

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

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

**THE MISSOURI SMALL TELEPHONE COMPANY GROUP'S
AMICUS CURIAE BRIEF**

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I. INTRODUCTION

This case presents two questions for the Missouri Public Service Commission (“Commission” or “PSC”) related to voice over internet protocol (“VoIP”) telephone service. First, Comcast IP Phone (“Comcast”) argues that federal law has preempted the PSC’s jurisdiction over Comcast’s VoIP service offering. Recent decisions by the FCC and the courts demonstrate that the PSC is not preempted from regulating Comcast’s facilities-based and “interconnected” VoIP service. Second, Comcast argues that even if the PSC is not preempted, the PSC should wait to take any action over Comcast until the FCC specifically classifies VoIP services. Comcast’s backup argument should also be rejected as both impractical and unlawful. Until the FCC states otherwise, Missouri statutes mandate that Comcast’s voice telephone service offering is subject to the same degree of regulation as all other telecommunications companies.

II. DISCUSSION

A. The MoPSC has not been preempted from regulating fixed VoIP service.

Comcast argues that the FCC is presently investigating how VoIP services such as Comcast’s should be regulated in the FCC’s *IP-Enabled Services* docket, which was initiated in 2004, and Comcast also relies on the FCC’s 2005 *Vonage* decision in support of its position that the PSC cannot regulate Comcast’s VoIP service. Recent decisions by the Eighth Circuit, the U.S. District Court, the Cole County Circuit Court, and the FCC all make quite clear that the FCC has not preempted state regulation of interconnected or “fixed” VoIP telephone service offered by cable television companies such as Comcast. In fact, the FCC has recently stated that interconnected VoIP providers such as Comcast will not qualify for preemption and will likely be subject to state regulation.

1. The *Vonage* Case Is Not On Point Here.

Comcast cites *Vonage* for the proposition that the FCC has prohibited the states from regulating “fixed” cable television VoIP telephone service in the same way the states regulate traditional telephone service. Comcast’s argument is incorrect, and it is contrary to recent decisions issued by the FCC and the courts. Specifically, the Eighth Circuit, the U.S. District Court (WD-Mo.), the Cole County Circuit Court, and the FCC have all issued recent decisions clearly confirming that the FCC has not preempted state regulation of “interconnected” or “fixed” VoIP such as the service offered by Comcast.

a. The Eighth Circuit’s 2007 Decision in the *Vonage* Appeal

On March 21, 2007, the Eighth Circuit Court of Appeals issued an opinion specifically reviewing the FCC’s *Vonage Order* and discussing the issues related to regulation of VoIP telephone service. *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007). In its decision, the Eighth Circuit distinguished the “nomadic” VoIP telephone service offered by Vonage from the “fixed/interconnected” VoIP telephone service offered by cable television companies such as Comcast:

A distinction can be drawn, however, between what is referred to as "nomadic" VoIP service and "fixed" VoIP service. Nomadic service is ... where a VoIP customer can use the service "nomadically" by connecting with a broadband internet connection anywhere in the universe to place a call. Fixed VoIP service describes the use of the same technology, that is, converting a voice communication into digital packets before transmitting it to another location, but in a way where the service is used from a fixed location. **For example, cable television companies offer VoIP service to their customers, but when they do so the ensuing transmissions use the cable running to and from the customer's residence. As a result, the geographic originating point of the communications can be determined. Thus, when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished.**

483 F.3d at 578 (emphasis added). Thus, the Eighth Circuit's review of the *Vonage Order* factually distinguished the "fixed" or "interconnected" VoIP telephone service offerings by cable television companies such as Comcast from the "nomadic" VoIP service at issue in the *Vonage* case.

As a part of the Eighth Circuit appeal, the New York Public Service Commission challenged the FCC's decision to the extent it might have been applied to "fixed/interconnected" VoIP service offered by cable television providers. The Eighth Circuit found that the New York PSC's challenge was not ripe for review because the FCC had not yet decided that issue, and the Eighth Circuit specifically cited the FCC's more recent Universal Service order:

[T]he FCC has since indicated VoIP providers who can track the geographical end-points of their calls do not qualify for the preemptive effects of the Vonage order. As a consequence, NYPSC's contention that state regulation of fixed VoIP services should not be preempted remains an open issue.

483 F.3d at 583 (emphasis added). Thus, the Eighth Circuit confirmed that the FCC has not preempted state regulation of "fixed" or "interconnected" VoIP services offered by cable telephone companies such as Comcast.

b. The U.S. District Court's (W.D. Mo.) 2007 Comcast Decision

On September 21, 2006, the Missouri PSC Staff filed the instant complaint against Comcast alleging that Comcast was offering a cable television "fixed" or "interconnected" VoIP service known as "Digital Voice" in Missouri without the necessary authority and certificates from the Missouri PSC. In response, Comcast sought an injunction against the

Missouri PSC from the U.S. District Court for the Western District of Missouri

On January 18, 2007, the District Court issued its *Order* denying Comcast's request for an injunction. The District Court observed, "[T]he FCC has not yet adopted any VoIP rule. At this time, there is no certainty about when or if a comprehensive rule covering the issue before the MoPSC will be adopted by the FCC."¹ The District Court's decision concluded that the FCC has not preempted state regulation of cable-based "fixed" or "interconnected" VoIP services:

