

**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.	)	

**RESPONDENT’S APPLICATION FOR REHEARING AND  
MOTION FOR EXPEDITED TREATMENT**

**Application for Rehearing**

COMES NOW Comcast IP Phone, LLC (“Comcast”) and pursuant to Ch. 386.500, RSMo., respectfully submits to the Missouri Public Service Commission (“the Commission”) this Application for Rehearing, arising out of the Commission’s Report and Order, dated November 1, 2007 (“the Report and Order”), and its Motion for Expedited Treatment, pursuant to 4 CSR 240-2.080(16). In support of its Application and Motion, Comcast states:

1. This proceeding arose out of a complaint which Staff filed against Comcast in which Staff alleged that Comcast was providing basic local exchange telecommunications service without a certificate of service authority or an effective tariff. Comcast responded that its VoIP service is not subject to Commission jurisdiction, and thus did not require certification or a tariff. After Staff and Comcast presented prefiled testimony, the matter was heard by the Commission on July 25, 2007, at a hearing during which the Commissioners posed numerous questions to witnesses and counsel concerning the legal and factual grounds for Commission jurisdiction. In the Report and Order the Commission held that the case involved a “reasonable disagreement regarding the Commission’s authority to regulate the services [Comcast]

provides...], Report and Order, at 12, and Commissioner Murray stated in her concurrence that it is bad public policy to regulate VoIP services.

2. The Commission's Report and Order must be lawful and reasonable, and based on substantial and competent evidence upon the whole record. In this case the Report and Order is both unlawful (the Commission incorrectly found that it has jurisdiction regulate any VoIP service and that, as a matter of law, the distinction between nomadic and fixed VoIP service was relevant and dispositive) and unreasonable (for example, the Commission incorrectly found that Comcast's VoIP service "differs" from Vonage's VoIP service, even though Comcast's VoIP service meets the preemption criteria of the FCC's *Vonage Order*.<sup>1</sup> As the Report and Order contains factual findings which are unreasonable and legal conclusions which are unlawful, the Commission should grant rehearing and, upon rehearing, should hold that it does not have jurisdiction over Comcast's service and should dismiss Staff's complaint.

**A. The Commission erred as a Matter of Law in that it Improperly Applied the Test for Preemption Outlined in the *Vonage Order*.**

3. The Commission's Report and Order is based in part on the FCC's *Vonage Order*. However, the Commission erred as a matter of law in its application of the factors established in the *Vonage Order* for preemption of state jurisdiction over VoIP services provided by cable companies, such as Comcast. The Commission's decision that jurisdiction over Comcast's VoIP service is proper is based on its finding that Comcast Digital Voice Service is a fixed VoIP service, while the *Vonage Order* involved a nomadic VoIP service offering by Vonage. This distinction is of no legal significance, and the Commission's holding to the contrary is a fatal flaw in the analysis which led to a finding of jurisdiction.

---

<sup>1</sup> *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (hereafter "*Vonage Order*").

4. The fact that Comcast's service differs from that of Vonage in terms of certain features and functionalities offered to consumers is irrelevant to the key legal issue: whether Comcast's Digital Voice service meets the preemption criteria set forth in the *Vonage Order*. Those criteria are (a) a requirement for a broadband connection from a user's location; (b) a need for IP compatible CPE; and (c) a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video. The Commission's Report and Order made no findings that Comcast did not meet these criteria; in fact, the evidence demonstrated the contrary. In effect, the Commission chose to ignore the test announced by the FCC for determining whether federal preemption is appropriate. Because the Commission ignored the preemption criteria set forth by the FCC and the *Vonage Order*, and set forth just a few lines above, the Commission should rehear this case.

