

IN THE SUPREME COURT OF OHIO

No. 08-0873

ON APPEAL FROM THE PUBLIC UTILITIES COMMISSION
OF OHIO, CASE NO. 04-658-TP-CSS

VALTECH COMMUNICATIONS, LLC,

APPELLANT,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

APPELLEE.

BRIEF OF THE FEDERAL COMMUNICATIONS
COMMISSION AND THE UNITED STATES OF
AMERICA AS AMICUS CURIAE

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The Federal Communications Commission and the United States submit this brief as *amicus curiae* at the invitation of the Court, and will present its views on two of the three issues for which the Court has requested supplemental briefing from the parties in ValTech Communications, LLC’s appeal from an order of the Public Utilities Commission of Ohio (“PUCO”). *See In the Matter of Complaint of Communications Options, Inc. v. ValTech Communications LLC*, 121 Ohio St. 3d 1480, 905 N.E.2d 1231 (2009) (the Court’s “May 11, 2009 order”). Specifically, the amicus will address (1) whether any aspect of ValTech’s appeal

is preempted by federal law, and (2) whether it is appropriate for the Court to refer any issue to the FCC under the doctrine of primary jurisdiction.¹

BACKGROUND

I. Regulatory Regime

The Telecommunications Act of 1996 adopted a national policy of promoting competition in the local telephone market and significantly expanded the FCC's jurisdiction with respect to "intrastate" telecommunications matters. *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 730 (1999). Among other things, the Telecommunications Act of 1996 added a new provision, Section 258, to the Communications Act, which made it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the [FCC] shall prescribe." 47 U.S.C. § 258(a). The practice of changing a telephone subscriber's service without complying with the FCC's prescribed verification procedures is commonly known as "slamming."

The FCC's verification procedures are set forth at 47 C.F.R. §§ 64.1100-1190, and apply to both interstate and intrastate telephone service. *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1561, ¶ 86 (1998). Section 258

¹ Amicus will not address the third issue posed by the Court, namely, "[i]f the court finds that any issue in this appeal is preempted or should be referred to the FCC under the doctrine of primary jurisdiction, what procedures should be followed by this court[;] [w]hat effect would such preemption or transfer have on this case and any related cases." 121 Ohio St. 3d at 1480, 905 N.E.2d at 1231. We do note, however, that to effectuate a primary jurisdiction referral, the parties, after consulting with FCC staff, would be required to make an appropriate filing at the FCC with respect to any issue the court wishes the FCC to resolve. *See Primary Jurisdiction Referrals Involving Common Carriers*, Public Notice, 15 FCC Rcd 22449 (2000).

preserved the role of the states “with respect to intrastate services,” but in exercising this role the states are to enforce the FCC’s prescribed slamming rules. *See* 47 U.S.C. § 258(a). Of particular relevance in this appeal are FCC rules 64.1130 and 64.1150, which, respectively, set out (a) the form and content of the letter of agency or authorization (“LOA”) that telecommunications carriers may use to lawfully switch a subscriber’s telephone service from one provider to another and (b) the procedures for resolving complaints regarding unauthorized changes to a subscriber’s telephone service. *See* 47 C.F.R. §§ 64.1130 & 64.1150.

Although the FCC was given the responsibility of adopting rules to implement Section 258, the FCC has determined that it is in the public interest to have state commissions “perform the *primary* administrative functions of our slamming liability rules,” and thus the FCC decided that slamming disputes should be brought before appropriate state commissions in those states electing to administer the FCC’s slamming rules (or before the FCC in those cases where the state had not so elected). *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, First Order on Reconsideration, 15 FCC Rcd 8158, 8170, ¶ 24 (2000) (emphasis in original). The FCC also noted that delegation of primary responsibility to the states to administer the slamming liability rules, “do[es] not preclude the filing of a petition for declaratory ruling alleging that a state has improperly implemented our verification or liability rules.” *Id.*, 15 FCC Rcd at 8172, ¶ 28. The State of Ohio elected to administer the FCC’s slamming rules. *See* November 21, 2000 Letter from PUCO to FCC (copy attached).

