

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Request for Agency)
Action of Carbon/Emery Telcom, Inc., v.) DOCKET NO. 12-2302-01
8x8, Inc.) ORDER OF DISMISSAL
) FOR LACK OF JURISDICTION
)

ISSUED: November 27, 2012

SYNOPSIS

By this order the PSC dismisses the request for agency action for lack of jurisdiction.¹

By The Commission:

This matter is before the Utah Public Service Commission (“PSC”) pursuant to a Request for Agency Action filed by Carbon/Emery Telecom, Inc. (“Carbon/Emery”) on July 18, 2012. Carbon/Emery asks the PSC to exercise its jurisdiction over and require 8x8, Inc. (“8x8”) to obtain a certificate of public convenience and necessity (“CPCN”) for voice over Internet protocol (“VoIP”) service in Utah and, more particularly, in Carbon County where Carbon/Emery provides telecommunications services under the PSC’s jurisdiction. 8x8 challenges Carbon/Emery’s request on jurisdictional grounds, arguing the PSC is preempted under federal and state laws from exercising jurisdiction over its service offerings in Utah.

¹ In light of this order, no further response to Carbon/Emery’s Request for Reconsideration and/or Clarification of Notice of Agency Action and Order Requiring Further Briefing, filed September 14, 2012, is necessary.

BACKGROUND

1. On November 12, 2004, the Federal Communications Commission (“FCC”) issued an order in connection with Vonage Holdings Corporation (the “Vonage Order”).² The Vonage Order addresses whether state commissions are preempted from exercising jurisdiction over VoIP services.
2. On March 20, 2012, Utah Governor Herbert signed into law Senate Bill 229 (“Substitute Telecommunications Regulatory Amendments”), with an effective date of May 8, 2012.³ This bill enacts the “Regulation of Internet Protocol Services” chapter of the Utah Code Ann. now codified at Utah Code Ann. §§ 54-19-101 to -103 (Supp. 2012).⁴ Section 54-19-103 specifically addresses the PSC’s authority over VoIP services.⁵
3. On July 18, 2012, Carbon/Emery Telcom, Inc. (“Carbon/Emery”) filed a request for agency action (the “Carbon/Emery complaint” or “Complaint”) against 8x8.⁶ The Complaint asserts jurisdiction is proper under the PSC’s general jurisdiction statute found at U.C.A. § 54-4-1.⁷ The Complaint makes no reference to the 2004 Vonage Order, nor to Utah Senate Bill 229 made effective just a few weeks before Carbon/Emery’s filing.
4. Carbon/Emery asserts “[u]pon information and belief” 8x8 “is providing, or proposes to provide” telecom services within the state of Utah which require a certificate of

² See *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (FCC 04-267 Memorandum Opinion and Order, released November 12, 2004).

³ See <http://le.utah.gov/~2012/bills/static/SB0229.html>.

⁴ See <http://le.utah.gov/UtahCode/section.jsp?code=54-19>.

⁵ See http://le.utah.gov/code/TITLE54/htm/54_19_010300.htm.

⁶ See Request for Agency Action, filed July 18, 2012.

⁷ See *id.* at 1, ¶ 3. Section 54-4-1 provides, in part: “The commission is hereby vested with the power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state....” Utah Code Ann. § 54-4-1 (2010).

public convenience and necessity and places 8x8 under PSC jurisdiction.⁸ In addition, Carbon/Emery asserts “[u]pon information and belief” 8x8 “is providing, or proposes to provide” managed VoIP services, which Carbon Emery claims are subject to competitive entry under U.C.A. § 54-8b-2.1 as “previously determined by the PSC” in a matter which Carbon/Emery neither identifies nor cites.⁹

5. On July 30, 2012, the PSC issued a request to the Division of Public Utilities (“Division”) to investigate Carbon/Emery’s claims.¹⁰

6. In response to the PSC’s action request, the Division of Public Utilities (“Division”) filed a memo on August 16, 2012, recommending the PSC schedule a technical conference “to further educate the parties on the nature of the services being offered [by 8x8].”¹¹ The Division’s memo did not address the issue of PSC jurisdiction.

7. Upon receiving the Division’s recommendation, the PSC attempted to schedule a technical conference in this docket on August 30, 2012,¹² and the date proposed was rejected by counsel for one of the parties.¹³

8. On August 31, 2012, in response to the PSC’s proposed date for a technical conference, 8x8, in an e-mail, challenged the jurisdiction of the PSC to hear this matter because

⁸ See Request for Agency Action, at 1-2, ¶ 4.

