

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

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

INITIAL BRIEF
MISSOURI INDEPENDENT TELEPHONE COMPANY GROUP

COMES NOW the Missouri Independent Telephone Company Group (“MITG”), comprised of Alma Communications Company d/b/a Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company (Otelco), MoKan DIAL, Inc., and Northeast Missouri Rural Telephone Company, and submits this initial brief pursuant to the briefing schedule adopted at the close of the evidentiary hearing.

Introduction

CATV affiliates such as Comcast IP Phone provide voice communications service over a wire to the customer’s premise, just as local exchange carriers do. Such service is telecommunications service subject to Missouri regulation. Internet protocol, or “IP”, refers to a technology utilized in converting voice for transmission. The type of technology utilized in providing a service has never been, and should not be, determinative of whether the service is subject to regulation.

There have been many improvements in technology utilized to transmit voice communications. There were many improvements in analog technologies, which were

replaced by digital technology. There were many improvements of digital technologies. IP is simply one more improvement, and it is not that recent.

Future technology improvements over IP are a virtual certainty. They will not change the nature of the service as being the transmission of voice. It would be an unwise decision for the Commission to base jurisdictional decisions on underlying technology. This could result in a hodge-podge of decisions reflecting each technology change. Comcast's request to start down this slippery slope should be rejected.

Different or improved technology, with increased efficiencies, does not change the fundamental nature of the service being provided. The critical inquiry is whether voice communications is being provided over wire. Underlying technology has never been justification to escape state regulation. CATV VoIP affiliates like Comcast IP Phone base their attempt to escape state regulation simply because IP is a different underlying technology. This attempt should be rejected.

Some CATV VoIP affiliates, such as Mediacom and Time Warner, have subjected themselves to Missouri regulation. Comcast has not. If Comcast IP Phone is permitted to escape regulation because its service utilizes IP technology, such a decision would set the stage for other LECs, presently regulated, to also escape regulation by provisioning their service via IP.

The FCC *Vonage*¹ decision stands only for the proposition that “over the top”, or “nomadic” VOIP services were at one time preempted from state regulation. The basis for such preemption was that states could not ascertain, differentiate, or separate

¹ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota public Utilities Commission*, before the Federal Communications Commission, WC Docket No. 03-211, released November 12, 2004.

intrastate nomadic VoIP calls from interstate nomadic VoIP calls. *Vonage* does not stand for the proposition that VoIP service constitutes information service that cannot be regulated as a telecommunications service. Indeed, the FCC's *Universal Service Contribution Order*² held that VoIP providers do provide telecommunications services.

As Comcast IP Phone's "Digital Voice" service under review here is a fixed base service, there is no plausible argument that Missouri has been preempted from regulating it.

CATV VoIP affiliates are not small "nascent" technology start up companies that must be protected from burdensome governmental regulation. The CATV companies are some of the larger corporations in the country. They are rolling out voice services throughout the United States. Comcast provides its service in thirty of the fifty states, including those with the largest populations.³ Indeed, as suggested by recent FCC notices, Comcast is in the process of replacing its traditional non-IP voice services with IP service in several states. Comcast's suggestion that it needs to be free from regulation in order to compete with companies the size of the MITG companies is absurd. This case is not about protecting a "nascent" technology. This case is about CATV efforts to obtain competitive advantage in the voice marketplace.

From the customer's standpoint, voice service is what Comcast offers. Voice service is what Comcast markets to its customers. The "V" in VoIP stands for "Voice".

² *In the Matter of Universal Contribution Methodology, before the Federal Communications Commission*, WC Docket No. 06-122, et al., released June 27, 2006, at ¶ 39-41.

³ See Comcast response to Staff's request for this list of states as Commissioner Murray requested at hearing.

If regulation of Comcast would cause Comcast to incur costs it is presently not incurring, so be it. Comcast made a conscious business decision to introduce its voice service in Missouri without obtaining certification, without obtaining approved tariffs, and without acquiring the systems and procedures necessary to comply with Commission rules and regulations. Comcast has already made its business decision not to initially spend the money. That business decision inherently assumed the risk Comcast would have to spend the money later if found subject to Missouri regulation. As the Commission found in its recent *Mediacom*⁴ Order, CATV VoIP affiliates must assume those costs, otherwise they would enjoy competitive advantage.

The Issue

The pivotal issue in this case is one of interpretation of the FCC's *Vonage* Order. The parties disagree as to which facts are relevant to the preemption analysis, but there is no factual disagreement as to the nature of Comcast's IP service.⁵ Comcast contends its service meets the definition of paragraph 32 of the *Vonage* Order, therefore regulation of Comcast's service is preempted.

