MDTC COMMENTS

ATTACHMENT 1

112 State Street
4th Floor
Montpelier, VT 05620-2701
TEL: 802-828-2358

TTY/TDD (VT): 800-253-0191
FAX: 802-828-3351
E-mail: psb.clerk@state.vt.us
Internet: http://www.state.vt.us/psb

State of Vermont

Public Service Board

STATE OF VERMONT
DEPT OF PUBLIC SERVICE
MONTPELIER, VT.
05620-2601
2009 DEC -8 P 3:41

December 8, 2009

TO ALL PARTIES IN PSB DOCKET NO. 7316

RE: Investigation into regulation of Voice over Internet Protocol ("VoIP") services

Dear Parties:

Pursuant to 30 V.S.A. Section 8 and 3 V.S.A. Section 811, I am enclosing my Proposal for Decision in the above case.

If you have any comments, please file them on or before the close of the business day on January 4, 2010. Any comments will then be submitted to the Public Service Board along with the Proposal for Decision for final determination. If you wish, you may request oral argument before the Board.

It should be emphasized that the enclosed Proposal is not a final decision of the Board and may be subject to modification by the Board.

Very truly yours,

June E. Tierney, Esq.
Hearing Officer

Enclosure
/db

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7316

Investigation into regulation of Voice over Internet Protocol ("VoIP") services	))	Hearing at Montpelier, Vermont November 18, 2008

Order entered:

PHASE I:
PROPOSAL FOR DECISION

PRESENT: June E. Tierney, Esq., Hearing Officer

APPEARANCES: John J. Cotter, Esq.
for Vermont Department of Public Service

Andrew Raubvogel, Esq.
Karen Tyler, Esq.
Shems Dunkiel Kassel & Saunders, PLLC
for Comcast Phone of Vermont, LLC

Paul J. Phillips, Esq.
Cassandra C. Larae-Perez, Esq.
Primmer Piper Eggleston & Cramer, PC
for the Eight Independent Vermont Incumbent Local Exchange Carriers

Jay E. Gruber, Esq.
for AT&T Services, Inc.

Jeanne E. Burns, Esq.
Morris L. Silver, Esq.
for Central Vermont Public Service Corporation

Brian P. Monoghan, Esq.
McNeil Leddy & Sheehan
for City of Burlington Electric Department

Michael J. Morrissey, Esq.
for FairPoint Communications

I. INTRODUCTION

This Docket is a generic investigation into the regulatory status of Voice Over Internet Protocol ("VoIP") services in the State of Vermont. This investigation is proceeding in two phases. In this first phase, there are two objectives to be accomplished:

(1) To determine as a factual matter the nature of the VoIP services that are being offered in this state; and

(2) To determine whether that factual record supports the legal conclusion that VoIP services constitute "telecommunications services" under Vermont state law and are therefore subject to the regulatory jurisdiction of the Vermont Public Service Board (the "Board"), to the extent the Board's jurisdiction has not been preempted by federal law.

In this Proposal for Decision, I recommend that the Board conclude that the VoIP services presently offered in Vermont indeed fall within the statutory definition of a "telecommunications service" under Vermont law. I further recommend that the Board conclude that traditional Vermont telecommunications regulation of VoIP services largely has been preempted by the Federal Communications Commission ("FCC" or the "Commission") for those VoIP services that are "nomadic" in nature, such as the AT&T CallVantage service offered by AT&T Corp. ("AT&T"). Finally, the Board should conclude that federal preemption has not attached, however, for those VoIP services that are "fixed," such as the Comcast Digital Voice service ("CDV") offered by Comcast IP Phone II, LLC ("Comcast IP").[1]

Having recommended that the Board reach these conclusions in the first phase of this investigation, the second phase, going forward, should consider the extent to which the Board should exercise its jurisdiction to regulate VoIP services as telecommunications services under Vermont law.

---

1. Throughout this Proposal for Decision, there are references to different Comcast affiliates. Comcast Phone of Vermont, LLC ("Comcast Phone") is a Vermont-certified telecommunications carrier that offers the telecommunications services necessary for Comcast IP, a retail interconnected VoIP service provider that delivers CDV to Comcast IP's end-user customers. While they are separate entities, both Comcast Phone and Comcast IP are affiliates of Comcast Corporation (herein collectively referred to with all of its affiliates as "Comcast").

II. PROCEDURAL HISTORY

By letter dated April 9, 2007, the Vermont Department of Public Service (the "Department") recommended that the Board open a generic investigation into VoIP services to clarify the rights and responsibilities of various VoIP service providers operating in Vermont.

The Board opened the instant investigation on May 16, 2007, and appointed a hearing officer to conduct this proceeding.

On May 21, 2007, a notice of appearance was entered by John H. Marshall, Esq., Downs Rachlin Martin PLLC, on behalf of Comcast Phone.

On May 29, 2007, notices of appearance were entered by Peter H. Zamore, Esq., and Benjamin Marks, Esq., Sheehey Furlong & Behm P.C., on behalf of Verizon New England, Inc., d/b/a Verizon Vermont ("Verizon").[2]

On June 8, 2007, a motion to intervene was filed and a notice of appearance was entered by Paul Phillips, Esq., and Cassandra LaRae-Perez, Esq., Primmer Piper Eggleston & Cramer PC, on behalf of a group of independent Vermont local exchange carriers (the "Independents").[3]

On June 19, 2007, a prehearing conference was convened in this matter. That hearing was attended by the Department, Comcast Phone, the Independents, AT&T and Verizon.

---

2. This docket was opened before the consummation of the sale of Verizon's Vermont operating assets in the spring of 2008 to Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications. On May 20, 2007, Verizon filed a motion for Alexander Moore to appear *pro hac vice* on behalf of Verizon as well. That motion was unopposed and granted at the prehearing conference on June 19, 2007. Verizon now is no longer a party in this docket. On April 15, 2008, FairPoint Communications filed a Notice of Substitution pursuant to which it stepped into Verizon's shoes in this docket. That same day, FairPoint Communications also filed a notice of appearance, as well as a motion for admission *pro hac vice* of Michael J. Morrisey, Esq., which no party has opposed. Mr. Morrisey is hereby granted leave to appear *pro hac vice* on behalf of FairPoint Communications.

3. The Independents' intervention motion was unopposed and thus granted in a procedural order dated March 7, 2008. At the time the intervention motion was filed, the group of the Independents consisted of nine members: Franklin Telephone Company, Inc.; Ludlow Telephone Company, Inc.; Northfield Telephone Company, Inc.; Perkinsville Telephone Company, Inc.; Shoreham Telephone Company, Inc.; Topsham Telephone Company, Inc.; Vermont Telephone Company, Inc., d/b/a VTel; and Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom; FairPoint Vermont, Inc., d/b/a FairPoint Communications. Since the filing of the Independents' intervention motion, it has developed that Fairpoint Communications is no longer counted among the Independents. Rather, for purposes of participation in this docket, FairPoint Communications now is separately represented. See *infra* n. 1, above.

At the prehearing conference, the Department recommended, with support from Comcast Phone, the Independents, AT&T and Verizon, that the Board should suspend further proceedings in the matter for the remainder of 2007 to allow action by the FCC to resolve the jurisdictional questions presented by VoIP services, and to schedule a status conference in this Docket in January 2008.

On January 9, 2008, AT&T filed an intervention motion, as well as a motion for the appearance *pro hac vice* of Jay E. Gruber, Esq., to represent AT&T in this proceeding. Both of these motions were granted in a procedural order issued on March 7, 2008.

On January 17, 2008, a status conference was convened during which the parties agreed to develop a schedule. In a filing made on January 25, 2008, the Department, Comcast Phone[4] and the Independents agreed to a schedule that would divide this Docket into three phases. Phase I, the Fact Finding Phase, was to commence with the filing of testimony by the VoIP providers by April 7, 2008. Phase II (Determining Jurisdiction) and Phase III (To What Extent the Board Should Exercise Jurisdiction) would follow the Phase I technical hearing. On March 7, 2008, an order was issued that adopted the proposed procedural schedule.

On April 9, 2008, a procedural order was issued granting intervenor status on a permissive basis to the following entities: Central Vermont Public Service Corporation ("CVPS"); City of Burlington Electric Department ("BED"); and Stowe VoIP, LLC.[5]

On April 29, 2008, a procedural order was issued approving a Protective Agreement pursuant to which Comcast Phone is required to produce allegedly confidential and allegedly proprietary information to the parties of this docket who have executed a schedule signifying their acceptance of the terms of the Protective Agreement.

