

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-1543-PET

Petition of Vanu Coverage Co. for (a) an ex parte emergency order directing Consolidated Communications Holding Company, Inc. to immediately restore service to all of Petitioner's Vermont microcell sites; and (b) issuance of preliminary and permanent injunctions precluding Consolidated Communications Holding Company, Inc. from discontinuing service to Petitioner's sites absent an order of the Commission	
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Order entered: 06/18/2018

ORDER DISMISSING PETITION WITHOUT PREJUDICE FOR LACK OF JURISDICTION

I. INTRODUCTION

In this Order, the Vermont Public Utility Commission ("Commission") dismisses for lack of jurisdiction a petition filed by Vanu Coverage Co. ("CoverageCo") for an emergency temporary restraining order and preliminary and permanent injunctive relief against Consolidated Communications Holding, Inc. ("Consolidated").

This case involves an unfortunate situation that, at the moment, does not appear to have a solution within the Commission's ability to provide. Although cell phone coverage has continued to expand throughout Vermont in recent years, many areas of the state still lack coverage. When people travel through areas that lack coverage, they cannot use their cell phones to call 911 in the event of an emergency. In the last five years or so, CoverageCo, with significant support from the State of Vermont, has attempted to address this issue by providing cell phone service through "microcells" in some rural areas that would otherwise lack coverage. To provide this service, CoverageCo has attached approximately 160 microcells, leased from the State, to telephone polls owned by Consolidated and others. For a total monthly charge of around \$8,000, plus pole attachment fees, Consolidated provides CoverageCo with a digital subscriber line ("DSL") connection that enables the wireless transmission functionality of the 120 or so microcells that are attached to Consolidated's telephone poles.

It is undisputed that CoverageCo has unfortunately run into significant financial problems and owes large amounts of money to a number of creditors, including more than \$100,000 to Consolidated. When Consolidated and CoverageCo were unable to negotiate a plan for repayment of arrearages, Consolidated cut off service to CoverageCo on May 23, 2018. There does not appear to be any dispute that Consolidated's actions were within its rights under its contract with CoverageCo. Two days later, CoverageCo filed its emergency petition, asking the Commission to order Consolidated to restore service immediately.

CoverageCo asserts that Consolidated's actions create an immediate threat to public health and safety by reducing the availability of cell phone service – and the ability of cell phone users to call 911 – in areas where CoverageCo's microcells provided the only service available. It is not clear on this record how large that service area is. According to CoverageCo, only around 75 to 80 of the microcells serviced by Consolidated were operational at the time Consolidated cut off service, and Consolidated argues that far fewer were operational. The Department of Public Service ("Department") has noted that a significant portion of those same areas of operation have alternative coverage available and therefore do not lose 911 availability as a result of Consolidated cutting off service to CoverageCo. Nevertheless, we do not doubt that Consolidated's decision has led to a decrease in cell phone coverage – and access to 911 via cell phones – in certain areas. Our decision today does not depend at all on the size of the area that is affected. We are troubled by the possibility of even a single person being delayed in contacting 911 in an emergency situation because CoverageCo can no longer provide the cell phone service it previously provided.

It is also troubling that, regardless of whether Consolidated provides service to CoverageCo's microcells, a significant portion of Vermont remains without cell phone coverage and therefore without access to 911 via a cell phone. It is equally, if not more, troubling that, even if Vermont someday achieves complete cell phone coverage throughout the state, a significant portion of Vermonters who cannot afford cell phones will still be without the ability to access 911 via a cell phone. These are real problems, and there are no easy solutions.

That said, to the extent solutions exist, we hold today that the Commission cannot provide them in this proceeding because we lack jurisdiction to resolve the matter CoverageCo has brought before us. As Consolidated and the Department note in their filings in this

proceeding, federal law places significant limitations on our ability to address the issues related to non-payment for DSL service that have now led to a lack of access to 911 via cell phones. The Federal Communications Commission (“FCC”) has held that the specific service Consolidated provides to CoverageCo – DSL service, a broadband service that the FCC classifies as an information service – cannot be regulated by state public utility commissions. The federal courts have accepted this distinction and agreed with the FCC that a purely information service cannot be regulated by states. We agree with Consolidated and the Department that we lack jurisdiction in this matter.