The FCC also established procedures for reviewing a state commission’s resolution of a slamming dispute. The FCC decided that challenges to a state commission’s factual determinations “shall be made in accordance with the relevant review provisions that are

applicable to each state commission,” but challenges to a state commission’s *process* for resolving a slamming complaint “must be brought to the FCC in the form of a petition for declaratory ruling.” 15 FCC Rcd at 8176-77, ¶ 37 (emphasis added).

II. Challenges to the PUCO’s Slamming Order.

In the underlying slamming dispute, which involved two local telephone service providers – ValTech and Communications Options, Inc. (“COI”), the PUCO concluded that ValTech unlawfully had switched COI subscribers to ValTech because the LOAs obtained by ValTech did not comply with FCC rule 64.1130, 47 C.F.R. § 64.1130, and because ValTech had fraudulently obtained the LOAs. *See In the Matter of the Complaint of Communications Options, Inc. v. ValTech Communications LLC*, Public Utilities Commission of Ohio, Case No. 04-658-TP-CSS (“*PUCO Slamming Order*”), Second Entry on Rehearing at 6.

ValTech now asks the Court to review certain aspects of the *PUCO Slamming Order*. Two of ValTech’s challenges were identified by the Court in its May 11, 2009 order for supplement briefing as possibly “challenging whether PUCO complied with federal requirements in resolving the slamming complaint against it, in particular [ValTech’s] first and second propositions of law.” 121 Ohio St. 3d at 1480, 905 N.E.2d at 1231.

ValTech argues in its first proposition of law that the PUCO lacked jurisdiction to resolve the underlying slamming complaint because “mandatory” state and federal procedures for bringing a slamming dispute before the PUCO, set out in, among other provisions, FCC rule 64.1150, 47 C.F.R. § 64.1150, were not followed and thus the slamming complaint “should have been dismissed.” *See, e.g.*, ValTech Merits Brief at 17. The PUCO answered this argument with its interpretation of FCC rules as imposing no requirement for the threshold informal procedures ValTech was seeking. PUCO Merits Brief at 21 (“Nowhere, however, does 47 C.F.R. § 64.1150

mandate that use of informal procedures as ValTech argues.”). ValTech disputed the PUCO’s interpretation of the FCC rules. ValTech Reply Brief at 3 (“The PUCO incorrectly states that the ‘FCC rules require *only* that the authorized carrier [], upon receiving notification by a subscriber of an unauthorized change, must direct the subscriber to the Ohio Commission for resolution of such complaint’ . . . the ‘FCC rules require more than this.’”).

In its second proposition of law, ValTech argues that the PUCO improperly implemented the FCC’s slamming liability rules, specifically FCC rule 64.1150(d), 47 C.F.R. § 64.1150(d), when the PUCO found that slamming occurred based on evidence “beyond the four corners of the LOA.” ValTech Merits Brief at 19. ValTech argued that:

Slamming occurs when, and only when, a carrier:

- a. presents a document for signature by the subscriber that is designed to look like something other than a LOA to change carrier; or
- b. changes the carrier without any contact with the subscriber; or
- c. forges a subscriber signature on a LOA;
- d. causes someone other than the subscriber to sign a LOA to change carrier; or
- e. [p]rocures a LOA from someone under a legal disability.

ValTech Merits Brief at 21. Thus, according to ValTech, “the reach of FCC Rule 47 C.F.R. § 64.1150(d)” is “that the relevant governmental agency will determine if a change is unauthorized using the carrier’s proof and any evidence supplied by the subscriber” (ValTech Merits Brief at 21), and therefore the PUCO could not “scrutinize the manner in which the knowing authorizations were given.” ValTech Merits Brief at 19. The PUCO disagreed. Its interpretation of both FCC rules and Ohio law is that a slamming violation occurs either when a LOA does not meet the technical specifications for a valid LOA *or* when an apparently

compliant LOA was obtained as a result of fraudulent or deceptive conduct by the carrier at issue. PUCO Merits Brief at 12, 17-18.

SUMMARY

The FCC already has determined that claims such as that asserted in ValTech's first proposition of law, which challenges the PUCO's process for resolving the underlying slamming complaint, must be reviewed by the FCC and not in court. In addition, because the FCC must review ValTech's first proposition of law, it would be appropriate for the Court in its discretion, under the doctrine of primary jurisdiction, to refer ValTech's second of proposition of law that, consistent with the FCC's prescribed slamming rules, the PUCO could not properly go beyond the four corners of the LOA in concluding that slamming had occurred.

