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, L.L.C.,	)	
Respondent	)	

AT&T MISSOURI'S *AMICUS BRIEF*

AT&T Missouri, [1] pursuant to 4 CSR 240-2.075(6)[2] and its Petition for Leave submitted simultaneously with this filing, respectfully submits this *amicus brief.*

As demonstrated below, federal law preempts state Commissions from imposing common carrier regulation on interconnected VoIP services. Even if the Missouri Public Service Commission ("Commission") determines it is not preempted here, it should refrain from taking action to regulate VoIP services at this time because the FCC in its *IP-Enabled Services* proceeding is specifically considering the proper classification of VoIP.

AT&T Missouri suggests that the Commission show restraint in this case as new technologies such as VoIP do not fit within the traditional regulatory framework and

[1] Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to in this pleading as "AT&T Missouri."

[2] 4 CSR 240-2.075(6) states that

> Any person not a party to a case may petition the commission for leave to file a brief as an *amicus curiae*. The petition for leave must state the petitioners interest in the manner and explain why an *amicus* brief is desirable and how the matters asserted are relevant to the determination of the case. A brief may be submitted simultaneously with the petition. Unless otherwise ordered by the commission, the brief must be filed no later than the initial briefs of the parties. If leave to file a brief as *amicus curiae* is granted, the brief shall be deemed filed on the dates submitted. An *amicus curiae* may not file a reply brief.

imposing such regulation will discourage the development of innovative services in Missouri.

Issue 1. Does federal law preempt the Commission's jurisdiction over Comcast IP Phone's Voice over Internet Protocol (VoIP) service?

Yes. The FCC has held that interconnected VoIP services are subject to exclusive federal jurisdiction. Moreover, such services are appropriately classified as "information services" rather than as "telecommunications services." State Commissions are therefore barred from imposing common-carrier type regulation on interconnected VoIP services.

a. Interconnected VoIP services are interstate services subject to the FCC's jurisdiction. In the *Vonage Order*,[3] the FCC held that interconnected VoIP services are subject to exclusive federal jurisdiction, and it expressly preempted the application of traditional state regulatory requirements to Vonage's VoIP service.[4] The FCC's goal of shielding VoIP services from traditional state regulation, moreover, was not limited to nomadic VoIP providers but extended to all facilities-based VoIP providers. As the FCC explained, "to the extent other entities, such as cable companies, provide VoIP service, [the FCC] would preempt state regulation to an extent comparable to what [it] [has] done in this Order."[5]

[3] Memorandum Opinion and Order, *Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), *aff'd Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[4] *See Vonage Order* ¶ 10; *See, e.g., NARUC v. FCC*, 737 F.2d 1095, 1111 (D.C. Cir. 1984) (the limitation on state authority over interstate services "is essential to the appropriate recognition of the competent governmental authority in each field of regulation") (internal quotation marks and emphasis omitted); Memorandum Opinion and Order, *Petitions of MCI Telecomms. & GTE Sprint Communications Corp.*, 1 FCC Rcd 270, ¶ 23 (1986).

[5] *Vonage Order* ¶ 32.

The *Vonage Order* does not turn on the *technical ability* to track the jurisdiction of individual calls. Rather, the FCC has long held that state regulation must give way to federal policy where the state regulation would negate federal policy, even though it may be technically possible to separately identify intra- and interstate communications.[6] This is precisely what the FCC did in the *Vonage Order*. There, the FCC has emphasized that VoIP service is inherently an all-distance service, and that, in order to subject that service to dual federal and state regulation, a service provider would be required to "sever" that service into distinct "interstate and intrastate" communications.[7]

Such a requirement would frustrate the federal policy objective of promoting the deployment of innovative, integrated advanced services that make efficient use of IP transmission capabilities and the advanced broadband technologies used to provide them.[8] Deploying the capabilities to track and manage the intrastate component of VoIP in order to comply with disparate state requirements would be enormously costly,[9] which in turn would inflate the cost to provide VoIP service and thus undermine federal policy favoring competition in order to provide consumers with the benefits of competitive rates and innovative new services at the lowest cost possible.

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[6] In the 1970s, for example, the FCC adopted a federal policy favoring end users' ability to use "foreign attachments," and it preempted a North Carolina regulation prohibiting the use of foreign attachments for intrastate calls. It was not "impossible" to track intra- and interstate calling, and end users in theory could have purchased separate telephones for intra- and interstate calling. But end users would not, in practice, purchase and use multiple phones, rendering North Carolina's regulation, as a practical matter, an impediment to the FCC's federal policy and therefore preempted. *See North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977). Likewise, in the BellSouth "Memory Call" case, the FCC preempted state regulation of BellSouth's voicemail service, notwithstanding several asserted means for tracking the intra- and interstate usages of that service, where the state regulation negated federal policy. *See* Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619, ¶¶ 15, 19-20 (1992).

[7] *Vonage Order* ¶ 31.

[8] *See id.* ¶ 29.

