

Chase Tower, Eighth Floor
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000 (304) 353-8180 Fax
www.steptoe-johnson.com

Writer's Contact Information
(304) 353-8113 – Telephone
(304) 353-8180 – Facsimile
dan.mcdonald@steptoe-johnson.com

January 14, 2011

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VIA HAND DELIVERY

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

Re:

CASE NO. 10-0383-T-C

EMERGENCY OPERATIONS OF KANAWHA COUNTY,

v.

YMAX COMMUNICATIONS CORPORATION and

MAGICJACK, LP,

Dear Mr. Owen:

For filing on behalf of YMax Communications Corporation and magicJack, LP in the above captioned proceeding, please find an original and twelve (12) copies of the Direct Testimony of Mark Pavol.

I ask that you please file the enclosed testimony and distribute the additional copies to the appropriate parties at the Commission. Also, please date stamp the file copy provided and return it with our messenger.

Should you have any questions please feel free to contact me.

Sincerely,

E. Dandridge McDonald

Evan hurson

EDM/tms Enclosures

cc:

Peter Russo, CFO (w/ enclosure)

Marc Weintraub, Esq. (w/ enclosure)

Richard M. Firestone, Esq. (w/ enclosure)

Service List (w/ enclosure)

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PUBLIC SERVICE COMMISSION OF WEST VIRGINIA CHARLESTON

CASE NO. 10-0383-T-C

EMERGENCY OPERATIONS OF KANAWHA COUNTY,

Complainant,

v.

YMAX COMMUNICATIONS CORPORATION and MAGICJACK, LP,

Defendants.

DIRECT TESTIMONY OF MARK PAVOL

January 14, 2011

- 1 Q. Please state your name, business address, employment, and experience in the telecommunications industry.
- 3 A. My name is Mark Pavol and my business address is 270 South Main Street, Flemington,
- 4 New Jersey, 08822. I am employed by X2Comm, Inc. and I am the President, Secretary
- 5 and Treasurer. I have over 15 years experience in the telecommunications industry
- 6 covering local and IXC operations. I have reviewed and analyzed Federal
- 7 Communications Commission ("FCC") actions, state and local regulatory actions, and
- 8 prepared filings with the FCC, state and local officials on behalf of YMax
- 9 Communications Corporation ("YMax Communications").
- 10 Q. Are you familiar with the issues in this complaint case?
- 11 A. I am familiar with the issues of this matter due to my involvement with YMax
- 12 Communications as an outside telecommunications consultant. I have been involved
- from the start of this inquiry process.
- 14 Q. Please explain the corporate structure of YMax Communications and magicJack,
- 15 **LP.**
- 16 A. YMax Communications is a Delaware corporation and magicJack LP ("magicJack") is a
- Delaware limited partnership. Both of these entities are subsidiaries of YMax
- 18 Corporation, which is also a Delaware corporation.
- 19 Q. Please explain for the Commission the magicJack® device and how it works, and
- whether its purchase or use can be tracked to any particular individual or business.
- 21 A. The magicJack device® weighs less than an ounce and is about the size of a cigarette
- 22 lighter. It plugs into the USB port of any computer wherever located. It is a completely
- 23 nomadic and portable device that a customer can use to make and/or to receive calls

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wherever in the country, or the world for that matter, he or she has a broadband connection. A customer who purchases the device and licenses the access software can then, as part of the registration process, elect whether to subscribe to various services. magicJack does not know where a purchaser intends to use a device, whether the purchaser may be the user or who the user is and where they may live, from how many locations the user intends to use it, or where the user may use it next. The vast majority of magicJacks are sold through Radio Shack, Best Buy, Wal-Mart or other retail outlets. magicJack does not collect customer information at the time of purchase from retail stores. Neither YMax Communications, magicJack nor the retailer knows where a purchaser intends to use a device, whether the purchaser may be the user, whether the device was bought as a gift, where the user may live, or whether the user intends to use the device from his or her home, office, vacation cabin or hotel. Indeed, parents have, for example, bought a magicJack® specifically for a daughter away at college or a son in Iraq so they can call family and friends, and children have bought a magicJack® specifically for elderly parents spending the Winter in a Sunbelt state so they can remain in touch. Neither YMax Communications, magicJack nor the retailer would know what county, or even state for that matter, E911 fees—even if properly crafted with proper legal authority—might be applicable to any given purchaser or user.