**B. The Commission's Holding that Regulation of Comcast's VoIP Service is not Preempted is Erroneous as a Matter of Law, in that Comcast's Service Results in a Net Protocol Conversion.**

5. The Commission's Report and Order was unlawful in that it fails to offer a reasonable explanation for its departure from (or for distinguishing) its previous decision that internet protocol to public switched telephone network (IP to PSTN) traffic is an enhanced information service and not a telecommunications service under the Telecommunications Act, because such traffic undergoes a net protocol change.<sup>2</sup> The Commission does not adequately explain how it can hold in one case that IP to PSTN traffic is an information service, and therefore not subject to Commission jurisdiction, while in this case it holds that the same traffic

---

<sup>2</sup> *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).*

is a telecommunications service. The Commission makes no attempt to announce a principled distinction between the two cases, or, if it is changing its rule, it fails to provide a reasoned explanation for that change. In drawing what is clearly a “difference without a distinction,” the Commission held that since the first case was an arbitration, and the subject case is a complaint proceeding, the holding in the first case does not control here. That is an obvious example of unlawful results-oriented legal analysis. Other than stating that it is not bound by its earlier decision, the Commission does not provide any explanation for ignoring its own precedent that was upheld by a federal court<sup>3</sup> or for its shift in policy. Report and Order, at 11.

6. As a result of the flawed legal analysis that a decision in one case cannot be binding on the same issue in another case, the Commission found that Comcast’s Digital Voice service was subject to Commission jurisdiction. This is error as a matter of law and should be corrected on rehearing. It results in discriminatory treatment of Comcast, which will now be subject to a different regime of intercarrier charges and other matters from similarly situated providers.

**C. The Commission erred as a Matter of Law in finding that the Eighth Circuit’s decision in *Minnesota PSC v. FCC* Precluded Federal Preemption of State Regulation of Comcast’s VoIP Service.**

7. The Commission based its determination that its ruling was not preempted by federal law on the U.S. Eighth Circuit Court of Appeals’ statement that the FCC’s conclusion that fixed VoIP services were likely preempted was not necessary to its decision in the Vonage case.<sup>4</sup> This decision does not provide an adequate basis for the Commission’s decision that its ruling is not preempted. The Eighth Circuit rejected the NY PSC’s appeal for procedural reasons

---

<sup>3</sup> *Southwestern Bell Telephone v. Missouri Public Service Commission*, 461 F. Supp.2d 1055 (2006).

because there was no reviewable final agency action. The FCC's determination that state regulation of cable VoIP is counter to federal policy was not questioned by the Eighth Circuit.

8. The Eighth Circuit's decision in particular considered only the FCC's determinations relying on a distinction for regulatory purposes between fixed and nomadic VoIP services. The Eighth Circuit did not in the same way rely upon the additional FCC conclusions, more relevant here, concerning the many other reasons that VoIP services are not subject to state regulation. For the reasons discussed above, all VoIP services are not subject to regulation by any state, including Missouri.

9. The Commission erred in concluding that it had no discretion not to defer consideration of the question presented to it in light of the pending FCC proceeding which will conclusively determine the status of Comcast's VoIP service.

**D. The Commission Erred as a Matter of Fact and Law in Concluding that Comprehensive State Regulation Should be Imposed on Comcast, in spite of the Fact that Market Forces are Sufficient to Forestall Improper Service Practices.**

10. The Commission erroneously rejected Comcast's argument that comprehensive regulation is inappropriate at this point because competitive forces will deter any anti-consumer activities by Comcast. The Commission found that the Missouri telecommunications statute gives it no discretion, and requires regulation. Report and Order, at 12. That finding is erroneous.

11. When a statute is reasonably open to interpretation, the Commission has the power to determine administratively its own jurisdiction.<sup>5</sup> As part of its authority to determine jurisdiction, the Commission has the discretion to delay its order in this case until the FCC makes a classification determination. The Commission erred in finding that, regardless of the

---

<sup>4</sup> *Minnesota Public Service Commission v. FCC*, 483 F.3d 570, 582-583 (8<sup>th</sup> Cir. 2007).

<sup>5</sup> *State v. Blair*, 146 S.W.2d 865, 874 (Mo. banc 1940).

bad public policy it was announcing by regulating VoIP in Missouri, it had no choice but to do so. The Commission failed to perform its obligation to determine whether regulation was in the public interest in this case.

