

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Staff of the Public Service Commission of the State)	
of Missouri,)	
Complainant,)	
)	
v.)	Case No. TC-2007-0111
)	
Comcast IP Phone, LLC,)	
)	
Respondent.)	

INITIAL POST-HEARING BRIEF OF COMCAST IP PHONE, LLC

Comes now Comcast IP Phone, LLC, (Comcast) by its undersigned attorneys, and for its post-hearing brief in the captioned proceeding, states the following:

I. INTRODUCTION

This case is about timing and regulatory certainty. The Federal Communications Commission (FCC) opened a proceeding in 2004 to determine whether voice over internet protocol (VoIP) services should be regulated and, if so, to what extent and by whose authority. *See In the matter of IP-Enabled Services* WC Docket No. 04-36, Notice of Proposed Rulemaking FCC 04-28, 2004 WL 439260, 10 F.C.C.R. 4863 (FCC March 10, 2004) (the “*IP-Enabled Proceeding*”). The FCC has issued several VoIP-related orders since opening that docket, but it has never authorized any state to impose certification or tariff regulation as sought in Staff’s Complaint.

It is not surprising that the FCC has yet to classify VoIP service, as it is prudent to allow services and technologies to develop before finally determining regulatory classification, particularly when a potential classification as a “telecommunications service” would prematurely burden a service with comprehensive and inappropriate regulatory obligations. (Choroser Rebuttal, Ex. 3, p. 12).

Here, the Staff ignored the FCC's deliberate regulatory review of VoIP services by filing its Complaint against Comcast for alleged violations of Missouri statutes regarding certification and tariff requirements. The FCC, not this Commission, has jurisdiction to determine whether, to what extent, and under whose authority VoIP services such as Comcast Digital Voice (CDV) may be subject to regulation. Staff's Complaint is premature because until the FCC resolves these issues, this Commission lacks jurisdiction to categorize CDV as telecommunications and, as a result, regulate Comcast.¹ No other state, even states that have statutes similar to Missouri, is attempting to regulate CDV.

Furthermore, if this Commission were to grant Staff's Complaint and find that CDV is a telecommunications service, the Commission would be ignoring its own precedent and the decision of a Missouri federal court, both of which found that internet protocol-originated traffic that is transmitted to the PSTN or public switched telephone network (IP-PSTN) is an information service and not a telecommunications service. CDV is indisputably an IP-PSTN service, the prior Commissions and federal court orders are clear, and the Commission therefore cannot grant Staff's Complaint that CDV is a telecommunications service.²

Moreover, CDV is not a traditional telephone service. The significant technical distinctions discussed below, the complete lack of urgency for action (no public harm has been evidenced by CDV offerings and subscribership), and the prior Commission and federal court rulings that IP to PSTN traffic is not telecommunications, should cause the Commission to refuse

¹ Comcast notes that even if the Commission believes it has the authority to exercise jurisdiction over VoIP services, it may defer a decision on Staff's Complaint until the FCC makes a final classification decision. See *Birch Telecom of Missouri Arbitration*, Case No. TO-98-278 (April 23, 1998), where the Commission deferred a determination of whether the traffic to an ISP constitutes local traffic until the issue of compensation was resolved by the FCC.

² Comcast does not advocate that CDV is an information service, but that based on current law and ongoing FCC decision making, the Commission cannot grant Staff's Complaint that CDV is a telecommunications service. (Choroser Rebuttal Ex. 3, p. 13)

to exercise jurisdiction until the FCC has *conclusively* determined whether, and to what extent, the states may play a role in regulating CDV.

II. CDV IS NOT TRADITIONAL TELEPHONE SERVICE

The facts demonstrate that Comcast's CDV service does not share the technical characteristics of a traditional telephone service. Its reliance on a proprietary private-managed Internet Protocol (IP) network distinguishes it from traditional PSTN services. In addition, voice traffic carried over CDV to or from an incumbent LEC or a CLEC undergoes a net protocol change, an important characteristic of an *information* service and not a characteristic of a telecommunications service.

As described on pp. 3-4 of Comcast witness Beth Choroser's rebuttal testimony (Ex. 3), Comcast provides interconnected VoIP service over a private-managed IP network. A CDV customer is provided with customer premises equipment called an embedded multimedia terminal adapter (eMTA). The eMTA includes a jack, into which the customer plugs a phone or in-house wiring. The eMTA contains a cable modem for use in accessing the Internet, as well as a device that converts phone signaling and voice into IP packets. These IP packets, whether they carry data or voice, travel over the same coaxial cable which runs from a customer's home to the Comcast head end. All of the packets are sent to the same cable modem termination system (CMTS). The voice packets are then sent to a call management server, sometimes referred to as a soft switch, which functions like a router on the Internet. From the call management server, voice calls can be routed in a variety of ways, depending upon their destination. If a call is destined for an ILEC subscriber, the IP packets must be converted through a net protocol change to TDM signals so that they can be sent to the PSTN. (Choroser Rebuttal, Ex. 3, pp. 3-4).

CDV differs from traditional voice service in many other ways. Comcast is able to offer its data, video and voice services all over the same cabling. This converged network permits

Comcast to take advantage of, and pass along to its customers, efficiencies in billing, installation and customer service. The convergence also allows Comcast to deploy enhanced features, which integrate its data, video and voice services. (Choroser Rebuttal, Ex. 3, p. 10, l. 17-23).

