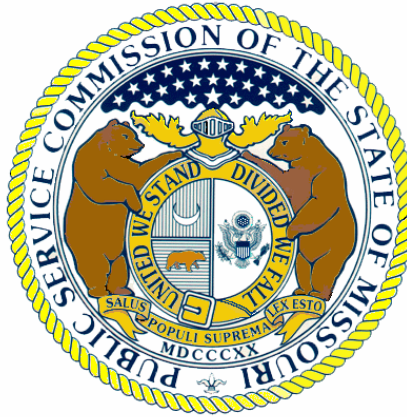


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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

Complainant,

v.

Comcast IP Phone, LLC,

Respondent.

Case No. TC-2007-0111

REPORT AND ORDER

Issue Date: November 1, 2007

Effective Date: December 31, 2007

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OF THE STATE OF MISSOURI

Staff of the Public Service Commission of the)	
State of Missouri,)	
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v.)	<u>Case No. TC-2007-0111</u>
)	
Comcast IP Phone, LLC,)	
)	
Respondent.)	

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Appearances

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Michael Dandino, Deputy Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Craig S. Johnson, Attorney at Law, 1648-A East Elm Street, Jefferson City, Missouri 65101, for the Missouri Independent Telephone Company Group.

REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: In response to a complaint brought by its Staff, the Commission finds that Comcast IP Phone is offering local exchange and interexchange telecommunications services in Missouri without the required certificates of service authority. The Commission orders Comcast IP Phone to either apply for the appropriate certificate, or stop offering the service. The Commission denies Staff's request for authority to seek civil monetary penalties against Comcast IP Phone.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On September 21, 2006, the Staff of the Commission filed a complaint against Comcast IP Phone, LLC. Staff's complaint alleges Comcast IP Phone is offering local

exchange and interexchange telecommunications services in Missouri without a certificate of service authority from the Commission, in violation of Missouri law.

By a notice issued on September 26, 2006, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of Staff's complaint on Comcast IP Phone. Comcast IP Phone responded on October 26, 2006, contesting the Commission's jurisdiction in a motion asking the Commission to dismiss Staff's complaint. The Commission denied the motion to dismiss on December 5, 2006, and directed Comcast IP Phone to file its answer to Staff's complaint. Comcast IP Phone filed a timely answer on December 26, 2006.

Meanwhile, on October 30, 2006, the Missouri Independent Telephone Company Group, (MITG) an affiliation of six small rural incumbent local exchange companies, filed an application to intervene in support of Staff's complaint.¹ The Commission granted MITG's application to intervene on November 7, 2006.

The Commission established a procedural schedule that required the parties to prefile direct, rebuttal, and surrebuttal testimony. The Commission conducted an evidentiary hearing for the purpose of cross-examination of those witnesses on July 25, 2007. The parties filed initial post-hearing briefs on September 14, 2007, followed by reply briefs on October 12, 2007. In addition, the Commission received *amicus curiae* briefs from the Small Telephone Company Group, Embarq Missouri, Inc., d/b/a Embarq, and AT&T Missouri.

¹ The members of MITG are Alma Communications Company, d/b/a Alma Telephone Company; Chariton Valley Telephone Corporation; Choctaw Telephone Company; Mid-Missouri Telephone Company; MoKan DIAL, Inc.; and Northeast Missouri Rural Telephone Company.

Comcast IP Phone and the Services it Offers

Comcast IP Phone, the respondent in this complaint, is a direct subsidiary of Comcast Cable Communications, LLC,² which is primarily a cable television provider. Comcast IP Phone, has never applied for, nor been granted, a certificate of service authority to provide either basic local or interexchange telecommunications services in Missouri.³

Since April 17, 2006, Comcast IP Phone has offered an all-distance Voice over Internet Protocol (VoIP) telecommunications service to customers in multiple municipalities in Missouri.⁴ Comcast IP Phone calls its VoIP service Comcast Digital Voice, and offers that service in several communities located near Kansas City.⁵

Comcast IP Phone provides its Comcast Digital Voice customers with equipment that allows the customer to plug their home phone into the coaxial cable that delivers cable television into the home. That equipment converts phone signals and voice into IP voice packets and IP data packets destined for the internet, which are transmitted to equipment at Comcast's end of the cable. Voice packets are delivered to a soft switch that routes them to their destination. If the call is destined for a customer of another phone company, the IP packets must be converted to TDM (Time Division Multiplex) signals so they can be sent to the public switched telephone network. That conversion is called a net protocol

² Choroser Rebuttal, Ex. 3, Page 1, Lines 10-13.

³ See the allegations in paragraphs 13 and 14 of Staff's complaint, which Comcast IP Phone admitted in its answer.

⁴ Transcript, Page 87, Lines 15-21.

⁵ Ex. 6. The municipalities in which Comcast IP Phone offers the service are: Baldwin Park, Bates City, Blue Springs, Buckner, Grain Valley, Greenwood, Independence, Lake Lotawana, Lake Winnebago, Lake Tapawingo, Lee's Summit, Oak Grove, Odessa, Pleasant Hill, Raymore, Raytown, Sibley, and Sugar Creek.

change.⁶ If a call is destined for another Comcast Digital Voice customer, even a customer in another state, the signal may not be converted and would not pass over the public switched telephone network.⁷

Comcast IP Phone's Comcast Digital Voice customers use that service to transmit information by wire, radio, and optical cable between points within an exchange defined by AT&T as the incumbent local exchange carrier.⁸ Similarly, the Comcast Digital Voice service is used to transmit information by wire, radio, and optical cable between points in two or more exchanges defined by AT&T.⁹

Comcast Digital Voice is a fixed VoIP service. That means the service is available only over the fixed coaxial cable connected to the customer's home or business.¹⁰ As a fixed VoIP service, Comcast Digital Voice differs from the VoIP telecommunications service offered by providers such as Vonage. Vonage does not own a coaxial cable or other means of providing a high-speed connection to its customers. Therefore, it offers its VoIP service to customers who establish their broadband connection with another service provider. Since Vonage's service relies on third-party broadband connections, that service is not tied to a specific location. A Vonage customer can make a phone call from anywhere in the world that has access to a broadband connection to the internet. Furthermore, a Vonage customer can choose a phone number from a variety of U.S. rate centers. In

⁶ Choroser Rebuttal, Ex. 3, Pages 3-4, Lines 17-26, 1-6.

⁷ Transcript, Page 108, Lines 11-25.

⁸ Ex. 4.

⁹ Ex. 5.

¹⁰ Choroser Rebuttal, Ex. 3, Page 4, Lines 22-24.

contrast, a Comcast Digital Voice customer is required to use a primary phone number that correlates to the physical location of the connection to Comcast's cable.¹¹

The differences between Comcast Digital Voice's fixed VoIP service and the nomadic VoIP service offered by Vonage are important because the Federal Communications Commission (FCC) has declared that the services offered by Vonage are subject to the exclusive jurisdiction of the FCC and that the various states cannot regulate those services. The question of whether the states can regulate fixed VoIP services, such as Comcast Digital Voice, is still undecided. That question will be further addressed in the Commission's Conclusions of Law.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law regarding Staff's complaint:

1. Comcast IP Phone is a "Telecommunications Company" and "Public Utility," as those terms are defined at Subsections 386.020 (51) and (42), RSMo Supp. 2006. As such, it is subject to regulation by this Commission.

2. Subsection 386.390.1, RSMo 2000, authorizes the Commission to bring a complaint against a public utility on its own motion.

3. As the party bringing a complaint, Staff has the burden of proving its allegations.¹²

4. Section 386.360.1, RSMo 2000, provides:

[w]henver the commission shall be of the opinion that a public utility, municipal gas system, person or corporation is failing or omitting or about to

¹¹ Choroser Rebuttal, Ex. 3, Pages 4-5, Lines 7-26, 1-4.

¹² *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n*, 116 S.W.3d 680 (Mo. App. W.D. 2003).

fail or omit to do anything required of it by law or by order or decision of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order or decision of the commission, it shall direct the general counsel to the commission to commence an action or proceeding in any circuit court of the state of Missouri in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.

5. Section 386.570.1, RSMo 2000, provides that any public utility that fails to comply with any provision of law, or with any “order, decision, decree, rule, direction, demand or requirement” of the Commission “is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.”

6. The General Counsel of the Commission is authorized by Section 386.600, RSMo 2000, to bring an action in circuit court to recover a penalty against a public utility.

7. Section 392.410.2, RSMo (Supp. 2006), states as follows:

No telecommunications company offering or providing, or seeking to offer or provide, any interexchange telecommunications shall do so until it has applied for and received a certificate of interexchange service authority pursuant to the provisions of subsection 1 of this section. No telecommunication company offering or providing, or seeking to offer or provide, any local exchange telecommunications service shall do so until it has applied for and received a certificate of local exchange service authority pursuant to the provisions of section 392.420.

8. Section 386.020(53), RSMo (Supp. 2006), defines “telecommunications service” as “the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means.”

9. Section 386.020(24), RSMo (Supp. 2006), defines “interexchange telecommunications service” as “telecommunications service between points in two or more exchanges.”

10. Section 386.020(31), RSMo (Supp. 2006), defines “local exchange telecommunications service” as “telecommunications service between points within an exchange.”

11. The Commission has found as a fact, that the Comcast Digital Phone service offered by Comcast IP Phone is used by customers to “transmit information by wire, radio and optical cable” both within and between exchanges. Therefore, Comcast Digital Phone service meets the statutory definition of a telecommunications service and under Missouri’s statutes; Comcast IP Phone must have a certificate of service authority before offering that service to its customers.

12. Missouri’s statutes and regulatory scheme are not, however, the only factors at play in this case. The FCC also regulates telecommunications services at the federal level. Consistent with the Supremacy Clause of the United States Constitution, the FCC has the authority to preempt state regulation that would conflict with federal regulation of telecommunications services. In general, the FCC regulates interstate telecommunications services, while local and intrastate services are left to be regulated by the various states. Therefore, the Commission may be preempted from exercising regulatory authority over some telecommunications services that would meet the definitions established by Missouri’s statutes.

13. The FCC has explicitly preempted state regulation of nomadic VoIP service. The Minnesota Public Utility Commission had sought to regulate Vonage’s DigitalVoice VoIP service. In its decision preempting the Minnesota PUC’s order, the FCC held that the

Minnesota Commission “may not require Vonage to comply with its certification, tariffing or other related requirements as conditions to offering DigitalVoice in that state.”¹³

In making its decision to preempt Minnesota’s regulation of DigitalVoice, the FCC found that as a practical matter, because calls could originate from anywhere in the world where a broadband connection could be made, it was impossible to separate the intrastate calls made using DigitalVoice from interstate calls. Thus precluding dual state and federal regulation of that VoIP service. On that basis of impossibility, the FCC found that federal regulation must prevail to preempt state regulation.

As described in the Findings of Fact section of this order, the Comcast Digital Voice service offered by Comcast IP Phone is a fixed VoIP service that differs from the nomadic VoIP DigitalVoice service offered by Vonage. Since a call using a fixed VoIP service must originate from a fixed connection to a cable, the difficulty of separating intrastate calls from interstate calls that led the FCC to preempt state regulation of the services offered by Vonage does not apply to a fixed VoIP service. Therefore, the FCC’s *Vonage* decision has not explicitly preempted state regulation of fixed VoIP service.

14. In its *Vonage* decision, the FCC predicted that it would likely also preempt state regulation of fixed VoIP services if that issue were presented to it in a future case. In the conclusion section of the *Vonage* decision, the FCC stated:

Moreover, for services having the same capabilities as DigitalVoice, the regulations of other states must likewise yield to important federal objectives. 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.

¹³ *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Util. Comm’n*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22433 (November 12, 2004)

However, when the Vonage decision was appealed to the U.S. 8th Circuit Court of Appeals, the New York Public Service Commission challenged the portion of the FCC's order that suggested state regulation of fixed VoIP service was likely to be preempted. In defending its order, the FCC argued that the question of preemption of state regulation over fixed VoIP service was not yet ripe for judicial review. The court agreed, stating:

We conclude the NYPSC's challenge to the FCC's order is not ripe for review. The 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. . . . As a consequence, NYPSC's contention that state regulation of fixed VoIP services should not be preempted remains an open issue.¹⁴

Thus, it is clear that the FCC has not yet preempted state regulation of fixed VoIP service of the sort offered in Missouri by Comcast IP Phone.

15. The FCC opened a rulemaking docket in 2004 to ultimately determine how all IP-enabled services, including fixed VoIP services, should be regulated.¹⁵ However, the FCC has not yet issued any rules and has not indicated when, if ever, it will do so. Even if the FCC eventually indicates an intent to preempt state regulation of fixed VoIP services, that decision will likely be subject to lengthy judicial appeals. Therefore, the Commission will not defer its decision on the regulation of fixed VoIP service while waiting for the FCC to act.

16. Comcast IP Phone also contends the Commission has already issued a decision in an arbitration case finding that internet protocol to public switched telephone network (IP-PSTN) traffic is an enhanced information service and not a telecommunications service under the Telecommunications Act because such traffic undergoes a net-protocol

¹⁴ *Minn. Pub. Serv. Comm'n v. FCC*, 483 F.3d 570, 582-583 (8th Cir. 2007).

¹⁵ *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

change.¹⁶ In the context of that arbitration decision, that means IP-PSTN traffic is subject to intercarrier compensation at reciprocal compensation rates rather than switched access charges. Comcast IP Phone contends the principle that IP-PSTN traffic, which includes VoIP traffic, is an information service, not a telecommunications service, would preclude state regulation of that service.

However, the FCC has not yet classified VoIP traffic as either an information service or a telecommunications service. That is one of the issues remaining to be decided in the FCC's pending rulemaking proceeding. The fact that this Commission made that finding in the narrow context of an arbitration decision regarding intercarrier compensation does not bind the Commission to reach the same conclusion in the broader context of this decision. The Commission concludes that its earlier decision in the arbitration case does not preclude it from addressing anew the question of its jurisdiction over a fixed VoIP service.

17. Assuming the Commission finds that it has the legal authority to regulate Comcast Digital Voice, Comcast IP Phone urges the Commission to refrain from exercising that authority while the question of state jurisdiction is before the FCC. Comcast IP Phone suggests there is no pressing need for state regulation of its VoIP service because it is a competitive service being offered in a competitive market. According to Comcast IP Phone, market forces are sufficient to protect Missouri's consumers without the need for regulation. Furthermore, Comcast IP Phone complains it would incur substantial expenses to modify its billing system to meet state requirements if it is found to be subject to state regulation.¹⁷

¹⁶ *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")*. Commission Case No. TO-2005-0336, 13 Mo P.S.C. 3d 519 (2005).

¹⁷ Choroser Rebuttal, Ex. 3, Pages 19-20, 1-12.

The problem with Comcast IP Phone's request that the Commission refrain from regulating the services it offers is that the controlling statute does not give the Commission the discretion to decide not to regulate a service that the legislature has determined should be regulated. The Comcast Digital Phone service that Comcast IP Phone offers meets the statutory definition of a telecommunications service subject to regulation by the Commission. The Commission cannot ignore the requirements of the statute and therefore, Comcast IP Phone must apply for a certificate of service authority to provide that service. If Comcast IP Phone believes that application of particular Commission Rules or state statutes would be unduly burdensome, it may request waiver of those rules or statutes pursuant to Section 392.361.5, RSMo 2000. So that Comcast IP Phone will have an opportunity to seek appropriate waivers before complying with this order, the Commission will give this order a sixty-day effective date.

DECISION

Based on the facts as it has found them, and its conclusions of law, the Commission finds that Comcast IP Phone is offering and providing local exchange and interexchange telecommunications services without a certificate of convenience and necessity in violation of Section 392.410.2, RSMo (Supp. 2006).

Staff's complaint asks for authority to file a petition in circuit court to seek imposition of civil penalties against Comcast IP Phone for its failure to obtain a certificate of convenience and necessity before offering its Comcast Digital Phone service in Missouri. The Commission finds that Comcast IP Phone's failure to obtain a certificate of convenience and necessity is due to a reasonable disagreement regarding the Commission's authority to regulate the services it provides, not from any disregard for the

authority of the Commission. In this circumstance, the Commission finds that it would not be appropriate to seek civil penalties against Comcast IP Phone at this time.

IT IS ORDERED THAT:

1. No later than December 10, 2007, Comcast IP Phone shall either cease providing Comcast Voice Service, or apply for an appropriate certificate of service authority to provide that service.

2. This Report and Order shall become effective on December 31, 2007.

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., Murray, with separate concurrence to follow, Clayton, Jarrett, CC., concur and certify compliance with the Provisions of Section 536.080, RSMo.
Appling, C., absent

Dated at Jefferson City, Missouri,
on this 1st day of November, 2007.