

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

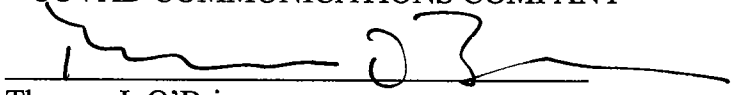
In the Matter of the Complaint of)
John Kavlich, MD dba Patient First,)
)
Complainant,)
)
v.)
)
Level 3 Communications, Inc.,)
AT&T Ohio, and DIECA Communications,)
Inc. dba Covad Communications)
Company,)
)
Respondents.)

Case No. 07-904-TP-CSS

**DIECA COMMUNICATIONS, INC. DBA
COVAD COMMUNICATIONS COMPANY'S
RENEWED MOTION TO DISMISS**

Now comes DIECA COMMUNICATIONS, INC. d/b/a Covad Communications Company ("Covad") and hereby renews its Motion to Dismiss the Complaint filed by John Kavlich, MD d/b/a Patient First ("Complainant"). A true and accurate copy of the original Motion to Dismiss was filed as part of Covad's Answer and is attached to this Motion as Exhibit A. Attached hereto is a Memorandum of Support.

Respectfully submitted on behalf of
DIECA COMMUNICATIONS INC. DBA
COVAD COMMUNICATIONS COMPANY


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MEMORANDUM OF SUPPORT

On August 8, 2007, Complainant filed a Complaint alleging that Level 3 Communications (“Level 3”) slammed Complainant “when they took our modem line and issued the number to another business without our knowledge or our approval.” Covad was deemed a “necessary party,” *sua sponte*, by the Attorney Examiner in an Entry dated March 26, 2008. To rebut the allegations in the Complaint, Covad filed its Motion to Dismiss and Answer on April 22, 2008. The bases for Covad’s Motion to Dismiss – and the bases of this renewed motion – are: (1) the Commission lacks jurisdiction over this Complaint because the activities surrounding the events alleged by Complainant relate entirely to Covad’s provision of Voice over Internet Protocol (“VoIP”) services, not local exchange telecommunications services over which this Commission exercises explicit jurisdiction; and (2) even if the Commission chose to exercise jurisdiction over this matter, the Complainant did not follow the appropriate informal complaint procedures specified by the FCC regarding slamming.

- 1. This Commission lacks subject matter jurisdiction over the Complaint because the alleged “slamming” activities relate to the provision of VoIP services, not traditional local exchange telecommunications services.**
 - a. Commission precedent supports dismissal of a complaint involving VoIP services or activities.**

Although this Commission undoubtedly retains jurisdiction over local exchange telecommunications services in the state of Ohio, it lacks jurisdiction over VoIP services.¹ The Commission reached this conclusion on March 26, 2007, when it dismissed a complaint for lack

¹ The activities involved in the alleged “slamming” relate to Covad’s provision of VoIP and broadband services to a new customer (not Complainant). Level 3 partners with Covad to provide the VoIP service. Covad serves as the underlying carrier. Upon authorization from Covad’s new customer, Covad, following industry practices, placed orders to port the customer’s telephone numbers from the old carrier to Covad, for the provision of interconnected VoIP services to the new customer. Covad does not provide traditional basic local exchange telecommunications services, although it is authorized to do so under the certificate issued by the Commission. Accordingly, the alleged “slamming” occurred as part of the activities associated with the provision of VoIP services – a service that is not subject to this Commission’s jurisdiction.

of jurisdiction on the grounds that the Commission does not regulate VoIP services. See, *Grip Tech. v. Bluemile, Inc.* (2007), 2007 Ohio PUC LEXIS 238 (stating “[n]or does the Commission regulate VoIP service providers”).

Additional statements made by this Commission in other cases involving VoIP provide further support for dismissal of this Complaint.² For example, in his concurring opinion in Case No. 03-2229-TP-ACE, *In the Matter of the Application of Time Warner Cable Information Services (Ohio), LLC for Authority to Offer Local and Interexchange Voice Services in Ohio Using Voice Over the Internet*, Chairman Schriber stated, it “appears that the propensity of the Courts as well as the FCC favor VoIP as an ‘information service’ as opposed to a telecommunication service,” and outside the scope of this Commission’s jurisdiction. In this same case, former Commissioner Mason explained in a separate concurring opinion: “I am very reluctant to view Internet phone service in a different capacity than cellular phone service. Both are offering people an opportunity to diversify their communications options and there is no evidence that supports burdensome regulation of either.” Commissioner Mason also highlighted the fact that “regulation of an industry in its infancy would only stymie development and improvement of the underlying technology.”

