

**IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

**IN RE: APPLICATION OF YMAX)
COMMUNICATIONS CORP. FOR DESIGNATION AS)
AN ELIGIBLE TELECOMMUNICATIONS CARRIER)**

DOCKET NO. 12-00155

PETITION TO INTERVENE

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to Tenn. Code Ann. § 65-4-118, respectfully petitions the Tennessee Regulatory Authority ("TRA" or "Authority") to grant the Consumer Advocate's intervention into this proceeding on behalf of the public interest because consumers may be adversely affected. For cause, Petitioners would show as follows:

1. The Consumer Advocate is authorized by Tenn. Code Ann. § 65-4-118 to represent the interests of Tennessee consumers of public utilities services by initiating and intervening as a party in proceedings before the Authority in accordance with the Uniform Administrative Procedures Act and Authority rules.
2. YMAX is a public utility regulated by the Authority and provides telecommunications services to consumers located in the State of Tennessee.
3. On December 20, 2012, YMAX filed in the Authority an *Application of YMAX Communications Corp. for Designation as an Eligible Telecommunications Carrier*.
4. On May 17, 2013, YMAX filed a letter informing the TRA of its local counsel and its intention to contact the TRA Staff regarding this matter.

5. YMAX is a corporate affiliate of magicJack LP, which sells the magicJack device, which can be inserted into a computer to provide internet telephone service.
6. One of the conditions necessary to qualify as an ETC is to provide “access to emergency services” to its customers. 47 C.F.R. § 54.101(a)(5).
7. Although some customers of the magicJack device may currently have access to 911 services, neither YMAX nor magicJack collect or remit fees for 911 services as required by Tenn. Code Ann. § 7-86-110, thereby jeopardizing its ability to offer 911 service on a continuous basis going forward.
8. On February 5, 2013, the State of Tennessee filed a *Complaint for Declaratory Order, Accounting and Other Relief* (“*Complaint*”), Case No. 13-141-I, against YMAX and magicJack in the Chancery Court for Davidson County for the failure of YMAX and magicJack to collect or remit fees for 911 services. A copy of the Complaint is attached as **Exhibit A**.
9. In its *Complaint*, the Attorney General requests the Chancery Court to issue a declaratory order that YMAX and magicJack are required to charge, collect and remit 911 fees under Tenn. Code Ann. § 7-86-101, *et seq.*, and an accounting and payment of all past due amounts plus applicable statutory interest.
10. On April 19, 2013, Defendants YMAX and magicJack filed a *Motion to Dismiss* and a *Memorandum in Support of Defendants’ Motion to Dismiss* (“*Memorandum*”) in Case No. 13-141-I. A copy of the *Motion* and *Memorandum* is attached as **Exhibit B**.
11. On page 9 of the *Memorandum*, YMAX and magicJack claim the statute requiring charging, collecting and remitting 911 fees does not apply to them and, therefore, they

are not required to charge, collect and remit fees for the 911 access provided to its customers.

12. On page 3 of the *Memorandum*, YMAX and magicJack allege the Attorney General's assumption that "all Defendants' customers necessarily have such direct 911 access" is false because such assumption is "not technologically feasible."
13. On page 16 of the *Memorandum*, YMAX and magicJack argue that "the ability to provide [911] access is significantly limited by the inability of providers of nomadic or portable services (such as the magicJack services) to determine where a customer is actually using the magicJack device at any given time."
14. On page 19 of the *Memorandum*, YMAX and magicJack argue the Attorney General's interpretation of the statute leads to "the unintended consequence of deterring providers like [YMAX and magicJack] from *voluntarily* offering direct access to 911 services to customers" (Emphasis added.)
15. In considering YMAX's filings in Chancery Case No. 13-141-I and in this Docket, and assuming YMAX, the entity requesting designation as an ETC, will be offering telecommunication services through the magicJack device, then it is against the public interest to accept YMAX's request to one tribunal (this Authority) that it qualifies as an ETC because it claims to offer access to 911 services and can provide annual accountings while it simultaneously argues in another tribunal (the Chancery Court) (a) 911 services are offered only voluntarily, (b) there are technological limitations to offering such 911 service to all customers, (c) its customers are nomadic and therefore it is uncertain how many actually use the 911 service in Tennessee, and (d) it alludes to the fact that if the

State requires it to charge, collect and remit fees for such services, it may deter them from providing the "voluntary" 911 services to its customers (*Memorandum* at page 19).

16. Additional investigation and discovery may be needed to determine whether the assertions in YMAX's applications are supported and whether YMAX is estopped from making such assertions.

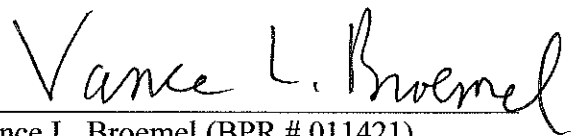
17. Only by participating in this proceeding can the Consumer Advocate work adequately to protect the interests of consumers.

WHEREFORE, Petitioner respectfully asks the Authority to grant the Petition to Intervene.

RESPECTFULLY SUBMITTED,



ROBERT E. COOPER, JR. (BPR #010934)
Attorney General and Reporter
State of Tennessee



Vance L. Broemel (BPR # 011421)
Senior Counsel
Charlena S. Aumiller (BPR #031465)
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-2812

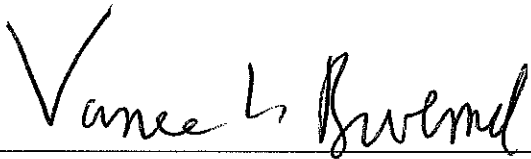
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition to Intervene was served via U.S. Mail or electronic mail upon:

Lance J.M. Steinhart
Lance J.M. Steinhart, P.C. Attorneys at Law
1725 Windward Concourse, Suite 150
Apharetta, Georgia 30005
(770) 232-9200
lsteinhart@telecomcounsel.com

H. LaDon Baltimore
Farris Bobango PLC
Historic Castner-Knott Building
618 Church Street, Suite 300
Nashville, TN 37219
(615) 726-1200
dbaltimore@farrismathews.com

This the 11th day of June, 2013.



Vance L. Broemel

Exhibit A

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,
by and through Robert E. Cooper, Jr.,
Attorney General and Reporter for
the State of Tennessee,

Plaintiff

v.

YMAX COMMUNICATIONS
CORPORATION, and MAGICJACK, L.P.

