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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.	**RESPONSIVE 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 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"). As detailed herein, 8x8 respectfully recommends that the Commission deny Carbon/Emery Telecom, Inc.'s ("Carbon/Emery" or "Applicant") Request for Agency Action as well as its recently filed Request for Reconsideration and/or Clarification of Notice of Agency Action and Order Requiring Further Briefing ("September 14 Request").

The Federal Communications Commission ("FCC") adopted the *Vonage Order* in 2004. The *Vonage Order* makes clear that the FCC has preempted states from imposing all market entry obligations on companies that provide nomadic "interconnected VoIP services," like 8x8. While there may have been a brief period of uncertainty as to whether the FCC's *Vonage Order* would be upheld on appeal, that time has long since passed. The Order has withstood appeal and

it is now black letter law that state commissions cannot impose on nomadic "interconnected VoIP providers" the type of market entry obligations that Carbon/Emery petitions the Commission to apply to 8x8.[1]

Likewise, there is no support under relevant state law for providing Carbon/Emery with the relief it seeks. 8x8 is not a "public utility" and does not provide "local exchange services" as those terms are defined under state law. Recently enacted legislation makes clear that Utah state law provides no basis for Commission jurisdiction. Furthermore, even if the Commission were to attempt to grant Carbon/Emery the relief it seeks, which we submit would be a misinterpretation of state law, federal law would preempt any attempt to regulate 8x8's market entry.

The September 14 Request for Reconsideration must also be denied for the same reasons that the Request for Agency Action fails. The Commission lacks jurisdiction under federal and state law to regulate 8x8's service offering. There is no need for a technical conference to establish this fact. As detailed herein, there is ample information about 8x8 that is publicly available such that any modicum of due diligence by counsel for the Utah Rural Telecom Association would have revealed that 8x8 is a provider of nomadic "interconnected VoIP services" similar to services provided by Vonage. To the extent that there is still an issue of fact, which there never was, we have included an affidavit from Bryan R. Martin, Chairman and Chief Executive Officer of 8x8, and pointed opposing counsel to numerous public filings made with the FCC demonstrating that 8x8 is a provider of nomadic "interconnected VoIP services" just

[1] *See generally Vonage Holding Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (Nov 12, 2004) ("*Vonage Order*"). The FCC's decision was appealed by several states, and on March 21, 2007, 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); *see also, infra* Section II.

like Vonage.[2] The Commission should recognize Applicant's filing for what it really is: an attempt to limit competition in its territory with no basis in federal or state law. Consumers benefit from 8x8's innovative services offerings, the public interest is served by 8x8's presence in the marketplace and neither federal, nor state, law bar its service offering. Accordingly, the Commission should reject Carbon/Emery's Request for Agency Action and its September 14 Request.

Introduction

On July 18, 2012, Carbon/Emery filed a Request for Agency Action against 8x8.[3] Carbon/Emery asserts that "[u]pon 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] The Applicant's filing cites to, and quotes from, the relevant definitions of "local exchange service" and "public telecommunications service" under state law.[5] Carbon/Emery further alleges 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.[6]

The Request for Agency Action continues by alleging 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,"[7] and as such, is subject to

2 *See infra*, Section I.
3 *See* Request for Agency Action (Jul. 18, 2012).
4 *See* Request for Agency Action, at ¶4 (Jul. 18, 2012).
5 *See* Request for Agency Action, at ¶¶5-6 (Jul. 18, 2012).
6 *See id.* at ¶7.
7 *See id.* at ¶9.

certain statutory obligations.[8] Carbon/Emery cites no support for the assertion that the Commission has previously determined that VoIP service is a "public telecommunications service" under Utah law and 8x8 will not speculate as to what the basis is for Carbon/Emery's claim. As explained in greater detail *infra*, any determination made by the Commission that providers of nomadic "interconnected VoIP services," like 8x8, are subject to Commission regulation is preempted by the *Vonage Order*.[9]Additionally, Carbon/Emery alleges that, upon information and belief, 8x8 is exchanging landline to landline local traffic with Carbon/Emery through a third party wireless transiting carrier and that the use of a third-party wireless transiting carrier does not change the character of the local services provided by 8x8.[10] With neither a CPCN nor an "appropriate agreement with Carbon/Emery,"[11] the Applicant argues that 8x8 is not authorized to provide public telecommunications services or local exchange services in the State of Utah generally, and in the Price Exchange specifically."[12]

On August 16, 2012, the Division of Public Utilities recommended that the Commission schedule a technical conference.[13] But due to Carbon/Emery's failure to identify the customer of which it complained,[14] as well as to address the serious jurisdictional questions raised by both state law and long-standing federal law,[15] Administrative Law Judge Melanie Reif issued an Order finding that "further factual allegations and briefing are needed to facilitate the

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[8] *See* Request for Agency Action, at ¶9 (Jul. 18, 2012).

