

Kira M. Slawson (7081)
Stanley K. Stoll (A3960)
BLACKBURN & STOLL, L.C.
Attorneys for Carbon/Emery Telcom, Inc.
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Telephone: (801) 521-7900
Fax: (801) 578-3579

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

CARBON/EMERY TELCOM, INC.,

v.

8X8, INCORPORATED.

**CARBON/EMERY TELCOM,
INC.'S BRIEF ON
JURISDICTION**

DOCKET NO. 12-2302-01

Carbon/Emery Telcom, Inc. (“Carbon/Emery”) filed a Request for Reconsideration and/or Clarification on September 14, 2012. The Public Service Commission (the “Commission”) has not addressed Carbon/Emery’s Request. However, as set forth in the Commission’s Order issued on September 5, 2012 (“September 5, 2012 Order”), Carbon/Emery and 8x8, Inc. are required to submit additional briefing to address the question of Commission jurisdiction on or before September 20, 2012. Therefore, Carbon/Emery submits this brief in support of its Request for Agency Action and in support of the Commission exercising jurisdiction in this matter as required by the Commission’s September 5, 2012 Order.

BACKGROUND

On or about March 28, 2012, Utah Rural Telecom Association, on behalf of its members (including Carbon/Emery) sent a cease and desist letter to 8x8, Inc. indicating that 8x8, Inc. was providing, or was proposing to provide local exchange services or other public

telecommunications services in the State of Utah in areas served by the URITA member companies, including rural exchanges with fewer than 5,000 access lines. *See URITA Letter dated 3-28-12, attached here as Exhibit 1.* 8x8 did not respond to the URITA Letter.

On July 18, 2012, Carbon/Emery filed a Request for Agency Action against 8x8 in which Carbon/Emery asserted that “upon information and belief, 8x8 is providing, or proposes to provide, local exchange services or other public telecommunications services in the State of Utah in areas served by Carbon/Emery.” Carbon/Emery further cited the definition of local exchange service and public telecommunications service under Utah law and alleged that prior to providing local exchange service or other public telecommunications services in the State of Utah, a telecommunications corporation must first obtain a Certificate of Public Convenience and Necessity (“CPCN”) from the Commission. *See “Request for Agency Action” filed July 18, 2012.*

In the Request for Agency Action, Carbon/Emery alleged that 8x8 is currently providing, or proposes to provide, managed VoIP services in Utah in general, and in Price, Carbon County, Utah specifically, and that under Utah law, as previously determined by the Commission, VoIP service is a public telecommunications service under Utah law, and as such, is subject to the requirements of UCA §54-8b-2.1—Competitive Entry. Carbon/Emery specifically alleged that upon information and belief 8x8 is exchanging landline to landline local traffic with Carbon/Emery through a third party wireless transiting carrier. Carbon/Emery alleged that the use of a third-party wireless transiting carrier does not change the character of the local services provided by 8x8 – they remain landline to landline local services subject to the jurisdiction of the Commission. 8x8 does not have a CPCN and does not have any agreement with Carbon/Emery to exchange local traffic with Carbon/Emery. Without the CPCN from the State of Utah, and an

appropriate agreement with Carbon/Emery, 8x8 is not authorized to provide public telecommunications or local exchange services in the State of Utah generally, and in the Price Exchange specifically. *See Request for Agency Action.*

On August 16, 2012, the Division of Public Utilities recommended that the Commission schedule a technical conference to “further educate the parties on the nature of the services being offered. *See Division Memo, filed August 16, 2012, attached hereto as **Exhibit 2.*** On August 30, 2012, Administrative Law Judge Melanie Reif sent an email to counsel for Carbon/Emery, Kira M. Slawson, and counsel for the Division of Public Utilities, Justin Jetter and Patricia Schmid, and counsel for the Office of Consumer Services, Paul Proctor, indicating the Commission would like to schedule a technical conference in this docket and suggesting September 13, 2012 at 9:00 a.m. *See Email from Judge Reif, dated 8-30-12, attached hereto as **Exhibit 3.*** Judge Reif also asked the attorneys if anyone had an email address for 8x8. Counsel for Carbon/Emery replied that Carbon/Emery did not have an email address for 8x8, but suggested that the customer, to whom 8x8 is providing service in Carbon/Emery’s area, may have such an email address. *See email from Kira M. Slawson dated 8-30-12, attached hereto as **Exhibit 4.*** Counsel for Carbon/Emery asked Judge Reif if she would like the name of the customer in Price, Utah who is receiving service from 8x8. The Commission, having received an email address for Brian Martin at 8x8, copied Mr. Martin on the email chain on August 30, 2012 *See Email from Judge Reif, 8-30-12, attached hereto as **Exhibit 5.***

On August 31, 2012 at 9:02 a.m., Judge Reif sent an email to all counsel and asked counsel to work together to propose an acceptable date for the technical conference *See Email from Judge Reif dated 8-31-12, attached hereto as **Exhibit 6.*** On August 31, 2012, Mr. Ronald Del Sesto, regulatory counsel for 8x8 sent an email to Judge Reif and counsel indicated that 8x8

believed it was premature to schedule a technical conference because 8x8 could not identify the customer about which Carbon/Emery complains. Mr. Del Sesto indicated that 8x8 had not been provided sufficient detail to locate the alleged customer in Price, Utah. Additionally, Mr. Del Sesto questioned the Commission's jurisdiction to hear this matter because he states that 8x8 provides exclusively nomadic, interconnected VoIP services. Mr. Del Sesto referred the parties to the FCC's Vonage Order, and to Utah Code Section 54-19-103 in support of his argument against Commission jurisdiction. *See Email from Mr. Del Sesto dated 8-31-12, attached hereto as Exhibit 7.*

In response to Mr. Del Sesto's email, without further input from any parties, Judge Reif sent an email to the parties indicating a technical conference would not be scheduled. *See Email from Judge Reif dated 8-31-12, attached hereto as Exhibit 8.* Upon receipt of Judge Reif's email, Counsel for Carbon/Emery sent an email to all parties identifying the customer in Price, Utah, as Parkway Dental, providing the telephone number for the customer, and indicating that Carbon/Emery believed that the issues raised by Mr. Del Sesto are the precise issues that are best addressed in a technical conference. *See Email from Kira Slawson dated 9-4-12, attached hereto as Exhibit 9.*

On September 5, 2012, the Commission issued its Order stating that "the federal and state laws cited by 8x8 raise serious questions about whether the Commission has jurisdiction in this action." *See September 5, 2012 Order, page 2.* Additionally, the Commission stated that "further factual allegations and briefing are needed to facilitate the Commission's consideration of the question of jurisdiction." *Id.* As a result, the Commission stated that "based on the positions asserted by 8x8, and for other good cause appearing, further proceedings are required to provide Carbon/Emery, 8x8, and any other interested parties an opportunity to brief the jurisdictional

issue.” *Id.* The Commission ordered Carbon/Emery and 8x8 to recite the specific facts each alleges that are relevant to the question of Commission jurisdiction.

FACTS

1. Carbon/Emery is a Utah corporation that is certificated by the Utah Public Service Commission to provide local telephone exchange service in Carbon and Emery Counties, State of Utah.

2. 8X8, Incorporated (“8x8”) is a Utah corporation.

3. Upon information and belief, 8x8 is providing, or proposes to provide, local exchange services or other public telecommunications services in the State of Utah in areas served by Carbon/Emery.

4. Specifically, 8x8 is providing local exchange services or other public telecommunications services through an interconnected VoIP service provided to Parkway Dental at its business location in Price, Utah.

5. Upon information and belief, the interconnected VoIP service provided by 8x8 to Parkway Dental provides VoIP to landline or landline to VoIP communications at Parkway Dental’s fixed business office located in Price, Utah.

6. Under Utah Code Ann. Section 54-8b-2(10), local exchange service under Utah law is defined as the provision of telephone lines to customers with the associated transmission of two-way interactive, switched voice communication with the geographic area encompassing one or more local communities as described in maps, tariffs, or rate schedules filed with and approved by the commission.

7. Under Utah Code Ann. § 54-8b-2(16), public telecommunications service is defined as the two-way transmission of signs, signals, writing, images, sounds, messages or other electromagnetic means offered to the public generally.

8. Under Utah law, as previously determined by the Commission in the Matter of the Application of Bresnan Communications, LLC for a Certificate of Public Convenience and Necessity, Docket No. 07-2476-01, VoIP service is a public telecommunications service under Utah law, and as such, is subject to the requirements of UCA §54-8b-2.1—Competitive Entry.

9. Prior to providing local exchange service or other public telecommunications services in the State of Utah, a telecommunications corporation must first obtain a Certificate of Public Convenience and Necessity (“CPCN”) from the Commission.

10. On or about February 8, 2012, Parkway Dental terminated all but one business line with Carbon/Emery. Call detail records that Carbon/Emery was able to review indicate that from February 8, 2012 to March 20, 2012 Parkway Dental utilized its one business line with Carbon/Emery to forward all incoming calls to 8x8 for termination to Parkway Dental pursuant to a fixed VoIP service provided by 8x8 to Parkway Dental. This permitted Parkway Dental and 8x8 to eliminate all business lines, but one from Carbon/Emery, while aggregating local traffic on the one remaining business line for termination to Parkway Dental.

