

June 24, 2009

EX PARTE PRESENTATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *IP-Enabled Services*, WC Docket No. 04-36; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68

Dear Ms. Dortch:

On May 21, 2008, seven small incumbent local exchange carriers doing business in the State of Montana (“Plaintiffs”) filed a complaint against CommPartners LLC (“CommPartners”) in the federal district court for the District of Montana (Cause No. CV-08-68-M-DM). The complaint seeks damages for failure to pay interstate and intrastate access charges for the delivery of traffic to Plaintiffs’ end user customers over the Public Switched Telephone Network (“PSTN”).¹

CommPartners denied liability for most of the charges, alleging that the vast majority of its calls used Voice over Internet Protocol (“VoIP”) technology, and were therefore not subject to access charges. But CommPartners has not paid any access charges to Plaintiffs, even on calls CommPartners admits originated as traditional circuit-switched traffic.

In January 2009 CommPartners filed a Motion to Dismiss with the court, based on the doctrine of primary jurisdiction. The court, however, stayed action in the case pending a Commission decision on the issue of whether access charges apply to VoIP-originated services.² The Court also required the parties to provide joint reports every 90 days on the status of the Commission’s proceedings relating to the case.

Plaintiffs believe the record in the above-mentioned proceeding is complete, and demonstrates clearly that all interexchange traffic terminating on Plaintiffs’ networks is subject to access charges regardless of the technology used to originate such calls.³

¹ The National Exchange Carrier Association, Inc. (“NECA”) is an intervenor in this case.

² A copy of the court’s stay order is attached as Appendix A. Plaintiffs subsequently moved the court to permit discovery to go forward, so they may at least determine the extent to which CommPartner’s calls are non-VoIP originated. The Court has permitted such discovery to proceed. A copy of the court’s second order is attached as Appendix B.

³ *See, e.g.* Comments of NECA, WC Docket No. 04-36, at 4 (May 28, 2004); Comments of Organization for Protection and Advancement of Small Telephone Companies, WC Docket No. 04-36, at 2 (May 28, 2004); Comments of Western Telecommunications Alliance, WC Docket No. 04-36, at 4 (May 28, 2004); Comments of National Telecommunications Cooperative Association, WC Docket No. 04-36, at 3 (May 28, 2004).

Consequently there appears to be no need to file any additional petitions seeking rulings from the Commission on the VoIP access charge issue. As indicated in these comments, there is an urgent need to resolve this issue because of the number of self-help measures that VoIP providers are engaged in by refusing to pay for using Plaintiffs' networks.

Given the Court's requirement for a status report every 90 days, however, Plaintiffs and NECA respectfully request the Commission provide an estimated time frame within which the FCC can be expected to issue a decision in the above-captioned proceedings within one week of the date of this letter. Plaintiffs and NECA believe this information will assist the court in its management of the case going forward.

Please let the undersigned know if you have any questions.

Sincerely,

By: /s/ Stephen R. Brown

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Lincoln Telephone Company, Inc.
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Southern Montana Telephone Company, Inc., and
Triangle Telephone Cooperative.

By: /s/ Gregory J. Vogt

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Of Counsel

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Association, Inc.

Enclosures

cc: Victoria Goldberg
John Alke, Esq.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

| | |
|-----------------------------------|----------------|
| 3 RIVERS TELEPHONE COOPERATIVE,) | CV 08-68-M-DWM |
| INC., CENTRAL MONTANA) | |
| COMMUNICATIONS, INC., INTERBEL) | |
| TELEPHONE COOPERATIVE, INC.,) | |
| LINCOLN TELEPHONE COMPANY,) | |
| INC., PROJECT TELEPHONE) | |
| COMPANY, INC., SOUTHERN) | |
| MONTANA TELEPHONE COMPANY,) | |
| INC., and TRIANGLE TELEPHONE) | |
| COOPERATIVE ASSOCIATION, INC.,) | |
|) | |
| Plaintiffs,) | |
|) | |
| and) | |
|) | |
| NATIONAL EXCHANGE CARRIER) | |
| ASSOCIATION,) | |
|) | |
| Plaintiff-Intervenor,) | |
|) | |
| vs.) | ORDER |
|) | |
| COMMPARTNERS, LLC,) | |
|) | |
| Defendant.) | |

Plaintiffs are local exchange carriers that own and operate equipment in their respective local exchange areas to enable end users to place and receive telephone calls. They also provide interstate and intrastate switched access

services to voice communications providers that allow these providers to transmit voice communications from one local exchange area to another. Complaint, ¶¶ 13-15. Federal and state laws require Plaintiffs to provide both interstate and intrastate switched access services pursuant to tariffs filed with federal and state agencies to anyone who requests such services. Id. at ¶¶ 18, 22.