[9] *See Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n,* 290 F. Supp. 2d 993, 999 (D. Minn. 2003), *aff'd,* 394 F.3d 568 (8th Cir. 2004).

[10] *See* Request for Agency Action, at ¶10 (Jul. 18, 2012).

[11] *Id.*

[12] *Id*.

[13] *See* Division Memo*,* (Aug. 16, 2012).

[14] Counsel for Carbon/Emery would later identify the customer as Parkway Dental. *See* email from Ms. Kira Slawson, Counsel for Carbon/Emery to Ms. Melanie Reif, Administrative Law Judge and Legal Counsel, Utah Pubic Service Comms'n, *et al*. (Sept. 4, 2012).

[15] *See* UT. CODE. ANN. § 54-19-103; *Vonage Order*; *see also*, email from Ronald W. Del Sesto, Jr, Counsel for 8x8, Inc., to Ms. Melanie Reif, Administrative Law Judge and Legal Counsel, Utah Pubic Service Comms'n, *et al.* (Aug. 31, 2012).

Commission's consideration of the question of jurisdiction[,]"[16] and that "the federal and state laws cited by 8x8 raise serious questions about whether the Commission has jurisdiction in this action."[17] The identity of the alleged third-party wireless transiting carrier remains unknown as Carbon/Emery failed to identify the party in its Request for Agency Action and has not done so in any subsequent communications.

On September 14, 2012, Carbon/Emery filed the September 14 Request. In this filing, the Applicant took "procedural exception" to the actions of the Commission. At least a portion of Carbon/Emery's "procedural exception" seems to be related to "interested parties" not being aware of 8x8's position. However, this portion of the September 14 Request appears to have been rectified as a record of the email exchanges between the parties is posted in the docket on the Commission's website.[18]

Next, even though 8x8 informed the Commission and Carbon/Emery that it is a provider of nomadic "interconnected VoIP services," Applicant complains that this is not fact[19] and that 8x8 provides service to a business with a fixed location.[20] Applicant then asserts that "[t]his does not appear to be a Vonage situation,"[21] without any detail or explanation as to why Carbon/Emery believes that 8x8's service can be distinguished from Vonage's. Carbon/Emery continues by stating that it is incumbent upon 8x8 to correct the Applicant's jurisdictionally

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[16] *See* September 5 Order, at p.2.

[17] *Id.*

[18] *See* http://psc.utah.gov/utilities/telecom/telecomindx/2012/12230201indx.html (last visited Sept. 19, 2012).

[19] As detailed *infra* Section I, even a minimum amount of due diligence by opposing counsel would have quickly put opposing counsel on notice that 8x8 is *exclusively* a provider of nomadic "interconnected VoIP services."

[20] Counsel for the Utah Rural Telecom Association is confused as to what makes a VoIP provider nomadic. It is not whether the location where the equipment is installed is fixed, but instead whether the service can be used from multiple locations. Indeed, counsel's conception of what constitutes a fixed provider of VoIP services would mean that all "interconnected VoIP services" are fixed since such services are always used from a fixed location.

[21] *See* September 14 Request, at p. 5.

deficient Request for Agency Action by making a formal filing with the Commission as to why the eight-year old *Vonage Order* preempts the Commission from granting the relief sought by Carbon/Emery, *i.e.*, the imposition of market entry regulation even though the Applicant did not reference, let alone address, either the *Vonage Order* or relevant state law in its Request for Agency Action.[22]

The September 14 Request continues by suggesting that a technical conference is the most expeditious and efficient way of addressing the concerns of the parties.[23] While Carbon/Emery failed to identify the customer as part of its initial filing and only did so when the Commission determined that the filing was woefully inadequate both in its factual allegations and claims of jurisdiction, Applicant suggests that a technical conference is now appropriate given that Carbon/Emery has identified the customer at issue.[24] According to Carbon/Emery, the technical conference would cover the following questions: (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?[25] The balance of Applicant's request concerns clarification of the September 5, 2012 Order.[26]

ARGUMENT

I. 8x8 Provides Nomadic "Interconnected VoIP Services"

8x8 provides a family of services including computer-to-computer, computer-to-phone and phone-to-computer Internet Protocol ("IP") communications services of the types described