Defendants

Case No. 13-141-I

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COMPLAINT FOR DECLARATORY ORDER, ACCOUNTING AND OTHER RELIEF

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee (hereinafter "the State," "Attorney General," or "Plaintiff"), brings this action for a declaratory order pursuant to Tenn. Code Ann. § 29-14-102, an accounting, and further relief as this Court deems proper, in the name of the State of Tennessee under Tennessee Code Annotated §§ 8-6-109, 7-86-108, and other applicable law against Defendants YMAX Communications Corporation ("YMAX") and MagicJack, L.P. ("MagicJack") and states to the Court as follows:

SUMMARY OF THE CASE

1. The Plaintiff, State of Tennessee, brings this action in order to require YMAX and MagicJack to collect, remit and/or pay charges into the fund which is used to operate 911 emergency communications in the State of Tennessee.

2. Telephone service providers such as Defendant YMAX are obligated under Tennessee law to pay a charge for the funding of 911 emergency communications.

3. Defendant YMAX is a telephone service provider with a certificate of convenience and necessity from the Tennessee Regulatory Authority ("TRA") and provides telephone service by means of the Internet.

4. YMAX provides telephone service by means of a device known as magicjack®, which can be inserted into a computer to provide internet telephone service. This device is marketed by Defendant MagicJack, an affiliate of YMAX, and materials included with the sale of the MagicJack device state that it can be used for 911 service.

5. Neither YMAX nor MagicJack, however, has collected, remitted or paid any charges for the funding of 911 emergency communications service.

PARTIES

6. Robert B. Cooper, Jr., is the Attorney General and Reporter for the State of Tennessee, and, pursuant to Tenn. Code Ann. § 8-6-109(b)(1), has the duty of "[t]he trial and direction of all civil litigated matters and administrative proceedings in which the state of Tennessee or any officer, department, agency, board, commission or instrumentality of the state may be interested."

7. Defendant YMAX is incorporated in the state of Delaware with its home office in West Palm Beach, Florida. Service of process can be made with YMAX's registered agent C T Corporation System, 800 South Gay Street, Suite 2021, Knoxville, Tennessee 37929.

8. Defendant MagicJack is a Delaware limited partnership with its home office in West Palm Beach, Florida, and an affiliate of YMAX. MagicJack sells a device which provides the ability to use the Internet to make and receive calls throughout most of North America. MagicJack has a registered agent in the state of Florida, C T Corporation, 1200 South Pine Island Road, Plantation, Florida 33324. Service of Process can be made through the Tennessee

Secretary of State.

JURISDICTION AND VENUE

9. This Court has jurisdiction and venue is proper. The jurisdiction of this Court is invoked pursuant to the provisions of Tenn. Code Ann. § 20-2-201 and Tenn. Code Ann. § 20-2-214. The Defendants, through their transactions, including but not limited to the sale and advertisement of the magicjack® device in Davidson County, are doing business in Tennessee and are subject to jurisdiction through the State's long-arm statute, Tenn. Code Ann. § 20-2-201 *et seq.*, specifically Tenn. Code Ann. § 20-2-214(a)(1), (2), and (6).

FACTUAL ALLEGATIONS

10. The Tennessee legislature has declared that "the establishment of a uniform emergency number [911] to shorten the time required for a citizen to request and receive emergency aid is a matter of public interest and concern." Tenn. Code Ann. § 7-86-102(b)(1).

11. The Tennessee legislature has further established a mechanism for funding 911 services in Tennessee through the means of an emergency telephone service charge. Tenn. Code Ann. § 7-86-108(a)(1).

12. Tennessee law requires telecommunications carriers to charge, collect, and remit this emergency telephone service charge. Tenn. Code Ann. § 7-86-110.

13. The emergency telephone service charge applies to all users and subscribers of "non-wireline service" which is defined as any non-wireline telecommunications service "that connects a user dialing or entering the digits to a PSAP [911 call center], including, but not limited to, commercial mobile radio service and IP-enabled services." Tenn. Code Ann. §§ 7-86-103(11); 7-86-108(a)(1)(B)(vi).

14. YMAX is a telecommunications carrier with a certificate of convenience and

necessity granted by the TRA.

15. In addition, the TRA has approved an Interconnection Agreement between YMAX and BellSouth Communication Corporation that provides in § 6.1.1 that "BellSouth shall provide YMAX with nondiscriminatory access to 911 and E911 data bases...."

16. YMAX provides telecommunications service through its relationship with its affiliate, MagicJack, which markets a device known as magicjack®.

17. When inserted into a computer, the magicjack® device provides the ability to use the Internet to make and receive calls in North America.

18. Materials included with the sale of the magicjack® device state that it can be used for 911 service.

19. Neither YMAX nor MagicJack, however, has paid, remitted or collected any charges for the funding of 911 emergency communications service as required by Tennessee law.

COUNT ONE – DECLARATORY ORDER

20. Plaintiff incorporates paragraphs 1-18 above as if again fully set forth.

21. Courts of record in the state of Tennessee have the power to render declaratory judgments regarding the rights, status, and other legal relations pursuant to Tenn. Code Ann. § 29-14-102. A dispute has arisen as to the rights and obligations of the parties under the Emergency Communications District Law. Tenn. Code Ann. § 7-86-101, *et seq.*

22. Plaintiff maintains that the statutes regarding the funding of emergency communications services, Tenn. Code Ann. § 7-86-101 *et seq.*, require YMAX and MagicJack to charge, collect, and remit the emergency telephone service charge.

23. Accordingly, Plaintiff prays that the Court enter a declaratory judgment that YMAX and MagicJack are required under Tennessee law to charge, collect, and remit the

emergency telephone service charge.

COUNT TWO - ACCOUNTING

24. Plaintiff incorporates paragraphs 1-22 above as if again fully set forth.

25. Although Defendants have a duty under Tennessee law to charge, collect, and remit the emergency telephone service charge, they have failed to do so.

26. In order to determine the amount owed by Defendants, Defendants should be required to make an accounting of: (a) all magicjack® devices sold in Tennessee; (b) all magicjack® devices used in Tennessee; (c) all calls made using the YMAX telecommunications carrier in Tennessee; and (d) any other information required to determine the amount owed by Defendants.

