P.3d at 20; *Welch v. Colo. State. Plumbing Bd.,* 474 P.3d at 242.

[123] Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/communications. Another common definition of "communications" is "the technology for the transmission of information (as by print or telecommunication)." *Id.* Applying this definition does not change the outcome, as both definitions include the same common key elements, that is, as system or technology for transmitting information.

[124] § 17-42-103(2)(e), C.R.S.; *People v. Harrison,* 465 P.3d at 20; *Welch v. Colo. State. Plumbing Bd.,* 474 P.3d at 242; Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/communications.

information.[125] Indeed, the Colorado Supreme Court has held that "including" is ordinarily used as a word of enlargement rather than limitation, and that "a statutory definition of a term as 'including' certain things does not restrict the meaning to those items included."[126] The Court noted that to hold otherwise would "transmogrify the word 'include' into the word 'mean.'"[127] For these reasons, the ALJ construes "including telephone services" as used in § 17-42-103(2)(e), C.R.S., as a nonexclusive example of a type of communications service subject to the statute.[128]

57. The above construction of "penal communication services" is consistent with other provisions in § 17-42-103, C.R.S., which reflect light upon the meaning of "penal communications service" in § 17-42-103(2)(e), C.R.S. For example, under the new § 17-42-103(3)(a), C.R.S., penal communication providers must maintain records and data identified in that subsection and compile the same in a report to be filed with the Commission. Among these items, providers must report on the total number of consumer complaints related to video quality, which is not a traditional telephone calling service.[129] This demonstrates that § 17-42-103, C.R.S., contemplates that penal communications service has a broader meaning beyond traditional telephone calling services and should be understood as including systems for transmitting or exchanging information.[130]

[125] *See Cherry Creek Sch. Dist. No. 5 v. Voelker by Voelker*, 859 P.2d 805, 813 (Colo. 1993) (*Cherry Creek*); *People v. Hayes*, 490 P.3d 1056, 1059 (Colo. App. 2020).
[126] *Cherry Creek*, 859 P.2d at 813; *People v. Hayes*, 490 P.3d at 1059.
[127] *Cherry Creek,* 859 P2d at 813, quoting *Lyman v. Bow Mar,* 533 P.2d 1129, 1133 (Colo. 1975).
[128] *See id; Lyman,* 533 P.2d at 1133.
[129] § 17-42-103(3)(a)(I) to (IX), C.R.S.
[130] *See People ex rel. v. Dunbar,* 493 P.2d at 665.

58. Based on the above, the key question in determining whether a service provided to a correctional facility is a "penal communications service" under § 17-42-103(2)(e), C.R.S., is whether the service enables the transmission or exchange of information. HomeWAV provides an "inmate communication platform" to eight Colorado correctional facilities that inmates use to communicate with friends and family. Inmates use HomeWAV's app to transmit and exchange information via VoIP voice call, video call, and e-messaging over the internet. Regardless of the specific format chosen (voice or video calling, or e-messaging), based on the undisputed facts, the ALJ concludes that HomeWAV's inmate communications platform is a system for transmitting or exchanging information. For the reasons and authorities discussed, HomeWAV provides penal communications services within the meaning of § 17-42-103(2)(e), C.R.S., to correctional facilities in Colorado for use by end users, and is therefore subject to § 17-42-103, C.R.S.

2. Other State Law Arguments Against Commission Authority

59. For the reasons and authorities discussed below, the ALJ rejects arguments that the Commission's authority is limited to public utilities and to the authority granted it in its enabling statutes. Similarly, the ALJ rejects arguments that restrictions on the Commission's authority applicable to its jurisdiction under title 40 extend beyond that title. Accepting these arguments would thwart the General Assembly's express intent, contrary to a cardinal rule of statutory construction that statutes should be construed first and foremost to effectuate the General Assembly's intent; and would construe the relevant statutes in such a way as to defeat obvious legislative intent.[131] Doing so would also undermine the General Assembly's legislative authority under Colo. Const. art. V, sec. 1 (1), which is a "clear and unrestricted grant of the

[131] *See Walgreen Co. v. Charnes*, 819 P.2d 1039, 1044 (Colo. 1991); *People v. Sneed*, 514 P.2d 776, 778 (Colo. 1976); *People v. Stevens*, 517 P.2d 1336, 1340 (Colo. 1973).

broadest legislative powers to the general assembly" and confers "every power capable of being delegated to the legislature in the matter of the enactment of laws."[132]

60. Through § 17-42-103, C.R.S., the General Assembly evinced its clear legislative intent to delegate authority over penal communications services and providers to the Commission; in doing so, the General Assembly plainly did not extend any title 40 restrictions on the Commission's authority to § 17-42-103, C.R.S.[133] The fact that the General Assembly chose to delegate authority to the Commission outside of title 40 has no bearing on the validity of the Commission's authority under title 17. The General Assembly plainly acted within its broad constitutional authority in delegating the Commission authority over penal communications services and providers in Title 17.[134] Similarly, whether penal communications service providers are public utilities is not dispositive or relevant. Indeed, since the question here is whether the Commission has authority under title 17, (not title 40), whether HomeWAV and other similar providers are "public utilities" subject to regulation under title 40 is nothing more than a red herring.

61. Under the plain language of § 40-15-401(1) C.R.S., information services, IP-enabled services, and VoIP services and providers are exempt from regulation under articles 1 to 7, and 15, of title 40, Colorado Revised Statutes.[135] Nothing in the plain statutory language

[132] *Vivian v. Bloom*, 177 P.2d 541, 548 (Colo. 1947); *Kerns,* 53 P.3d at 1160; *People v. Bowman,* 812 P.2d at 728.

[133] *See* § 40-15-401, C.R.S. (identifying entities and services over which the Commission lacks jurisdiction to regulate under articles 1 to 7 and 15 of title 40).

[134] *Supra*, ¶ 59.

