FINAL REPORT AND RECOMMENDATIONS

PSC DOCKET 641: MOMENTUM TELECOM INC APPLICATION FOR AUTHORITY TO PROVIDE TELECOMMUNICATIONS SERVICES IN THE USVI

JOHANN A. CLENDENIN, HEARING EXAMINER

June 3, 2016

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June 3, 2016

Donald G. Cole
Executive Director
U.S. Virgin Islands Public Services Commission
P.O. Box 40, Charlotte Amalie,
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Via: Email: duxcole@gmail.com

Subject: **Docket 641**

Dear Director Cole:

As the appointed Hearing Examiner in Docket 641 - Momentum Telecom Inc., as remanded and reconsidering previous orders and recommendations of the Virgin Islands Public Service Commission, this Final Report and Recommendations for the Public Services Commission (PSC) is submitted and ordered that this Opinion be presented to the Commissioners for consideration.

Sincerely,

Johann (John) A. Clendenin

Hearing Examiner

Attached: *Hearing Examiner - MEMORANDUM OPINION AND ORDER, PSC Docket 641 - Momentum Telecom Inc ~ Clendenin 6-3-2016*

Government of the U.S. Virgin Islands PSC #641

Before the

V.I. Public Services Commission

IN RE:

Momentum Telecom, Inc. Application for)
Authority to Provide Telecommunications) Docket No. 641
Services in the USVI)
)

MEMORANDUM OPINION AND ORDER

Opinion Dated: Friday June 3, 2016 **Adopted:** _____

By: Johann A. Clendenin
Hearing Examiner

Executive Summary

This opinion and order is made in reconsideration of previous recommendations and subsequent adoptions of the Hearing Examiner and the Commission. While the specific PSC Docket 641 (*Momentum Telecom, Inc. Application for Authority to Provide Telecommunications Services within the USVI*) addresses the application of Momentum Telecom Inc. for a certificate to operate in the Territory of the U.S. Virgin Islands, the salient implication to the Public Services Commission (" PSC" or "Commission") Telecommunications policy remains germane and was and is within the scope of the continued public hearing.

This intervention was precipiated when on December 18, 2015, AT&T Mobility, Inc. and CTIA Wireless (hereinafter "Petitioners') filed with the Petitions for Reconsideration in Docket 641.

On January 12, 2016, the Commission held a special meeting on both St. Thomas and St. Croix and voted to grant the Petitions for Reconsideration and remand the matter back to Hearing Examiner Johann A. Clendenin for further review.

In accordance with Virgin Islands Rules and Regulations, Title 30, § 11-45 *("Any person not a party to a proceeding may make written application for leave to intervene showing the extent of his interest in the matter")* extensive efforts were made to allow intervention.

The reconsideration concerned the extent that the Commission's jurisdiction granted in the VI Code over telephone service as interpreted and construed liberally in order to accomplish the purposes thereof is inclusive of the infrastructure to provide telephone service such as Telecommunications, Information Services, Internet, Voice over Internet Protocol (VoIP), Broadband, Wireless and other mobile telephone devices such as computers used for telephone calls, tablets, and smartphones to the extent not pre-empted by federal law. In order to ensure that all stakeholders could be heard petitions to intervene were solicited from telecommunications service providers, other interested public utilities, Virgin Islands Government, Virgin Islands Legislature and the general public. The public hearing was held on March 8, 2016 and the petitioners were given a further opportunity to submit recommendations of findings of facts and conclusions of law. These further opportunities were accepted and the submissions included in the Appendix.

Three broad fundamental principles continue to justify governmental oversight of the telecommunications utility sector. First, since a telecom utility provides essential services for the well-being of society – both businesses and individuals – it is an industry "*affected with the public interest*." Second, in the past, the technological and economic features of the industry, particularly the highly capital intensive nature of utility services essential to an industrial society compared to other industrial enterprises, were such that a single provider was often the most effective way to serve the overall demand at a lower cost than any combination of smaller entities could. In the absence of regulatory intervention, competition could not thrive under these conditions; eventually, all firms but one will exit the market or fail or combine in order to prevent ruinous competition.[1]. The entities that survive were called *natural monoplies* – and, like other monopolies, they had the power to restrict services and set prices at levels higher than are economically justified. Given these two conditions, economic regulation is the explicit public or governmental intervention into a market that is necessary to achieve public benefits that the market fails to achieve on its own.

As the global market has changed over the decades with technological advances the public is inundated with a variety of choices and services that fall within the parameters of the Virgin Islands Code which gives this commission jurisdiction over all "telephone service." 30 U.S.V.I.

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[1] *See* Paul J. Garfield and Wallace F. Lovejoy, *Public Utility Economics* (Prentice-Hall 1964), pp. 15-19, particularly p. 17 and 412-413; NARUC Telecommunications Committee, Staff Subcommittee on Federal Issues (J. Witmer editor), *Federal Universal Service: The High Cost Fund, A NARUC Primer on FCC Universal Service Reform of the High Cost Fund to Support Voice and Broadband Networks and Services in Rural and Tribal Areas, (November 8, 2011);* Harry Trebing,, *Evaluating Market Power In Public Utility Industries: New Dimenstions of Market Failure And Reform Proposals* (Michigan State University 2000), p. 4 (Effective Competition requires at least 5-6 firms of apporoximate equal size so the provders become price takers; a tight oligopoly arises when there are 4 providers who collectively comprise 60 to 100% of the market providers).

Code § 1(c). The code does not contain a definition of "telephone service" however the Code also states that the provisions of Chapter 30 "shall be interpreted and construed liberally in order to accomplish the purposes thereof." These provisions have been in effect for decades.

Although the PSC has chosen not to regulate during the market expansion and rapidly growing technology advances, the proliferation of networks and technologies providing the same if not similar services warrant consideration of the potential application of regulation in this case and, if so, then determining at which point the PSC should begin regulatory control As one of the local "laboratories of democracy" lauded by the Supreme Court[2] when considering the benefits of dual sovereignty and federalism, this occurs concomitant with, but independent of the changing application of oversight in the States. A significant factor locally in the U.S. Virgin Islands is the location in the Territory of extraordinary fiber optic access due to geographic location on Saint Croix of international cables and the close to $300,000,000. of internet infrastructure investments by the private sector and government.

