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December 10, 2010

VIA HAND DELIVERY

Sandra Squire, Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25323

Re:

CASE NO. 10-0383-T-C

EMERGENCY OPERATIONS CENTER OF KANAWHA COUNTY,

ν.

YMAX COMMUNICATIONS CORPORATION and

MAGICJACK, LP

Dear Ms. Squire,

Please find enclosed for filing in the above proceeding an original and twelve copies of Response to Defendants' Motion for Summary Judgment; Response to Motion to Stay Discovery; and Motion to Compel Discovery. Copies of the same have been forwarded to parties of record.

Thank you for your assistance in this matter.

Sincerely

Jared M. Tully

Enclosures

cc:

Terry C. Owen, Esq. Marc Weintraub, Esq. Richard M. Firestone, Esq. E. Dandridge McDonald, Esq.

STATE OF WEST VIRGINIA PUBLIC SERVICE COMMISSION CHARLESTON, WEST VIRGINIA

EMERGENCY OPERATIONS CENTER
OF KANAWHA COUNTY and
W. KENT CARPER, in his capacity as
President of the EMERGENCY OPERATIONS
CENTER OF KANAWHA COUNTY, Executive Committee

Complainants,

v.

Case No. 10-0383-T-C

YMAX COMMUNICATIONS CORPORATION and MAGIC JACK, LP

Defendants.

RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; RESPONSE TO MOTION TO STAY DISCOVERY; AND MOTION TO COMPEL DISCOVERY

COMES NOW, Metro Emergency Operations Center of Kanawha County ("Metro") and W. Kent Carper, by Counsel, Jared M. Tully of Frost Brown Todd LLC, and responds to Defendants' Motion for Summary Judgment as follows:

SUMMARY OF ARGUMENT

Defendants claim that there is no genuine issue of material fact, while simultaneously asking the Commission to stay discovery. However, it is clear that there is an issue of fact as to whether Defendants offer interconnected voice over internet protocol ("VoIP") service. The service offered by Magic Jack and YMAX is, in fact, interconnected VoIP service because it is a single service which allows consumers to send and receive calls to the public switched telephone network, thereby falling within the definition of interconnected VoIP. The fact that any consumer can combine incoming and outgoing calls leads to the clear conclusion that the

Defendants' service falls squarely within the FCC definition of interconnected VoIP. The Commission, however, will have the ability to determine this once Defendants respond to discovery propounded upon them and a hearing is heard on all of the evidence.

PROCEDURAL BACKGROUND

On March 22, 2010, Metro filed a complaint against YMAX Communications and Magic Jack, LP, alleging that Magic Jack had not collected and remitted 911 fees to Metro as required by law. Metro sought an order from the Commission compelling Defendants to collect and remit these fees pursuant to West Virginia Code § 7-1-3cc(b) which authorizes county commissions to impose an enhanced 911 fee upon subscribers of telephone and VoIP service. For purposes of VoIP service, West Virginia law and the Public Service Commission have adopted the FCC definition of "interconnected VoIP." On April 2, 2010, Magic Jack filed an answer stating that it was not an interconnected VoIP provider and was not required to collect and remit 911 fees.

On June 25 and 28, 2010, Staff filed memoranda recommending that Magic Jack be required to collect and remit 911 fees to Metro. Magic Jack responded to the Staff memoranda by again denying that it was an interconnected VoIP provider. Metro responded by supporting the Staff memoranda. On July 22, 2010, the West Virginia Enhanced 911 Council filed a letter in support of Metro, requesting that the Commission to require Magic Jack to collect and pay 911 fees. On August 2, 2010, the Commission issued a procedural order which set this proceeding for hearing and established dates for the filing of testimony.

On November 30, 2010, Defendants filed a Motion for Summary Judgment, making the same arguments they made in their Answer in this case which also sought dismissal. For the

¹ Kanawha County has adopted an enhanced 911 fee ordinance which is in effect and on file with the Public Service Commission as required by statute.

following reasons, Metro and W. Kent Carper respectfully request that this Commission deny Defendants' Motion.

ARGUMENT

A. Issues of Fact Exist as to Whether Defendants' Service is Interconnected VoIP Service.

Defendants rely upon the FCC's definition of interconnected VoIP service which provides:

An interconnected Voice over Internet protocol (VoIP) service is 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 customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. 47 CFR §9.3 (Emphasis added).

Defendants rely upon part four (4) of the definition and argue that "YMax Communications Corp. gives customers the option of getting a phone number and receiving calls, by subscribing to its magicIn® serice. MagicJack, on the other hand, gives customers the option of making outgoing calls to the US, Canada, Puerto Rico and the Virgin Islands, by subscribing to its magicOut® service. Neither magicJack nor YMax Communications Corp. offers a single service that permits users generally to receive calls that originate on the PSTN and to terminate calls to the PSTN," claiming that they are not interconnected VoIP providers.

On December 1, 2010, in accordance with the Commission's August 2, 2010 Commission Order, Metro submitted direct testimony, including that of Billy Jack Gregg. His testimony clarifies the factual matters at issue, namely—is the corporate structure adopted by Defendants, who are affiliated companies located in the same location, sharing the same phone

number, sufficient for it to fall outside of the FCC definition of interconnected VoIP. It is the position of Metro that it does not for many reasons, including the fact that customers are essentially compelled to accept both incoming and outgoing services and the fact that customers can combine the offerings of incoming and outgoing calls. While the parties disagree as to how the Commission should ultimately decide the issue, it is apparent that a factual issue exists regarding the matter.

Mr. Gregg offered the following testimony:

- Q. IN YOUR OPINION, IS MAGIC JACK AN "INTERCONNECTED VOIP SERVICE PROVIDER?"
- A. Yes. The device and the service offered by magicJack, LP, and its affiliate YMAX allow the customer to make calls to the PSTN and receive calls from the PSTN using a broadband connection. A customer purchasing from Magic Jack is purchasing a single service that allows the customer to make and receive calls over a broadband connection to the PSTN. From a customer's viewpoint there is no difference between magicJack, LP, and YMAX: there is only a single service provided by Magic Jack. (Gregg Direct Testimony, p. 15, ll. 14-22).

Mr. Gregg further opined:

However, as a practical matter the corporate structure adopted by Magic Jack has little relevance. The two companies operate as a single entity and provide a single service. magicJack, LP, and YMAX are affiliates which share the same officers and have the same address and phone number: 5700 Georgia Ave., West Palm Beach, Florida 33405, 561-586-3380. When a customer purchases a Magic Jack device, there is no option to buy only the Magic Jack device without also purchasing the telecommunications service provided by YMAX. Nor is a customer able to purchase only outgoing call service provided by magicJack, LP, without also purchasing the incoming call service provided by YMAX. In short, Magic Jack offers a single, integrated VoIP service that allows a customer to make and receive calls on the PSTN. As a result, Magic Jack should be subject to all the requirements of an interconnected VoIP

provider. (Gregg Direct Testimony, p. 16, ll. 5-16).

Moreover, Defendants advertise their interconnected VoIP service as a single service. "Magic Jack advertises a single service - "free local and long distance calling" – and charges customers a single price for this service - \$39.95 for the first year and \$19.95 a year thereafter." (Gregg Direct Testimony, p. 17, 11. 1-3).

Mr. Gregg has a unique perspective on this issue. He is a customer of Defendants. He noted in Direct Testimony:

- Q. YOU STATED THAT CUSTOMERS DO NOT HAVE THE OPTION TO BUY THE MAGIC JACK DEVICE WITHOUT ALSO PURCHASING TELECOMMUNICATIONS SERVICES FROM YMAX, AND THAT CUSTOMERS ARE NOT ABLE TO SEPARATELY PURCHASE ONLY OUTGOING SERVICE PROVIDED BY MAGIC JACK OR INCOMING SERVICE PROVIDED BY YMAX. HOW DO YOU KNOW THIS?
- A. I personally tried to buy the Magic Jack device without subscribing to YMAX's telecommunications service. I also tried to purchase just outgoing service and just incoming service. I was always informed that I had to buy the entire service as advertised by Magic Jack, that is, \$39.95 for the Magic Jack device and one year of service, and \$19.95 annually for service thereafter. I received the same story from Magic Jack retailers Radio Shack, Sears and Wal-Mart. I ultimately purchased a Magic Jack from Wal-Mart.
- Q. AS A CUSTOMER WHO PURCHASED A MAGIC JACK, WHAT OPTIONS WERE YOU GIVEN DURING THE PROCESS OF REGISTERING YOUR MAGIC JACK?
- A. After inserting the Magic Jack device in my computer, the Magic Jack software downloaded and the registration process began. In order to use the Magic Jack device I had already purchased, I had to click a button stating that I accepted Magic Jack's terms of service as written. There was no other option.² Once I choose a phone number, a box appeared with a

² Mr. Gregg noted in his testimony: "There was no box for "I do not agree." If the box that said, "I have read and

check mark already in it that said: "I elect to accept free outgoing service (recommended)." In short, customers are directed through the registration process so that they can finally receive the service they were advised they were buying: "free local and long distance calling." (Gregg Direct Testimony, pp. 17-18).

It is apparent, that the service offered by Defendants is a service which "permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." Defendants do not offer any option for not accepting both incoming and outgoing service. As such, they are offering interconnected VoIP service. Defendants attempts to avoid falling within the FCC definition of interconnected VoIP are ineffective. The 2005 FCC, upon which Defendants rely, recognizes that services such as Defendants fall within the definition of interconnected VoIP noting:

The scope of today's Order is limited to providers of interconnected VoIP services. We seek comment on whether the Commission should extend these obligations, or similar obligations, to providers of other VoIP services that are not covered by the rules adopted today. For instance, what E911 obligations, if any, should apply to VoIP services that are not fully interconnected to the PSTN? Specifically, should E911 obligations apply to VoIP services that enable users to terminate calls to the PSTN but do not permit users to receive calls that originate on the PSTN? Should E911 obligations apply to the converse situation in which a VoIP service enables users to receive calls from the PSTN but does not permit the user to make calls terminating on the PSTN? We tentatively conclude that a provider of a VoIP service offering that permits users generally to receive calls that originate on the PSTN and separately makes available a different offering that permits users generally to terminate calls to the PSTN should be subject to the rules we adopt in today's Order if a user can combine those separate offerings or can use them simultaneously or in immediate succession. [Emphasis

agree to the terms of service," was not checked, the registration process would not move forward. Throughout the entire registration process there was a heading that said: 'You must complete the entire registration process. Your Magic Jack will not have out outbound or inbound calling capabilities unless you complete the process."

Accordingly, given the fact that (1) a user is not given a realistic option of receiving only one of the services (incoming or outgoing calls) and (2) the fact that even if Defendants did offer such an option the consumer, or user, of the Defendants' service can combine the separate offering or can use them simultaneously, or in immediate succession. As such, the Defendants' service falls squarely within the FCC definition of interconnected VoIP service.

However, the determination of whether the Defendants' service falls within the definition of interconnected VoIP is one that the Commission will make once the evidence is heard at hearing. For purposed of Defendants' Motion for Summary Judgment, it is apparent that a genuine issue of material fact exists and that Defendants' Motion should be denied.

B. Defendants' Motion to Stay Discovery Should be Denied and Defendants Should be Compelled to Respond to Outstanding Discovery Requests.

Defendants also move the Commission to stay discovery in this action. This request makes little sense. Defendants state that there is no issue of fact and also seek to avoid producing information and/or documents which bear direct relevance to this action. Moreover, there is no authority for refusing to respond to discovery requests because a motion for summary judgment is pending, as is evident by the fact that Defendants do not state any rule in support of their Motion to Stay.

The Commission's procedural rules provide that any party may serve discovery requests. W. Va. Code R. § 150-1-13.6.b. The party served with discovery must provide responses within twenty days. W. Va. Code R. §150-1-13.6.c. Any objections to discovery requests must be made within fourteen (14) days. W. Va. Code R. §150-1-13.6.d. Any objections not timely filed are

deemed waived. "Objections to discovery requests not timely filed are waived, except for good cause shown." W. Va. Code R. §150-1-13.6.e.

On November 10, 2010, Staff served its Third Set of Discovery Requests upon Defendants, who filed their Motion to Stay Discovery on November 30, 2010. As such, Defendants waived any objections to those discovery requests. Moreover, Defendants offer no reason as to why responding to discovery should be stayed, other than that they have filed a Motion for Summary Judgment. Defendants should be compelled to provide discovery responses, in part, because those responses are necessary to provide information to defend against their Motion for Summary Judgment.

Given the need to obtain the discovery responses to fully respond to Plaintiff's Motion for Summary Judgment, Metro and W. Kent Carper move, pursuant to W. Va. Code R. §150-1-13.6.f, to compel Defendants to respond to outstanding discovery. In addition to the need to respond to outstanding discovery to address the Motion for Summary Judgment, the responses are necessary for all parties to properly prepare for Direct Testimony; Rebuttal Testimony and for the Hearing scheduled for March 1, 2010.

CONCLUSION

WHEREFORE, the Emergency Operations Center for Kanawha County and W. Kent Carper respectfully request that the Commission deny Defendants' Motion for Summary Judgment and Order Defendants to respond to outstanding discovery requests.

Respectfully submitted,

Emergency Operations Center of Kanawha County and W. Kent Carper

By Counsel,

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STATE OF WEST VIRGINIA PUBLIC SERVICE COMMISSION CHARLESTON, WEST VIRGINIA

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Defendants.

CERTIFICATE OF SERVICE

I, Jared M. Tully, hereby certify that a true copy of the foregoing "Response to Defendants' Motion for Summary Judgment; Response to Motion to Stay Discovery; and Motion to Compel Discovery," was served by U.S. Mail, postage prepaid, on this 10th day of December, 2010, to:

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