Staff, OPC, and the MITG contend that the basis for preemption in the *Vonage* Order was the nomadic nature of the Vonage service. Because the Vonage subscriber could be located anywhere in the world, it was not possible for Minnesota to determine which calls originated and terminated within Minnesota. Because Minnesota was unable to ascertain, differentiate, or separate intrastate nomadic VoIP calls from interstate

⁴ See footnote 6 below.

⁵ At hearing, counsel for Comcast agreed that factually, Comcast service is different from the Vonage service. He agreed there is no dispute as to the facts underlying Comcast service, only disagreement as to what facts are relevant under the legal analysis. Transcript, Vol 2, pages 38, 40.

nomadic VoIP calls, the FCC preempted Minnesota from regulating calls that could be taking place entirely outside Minnesota.

Vonage Decision

Comcast bases its position that this Commission is preempted from regulating its service based upon paragraph 32 of the *Vonage* decision, which states as follows:

32. Indeed, the practical inseverability of other types of IP-enabled services having basic characteristics similar to DigitalVoice would likewise preclude state regulation to the same extent as described herein. Specifically, these basic characteristics include: a requirement for a broadband connection from the user's location; a need for IP-compatible CPE; and 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. In particular, the provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication and counsels against patchwork regulation. Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.

The MITG believes that the “practical inseverability” that would “preclude state regulation to the same extent described herein”, which “greatly complicates the isolation of intrastate communications”, are all FCC references to the inability to separate intrastate and interstate communications inherent in nomadic Vonage calls. The MITG does not believe the FCC intended preemption simply based on the service characteristics of IP enabled services. If that were the case, the FCC would simply have preempted all state regulation of all IP services.

This view is borne out by a review of other paragraphs of the Vonage decision. Paragraphs 23-32 were all paragraphs discussing “Preemption Based on Impossibility”, Item A.4 under “Topic III. Discussion”. Not only was paragraph 32 part of the “impossibility” discussion, preceding paragraphs 23-31 clarify that the “impossibility”

leading to preemption was the impossibility to separate intrastate from interstate calls made by Vonage customers::

¶ 23 contains the FCC conclusion there was no plausible approach to separating Vonage service calls into interstate and intrastate components, and relied upon Vonage's inability to directly or indirectly identify the geographic location of the Vonage customer making the call;

¶ 25 found that it was the total lack of dependence on *any* geographically defined location that most distinguishes Digital Voice from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications. The FCC found that Vonage has no way to know its customers' locations;

¶ 26 and ¶ 27 specifically found that using the NPA/NXX associated with Vonage subscribers as an indirect method of locating them would result in Minnesota regulating every Vonage call, and in so doing regulating commerce occurring outside of Minnesota's borders (see also ¶ 39), which would lead to misidentification between local, intrastate, and interstate calls;

¶ 29 and ¶ 31 found that the FCC need only show that interstate and intrastate aspects were inseverable, and that the communications of Vonage customers were not capable of being separated.

It is clear from this analysis that the *Vonage* decision was based upon the inability to separate interstate from intrastate communications. It was not, as Comcast contends, based upon the service characteristics of VoIP.

Subsequent FCC Refinement of *Vonage*

In its June 27, 2006 *Universal Service Contribution Order*⁶, the FCC refined the *Vonage* decision. At paragraphs 38-45, the FCC found that interconnected VoIP providers do provide telecommunications service as they provide transmission of voice to

⁶ Footnote 2 above.

the points specified by the user, that such transmissions or calls are jurisdictionally mixed, and that treating VoIP providers as providers of *telecommunications service* was supported by the principle of competitive neutrality. The FCC determined that interconnected VoIP providers should not be unfairly advantaged or disadvantaged over other providers utilizing different technologies to provide telecommunications service.

Later, at paragraph 56 of the *Universal Contribution Order*, the FCC specifically discussed its prior *Vonage* decision. The FCC stated that a fundamental premise of the *Vonage* decision was the impossibility to determine whether calls by Vonage customers stay within or cross state boundaries. The FCC went further to limit the preemptive effects of *Vonage* by stating that “an interconnected VoIP provider with the capability to track the jurisdictional nature of customers calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.”

Controlling Precedent is Contrary to Comcast’s Position

Comcast’s arguments as to the effect of ¶ 32 of the *Vonage* decision are erroneous. Not only has the FCC issued decisions contrary to Comcast’s position, all Missouri decisions by this Commission and Missouri courts have consistently interpreted *Vonage* contrary to Comcast’s position. A Missouri state court has upheld this Commission’s determination that fixed based VoIP service is subject to Missouri regulation. A Missouri federal court has refused to enjoin the Missouri Commission from regulating Comcast.

The State of Minnesota and others appealed the *Vonage* decision. On March 21, 2007, the Eighth Circuit Court of Appeals issued an opinion specifically reviewing the

FCC's *Vonage Order*, and discussing the issues related to VoIP telephone service.⁷ In its decision, the Eighth Circuit clearly distinguished the "nomadic" VoIP telephone service offered by Vonage from the "fixed/interconnected" VoIP telephone service offered by cable television companies such as Comcast:

A distinction can be drawn, however, between what is referred to as "nomadic" VoIP service and "fixed" VoIP service. Nomadic service is ... where a VoIP customer can use the service "nomadically" by connecting with a broadband internet connection anywhere in the universe to place a call. Fixed VoIP service describes the use of the same technology, that is, converting a voice communication into digital packets before transmitting it to another location, but in a way where the service is used from a fixed location. For example, cable television companies offer VoIP service to their customers, but when they do so the ensuing transmissions use the cable running to and from the customer's residence. As a result, the geographic originating point of the communications can be determined. Thus, when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished.

Order, p. 9. Thus, the Eighth Circuit's review of the *Vonage Order* factually distinguished the "fixed" or "interconnected" VoIP telephone service offerings by cable television companies such as Comcast from the VoIP service at issue in the *Vonage* case.

As a part of the Eighth Circuit appeal, the New York Public Service Commission challenged the FCC's decision to the extent it might have been applied to "fixed/interconnected" VoIP service offered by cable television providers. The Eighth Circuit found that the New York PSC's challenge was not ripe for review because the FCC had not yet decided that issue, and the Eighth Circuit specifically cited the FCC's more recent Universal Service order:

⁷ *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007).

“[T]he FCC has since indicated VoIP providers who can track the geographical end-points of their calls do not qualify for the preemptive effects of the Vonage order. As a consequence, NYPSC’s contention that state regulation of fixed VoIP services should not be preempted remains an open issue.”

Order. p. 22 Thus, the Eighth Circuit confirmed that the FCC has not preempted state regulation of “fixed” or “interconnected” VoIP services offered by cable telephone companies such as Comcast’s service.

VoIP providers also appealed the FCC Universal Service Contribution Order. This appeal resulted in a 2007 decision of the United States Court of Appeals for the District of Columbia Circuit. The DC Circuit in *Vonage Holdings Corporation v FCC, et al.*, June 1, 2007 Case No. 06-1276, slip opinion pages 14-16, affirmed the FCC’s determination that VoIP service includes telecommunications service.

This Commission’s prior decisions are consistent with FCC and federal court precedent. This Commission has held its jurisdiction over fixed CATV VoIP service has not been preempted by the FCC’s *Vonage* Order. There is no reason why this Commission should now change its interpretation. A chronological review of Commission decisions reveals no basis for a change of interpretation.

July 11, 2005 M2A Order

Comcast characterizes the 2005 M2A arbitration Order⁸ as this Commission’s “Missouri VoIP Order”. This is a leap Bob Beaman would envy. The case did not involve a VoIP provider. The case did not involve the regulatory classification of Voice over IP. The case involved the arbitration of interconnection terms between SBC and a

⁸ TO-2005-0336, July 11, 2005.

coalition of CLECs. One of the hundreds of issues presented for final offer arbitration was whether “net protocol change” traffic transported by CLECs to SBC should be paid for at access or reciprocal compensation rates. The Commission’s Order merely modified the Arbitrator’s decision for purposes of internal consistency. The language of this Commission’s decision at page 36 of that Order contains absolutely no discussion concerning the regulatory classification of VoIP service, or preemption.

August 8, 2006 Time Warner Order

Over a year after the M2A Order, this Commission first addressed VoIP preemption in its Time Warner Order⁹. Time Warner’s CATV VoIP affiliate took the position Missouri was preempted from regulating its VoIP service. In its findings of fact, the Commission found that Time Warner’s service was stationary, and Time Warner had the ability to track call jurisdiction. The Commission then concluded, as a matter of law, that Time Warner’s service was subject to the Commission’s jurisdiction, and the FCC’s Vonage Order did not serve to except or preempt Missouri jurisdiction.

