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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Request for Agency Action of Carbon/Emery Telecom, Inc. v. 8x8, Inc.	**FURTHER BRIEF FILED IN RESPONSE TO REQUEST FOR AGENCY ACTION AND ORDER REQUIRING FURTHER BRIEFING** DOCKET NO. 12-2302-01

8x8, Inc. ("8x8") hereby submits its reply brief in response to the Notice of Request for Agency Action and Order Requiring Further Briefing issued by the Utah Public Service Commission ("Commission") on September 5, 2012 ("September 5, 2012 Order"). 8x8 reiterates its recommendation that the Commission deny Carbon/Emery Telecom, Inc.'s ("Carbon/Emery" or "Applicant") Request for Agency Action as well as its Request for Reconsideration and/or Clarification of Notice of Agency Action and Order Requiring Further Briefing ("September 14 Request").

Introduction

Despite numerous filings made with the Commission, Applicant has failed to meet its factual and legal burden that would allow the Commission to find that it has jurisdiction over 8x8's service offering. As detailed in 8x8's Responsive Brief and accompanying affidavit, the company offers nomadic interconnected Voice over Internet Protocol ("VoIP") services

exclusively. Federal law is clear that state commissions may not regulate such offerings, a fact with which Carbon/Emery agrees. Moreover, Applicant has submitted no evidence and cited to no law that would support a contrary finding. Accordingly, 8x8 respectfully submits that the Commission must dismiss Carbon/Emery's Request for Agency Action and deny its September 14 Request.

While not relevant to its service offerings, 8x8 further submits that Applicant's characterization of the current status of federal and state law with respect to fixed interconnected VoIP services is inaccurate. Contrary to Carbon/Emery's unsupported assertions, federal law remains unsettled as to what jurisdiction, if any, state commissions may have over fixed interconnected VoIP services. Moreover, 8x8 did not find the reference by Carbon/Emery to the Commission's Bresnan Broadband of Utah, LLC ("Bresnan") proceeding as supportive of Applicant's position that the Commission asserted jurisdiction over fixed interconnected VoIP services in that proceeding. Additionally, the service described by Bresnan bears little, if anything, in common with the service offered by 8x8. But the Commission need not reach the issue of what its jurisdiction may or may not be with respect to fixed VoIP services in this proceeding as 8x8 offers a nomadic interconnected VoIP service.

Argument

I. Applicant Fails to Establish that the Commission has Jurisdiction over 8x8's Service Offering

Applicant devotes only three pages of its Initial Brief[1] to legal argument as to the basis for Commission jurisdiction over 8x8's service offering. The only argument on which Carbon/Emery rests is that there are two types of interconnected VoIP service, nomadic and

[1] *See generally*, Carbon/Emery Telecom, Inc.'s Brief on Jurisdiction (dated Sept. 20, 2012) ("Initial Brief").

fixed, and that Commission is preempted from regulating nomadic but not fixed VoIP services.[2] Thus, if 8x8's service is nomadic, and not fixed, the parties agree that the Commission is preempted from regulating 8x8's service offering.[3]

In support of its position that 8x8 is offering a fixed VoIP service, Carbon/Emery neither offers any basis for its definition of what constitutes a fixed VoIP service, nor does it point to or submit any evidence that 8x8 is offering a fixed VoIP service. The lack of evidence contradicting 8x8's showing[4] that its service meets the definition of a nomadic interconnected VoIP service is, by itself, enough to result in the dismissal of the Request for Agency Action and denial of the September 14 Request.