Without jurisdiction, we cannot address the merits of CoverageCo’s petition and must instead grant Consolidated’s motion to dismiss without prejudice.

II. Procedural History

On May 25, 2018, CoverageCo filed a petition for an emergency temporary restraining order and preliminary and permanent injunctive relief against Consolidated. The petition notes that on May 23, Consolidated ceased providing DSL service to CoverageCo’s microcell sites due to CoverageCo’s failure to pay past-due bills. CoverageCo asks the Commission to require Consolidated to restore service to CoverageCo.

On May 25, 2018, the Commission scheduled a hearing on this matter for the next business day, May 29, 2018.

On May 29, 2018, CoverageCo filed a prehearing memorandum. CoverageCo also filed a motion to allow testimony and cross-examination of its two witnesses by phone. We granted that motion on that same day.

On May 29, 2018, the Commission held a preliminary hearing and took testimony (live and by phone) from four witnesses: CoverageCo presented two witnesses, Consolidated presented one witness, and the Department presented one witness. At the end of that hearing, the Commission strongly urged the parties to attempt to resolve this matter, while also directing the parties, if a settlement could not be reached, to file briefs by June 1, 2018, with any response briefs due June 5, 2018. During the May 29, 2018 hearing, the Commission also requested that Consolidated provide the Commission with certain documents, including a copy of the service contract between Consolidated and CoverageCo (the “Contract”).

On May 29, 2018, the Commission received public comments from Representative Laura Sibilia, as well as comments from Mr. Stephen Whitaker.

On June 1, 2018, CoverageCo, Consolidated, and the Department filed their initial briefs. Consolidated also moved to dismiss the petition for lack of jurisdiction. The Department's initial brief agreed with Consolidated that the Commission lacks jurisdiction to hear this matter.

On June 1, 2018, Consolidated also filed the Contract under seal, along with a motion for a protective order, with an averment that the Contract contained confidential sensitive business information.

On June 2, 2018, Mr. Whitaker filed additional public comments, which included an attachment that was an unredacted version of the Contract, even though Consolidated had filed a motion the day before for a protective order based on the Contract containing confidential sensitive business information.

On June 4, 2018, Consolidated filed an emergency motion requesting that the Commission remove the allegedly confidential material from the ePUC filing system.

On June 5, 2018, the Commission granted Consolidated's request to remove the allegedly confidential material until the Commission ruled upon its confidentiality. In that same Order, the Commission required CoverageCo to show cause as to how this confidential information was obtained by a member of the public.

On June 5, 2018, CoverageCo, Consolidated, and the Department filed their reply briefs. CoverageCo's brief argued that the Commission has jurisdiction to hear this matter, while Consolidated and the Department continued to argue that the Commission lacks jurisdiction.

On June 6, 2018, Consolidated filed a letter arguing that CoverageCo's June 5, 2018, brief contained jurisdictional arguments that should have been presented in the initial briefs.

On June 8, 2018, in response to the Commission's June 5, 2018, Order, CoverageCo filed a brief opposing Consolidated's motion for a protective order regarding the Contract, and an affidavit noting that CoverageCo had provided the Contract to a member of the public, despite the requirement in the Contract that it be treated as confidential.

On June 8, 2018, CoverageCo also filed a letter asking that the Commission decline to consider two affidavits that Consolidated included in its filings.

On June 11, 2018, Mr. Whitaker filed additional public comments.

On June 12, 2018, Consolidated filed a response asserting that the Commission can consider those affidavits.

On June 12, 2018, Consolidated also filed a reply brief in support of its motion for a protective order.

On June 14, 2018, we granted in part and denied in part Consolidated's motion for a protective order.

On June 15, 2018, Mr. Whitaker filed additional public comments.

III. DISCUSSION

The Commission has broad authority under Title 30 to regulate persons and entities that offer services that fall within the Commission's jurisdiction, including any "person or company offering telecommunications service to the public on a common carrier basis."¹ Consolidated is such an entity and operates under a Certificate of Public Good ("CPG") that it obtained from the Commission in Docket 8881.² Consequently, State law provides the Commission with broad jurisdiction 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."³

Federal law, however, places limits on the Commission's jurisdiction over Consolidated. As the Vermont Supreme Court has held, federal law preempts the Commission from imposing regulatory requirements on enhanced services or information services "to the extent they conflict with federal law or policy."⁴ In addressing the matter of Voice over Internet Protocol ("VoIP"), the Vermont Supreme Court also held that we "should defer to the FCC's classification decision, if and when the FCC decides the issue."⁵

¹ 30 V.S.A. § 203(5).

² *Joint Petition of Consolidated Communications Holding, Inc., Consolidated Communications, Inc., Falcon Merger Sub, Inc., FairPoint Communications, Inc., Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, FairPoint Vermont, Inc., d/b/a/ FairPoint Communications, UI Long Distance, Inc., and Enhanced Communications of Northern New England, Inc., for approval of a transfer of control by merger, pursuant to 30 V.S.A. §§ 107, 108, 109, 231(a), and 311*, Case No. 8881, Order of 6/26/17 and accompanying CPG.

³ 30 V.S.A. § 209(a)(3).

⁴ *In re Investigation into Regulation of Voice Over Internet Protocol Servs.*, 2013 VT 23, ¶ 24, 193 Vt. 439, 70 A.3d 997.

⁵ *Id.* ¶ 31.

Since 2002, the FCC has classified DSL service as either an interstate or an information service (or both), and therefore not an intrastate telecommunications service subject to state jurisdiction. In 2002, the FCC “classified broadband Internet access service over cable systems as an ‘interstate information service,’ a classification that the Supreme Court upheld in June 2005 in the *Brand X* decision.”⁶ In 2015, the FCC reclassified broadband service such as DSL as a telecommunications service, but also “‘reaffirmed its longstanding conclusion’ that broadband service falls within its jurisdiction as an interstate service.”⁷ On January 4, 2018, the FCC explicitly held that broadband Internet access services are information services that “should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements.”⁸ The FCC noted that its ruling applied to DSL services because “[t]he term ‘broadband Internet access service’ . . . encompasses the delivery of fixed broadband over any medium, including various forms of wired broadband services (e.g., cable, DSL, fiber).”⁹ The FCC concluded that “allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each [Internet Service Provider] to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.”¹⁰

Here, it is undisputed that the service CoverageCo obtains from Consolidated is DSL service and nothing else. While CoverageCo converts this DSL service into a wireless signal for cellular customers, CoverageCo does not itself make calls through Consolidated’s network. Thus, the DSL service provided by Consolidated to CoverageCo is unlike Voice over Internet

⁶ *In the Matter of Restoring Internet Freedom*, 33 F.C.C. Rcd. 311, ¶ 10 (2018) (citing *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 967 (2005)).

⁷ *United States Telecom Ass’n v. Fed. Comm’n’s Comm’n*, 825 F.3d 674, 730 (D.C. Cir. 2016) (quoting 2015 Open Internet Order, 30 FCC Rcd. at 5803 ¶ 431) (alteration marks omitted).

⁸ *Restoring Internet Freedom*, 33 F.C.C. Rcd. 311, ¶ 194.

⁹ *Id.* ¶ 23.

¹⁰ *Id.* ¶ 194. The FCC also held that federal law “preempt[s] any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.” *Id.* ¶ 195. We do not rest our decision on that proclamation. As the U.S. Supreme Court has held, “an agency’s mere assertion that state law is an obstacle to achieving its statutory objectives” does not in itself preempt state law. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). We do, however, recognize that the FCC has authority to classify services, and, as the Vermont Supreme Court has held, we “should defer to the FCC’s classification decision, if and when the FCC decides the issue.” *Investigation into Regulation of Voice Over Internet Protocol Servs.*, 2013 VT 23, ¶ 31.