27. Defendants should be required to pay all past due amounts, plus any applicable statutory interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, State of Tennessee, *ex rel.* Robert E. Cooper, Jr., Attorney General and Reporter, pursuant to Tennessee Code Annotated §§ 8-6-109, 7-86-108, the Attorney General's general statutory authority, the Attorney General's common law authority, and this Court's equitable powers, prays:

1. That this Complaint be filed without cost bond as provided by Tenn. Code Ann. §§ 20-13-101.

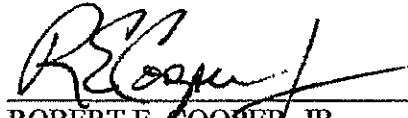
2. That process issue and be served upon Defendants, requiring each of them to appear and answer this Complaint;

3. That all costs in this case be taxed against Defendants;

4. That the Plaintiff be granted the relief prayed for in its request for: (a) a declaratory order; and (b) an accounting and payment of all past due amounts, plus any applicable statutory interest;

5. That this Court grants Plaintiff such other and further relief as this Court deems just and proper.

Respectfully submitted,


ROBERT E. COOPER, JR.
Attorney General and Reporter
B.P.R. No. 10934

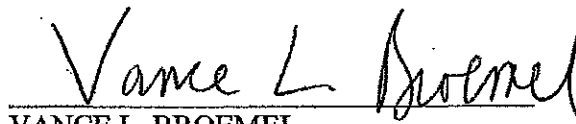

VANCE L. BROEMEL
Senior Counsel
B.P.R. No. 11421
Office of the Tennessee Attorney General
Consumer Advocate & Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-8733
Facsimile: (615) 741-1026
Email: Vance.Broemel@ag.tn.gov

Exhibit B

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE**

STATE OF TENNESSEE,)
By and through Robert E. Cooper, Jr.,)
Attorney General and Reporter for)
the State of Tennessee,)
)
Plaintiff,)
)
v.)
)
YMAX COMMUNICATIONS)
CORPORATION, and MAGICJACK, L.P.)
)
Defendants.)

COPY

Case No. 13-141-I

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure, Defendants YMAX Communications Corporation ("YMAX") and MagicJack, LP ("MagicJack") (collectively "Defendants"), by and through counsel, respectfully move to dismiss the State's Complaint for failure to state a claim upon which relief can be granted. The State alleges that Defendants failed to administer emergency telephone service charges ("911 Charges") as supposedly required by the Tennessee Emergency Communications District Law ("ECDL"), Tenn. Code Ann. §§ 7-86-101 *et seq.* As set out in Defendants' accompanying Memorandum in support of this Motion, the Court should dismiss the Complaint for two reasons.

First, the ECDL does not impose any collection or payment obligations upon Defendants because they do not charge or bill magicJack users for making or receiving ordinary phone calls.

See Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) & (iv) (addressing fees payable by users who pay for service, whether retrospectively or prospectively). As the Attorney General has previously conceded, non-wireline users who can make or receive calls for free and are not billed are not required to pay 911 Charges.

Second, applying the ECDL to Defendants would be inconsistent with Federal Communications Commission ("FCC") orders and policy. *See* Tenn. Code Ann. § 7-86-108(a)(1)(B)(vi) (applying ECDL to non-wireline services only "to the extent such application is not inconsistent with the orders, rules and regulations of the federal communications commission"). The Complaint ignores (1) that Defendants are not required by the FCC to provide 911 emergency calling capability, and (2) that technological obstacles prevent Defendants from knowing where their services' users actually are (whether in Tennessee or elsewhere). The State's interpretation of the ECDL would thus deter Defendants from offering access to 911 services at all, undercutting the FCC's goals of preventing undue regulation from stifling the evolution of new communications technologies and of encouraging widespread access to 911 services.

For these reasons, the Complaint should be dismissed with prejudice.

Respectfully submitted,



Samuel L. Felker, Esq. (#9045)
Russell S. Baldwin, Esq. (#019288)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
Telephone: (615) 742-6200
Facsimile: (615) 742-2719

Robert N. Weiner, Esq.
Murad Hussain, Esq.
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 2004-1206
Telephone: (202) 942-5000
Facsimile: (202) 942-5999
[*Pro hac vice* motions pending]

Attorneys for Defendants

**THIS MOTION IS EXPECTED TO BE HEARD ON FRIDAY, MAY 17, 2013,
BEGINNING AT 9:00 A.M. IF NO RESPONSE IS TIMELY FILED AND SERVED, THE
MOTIONS SHALL BE GRANTED AND COUNSEL NEED NOT APPEAR IN COURT
AT THE TIME AND DATE SCHEDULED FOR THE HEARING.**

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2013 a true and correct copy of the foregoing pleading was served via U.S. Mail, First Class postage prepaid, on the following:

Vance L. Broemel, Senior Counsel
Tennessee Attorney General's Office
425 5th Avenue North
Nashville, TN 37243



RECEIVED

APR 19 2013

CONSUMER ADVOCATE &
PROTECTION DIVISION

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,)
By and through Robert E. Cooper, Jr.,)
Attorney General and Reporter for)
the State of Tennessee,)
)
Plaintiff,)
)
v.)
)
YMAX COMMUNICATIONS)
CORPORATION, and MAGICJACK, L.P.)
)
Defendants.)

COPY

Case No. 13-141-I

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The State has brought this case under the Tennessee Emergency Communications District Law ("ECDL"), Tenn. Code Ann. §§ 7-86-101 *et seq.*, even though the Attorney General's own written opinion, the statutory language, and the orders of the Federal Communications Commission establish that this law does not apply here.

The State alleges that Defendants YMax Communications Corporation ("YMax") and magicJack LP (collectively "Defendants") failed to collect and remit emergency telephone service charges ("911 Charges") as supposedly required by the ECDL. That law mandates that various providers of telephone services assess 911 Charges on their subscribers and remit any money they are able to collect either to "emergency communications districts" (for landline providers) or a statewide Emergency Communications Board (for providers of cellular and Internet-based services).

Defendant magicJack LP sells “the magicJack® device,” and YMax is a corporate affiliate of magicJack LP. Users of the magicJack device can plug it into a computer wherever they can get a high speed Internet connection provided by some unaffiliated third-party. Users of the device, if they choose, can then subscribe to a service that enables them to make telephone calls, and/or, if they choose, to a separate service that enables them to receive calls, through the Voice-over-Internet-Protocol (“VoIP”) technology invented by Defendants’ parent company.¹ These VoIP services are portable, or “nomadic,” meaning that users with Internet access can access them from virtually anywhere.