On November 18, 2008, a technical hearing was convened. At the conclusion of that hearing, the parties agreed that Phase I (fact finding) and Phase II (jurisdictional determination)

---

4. On January 17, 2008, Downs Rachlin Martin PLLC, the original attorneys in this docket for Comcast Phone, filed a motion for leave to withdraw from representing Comcast Phone in this investigation. That motion was granted in a procedural order dated March 7, 2008. The representation of Comcast Phone's interests was taken over by Shems Dunkiel Kassel & Saunders, PLLC, who entered a notice of appearance in this docket on behalf of Comcast Phone on January 17, 2008.

5. Stowe VoIP, LLC subsequently was given leave to change its status in this docket from intervenor to interested person.

of this proceeding should be consolidated into a single Phase I for purposes of efficient post-hearing briefing.

On February 27, 2009, Comcast Phone filed a motion to reopen the evidentiary record in this phase of the proceeding to supplement the record with additional testimony from its witness David Kowolenko concerning facts allegedly relevant to the Board's subject-matter jurisdiction to regulate VoIP services.

The parties filed direct briefs on or before March 4, 2009.

On March 13, 2009, the Department filed a response opposing Comcast Phone's motion to reopen the evidentiary record.

On March 18, 2009, the Independents joined the Department in opposing Comcast Phone's motion. That same day, I issued a memorandum establishing a deadline of April 1, 2009, for any additional comments to be filed by the parties concerning Comcast Phone's motion to reopen the record.

On March 20, 2009, the parties filed a stipulated motion to extend the March 24, 2009, deadline for filing reply briefs pending resolution of Comcast Phone's motion to reopen the record.

On March 23, 2009, I denied the stipulated request to extend the deadline for filing reply briefs.

All parties filed reply briefs on March 25, 2009. On that same date, the Independents also filed a motion to strike portions of Comcast Phone's brief and certain proposed findings of facts on the grounds that Comcast Phone's submissions in part relied on facts not in evidence and exceeded the scope of Phase I of this investigation.

On April 1, 2009, Comcast Phone filed a response "clarifying" that it was requesting a decision on its motion to reopen the record pursuant to V.R.C.P. 12(h)(3), which requires the dismissal of a proceeding when subject-matter jurisdiction is determined to be lacking. Comcast Phone stopped short, however, of asking to convert its motion to reopen the record into a motion to dismiss. For the reasons explained in this proposal for decision, I have denied Comcast Phone's motion to reopen the evidentiary record, and I have denied the Independents' motion to strike.

III. POSITIONS OF THE PARTIES

The Department

The Department maintains that VoIP services are subject to regulation by the Board because they meet the state statutory definition of telecommunications services as set forth in 30 V.S.A. § 203(5). The Department contends that the Board is authorized to exercise its consumer- protection jurisdiction over VoIP services offered in Vermont. While recognizing that the Board is preempted by federal law from subjecting "nomadic" VoIP to certification, tariffing and other related requirements as conditions for offering service in Vermont, the Department argues that the Board retains the authority under state law to regulate "fixed" VoIP to the extent that it constitutes a separately identifiable intrastate telecommunications service offered in Vermont.

Central Vermont Public Service

As does the Department, CVPS maintains that VoIP services are subject to regulation under Vermont state law as telecommunications services and that state regulation is not fully preempted by federal law. CVPS argues that because VoIP services are consistent with and comparable to local exchange telephone service, the Board's regulation of VoIP services should be comparable as well, in particular with respect to the use by VoIP service providers of electric-utility facilities and operations, including network facilities and attachments to utility-owned poles or other infrastructure.

Comcast Phone

Comcast Phone argues that Vermont is foreclosed from regulating VoIP service pursuant to state law because VoIP service meets the federal law definition of an "information service," and federal law specifically exempts information services from traditional state common-carrier regulation. Furthermore, ComCast Phone maintains that state regulation of VoIP service has been preempted by the FCC's exercise of its regulatory jurisdiction and would frustrate policies promoting deployment of advanced, nationwide broadband and interactive computer services generally.

AT&T

AT&T shares Comcast Phone's view that VoIP service is an "information service," as defined under federal law, and is therefore exempt from state common-carrier regulation. Furthermore, AT&T argues that AT&T CallVantage is a "nomadic" VoIP service, and as such is exempt from state common-carrier regulation because the FCC has exercised its power to preempt state regulation of "nomadic" VoIP. AT&T further maintains that the FCC's preemption extends to "facilities-based" VoIP service as well.

The Independents

The Independents maintain that VoIP is a technology that facilitates the provision of voice services in Vermont, and that a combination of technologies used by VoIP providers render these VoIP services equivalent to the services provided by traditional telephone companies. Accordingly, the Independents argue that VoIP-based services are telecommunications services under both the federal-law definition and the Vermont state-law definition. The Independents assert that to the extent a VoIP service is deemed to be an information service, then federal law may preempt Vermont state law regulation of VoIP, and that in the event a VoIP service is deemed to be a telecommunications service then Vermont law is not preempted. Finally, in so far as the intrastate and interstate components of the VoIP-based services are separable, the Independents maintain that the regulation of such services under Vermont law is not preempted by federal law.

Burlington Electric Department

BED has intervened in this proceeding but has not actively participated to date, and therefore has not taken a position with respect to the issues that are being explored in Phase I of this docket.

FairPoint Communications

FairPoint has noticed an appearance in this proceeding but has not actively participated to date, and therefore has not taken a position with respect to the issues that are being explored in Phase I of this docket.

IV. FINDINGS

VoIP defined

1. VoIP is a communications technology that delivers voice communication services using internet protocol ("IP"). Wimer pf. at 14; Kowolenko reb. at 7.

2. A "protocol" in this context is a specific set of rules, procedures or conventions relating to the format and timing of data transmission between two devices. Kowolenko pf. at 12-13.

3. IP is a protocol that operates at network level above the physical medium used for electromagnetic communications. Tr. 11/18/08 at 35 (Chase).

4. Media Gateway Control Protocol ("MGCP") is a widely-used VoIP protocol. MGCP defines how analog signals are converted to IP format at the media gateway. MGCP defines media gateways to include, among other network elements, "Trunking Gateways that interface between the telephone network and a Voice over IP network" and "Residential Gateways that provide a traditional analog (RJ11) interface to a Voice over IP network." Chase pf. at 6-7.

5. The term "interconnected VoIP" means a service that: (i) enables real-time, two-way voice communications; (ii) requires a broadband connection from the user's location; (iii) requires Internet protocol-compatible customer premises equipment ("CPE"); and (iv) permits users generally to receive calls that originate on the public switched telephone network ("PSTN") and to terminate calls to the PSTN. Kowolenko pf. at 8.

6. A "protocol conversion" allows individuals who generate and receive data in one communications protocol to communicate with individuals who send and receive data in a different communications protocol. A call placed by a VoIP service customer to a customer on the PSTN may undergo more than one protocol conversion between the end points of the call. Tr. 11/18/08 at 17 (Chase); Kowolenko reb. pf. at 6.

How VoIP works

7. From the perspective of a user picking up the telephone, the service provided by VoIP is essentially the same as, or a very similar experience to traditional telephone service. VoIP service looks, acts, and feels like regular telephone service in many respects. Chase pf. at 10; tr. 11/18/08 at 28 (Chase); tr. 11/18/08 at 163 (Kowolenko).

8. To initiate a call with a traditional phone service, a sender typically generates sound waves through a telephone set; a telephone set is a device that receives an audible wave and places that information over it through an electric signal which it sends over a copper line. To receive a call, at the other end a similar set would receive that analog electric signal and present it to the receiver in an audible format. Tr. 11/18/08 at 26 (Chase).

9. A typical VoIP-based communication originates as an analog signal when a caller initiates a call using an analog telephone. The caller picks up the receiver of the analog telephone and speaks into the receiver. The telephone sends audio signals in an electric format to the media gateway. The media gateway converts that signal into VoIP technology and sends it across the network. Tr. 11/18/08 at 18-19 and 28-29 (Chase); Kowolenko pf. at 11; Nurse pf. at 8.

10. The caller's telephone is connected to a piece of equipment[6] located at the caller's premises that provides access to the broadband network and converts the analog voice signaling as well as voice content into its digital equivalent, and then organizes the digital information into "packets." Kowolenko pf. at 10; tr. 11/18/08 at 18-19 (Chase).

11. Electromagnetic communications involve a sender and a receiver exchanging data over an electromagnetic medium. Tr. 11/18/08 at 25 (Chase).

