

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

In the Matter of the Application of the	)	
Registration, Reporting and Contribution	)	File No. DO-2011-
Requirements to All IVoIP Providers	)	

**MOTION**

COMES NOW the Staff of the Missouri Public Service Commission and for its Motion states:

1. Internet protocol (IP) is the software that tracks internet addresses, routes internet messages and recognizes incoming messages. It also acts as a gateway to connect networks. Its counterpart in the public switched telephone network has been Signaling System 7, which performs the same functions, but uses the ten-digit North American Numbering Plan numbers, rather than the 32-bit addresses used by IP. IP is increasingly used for some part of the transmission of calls on the public switched network, although such calls that use “IP in the middle” are treated, for regulatory purposes, no differently than those using any other signaling system.

2. This matter concerns the provision of Interconnected Voice over Internet Protocol (IVoIP), a telecommunications-like service. IVoIP service can be offered by traditional telecommunications companies, such as local exchange telephone companies (either incumbent or competitive) or non-traditional companies, such as cable television companies that can use IP to deliver voice communication service over the coaxial cable used to deliver cable television services. IP is the signaling system; VoIP is the provision of voice service using IP; IVoIP is the provision of VoIP in a way that interconnects with the public switched network, enabling a VoIP user to send calls to and receive calls from any other telephone. However, IVoIP is excluded from the definition of “telecommunications service” under §386.020(54)(j).

3. IVoIP service appears to end users to be basic local telecommunications service. The service utilizes “regular” handsets and the service has all of the functions of telecommunications service, such as availability of E911. In most cases, IVoIP service is fixed in location because it is hard-wired to a location. The most common providers are cable television companies, whose coaxial cable serves a single, fixed physical location.

4. IVoIP service can also be “nomadic,” meaning that the service can be used anywhere the computer on which it relies is located. If a Missouri end user takes a laptop to Chicago, the end user can use it to place an IVoIP call to any other telephone connected to the public switched network. In 2007, after a lengthy battle by the Minnesota PUC, the Eighth Circuit held that states could not regulate nomadic IVoIP, due to the impossibility of ascertaining the jurisdictional nature of the call. The matter did not reach the question of preemption of the states, as the impossibility of a state invoking its jurisdiction rendered the preemption question moot.<sup>1</sup>

5. Missouri law does not distinguish between fixed or nomadic IVoIP, providing as follows:

**392.550. Interconnected voice over Internet protocol service, registration required--charges to apply--procedure for registration--authority of commission.**

1. No [...] entity shall offer or provide interconnected voice over Internet protocol service as defined in section 386.020 without first having obtained a registration from the commission allowing it to do so.

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2. Interconnected voice over Internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges.

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3. The commission shall grant a registration, without a hearing and no later than thirty days following the filing of an application accompanied by an affidavit [that states]:

- (1) The ... principal place of business and the ... officers [...];
- (2) Each exchange ... in which [it will] provide [IVoIP] service;
- (3) That [it] is legally, financially, and technically qualified [...];
- (4) That [it will] comply with all applicable [law];
- (5) That [it will collect and remit, as local exchange companies do, the following]:
  - (a) Telecommunications [Relay Service charge];
  - (b) Missouri universal service fund under section 392.248;
  - (c) Local enhanced 911;
  - (d) Any applicable license tax;
- (6) [That it will pay the] annual [commission] assessment [...];
- (7) [That it will file a verified annual report] limited to: (a) Information [to confirm compliance with] (5) and (6) [above];
  - (b) A list of ... exchanges, ... in which customers are served; and

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<sup>1</sup> *Minnesota Public Utilities Commission v FCC*, 483 F3d 570 (8<sup>th</sup> Cir. 2007).

- (c) The number of customers or lines ...in each exchange [...]; and
  - (8) That the applicant has ... a process for handling ... customer ... issues ... and ... complaints.
4. Notwithstanding any other provision of law ..., the ... commission shall have the following authority [over IVoIP service and service providers]:
- (1) To assess and collect fees [for Telecommunications Relay Service];
  - (2) To assess and collect fees [for Missouri USF];
  - (3) To assess and collect [the annual commission assessment];
  - (4) To assess and collect [local sales and E911 taxes];
  - (5) To hear and resolve complaints [concerning the payment of access charges ...]; and
  - (6) To revoke or suspend the registration of any provider of interconnected voice over Internet protocol service who fails to comply with the requirements of this section.

6. When §392.550 went into effect in 2008, the Staff did not attempt to apply it to nomadic IVoIP providers, despite the fact that the statute carves out no exception or exemption for nomadic IVoIP. The Staff reasoned that if it is impossible to ascertain the jurisdictional nature of the calls made using the nomadic service, then it is equally impossible for the Commission to exert jurisdiction over them.

7. On November 5, 2010, the FCC released a Declaratory Ruling in WC Docket No. 06-122 (FCC 10-185), in which it determined that, under certain circumstances, states may assess universal service contributions against nomadic IVoIP providers.

In this Declaratory Ruling, we advance the goals of universal service by ruling on a prospective basis that states may extend their universal service contribution requirements to future intrastate revenues of nomadic interconnected Voice over Internet Protocol (VoIP) service providers, so long as a state's particular requirements do not conflict with federal law or policies. Specifically, we conclude that state universal service fund contribution rules for nomadic interconnected VoIP are not preempted if they are consistent with the Commission's contribution rules for interconnected VoIP providers and the state does not enforce intrastate universal service assessments with respect to revenues associated with nomadic interconnected VoIP services provided in another state.

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Section 254(b) [of the Telecommunications Act of 1996] also provides that Commission policy on universal service shall be based, in part, on the principles that contributions should be equitable and nondiscriminatory and that the support mechanisms should be specific, predictable, and sufficient. The Act mandates universal service contributions from "[every telecommunications carrier that provides interstate telecommunications services]" and authorizes the Commission

to assess contributions on “[a]ny other provider of interstate telecommunications . . . if the public interest so requires.”

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Of particular relevance to this proceeding, the Commission in 2006 adopted rules requiring interconnected VoIP providers to contribute to the federal Universal Service Fund. The Commission explained that interconnected VoIP providers, like other contributors, “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 [Public Switched Telephone Network].” The Commission also concluded that requiring interconnected VoIP providers to contribute to universal service would promote the “principle of competitive neutrality” by “reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations.”

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Because of the difficulty that nomadic interconnected VoIP providers have in identifying whether calls are interstate as opposed to intrastate, the Commission in the *Interim Contribution Methodology Order* established a “safe harbor” under which an interconnected VoIP provider may presume that 64.9 percent of its revenues arise from its interstate operations. In the alternative, an interconnected VoIP provider may conduct a traffic study (i.e., a statistical sampling) to estimate the percentage of its revenues attributable to interstate traffic and use that percentage to calculate its contribution amount. Interconnected VoIP providers that are able to determine the jurisdictional nature of their calls may calculate their federal contribution amounts using actual revenue allocations. [footnotes omitted]

Using the methodology set out in the FCC Opinion, the MoPSC could ascertain whether an IVoIP provider fell under its jurisdiction. Basing its calculation on the FCC’s safe harbors, it makes sense to require an IVoIP provider to calculate its Missouri jurisdictional revenue one of three ways: (1) a safe harbor under which 35.1 percent of the provider’s revenues is allocated to the intrastate jurisdiction; (2) the provider’s actual Missouri intrastate revenues; or (3) the provider’s Missouri intrastate revenues determined through an FCC-approved traffic study.

8. In addition, the MoPSC would need to establish a methodology whereby Missouri jurisdictional revenues are not counted as another state’s revenues, and vice-versa. The simplest way would be to use the customer’s billing address as a surrogate for where service is rendered to determine which state to allocate the revenues, but this method is imprecise and could result in double allocation if another state uses a different method, such as the registered 911 location, as the service location surrogate.

[T]he interim regulations adopted in the *Interim Contribution Methodology Order* do not protect against the possibility that an interconnected VoIP provider may be

subject to double assessment on the same revenues if two states adopt inconsistent methods for determining the intrastate revenue base used to calculate state universal service payments.

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[W]e conclude that duplicative state assessments on interconnected VoIP providers would violate the principle of competitive neutrality by placing interconnected VoIP providers at an artificial competitive disadvantage with respect to their traditional telephony competitors, which are generally not subject to double assessments.

