

**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.)	

COMCAST’S REPLY BRIEF

Comes now Comcast IP Phone, LLC (Comcast), by and through its undersigned counsel and respectfully submits its reply brief in the above-referenced proceeding.

I. INTRODUCTION

Both Staff and the Missouri Independent Telephone Company Group (MITG) utilize the majority of their initial briefs to discuss federal and state precedents and why Commission regulation of Comcast Digital Voice (CDV) is not preempted by the FCC. But Staff and MITG spend very little time discussing the rationale for state regulation and why the Commission should grant Staff’s complaint. Neither brief points to customer service complaints, intercarrier disputes, or any other reason why the Commission should disrupt the work of the FCC on this issue.

Staff’s approach is echoed by the Missouri Small Telephone Group (MSTG) and Embarq in their *amicus curiae* briefs. All want to impose regulation on Comcast for regulation’s sake. AT&T’s *amicus curiae* brief, on the other hand, recognizes the unique nature of CDV, that it does not fit into the Commission’s traditional regulatory framework, and that it makes sense to defer to the FCC on the jurisdictional question.

II. THE MISSOURI VOIP ORDER HELD THAT VOIP IS AN INFORMATION SERVICE, RENDERING VOIP BEYOND COMMISSION JURISDICTION

While the Staff and other parties devote much of their briefing to discussion of federal precedent, they expend little effort discussing this Commission's own decision regarding VoIP in Case No. TO-2005-0336, which was affirmed in Southwestern Bell Telephone v. Missouri Public Service Commission, 461 F. Supp.2d 1055 (E.D. Mo. 2006) (the Missouri VoIP Order). In fact, Staff ignores the case entirely, and for good reason, because as explained below the Missouri VoIP Order prohibits the Commission from granting Staff's Complaint as a matter of law.

MITG claims that the Commission's Order in Case No. TO-2005-0336 merely modified the Arbitrator's Order for purposes of internal consistency and that there is no discussion concerning the regulatory classification of VoIP service. MITG Brief, at p. 10. However, the Commission's Arbitration Order specifically incorporated the Final Arbitrator's Report by reference. Therefore, the Commission adopted the arbitrator's finding that IP-PSTN traffic falls squarely within the "net protocol change" portion of the FCC's multi-part enhanced services definition. The arbitrator's report also contains an extensive discussion of the FCC's IP-Enabled Rulemaking and the regulatory treatment of VoIP. While this discussion took place in an arbitration proceeding, that fact alone does not mean that the Commission did not understand the ramifications of its Order or that the decision is not applicable outside of the arbitration context.

Embarq argues that the Commission is not bound by the Missouri VoIP Order or the legal concept of *stare decisis*. Although courts may excuse apparent inconsistencies between current and prior decisions of an administrative agency, they do so only where the change in opinion is not otherwise arbitrary or unreasonable. See McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee, 142 S.W.3d 228, 235 (Mo. App. 2004). But the case now before the Commission does not allow for a reasoned change in opinion. Should the

Commission grant Staff's complaint, it would be saying that the same IP-PSTN traffic, which only two years ago it held was an information service under federal law for intercarrier compensation purposes, is now part of a "telecommunications service" under state law for certification purposes. Where a service has elements of both telecommunications and information services, it must be classified as one or the other for purposes of regulation. The FCC has noted that the Telecommunications Act requires it to classify an integrated service offering as solely a telecommunications service or solely an information service, depending upon the nature of the functions offered to the end user, because the Act's legislative history demonstrates that the definitions of "telecommunication service" and "information service" are mutually exclusive.¹ A service cannot be classified as both a "telecommunications service" and an "information service" because the Commission wishes to regulate the service. Such reasoning would amount to unprincipled result-oriented decision making. The Commission cannot engage in such behavior.

Moreover, if the Commission were to find CDV a "telecommunications service," it would subject Comcast to discriminatory treatment on intercarrier compensation obligations *vis a vis* other IP-PSTN traffic providers in Missouri, in direct contradiction of its prior Order and the Missouri VoIP Order. A "telecommunications service" provider is obligated to pay access charges for its originating non-local traffic, but as the Commission's Order and Missouri VoIP Order held, IP-PSTN traffic is not subject to access charges and is only subject to reciprocal compensation rates, which are lower than access charge rates.