The Court should dismiss the Complaint pursuant to Tenn. R. Civ. Pro. 12.02(6) because it fails to state a valid claim for two reasons. First, the ECDL does not impose any collection or payment obligations upon Defendants because they do not charge or bill magicJack users for making or receiving ordinary phone calls. As the Attorney General has previously opined, non-wireline users who can make or receive calls for free and are not billed are not required to pay 911 Charges.

Second, the ECDL by its terms applies to non-wireline services only “to the extent such application is not inconsistent with the orders, rules and regulations of the federal communications commission.” Tenn. Code Ann. § 7-86-108(a)(1)(B)(vi). By requiring that the ECDL be applied accordance with FCC orders, rules and regulations, the Legislature was not merely trying to avoid conflict with federal law. It was trying to make the ECDL coextensive with FCC regulation.

Applying the law as the State urges here would not be in accordance with FCC rules and orders. That is because the FCC distinguishes between (1) providers of “interconnected” VoIP

¹ See, e.g., U.S. Patent No. 5,825,771 (filed Nov. 10, 1994) (noting assignee VocalTec, Ltd.).

services, who are subject to regulation and required to provide 911 emergency calling capability, and (2) providers of “non-interconnected” VoIP services, such as Defendants, who are not subject to such regulation and not required to provide such calling capability. The Complaint here, however, appears to miss the FCC’s crucial distinction between interconnected and non-interconnected service, alleging instead that the 911 Charges apply “to all users and subscribers of ‘non-wireline service.’”

The Complaint heightens the inconsistency with FCC orders, rules and regulations by also assuming that non-interconnected providers like Defendants are obligated to provide all their Tennessee customers with direct access to 911 services. By its terms, the ECDL is more limited. The Complaint also assumes that all Defendants’ customers necessarily have such direct 911 access. That is not technologically feasible, although Defendants have gone beyond the FCC’s requirements and voluntarily made direct access to 911 services available to customers who register a valid address in Tennessee. The Complaint’s two incorrect assumptions lead the State to a third: that Defendants must collect 911 Charges from all their customers in Tennessee. The ECDL nowhere imposes that sweeping obligation.²

² These are not all the problems with the State’s approach. For example, if this matter were to proceed beyond the Motion to Dismiss stage, Defendants would show that the State’s position improperly discriminates against magicJack users (who are disproportionately low income). The nomadic nature of the magicJack device and services and the different ways in which they are used are demonstrated by the fact that in those jurisdictions where magicJack users have registered for 911 access, those users make 911 calls at a rate approximately one-tenth that of other users. Thus, not only would the State’s position require that magicJack users pay 911 Charges even if they are not based in Tennessee, but given the sharp disparity in 911 use, charging them the same fee as any other landline or non-wireline user lacks any reasonable basis. Defendants would also show that the costs of implementing 911 Charges in accordance with the allegations here would significantly exceed the amounts Defendants could recoup as “administrative fees” under the ECDL, leaving Defendants forced to absorb undue costs out of proportion to the service being provided and, potentially, to discontinue providing 911 access.

RELEVANT BACKGROUND

I. VoIP TECHNOLOGY

The evolution of modern telecommunications reflects a trend toward greater mobility for users. Traditionally, the “public switched telephone network,” or PSTN, has used hard-wired lines (*i.e.*, “landlines”) to connect the stationary telephones in a customer’s home or business to the local telephone exchange. By contrast, wireless telephone services (such as commercial mobile radio services, *i.e.*, “cellular” phone service) are mobile. They are not tied to a landline connection to the PSTN. Thus, wireless service providers typically operate over a larger geographic area and allow users more mobility than landline providers do.

VoIP facilitates transmission of calls over the Internet. Although it is possible to provide VoIP service to a fixed location, entrepreneurs using innovative technology have also developed VoIP services that are highly portable. Those services can be used by customers wherever they are, so long as they have Internet connections. The FCC has recognized that unlike traditional telephone calls, VoIP services let users “make a VoIP call from a computer, a special VoIP phone, or a traditional phone with or without an adapter,” including potentially from “wireless ‘hot spots’ in public locations.” FCC, *Consumer Guide: Voice over Internet Protocol (VoIP)* at 1, at <http://transition.fcc.gov/cgb/consumerfacts/voip.pdf> (last visited Apr. 17, 2013).

Federal law and FCC policy divide VoIP services into two categories: “interconnected” and “non-interconnected” VoIP services. Under FCC regulations, a VoIP service is “interconnected” only if that single service can be used to both make calls to and receive calls from the PSTN. *See* 47 C.F.R. § 9.3(1) (defining “interconnected VoIP service” as single integrated service that “[e]nables real-time, two-way voice communications”). By contrast, a single VoIP service is “non-interconnected” if it lets users “place calls to, or receive calls from

the PSTN, but not both.” *In re Connect Am. Fund*, 26 FCC Rcd. 17663, 18148 (2011) (emphasis added); *see also* 47 U.S.C. § 153(36) (defining “non-interconnected” VoIP service as one that “enables real-time voice communications” that either “originate from or terminate to the user’s location” (emphasis added)); *In re Contributions to Telecomms. Relay Servs. Fund*, 26 FCC Rcd. 3285, 3290-91 (2011) (citing “‘one-way’ VoIP services” as non-interconnected).

A single company can provide multiple one-way services, but this does not change the “non-interconnected” nature of the one-way services. For example, the FCC recently explained to the U.S. Congress that Skype was “[t]he largest non-interconnected VoIP provider.” *Caller Identification Info. in Successor or Replacement Techs.*, 26 FCC Rcd. 8643, 8658 (2011). Skype enables its users to both make and receive calls, but it does so by offering two separate one-way, “non-interconnected” services: SkypeIn, for receiving calls, and SkypeOut, for placing calls. *See In re Universal Serv. Contribution Methodology*, 27 FCC Rcd. 5357, 5388 (2012). Similarly, Google Voice also provides the ability to make phone calls through non-interconnected services. *See Proposed Rules - Wireless E911 Location Accuracy Requirements; E911 Requirements for IP-Enabled Service Providers*, 76 Fed. Reg. 47114, 47115 (F.C.C. Aug. 4, 2011) (“A number of companies, such as Skype and Google Voice offer a variety of ‘one-way’ interconnected VoIP services that enable inbound calls from the PSTN or outbound calls to the PSTN, but not both.”).