The conclusion after soliciting written comment from the government, the VI Legislature, Stakeholder utilities, consultants and the public and hearing public testimony is that the PSC has clear jurisdiction over telephone service, including telecommunications as set out in subsequent federal law. Consistent with the liberal interpretation provision granted by law in the Territory is that it includes oversight jurisdition in the variety of telecommunications and information services available in the marketspace of the 21st Century and that doing so is both consistent with VI and federal law and not constrained by anticipated changing technology.

The memorandum opinion and order of the Hearing Examiner Johann A. Clendenin is that the application of Docket 641 previously approved and ordered by the Commission and now fully reconsidered in this proceeding, including resolution of the scope of the application issues raised in the initial and reconsideration proceedings be approved.

[2] *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

Docket 641: Table of Contents

Docket 641: Introduction

This matter comes before the Commission at a critical moment for the PSC's Telecommunications efforts and challenges the continuing role in regulatory oversight as the global expansion in telecommunications technology dramatically changes traditional notions of regulated telephone service. Key stakeholders have been working together nationally to develop a strategy to understand and debate Telecommunications, Information Services, wired and wireless broadband networks and cybersecurity. The PSC in considering Docket 641 is facing broader policy issues as it looks to understand the inherent implications involved as a focus shifts to implementation given the substantial investment made by private utilities and the V.I. Government in Fiber Optic infrastructure. Keys to the successful execution of the Commission's policy and legal constraints, notably our plans to ensure interconnection under V.I. and federal law as required by the Federal Communications Commission,[3] enforce federal law as required by federal law[4], act in a competitively neutral manner when developing a specific V.I. requirement under 47 U.S.C. 253 of federal law, assure accountability and balance the needs in expanding telecommunications capability in the Territory, is critical for private sector stakeholders the Government and the public.

Development of new technologies and solutions in telecommunications is a national imperative,

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[3] *In re: Time-Warner,* Docket No. 06-55 (March 1, 2007)(wholesale services and interconnection are telecommunications and apply to facilities regardless of the nature of the services provided over the facilities; state policies holding that VoIP is information service without interconnection rights as opposed to telecommunications which has interconnection rights are incorrect and should be corrected although they are not pre-empted in this decision); *DQE v. North Pittsburgh Telephone Company*, File No. EB-05-MD-027 (February 2, 2007)(local phone company cannot refuse to interconnect with alternative provider on theory that the service is information service and not wholesale telecommunications service); *In re: Petition of CRC to Preempt Maine Public Service Commission,* Docket No. 10-143 (May 26, 2011)(Section 251(a) requires interconnection and exchange of traffic regardless of any Section 251(f) rural exemption, which scope is to be decided by the state; wholesale carriers have the same rights as other telecommunications providers in Section 251(a) although we do preempt any contrary state decisions but provide clarification so they can correct their decisions); *In re: Vonage Preemption of the Minnesota Public Utilities Commission,* WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) *affd, Minn. Pub. Utils. Comm'n v. FCC,* 483 F.3d 570 (8th Cir. 2007)(Preemption of state authority to require certificate or impose 911 duty preempted but states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints); *In re: Puliver.Com*, Docket No. 03-211 (February 19, 2004)(peer-to-peer VoIP service that is free and does not interconnection with the Public Switched Telecommunications Network is information service not telecommunications)); *Comcast IP Phone v. Missouri Public Service Commission,* Federal District Court, Western District, Central Division, Docket No. Case No. 06-4233-CV-C-NKL (January 18, 2007)(FCC *Vonage Preemption* decision limited to "nomadic" VoIP not fixed landline VoIP); *In re: Petition of Kansas and Missouri,* Docket No. 06-122 (November 5, 2010)(States can impose state obligation to support universal service so long as there is no double-assessments notwithstanding prior FCC preemption of Minnesota law *Vonage* interpreted in *Holdings Corp. v. Nebraska Public Service Comm'n,* 543 F. Supp. 2d 1062 (D. Neb. 2008) (Case No. 4:07-cv-03277-LSC-FG3) to include "nomadic" and "fixed wireline VoIP" from state regulation.

[4] *Illinois Public Telecommunications v. FCC,* 752 F.3d 1018 (D.C. 2014) rehearing denied 2014 U.S. App. Lexis 694 (August 12, 2014), cert denied 2015 U.S. Lexis 2047 (March 23, 2015)(variations in state law do not warrant preemption and states are under the constitutional authority and duty to apply federal statutes and determine statutorily appropriate remedies).

particularly the deployment of fiber networks in a competitive global market.[5] Reliable and secure networks are the foundation of our digital economy and essential platforms for innovation, self-expression, and civic engagement. Moreover, these networks are vastly interdependent; localized attacks can have global implications, and the stakes continue to rise as cyber adversaries become more sophisticated and devious in their methods.[6] The Territory with its tremendous Internet capacity and significant infrastructure development will need bold and persistent leadership to get ahead and stay ahead of this challenge.

Understanding the requirements of law, policy and regulation requires sustained collaboration—between and among private companies, government agencies, and the public at large. The PSC is the essential starting point for any collaborative engagement on Telecommunications regulation, a topic that necessarily includes telephone service under V.I. law. It provides a common language and legal framework for identifying, assessing, and responding to public utilities in their strategies of providing services to the public. New technology deployment represents a substantial commitment from the private sector. Together with the local government supported by Federal dollars, there has been close to $300,000,000 invested in infrastructure for telecommunications. The V.I. Code has not been modified in meaningful ways to address the burgeoning technology advances. The legislature also did not adopt proposed revisions to PSC authority in 2009 and 2013. The public good and public interest needs to be balanced and the Hearing Examiner concludes that technology changes whether in "Energy" such as renewable energy advances in wind and solar or in "Telecommunications" technology do not call for a need to be specifically updated in the V.I. Code. Providing a level playing field that is consistent with, and enforces, federal law is a major concern to the parties commenting on this hearing Docket 641. Testimony and participation was solicited from the public, the government and the legislature as well as interested business leaders to join the discussion in the hearing. The intense interest and robust participation is a clear indication that it was a necessary and prudent step for the Commission to both examine the larger issue of jurisdiction and to give every opportunity for interested parties to be granted a thorough voice in the proceedings.