Neither the Complainant nor any party to this proceeding has identified any jurisdictional basis upon which this Commission can render a decision regarding alleged “slamming” activities associated with the provision of VoIP services.

² Despite the Commission’s emphatic statement in *Grip Tech*, the exact issue of whether the Commission has jurisdiction over VoIP services remains unanswered as part of Case No. 03-950-TP-COI, *In the Matter of the Commission Investigation Into VoIP Services Using Internet Protocol*. Although the Commission has yet to render a final decision in Case No. 03-950, prior statements from this Commission indicate that VoIP services will not, and should not, be regulated.

b. Dismissal of this Complaint is supported by federal law and precedent.

Dismissal of this Complaint would not only be consistent with prior Commission decisions, but would also be consistent with federal law for the following reasons: (1) the FCC has preempted other state actions attempting to regulate VoIP services or providers (and those decisions have been upheld); and (2) the FCC retains primary jurisdiction over VoIP services and related “slamming” complaints.

In November 2004, the FCC released the *Vonage Order*³ in which it preempted an order of the Minnesota Public Utilities Commission applying its intrastate “telephone company” regulations to VoIP services offered by Vonage. The FCC’s order was based on the finding that VoIP is a jurisdictionally mixed service that cannot practically be separated into inter- and intra-state components for the purpose of complying with state regulatory requirements. Recognizing that innovative and evolving services such as VoIP should not be subject to a patchwork of regulations that would directly conflict with the goals of the Telecommunications Act of 1996 and the FCC’s deregulatory rules, the FCC preempted state regulation of VoIP services. In doing so, the FCC also made clear that preempting state regulation of VoIP services was essential to “*increase investment and innovation in [VoIP services] to the benefit of American consumers.*” *Id.* at paragraph 2. As a result, the FCC made “clear that this Commission, not state commissions, has the responsibility and obligation to decide whether certain regulations apply to [VoIP] services.” The FCC has recently confirmed that nothing in its subsequent decisions to apply limited federal rules to VoIP services undermines its holding in the *Vonage Order*.

³ *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (November 12, 2004), *petitions for review denied*, *Minnesota Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007) (“*Vonage Order*”).

In March 2007, the 8th Circuit Court of Appeals affirmed the FCC's *Vonage Order*, which preempted state regulation of VoIP services.⁴ In upholding the *Vonage Order*, the Court of Appeals did not even suggest that fixed VoIP services are subject to state regulation. In fact, the court expressly noted that the FCC, if faced with the precise issue of state regulation of facilities-based VoIP services, likely would preempt state regulation of such fixed VoIP services.⁵

Indeed, the FCC has not limited its preemption of state regulation to Vonage, but applied it to other interconnected VoIP services as well. As the FCC explained, the "integrated capabilities and features" characteristic of VoIP "are not unique to [Vonage's service], but are inherent features of most, if not all, IP-based services."⁶ The FCC's conclusions about Vonage's service apply equally as well to "other types of IP-enabled services that have basic characteristics similar to" Vonage, including "cable companies" and other "facilities based providers," and the order indicated the FCC would "preclude state regulation to the same extent."⁷

The Commission's own decision in *Grip Tech* is consistent with this approach and should be followed again in this instance by dismissing the Complaint.

Likewise, the Ninth Circuit recently affirmed the dismissal of a slamming complaint filed in federal court finding that the FCC had primary jurisdiction over VoIP services and providers, as well as over slamming complaints associated with those services. In *Clark v. Time Warner Cable*,⁸ the Ninth Circuit upheld the dismissal of the slamming complaint, finding that the FCC

⁴ *Minnesota Public Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

⁵ *Id.* at 582-83.

⁶ *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (November 12, 2004), 19 FCC Rcd at 22404, n.93

⁷ *Id.* at 22424.

⁸ *Clark v. Time Warner Cable*, 523 F. 3^d 1110 (9th Cir. April 30, 2008).

retains primary jurisdiction over “slamming” allegations associated with interconnected VoIP providers. The original complaint against Time Warner involved allegations of unauthorized “slamming” of a customer’s telephone service. The district court dismissed the complaint on the grounds that the FCC should consider the complaint first as well as for failure to state a claim upon which relief could be granted.