22 *See* September 14 Request, at p. 5.
23 *Id*. at p.7.
24 *Id.*
25 *Id.* at p.7.
26 *Id*. at 7-8.

in the FCC's 1998 Report to Congress.[27] The services 8x8 offers to its customers allow those customers to use an existing broadband Internet access service (such as DSL or cable modem service) to communicate via voice or video with an 8x8-supplied terminal adapter or with a software application. Under federal law, an "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 equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network [PSTN] and to terminate calls to the [PSTN]."[28]

8x8's voice offering allows for real-time, two-way voice communications.[29] 8x8's service requires customers to have a pre-existing broadband Internet connection provided by a third party.[30] 8x8 does not provide broadband Internet connectivity to any customers anywhere including customers in the State of Utah as well as those in Price, Carbon County.[31] Further, in order to make use of 8x8's services, customers must have specialized CPE either in the form of hardware capable of encoding and decoding Internet protocol messages or a software application offered by 8x8 for use with its services which requires the use of a computer, *i.e.*, specialized CPE.[32] Also, 8x8 customers can receive calls that originate on the PSTN and terminate calls to the PSTN.[33] The service provided to the customer in Price, Carbon county requires the use of specialized CPE, in connection with a third-party-provided broadband Internet connection, and can be used from any location where broadband Internet connectivity is available.[34] Accordingly,

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27 *See Universal Service Report to Congress*, FCC 98-67 (rel. Apr. 10, 1998).
28 47 C.F.R. § 9.3
29 *See* Affidavit of Bryan R. Martin, Chairman & CEO, 8x8, at ¶4.
30 *See* Affidavit of Bryan R. Martin, Chairman & CEO, 8x8, at ¶¶8-10.
31 *See id*. at ¶9
32 *See id.* at ¶¶12,14.
33 *See id.* at ¶5.
34 *See Id.* at ¶14.

8x8 is a provider of nomadic "interconnected VoIP services," as that term is defined under federal law, and provides such service to the customer identified by Carbon/Emery.

As further evidence of the classification of 8x8's service offerings, 8x8 requests that the Commission take notice of its publicly-available filings made over the years with the FCC clearly demonstrating that 8x8 offers nomadic "interconnected VoIP services." Since the FCC first adopted rules and orders requiring providers of nomadic "interconnected VoIP services" to comply with specific obligations, 8x8 has made the requisite filings in a variety of dockets and proceedings including those pertaining to E911,[35] Customer Proprietary Network Information,[36] and Universal Service Fund ("USF") contribution obligations.[37] Moreover, 8x8 is identified as a provider of "interconnected VoIP services" on the FCC's Form 499 Filer Database website.[38] All of this information is easily found on the FCC's website and even a minimal amount of due diligence by counsel for the Utah Rural Telecom Association would have revealed the classification of 8x8's service under federal law.

8x8's services are largely analogous to those provided by other VoIP providers, such as Vonage. 8x8 customer voice and video sessions are transmitted over IP networks. The 8x8 service provides customers the protocol conversion and other feature and functions needed to communicate (again, via the customer's existing broadband IP link) with stations on the PSTN. This capability is made possible through contractual arrangements between 8x8 (in its capacity as an information services provider/end user) and other duly authorized carriers. The 8x8 service

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[35] *See, e.g.,* Letter from Larry Blosser, Counsel for 8x8, Inc., to Marlene H. Dortch, Secretary, FCC (Aug. 1, 2005) (concerning subscriber notification, acknowledgement status and compliance report obligations imposed on interconnected VoIP providers by the FCC in WC Docket nos. 04-36 and 05-196).

[36] *See, e.g.,* Letter from Bryan Martin, Chairman & CEO, 8x8, Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 29, 2008) (submitting the company's CPNI compliance certification when the FCC's rules were extended to providers of interconnected VoIP services).

[37] *See, e.g.,* Letter from William B. Wilhelm, Jr. and Douglas Orvis II, Counsel for 8x8, Inc., to Marlene H. Dortch, Secretary, FCC (July 18, 2006) (requesting expedited consideration of its traffic study for purposes of calculating USF contributions for interconnected VoIP providers in WC Docket No. 06-122).

