

At a session of the Public Service Commission held at its office in Jefferson City on the 5th day of December, 2006.

Case No. TC-2007-0111

Effective Date: December 15, 2006

On September 21, 2006, the Commission's Staff filed a complaint against Comcast IP Phone, LLC, alleging that, by offering a telecommunications service known as Digital Voice in several Missouri exchanges, Comcast IP Phone is providing basic local and intrastate interexchange telecommunications services without the required certificates of service authority. The Commission notified Comcast IP Phone of the filing of Staff's complaint in a notice issued on September 26. That notice directed Comcast IP Phone to answer or otherwise respond to Staff's complaint by October 26. On October 26, rather than filing an answer, Comcast IP Phone filed a motion asking the Commission to dismiss

Staff's complaint, arguing that the Commission does not have jurisdiction over the telecommunication service offered by Comcast IP Phone.

Digital Voice, the telecommunications service offered by Comcast IP Phone, is a Voice Over Internet Protocol (VoIP) service. That means that it uses signals that travel partially or exclusively over internet protocol networks rather than over the switched telecommunications network. Comcast IP Phone argues that the Federal Communications Commission has indicated its intention to regulate VoIP services at the federal level, thus preempting state regulation over those services. In particular, Comcast IP Phone indicates that the FCC has opened an IP-Enabled Rulemaking Proceeding¹ to determine how VoIP services should be regulated. Furthermore, in its 2004 Vonage decision,² the FCC preempted Minnesota's attempt to impose state regulation on VoIP services offered to customers in that state. On that basis, Comcast IP Phone asserts that the Missouri Public Service Commission lacks jurisdiction to grant the relief that Staff seeks in its complaint, and contends that Staff's complaint must be dismissed.

Staff responded to the motion to dismiss on November 13. The Missouri Independent Telephone Company Group (MITG)³ and the Missouri Small Telephone Company Group (STCG)⁴ also responded to Comcast IP Phone's motion on November 13. Staff, MITG, and STCG argue that the FCC has not preempted state regulation over the

¹ WC Docket No. 04-36.

² In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).

³ MITG was allowed to intervene as a party on November 7, 2006.

⁴ STCG's motion for leave to file *amicus curiae* comments was granted on November 29, 2006.

type of VoIP service that Comcast IP Phone is offering. They contend that the FCC's Vonage decision preempts state regulation over a VoIP service that is not tied to a fixed location, because it would be impossible to determine whether a particular call was interstate or intrastate in nature. In contrast, they argue that the Digital Phone service offered by Comcast IP Phone appears to be a fixed VoIP service, tied to a specific location by Comcast's cable. For such a fixed service, it should be possible to determine whether a particular call is interstate or intrastate, and thus the Vonage decision's rationale supporting federal preemption would not apply.

After considering the arguments presented, the Commission concludes that Comcast IP Phone's motion to dismiss should be rejected. The FCC's Vonage decision that federal preemption of state regulation over Vonage was required was based on specific facts explained in that decision. In particular, Vonage was offering a nomadic VoIP service that could be accessed from anywhere in the world through a broadband connection to the internet. A Minnesota resident who purchased VoIP service from Vonage could make a call from their hotel in New York as easily as from their home in Minnesota, and Vonage had no means by which to determine from where that call originated. As a result, it would not be possible to separate intrastate calls from interstate calls and federal regulation of the mixture of intrastate and interstate calls would preempt state regulation. Based on those facts, the FCC found that state regulation of Vonage was preempted.

In contrast, Staff states that Comcast IP Phone is offering a fixed VoIP service that a customer may access only through a cable connected to their home. On that basis, Staff asserts that it may be possible to separate intrastate from interstate calls, allowing for state regulation of the intrastate telecommunications services. If Staff's factual allegations are

correct, the impossibility of separating intrastate from interstate calls that the FCC cited as the reason to preempt state regulation over Vonage does not exist in this case. Indeed, the FCC has recently indicated that “an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.”⁵ Therefore, the FCC’s Vonage decision does not preempt state regulation over fixed VoIP service, and Staff’s complaint may proceed.

At this time, the Commission does not have sufficient facts before it to determine whether Comcast IP Phone is offering a telecommunications service that makes it subject to regulation by this Commission. The hearing process will allow those facts to be developed and presented to the Commission so that it ultimately can make that determination. However, if the facts asserted in Staff’s complaint are accepted as true, as they must be when considering a motion to dismiss,⁶ Staff has stated a claim upon which relief can be granted. Comcast IP Phone’s motion to dismiss will be denied, and it will be ordered to answer Staff’s complaint.

IT IS ORDERED THAT:

1. The Motion to Dismiss of Respondent Comcast IP Phone, LLC is denied.
2. Comcast IP Phone shall file its answer to Staff’s Complaint no later than December 26, 2006.

⁵ In the Matter of IP-Enabled Services, WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking (“VoIP Universal Service Contribution Order”), released June 27, 2006, page 29, paragraph 56.

⁶ Eastwood v. North Central Missouri Drug Task Force, 15 S.W.3d 65, (Mo. App. W.D. 2000).

3. This order shall become effective on December 15, 2006.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Gaw and Clayton, CC., concur
Murray and Appling, CC., absent

Woodruff, Deputy Chief Regulatory Law Judge