On appeal, the Ninth Circuit agreed. The appellate court noted that the FCC had issued a Notice of Proposed Rulemaking seeking comment on how to define and regulate all IP-enabled services, including VoIP. Specifically, the FCC sought comment on whether the anti-slamming provisions should apply to VoIP providers.⁹ The court concluded that Congress had specifically delegated responsibility to the FCC to define “slamming” violations and that the FCC had primary jurisdiction over the complaint.¹⁰

In light of the FCC actions and federal precedent, the Commission must act consistently and refuse to exercise jurisdiction over this Complaint. Neither the Complainant nor any party to this proceeding has identified a jurisdictional basis upon which this Commission can process the Complaint, particularly in light of the fact that the activities involved in the alleged slamming relate to VoIP services. Accordingly, the Commission should dismiss the Complaint for lack of jurisdiction.

c. Pursuant to R.C. 4905.042 and R.C. 4905.72, the Commission must act consistently with the FCC and federal law.

Ohio law requires that “[r]egarding advanced services or internet protocol-enabled service as defined by federal law, including federal regulations, the public utilities commission shall not exercise any jurisdiction over those services that is prohibited by, or is inconsistent with

⁹ Clark at 1113, citing *In re IP-Enabled Services*, 19 F.C.C.R. 4910-11.

¹⁰ Clark at 1115-16.

its jurisdiction under, federal law, including federal regulations.” (Emphasis added.) Ohio Revised Code Section (“R.C.”) 4905.042. More specifically, “[w]ith respect to public telecommunications service only, the rules prescribing procedures necessary for verifying consumer consent shall be consistent with the rules of the federal communications commission in 47 C.F.R. 64.1100 to 64.1170.” (Emphasis added.) R.C. 4905.72. Working in tandem, these statutes mandate that the Commission follow the FCC’s lead and forebear from applying the anti-slamming rules to VoIP services. Therefore, the Commission must act consistently with federal precedent and refuse to exercise jurisdiction over this case.

2. The Complainant failed to follow the informal complaint process set forth in 47 C.F.R. 64.1150, and required by the FCC, prior to filing the Complaint.

Without waiving the primary jurisdictional arguments for dismissal, the Complaint should also be dismissed for Complainant’s failure to follow the informal complaint process. Pursuant to Ohio Administrative Code Rule 4901:1-1-05, a “telecommunications provider that is informed by a subscriber or the commission of an unauthorized provider change shall follow the informal complaint procedures and remedies provided by the FCC for resolution of informal complaints of unauthorized changes of telecommunication providers.” As set forth in 47 C.F.R. 64.1150, these informal procedures include:

- Subscriber notification of the unauthorized carrier change;
- Referral of the complaining subscriber to the relevant state public utilities commission or FCC;
- State public utilities commission or FCC sends notice to alleged “unauthorized carrier of the complaint and order that the carrier remove all unpaid charges for the first 30 days after the slam from the subscriber’s bill pending a determination of whether an unauthorized change *** has occurred;”
- Alleged unauthorized carrier has 30 days to submit valid proof of verification of the carrier change; and

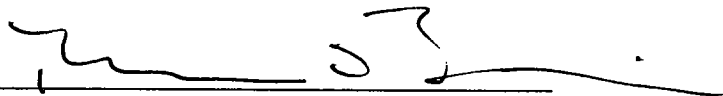
- State public utilities commission or FCC determines whether the unauthorized carrier change occurred.

Notably, the Ohio Supreme Court explains that, “the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.” *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, paragraph 1 of syllabus. The Complainant, however, did not, prior to filing the Complaint, follow the FCC’s mandatory informal complaint procedures set forth in 47 C.F.R. 64.1150, and therefore did not comply with Ohio or federal law.

CONCLUSION

For the above-stated reasons, Covad respectfully requests that its Renewed Motion to Dismiss be granted.


Respectfully submitted on behalf of
DIECA COMMUNICATIONS INC. DBA
COVAD COMMUNICATIONS COMPANY



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CERTIFICATE OF SERVICE

I hereby certify that a copy of DIECA COMMUNICATIONS, INC. DBA COVAD COMMUNICATIONS COMPANY'S RENEWED MOTION TO DISMISS AND ANSWER was served by first class mail, postage prepaid this 21st day of July 2008 on the following parties:



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THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**DIECA COMMUNICATIONS, INC. DBA
COVAD COMMUNICATIONS COMPANY'S
MOTION TO DISMISS And ANSWER**

Pursuant to the March 26, 2008 and April 10, 2008 Attorney Examiner's Entries and Ohio Administrative Code (O.A.C.) Rule 4901-9-01, DIECA Communications, Inc. dba Covad Communications Company ("Covad") hereby submits its Motion to Dismiss and Answer to the Complaint filed by John Kavlich, MD dba Patient First ("Complainant").