As the FCC also has recognized, “the mobility enabled by a VoIP service that can be used from any broadband connection” makes it difficult to afford users access to 911 emergency services. *In re E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 10245, 10259 (2005) (“*VoIP 911 Order*”). The primary obstacle is that “[t]hese ‘portable’ VoIP service providers often have no reliable way to discern from where their customers are accessing the VoIP service.” *Id.* Nonetheless,

because interconnected VoIP always provides two-way voice communication like telephones and cell phones, and for fear that users of interconnected VoIP might not understand that their service offered different capabilities than cell phones or landlines, the FCC required those interconnected VoIP providers to make 911 services accessible. *See id.* at 10256-57; 47 C.F.R. § 9.5(b). Significantly, the FCC did not impose this obligation on non-interconnected services. *See VoIP 911 Order*, 20 FCC Rcd at 10258 n.78 (“The rules we adopt in today’s Order also apply only to providers that offer a single service that provides the functionality described above.” (emphases added)).

Since 2005, the FCC has repeatedly considered and sought public comment on the possibility of extending its E911 rules to include non-interconnected VoIP services, such as a one-way service or two one-way services that a customer can combine or use simultaneously. *See, e.g., In re Amending the Definition of Interconnected VOIP Service in Section 9.3 of the Commission’s Rules*, 26 FCC Rcd. 10074, 10090 (2011) (seeking public comment on whether E911 obligations should be extended to cover outbound-only VoIP service providers). Although the FCC has received and considered many proposals to subject non-interconnected VoIP services to 911 regulatory requirements, the Agency has never revised its rules to impose such requirements.

II. THE MAGICJACK DEVICE AND SERVICES

Each purchaser of a magicJack device must agree to the “Terms of Service” in order to use the devices and subscribe to related services. *See* Terms of Service and Software License Agreement for magicJack, LP and YMAX Communications Corporation and magicJack VocalTec Ltd. (“Defs.’ Terms of Service”), Preamble, *available at* <http://www.magicjack.com/tos>. These Terms of Service, which the Complaint incorporates by

reference,³ explain that the magicJack device plugs into the USB port on a computer and allows users to elect to choose a unique phone number that allow them to receive free phone calls over the Internet. *See id.* ¶¶ 1, 3(a). Users can also elect to choose a separate service allowing them to make free outgoing calls over the Internet. *See id.* ¶ 3(b). Unlike traditional wireline telephone service or wireless service, users of magicJack VoIP services must obtain their own Internet connection from a third-party Internet provider, because Defendants do not provide Internet access. *See id.* ¶ 1 (“[Y]ou need a computer . . . with a high speed Internet connection . . . [Y]ou are responsible for getting the things you need to make . . . [the magicJack device] work, and that may involve third-party fees (such as Internet service provider or Internet airtime charges).”).

Once connected to a computer and a third-party Internet connection, the magicJack device allows users “to receive for free incoming calls using the phone number [they] have chosen.” Defs.’ Terms of Service ¶ 4. If users have also chosen “outgoing service, the magicJack . . . device . . . allows [them] to make free outgoing calls to other [magicJack] device users located anywhere in the world, and to subscribers on traditional telephone networks or cellular networks in the United States.” *Id.* Although users may pay an annual license fee to access software on computer servers, they are not charged for telecommunication services, whether monthly, call-by-call, or otherwise. *See id.* ¶ 1 (explaining that magicJack device and services are “not a telecommunications service” and are “subject to different regulatory treatment

³ The State alleges that “[m]aterials included with the sale of the magicjack[®] [sic] device state that it can be used for 911 service.” (Compl. ¶ 18.) Because the Terms of Service are among those materials, the Complaint necessarily incorporates them by reference. Materials outside the complaint but “incorporated by reference” into the complaint “may be considered [on a Rule 12.02(6) motion] without converting the motion into one for summary judgment.” *See Cochran v. City of Memphis*, W2012-01346-COA-R3CV, 2013 WL 1122803, at *2 (Tenn. Ct. App. Mar. 19, 2013).

from telecommunications services”); *see also id.* ¶ 3(a) (citing possible annual license fee). At most, users may be required to pay for separate specialty services if they choose to use them, such as conference lines and international calling. *See id.* ¶ 4.

Like Skype and Google Voice, Defendants provide non-interconnected VoIP services, because the magicJack device enables users to subscribe to one or both of two separate services, one to make calls and the other to receive calls. *See* Defs.’ Terms of Service ¶ 3(a) & (b) (describing separate optional features for receiving and making calls). However, unlike Skype and Google Voice, which do not provide 911 calling capability,⁴ Defendants voluntarily provide a 911 solution for magicJack customers. *See id.* ¶ 5 (“The services are not traditional telephone services, so we are not required to provide you with access to emergency 911, E911, or similar access to emergency services. However, when you register to use the magicJack . . . device, you will be enrolled in the voluntary 911 service, if you register a United States 911 service address for United States telephone numbers and/or a Canadian 911 service address for Canadian telephone numbers.”).

Because customers can establish or take advantage of third-party Internet connections anywhere, Defendants cannot know where a customer is using the magicJack device or services unless the customer affirmatively provides that information, and thus they require customers to provide their addresses for 911 purposes upon first registering the magicJack device and whenever they “change the location from which [they] place [their] calls.” Defs.’ Terms of

⁴ “[A]part from in very limited circumstances, the [Skype] Software does not allow [users] to make emergency calls to emergency services.” Skype, *Support: Can I call an emergency number from Skype?*, at <https://support.skype.com/en/faq/FA29/can-i-call-an-emergency-number-from-skype?frompage=search&q=emergency&fromSearchFirstPage=false> (last visited Apr. 17, 2013). Similarly, “Google Voice is not capable of placing or receiving emergency services calls.” Google Voice, *Additional Terms of Service - Emergency Calls*, at <http://www.google.com/intl/en/googlevoice/legal-notices.html> (last visited Apr. 17, 2013).

Service ¶ 5. Because Defendants' VoIP services are not tied to a single location, they are referred to as "nomadic" VoIP services. *See VoIP 911 Order*, 20 FCC Rcd. at 10333 (Statement of Commissioner Adelstein) (referring to some VoIP services as "nomadic").

