

**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 INITIAL BRIEF

Introduction

The Staff filed a Complaint against Comcast IP Phone, LLC (hereinafter Comcast). The Complaint asserts that Comcast is offering and providing local exchange telecommunications service and interexchange telecommunications service in five listed exchanges without having applied for and received required certificate of service authority from the Commission. The Complaint requests the Commission to authorize the General Counsel to bring a penalty action in circuit court.

Comcast filed a Motion to Dismiss Staff’s Complaint. The Motion asserts that the Commission is preempted from regulating Comcast’s Voice over Internet Protocol (VoIP) service known as Digital Voice. The Commission denied Comcast’s Motion and directed Comcast to file an answer. In its Answer, Comcast denies that it is providing local exchange telecommunications services and interexchange telecommunications services in the listed exchanges, and it asserts that the Federal Communications Commission has exclusive jurisdiction to determine whether VoIP services may be subject to regulation.

The Staff pre-filed the Direct Testimony and Surrebuttal Testimony of William Voight. Comcast pre-filed the Rebuttal Testimony of Beth Choroser. The Commission conducted a

hearing on July 25, 2007. The Staff, Comcast, the Office of Public Counsel, and intervenor Missouri Independent Telephone Company Group appeared and participated at the hearing.

The Argument section of the Staff's Initial Brief will address the agreed upon List of Issues.

Argument

(1) Does federal law preempt the Commission's jurisdiction over Comcast IP Phone's Voice over Internet Protocol (VoIP) service?

No. The Commission has jurisdiction, pursuant to Section 386.250(2) and Chapter 392 RSMo, over telecommunications companies that offer or provide intrastate telecommunications services. Federal law has not preempted the Commission's jurisdiction over fixed VoIP services, such as Comcast's Digital Voice (CDV).¹

Section 392.410.2 RSMo Supp. 2006 provides that no telecommunications company offering or providing any interexchange telecommunications service shall do so until it has applied for and received a certificate of interexchange service authority. This section further provides that no telecommunications company offering or providing any local exchange telecommunications service shall do so until it has applied for and received a certificate of local exchange service authority.

Section 386.020(53) generally defines "telecommunications service" as the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. Section 386.020(24) defines "interexchange telecommunications service" as telecommunications service

¹ On September 5, 2007, the Circuit Court of Cole County ruled that Missouri has not been preempted from regulating Time Warner Cable's stationary, or fixed, VoIP service. *State ex rel. Time Warner Cable Information Services (Missouri), LLC d/b/a Time Warner Cable v. Public Service Commission*, Case No. 06AC-CC00935. The Judgment in the *Time Warner Cable* case is subject to appeal.

between points in two or more exchanges. Section 386.020(31) defines “local exchange telecommunications service” as telecommunications service between points within an exchange.

Comcast offers and provides interexchange telecommunications service in Missouri. Its Digital Voice service transmits information by wire, radio and optical cable between two or more points in two or more exchanges. (Exh. 5, Comcast’s Response to Staff Data Request No. 11; Choroser, Tr. 85). Comcast offers and provides local exchange telecommunications service in Missouri. Its Digital Voice service transmits information by wire, radio and optical cable that can be between points within an exchange. (Exh. 4, Comcast’s Response to Staff Data Request No. 10; Choroser, Tr. 84-85).

Comcast has neither applied for nor received a certificate of interexchange service authority to offer or provide interexchange telecommunications service in Missouri. (Answer of Comcast, para. 11). Comcast has neither applied for nor received a certificate of local exchange service authority to provide basic local exchange telecommunications service in Missouri. (Answer of Comcast, para. 11).

Comcast argues that the Commission is preempted from regulating Comcast’s VoIP service. Comcast relies on the FCC’s Vonage Order and on the FCC’s IP-Enabled Rulemaking Proceeding. (Comcast’s Memorandum in Support of Motion to Dismiss). Comcast’s reliance is misplaced.