### **E. Summary**

12. The Commission's Report and Order is unlawful, unjust and unreasonable for the reasons stated above and other reasons, including that it (a) fails to give appropriate weight to the FCC's IP-Enabled rulemaking proceeding where the FCC will determine how all IP-enabled services will be regulated; (b) provides no principled basis to distinguish its finding in the Missouri ICA arbitration that VoIP is an enhanced service from its holding in this case that VoIP is a telecommunications service (or, alternately, fails to explain its changed position or the effects of that change); (c) draws an unprincipled and unsupported distinction between so-called fixed and nomadic VoIP services; (d) fails to provide a principled substantive rationale for subjecting a VoIP provider to its jurisdiction; (e) creates a discriminatory rule that would treat Comcast differently from other VoIP providers with regard to intercarrier compensation and other matters; (f) fails to properly account for the many differences between VoIP services and the traditional telephone services subject to its regulatory authority; (g) fails to respond to the many reasons the FCC has given as the basis for its understanding that VoIP services are subject to exclusive federal jurisdiction and are different in this and other respects from traditional telephone services; (h) improperly finds that it lacks the discretion to defer ruling on this issue pending the FCC's resolution of the same issue; (i) fails to properly weigh the extreme burdens its ruling will impose on Comcast against the negligible (if any) benefits that would result from its ruling; (j) erroneously concludes that if the FCC has not expressly held that a particular form of VoIP service is subject to exclusive federal regulation, it therefore follows that Missouri is free to regulate that service; (k) the December 10 deadline fails to provide Comcast sufficient

time to file an application for a certificate of authority and waivers of Commission ; (l) finds itself free to ignore the authority of the FCC to determine how all VoIP services will be regulated; and (l) errs in imposing restrictive state regulation on a national service that is offered in Missouri and other states, and on an interstate basis, where, as to many of the components of the service that Missouri seeks to regulate, those components are inseverably interstate. By imposing requirements on a national communications provider offering a national service that will powerfully affect the provider's ability to offer that service as it chooses and as consumers want in a competitive market in forty-nine other states, as well as interstate, the Commission has acted unlawfully and in violation of federal law.

13. The Report and Order is unlawful, unjust and unreasonable because it is not supported by competent and substantial evidence upon the record as whole, and is contrary to the substantial and competent evidence which is contained in the record.

#### **Motion for Expedited Treatment**

14. Comcast requests that the Commission rule on its Application for Rehearing on an expedited basis pursuant to 4 CSR 240-2.080(16). In support of this motion, Comcast states:

- a) On November 1, 2007, the Commission issued its Report and Order in this matter with an effective date of December 31, 2007.
- b) The Report and Order requires Comcast either to apply for a certificate of service authority or cease providing Digital Voice service by December 10, 2007.
- c) The Commission's ruling on this Application for Rehearing is critical, so that Comcast can pursue appellate relief before the Commission's December 10, 2007 deadline.
- d) There will be no adverse impact on Comcast's customers or the general public by the Commission granting this Motion for Expedited Treatment.

e) This Request for Expedited Treatment is being filed as soon as practicable after the subject Report and Order.

15. Comcast respectfully requests the Commission rule on Comcast's Application for Rehearing by November 26, 2007.

WHEREFORE, Comcast respectfully requests that the Commission grant its Application for Rehearing, and on rehearing reverse the holding in its Report and Order that Comcast's VoIP service is subject to its jurisdiction. Further, Comcast moves that the Commission give this motion for rehearing expedited treatment, principally in light of Comcast's need to seek expedited consideration in the Circuit Court should the Application for Rehearing be denied.

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL LLP

By: /s/ Mark P. Johnson

Mark P. Johnson MO Bar #30740  
Roger W. Steiner MO Bar #39586  
4520 Main Street, Suite 1100  
Kansas City, Missouri 64111  
Phone: 816.460.2400  
Fax: 816.531.7545  
Email: mjohnson@sonnenschein.com  
rsteiner@sonnenschein.com

ATTORNEYS FOR COMCAST IP PHONE, LLC

### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been transmitted electronically to all counsel of record this 12th day of November, 2007.

/s/ Mark P. Johnson

Attorney for Comcast IP Phone, LLC