Comcast will soon launch its “smart zone” communications center. This is a fully integrated, web-based communications center that allows customers to go to one central location to receive email, check voicemail online, send instant messages, and manage a new smart address book that updates contacts on emails, cell phones, personal digital assistants, and digital phones. (Choroser Rebuttal, Ex. 3, p. 11, l. 3-10). Other innovations will allow Comcast’s network to enable an enhanced cordless phone for use in conjunction with CDV. Such a phone will permit on screen access to emails, voicemail, instant messaging, address books, and Internet-based phone directories. (*Id.* at l. 13-17).

Perhaps of greatest import is the fact that the provision of CDV involves a net protocol conversion, which takes place when a call is converted from IP format to TDM format so that it can be sent to an end user on the PSTN. (*Id.* at l. 19-21). This conversion “transforms” information. Net protocol conversion is a key indicator of whether a service is an information service.³

Comcast’s CDV bears little resemblance to traditional telephone service in several material aspects. The significant technical distinctions discussed above and the prior Commission and federal court rulings that IP to PSTN traffic is not telecommunications should cause the Commission to refuse to exercise jurisdiction until the FCC has *conclusively* determined whether, and to what extent, the states may play a role in regulating CDV.

³ Comcast does not advocate that CDV is an information service, but that based on current law and ongoing FCC decision making, the Commission cannot grant Staff’s Complaint that CDV is a telecommunications service. (Choroser Rebuttal Ex. 3, p. 13)

III. THE COMMISSION IS PREEMPTED FROM REGULATING CDV DUE TO A COMPREHENSIVE FEDERAL EFFORT TO REGULATE VOIP AND THE PENDENCY OF RELEVANT PROCEEDINGS AT THE FCC

It is well established that the FCC determines regulatory classifications under federal law and the result of such FCC action may not subject CDV to state regulation. The Staff has nonetheless ignored this fact and pursued a Complaint that is premised on its belief that Comcast is a telecommunications company as defined in section 386.020(51), RSMo.⁴ Under section 392.410.2 a telecommunications company must obtain a certificate of service authority before it may offer service in Missouri. However, in order to be a telecommunications company under Missouri statutes a company must be providing telecommunication service. Section 386.020(52) defines “telecommunication service” as the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. This definition encompasses services which are clearly outside the jurisdiction of the Commission, such as Internet access services. Internet access services transmit information by the media listed in the definition, but they have been classified as an information service by the FCC. (Choroser Rebuttal, Ex. 3, p. 8). Comcast’s CDV is a VoIP service, and the FCC has already held that certain VoIP services are information services, but they have not found that any VoIP service is a telecommunications service. Staff has likewise failed to demonstrate that CDV is a telecommunications service and, hence, that Comcast is a telecommunications provider.

Consequently, Staff has not provided conclusive evidence that Comcast provides local exchange and interexchange telecommunication service in Missouri, as defined in sections 386.020(31) and 386.020(24). While a CDV customer residing in Missouri can reach other voice service subscribers who are either in Missouri or outside Missouri, this is also true of subscribers to other IP-PSTN capable services such as Vonage and peer to peer services such as

⁴ All citations to Missouri statutes are to RSMo. Supp. 2005.

Skype. (Choroser Rebuttal, Ex. 3, p. 9). This Commission cannot regulate Vonage or Skype, as those services have been deemed by the FCC to be outside the jurisdiction of the Commission.

In the case of CDV, while the FCC has not made a determination on whether it is a telecommunications service or information service, this Commission and a Missouri federal court have found that interconnected VoIP service which offers IP-PSTN connectivity is not a telecommunication service. See discussion of *Missouri VoIP Order* in section IV of this brief. Therefore, the service is not subject to Commission regulation. Until the FCC makes its ultimate classification, the Commission should follow its prior order and the decision of the federal court and not exercise jurisdiction over Comcast.

A. The FCC's *IP-Enabled Rulemaking Proceeding* and Subsequent FCC Decisions Regarding VoIP Services.

The FCC opened the *IP-Enabled Proceeding* in 2004 to address in a comprehensive manner the various regulatory and policy issues implicated by VoIP services. That proceeding, and subsequent FCC decisions regarding IP-Enabled services, including VoIP, demonstrate the FCC's purpose to prevent regulation which will stunt the growth of these innovative services. These decisions demonstrate that the FCC has exercised its primary jurisdiction and is in the process of making determinations regarding the statutory classification for VoIP, thereby preempting any attempt by this Commission to step in prematurely.

In its Notice of the *IP-Enabled Proceeding*, the FCC set forth the need for addressing IP-Enabled services, including VoIP, in a comprehensive manner. The FCC stated:

- VoIP services are not necessarily mere substitutes for traditional telephony services, because the new networks based on the Internet Protocol are, both technically and administratively, different from the PSTN. Whereas the PSTN is designed to meet the analog communications requirements of two-way voice conversations, IP networks are designed to meet the short-burst digital data communications requirements of computing networks. . . . The rise of IP thus challenges the key assumptions on which communications networks, and regulation of those networks, are predicated: Packets routed across a global

network with multiple access points defy jurisdictional boundaries. (*IP-Enabled Proceeding*, ¶ 4).