ARGUMENT & AUTHORITY

The State alleges (albeit indirectly) that Defendants are providers of "non-wireline service."⁵ The Complaint further alleges that 911 Charges apply "to all users and subscribers" of non-wireline service, but that Defendants have not "paid, remitted or collected any charges for the funding of 911 emergency communications service as required by Tennessee law." (Compl. ¶¶ 13, 19.) The ECDL does not expressly impose any such obligation on non-wireline providers. To determine the obligations of non-wireline providers, it is necessary to piece together various cross-references in amendments to the statute that pertain to non-wireline services. That exercise makes clear that the Complaint fails for two reasons. First, Defendants do not have any collection or payment obligations under the ECDL, because they do not charge or bill magicJack users for making or receiving ordinary calls. Second, the obligation of non-wireline providers to remit 911 Charges applies only to the extent it accords with FCC orders, rules and regulations. Applying the ECDL to Defendants as the State urges here would substantially diverge from the FCC's carefully crafted and repeatedly revisited approach. As a result, the State's claims, in this respect and others, well exceed the scope of the statute.

⁵ The Complaint alleges that Defendants provide Internet-based calling services. (*See* Compl. ¶ 17.) The State apparently must contend that under the ECDL, "services and applications making use of Internet protocol (IP) including, but not limited to, voice over IP" are "IP-enabled services," and that such services are one form of "non-wireline service." Tenn. Code Ann. § 7-86-103(9) & (11).

I. DEFENDANTS HAVE NO OBLIGATION TO COLLECT OR REMIT 911 CHARGES BECAUSE THEY DO NOT CHARGE OR BILL THEIR USERS FOR MAKING OR RECEIVING ORDINARY CALLS.

The Complaint never cites the provision of the ECDL that expressly requires non-wireline providers to collect and remit any 911 Charges – for good reason. There is no such provision. Rather, an intricate review of the statute is required in order to divine the obligations imposed by the law on non-wireline providers. That review, in conjunction with the Attorney General’s own prior published opinion, confirms that the ECDL does not require Defendants to collect or remit 911 Charges, because they do not charge or bill their users for making or receiving ordinary calls.

Tennessee’s ECDL, enacted in 1984, established 911 as the primary emergency telephone number in the State. *See* Tenn. Code Ann. §§ 7-86-101 *et seq.* The Act authorized the creation of local municipal entities known as “emergency communications districts” and empowered them to levy 911 Charges on users of traditional landline telephone services. *Id.* §§ 7-86-104, 7-86-108(a)(1)(A). In the 1998 amendments to the ECDL, the Legislature created the statewide Emergency Communications Board for levying statewide 911 Charges on users of commercial mobile radio services (“CMRS”), such as cell phones. *See id.* §§ 7-86-302(a), 7-86-303(c). The provisions regarding the administration of 911 Charges on CMRS users were inserted into the statute’s original provisions as a new subsection at Tenn. Code Ann. § 7-86-108(a)(1)(B).⁶

In 2006, the Legislature expanded the Board’s authority to include IP-enabled services.

⁶ Notably, subsection (a)(1)(A) refers to each emergency communications district’s “board of directors” that administers 911 Charges for landline users, while subsection (a)(1)(B) confusingly refers simply to “the board” when discussing 911 Charges for cell phone users. To be clear, “the board” is necessarily a reference to the statewide Emergency Communications Board.

It first added a provision that expanded the Board's functions to include "[a]dminister[ing] the deployment of 911 service for emerging communications technologies, including, but not limited to, IP-enabled service" Tenn. Code Ann. § 7-86-306(a)(8) (enacted by 2006 Tenn. Laws Pub. Ch. 647 § 1 (S.B. 3860) (May 12, 2006)). A month later, the Legislature added more provisions regarding IP-enabled services and introduced a new term to encompass them as well as CMRS: "non-wireline service." *See generally* 2006 Tenn. Laws Pub. Ch. 925 (S.B. 3861) (June 20, 2006). One of these new provisions was shoehorned into the subsection, noted above, that was added in 1998 to address 911 Charges for CMRS:

Effective July 1, 2006, this subdivision (a)(1)(B) shall apply to all subscribers and users of non-wireline service, to the extent such application is not inconsistent with the orders, rules and regulations of the federal communications commission.

Tenn. Code Ann. § 7-86-108(a)(1)(B)(vi). Because "non-wireline service" includes but is broader than CMRS, the effect of the 2006 amendment was essentially to substitute "non-wireline service" for "CMRS" throughout subdivision (a)(1)(B).

The provisions relevant here are subdivisions (a)(1)(B)(iii) and (iv), which were first enacted by the Legislature in 2003. *See* 2003 Tenn. Laws Pub. Ch. 205, § 1 (H.B. 1473). Subdivision (a)(1)(B)(iii) provides: "For customers who are billed retrospectively, known as standard customers, (CMRS) providers shall collect the service charge on behalf of the board as part of their monthly billing process and as a separate line item within that billing process." Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) (emphasis added). Through July 2011, subdivision (a)(1)(B)(iv) provided: "The service charge shall also be imposed upon customers who pay for service prospectively (prepaid customers)." 2003 Tenn. Laws Pub. Ch. 205, § 1 (H.B. 1473) (emphasis added).

In 2009, the Attorney General authoritatively interpreted subdivisions (a)(1)(B)(iii) and (iv) as "[t]he liability" for 911 Charges only "to those customers who are charged and billed

monthly for the service.” Tenn. Att’y Gen. Op. No. 09-87, at 7 (May 18, 2009), at <http://www.tn.gov/attorneygeneral/op/2009/op/op87.pdf> (last visited April 17, 2013). “From these provisions,” the Attorney General concluded, “it is apparent that liability for [911 Charges] is indeed tied to payment for the service and is implicitly limited to those who must make such payments.” *Id.* Where users make calls for free and there is no “mechanism for payment of the service charge by someone who is not charged or billed and does not pay at all,” “the users of these phones will not be ‘customers who pay’ for the service,” and therefore “no service charge is due for them.” *Id.*

As discussed, the 2006 non-wireline amendments indicate that the term “CMRS” should be replaced with “non-wireline” throughout subdivision (a)(1)(B), including the two subsections that the Attorney General interpreted. Therefore, the Attorney General’s interpretation applies to non-wireline services, such that liability for 911 Charges only attaches to users of non-wireline services who are billed monthly. The magicJack Terms of Service, which the Complaint incorporates by reference to Defendants’ sales materials,⁷ make clear that users can make and receive calls for free, and that they do not receive bills monthly or otherwise. *See* Defs.’ Terms of Service ¶¶ 1, 3(a), 4; *see also supra* Relevant Background, Section II.