[T]he Court is unable to find that the FCC has preempted the entire field of VoIP services or that allowing state regulation of intrastate telecommunications services, which also happen to be VoIP services, stands as an obstacle to the accomplishment and execution of the full objectives of Congress.²

Accordingly, the U.S. District Court denied Comcast's motion for injunction and closed the case. The District Court's ruling demonstrates that the FCC has not preempted the Missouri PSC's regulation of "fixed" or "interconnected" VoIP telephone services offered by cable television companies.

c. The Cole County Circuit Court

On September 5, 2007, the Cole County Circuit Court affirmed the PSC's decision denying Time Warner Cable Information Services (Missouri) LLC's request to remove the language for its fixed or "interconnected" VoIP service from its PSC tariffs. The Circuit Court held that the PSC did not err in determining that it had not been preempted by the FCC. See Attachment B, *State ex. rel Time Warner v. Missouri PSC*, Cole County Circuit Court Case No. 06AC-CC00935, *Findings of Fact, Conclusions of Law, and Judgment*.

¹ *Comcast IP Phone of Missouri v. Missouri PSC*, Case No. 06-4233-CV-C-NKL, *Order*, Jan. 18, 2007, p. 4.

d. Recent FCC Decisions

Recent FCC decisions confirm that the FCC has not yet classified “fixed” or “interconnected” VoIP service offered by cable companies. In fact, Comcast concedes that the FCC currently has a docket open to consider how to regulate “interconnected VoIP” services offered by cable television companies.³ FCC orders in this docket demonstrate that the FCC has not issued a final ruling as to how cable-based VoIP providers such as Time Warner should be regulated. For example, on June 27, 2006, the FCC stated that **“an interconnected VoIP provider with the capability to track the jurisdictional nature of customers calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.”**⁴ Therefore, Comcast’s claim that the FCC has preempted regulation of “fixed/interconnected” VoIP service is simply inconsistent with recent FCC decisions.

2. The PSC should not defer regulation of Comcast’s Digital Voice service pending the outcome of the FCC’s *IP-Enabled Proceeding*.

Comcast’s secondary argument is that the PSC should defer imposing any state regulation on Comcast’s VoIP service until the FCC issues a definitive ruling on the issue. Comcast’s argument is both unlawful and impractical.

a. Comcast’s Proposal Is Unlawful.

Missouri statutes mandate that Comcast’s voice telephone service offering is subject to the same degree of regulation as all other telecommunications companies. Specifically, §386.020(53) RSMo. defines telecommunications service as “the transmission of

² *Id.* at p. 11.

³ *In the Matter of IP-Enabled Services*, WC Docket No. 04-36.

⁴ FCC’s *Report and Order* in WC Docket No. 04-36, issued June 27, 2006, p. 29, ¶56 (emphasis added).

information by wire, radio, optical cable, electronic impulses, or other similar means.” In this case, Comcast is using its own lines in conjunction with other telecommunications company’s lines to provide intrastate telecommunications service, and there is no provision in Missouri law that would allow the PSC to delay or forebear from regulating Comcast’s intrastate telecommunications service. Accordingly, the PSC is required to regulate Comcast’s service in the same way that it regulates traditional telephone service providers unless and until the FCC rules otherwise.

b. Comcast’s Proposal Is Impractical.

Comcast’s proposal to delay enforcement of state law is also impractical. The FCC’s *IP-Enabled Services* docket has been pending for over three (3) years, and Comcast’s proposal to “wait and see” would continue to create litigation and regulatory uncertainty while the FCC considers the matter. As the PSC is aware, the FCC can be slow to act on complicated issues, and there is no guarantee that the FCC will issue a final ruling. The PSC should decline Comcast’s proposal to create an undefined regulatory limbo pending an FCC decision that may not be issued for years if at all.

c. Comcast’s Proposal Is Bad Policy.

As a policy matter, Comcast’s position would produce an unfair result and an improper incentive. It would be an unfair result to reward Comcast for its decision to try and sidestep PSC jurisdiction while other cable television VoIP providers that played by the rules such as Time Warner would be punished. It would also be an improper incentive for all traditional telephone companies to add some type of IP component to their networks in order to escape PSC jurisdiction.

III. CONCLUSION

Recent decisions by the FCC and the courts demonstrate that the PSC is not preempted from regulating Comcast's interconnected VoIP service. On the contrary, Missouri law requires the PSC to treat all providers of intrastate voice telecommunications service in the same way. Comcast's request that the PSC should wait to take any action over Comcast until the FCC specifically classifies VoIP services is both unlawful and impractical. Until the FCC states otherwise, Missouri statutes mandate that Comcast's voice telephone service offering is subject to the same degree of regulation as all other telecommunications companies.

RESPECTFULLY SUBMITTED,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was mailed, served electronically, or hand-delivered, this 14th day of September, 2007, to:

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ATTACHMENT A

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