- With regard to telephone calls, IP-enabled data services might include virtual telephone numbers, directory dialing, automated voicemail attendants, call pre-screening, and call forwarding of pre-screened calls to other IP-enabled devices, such as a computer or wireless phone. Industry analysts also contemplate a unified messaging or a unified mailbox that collects a user's e-mail, voicemail, and faxes, which may be accessed through the web, a telephone or any other IP-enabled device. These services permit users to decide which media they would like to use to respond to a given message. For example, software might read a user's e-mail messages or faxes to him or her over the telephone, allowing the user to respond via e-mail, voicemail, facsimile, or voice telephony. (*IP-Enabled Proceeding*, ¶ 18).
- The Act distinguishes between “telecommunications service[s]” and “information service[s],” and applies particular regulatory entitlements and obligations to the former class but not the latter. Thus, our analysis begins with an examination of the statutory definitions as they apply to particular types of IP-enabled service. But, as described more fully, commenters must consider what policy consequences flow from a particular statutory definition. The Act reflects Congress' attempt to balance numerous policy objectives. For example, Congress stated that the Internet should remain free from regulation. . . . The Commission is empowered by statute to weigh these various objectives and craft regulations that specifically target the relevant features of VoIP and other IP-enabled services. Where the Act does not prescribe a particular regulatory treatment, the Commission may have authority to impose requirements under Title I of the Act. Alternatively, the Commission may forbear from applying specific provisions. (*IP-Enabled Proceeding*, ¶ 42).

Since opening its *IP-Enabled Proceeding* to address the complex technical and policy issues set forth above, the FCC has issued *nine* orders addressing the regulatory framework of VoIP and is expected to address additional issues in its ongoing *IP-Enabled Proceeding*.

In its first Order the FCC classified pulver.com's Free World Dialup service as an unregulated information service. *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004) (the *FWD Order*). Free World Dialup is a free computer-to-computer VoIP service and the Commission declined to classify other types of VoIP services as it explained that it would “address the legal status of those communications in the companion *IP-*

Enabled Services rulemaking. (*FWD Order*, at n.3). Next, the Commission classified AT&T's phone-to-phone VoIP service that among other things did not undergo a net protocol conversion and provided no enhanced functionality to end users due to IP technology as a telecommunications service. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004). The FCC next preempted an order of the Minnesota Public Utilities Commission applying Minnesota's telecommunications regulations to Vonage's VoIP service. *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, FCC 04-267, 2004 WL 2601194, 19 F.C.C.R. 22404 (2004) (the "*Vonage FCC Order*," ¶ 1). The FCC expressly stated it was not deciding whether VoIP services are information services or telecommunication services. (*Vonage FCC Order*, ¶ 14). The *Vonage* decision is discussed more fully in section III B of the brief.

In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, 20 FCC Rcd 10245 (2005), the FCC required interconnected VoIP service providers to supply E911 capabilities to their customers. Next, the FCC determined that the Communications Assistance for Law Enforcement Act ("CALEA") applies to providers of interconnected VoIP services, regardless of whether classified as telecommunications or information services. *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 F.C.C.R. 14989 (2005) (the *CALEA Order*). Next, the FCC established universal service contribution obligations for providers of interconnected VoIP services. *In the Matter of Universal Service Contribution Methodology*, 2006 WL 1765838 (2006) (*USF Order*). The FCC indicated that there would, in the future, be a final decision classifying interconnected VoIP services. *USF Order*, ¶ 35.

More recently, the FCC extended the customer proprietary network information (CPNI) obligations, disability access obligations and telecommunications relay services requirements to providers of interconnected VoIP services. *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, IP-Enabled Services*, 22 FCC Rcd 6927 (2007); *Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons With Disabilities*, 2007 WL 1744 291 (2007).

Finally, the FCC has required interconnected VoIP providers to pay FCC regulatory assessment fees. *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, 2007 WL 2241209 (2007).

The decisions made by the FCC demonstrate that it is applying regulations to interconnected VoIP in a very measured and thoughtful fashion so as to reflect Congress' balancing of numerous policy objectives in the Telecommunications Act. By acting on Staff's Complaint, the Commission runs the risk of creating policy consequences that the FCC has worked to avoid.

B. The *Vonage FCC Order*.

As noted earlier, the *Vonage FCC Order* did not determine whether CDV was a telecommunications service or information service. However, the decision provides guidance to the Commission regarding the interplay between state and federal regulation. The *Vonage FCC Order* recognized that the FCC, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [Vonage's] Digital Voice and other IP-enabled services having the same capabilities." (*Vonage FCC Order*, ¶ 1).

The *Vonage FCC Order* also predicts how the FCC would rule regarding CDV. In its *Vonage* decision, the FCC identified the following characteristics that would render VoIP service

offered by a cable operator subject to the same preemption applicable to Vonage's service: "a requirement for a broadband connection from the user's location; a need for IP-compatible CPE; and a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video." *Vonage FCC Order* at ¶ 32. CDV service meets all three preemption criteria. (Choroser Rebuttal, Ex. 3, pp. 3-4).

IV. THE COMMISSION HAS ALREADY DETERMINED THAT VOIP IP-PSTN TRAFFIC IS NOT A TELECOMMUNICATIONS SERVICE

Staff may cite the District Court order in *Comcast IP Phone of Missouri, LLC v. The Missouri Public Service Commission*, Case No. 06-4233-CV-C-NKL (W.D. Mo., Jan. 18, 2007), in support of its assertion that the Commission is not preempted by the FCC. However, that order merely recognized that the Commission has the jurisdiction to decide whether CDV is a telecommunications service and did not order that the Commission should regulate CDV. The Commission is free to determine that CDV is not a telecommunication service or to delay its decision until the FCC determines the appropriate classification. Indeed, the Commission has already faced a similar issue involving reciprocal compensation concerning VoIP traffic.

