

ORIGINAL

IN THE SUPREME COURT OF OHIO

ValTech Communications, LLC,	:	
	:	CASE NO.: 08-0873
Appellant,	:	ON APPEAL FROM THE
	:	PUBLIC UTILITIES COMMISSION
v.	:	OF OHIO
	:	
Public Utilities Commission of Ohio,	:	PUBLIC UTILITIES COMMISSION OF
	:	OHIO CASE NO. 04-658-TP-CSS
Appellee.	:	

**SUPPLEMENTAL BRIEF OF APPELLANT
VALTECH COMMUNICATIONS LLC**

Charles H. Cooper, Jr. (0037295)
 Rex H. Elliott (0054054) (COUNSEL OF RECORD)
 John C. Camillus (0077435)
 Cooper & Elliott, LLC
 2175 Riverside Drive
 Columbus, Ohio 43221
 (614) 481-6000
 (614) 481-6001 (Facsimile)

Attorneys for Appellant
 ValTech Communications, LLC

Richard Cordray
 Attorney General of Ohio
 Duane W. Luckey (0023557) (COUNSEL OF RECORD)
 Assistant Attorney General
 Chief, Public Utilities Section
 The Public Utilities Commission of Ohio
 180 East Broad Street, 9th Floor
 (614) 728-9481
 (614) 644-8764 (Facsimile)

Counsel for Appellee
 Public Utilities Commission of Ohio

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT.....	3
I. This appeal, including the issue of whether the PUCO's process was consistent with federal requirements, is not preempted by federal law because ValTech is challenging whether the PUCO followed its own rules, not whether the PUCO rules generally comply with federal requirements.....	3
II. None of the issues in this appeal are appropriate for referral to the FCC under the doctrine of primary jurisdiction.....	5
III. While this Court should not refer any issues to the FCC, if it chooses to do so, it should stay the case pending the FCC ruling.....	8
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Business Edge Group, Inc. v. Champion Mortg. Co. Inc.</i> (3d Cir. 2008), 519 F.3d 150.....	6
<i>Clark v. Time Warner Cable</i> (9 th Cir. 2008), 523 F.3d 1110.....	8
<i>CSX Transp. Inc. v. Transportation-Comm. Int'l Union</i> (D.Md. 2006), 413 F.Supp.2d 553.....	8
<i>Danna v. Air France</i> (2d Cir. 1972), 463 F.3d 407.....	7
<i>Global Crossing Bandwidth, Inc. v. OLS, Inc.</i> (W.D.N.Y. 2009), No. 05-CV-6423L, 2009 WL 763483.....	6
<i>Gross Common Carrier v. Baxter Healthcare Corp.</i> (7 th Cir. 1995), 51 F.3d 703....	7
<i>In re Implementation of Subscriber Carrier Selection Changes Provisions of the Telecom. Act of 1996, First Order on Reconsideration, CC Docket No. 94-129, 15 F.C.C.R. 8158.</i>	1, 4
<i>Lipton v. MCI Worldcom, Inc.</i> (D.D.C. 2001), 135 F.Supp.2d 182.....	5
<i>National Comms. Ass'n. v. AT&T Co.</i> (2d Cir. 1995), 46 F.3d 220.....	7
<i>Red Lake Band of Chippewa Indians v. Barlow</i> (8 th Cir. 1988), 846 F.2d 474.....	5
<i>Schiller v. Tower Semiconductor, Ltd.</i> (2d Cir. 2006), 449 F.3d 286.....	5
<i>United States v. Western Pac. R. Co.</i> (1956), 352 U.S. 59.....	8
<i>United States ex rel. Taylor v. Gabelli</i> (S.D.N.Y. 2004), 345 F.Supp.2d 340.....	7

