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**State of Vermont
Public Utility Commission**

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MEMORANDUM

To: Joint Fiscal Committee

From: Kyle Landis-Marinello, ^{klm} General Counsel, Vermont Public Utility Commission

Re: Memorandum ordered by Section E.234 of Act 11 of the 2018 Special Session regarding the Vermont Public Utility Commission's regulatory authority with respect to Vermont's Enhanced 911 network

Date: August 31, 2018

In Section E.234 of Act 11 of the 2018 Special Session, the Vermont Legislature ordered the Public Utility Commission to file a memorandum with the Joint Fiscal Committee:

On or before September 1, 2018, the Public Utility Commission shall submit a memorandum to the Joint Fiscal Committee detailing its regulatory authority with respect to Vermont's Enhanced 911 network, with specific reference to the regulatory authority of both the E-911 Board and the Federal Communications Commission. The memorandum shall include the Commission's recommendations, if any, for ensuring comprehensive regulatory oversight and enforcement of matters pertaining to the E-911 network.

Act 11, § E.234 (2018 Special Session). This memorandum responds to that request.

The Commission appreciates the Joint Fiscal Committee's interest in Vermont's Enhanced 911 ("E-911") network. It is critically important that Vermonters have access to E-911 services. As the Commission noted in a recent order, "we are troubled by the possibility of even a single person being delayed in contacting 911 in an emergency situation."¹

Regarding the Committee's specific request for an explanation of the scope of our regulatory authority, versus that of the E-911 Board and the Federal Communications Commission ("FCC"), it is difficult for us to fully address that question at this time. This is for two reasons. First, while some jurisdictional matters have been settled, many others remain unsettled, both as a matter of federal law and state law. The Public Utility Commission expects to issue rulings on some of these jurisdictional matters in the next few months. That said, the final word on these matters may end up coming from the Vermont Supreme Court (for questions

¹ *Petition of Vanu Coverage Co.*, Case No. 18-1543-PET, Order of 6/18/18, at 2.

of state law) or the federal courts (for questions of federal law). Second, as a quasi-judicial body, the Commission must provide due process to the parties that appear before us in contested matters, and we currently have three pending proceedings that directly raise some of these same jurisdictional questions. We expect that the Commission will issue rulings in those cases before the end of the year. Those rulings—which we will provide to the Joint Fiscal Committee as soon as they are issued—should resolve some of the uncertainty regarding these jurisdictional issues.

Uncertainty Regarding Jurisdiction over E-911

Depending on their situation, Vermonters are likely to use one of the following three methods in the event that they need to access E-911 services: (1) a traditional landline; (2) a cell phone; or (3) Voice over Internet Protocol (“VoIP”).

Regarding traditional landlines, the State of Vermont has jurisdictional authority over the businesses providing these services and all aspects of the services, terms, and conditions. State law requires that local exchange telecommunications companies provide continuous access to E-911 to each residential dwelling, even if that residence no longer receives other telecommunications services.²

The State’s regulatory authority over cell phones is more limited. Under federal law, which preempts state law wherever the two are in conflict, states cannot “regulate the entry of or the rates charged by any commercial mobile service or any private mobile service.”³ Vermont therefore does not have authority to require cell phone service providers to ensure cell phone coverage to Vermonters. This is so even for situations where someone has abandoned their landline and uses only a cell phone: if that person does not have cell phone reception at their home, then they will not have access to E-911. Similarly, if someone is traveling along an area that does not provide cell phone coverage, and thus does not have access to E-911, the State cannot mandate that a company provide coverage in that area. This issue arose earlier this year when Vanu CoverageCo was providing cell phone service through “microcells” that depended on digital subscriber line (“DSL”) services provided by Consolidated Communications. When CoverageCo failed to pay its bills, Consolidated cut off DSL services (and thus CoverageCo’s wireless services as well), resulting in some Vermonters losing E-911 access in certain areas. The Commission held that although the situation was regrettable and worrisome, federal law preempts states from forcing Consolidated to provide CoverageCo with DSL services:

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

² See, e.g., 30 V.S.A. § 7055(a); Commission Rule 7.100. The Commission’s Rules are available at <http://puc.vermont.gov/about-us/statutes-and-rules/current-rules-and-general-orders>.

³ 47 U.S.C. § 332(c)(3).

states. We agree with Consolidated and the Department that we lack jurisdiction in this matter.⁴

That said, Vermont does retain authority over “the other terms and conditions of commercial mobile services.”⁵ Vermont has exercised that authority to require cell phone companies to provide their customers with access to E-911 wherever those customers have cell phone coverage.⁶

Regarding VoIP services, the jurisdictional landscape is unsettled, particularly with regard to whether federal law allows Vermont to regulate the provision, terms, and conditions of VoIP services. As explained below, this is one of the three matters currently pending before the Commission.

Pending Matters that Raise Jurisdictional Questions

Three matters that are currently pending before the Commission directly or indirectly raise jurisdictional issues regarding access to E-911 services.

First, as mentioned above, the Commission has before it a motion for reconsideration regarding whether the Commission has jurisdiction to regulate VoIP services. On February 7, 2018, the Commission issued an order concluding that state jurisdiction exists to regulate VoIP services just as the State can regulate other telecommunications services.⁷ This would mean that the State could regulate the provision of E-911 services from VoIP providers without being preempted by federal law. The Commission expects that it will issue a ruling on the motion to reconsider its decision in that matter by the end of the year.

Second, the Commission has before it a pending investigation into E-911 reliability and planning.⁸ In that investigation, the petitioners and other parties to that proceeding have explicitly raised numerous issues regarding the scope of the State’s jurisdiction over the provision of E-911 services. The Commission expects that it will issue a ruling on that matter by the end of the year.

Third, the Commission has before it a pending investigation regarding specific instances in which the disruption of call traffic prevented Vermonters from accessing E-911 through traditional landlines.⁹ The Commission expects that it will issue a ruling on that matter by the end of the year.

⁴ *Petition of Vanu Coverage Co.*, Case No. 18-1543-PET, Order of 6/18/18, at 2.

⁵ 47 U.S.C. § 332(c)(3).

⁶ See, e.g., 30 V.S.A. § 7055(a); Commission Rule 7.100.

⁷ *Investigation into Regulation of Voice over Internet Protocol (“VoIP”) Services*, Docket No. 7316, order of 2/7/18, motion for reconsideration pending.

⁸ *Petition for Investigation re 911 Reliability and Planning*, Docket No. 8842.

⁹ *Investigation pursuant to 30 V.S.A. § 209 into Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, and its network design and delivery of 911 calls in Vermont*, Docket No. 8850.

Conclusion

As noted above, some jurisdictional matters are settled and some remain uncertain. Given the three matters that are currently pending before the Commission, it would deprive the parties to those proceedings of due process if the Commission were to resolve jurisdictional matters outside of those proceedings. In light of this obligation of the Commission as a quasi-judicial independent body, it is difficult for the Commission to say much more about these jurisdictional matters; or to make any specific recommendations regarding E-911 services, until those proceedings have concluded.

That said, the Commission appreciates the interest of the Joint Fiscal Committee in this crucial matter, and the Commission will make sure to notify the Committee immediately once it has issued decisions in the matters mentioned above. Those decisions should provide additional guidance regarding the Commission's position on its jurisdiction over access to E-911 services.