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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

CARBON/EMERY TELCOM, INC.,

v.

8X8, INCORPORATED.

**REQUEST FOR
RECONSIDERATION AND/OR
CLARIFICATION OF NOTICE
OF AGENCY ACTION AND
ORDER REQUIRING FURTHER
BRIEFING**

DOCKET NO. 12-2302-01

Carbon/Emery Telcom, Inc. (“Carbon/Emery”) hereby requests reconsideration and/or clarification of the Notice of Request for Agency Action and Order Requiring Further Briefing filed by the Utah Public Service Commission (“Commission”) on September 5, 2012 (“September 5, 2012 Order”).

BACKGROUND

On July 18, 2012, Carbon/Emery filed a Request for Agency Action against 8x8, Inc. (“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 Utah Public Service Commission (“PSC”).

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. Carbon/Emery sought agency action on this issue.

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). 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. 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. 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.

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. 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.

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. 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.

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.” (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.” The Commission ordered Carbon/Emery and 8x8 to recite the specific facts each alleges that are relevant to the question of Commission jurisdiction.” The Commission ordered that briefs are due within 15 days of the Commission Order and Responsive briefs and further responses to the initial request for agency action are due 30 days from this order

ARGUMENT

I. Carbon/Emery Has Due Process Concerns About the Procedural Posture of this Matter.

Carbon/Emery takes procedural exception to the actions of the Commission in this matter. Carbon/Emery filed a Request for Agency Action with the Commission. 8x8 did not file any responsive pleading to the Request for Agency Action. Rather, counsel for 8x8 argued in an email that a technical conference was premature, and questioned the jurisdiction of the Commission in an email. The Commission, in response to this email correspondence, issued an Order stating that “based on the positions asserted by 8x8, and good cause appearing,” interested parties should have the opportunity to brief the jurisdictional issue. The Commission should bear in mind that all potentially “interested parties” are not aware of the position of 8x8 because

8x8 has not filed any pleading, made any motion, or provided any formal response in this action. On the contrary, the Commission refers in its order to 8x8's position in this matter, which the Commission gleans from an email sent from 8x8's regulatory counsel, Ronald Del Sesto—this email is not attached to the September 5, 2012 Order; was not filed with the Commission in this matter; and does not appear on the Commission website for this docket. In other words, 8x8 has not filed any document with the Commission setting forth its "positions" to which interested parties could respond.

Even if 8x8's email had been properly filed with the Commission, 8x8's email is merely an argument—not fact. 8x8 claims in its email that it is a nomadic VoIP provider and as such under the Vonage Order is exempt from regulation. However, 8x8 has offered no factual basis for this claim, and certainly has not formally made this claim with the Commission.

Additionally, the customer to which 8x8 is providing service is a local business with a fixed location. Customers call the dentist office telephone number and the phones ring at the dentist office's fixed location. This does not appear to be a Vonage situation. However, if it is, 8x8 can raise these issues in a properly filed pleading before the Commission. Additionally, any argument that 8x8 has regarding Utah Code Section 54-19-103(1) prohibiting regulation of 8x8 under state law should be properly raised in a pleading filed before the Commission.¹

8x8's suggests in its email that Carbon/Emery (1) withdraw its Request for Agency Action and refile it to identify the customer in question, and (2) explain how the Commission has jurisdiction over this matter. However, procedurally, this suggestion is defective.

Carbon/Emery has filed a Request for Agency Action. If additional facts are needed by the

¹ However, Utah Code Section 54-19-103(2)(v) specifically provides that the regulatory prohibition of Subsection (1) does not affect or modify the application of Section 54-8b-2.1.

Commission, the Commission should either order a technical conference, or required 8x8 to formally respond to the allegations in the Request for Agency Action. The Commission should not consider the email arguments of 8x8 which are not properly before the Commission.