[9] S*ee id.*,

In affirming the *Vonage Order*, the Eighth Circuit specifically focused on whether *requiring* providers to shoulder this type burden would be consistent with federal policy[10] and endorsed the FCC's analysis: "[i]t was proper for the FCC to consider the economic burden of identifying the geographic endpoints of VoIP communications in determining whether it was impractical or impossible to separate the service into its interstate and intrastate components."[11] The court held that "[s]ervice providers are not required to develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can regulate."[12]

Some have suggested that the following statement in the FCC's *VoIP Universal Service Order* regarding tracking the jurisdiction of individual calls shows that the FCC did not intend to preempt "fixed" VoIP service:

> a fundamental premise of our decision to preempt Minnesota's regulations 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.[13]

This statement merely makes explicit what was implicit in the *Vonage Order* -- *i.e.*, that *if* a VoIP provider developed and deployed the technology necessary to track the jurisdictional nature of the many communications capabilities employed in VoIP and to

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[10] *See* 483 F.3d at 578-79.

[11] *Id.* at 578.

[12] *Id.; see also Vonage Order* ¶ 29 (noting the FCC has previously declined to require carriers "to separate out an intrastate component of other services for certain regulatory purposes where the provider . . . *had no service-driven reason to incorporate such capability into its operations*").

[13] VoIP Universal Service Order ¶ 56.

isolate those communications that were solely intrastate -- then that provider's intrastate service would be severable and subject to state jurisdiction. But that does not mean that all (or even any) VoIP providers have already developed and deployed such technology, much less that a state regulatory requirement mandating that providers do so would be consistent with federal policy. Forcing VoIP providers to make such significant and potentially costly changes to the nature of their services would frustrate federal policy favoring the deployment of those services (and the broadband technologies that support them) on an integrated basis and in an efficient manner.

Nor does the FCC's creation of an interstate "safe harbor" in the *VoIP Universal Service Order* mean that the states have regulatory authority over VoIP services.[14] On the contrary, the FCC's primary reason for establishing a safe harbor was to ensure competitive neutrality between VoIP providers and the conventional telephone toll providers with which VoIP providers directly compete.[15]

b. VoIP should be classified as an information service. The 1996 Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[16] VoIP service does exactly that. As the FCC has emphasized, VoIP services "offer[] customers a suite of integrated capabilities and features that allow[] the user to manage personal communications dynamically."[17] These capabilities and

[14] In the *VoIP Universal Service Order*, the FCC ruled that VoIP providers that had not developed or implemented the capability "to track the jurisdictional confines of customer calls," *VoIP Universal Service Order* ¶ 56, should assume that 64.9% percent of their revenues are for interstate service. *Id.* ¶ 53

[15] *See id.* In choosing that safe harbor, moreover, the FCC specifically stated that "it would be reasonable . . . to treat the interconnected VoIP traffic as *100% interstate* for USF purposes." *Id.* (emphasis added).

[16] 47 U.S.C. § 153(20).

[17] *Vonage Order* ¶ 7.

features include not only "real-time, multidirectional voice functionality," but also "voicemail, three-way calling, online account and voicemail management," as well as the ability to use the Internet to "manage … communications by configuring service features [and] handling voicemail."[18] VoIP also enables unified messaging features, which permits end users to "play voicemails back through a computer or receive them in e-mails with the actual message attached as a sound file."[19]

The FCC has already concluded that many VoIP service capabilities fall within the "information service" classification in connection with its conclusion that broadband Internet access is appropriately classified as an information service.[20] Because VoIP providers, like broadband service providers, offer these capabilities as a single, integrated service offering that "combines computer processing, information provision, and computer interactivity with data transport," that service "constitute[s] an information service, as defined in the [1996] Act."[21] And, as the FCC held in connection with its ruling that a VoIP service that does not interconnect with the PSTN is an "information service," it makes no difference that VoIP, in addition to its other capabilities, "happens to facilitate a direct disintermediated voice communication."[22]

The classification of VoIP service as an "information service" for purposes of federal law -- which also establishes that VoIP service is an "enhanced service" under the

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[18] *Id.*

[19] *Id.*

[20] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 36 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd*, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

[21] *Id.* ¶¶ 36, 38.

[22] *Memorandum Opinion and Order,* Petition for Declaratory Ruling that pulver.com's Free World Diaup Is Neither Telecommunications Nor a Telecommunications Service, *19 FCC Rcd 3307* ¶ 12 (2004) ("*Pulver Order*").

FCC's *Computer Inquiry* regulations pre-dating the 1996 Act[23] -- is critical here because the FCC has held that states may *not* impose common-carrier type regulation on enhanced services. On the contrary, the FCC has emphasized that the "absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network,"[24] and it has long held that any attempts by state or local authorities to impose common-carrier regulation on such services are preempted.[25]

Issue 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?

Yes. The FCC in its *IP-Enabled Services* proceeding is specifically considering the proper classification of VoIP. There, the agency explained that "IP networks are increasingly being used to carry voice communications," that facilities-based providers

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[23] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, ¶ 102 (1996) ("[A]ll of the services . . . previously considered to be 'enhanced services' are 'information services.'").

[24] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 7 (1980); *see also id.* ¶ 128 ("regulation of enhanced services is simply unwarranted").

[25] *See, e.g.*, *Vonage Order* ¶ 21 & n.78 (noting the FCC's "long-standing national policy of nonregulation of information services" and observing that "public-utility type" regulations of such services are preempted); Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512, ¶ 83 n.34 (1981) ("In this proceeding we have to date preempted the states . . . . States, therefore, may not impose common carrier tariff regulation on a carrier's provision of enhanced services."); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 106 (D.C. Cir. 1989) (explaining that the FCC has "exercised [its] . . . jurisdiction to preempt the states from regulating the offering of . . . enhanced services"); Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, ¶ 347 (1986) ("[W]e do not alter our conclusion in *Computer II* that such [enhanced] services must remain free of state and federal regulation."); Report and Order, *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, ¶ 18 (1983) (a "major goal [that the FCC] sought to achieve . . . was to prevent uncertainty regarding the provision of . . . enhanced services which could arise if there were a threat that *regulation by this or other agencies* might inhibit unregulated providers or create impediments to innovation by carriers and others") (emphasis added).

such as "[c]able operators, wireline carriers, and wireless providers" have announced deployment of "IP networks to transmit IP telephony services to their subscribers," and that "[p]roviders not owning extensive facilities" have done so as well.[26] The FCC asked parties to file comments addressing, among other things, "[w]hich classes of [these] IP-enabled services, if any, are 'telecommunications services' under the Act," and "[w]hich, if any, are 'information services.'"[27] The FCC has received comments and reply comments on that question and now has a complete record on which to base a decision.

During the pendency of the FCC's ongoing proceeding, moreover, the FCC has carefully avoided pre-judging the statutory classification of VoIP, even as it has taken a number of steps to establish a regulatory framework for VoIP providers. Thus, for example, in the *Vonage Order*,[28] the FCC held that state regulation of Vonage's VoIP service, known as DigitalVoice, was preempted "irrespective of the definitional classification" of that service under the 1996 Act.[29] Likewise, in the *VoIP 911 Order*,[30] the FCC imposed E911 requirements on interconnected VoIP services without "decid[ing] whether [such services] are telecommunications services or information services."[31] And in the *VoIP Universal Service Order*,[32] the FCC -- in reliance on its discretionary authority to assess providers of interstate "telecommunications" -- imposed universal service

[26] *IP-Enabled Services NPRM* 26 ¶¶ 10, 12, 15.

[27] *Id.* ¶ 43.

[28] Memorandum Opinion and Order, *Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), *appeal pending, Minnesota Pub. Utils. Comm'n v. FCC*, Nos. 05-1069, *et al.* (8th Cir.).

[29] *Vonage Order* ¶ 14.

[30] First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services*, 20 FCC Rcd 10245 (2005) ("*VoIP 911 Order*").

[31] *VoIP 911 Order* ¶ 22.

[32] Report and Order and Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, 21 FCC Rcd 7518 (2006) ("*VoIP Universal Service Order*").

payment obligations on interconnected VoIP services, again without "classif[ying] [such services] as 'telecommunications services' or 'information services' under the definitions of the [1996] Act."[33]

The pendency of the FCC's ongoing *IP-Enabled Services* proceeding, along with the FCC's firm effort to avoid prejudging the outcome of that proceeding, strongly counsels restraint by this Commission. As the Supreme Court has explained, the FCC is the agency Congress has charged with interpreting and applying the 1996 Act's definitions,[34] and the FCC has undertaken that task repeatedly over the last decade, calling upon its "expert and specialized knowledge" and promoting "desirable uniformity" in the industry.[35]

Subjecting VoIP service to state regulation at this point would impose significant burdens on and harms to the service (e.g., restructuring the service to create a separate intrastate service) that could not easily be undone if the FCC does exercise preemption when it rules. In any event, it is highly unlikely that the anticipated FCC decision will be entirely consistent with a decision by this Commission to impose state jurisdiction on VoIP providers. Thus, in some way, any decision by this Commission to subject VoIP to state regulation may have to be modified after the FCC acts. This will no doubt force the VoIP providers to undo at least some of whatever may be required by this Commission (should it assert jurisdiction) and, therefore, create burdens that do not now exist. Respectfully, it would be more prudent not to impose such burdens and create such uncertainty on the

[33] *VoIP Universal Service Order* ¶ 35.

[34] *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700-01 (2005).

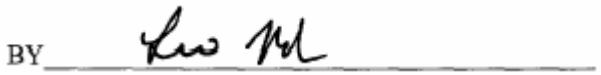
[35] *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956).

industry, as doing so will discourage the development of innovative services and additional competitive choices for Missouri.

In view of the fact that the FCC is presently considering the statutory classification of VoIP services, it would be appropriate and prudent for this Commission to refrain from taking any action on VoIP services until the FCC acts.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

BY 

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CERTIFICATE OF SERVICE

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