The Commission also noted paragraph 56 of the FCC’s June 27, 2006 Report and Order and Notice of Proposed Rulemaking in WC Docket No. 04-36. In that decision the FCC stated that a “VOIP provider with the capability to track the jurisdictional nature of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.”

⁹ LT-2006-0162, Report and Order of August 8, 2006.

On September 5, 2007, the Cole County Missouri Circuit Court entered a decision upholding the Missouri Commission's decision, and rejected Time Warner's appeal.¹⁰

December 5, 2006 Order in this case

In its December 5, 2006 Order Denying Comcast's motion to dismiss this proceeding, the Commission concluded that the *Vonage* Order was specific to the facts of Vonage's service. This Commission concluded that *Vonage* preemption was based upon the nomadic characteristics of Vonage service, which made it impossible to separate interstate and intrastate calls.

July 24, 2007 Mediacom Order

In its July 24, 2007 Order¹¹ this Commission denied a waiver of Commission rules to Mediacom's CATV VoIP affiliate. The basis for the Commission's decision was that there is a cost of complying with the Commission's rules, and CATV VoIP affiliates could not be released from those rules without providing the CATV company with an unfair advantage over other LECs providing voice service.

US District Court

Comcast asked the United States District Court for the Western District of Missouri to enjoin the Missouri Public Service Commission from classifying Comcast's VoIP service. In an Order dated January 18, 2007¹², District Judge Laughrey denied Comcast's request. The District Court held that the MoPSC, in the absence of

¹⁰ September 5, 2007 Findings of Fact, Conclusions of Law, and Judgment, Cole County Missouri Circuit Court Case No. 06AC-CC00935, State ex rel Time Warner, relator v. MoPSC, et al, respondents.

¹¹ TE-2006-0415.

¹² Case No. 06-4233-CV-C-NKL.

preemption or a contrary determination by the FCC, had jurisdiction to make the classification. In reviewing the FCC's *Vonage* decision, the Court held that the basis for the preemption set forth by the FCC in *Vonage* was the impossibility of separating *Vonage* traffic into interstate and intrastate components. The Court found that the FCC had not preempted the entire field of VoIP services from state regulation.

Summary

In summary, all decisions available are consistent. They have held that the *Vonage* Order based preemption on the impossibility to separate interstate from intrastate calls made by providers of nomadic VoIP service. They have held that the FCC has not preempted fixed base CATV VoIP services from state regulation. Missouri is not preempted regulating fixed base VoIP service.

The *Vonage* analysis does not apply to Comcast service. Comcast's service is geographically fixed. All calls originated by Missouri subscribers originate from Missouri. There is no impossibility to separate intrastate from interstate calls. Any difficulties *Vonage* may have in determining the terminating point of calls to wireless customers, or to nomadic type *Vonage* customers, are no different from the difficulties regulated carriers face today. If a wireline service were preempted from state regulation because of the inability to determine the terminating points for these types of calls, regulation of all landline telecommunications services would be preempted.

At hearing, Comcast attempted to avail itself of the *Vonage* decision by claiming it could not determine the actual call termination points of calls made by its VoIP customers to a nomadic VoIP customer, to a mobile phone customer, or to a customer

using foreign exchange service¹³. Comcast fails to understand the basis of the *Vonage* decision in this regard. It was the inability to associate the nomadic Vonage customer's location when *originating* calls that was the basis of impossibility. For fixed based CATV VoIP customers, this inability to fix the origination point of the call does not exist. Comcast customers have a telephone number fixed to a specific geographic location.

All LECs are subject to the same vagaries in determining the terminus of calls their customers make to wireless customers.¹⁴ If an inability to determine the termination point of calls to wireless customers justified preemption from state regulation, no LEC would be subject to Missouri jurisdiction.

WHEREFORE, on the basis of the foregoing, the MITG requests that the Commission enter an order granting the relief requested in Staff's Complaint.

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CERTIFICATE OF SERVICE

¹³ Ex 3 Choroser Rebuttal, pages 9 and 15.

¹⁴ The MITG disagrees with Ms. Choroser that FX service customers is an apt example. FX customers have a number in their home exchange, and purchase a facility and number in the "presence" exchange. For FX service, each leg is considered a separate call. There is no inability to determine origination and termination points of interstate or intrastate calls to an FX customer.

I hereby certify that a true and correct copy of this pleading was electronically mailed to the following attorneys of record in this proceeding this 14th day of September, 2007:

William Haas
Michael Dandino
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/s/ Craig S. Johnson
Craig S. Johnson