ARGUMENT

I. THE FCC AND NOT THE COURT IS THE PROPER FORUM TO REVIEW VALTECH'S FIRST PROPOSITION OF LAW.

As the parties acknowledge in their arguments before the Court, the PUCO's authority to resolve this slamming dispute is derived from and must be consistent with federal law. For instance, ValTech asserts that on their face the State of Ohio's slamming rules "'shall be consistent with the rules of the federal communications commission in 47 C.F.R. 64.1100 and 1150.'" ValTech Merits Brief at 16, *quoting* Ohio Rev. Code § 4905.72B(1); *see also* PUCO Merits Brief at 12 (the PUCO "must follow [state] law and federal regulations" in resolving slamming disputes).

In its first proposition of law, ValTech argues that the process the PUCO employed in resolving the underlying slamming complaint was inconsistent with "the clear language of 47 C.F.R. 64.1150." ValTech Merits Brief at 12. According to ValTech and disputed by the

PUCO, this rule mandates an attempt for an informal resolution of a slamming dispute as a precondition for filing a formal complaint. ValTech argues that no such attempt was made here and thus that the PUCO's process in resolving this particular slamming dispute did not comply with the FCC's requirements.

The FCC has stated, as the Court's May 11, 2009 order recognized, that the FCC is the proper forum to review procedural challenges to a state commission's disposition of a slamming complaint. In contrast to challenges to a state commission's factual determinations, which are reviewable "in accordance with the relevant review provisions that are applicable to each state commission," the FCC has said that "[c]hallenges to whether a state commission's process for resolving slamming complaints are consistent with this order [implementing the slamming regime] *must* be brought to the FCC in the form of a petition for declaratory ruling." 15 FCC Rcd at 8176-77, ¶ 37 (emphasis added). Thus, ValTech's challenge to the PUCO's process for resolving the underlying slamming complaint must be adjudicated before the FCC.

In their supplemental briefs, the parties urge the Court to retain review of this procedural challenge to the *PUCO Slamming Order* because (a) ValTech has not argued that the "rules and regulations in place by the state entity [do not] comply with FCC requirements" but only that the PUCO failed to follow those rules (ValTech Supplemental Brief at 1), and (b) the underlying slamming dispute involves only "intrastate telephone services" (PUCO Supplemental Brief at 2).

Nothing in the supplemental briefs, however, undermines what emerges from the parties' earlier briefs. The PUCO took the position that it could consider and resolve a slamming complaint in the absence of an attempt prior to the filing of the complaint for an informal resolution of the dispute. ValTech claims that PUCO's procedures in this regard failed to comply with a mandatory precondition under the FCC's rules for commencing a formal

slamming complaint proceeding. The PUCO disputes the accuracy of ValTech's understanding of what the FCC's rules require. The proper interpretation of those rules has thus squarely been put in issue here.

Despite the parties' recent emphasis in their supplemental briefs that this slamming case involves only intrastate service, neither party appears to dispute that the FCC's slamming rules govern slamming cases with respect to both interstate and intrastate service. They simply disagree about whether the FCC's rules should be interpreted to prevent the PUCO from allowing a formal complaint to be filed in the absence of a prior attempt to achieve an informal resolution of the dispute. That is an issue for the FCC to decide. *See* 15 FCC Rcd at 8177, ¶ 37.

II. IT IS APPROPRIATE FOR THE COURT TO REFER TO THE FCC, UNDER THE DOCTRINE OF PRIMARY JURISDICTION, VALTECH'S SECOND PROPOSITION OF LAW.

Independent of its finding that slamming had occurred because the LOAs obtained by ValTech did not meet the requirements of the 47 C.F.R. § 64.1130 (*see PUCO Slamming Order*, Opinion and Order, Conclusions of Law #9), the PUCO also found that slamming had occurred because ValTech fraudulently obtained the LOAs. *See, e.g.*, PUCO Merits Brief at 17. ValTech argues, as its second proposition of law, that this was error. Specifically, according to ValTech, the PUCO could not "look beyond the four corners of the LOA to scrutinize the manner in which the knowing authorizations were given" to find that a slam had occurred. ValTech Merits Brief at 19.

