Decision No. C23-0545

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22D-0293T

IN THE MATTER OF THE VERIFIED PETITION OF TRIAL STAFF OF THE COMMISSION FOR A DECLARATORY ORDER REGARDING THE APPLICABILITY OF C.R.S. § 17-42-103 AND CONSTRUING THE DEFINITION OF THE TERM "PENAL COMMUNICATION SERVICES".

COMMISSION DECISION DENYING EXCEPTIONS

Mailed Date: August 17, 2023
Adopted Date: August 2, 2023

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I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission denies exceptions filed on June 12, 2023 (Exceptions), by HomeWAV LLC (HomeWAV), consistent with the discussion below, and affirms Decision No. R23-0337 (Recommended Decision) issued May 23, 2023, by the assigned

Administrative Law Judge (ALJ) granting the Petition for Declaratory Order (Petition) filed by Trial Staff of the Commission (Trial Staff) on June 22, 2022.

B. Background

2. On June 22, 2022, Trial Staff filed its Petition seeking a declaratory order pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1304(f) of the Commission's Rules of Practice and Procedure. Under recently-enacted House Bill (HB) 21-1201, the Commission is charged with implementing reporting requirements concerning certain communications services provided to inmates. These requirements are codified in § 17-42-103(3), C.R.S.

3. Trial Staff requested the Commission find that the requirements of § 17-42-103, C.R.S. apply to Voice over Internet Protocol (VoIP) service providers; define how the term "penal communication services" in the same statute should be construed; and declare that HomeWAV is subject to the statute.

4. Section 17-42-103(3), C.R.S. requires that "[e]ach penal communications service provider" maintain records and data listed in statute for each correctional facility to which it provides penal communications services. Service providers are required to provide the required records and data in a report to the PUC quarterly. Under subsection (4) the PUC is required to publish the information on its website.

5. The facts in this case are not disputed. HomeWAV provides an inmate communication platform that enables inmates to communicate with friends and family via HomeWAV's application and hardware. The platform allows inmates to place voice calls using non-interconnected VoIP, video calls, and send e-messages using HomeWAV's app, and provides

service to a number of correctional facilities in Colorado.[1] HomeWAV's voice is registered as a non-interconnected VoIP service under the Federal Communications Commission's rules.

6. Trial Staff argues that "penal communication services" is expansive and general under the statute, arguing that the statutory language is inclusive of VoIP providers such as HomeWAV plainly providing "communications services" for transmitting or exchanging information. Citing both the plain language and supporting legislative history of HB 21-1201, Staff argues that reporting requirements in § 17-42-103(3)(a)(IX), C.R.S. for providers to report the number of consumer complaints "related to video quality" applies broadly, and not just to telephone communications.

7. Following briefing,[2] through her Recommended Decision, the assigned ALJ granted the petition and rejected HomeWAV's arguments, including that federal law preempts the reporting requirements in § 17-42-103, C.R.S.

8. HomeWAV filed exceptions as permitted by § 40-6-114, C.R.S. and Rule 1505, 4 CCR 723-1, arguing that the ALJ erred (1) in failing to find federal preemption and, specifically, in her interpretation of the *Vonage Order*;[3] (2) in the interpretation of various laws and legal standards regarding public utilities law, and in particular application of the recent Colorado Supreme Court case.[4]

[1] *See* Recommended Decision at ¶ 10-19 (providing factual findings that are undisputed in exceptions).

[2] Recommended Decision at ¶¶ 2-9.

[3] *The Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404 (2004) (Vonage Order or 2004 Vonage Order), *aff'd sub nom. Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[4] *Danks v. Colo. Pub. Util. Comm'n.*, 512 P.3d 692 (Colo. 2022) (*Danks*).

9. Trial Staff filed timely response arguing that HomeWAV's claims are meritless, as explained by the ALJ in her Recommended Decision. Trial Staff requests that the Commission reject HomeWAV's arguments and affirm the ALJ's Recommended Decision.

C. Exceptions Discussion and Findings

10. As discussed in detail below, Federal law does not preempt the limited reporting requirements required in Title 17. Reporting requirements applicable to only certain types of carriers would lead to absurd results and incomplete data. Federal regulation of internet protocol services does not conflict with mere reporting requirements, and case law supports state reporting requirements in similar situations. The ALJ's decision provides sound legal analysis and conclusions regarding applicability of Title 17. HomeWAV's arguments are unconvincing. As discussed below, HomeWAV's Exceptions are denied, and the Recommended Decision is upheld.

1. Federal Preemption Argument Discussion

11. Federal law may preempt state law where a federal statute has an express preemption provision, and where federal law impliedly preempts state law.[5] The ALJ properly notes that implied preemption includes circumstances where federal law so thoroughly occupies a field that there is a reasonable inference that Congress left no room for states to supplement regulation (field preemption);[6] and where state law directly conflicts with federal law such that it is impossible to comply with both federal and state requirements or where the state law stands as an obstacle to executing and accomplishing Congress' full objectives (conflict preemption).[7] As

[5] *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

[6] *Fid. Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[7] *See* Recommended Decision at ¶ 66 (string cite omitted, noting that categories for preemption are not rigidly distinct).

an affirmative defense, HomeWAV bears the burden to establish federal preemption,[8] either through showing impossibility of complying with both state and federal law, or actual conflict.

12. The ALJ iterates telecommunications federal regulation and history.[9] Parties do not dispute that HomeWAV provides certain "information services" through video calling and e-messaging services. The ALJ explains that the FCC lightly regulates information services and does not expressly or impliedly preempt state regulation. The decision goes on to state that HomeWAV fails to recognize important recent orders in *ACA Connects-America's Communication Association v. Bonta* and *Mozilla v. FCC.*[10] As pointed out by Trial Staff in its response, the Exceptions make no citation or argument regarding the ALJ's findings of the information services provided. The ALJ's reasoning and findings to these points are sound and – making no arguments here – HomeWAV fails to meet any burden to overturn her findings that there is no federal preemption with regard to information services provided as part of a company's penal communications services.

13. The ALJ next analyzes HomeWAV's Voice over Internet Protocol (VoIP) services, which is the focus of HomeWAV's first argument in exceptions. Noting federal regulations applicable to VoIP, the ALJ finds no federal regulation that expressly or implicitly regulate VoIP such that the state law here – providing limited reporting and maintaining rates consistent with federal standards – is in conflict.

14. Through its Exceptions and before the ALJ, HomeWAV rested its arguments on the FCC's 2004 Vonage Order. The ALJ analyzes the Vonage Order and subsequent rulings in

[8] *See Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133-34 (10th Cir. 2007) (Citations omitted).

[9] Recommended Decision at ¶¶ 70-74.

[10] *ACA Connects-Am.'s Commc'n Ass'n v. Bonta*, 24 F.4th 1233 (9th Cir. 2022) (*ACA Connects*); *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (*Mozilla*)

her Recommended Decision at length. In Vonage, the FCC noted the impossibility of tracking jurisdictional confines of "nomadic" VoIP (calls that could be placed from anywhere). As iterated in the ALJ's decision, on appeal, the Courts recognized a difference between "fixed" VoIP that originated from a set location and nomadic VoIP, and determined that the Vonage Order did not apply to fixed VoIP. The ALJ points out that as technology evolved, the Court rulings did as well. By 2011, the FCC declined to preempt all state regulation over VoIP-originating traffic, allowing for certain VoIP traffic to be tariffed both on state and federal levels.