12. Electromagnetic communications include transmission of both analog and digital signals over wires, cables, television cables, microwaves, radio waves, light waves or combinations of these or similar media. Tr. 11/18/08 at 34-35 (Chase).

13. Interconnected VoIP is not provided over an entirely optical network. At some point in the network used to complete a VoIP call, an electromagnetic signal is used. Tr. 11/18/08 at 199-200 (Wimer).

14. From a technical perspective, VoIP service fits the definition under Vermont law of a "telecommunications service," namely, "the transmission of an interactive two-way electromagnetic communication, including voice, image, data and information," where the "[t]ransmission of electromagnetic communications includes the use of any media such as wires,

---

6. For purposes of the findings and discussion in this Order, I refer to this equipment as "Customer Premises Equipment" or "CPE." I note that the accepted definition of CPE is otherwise broad enough to include a customer's telephone as well. See NEWTON'S TELECOM DICTIONARY 219 (16th ed. 2000) (defining "CPE").

cables, television cables, microwaves, radio waves, light waves or any combination of those or similar media." 30 V.S.A. § 203(5); Chase pf. at 4; tr. 11/18/08 at 28-29 (Chase); tr. 11/18/08 at 151 (Kowolenko); tr. 11/18/08 at 190 (Wimer); Affidavit of E. Christopher Nurse dated February 10, 2009 at ¶ 3.[7]

15. "Nomadic" VoIP service allows callers to use this service anywhere they can gain access to a broadband connection, without regard to the identity of the broadband provider. Chase pf. at 5; Nurse pf. at 8.

16. When a customer uses a "nomadic" VoIP service, it is not possible to determine the specific geographic endpoints of the call, and therefore also not possible to determine if any particular call is interstate or intrastate in nature. Chase pf. at 5; Nurse pf. at 9.

17. Fixed or "non-nomadic" VoIP service requires the use of this service at a permanent, fixed location known to the user and the network operator. Chase pf. at 5.

18. VoIP technology provides the core services that are commonly described as local-exchange-carrier services. Tr. 11/18/08 at 166 (Kowolenko).

Comcast IP's CDV Service

19. Comcast is the largest cable multi-system operator in the United States. Comcast has built a national network through which it can offer products such as video programming, high-speed internet access, and interconnected VoIP services. Kowolenko pf. at 4.

20. Comcast's distribution plant in Vermont is a hybrid fiber-coaxial network ("HFC"), connected at multiple points along Vermont's borders to the national fiber backbone, and supported by six "headends" in Vermont and a master headend in New Hampshire. The headend is the Comcast facility to which the HFC terminates, which contains the electronics that support the Comcast network infrastructure. Kowolenko pf. at 4.

21. Comcast has over 4,800 miles of cable plant in Vermont, extending to areas with more than 230,000 households in 127 communities. Kowolenko pf. at 4-5.

---

7. Mr. Nurse's affidavit was submitted in answer to an interrogatory I propounded to AT&T on February 4, 2009. I hereby admit this affidavit into the evidentiary record as Exhibit Board-1. Any party who wishes to object to the admission into evidence of this document should do so in conjunction with filing comments, if any, on this Proposal for Decision.

22. Comcast IP is an indirect subsidiary of Comcast. Comcast IP provides its VoIP service to consumers in Vermont, marketed under the trade name Comcast Digital Voice. Comcast IP also offers Comcast Business Class Digital Voice to business customers.[8] Kowolenko pf. at 2, 6-7.

23. Comcast Phone, also an indirect wholly-owned subsidiary of Comcast, is a competitive local exchange carrier certified to provide intrastate telecommunications service in Vermont. Kowolenko pf. at 6.

24. Comcast Phone offers wholesale telecommunications services, including local-exchange services, to providers of interconnected VoIP services on a common-carrier basis pursuant to the terms and conditions of its Local Interconnection Service offering. Kowolenko pf. at 6-7; tr. 11/18/08 at 177-178 (Kowolenko); exh. ITC-7.

25. Comcast IP purchases local interconnection service from Comcast Phone. For its business-class digital voice offering, Comcast IP purchases wholesale telecommunications services from a different provider that is not affiliated with Comcast. Kowolenko pf. at 6-7; tr. 11/18/08 at 176-177 (Kowolenko).

26. Comcast IP's CDV service is delivered to end users in part using VoIP technology. It delivers two-way voice or data transmission within a local exchange area. CDV is transparent from the perspective of the customer in relation to the dial tone, the ability to originate a call and to have it terminate on another telephone. Wimer pf. at 14; tr. 11/18/08 at 193 (Wimer); tr. 11/18/08 at 163 and 167 (Kowolenko).

27. Comcast IP employs the VoIP protocol "MGCP" to provide CDV. Kowolenko pf. at 12.

28. Comcast IP refers to the CPE used in connection with its CDV service as an eMTA (embedded multimedia terminal adaptor). Comcast IP leases eMTAs to customers for a monthly fee. The customer's eMTA is connected to the Comcast network via the customer's inside cable wiring. Kowolenko pf. at 10-11.

---

8. For the sake of simplicity, the abbreviation of "CDV" for Comcast Digital Voice is used comprehensively in this decision to also include Comcast Business Class Digital Voice.

29. To place a CDV call, a Comcast IP customer in Vermont uses a traditional telephone. That telephone, in turn, is connected to the eMTA that the customer leases from Comcast IP. Tr. 11/18/08 at 120 (Kowolenko); Kowolenko pf. at 10-11.

30. A CDV call does not originate and terminate in IP. The eMTAs located at the Comcast IP customers' premises convert the call into IP (originating caller) and back from IP (terminating caller) to a signal that can be recognized and processed by the callers' telephone sets. Chase pf. at 7; tr. 11/18/08 at 22-23 (Chase); tr. 11/18/08 at 197-98, 202-03 (Wimer).

31. Protocols utilized at the eMTA include foreign exchange office, foreign exchange subscriber station (the signaling protocol between an analog telephone and the eMTA), Pulse Code Modulation (the protocol controlling the conversion from analog to digital), and Voice over IP (the protocols controlling encapsulation into packets and transmission according to MGCP). Tr. 11/18/08 at 22 (Chase).

32. The eMTA performs several functions. It transforms the customer's analog voice signal into IP packets which the eMTA then transmits to Comcast IP's local IP network. Kowolenko pf. at 11.

33. The eMTA also provides the end user with a high-speed data connection to the internet. The eMTA also is the "home" for the IP address that allows the network to communicate with the eMTA for proper routing of CDV packets. Kowolenko pf. at 11.

34. When Comcast IP receives the IP data packets generated by the eMTA, the packets then travel together over the same coaxial cable running from the Comcast IP customer's home to the Comcast headend. Kowolenko pf. at 11.

35. At Comcast's headend, all packets terminate to the same equipment, called a cable modem termination system ("CMTS"). The CMTS separates voice packets from data packets and send them to a call-management server, also called a "soft switch." Kowolenko pf. at 11.

36. The soft switch that serves Vermont is located in Massachusetts. Kowolenko pf. at 12.

37. The soft switch functions much like a router on a traditional data network, directing CDV calls in a variety of ways, depending on their destination. Kowolenko pf. at 12.

38. CDV relies on two "media gateways," one located at the Comcast soft switch facility, and the other in the eMTA at the customer's premises. The eMTA media gateway located at the

customer's premises provides a conversion from analog voice and signaling to VoIP. Chase pf. at 7.

39. Many CDV calls are bound for traditional telephone service subscribers via the PSTN. Kowolenko pf. at 10 and 11.

40. When a CDV customer in Vermont calls another CDV customer in Vermont, the call does not traverse the PSTN. Rather, it remains entirely on Comcast's network. CDV customers can make a local call to non-CDV customers in Vermont, such as PSTN customers. Kowolenko pf. at 17; tr. 11/18/08 at 88-93 and 94-96 (Kowolenko).

41. Comcast IP's CDV service is fixed or "non-nomadic" VoIP, as it requires the end-user to use a geographically specific telephone number. Tr. 11/18/08 at 48 (Kowolenko).

42. CDV is a product that competes directly with traditional voice services such as those offered by Vermont's incumbent local exchange carriers. Tr. 11/18/08 at 67-69 and 163 (Kowolenko).

43. CDV has been designed and marketed to resemble a traditional telephone service to its end-users. Kowolenko pf. reb. at 8.

