

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

Staff of the Public Service Commission of the
State of Missouri,

Complainant,

v.

Comcast IP Phone, LLC

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) **Case No. TC-2007-0111**
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**THE MISSOURI SMALL TELEPHONE COMPANY GROUP'S
AMICUS CURIAE COMMENTS
IN OPPOSITION TO COMCAST'S MOTION FOR TO DISMISS**

COMES NOW the Missouri Small Telephone Company Group ("STCG")(see Attachment A), by and through their undersigned counsel, and submits the following *Amicus Curiae* Comments in opposition to the motion to dismiss filed by Comcast in this matter.

I. INTRODUCTION

There are insufficient facts in the record before the Missouri Public Service Commission ("Commission" or "Missouri PSC") to allow it to make the necessary legal analysis of the nature of Comcast's service offering in light of the various Federal Communications Commission (FCC) rulings on voice over internet protocol ("VoIP") telephone service. Nevertheless, if the Commission is inclined to apply the FCC's analysis to what can be surmised about Comcast's service thus far, then it does not appear that the Missouri PSC is preempted from regulating Comcast's intrastate telecommunications service offering.

II. ARGUMENT

A. NO FACTUAL BASIS TO GRANT DISMISSAL.

1. There Has Been No State Commission Action or Factfinding.

Any decision to dismiss this case would be premature because the Missouri PSC has not made any findings of fact as to the nature of the voice telephone service offered by "Comcast IP Phone" or the relationship between the regulated "Comcast Phone" entity operating in Missouri as opposed to the "Comcast IP Phone" entity that protests state regulation in this case. In addition, the FCC has not conclusively resolved the jurisdictional issues presented by fixed VoIP services offered by cable television companies.

There is no hardship on Comcast because Comcast or one of its affiliates already appears to have a certificate of service authority from the Missouri PSC to offer voice telephone service in the exchanges at issue here.¹ Also, other cable television VoIP providers are currently operating under certificate of service authority from the PSC.² Thus, Comcast will simply be operating on the same level playing field with the rest of Missouri's traditional telephone providers as well as Missouri's currently-regulated "fixed" cable television VoIP providers unless and until the FCC rules otherwise. Moreover, and as explained below, the factual record is insufficient at this time to allow either the Missouri PSC to make a determination on the issues raised in Comcast's motion for an injunction.

¹ In fact, "Comcast Phone of Missouri, LLC" obtained certificate of service authority to provide basic local, local exchange, and interexchange telecommunications services in the state of Missouri from the Missouri PSC in Case No. LA-2005-0417 on June 27, 2005.

² For example, Mediacom obtained certificate of service authority from the Missouri PSC in Case No. LA-2005-0150, and Time Warner obtained its certificate of service authority in Case No. LT-2006-0162.

2. The Factual Record is Insufficient.

Missouri law requires Commission orders to be supported by sufficient findings of fact and conclusions of law, and this requirement has been consistently enforced by Missouri courts.³

a. Insufficient Facts About “Comcast Phone” versus “Comcast IP Phone”.

On June 27, 2005, the Missouri PSC granted Comcast Phone of Missouri, LLC (“Comcast Phone”) a certificate of service authority to provide basic local and interexchange services in Case No. LA-2005-0417. On September 1, 2005, Comcast Phone was granted authority to utilize the fictitious name “Comcast Digital Phone” in its certification. In its Application in LA-2005-0417, Comcast Phone indicated that it was subject to Missouri PSC jurisdiction and would comply with the Missouri PSC’s rules and regulations. Comcast Phone also attached a copy of the 2004 Annual Report and 2004 SEC 10-K of Comcast Corporation. These attachments indicate that “Comcast Digital Voice”, an IP phone service, would be launched in 20 markets in 2005, with full deployment targeted for the following year. Staff’s Complaint does not specify what name Comcast IP has given to the service that Staff challenges.

At this time, there are no established facts as to whether Comcast Phone intended to obtain a certificate of service authority to offer Comcast Digital Voice Service in Missouri PSC Case No. LA-2005-0417. If so, there has been no explanation as to why Comcast instead decided to offer Comcast Digital Voice via an uncertificated entity, Comcast IP Phone. Thus, there is an insufficient factual record in this case to address the relationship

³ See *State ex rel. Monsanto v. PSC*, 716 S.W.2d 791 (Mo. banc 1986); *State ex rel. Coffman v. PSC*, 150 S.W.3d 92 (Mo. App. 2004); *State ex rel. Coffman v. PSC*, 121 S.W.3d 534 (Mo. App. 2003); *State ex rel. Laclede Gas v. PSC*, 103 S.W.3d 813 (Mo. App. 2003); *AT&T Communications v. PSC*, 62 S.W.3d 545 (Mo.

between Comcast (*i.e.* Comcast IP Phone), Comcast Phone of Missouri, LLC ("Comcast Phone"), Comcast Corporation, and the VoIP service, service components, or manner of provisioning in question. More factual development is necessary before the Commission can evaluate issues as to its jurisdiction to proceed.

b. Insufficient Facts about "Comcast Digital Voice" Service.

At this time, there are no established facts as to the nature of "Comcast Digital Voice" service. There are no established facts as to what Comcast entities offer what portions of the facilities and processes that constitute Comcast Digital Voice service. Other cable television ("CATV") VoIP affiliates have requested and obtained certificates of authority to provide telephone service utilizing a VoIP product.⁴ Comcast's motion to dismiss cites the *Vonage* case,⁵ but the *Vonage* preemption analysis was based on a specific set of facts that were then applied to the law. Therefore, it is essential to have established facts in order to apply the FCC's *Vonage* analysis to Comcast and its service in question. Specifically, the Missouri PSC must have information about the following issues in order to apply the FCC's analysis in *Vonage* and its other VoIP decisions:

- (1.) What entity or entities provide the poles, wires, customer premises equipment, internet service, broadband connection, software, etc., necessary for Comcast Digital Voice service, and any related suite of integrated services?
- (2.) Is the equipment necessary for Comcast Digital Voice service portable, or is

App. 2001); *State ex rel. Noranda Aluminum v. PSC*, 24 S.W.3d 243 (Mo. App. 2001).

⁴ Mediacom obtained its certificate in LA-2005-0150. Time Warner obtained its certificate in LT-2006-0162.

⁵ *Vonage Holdings Corporation petition for declaratory ruling concerning and order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, *Memorandum Opinion and Order*, 19 FCC Rcd

it fixed to the location of the subscriber?

- (3.) How do Comcast Digital Voice calls terminating to the Public Switched Telecommunications Network (PSTN) interface and terminate?
- (4.) How do calls from the PSTN terminating to Comcast Digital Voice subscribers interface and terminate?
- (5.) Does a Comcast Digital Voice subscriber have to have a North American Numbering Plan (NANP) telephone number assigned?
- (6.) Are the telephone numbers assigned to Comcast Digital Voice subscribers tied to the user's physical location for either assignment or use?
- (7.) **Do the characteristics of Comcast DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications?**

The Missouri PSC must have answers to these questions and possibly additional information in order to fully and fairly consider the issue of jurisdiction. Again, it is necessary for the Missouri PSC to develop a factual record before it can apply the FCC's preemption analysis and make a decision on the issue of jurisdiction.

Comcast suggests that the FCC has already held that state commissions are preempted from regulating VoIP services such as Comcast's in the FCC's *Vonage* decision, but Comcast's arguments overstate the ruling of the *Vonage* order. The *Vonage* order addressed a specific set of facts, and Comcast has not established a similar set of facts in this case. In other words, VoIP telecommunications services are not *per se* preempted as claimed by Comcast. Rather, state and/or federal agencies must first

examine the nature of the VoIP service offering to determine in the first instance whether that service falls under the *Vonage* VoIP preemption. This question requires the development of a factual record, and the PSC has jurisdiction to make findings of fact and determine whether a VoIP voice service offering is preempted.

B. The FCC Has Not Decided This Issue or Preempted the Missouri PSC.

The basis for federal preemption comes from the Supremacy Clause of the Constitution, and the Supreme Court has identified three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption:

Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulation is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Kinley Corp. v. Iowa Utils. Bd., 999 F.2d 354, 357-58 (8th Cir. 1993). Preemption may result not only from an action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation. *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1898-99, 90 L.Ed. 2d 369 (1986).

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

Neither Congress nor the FCC have preempted state regulation of the facilities-based “fixed” VoIP service that appears to be at issue in this case. The FCC’s *Vonage* decision was based on conflict preemption. In *Vonage*, the FCC concluded that, because of the impossibility of separating out any intrastate component of Vonage’s “DigitalVoice” service, it had to preempt the Minnesota Public Service Commission’s jurisdiction because it conflicted with federal rules and policies governing interstate communications.⁶ Although the facts have not yet been established in this case, it would appear that the Comcast VoIP service at issue here may be legally and technically distinguishable from Vonage’s service. If so, then the FCC’s *Vonage* case does not result in express preemption, field preemption, or conflict preemption of the Missouri PSC’s traditional telephone company regulation of Comcast’s facilities-based service.

A. No Express Preemption

The *Vonage* Order did not expressly preempt state regulation of “fixed” VoIP services such as Comcast’s “Digital Voice” service. For example, the FCC has more recently stated:

a fundamental premise of our decision to preempt Minnesota’s regulation in the *Vonage* Order was that it was impossible to determine whether calls made by Vonage’s customers stay within or cross state boundaries . . . **[W]e note 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.**⁷

⁶ *Vonage* Order, ¶ 31.

⁷ 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”), issued June 26, 2006, p. 29, ¶56 (emphasis added).

Thus, the FCC has explained that it did not intend to preempt state regulation over “fixed” VoIP providers that can track the jurisdictional nature of customer calls. It would appear that Comcast is a “fixed” VoIP provider, so it is therefore likely that Comcast can track the jurisdiction of its customers’ calls. Nevertheless, and as explained above, the Commission does not have sufficient facts to determine whether Comcast has the capabilities to track the jurisdiction of its customers’ calls, so it is impossible at this time to determine whether or not state regulation of Comcast’s service has been preempted.⁸

B. No Field Preemption

The *Vonage* Order notes that Congress has set up a dual regulatory regime for communications services:

... In section 2(a) of the Act, Congress has given the Commission exclusive jurisdiction over “all interstate and foreign communication” and “all persons engaged . . . in such communication. Section 2(b) of the Act reserves to the states jurisdiction “with respect to intrastate communication service . . . of any carrier.”⁹

In other words, *Vonage* correctly recognizes that Congress has not occupied the field of intrastate telecommunications regulation. Rather, federal law “specifically denies the [FCC] jurisdiction to regulate intrastate communications services, and leaves that authority with

⁸ The issue of “fixed” VoIP services has been raised in the appeal of *Vonage* before the United States Court of Appeals for the Eighth Circuit in Case No. 05-1069, and the FCC’s Brief argues that the questions concerning preemption of “fixed” VoIP services are premature. “The *Preemption Order* does not specifically address fixed VoIP services, but rather speaks only of services “having basic characteristics similar to DigitalVoice.” *Brief of the Respondents, Minnesota Public Utilities Commission, v. FCC*, Nos. 05-1069, *et al.* p. 62. The FCC’s brief continues, “The NYPSC’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. *Id.* The FCC’s Brief adds, “**DigitalVoice is not a fixed VoIP service, and the FCC did not have before it any particular state regulation seeking to regulate fixed VoIP services.**” *Id.*, p. 63 (emphasis added). The FCC Brief concludes, “Moreover, VoIP services can be provided in a variety of different ways . . . , and the particular characteristics of a fixed VoIP service may bear on the FCC’s preemption analysis. ‘The presence of such fact-intensive inquiries mandates deferral of review until an actual preemption of a specific state regulation occurs.’” *Id.*

⁹ *Vonage Order*, ¶ 16.

the States.” *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004).

C. No Conflict Preemption

Vonage held that because there was no possible way to separate the intrastate (*i.e.* Minnesota-only) component of Vonage’s Digital Voice service from the interstate component, the Minnesota PSC’s attempt to assert jurisdiction produced a direct conflict with federal law and policies. The FCC explained, “Thus, under existing Commission precedent, regardless of its definitional classification, and unless it is possible to separate a Minnesota-only component of DigitalVoice from the interstate component, Minnesota’s order produces a direct conflict with our federal law and policies, and impermissibly encroaches on our exclusive jurisdiction over interstate services such as DigitalVoice.”¹⁰ More recently, however, the FCC has indicated that “fixed” VoIP services would be treated differently and stated 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.”**¹¹

The facts have not yet been established in this case, but it would appear that Comcast’s service may be distinguishable from Vonage’s DigitalVoice service. For example, Vonage’s service is fully portable, so customers may use the service anywhere in the world where they can find a broadband connection. As a result, Vonage does not know where in the world its users are when using DigitalVoice.¹² The FCC declared, “Indeed, it is the total lack of dependence on *any* geographically defined location that most

¹⁰ *Vonage Order*, ¶ 22.

¹¹ *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”), issued June 26, 2006, p. 29, ¶56 (emphasis added).

¹² *Vonage Order*, ¶ 5.

distinguishes DigitalVoice from other services whose federal or state jurisdiction is based on the geographic end points of the communications.”¹³

On the other hand, Comcast’s service appears to be facilities-based and limited to a specific customer location. Indeed, last year Comcast stated to the FCC:

Comcast’s current VoIP service is not marketed as a nomadic service.

It is sold to be used at a particular address, and it is that address that

Comcast uses when providing Automatic Location Information to

PSAPs.¹⁴

Thus, it would appear that the analysis and facts in *Vonage* are not applicable to the service provided by Comcast because Comcast’s service is “fixed” or stationary and customers can only use Comcast’s service in specific locations with its affiliates’ cable facilities.

The FCC’s decision to preempt Minnesota’s regulation of Vonage’s DigitalVoice service was based on the fact that there was no practical means to separate the service into its interstate and intrastate components because Vonage’s customers can access the service anywhere in the world through a broadband connection to the Internet. In this case, it appears that Comcast’s customers use telephone numbers associated with the customer’s local rate center, and Comcast’s service does not appear to be portable. Therefore, it appears that Comcast can determine the geographic locations of its customers and can identify a call as being intrastate or interstate. Accordingly, the conflict

¹³ *Vonage Order*, ¶ 25.

¹⁴ *Ex Parte Notice of Comcast Corporation to the FCC*, WC Docket No. 04-36, *IP-Enabled Services*, filed May 12, 2005 (emphasis added). “PSAP” is an abbreviation for “Public Safety Answering Point” – an agency responsible for answering 9-1-1 emergency calls for emergency assistance from ambulance, fire, or police services.

that the FCC found to exist between state and federal regulation of Vonage's DigitalVoice service does not appear to exist in this case. At the very least, Comcast has made no showing that it is incapable of identifying and separating intrastate and interstate communications.

III. CONCLUSION

WHEREFORE, the STCG suggests that the Commission: (a) deny Comcast's motion to dismiss, or (b) reserve judgment until the Commission has had an opportunity to make findings of fact and conclusions of law to determine the nature of the VoIP service offering provided by Comcast, as well as the relationship between the Comcast entity that presently has certificate of service authority from the Missouri PSC to provide voice telecommunications service and the Comcast entity that is offering voice service without certificate of service authority, and the extent of the Commission's jurisdiction over those entities and service offerings.

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 13th day of November, 2006, to:

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