Protocol (VoIP) or any other service that provides “essentially the same service as traditional telecommunications” provided by land-lines.¹¹ The only service CoverageCo obtains is DSL.¹²

In light of the Court decisions in *Brand X* and *Investigation into Regulation of Voice Over Internet Protocol Services* and the FCC’s classification of broadband services such as DSL as information services, we are preempted from asserting jurisdiction here. Although CoverageCo points out that the *Restoring Internet Freedom* ruling did not go into effect until June 11, 2018, this does not affect our analysis. As noted earlier, DSL service was not subject to state jurisdiction even before the *Restoring Internet Freedom* order went into effect. At any rate, jurisdiction is an issue that can be raised “at any stage in the litigation, even after trial and the entry of judgment,” and whenever a tribunal determines that it lacks jurisdiction, it “shall dismiss the action.”¹³ Thus, even if jurisdiction had existed at the time Consolidated disconnected service to CoverageCo, in light of the Vermont Supreme Court decision in *Investigation into Regulation of Voice Over Internet Protocol Services*, which directs the Commission to defer to the FCC’s classification of services, we could not ignore a subsequent loss of our jurisdiction to rule on this matter when the *Restoring Internet Freedom* decision went into effect.

Finally, although the FCC’s *Restoring Internet Freedom* order notes that it does not displace “the states’ traditional role in generally policing such matters as fraud, taxation, and general commercial dealings,”¹⁴ that is not the type of matter in front of us here. While the Contract could be viewed as a “general commercial dealing,” it is not one that was ever presented to us for approval or that we have jurisdiction to review. CoverageCo explicitly notes that it “does not ask the Commission to craft a payment plan or award damages in a contract

¹¹ *Investigation into Regulation of Voice Over Internet Protocol (“VoIP”) Servs.*, Docket No. 7316, Order of Feb. 7, 2018, at 3.

¹² Even if we were to view Consolidated’s DSL service as in effect providing cellular service, we would still lack jurisdiction because federal law explicitly states that we cannot issue orders requiring that cellular service be made available in this State. 47 U.S.C. § 332(c)(3)(A) (“[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service . . .”).

¹³ *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

¹⁴ *Restoring Internet Freedom*, 33 F.C.C. Rcd. 311, ¶ 196.

matter.”¹⁵ CoverageCo recognizes that both CoverageCo and Consolidated “appear to agree that the Commission does not have authority in these areas.”¹⁶

For these reasons, we agree with Consolidated and the Department that we lack jurisdiction to address this matter and must grant Consolidated’s motion to dismiss.

IV. ORDER

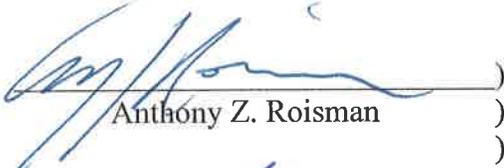
IT IS HEREBY ORDERED that this matter is dismissed without prejudice for lack of jurisdiction.

¹⁵ Petitioner’s Reply Brief, 6/5/18, at 7.

¹⁶ *Id.* at 7 n.20. To the Commission’s knowledge, CoverageCo has not filed any legal proceedings to enforce the Contract. CoverageCo has not identified any provision of the Contract – or, for that matter, any Commission Rule, Order, or CPG – that Consolidated’s actions violate.

SO ORDERED.

Dated at Montpelier, Vermont, this 18th day of June, 2018.

)	PUBLIC UTILITY COMMISSION OF VERMONT
Anthony Z. Roisman)	
)	
Sarah Hofmann)	

OFFICE OF THE CLERK

Filed: June 18, 2018

Attest: 
Deputy Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 18-1543-PET - SERVICE LIST

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