Q. Please explain the access software and licensing process.

magicJack sells the magicJack® device and licenses the access software. If someone has a magicJack® device, has a valid license for the software, and agrees to the applicable Terms of Service, then they have the capability to use and are given the opportunity to sign-up for various services. YMax Communications gives such customers the option of

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getting a phone number and of receiving calls, by subscribing to the magicIn[®] service. magicJack gives such customers the option of making outgoing calls to the United States, Canada, Puerto Rico and the Virgin Islands, by subscribing to the magicOut[®] service. One entity offers a service that permits users generally to receive calls that originate on the PSTN. The other separately makes available a different service offering that permits users generally to terminate calls to the PSTN. Customers can also choose whether to purchase international calling minutes, sign up for voicemail, etc.

Do magicJack and YMax Communications have customer information about purchasers and users of magicJack® devices sufficient to properly assess and attempt to collect a Kanawha County 911 fee from them?

As noted earlier, the vast majority of magicJacks are sold through retail outlets. magicJack does not receive customer information at the time of purchase from retail stores. Neither YMax Communications, magicJack nor the retailer knows where a purchaser intends to use a device, whether the purchaser may be the user, whether the device was bought as a gift or where the user may live.

YMax Communications and magicJack do not know whether the user may use the device for non-business or business purposes, or both. In either case, YMax Communications and magicJack do not know the purchaser's or the user's primary residence or the site where the device will primarily be used. As I explained, the magicJack® is a completely nomadic and portable device that a customer can use wherever he or she has a broadband connection. Customers are given the ability to pre-register multiple locations for 911 calling purposes and, because the device is so readily nomadic, to select one of their pre-registered locations with one click each time they change locations. They can quickly

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and easily add new locations as well. Customers control what locations they enter and when they choose to do so, and in what order they enter them (e.g., alphabetical, a typical day's travel schedule, or even randomly as they think of places they will be). There is no indication of what may later turn out to be a customer's primary place of use that day, that week, that month or that season. The customer needs to renew his or her license agreement upon the expiration of the one year license anniversary. At the time of renewal, only payment information sufficient to renew the license is collected, which may or may not be from the actual end user of the device and/or related to his or her locations where the device might be used.

- Q. Are there other reasons as well why magicJack and YMax Communications cannot include an E911 fee as a line item on each West Virginia customer's bill?
- A. A magicJack[®] user who subscribes to either magicIn[®] service or magicOut[®] service or both is not billed for any interstate or intrastate calls, nor are they billed any monthly fees. There are no invoices to the customer on which to include a separate line item stating the amount of any fee that might be levied. There are no bills rendered at all, let alone separately in each county in order to act as a billing agent for each county.
- Q. Are YMax Communications and magicJack engaged in the business of providing interconnected VoIP?
- 19 A. Based on my knowledge, experience and understanding of the FCC's definition of
 20 interconnected VoIP service, as defined at 47 C.F.R. § 9.3, YMax Communications and
 21 magicJack are not engaged in the business of providing interconnected VoIP service. In
 22 adopting its mandates for interconnected VoIP service providers, the FCC defined
 23 interconnected VoIP service for E911 and other purposes as one where, among other

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things, "the service offering permits users generally to receive calls that originate on the PSTN and to terminate calls to the PSTN." In re E911 Requirements for IP-Enabled Service Providers, WC Dkt No. 05-196, First Report and Order and Notice of Proposed Rulemaking, at 14 (released June 3, 2005) (emphasis in original). The FCC went on to explain, "The rules we adopt in today's Order also apply only to providers that offer a single service that provides the functionality described above." Id. at 14 n.78. In its Notice of Proposed Rule Making, the FCC noted that the scope of its Order is limited to providers of interconnected VoIP services. It did seek comment on whether to extend those obligations to providers of other VoIP services not covered by the rules being adopted. The FCC tentatively concluded 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." *Id.* at 33. The FCC said this was only a tentative conclusion, which is the mechanism by which the FCC elicits public comment in a Notice of Proposed Rulemaking on possible future rule changes. The FCC has never adopted this tentative 2005 proposal, instead maintaining the existing definition of interconnected VoIP to which the West Virginia statute refers. Therefore, the FCC's rules and its definition of interconnected VoIP service continue to apply only to providers that offer a single service that permits users generally to receive calls that originate on the PSTN and to terminate calls to the PSTN. As described above, YMax Communications gives customers the option of getting a phone number and of receiving calls, by subscribing to its magicIn® service. magicJack, on the other hand,

1 gives customers the option of making outgoing calls to the United States, Canada, Puerto Rico and the Virgin Islands, by subscribing to its magicOut® service. Neither magicJack 2 3 nor YMax offers a single service that permits users generally to receive calls that originate on the PSTN and to terminate calls to the PSTN. Neither therefore provides an 4 interconnected VoIP service as defined by 47 C.F.R. § 9.3—and consequently W. Va. 5 6 Code § 7-1-3cc(b) and W. Va. Code R. § 150-32-2.3.a. Is the FCC currently reconsidering the definition of interconnected VoIP service? 7 Q. 8 On September 23, 2010, the FCC initiated a new Notice of Inquiry once again seeking A. 9 public comment on whether it should consider proposing changes to its E911 rules. In 10 doing so, the FCC again specifically recognized the limited scope of its definition of interconnected VoIP services and therefore the limited reach of its 911 requirements: 11 Thus far, the Commission's VoIP 911 rules have been limited to 12 providers of interconnected VoIP services. Since these rules were 13 adopted, however, there has been a significant increase in the 14 availability and use of portable VoIP services and applications that 15 do not meet one or more prongs of the interconnected VoIP 16 17 definition. In light of the increase in use of these services, we seek comment on whether we should extend 911 and E911 18 19 obligations to providers of VoIP services that are not currently covered by the rules. 20 In re E911 Requirements for IP-Enabled Service Providers, WC Dkt No. 05-196, Further 21 22 Notice of Proposed Rulemaking and Notice of Inquiry (FCC10-177), at ¶ 31, released Sept. 23, 2010 (emphasis added). The FCC went on to give as a specific example of a 23 VoIP service that is *not* covered by § 9.3 of its rules: 24 25 Should 911/E911 obligations apply to VoIP services that enable users to receive calls from the PSTN and terminate calls to the 26 PSTN but as separately elective services? Even though such VoIP 27 28 services do not fully meet the definition of "interconnected VoIP,"

1 should such service providers assume the same public safety 2 responsibilities? 3 Id. at ¶ 31 (emphasis added). So while the FCC is once again contemplating, and seeking public comment on, the possibility of extending its E911 rules more broadly in the future, 4 5 it left no doubt that the definition in those rules today—the definition incorporated into 6 West Virginia law—does not cover the magicJack or YMax services. Neither magicJack 7 nor YMax offers a single, not separately elective, service that permits users generally to 8 receive calls that originate on the PSTN and to terminate calls to the PSTN. 9 Q. Is either YMax Communications or magicJack regulated by the FCC as a provider 10 of interconnected VoIP services? Does either company collect or remit E911 fees in 11 any state? 12 Neither YMax Communications nor magicJack is regulated by the FCC as a provider of A. 13 interconnected VoIP services. Neither company collects or remits E911 fees in any state 14 based upon the current FCC and/or state regulations and applicable statutes in place. 15 Kanawha County is currently the only entity or person that has asked a state regulatory 16 authority to determine the applicability of E911 fees to the magicJack and/or YMax 17 Communications services. 18 Q. If the Commission determines that an interconnected VoIP service is being offered, 19 is some type of waiver or fee adjustment reasonable or feasible? West Virginia counties are authorized to impose an enhanced 911 fee on subscribers to 20 A. 21 interconnected VolP service, but by the terms of the governing statute only as follows: 22 the fee is "imposed upon in-state subscribers to [VoIP] service, as VoIP service is 23 defined by the [FCC]." W. Va. Code § 7-1-3cc(b) (emphasis added). The Commission's

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1 regulations specifically provide that VoIP service "has the same definition as Interconnected [VoIP] as set forth in the rules and regulations of the [FCC], 47 C.F.R. § 2 3 9.3." W. Va. Code R. § 150-32-2.3.a. Thus, counties can impose an enhanced 911 fee on VoIP service subscribers primarily located in West Virginia, but only to the extent that 4 5 the service meets the FCC's definition of interconnected VoIP service. 6 magicJack nor YMax offers a single service that permits users generally to receive calls 7 that originate on the PSTN and to terminate calls to the PSTN. Neither therefore 8 provides an interconnected VoIP service as defined by by the FCC, as set forth in 47 9 C.F.R. § 9.3 and as described in detail by the FCC. Consequently, West Virginia Code 10 § 7-1-3cc(b) and W. Va. Code R. § 150-32-2.3.a. do not authorize imposition of such a fee and the Commission is without authority here to determine to the contrary. 11 12 In addition, a waiver or fee adjustment is not only reasonable or feasible, but necessary. As noted above, the magicJack device[®] is a completely nomadic and portable device that 13 14 a customer can use to make and/or to receive calls wherever he or she has a broadband 15 connection. Neither magicJack nor YMax Communications knows where a purchaser 16 intends to use a device, whether the purchaser may be the user or bought the device as a 17 gift, who the user is and where they may live, from how many locations the user intends to use it, or where the user may use it next. Neither magicJack nor YMax 18 19 Communications knows what county, or even state for that matter, E911 fees—even if properly crafted with proper legal authority—might be applicable to any given purchaser 20 or user. A magicJack[®] user who subscribes to either magicIn[®] service or magicOut[®] 21 22 service or both is not billed for his or her interstate or intrastate calls, nor is he or she 23 billed any monthly fees. There are no invoices to the customer on which to include a

separate line item stating the amount of any fee that might be levied. There are no bills rendered at all, let alone separately in each county in order to act as a billing agent for each county. As noted earlier, YMax Communications and magicJack do not know where a purchaser intends to use the device. YMax Communications and magicJack do not know whether the user may use the device for non-business or business purposes, or both. In either case, YMax Communications and magicJack do not know the purchaser's or the user's primary residence or the site where the device will primarily be used.

- Q. Have you reviewed the direct testimony presented by the Emergency Operations of
 Kanawha County?
- 10 A. Yes, and I reserve observations on the direct testimony of the Emergency Operations of
 11 Kanawha County for my rebuttal testimony.
- 12 Q. Does this conclude your direct testimony?
- 13 A. Yes.

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CERTIFICATE OF SERVICE

I, E. Dandridge McDonald, one of the counsel for YMax Communications Corporation and magicJack, LP, do hereby certify that a copy of the Direct Testimony of Mark Pavol has been served upon the following by first class mail, postage prepaid this 14th day of January, 2011, addressed as follows:

VIA HAND DELIVERY

Terry C. Owen, Staff Attorney Legal Division Public Service Commission of West Virginia 201 Brooks Street Charleston, West Virginia 25301

Jared M. Tulley
FROST BROWN TODD LLC
Laidley Tower, Suite 401
500 Lee Street, East
Charleston, West Virginia 25301

E. Dandridge McDonald (WVSB No. 2439)