44. Comcast IP views incumbent local exchange carriers as competitors with Comcast IP's CDV service. CDV is marketed as a replacement service for existing land-line communications services. Tr. 11/18/08 at 68-69 and 102 (Kowolenko).

45. Comcast IP assigns CDV customers "geographic" telephone numbers that correlate to the physical location of the rate center where the customer and the eMTA are located. Kowolenko pf. at 16.

46. Comcast IP offers a product called SmartZone, an online application made possible through IP technology that integrates Comcast's voice, data and video services. Using SmartZone from any internet connection, CDV customers can send and receive electronic mail; check, manage and forward voicemails; manage a single address book; and access personalized information about weather, news and investments. Planned enhancements include remote programming of a customer's digital video recorder. Kowolenko pf. at 12.

47. Comcast has developed a cordless telephone that is compatible with CDV and the Comcast eMTA and integrated with SmartZone. CDV customers will be able to use this phone

to check electronic mail and to surf the internet, as well as to place calls. Kowolenko pf. at 19; tr. 11/18/08 at 157 (Kowolenko).

48. In Vermont, Comcast IP currently offers a call package that includes unlimited nationwide calls from home, as well as calls to Puerto Rico and Canada, for a flat rate. The service includes one line with the following calling features: three-way calling, anonymous-call rejection, call forwarding (selective), call forwarding (variable), call return, call screening, call waiting, caller identification and blocking, caller identification with call waiting, repeat dialing, and speed dialing. Kowolenko pf. at 18.

49. CDV is commonly purchased in a discounted bundle called "Triple Play," which also includes Comcast's video and high-speed internet access services. Triple Play customers receive a single monthly bill. Kowolenko pf. at 9, 19-20; exh. Comcast-2.

50. Comcast Digital Phone II, LLC, pays into the federal Universal Service Fund, and is subject to the federal Communications Assistance for Law Enforcement Act, as well as to federal regulations concerning Customer Proprietary Network Information, Telecommunications Relay Services and local number portability requirements. Kowolenko pf. at 20.

51. Comcast Phone pays into all state funds to which telecommunications carriers must contribute, including the state Universal Service Fund. Kowolenko pf. at 20.

52. Comcast IP is subject to all FCC regulations regarding the provision of E911 by interconnected VoIP providers. Comcast's Vermont network is fully E911 capable, and connected to Vermont's E911 tandems. CDV customers are in the State's Automatic Number Identification database, and their 911 calls carry Automatic Number Identification information. Kowolenko pf. at 21.

AT&T's AT&TCallVantage Service

53. AT&T serves fewer than 20 Vermont customers with its AT&T CallVantage Service. Nurse pf. at 4.

54. AT&T CallVantage is delivered to end users in part using VoIP technology. Wimer pf. at 14; tr. 11/18/08 at 193 (Wimer).

55. AT&T refers to the CPE used in connection with AT&T CallVantage as a "Telephone Adaptor." Nurse pf. at 8.

56. AT&T CallVantage rides on top of a customer's broadband internet access service. In a typical application, the customer plugs a standard household telephone into a Telephone Adaptor that AT&T provides when the customer subscribes to the AT&T CallVantage service. The Telephone Adaptor and the customer's computer both plug into a router/modem for the customer's broadband service. Nurse pf. at 8.

57. AT&T CallVantage is agnostic as to the underlying broadband provider. For example, in one day, the customer could use AT&T CallVantage at home in combination with a digital subscriber line service provided by an independent local exchange carrier, or at another location using a cable modem service, or at an airport or coffee shop using a WiFi connection. The AT&T CallVantage service would work equally well and identically at all of those locations and using any one of those means of connecting to the internet. Nurse pf. at 8.

58. AT&T Call Vantage is a nomadic VoIP service that can be used from any location where the user has access to a broadband internet connection. Nurse pf. at 9.

59. AT&T has no independent means to verify the actual location of anyone who uses the AT&T CallVantage service. Nurse pf. at 9.

60. When an AT&T CallVantage customer in Vermont places a call to a non-AT&T CallVantage customer in Vermont, the call is always transmitted outside the state of Vermont before being terminated to the called party in Vermont. Exh. ITC-ATT-Joint I at para. 2.

61. At present, AT&T offers a variety of service plans ranging in cost from $10.99 to $49.99 per month and featuring different allowances for local and long-distance usage and different calling territory limitations. Nurse pf. at 5.

62. AT&T offers three AT&T CallVantage service plans and two AT&T CallVantage Softphone service plans which provide customers with such service features as unlimited local and long distance calling in the United States and to Canada and Puerto Rico, low international rates, plus additional services and features, including parental controls. Nurse pf. at 5.

63. AT&T CallVantage offers the following service features: voicemail, "do not disturb" call screening, call logging, contact information storage, call forwarding, speed dialing, three-way calling, conference calling, call waiting, caller identification, emergency calling services, fax and modem support and directory assistance. Nurse pf. at 5.

64. In many respects, the features of AT&T CallVantage are the same as features that are familiar to consumers from using their traditional telephone service, such as voicemail, three-way calling and call waiting. Nurse pf. at 8.

65. In other respects, the features of AT&T CallVantage are different from traditional telephone service, such as the ability to sort call logs, the ability to forward a voice message as an e-mail message attachment, or the ability to set up a ten-person call using a remote computer service. These features give customers additional control and flexibility in managing their voice communications. Nurse pf. at 8.

66. The standard CallVantage plans work through a regular telephone connected to a Telephone Adaptor, provided as part of the CallVantage service. The Telephone Adaptor, in turn, is connected to the customer's existing broadband internet service connection. Nurse pf. at 5.

67. The Softphone service plans eliminate the need for a regular telephone by enabling customers to make and receive calls directly through their computers once the customer downloads the necessary software onto their computers. Nurse pf. at 5.

68. AT&T advises its AT&T CallVantage customers of the differences between the AT&T CallVantage service and traditional wireline telephone service in an information package that is provided to new customers, as well as in the subscriber agreement that each customer executes to accept the service. These materials also advise customers of the limitations of AT&T CallVantage, such as the fact that it will not work if there is a power outage or an internet outage, and that it is not compatible with home security systems and medical monitoring devices, and that its E911 coverage is different from what is provided through a wireline service. Nurse pf. at 10.

69. With minor exceptions, AT&T CallVantage customers can port existing numbers to or from an independent local exchange carrier, a competitive local exchange carrier, a wireless carrier, or another VoIP carrier. Nurse pf. at 11.

70. AT&T CallVantage service is subject to all applicable FCC rules regarding 911. The service is also subject to the federal Communications Assistance for Law Enforcement Act. Nurse pf. at 10.

71. AT&T CallVantage customers pay state and federal taxes and surcharges, including 911 fees, Telecommunications Relay Service fees, and Universal Service Fund fees, including, in Vermont, the Vermont USF charge. Nurse pf. at 10.

V. Discussion

A. Introduction

VoIP technologies, including those used to facilitate IP telephony, enable real-time delivery of voice and voice-based applications.[9] IP is simply a language for sending data through the traditional telecommunications system. When VoIP is used, a voice communication traverses at least a portion of its communications path in an IP packet format using IP technology and IP networks.[10] VoIP can be provided over the public internet or over private IP networks. VoIP can be transmitted over a variety of media (e.g., copper, cable, fiber, wireless).[11] VoIP technology changes the contents of a particular communication into digital packets of information, which it then sends over private networks or over the internet to an end user.[12] These separate packets of information run through various computers, routers, and switches, and are then "reconstituted" at the destination.[13]

VoIP service essentially offers the same service as traditional telephone service. In fact, it is marketed in Vermont and elsewhere expressly as a substitute for traditional land-line telephone service. As in the case of traditional telephone service, a VoIP customer who wishes to place a call simply picks up the receiver of a standard telephone, dials a telephone number and conducts a conversation when the call is answered on the other end. In short, while VoIP may differ in its technological platform from a traditional telephone service, the VoIP experience is transparent to the customer, who is unlikely to register a difference from traditional telephone

---

9. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457 ¶6 (2004).

10. *Id.*

11. *Id.*

12. *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, 386 F.Supp.2d 144, 145 (W.D.N.Y. 2005).

13. *Id.*

service in terms of the dial tone, the ability to originate a call and to have that call terminate on another phone. For this reason, it is appropriate for the Board to consider how VoIP should be regulated in Vermont, to the extent the law permits, in order to ensure that the VoIP customer's regulatory protections are consistent with those afforded to the customers, the competitors, and the public at large in the realm of traditional telephone service.

The purpose of this proceeding, then, is to ascertain the extent to which Vermont telecommunications law applies to regulate the provisioning of VoIP services in Vermont. Apart from the enabling legislation enacted by Vermont's legislature and codified in Title 30, the authority of the Board to regulate intrastate telecommunications is also defined by the extent to which such state regulatory authority has or has not been preempted, whether by operation of federal statutory law, or through a lawful exercise by the FCC of its federal regulatory powers to oust state authority. Therefore, it is also necessary in this proceeding to examine the extent to which federal law or FCC action has preempted Vermont state regulation of VoIP services offered in Vermont. These are the two principal legal issues that will be examined and ruled upon in this proposal for decision.

B. The Federal Telecommunications Law Framework

In the United States, telecommunications services have long been regulated pursuant to a dual-jurisdictional regimen. In promulgating the Federal Communications Act of 1934, Congress sought "to divide the world of domestic telephone service neatly into two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the states would retain exclusive jurisdiction."[14] Thus, in broad terms, Congress exercised its legislative prerogative to charge the Federal Communications Commission ("FCC" or the "Agency" or the "Commission") with regulating interstate and foreign commerce in wire and radio communication, while expressly reserving to the states – and denying to the FCC – the authority to regulate intrastate communication service.[15]

---

14. *Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 360 (1986).

15. *See* 47 U.S.C. §152.

In 1996, Congress comprehensively reformed telecommunications law in the United States by passing the Telecommunications Act (the "1996 Act"). Significantly, the 1996 Act preserved the dual-jurisdictional regimen of interstate and intrastate regulation, thus signaling a deliberate decision by Congress to retain the existing partnership between federal and state authorities that governs U.S. telecommunications regulation. The 1996 Act exemplifies "a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations. . . . "[16]

C. State Law Jurisdiction to Regulate Telecommunications

The 1996 Act has been construed by the Vermont Supreme Court to afford the Vermont Legislature broad powers to regulate telecommunications as long as its actions as a state legislature are not inconsistent with federal law.[17] The Vermont Legislature has exercised its broad powers by giving the Board a clear statutory mandate to regulate telecommunications in Vermont. Specifically, the Board's regulatory jurisdiction covers all companies "offering telecommunications service to the public on a common carrier basis."[18] Furthermore, the Board is endowed with statutory authority over the "manner of operating and conducting any business subject to supervision under this chapter, so as to be reasonable and expedient, and to promote the safety, convenience and accommodation of the public." 30 V.S.A. § 209(a)(3). Taken together, these provisions of Title 30 establish with abundant clarity that the Vermont Legislature has exercised its legislative authority to empower the Board to play a key role in regulating telecommunications at the state level.[19]

Vermont law defines the term "telecommunications service" very broadly as "the transmission of any interactive two-way electromagnetic communications, including voice,

---

16. *Puerto Rico Tel Co. v. Telecommunications Regulatory Bd. of P.R.*, 189 F.3d 1, 14 (1st Cir. 1999).

17. *In re Petition of Verizon New England Inc.*,173 Vt. 327, 332 (2002).

18. 30 V.S.A. § 203(5).

19. Vermont has not enacted any legislation that affirmatively forecloses the Board from subjecting interconnected VoIP services to traditional public utility regulations. This stands in marked contrast to the eleven states noted by Comcast for enacting such legislation. *See* Comcast Direct Brief at 3, n. 6.

image, data and information."[20] Further, "[t]ransmission of electromagnetic communications includes the use of any media such as wires, cables, television cables, microwaves, radio waves, light waves or any combination of those or similar media."[21]

All of the expert witnesses who testified at the technical hearing in this docket agreed that from a technical perspective, interconnected VoIP is covered by Vermont's definition of "telecommunications services."[22] Because interconnected VoIP includes the transmission of electromagnetic signals through wires or related media at some point during a call, and because Vermont law includes the use of light waves within the definition of transmission of electromagnetic communications, I find the record evidence supports the legal conclusion that the VoIP services offered in Vermont by Comcast IP and AT&T – and by logical extension any other similarly provisioned VoIP services – fall within the Board's jurisdiction to regulate telecommunications services pursuant to 30 V.S.A. § 203(5).[23]

From my construction of 30 V.S.A. § 203(5) as including VoIP services, it follows further that VoIP service providers operating in Vermont are subject to all rights and responsibilities as these relate to the use of utility facilities and coordination with affected utility operations, including, as CVPS has pointed out in its brief, the attachment of facilities used to provide VoIP services to utility-owned or operated poles and other network facilities and infrastructure.[24] I specifically find that the Board has jurisdiction over any VoIP provider in Vermont as an "attaching entity" under Rule 3.702(B) and a "communications service provider" under 30 V.S.A. § 8090(2A). This conclusion is not only sound as a matter of law, it is also reasonable as a matter of policy. The VoIP services in Vermont compete directly with traditional voice services such as those offered by the incumbent local exchange carriers and are marketed

---

20. 30 V.S.A. § 203(5).

21. *Id.*

22. *See* Finding 14, above.

23. *See* Findings 11-14, above .

24. CVPS Direct Brief at 10.

as a replacement service for existing land-line communications services.[25] From a policy perspective, it makes good sense then to impose upon and grant to VoIP service providers the same regulatory responsibilities and privileges relating, among other things, to the use of utility facilities in Vermont to the extent these are employed in delivering VoIP service.

Finally, I note the consistency of the jurisdictional conclusions I have reached with the emphasis the FCC itself has placed upon the collaborative partnership that exists between that federal agency and the state commissions in regulating the nation's communications infrastructure and service offerings. It is the FCC's stated expectation that "as we move forward in establishing policy and rules for DigitalVoice and other IP-enabled services, states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practice, for example, in advertising and billing, and generally responding to consumer inquiries and complaints."[26] Thus, the FCC has expressly declined to assert preemption as a bar to states regulating interconnected VoIP pursuant to general state laws "governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices."[27] Accordingly, I recommend that the Board conclude that the VoIP services offered in Vermont are subject to regulation and enforcement pursuant to the general laws of this state.

D. Preemption Analysis

AT&T and Comcast Phone contend that the Board is preempted from asserting state regulatory jurisdiction over their respective VoIP services as telecommunications services under Vermont law because these services constitute "information services" as defined under federal law, and as such are subject only to the interstate regulatory jurisdiction of the FCC, which has established a policy of "non-regulation" for information services.[28]

---

25. *See* Findings 42, 44 and 65, above.

26. *In the Matter of Vonage Holdings Corp., 19 F.C.C.R. 22404 at* ¶ 1 (rel. Nov. 12, 2004) (hereinafter "Vonage Order.").

27. *Id.*

28. Comcast Reply Brief at 5; AT&T Direct Brief at 9.

It is well settled that the supremacy clause of the United States Constitution allows federal law to fully preempt state and local laws.[29] However, it is equally true that "the Board ordinarily applies state law until it has been demonstrably preempted."[30] For the reasons outlined below, I conclude that while AT& T has persuasively demonstrated that AT&T CallVantage service is a "nomadic" VoIP service for which the FCC has pre-empted traditional state telecommunications regulation, Comcast Phone has not made a comparable showing that federal preemption attaches to state regulation of CDV, Comcast IP's "non-nomadic" or "fixed" VoIP service.

In the context of telecommunications regulation, it has long been established that the FCC may fully pre-empt state telecommunications regulation, provided the Agency acts within the scope of its congressionally delegated authority.[31] This limitation on the FCC's pre-emptive powers follows from the simple fact that a federal agency "literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."[32]

Congress has conferred broad, but nonetheless limited, regulatory jurisdiction upon the FCC in the 1996 Act. Given the dual-jurisdictional boundaries established by Congress as a matter of statutory law, the FCC historically has applied a geographic "end-to-end" analysis based on the physical endpoints of a communication to distinguish interstate from intrastate communications for purposes of establishing and enforcing its jurisdiction.[33] In the case of interconnected VoIP, however, this analysis has been more complicated. The FCC has identified VoIP as a "mixed use" or "jurisdictionally mixed" service because it is capable of communications both between intrastate end points and between interstate endpoints.[34] VoIP

---

29. U.S. Const. Art. VI, cl. 2; *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000).

30. Docket 7193, *Petition of Vermont Department of Public Service for an investigation into alleged unlawful customer records disclosures by AT&T Communications of New England, Inc.*, Order of 9/18/06 at 13.

31. *Louisiana Pub. Serv. Comm'n.*, 476 U.S. at 368-69 (discussing preemptive effects of 47 U.S.C. § 152).