[135] § 40-15-401(1), C.R.S., (exempts the above services and providers from regulation under article 15 of title 40, and under the "Public Utilities Law" of the state); § 40-1-101, C.R.S., (the "Public Utilities Law" of the state are articles 1 to 7, of title 40, of the Colorado Revised Statutes). *See Colorado Office of Consumer Counsel v. Public Utils. Comm'n,* 752 P.2d at 1052*; In re Marriage of Chalat,* 94 P.3d at 1194*; People v. Bowman,* 812 P.2d at 728*; In re Marriage of Davisson,* 797 P.2d at 810.

supports the proposition that such services and providers are exempt from Commission regulation when the General Assembly expressly gives the Commission authority to regulate under any other article of title 40 or any other title of the Colorado Revised Statutes.[136] Because the plain language of § 40-15-401(1), C.R.S., only restricts the Commission's authority to regulate the identified services and providers under articles 1 to 7 and 15 of title 40, applying those limits beyond title 40 would add language to § 40-15-401(1), C.R.S., that does not exist.[137]

62. The cases that HomeWAV cites in support of its arguments are distinguishable and unhelpful.[138] For example, in *Danks*, the Colorado Supreme Court reviewed a Commission decision applying the definition of a public utility in § 40-1-103(1)(a)(I), C.R.S. While *Danks* discusses the meaning of a public utility under § 40-1-103(1)(a)(I), C.R.S., it does not declare that the Commission only has authority over public utilities even where the General Assembly has statutorily delegated the Commission authority over entities that may not be public utilities.[139] And, *Danks* reviewed the meaning of "public utility" under § 40-1-103(1)(a)(I), C.R.S., which is unhelpful here given that § 40-1-103(1)(a)(I), C.R.S., defines the terms "'public utility' when used in articles 1 to 7" of title 40, Colorado Revised Statutes.[140] Indeed, the question there related to whether an entity is subject to regulation as a public utility under articles 1 to 7, title 40. Here, the Commission does not attempt to regulate the relevant penal communications service providers as public utilities under title 40.

[136] *See In re Marriage of Davisson,* 797 P.2d at 810.

[137] *People v. Goodale,* 78 P.3d 1103, 1107 (Colo. 2003); *PDM Molding, Inc., v. Stanberg,* 898 P.2d at 545; *In re Marriage of Davisson,* 797 P.2d at 810.

[138] *See* HomeWAV's Brief at 9-10, citing *Danks,* 512 P.3d at 699-700; HomeWAV's Response at 7, citing *Union Rural Elec. Ass'n, Inc. v. Town of Frederick,* 670 P.2d 4, 6 (Colo. 1983); *U.S. West Commc'n Inc. v. City of Longmont*, 948 P.2d 509, 520 (Colo. 1997); *Colorado Utilities Corp. v. Pub. Utilities Comm'n*, 61 P.2d 849, 854 (Colo. 1936).

[139] *Danks*, 512 P.3d at 699-700.

[140] § 40-1-103(1)(a)(I), C.R.S.; *Danks*, 512 P.3d at 699-700 (discussing "public utility" as defined in § 40-1-103(1)(a)(I), C.R.S.)

63. The other cases that HomeWAV cites are similarly unhelpful. For example, in *Union Rural Electric Association*, the Court reaffirmed prior decisions concluding that the Colorado Constitution bars the Commission's jurisdiction over municipal utility operations within its own borders.[141] Likewise, in *U.S. West Commc'ns Inc.*, the Court held that colo. const. art. XXV allows the General Assembly to delegate authority over public utilities to the Commission but does not authorize the General Assembly to delegate the Commission authority over municipal utility operations.[142] And, in *Colorado Utilities Corp.,* the Court considered whether a coal mining company is a public utility within "the definition contained in the public utilities statute."[143]

64. HomeWAV's reliance on *Flavell v. Dept. of Welfare*, 355 P.2d 941, 946 (Colo. 1960) is also misplaced.[144] *Flavell* holds that an attack on agency's actions may be made where such actions "do not come clearly within the powers granted *or* which fall beyond the purview of statute granting the agency or body its powers."[145] Thus, *Flavell* stands for the proposition that an agency may only act within the authority granted it, not that such authority can only be granted in the statute creating the agency.[146] Here, the General Assembly has plainly granted the Commission authority, per § 17-42-103, C.R.S.

[141] *Union Rural Elec. Ass'n, Inc.,* 670 P.2d at 6-8, citing colo. const. art. V, § 35 and art. XXV.
[142] *U.S. West Commc'ns Inc.*, 948 P.2d at 520.
[143] *Colorado Util. Corp. v. Pub. Util. Comm'n*, 61 P.2d 849, 854 (Colo. 1936).
[144] *See* HomeWAV's Brief at 8.
[145] *Flavell*, 355 P.2d at 946 (emphasis added).
[146] *See id.*

C. Federal Preemption

1. Preemption Standards and Burden of Proof

65. Under the Supremacy Clause in Article VI of the United States Constitution, federal law may preempt state law where a federal statute has an express preemption provision (express preemption), and where federal law impliedly preempts state law.[147]

66. Implied preemption includes circumstances where federal law so thoroughly occupies the field as to make a reasonable inference that Congress left no room for states to supplement it (field preemption);[148] and where state law directly conflicts with federal law such that it is impossible to comply with both federal and state requirements or where the state law stands as an obstacle to executing and accomplishing Congress's full objectives (conflict preemption).[149] What is a sufficient obstacle is a matter of judgment that should be informed by examining the relevant federal statute as a whole and identifying its purpose and intended effect.[150] As to conflict preemption, where state law furthers the goal of federal law, the analysis turns on whether the state law's method to effectuate the common goal conflicts with federal law.[151]

[147] *See Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 368-69 (1986).
[148] *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982).
[149] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1195-96 (10th Cir. 2010); *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000); *Figueroa v. Foster,* 864 F.3d 222, 227-28 (2d Cir. 2017); *All Am. Tel. Co. v. AT&T Corp.,* 328 F. Supp. 3d 342, 361(S.D. N.Y. 2018). The categories for preemption are not rigidly distinct; field preemption and conflict preemption may also fall into the express preemption category. *See Crosby,* 530 U.S. at 372, fn, 6.
[150] What is a sufficient obstacle is a matter of judgment that should be informed by examining the relevant federal statute as a whole and identifying its purpose and intended effect. *Crosby,* 530 U.S at 374.
[151] *Crosby*, 530 U.S. at 380, fn.14, citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 82-83 (1987).

