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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

CARBON/EMERY TELCOM, INC.

v.

8X8, INCORPORATED

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

DOCKET NO. 12-2302-01

Carbon/Emery Telcom, Inc. (“Carbon/Emery”) submits this Reply 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.

INTRODUCTION

8x8 argues that it provides nomadic VoIP service that is preempted from regulation by the Utah Public Service Commission under the terms of the Vonage Order.¹ However, as demonstrated in Carbon/Emery’s initial brief, and discussed in further detail herein, there are key distinctions between a Vonage type service and the service provided by 8x8 in this instance that preclude application of the Vonage Order and require the Public Service Commission to exercise jurisdiction over this matter. In fact, 8x8 is engaged in an artifice or scheme to provide local exchange service in Carbon County, Utah while avoiding the statutory requirements to obtain a

¹ 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)).

certificate of public necessity and convenience, and the obligation to enter into a Local Traffic Exchange or Interconnection Agreement with the local exchange provider, Carbon/Emery. The Utah Public Service Commission should not permit this, and should not hesitate to exercise its jurisdiction to regulate local exchange service and public telecommunications services in Utah.

As demonstrated herein, under the scheme that 8x8 is attempting to advance, no company who is seeking to competitively enter the rural markets to provide VoIP or resold voice services would be required to obtain a certificate of public necessity and convenience. This would be contrary to Utah law, both historical and recent, and contrary to years of Public Service Commission precedence.

ARGUMENT

A. The Service that 8x8 is Providing is Subject to the Jurisdiction of the Utah Public Service Commission.

Utah law provides that “the commission may issue a certificate to a telecommunications corporation authorizing it to compete in providing local exchange services or other public telecommunications services in all or party of the service territory of an incumbent telephone corporation.”² Under Utah law, a telecommunications corporation is defined as “any corporation or person...owning, controlling, operating, managing or reselling a public telecommunications service.”³ “Public telecommunications service” is defined as “two-way transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means offer to the public generally.” 8x8 admits that its service offering allows for “real-time, two-way voice

² U.C.A. Section 54-8b-2.1(1)

³ U.C.A. Section 54-8b-2(18)

communications,”⁴ but somehow claims that it is not providing public telecommunications because 8x8 does not provide “two-way *transmission*” of signs, signals, writings, images, sounds, messages, data, or other information.⁵ 8x8 claims that it is the third party broadband internet provider that enables the “transmission” of the sounds, messages, or data—not 8x8.⁶ This is ridiculous.

8x8 claims that it purchases connectivity to the public switched telephone network from regulated telephone carriers, and that 8x8’s services allow customers to engage in real-time two-way voice communications through the telecommunications services that it purchases from regulated telephone carriers.⁷ It is inconsistent and disingenuous for 8x8 to claim that it purchases telecommunications services from regulated telephone carriers, and uses those telecommunications services in providing its VoIP services to enable its customers to engage in two-way, real-time voice communications on the public switched telephone network, but it is not engaged in the provision of public telecommunications services. Merely because 8x8 utilizes the facilities of another carrier, does not negate the fact that it is providing public telecommunications services. On the contrary, in fact, the Utah statute contemplates that a reseller of public telecommunications services is a telecommunications corporation.⁸

Additionally, 8x8’s argument that it is not providing local exchange service because 8x8 doesn’t have any telephone lines is equally absurd. “Local exchange service” is defined as the provision of telephone lines to customers with the associated transmission of two-way interactive, switched voice communication within the geographic area encompassing on or more

⁴ See Affidavit of Bryan Martin, ¶4

⁵ 8x8 Responsive Brief, p.12.

⁶ *Id. at 13.*

⁷ See Affidavit of Bryan Martin, ¶¶4-7.

