

IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

IN RE:

NOTICE OF THE INDIRECT
TRANSFER OF CONTROL OF YMAX
COMMUNICATIONS CORP.

)
)
)
)
)
)
)

DOCKET NO. 17-00142

PETITION TO INTERVENE

Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee, by and through the Consumer Protection and Advocate Division of the Office of the Attorney General (Consumer Advocate), pursuant to Tenn. Code Ann. § 65-4-118, respectfully petitions the Tennessee Public Utility Commission (TPUC) to grant the Consumer Advocate's intervention into this proceeding because consumers' interests, rights, duties or privileges may be determined or affected by the *Notice of the Indirect Transfer of Control of YMax Communications Corp.* (*Notice*) filed in this TPUC Docket by YMax Communications Corp (YMax). For cause, the Consumer Advocate 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 any matter or proceeding before the Commission in accordance with the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 *et seq.*, and Commission rules.

2. YMax is a public utility regulated by the TPUC and provides "competing local telecommunications services, including exchange access telecommunication services, and

facilities-based and resold exchange and interexchange telecommunications within the State of Tennessee”.¹ YMax is a wholly-owned indirect subsidiary of magicJack VocalTec Ltd. (MJVT) and is a Delaware corporation located at 560 Village Blvd., Suite 120, West Palm Beach, Florida 33409.²

3. On December 14, 2017, YMax filed the *Notice* in which YMax is seeking approval³ from TPUC of the transfer of control of YMax from MJVT to B. Riley Financial, Inc. (B. Riley) due to a merger transaction in which B. Riley will acquire control of MJVT and its subsidiaries.⁴

4. YMax states that the proposed merger transaction will serve the public interest, and will be transparent to its customers without an expectation in the discontinuance, reduction, loss or impairment of service to its customers.⁵ In addition, YMax states that the proposed merger transaction will not harm competition.⁶

7. In 2015, the State of Tennessee, YMax and MJVT entered into a Settlement Agreement regarding payment of fees into the 911 emergency communications fund. A copy of this Settlement Agreement is attached as **Exhibit A**. In this Settlement Agreement, YMax and MJVT agreed to remit 911 fees to the Tennessee Emergency Communication Board.

12. The interests of consumers, including without limitation compliance of YMax and MJVT to the Settlement Agreement under the proposed merger in the *Notice*, may be affected by determinations and orders made by TPUC in this matter.

¹ *Initial Order Granting Certificate of Public Convenience and Necessity*, TPUC Docket No. 06-00067 (Sept. 18, 2006). See also *Notice* at page 1.

² *Notice* at page 1.

³ The Parties state they are submitting this *Notice* for informational purposes only. However, changes of control even at the parent level require TPUC approval. *Order, In re: Joint Filing of AT&T Inc. and Bell South Corporation Together with its Certificated Tennessee Subsidiaries Regarding Change of Control of the Operating Authority of Bell South Corporation's Tennessee Subsidiaries*, TPUC Docket No. 06-00093 (Nov. 1, 2007).

⁴ *Id.*

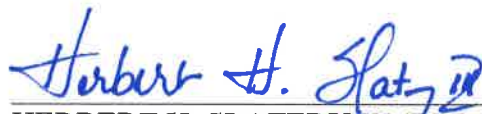
⁵ *Id.* at page 3.

⁶ *Id.*

13. Only by participating as a party in this Docket can the Consumer Advocate adequately carry out its statutory duty to represent the interests of Tennessee consumers.

WHEREFORE, Petitioner respectfully asks the Commission to grant this Petition to Intervene.