11. The remaining business line that was being utilized to aggregate the local traffic, was forwarding the calls to an 8x8 number in Richfield, Utah, which is outside Carbon/Emery’s service territory. Thus, this call forwarding scheme resulted in toll charges to Parkway Dental.

12. On or about March 20, 2012, Parkway Dental requested that its one remaining business number be ported from Carbon/Emery to Verizon Wireless.

13. Upon information and belief, the porting request by Parkway Dental was made at the suggestion of 8x8 so that Parkway Dental could utilize 8x8's fixed VoIP service without incurring toll charges on a monthly basis.

14. On or about March 20, 2012, Carbon/Emery ported the telephone number for Parkway Dental to Verizon Wireless, as required by law.

15. Upon information and belief from and since Carbon/Emery ported the number to Verizon Wireless, Parkway Dental has been using the Verizon Wireless number to aggregate local traffic to terminate it utilizing 8x8's fixed VoIP service.

16. Additionally, upon information and belief, Parkway Dental and 8x8 are using the 8x8 fixed VoIP service to originate local calls landline calls, which are somehow sent to the public switched telephone network impermissibly using the single Verizon Wireless number.

17. Upon information and belief, as set forth above, 8x8 is exchanging landline to landline local traffic with Carbon/Emery through a third party wireless transiting carrier, Verizon Wireless. The use of Verizon Wireless, as the transiting carrier, does not change the character of the local services provided by 8x8. The services remain landline to landline local services which are subject to the jurisdiction of the Commission under Utah Code Section 54-8b-2, 54-8b-2.1, and 54-19-103.

18. 8x8 does not have a CPCN from the State of Utah.

19. 8x8 does not have a traffic exchange or interconnection agreement with Carbon/Emery.

20. 8x8 is not authorized under Utah law to provide public telecommunications or local exchange services in the State of Utah.

ARGUMENT

I. 8x8 Is Providing “Fixed” Interconnected VoIP Service to Parkway Dental.

8x8 claims in its email to Judge Reif, that it is a nomadic VoIP provider¹ and as such under the Vonage Order² is exempt from regulation. VoIP service is defined as:

“an internet application utilizing "packet-switching" to transmit a voice communication over a broadband internet connection. In that respect, it is different from the "circuit-switching" application used to route traditional landline telephone calls. In circuit-switched communications, an electrical circuit must be kept clear of other signals for the duration of a telephone call. Packet-switched communications travel in small digital packets along with many other packets, allowing for more efficient utilization of circuits.”

Minnesota PUC v. FCC, 483 F.3d 570, 574 (8th Cir. 2007). Additionally, according to the Eighth Circuit Court of Appeals:

“Interconnected VoIP service" is defined as a service that:

- (1) Enables real-time, two-way voice communications;
- (2) Requires a broadband connection from the user's location;
- (3) Requires Internet protocol-compatible customer premises equipment (CPE); and
- (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. *Id.*

In the Vonage Order, the FCC preempted the Minnesota PUC from applying traditional telephone company regulations to Vonage’s IP-enabled voice service. The FCC held that the Vonage service was a fully portable service that customers could use anywhere in the world so long as they had a broadband connection, and that as such, there are no practical means for separating interstate and intrastate components of the calls. Therefore, allowing the Minnesota PUC to regulate Vonage’s VoIP service would defeat federal law and policy.

¹ 8x8 has offered no factual basis for this claim, and certainly has not formally made this claim with the Commission.

² In the Matter of Vonage Holdings Corporation’s Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission (WC Docket No. 03-211) (2004) 19 FCC Recd 22404.

It would appear that 8x8 is an interconnected VoIP provider. 8x8 provides VoIP service to Parkway Dental, which permits Parkway Dental to receive calls that originate on the public switched telephone network (“PSTN”), and to terminate calls to the PSTN using a broadband connection from Parkway Dental’s location using internet protocol compatible customer premises equipment. However, the inquiry does not end there.

There are two types of interconnected VoIP service—nomadic and fixed. Nomadic VoIP service can be described as a Vonage type service where the VoIP customer can “use the service ‘nomadically’ by connecting with a broadband internet connection anywhere in the universe to place a call.” *Minnesota PUC v. FCC*, 483 F.3d at 575. Fixed VoIP service, on the other hand, uses the same technology, but in a way where the service is used from a fixed location. In this instance, 8x8 is providing VoIP service to Parkway Dental at Parkway Dental’s fixed business location. Calls to and from Parkway Dental are made to and from a fixed geographical location. Thus, the VoIP service being provided to Parkway Dental is a fixed interconnected VoIP service.