⁸ U.C.A. Section 54-8b-2(18).

local communities as described in maps, tariffs, or rate schedules filed with and approved by the commission.” 8x8 admits, in the Affidavit of Bryan Martin, that it purchases telecommunications numbers and telecommunications services from licensed telecommunications providers to provide its VoIP customers with connectivity to the public switched telephone network.⁹ 8x8 acknowledges that it provides VoIP services to Parkway Dental.¹⁰ There is no dispute that Parkway Dental is located in Carbon County, Utah. Carbon/Emery is the only certificated local exchange provider in Carbon County, Utah.¹¹ 8x8 and Parkway Dental are using a local telephone number that permits Carbon County residents to dial a local number, which is not purchased from Carbon/Emery, to connect with Parkway Dental’s business office in Carbon County, Utah.¹²

8x8 states that it is not engaging in the exchange of local traffic because it does not control any telephone lines.¹³ 8x8 misses the mark with this argument. 8x8 could not be an interconnected VoIP carrier unless it is connected to the PSTN by telephone lines—whether such lines are owned and installed by 8x8, or whether they are purchased or leased by 8x8 from some regulated telephone carrier is irrelevant for the inquiry. 8x8 has provided its customer, Parkway Dental, with access to telephone lines that provide connectivity to the PSTN,¹⁴ to permit two-way interactive, switched voice communication within the geographic area encompassing Carbon County, Utah, and the associated local communities as described in the maps and tariffs filed by Carbon/Emery with the Public Service Commission. Thus, 8x8 is providing local

⁹ Affidavit of Bryan Martin, ¶¶5-7

¹⁰ *Id.* at ¶14

¹¹ Affidavit of Brock Johansen, ¶4, attached hereto as **Exhibit A**.

¹² *Id.* at ¶¶5-7, 9 and 15

¹³ Brief of 8x8, p. 15

¹⁴ See Affidavit of Bryan Martin, ¶6

exchange service as defined under Utah law.¹⁵ Such service is subject to the jurisdiction of the Utah Public Service Commission under U.C.A. Section 54-8b-2.1.

B. The Service Provided to Parkway Dental Is Not Nomadic.

8x8 claims that it is a nomadic interconnected VoIP carrier. 8x8 spends considerable time in its brief arguing that it is an interconnected VoIP carrier.¹⁶ Carbon/Emery does not dispute the fact that 8x8 is an interconnected VoIP provider. Rather, Carbon/Emery disputes that 8x8 is a nomadic provider of VoIP services. 8x8 claims that its services can be provided to any location where broadband internet connectivity is available, assuming the 8x8 customer brings either the necessary equipment with them, or uses a software client associated with their 8x8 account in conjunction with broadband internet access services.¹⁷ Mr. Martin does not state in his affidavit what type of equipment Parkway Dental would have to bring with it to New York, if Parkway Dental wanted to initiate and receive calls associated with the (435) 472-5556 number from a New York location, nor does Mr. Martin indicate whether Parkway Dental has, in fact, used a software client associated with its 8x8 account. The fact that it may be theoretically possible for Parkway Dental to use 8x8 interconnected managed VoIP system in a nomadic nature, or that 8x8 provides nomadic VoIP services to other customers, is not dispositive of whether the services offered to 8x8 in this instance, under these particular circumstances, are in fact nomadic VoIP services.

¹⁵ U.C.A. 54-8b-2(10)

¹⁶ Although, the 8x8 Brief is somewhat vague, it seems to imply that all interconnected VoIP traffic has been treated jurisdictionally as interstate traffic that is pre-empted by the Vonage Order.

¹⁷ See Affidavit of Bryan Martin, ¶13.

The FCC has never claimed exclusive federal jurisdiction over all interconnected VoIP traffic.¹⁸ In the Vonage Order, the FCC determination that Vonage's nomadic VoIP service should be characterized as entirely interstate (and thus subject to exclusive federal jurisdiction) was based largely on the fact that the location of the Vonage caller could not reasonably be determined because a Vonage caller can use a single number to place calls from a variety of locations.¹⁹ As indicated in Carbon/Emery's initial Brief, in the *Universal Service Order* issued by the FCC on June 27, 2006,²⁰ 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. In this instance, Parkway Dental is using the interconnected VoIP service at its dental offices in Price, Utah. The fact that it may be theoretically possible for Parkway Dental to take its VoIP equipment to New York,²¹ doesn't negate the fact that it is not likely to do so, and if it did, it would be unable to make and receive calls at its business location. Because 8x8 is capable of tracking the jurisdiction of Parkway Dental's calls, federal preemption does not apply to this service.