32. *Id.* at 374.

33. *See, e.g., Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000).

34. *Vonage Order* at ¶ 18.

thus is a service that lies at the intersection of the federal and state spheres of telecommunications regulation. The "jurisdictionally mixed" nature of VoIP has engendered extensive litigation as state commissions and the FCC have struggled to delineate and apply the scope of their respective powers to regulate this innovative means of communication.[35]

The Vonage Order

The leading example of the jurisdictional struggle that has attended the regulation of interconnected VoIP is the *Vonage* case that was decided in 2004, in which the FCC preempted the State of Minnesota from regulating Vonage Holdings Corporation's digital VoIP service ("DigitalVoice") pursuant to traditional state "telephone company" regulation.

In ousting Minnesota's regulatory jurisdiction over DigitalVoice, the FCC invoked the "impossibility" exception of federal preemption analysis. The "impossibility" exception allows the FCC to preempt state regulation of a service which would otherwise be subject to dual federal and state regulation where it is impossible to separate the service's intrastate and interstate components as contemplated by the 1996 Act.[36]

The FCC's preemption analysis in *Vonage* began with the observation that "our threshold determination must be whether DigitalVoice is purely intrastate (subject only to state jurisdiction) or jurisdictionally mixed (subject also to federal jurisdiction)."[37] The Agency then found that the geographic endpoints of communications using DigitalVoice could not be determined with any certainty, thus making it "impossible" to know whether a specific communication was an intrastate communication subject to state regulation, or an interstate communication subject to federal regulation. Consequently, the FCC reasoned, any application of state regulation to a perceived intrastate portion of a DigitalVoice communication would invariably result in state regulations being applied to interstate communications. "Without a practical means to separate the service, the Minnesota [PUC] Vonage Order unavoidably reaches

---

35. *See*, e.g., *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007), affirming *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 F.C.C. Rcd. 22404 (Nov. 12, 2004).

36. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368 (FCC can preempt state law "where compliance with both federal and state law is in effect physically impossible.")

37. *Vonage Order* at ¶ 18.

the interstate components of the DigitalVoice service that are subject to exclusive federal jurisdiction."[38]

Having thus established the "impossibility" of jurisdictional separation, the FCC held that preemption of the Minnesota state regulations was warranted as these were deemed to conflict with "federal rules and policies governing *interstate* DigitalVoice communications."[39] The Agency then emphasized that "the practical inseverability of other types of IP-enabled services having basic characteristics similar to DigitalVoice would likewise preclude state regulation to the same extent as described herein."[40]

Applying the "impossibility" test used by the FCC in *Vonage* to determine that DigitalVoice would not be subject to state telecommunications regulation, I conclude that it is appropriate for AT&T CallVantage and CDV to receive different regulatory treatment in Vermont. Turning first to AT&T CallVantage, the evidence shows that it is a "nomadic" VoIP service. AT&T has no means of verifying the actual location of an AT&T CallVantage customer who is using that service. Beyond being confined to use in the United States, and then only where 911 service is available, an AT&T CallVantage customer is not limited to any particular geographic location when using AT&T CallVantage.[41] This is a material similarity between AT&T CallVantage and Vonage's DigitalVoice, which the FCC described as "designed to overcome geography, not track it."[42] The agency expressly noted, "it is the total lack of dependence on *any* geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is determined based on geographic end points of the communications."[43]

---

38. *Vonage Order* at ¶ 23.

39. *Id.* at ¶ 31 (emphasis added).

40. *Id.* at ¶ 32.

41. *See* Findings 57- 59, above.

42. *Vonage Order* at ¶ 25.

43. *Id.* (emphasis in original).

As the use of AT&T CallVantage does not depend on any geographically defined location, it follows from the *Vonage* order that AT&T CallVantage is a VoIP service that is "impossible" to separate into intrastate and interstate components and therefore is exempt from traditional state telecommunications regulation due to federal preemption to the same extent that Vonage's DigitalVoice service has received such regulatory treatment.

The scope of this preemption, however, is not absolute. The FCC has specified that the preemption extends only to such state laws and regulations that directly conflict "with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing and other requirements arising from these regulations. . . ."[44] As determined earlier in this Proposal for Decision, the FCC has not preempted state regulation of interconnected VoIP pursuant to general state laws.[45] I therefore conclude that, subject to the scope of preemption of state telecommunications regulation as outlined above, AT&T's AT&T CallVantage service must be offered in Vermont on terms and by means consistent with Vermont's general-law obligations, such as state consumer protection laws of general applicability.

I reach a different legal conclusion, however, in the case of Comcast IP's CDV service. Unlike AT&T CallVantage and DigitalVoice, CDV is a service that requires the end-user to use a geographically specific telephone number.[46] For this reason, it remains possible for Comcast IP to distinguish between the interstate and intrastate components of its CDV service. This technical difference between CDV and DigitalVoice is significant. It embodies the very scenario in which the FCC has stated its *Vonage* preemption ruling will not apply.

In a proceeding concerning universal service funding that was convened after the *Vonage* case, the FCC elaborated on the scope of the preemption decreed in the *Vonage Order*:

> [A]n interconnected VoIP provider with a 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. This is because the

---

44. *Id.* at ¶ 20.

45. *See infra* p. 20.

46. *See* Finding 41, above.

> central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider.[47]

This language from the *USF Order* unambiguously recognizes that interconnected VoIP providers who have the capability to track jurisdictional confines do not qualify for *Vonage* preemption and are therefore subject to traditional state telephone regulation. As the evidence in this investigation establishes that CDV is a fixed VoIP service with jurisdictional endpoints that Comcast IP is capable of tracking, there indeed exists a practical means by which to separate CDV communications into intrastate and interstate traffic. It necessarily follows, then, that Comcast IP's CDV service lies beyond the reach of the FCC's power of preemption, and therefore remains subject to state regulation as a telecommunications service as that term is defined pursuant to 30 V.S.A. 205(3).

Notwithstanding the guidance the FCC gave in the *USF Order* concerning the scope of *Vonage* preemption applicable to jurisdictionally mixed VoIP, Comcast Phone and AT&T maintain that federal law preempts VoIP regulation that would otherwise be within the jurisdiction of the Board under state law. They specifically argue that preemption analysis in this case necessarily begins with determining whether the VoIP services at issue are legally classified as "information services" or "telecommunications services" as these terms are defined under federal law. AT&T and Comcast Phone insist that both AT&T CallVantage and CDV qualify as information services under federal law, and as such are exempt from all state regulation, because any state regulation of an information service necessarily conflicts with the FCC's federal policy of "non-regulation" of information services.

The desire to focus first on determining the federal classification of VoIP serves the arguments advanced by AT&T and Comcast Phone, but it is neither relevant to the factual investigation in this docket, nor does it comport with the relevant FCC precedent concerning the regulation of jurisdictionally-mixed services such as VoIP.[48] The inquiry underway in this

---

47. *Universal Serv. Contribution Methodology*, 21 F.C.C.R. 7518 at ¶ 56 (2006); (*rev'd on other grounds*, 489 F.3d 1232(2007)) (the "USF Order").

48. Understandably, the legal classification of their VoIP service offerings under federal law is of considerable interest to AT&T and Comcast Phone, as telecommunications services are subject to mandatory Title II common carrier regulation, 47 U.S.C. § 153(44), while information services are not. *Nat'l Cable & Telecomms. Ass'n v.*

docket concerns the factual nature of the VoIP services being offered in Vermont and the applicability of the term "telecommunications" to these service offerings as a matter of Vermont state law. This inquiry into the factual support for applying a state statutory term does not implicate how federal law classifies these services.

Nor is the matter of federal law classification necessary for purposes of preemption analysis in this case. This conclusion follows logically from the fact that the FCC itself did not treat this classification as necessary or dispositive to its preemption analysis in the *Vonage Order*, where the Commission preempted Minnesota state regulation of a jurisdictionally mixed VoIP service expressly *without* deciding whether that service was an information service or telecommunications service under federal law.[49]

Noting that the "characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme," and that "permitting Minnesota's regulations would thwart federal law and policy," the FCC stated that it reached its decision to preempt Minnesota's state telecommunications regulation "*irrespective of the definitional classification* of DigitalVoice under the Act, *i.e., telecommunications or information service*, a determination we do not reach in this Order."[50] Specifically, the Agency held:

> Under existing Commission precedent, regardless of its definitional classification, and *unless it is possible* to separate a Minnesota-only component of DigitalVoice from the interstate component, Minnesota's order produces a direct conflict with

---

Brand X Internet Servs., 545 U.S. 967, 975-77 (2005). The 1996 Act defines two categories of regulated entities: telecommunications carriers and information-service providers. The 1996 Act regulates telecommunications carriers, but not information-service providers, as common carriers. Telecommunications carriers, for example, must charge just and reasonable, non-discriminatory rates to their customers, 47 U.S.C. §§ 201-209, design their systems so that other carriers can interconnect with their communications networks, § 251(a)(1), and contribute to the federal "universal service" fund, § 254(d). Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under the 1996 Act, though the FCC has jurisdiction to impose additional regulatory obligations if it so chooses. *Brand X Internet Servs.*, 545 U.S. at 975-76.