But Applicant's failure to establish any support for its position is far more profound than a lack of evidence. Carbon/Emery has also failed to identify any legal basis for its position. Applicant wrongly asserts that because 8x8's service is used from a fixed geographic location, 8x8 offers a fixed VoIP service. Specifically, the Initial Brief incorrectly provides as follows:

> Fixed VoIP service, on the other hand, uses [an Internet application and packet switching], 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.[5]

Unfortunately for the Applicant, its proposed, unsupported definition fails for numerous reasons. First, Carbon/Emery provides no legal basis for its definition. Instead, it is simply a manufactured, self-serving definition adopted to support the Applicant's position. Tellingly,

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[2] *See* Initial Brief, at 9 ("[The distinction between nomadic and fixed] is critical because the Vonage Order, relied upon by 8x8 only preempted nomadic VoIP service from state regulation.").
[3] As detailed *infra* Section II, even assuming *arguendo* that 8x8 offers a fixed interconnected VoIP service, which it most certainly does not, 8x8 does not agree that the Commission would necessarily have jurisdiction over its offering of that service. But the Commission need not reach this issue as 8x8's offers exclusively a nomadic interconnected VoIP service to all of its customers throughout the world including Parkway Dental.
[4] Affidavit of Bryan R. Martin, CEO, 8x8, Inc. (filed Sept. 20, 2012).
[5] Initial Brief, at 9 (emphasis supplied).

Carbon/Emery does not cite to the Federal Communications Commission's ("FCC") rules, nor point to any FCC orders related to VoIP or Internet protocol ("IP") -enabled services, of which there are many, nor rely on any expert advisory bodies for their proposed definition of a "fixed interconnected VoIP service." The reason for ignoring the FCC rules and orders is that none distinguish between fixed and nomadic interconnected VoIP services. The definition of an "interconnected VoIP service," which is found at 47 C.F.R. § 9.3, makes no such distinction.[6] None of the orders following the FCC's adoption of this definition distinguish between fixed versus nomadic offerings. Even the *Vonage Order* did not find the distinction between nomadic and fixed persuasive for purposes of preemption.[7] Instead, all FCC orders imposing obligations on providers of nomadic interconnected VoIP services cite to the definition adopted by the FCC in its *VoIP E911 Order*[8] and codified at 47 C.F.R. § 9.3.[9]

Next, the self-serving definition offered by the Applicant fails according to its own terms as it does not distinguish 8x8's service from that offered by Vonage. Carbon/Emery fails to account for the fact that Vonage's offering, the subject of the *Vonage Order* and a service that

[6] Moreover, Carbon/Emery suggests that the United States Court of Appeals for the Eighth Circuit adopted the definition of an "interconnected VoIP service." *See* Initial Brief, at 8. This is inaccurate as the Court cites to the definition established by the FCC. *See* 483 F.3d 570, 574 n.2 (8th Cir. 2007) (citing to 47 C.F.R. § 9.3). Additionally, relying on the Court's description of VoIP services and offerings for anything but the most basic explanations is perilous given that the Court itself recognized that its technical analysis of such offerings was superficial at best. *See id.* at 575 ("With this oversimplified summary of VoIP service as a backdrop, we consider the particular dispute which gave rise to the consolidated petitions for review now before our court."). *Id.*

[7] *See Vonage Holding Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22424, ¶ 32 (Nov 12, 2004) ("*Vonage Order*") ("Accordingly, to the extent that other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.") *Id.* (internal citations omitted). The United States Court of Appeals for the Eighth Circuit affirmed the FCC's declaratory ruling. *See Minnesota Public Utilities Comm'n. et al. v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[8] *See* IP-Enabled Services, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) ("*VoIP E911 Order*").

[9] The one exception to this is the FCC's recent order extending telephone relay service contribution requirements to certain types of one-way providers of interconnected VoIP services. *See* Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, 26 FCC Rcd 14557 (2011). But this is not relevant to the present proceeding.

Carbon/Emery admits is a nomadic interconnected VoIP service,[10] is also always used from a fixed location. Vonage subscribers use the service from a fixed location which is, in most cases, their residence, and, if used from a different location, that new location must also be fixed and have access to a broadband Internet connection. But there is no requirement that Vonage customers use their service from multiple, fixed geographic locations and Applicant makes no argument to the contrary.