C. 8x8's Service Is Designed to Circumvent Utah Law and Commission Regulation.

The fact of the matter is that 8x8 has offered Parkway Dental an alternative to local business service from Carbon/Emery, utilizing an improper scheme whereby Parkway Dental ported a local Carbon/Emery telephone number to Verizon Wireless, and now uses that Verizon Wireless local number to transit calls to 8x8's VoIP service. The telephone number assigned to

¹⁸ See *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570, 575 (8th Cir. 2007) and *Universal Service Contribution Methodology Proceeding, Report and Order of Proposed Rulemaking* (WC Docket No. 06-122) (2006) 21 FCC Rcd 7518.

¹⁹ See *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570, 575 (8th Cir. 2007).

²⁰ *Universal Service Contribution Methodology Proceeding, Report and Order of Proposed Rulemaking* (WC Docket No. 06-122) (2006) 21 FCC Rcd 7518.

²¹ Carbon/Emery certainly does not concede that Parkway Dental could, in fact, make and receive calls from a hotel in New York.

Parkway Dental's account was not purchased by 8x8 from Carbon/Emery, nor was it provided by 8x8.²² Typically, in a nomadic VoIP situation in rural Utah, the nomadic VoIP provider is unable to obtain local telephone numbers from the local exchange provider unless the VoIP provider is certificated.²³ Therefore, when a customer uses a truly nomadic VoIP service in rural Utah, the customer is given a long distance number from the VoIP provider, and calls placed to and from that number are subject to long distance charges.²⁴ In this case, 8x8 and Parkway Dental are using a local Carbon County number that was ported from Carbon/Emery to Verizon Wireless.²⁵ If this scheme is permitted to occur, there will be no need for any VoIP provider, fixed or nomadic to ever obtain a Certificate of Public Necessity and Convenience from the Utah Public Service Commission, or an Interconnection Agreement or Traffic Exchange Agreement from the incumbent local exchange carrier again. Competitors could simply tell their customers to port their existing local landline telephone numbers to a wireless provider, then forward the now-wireless number to one of the VoIP provider's long distance numbers, thus, permitting the VoIP provider to utilize the wireless number to improperly transit local traffic. The Utah Public Service Commission should not sit idly by and let this scheme advance.

8x8 claims that Carbon/Emery is merely trying to limit competition in its territory. On the contrary, Carbon/Emery is merely trying to require the Utah Public Service Commission to enforce the Utah statutes regarding competitive entry for providing local exchange services or other public telecommunications. Under Utah law, competition for local exchange service or other public telecommunications services is permitted so long as the competitor has obtained a certificate of public necessity and convenience. 8x8 is not entitled to provide

²² See Affidavit of Brock Johansen, ¶15-7, 9

²³ *Id.* at ¶18

²⁴ *Id.*

²⁵ *Id.* at 9 and 16

telecommunications services in Carbon County, Utah because it is not certificated to provide local service in Carbon County, Utah, and 8x8 does not have an interconnection agreement or traffic exchange agreement with Carbon/Emery.

CONCLUSION

8x8 is providing local exchange service using a fixed VoIP platform to Parkway Dental in Price, Utah without a CPCN. Moreover, 8x8 is impermissibly using a ported wireless number to connect its service to the PSTN. 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.

Dated this 5th day of October, 2012.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Carbon/Emery Reply Brief on Jurisdiction was sent to the following individuals by regular or electronic mail, as noted below, this 5th day of October, 2012.

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EXHIBIT A

AFFIDAVIT OF BROCK JOHANSEN