RESPECTFULLY SUBMITTED,



HERBERT H. SLATTERY III (BPR #09077)
Attorney General and Reporter
State of Tennessee



KAREN H. STACHOWSKI (BPR #019607)
Assistant Attorney General
Office of the Tennessee Attorney General
Public Protection Section
Consumer Protection and Advocate Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-2370
Fax: (615) 532-2910
Email: karen.stachowski@ag.tn.gov

CERTIFICATE OF SERVICE

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

Thomas Fuller
Executive Vice President and CFO
magicJack VocalTec Ltd.
560 Village Blvd., Suite 120
West Palm Beach, FL 33409
Thomas.fuller@magicJack.com

Bennett L. Ross
Daniel Brooks
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
BRoss@wileyrein.com
DBrooks@wileyrein.com

Alan N. Forman
Executive Vice President & General Counsel
B. Riley Financial, Inc.
299 Park Avenue, 7th Floor
New York, NY 10171
aforman@brileyfin.com

William F. Maher
Jennifer L. Kostyu
Wilkinson Barker Knauer, LLP
1800 M Street, N.W., Suite 800N
Washington, D.C. 20036
WMaher@wbklaw.com
JKostyu@wbklaw.com

This the 9th day of February 2018.

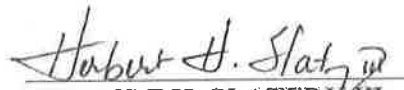
Karen H. Stachowski
Karen H. Stachowski

APPROVAL OF COMPROMISE AND SETTLEMENT OF:

State of Tennessee v. YMax Communications Corp., and MagicJack, L.P.,

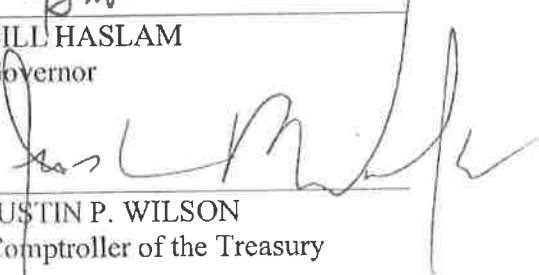
Pursuant to Tenn. Code Ann. § 20-13-103, the undersigned Attorney General, with the approval of the Governor and the Comptroller, as evidenced by their signatures below, authorizes settlement in *State of Tennessee v. YMax Communications Corp., and MagicJack, L.P.*, Davidson County Chancery Court Docket No. 13-141-I, according to the following terms.

- 1) Defendants will pay \$37,500.00 to the State of Tennessee.
- 2) Defendants will pay court costs.
- 3) Defendants will continue their current practice of billing, collecting, and remitting 911 charges to the Tennessee Emergency Communications Board.
- 4) The State's claim will be dismissed with prejudice.
- 5) Appropriate orders shall be submitted to the Court reflecting the resolution of the suit.


HERBERT H. SLATTERY III
Attorney General and Reporter

APPROVED:


BILL HASLAM
Governor


JUSTIN P. WILSON
Comptroller of the Treasury

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into this ____ day of April, 2015, by and between YMax Communications Corporation ("YMax") and magicJack, L.P. ("magicJack"), collectively ("Defendants") and Herbert H. Slatery III, Attorney General for the State of Tennessee ("Attorney General"), who filed suit in the name of the State of Tennessee advancing the claims of the Tennessee Emergency Communications Board ("TECB") collectively ("State of Tennessee" or "State"). Defendants and the State are collectively hereinafter referred to as the "Parties".

RECITALS

WHEREAS, on February 5, 2013, the Tennessee Attorney General brought an action in Davidson County Chancery Court, pursuant to the Tennessee Emergency Communications District Law ("ECDL"), Tenn. Code Ann. § 7-86-101, *et seq.*, alleging Defendants were required to bill and collect emergency telephone service charges ("911 Charges") from Tennessee users of their "magicJack®" device and then remit the collected 911 Charges to the State;

WHEREAS, in the Complaint, the State of Tennessee sought injunctive, declaratory and other equitable relief pursuant to the ECDL;

WHEREAS, Defendants responded to the Complaint by filing a Motion to Dismiss and a Supplemental Motion to Dismiss, arguing among other things, that they were not subject to the ECDL and had no obligation to collect 911 Charges from their customers;

WHEREAS, in August 2013, in conjunction with the settlement of unrelated litigation in Alabama, the Defendants began voluntarily sending bills for 911 Charges to customers who had registered a primary address in Tennessee for 911 purposes and also started remitting to the State Board the 911 Charges they collected; and

WHEREAS, in recognition of Defendants' current practices regarding 911 Charges, and in order to avoid the costs and uncertainties of litigation, the Parties have agreed to compromise and settle all matters in dispute in this action upon full and final payment of the amounts required herein to dismiss the action filed in Davidson County Chancery Court on February 5, 2013 with prejudice.

NOW, THEREFORE, in consideration of the foregoing recitals, which are contractual in nature, the mutual promises, premises, covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **RELEASE BY THE TENNESSEE ATTORNEY GENERAL:** In consideration of the execution of this Agreement and upon full and final payment of the monetary payment and other good and valuable consideration set forth herein, the Tennessee Attorney General does hereby release, remise and forever discharge YMax and magicJack and their officers, directors, partners, employees, agents, representatives, affiliates, predecessors, parents, subsidiaries, successors and assigns ("Released Entities") from all civil claims and causes of action based on the facts or subject matter alleged in the State's Complaint dated February 5, 2013, *State of Tennessee v. YMax Communications Corp. and magicJack, L.P.*, Case No. 13-141-I, Davidson County Chancery Court, which the Tennessee Attorney General could have asserted against the

Defendants at any time up to and including the Effective Date¹ of this Agreement resulting from the facts, practices, events and matters alleged in the Complaint.

2. Notwithstanding any term of this Agreement, any and all of the following forms of liability and/or claims are specifically reserved and excluded from the Release in Paragraph 1 as to any entity or person, including the Defendants:

- A. Any criminal liability that any person or entity, including the Defendants, have or may have to the State of Tennessee or any other law enforcement entity.
- B. Any civil or administrative liability that any person or entity, including the Defendants, have or may have to the State of Tennessee under statutes, regulations, or rules for the following claims:
 - 1. State or federal antitrust violations;
 - 2. State environmental claims;
 - 3. State false claims not based on the conduct alleged in the complaint; and/or
 - 4. State or federal tax claims.
- C. Any matters based on future acts;
- D. Enforcement of this Agreement; and/or
- E. Exclusion of the forms of liability and/or claims set forth in A-D in this paragraph from the Release in Paragraph 1 of this Agreement does not affect any rights or defenses Defendants might have not arising from this Agreement relating to that liability and/or claims.

3. RELEASES OF DEFENDANTS: In consideration of the execution of this Agreement and other good and valuable consideration, the Released Entities hereby release, remise and forever discharge the State of Tennessee, its agencies, divisions, entities, boards,

¹ For the purposes of this Agreement, the Effective Date shall be the date that the Attorney General signs this Agreement.

officers, employees, agents and representatives from any and all claims and causes of action arising from the facts and subject matter alleged in the State's Complaint dated February 5, 2013, *State of Tennessee v. YMax Communications Corp. and magicJack, L.P.*, Case No. 13-141-I, Davidson County Chancery Court, and related in any way to the investigation and prosecution thereof by the State at any time up to and including the Effective Date of this Agreement resulting from the facts, practices, events and matters alleged in the Complaint and the investigation and prosecution thereof by the State.

4. PAYMENT TO THE STATE: YMax and magicJack agree to pay the State of Tennessee, Office of the Attorney General, by electronic funds transfer pursuant to the directions of counsel for the State the sum of Thirty-Seven Thousand Five Hundred Dollars (\$37,500.00), within no more than five days of the Effective Date of this Agreement. Said funds defray the Tennessee Attorney General's and the TECB's legal, administrative, and investigative fees and costs of investigation and prosecution of this matter. All funds will be distributed at the sole discretion of the Tennessee Attorney General. It is expressly agreed and understood by the State of Tennessee, acting by and through the Attorney General for the State of Tennessee and on behalf of the TECB, that by entering into this Agreement and paying said payment to the State, the Defendants are not in any way admitting that they are subject to the ECDL or that they are liable for payment of any of the 911 Charges sought in the Attorney General's Complaint.