The PSC's prior decision to certificate Momentum Telecommunications and seek input on clarifying the scope of the PSC's authority in this clarifying decision is appropriate. The parties had notice this was an important issue for the Territory and the subsequent reconsideration proceedings provided the parties with notice and a meaningful opportunity to be heard, which is the essence of due process. The Hearing Examiner properly addressed the silence in the statute on the relationship between "telecommunications" under federal law and "telephone service" under the V.I. Code. The Hearing Examiner affirmatively found that "wholesale" service is telephone service under our Territory law and thereby resolved an ambiguity in the meaning of the phrase "telephone service" in our statute when it comes to wholesale service. This approach does not violate federal or V.I. law, particularly Section 41. The Hearing Examiner properly recommended yet again that the PSC certificate Momentum Telecom, Inc. as a provider of wholesale telecommunications under federal law and a telephone

[5] *See* e.g., *In re: National Broadband Plan For Our Future,* Docket No. 09-191, FCC Staff Presentation (September 29, 2009), slide 38 (Fiber to the Premises is necessary to compete with the fastest national broadband infrastructures (S. Korea/Japan).

[6] *See* e.g., Department of Homeland Security, NARUC Telecommunications Staff Committee Tour, February 12, 2016 (Telecommunications platform is essential to cybersecurity as it is the platform on which all other platforms depend).

service provider under our law.

It is further concluded that an integral requirement of this decision must be one which ensures that the PSC can, and must, enforce the V.I. and federal mandates for the interconnection and competitive neutrality required under law. Otherwise, other carriers could refuse to interconnect as occurred in the FCC's *Time-Warner* decision or the PSC would be imposing requirements on some, but not all, providers of similar services. Selective requirements for some, but not all, providers of similar services when it comes to the authority of the PSC to the extent permitted by law puts regulated entities at a competitive disadvantage vis a vis other providers who the PSC could, but choose not to, subject to it's authority.

The PSC avoids this potential for a requirement that is not competitively neutral by expressly clarifying that differing technologies, regardless of the services provided over that technology (content), is telephone service. The PSC can, and should, certificate them or regulate them but only to the extent consistent with V.I. and federal law as explained below. The PSC does so in order that consumers have a seamless and reliable telephone service despite opposing claims by other network owners or service providers. The PSC should reject claims that this overarching concern for consumers and competition is less reasonable than concluding that the PSC cannot do anything because a legislature lacked some omniscient and infallible view of what was meant by "telephone service" in perpetuity in 1965. It is also noted that the Territory has seen extensive investment in telecommunications infrastructure and notable redundant investments have been made without achieving the goals of neutral competition and last mile services to the consumer.

This decision is consistent with, and in furtherance of, federal law. The FCC already classified the consumers' retail end-user internet service i.e., Broadband Internet Access Service (BIAS), to be a Title II federal telecommunications service in its recent *Open Internet Order*.[7] The PSC commits no legal error by recognizing that federal development and acting in furtherance of that decision by considering BIAS to be a "telephone service" but then awaiting further federal clarification on what that means to the PSC. Today's decision imposes no mandates and certainly is not acting to set rates or tariffs for BIAS in the V.I. as part of this wholesale disposition.

The PSC should agree with the Hearing Examiner that telephone service includes Commercial Mobile Service (CMRS). Section 47 U.S.C. § 332 already classifies wireless as a common carrier service in Title II under federal law. Section 332 goes further to specify that, the states although they cannot regulate the entry or rates charged by CMRS or a private mobile service, can regulate other "terms and conditions" of mobile service. This includes approval of interconnection agreements and acting to ensure that consumers can seamlessly interconnect with other networks. While the scope of what additional terms and conditions means will logically develop over time, it is no violation of our V.I. law to conclude that CMRS is telephone service in order to enforce federal law in the Territory. Since the PSC imposes no rates or entry

[7] *In re: Open Promoting and Preserving an Open Internet,* Docket No. 14-28 (March 12, 2015). Although the Order is still on appeal in Docket No. 15-1063 in the District of Columbia Court of Appeal, the FCC continued to act as if this were the law. This includes consumer notices on contacting the FCC if internet speeds are less than those promised and, most recently, a proposed rulemaking on protecting the privacy of consumer internet service provider information. *See*

mandates, the PSC violates no federal law by noting that it could, and might, address "other terms and conditions" for Section 332 wireless services as part of PSC wholesale disposition.

The PSC commits no legal error by concluding that Voice over Internet Protocol (VoIP), although it has not been classified as a "telecommunications" or "information service" at this time, is within the PSC's authority. The FCC's preemption of state regulation of VoIP was limited to "nomadic" VoIP and not landline VoIP. The PSC is not seeking to regulate nomadic VoIP. Moreover, the FCC subsequently required the states to resolve interconnection disputes involving VoIP and permitted reasonable assessments on all VoIP providers when the assessment supports local objectives like those of the V.I.[8] The conclusion today that landline VoIP is an integral component of wholesale service and that nomadic VoIP may be subject to state universal service assessments as part of PSC wholesale disposition is no violation of law when the PSC decision rests on, and acts in furtherance of, the *Vonage Order* and *Missouri Decision.*

The PSC should reject the view of some parties that the failure to amend Section 41 since 1965, particularly in 2009 and 2013, means that the PSC is precluded from ever considering technologies or services other than those that existed in 1965. The PSC should agree with the hearing examiner that a more reasonable interpretation of this legislative phrase is one which meshes V.I. and federal law by concluding that what constitutes "telephone service" does not change just because the technology changed. Telephone service, even if it were the limited local service suggested by the opposing parties, no longer ceases being telephone service just because there is a new technological way of providing it to consumers.

The PSC should reject this view in favor of a more reasonable view which interprets "telephone service" like the way the courts have interpreted the First and Second Amendments or even ways of generating energy. The word does not change but, instead, our understanding of what the word means changes over time, particularly in response to new technology. This approach avoids a statutory interpretation and absurd result that could occur if we adopt the opposing parties view and thereby insert the limiting phrase "as it existed in 1965" in the definition. That phrase was not there in 1965 and it is not there today. The legislature alone is free to insert that phrase not the PSC. The PSC therefore should reject the invitation to insert that phrase in order to uphold a theory that no technology or service since 1965 can ever be "telephone service" since it did not exist in 1965 unless and until the definition is expressly amended to say otherwise.[9]

The more reasonable interpretation reflects the first principle of administrative law and rejects other principles propounded by the opposing parties. The first principle holds that when the statute is silent or ambiguous with respect to the specific issue, the only question is whether the agency's interpretation is reasonable.[10] The statute is silent on whether "telecommunications" is encompassed within, and is a part of, "telephone service" and the PSC

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[8] See n. 1 *infra* and *In re: Petition of UTEX to Preempt Texas Public Utility Commission regarding interconnection dispute with ATT Texas involving Voice over Internet Protocol (VoIP),* Docket No. 09-134 (October 9, 2009)

[9] *See inter alia., Zimmerman v. O'Bannon,* 442 A.2d 674 (Pa. 1983)(interpretations cannot produce absurd results) and *Worley v. Augustin,* 456 A.2d 558 (Pa. 1983)(court cannot insert words where they do not exist).

[10] *Illinois Public Telecommunications Commission v. FCC,* 752 F.3d 1018 (D.C. 2014), *cert denied* 2015 U.S. Lexis 2047.

should conclude that it is. The statute is ambiguous with regard to how the V.I. phrase "telephone service" is to be read in light of subsequent changes in technology, services, and federal law. Given the PSC mandate to enforce federal law and the V.I. law, the conclusion should be that the phrase is sufficiently flexible to address these changes. However, the PSC's approach cannot and should not violate the current federal limitations on BIAS, wireless, or cable service set out by the FCC and the courts. The fact that this interpretation is more reasonable than the opposing parties does not make it unreasonable or contrary to law.

Docket 641 Regulatory Framework

The Virgin Islands Code gives this commission jurisdiction over all "telephone service." 30U.S.V.I. Code § 1(c). The code does not contain a definition of "telephone service." The Virgin Islands Code also states that the provisions of Chapter 30 (that is, the portions of the code dealing with public utilities) "shall be interpreted and construed liberally in order to accomplish the purposes thereof." These provisions have been in effect for decades. Their potential application to this case is essential.

There has been substantial national debate and much conflicting law as well as changes in policy by the FCC and States over the salient meaning of "telephone" telecommunications, Information Services, Wireless and Broadband. This national debate has been significantly influenced by political interest groups and powerful industry lobbyists.

The National Association of Regulatory Commissioners (NARUC) has a National Telecommunications Committee that studies these regulatory issues. This Hearing Examiner is a member of this committee. In addition the Hearing Examiner is Chairman of the Mid-Atlantic Conference of Regulatory Utilities Commissioners (MACRUC) Telecommunications Committee. Both of these bodies study the contemporary state of regulatory affairs in the States and Territories. It is abundantly clear that the litigeous nature of differing positions and curried political favor has resulted in confusing and often conflicting legislation in and among the various jurisdictions. This national chaos should not unduly influence the Territory of the U.S. Virgin Islands into avoiding legitimate regulatory control within Federal and Territorial law.

To address the matter of Momentum's Application for a certificate and willingness to be regulated as a "Middle Mile" provider, the following questions were initially posed to the local industry, government and public to be addressed in the original hearing. The regulatory issues are provided herein and remain the salient issues governing this reconsideration.

1. Does the PSC have a role in opening the local wireline telecommunications market to competition?

The answer to this is probably yes – at least with respect to interconnection.[11] Wireless is supplanting wireline for phone service –but not so much for data services. The FCC has consistently stated that wireless is not a substitute service for, or supplement to, wireline service.[12] However, the FCC's recent *706 Report* now states that consumers have access to advanced telecommunications capability only to the extent that they have access to fixed and mobile broadband service.[13] In any case, historically, competitors are not fond of connecting with each other for obvious reasons. For TDM connections, the federal law says explicitly that a State/territory can, if their state law allows it - "arbitrate" interconnection disputes between incumbent local exchange carriers and new entrants. 47 USC 251-2. The recent Internet Protocol interconnection dispute is another example where incumbents with TDM networks resist interconnection demand of IP network owners.[14]

For IP connections for VOICE – the FCC say the carriers should do it and has an open proceeding on whether the 47 USC 251-2 State arbitration provisions apply, that question is currently being litigated in federal appellate court (whether a state (it was Michigan)) can arbitrate such disputes. NARUC filed a friend of the court brief there.)

The latest FCC order (on net neutrality) says states have no authority to use the 251-2 permitted arbitrations for interconnection disputes on wireline internet service. They also say that internet backbone service is not a telecommunications service and imply states have no authority there either. However, the same order said that Broadband Internet Access Service (BIAS), or end-user retail service, is a Title II telecommunications service. This is an example of the confusion and conflicting law and regulatory implication!

How does the PSC determine if a fiber line is "internet backbone" or just a trunk for a range of services? The same order suggests that the States / Territories have authority under 201-202 to address it but so far the States do not.

2. Can and should the PSC restrict market entry by competing wireline service providers in order to preserve universal service?

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[11] *See In re: Petition of UTEX to Preempt Texas Public Utility Commission regarding interconnection dispute with ATT Texas involving Voice over Internet Protocol (VoIP),* Docket No. 09-134 (October 9, 2009)(FCC will not preempt state commission addressing VoIP interconnection under federal law).

[12] FCC *Voice Telephone Service: Status as of December 21, 2014* (March 2016), p. 1, n. 3.

[13] FCC *Section 706 Report: 2016 Broadband Progress Report,* Docket No. 15-191 (January 29, 2016), para. 17.

[14] See *e.g., In re: Connect America Fund, Docket No. 10-90; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Petition for Declaratory Ruling that tw telecom inc. has the Right to Direct IPto- IP Interconnection, WC Docket No. 11-119; Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; High-Cost Universal Service Support, WC Docket No. 05-337; Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Federal State Joint Board on Universal Service, CC Docket No. 96-45; Lifeline and Link-Up, WC Docket No. 03-109; Universal Service Reform – Mobility Fund, WT Docket No. 10-208,* Cablevision Ex Parte (May 8, 2013).