ANSWER

Covad generally denies the allegations set forth in the Complaint for lack of information and belief. The Complainant does not name or allege any conduct by or raise any complaint against Covad. Therefore, there are no facts alleged by Complainant that relate to Covad or to which Covad can respond.

MOTION TO DISMISS

Complainant fails to state a claim upon which relief can be granted against Covad, and the Complainant fails to state that Covad provided unreasonable, unjust, or insufficient service in violation of the law. Covad requests that the Complaint as to Covad be dismissed.

Furthermore, Covad respectfully submits that the Public Utilities Commission of Ohio (“Commission”) does not have jurisdiction over this Complaint since the Complaint relates to the provision of Voice over Internet Protocol (“VoIP”) services, not telecommunications services over which this Commission has explicit jurisdiction. VoIP services are not regulated by the Commission, and therefore, the Commission is not the appropriate forum or venue for consideration of this Complaint. The appropriate forum, if any, is before the Federal Communications Commission (“FCC”). Covad is prepared to file a motion to remove the Complaint to the FCC, if necessary, as further explained below.

CONDITIONAL RESPONSE TO ALLEGATIONS

1. Without waiving Covad’s right to assert lack of jurisdiction and without waiving a request to seek a Commission determination on the jurisdictional issue, Covad provides a brief response to the Complaint.
2. Covad admits that it is a certificated competitive local exchange provider in the State of Ohio.
3. Covad was deemed a “necessary party,” *sua sponte* by the Attorney Examiner Entry dated March 26, 2008.
4. Upon information and belief, Covad admits that it processed a Letter of Agency (“LOA”) from a new customer, Allcare Dental & Dentures (“Allcare”), on or about May 17, 2007. Covad further admits that the LOA, a copy of which is attached to Level 3

Communications, Inc.'s ("Level 3") Letter dated October 25, 2007, filed during an informal complaint process, is a true and correct copy of Allcare's LOA.¹ Per the LOA, Allcare authorized Covad to replace the VoIP services provided formerly by AT&T and to take necessary steps to authorize the change in those services for four (4) telephone numbers ("TNs"). The only TN in controversy is "440-826-4400" – a TN explicitly listed on the LOA.

5. Upon information and belief, Covad admits that it processed the proper paperwork through its LNP vendor to port the four TNs pursuant to the LOA. Level 3 is Covad's voice switch provider in the provision of VoIP services. Pursuant to established procedures, Level 3 placed the porting change orders per Covad's request. Covad further admits that it continued to process port requests for all four TNs in reliance on the LOA until the ports were completed.

6. Upon information and belief, Covad further admits that Complainant is not a customer of Covad and Covad has not provided any services to Complainant. Covad is not directly aware of the facts asserted in Complaint as to lack of service and is not aware of any damages that Complainant alleges occurred or is seeking to recover within the jurisdiction of this Commission.

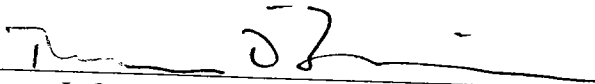
7. Covad has not intentionally or knowingly violated any federal rules regarding "slamming related to its provisioning of VoIP services;" nor did it intend to authorize the porting of a number that was not used by Allcare. Instead, Covad relied in good faith on the LOA to pursue the porting of the TNs, and such reliance was reasonable.

WHEREFORE, having fully responded to the allegations set forth in the Complaint, Respondent DIECA Communications, Ind. dba Covad Communications Company, respectfully

¹ Covad notes that the LOA is a confidential document, as marked. Covad did not authorize the release or disclosure of the LOA and reserves the right to seek all available remedies for such disclosure.

requests that the Commission issue an order denying John Kavlich, MD dba Patient First, the relief requested in its Complaint as it relates to Covad. Furthermore, Covad respectfully requests that the Commission dismiss the Complaint with prejudice as it relates to Covad.

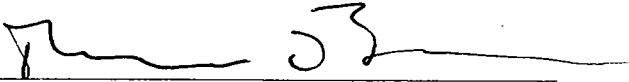
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CERTIFICATE OF SERVICE

I hereby certify that a copy of DIECA COMMUNICATIONS, INC. DBA COVAD COMMUNICATIONS COMPANY'S MOTION TO DISMISS AND ANSWER was served by first class mail, postage prepaid this 22nd day of April 2008 on the following parties:



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Case No(s). 07-0904-TP-CSS

Summary: Motion to Dismiss electronically filed by Teresa Orahod on behalf of DIECA Communications dba Covad Communications Company