After the Attorney General’s 2009 opinion, the Legislature amended subdivision (a)(1)(B)(iv), effective July 2011. Even now, however, the subdivision does not cover Defendants. The amendment imposed a new, alternative fee upon “[p]repaid wireless telecommunications service customers.” *See* 2010 Tenn. Laws Pub. Ch. 774, § 2 (S.B. 2497) (amending Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv) and cross-referencing new fee imposed at § 7-86-128); *id.* § 5 (clarifying effective date). This amendment also explicitly and narrowly

⁷ *See supra* note 3.

defined “wireless telecommunications service” as meaning CMRS. *Id.* § 3 (adding definition to Tenn. Code Ann. § 7-86-103). Therefore, this new alternative fee is inapplicable to other forms of prepaid non-wireline services, such as the VoIP services that Defendants provide. As a result, subdivision (a)(1)(B)(iv) remains inapplicable to Defendants.

In sum, because magicJack users are “not charged or billed and do[] not pay at all” for making calls, they are not “‘customers who pay’ for the service.” Tenn. Att’y Gen. Op. No. 09-87, at 7. Therefore, “no service charge is due for them.” *Id.* Accordingly, the Complaint fails to state a valid claim that Defendants have failed to collect service charges.

II. APPLYING THE ECDL TO DEFENDANTS WOULD IMPERMISSIBLY CONFLICT WITH FCC ORDERS, RULES, AND REGULATIONS, AND THUS WOULD CONFLICT WITH THE ECDL ITSELF.

In adopting the 2006 amendments to the ECDL, the Legislature intended to harmonize Tennessee law with FCC regulation and policies. In particular, the 2006 amendments impose 911 Charges on non-wireline service only “to the extent such application is not inconsistent with” the FCC’s orders, rules and regulations. Tenn. Code Ann. § 7-86-108(a)(1)(B)(vi) (emphasis added). The Oxford English Dictionary defines “inconsistent” as “not consonant or in accordance; at variance.” OED Online (Oxford Univ. Press 2013), *available at* <http://www.oed.com/view/Entry/93864?redirectedFrom=inconsistent&>. Although “not inconsistent with” can also mean “not incompatible with,” *see id.*, to read this provision of the ECDL as foreclosing only applications that are incompatible with FCC orders, rules, or regulations would render the provision superfluous. A state law that is “incompatible” with FCC orders on matters within the agency’s delegated authority would be preempted anyway. *See, e.g., Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989) (explaining that in a prior case, court “upheld the FCC’s preemption decision because state regulation was incompatible with the valid and lawful federal objective of developing a free, competitive market

in customer telephone equipment”); *see also* *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577-78 (2011) (finding state law was preempted federal law where it was impossible for party to satisfy requirements of state and federal law alike). Thus, for the Legislature to state that the ECDL cannot be “incompatible” with FCC orders would accomplish nothing that preemption doctrine would not already do. For this reason, interpreting “not inconsistent with” as “not incompatible with” would violate the central axiom of statutory construction that “legislative enactments should not be construed to render their provisions mere surplusage.” *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 472 (1997).

Here, the Legislature was familiar with the FCC’s regulatory initiatives in this area and specifically acknowledged the Agency’s expertise and flexibility to adapt to “rapid technological advancements.” Tenn. Code Ann. § 7-86-102(b)(3). Therefore, the logical reading of the consistency requirement in § 7-86-108(a)(1)(B)(vi) is that the Legislature wanted the FCC’s carefully considered standards to define the contours of the ECDL’s mandates.

Those FCC standards distinguish between the services offered by Defendants (and certain others) and the services offered by other types of VoIP providers. Since 2005, the FCC has required “interconnected” VoIP providers to ensure that their users can make 911 calls. *See VoIP 911 Order*, 20 FCC Rcd. at 10246. By contrast, the FCC has never required non-interconnected VoIP providers to provide such 911 calling capability. This is no oversight. Because technologies and the marketplace have continued to evolve in recent years, the FCC has repeatedly examined the specific question of what kinds of VoIP services should be subject to regulation regarding the provision of 911 services – and what kinds should not. *See, e.g., id.* at 10254. In 2011, the FCC again conducted a public inquiry on whether to revise its policy on this specific issue and requested comment on whether to extend 911 obligations to non-

interconnected VoIP services, such as those offered by magicJack, Skype, and Google Voice. *See Amending the Definition of Interconnected VoIP Service*, 26 FCC Rcd. at 10090. Nearly two years later, and despite the development of a comprehensive rulemaking record, the policy remains unchanged. As a result, the FCC continues to impose 911 obligations only on interconnected VoIP providers, and not on non-interconnected VoIP providers. The FCC's continued distinction between interconnected and non-interconnected VoIP services reflect the agency's best efforts to balance competing policy and practical considerations, including the technological obstacles to imposing 911 Charges on users of some VoIP services. *See VoIP 911 Order*, 20 FCC Rcd. at 10247 (“[T]oday we adopt a balanced approach that takes into consideration the expectations of consumers, the need to strengthen Americans’ ability to access public safety in times of crisis, and the needs of entities offering these innovative services.” (emphasis added)).

Nonetheless, it appears that the State would require Defendants and similar providers to collect 911 Charges from “all users and subscribers of non-wireline service.” (Compl. ¶ 13) (emphasis added). That claim exceeds the bounds of the ECDL. To begin with, by its plain terms, the ECDL imposes charges only on those users “whose place of primary use . . . is in Tennessee.” Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(b) (emphasis added). But more to the point here, the claim appears to rest on the assumptions that Defendants are obligated to provide all of their Tennessee customers with direct access to 911 services; that all of Defendants’ customers in fact have such direct 911 access, and that Defendants must collect 911 Charges from all of their customers in Tennessee. These assumptions are not correct, and are inconsistent with the FCC’s policies. Because of that inconsistency, the State’s claim falls outside the boundaries that the ECDL delineated.

The flawed assumptions driving the State's claim may stem in part from a misunderstanding of magicJack technology. The Complaint alleges: "Materials included with the sale of the magicJack® device state that it can be used for 911 service." (Compl. ¶ 18.) However, the fact that the device is capable of providing access to 911 service does not mean that every user is necessarily capable of using the device to access 911 service, nor does it mean that every user who can access the 911 service in Tennessee primarily does so from Tennessee.

That Defendants have voluntarily chosen to go beyond FCC requirements and make direct access to 911 services available to customers is irrelevant. As the FCC has recognized, the ability to provide such access is significantly limited by the inability of providers of nomadic or portable services (such as the magicJack services) to determine where a customer is actually using the magicJack device at any given time. *See VoIP 911 Order*, 20 FCC Rcd. at 10259 ("These 'portable' VoIP service providers often have no reliable way to discern from where their customers are accessing the VoIP service.").