With regard to federal law as it applies to U.S. territories, as a matter of federal law, 47 USC 253 pre-empts any "state" law or regulation that stops any provider from providing any interstate or intrastate telecommunications service. However, Section 253(b) permits states to impose, on a competitively neutral basis and consistent with Section 254 (universal service), requirements needed to preserve universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers. , One can view the "exemptions" in 253 (b) as allowing the PSC to handle service quality and Universal Service Fund (USF) policies, but the USF policies have to be applied in a competitively neutral fashion and according to 254 must be consistent with federal mechanisms.

Therefore it would be difficult for the PSC to make the case that restricting entry falls within that 253(b) USF provision. By certificating and regulating some providers but not others, the disparity in regulatory accountability in the V.I. may be viewed as not being competitively neutral given the disparate costs for regulatory accountability. By the same token, however, the FCC's *Vonage Order* pre-empted state certification and 911 mandates which, as explained earlier, the courts either limited to "nomadic" or "over the top" VoIP (*the Missouri decision* in note 1) or "nomadic" and "wireline" VoIP (the *Minnesota decision* in note 1).

The PSC could under 47 USC 251(f) avoid arbitrating interconnection disputes with our incumbent (Innovative) under certain conditions given our VI service territory qualifies as rural as the term is defined in the Telecommunications Act. This process would slow down new entry into the VI Marketspace but is not consistent with the desire for a level playing field. However, other jurisdictions like Pennsylvania have phased out this "rural exemption" so the approach varies by jurisdiction.

3. Should the PSC regulate new wireline service providers? To what extent?

The PSC should want some showing that new competitors can actually provide the promised services and a certificate requirement to do business that requires some minimum level of capital, so that they don't dig up streets and then go bankrupt. In situations where a certificate is not possible, as with "nomadic" VoIP under the *Missouri* decision or "nomadic" and "landline" VoIP under the *Minnesota* decision, the PSC could consider a registration or license option with minimal requirements. Conversely, the PSC could use the new "national certificate" approach set out in the June 2015 *Numbering Order* and note that the information required to be provided to the states by the FCC could be used to enforce the non-entry or non-911 mandates that the *Vonage Order* did leave with the states as explained in note 1 above. The PSC should also note that because of 253, we cannot deny a certificate to provide a telecom service UNLESS the PSC can show the company has engaged is fraudulent activity in the past or they are so chronically underfunded and are so unlikely to succeed that customers would be harmed.

4. Can and should the PSC require a service provider to obtain a "Certificate of Authority" to provide telephone services?

Yes. However, as explained above in wireless, Section 322 prohibits entry regulation so no certificate may be permitted but the residual authority over "terms and conditions" that are not rates or entry. This arguably permits the V.I. to impose some type of registration or information filing to enforce those terms and conditions if the V.I. decides it wants to do that.[15] Moreover, as explained above, at a minimum certification cannot be required of "nomadic" VoIP under the *Missouri* interpretation of the *Vonage Order* but it may be required of landline VoIP i.e., cable. In some states, cable providers have obtained certificates as a "wholesale telecommunications" provider to deliver retail VoIP to consumers. In either case, one approach could be to use the information that must be provided to the states in the FCC's newly announced "national certificate" set out in the June 2015 *VoIP Numbering Order.*

The PSC cannot really DENY a certificate, unless, based on the same requirements we apply equally to all, or if the PSC were to discover a company has a history of fraudulent activity or is seriously underfunded. However, there are instances where we cannot require one either.

5. Should the PSC abstain from regulating VoIP (Voice over Internet Protocol) service providers?

The reason for PSC oversight in this area has nothing to do with the technology to provide service. If conditions are such that the PSC does not need to regulate time division multiplexing (TDM) based services, then it is likely that the PSC does not need to regulate VoIP. That is partly because the overwhelming choices for voice that consumers have today is the incumbent TDM network for voice over copper or FiOS (fiber) voice and the cable company's VoIP using Data Over Cable Service Interface Specification (DOCSIS) 3.0 technology developed by CableLabs.

If conditions are such that you have to regulate some aspects of service of TDM based service, such as provision of 911, emergency restoration, disconnection policy, providing a forum for billing disputes and "SERVICE QUALITY" and if they are both wireline services, we probably need to oversee VoIP. But, again, the court precedent supports and denies that option.

There are special characteristics of VoIP (aka the need for battery back up) that raise additional concerns but those concerns rooted in technological change are no basis for concluding this is not telephone service under our law! This is clearly evident in the disruption of the Innovative EVO service during a recent power outage in the Territory. It is also clear that VoIP based

[15] It is worth noting that the California Public Utilty Commission (CPUC) under then-Governor Gray Davis proposed to regulate "terms and conditions" of service like contract terms, print size, consumer complaints, and similar matters. CTIA vigorously opposed the move citing the CTIA Code of Conduct and a "light touch' regulatory approach in support of that result. Governor Davis was recalled in part due to the energy price spikes triggered by their deregulation law and Governor Schwarzenegger succeeded him. CPUC abandoned that proposal. Commissioner Chong from CPUC then proposed a NARUC resolution that would have set the FCC standards for "terms and conditions" as the state and federal floor and ceiling, effectively centralizing authority at the FC C as advocated by CTIA and major industry providers. The resolution failed in the Telecommunications Committee by an 8 to 7 vote. It was never resurrected. No states has taken action to regulate "terms and conditions" since then.

services will be competing directly with legacy TDM based services more and more not that the Territory has competing providers, and even where there is no competing provider (wireless or otherwise), then oversight is usually needed.

This is demonstrated in Table 6 and Figures 6 and 7 of the FCC's October 2014 *Local Competition Report* shows that interconnected VoIP bundles are overwhelmingly provided either by the incumbent carriers using DSL or Fiber-to-the-Premises or by cable companies using cable modem technology. And, where there are competitive alternatives other than cable or the incumbent do exist, Figure 8 shows that the competition that does exist relies almost exclusively on unbundled network elements supplied by the incumbents or the competitors' ability to resell the incumbents' services.

n.b. WIRELESS: As a matter of federal law in 47 U.S.C. § 332, States cannot regulate "rates" for wireless (basically unless you only have one provider and the rates are outrageous and even then you have to get permission from the FCC) or entry, but States have explicit authority under 332 to oversee "other terms and conditions of service." The PSC should note that the wireless industry has argued nationally every regulation you have effectively "sets the rate" or is "rate regulation" pre-empted in 47 USC 332 (c) although the courts reject that.[16]
Section 332(C)(3)(A) does allow the state to petition the FCC to regulate the rates based on market conditions and the FCC must make a decision within 9 months from that request. No state or territory has taken such an action so the probability of success is uncertain at best. A recent panel on that option conducted by the NARUC staff telecommunications staff subcommittee was vigorously contested by the wireless industry panel members.

n.b. WIRELINE: For facilities based VoIP providers (primarily cable companies using cable modem using DOCSIS 3.0 technology), the PSC has jurisdiction until some court rules otherwise. However, the *Minnesota* decision upholding a broad prohibition on the states imposing certification or 911 mandates on VoIP reflected the FCC's argument that VoIP traffic was "inserverable" into interstate and intrastate traffic although in the subsequent *Kansas-Nebraska* order discussed in note 1 *infra,* the FCC indicated that traffic was severable. Consequently, the probability of imposing certification is unpredictable at best. ,

Docket 641 Scope of Proceeding and Issues of Interest

The scope of the proceeding included an exploration of both the merits of issuing Momentum Telecom, Inc. a Certificate and the scope of that certificate because it raised broader implications of PSC regulatory oversight of Information Services, Broadband, Wireless and "middle mile"

[16] *CTIA v. FCC,* 168 F.3d 1332 (C.A.D.C. 1999); *Mountain Solutions v. Kansas State Corporation Commission,* 966 F.Supp. 1043 (D.Kan. 1997; aff'd 149 F.3d 1058.

infrastructure service providers. Of particular interest was the inclusion of Information Services of all types of new technologies utilizing fiber and the Internet into the broader category of Telecommunications and whether the Virgin Islands Code which gives this commission jurisdiction over all "telephone service." 30U.S.V.I. Code § 1(c). The V.I. law contains no definition of "telephone service" but the law instructs that the term "shall be interpreted and construed liberally in order to accomplish the purposes thereof."

This gave rise to claims in the underlying proceeding that "telecommunications" and "information service" under federal law and defined in federal law are distinct from "telephone service" under V.I. law. The opposing parties claimed that the 1965 term "telephone service" meant service and technology as it was understood at that time. This did not encompass "telecommunications" or "information service" or "wireless" or "internet service" or other technologies and networks.[17] The Hearing Examiner suggested that the silence on technology in 1965 and the requirement that the term be liberally construed was sufficient to include these.[18]

Salient Telecommunications Issues

1. Opening Markets. The U.S.V.I., like the states, has a role to play in opening markets under federal law (Telecommunications Act of 1996; The PSC has authority to approve interconnection agreements between incumbents and competitors; the PSC also has power to mediate and arbitrate interconnection disputes.[19] Section 253 allows a state to impose technologically neutral requirements if in furtherance of state universal service although the FCC has overturned state decisions in the past but has, in other decisions, permitted states to set termination rates for wireless service.[20].

2. Restrict Entry. A PSC attempt to restrict entry by competitors would likely be challenged as an obstacle to the competition envisioned under the TA-96 (Telecommunications Act of 1996). This would likely prevail given prior Section 253caselaw holding that Section 253(a) prohibits

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[17] Tr. 20, 44, and 111.
[18] Tr. 41.
[19] *In re: Petition of UTEX to Preempt Texas Public Utility Commission regarding interconnection dispute with ATT Texas involving Voice over Internet Protocol (VoIP),* Docket No. 09-134 (October 9, 2009)
[20] *Compare* 47 U.S.C. § 332(c)(3)(A)("states may not set entry rates") and *Metro PCS v. FCC,* 644 F.3d 410 (C.A.D.C. 2011)(FCC did not abuse discretion by allowing state commission to set termination rates wireless provider was required to pay local exchange carrier for wholly intrastate communications) with *Starpower Petition to Preempt the Virginia Corporation Commission on interpretation and enforcement of interconnection agreements,* Docket No. 00-52 (June 14, 2000)(preemption granted) and *In re: Petition of UTEX to Preempt Texas Public Utility Commission regarding interconnection dispute with ATT Texas involving Voice over Internet Protocol (VoIP),* Docket No. 09-134 (October 9, 2009)(preemption denied as state is willing and able to arbitrate dispute involving VoIP).

requirements that are barriers to entry although some requirements may be upheld if they meet the exceptions set out in Section 253(b).[21]

3. CLEC Regulation. Competitive Local Exchange Carrier (CLEC) Regulation of new entrants is a clear responsibility of the PSC. It does raise several questions going forward:

a. Are all regulations applied equally to all carriers? Or only some regulations apply to competitors but not others because they lack market power?

b. Should the incumbent alone, and not competitors, have the obligation of universal service (serve all customers) as the Carrier of Last Resort (COLR)?

c. What "market competition" test can be used by the PSC to say that the market is so competitive you do not need price regulation any more.

d. Will Territory Competitors serve all customer market segments or only some i.e., higher-margin small to mid-size businesses but not thinner margin residential customers? Why? Business rates are historically priced well above cost to support residential rates that are either barely above, if not below, costs. What will happen to the contribution that higher priced business rates have made to supporting lower-priced residential rates? Is that claim even real but just a 30-second sound byte claim made to Who will make that up? How will it be made up?