49. *Vonage Order* at ¶ 14.

50. *Vonage Order* at ¶ 14 (emphasis added). Two years after issuing the *Vonage* order, this same issue of "definitional classification" arose in the context of the *USF Order*, where the FCC decided to establish universal service contribution obligations for interconnected VoIP service providers. The FCC chose to decide that case as well without resolving the classification issue with respect to interconnected VoIP. *USF Order* at ¶ 35.

> our federal law and policies, and impermissibly encroaches on our exclusive jurisdiction over interstate services such as DigitalVoice.[51]

In this holding from the *Vonage Order*, the FCC highlighted the primacy of the dual-jurisdictional divide in the 1996 Act – not the federal classification issue – as the critical consideration in analyzing a preemption claim in the context of regulating a jurisdictionally mixed service such as VoIP. The *Vonage* holding affirms that state regulation of a jurisdictionally mixed service is deemed to directly conflict with federal law as an impermissible encroachment upon the FCC's interstate jurisdiction unless it is possible to separate out an intrastate-only component of the VoIP service in question. Where such jurisdictional separation is not possible, federal preemption will follow, as it did in *Vonage*.[52] But where jurisdictional separation is possible, no conflict exists with the FCC's lawful exercise of regulatory jurisdiction, and thus no federal preemption attaches.[53]

The FCC properly treated the possibility of separation as the pivotal element in its preemption analysis because, as the U.S. Supreme Court has explained, "the critical question in any pre-emption analysis is always whether Congress intended that federal law supersede state law."[54] In turn, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[55] As the *Louisiana* Court noted, the jurisdictional limits set

---

51. *Vonage Order* at ¶ 22 (emphasis added).

52. *Vonage Order* at ¶¶ 1, 14 and 23-32. See also *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 376 n.4 (citing with approval cases from North Carolina in which "FCC preemption of state regulation was upheld where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation")(emphasis in the original). Comcast Phone cites these same cases as an endorsement by the U.S. Supreme Court of the premise that the FCC may legitimately preempt all state regulation of a VoIP service such as CDV because such regulation interferes with federal policies. Comcast Reply Brief at 4-5. In so doing, Comcast Phone does not acknowledge that the *Louisiana* Court expressly cited these North Carolina cases as examples of legitimate FCC pre-emption because separations was *not* possible. The factual findings in this case are that Comcast's technology in fact makes it possible to separate the intra and interstate components of CDV's service. Consequently, it is not clear why Comcast Phone has cited the North Carolina cases in support of its preemption argument.

53. *USF Order* at ¶ 56.

54. *Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n,* 476 U.S. at 369.

55. *Id.* at 374.

forth by Congress in Section 152(b) of Title 47 must be understood as "a congressional *denial* of power to the FCC" to adopt and enforce policies that void the authority of state commissions over matters reserved to their jurisdiction.[56] Thus, the Agency's focus on the possibility of jurisdictional separation in *Vonage* appropriately recognizes Congress' manifest intent in the 1996 Act for the FCC and the states to share regulatory jurisdiction in order "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[57]

Nonetheless, Comcast Phone characterizes the focus on the feasibility of jurisdictional separation as "a fundamental misunderstanding of the applicable law" and as "a contention that States nonetheless retain regulatory authority over the intrastate 'components' of information services. . . ."[58] I do not find this characterization persuasive, for two reasons. First, as noted above, analyzing the jurisdictional implications of an identifiably intrastate component of a mixed-jurisdictional VoIP service flows logically from the FCC's orders in *Vonage* and *USF,* and this approach finds clear support in the Supreme Court's *Louisiana* decision. Second, Comcast Phone's characterization assumes a legal determination that has never been made, namely, that a fixed VoIP service constitutes an "information service" under federal law. Comcast Phone clearly seeks such a legal determination from the Board in this docket, but I conclude that such action by the Board is not warranted under these circumstances and is best left to the FCC, which presently has a proceeding pending that is expressly designed to resolve this issue of federal-law classification raised here by AT&T and Comcast Phone.[59]

---

56. *Id.*

57. 1996 Act Preamble Pub. L. No. 104-104 (1996). See also 47 U.S.C. § 152.

58. Comcast Reply Brief at 3.

59. In 2004, the FCC opened a generic proceeding to comprehensively address the regulatory and policy issues regarding IP-enabled services. *In the Matter of IP-Enabled Services* ("IP-Enabled Proceeding"), 19 F.C.C.R. 4863 (2004). Among the issues to be decided in that proceeding is whether IP-enabled services such as VoIP are information services or a telecommunications services under federal law. *Id.* at ¶¶ 42-44. Given this clear statement of intent by the FCC to decide this question of federal law, I am mindful of the deference that is due a federal agency's interpretation of a federal statute within its administrative realm. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)(requiring court to give "controlling weight" to

Comcast Phone maintains that state telecommunications regulation of VoIP service must yield to the FCC's imperative policy priority of promoting Congress' goal as established in the 1996 Act "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."[60] While there is no question that the 1996 Act contains this expression of Congressional intent, there is nothing about this language to suggest that it inherently trumps the jurisdictional limits that Congress simultaneously chose to place in Section 152 of Title 47 on the FCC's regulatory powers vis-a-vis the states. Rather, to the extent that the national policy of unfettered internet regulation is deemed to be implicated in and to conflict with state efforts to regulate jurisdictionally mixed interconnected VoIP service, it is more logical, and therefore more reasonable, to conclude that the general statement of national policy that Comcast Phone relies on to assert preemption must yield to the real and specific intrastate regulatory jurisdiction Congress expressly reserved to the states in the 1996 Act.[61]

E. Rulings on Motions

1. Comcast Phone's motion to reopen the evidentiary record

In its motion to reopen the evidentiary record, Comcast Phone seeks to introduce additional direct testimony from its witness David Kowolenko concerning certain features of CDV that were under development when Mr. Kowolenko originally filed his direct and rebuttal testimony in this case. The new testimony also deals with additional information concerning

---

federal agency legislative regulations "unless they are arbitrary, capricious, or manifestly contrary to statute"). While a state agency generally is deemed legally competent to interpret a federal statute, its "interpretation of federal law is not entitled to the deference ordinarily afforded a federal agency's interpretation of its own statutes or regulations." *Qwest Corp. v. Washington State Utilities and Transportation Comm'n.*, 484 F.Supp.2d 1160, 1168-69 (W.D. Wa. 2007)(citing *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1496 (9th Cir. 1997); *see also Comcast IP Phone of Missouri, LLC. et al., v. Missouri Public Service Comm'n, et. al*, No. 06-4233-CV-C-NKL, 2007 WL 172359 (W.D. Mo. Jan. 18, 2007)(citing *Amisub (PSL), Inc. v. Colorado Dep't of Social Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989)).

60. 47 U.S.C. § 230(b)(2). *See* Comcast Direct Brief at 28-29. The policy statement cited by Comcast Phone is found in the section of the 1996 Act dealing specifically with "protection for private blocking and screening offensive material." The policy statement is not incorporated by reference into Section 152, where Congress specified the jurisdiction granted to the FCC and the states respectively.

61. 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 370.

how CDV calls are routed on the Comcast IP broadband network. Comcast Phone maintains that the supplemental testimony further demonstrates why its CDV service meets the definition of an information service under federal law and is therefore exempt from state telecommunications regulation. Accordingly, Comcast Phone claims this additional information is necessary in order to facilitate a determination of the Board's subject-matter jurisdiction in this proceeding.

Both the Department and the Independents argue that Comcast Phone's motion should be denied because the additional information that Comcast Phone seeks to enter into the evidentiary record is irrelevant, and, in the case of the testimony describing call routing, is being offered in an untimely fashion without justification for its late submission.