67. Federal preemption is an affirmative defense upon which the asserting party bears the burden of proof.[152] Here, the burden to establish federal preemption rests upon HomeWAV and ViaPath. A party arguing conflict preemption based on impossibility bears a demanding burden to establish that compliance with federal and state law is a physical impossibility or that state law directly conflicts with federal law.[153] Likewise, a party arguing that state law is an obstacle to accomplishing and executing Congress's full purposes and objectives also bears a heavy burden that requires an actual conflict with the overriding federal purpose and objective, and requires the repugnance or conflict to be so direct and positive that the two acts cannot be reconciled or consistently stand together.[154]

68. A federal agency acting within the scope of its Congressionally delegated authority may preempt state law.[155] As the United States Supreme Court (Supreme Court) has found, "an agency literally has no power to act, let alone to pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it" and the best way to determine whether Congress intended an agency's regulations to preempt state law is to examine the nature and scope of the authority that Congress granted the agency.[156] Indeed, the ultimate touchstone of the preemption analysis is Congressional intent.[157] The same ordinary preemption principles apply regardless whether the federal law at issue is a statute or regulation.[158]

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[152] *See Emerson v. Kan City S. Ry. Co.* 502 F.3d 1126, 1133, 1134 (10th Cir. 2007) (Citations omitted).

[153] *In Re Methyl Tertiary Butyl Ether (MTBE) Prod. Liability Litig.,* 725 F.3d 65, 97 (2d Cir. 2013); *All Am. Tel. Co.,* 328 F. Supp. 3d at 361.

[154] *In Re MTBE.,* 725 F.3d at 101-02; *All Am. Tel. Co.,* 328 F. Supp. 3d at 361.

[155] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 369.

[156] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 374.

[157] *Crosby*, 530 U.S. at 380, fn.14 citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

[158] *N.Y. Pet Welfare Ass'n, Inc., v. City of New York,* 850 F.3d 79, 87 (2d Cir. 2017); *All Am. Tel. Co.,* 328 F. Supp. 3d at 361.

69. The Supreme Court has found that when a federal agency pursues a policy of non-regulation, the agency can only preempt the states from exercising regulatory authority when the agency has chosen not to exercise its full authority.[159] This aligns with the principle that a federal agency must have Congressionally delegated authority before it may preempt a state law;[160] without such authority, a federal agency cannot preempt state law simply because it believes that this will best effectuate federal policy.[161] Otherwise, a federal agency may confer power upon itself (which it cannot do); this may also result in an agency overriding Congress.[162]

2. Preemption Under the Federal Act and the FCC's Regulations

70. Congress originally enacted the Act in 1934 in a monopolistic environment, using a tariff system to ensure that telecommunications consumers were protected from unjust, unreasonable, or discriminatory rates, terms, and conditions.[163] Telecommunications providers were regulated as common carriers subject to a plethora of requirements under Title II of the Act.[164] In 1996, Congress changed the Act's scheme by adopting changes to open telecommunications markets to competition and remove barriers to market entry.[165]

[159] *See Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1978). *See also Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 US 767, 774 (1947); *ACA Connects-America Communs. Ass'n. et. al v. Bonta*, 24 F. 4th 1233, 1241 (9th Cir. 2022) (*ACA Connects*).

[160] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 374.

[161] *See id.*

[162] *See id* at 374-75.

[163] *See* 47 USC § 203(a), and (c)(3); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 388-389 (Wash. 2008).

[164] The Act is found within "Chapter 5" of Title 47, United States Code. Within Chapter 5, the Act is further broken down into "Subchapters," which, in the context of the Act, federal courts have referred to as a "Title" of the Act. Thus, for example, courts have referred to Subchapter I of the Act as Title I of the Act and Subchapter II of the Act as Title II of the Act, and so on. This Decision refers to Titles of the Act consistent with this and the manner in which federal courts have referenced the Act. *See e.g., Brand X,* 545 US at 975; *United States v. Southwestern Cable Co.,* 392 US 157 (1968*); ACA Connects.,* 24 F. 4th 1233; *California v. FCC,* 905 F.2d 1217 (9th Cir. 1990); *Mozilla,* 940 F.3d 1.

[165] *See* 47 USC §§ 160 (a) and (b) and 253.

71. The Act applies to interstate communications, and with limited exceptions, the Act expressly denies the FCC regulatory authority over intrastate communications.[166] Indeed, 47 USC § 152(b) "fences off" intrastate matters from the FCC's reach or regulation.[167] In fact, the Supreme Court has found that the statutory language with which the Act bars the FCC's jurisdiction over intrastate matters is "certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC," and that provisions in the Act plainly contemplates a dual federal and state regulatory system.[168] Thus, as a starting point, it is well-established that the Act is intended to apply to interstate communications, and to expressly prohibit the FCC from regulating intrastate communications.[169] The FCC's preemption power under the Act must be considered with this in mind given that it is one of the Act's foundational premises.[170]

72. Under Title II of the Act, the FCC has express and expansive authority to regulate telecommunications services as common carriers.[171] For example, Title II contains a host of requirements that apply to common carriers, such as requiring that they charge reasonable rates, refrain from unreasonable discrimination, and allow other carriers to interconnect with their networks.[172] Indeed, Title II of the Act gives the FCC express preemptive authority with