4. U.S.V.I. Certification and Numbering. A certificate or registration process is a good idea. It gives the Commission a contact and regulatory lever to ensure compliance with stable policies or rules in the telephone services marketspace i.e., making all carriers support a state universal service fund (USF) that support affordable service to all customers. However, the FCC's June 18, 2015 *Numbering Order* in Docket Nos. 13-97 and 99-200 permits VoIP providers to get a national certification from the FCC to get numbers but also provide contact information to the states. Consequently, the PSC should consider carefully before impose a certificate mandate on "mobile" VoIP like Vonage because the *Vonage Order* pre-empted state certification, as noted in the *Numbering Order* above. However, federal court precedent does allow the PSC to require a certificate from fixed wireline VoIP i.e., cable although other federal courts have held to the contrary.[22] Another important issue is that infrastructure "carriers" i.e. viNGN must have a

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[21] *In re Public Utility Commission of Texas*, Docket No. CCBPol 96-13 (October 1, 1997)

[22] *Compare In re: Vonage Preemption of the Minnesota Public Utilities Commission,* WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) *affd, Minn. Pub. Utils. Comm'n v. FCC,* 483 F.3d 570 (8th Cir. 2007)(Preemption of state authority to require certificate or impose 911 duty preempted but states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints) with *Comcast IP Phone v. Missouri Public Service Commission,* Federal District Court, Western District, Central Division, Docket No. Case No. 06-4233-CV-C-NKL (January 18, 2007)(FCC *Vonage Preemption* decision limited to "nomadic" VoIP not fixed landline VoIP).

certificate before they can get telephone numbers to assign to their customers; otherwise, they must use an intermediary who does have a certificate.

5. VoIP Regulation. A controversial issue for the PSC. Some parties as in the hearing written testimony will claim it is "information service" and "not telecommunications" so therefore you cannot regulate it.[23] Others will say it is "telecommunications" that is fixed wireline and "not information service" or "nomadic" VoIP so you can regulate it.[24]

It is important to note that "information service" is only regulated by the FCC but that "telecommunications" is regulated by the FCC 'and the states' unless the FCC pre-empts (takes away) state authority. The FCC has not yet decided if VoIP is "telecommunications" or "information service" under federal law. Recently, the FCC issued a decision in the "VoIP Symmetry Rule" decision ruling that VoIP providers who use internet companies to carry their voice calls can, sometimes, be paid by other carriers for the "functional equivalent" of switching service – a significant result since under the "old" regime only "traditional switching" was what one carrier had to pay another carrier.

"VoIP using the internet" or "nomadic" has never been sold by the providers as a substitute for traditional wireline voice because, for one thing, it cannot provider 911 although cable-company VoIP, by far the largest provider of VoIP nationwide, can do 911 BUT they traditionally resist (1) certification as a telephone company for the retail service although they do obtain certification by a wholesale telecommunications affiliate to interconnect with the incumbents' network consistent with the *Time-Warner* decision set out in note 1 *infra*; (2) either providing or paying the incumbent carrier to be the Carrier of Last Resort (COLR), what the company with the universal service obligation must do, which the FCC has adopted somewhat in the recent *Transformation Order* of 2011 in ruling that census blocks in federally supported high-cost areas would no longer receive support if an "unsubsidized competitor" was serving that census block

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[23] This interpretation usually cited to *In re: Puliver.Com*, Docket No. 03-211 (February 19, 2004) (peer-to-peer VoIP service that is free and does not interconnect with the Public Switched Telecommunications Network is information service not telecommunications).

[24] *Compare In re: Vonage Petition to Preempt the Minnesota Commission,* Docket No. 03-211 (November 12, 2004), 19 FCC Rcd 22404 (2004) *affd, Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (Preemption of state authority to require certificate or impose 911 duty preempted but states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints) with Comcast *IP Phone v. Missouri Public Service Commission,* Federal District Court, Western District, Central Division, Docket No. Case No. 06-4233-CV-C-NKL (January 18, 2007)(FCC *Vonage Preemption* decision limited to "nomadic" VoIP not fixed landline VoIP) and *In re: Petition of Kansas and Missouri,* Docket No. 06-122 (November 5, 2010)(States can impose obligation to support universal service so long as there is no double-assessments notwithstanding prior FCC preemption of Minnesota law in *Vonage* interpreted in *Holdings Corp. v. Nebraska Public Service Comm'n,* 543 F. Supp. 2d 1062 (D. Neb. 2008) (Case No. 4:07-cv-03277-LSC-FG3) as preempting "nomadic" and "fixed wireline VoIP.".

fully or partially[25]; and (3) their presence is sufficient to remove price regulation for traditional voice service even if the market is, at best, a stable duopoly.

1. Fixed VoIP should be a regulated service at the territory level as far as the PSC is concerned based on the *Vonage Order* and *Missouri Decision* in note 1 and *seriatim* above. Even though we have not required fixed VoIP providers to obtain a certificate of public convenience and necessity or to file tariffs, the PSC should allow / request carriers to submit to regulation and file tariffs voluntarily or require a certificate under the *Vonage-Missouri Decision* approach as opposed to the broader *Vonage Order* interpretation set out in the *Minnesota Decision*. This would allow the PSC to qualify Cable Wireless and Broadband carriers as an ETC for Lifeline service, bringing welcome Federal USF dollars into the territory.

2. The PSC should consider requiring all fixed VoIP providers to contribute to the Territory Universal Service Fund, and allow them to draw from it to provide USVI's supplement to the Federal Lifeline program. The FCC already requires VoIP provides to support federal universal service and permits states to assess VoIP revenues for state purposes so long as there is no double-assessment at the state level using a proxy safeharbor rule.[26] Under this regime, competition improves rather than detracts from universal service. Our USF then also advances the VI public interest. The following recent information from the FCC highlights the issue of regulatory jurisdiction and why the V.I. PSC needs to exercise the full extent of its oversight in the Territory:

a. The FCC's recent investigation of Total Call Mobile revealed apparent holes in the federal safeguards that are supposed to protect taxpayer funds. For example, the National Lifeline Accountability Database (NLAD) is intended to verify a person's identity and address, among other things, before deeming that person eligible for Lifeline support. Identity verification is done by a third party, which reviews a person's first and last name, date of birth, and the last four digits of his Social Security number. But the FCC learned how Total Call Mobile's agents apparently overrode these third-party identity verification (TPIV) safeguards of the NLAD for 99.8% of its new subscribers in the last quarter of 2014.

b. The FCC confirmed that Total Call Mobile was not alone. Three of the companies identified by Total Call Mobile's agents indiscriminately overrode the TPIV safeguards between October 1014 and February 2015. One overrode the safeguards for 98.5% of its new subscribers; Another overrode the safeguards for 96.2% of its new subscribers; and a Third overrode the safeguards for 96% of its new subscribers. Furthermore, eight other wireless resellers overrode federal safeguards more than half of the time between October 2014 and February 2015: Carrier A (99.5%), Carrier B (97.4 %), Carrier C (97.6%), Carrier D (95.3%), Carrier E (92.7 %), Carrier F (89.4 %), Carrier G (74.2 %), and Carrier H (50.6 %).