5. CONTINUED BILLING AND COLLECTION OF 911 CHARGES: The Parties acknowledge and agree that in August 2013, in conjunction with the settlement of unrelated litigation in Alabama, the Defendants began voluntarily sending bills for 911 Charges to customers who have registered a primary address in Tennessee for 911 purposes. Defendants also started

remitting to the TECB the 911 Charges they collected. Defendants have agreed that, absent material changes in the applicable law specifically requiring and/or dictating otherwise, they will continue and not cease their current practice of billing, collecting and remitting to TECB 911 Charges for customers who register a primary address in Tennessee for 911 purposes.

6. NO ADMISSION OF LIABILITY: The Parties expressly agree this is a compromise and settlement of disputed matters, and this Agreement and related agreed dismissal order are not admissions by any of the Parties regarding the merits of this dispute or the legal positions taken by the Parties in this matter. Nothing contained in this Agreement shall ever be used against either party as, or deemed by any person to constitute, an admission by any party to this Agreement. YMax and magicJack expressly deny that they are subject to the ECDL and deny they are obligated to bill and collect 911 Charges from their customers or to remit 911 Charges to the State of Tennessee.

7. CONTROLLING LAW: This Agreement shall be construed and enforced in conformity with the laws of the State of Tennessee.

8. DISMISSAL OF ACTION: Upon approval of the Attorney General and after full and final payment to the State of Tennessee of the sum of Thirty-Seven Thousand Five Hundred Dollars (\$37,500.00) paid by the Defendants, the Parties agree to submit an Agreed Order of Dismissal, in the form attached hereto as Exhibit A, dismissing the February 5, 2013 Complaint with prejudice. As an accommodation and consideration for this Agreement, all court costs shall be paid by Defendants.

9. GENERAL PROVISIONS:

(A) This Agreement shall not be construed against the party preparing it, but shall be construed as if it were prepared jointly by all affected persons and entities, and any uncertainty or ambiguity, or both, shall not be interpreted against any such person or entity.

(B) This Agreement may be executed by duplicate counterparts, each of which shall be deemed an original, and which when taken together shall constitute one and the same Agreement. Delivery of the counterpart may be accomplished by either party by use of electronic mail submission, and delivery by those methods will have the same binding effect as delivery of an original copy.

(C) Nothing in this Agreement shall be construed to affect, limit or alter any private right of action by and on behalf of any private individual or other person against the Defendants.

(D) Acceptance of this Agreement by the Attorney General shall not be deemed approval by the Attorney General of any of Defendants' advertising or business practices. Further, neither Defendants nor anyone acting on their behalf shall state or imply or cause to be stated or implied that the State of Tennessee, the Attorney General, the TECB or any other governmental unit of the State of Tennessee has approved, sanctioned or authorized any practice, act, advertisement or conduct of the Defendants.

(E) This Agreement may only be enforced by the Parties or the Court hereto.

(F) The titles and headers to each section of this Agreement are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Agreement.

(G) As used herein, the plural shall refer to the singular and the singular shall refer to the plural and the masculine and the feminine and the neuter shall refer to the other, as the context requires.

(H) Except as expressly set forth in the Release in paragraph 1 and 2 of this Agreement, nothing in this Agreement shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Agreement and related dismissal order shall not bar the State, or any other governmental entity, from enforcing laws, regulations or rules against Defendants with regard to any future conduct unless it is specifically released in paragraph 1 and 2 of this Agreement.

(I) Nothing in this Agreement constitutes an agreement by the State of Tennessee concerning the characterization of the amounts paid hereunder for purposes of any proceeding under the Internal Revenue Code or any state tax laws.

(J) No waiver, modification, or amendment of the terms of this Agreement shall be valid or binding unless made in writing, signed by the party to be charged and then only to the extent set forth in such written waiver, modification or amendment.