Vonage Order

In 2003, the Minnesota Department of Commerce filed a complaint with the Minnesota Public Utilities Commission alleging that the DigitalVoice services being offered by Vonage, which utilized VoIP technology, were telephone services, and that Vonage was offering such services without complying with state regulations. As a result, the Minnesota Commission

ordered Vonage to comply with the Minnesota regulations applicable to telephone services. In response, Vonage filed a petition with the FCC requesting it to preempt the order. The FCC determined it was appropriate to preempt state regulation because it was impossible or impractical to separate the intrastate components of VoIP service from its interstate components. *Minnesota Public Utilities Commission v. Federal Communications Commission*, 483 F.3d 570, 574 (8th Cir. 2007).

The impossibility exception of 47 U.S.C. § 152(b) allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory policy, i.e., state regulation would conflict with federal regulatory policies. *Minnesota PUC*, 483 F.3d at 576.

The Minnesota Commission, and other parties, filed petitions seeking review of the FCC's Vonage Order. The Eighth Circuit began its Opinion by defining various terms. VoIP is an internet application utilizing "packet-switching" to transmit a voice communication over a broadband internet connection. *Minnesota PUC*, 483 F.3d at 574. A distinction can be drawn, however, between what is referred to as "nomadic" VoIP service and "fixed" VoIP service. Nomadic service is the type 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. *Minnesota PUC*, 483 F.3d at 575.

The Eighth Circuit affirmed the Vonage Order, but what is of significance to this case is the Court's holding that the New York Public Service Commission's petition for review was not ripe for review.

The NYPSC's petition raised the issue of whether ¶ 32 of the FCC's Vonage Order arbitrarily preempted "fixed" VoIP services offered by cable television companies, even though the intrastate components can more easily be separated from the interstate components of such services. *Minnesota PUC*, 483 F.3d at 574.

In the challenged paragraph, the FCC states: [T]he practical inseparability of other types of IP-enabled services having basic characteristics similar to DigitalVoice *would* likewise preclude state regulation Accordingly, 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." *In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, 22424 at ¶ 32 (2004) WL 2601194 at **11 (emphasis added).

The FCC argued the NYPSC's issue was not ripe for judicial review. The Vonage Order states "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." *Id.* (emphasis added). Because the Vonage Order only addresses services "having basic characteristics similar to DigitalVoice," *id.*, and does not specifically address fixed VoIP service providers, the FCC argued the NYPSC's appeal was premature. The FCC contended the language is at most a prediction of what it might do if faced with the issue of fixed VoIP service

providers, and argued the Court should decline to rule on the merits of the NYPSC's appeal until presented with an order preempting state regulation of fixed VoIP service providers. *Minnesota PUC*, 483 F.3d at 582.

The Court recognized that it is limited by Article III of the Constitution to deciding actual cases or controversies ripe for review.

The basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Missouri v. Cuffley, 112 F.3d 1332, 1337 (8th Cir. 1997) (internal quotations and citations omitted). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.* 473 U.S. 568, 580-581 (1985)). *Minnesota PUC*, 483 F.3d at 582.

Therefore, the Court concluded the NYPSC's challenge to the FCC's order is not ripe for review. The Vonage Order only suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services. Nonetheless, the order does not purport to actually do so and until that day comes it is only a mere prediction. *See U.S. Telecom Ass'n v. FCC* 359 F.3d 554, 594 (D.C. Cir. 2004) (holding a general prediction set forth in order does not constitute final agency action). Indeed, as the Court noted, the FCC has since indicated VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effects of the Vonage Order. *See Universal Serv. Contribution Methodology*, 21 F.C.C.R. at 7546 ¶ 56. As a consequence, NYPSC's contention that state regulation of fixed VoIP services should not be preempted remains an open issue. *Minnesota PUC*, 483 F.3d at 582-83.

Because Comcast provides a fixed VoIP telephone service (Voight Direct Testimony, Exh. 1, p. 17), the Vonage Order does not preempt the Commission's jurisdiction over Comcast's intrastate telecommunications services.