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[25] *In re: Transformation Order, CAF II Auction*, Docket No. 10-9 (June 10, 2014), paragraph 162.
[26] *In re: Universal Service Contribution Methodology*, Docket No. 04-36 (June 27, 2006) para. 1-2; *In re: Kansas and Nebraska USF Petitions*, Docket No. 06-122 (November 5, 2010).

c. The FCC found that the aggregate numbers for just these five months of enrollment were staggering. Roughly one third of the 2.5 million Lifeline subscribers enrolled by wireless resellers, or 821,482 subscribers, were enrolled using a TPIV override. And, even setting aside Total Call Mobile, the other 11 wireless resellers mentioned above were responsible for 616,937 of those enrollments. USAC changed the TPIV override process on February 2, 2015, to stem this widespread abuse. But the FCC remains concerned that existing safeguards still may let unscrupulous carriers exploit the program. On USAC's website, USAC Staff still does not review any document that verifies a person's identify before authorizing a TPIV override (now called a "TPIV dispute resolution"). Instead, staff only review a certification from the carrier that the requisite documents are in order. In other words, the integrity of the process relies on the integrity of the carriers-the only ones who know if a subscriber's identity is legitimate.

d. 277,599 subscribers have been enrolled through the new TPIV process, with some wireless resellers relying on that process much more heavily than others. Six of the wireless resellers identified above have relied on the new TPIV override process more than a 1,000 times: Carrier 1. (48,908 Overides), Carrier 2. (20,656), Carrier 3. (10,817), Carrier 4. (5, 101, Carrier 5. (2,449) and Carrier 6. ((1,307.) Four other wireless resellers – A (32,052, B (31,628), C (17,540) and D (3,649) have also frequently over ridden these federal safeguards.

e. Although the NLAD is also supposed to verify a person's address, it allows carriers to override that check with the press of a button. As USAC's website explains - staff does not review any document that verifies a subscriber's address before authorizing an address override. Instead, if a carrier indicates that an enrollee's address is in a rural or tribal area and thus is not verifiable by the United States Postal Service, the override is automatically granted. As a result, here too the integrity of the process still depends on the integrity of the carriers-the only ones who know if a subscriber's address is legitimate.

f. 494,921 subscribers have been enrolled through the address override process since October 2014, with some wireless resellers relying on that process much more heavily than others. Fourteen of the wireless resellers identified above have relied on the address override process more than 1,000 times.

There is apparently much work to be done before American taxpayers can know that the money they contribute each month to the Fund is not wasted or put to fraudulent use.

The basic issue, whether "Lifeline" or other critical programs for the people of the U.S. Virgin Islands, is that the PSC in the USVI has jurisdiction on the entire scope of "Telephone Services" whether the PSC has exercised the authority or not! The opportunity for abuse is clear and the demonstrated performance of Public Utilities and Carriers is wanting.

There have been many and there will continue to be many technological advances and services offered in Telecommunications. The PSC must protect the consumer from manipulative practices which prevent services promises or curtail competition.

The burden of the "last mile" must not only be on the traditional terrestrial provider of copper. A phone call / telecommunications are the same regardless of the technology!

Docket 641: Interested Party Reconsideration Submissions

See Appendix

Docket 641: Georgetown Consulting Report

See Appendix

Docket 641: Public Hearing ~ 8 March 2016

A public hearing was held on March 8, 2016 with the purpose to entertain comments from the Public and interveners on Docket #641regarding the Momentum Telecom, Inc. and their application for authority to provide telecommunications services in the USVI. The broader issue considered was whether the PSC has or should have jurisdiction over the "Information Services" component of "Telecommunications" in the Territory and the policy issues surrounding regulation. Testimony was heard from Momentum Telecom, Inc., Georgetown Consulting Group, Inc., the PSC Staff and members of the public at large in an open forum conducted at the PSC offices in Saint Thomas and Saint Croix (Via Video Conference).

The transcript of the public hearing and testimony is available as an Appendix

Docket 641: Interested Party Recommendations of Findings of Facts and Conclusions of Law Submissions

See Appendix

Docket 641: Hearing Examiner Findings

1. That there is significant competitive interest and substantial differences of opinion regarding the matters before the Commission on regulating Information Services component of Telecommunications and the Momentum Telecom, Inc. application for a Certificate.
2. That the public is often confused by the myriad technical services offered and the technology providing the services and solutions.
3. That the public seeks reliability and transparency and service to remote locations
4. That the VI Code provides for the regulatory control of the Momentum Telecom, Inc. Application
5. That the substantial investment by both the government and private industry needs oversight and some regulatory provision in order to serve the public interest.

Docket 641: Hearing Examiner Conclusions

1. That Momentum Telecom, Inc.'s Application continues to be prudent and within the jurisdiction of the PSC.
2. That the telephone services / telecommunications environment is critical in the Territory and the myriad positions and multiple niche markets of competitors demand regulatory control to ensure reasonable competition and service reliability essential for the public good.
3. That in the matter of policy, the PSC should ensure jurisdiction over the broader category of "Unified Telecommunications" to include Broadband, wireless, wireline, VoIP, Information Services and middle mile infrastructure to the extent not preempted by law or FCC orders.

Docket 641: Hearing Examiner Recommendations

1. That the Certificate previously approved for Momentum Telecom, Inc. by the PSC on Docket #641 is appropriate.
2. That the VI Code should continue to be interpreted as written in 1965 and that the term "telephone service" is inclusive of the infrastructure or technology to provide telephone service such as Telecommunications, Internet, Voice over Internet Protocol (VoIP), Broadband, Wireless and other mobile telephone devices such as computers used for telephone calls, tablets, and smartphones.
3. That the PSC has the appropriate and continuing requirement to examine the changing landscape of telephone services in the Territory and provide regulatory oversight including rate structures where appropriate.

ORDERED that this opinion be presented to the Public Service Commission for its consideration.

Entered this 3rd day of June, 2016

Johann A. Clendenin

Hearing Examiner

Docket 641: Appendices