

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CAMBRIDGE TELEPHONE COMPANY)	No. 05-0259
)	
C-R TELEPHONE COMPANY)	No. 05-0260
)	
EL PASO TELEPHONE COMPANY)	No. 05-0261
)	
GENESEO TELEPHONE COMPANY)	No. 05-0262
)	
HENRY COUNTY TELEPHONE COMPANY)	No. 05-0263
)	
MID CENTURY TELEPHONE COOPERATIVE)	No. 05-0264
)	
REYNOLDS TELEPHONE COMPANY)	No. 05-0265
)	
Petition for Declaratory Relief and/or)	
Suspension or Modification Relating To Certain)	
Duties Under Sections 251(b) and (c) of the Federal)	
Telecommunications Act, pursuant to Section)	
251(f)(2) of that Act; and for other necessary or)	
Appropriate relief.)	
)	
METAMORA TELEPHONE COMPANY)	No. 05-0270
)	
MARSEILLES TELEPHONE COMPANY)	No. 05-0277
)	
Petition pursuant to Section 251(f)(2) of the)	
federal Telecommunications Act of 1996)	
for Suspension or Modification Relating To Certain)	
Duties arising Under Sections 251(b) and (c) of)	
the Federal Act, or in the alternative for a)	
declaration that no such duties exist under)	
the subject conditions; for entry of an)	
Interim Order; and for other necessary and)	
appropriate relief.)	

ILLINOIS COMMERCE COMMISSION STAFF'S
RESPONSE TO THE EMERGENCY MOTION OF THE VIOLA HOME
TELEPHONE COMPANY, METAMORA TELEPHONE COMPANY,
HARRISONVILLE TELEPHONE COMPANY, AND MARSEILLES TELEPHONE
COMPANY FOR LEAVE TO CITE ADDITIONAL AUTHORITY

NOW COMES the Staff of the Illinois Commerce Commission (hereafter “the Staff”) and, in response to the Emergency Motion for Leave to Cite Additional Authority of the Viola Home Telephone Company, Metamora Telephone Company, Harrisonville Telephone Company, and the Marseilles Telephone Company, states as follows:

1. On June 28, 2005, the Viola Home Telephone Company, Metamora Telephone Company, Harrisonville Telephone Company, and the Marseilles Telephone Company (hereafter “Joint Movants”) jointly filed their Emergency Motion for Leave to Cite Additional Authority. *See, generally, Motion*. Specifically, the Joint Movants seek leave to cite as additional authority for adoption of the *Proposed Order* the U.S. Supreme Court’s June 27, 2005 decision in National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al. , 535 U.S. ---, 2005 U.S. Lexis 5018 (2005) (hereafter “Brand X decision”). *Motion, generally*.

2. The Joint Movants assert that the *Brand X* decision stands for the proposition that cable modem service is not a “telecommunications service” within the meaning of Section 153(44) of the federal Telecommunications Act of 1996, 47 U.S.C. §153(44), but rather an “information service” within the meaning of Section 153(20) of the same Act, 47 U.S.C. §153(44). *See, e.g., Motion, ¶¶2-5, 14*. The Joint Movants contend that this holding should be read to include

Voice over Internet Protocol service (hereafter “VoIP service”), which they assert that Sprint intends to provide here.¹ *Id.*, ¶13.

3. In fact, in its *Brand X* decision, the Supreme Court merely upheld, as a permissible construction of the Act, a Federal Communications Commission (hereafter “FCC”) decision determining that cable modem service is an “information service” within the meaning of Section 153(20). *Brand X*, 535 U.S. at --; 2005 U.S. Lexis at 37; slip. op. at 14-15. This is significant in light of the fact that the FCC has specifically not spoken to the question of whether VoIP is a telecommunications service or an information service.

4. In its recent *Vonage Preemption Order*, the FCC preempted a state requirement that a VoIP service comply with certain state 9-1-1 requirements. *Memorandum Opinion and Order*, ¶41, In the Matter of Vonage Holdings Corporation: Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, FCC No. 04-267, WC Docket No. 03-211 (released November 12, 2004). In so holding, however, the FCC declined to decide the question of whether the VoIP service in question was a telecommunications service or an information service, determining that it had the authority to preempt the relevant state requirements in either case. *Id.*, ¶¶20-22; see also Statement of Commissioner Kathleen Q. Abernathy (Commissioner Abernathy considers a defect ion the decision to be the fact that the FCC “should

¹ In support of this contention, the Joint Movants cite, and attach to their Motion, a copy of a diagram distributed by Sprint on June 9, 2003 at oral argument in this proceeding. As the Staff made clear at the time, the use of this diagram at oral argument was improper, as it had not been circulated to the parties 48 hours prior to oral argument, in violation of Rule 200.850 of the Rules of Practice before the Illinois Commerce Commission. Tr. at 25. It was certainly not marked as an exhibit. Tr. at 6. Accordingly, it should not be considered.

[but does not] provide a thorough and careful analysis of whether IP-enabled services are information services or telecommunications services, given the potentially far-reaching implications of that classification”). Further, the FCC stated that:

We emphasize that while we have decided the jurisdictional question for Vonage’s DigitalVoice here, we have yet to determine final rules for the variety of issues discussed in the *IP-Enabled Services Proceeding*. While we intend to address the 911 issue as soon as possible, perhaps even separately, we anticipate addressing other critical issues a[associated with the provision of VoIP service] such as universal service, **intercarrier compensation, section 251 rights and obligations, [fn] numbering**, disability access, and consumer protection in that proceeding. [fn]

Id., ¶44 (emphasis added)

5. Likewise, in its *VoIP 9-1-1 Order*, issued earlier this month, the FCC specifically found that: “[b]ecause we have not decided whether interconnected VoIP services are telecommunications services or information services, we analyze the issues addressed in this Order primarily under our Title I ancillary jurisdiction to encompass both types of service.” *First Report and Order and Notice of Proposed Rulemaking*, ¶22, In the Matters of IP-Enabled Services / E911 Requirements for IP-Enabled Service Providers, FCC No. 05-116; WC Docket Nos. 04-36, 05-196 (released June 3, 2005) (emphasis added).

6. In other words, the *Brand X* decision cannot be read to support the conclusion that VoIP service is not a telecommunications service. It merely upholds the validity of an FCC decision that, according to the FCC, does not speak to that question.

7. Indeed, the FCC has, on at least one occasion, found that a form of IP telephony is indeed a telecommunications service. Order, ¶18, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, FCC No. 04-97, WC Docket No. 02-361 (released April 21, 2004).

8. Accordingly, the Staff sees no reason to cite the *Brand X* decision. The Staff recommends that the *Proposed Order* be adopted without the amendment requested by Joint Movants.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully Submitted,

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