IP-Enabled Rulemaking Proceeding

Comcast filed a motion for a preliminary injunction in federal court seeking an order enjoining the Commission from proceeding with Staff's Complaint in the present case. The Court denied the motion. The Court acknowledged the FCC opened a rulemaking proceeding in 2004 to comprehensively address the regulatory and policy issues related to VoIP services. *In the matter of IP-Enabled Services*, 19 F.C.C.R. 4863 (2004). But the Court also recognized that the FCC has not yet adopted any VoIP rule. The Court held that the Commission is authorized to regulate intrastate telecommunications services.² The Court concluded "the fact that the FCC has opened a rulemaking proceeding to comprehensively address the regulatory issues pertaining to VoIP services is not an expression of the FCC's intent to preempt the entire field of VoIP services."³

(2) If the Commission is not preempted by federal law, should the Commission refrain from taking action concerning Comcast IP Phone's VoIP service until the FCC classifies VoIP services?

No. Section 392.420 RSMo 2000 authorizes the Commission, in connection with the issuance of a certificate of interexchange or local exchange service authority to entertain a petition under section 392.361 to suspend or modify the application of its rules or the application of statutory provision contained in sections 392.200 to 392.340 if such waiver is otherwise consistent with the other provisions of sections 392.361 to 392.520 and the purposes of this

² *Comcast IP Phones of Missouri, LLC, v. The Missouri Public Service Commission*, Case No. 06-4233-CV-C-NKL, U.S. Dist. Ct. W.D. Mo., Order, filed Jan. 18, 2007, p.5.

chapter. There is no statutory authority for the Commission to waive the certification requirement of section 392.410 RSMo.

Further, although Comcast has attempted to style this case as one of public policy, which it is not, Comcast's straw man public policy arguments fall short of the mark. Comcast's witness testified that the efficiency of its converged network "extends to billing, installation, and customer service, so that CDV subscribers can have questions about multiple services addressed by a single customer service representative, and they need pay only one invoice each month." (Choroser Rebuttal, Exh. 3, p.10). Yet when cross-examined, the witness couldn't identify a requirement for a Missouri Commission regulated telecommunications company to have separate customer service representatives for its regulated telecommunications services, or to have separate installation crews for its regulated services, or to have separate bills for its regulated services. (Choroser, Tr. 75-76). This witness suggested that it would cost in excess of \$4 million to revamp its [CDV] billing system to comport with the Commission's rules. (Choroser Rebuttal, Exh. 3, p. 19). The witness did, however, admit that Comcast's affiliates already have a different billing system that takes into account that there would be variations in how states regulate phone service. (Choroser, Tr. 80, 107-08).

Finally, these are not *de minimis* violations. Comcast began offering and providing its CDV service in Missouri over a year ago on April 18, 2006 (Choroser, Tr. 87); it provides service in 18 Missouri towns (Comcast Response to Staff Data Request No. 12, Exh. 6); it serves a substantial number of customers (See Comcast Response to Staff Data Request No. 15, Exh. 9HC); and it has received substantial revenues for its service. (See Comcast Response to Staff Data Request No. 17, Exh. 8HC).

³ Id., pp.9-11

WHEREFORE, the Staff requests that the Commission:

a) find that Comcast is offering and providing local exchange telecommunications service in violation of section 392.410.2 RSMo,

b) find that Comcast is offering and providing interexchange telecommunications service in violation of section 392.410.2 RSMo, and

c) authorize the General Counsel of the Commission to bring an action in Circuit Court to recover from Comcast the maximum statutory forfeiture allowed by section 392.360 RSMo for each separate, distinct, and continuing violation.

Respectfully submitted,

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Comcast's affiliates provide service in 28 other states and the District of Columbia. Comcast's witness testified that the legislatures of seven of those states (Delaware, Florida, Georgia, Indiana, Maryland, Ohio and Virginia) had precluded the regulation of VoIP by the state commission. (Choroser Rebuttal, Exh. 3, p. 23). The attached Appendix lists the 22 remaining jurisdictions where Comcast's affiliates provide service; and the Appendix shows the results of a computerized search for those states' statutory definitions of regulated telecommunications service.

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 14th day of September 2007.

/s/ William K. Haas

Appendix

Arkansas

A.C.A. § 23-17-202 (13) "Telecommunications service" means the offering to the public for compensation the 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. Such term does not include radio and television broadcast or distribution services or the provision or publishing of yellow pages, regardless of the entity providing such services or services to the extent that such services are used in connection with the operation of an electric utility system owned by a government entity.