Procedural objections aside, Carbon/Emery has already identified the customer in question in an email (the same method used by 8x8 to make its legal arguments in this matter). Thus, 8x8's argument that it cannot properly respond to the complaint is unfounded. Additionally, with regard to the jurisdictional issue, Carbon/Emery has, in fact, alleged jurisdiction in its Request for Agency Action—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. If 8x8 disputes these allegations and the statement of jurisdiction, the proper procedure should be for 8x8 to file a responsive pleading indicating the factual and legal basis for its dispute. The interested parties should be granted the opportunity to respond to this argument. 8x8 should not be permitted to raise a jurisdictional challenge merely by sending an email to the Judge and counsel.

Carbon/Emery hereby requests that the Commission reconsider its order requiring further briefing before 8x8 is required to prepare a response to the Request for Agency Action. If 8x8 has a jurisdictional challenge, it can, and should, file that challenge with the Commission so that interested parties may properly respond to such challenge.

II. A Technical Conference is an Expeditious and Efficient Way of Addressing the Concerns of the Parties.

Additionally, with regard to 8x8's statement that a technical conference is premature and that they cannot identify the customer in question, Carbon/Emery would refer 8x8 and this Commission to the email from Carbon/Emery Counsel, dated September 4, 2012 in which the customer and the telephone number were identified prior to the Commission's September 5, 2012 Order. Technical conferences are routinely scheduled to discuss factual matters, procedures, and technical issues. They are typically scheduled early in the process as a means of narrowing the focus, gathering information, and allowing the interested parties to participate in a meaningful discussion of open issues. It would seem that a technical conference would be the ideal way of vetting out the precise issues that Mr. Del Sesto refers to in his email, specifically:

1. Who is the alleged customer who is receiving service from 8x8?
2. What kind of service is 8x8 providing?
3. How are local calls routed with 8x8?
4. Is the service provided a nomadic service, like Vonage, or is it a fixed VoIP service provided to a fixed business location?

III. Carbon/Emery Seeks Clarification of the September 5, 2012 Order.

Carbon/Emery believes that the most efficient way of addressing these issues is by way of a technical conference, and would urge the Commission to reconsider its September 5, 2012 Order. If, however, the Commission refuses to reconsider its September 5, 2012 Order, Carbon/Emery requests clarification on the briefing and responsive pleadings ordered in the September 5, 2012 Order.

Specifically, Carbon/Emery requests clarification on the following issues:

1. Will the parties be permitted to engage in discovery during the briefing schedule? Since Carbon/Emery is not privy to the technical call and routing detail of 8x8 VoIP

service, it is unable to offer anything more than its technical assumptions based on the information it has been able to glean from call records and customer contact.

2. Will the Commission require affidavits in support of the briefs that are to be filed by September 20, 2012?

3. What is the Commission referring to when it states that “further responses to the initial request for agency action” are due 30 days from this order? What types of responses is the Commission seeking? From whom?

CONCLUSION

Carbon/Emery first seeks expeditious reconsideration of the Commission’s September 5, 2012 Order. The Commission has permitted 8x8 to raise issues in an email that due process considerations require to be filed formally with the Commission so that interested parties can properly respond to the arguments and issues raised. Additionally, Carbon/Emery believes that a technical conference is an expeditious and reasonable method for addressing the concerns of the parties at this juncture. If, after a properly noticed technical conference, the Commission has believes further briefing would be helpful, the parties can be ordered to provide such briefing, after a period of discovery if needed. In the alternative, if the Commission is not inclined to reconsider its September 5, 2012 Order, Carbon/Emery requests clarification on the briefing and responses it has been ordered to provide.

Dated this 14th day of September, 2012.

BLACKBURN & STOLL, LC

Kira M. Slawson
Stanley K. Stoll
Attorneys for Utah Rural Telecom Association

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Request for Reconsideration and/or Clarification was sent to the following individuals by regular or electronic mail, as noted below, this 14th day of September, 2012.

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