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November 10, 2006

Colleen Dale
Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: TC-2007-0111

FILED³

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Missouri Public
Service Commission

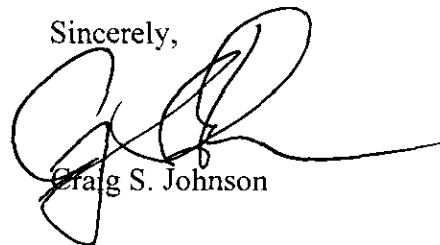
Dear Secretary Dale:

Enclosed for filing is the MITG Response to Comcast's Motion to Dismiss.

Copies are being provided electronically to counsel of record.

I am filing this by hand as my EFIS upload issues have not been resolved.

Sincerely,



Craig S. Johnson

FILED³

Missouri Public
Service Commission

Case No. TC-2007-0111

4. It is important for the Commission's decision as to jurisdiction to be fully and fairly determined, based upon a full and accurate factual record.

Inadequate Factual Record

5. At this time there is an inadequate factual record upon which to fully and fairly address Staff's Complaint, or Comcast's Motion to Dismiss.

6. It is uncertain as to the relationship of Comcast IP Phone, LLC, Respondent ("Comcast IP"), to Comcast Phone of Missouri, LLC ("Comcast Phone"), Comcast Corporation, and the VoIP service, service components, or manner of provisioning the service in question. More factual development is necessary before the Commission can evaluate issues as to its jurisdiction or as to preemption.

7. On June 7, 2005, Comcast Phone obtained a certificate of service authority to provide basic local and interexchange services in 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 it was subject to Commission jurisdiction and would comply therewith. It 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.

8. Staff's Complaint does not specify what name Comcast IP has given to the service that Staff challenges. According to Comcast IP's Motion to Dismiss and Supporting Memoranda, the service in question is a VOIP service, known as "Digital Voice". According to the affidavit of Beth Choroser in the related US District Court

Case, the service in question in this Complaint proceeding is known as "Comcast Digital Voice".

9. 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 LA-2005-0417. If so, there has been no explanation as to why Comcast instead decided to instead offer Comcast Digital Voice via an uncertificated entity, Comcast IP, Respondent.

10. 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 are necessary for the provisioning of 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.¹ It is essential to have established facts as to the following matters in order to apply the FCC's *Vonage* analysis² to the Respondent and to the service in question:

- a. 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 integrates services?
- b. is it necessary for the customer to subscribe to Comcast CATV service in order to receive Comcast Digital Voice Service?

¹ Mediacom obtained its certificate in LA-2005-0150. Time Warner obtained its certificate in LT-2006-0162.

² *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 22404 (2004).

- c. is it necessary for the customer to have broadband access to the internet in order to receive Comcast Digital Voice Service?
- d. is it necessary for the customer to purchase broadband access from Comcast in order to receive Comcast Digital Voice Service?
- e. what type of consumer premises equipment is necessary for the receipt of Comcast Digital Voice Service?
- f. is the equipment necessary for Comcast Digital Voice service portable, or is it fixed to the location of the subscriber?
- g. how do Comcast Digital Voice calls terminating to the PSTN interface and terminate?
- h. how do calls from the PSTN terminating to Comcast Digital Voice subscribers interface and terminate?
- i. does the Comcast Digital Voice subscriber have to have a NANP telephone number assigned?
- j. are the telephone numbers assigned to Comcast Digital Voice subscribers tied to the user's physical location for either assignment or use?
- k. Is Comcast telling subscribers they can keep their existing phone number and utilize it for Comcast Digital Voice service?
- l. does Comcast intend to obtain interconnection agreements with LECs in order to exchange traffic, participate in number portability provisioning, and participate in intercompany compensation?

- m. do the characteristics of Comcast DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications?
- n. what other integrated capabilities and features, besides voice service, are available under Comcast Digital Voice service?
- o. is Comcast Digital Voice service 911 compliant?
- p. is Comcast Digital Voice service CALEA compliant?
- q. will universal service fund contributions be made for Comcast Digital Voice service?

11. There may be additional facts or issues developed, besides those above, that will be necessary to consider in order for the Commission to fully and fairly consider the jurisdiction issue.

12. In order for the Commission to have developed an accurate factual record, it is necessary to permit the parties an opportunity to conduct discovery, and if necessary, conduct an evidentiary hearing with respect to disputed facts, if any. This should be done by the Commission before ruling upon Comcast's motion to dismiss.

Preemption of MoPSC Jurisdiction

13. Comcast's request for an injunction in federal court is not ripe because: (1) Comcast has failed to exhaust its administrative remedies before the Commission; and (2) the Commission has taken no action on the complaint filed by its Staff and made no findings of fact or conclusions of law on the question of its jurisdiction over Comcast. Review of an agency action usually is limited to the agency's final decision. *AT&T v. Illinois Bell*, 349 F.3d 402, 409 (7th Cir. 2003). The issuance of an administrative agency

complaint is not typically considered a "final agency action" by the courts. *FTC v. Standard Oil Co.*, 449 U.S. 232; 101 S.Ct. 488; 66 L.Ed. 426 (1980).

14. Comcast's request for a federal injunction is not ripe unless and until the Commission acts to assert jurisdiction after making findings of fact and conclusions of law as to the nature of Comcast's voice telephone service offering. The fundamental purpose 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." *Nat'l Park Hospitality v. Dep't of the Interior*, 538 U.S. 803, 807-808 (2003).

15. Principles of federalism lend the ripeness doctrine additional force "when a federal court is reviewing a state agency decision at an interim stage in an evolving process." *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999).

16. 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).

17. Neither Congress nor the FCC have preempted state regulation of the type of facilities-based "fixed" VoIP service which is believed 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 must preempt the Minnesota Public Service Commission's jurisdiction because it conflicted with federal rules and policies governing interstate DigitalVoice communications. *Vonage Order*, ¶ 31. However, Vonage's service is legally and technically distinguishable from the believed fixed nature of Comcast's VoIP service at issue in this case. Therefore, 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.

18. The *Vonage* Order did not expressly preempt state regulation of VoIP services such as Comcast's "Digital Voice" service. 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.**

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 clearly explained that it did not intend to preempt state regulation over “fixed” VoIP providers that can track the jurisdictional confines 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.

19. 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. *Vonage Order*, ¶ 16.

In other words, *Vonage* correctly recognizes that Congress has not occupied the field of intrastate telecommunications regulation. Rather, the federal Telecommunications Act “specifically denies the [FCC] jurisdiction to regulate intrastate communications services, and leaves that authority with the States.” *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004).

20. *Vonage* held that, as it was not possible to separate a Minnesota-only component of Digital Voice from the interstate component, Minnesota’s order produced a direct conflict with federal law and policies. *Vonage Order*, ¶ 22.

21. *Vonage*’s service was fully portable, so customers may use the service anywhere in the world where they can find a broadband connection. According to *Vonage*, it does not know where in the world its users are when using DigitalVoice. *Vonage Order*, ¶ 5. The FCC declared, “Indeed, it is the total lack of dependence on *any* geographically defined location that most distinguishes DigitalVoice from other services

whose federal or state jurisdiction is based on the geographic end points of the communications.” *Vonage Order*, ¶ 25. *Vonage* directs that “fixed” VoIP services would be subject to state regulation. It appears at this time, subject to more factual development, that Comcast’s service is fixed. Comcast’s service appears to be facilities based and limited to a specific customer location. It is noted that 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.

Ex Parte Notice of Comcast Corporation to the FCC, WC Docket No. 04-36, *IP-Enabled Services*, filed May 12, 2005.

22. In this case, it appears that Comcast’s customers use telephone numbers associated with the customer’s local rate center, and Comcast’s service is not portable. Therefore, it is currently believed that Comcast knows the geographic locations of its customers and can identify a call as being intrastate or interstate. Accordingly, the conflict that the FCC found to exist between state and federal regulation of Vonage’s DigitalVoice service presumably does not exist between state and federal regulation of Comcast’s service.

WHEREFORE, on the basis of the foregoing, the MITG respectfully requests that the Commission enter an order for a prehearing conference, with direction for the parties to engage in discovery, discuss potential stipulation as to facts, and if necessary schedule

an evidentiary hearing on Comcast's motion to dismiss, together with such additional and further relief as the Commission deems appropriate.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was electronically mailed to the following attorneys of record in this proceeding this 10th day of November, 2006:

William Haas
Michael Dandino
Mark Johnson



/s/ Craig S. Johnson
Craig S. Johnson