In Case No. TO-2005-0336⁵, the Commission made the key determination which underlies this case, finding that internet protocol to public switched telephone network (IP-PSTN) traffic is an enhanced service and not a telecommunications service under the Telecommunications Act. The Eastern District of Missouri affirmed the Commission's ruling that IP-PSTN traffic is subject to intercarrier compensation at reciprocal compensation rates, rather than switched access charges, because "IP-PSTN traffic is an 'enhanced service' that falls

⁵ *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, July 11, 2005.

squarely within the ‘net protocol change’ portion of the FCC’s multi-part enhanced service definition.” *Southwestern Bell Telephone v. Missouri Public Service Commission*, 461 F. Supp.2d 1055, 1079 (2006) (*Missouri VoIP Order*).

Net protocol conversion is a determinative indicator of whether a service is an enhanced or information service. *Id.* at 1081. In the *Missouri VoIP Order* the Court agreed with the Commission that a net-protocol conversion occurs when an end user sends information into a network in one protocol and it exits the network in a different protocol. Such a conversion transforms the information and therefore provides an “enhanced” and an “information” service. *Id.* at 1082.

A CDV subscriber’s call to a non-CDV subscriber undergoes a net-protocol change, as the information sent and received is changed from the digitized packets of the IP protocol to the time division multiplex (TDM) protocol used on the PSTN. (Choroser Rebuttal, Ex. 3, p. 4, l. 3-6). The *Missouri VoIP Order* recognized that this transformation makes a VoIP IP-PSTN call an information service. *Id.*

Even though the *Missouri VoIP Order* addressed IP-PSTN traffic in the context of intercarrier compensation, its principals must apply to Staff’s Complaint. Not only would it make no sense to classify IP-PSTN traffic as an information service for intercarrier compensation purposes but as a telecommunications service for state regulation, but once a service is classified for one purpose, it is classified for all purposes. This is because the FCC, in keeping with the legislative history of the Telecommunications Act, interprets the Act’s definition of “telecommunication service” and “information service” to be mutually exclusive. *CALEA Order*, ¶ 15. While the FCC is the ultimate authority on regulatory classification, the Commission should not -- indeed, cannot -- confuse the issue by contradicting its earlier decision and that of a federal court.

The *Missouri VoIP Order* and underlying Commission arbitration order, issued in 2005 and 2006, respectively, demonstrate why Staff's Complaint should be rejected. Staff is applying a state telecommunications statute to an interconnected VoIP service that this Commission and a Missouri federal district court have already determined is not a telecommunications service. These decisions have also found application in the interconnection agreements, all duly approved by the Commission and under which the signatory parties are currently operating, which contractually incorporated the finding that interconnected VoIP is not a telecommunications service. Therefore, due to the need to apply regulatory policy in a consistent in a coherent fashion to all providers, the Commission cannot reverse such a recently adopted position and find here that CDV is a telecommunications service.

V. REGULATORY PARITY WILL NOT BE ACHIEVED BY REGULATING CDV

The Staff and the intervenors argue that the Commission must impose regulation on Comcast to "level the playing field." (Voight Direct, Ex. 1, p. 14, l. 7-14; Tr. 17, l. 1-3). Indeed, Staff admits that the entire motivation for the filing of this Complaint was to level the playing field. (Tr. 57, l. 12-17). However, the regulatory parity argument ignores the fact that there is no level playing field and the reason for traditional telephone regulation is not present in this case. Indeed, Comcast is already subject to numerous regulatory obligations. Calling for a level playing field is simply an attempt at results-oriented regulation: Staff wants the Commission to regulate VoIP, but to do so it must reach the legal and factual conclusions that VoIP is a telecommunications service and that Comcast is a telecommunications provider, without regard to the law and the evidence. Regulation is the right result, Staff and the intervenors argue, so the Commission should ignore inconvenient problems with the law and the evidence.

A. Traditional Regulatory Paradigm.

Regulation was put in place to control the market power of monopoly telephone companies. Regulation was necessary to constrain the telephone company's pricing and profits and required the attention and resources of an expert public agency because of the complexity of the ratemaking process. (Choroser Rebuttal, Ex. 3, p. 15, l. 18-23). The agency needed to protect consumers from potential monopoly abuses or inadequate service because there was no other way for the harmed customer to receive essential telecommunication services. (*Id.* at l. 23-26).

Competition is now developing for many customers in many geographical markets. As competition spreads, the incumbent's market power will diminish and this will eliminate the need to regulate the incumbent's prices and quality of service. New entrants, such as Comcast, do not have market power and cannot overcharge or offer substandard service without losing customers and losing money. (*Id.*, p. 16, l. 9-10). The consumer has choices between the incumbent and the new entrant, in fact often among many new entrants. If an entrant treats the customer badly, he or she can shop somewhere else. Staff has been able to find very few instances of consumer dissatisfaction with Comcast service. (Voight Direct, Ex. 1, p. 16, l. 2).

B. Current Regulation Involving Comcast.

Comcast is not operating as an unregulated entity. As discussed in Section III. A. of the brief, the FCC has imposed many obligations on CDV: E911 , CALEA requirements, universal service payment obligations, CPNI protections for consumers, disability access obligations, telecommunications relay services requirements, and regulatory assessment fee responsibilities. (Choroser Rebuttal, Ex. 3, p. 7, l. 3-5).

Further, CDV adheres to the FCC's truth-in-billing standards and voluntarily provides many other public benefits such as soft dial tone for delinquent accounts, free directory

assistance for calls for the visually impaired and access to the relay system for the hearing and speech impaired. (Choroser Rebuttal, Ex. 3, p. 21, l. 4-7).