As stated above, the Commission and the Missouri VoIP Order found IP-PSTN traffic to be an "information service." Therefore, granting the Staff complaint and finding CDV a

¹ In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, 20 F.C.C.R. 14989 ¶¶ 15, 16 (2005).

“telecommunications service” would require Comcast to pay access charges when other providers of IP-PSTN traffic do not, thereby discriminating against Comcast by preventing it from paying the more economical reciprocal compensation rates paid by other IP-PSTN providers. Aside from producing utter regulatory incoherence and discrimination, such an outcome is completely contrary to the federal court precedent established by the Missouri VoIP Order. Therefore, the Commission, as a matter of law, cannot grant the Staff complaint.

III. DISCUSSION OF IP-ENABLED PROCEEDINGS

The IP-Enabled Proceeding² was opened by the FCC to address comprehensively the regulatory and policy issues related to VoIP services. Staff’s Initial Brief, p. 7. In paragraph 2 of its petition for leave to file its *amicus* brief, MSTG acknowledges that the issues raised by this case are presently being examined by the FCC. The Commission has recently recognized in Case No. TE-2006-0415 that “[p]roposed federal legislation and recent and prospective decisions by the courts and FCC could impact or even supplant the Commission’s authority over cable television companies offering a local voice service in the near future.”³ Comcast agrees that the issues in this case are before the FCC and the Commission should be careful not to disrupt the FCC’s deliberative process established in the IP-Enabled Proceeding.

A. Discussion of the Vonage Order

All of the parties that want the Commission to grant Staff’s complaint argue that the Vonage Order does not apply to CDV because CDV is not a “nomadic” service. Comcast reiterates that the Vonage decision does not turn on whether CDV can track the jurisdiction of calls. The Vonage decision does not classify VoIP service as a “telecommunication service” or an “information service.” Instead, the FCC indicated that cable companies that provide VoIP

² In the Matter of IP-Enabled Services, 10 F.C.C.R. 4863 (2004) (the IP-Enabled Proceeding).

³ Report and Order (July 24, 2007), p. 13; In the Matter of the Application of MCC Telephony of Missouri, Inc. for Waiver of Compliance with the Requirement of 4 CSR 240-32.

services having the basic characteristics similar to Vonage's Digital Voice service would also be exempt from state regulation.

Paragraph 32 of the Vonage Order lists the basic characteristics as (1) a requirement for a broadband connection from the user's location; (2) a need for IP-compatible CPE; and (3) 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. CDV meets each of these requirements. (Choroser Rebuttal, Ex. 3, p.p. 2-4).

Regardless of which interpretation of the Vonage Order which the Commission which eventually adopts, the parties all agree that the FCC has not classified VoIP as a "telecommunications service" or an "information service." This lack of classification is deliberate, as the FCC has avoided pre-judging this question even when establishing a regulatory framework for VoIP providers by thoughtfully and sequentially adding minimal regulation that achieves important public policy goals. The Commission should respect the FCC's deliberation and also avoid pre-judging the regulatory status of CDV.

B. Discussion of VoIP Universal Service Order (USF Order)

Several of the parties argue that the FCC's USF Order means that CDV is subject to Commission regulation. However, even though the FCC stated that an interconnected VoIP provider with the capability to track the jurisdictional confines of calls (originating and terminating locations) would no longer qualify for the preemptive effects of the Vonage Order and would be subject to state regulation, the FCC again declined to classify VoIP as either an information service or a telecommunications service. The FCC noted at paragraph 58 of the USF Order that because it had not yet made this classification, some interconnected VoIP providers

“may hold themselves out as telecommunications carriers, but others do not, considering themselves instead to be ‘end users.’” This is exactly what has happened in Missouri, as some interconnected VoIP providers such as Charter Fiberlink hold themselves out as telecommunications companies under Missouri law, while others, such as Comcast, do not. (Choroser Rebuttal, Ex. 3, p. 14-15). Another company’s choice to be a “telecommunications company” under Missouri law does not mean that Comcast is bound by that choice.

IV. COMCAST’S OPERATIONS ARE NOT STATE SPECIFIC

Staff attempts to make the argument that Comcast could use an existing Comcast Digital Phone billing system for its CDV service so that it would not have to spend \$4 million to revamp the CDV billing system to comport with the Commission rules. Staff misses the point of Comcast’s testimony on this matter because Comcast Digital Phone is an entirely different and circuit switched service that is offered pursuant to an agreement using a third party’s switching facilities. Comcast Digital Phone is not offered in Missouri. (Choroser Rebuttal, Ex. 3, p. 11, l. 1). Comcast Digital Phone’s billing system is configured to keep up to date with changes in state regulation (Tr. 107-108). CDV, however, is provided via Comcast’s own facilities and was designed with its own national billing system which did not take into account variations in state regulation. (Id.) The two billing platforms are completely separate and cannot be merged.

Missouri law does not require a company to have separate customer service representatives, installation crews, or bills for its regulated telecommunication services. What Staff fails to understand is that these support functions for Comcast CDV service are not set up on a state-by-state basis. For example, some CDV customer service representatives answer calls for all states; if CDV had to comply with Missouri customer service regulations (such as disconnect rules), all CDV customer service representatives would have to be trained in Missouri

regulation even though only a small percentage of calls to the CDV call center involve Missouri customers.

Another example is that the CDV invoice may describe the monthly recurring charge for video, Internet access and CDV as a single line item. (Choroser Rebuttal, Ex. 3, p. 5, l. 15-17). If CDV had to comply with the Commission's disconnect regulations, it would have to break out what portion of the single line item the customer must pay to maintain phone service. Comcast would need to expend significant development dollars in order to bill for its services in a different manner, with no corresponding consumer benefit. (*Id.* l. 18-20). These are examples of the inefficiencies that result when individual states impose rules on a service that is deployed on a national basis and has integrated features that span multiple products.

V. THE COMMISSION SHOULD DEFER ACTION ON THIS MATTER UNTIL RECEIVING CLARIFICATION FROM THE FCC

Predictably, the Staff, STCG, Embarq and MITG all request that the Commission take immediate action on Staff's complaint as they claim regulation of CDV is vitally important for the provision of telecommunication service in Missouri. Yet none of the parties provides any evidence of consumer or carrier complaints against Comcast. Embarq and others claim that Comcast is evading regulation, giving it an unfair competitive advantage over existing ILECs. But as shown in its initial brief, Comcast is fulfilling the same social obligations as the ILECs, such as USF payments, 911 fees, etc.

Embarq claims that such voluntary compliance is not sufficient because Comcast could refuse to be audited. Apparently Embarq does not understand that payments for 911 and USF assessments, etc. are made by a regulated entity: Comcast Phone of Missouri, LLC. (Choroser Rebuttal, Ex. 3, p. 20, l. 20-25). Comcast Phone of Missouri is accountable for these payments and is responsible for any inaccurate, late or missed payments, and may be audited by the Commission.

As explained in Comcast's initial brief, the true level playing field does not exist. The ILECs enjoy advantages (such as USF support) that Comcast does not. The Commission cannot undo years of regulatory advantages that the ILECs have enjoyed in order to achieve regulatory parity. Granting Staff's complaint will not level the playing field.

Staff and others argue that the Commission has no choice but to regulate CDV as a telecommunications service under § 392.410 RSMo. But this argument does not recognize the discretion that the Commission has in the exercise of its authority. As pointed out in Comcast's initial brief, the Commission has deferred to the FCC in arbitration proceedings where the FCC had yet to make important determinations with respect to internet traffic. The Staff of the Commission has even recommended that the Commission delay its decision in state tariff filings to see whether the FCC would preempt state action. The same forbearance is appropriate in the case of Comcast.

VI. CONCLUSION

Staff admits in its brief that the Vonage Order suggests the FCC, if faced with the precise issue before this Commission, would preempt fixed VoIP services. Staff admits that the FCC would preempt Commission regulation of CDV. At this point, Comcast must ask: What is the purpose of granting Staff's complaint? It appears that Staff is asking the Commission to subject CDV to state regulation for a finite time, until it is preempted by the FCC. Because the Staff complaint is devoid of any reason to regulate CDV (no customer complaints alleged, no interconnection problems with other carriers, social obligations are being met), the Commission should deny Staff's complaint until the FCC determines the statutory classification of VoIP services.

Respectfully submitted,

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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 October, 2007.

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