The same is true for 8x8 customers who can use the service from multiple, fixed geographic locations. As detailed in the affidavit submitted by 8x8's CEO Bryan Martin, Parkway Dental's 8x8 service can also be used from different, fixed geographic locations so long as such locations have broadband Internet access.[11] Thus, the Commission must reject Applicant's definition as it does not even provide a basis for distinguishing 8x8's service from that of Vonage's, a service it admits is nomadic and, as Applicant also admits, not subject to the Commission's jurisdiction due to federal preemption.[12]

Third and finally, Applicant's proposed definition of a fixed VoIP service inexplicably focuses on how it is used by one particular customer, without evidence supporting the claim, rather than the capabilities and characteristics of the service. A mobile phone customer may choose to only use a mobile phone from a fixed location. The use of a mobile device in this manner does not transform the service offering from a mobile to a fixed service subjecting a wireless provider to state licensing requirements yet absurd proposition is what Carbon/Emery proposes in support of its baseless argument that 8x8 is offering fixed VoIP services. It is the characteristics and capabilities of the offering, not how it is used, that makes a service fixed,

[10] *See* Initial Brief at 9 ("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") (internal citations omitted).
[11] Affidavit of Bryan R. Martin, at ¶¶ 13-14 (filed Sept. 20, 2012).
[12] *See* Initial Brief, at 9.

nomadic or mobile. Accordingly, how a service is used by a single customer is irrelevant to its classification as a nomadic interconnected VoIP service.[13]

What makes Vonage and 8x8 nomadic interconnected VoIP service providers and not fixed is that both services have the *capability* to be used from multiple fixed locations where each such location has broadband Internet access service available.[14] The service itself is nomadic, not the location from which it is used. In contrast, a fixed interconnected VoIP service is one that *does not have the capability* of being used from any geographic location where broadband Internet access is available; instead, it can only be used in connection with the specific broadband Internet connection provided at a discrete location. Interconnected VoIP services provided by cable companies are an example of a fixed interconnected VoIP service because such services may only be used from the location where they are installed used only in concert with the facilities-based broadband Internet access service that is also offered by the cable company.

Support for these definitions can be found in a Final Report released on March 22, 2010, by the Communications Security, Reliability and Interoperability Council ("CSRIC") and attached hereto as Exhibit A ("Final Report"). CSRIC was established at the direction of the Chairman of the FCC in accordance with the provisions of the Federal Advisory Committee Act.[15] According to its Charter, attached as Exhibit B, the purpose of CSRIC is to recommend to the FCC "optimal security, reliability, and interoperability of communications systems, including public safety, telecommunications, and media communications."[16] CSRIC is charged with providing recommendations that include, among other things, "the security, reliability,

[13] While irrelevant to whether the Commission has jurisdiction over 8x8's offering, Applicant did not even bother to submit any evidence in support of its assertion that Parkway Dental only uses 8x8's service from one, fixed location.
[14] Affidavit of Bryan R. Martin, at ¶¶ 13-14 (filed Sept. 20, 2012).
[15] *See* http://transition.fcc.gov/pshs/advisory/csric/ (last visited Oct. 4, 2012).
[16] CSRIC Charter, at ¶ 3 (Exhibit B).

operability, and interoperability of wireline, wireless, satellite, cable, and public voice and data networks … ."[17] In short, CSRIC is comprised of private and public sector experts that are directed to develop plans and best practices based on the FCC's policies with respect to the delivery of emergency services and disaster relief planning for next generation networks including all forms of interconnected VoIP services and other IP-enabled services. As detailed *supra*[18] the definition of an "interconnected VoIP service" was established by the FCC in its *VoIP E911 Order*. Accordingly, as the expert body charged with advising the FCC as to whether to expand services subject to such regulations, CSRIC's consideration of these issues serves as an authoritative source as to what constitutes fixed, nomadic and mobile VoIP services.