ValTech's "four corners" argument goes to the heart of the slamming regime and raises an issue of first impression for the FCC. The doctrine of primary jurisdiction is "applicable to claims properly cognizable in court that contain some issue within the special competence of an

administrative agency” and “requires the court to enable a ‘referral’ to the agency, staying further proceedings, so as to give the parties reasonable opportunity to seek an administrative ruling.” *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). *See also State ex rel. Banc One Corp. v. Walker*, 86 Ohio St. 3d 169, 171, 712 N.E.2d 742, 744-45(1999) (“The doctrine of primary jurisdiction applies where a claim is originally cognizable in a court and enforcement of the claim requires the resolution of issues that have been placed within the special expertise of an administrative body.”) (citations omitted).

Thus, under the doctrine of primary jurisdiction, it would be appropriate for the Court in its discretion to refer ValTech’s second proposition of law to the FCC so that the FCC may consider ValTech’s “four corners” argument alongside its necessary review of ValTech’s first proposition of law with respect to its challenge to the *PUCO Slamming Order*. As noted above, *see n. 1*, the parties would be required to make an appropriate filing at the FCC to effectuate a primary jurisdiction referral concerning this issue.

CONCLUSION

The FCC is the forum that must address ValTech's first proposition of law, which seeks review of the PUCO's process for resolving the underlying slamming complaint, and, under the doctrine of primary jurisdiction, it would be appropriate for the FCC also to review ValTech's second proposition of law, which seeks review of the PUCO's finding that slamming occurred based on evidence beyond the "four corners" of the LOA.

Respectfully submitted,


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July 23, 2009

ATTACHMENT



The Public Utilities Commission of Ohio

DUCKET FILE COPY ORIGINAL

Bob Taft, Governor

Alan R. Schriber, Chairman

Commissioners

Ronda Hartman Fergus

Craig A. Glazer

Judy A. Jones

Donald L. Mason

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FCC MAIL ROOM

November 21, 2000

Magalie Roman Salas
Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

RE: CC Docket No. 94-129 - Application for Authority to Administer Slamming Complaints

Dear Ms. Salas:

Pursuant to the procedures established in the Federal Communications Commission's (FCC's) *First Order On Reconsideration* released May 3, 2000, and the *Third Report and Order and Second Order on Reconsideration* released on August 15, 2000, in CC Docket No. 94-129, the Public Utilities Commission of Ohio (Ohio Commission or PUCO) is electing to administer the FCC's Title 47, §64 carrier slamming requirements. Consequently, the Ohio Commission elects to take primary responsibility for resolving Ohio's consumers' slamming complaints as of the effective date of the FCC's modified unauthorized carrier change rules. The information required of individual states by the FCC for authority to administer slamming complaints is provided below.

Complaint Process

Method of Filing: Consumers may contact the Ohio Commission regarding their slamming complaints by letter, fax, online electronic complaints, or telephone call.

Mailing address:

The Public Utilities Commission of Ohio
Public Interest Center
180 East Broad St.
Columbus, Ohio 43215-3793

Toll-free consumer complaints phone number: 1/800-686-7826
TTY/TDD Toll-free phone number: 1/800-686-1570
Fax phone number: 1/614-752-8351
Internet Online complaint form: webmaster@puc.state.oh.us

Filing Fees

\$0.00 to file a formal or informal complaint

Documentation Consumer Must Provide: The PUCO staff investigator may request a copy of the page of the consumer's telephone bill that contains the alleged unauthorized carrier's charges. An investigator will contact the alleged unauthorized carrier and request proof that, prior to switching the consumer, the carrier obtained authorization from the consumer or other applicable statement.

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List A B C D E

Procedure (Safeguards, Deadlines, Appeal Rights)

The PUCO's rules require an alleged unauthorized carrier to respond to a PUCO complaint investigator within ten business days. Consistent with the FCC's rules, the Ohio Commission requires the alleged slamming carrier to remove all unpaid charges from a subscriber's bill pending a determination of whether an unauthorized charge has occurred (that is, if the carrier has not already done so). Consistent with §64.1120, upon receipt of the carrier's proof of authorization, typically either a tape-recorded independent third-party verification, letter of authorization (LOA), or electronic verification, the Ohio staff investigator listens to the tape or reads the LOA in order to determine if the verification complies with Federal and state rules. Any evidence supplied by the consumer is also taken into account. The Ohio Commission notes that its verification requirements meet or exceed the FCC's rules. If the investigator determines the carrier verification complies with state law, the consumer is notified that the PUCO found no slam occurred. If the investigator determines the verification was inadequate, then the unauthorized carrier and consumer are informed that a slam did occur and that, in accordance with 47 U.S.C. §258 (b), federal and state remedies apply. If the carrier fails to provide proof of authorization or does not respond to the complaint at all, the investigator determines a slam did occur and notifies the unauthorized carrier and consumer of that finding.

The Ohio Commission, upon their effective date, ensures that it will enforce the FCC's carrier liability requirements. Specifically, a carrier that fails to comply with the FCC's §64.1140 requirements and procedures shall be liable to the subscriber's properly authorized carrier in an amount equal to 150 percent of all charges paid to the submitting telecommunications carrier by such subscriber after such violation, as well as for additional amounts as prescribed in §64.1170. Specifically, the Ohio Commission notes that if the subscriber has already paid charges to the unauthorized carrier, and the authorized carrier receives payment from the unauthorized carrier, the authorized carrier will be required to refund or credit to the subscriber any amounts determined in accordance with the provisions of §64.1170(c). If the subscriber has been absolved of liability, the unauthorized carrier will also be liable to the subscriber for any charge required to return the subscriber to his or her properly authorized carrier, if applicable.

Moreover, if a subscriber's service provider is verified to be changed without authorization and if the subscriber has not already paid charges to the unauthorized carrier, the subscriber will be absolved of liability for charges imposed by the unauthorized carrier for service provided during the first 30 days after the unauthorized change. Upon being informed by a subscriber that an unauthorized change has occurred, the Ohio Commission will require the authorized carrier, the unauthorized carrier, or the executing carrier to inform the subscriber of this 30-day absolution period. The Ohio Commission will also ensure that any charges imposed by the unauthorized carrier on the subscriber for service provided after this 30-day period shall be paid by the subscriber to the authorized carrier at the rates the subscriber was paying to the authorized carrier at the time of the unauthorized change in accordance with the provisions of §64.1160(e).

Subscribers or carriers dissatisfied with the Ohio Commission's informal resolution to the slamming complaint will be afforded the option to file a formal complaint with the PUCO. There is no fee rendered by the Ohio Commission for filing a formal complaint. Additionally, a carrier or consumer that believes the Ohio Commission has not appropriately followed the FCC's Part 64 slamming requirements will be instructed to file a petition for declaratory ruling with the FCC.

November 21, 2000

Page 3

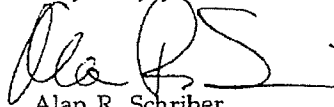
FCC-State Coordination

Reporting: The PUCO complaints staff enters each slamming complaint that is investigated into our complaints database. Consistent with paragraph 34 of the FCC's May order in CC Docket No. 94-129, the Ohio Commission will regularly file with the FCC a report that details slamming activity. These filings will identify the number of slamming complaints handled, including data on the number of valid complaints per carrier; the identity of top slamming carriers; slamming trends and other relevant information.

Coordination: The primary contact for the FCC for coordination of FCC complaint referrals and State slamming reporting is Mr. Dan Anderson, Public Utilities Administrator, Consumer Services Department (614-995-0444).

The PUCO wishes to thank the FCC for the authority to administer slamming complaints in the state of Ohio. We also look forward to working with the FCC in an attempt to eradicate slamming altogether. If you have any comments or questions regarding this application, please direct them to Dan Shields on 614-644-7797.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Alan R. Schriber', is written over a horizontal line.

Alan R. Schriber
Chairman

ARS/DFS:ct

cc: FCC, Consumer Information, Bureau Chief

IN THE SUPREME COURT OF OHIO

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PUBLIC UTILITIES COMMISSION OF OHIO,)	
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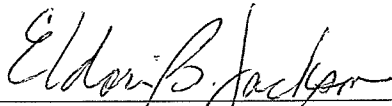
CERTIFICATE OF SERVICE

I, Eldoris B. Jackson, hereby certify that the foregoing "Brief of Federal Communications Commission and United States of America As Amicus Curiae" was served this 23rd day of July, 2009, by mailing true copies, postage prepaid, to the following persons at the addresses below:

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Eldoris B. Jackson