(K) Any failure by any party to this Agreement to insist upon the strict performance by any other party of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions of this Agreement, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

(L) If any clause, provision or section of this Agreement shall, for any reason, be held illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect any other clause, provision or section of this Agreement and this Agreement shall be construed and

enforced as if such illegal, invalid or unenforceable clause, section or other provision had not been contained herein.

(M) Time shall be of the essence with respect to each provision of this Agreement that requires action to be taken by the Parties within a stated time period or upon a specified date.

(N) Nothing in this Agreement shall be construed to waive any claims of Sovereign Immunity the State may have in any action or proceeding.

(O) Defendants will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of circumventing any part of this Agreement or the spirit or purposes of this Agreement.

(P) Defendants have provided the State with certain documents, advertisements, and contracts. Defendants acknowledge and agree that providing these documents to the State in no way constitutes the State's pre-approval, review for compliance with state or federal law, or with this Agreement, or a release of any issues relating to such documents except to the limited extent expressly provided in the release set forth in Paragraphs 1 and 2 of this Agreement.

(Q) Defendants agree that this Agreement does not entitle them to seek or to obtain attorneys' fees as a prevailing party under any statute, regulation or rule, and the Parties further waive any rights to attorneys' fees that may arise under such statute, regulation or rule.

10. REPRESENTATIONS AND WARRANTIES:

(A) By agreeing to this Agreement, Defendants reaffirm and attest that the information provided by Defendants to the Attorney General and his representatives prior to entry of this Agreement was in all material respects truthful, accurate, and consistent with Defendants' descriptions of what they were providing to the Attorney General. Further, Defendants did not withhold material responsive to a particular request except as stated in the response to the request.

The Attorney General's agreement to this Agreement is expressly premised upon these affirmations and attestations and Defendants acknowledge and understand the Attorney General throughout the course of the investigation of this matter relied upon the information provided by the Defendants in negotiating and agreeing to the terms and conditions of this Agreement.

(B) If the Attorney General finds that Defendants are in material breach of Paragraph 10(A), the State retains the right to seek modification of this Agreement from the Davidson County Chancery or Circuit court upon proper written notice to Defendants.

(C) Defendants represent and warrant that the execution and delivery of this Agreement is their free and voluntary act, this Agreement is the result of good faith negotiations, and the Parties agree the Agreement and terms hereof are fair and reasonable. Further, the Defendants represent and warrant that no offers, agreements, or inducements of any nature whatsoever have been made to the Defendants by the State of Tennessee, its attorney(s), or any employee of the Attorney General, to procure this Agreement.

(D) Defendants represent that the signatories to this Agreement have authority to act for and bind the Defendants.

(E) Defendants YMax Communications Corp. and magicJack, L.P., warrant and represent that they are the proper parties to this Agreement.

(F) Defendants warrant and represent that YMax Communications Corp. and magicJack, L.P. are the true legal names of entities entering into this Agreement.

11. COURT COSTS: All costs associated with the filing and distribution of this Agreement and the Agreed Order of Dismissal and any other incidental costs or expenses incurred thereby shall be borne by Defendants. Further, no discretionary costs shall be taxed to the Parties.

12. ENTIRE AGREEMENT: This Agreement sets forth the entire agreement between the Parties, and there are no representations, agreements, arrangements, or understandings, oral or written, between the parties relating to the subject matter of this Agreement which are not fully expressed herein or attached hereto.

Wherefore, this Agreement is entered into by the Parties as of the dates written below.

For YMax:

Signed: [Signature]

Name: Gerald C. Vento

Title: President

Date: April 6, 2015

For magicJack:

Signed: [Signature]

Name: Gerald C. Vento

Title: President

Date: April 6, 2015

For the State of Tennessee:

[Signature]
HERBERT H. SLATERY III

Tennessee Attorney General and Reporter

Date: May 25, 2015

Approved by: [Signature]

Tennessee Emergency Communications Board

Date: May 28, 2015