According to the Final Report, a service is a "fixed" VoIP when "an IP endpoint that *cannot* move, is always in the same location and always accesses a network from the same point."[19] Accordingly, what makes an interconnected VoIP service fixed is that the IP endpoint is *incapable of use* from a location other than the one in which it is installed, not whether the service is used by one particular customer from a fixed location. As further explained by CSRIC, a "nomadic VoIP service" is one where a user is "constrained within an access network such that their location can be represented as a definitive civic address for that network attachment [and] [t]he user *may* move from one network attachment to another but cannot maintain a session during that move."[20] Thus, a nomadic interconnected VoIP service is one that *may* be used or *has the capability of being used* from multiple fixed locations. There is no requirement that it is actually used from multiple fixed locations.[21]

[17] *Id*.
[18] See *supra*, p. 4.
[19] Final Report, at § 1.1, 1.1 n.3 (emphasis supplied) (internal citations omitted) (Exhibit A).
[20] *Id.*, at § 1.1, 1.1 n.4. (emphasis supplied) internal citations omitted) (Exhibit A).
[21] The Final Report also includes a definition for "mobile VoIP services." *Id*. at § 3.2. (Exhibit A).

The definitions adopted by CSRIC are superior to the self-serving definitions proposed by Applicant. CSRIC's interest is in developing rational policies for the overall communications marketplace for all stakeholders and does not have an interest in promoting a definition that serves the interest of a single party. It also provides a means for classifying fixed and nomadic interconnected VoIP services based on the capabilities of the service offering rather than use by one customer. In applying the CSRIC definition of nomadic VoIP service to 8x8's service offering to Parkway Dental, it becomes clear that since a Parkway Dental "user may move from one network attachment to another,"[22] 8x8's service is a nomadic interconnected VoIP service that is subject to federal preemption by virtue of the *Vonage Order*.

II. Applicant Misrepresents the Status of Federal and State Law with Respect to Fixed Interconnected VoIP Services

As explained above, 8x8 offers a nomadic interconnected VoIP service that is similar to the service offered by Vonage and therefore the Commission is preempted from granting the relief sought by the Applicant. There is no need for 8x8 to establish anything more. But 8x8 is compelled to correct Carbon/Emery's mischaracterization of federal and state law with respect to fixed VoIP services. Contrary to mere naked assertions by Carbon/Emery that state commissions can regulate fixed VoIP offerings, neither federal nor state law is clear on this point.

Carbon/Emery asserts that the "Vonage Order . . . only preempted nomadic VoIP service from state regulation."[23] Yet, Applicant conveniently fails to address a statement by the FCC in the *Vonage Order* directly to the contrary: "Accordingly, to the extent that other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent

[22] Final Report, at § 1.1, 1.1 n.4 (Exhibit A); *see* also, Affidavit of Bryan R. Martin, at ¶¶ 13-14 (filed Sept. 20, 2012) (explaining that Parkway Dental can use t8x8's service from any location where broadband Internet access service is available).
[23] Initial Brief, at 9.

comparable to what we have done in this Order."[24] It is unclear on what basis Applicant believes that the *Vonage Order* only preempts nomadic interconnected VoIP services and not fixed offerings when the order itself provides otherwise.

Pivoting immediately away from the *Vonage Order*, with no reference to the language that is inconvenient to Carbon/Emery, Applicant cites to the FCC's *VoIP USF Order*.[25] Carbon/Emery argues that the FCC "clarified" that "fixed VoIP providers -- those providers who can track the geographical end points of their calls-- do not qualify for preemption under the Vonage Order."[26] Once again, Applicant provides no cite for the proposition that the FCC has clarified the limits of the preemptive effect of the *Vonage Order*. Instead, the prior sentence addresses the *VoIP USF Order*, and the sentence asserting that the FCC has clarified the limits of the preemptive effects of the *Vonage Order* does not include a citation to a FCC order but a reference to the Eighth Circuit decision upholding the *Vonage Order* on appeal.[27] Then, the paragraph concludes with the statement "The Vonage Order certainly did not preempt all state regulation of VoIP."[28]