[38] *See* http://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=825996 (last visited Sept. 19, 2012).

offering does not provide phone-to-phone services between stations on the PSTN. Moreover, like Vonage's service offering, 8x8 allows customers to move their equipment to different locations and still make use of the service.[39] For example, a customer that signs up for service in Price, Utah, could take their equipment to New York City and continue to receive and place calls using the same telephone numbers so long as there is broadband Internet connectivity available to the customer in New York City.[40]

II. The Federal Communications Commission's Vonage Order Preempts State Regulation of 8x8's Service offerings

The FCC has made several important determinations concerning the state and federal obligations of VoIP service providers such as 8x8. First, the FCC has determined that computer-to-computer VoIP services (those services that do not utilize the PSTN), such as some of those services provided by 8x8, are information services subject to exclusive federal regulation.[41] Further, in the FCC's *Vonage Order*,[42] the Commission determined that computer-to-phone VoIP services, such as those 8x8 services described *supra* Section I, are similarly subject to *exclusive federal jurisdiction.* Section 2(b) of the Communications Act of 1934 reserves to the states jurisdiction "in connection with intrastate communication service."[43] However, as expressly found in the *Vonage Order*, it is impossible to separate the inter- and intra-state components and capabilities of computer-to-phone VoIP services. As such, the FCC exercised its authority to preempt state entry and rate regulation.[44]

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39 *See* Affidavit of Bryan R. Martin, Chairman & CEO, 8x8, at ¶13.

40 *See id*.

41 *See generally Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004) ("*Pulver Order*").

42 *See generally Vonage Order*.

43 47 U.S.C. § 152(b).

44 *See Vonage Order*, at 22413, ¶ 17 (citing *Qwest Corp. v. Minnesota Pub. Utils. Comm'n,* 380 F.3d 367, 374 (8th Cir. 2004)) (finding that, with respect to jurisdictionally mixed special access services, the Commission "*certainly has the wherewithal to preempt state regulation in this area if it so desires"*) (emphasis added).

Specifically, in the *Vonage Order*, the FCC found that "the characteristics of [Vonage's VoIP service] DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota's regulations would thwart federal law and policy."[45] The FCC's ruling was not narrowly limited to any particular regulatory provision; instead, the FCC preempted the application of Minnesota's "traditional 'telephone company' regulations," which includes telecommunications certification and entry requirements.[46] In preempting Minnesota's "traditional 'telephone company' regulations," the FCC "ma[de] clear that *this Commission, not the state commissions*, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities. For such services, *comparable regulations of other states must likewise yield* to important federal objectives."[47] While not relevant to either Vonage's or 8x8's nomadic "interconnected VoIP service," the FCC further found it would preempt even fixed offerings of "interconnected VoIP services."[48] For example, cable companies are often referred to as providers of fixed "interconnected VoIP services" as, unlike both 8x8 and Vonage, they provide both the broadband Internet connection and the "interconnected VoIP service," and, also unlike

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[45] *Vonage Order*, at 22411-22412, ¶14. In addition to this fundamental determination of applying exclusive federal jurisdiction to Vonage's VoIP service, the FCC suggested that Congress's manifest preference for an unregulated Internet provided additional support for the preemption of state regulations, and that "multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states." *Id.*

[46] *See generally Vonage Order*, at 22404-22405, 22430-22431; ¶¶1, 42.

[47] *Vonage Order*, at 22404-22405, ¶1 (emphasis added). In addition to this basic finding of exclusive federal jurisdiction, the FCC suggested that Congress's manifest preference for an unregulated Internet provided additional support for the preemption of state regulations, and that "multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states." *Id.* at 22412, ¶ 14.

[48] *Id.,* at 22424, ¶ 32 ("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.") (internal citations omitted).

8x8 and Vonage, the specialized CPE cannot be re-located to another geographic location in connection with use of the "interconnected VoIP service."

The federal courts have also applied these important distinctions. Specifically, after reviewing the characteristics of Vonage's DigitalVoice service in light of federal telecommunications law, the United States District Court of Minnesota found Minnesota's attempt to regulate VoIP services, such as 8x8's, preempted by federal law evidencing a clear congressional intent to leave the Internet and information services unregulated.[49] This decision was based in large part on the fact that Vonage's services (like 8x8's) are provided using the customer's existing broadband connection, which is provided by the customer's Internet service provider.[50] This ruling had the specific effect of preventing the state from imposing traditional state telecommunications requirements on Vonage.[51]

Subsequently, the United States Court of Appeals for the Eighth Circuit upheld the *Vonage Order* when a number of state commissions appealed it finding that the *Vonage Order* preempted state regulation of nomadic interconnected VoIP services like those offered by 8x8.[52] Under the Hobbs Act, an FCC order may be challenged only by filing a petition for review with a U.S. Court of Appeals. The Eighth Circuit had exclusive jurisdiction to review the *Vonage Order* under the Hobbs Act and its judgment is binding nationwide.[53] Accordingly, state commissions, throughout the United States, are preempted from regulating providers of nomadic, interconnected VoIP services, like 8x8.

