

**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 REPLY BRIEF

Introduction

This case is about Comcast’s repeated, continuing and escalating violations of state law. The record in this case clearly shows that Comcast is offering and providing local exchange telecommunications service and interexchange telecommunications service without having applied for and received certificate of service authority from the Commission as required by Section 392.410.2 RSMo Supp. The Complaint requests the Commission to authorize the General Counsel to bring a penalty action in circuit court.

Argument

(1) Federal law does not preempt the Commission’s jurisdiction over Comcast’s Voice over Internet Protocol (VoIP) service.

Even though the Eighth Circuit has ruled that the FCC’s Vonage Order did not purport to preempt fixed VoIP services,¹ Comcast continues to argue that it did. In particular, Comcast recites part of Paragraph 32 of the Vonage Orders where the FCC identified certain characteristics that would render VoIP service offered by a cable operator subject to the same preemption applicable to Vonage’s services. Comcast conveniently overlooks the first sentence of Paragraph 32: “Indeed, the practical insurmountability of other types of IP-enabled services

¹ *Minnesota Public Utilities Commission v. Federal Communications Commission*, 483 F. 3d 570 (8th Cir. 2007).

having basic characteristics similar to DigitalVoice would likewise preclude state regulation to the same extent described herein.”² In Paragraphs 14-31 of the Vonage Order, the FCC determined to preempt Minnesota’s regulation of Vonage’s DigitalVoice because the characteristics of DigitalVoice preclude any practical separation into interstate and intrastate communications. In particular, at Paragraph 23, the FCC found no plausible approach to separating DigitalVoice into interstate and intrastate components given that Vonage has no means of directly or indirectly identifying the geographic location of a DigitalVoice subscriber. Comcast, on the other hand, can identify the geographic location of its fixed VoIP subscriber and therefore does not encounter the practical inseverability that led the FCC to preempt Minnesota’s regulation of Vonage’s DigitalVoice.

Comcast relies upon the Commission’s Arbitration Order in Case No. TO-2005-0336 for the proposition that the Commission has already determined that VoIP IP-PSTN traffic is not a telecommunications service, Comcast’s reliance is misplaced.³

It is correct that the Commission accepted the Arbitrator’s holding accepting MCI’s argument that “IP-PSTN traffic, on the other hand falls squarely within the ‘net-protocol change’ portion of the FCC’s multi-part enhanced service definition and is therefore, appropriately charged at reciprocal compensation rates instead of switched access rates.” But Comcast reads too much into the Commission’s decision. The Commission was asked to decide in the context of a final offer, i.e., baseball style, arbitration which intercarrier compensation applies to IP-

² *In re Vonage Holdings Corp.* 19 F.C.C.R. 224 04 (2004).

³ *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri’s Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement (“M2A”)*, July 11, 2005, pp. 34-36. The Federal District Court affirmed this part of the Commission’s Arbitration Order in *Southwestern Bell Telephone v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055 (Mo. E.D. 2006). An appeal on other parts of the Commission’s Arbitration Order is pending in the Eighth Circuit.

PSTN traffic. The Commission was not asked to decide, and it did not decide, whether IP-PSTN traffic is an enhanced service exempt from state regulation.

(2) The Commission should not refrain from taking action concerning Comcast IP Phone's VoIP service until the FCC classifies VoIP services.

Comcast asks the Commission to delay its order in this case until the FCC decides the regulatory classification of fixed VoIP services. Comcast cites to other instances where the Commission has deferred or has been requested to defer a decision pending action by the FCC. These other instances are inapposite.

Comcast states that in Case No. TO-98-278, the Commission determined that the record in an arbitration proceeding was not sufficiently persuasive to move the Commission to make a final decision on the ISP reciprocal compensation issue in light of the FCC's pending proceeding on the same issue.⁴ First, the record in the present case persuasively demonstrates that Comcast is providing telecommunications service in violation of state law and persuasively demonstrates that the FCC has not preempted the state law. Second, the arbitration in Case No. TO-98-278 was not addressing unlawful action by a party to the arbitration.

Comcast states that in Case No. TT-2002-129, the Staff recommended that the Commission delay taking further action on tariffs filed by AT&T, Sprint and MCI increasing monthly surcharges to recover fees charged by local phone companies to see whether the FCC would preempt state action regarding truth-in-billing and line item surcharges. First, although the Staff noted that rulemaking proceeding were underway at both the Missouri Commission and

⁴ *In the Matter of the Petition of Birch Telecom of Missouri, Inc., for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with Southwestern Bell Telephone Company*, Case No. TO-98-278, Arbitration Order, April 23, 1998.

the FCC, the Staff recommended the Commission hold Case No. TT-2002-129 in abeyance until the Commission finished its rulemaking proceeding.⁵ Second, the tariffs at issue in Case No. TT-2002-129 were already in effect, i.e., the Commission had already concluded, over Public Counsel's objection, that the tariffs were lawful.

Comcast states that Staff sought a similar delay in Case No. TT-2003-0043, where it gave an alternative recommendation to put off its tariff decision until the FCC issued a ruling on a similar tariff. Case No. TT-2003-0043 did not involve ongoing unlawful activity. In Case No. TT-2003-0043, the Commission had suspended Spectra's tariff filing designed to change its regulations related to conditions under which Spectra could request security deposits from access customers. The Staff testimony suggested that all parties would benefit in simply knowing the FCC's decision.⁶

As Comcast notes, the FCC has required interconnected VoIP services to supply E911 capabilities to their customers, has determined that the Communications Assistance for Law Enforcement Act applies to providers of interconnected VoIP services, and has established universal service contribution obligations for providers of interconnected VoIP services. Thus, it is hardly a foregone conclusion that the FCC will preempt fixed VoIP services from regulation as telecommunications services.

Conclusion

WHEREFORE, the Staff requests the Commission to find that Comcast is providing local exchange and interexchange telecommunication services without certificate of service authority and to authorize the General Counsel to bring a penalty action in Circuit Court.

⁵ *In the Matter of AT&T Communications of the Southwest Inc.'s Proposed Tariff to Establish a Monthly Instate Connection Fee and Surcharge*, Case No. TT-2002-129, Staff's Suggestion Regarding Commission Proceedings, March 4, 2005.

⁶ *In the Matter of Spectra Communications Group, LLC MO No. 2 Facilities for Intrastate Access*, Case No. TT-2003-0043, Surrebuttal Testimony of John Van Eschen, November 12, 2002.

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

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 12th day of October 2007.

/s/ William K. Haas