The only way to correct Applicant's misinterpretation of federal law is to address each confused and misleading assertion. Beginning with the claim that the *VoIP USF Order* clarified the *Vonage Order*, it did no such thing. Clarification of the *Vonage Order* was not properly before the Commission when it issued the *VoIP USF Order*. Any clarification of the *Vonage Order* by the FCC can only occur in response to a petition seeking such or a notice and comment proceeding. The *VoIP USF Order* was neither. At best, it is a statement of the policy of the

[24] *Vonage Order*, 19 FCC Rcd at 22424, ¶ 32.
[25] Initial Brief, at 9.
[26] *Id.*
[27] Initial Brief, at 9.
[28] *Id.*

Commission at the time the *VoIP USF Order* was adopted.[29] Given that this Order was released in June, 2006, and only one of the Commissioners that was part of the FCC at the time the *VoIP USF Order* adopted remains, it is fair to say that the *VoIP USF Order*, with respect to the issue of the preemptive effects of the *Vonage Order*, is not even persuasive as indicative of the current policy of the FCC concerning this discrete issue.

Next, the notion that "fixed VoIP providers" are those that "can track the geographical end points of their calls" is a statement manufactured by Carbon/Emery. The FCC has never defined fixed VoIP providers in this manner. Applicant does not provides a pinpoint cite to the portion of the *VoIP USF Order* on which they rely for this baseless claim and there is nothing in that order that would support it. Instead, the portion addressing the preemptive effects of the *Vonage* Order refers to an "interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls"[30] without reference to fixed interconnected VoIP services. In fact, this portion has nothing to do with classification of such services but instead concerning the reporting of revenue for purposes of federal USF contribution. As noted *supra* Section I, the *VoIP USF Order*, like all the orders addressing interconnected VoIP services, relies on the definition of an "interconnected VoIP service" established in the *VoIP 911 Order* and codified in 47 C.F.R. § 9.3,[31] which does not distinguish between fixed and nomadic interconnected VoIP services. Thus, there is no definition of "fixed interconnected VoIP providers" that can be found in the *VoIP USF Order* and this order has no relevance to the jurisdictional issue before the Commission in this proceeding.

[29] See *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 594 (D.C.Cir.2004) (finding that a prediction set forth in order does not constitute final agency action).
[30] Universal Service Contribution Methodology, 21 FCC Rcd 7518, 7546, ¶ 56.
[31] *See, e.g., id.* at 7526, ¶15.

The citation to the Eighth Circuit decision is curious as it appears following the inaccurate assertion that "fixed VoIP providers . . . do not qualify for preemption under the Vonage Order."[32] But the reference to "483 F.3d at 583"[33] does not support the claim that precedes it. The complete paragraph from the Eight Circuit decision stretches from 483 F.3d at 582-583 and provides as follows:

> We conclude the [New York Public Service Commission's] challenge to the FCC's order is not ripe for review. The order only suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services. Nonetheless, the order does not purport to actually do so and until that day comes it is only a mere prediction. Indeed, as we noted, the FCC has since indicated VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effects of the Vonage order. As a consequence, [the New York Public Service Commission's] contention that state regulation of fixed VoIP services should not be preempted remains an open issue.[34]

Thus, the Eighth Circuit did not find that "fixed VoIP providers . . . do not qualify for preemption under the Vonage Order." Instead, the Eighth Circuit determined that it "remains an open issue."[35] An "open issue" is one that has not been determined. Accordingly, Applicant cannot cite to the Eighth Circuit decision as support for the proposition that fixed VoIP services are not preempted by the *Vonage Order*. Instead, the most that can be said based on the Eighth Circuit decision is that the preemptive effects of the *Vonage Order* as applied to a fixed VoIP service is unsettled.