[166] 47 USC §§ 151 and 152(b),
[167] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 370.
[168] *Id.*
[169] *Id. See e.g.,* 47 USC §§ 151; 152(b); 230(b); 262(g).
[170] *See Crosby*, 530 U.S. at 380, fn.14; *Cipollone,*505 U.S. at 516 (Congressional intent is ultimate touchstone of preemption analysis).
[171] 47 USC §§ § 153(51); 207 to 276; *ACA Connects,* 24 F. 4th at 1238. *See Brand X*, 545 US at 975-76. *See also Verizon v. FCC,* 740 F.3d 623, 631 (D.C. Cir. 2014).
[172] *See* 47 USC §§ 201(b), 202(a), and 251(a).

limitations, under 47 USC § 253(d), over state or local laws that violate 47 USC § 253(a) or (b).[173]

73. Title I of the Act does not provide the FCC expansive authority to regulate. Rather, numerous courts have found that Title I of the Act gives the FCC limited ancillary authority, which is not an independent source of regulatory authority.[174] The FCC and courts have recognized that the FCC may exercise this ancillary authority if (1) its general jurisdictional grant under Title I covers the regulated subject, and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[175] Notably, in two recent decisions (*ACA Connects* and *Mozilla*), federal courts built upon prior Supreme Court decisions relating to the FCC's limited Title I ancillary authority.[176] In both cases, the Courts specifically found that the FCC lacks authority to preempt state law using its ancillary authority under Title I of the Act.[177] That is because, at least in part, the FCC's authority under Title I of the Act is limited to actions that are reasonably ancillary to the effective performance of its statutorily mandated responsibilities, which *themselves* must come from Title II, III, or VI of the Act.[178] Thus, for the FCC to have preemptive authority, there must be a regulatory basis for this within Titles II, III, or VI of the Act. This follows the principal discussed above that where a federal agency such as the FCC lacks Congressionally delegated authority to regulate services, it

[173] 47 USC § 253(d). No party asserts that the FCC has preempted the state law at issue here consistent with the requirements of 47 USC § 253.

[174] *ACA Connects*, 24 F. 4th at 1238; *Mozilla,* 940 F.3d at 18, 74-76; *Verizon,* 740 F.3d at 631. *See e.g., United States v. Southwestern Cable Co.,* 392 US 157, 178 (1968) (recognizing that authority under 47 USC §152(a) "is restricted to that reasonably ancillary to the effective performance" of the FCC's responsibilities relating to the regulation of television broadcasting.); citing *California v. FCC*, 905 F.2d at 1240 n.35.

[175] *Mozilla*, 940 F.3d at 75-76; *Verizon,* 740 F.3d at 632; *Am. Library Ass'n v. FCC,* 406 F.3d 689, 692 (D.C. Cir. 2005); *In re Digital Broad. Content Prot.,* 18 FCC Rcd. 23550, 23563 (2003).

[176] *ACA Connects,* 24 F. 4th at 1238-40; *Mozilla*, 940 F.3d at 75-76.

[177] *ACA Connects,* 24 F. 4th at 1239-40; *Mozilla.* 940 F.3d at 74-76; citing *California v. FCC*, 905 F.2d at 1240 n.35; and *Southwestern Cable Co.,*392 US at 178.

[178] *See Mozilla*, 940 F.3d at 75-76 citing *Am. Library Ass'n.* 406 F.3d at 691-92.

equally lacks the power to preempt state law that regulates such services.[179] Indeed, Congress has not granted the FCC freestanding preemption authority to displace state laws in areas in which it does not otherwise have regulatory power.[180]

74. Thus, in determining whether the Act gives the FCC authority to preempt Colorado from regulating the relevant services, it is important to first identify the source of the FCC's regulatory authority over the services at issue.[181] HomeWAV offers non-interconnected VoIP voice service that uses its application and requires IP-compatible customer premises equipment to allow inmates to place voice calls originating in IP format via the public internet to any valid 10-digit U.S. phone number, including landlines, mobile, or VoIP phones, and that may be interconnected with the PSTN on the terminating end of the call. HomeWAV also offers video calling and e-messaging services transmitted via the internet through HomeWAV's application between inmates and those outside a correctional facility.[182]

a. Information Services

75. HomeWAV and ViaPath agree that the FCC has classified video calling and e-messaging services as information services under the Act.[183] Staff does not dispute these assertions. For the reasons and authorities that HomeWAV and ViaPath provide, the ALJ agrees

[179] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 370. *See Mozilla*, 940 F.3d at 75.

[180] *Mozilla*, 940 F.3d at 76.

[181] *See ACA Connects,* 24 F. 4th at 1238.

[182] *See* Stipulated Facts at 1-4.

[183] HomeWAV's Brief at 2 and 4, citing *In the Matter of Framework for Broadband Internet Serv.,* 25 FCC Rcd. 7866, 7909–10 (2010); *In the Matter of Petitions for Declaratory Ruling on Reg. Status of Wireless Messaging Serv*., 33 FCC Rcd. 12075 (2018); *In the Matter of Commc'ns Assistance for Law Enf't Act & Broadband Access & Servs*., 20 FCC Rcd.14989, 15000 (2005); *In the Matter of Implementation of Sections 716 & 717 of the Commc'ns Act of 1934*, 26 FCC Rcd. 14557, 14574 (2011); ViaPath's Brief at 4-5, citing *In re Restoring Internet Freedom,* 33 FCC Rcd. 311, ⁋ 22 (2018); *In re Framework for Broadband Internet Service*, 25 FCC Rcd. 7866, ¶ 107 (2010).

that the FCC has classified video calling and e-messaging services as information services[184] under the Act and considers them as such for purposes of addressing the parties' preemption arguments.