⁹ *Id.* at 2, ¶ 9. Carbon/Emery identifies this information in a subsequent pleading.

¹⁰ See Action Request, issued July 30, 2012.

¹¹ Division Memo, filed August 16, 2012.

¹² See E-mail from Melanie Reif, Administrative Law Judge, Utah Public Service Commission, to Parties (Aug. 30, 2012; 3:56 P.M.), available at: <http://www.psc.utah.gov/utilities/telecom/12docs/12230201/234276%20No1%20Email%20Correspondence%208-30-2012.pdf>.

¹³ See E-mail from Paul Proctor, Assistant Utah Attorney General, to Parties (Aug. 31, 2012; 7:51 A.M.), available at: <http://www.psc.utah.gov/utilities/telecom/12docs/12230201/234286%20No8%20Email%20Correspondence%208-31-2012.pdf>.

8x8 is exclusively a nomadic VoIP provider¹⁴ which the PSC is preempted from regulating under federal and state law.¹⁵ In particular, 8x8 claimed the PSC is preempted from exercising jurisdiction over 8x8's service offerings under both the Vonage Order and Utah Code Ann. § 54-19-103(1).¹⁶

9. On September 4, 2012, the PSC communicated the following message to the parties: "At this time, please be advised that a technical conference will not be scheduled in this docket."¹⁷

10. Carbon/Emery thereafter communicated its "disappoint[ment]" concerning the status of the technical conference,¹⁸ and provided the name and telephone number of the customer, Parkway Dental, per 8x8's request.¹⁹ Carbon/Emery stated, "[w]e would like to better understand 8x8's service and the way calls are routed by 8x8[,] because we believe 8x8 is providing local service. We believe a technical conference would best serve all parties."²⁰

¹⁴ See E-mail from Ronald W. Del Sesto, Jr., Counsel for 8x8, to Parties (Aug. 31, 2012; 12:08 P.M.), available at: <http://www.psc.utah.gov/utilities/telecom/12docs/12230201/234288%20No10%20Email%20Correspondence%208-31-2012.pdf>. 8x8 also requested clarification regarding the alleged customer located in Price, Carbon County, Utah. See *id.* Without this information, 8x8 asserted it could not provide meaningful input at a technical conference. See *id.*

¹⁵ See *id.*

¹⁶ See *id.* A copy of the Vonage Order is attached to 8x8's email.

¹⁷ E-mail from Melanie Reif, Administrative Law Judge, Utah Public Service Commission, to Parties (Sept. 4, 2012; 12:17 P.M.), available at: <http://www.psc.utah.gov/utilities/telecom/12docs/12230201/234291%20No13%20Email%20Correspondence%209-4-2012.pdf>.

¹⁸ E-mail from Kira Slawson, Counsel for Carbon/Emery, to Melanie Reif, Administrative Law Judge, Utah Public Service Commission (Sept. 4, 2012; 1:17 P.M.), available at: <http://www.psc.utah.gov/utilities/telecom/12docs/12230201/234292%20No14%20Email%20Correspondence%209-4-2012.pdf>.

¹⁹ See *id.*

²⁰ *Id.*

11. On September 5, 2012, the PSC issued a notice of request for agency action and order requiring briefing on the issue of PSC jurisdiction.²¹ The PSC's order, in part, states: "The [PSC] agrees that jurisdiction cannot be presupposed. The federal and state laws cited by 8x8 raise serious questions about whether the [PSC] has jurisdiction in this docket. Further factual allegations and briefing are needed to facilitate the [PSC's] consideration of the question of jurisdiction."²² The PSC therefore ordered: "Based on the positions asserted by 8x8, and for other good cause appearing, further proceedings are required to provided Carbon/Emery[], 8x8, and any other interested parties an opportunity to brief the jurisdictional issue."²³

12. On September 14, 2012, Carbon/Emery filed a request for reconsideration and/or clarification of the PSC's ordered issued on September 5, 2012.²⁴ Carbon/Emery argues in this filing that it was improper for 8x8 to raise its jurisdictional claim in an email and, if Carbon/Emery's petition is defective, as 8x8 asserts, the proper remedy is to either hold a technical conference or order 8x8 to respond to the complaint.²⁵

13. On September 18, 2012, counsel for 8x8 filed a motion for an attorney licensed in a foreign state to represent 8x8.²⁶

²¹ See Notice of Request for Agency Action and Order Requiring Further Briefing, issued September 5, 2012.

²² Id. at 2.

²³ Id.

²⁴ See Request for Reconsideration and/or Clarification of Notice of Agency Action and Order Requiring Further Briefing, filed September 14, 2012.

²⁵ See id. at 5-6.

²⁶ See Motion for an Attorney Licensed in a Foreign State to Represent 8x8, Inc., filed September 18, 2012. 8x8's motion was granted on October 2, 2012. See Order Granting Motion for an Attorney Licensed in a Foreign State to Represent 8x8, Inc., issued October 2, 2012, and Erratum Order Granting Motion for an Attorney Licensed in a Foreign State to Represent 8x8, Inc., issued October 3, 2012 (correcting briefing due date).

14. On September 20, 2012, Carbon/Emery and 8x8 each filed their briefs on the issue of jurisdiction.²⁷ 8x8's brief included an affidavit of its Chairman and Chief Executive Officer, Bryan R. Martin ("Mr. Martin").²⁸

15. Mr. Martin's affidavit which was attached to 8x8's September 20, 2012 filing states, in part:

4. 8x8's voice offerings allow customers to engage in real-time, two-way voice communications.²⁹

5. 8x8 services allow customers to receive voice communications through the public switch telephone network as well as to initiate communications to users of the public switched telephone network.³⁰

...

8. All of 8x8's offerings require that the customer have a broadband Internet connection.³¹

9. 8x8 does not offer any customers broadband Internet connectivity, . . . includ[ing] those located in the State of Utah as well as those in Price, Carbon County.³²

10. 8x8 customers must purchase broadband Internet connectivity from a third party.³³

11. Customers must use the broadband Internet connection provided by a third party in order to make use of 8x8's services.³⁴

12. 8x8 customers must use specialized customer premises equipment or a software application to make use of 8x8's service offerings. Traditional

²⁷ See Carbon/Emery Telecom, Inc.'s Brief on Jurisdiction, filed September 20, 2012. See also 8x8's Responsive Brief Filed in Response to Request for Agency Action and Order Requiring Further Briefing, filed September 20, 2012.

²⁸ See Affidavit of Bryan R. Martin, filed September 20, 2012.

²⁹ Id. at 1, ¶ 4.

³⁰ Id. at 1, ¶ 5.

³¹ Id. at 2, ¶ 8.

³² Id. at 2, ¶ 9.

³³ Id. at 2, ¶ 10.

³⁴ Id. at 2, ¶ 11.

telephony equipment cannot process communications encoded in Internet protocol format and will not function with 8x8's service offerings without specialized customer premises equipment.³⁵

13. 8x8's services can be provided to any location where broadband Internet connectivity is available. This means that a customer can move [his/her/its] device from one geographic location to another and continue to make use of 8x8's service.³⁶

14. ...Parkway Dental's service configuration conforms to the description of 8x8's service described herein.³⁷

16. On October 5, 2012, Carbon/Emery and 8x8 filed their respective responsive briefs.³⁸ Carbon/Emery's brief included an affidavit of its Chief Executive Officer and General Manager, Brock Johansen ("Mr. Johansen").³⁹

17. Mr. Johansen's affidavit states that he has personal knowledge of Carbon/Emery's operations and he makes the following general statements regarding 8x8:

5. ...8x8 does not, and has not purchased any telecommunications services from Carbon/Emery.⁴⁰

6. ...8x8 has not purchased any telephone numbers or telecommunications services that support the use of telephone numbers from Carbon/Emery.⁴¹

7. 8x8 is not obtaining telephone numbers or connectivity to the public switched network from Carbon/Emery....⁴²

8. ...[A]ll customers in Carbon/Emery's local exchanges who use nomadic VoIP carriers have a long distance number that provides [customer] connectivity to the public switched telephone network.⁴³

³⁵ Id. at 2, ¶ 12.

³⁶ Id. at 2, ¶ 13.

³⁷ Id. at 3, ¶ 14.

³⁸ See Carbon/Emery Telecom, Inc.'s Reply Brief on Jurisdiction, filed October 5, 2012. See also 8x8's Further Brief Filed in Response to Request for Agency Action and Order Requiring Further Briefing, filed October 5, 2012.

³⁹ See Affidavit of Brock Johansen, filed October 5, 2012.

⁴⁰ Id. at 1, ¶ 5.

⁴¹ Id. at 2, ¶ 6.

⁴² Id. at 2, ¶ 7.

9. 8x8 and its customer, Parkway Dental, are using a local telephone number . . . to access the public switched telephone network.⁴⁴

...

13. On or about March 20, 2012, Parkway Dental requested that [the local telephone number referred to above] be ported from Carbon/Emery to Verizon Wireless.⁴⁵

14. On or about March 20, 2012, Carbon/Emery ported the telephone number....⁴⁶

15. ...[A]ll calls to Parkway Dental from the Carbon/Emery extended service areas, are local calls.⁴⁷

16. Parkway Dental and 8x8 are using this Verizon Wireless phone number to obtain connectivity to the public switched telephone network, and the Verizon number is being improperly used to transit local traffic to 8x8....⁴⁸

18. Mr. Johansen's affidavit does not contradict the statements contained in Mr. Martin's affidavit that 8x8 is offering a nomadic service like the one in the Vonage Order.

PARTIES' POSITIONS

I. Carbon/Emery

Carbon/Emery argues that because 8x8 is providing interconnected VoIP service to a fixed geographic location (i.e, a dental office in Price, Utah where Carbon/Emery provides certificated local exchange service), 8x8 is thus a "fixed" VoIP provider which does not qualify for preemption under the Vonage Order. Carbon Emery further asserts that "fixed" VoIP providers are subject to PCS regulation pursuant to Minnesota PUC v. FCC, 483 F.3d 570 (8th Cir. 2007) and under the PSC's report and order In the Matter of the Application of Bresnan

⁴³ Id. at 2, ¶ 8.

⁴⁴ Id. at 2, ¶ 9.

⁴⁵ Id. at 3, ¶ 13.

⁴⁶ Id. at 3, ¶ 14.

⁴⁷ Id. at 3, ¶ 15.

⁴⁸ Id. at 3, ¶ 16.

Communications, LLC for Certificate of Public Convenience and Necessity, Docket No. 07-2476-01. According to Carbon/Emery, 8x8 is not providing a Vonage-type service. As such, Carbon/Emery argues PSC jurisdiction is proper and 8x8 must obtain a CPCN under Utah law.

Additionally, Carbon/Emery argues that 8x8's reliance on U.C.A. § 54-19-103 as an additional avenue of preemption is misplaced because, as a "fixed" VoIP service provider, 8x8 is still required to go through the competitive entry process set forth in U.C.A. § 54-8b-2.1, and § 54-19-103(2) does not affect or modify the competitive entry process under § 54-8b-2.1.

II. 8x8

8x8 asserts it provides exclusively nomadic, interconnected VoIP service over which the FCC has specifically preempted state commissions from exercising jurisdiction in the Vonage Order. 8x8 argues Carbon/Emery's claim that 8x8 is "fixed" based on the geographic location of the customer (i.e., a dental office in Carbon County) reveals a misunderstanding about what it means to be nomadic. 8x8 explains,

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. 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.⁴⁹

8x8 also asserts the PSC is preempted under state law; specifically, U.C.A. § 54-19-103 which states in relevant part: “A state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service or voice over Internet protocol service.” Utah Code Ann. § 54-19-103(1) (2012).

8x8 identifies itself as a VoIP service provider whose service offerings allow for real-time, two-way voice communications. 8x8’s service requires customers to have an existing broadband Internet connection provided by a third party. 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. Further, in order to make use of 8x8’s services, customers must have specialized Internet protocol-compatible equipment (“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. 8x8 customers can receive calls that originate on the public switched telephone network (“PSTN”) and terminate calls to the PSTN. 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. Accordingly, 8x8 asserts it is a provider of nomadic “interconnected VoIP services,” as that term is defined under federal law, and it provides that same service to the customer identified by Carbon/Emery.

⁴⁹ 8x8’s Further Brief Filed in Response to Request for Agency Action and Order Requiring Further Briefing at 6, filed October 5, 2012. 8x8 provides additional technical background and support for this position. See id. at 6-7.

8x8 contends its service offerings are readily discoverable through its many public FCC filings, denoting 8x8 as a nomadic, VoIP service provider and showing that it is complying with its specific obligations at a nomadic, VoIP service provider under FCC rules requiring contribution to E911 and Universal Service Fund (“USF”). Moreover, 8x8 states it is identified as a provider of “interconnected VoIP services” under the FCC’s Form 499 Database website.⁵⁰

8x8 describes its services as “largely analogous” to other VoIP service providers, including 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 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. 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.⁵¹

8x8’s Chairman and CEO, Mr. Martin, reiterates many of these points in his affidavit.⁵²

⁵⁰ The PSC located the form at http://apps.fcc.gov/cgb/form499/499results.cfm?FilerID=&frn=&operational=&comm_type=Any+Type&LegalName=8x8&state=Any+State&RI=and&XML=FALSE and takes judicial notice of it. Form 499 detailed filer information shows 8x8 is principally engaged in “[i]nterconnected VoIP” communications. See <http://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=825996>.

⁵¹ 8x8’s Response Brief Filed in Response to Request for Agency Action and Order Requiring Further Briefing at 8-9, filed September 20, 2012.

⁵² See Affidavit of Bryan R. Martin, Chairman and CEO of 8x8, Inc., supra n.28.

Lastly, 8x8 argues that state law cannot be read to require 8x8 to obtain a CPCN, because that would violate federal law and would be preempted by the Vonage Order. 8x8 further claims that it is neither a “public utility” nor a “public telecommunications service” under state law because it does not provide “two-way transmission of signs, signals, writings, images, sounds, messages, data, or other information” as set forth in U.C.A. § 54-8b-2(16), unless that statute is read to require all Internet-based companies (e.g., Apple, Amazon, Facebook, Vonage, etc.) to apply for and obtain a CPCN. 8x8 explains that it relies on users subscribing to broadband Internet connections from a third party in order to make use of its service; thus, in 8x8’s view, it is the third party broadband provider, and not 8x8, that enables the transmission defined under state law as “public telecommunications service.” Similarly, 8x8 claims it is not a “telecommunications corporation” required to apply for a competitive entry under U.C.A. § 54-8b-2.1 because its offerings qualify as either an “Internet protocol-enabled service” as defined by U.C.A. § 54-19-102(1) or a “VoIP service” as defined by § 54-19-102(2), and therefore regulation of its offerings is statutorily prohibited under § 54-19-103(1), which states: “A state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service or voice over Internet protocol service.” Utah Code Ann. § 54-19-103(1). Further, the statutory exception to Section 54-19-103(1) for application of Section 54-8b-2.1 (i.e., the “competitive entry” statute), recognized under Section 54-19-103(2)(v), is inapplicable because the competitive entry statute is limited to a “telecommunications corporation.” A “telecommunications corporation” is defined by Section 54-8b-2(18) to include a corporation that owns, controls, manages or resells a “public telecommunications service.” As explained above, 8x8 asserts its services do not meet the definition of “public

telecommunications service” and thus 8x8 argues it is not a “telecommunications corporation” subject to PSC jurisdiction. Finally, 8x8 argues that rules of statutory construction require the PSC to read state law governing competitive entry in a manner that is consistent with existing federal laws, and doing so requires that the PSC is preempted from exercising its jurisdiction over this matter.

DISCUSSION, FINDINGS, AND CONCLUSIONS

I. A challenge of subject-matter jurisdiction may be raised at any time

Carbon/Emery takes exception to the manner in which 8x8 raised its jurisdictional challenge in this docket. As noted above, 8x8 initially raised its jurisdictional concerns in an email when the PSC notified the parties that a technical conference was being considered. Thereafter, the PSC ordered briefing on the issue and the parties responded.

Under Rule 12 of the Utah Rules of Civil Procedure, which we apply pursuant to R746-100-1(C) of the Utah Administration Code, the PSC is obligated to dismiss an action “whenever it appears by suggestion of the parties or otherwise that the [PSC] lacks [subject matter] jurisdiction.” Utah R. Civ. P. 12(h)(2). Our courts have long recognized that “[b]ecause subject matter jurisdiction goes to the heart of a court’s authority to hear a case . . . it . . . may be raised at any time, even if first raised on appeal.” Baby E.Z. v. T.I.Z., 2011 UT 38, ¶ 25 (emphasis added). It is therefore of no import that 8x8 raised its concern about jurisdiction in an email or that it was raised before a technical conference occurred in this docket. The issue is properly before the PSC and we address it accordingly.

II. The Vonage Order preempts PSC regulation of 8x8's services

In July 2003, the Vonage case began with an administrative complaint like the one raised in this docket. The Minnesota Department of Commerce asserted before the Minnesota Public Utilities Commission (“Minnesota PUC”) that Vonage was providing telephone exchange service in Minnesota and was thus subject to the requirements of the state, including obtaining operating authority (i.e., a certificate), filing of tariffs, and providing and funding 911 emergency services.⁵³ Vonage challenged the complaint on jurisdictional grounds, asserting state laws and regulations did not apply to it and, even if they did, they were preempted by federal law.⁵⁴ The Minnesota PUC thereafter issued an order, asserting regulatory jurisdiction, and the Vonage appeal ensued.

On November 12, 2004, the FCC released the Vonage Order, preempting the Minnesota PUC from regulating Vonage’s DigitalVoice service, which provides VoIP service and other communications capabilities. In so doing, the FCC found that it was neither possible nor practical to separate DigitalVoice into interstate and intrastate communications without negating valid federal policies and rules.⁵⁵ Thus, the Vonage Order “mak[es] clear that the [FCC], 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.”⁵⁶

8x8’s uncontested affidavit testimony establishes that 8x8’s service is like the service at issue in Vonage. 8x8 provides a nomadic VoIP service and does not provide

⁵³ See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission; WC Docket No. 03-211, at 5.

⁵⁴ See *id.* at 6.

⁵⁵ See *id.* at 1. See also *id.* at 8.

⁵⁶ *Id.* at 2 (emphasis added).

broadband to its customers. 8x8 requires customers to obtain broadband Internet access from a third party. 8x8's customers use specialized equipment or software to make use of 8x8's service. 8x8's service can be accessed anywhere a broadband Internet connection is available. Customers using 8x8's service can, therefore, relocate to any geographic area where broadband exists and still use 8x8's service. This is what makes 8x8's service nomadic rather than fixed. The dental office in Carbon County, Utah where 8x8's service is currently being used conforms to 8x8's specifications, regardless of the service being used in a fixed location. The dental office is capable of taking its equipment anywhere, including for example New York City, and as long as broadband access exists there, 8x8's service will continue to work. 8x8 claims the PSC is preempted just as the Minnesota PUC was preempted in Vonage. We agree.⁵⁷ Indeed, the FCC seems to have anticipated the issues raised by Carbon/Emery and provided direction to state commissions and service providers contemplating questions like those that arose in Vonage:

the practical inseparability of other types IP-enabled services having basic characteristics similar to DigitalVoice would likewise preclude state regulations to the same extent as described herein. Specifically, these basic characteristics include: a requirement for a broadband connection from the user's location; a need for IP-compatible [customer premises equipment] CPE; and a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications access other features and capabilities, even video. ...[T]o the extent other entities . . . provide VOIP services, we would preempt regulations to an extent comparable to what we have done in this Order.⁵⁸

⁵⁷ We likewise agree that it is therefore unnecessary to address Carbon/Emery's claim that 8x8 service is "fixed" rather than "nomadic."

⁵⁸ Id. at 21 (emphasis added).

Accordingly, because of the nature of 8x8's service to Parkway Dental, the PSC is preempted from exercising jurisdiction over 8x8's services as argued by Carbon/Emery.^{59, 60} As explained in Chairman Powell's statement attached to the order, the Vonage Order recognizes an important legal distinction and policy objective "that VoIP services are unquestionably interstate in nature. VoIP services are nomadic and presence-oriented, making identification of the end points of any given communications session completely impractical and, frankly unwise."⁶¹ Chairman Powell's statement applies with equal force to the services 8x8 provides to Parkway Dental.

ORDER

For the reasons explained herein, this matter is dismissed for lack of jurisdiction.

DATED at Salt Lake City, Utah, this 27th day of November, 2012.

/s/ Melanie A. Reif
Administrative Law Judge

⁵⁹ However, that is not say states may not regulate VoIP providers on a local level to ensure state taxes are collected, consumers are protected against fraud, and fair business practices in advertising and billing are carried out. See id. at 2. See also id. at 8, n.47 ("[T]his Order does not address Minnesota's general laws governing entities conducting businesses within the state, such as laws concerning taxation; fraud; general commercial dealings; marketing; advertising, billing and other business practices").

⁶⁰ Having determined that the PSC is preempted under federal law from exercising jurisdiction over this matter, the state law argument asserted by Carbon/Emery is moot.

⁶¹ Id. at 34, Statement of Chairman Michael K. Powell (emphasis added).

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Approved and confirmed this 27th day of November, 2012, as the Order of
Dismissal for Lack of Jurisdiction of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
D#239421

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of November, 2012, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic Mail:

Kira M. Slawson (kslawson@blackburn-stoll.com)
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