The state law relied on by Applicant provides no greater clarity with respect to the Commission's jurisdiction. Carbon/Emery refers generally to a 2007 proceeding concerning Bresnan's facilities-based coaxial cable offering of hybrid traditional telephony services and IP-enabled services. As an initial matter, 8x8 highlights that it would be difficult to find an offering

[32] Initial Brief, at 9.
[33] *Id.*
[34] *Minnesota PUC v. FCC*, 483 F.3d 570, 582-583 (8th Cir. 2007) (internal citations removed).
[35] *Id.* at 583.

that shares less in common with 8x8's service than what Bresnan described in its application. In fact, the services are so different that Applicant's attempt to analogize the offerings fails simply based on the dissimilarities between the two services. In other words, even if we assume *arguendo* that Carbon/Emery's characterization of what the Commission determined in the Bresnan proceeding is correct, which it most assuredly is not, the Commission's conclusions in that proceeding would have absolutely no relevance to the service offered by 8x8.

As described by Katherine Kirchner, Vice President of Telephony Operations for Bresnan, the Digital Voice offering required the use of a Bresnan issued modem connected to Bresnan coaxial cable that did not use the public Internet for transport.[36] Moreover, Bresnan sought to offer a hybrid system that incorporated both IP-enabled services and traditional telephony that would use "traditional circuit switched technology."[37] Unlike Bresnan, 8x8 does not offer any facilities-based offerings, cable or otherwise, 8x8's service can be used with any broadband Internet access service and not just that offered in connection with a cable service,[38] 8x8'offering does not include "traditional circuit switched technology,"[39] and 8x8 uses the "public" Internet for transport.

Aside from the important technical differences between Bresnan and 8x8 offerings that make any reference to the Bresnan proceeding of no utility whatsoever, Carbon/Emery asserts, without support, save for a general cite to the relevant docket, that:

> Additionally, as the 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, the Commission rejected that argument and specifically found that Bresnan's VoIP

[36] *See* Direct Testimony of Katherine M. Kirchner, at 2 Docket No. 07-2476-01 (dated June 15, 2007).
[37] Application of Bresnan Broadband of Utah, LLC, at ¶ 6 Docket No. 07-2476-01 (dated Feb. 5, 2007).
[38] Affidavit of Bryan R. Martin, at ¶¶ 13-14 (filed Sept. 20, 2012).
[39] Application of Bresnan Broadband of Utah, LLC, at ¶ 6 Docket No. 07-2476-01 (dated Feb. 5, 2007).

service was a public telecommunications service, subject to regulation by the Commission.[40]

Yet, there is no indication from the docket that Bresnan fought the classification of its service. Indeed, Ms. Kirchner indicates that the company was seeking certification from the Commission and thought that it was subject to the relevant state statutes.[41] To be sure, Bresnan's application pointed to the uncertainty of federal law with respect to FCC preemption and that it did not think it met the definition of a "public telecommunications service" under state law.[42] But Bresnan willingly committed to "act[ing] in all respects as if its IP-Enabled services are local exchange telecommunications services in Utah" if its application was granted.[43] Meantime, Bresnan expressly reserved the right to revisit these issues either in other jurisdictions or if federal law became settled with respect to the offering of such services.[44] Thus, Bresnan made clear that it was not challenging the Commission's jurisdiction over its service offering.

Likewise, the Report and Order issued by the Commission on November 16, 2007, does not even consider the issue of whether the Commission has jurisdiction over Bresnan's offering. The only reference to this issue in the Report and Order provides "Bresnan believes its IP-Enabled service is not a public telecommunications service as defined by Utah Code Ann. § 54-8b-2(16), but acknowledges said belief remains a matter of dispute at the state and Federal level and so has filed its Application so that it can act in all respects as if its IP-Enabled services are a local exchange telecommunications service in Utah."[45] This falls far short of Applicant's representation that the Commission "rejected that argument and specifically found that Bresnan's VoIP service was a public telecommunications service, subject to regulation by the