As for Missouri regulatory obligations, Comcast voluntarily pays MUSF and Commission assessments through its regulated CLEC, Comcast Phone of Missouri, LLC. Comcast Phone of Missouri also remits the state relay fee, municipal 911 fees, and municipal license taxes. (Choroser Rebuttal, Ex. 3, 20, l.20-25). CDV obtains its numbers through Comcast Phone of Missouri, which is subject to the Commission's oversight in the same manner as other CLECs. (*Id.*, p. 21, l. 1-3). Regardless of representations that Comcast is getting a free ride, the facts demonstrate to the contrary.

C. Advantages Enjoyed By Incumbents.

The playing field is not level because Comcast does not have many of the unique advantages enjoyed by Missouri incumbents. It does not build its network using capital that earns an allowed rate of return and has never been a monopoly voice service provider. (Choroser Rebuttal, Ex. 3, p. 21, l. 16-19). ILECs receive subsidies from the universal service fund, while CDV pays into, and receives nothing from, that fund. CDV does not have the protection of the filed rate doctrine which would make its rates presumptively reasonable and provide limitations on liability that are enjoyed only by regulated companies. (*Id.*, p. 21, l. 10-15). Instead, CDV has obligations that the ILECs do not have, such as the requirement for each subscriber to sign a 911 acknowledgement. There is simply no level playing field and imposing state regulation on CDV will not create one.

VI. COSTS OF REGULATION

Given the FCC's pending docket to address regulation of VoIP providers, the absence of market power enjoyed by Comcast, and the absence of consumer complaints cited by Staff

against CDV, it is premature for the Commission to impose its regulatory requirements on Comcast. Commissioner Murray raised a question at the hearing which recognized this fact:

And if we were to -- if this Commission were to order that the service that Comcast provided is a telecommunications service and that, therefore, you have to be certificated to provide that service, then in the near future, within the next year or two, the FCC decides that the service that it provides is an information service, not subject to state regulation, can you tell me what -- what that interim period would create for Comcast?

(Tr. 101, l. 13-20). Should the Commission grant Staff's Complaint, Comcast would be required to make significant Missouri-unique changes to the billing system that it uses for its bundled products in multiple states to be able to accommodate the billing rules and payment allocation rules. (Tr. 101, l. 21-24). Comcast would have to retrain its customer service agents on Missouri-specific rules and set aside separate groups of agents to deal with Missouri-specific rules. (Tr. 102, l. 1-4).

Comcast's initial vendor estimates suggest it would take several months and cost in excess of \$4 million just to revamp Comcast's billing systems to comport with the Commission's rules. (Choroser Rebuttal, Ex. 3, p. 19, l. 19-20). It is premature, and simply unnecessary, for the Commission to require Comcast to expend this money to make the above changes before the FCC has determined the regulatory classification of VoIP.

VII. COMCAST'S STATE-BY-STATE ANALYSIS DEMONSTRATES THAT MISSOURI WOULD BE UNIQUE IF THE COMMISSION CHOOSES TO GRANT STAFF'S COMPLAINT

Commissioner Murray asked the parties to address the statutory requirements regarding certification in the other states where Comcast provides CDV. (Tr. p. 111, l. 112, l. 5-24, 1-20). Attached as Exhibit 1 is a synopsis of regulatory requirements in the 28 states and District of Columbia where Comcast provides CDV.

Nine of the states have statutes which prohibit the regulation of VoIP services. Many states have statutes similar to Missouri. For example, Utah's definition of "telecommunications service" is similar to Missouri's two-way transmission of signs, sounds, messages etc. by wire, radio, lightwaves etc. offered to the general public. "Telephone corporation" is a corporation that owns or operates a public telecommunication service. Similarly, Washington defines "telecommunications" as the transmission of information by wire, radio, optical cable or other similar means and a "telecommunications company" is a corporation owning or operating or managing facilities used to provide telecommunications for hire to the general public.

While each state's statutes are different, it is telling that none of the states have brought an action against Comcast regarding regulation of CDV service.

VIII. THE COMMISSION HAS AUTHORITY TO DEFER TO THE FCC WHEN DETERMINING WHETHER TO REGULATE CDV

Some of the Commissioners questioned whether the Commission has the authority to waive or forbear regulation of CDV. (Tr. 13, 21). The answer is yes, it has that authority.

When a statute is reasonably open to interpretation, the Commission has the power in the first instance to determine administratively its own jurisdiction. *State v. Blair*, 146 S.W.2d 865, 874 (Mo. banc. 1940). As shown above, there is uncertainty as to the regulatory classification of CDV as the FCC has not yet decided this issue. If the FCC determines that CDV is an information service or orders state utility regulatory commission forbearance, the Commission would not have any jurisdiction over Comcast.

As part of its authority to determine its jurisdiction, the Commission has the discretion to delay its order in this case until the FCC makes a classification decision. In other instances the Commission has deferred or has been requested to defer a decision pending action by the FCC.

For example, in Case No. TO-98-278,⁶ the Commission determined that the record in an arbitration proceeding was not sufficiently persuasive to move the Commission to make a final decision on the ISP reciprocal compensation issue in light of the FCC's pending proceeding on the same issue. The Commission determined that it would not be appropriate to determine the issue until the issue of compensation was resolved by the FCC.

Moreover, the Staff has recommended in past cases that the Commission defer a decision until the FCC provided clarity. In Case No. TT-2002-129,⁷ the Staff recommended that the Commission delay taking any further action on tariffs filed by AT&T, Sprint and MCI increasing monthly surcharges to recover fees charged by local phone companies to see whether the FCC would preempt state action regarding truth-in-billing and line item surcharges. Staff sought a similar delay in Case No. TT-2003-0043,⁸ where it gave the Commission an alternative recommendation to put off its tariff decision until the FCC issued a ruling on a similar tariff.