15. The ALJ concludes that HomeWAV failed in this case to establish that its services fit within the 2004 Vonage Order confines. For one, she notes that the services appear "fixed" since they originate from a set location – the Vonage Order does not apply to fixed VoIP. Setting the fixed consideration aside, the ALJ determined that HomeWAV also failed to establish that it cannot distinguish between intrastate and interstate traffic. Further still, she notes that the Vonage Order preempts state efforts that are *dramatically different* from the regulations here.[11] Vonage addressed tariffed offerings and market entry requirements – here, where the regulations primarily require information and simply align intrastate rates with Federal thresholds, HomeWAV makes no argument for why Vonage should apply at all in these circumstances.

16. HomeWAV argues on Exceptions that this analysis is in error – primarily claiming that its services "clearly constitute nomadic VoIP services." HomeWAV then claims that none of the cases cited overturn the Vonage Order, and summarily that because the Vonage Order remains good law, it "requires that C.R.S. § 17-42-103(3) be preempted as to HomeWAV's services."

[11] Recommended Decision at ¶ 91.

17. Trial Staff responds and notes that HomeWAV's exceptions wholly ignore the ALJ's full analysis. Namely, the ALJ concluded that *regardless* of whether the services were fixed or nomadic, HomeWAV fails to demonstrate how the Vonage Order entirely preempts a reporting requirement and intrastate cap in line with Federal amounts. Staff further points out that the primary case cited by HomeWAV in Exceptions, *Free World Dialup*,[12] is inapplicable. *Free World Dialup* excludes service from "telecommunications service" if it is at no charge as an application, thereby preempting contrary state regulation. As Trial Staff points out, HomeWAV is not free to a captive population; permits calling to any 10-digit number and is "VoIP" service unlike the services provided in *Free World Dialup*; and is not simply an application service *Free World Dialup*'s deregulatory policies aimed to encourage. Further still, *Free World Dialup* preempted contrary state regulation. Here, again, HomeWAV makes no showing that the limited reporting regulations and confirming consistency with Federal pricing are inconsistent, incompatible, or otherwise impossible to comply with in relation to Federal regulations.

18. We agree with Trial Staff. Regardless of whether HomeWAV is a fixed or nomadic VoIP service provider, the Vonage Order preempts state efforts to impose regulations that are dramatically different from those at issue here – *i.e.*, regulations that would compel a tariffed offering, market entry requirements, or other traditional telephony regulations. Section 17-42-103, C.R.S., does not impose any such obligations. Colorado state law here primarily creates reporting obligations.[13] In the only area addressing rates, the statute simply incorporates and applies the FCC's rate caps to intrastate communications.[14]

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[12] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307,3313 (2004) ("in order to be a telecommunications service, the service provider must assess a fee for its service.") (Free World Dialup).

[13] *See* § 17-42-103(3)(a), C.R.S.

[14] *See* § 17-42-103(5)(a), C.R.S.

19. The ALJ correctly concludes that HomeWAV failed to meet its burden that the regulations *here* are in any way preempted by federal law. The arguments on Exceptions that reiterate partial arguments made before the ALJ are similarly uncompelling.

2. Statutory Authority Argument Discussion

20. HomeWAV next makes two brief arguments that the ALJ further erred in her analysis. First, Exceptions claim that the Recommended Decision reads "legislative silence" as a grant of authority, claiming that Title 17 must explicitly call out "VoIP" or other IP enabled services. This argument belies the plain language of the statute.

21. While Title 40 makes explicit that VoIP and IP enabled services are exempt from rate and related utility regulation – consistent with potential conflicts in federal law – Title 17 makes no technology differentiation in any "penal communications services." "[C]ommunications services" in Title 17 regarding reporting requirements and consistency with federal rate caps is technologically neutral. This plain language can be read in harmony with exceptions from Title 40 regulation for certain technology types regarding rate, quality of service, and related regulations delineated in § 40-15-101, C.R.S., et seq. and reclassifications of state telecommunications market regulation, which was limited in recent years concurrent with federal regulations and classification clarification regarding corresponding market and rate regulations. Consistency in specific reporting for all providers, regardless of technology used, does not conflict with Title 40 market regulation limitations and avoids reading words into the statute that would exclude VoIP where no such language exists in Title 17.