76. As already explained, the FCC lightly regulates information services using its limited ancillary authority under Title I of the Act.[185] That limited ancillary authority does not give the FCC authority to preempt state law.[186] Indeed, for the FCC to preempt state law regulating information services, the FCC must first have Congressionally delegated authority to regulate such services independent of it its Title I ancillary authority.[187] Only the invocation of federal regulatory authority can preempt state regulatory authority.[188] Such is not the case here. Indeed, the FCC would first need an independent source of authority outside of Title I over information services, and preemption must be reasonably ancillary to its effective performance of the statutorily mandated responsibilities delegated to it in Titles II, III, or VI of the Act.[189] Although they carry the burden of proof as to preemption, neither HomeWAV nor ViaPath point

[184] Information service is: "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 such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." 47 USC § 153(24).

[185] *See* 47 USC § 153(24); *ACA Connects,* 24 F. 4th 1233 at 1238; *Mozilla*, 940 F.3d at 18; *In re Restoring Internet Freedom*, 33 FCC Rcd at 314 (information services are lightly regulated).

[186] *ACA Connects,* 24 F. 4th at 1238; *Mozilla,* 940 F.3d at 74-76, citing *California v. FCC*, 905 F.2d at 1240 n.35, and *Southwestern Cable Co.,* 392 US at 178. ViaPath argues that *Mozilla* left open the possibility that state regulation of broadband services (even as information services) could give rise to conflict preemption. ViaPath's Brief at 10, citing *Mozilla*, 940 F.3d at 82 and 85. But the Court's conclusions on the conflict preemption argument do not purport to impact or otherwise modify its conclusion that the FCC lacks preemptive authority over information services under Title I. *See Mozilla*, 940 F.3d at 75-82. Rather, the Court found that the FCC's conflict preemption argument was an attempt to force a square peg into a round hole given that conflict preemption requires a fact-intensive inquiry into a specific state law, but no such laws were at issue. *Id.* at 81-82.

[187] *See ACA Connects,* 24 F. 4th at 1238-40; *Mozilla*, 940 F.3d at 75-76.

[188] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 370; *ACA Connects,* 24 F. 4th at 1237.

[189] *See ACA Connects,* 24 F. 4th at 1238; *Mozilla*, 940 F.3d at 75-76; *Verizon,* 740 F.3d at 632; *Am. Library Ass'n,* 406 F.3d at 692. *See also Southwestern Cable Co.,*392 US at 178; *California v. FCC,* 905 F.2d at 1240 n.35; *In re Digital Broad. Content Prot.,* 18 FCC Rcd. 23550, 23563 (2003).

to an independent source of regulatory authority over information services outside of Title I to which the FCC's suggested preemption would be reasonably ancillary, and the ALJ finds none.

77. HomeWAV and ViaPath fail to recognize that two decisions (discussed above) issued after the 2004 Vonage Order clarify the FCC's preemptive power over Title I information services. As noted, in *ACA Connects* and *Mozilla*, building upon prior Supreme Court precedent relating to the FCC's limited Title I ancillary authority, both Courts agreed that when the FCC classified certain services (there, broadband internet services) as Title I information services, the "FCC stripped itself of the requisite regulatory authority, and accordingly, of the preemptive authority to displace state laws."[190] The *Mozilla* Court explained that if Congress wanted Title I to vest the FCC with power to negate states' statutory and sovereign authority just by "washing its hands of its own regulatory authority," Congress would have said so.[191] Indeed, Congress "does not alter the fundamental details of a regulatory scheme, let alone step so heavily on the balance of power between the federal government and the States, in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[192] The mousehole here is the FCC's ancillary authority under Title I.

78. The *Mozilla* Court also found that the impossibility preemption exception does not create preemption authority out of thin air and cannot serve as a substitute for the necessary delegation of power from Congress.[193] The Court also rejected arguments that 47 USC § 152

[190] *ACA Connects,* 24 F. 4th at 1239-40. *See Mozilla,* 940 F.3d at 75-76.

[191] *Mozilla,* 940 F.3d at 84.

[192] *Mozilla,* 940 F.3d at 84, (internal quotations omitted), quoting, *Whitman v. American Trucking Assn's,* 531 US 457, 468 (2001).

[193] *Mozilla*, 940 F.3d at 78.

(described as the "statutory hook for the impossibility exception"), by itself gave the FCC preemption authority.[194]

79. While the issue here involves different types of information services, the same principle applies: Title I does not provide the FCC express or implied preemptive authority over state regulation of information services.

80. To the extent that HomeWAV and ViaPath argue that the FCC's policy decisions, or the policy declarations in the Act can preempt state law regulating information services, this argument also fails.[195] When a federal agency pursues a policy of non-regulation, the agency can only preempt the states from exercising regulatory authority when the agency has chosen not to exercise its full authority.[196] In *ACA Connects*, the Court rejected arguments that the FCC's decision to classify broadband services as Title I information services preempts state net neutrality laws because the state regulation conflicts with the "absence of federal regulation."[197] As noted, when the FCC classified broadband services as Title I information services, it gave up its Title II authority to regulate broadband services as common carrier services. This means the FCC no longer has substantive authority to regulate broadband services outside of its ancillary authority over information services under Title I.[198] Because it lacked authority over such services, the FCC did not choose not to exercise its full authority over such services, and such, could not preempt state law based on its policy not to regulate.[199]

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[194] *Id.*

[195] *See* HomeWAV's Brief at 2; ViaPath's Brief at 19-20.

[196] *See Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1978). *See also Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 US 767, 774 (1947); *ACA Connects*, 24 F. 4th at 1241.

[197] *ACA Connects*, 24 F. 4th at 1241-42 citing *Ray,* 435 U.S. at 178, and *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 374.

[198] *ACA Connects*, 24 F. 4th at 1241-42.

[199] *Id.* citing *Ray.,* 435 U.S. at 178 and *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 374.