When considering the regulation of new telecommunications services where concurrent federal and state jurisdiction may exist, the best way for the Commission to decide an issue or determine jurisdiction may be to delay its decision until further guidance is provided by the FCC. This course of action is supported by the fact that the FCC has opened the *IP-Enabled Proceeding*. In addition, Comcast is paying all Commission assessments, as well as 911 and other regulatory fees. Finally, the record does not contain examples of customer complaints concerning Comcast which would necessitate the Commission taking action on Staff's Complaint before the FCC's classification determination.

⁶ *Birch Telecom of Missouri Arbitration*, (April 23, 1998).

⁷ *AT&T Communications of the Southwest*, (March 11, 2005).

⁸ *Spectra Communications Group, LLC*, (November 15, 2002).

IX. PENALTIES ARE NOT APPROPRIATE IN THIS CASE

Staff's Complaint asks the Commission to authorize a civil action for penalties under § 386.600 against Comcast. In deciding not to apply to the Commission for a certificate, Comcast justifiably relied on the fact that the FCC has not yet classified interconnected VoIP as a telecommunications service. Moreover, this Commission had also determined in the context of access/reciprocal compensation payments that IP-PSTN traffic was an information service and that determination was upheld on appeal.

The Office of Public Counsel recognizes that the law is unsettled and has indicated that it is not interested in penalties against Comcast. (Tr. p. 28-29, l. 17-25, 1.4). Public Counsel believes that penalties should only be assessed after the Commission makes its ruling and Comcast refuses to comply. The imposition of penalties against Comcast is premature until and unless the Commission determines that it has jurisdiction over Comcast and Comcast refuses to recognize this jurisdiction.

X. CONCLUSION

Until the FCC makes its VoIP classification determination the Commission should follow the *Missouri VoIP Order* or defer its decision on Staff's Complaint until FCC guidance is provided. There is no customer service crisis that demands immediate Commission action. Moreover, Comcast is living up to the same regulatory responsibilities that ILECs shoulder. In denying Staff's Complaint, the Commission can avoid creating regulatory uncertainty as well as disrupting the FCC's deliberation process embodied in the *IP-Enabled Proceeding*.

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL LLP

By: /s/ Mark P. Johnson

Mark P. Johnson MO Bar #30740

Roger W. Steiner MO Bar #39586

4520 Main Street, Suite 1100

Kansas City, Missouri 64111

Phone: 816.460.2400

Fax: 816.531.7545

Email: mjohnson@sonnenschein.com

rsteiner@sonnenschein.com

ATTORNEYS FOR COMCAST IP PHONE, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been transmitted electronically to all counsel of record this 14th day of September, 2007.

/s/ Mark P. Johnson

Attorney for Comcast IP Phone, LLC

Exhibit 1

Arkansas

Under 23-1-101 of the Arkansas Code a “public utility” includes persons or corporations owning or operating in the state equipment or facilities for conveying or transmitting messages or communications by telephone where such service is offered to the public for compensation. “Service” includes any product or commodity furnished and the plant, equipment, apparatus, appliances, property and facilities employed by any public utility in performing any service or in furnishing any product or commodity devoted to the public purposes of the utility and to the use and accommodation of customers or patrons.

Under section 23-3-201 no construction or operation of any equipment or facilities for supplying a public service or extension shall be undertaken without first obtaining a certificate of public convenience and necessity from the Public Service Commission.

Rule 13.02 of the Arkansas Public Service Commission Rules provides that no telecommunications provider shall offer intrastate long distance or toll service without first obtaining a certificate of public convenience and necessity from the Commission. “Telecommunications provider” is defined in the rules as any person, firm, partnership, corporation or other entity that offers telecommunications services to the public for compensation. “Telecommunications services” are defined as the offering to the public for compensation that transmission of voice, data or other electronic information at any frequency over any part of the electromagnetic spectrum, notwithstanding any other use of the associated facilities.

California

Section 1001 of the California Utilities Code states that no telephone corporation shall begin the construction of a line, plant or a system without having first obtained a certificate from

the California Public Utilities Commission. “Telephone corporation” is defined as including every corporation or person owning, controlling, operating or managing any telephone line for compensation within the state. (Section 234) “Telephone line” includes all conduits, ducts, pulls, wires, cables, instruments and appliances and all other real estate fixtures and personal property owned, operated or managed in connection with or to facilitate communication by telephone. (Section 233).

Colorado

Under 40-1-103 of the Colorado Revised Statutes the term “public utility” includes every telephone corporation. Telephone corporations are subject to the jurisdiction, control and regulation of the Colorado Public Utility Commission.

Under section 40-5-101, no public utility shall begin the construction of a new facility or plant without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction.

Under section 40-15-503 of the Colorado Revised Statutes, no provider of local exchange services shall operate in the state without a certificate of public convenience and necessity.

Under section 40-15-102, basic local exchange service means the telecommunications service which provides a local dial tone and local usage necessary to place or receive a call within an exchange area and any other services added by the Commission.

Connecticut

Under section 16-247a of the Connecticut Code “telecommunication service” means any transmission in one or more geographic areas between or among points specified by the user of information of the user’s choosing without change in the former content of the information as sent and received by means of electromagnetic transmission, including but not limited to fiber

optics, microwave and satellite with or without benefit of any closed transmission medium and including all instrumentalities, facilities, apparatus and services except customer premises equipment, which are used for the collection, storage, forwarding, switching and delivery of such information and are essential to the transmission. Under section 16-247c no person shall provide intrastate telecommunication service unless the person is certificated to provide intrastate telecommunication services by the Department of Public Utility Control.