As a preliminary matter, the parties do not agree on the applicable legal standard for deciding Comcast Phone's motion, which was styled a "Motion to Reopen the Record" but did not cite to any procedural rule for decision. Rather, Comcast Phone simply asserted that the Board enjoys broad discretion to reopen the evidentiary record, citing the case of *In re Petition of Twenty-Four Vermont Utilities*.[62] In their respective responses, the Department and the Independents pointed out that *In re Petition of Twenty-Four Vermont Utilities* establishes that a motion to reopen the evidentiary record is typically treated as a request for a partial new trial pursuant to V.R.C.P. 59(a). That rule, in turn, has been construed by the Vermont Supreme Court to require a showing that there is new evidence that might lead to a different outcome on the issue involved.[63] According to the Department and the Independents, Comcast Phone failed to make such a showing in its motion. After the Department and the Independents had filed their responses, Comcast Phone filed a letter [64] clarifying that it was moving to reopen the record to seek admission of evidence pertaining to the Board's subject-matter jurisdiction to regulate VoIP service in Vermont, and that, as such, the proffered new testimony is both relevant and timely introduced pursuant to V.R.C.P. 12(h)(3).[65]

---

62. 159 Vt. 339, 356-57 (1992).

63. *Id.*

64. Letter from Karen Tyler, Esq., to Susan Hudson dated April 1, 2009.

65. V.R.C.P. 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

I accept Comcast Phone's clarification that Mr. Kowolenko's proposed supplemental testimony is intended to inform the determination of the Board's subject-matter jurisdiction in this case. Under Vermont law, subject-matter jurisdiction is an issue that may be raised at any time, and a party cannot be foreclosed from raising this issue during litigation.[66] While Comcast Phone's filing does not expressly seek dismissal of this investigation, Comcast Phone certainly has made a "suggestion" to that effect by requesting that its motion be decided under V.R.C.P. 12(h)(3). Therefore, I will treat Comcast Phone's filing as a motion to dismiss this investigation for want of subject-matter jurisdiction, and Mr. Kowolenko's proposed supplemental testimony as an affidavit in support of that motion to dismiss.[67]

Turning to the substantive merits of Comcast Phone's motion, some of the information contained in Mr. Kowolenko's proposed supplemental direct testimony is characterized as an "update" of his prior testimony concerning CDV features that were under development when Mr. Kowolenko timely filed his original direct testimony in April of 2008 and his rebuttal testimony in July of 2008. The remaining portion of Mr. Kowolenko's proposed supplemental testimony deals with CDV call routing. Comcast Phone maintains that this information is relevant to determining whether its CDV service is "an information service within the exclusive jurisdiction of the FCC."[68] For the reasons discussed earlier in this proposal for decision, I have concluded that this proceeding will not address whether CDV is an information service or a telecommunications service under federal law. The Board's subject-matter jurisdiction to regulate VoIP services arises from 30 V.S.A. § 203(b)(5) and § 209, two state-law statutory provisions that are not informed in their application by the "updated" information concerning CDV's new, additional features, or by whether CDV may be deemed an information service under federal law. Because I find Mr. Kowolenko's proposed supplemental testimony to be irrelevant to resolving the question of subject-matter jurisdiction that Comcast Phone has raised,

---

66. *Poston v. Poston*, 161 Vt. 591, 992 (1993).

67. Attached to Comcast Phone's motion was a copy of Mr. Kowolenko's proposed new testimony given under oath and duly witnessed by a notary public.

68. Comcast Motion to Reopen the Record at 2.

I decline to admit this testimony into the evidentiary record and I deny Comcast Phone's motion to dismiss this proceeding for want of subject- matter jurisdiction.[69]

2. Independents' motion to strike

The reply brief filed by the Independents on March 25, 2009, incorporates a motion to strike certain proposed findings and legal arguments contained in Comcast Phone's direct brief dated March 4, 2009.[70] The Independents argue that the objectionable portions of Comcast Phone's direct brief rely on facts that are not within the evidentiary record of this proceeding. The Independents point out that under Vermont law, findings of fact must "be based exclusively on the evidence and on matters officially noticed."[71]

Having reviewed Comcast Phone's proposed findings of fact, I have identified two proposed findings— Comcast Phone Proposed Findings 21 and 24— that are supported by the proposed supplemental testimony from Mr. Kowolenko that I have excluded from the evidentiary record. As these are mere proposed findings of fact, and as I have not adopted these proposed findings of fact in this proposal for decision, there is no basis under 30 V.S.A. § 809(g) for striking Comcast Phone's Proposed Findings 21 and 24. I therefore conclude that the Independents' motion to strike is moot to the extent that it seeks to strike Comcast Phone Proposed Findings 21 and 24.[72]

To the extent that the Independents' motion seeks to strike certain remarks or legal arguments in Comcast Phone's direct brief, I note that this requested relief is beyond the scope of the authority the Independents have cited in support of their motion. Section 809(g) of Title 30 does not provide a basis for striking from the record of a proceeding a mere prefatory remark or a

---

69. Because I have disposed of this matter on the grounds of relevancy, there is no need to reach the question of whether Comcast Phone's motion satisfies the requirements of V.R.C.P. 59(a) for reopening the record.

70. Independents' Reply Brief at 3.

71. 3 V.S.A. § 809(g).

72. I have noted the Independents' objection to Comcast Phone's citation to a report by Microeconomic Consulting and Research Associates, Inc. (the "MiCRA Report"). Independent's Reply Brief at 3. To date the MiCRA Report has not been admitted into the evidentiary record of this proceeding, nor have I taken judicial notice of it. Furthermore, because Comcast Phone has not proposed and I have not made any findings based on the MiCRA Report, I conclude the Independent's motion to strike is moot on this point as well.

legal argument that purports to rely on facts not in evidence.[73] Rather, such concerns are more typically and effectively addressed through oral or written arguments by counsel that call the court's attention to the fact that it should not give any weight to remarks or argument that are not supported by the evidence.[74] Accordingly, for the foregoing reasons, I deny the Independents' motion to strike.

VI. CONCLUSION

I recommend that the Board conclude in the first phase of this docket that state-law jurisdiction exists for the Board to regulate VoIP services offered in Vermont and that the exercise of this jurisdiction has not been fully preempted, whether by operation of federal law or by action of the FCC in exercising its preemptive powers. If adopted by the Board, these conclusions of law will raise new policy questions concerning how the Board should exercise its regulatory jurisdiction over VoIP services, if at all. These policy questions will then become the subject of the second phase of this investigation.

I recommend that during this second phase, the parties should receive an opportunity to develop an evidentiary record to support their positions regarding these policy questions and any other relevant policy issues. During this second phase the parties also should be required to bring forward concrete proposals they deem appropriate, if any, for how the Board should exercise its regulatory jurisdiction over VoIP services. The review of any such policy proposals should include an opportunity for legal arguments to be advanced concerning whether these policy proposals conflict impermissibly with federal law.

Findings proposed and arguments made by any party that are inconsistent with this Proposal for Decision are hereby rejected.

While I recognize that the orders issued by a hearing officer in multi-phased proceedings are generally considered to be interim in nature, I have concluded that it is appropriate in this

---

73. Nor does the Independent's effort to strike portions of Comcast Phone's direct brief fit within Vermont's procedural rule governing such motions. V.R.C.P. 12(f) provides that "the court may order stricken from any pleading any . . . immaterial . . . matter." While an argument set forth in a legal brief certainly could be considered "immaterial" if it is based on facts not in evidence, the rule on its face applies to pleadings only, and not to legal briefs or other papers that are typically filed with a court. Compare V.R.C.P. 7(a) (defining pleadings) and V.R.C.P. 7(b) (describing motions and other papers).

74. *See, e.g.*, DPS Reply Brief at 2.

case to treat this Order as a Proposal for Decision and to report my findings of fact in writing to the Board pursuant to 30 V.S.A. § 8(c). Accordingly, this Proposal for Decision has been served upon the parties pursuant to 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this _____ day of _____, 2009.

_____
June E. Tierney, Esq.
Hearing Officer

VII. ORDER

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

1. The findings of fact, conclusions of law, and recommendations of the Hearing Officer are adopted.

2. The Hearing Officer shall promptly convene a prehearing conference in this Docket to establish a procedural schedule for the second phase of this investigation.

Dated at Montpelier, Vermont, this _____day of _____, 2009.

_____)	
)	PUBLIC SERVICE
)	
_____)	BOARD
)	
)	OF VERMONT
_____)	

OFFICE OF THE CLERK

FILED:

ATTEST:_____

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)