22. HomeWAV's final argument is also unsupported and inconsistent with law. Without citation, HomeWAV states that the Colorado Constitution permits the legislature to "delegate authority to the PUC only over 'public utilities.'" HomeWAV argues that the ALJ's

reading of *Danks* and other case law gives the PUC "potentially unbounded powers." Not so. While the Commission has broad regulatory authority over public utilities, grounded both in the state Constitution and statute, the legislature can – and does – delegate authority to the Commission over non-utility entities.

23. The Colorado Supreme Court's determination in *Danks* was specific to certificate of public convenience and necessity (CPCN) requirements as applicable to specific gas gathering systems that are classified as public utilities. While the Court found that the Commission in that instance rightly did not impose public utility CPCN requirements on a portion of the gas gathering system that did not constitute a public utility, the Commission also made clear that – even if it was not a public utility – it continued to have safety oversight of gas gathering systems generally through regulation delegated by the state legislature in § 40-2-115, C.R.S.

24. Accepting HomeWAV's arguments would be a major change, contrary to decades of legislative action. The state legislature frequently codifies regulatory duties and requirements to the Commission for entities not classified as "public utilities" in addition to providing regulatory directives for the Commission to undertake outside of Title 40.[15]

25. As Trial Staff points out in its reply, HomeWAV's reading of *Danks* - that the Commission can *only* regulate public utilities - would strip the Commission of regulatory authority in a number of areas where the legislature has lawfully delegated authority to the Commission. The ALJ rightly rejected these arguments that would lead to absurd results. We therefore reject HomeWAV's remaining arguments in Exceptions.

[15] For example, Titles 6, 17, and 27 set out state telecom programs with Commission oversight; air quality standards in Title 25 underlie utility applications to bring on new renewable energy; local government provisions in Title 29 give the Commission an express role in siting utility facilities; county government provisions in Title 30 address certain exception language relevant to Commission regulation; and Title 42 sets out vehicle standards the Commission uses in regulating transportation providers.

3. Conclusion

26. The ALJ's reasoning in her Recommended Decision is sound. On Exceptions, HomeWAV fails to meet its burden to show federal preemption exits. Further still, and contrary to HomeWAV's assertions, the ALJ's reading of *Danks* does not provide the Commission unbounded authority. The primary obligation imposed under § 17-42-103, C.R.S., on penal communications service providers is quarterly reporting. As Staff points out, reporting obligations are proven and helpful in gathering information to narrowly tailor laws and policy to avoid overreach.[16]

27. Title 17 provides legislative direction to have minimum information regarding services provided to vulnerable inmate populations. To exclude VoIP or any provider of inmate communication services from reporting based on technology will severely limit the state's interest in transparency.

28. HomeWAV provides no precedent or persuasive argument to revise the ALJ's order. We deny HomeWAV's exceptions and uphold the Recommended Decision.

II. ORDER

A. It Is Ordered That:

1. Exceptions to Decision No. R23-0337 filed on June 12, 2023, by HomeWAV, LLC, are denied, consistent with the discussion above.

[16] Staff response at 11 (citing THE PEW CHARITABLE TRUSTS, How States Use Data to Inform Decisions (Feb. 2018), available at http://www.pewtrusts.org/en/research-and-analysis/reports/2018/02/how-states-use-data-toinform-decisions) (noting that one of five key actions state leaders could take to maximize data is to "[u]tilize analytical techniques to extract information from data; visualize and disseminate data in the form of charts, dashboards, and reports; use findings to inform, guide, or alter decisions.")

2. The 20-day time period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

3. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING August 2, 2023.

(S E A L)

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

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Commissioners

ATTEST: A TRUE COPY

Rebecca E. White,
Director