

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7316

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

Order entered: 4/12/2013

**PROCEDURAL ORDER ON REMAND
AND NOTICE OF HEARING**

I. INTRODUCTION

This docket is an investigation opened to clarify the rights and responsibilities under Vermont law of companies providing Voice Over Internet Protocol ("VoIP") services. On March 29, 2013, the Vermont Supreme Court ("Court") remanded the matter to the Vermont Public Service Board ("Board") to determine whether VoIP is an "information service" or a "telecommunication service" under federal law.¹ Accordingly, in this Order we reopen the docket for purposes of complying with the mandate of the Court and completing the investigation.

II. DISCUSSION

This investigation began in 2007 at the request of the Vermont Department of Public Service ("DPS"). Then, as now, there was uncertainty over the extent to which applicable federal and state law, originally adopted to regulate the public switched telephone network ("PSTN"), applies to voice calling that relies on different protocols for transferring data (i.e., the transmission of digitized packets of information) and alternative networks that transmit data via

1. *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 2013 VT 13 (March 29, 2013).

internet protocol ("IP") rather than analog signals. We completed the initial phase of our investigation in October 2010.²

In the interest of clarity, we note here that key elements of our Phase I Order remain undisturbed on appeal. In our Phase I Order, we concluded that "nomadic" VoIP services, in which a caller can originate a telephonic connection from any location with broadband access, is not subject to regulation under Vermont law in light of the jurisdictional lines drawn by Congress and the Federal Communications Commission ("FCC"). This determination was affirmed on appeal, based on our finding that this service cannot be separated into its interstate and intrastate components.³ We also concluded in Phase I that "fixed" VoIP service – i.e., a service that originates from a fixed geographic location, with calls routed over the provider's IP network rather than the public internet – *is* subject to our authority as a matter of Vermont law to the extent the calls are intrastate as opposed to interstate. The Court affirmed this aspect of our decision, agreeing with us that by offering fixed VoIP appellant Comcast Phone was "offering telecommunications service to the public on a common carrier basis" under the relevant provision of our enabling statute, 30 V.S.A. § 203(5).⁴ The Court specifically found no error in our determination that the service can be separated into its intrastate and interstate components.⁵

The Court likewise found no error in our "general approach" to the question of whether federal law preempts our authority to regulate fixed VoIP.⁶ Under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, providers of "telecommunications services" are subject to regulation by the FCC as common carriers under Title II of the Act while

2. *See Investigation into Regulation of Voice over Internet Protocol ("VoIP") Services*, Docket 7316, Order of 10/28/10 ("Phase I Order"). We subsequently denied a motion to alter the Phase I Order. *See Investigation into Regulation of Voice over Internet Protocol ("VoIP") Services*, Docket 7316, Order of 2/11/11. We entered an Order closing the docket in February 2012 for the express purpose of making our Phase I determinations final and appealable in light of the fact that settlement efforts among the parties had failed and the Vermont Supreme Court had dismissed an appeal by VoIP provider Comcast Phone of Vermont LLC ("Comcast Phone") as premature. *See Investigation into Regulation of Voice over Internet Protocol ("VoIP") Services*, Docket 7316, Order of 2/2/12.

3. *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 2013 VT 13 at ¶ 22. We note that following the entry of our Phase I Order the FCC endorsed a methodology for such separation, at least for purposes of calculating universal service fund contributions without risking preemption. *See In the Matter of Universal Service Contribution Methodology*, 25 FCC Rcd. 15651, 15657-8 (2010).

4. *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 2013 VT 13 at ¶ 22.

5. *Id.* at ¶ 22.

6. *Id.* at ¶ 23.

providers of "information services" are exempt from such regulation.⁷ We concluded, and the Court agreed, that even if fixed VoIP were an information service for purposes of the Telecommunications Act, this would not preclude all state regulation of this service on grounds of either express or field preemption.⁸ Rather, "if VoIP is an information service then the result is that the regulations in Title II of the Telecom Act do not apply."⁹ As the Court noted, "[i]nformation services are not wholly exempt from regulation, and state regulations are preempted only to the extent they conflict with federal law or policy."

Thus, in light of the Court's remand, we must address whether fixed VoIP is an information service within the meaning of the Telecommunications Act. We note that the procedural posture of the case may require revisitation of an evidentiary determination made in the Phase I Order. In that decision, we adopted the Hearing Officer's denial of a motion made by Comcast Phone to reopen the record to admit supplemental testimony with what was then characterized as new information about how Comcast Phone routes fixed VoIP calls on its broadband network.¹⁰ Comcast maintained that the supplemental testimony would have further demonstrated why its fixed VoIP service meets the definition of "information service" under federal law, which we deemed irrelevant because we declined to reach the legal question. Now that we must decide the question, it may be appropriate to revisit the issue of what additional evidence, if any, is needed to create a record that is sufficient for a full and fair determination.

Accordingly, we are reopening this docket, appointing a staff attorney, Donald Kreis, as Hearing Officer to conduct further proceedings pursuant to 30 V.S.A. § 8, and scheduling a status conference. At the status conference, the parties will have an opportunity to state their views as to what further proceedings are necessary prior to the Board making the determination required by the mandate of the Vermont Supreme Court.

7. *Id.* at ¶ 6 (citing *Federal-State Joint Board on Universal Services*, 13 FCC Rcd. 11501, 11507 (1998)).

8. *Id.* at ¶ 24.

9. *Id.*

10. Phase I Order at 30-33 and 39.

III. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. Pursuant to 30 V.S.A. § 209(a)(3), and consistent with the mandate of the Vermont Supreme Court entered on March 29, 2013, an investigation is reopened into state regulation of fixed VoIP services.

2. Pursuant to 30 V.S.A. § 8, Donald M. Kreis, Esq., Staff Attorney, is appointed to serve as Hearing Officer in this proceeding.

3. Pursuant to 30 V.S.A. § 10(c), a status conference will be held in this matter on Tuesday, April 30, 2013, commencing at 9:30 A.M., at the Public Service Board Hearing Room, located on the Third Floor of the People's United Bank Building, at 112 State Street, Montpelier, Vermont.

Dated at Montpelier, Vermont, this 12th day of April, 2013.

<u>s/James Volz</u>)	PUBLIC SERVICE
)	
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: April 12, 2013

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)