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This issue of duplicative assessments is not one of first impression for the states. Concern about potential double billing of intrastate revenues exists in the wireless context as well, because a wireless customer's principal place of use may be different from his or her billing address. Evidence in the record indicates that states have successfully resolved allocation of wireless intrastate revenues for purposes of state universal service contributions without the need for Commission intervention. In fact, an allocation of revenues among the states modeled on the Mobile Telecommunications Sourcing Act, but adapted to provide interconnected VoIP service providers a means of determining a customer's primary place of use of service, could be a method of ensuring against double assessments in the context of interconnected VoIP. [footnotes omitted]

If Missouri were to base its intrastate assessments of nomadic IVOIP providers using an adaptation of the Mobile Telecommunications Sourcing Act ("MTSA") that determined a primary place of service use, it could assert jurisdiction and begin to treat all IVOIP providers (both fixed and nomadic) equally, or at least closer to equally than they are treated now. The FCC notes that such equal treatment is desirable:

Although there may be an administrative burden on interconnected VoIP providers to allocate their revenues among the states under various state rules, it is similar to what other providers, including wireless providers, have been doing for years. We also believe that any administrative burden is outweighed by the harm to competitive neutrality and to universal service that would occur if we were to preempt all state assessments in this prospective Declaratory Ruling. We will continue to monitor state implementation and enforcement of universal service assessments on interconnected VoIP providers, and we have the authority to reconsider our decision if presented with evidence that states are imposing undue burdens on interconnected VoIP providers' ability to avoid double assessment.

9. The MoPSC would also need to establish a regulatory system for nomadic IVOIP providers that takes effect within a certain time of that provider acquiring a "Missouri" end user. As noted above, the statute provides that an IVOIP provider shall register with the Commission

before offering the service in Missouri, but a nomadic provider will not necessarily know that an end user qualifies as a “Missouri” end user until it can determine the primary place of service use under the adapted MTSA. In addition, requiring registration after the service is in use makes it clear that the Commission is not erecting any barrier to entry. As the FCC notes in its Opinion,

The Commission in the *Vonage Preemption Order* concluded that “the Minnesota Commission may not require Vonage to comply with its certification, tariffing or other related requirements as conditions to offering [its VoIP service] in that state.” Thus, as the states note, the *Vonage Preemption Order* can be read to preempt only state conditions to entry. Because state universal service contribution requirements typically do not impose any burden on a provider until after the provider actually has entered the market, the *Vonage Preemption Order* can be read not to preempt such requirements. On the other hand, [it] used broad language in preempting the Minnesota Commission from “applying its traditional ‘telephone company’ regulations to Vonage’s DigitalVoice service[.]” [footnotes omitted]

10. Finally, the Staff is of the opinion that the regulatory parameters established in §392.550 do not constitute the application of traditional telephone company regulations to any IVoIP provider in Missouri. For fixed-location providers, no attempts to apply quality of service, billing or tariffing requirements has been or will be made. All of the requirements in §392.550 are *de minimus* reporting requirements and the payment of assessments. As the fixed-location providers already comply with those requirements, it is in the interests of competitive neutrality to require that nomadic providers also comply. As the FCC noted,

In light of the *Interim Contribution Methodology Order*, we conclude that the application of state universal service contribution requirements to interconnected VoIP providers does not conflict with federal policies, and could, in fact, promote them. Such providers benefit from state universal service funds, just as they benefit from the federal Universal Service Fund, because their customers value the ability to place calls to and receive calls from users of the PSTN. Similarly, extending state contribution requirements to nomadic interconnected VoIP providers promotes the principle of competitive neutrality by “reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations.”

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Because we do not have before us any dispute concerning state enforcement against an interconnected VoIP provider, we decline at this time to consider the limits of state enforcement authority in this area. We note, however, that nothing in this Declaratory Ruling affects our conclusion in the *Vonage Preemption Order* concerning preemption of rate regulation, tariffing, or other requirements that operate as “conditions to entry.”

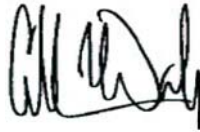
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Nothing in this Declaratory Ruling in any way prejudices our authority to adopt a different approach in the context of a broader contribution reform proceeding and, if necessary, to preempt state laws and regulations that frustrate the achievement of federal universal service policies

At this point, the Staff believes that the Commission should exert jurisdiction over nomadic IVoIP providers. This would necessitate a rulemaking establishing the principles and restrictions discussed above, that would establish an adapted MTSA, establish a deadline for registration with the Commission, waive the “prior registration” requirement set out in §392.550 and clearly set out any other obligations to be imposed on nomadic IVoIP providers.

**WHEREFORE**, the Staff asks that the Commission tell the Staff whether it agrees that the Commission should exert jurisdiction over IVoIP providers as set forth above, and if so, allow the Staff to submit a proposed rule to that effect as soon as is practicable.

Respectfully submitted,



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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 8<sup>th</sup> day of February, 2011.