Delaware

Under section 202 of the Delaware Code, the Public Service Commission has no jurisdiction or regulatory authority over VoIP service including but not limited to the imposition of regulatory fees, certificate requirements, rates, terms or other conditions of service.

Florida

Under section 364.011 of the Florida Statutes VoIP services are exempt from oversight by the Public Service Commission.

Georgia

Under section 46.5.222, the Georgia Public Service Commission shall not have any jurisdiction, right, power, authority or duty to impose any requirement or regulation relating to the setting of rates, terms and conditions for the offering of broadband service, VoIP or wireless service.

Illinois

Under section 220 ILCS 5/13-401 no telecommunications carrier offering or providing or seeking to offer or provide any local exchange telecommunication service shall do so until it has received a certificate of exchange service authority.

Local exchange telecommunication service means telecommunication service between points within an exchange or the provision of telecommunication service for the origination or termination of switch telecommunication services (section 13-204). Telecommunication service means the provision or offering for rent, sale or lease of the transmittal of information by means of electromagnetic, including light, transmission with or without benefit of any close transmission meeting, including all instrumentalities, facilities, apparatus, and services used to provide such transmission (13-203).

Telecommunications carrier means every corporation that owns, controls, operates or manages directly or indirectly, for public use any plant, equipment or property used for or in connection with the provision of telecommunication services between points within the state which are specified by the user. (13-202)

Indiana

Under Indiana Codes 8-1-2-1.1 a person or entity that transmits communications through internet protocol enabled retail services including voice, data, video or any combination of those voice data and video communications is not a public utility solely by reason of engaging in any such activity.

Kansas

Under K.S.A. 66-131 no public utility shall transact business in the State of Kansas until it obtains a certificate from the Corporation Commission. Under K.S.A. 66-104 a “public utility” includes every corporation, company and individual that own, control, operate or manage any equipment, plant for the transmission of telephone messages. The term “transmission of telephone messages” shall include the transmission by wire or other means of any voice, data,

signals or facsimile communications, including all such communications now in existence or may be developed in the future.

Louisiana

The Louisiana Public Service Commission's Regulations for Competition in the Local Telecommunications Market defines "telecommunications" as the bi-directional transmission of information of the user's choosing among points specified by the user including voice, data, image, graphics and video without change in form or content of the information as sent and received by means of an electromagnetic and/or fiber optic transmission medium including all instrumentalities, facilities, apparatus and services essential to such transmission. (Section 101.40) Telecommunication Service Provider is a term used to refer to any person or entity offering and/or providing telecommunication services for compensation or any monetary gain. (Section 101.44) Under Section 301 of the regulations, any Telecommunication Service Provider desiring to offer a telecommunication service is required to apply to the Commission for issuance of a certificate of authority.

Maryland

Under section 1-101 of the Maryland Code, a "telephone company" means a public service company that owns telephone lines to receive, transmit or communicate telephone communications. "Telephone lines" means the material, equipment and property owned by a telephone company and used or to be used for or in connection with a telephone service.

The Maryland Public Service Commission grants franchises to public service companies under section 5-201 of the Maryland Code.

Massachusetts

The Massachusetts Department of Utility Control shall have general supervision and regulation of the transmission of intelligence within the commonwealth by electricity by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities or equipment appertaining thereto or utilized in connection therewith. (Massachusetts General Laws (MGL) Chapter 159, section 12).

MGL, Chapter 159, section 19 requires telecommunication service providers furnishing service within the Commonwealth to have on file with the department all rates, rules and regulations, conditions and limitations for the provision of intrastate services. All telecommunication service providers proposing to offer telecommunication services must first register with the department before commencing operations in the state.

Michigan

Under Section 484.2301 of the Michigan Code, a telecommunication provider shall not provide basic local exchange service without a license issued from the Commission. Under Section 484.2102 of the Michigan Code, a “telecommunication provider” means a person that for compensation provides one or more telecommunication services and “telecommunication services” include regulated and unregulated services offered to customers for the transmission of two-way interactive communication and associated usage. The same section defines “basic local exchange service” means the provision of an access line and usage within a local calling area for the transmission of high-quality two way interactive switched voice or data communication.

Minnesota

Under Section 237.16 of the Minnesota statutes no person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the managerial financial resources to provide the proposed telephone services and a certificate of authority from the Commission under terms and conditions the Commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with Commission rules.

“Telecommunications carrier” under 237.01 of the Minnesota statutes means a person, firm, association or corporation authorized to furnish one or more the following telephone service to the public: (1) interexchange telephone service, (2) local telephone service pursuant to a certificate of authority granted under section 237.16.

Under subsection 12 of section 237.16 of the Minnesota statutes, no telecommunication carrier shall construct or operate any line, plant or system without first obtaining from the Commission a determination that the present or future public convenience and necessity require or will require the construction, operation and a new certificate of territorial authority.

New Hampshire

Under Chapter 374 of the New Hampshire Code, the Public Utilities Commission shall have the general supervision of all public utilities. Under section 374:22 of the New Hampshire Code, no person or business entity shall commence business as a public utility or engage in such business or begin the construction of a plant, line or other apparatus without first having obtained the permission and approval of the New Hampshire Public Utility Commission. Under Chapter 362, the term “public utility” includes every corporation owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone messages.

New Jersey

The New Jersey Board of Public Utility Commissioners has general supervision and regulation of and jurisdiction and control over all public utilities and their property, equipment, facilities and franchises. The term “public utility” includes every corporation that may own, operate, manage or control any telephone system for public use under privileges granted by the state or any political subdivision thereof. (48:2-13 N.J.S.A.).

A competitive local exchange carrier must be granted authority by the Board to provide telecommunications service. New Jersey Administrative Code, § 14:10-5.2.

Ohio

Section 4905.042 of the Ohio Revised Code provides: “Regarding advanced services or internet protocol - enabled service as defined by federal law, including federal regulations, the Public Utilities Commission shall not exercise any jurisdiction over those services that is prohibited by, or is inconsistent with its jurisdiction under, federal law, including federal regulations.

Oregon

Under Oregon Revised Statute 759.020 no corporation shall provide intrastate telecommunications service on a for-hire basis without a certificate of authority issued by the Public Utility Commission. “Intrastate telecommunications service” is defined as any telecommunications service in which the information transmitted or originated and terminates within the boundaries of the State of Oregon. Section 759.005 ORS.

Pennsylvania

A “public utility” is defined in Chapter 102, Title 66 of the Pennsylvania Code as any person or corporation owning or operating equipment or facilities for conveying or transmitting

messages or communications by telephone. Under Chapter 1101 of the Pennsylvania Code, upon the application of any proposed public utility and the approval of such application by the Commission evidenced by a Certificate of Public Convenience, it should be lawful for any such proposed public utility to begin to offer, render, furnish or supply service.

South Carolina

Under section 58-9-10 of the South Carolina Code the term “telephone utility” includes persons and corporations owning or operating in the state equipment or facilities for the transmission of intelligence by telephone for hire including all things incident thereto unrelated to the operation of telephones. Under section 59-9-280 of the South Carolina Code, no telephone utility shall begin the construction or operation of any telephone utility plant or system without first obtaining from the South Carolina Public Service Commission a certificate of public convenience and necessity.

Tennessee

Under section 65-4-201 of the Tennessee Code no individual or entity shall offer or provide any individual or group of telecommunication services without first obtaining from the Tennessee Regulatory Authority a certificate of convenience and necessity for such service or territory except as exempted by provisions of state or federal law. No public utility shall establish or operate any line, plant or system without having first obtained from the Authority a certificate.

Under 65-4-101 of the Tennessee Code, a “public utility” means a corporation that owns, operates, manages or controls within the state telephone or telecommunications services or any other like system, plant or equipment affected by and dedicated to public use under privileges, franchises, licenses or agreements granted by the state or by any political subdivision thereof.

Under 65-4-101(8) a “telecommunications service provider” means any authorized by law to provide, and offering or providing for hire any telecommunications service, telephone service unless otherwise exempted from this definition by state or federal law.

Texas

Under section 54.001 of the Texas Utilities Code a person may not provide local exchange telecommunications service, basic local communications service or switched access service unless the person obtains a (1) certificate of convenience and necessity or (2) a certificate of operating authority or (3) service provider certificate of operating authority.

Under section 54.251, basic local telecommunications service includes flat rate residential and business local exchange telephone service, tone dialing service, access to operator services, access to directory assistance services, access to 911 service, the ability to report service problems seven days a week, lifeline and tel-assistance services and any other service the Commission determines after a hearing is a basic local telecommunications service.

Utah

Under section 54-4-25 of the Utah Code, telephone corporations may not construct a system without first having obtained from the Commission a certificate of present or future public convenience and necessity. Section 54-2-1 defines “telephone corporation” means any corporation that owns, operates, controls or resells a public telecommunications service. “Public Telecommunications service” is defined in 54-8b-2 as the two-way transmission of signs, signals, writing, images, sounds, messages, data and other information of any nature by wire, radio, light waves or other electromagnetic means offered to the public generally.

Virginia

Under Section § 56-1 of the Virginia Code “local exchange telephone service” shall not include VoIP service for the purpose of regulation by the Virginia State Corporation Commission, including the imposition of certification processing fees and other administrative requirements, and the filing or approval of tariffs.

Washington

Revised Code of Washington (RCW) 80.36.350 requires registration with the Washington Utilities and Transportation Commission for each telecommunications company. RCW80.04.010 defines “telecommunications company” as every corporation owning, operating, or managing facilities used to provide telecommunications for hire to the general public within the state. Telecommunications is defined as the transmission of information by wire, radio, optical cable, electromagnetic or other similar means.

Washington, DC

Under section 2501 of the Washington, D.C. Public Service Commission Rules, no party shall provide local exchange service to the public, regardless of the facilities used, without first receiving certification from the Commission to provide such service. “Local exchange service” is defined as telecommunications service provided within an exchange area. “Telecommunications service” means the offering of telecommunications for a fee directly to the public. Telecommunications means the transmission, between or among points specified by the user of information of the users’ choosing, without change in the form or content of the information as sent and received.

West Virginia

Under section 150-6-14.2 of the West Virginia Public Service Commission Rules, no telecommunications carrier may provide local exchange telecommunication service within the state without first obtaining a certificate of public convenience and necessity from the Commission. "Telecommunications carrier" is defined as any provider of telecommunications services to the public. "Telecommunications services" are any of the following when offered for the purposes of communicating between points, to the public and regulated to any degree by the Commission: (1) access to the public switched telecommunications network, (2) signaling capability, (3) switching, (4) transmission of electrical signals, including radio or light-wave signals of a digital or analog nature, (5) controls for proper and successful telecommunication.