81. The situation here is no different; the FCC has limited ancillary authority under Title I over the information services at issue in the first place, and its choice to lightly regulate such services does not amount to a decision not to exercise its full authority over such services.[200] The FCC's light-touch regulation of information services is consistent with its limited statutory authority, and does not amount to a Congressional grant of statutory authority (express or implied) necessary to preempt.[201]

82. Finally, the *Mozilla* Court also found that the Congressional policy declaration in the Act (under 47 USC § 230) 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 is not a delegation of regulatory authority to the FCC.[202] In rejecting arguments that this statutory policy declaration gives the FCC preemption authority, the Court said "no dice," explaining that 47 USC § 230 is a statement of policy, not a delegation of regulatory authority.[203] The Court also found that such policy statements do not "convey mandated responsibilities" that the FCC may use to support an exercise of its ancillary authority.[204] As such, even the Congressionally declared policy behind Act do not give the FCC authority (express or implied) to preempt state regulation of information services.

[200] *See id,* quoting *Brand X,* 545 U.S. at 975-76. *See also Ray,* 435 U.S. at 178; *Bethlehem Steel,* 330 US at 774.

[201] *See Ray.,* 435 U.S. at 178. *See also Bethlehem Steel,* 330 US at 774; *ACA Connects*, 24 F. 4th at 1241.

[202] *Mozilla*, 940 F.3d at 78-79.

[203] *Id.* citing *Comcast Corp., v. FCC,* 600 F.3d 642, 652, 654 (D.C. Cir. 2010).

[204] *Id.* at 79 citing *Comcast Corp., v. FCC,* 600 F.3d 642, 644, 654 (D.C. Cir. 2010); *Motion Picture Ass'n of America v. FCC,* 309 F.3d 796-806-807 (D.C. Cir. 2002).

b. VoIP Services

83. Although it has authority to do so, the FCC has not classified VoIP services as information services (subject to Title I) or telecommunication services (subject to Title II).[205] Nonetheless, HomeWAV contends that its VoIP services are subject to "limited FCC oversight."[206] Looking at the plain language of the Act, ALJ finds no express or implied preemption authority.

84. Title I of the Act includes the definitions of interconnected and non-interconnected VoIP services and incorporates those definitions into the definition of advanced communications services but does not otherwise include provisions purporting to regulate such services.[207] Other Titles in the Act include provisions that implicate VoIP services. Specifically, the following is a list and brief description of provisions in Title II and VI[208] that implicate VoIP:

- § 222(d), (f) and (g) (carriers are not prohibited from using or disclosing customer information to provide call location information concerning the user of an IP-enabled voice service as defined in § 615b (defined as interconnected VoIP service)); (without express consent, customer not considered to have approved use or disclosure of the "user of an IP-enabled voice service"); (provider of IP-enabled voice service must provide information detailed in the section);
- § 227(h)(2)(G) (FCC must include analyses and recommendations relating to interconnected and non-interconnected VoIP services in an annual report to Congress);

[205] *Brand X.*,545 U.S. at 980-81; *Mozilla,* 940 F.3d at 17. *See In the Matter of Connect Am. Fund, A Nat'l Broadband Plan for Our Future, Establishing Just & Reasonable Rates for Loc. Exch. Carriers, High-Cost Universal Serv. Support, Developing an Unified Intercarrier Comp. Regime, Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund*, 26 F.C.C. Rcd. 17663, 17895 (2011). That said, the FCC has interpreted the term "telecommunications" in limited contexts to include "interconnected VoIP" and relied on its ancillary authority to extend certain regulatory obligations historically limited to telecommunications providers to those providers, such as requiring them to contribute to the advancement of universal service. *In the Matter of Universal Serv. Contribution Methodology,* 21 FCC Rcd. 7518, 7537 (2006).

[206] HomeWAV's Motion at 3.

[207] 47 USC § 153(1)(interconnected and non-interconnected VoIP are advanced communications service; (25)(defining interconnected VoIP service as set forth in 47 CFR 9.3) and (36)(defining non-interconnected VoIP).

[208] Most provisions in Title VI refer to "IP-enabled voice service," which 47 USC § 615b(8) defines to mean "interconnected VoIP service" as set forth in 47 CFR 9.3.

- § 251a(a)(1) and (c) (Act does not prevent states from imposing a fee or charge for 9-8-8 related services on IP-enabled voice service);

- § 276(d) (advanced communication services is a payphone service subject to nondiscriminatory provisions instituted against Bell companies);

- § 610(b)(1)(C) (hearing aid compatibility requirements for customer premises equipment used with advanced communication services);

- § 615a(a), (b) and (c) (IP-enabled voice service providers have immunity or protection from liability no less than that given to local exchange companies under federal and state law and immunity protection for using IP-enabled voice service for 9-1-1 communications);

- § 615a-1(a) to (c), and (f) to (i) (relating to IP-enabled voice service providers providing 9-1-1 and enhanced 9-1-1 service and allowing state fees to support such services (among other items));

- § 615c(b)(2) and (c) (those with expertise on VoIP services may be selected to serve on an advisory committee; advisory committee recommendations must include procedures and deadlines applicable to IP-enabled providers, and VoIP providers and manufacturers);

- § 616 (VoIP providers must contribute to the Telecommunications Relay Services Fund);

- § 617 (requirements to make advanced communication services and equipment used for interstate commerce accessible to persons with disabilities); and

- § 620 (FCC to establish rules that define as eligible for relay service support, programs to make advanced communications accessible to low-income persons who are "deaf-blind.").

85. None of the Act provisions implicating VoIP expressly preempt the state law at issue; impose requirements that actually conflict with the state law at issue; impose requirements that would make it impossible to comply with both state and federal law; or so occupy the field as to lead to a reasonable presumption that Congress intended to preempt states from

supplementing with non-conflicting state law like the one at issue here.[209] And, although they carry the burden of proof as to preemption, HomeWAV and ViaPath cite no such provisions.