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[49] *See Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003).

[50] *See id.* at 995.

[51] *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n,* 290 F. Supp. 2d 993, 999 (D. Minn. 2003), *aff'd,* 394 F.3d 568 (8th Cir. 2004).

[52] *See Minnesota Public Utilities Comm'n. et al. v. FCC*, 483 F.3d 570 (2007).

[53] *See Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) (noting that another circuit's decision regarding an FCC order "is binding outside of" that circuit).

III. 8x8 is Not a "Public Utility" Under State Law

Apart from federal law, Utah state law also makes clear that the Commission lacks the jurisdiction to regulate 8x8's entry into the communications marketplace. Carbon/Emery's cursory review of relevant state law falls woefully short of establishing Commission jurisdiction over 8x8's offering. The Applicant claims that "VoIP service is a public telecommunications service under Utah law"[54] and thus requires a CPCN in order to offer such services.[55] Notably, Carbon/Emery cites to no authority for the proposition that VoIP is a "public telecommunications service under Utah law."[56] As detailed *supra* in Section II, such a finding, as applied to 8x8, would violate federal law and would be preempted by the *Vonage Order*. But 8x8 submits that Carbon/Emery has misinterpreted state law. A more reasonable interpretation of relevant state law is that the Commission does not have the jurisdiction to require "interconnected VoIP providers" to obtain CPCNs to offer service in the State.

The legislature granted the Commission "jurisdiction to supervise and regulate every public utility in this state … ."[57] A "public utility" is defined as including a "telephone corporation,"[58] which is defined as "any corporation . . . who owns, controls, operates, manages, or resells a public telecommunications service as defined in Section 54-8b-2."[59] A "public telecommunications service" means the "two-way transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, [etc.] offered to the public generally."[60] However, 8x8 does not provide "two-way *transmission* of signs, signals,

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54 Request for Agency Action, at ¶10 (Jul. 18, 2012).
55 *Id.*
56 *Id*.
57 UT. CODE ANN. § 54-4-1. *See also,* Request for Agency Action, at ¶3 (Jul. 18, 2012).
58 *Id.* at . § 54-2-16(a).
59 *Id.* at § 54-2-25(a).
60 *Id.* at § 54-8b-2(16).

writings, images, sounds, messages, data, or other information"[61] unless the statute is read to require all Internet-based companies, like Apple, Amazon, FaceBoook, Vonage, etc., to apply for and obtain certificates from the Commission. Like these companies, 8x8 relies on users presubscribing to a broadband Internet connection from a third party in order to make use of its service. In providing broadband Internet access, it is the third party that enables the *transmission* described by the definition of a "public telecommunications service." To the extent the definition applies to any party at all, it would apply to the provider of the transmission service, *i.e.*, the party that provides broadband Internet access and not 8x8.

Further support of this proposition can be found in a separate statutory provision that broadly limits the ability of any state agency and the Commission to regulate "Internet protocol-enabled service" or "VoIP service."[62] The relevant statute defines an "Internet protocol-enabled service" as "any service, functionality, or application that uses Internet protocol or a successor protocol that enables an end user to send or receive voice, data, or video communications."[63] A "VoIP service" is defined as one that "(a) enables real time, two-way voice communication originating from or terminating at the user's location in Internet protocol or a successor protocol; (b) uses a broadband connection from the user's location; and (c) permits a user to receive a telephone call on the [PSTN] and to terminate a call to the [PSTN]."[64] 8x8's offering qualifies as either an "Internet Protocol-enabled service" or a "VoIP service" and therefore regulation of the offering is subject to the statutory prohibition.

The statutory prohibition applicable to providers of Internet protocol-enabled and VoIP service providers contains an exception where the Commission's authority established by Utah

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61 *Id.* (emphasis supplied).
62 *Id.* at § 54-19-103(1).
63 *Id.* at § 54-19-102(1).
64 *Id.* at § 54-19-102(2).

Code Ann. § 54-8b-2.1 is preserved. However, the Commission's jurisdiction defined by that statute is limited to a "telecommunications corporation." A "telecommunications corporation" is defined again with reference to a corporation that owns, controls, manages or resells a "public telecommunications service."[65] For the reasons detailed immediately above, 8x8's services do not meet the definition of a "public telecommunications service" and thus is not a "telecommunications corporation" subject to Commission jurisdiction.

In any event, even if Carbon/Emery wrongly insists that these statutory provisions govern 8x8's service offering, the *Vonage Order* clearly preempts any effort to regulate 8x8's service. The FCC adopted the *Vonage Order* in 2004. It should be assumed that the Utah legislature was aware of the *Vonage Order* when it adopted the provision prohibiting regulation of Internet protocol-enabled and VoIP services that were enacted in May, 2012. To do otherwise would be to assume that the legislature enacted a statute that violates federal law. The basic canons of statutory interpretation mandate interpreting laws in a manner such that they are both constitutional and do not violate existing laws. Thus, the only reasonable interpretation of all of the relevant statutory provisions in Utah is that the legislature recognized the reality of the limits of state authority over Internet protocol-enabled and VoIP services in the face of federal preemption and, in enacting the code sections addressing such services, attempted to clarify that the Commission's jurisdiction was severely limited when it comes to providers of such services.

IV. 8x8 Does Not Provide "Local Exchange Services" Under State Law

Carbon/Emery further alleges that 8x8 is providing "local exchange services" under state law and that a CPCN is required to offer such services.[66] Carbon/Emery admits that the definition of a "local exchange service" includes "the provision of telephone lines" to customers

[65] *Id.* at § 54-8b-2(18).

[66] *See* Request for Agency Action, at ¶ 10.

"with the geographic area encompassing one or more local communication as described in maps, tariffs, or rate schedules filed with an approved by the commission[,]"[67] but then fails to inform the Commission of the definition of what constitutes a "telephone line" under state law. Pursuant to the relevant statutory definition, a "telephone line" is defined as including "all conduits, ducts, poles, wires, cables, instruments, and appliances, and *all other real estate, fixtures, and personal property owned, controlled, operated, or managed* in connection with or to facilitate communication by telephone whether that communication is had with or without the use of transmission wires."[68] In short, a "telephone line" is some form of physical property used "to facilitate communication by telephone."[69]

As detailed in Section III, *supra*, 8x8 does not control any transmission equipment of any sort. Instead, the broadband Internet connectivity is provided by an unrelated third party. Even Carbon/Emery recognizes this by referring in its complaint to an unknown and yet-to-be identified "third party wireless transiting carrier."[70] While 8x8 can neither deny nor confirm that the third party providing broadband Internet access services to Parkway Dental is a wireless provider, the Applicant's allegations make clear that even Carbon/Emery recognizes that there is a third party unrelated to 8x8 providing service to Parkway Dental that makes 8x8 service possible. Accordingly, 8x8 is not a provider of "local exchange service" as the company does not provide "telephone lines."

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67 *See* Request for Agency Action, at ¶5; *see also,* UTAH CODE. ANN. § 54-8b-2(10).

68 UTAH CODE. ANN. § 54-2-1(26) (emphasis supplied).

69 *Id*.

70 Request for Agency Action, at ¶10 (Jul. 18, 2012).

CONCLUSION

8x8 respectfully submits that the Commission should deny Carbon/Emery's Request for Agency Action and the September 14 Request. The eight-year old *Vonage Order* makes clear that the actions the Applicant petitions the Commission to engage in are preempted under federal law. Additionally, none of the services offered by 8x8 provide the Commission with the jurisdiction under state law to subject 8x8 to market entry regulation. 8x8 is not a "public utility," and neither provides a "public telecommunications," nor a "local exchange service" as these terms are defined under state law. Even if state law supported regulation of 8x8's offerings, which it does not, federal law would preempt any such state laws by virtue of the *Vonage Order.* Furthermore, there is no need for a technical conference or clarification of the September 5, 2012 Order. The questions that a technical conference would consider have either already been answered or are irrelevant to the central question of whether the Commission has the jurisdiction to grant the relief sought, *i.e.*, market entry regulation of a provider of nomadic "interconnected VoIP services." 8x8 respectfully submits that the resources of the Commission, 8x8 and Carbon/Emery are better spent elsewhere rather than debating what is, and has been, settled law for a very long time.

Dated this 19th day of September, 2012.

Bingham McCutchen, LLP

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Ronald W. Del Sesto, Jr.
Attorney for 8x8, Inc.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of Responsive Brief was sent to the following individuals by mail, as noted below, this 19th day of September, 2012. Additionally, all parties will receive courtesy electronic copies of this filing tomorrow, September 20, 2012.

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