Consistent with technological limitations, the solution the FCC adopted for interconnected VoIP services was to allow customers to register addresses where they expect to use the services, and then provide those registrants the ability to connect directly to 911 services in the jurisdictions they identify. *See VoIP 911 Order*, 20 FCC Rcd. at 10266 (stating that "an interconnected VoIP provider must transmit all 911 calls, as well as a call back number and the caller's 'Registered Location' for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location"); *see also* 47 C.F.R. § 9.5(b)(2) (similar). To provide service voluntarily (unlike Skype and Google Voice, who do not provide such service, thus leaving their customers unable to reach emergency

assistance through those providers⁸), Defendants modeled its registration process after those FCC requirements for interconnected VoIP services. The FCC recognized that this Registered Location solution was imperfect for interconnected carriers because it “is not always technologically feasible for providers of interconnected VoIP services to automatically determine the location of their end users.” *Id.* at 10271. It is no less imperfect for non-interconnected providers like Defendants that adopt it voluntarily, as the State itself has acknowledged about magicJack itself. First, there is no guarantee that a user will choose to register for 911 service at all. Second, for those registered users who call 911, the only location information that a provider can transmit to a dispatcher are the addresses that the users registered. *See id.* at 10266. However, given the nomadic nature of the magicJack device, users may be calling from locations other than where they registered. In short, as the FCC recognized, the effort to provide direct access to 911 services through VoIP – in particular, non-interconnected VoIP – faces a host of technological problems. *See, e.g., id.* at 10259 (“These ‘portable’ VoIP service providers often have no reliable way to discern from where their customers are accessing the VoIP service.”).

The State suggests that non-wireline providers must collect 911 Charges from all users and subscribers of non-wireline services in Tennessee, without regard, apparently, to whether Tennessee is the “primary place” of usage, or even whether the user has registered a valid location to receive direct access to 911 services. The State’s suggestion thus fails to recognize technological and marketplace realities reflected in the FCC’s decision.

Moreover, the State is attempting to make non-wireline service providers, and not just customers, directly liable for uncollected 911 Charges, even though the ECDL does not authorize the imposition of such liability on providers. *See* Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(a)

⁸ *See supra* note 4.

(providing, after substitution of “non-wireline” for “CMRS,” that “subscribers and users shall be subject to the emergency telephone service charge”); *id.* § 7-86-108(a)(1)(B)(ii)(a) (providing, after substitution of “non-wireline” for “CMRS,” that “[e]ach [non-wireline] provider shall remit the funds collected as the service charge to the board every two (2) months” (emphasis added)). That intensifies the inconsistency with the FCC’s approach, by not only ignoring the critical distinction the FCC recognized, but imposing penalties on that basis. Finally, it is plainly inconsistent with FCC orders, rules, and regulations – and thus contrary to the ECDL – for the State to seek to apply the ECDL without giving effect to the FCC’s carefully drawn and repeatedly considered distinction between the obligations appropriate to apply to interconnected versus non-interconnected VoIP service providers.

The State’s claims are also inconsistent with the FCC’s critical regulatory objectives. For one, the FCC wanted to avoid stifling technological innovation and new service offerings with excessive regulatory burdens in this area. In its order that imposed 911 obligations only on interconnected VoIP providers, the FCC explained that “the Commission is committed to allowing these services to evolve without undue regulation in accord with our nation’s policies for Internet services” *VoIP 911 Order*, 20 FCC Rcd. at 10247. Moreover, while the FCC did not require non-interconnected carriers to provide direct access to 911 services, the Agency certainly did not want to deter them from doing so. Indeed, the Congressional mandate to the FCC in the Wireless Communications and Public Safety Act of 1999, better known as the “911 Act,” was “to enhance public safety by encouraging and facilitating the prompt deployment of a nationwide, seamless communications infrastructure for emergency services that includes wireless communications.” *In re Implementation of 911 Act*, 15 FCC Rcd. 17079, 17081 (2000). To that end, the FCC’s goal in its 2005 *VoIP 911 Order* on 911 services and VoIP providers was

to “enhance the public’s ability to contact emergency services personnel during times of crisis and enable public safety personnel to obtain accurate information regarding the location of the caller.” *Amending the Definition of Interconnected VoIP Service*, 26 FCC Rcd. at 10075. That is likewise the overriding objective of the ECDL. *See* Tenn. Code Ann. § 7-86-102(a) & (b).

But the State’s reading of the ECDL would have the unintended consequence of deterring providers like Defendants from voluntarily offering direct access to 911 services to customers, thus joining the ranks of non-interconnected providers such as Skype and Google Voice, who have elected not to provide emergency service access and thus leave their customers unable to reach emergency assistance through their VoIP services.⁹ That is because the only way a non-interconnected provider could avoid the administrative burden, the uncertainty, the failure to acknowledge technological limitations, and the potential liability attendant to the State’s approach would be to do what the FCC’s order plainly permits – not offer 911 services.

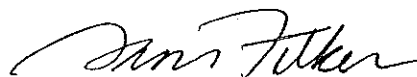
In short, the State’s allegations under the ECDL are inconsistent with the FCC’s orders, regulations and rules, as well as the policies that animate them. Because the Legislature intended to harmonize the ECDL with the FCC’s regulation in this area, the State’s allegations fall outside the purview of the statute. As a result, the Complaint fails to state a valid claim.

CONCLUSION

For the forgoing reasons, Defendants’ respectfully submits that the State’s Complaint must be dismissed in its entirety, with prejudice, pursuant to Tenn. R. Civ. Pro. 12.02.

⁹ *See supra* note 4.

Respectfully submitted,



Samuel L. Felker, Esq. (#9045)
Russell S. Baldwin, Esq. (#019288)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
Telephone: (615) 742-6200
Facsimile: (615) 742-2719

Robert N. Weiner, Esq.
Murad Hussain, Esq.
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 2004-1206
Telephone: (202) 942-5000
Facsimile: (202) 942-5999
[*Pro hac vice* motions pending]

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2013 a true and correct copy of the foregoing pleading was served via U.S. Mail, First Class postage prepaid, on the following:

Vance L. Broemel, Senior Counsel
Tennessee Attorney General's Office
425 5th Avenue North
Nashville, TN 37243

