IN THE SUPREME COURT OF OHIO

ORIGINAL

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 REPLY 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

FILED
JUN 24 2009
CLERK OF COURT
SUPREME COURT OF OHIO

SUPPLEMENTAL REPLY BRIEF

The parties agree that federal law does not preempt any aspect of this appeal. COI, however, goes beyond the questions posed by this Court raising arguments that go to the merits of the dispute. ValTech addresses COI's supplemental memorandum as follows.

THERE IS NO DISPUTE REGARDING THE QUESTIONS PRESENTED BY THIS COURT FOR SUPPLEMENTAL BRIEFING

This Court appropriately questioned whether any aspect of this appeal is preempted by federal law due to the parties reference to certain rules promulgated by the FCC. More specifically, ValTech's Proposition of Law Number 1 contends that COI failed to follow FCC and Ohio rules which require a telecommunications provider to direct a subscriber to the PUCO for informal resolution of a slamming complaint prior to filing a complaint. ValTech argues that COI's complaint should have been dismissed at the outset due to COI's failure to follow these rules.

The FCC and Ohio rules are perfectly consistent. The FCC rule makes clear that a carrier such as COI must refer a subscriber to the PUCO when it learns of an unauthorized carrier change. 47 C.F.R. 1150(b). Switching a subscriber without authorization is commonly referred to as "slamming." This FCC rule, using the word "shall," is mandatory. Ohio Administrative Code Sections 4901:1-5-08(C) and (D) similarly make clear that a telecommunications provider such as COI "shall" follow the informal complaint procedures prescribed <u>by the FCC</u> for unauthorized carrier changes and that a complaint may be filed by the carrier only if the informal complaint procedures have failed.

ValTech is not challenging any of these rules. To the contrary, ValTech maintains that COI's complaint must be dismissed because COI did not follow these clearly defined procedural rules. Indeed, there is <u>no</u> dispute that COI did <u>not</u> direct the subscriber to the

PUCO for resolution of any complaint regarding an unauthorized change in carriers. Rather, COI simply proceeded with the filing of a formal Complaint.

This case is critically important so carriers like COI will not be encouraged to file complaints against competitors without following the procedure for resolving complaints prescribed by both federal and state law. Any such complaints can be addressed by the PUCO, the subscriber and the allegedly offending carrier before the matter deteriorates into years of costly and potentially needless litigation. COI failed to follow the prerequisites to filing a complaint with the PUCO. As a result, COI's Complaint must be dismissed.

COI'S MISCELLANEOUS ARGUMENTS

COI spends much of its brief arguing that Section 4901:1-5-08 of the Ohio Administrative Code "has no application to a complaint brought by a *carrier*." COI's position is not true and, in fact, is contrary to the express language of the rule:

> (C) Any **telecommunications provider** that is informed by a subscriber or the commission of an unauthorized provider change shall follow the informal complaint procedures and remedies prescribed by the federal communication commission for the resolution of informal complaints of unauthorized changes of telecommunications providers.
>
> (D) Any subscriber **or telecommunications provider** whose complaint cannot be resolved informally may file a formal complaint under section 4905.26 of the Revised Code, regarding any violation of section 4905.72 of the Revised Code, or of this rule. If the commission finds, after notice and hearing, that a telecommunications provider has violated section 4905.72 of the Revised Code or this rule, the telecommunications provider shall be subject to the remedies provided for in section 4905.73 of the Revised Code.

O.A.C. §4901:1-5-08(C)(D). It is inconceivable why COI would represent to this Court that the rule applies only to a subscriber when its own express terms require any telecommunications provider to follow the FCC rules and direct subscribers to the PUCO for informal resolution of the complaint before a formal complaint is filed.

COI also argues that the PUCO has the authority to address allegations of "slamming." ValTech, however, has never contended the PUCO could not address allegations of slamming. Rather, ValTech contends that COI did not follow the mandatory procedures required by FCC and Ohio rules before a complaint can be filed. Had the subscribers been directed to the PUCO, and had the informal complaint resolution process failed, then and only then would COI be authorized to file a complaint.

Finally, COI contends that the FCC defers to the state for resolution of slamming complaints. ValTech does not dispute this argument either. COI's argument, however, misses the point. ValTech admits the PUCO has jurisdiction to resolve a complaint provided it complies with FCC Rule 64-1150(b) and OAC Sections 4901:1-5-08(C) and (D). By refusing to send subscribers to the PUCO to resolve any allegation of an unauthorized change or slamming, COI failed to follow these rules. If companies like COI are allowed to bypass these rules and simply file complaints, the PUCO will become a new battleground for competitors, and this Court will be inundated with appeals from the fallout of those battles. The purpose of the rules is to resolve disputes at an early stage and to avoid costly and time-consuming litigation before the PUCO. COI's failure to follow these rules jeopardizes each of these important objectives.

The Court will recall that COI, a carrier and competitor, is the Complainant. Not a single subscriber filed a Complaint nor did a single subscriber ever contact the PUCO. Had COI referred these five subscribers to the PUCO for resolution of any complaint regarding whether they authorized the change in carriers, this dispute could have been resolved five years ago.

CONCLUSION

The parties agree that no issues are preempted. If this Court disagrees and refers any issues to the FCC for adjudication, ValTech submits that this matter should be stayed pending a final resolution of any such issues before the FCC and this Court.

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)

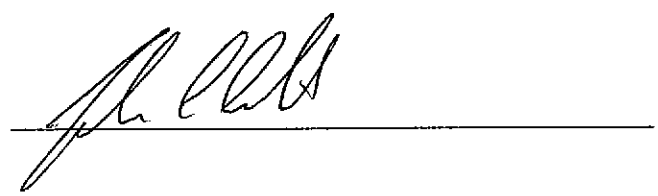
Attorneys for Appellant
ValTech Communications, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Supplemental Reply Brief of Appellant ValTech Communications, LLC was served on the following counsel of record, by ordinary U.S. mail, postage prepaid, this 24th 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