CONSTITUTIONAL PROVISIONS; STATUTES;
ADMINISTRATIVE REGULATIONS

	<u>Page</u>
Ohio Revised Code §4905.26.....	2, 3, 7, 9
Ohio Revised Code §4905.72.....	4
OAC 4901:1-5-07 (former).....	9
OAC 4901:1-5-08 (former).....	2, 3, 6, 9
Ohio Evidence Rule 615.....	2, 10
47 C.F.R. §64.1100.....	4
47 C.F.R. §64.1150.....	4, 6, 9

INTRODUCTION

On May 11, 2009, this Court ordered the parties to file briefs addressing three issues related to FCC jurisdiction. Those issues, and a summary of Appellant ValTech Communications, LLC's responses, are as follows:

- (1) **Is any aspect of this appeal preempted by federal law, in particular as a challenge to whether PUCO's process for resolving the complaint was consistent with federal requirements?**

No. This appeal is not preempted by federal law. Federal law permits consumers to file slamming complaints with state commissions or with the FCC, at the election of the consumer. *See In re Implementation of Subscriber Carrier Selection Changes Provisions of the Telecom. Act of 1996*, First Order on Reconsideration, CC Docket No. 94-129, 15 F.C.C.R. 8158, ¶¶27, 28. Thus, it was appropriate for the complaint to be filed with PUCO. On appeal, ValTech challenges not whether PUCO's rules comport with FCC requirements, but rather, whether the procedure followed in this case properly complied with PUCO's *own* rules. In the case of an alleged carrier change, FCC rules require the carrier to refer the subscriber to the PUCO. 47 C.F.R. 64.1150. Consistent with this rule, Ohio law requires carriers to follow the FCC rules for the resolution of complaints and permits a filing only if the complaint cannot be resolved through the PUCO's informal complaint resolution process. O.A.C. 4901:1-5-08(C) and (D). These rules were not followed by COI, which is why their complaint should have been dismissed.

Federal law preempts where a party is challenging whether the rules and regulations in place by the state entity comply with FCC requirements. Where, as here, the parties make no argument that the state entity's rules and regulations are inconsistent with FCC requirements, and only complain that those rules and regulations were not followed, federal law does not preempt, and FCC jurisdiction is not mandatory.

- (2) Under the doctrine of primary jurisdiction, what issues in this appeal, if any, would be appropriate to refer to the FCC? For any such issues, should the court so refer them?**

None of the issues in this appeal are appropriate for referral to the FCC under the doctrine of primary jurisdiction. None of the four factors in the flexible rule surrounding primary jurisdiction are present here. This is not a case in which the issues fall outside the expertise of the judiciary, it is not a case that presents issues particularly within the agency's discretion, there is no danger of inconsistent rulings, and no prior application to the agency has been made. In addition, the doctrine of primary jurisdiction is a discretionary one, and the parties can waive primary jurisdiction. By failing to raise the issue here, both parties have waived it.

- (3) If the court finds that any issue in this appeal is preempted or should be referred to the FCC under the doctrine of primary jurisdiction, what procedures should be followed by the court? What effect would such preemption or transfer have on this case and any related cases?**

While none of the issues in this appeal are preempted, and none should be referred to the FCC under the doctrine of primary jurisdiction, if this Court decides differently, and this Court refers any issues to the FCC, and the FCC agrees that COI failed to follow the appropriate pre-complaint referral rules, this Court will be required to adopt the FCC's position and dismiss COI's complaint. Even if, however, the FCC determines that PUCO properly implemented FCC rules, this Court will still be left to determine the issues over which the FCC has no jurisdiction, including, for instance, the question of whether the hearing examiner committed reversible error in failing to require the separation of witnesses pursuant to Rule 615. More importantly, regardless of the FCC decision, this Court will still have to answer the question of whether the informal complaint procedures set forth in former OAC 4901:1-5-08 are mandatory preconditions to the filing of a formal complaint with the PUCO pursuant to O.R.C.

4905.26. The answer is yes, of course, due to Ohio law which requires carriers to follow FCC rule requiring carriers to refer complaints to the state commission for resolution and requires an attempt at informal resolution before a complaint is filed. This provides an additional reason not to refer the matter to the FCC, as such a referral will cause an extraordinary delay to the litigants, and will fail to resolve all of the issues involved in ValTech's appeal.

ARGUMENT

I. **This Appeal, Including The Issue Of Whether The PUCO's Process Was Consistent With Federal Requirements, Is Not Preempted By Federal Law Because ValTech Is Challenging Whether The PUCO Followed Its Own Rules, Not Whether The PUCO Rules Generally Comply With Federal Requirements.**

ValTech's fundamental argument is that the procedures below failed to comply with former Ohio Administrative Code section 4901:1-5-08, which was in place at the relevant time for these proceedings. OAC 4901:1-5-08(D) stated, "Any subscriber or telecommunications provider **whose complaint cannot be resolved informally** may file a formal complaint under section 4905.26 of the Revised Code." (Emphasis added.) This, ValTech argues, constitutes a mandatory procedural requirement that, if not followed, precludes the filing of a complaint with the PUCO under §4905.26. Whether the Ohio Administrative Code provision in place at the time precludes a filing of a complaint with the Ohio PUCO pursuant to §4905.26 of the Ohio Revised Code is a question of Ohio law for this Court, not a question for the FCC.

ValTech does not argue that the procedures required by the PUCO fail to comply with FCC requirements. To the contrary, ValTech argues that the PUCO procedures require compliance with the FCC rules. Thus, ValTech is not arguing that the PUCO's process for handling slamming complaints is inconsistent with FCC requirements, but rather, that the PUCO's process was not properly followed *in this case*. That decision is one for this Court, not for the FCC.

In ValTech's view, the language cited by this Court in *In re Implementation of Subscriber Carrier Selection Changes Provisions of the Telecom. Act of 1996, supra*, demonstrates that there is no FCC preemption here. According to that FCC decision, a challenge to "whether a state commission's process for resolving complaints" is consistent with FCC requirements must be brought to the FCC. *Id.* at ¶37. This statement, phrased in the abstract, and, notably, in the plural, demonstrates that the FCC was stating that a challenge to whether the state's general procedure complies with the FCC regulations must be brought to the FCC -- not whether a state commission's decision violated an FCC-compliant procedure in a given case. This, of course, makes perfect sense, as the FCC is, and should be, the best arbiter of what its own regulations actually require, while a state commission has a built-in review process for correction of individualized errors.

Here, ValTech does not argue that the PUCO's general process for resolving slamming complaints somehow violates the FCC rules. ValTech argues, instead, that the PUCO's process properly incorporates the relevant FCC requirements, but the PUCO simply failed to follow its own rules in this instance. Ohio Revised Code §4905.72(B)(1) requires a public utility to obtain verified consent of a consumer to a change in service provider "in accordance with rules adopted by the ...commission pursuant to Division (D) of this section." Division (D) requires that rules so adopted "shall be consistent with the rules of the federal communications commission in 47 C.F.R. 64.1100 and 1150." Finally, 47 C.F.R. 64.1150 states that, when a carrier is informed by a subscriber of an unauthorized change, the carrier "shall direct the subscriber" to the state commission, and "shall also inform the subscriber that he or she may contact and seek resolution from the alleged unauthorized carrier." The federal and state regulations at issue are not in conflict with one another, but are consistent and complementary.

This Court is perfectly well suited to make a determination as to whether COI, as the carrier informed of the allegedly unauthorized change, complied with that requirement. This case does not call for any need to interpret the FCC rule. This is also not a case where the FCC would be asked to provide new guidance or formulate additional rules. Nor is it a matter of determining whether the procedures in place by the PUCO adequately protect the interests and rights that the FCC sought to secure in promulgating its regulations. Rather, the issue here is whether COI complied with the applicable procedural requirements *under state law*. ValTech submits that COI did not comply with these important procedural requirements and that COI's failure to follow these requirements led to years of unnecessary litigation. ValTech submits that COI's failure to comply with these important rules warrants dismissal of COI's complaint.

II. None Of The Issues In This Appeal Are Appropriate For Referral To The FCC Under The Doctrine Of Primary Jurisdiction.

The doctrine of primary jurisdiction counsels against referral of any issue in this appeal to the FCC. While there is no "fixed formula" for determining whether an agency has primary jurisdiction, generally, courts should consider four factors: (1) whether the question is within the conventional experience of judges or involves considerations within the agency's particular field of expertise; (2) whether the question is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *Schiller v. Tower Semiconductor, Ltd.* (2d Cir. 2006), 449 F.3d 286, 295. The doctrine of primary jurisdiction should be invoked only "sparingly, as it often results in added expense and delay." *Red Lake Band of Chippewa Indians v. Barlow* (8th Cir. 1988), 846 F.2d 474, 477. Primary jurisdiction "should seldom be invoked unless a factual question requires both expert consideration and uniformity of resolution." *Lipton v. MCI Worldcom, Inc.* (D.D.C. 2001), 135 F.Supp.2d 182, 191. In the present case, especially in light of the fact that applying primary jurisdiction should be the exception rather

than the rule, application of each of the four factors indicates that this Court should refrain from invoking the doctrine.

The issues in this case present no question that is outside the conventional experience of judges or involves considerations within the agency's particular field of expertise. This case presents virtually no issue that requires any meaningful degree of familiarity with anything that can reasonably be described as technical. The issues before the Court are legal issues, with which familiarity with the intricacies of how telecommunications carriers operate is of no particular import.

In the case of *Global Crossing Bandwidth, Inc. v. OLS, Inc.* (W.D.N.Y. 2009), No. 05-CV-6423L, 2009 WL 763483, a case which presented issues far more technical than the case at bar, the Court recognized that, while the case did present some technical questions, no issues were "so arcane, complex or esoteric that they would best be left to the agency to decide in the first instance." *Id.* at *5. Similarly, in *Business Edge Group, Inc. v. Champion Mortg. Co. Inc.* (3d Cir. 2008), 519 F.3d 150, 154, the Court of Appeals remanded the matter to the district court, rather than referring the case to the FCC, because the district court was fully capable of resolving the pertinent issues. The same is true here. There is nothing in this appeal that falls outside of this Court's competence.

Applying the second factor, this case presents no issue that is particularly within the FCC's discretion. Initially, this is because the FCC has already addressed the questions applicable to this case, by virtue of promulgating the regulation found in 47 C.F.R. 64.1150. More importantly, however, the basic issue with which this Court is concerned, as noted above, is a question of interpretation of a provision of the Ohio Administrative Code. Answering that question is outside the FCC's discretion. Indeed, if ValTech were required to proceed to the FCC to argue that COI failed to comply with former Ohio Administrative Code provision 4901:1-5-

08(D), and was therefore barred from pursuing an action before the PUCO under Ohio Revised Code §4905.26, it is virtually certain that the FCC would insist that it had no authority to interpret or apply Ohio's statutes and administrative regulations. The FCC would simply hold that the PUCO rules comply with FCC mandates, and send the case back to this Court for resolution of the state-law questions at issue.

On the third factor, there appears to be no danger of inconsistent rulings. For the reasons noted above, FCC intervention will not serve to prevent inconsistent rulings, when the issues at bar relate primarily, if not exclusively, to Ohio law. Furthermore, courts generally find that this factor weighs in favor of referral to the agency only where the agency is simultaneously contemplating the same issue. *See, e.g., Danna v. Air France* (2d Cir. 1972), 463 F.3d 407, 412 (finding that referral to agency was appropriate because agency was "currently considering an investigation into the lawfulness" of the practice at issue in the litigation). Here, there is no indication that the FCC is currently considering anything related to the lawfulness of the PUCO proceedings below.

As to the fourth factor, no party has made a prior application to the FCC. This is undisputed. Where a prior application to the agency has not been made, this factor disfavors referral. *See, e.g., National Comms. Ass'n. v. AT&T Co.* (2d Cir. 1995), 46 F.3d 220, 222; *United States ex rel. Taylor v. Gabelli* (S.D.N.Y. 2004), 345 F.Supp.2d 340, 357 (noting that the fact that there was no prior application to the FCC disfavors referral).

Finally, neither ValTech nor the PUCO raised or argued the issue of primary jurisdiction to this Court. Primary jurisdiction is, of course, different from subject matter jurisdiction in that it "does not, for instance, concern a court's power to hear a case in the first instance. Consequently, application of the doctrine of primary jurisdiction can be waived or forfeited by the parties." *Gross Common Carrier v. Baxter Healthcare Corp.* (7th Cir. 1995), 51

F.3d 703, 706; *see also CSX Transp. Inc. v. Transportation-Comm. Int'l Union* (D.Md. 2006), 413 F.Supp.2d 553, 564 ("the doctrine of primary jurisdiction, under which a court defers to an administrative agency for a particular finding, is waivable by simple failure to assert it"). As a result, in addition to the fact that referral to the FCC under the doctrine of primary jurisdiction is improper on the merits here, this Court should also deem the argument waived, and refuse to refer the case to the FCC on that basis as well.

Primary jurisdiction "is not designed to secure expert advice from agencies very time a court is presented with an issue conceivably within the agency's ambit." *Clark v. Time Warner Cable* (9th Cir. 2008), 523 F.3d 1110, 1114 (internal quotation omitted). This Court is more than competent to rule on the issue before it without the input of the FCC. The primary jurisdiction factors militate against referral to the FCC, and the parties have waived any argument as to primary jurisdiction. Accordingly, this Court should not refer the case to the FCC.

III. While This Court Should Not Refer Any Issues To The FCC, If It Chooses To Do So, It Should Stay The Case Pending The FCC Ruling.

For all of the above reasons, ValTech submits that referral to the FCC is entirely improper in the present case. Nevertheless, should this Court elect to refer the case to the FCC, it should stay the case pending the FCC's disposition of the matter. The U.S. Supreme Court has held that, where a court refers a matter to an agency for review, the judicial process is "suspended" while the agency renders its decision

Primary jurisdiction on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R. Co. (1956), 352 U.S. 59, 63-64.

A finding of preemption or an order of transfer to the FCC by this Court would result in either an outright victory for ValTech, or a massive delay in this Court's proceedings. Should the FCC find that the PUCO's pre-complaint procedures were inadequate, this Court would be bound by those findings and be required to reverse the Commission's decision. Thus, ValTech would prevail. If, however, the FCC determined that the PUCO procedure applied in this case did not violate any FCC regulations, the parties would be right back before this Court, arguing all of the same issues.

This Court would still be required to determine whether the informal complaint procedures set forth in former OAC 4901:1-5-08 are mandatory preconditions to the filing of a formal complaint with the PUCO pursuant to O.R.C. 4905.26. The FCC would only have jurisdiction to determine whether 47 C.F.R. 64.1150 was violated -- it would have neither the competence nor the jurisdiction to determine whether the Commission complied with former OAC 4901:1-5-08, or whether compliance with that regulation is mandatory before the filing of a complaint under O.R.C. 4905.26.

This Court would still have to decide whether slamming is a violation entirely distinct from fraudulent and deceptive sales practices, and whether evidence only of false and deceptive sales practices can support a finding of a slamming violation. ValTech has argued that the Commission's decision effectively melded violations of former Ohio Admin. Code 4901:1-5-07 and former 4901:1-5-08 into a single violation. This is a matter of Ohio law for this Court to determine. Any ruling made by the FCC regarding whether the consumers were properly referred to the PUCO and to ValTech for resolution would have no bearing on this legal issue.

This Court would still have to decide whether Ohio Rule of Evidence 615 applied to the hearing before the Attorney Examiners, and whether it was error for the Attorney Examiner to fail to require a separation of witnesses, upon ValTech's motion. This issue clearly falls within the sole province of this Court, and, even if the FCC finds that nothing in the proceedings before the Commission violated FCC rules, this Court would still need to determine whether the grave evidentiary error committed below requires reversal. Indeed, perhaps the most efficient and restrained manner to address this appeal overall would be to simply reverse the Commission's decision based on the Rule 615 violation. Such a ruling is clearly within the province of this Court, and does not require resolution of the jurisdictional questions at issue in this brief.

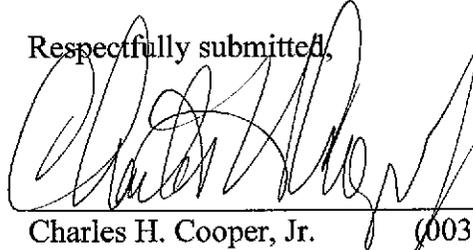
Finally, even after a hypothetical referral to the FCC in which the FCC approved of the procedure utilized in this case, this Court would still have to decide the questions of whether the Commission erred by applying the wrong burden of proof, and whether the Commission erred in holding that the evidence supported a finding of a pattern or practice of violations.

In short, there is no valid reason to refer any issue in this case to the FCC. There is no preemption because ValTech is fundamentally challenging COI's failure to comply with state law and not challenging the procedures the PUCO has in place. Furthermore, the doctrine of primary jurisdiction is the exception rather than the rule, is discretionary, and counsels against referral of any issues to the FCC. This Court should elect not to refer any issues to the FCC, and should rule on the merits of the case as it has been briefed and argued by the parties.

CONCLUSION

For all the foregoing reasons, this Court should not refer any issues to the FCC for resolution.

Respectfully submitted,



Charles H. Cooper, Jr. (0037295)

Rex H. Elliott (0054054)

John C. Camillus (0077435)

Cooper & Elliott, LLC

2175 Riverside Drive

Columbus, Ohio 43221

(614) 481-6000

(614) 481-6001 (Facsimile)

Attorneys for Appellant

ValTech Communications, Inc.

CERTIFICATE OF SERVICE

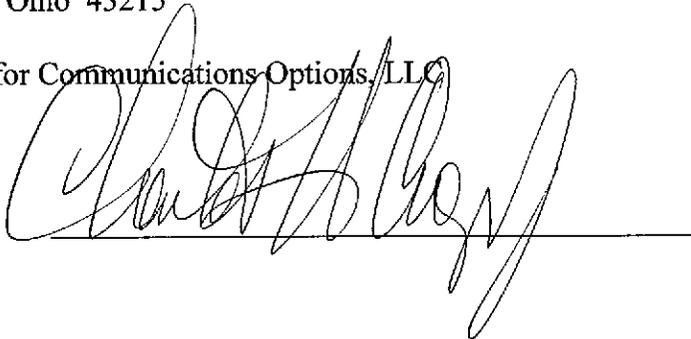
The undersigned hereby certifies that a copy of the foregoing Supplemental Brief of Appellant ValTech Communications, LLC was served on the following counsel of record, by ordinary U.S. mail, postage prepaid, this 10th day of June, 2009:

Richard Cordray, Esq.
Attorney General of Ohio
Duane W. Luckey, Esq.
Assistant Attorney General
Chief, Public Utilities Section
The Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Attorneys for Appellee
Public Utilities Commission of Ohio

Brian M. Zets, Esq.
Wiles, Boyle, Burkholder & Bringardner
300 Spruce Street
Floor One
Columbus, Ohio 43215

Attorneys for Communications Options, LLC

A handwritten signature in black ink, appearing to read "Brian M. Zets", is written over a horizontal line. The signature is cursive and somewhat stylized.