[40] Initial Brief, at 10.
[41] *See* Direct Testimony of Katherine M. Kirchner, at 3 Docket No. 07-2476-01 (dated June 15, 2007).
[42] Application of Bresnan Broadband of Utah, LLC, at ¶ 6 Docket No. 07-2476-01 (dated Feb. 5, 2007).
[43] *Id.*
[44] *Id.*
[45] Application of Bresnan Broadband, LLC for a Certificate of Public Convenience and Necessity, *Report and Order*, Docket No. 07-2476-01 (Nov. 16, 2007).

Commission."[46] The remainder of the 23 page order considers the public interest and issues wholly unrelated to whether the Commission has jurisdiction over Bresnan's proposed service offering.

The Post-Hearing Brief of the Division of Public Utilities ("DPU") also makes clear that preemption was not an issue under consideration in the Bresnan proceeding. Instead, the DPU notes that Bresnan is "voluntarily submitting itself to state jurisdiction, acknowledging at least under current law that it needs state authority."[47] There is no indication as to what the basis is for either Bresnan's position or the DPU's finding and certainly nothing that indicates that fixed VoIP services are, in fact, "public telecommunications services" under state law in the DPU's Post-Hearing Brief.

Based on these documents, Bresnan did not advocate for treating its service differently than a regulated service and that the Commission did not have to rule on whether it had jurisdiction over Bresnan's offering since Bresnan did not contest jurisdiction. To the contrary, Bresnan agreed to treat its service as subject to state regulation if the Commission issued the company a certificate to offer service and instead reserved the right to revisit these issues at a later date. Moreover, based on its application, Bresnan did not attempt to segregate its service offering into unregulated, fixed IP-enabled services and traditional circuit telephony offerings.[48] As such, this proceeding is not even indicative of one that considered the provision of a fixed interconnected VoIP service. Thus, Carbon/Emery's argument that the Bresnan proceeding stands for the proposition that the Commission determined it has jurisdiction to regulate fixed VoIP services does not survive even superficial scrutiny.

[46] Initial Brief, at 10.
[47] DPU Post-Hearing Brief, at 13 Docket No. 07-2476-01 (Oct. 10, 2012).
[48] Application of Bresnan Broadband of Utah, LLC, at ¶ 6 Docket No. 07-2476-01 (dated Feb. 5, 2007).

CONCLUSION

8x8 respectfully submits that the Commission should deny Carbon/Emery's Request for Agency Action and the September 14 Request. Applicant's filings in this proceeding have failed to establish a factual basis for finding that 8x8 offers a service that is any different than that which is subject to the preemptive effects of the *Vonage Order*. Carbon/Emery has also failed to identify any other federal or state law that would provide the Commission with jurisdiction over a nomadic interconnected VoIP service provider like 8x8.

While completely irrelevant to 8x8's service offering, Applicant has also misrepresented federal and state law with respect to state commissions' jurisdiction over fixed VoIP services. The FCC orders relied on by Carbon/Emery provide a confused statement of FCC *policy* concerning this issue. Moreover, the Eighth Circuit decision cited to by Applicant can, at best, demonstrate only that federal law is unsettled with respect to the preemptive effects of the *Vonage Order* on fixed VoIP services. State law provides no additional guidance. The Bresnan proceeding relied upon applicant did not even consider the Commission's potential jurisdiction over such services. However, the Commission need not reach this issue in this proceeding as 8x8 offers a nomadic interconnected VoIP service.

8x8 respectfully submits that the Commission should dismiss Carbon/Emery's Request for Agency Action as jurisdictionally deficient under what has been settled law for a very long time.

Dated this 4th day of October, 2012.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Further Brief was sent to the following individuals by mail, as noted below, this 4th day of October, 2012. Additionally, all parties will receive courtesy electronic copies of this filing tomorrow, October 5, 2012.

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