86. While the FCC has several regulations that implicate VoIP, the ALJ finds none that purport to expressly preempt the state law; impose requirements that actually conflict with the state law at issue; impose requirements that would make it impossible to comply with both state and federal law; or so occupy the field as to lead to a reasonable presumption that Congress intended to preempt states from supplementing with non-conflicting state law like the one at issue here.[210] And again, while they carry the burden of proof as to preemption, HomeWAV and ViaPath cite no such regulations.

87. Instead, HomeWAV and ViaPath heavily rely on the FCC's 2004 Vonage Order.[211] In that case, the FCC preempted certain Minnesota Public Utility Commission (Minnesota PUC) regulations applicable to nomadic or portable VoIP calls based upon the string of conflict preemption known as the "impossibility exception."[212] Given the inherently portable nature of nomadic VoIP technology, the FCC explained that it was impossible to track the jurisdictional confines of such calls (*i.e.*, interstate vs. intrastate), and on the basis of that technological impossibility, preempted Minnesota's regulations.[213] The Minnesota PUC, the New York Public Service Commission (NYPSC), and many others appealed the Vonage Order.[214]

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[209] *Supra,* ¶¶ 65-67. *See Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta,* 458 U.S. 141, 153 (1982); *Crosby,* 530 U.S. at 372; *In re Universal Serv. Fund Tel. Billing Practice Litig.,* 619 F.3d 1188, 1195-96 (10th Cir. 2010*)*; *Choate v. Champion Home Builders Co*., 222 F.3d 788, 792 (10th Cir. 2000).

[210] *Supra,* ¶¶ 65-68. *See Fidelity Fed. Sav. & Loan Assn.,* 458 U.S.at 153; *Crosby*, 530 U.S. at 372; *In re Universal Serv. Fund Tel. Billing Practice Litig.,* 619 F.3d at 1195-96*; Choate,* 222 F.3d at 792.

[211] *Vonage Order*, 19 FCC Rcd 22404.

[212] *Id.* at 22418-22424.

[213] *Id.* at 22423-22424.

[214] *Minnesota Pub. Utils. Comm'n v. FCC,* 483 F.3d 570 (8th Cir. 2007).

88. On appeal, the NYPSC argued that the FCC did not meet its burden to justify preempting all VoIP service, including fixed VoIP service, because it failed to demonstrate that its decision is narrowly tailored to preempt only those state regulations which would negate FCC's regulations.[215] The NYPSC explained that since the geographic location of fixed VoIP users placing calls can be readily identified, those calls can be regulated by states (as intrastate communications).[216] The FCC responded that the Vonage Order does not specifically address fixed VoIP service providers, and that at best, the Vonage Order merely predicts what the FCC might do if faced with the issue of fixed VoIP service providers.[217] The Court agreed, finding that preemption of fixed VoIP service is not ripe for judicial review because the Vonage Order does not address fixed VoIP service and providers, and that whether state regulation of fixed VoIP services should be preempted "remains an open issue."[218] The Court also took care to explain the differences between nomadic and fixed VoIP.[219] Nomadic VoIP service allows a VoIP customer to use the service nomadically by connecting with a broadband internet connection anywhere in the world to place a call, while fixed VoIP service requires the VoIP customer to use the service from a fixed location.[220] The Court specifically found that when VoIP service is fixed and not nomadic,

[215] *Id. Id. at* 581-82.
[216] *Id.*
[217] *Id.* at 582.
[218] *Id.*
[219] *See id.* at 575.
[220] *Minnesota Pub. Utils. Comm'n,* 483 F.3d at 575.

the interstate and intrastate portions of the service "can be more easily distinguished."[221]

89. Soon after the Vonage Order, technology evolved to enable companies to track the jurisdictional confines of "fixed" or non-portable VoIP-originated calls.[222] As a result, the FCC expressly found 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."[223] The FCC explained that this circumstance negates the Vonage Order's justification to preempt state law.[224] In 2011, the FCC declined to preempt all state regulation of VoIP-originated traffic, instead allowing for toll VoIP-PSTN traffic to be tariffed through both federal and state tariffs.[225] The FCC took care to note that it does not rely on the contention that it has authority to adopt that regime because "all VoIP-PSTN traffic should be treated as interstate."[226] In sum, since issuing the Vonage Order, the FCC narrowed the scope of the potential preemptive effects of the Vonage Order, and has made it clear that it does not view all VoIP services as being exclusively under its jurisdiction.[227]

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[221] *Id.* Throughout both the Vonage Order, and the Eight Circuit's decision on appeal, there is no mention of non-interconnected VoIP service. Instead, both decisions speak only to interconnected VoIP service. *See generally Minnesota Pub. Utils. Comm'n,* 483 F.3d at 570 (8th Cir. 2007); *Vonage Order*, 19 FCC Rcd 22404 (2004). This raises questions as to whether the Vonage Order was ever intended to apply to non-interconnected VoIP services like HomeWAV's. The Vonage Order was issued before the FCC classified broadband services as information services under Title I, and the *ACA Connects* and *Mozilla* cases, which clarified the FCC's preemption authority under the Act. This raises questions as to the validity of the Vonage Order's preemptive effects on broadband-enabled services such as VoIP. This Decision does not address that issue, and instead assumes the Vonage Order still has preemptive effect.

[222] *See Centurytel of Chatham v. Sprint Commc'ns, Co.,* 185 F. Supp. 3d 932, 944 (U.S. Dis. Ct. W. D. LA. 2016).

[223] *In the Matter of the Universal Service Contribution Methodology,* 21 FCC 7518, 7546 (2006) (emphasis in original). *See Centurytel,* 185 F. Supp. 3d 932 (U.S. Dis. Ct. W. D. LA. 2016).

[224] *In the Matter of the Universal Service Contribution Methodology,* 21 FCC 7518, 7546 (2006).

[225] *See In the Matter of Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking,* 26 FCC Rcd. 4554, ¶ 934 (2011), also available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf (Comprehensive Reform Order). *See Centurytel,* 185 F. Supp. 3d at 938.

[226] Comprehensive Reform Order, ¶¶ 934 and 959.

[227] *Id.*

90. As HomeWAV carries the burden to establish that the FCC has preempted Colorado's regulation of HomeWAV's VoIP services, it must establish that its services fit within the Vonage Order's confines.[228] It failed to do this. For one, all of HomeWAV's VoIP calls originate from the correctional facility that it serves, rendering it a fixed VoIP service. Given that the Vonage Order's preemptive effects do not apply to fixed VoIP service, it plainly does not apply to HomeWAV's VoIP services.[229] Setting that aside, after the Vonage Order, the FCC specifically found that providers with the ability to distinguish the interstate and intrastate portions of VoIP service do not qualify for the Vonage Order's preemptive effects.[230] HomeWAV does not address this at all. Thus, even if the Vonage Order could preempt fixed VoIP service state regulation, HomeWAV failed to demonstrate that its service qualifies for that preemption because it did not establish that it is unable to distinguish between the interstate and intrastate portions of its fixed VoIP service.

91. Finally, the Vonage Order preempts state efforts to impose regulations that are dramatically different from those at issue here, that is, regulations that would compel a tariffed offering, market entry requirements (including obtaining a certificate of authority before offering services) and other traditional telephone company regulations.[231] This is no small distinction given that conflict preemption analysis requires a finding that the state law at issue actually conflict with or stand as an obstacle to federal law, or that it is impossible to comply with both

[228] *See Emerson v. Kan City S. Ry. Co.* 502 F.3d 1126, 1133, 1134. (10th Cir. 2007)

[229] *See Minnesota Pub. Utils. Comm'n,* 483 F.3d at 582.

[230] *In the Matter of the Universal Service Contribution Methodology,* 21 FCC 7518, 7546 (2006) (emphasis in original).

[231] *Minnesota Pub. Utils. Comm'n,* 483 F.3d at 580-81.

federal and state requirements.[232] Here, § 17-42-103, C.R.S., does not impose traditional telephone company or common carrier regulations (including market entry requirements), but instead primarily creates reporting obligations.[233] In the one area of the state law impacting rates, the statute incorporates and applies the FCC's rate caps to intrastate communications.[234] This creates no conflict with federal law; instead, it furthers federal law by ensuring that protections that federal law afford to interstate communications apply to the relevant intrastate communications. And nothing about the state law's method to further the federal law's goals conflicts with the federal law's goals.[235]

92. Neither HomeWAV nor ViaPath met their burden to establish that compliance with federal and the state law at issue is a physical impossibility; or that an actual conflict exists between state and federal law such that state law is an obstacle to accomplishing and executing Congress's full purposes and objectives.[236] They instead assert a conflict because the federal government lightly regulates their services, but this does not amount to a conflict that is so direct and positive that the two acts cannot be reconciled or consistently stand together.[237] To the contrary, § 17-42-103, C.R.S., imposes light regulation, primarily through reporting requirements, and where rates are implicated, the state law incorporates the FCC's rate caps. And, as discussed earlier, a federal policy of non-regulation does not provide grounds to preempt

[232] *Crosby*, 530 U.S. at 372; *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d at 1195-96; *Choate,* 222 F.3d at 792;*Figueroa v. Foster,* 864 F.3d 222, 227-28 (2d. Cir. 2017); *All Am. Tel. Co. v. AT&T Corp.,* 328 F. Supp. 3d 342, 361(D.C. S. N.Y. 2018).

[233] *See* § 17-42-103(3)(a), C.R.S.

[234] § 17-42-103(5)(a), C.R.S.

[235] *See Crosby*, 530 U.S. at 380, fn.14, citing *CTS Corp.*, 481 U.S. 69, 82-83 (1987).

[236] *See In Re Methyl Tertiary Butyl Ether (MTBE) Prod. Liability Litig.,* 725 F.3d 65, 97, 101-102 (2d Cir. 2013); *All Am. Tel. Co.,* 328 F. Supp. 3d at 361.

[237] *In Re MTBE.,* 725 F.3d at 101-02; *All Am. Tel. Co.,* 328 F. Supp. 3d at 361.

state law unless the federal agency is not exercising its full authority.[238] Here, no such authority has been identified.

93. To the extent that HomeWAV and ViaPath argue that state law conflicts with pro-competition provisions in 47 USC § 160(a) that apply to telecommunications service, that argument is rejected. Since the FCC has not classified VoIP service a telecommunications service, it is not yet clear that § 160 applies to VoIP service. Even so, § 160 would only permit the FCC to preempt states from applying or enforcing provisions of the Act that the FCC has decided to forebear from applying.[239] There has been no showing that the state law at issue here attempts to apply an Act provision that the FCC has decided to forebear from applying. As such, the pro-competition provisions in § 160 have no work to do here.

94. For all the reasons and authorities discussed, the ALJ concludes that ViaPath and HomeWAV have failed to meet their burden to establish that federal law preempts § 17-42-103, C.R.S.

D. CONCLUSIONS

95. For all the reasons and authorities discussed, the ALJ grants the Petition consistent with the above discussion, and rejects HomeWAV's and ViaPath's arguments that federal law preempts § 17-42-103, C.R.S.

96. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding and recommends that the Commission enter the following order.

[238] *Supra*, ¶¶ 80-82.
[239] *See* 47 USC § 160(a), (b), and (e).

V. ORDER

A. The Commission Orders That:

1. The Petition for Declaratory Order that Colorado Public Utilities Commission Staff filed on June 22, 2022, is granted, consistent with the above discussion.

2. Proceeding No. 22D-0293T is closed.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

6. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge