

**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.	)	

**STAFF’S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

COMES NOW the Staff of the Missouri Public Service Commission and for its memorandum states:

1. On September 21, 2006, the Staff filed a Complaint against Comcast IP Phone, LLC, (Comcast). The Complaint states that Comcast is offering and providing local exchange and interexchange telecommunications services without certificate of service authority required by Section 392.410.2 RSMo. The Complaint seeks authorization to file a penalty action in Circuit Court.

2. On October 26, 2006, Comcast filed a motion, and supporting memorandum, asking the Commission to dismiss the Complaint for lack of jurisdiction.<sup>1</sup>

3. Comcast notes, correctly, that 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.

4. Comcast argues that this Commission does not have jurisdiction over Comcast’s Voice over Internet Protocol (VoIP) services because the Federal Communications Commission (FCC) has not authorized any state to impose any certification or tariff regulations on VoIP

---

<sup>1</sup> Comcast has filed a complaint in the U.S. District Court for the Western District of Missouri seeking to enjoin the Commission from regulating Comcast’s service. *Comcast IP Phone LLC v. The Missouri Public Service*

service providers. Comcast has put the cart before the horse. The State of Missouri does not need authority from the FCC to regulate intrastate telecommunications services. Although the FCC has jurisdiction over interstate and foreign communications, the federal Telecommunications Act reserves to the state's jurisdiction with respect to intrastate communications.<sup>2</sup>

Comcast did not dispute that its VoIP service falls within the Commission's statutory jurisdiction under Chapter 392 RSMo to regulate intrastate telecommunications services. Comcast argues, instead, that the Commission is preempted from enforcing telecommunications regulation of Comcast's VoIP service because the FCC has indicated in the Vonage Order<sup>3</sup> its intent to preempt state regulation of entities such as cable companies that provide VoIP services. The Staff does not agree that the FCC indicated such an intent in the Vonage Order. Regardless, a general prediction of agency action is not final agency action. *U.S. Telecom Ass'n. v. F.C.C.*, 360 U.S. App. D.C. 202, 359 F.3d 554, 594 (D.C. Cir. 2004).

The FCC's Vonage Order did not express an intent to preempt state regulation of those intrastate telecommunications services similar to Comcast's.

The Vonage Order preempted an order of the Minnesota Public Utilities Commission that had applied "traditional telephone company" regulations to nomadic VoIP-based services offered by Vonage Holdings Company. The lynch pin in the FCC's decision is that there is no practical means to separate the service into its interstate and intrastate components because Vonage's customers may access the service anywhere in the world through a broadband connection to the

---

*Commission*, Case No. 06-4233-CV-C-NKL. The Court denied Comcast's Motion for a Temporary Restraining Order and has scheduled briefing on Comcast's Motion for Preliminary and Permanent Injunctions.

<sup>2</sup> 47 U.S.C. § 152

<sup>3</sup> See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning and Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("Vonage Order"), Petitions for review pending, *The Minnesota Public Utilities Commission v. F.C.C.*, Nos. 05-1069, *et al.* (8<sup>th</sup> Cir.). The Eighth Circuit heard oral argument on January 12, 2006.

internet. The FCC concluded, “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.”<sup>4</sup>

The FCC itself rejects the application of the Vonage Order to fixed services such as Comcast provides. The FCC’s Brief to the Eighth Circuit notes, “the *Preemption Order* does not specifically address fixed VoIP services, but rather speaks only of services ‘having basic characteristics to DigitalVoice.’”<sup>5</sup> The FCC’s Brief continues, “the [New York Public Service Commission’s] attempt to obtain a ruling from this Court on how the FCC’s prediction would apply to fixed VoIP services should be rejected as premature.”<sup>6</sup> The FCC Brief concludes, “Moreover, VoIP can be provided in a variety of ways . . . , and the particular characteristics of a fixed VoIP service may bear on the FCC’s preemption analysis. ‘The presence of such fact-intention inquires mandates deferral of review until an actual preemption of a state regulation occurs.’”<sup>7</sup>

Comcast also suggests that the Commission’s regulation of its intrastate telecommunications service has been preempted by the FCC having opened a proceeding in 2004 to determine whether VoIP services should be regulated and, if so to what extent and by whose authority.<sup>8</sup> The FCC addressed that proceeding in the Vonage Order where it stated 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.”<sup>9</sup> This statement that such matters will be addressed in the future further demonstrates that the

---

<sup>4</sup> Vonage Order at paragraph 46.

<sup>5</sup> Brief of the Respondents, page 62.

<sup>6</sup> Id. The FCC’s Brief adds, “DigitalVoice is not a fixed VoIP service, and the FCC did not have before any particular state regulation seeking to regulate fixed VoIP services.” Id. page 63

<sup>7</sup> Id.

<sup>8</sup> In the Matter of IP-Enabled Services, WC Docket No. 04-36.

FCC has not acted to preempt state regulation of intrastate telecommunications provided by fixed VoIP.<sup>10</sup>

In conclusion, Comcast's intrastate telecommunications services are subject to the jurisdiction of the Commission, and the FCC has not acted to preempt state regulation of these services.

WHEREFORE, the Staff requests the Commission (1) to deny Comcast's Motion to Dismiss and (2) to direct Comcast to file an answer to the complaint.

Respectfully submitted,

/s/ William K. Haas  
William K. Haas  
Deputy General Counsel  
Missouri Bar No. 28701  
Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-7510 (Telephone)  
(573) 751-9285 (Fax)  
[william.haas@psc.mo.gov](mailto:william.haas@psc.mo.gov)

---

<sup>9</sup> Vonage Order, Footnote 46

<sup>10</sup> The Staff does not concede that FCC preemption of fixed VoIP services such as Comcast provides would withstand judicial review.

### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed this 13<sup>th</sup> day of November 2006.

/s/ William K. Haas