This distinction is critical because the Vonage Order, relied upon by 8x8 only preempted nomadic VoIP service from state regulation. In the *Universal Service Order* issued by the FCC on June 27, 2006,³ the FCC clarified the Vonage order and held that federal preemption does not apply to interconnected VoIP service where the provider is capable of tracking the jurisdiction of customer calls. The FCC, since the Vonage Order, has indicated that fixed VoIP providers—those providers who can track the geographical end point of their calls—do not qualify for preemption under the Vonage Order. *See Minnesota PUC v. FCC*, 483 F.3d at 583. The Vonage Order certainly did not preempt all state regulation of VoIP.

³ Universal Service Contribution Methodology Proceeding, Report and Order of Proposed Rulemaking (WC Docket No. 06-122) (2006) 21 FCC Rcd 7518.

Additionally, as this Commission is undoubtedly aware, in the Matter of the Application of Bresnan Communications, LLC for a Certificate of Public Convenience and Necessity, Docket No. 07-2476-01, Bresnan argued that its IP-enabled services was not a public telecommunications service. However, this Commission rejected that argument and specifically found that Bresnan's VoIP service was a public telecommunications service, subject to regulation by the Commission. Therefore, 8x8's reliance on the Vonage Order is misplaced. 8x8 is not providing a Vonage type service. On the contrary, 8x8 has offered Parkway Dental a fixed VoIP solution that impermissibly allows 8x8 and Parkway Dental to exchange local traffic without 8x8 having a CPNC. This is not permissible under Utah law.

II. The Commission Has Jurisdiction to Regulate Local Exchange Service and Fixed VoIP Service Under Existing Utah Law.

Carbon/Emery, in its Request for Agency Action, alleged jurisdiction generally, pursuant to Utah Code Sections 54-4-1 (General Jurisdiction), and specifically alleging that the Commission has jurisdiction over 8x8 because 8x8 is providing local exchange services or other public telecommunications services in the State of Utah without a Certificate of Public Necessity and Convenience in violation of Utah Code Section 54-8b-2.1. Because Carbon/Emery is not in possession of any facts from 8x8 that would defeat jurisdiction, 8x8 should be required to file a responsive pleading indicating the factual and legal basis for its dispute of jurisdiction. As demonstrated above, the Vonage Order does not defeat the Commission's jurisdiction in this matter.

Additionally, 8x8's reliance on Utah Code Annotated Section 54-19-103 is misplaced. While Section 54-19-103(1) provides that "a state agency and political subdivision of the state may not, directly or indirectly, regulate Internet Protocol-enabled service of voice over Internet protocol service," Section 54-19-103(2) provides that the regulatory prohibition in Subsection 1

does not affect or modify the application of Section 54-8b-2.1. Thus, Utah law is clear that fixed VoIP services are public telecommunications services, and as a result the fixed VoIP service provider must obtain a CPCN under Utah law prior to providing such services.

CONCLUSION

8x8 is providing fixed VoIP service to Parkway Dental in Price, Utah without a CPCN. The service provided by 8x8 is subject to the jurisdiction of the Commission and the Commission is obligated to address the Request for Agency Action filed by Carbon/Emery. Carbon/Emery reserves the right to submit additional briefing upon receipt of a response from the Commission on Carbon/Emery's Request for Reconsideration and/or Clarification.

Dated this 20th day of September, 2012.

BLACKBURN & STOLL, LC

Kira M. Slawson
Stanley K. Stoll
Attorneys for Carbon/Emery Telcom, Inc.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Carbon/Emery Brief on Jurisdiction was sent to the following individuals by regular or electronic mail, as noted below, this 20th day of September, 2012.

8x8, Incorporated
Ronald Del Sesto
r.delsesto@bingham.com

8x8, Incorporated
Bryan Martin
Bryan.martin@8x8.com

Patricia Schmid
Assistant Attorney General
Division of Public Utilities
pschmid@utah.gov

Justin Jetter
Assistant Attorney General
Division of Public Utilities
jjetter@utah.gov

William Duncan
Division of Public Utilities
wduncan@utah.gov

Paul Proctor
Office of Consumer Services
pproctor@utah.gov

Eric Orton
Office of Consumer Services
eorton@utah.gov

Michelle Beck
Office of Consumer Services
mbeck@utah.gov