California

West's Ann.Cal.Pub.Util.Code § 2892.1

(a) For purposes of this section, "**telecommunications service**" means voice communication provided by a telephone corporation as defined in Section 234, voice communication provided by a provider of satellite telephone services, voice communication provided by a provider of mobile telephony service, as defined in Section 2890.2, and voice communication provided by a commercially available facilities-based provider of voice communication services utilizing voice over Internet Protocol or any successor protocol.

Colorado

Connecticut

C.G.S.A. § 16-247a(6) "Telecommunications service" means any transmission in one or more geographic areas (A) between or among points specified by the user, (B) of information of the user's choosing, (C) without change in the form or content of the information as sent and received, (D) by means of electromagnetic transmission, including but not limited to, fiber optics, microwave and satellite, (E) with or without benefit of any closed transmission medium and (F) 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.

Illinois

220 ILCS 5/13-203 § 13-203. Telecommunications service. "**Telecommunications service**" means the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission and also includes access and interconnection arrangements and services. "**Telecommunications service**" does not include, however:

(a) the rent, sale, or lease, or exchange for other value received, of customer premises equipment except for customer premises equipment owned or provided by a telecommunications carrier and used for answering 911 calls, and except for customer premises equipment provided under Section 13-703;

(b) telephone or telecommunications answering services, paging services, and physical pickup and delivery incidental to the provision of information transmitted through electromagnetic, including light, transmission;

(c) community antenna television service which is operated to perform for hire the service of receiving and distributing video and audio program signals by wire, cable or other means to members of the public who subscribe to such service, to the extent that such service is utilized solely for the one-way distribution of such entertainment services with no more than incidental subscriber interaction required for the selection of such entertainment service.

The Commission may, by rulemaking, exclude (1) private line service which is not directly or indirectly used for the origination or termination of switched **telecommunications service**, (2) cellular radio service, (3) high-speed point-to-point data transmission at or above 9.6 kilobits, or (4) the provision of **telecommunications service** by a company or person otherwise subject to Section 13-202(c) to a telecommunications carrier, which is incidental to the provision of service subject to Section 13-202(c), from active regulatory oversight to the extent it finds, after notice, hearing and comment that such exclusion is consistent with the public interest and the purposes and policies of this Article. To the extent that the Commission has excluded cellular radio service from active regulatory oversight for any provider of cellular radio service in this State pursuant to this Section, the Commission shall exclude all other providers of cellular radio service in the State from active regulatory oversight without an additional rulemaking proceeding where there are 2 or more certified providers of cellular radio service in a geographic area.

Kansas

KS ST § 66-1,187 (o) "**Telecommunications service**" means the provision of a service for the transmission of telephone messages, or two-way video or data messages.

Louisiana

Massachusetts

Michigan

M.C.L.A. 484.2102 (gg) "**Telecommunication services**" or "services" includes regulated and unregulated services offered to customers for the transmission of 2-way interactive communication and associated usage. A **telecommunication service** is not a public utility service.

Minnesota

Mississippi

New Hampshire

New Jersey

N.J.S.A. 48:2-21.17 "Telecommunications service" means any **telecommunications service** which is subject to regulation by the board pursuant to Title 48 of the Revised Statutes.

N.J.S.A. 48:5A-3 u. "Telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Oregon

O.R.S. § 759.005 (g) "Telecommunications service" means two-way switched access and transport of voice communications but does not include:

(A) Services provided by radio common carrier.

(B) One-way transmission of television signals.

(C) Surveying.

(D) Private telecommunications networks.

(E) Communications of the customer that take place on the customer side of on-premises equipment.

Pennsylvania

66 Pa.C.S.A. § 3012 "Telecommunications service." The offering of the transmission of messages or communications for a fee to the public.

South Carolina

Code 1976 § 58-9-10 (15) The term "**telecommunications services**" means the services for the transmission of voice and data communications to the public for hire, including those nonwireline services provided in competition to landline services.

Tennessee

Texas

Utah

U.C.A. 1953 § 54-8b-2 (16) "Public telecommunications service" means the two-way transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means offered to the public generally.

Washington

Washington, DC

DC ST § 43-1451 (20) "Telecommunications service" means the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available to the public, regardless of the facilities used.

West Virginia