Defendant Commpartners, LLC (Commpartners) provides communications services, including Voice over Internet Protocol (VoIP) services. VoIP services allow customers to make and receive voice transmissions via the internet. See Vonage Holdings Corp. v. Minn. Public Utilities Commn., 290 F. Supp. 2d 993, 995 (D. Minn. 2003) (describing VoIP technology).

Plaintiffs claim Commpartners has been utilizing Plaintiffs' interstate and intrastate switched access services without making required payments. Commpartners respond that VoIP services are not subject to these payments. Answer, ¶¶ 4-7. However, Plaintiffs assert that VoIP is subject to both the interstate and intrastate payments, and they claim that much of Commpartners' business does not involve VoIP services. Novy Decl., ¶¶ 12-25. The National Exchange Carrier Association (NECA) intervened in support of the Plaintiffs, and

joins in their position.¹

The Federal Communications Commission (FCC) is currently undertaking rulemaking that Commpartners claims will resolve whether the services it provides are subject to tariffs. Order on Remand and Report and Order and Further Notice of Proposed Rulemaking (Nov. 5, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-262A1.pdf.

Commpartners now moves to dismiss the action based on the doctrine of primary jurisdiction.

Primary jurisdiction is a prudential doctrine by which a court may dismiss or stay a matter to allow resolution of an issue within the expertise of an administrative agency. Reiter v. Cooper, 507 U.S. 258, 268-69 (1993). It is properly invoked when a claim is cognizable in federal court but involves resolution of an issue of first impression or technical issues committed to a regulatory agency. Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166, 1172 (9th Cir. 2002). When deciding whether primary jurisdiction applies, courts should consider whether there is “(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body

¹Unless otherwise noted, references to “Plaintiffs” include both the Plaintiffs and Plaintiff-Intervenor NECA.

having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.” Clark v. Time Warner Cable, 523 F.3d 1110, 1115 (9th Cir. 2008).

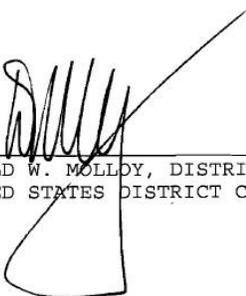
All of the criteria set forth in Clark support invoking primary jurisdiction. Whether VoIP services are subject to access fees is an unsettled issue. The FCC is an agency to which primary jurisdiction applies because Congress has charged the agency with administering the Telecommunications and Federal Communications Acts. Clark, 523 F.3d at 1115; 47 U.S.C. §§ 151 et seq. Finally, how to apply existing tariffs and access fee regulations to new technologies such as VoIP involves the technical expertise of the FCC. Clark, 523 F.3d at 1115 (invoking primary jurisdiction “where it is unclear whether a federal statute applies to a new technology”). Thus, the doctrine of primary jurisdiction applies here, and it is appropriate for the Court to defer resolution of this matter until the FCC determines whether VoIP services are subject to the tariffs collected by Plaintiffs. However, to allow Plaintiffs to preserve their issues, the Court will stay rather than dismiss the case. See Brown, 277 F.3d at 1173.

IT IS HEREBY ORDERED that Commpartners’ motion to dismiss (dkt #25) is DENIED, and the case is STAYED until the FCC renders a decision on the

issues presented by Plaintiffs.

IT IS FURTHER ORDERED that the parties shall file a joint status report every 90 days following entry of this Order informing the Court of the status of the FCC proceedings as they relate to this case.

Dated this 31st day of March, 2009.



DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

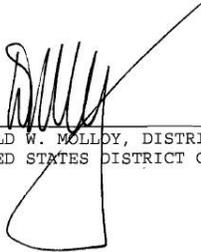
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| NATIONAL EXCHANGE CARRIER) | |
| ASSOCIATION,) | |
|) | |
| Plaintiff-Intervenor,) | |
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| COMMPARTNERS, LLC,) | |
|) | |
| Defendant.) | |

The Court previously stayed this case while the FCC renders a decision on issues central to the case. Ord. at 4-5 (dkt #36). Plaintiffs and Plaintiff-Intervenor now move the Court for an order modifying the stay to allow them to conduct discovery. They argue that Commpartners may provide services that will not be affected by the FCC's pending decision, and it would serve the interests of judicial efficiency to allow discovery so Plaintiffs can ascertain what portion of Commpartners' business relates to already settled law. See Flying J Inc. v. Sprint Commun. Co. L.P., Civ. No. 1:99-CV-111-ST (D. Utah Jan. 10, 2000), attached as Ex. A.

Commpartners did not file a response. “[F]ailure to file a response brief may be deemed an admission that the motion is well taken.” L.R. 7.1(d)(1)(B).

IT IS HEREBY ORDERED that the motion for modification of the Court order staying proceedings (dkt #38) is GRANTED. The stay is modified and the parties may proceed with discovery.

Dated this 12th day of June, 2009.


DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT