BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AMICUS CURIAE BRIEF OF EMBARQ

COMES NOW Embarq Missouri, Inc. d/b/a Embarq, by and through its undersigned counsel, and respectfully submits the following *Amicus Curiae* Brief on the issues presented in the above-referenced proceeding:

I. INTRODUCTION

As detailed in Embarq's Petition for Leave to File *Amicus Curiae* Brief ("Petition"), the issue of state regulatory authority over Voice over Internet Protocol ("VoIP") service providers is a critical one for the regulated telecommunications industry. Embarq will not repeat here the arguments in its Petition, although some of those arguments bear on the second issue presented for decision. Embarq's Brief will focus on the legal aspects of the first issue presented, the issue of preemption, because that issue truly controls the outcome of this case. If the Commission is preempted, then that effectively ends Staff's complaint. However, if the Commission is not preempted, then in answering the second question the Commission *cannot* refrain from taking at least some "action" regarding Comcast IP Phone's ("Comcast") Digital Voice VoIP service. For example, the Commission does not have the statutory authority to permit Comcast to continue to

operate without obtaining a certificate of authority. Furthermore, because Comcast has yet to agree to the Commission's jurisdiction, the record in this case obviously does not support regulatory waivers or other regulatory flexibility that the Commission does have statutory authority to grant. Consequently, the focus of the Commission's decision should be on Issue 1, and on a finding that the Commission is not preempted by federal law.

II. ARGUMENT

1. Does federal law preempt the Commission's jurisdiction over Comcast IP Phone's voice over internet protocol ("VoIP") service?

The Commission is not preempted from regulating Comcast's VoIP service

As the Commission is well aware, Article VI, the Supremacy Clause, of the Constitution of the United States allows federal law to pre-empt all state laws that conflict with federal law. The jurisprudence of pre-emption focuses on discerning the intent of Congress, which can be found in many forms, such as express pre-emption, field pre-emption (where the statutory scheme enacted by Congress is so pervasive that it is assumed the federal system "occupies the field" to the exclusion of any state regulation), and conflict pre-emption (where state regulations stand as an obstacle to the accomplishment of some dominant federal purpose).[1] However, consideration of the Supremacy Clause involves an understanding of the principle that historic police powers of the states are not to be pre-empted unless that is "the clear and manifest purpose of Congress."[2] In other words, there is a *presumption against pre-emption* of state police power regulations.[3] This presumption also operates to require that any federal pre-emption of state police powers must be narrowly tailored.[4]

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1 *See, e.g., Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kansas,* 489 U.S. 493, 509; 109 S. Ct. 1262, 1273 (1989).

2 *See, e.g., Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230; 67 S. Ct. 1146 (1947).

3 *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516; 112 S. Ct. 2608 (1992).

4 *Id.,* at 518.

With this background, there cannot be any finding that the Commission is pre-empted from regulating Comcast's Digital Voice ("CDV") service. Neither Congress nor the FCC has explicitly pre-empted states from imposing traditional common carrier regulation on fixed VoIP service providers. The seminal FCC decision on federal preemption of state regulation of VoIP services is the FCC's *Vonage Order.*[5] In the *Vonage Order* the FCC preempted the Minnesota Public Utility Commission from imposing "traditional common carrier regulation" on Vonage's VoIP service.[6] The FCC based its pre-emption on the fact-based "impossibility" doctrine of pre-emption (which is a "subset," if you will, of conflict pre-emption), wherein the impossibility of separately identifying and segregating the interstate and intrastate components of telecommunications means that state regulation would necessarily apply to interstate telecommunications in a way that would frustrate federal law and policies.[7]

However, the *Vonage Order* concerned "nomadic" VoIP services, and the "impossibility" doctrine is not applicable to fixed VoIP services such as the CDV service at issue in this proceeding. As detailed in Staff witness Mr. Voight's testimony,[8] after the *Vonage Order* the FCC issued its *Contribution Order*[9] where the FCC stated that if a carrier can track the jurisdiction of its calls, then the basis for preemption in the *Vonage Order* would no longer exist "and [the VoIP service provider] would be subject to state regulation."[10] (emphasis added) In other words, if a VoIP service provider can track its calls, it would be subject to all applicable

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5 *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (Rel. November 12, 2004) ("*Vonage Order*").

6 *Vonage Order,* ¶ 35;

7 *See Vonage Order,* ¶¶ 23, 31 – 32.

8 Exhibit 1, Voight Direct, pg. 9, lines 30 – 39.

9 *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, CC Docket 96-45 (other dockets omitted), FCC 06-94, (Rel. June 27, 2006) ("*Contribution Order*"), which determined that providers of interconnected VoIP services (which includes CDV) would be required to contribute to the federal universal service fund.

10 *Contribution Order,* ¶ 59.

state regulations (i.e., the carrier would be subject to more than just a requirement to contribute to a state universal service mechanism, which is the subject of the *Contribution Order*).

The 8th Circuit's recent decision in *Minn. Pub. Utils. Comm'n v. FCC*[11] upholding the FCC's *Vonage Order* did not extend the original ruling to fixed VoIP services. The decision affirmed the FCC's *Vonage Order.* The *Vonage Order* was specifically precipitated by a decision of the Minnesota Public Utilities Commission, but the *Vonage Order's* preemption extended to more than just the Minnesota Commission's order with respect to the "Digital Voice" VoIP service provided by Vonage. The *Vonage Order* preempted all "comparable regulations of other states" applied to any VoIP services that "share the same basic characteristics" as Vonage's service.[12] As explained in *Minn. Pub. Utils. Comm'n v. FCC,* multiple direct appeals of the *Vonage Order* were taken to different Federal Appeals Circuits, and all of the appeals were consolidated at the 8th Circuit.[13] Consequently, the 8th Circuit's decision is controlling in Missouri with respect to the preemptive effect, if any, of the *Vonage Order.*

Although the FCC stated in the *Vonage Order* that it would preempt state economic regulation of VoIP services that display the same basic characteristics as Vonage's nomadic Digital Voice service, the FCC argued to the 8th Circuit, and the Court found, that the FCC had not addressed fixed VoIP services in the *Vonage Order*. The Court ruled that a challenge to the *Vonage Order* by the New York Public Service Commission, on the grounds that the FCC had exceeded its authority in preempting state regulation of fixed VoIP services, was premature and would not be ruled on because the FCC had not preempted state regulation of fixed VoIP

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11 *Minn. Pub. Utils. Comm'n v. FCC,* 483 F.3d 570 (8th Circuit, March 21, 2007)
12 *Vonage Order,* ¶ 1.
13 *Minn. Pub. Utils. Comm'n v. FCC,* 483 F.3d at 577.

services.[14] Therefore, as found by the 8th Circuit, the *Vonage Order* does not preempt states from regulating fixed VoIP services, such as CDV.

Comcast has not proven that it cannot jurisdictionalize its intrastate traffic

Even if the *Vonage Order* did apply to Comcast's fixed CDV service, which it does not, by the very terms of the *Vonage Order* and the *Contribution Order* the Missouri Commission would not be preempted from regulating Comcast's CDV service because it is not impossible to jurisdictionalize CDV's intrastate traffic. In order to avoid regulation, Comcast apparently relies more on the notion that the service it provides is an "information service," rather than relying on the notion that it cannot juridictionalize the voice traffic that it originates and terminates in Missouri. In prefiled testimony, Comcast witness Ms. Choroser's rebuttal testimony devotes only one question and answer to the issue of Comcast's ability to jurisdictionalize its traffic.[15] That testimony admits that Comcast can jurisdictionalize CDV traffic based on NPA-NXX, just like every telecommunications carrier can.

As the prefiled testimony of Staff witness Voight amply explains, the CDV service easily satisfies the Missouri statutory definition of "telecommunications service."[16] Missouri law does not make an exception for voice provided via an "information service." Normally the Commission would place a high burden upon a party contending that the Commission has no jurisdiction to regulate something that looks like, and competes with, traditional wireline telecommunications service. Ms. Choroser's "caveats" about the potential unreliability of an NPA-NXX in the case of "a nomadic VoIP customer, a mobile phone customer, or any other customer using a foreign exchange number" is not unique nor unlike what every traditional telecommunications provider has to deal with today.

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14 *Minn. Pub. Utils. Comm'n v. FCC,* 483 F.3d at 582 – 583.
15 Exhibit 2, Choroser Rebuttal, pg. 15.
16 Exhibit 1, Voight Direct, pgs. 5 – 6.

Furthermore, in light of the FCC's requirement that providers of interconnected VoIP service must provide 911 access, which includes a requirement to allow end-users to constantly maintain a physical "registered location,"[17] arguments that providers of fixed VoIP services cannot jurisdictionalize their traffic are disingenuous. Comcast's pre-filed testimony provides no support for the idea that Comcast cannot jurisdictionalize its intrastate traffic. Furthermore, as Mr. Voight pointed out in his pre-filed testimony, the Commission has previously determined that Time Warner can jurisdictionalize its VoIP traffic.[18] Consequently, the impossibility doctrine provides no basis for pre-emption, even if the Commission were inclined to self-inflict pre-emption by engaging in the FCC's analysis from the *Vonage Order.*

The Commission is not bound by its decision in Case No. TO-2005-0336

Comcast's rebuttal testimony takes the somewhat confusing position that although Comcast will not contend that its CDV service is an "information service," because the Commission previously found that IP-PSTN services should be subject to reciprocal compensation in Case No. TO-2005-0336,[19] and that decision was upheld by the U.S. District Court for the Eastern District of Missouri,[20] that the Commission "cannot now grant Staff's complaint and find that an IP-PSTN [call] is a telecommunications service."[21] Comcast's argument appears to clearly recognize that the FCC has not categorized IP-PSTN service as either information service or telecommunications service, and therefore it appears that Comcast is arguing that the one thing that prevents the Commission from treating CDV as a

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17 *In the Matter of E911 Requirements for IP-Enabled Service Providers.* First Report and Order and Notice of Proposed Rulemaking, WC Docket No. 05-196, FCC 05-116, ¶ 37 (Rel. June 3, 2005 ("*VoIP 911 Order*").

18 Exhibit 1, Voight Direct, pg. 11, citing Case No. LT-2006-0162.

19 *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").*

20 *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. The Missouri Public Service Comm'n* , 461 F. Supp. 2d 1055 (U.S. Dist Ct, E.D. MO, 2006) ("*SBC Missouri v. PSC*")

21 Exhibit 2, Choroser Rebuttal, pg. 13, lines 15 – 20.

telecommunications service is the precedent from Case No. TO-2005-0336 and from *SBC Missouri v. PSC.*

As an initial matter, an administrative agency like the Commission is not bound by precedent or the legal concept of *stare decisis.*[22] Insofar as judicial courts are subject to *stare decisis*, the Missouri Supreme Court has made this common sense finding:

> The adherence to precedent is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course. American history is replete with examples of instances where experience and the changing needs of society trump adherence to precedent and demonstrate the fallacy of an earlier interpretation.[23]

This common sense approach to "precedent" is particularly applicable to regulatory law matters and to courts that rule on appeals of administrative agency decisions. As Staff Witness Mr. Voight pointed out in prefiled testimony, the regulation of IP-based services is very dynamic and evolving.[24] Because of the tremendous precedent at the FCC regarding information services and their interplay with telecommunications services, the FCC itself has obviously had to work hard to adapt to its precedents in order to apply numerous telecommunications regulations to VoIP services. Such regulations include requirements for access to 911, contributions to federal universal service, and compliance with CALEA,[25] notwithstanding the fact that the FCC itself has so far managed to avoid classifying VoIP as a telecommunications service under federal law. Having avoided that classification, it is inescapable that the FCC has also not classified VoIP service as an information service, even if the District Court in *SBC Missouri* might have classified IP-PSTN traffic as an information service for intercarrier compensation purposes.

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22 *State ex rel. AG Processing, Inc. v. Public Service Comm'n,* 120 S.W.3d 732, 736 (Mo. 2003).

23 *Medicine Shoppe Internat'l, Inc., v. Director of Revenue,* 156 S.W.3d 333. 335, (Mo. 2005).

24 *See* Exhibit 3, Voight Surrebuttal, pgs. 7 – 8, FN 2.

25 *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295 and RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, FCC 05-153, Released September 23, 2005 ("*VoIP CALEA Order*")

The Court in *SBC Missouri* addressed a narrow issue of the appropriate intercarrier compensation for IP-PSTN traffic, and did not address "VoIP" traffic *per se.* The Court in *SBC Missouri* addressed the issue of whether the Commission's decision to order reciprocal compensation for IP-PSTN traffic in an FTA § 251 interconnection arbitration was arbitrary and capricious or violated federal law. Finding that the Commission's decision was not arbitrary and capricious and did not violate federal law is not tantamount to finding that the Commission cannot impose certain state regulations on a fixed VoIP service. The Court in *SBC Missouri* did not address the preemption question at issue here.

Just as significantly, the Court did not have the benefit of the 8th Circuit's *Vonage* decision nor the benefit of the FCC's *Contribution Order,* both of which make clear that the FCC has not preempted state regulation of fixed VoIP services that can be jurisdictionalized. Consequently, while the Court in *SBC Missouri* might have characterized IP-PSTN traffic as "information service" for purposes of its own analysis in deciding the question before it, the decision in *SBC Missouri* should not be viewed as controlling the disposition of the issue presently before the Commission. It should also be compelling that the analysis of the U.S. District Court for the Western District of Missouri, in denying Comcast's Motion for a Permanent Injunction in this case, strongly rejected Comcast's arguments that the Commission has been pre-empted.[26]

While Comcast might prefer that this Commission wait on the FCC to classify VoIP service for regulatory purposes, this Commission should not wait because the FCC has *not* declared such VoIP IP-PSTN service to be an information service and the FCC has not

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[26] *Comcast IP Phone of Missouri, LLC, et al., v. The Missouri Public Service Comm'n,,* Case No. 06-4233-CV-C-NKL, Order (US Dist. Ct. W.D. MO, Jan. 18, 2007).

preempted states from regulating such VoIP IP-PSTN service.[27] Even if such VoIP IP-PSTN service *can* be classified as an information service, the Communications Act does not preempt state regulation of information services and Embarq submits that the FCC has never issued an order preempting states from imposing traditional common carrier regulation on the type of fixed VoIP IP-PSTN services at issue here.

Not only is there no clear pre-emption of the Commission, Embarq believes it is highly unlikely that the FCC will preempt states with respect to regulation of fixed VoIP providers. In reviewing the FCC's rationale for basing preemption on the "impossibility" doctrine, the 8th Circuit repeatedly notes that the facts underlying the FCC's "impossibility" rationale are not immutable. The FCC itself was clear in the *Contribution Order* that if a carrier can jurisdictionalize its traffic, then there would be no preemption of state regulation.[28] The 8th Circuit stated "if, in the future, advances in technology undermine the central rationale of the FCC's [*Vonage Order*], its preemptive effect may need to be reexamined."[29] The 8th Circuit even opined that "when VoIP is offered as a fixed service rather than a nomadic service, the

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[27] It is arguable whether the FCC has completely preempted states from regulating VoIP services even if such services were properly considered "information services." The FCC's broad preemption orders in the *Computer Inquiry* cases all predate VoIP services and so the FCC has never specifically addressed state regulation or preemption of an enhanced/information service that is voice communication (i.e., is "telecommunications") rather than is a service that *uses* telecommunications. (*See generally Vonage Order* FN 77 for citations to the line of *Computer Inquiry* decisions, which constitute a body of law deserving of treatment far beyond what can be attempted in this case.) The initial *Computer Inquiry* case was initiated in the late 1960s, and when the FCC originally preempted states from regulating enhanced services, the services at issue were in the nature of data processing and voice mail, not an enhanced service that is a substitute for traditional telephone service. Original pre-emption orders were focused on pre-empting state regulation of structural separation requirements for enhanced services provided by dominant carriers in the telecommunications market, and there was no regulated analog to such enhanced services at that time, unlike now where VoIP competes directly with regulated telecommunications service. Even then, the FCC had some of its pre-emption orders overturned because they were not sufficiently narrow. *See California v. FCC,* 39 F.2d, 919, 931 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995). The FCC has recognized that pre-emption of state regulation of enhanced services may not be appropriate if the intrastate component of an enhanced service could be separated from the interstate component and if state regulation would not negate valid FCC regulatory goals. *California III*, at 931, and *see generally Vonage Order,* FN 78.

[28] *Contribution Order,* ¶ 56.

[29] *Minn. Pub. Utils. Comm'n v. FCC,* 483 F.3d at 580.

interstate and intrastate portions of the service can be more easily distinguished."[30] Consequently, as Embarq stated above, the Commission should not inflict pre-emption upon itself.

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

The Commission should act to level the playing field between the regulated industry and Cable telephony providers.

The FCC's *Contribution Order* provides an excellent analysis that can be used to explain of why greater regulation of fixed VoIP service is in the public interest. Although the *Contribution Order* only addressed a requirement for providers of interconnected VoIP service to contribute to the federal USF ("FUSF"), the FCC's rationale is equally applicable to traditional state regulation of competitive carriers. In the *Contribution Order* the FCC found that the contribution base for the FUSF has been shrinking from declining revenues associated with traditional wireline services, such as long distance,[31] while at the same time the number of subscribers to VoIP services has increased "significantly" and the FCC expects that trend to continue.[32] The *Contribution Order* even contemplates that the definition of "interconnected VoIP services may need to expand as new VoIP services increasingly substitute for traditional phone service."[33] (emphasis added) There is no reason to believe that these national telecommunications market trends cited to by the FCC are not also present in Missouri.

In addition, the FCC made a finding that requiring VoIP providers to contribute to the FUSF is in the public interest. The FCC made such a finding, based on the fact that "it [is] in the public interest to extend universal service contribution obligations to classes of providers that

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30 *Id.*, at 575.
31 *Contribution Order*, ¶¶ 17 - 18, 34.
32 *Contribution Order*, ¶¶ 19, 34.
33 *Contribution Order*, ¶ 36.

benefit from universal service through their interconnection with the PSTN."[34] The FCC also relied on its belief "that providers of interconnected VoIP services similarly benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN, which is supported by universal service mechanisms."[35] These findings demonstrate that VoIP service providers are competing with regulated ILECs and benefit from their access to the ILECs' networks.

Finally, the FCC also based its "public interest" finding on the principle of competitive neutrality.[36] The FCC observed that "as the interconnected VoIP service industry continues to grow, and to attract subscribers who previously relied on traditional telephone service, it becomes increasingly inappropriate to exclude interconnected VoIP service providers from universal service contribution obligations."[37] The same can be said for excluding fixed VoIP providers from traditional common carrier regulations applicable to competitive carriers. Cable companies like Comcast, after all, are not start-up companies. Comcast is a huge, well-financed, publicly traded company that is adding phone service to its existing infrastructure and service portfolio. Comcast may voluntarily pay into various "social" programs, such as the state USF and 911 fees, but if those payments are truly "voluntary" and Comcast is not legally required to make those payments, then Comcast is obviously not legally accountable for inaccurate payments, late payments, or missed payments; Comcast could presumably refuse to be audited. Perhaps the whole telecommunications industry could be placed on such an honor system, if it works so well for Comcast.

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34 *Contribution Order*, ¶ 43.
35 *Id.*
36 *Contribution Order*, ¶ 44.
37 *Id.*

Cable providers of fixed VoIP services are winning lines from ILECs. Comcast provides voice service in Embarq's Buckner, Lake Lotawana, Oak Grove, Odessa, and Pleasant Hill exchanges.[38] But Comcast's evasion of any regulation by the Commission provides it with an unfair competitive advantage, and is not in the public interest.[39]

III. CONCLUSION

Simply put, the FCC has not classified fixed VoIP service as either a telecommunications service or an information service. However, fixed VoIP service does satisfy the definition of "telecommunications service" under Missouri law, and Comcast's fixed VoIP service is a substitute for, and competes directly with, ILECs' telecommunications services. Neither the federal Communications Act, nor the FCC, has preempted states from regulating fixed VoIP services like Comcast's Digital Voice service. There has been no express preemption, and it is not impossible to jurisdictionalize the intrastate component of Comcast's service. Consequently, the Commission should grant the relief requested in Staff's Complaint.

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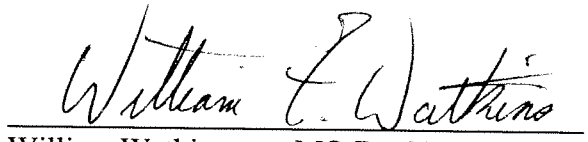
[38] *In the Matter of the Application of Embarq Missouri, Inc. for Competitive Classification Under Section 392.245.5, RSMo 2005,* Case No. IO-2006-0551, Report and Order (July 20, 2006).

[39] Exhibit 1, Voight Direct, pgs. 14 – 15.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served on the following parties by electronic mail, this 14th day of September 2007.

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