

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

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

**RESPONDENT’S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
COMPLAINT**

Comes now Comcast IP Phone, LLC (“Comcast”), Respondent in the above-captioned proceeding, and submits the following memorandum in support of its Motion to Dismiss the Complaint filed by the Commission’s Staff.

I. BACKGROUND

In its Complaint, Staff asks the Commission to assert jurisdiction over Comcast’s Voice Over Internet Protocol (“VoIP”) service, known as Digital Voice, to find that Comcast is providing telecommunications services, through Digital Voice, in violation of Missouri’s telecommunications regulations, and to penalize Comcast until it complies with those regulations. Comcast has moved the Commission to dismiss Staff’s Complaint because the Commission is preempted from regulating Comcast’s VoIP service.

VoIP services are a burgeoning area of communications. VoIP services rely on a new technology that allows customers to communicate using signals that travel partially or exclusively over internet protocol networks, rather than over typical switched telecommunications networks. VoIP technology offers the present reality of multi-dimensional

control over personal communications as well as the future promise of expanded services. It is this very type of technological growth—premised on the vast capacity of the Internet—that sparked Congress to declare that:

It is the public policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and]
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other computer services, unfettered by Federal or State regulation . . .

47 U.S.C. § 230(b). The FCC has stated an express intent to preempt state regulation of VoIP services pending resolution by the FCC of technical and policy issues implicated by VoIP.

The type of communication offered by VoIP has led to technical and policy debates regarding how best to regulate this previously unknown species of communication. Those debates led the FCC to open a proceeding in 2004 to determine whether 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 (F.C.C. March 10, 2004) (the “*IP-Enabled Rulemaking Proceeding*”). The FCC explained that the purpose of the *IP-Enabled Rulemaking Proceeding* is to facilitate the transition from traditional legacy networks to this new type of internet-based communication, “relying wherever possible on competition and applying discrete regulatory requirements only where such requirements are necessary to fulfill important policy objectives.” *IP-Enabled Rulemaking Proceeding*, ¶ 5.

The FCC has issued several VoIP-related Orders since opening the *IP-Enabled Rulemaking Proceeding*, but has not authorized any state to impose on VoIP service providers

certification or tariff regulations such as those raised in Staff's Complaint. To the contrary, the FCC has explained that the *IP-Enabled Rulemaking Proceeding* "will resolve important regulatory matters with respect to IP-enabled services generally, including . . . the extent to which states have a role in such matters." *In re the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (Nov. 12, 2004) (the "Vonage FCC Order").

The FCC, not the Commission, has jurisdiction to determine whether, to what extent, and under whose authority VoIP services such as Comcast's Digital Voice may be subject to regulation. Until these issues are resolved by the FCC, this Commission lacks jurisdiction to regulate Comcast's Digital Voice service. Accordingly, Staff's Complaint against Comcast should be dismissed.

II. LEGAL STANDARD

A Motion to Dismiss pursuant to 4 CSR 240-2.070(6) is similar to a motion asserted under Mo. R. Civ. Proc. 55.27(6), a "failure to state a claim upon which relief can be granted." A motion to dismiss for failure to state a claim upon which relief can be granted attacks the legal sufficiency of the complaint by claiming that, even if the facts in the pleading are true, they do not constitute legal grounds for any relief. *MCI Telecommunications Corporation, Inc. et al. vs. Southwestern Bell Telephone Company, Inc.*, Case No. TC-97-303, 1997 Mo. PSC LEXIS 126, 18-19 (Mo. PSC 1997).

The purpose of a motion to dismiss is to expedite litigation and lies in the interest of judicial economy. Motions to dismiss relieve the Commission from hearing cases for which there is no remedy within the jurisdiction of the Commission and for which no relief may be granted. *Id.* at 20. The Commission must dismiss a case if the complainant has not alleged any

violation of law, rule or order over which this Commission has jurisdiction. *Ozark Border Electric Cooperative v. City of Poplar Bluff, Missouri, and Union Electric Company*, Case No. EC-96-269, 1996 Mo. PSC LEXIS 19, 8 (Mo. PSC 1996).

III. ARGUMENT

THE COMMISSION LACKS JURISDICTION OVER VOIP SERVICE AS REGULATION IS PREEMPTED BY THE FCC

The Commission is preempted from enforcing state telecommunications regulations against Comcast's VoIP service, as it is without jurisdiction to regulate VoIP. Congress has dictated that the FCC, not state regulators, must first determine the appropriate regulatory framework for services such as VoIP. *See* 47 U.S.C. § 151.¹ The FCC has preempted state agencies that have attempted to regulate VoIP services and has indicated its intent to preempt state regulation of "other entities, such as cable companies, [that] provide VoIP services." Vonage FCC Order, ¶ 46.

Notwithstanding the clear intent of the FCC to preempt states from regulating VoIP services at this time, Staff has filed a Complaint to enforce Missouri's telecommunications regulations against Comcast's VoIP service. Any assertion of jurisdiction by the Commission would be wholly improper. The ultimate issue of the appropriate regulatory framework for VoIP services is under comprehensive review by the FCC, the only agency that presently has jurisdiction to resolve the regulatory uncertainty that VoIP services create. When other state

¹ 47 U.S.C. § 151 provides: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided and which shall execute and enforce the provisions of this chapter."

agencies have attempted to regulate VoIP services, courts have recognized that the FCC has primary jurisdiction over the issue and have enjoined states from inserting themselves into the regulatory process. *See, e.g., Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, 386 F.Supp.2d 144 (W.D. N.Y. 2005). Alternatively, courts have found that under the present definitional structure of the 1996 Act, VoIP constitutes an “information service” not subject to state regulation. *See, e.g., Vonage Holdings Corp. v. The Minnesota Public Utilities Comm’n*, 290 F. Supp.2d 993, 1003 (D. Minn. 2003); *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, v. The Missouri Public Service Comm’n, et al.*, Case No. 4:05-cv-1264, at 43 (E.D. Mo. September 14, 2006). This Commission lacks jurisdiction over the issues raised in the Complaint, and should dismiss the Complaint.

A. Regulation Of VoIP Is A Question Of Federal Law Subject To The Rulemaking Authority Of The FCC.

The Supremacy Clause of Art. VI of the United States Constitution gives Congress, or a federal agency acting within the scope of its congressionally delegated authority, the power to preempt state law. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). Congress has delegated the authority to execute and enforce the Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.* (the “1996 Act”) to the FCC. Whether VoIP services are subject to federal or state regulation under the 1996 Act is an issue that first requires resolution of the technical nature of VoIP services. *Frontier Telephone*, 386 F.Supp.2d at 149. The FCC has opened a comprehensive rulemaking proceeding to address the regulatory framework, if any, for VoIP services and has stated its intent to preempt state regulation of VoIP services pending the outcome of that proceeding. *See Vonage FCC Order*, ¶ 30. Accordingly, the Commission must give way to the primary jurisdiction of the FCC to

determine the appropriate regulatory framework for Comcast's Digital Voice. Indeed, courts either have deferred ruling on the issue of the classification of VoIP services in deference to the FCC, *Frontier Telephone*, 386 F.Supp.2d at 149, or have deemed them preempted as an "information service" without further expounding on the FCC's rulemaking authority to address the hybrid nature of VoIP services, *Vonage*, 290 F. Supp.2d at 1003; *Southwestern Bell Telephone, L.P.*, Order dated September 14, 2006 at 43. Any action by the Commission to regulate Comcast's VoIP service would violate the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2. As the Commission lacks jurisdiction, the Complaint should be dismissed.

B. Regulations Propounded By The FCC Preempt Any Action By This Commission To Regulate Comcast's Digital Voice.

In *Louisiana Public Serv. Commission v. Federal Communications Commission*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), the United States Supreme Court outlined six ways in which federal preemption of state law can occur. *Id.* 476 U.S. at 368-69. Two methods of preemption outlined in that case would apply to any action taken by the Commission against Comcast's VoIP service. Specifically, a Commission enforcement action against Comcast is preempted because (1) Congress has expressed a clear intent to preempt state law by enacting a federal statute, and (2) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.*

1. Congress Intended That The FCC, Not This Commission, Determine The Proper Regulatory Framework for IP-Enabled Services Such As VoIP.

Inherent in a preemption analysis "is whether Congress intended that federal regulation supersede state law." *Id.* Congress created the FCC for the purpose of "centralizing authority" to "execute and enforce the provisions of the [1996 Act]." *See* 47 U.S.C. § 151. The FCC has

opened a proceeding to determine whether, to what extent, and by whose authority VoIP services will be regulated. *See IP-Enabled Rulemaking Proceeding*, ¶ 46 (setting forth the FCC’s authority to determine the regulatory framework for IP-enabled services, including VoIP²). The FCC’s open proceeding will establish “the extent to which states have a role” in regulating VoIP services, if any. Vonage FCC Order, n. 46. The Vonage FCC Order makes clear 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.

2. State Regulation of Comcast’s VoIP Service Stands As An Obstacle To The Accomplishment And Execution Of The Full Objectives Of Congress.

In its Complaint, Staff is seeking an order finding Comcast in violation of Revised Missouri Statute § 392.410.2, which requires a telecommunications company to obtain a Commission-issued certificate of service authority to offer certain services. To maintain its certificated status, Comcast would then be required to comply with a host of Missouri regulatory requirements. *See, e.g.*, R.S.Mo. § 392.450.2(1) (filing and maintenance of tariffs); R.S.Mo. § 392.450.2(2) (quality of service and billing standards); and R.S.Mo. § 392.500 (notice for rate changes). If the Commission asserts jurisdiction over Comcast’s VoIP service, it will have

² The FCC explained: “Congress has provided the Commission with a host of statutory tools that together accord the Commission discretion in structuring an appropriate approach to IP-enabled services. Title II of the Communications Act governs the regulation of telecommunications services. Similarly, Title VI governs the regulation of cable services. Title I of the Act confers upon the Commission ancillary jurisdiction over matters that are not expressly within the scope of a specific statutory mandate but nevertheless necessary to the Commission’s execution of its statutorily prescribed functions. Section 1 of the Communications Act established the Commission ‘[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio,’ and section 4(i) authorized the Commission to ‘perform any and all acts, makes such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.’ Ancillary jurisdiction may be employed in the Commission’s discretion, where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation. ‘Because the Commission’s judgment on how the public interest is best served is entitled to substantial deference, the Commission’s choice of regulatory tools’ when these conditions are met will stand ‘unless arbitrary or capricious.’” *IP-Enabled Rulemaking Proceeding*, ¶ 46 (internal citations omitted).

implicitly assumed the power to determine the appropriate regulatory scheme for VoIP service in general. The FCC has ruled against other state commissions that have similarly attempted to regulate VoIP services. In the Vonage FCC Order, the FCC found that the Minnesota Public Utilities Commission's attempt to regulate the Vonage VoIP service "directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as Digital Voice." Vonage FCC Order, ¶20.

Any attempt by the Commission to impose state regulation on Comcast's VoIP service will stand as an obstacle to the accomplishment and execution of the full objectives of Congress—*i.e.*, that the FCC (not this Commission) is the "centralizing authority" to "execute and enforce the provisions of the [1996 Act]." *See* 47 U.S.C. § 151. For regulation to be appropriate, VoIP service first must be determined to be a "telecommunications service" and not an "information service" under the 1996 Act. *See* Vonage FCC Order, ¶¶20, 21. The FCC expressly refrained from deciding the classification of Vonage's service, noting, however, that if a VoIP service ultimately is deemed to be an "information service, it would be subject to the Commission's long-standing policy of nonregulation of information services." Vonage FCC Order, ¶ 21 and n. 46. If VoIP service is deemed a "telecommunications service," it may be subject to regulation of some type. Vonage FCC Order at n. 69. Even if VoIP service is deemed a "telecommunications service," however, it still is not subject to state regulation unless it is purely an intrastate service. 47 U.S.C. § 152(b). If it is an interstate service, the FCC has exclusive regulatory jurisdiction. 47 U.S.C. § 152(a). If the service is capable of both interstate and intrastate communications, it is a "jurisdictionally mixed" service, and "the [FCC] may exercise its authority to preempt inconsistent state regulations that thwart federal objectives,

htreating jurisdictionally mixed services as interstate with respect to the preempted regulations.”
Vonage FCC Order, ¶ 17.

The FCC made clear in the Vonage FCC Order that the answer to these outcome-determinative questions is within the FCC’s exclusive purview. Vonage FCC Order, ¶46. 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 same is true for VoIP services that differ from Vonage’s: “To the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.” Vonage FCC Order, ¶¶ 32, 46.

IV. CONCLUSION

For the foregoing reasons, Comcast respectfully requests that this Commission enter an Order dismissing Staff’s Complaint against Comcast seeking to enforce state telecommunications regulations against Digital Voice, Comcast’s VoIP service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and final copy of the foregoing was served by electronic mail
on this 26th day of October, 2006, on the following:

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