

**BEFORE THE
MISSOURI PUBLIC SERVICE COMMISSION**

In the Matter of Tariff No. 3 of)	
Time Warner Cable Information Services)	Case No. LT-2006-0162
(Missouri), LLC d/b/a Time Warner Cable)	Tariff File No. JL-2006-0231

Brief of the MITG

Comes now the MITG and submits the following brief in opposition to the proposed tariff change of Time Warner Cable Information Service (TWCIS) at issue in this proceeding.

Introduction

TWCIS applied for and received from This Commission authority to provide local and interexchange voice telecommunications services under the same rules and regulations that applied to traditional telecommunications providers.¹ At that time, TWCIS agreed to comply with all of the Commission’s applicable rules and service standards, including but not limited to: billing, quality of service, and tariff filing requirements.² Thereafter, TWCIS provided “Digital Phone” service pursuant to its Tariff PSC Mo. No. 2 that includes local and long-distance voice service and calling features to Missouri customers.³

On September 23, 2005, TWCIS filed proposed Tariff PSC Mo. No. 3 designed to replace its Missouri Tariff PSC Mo. Nos. 1 and 2 in their entirety.⁴ Tariff No. 3 would remove exchange services and residential end user offerings, including Digital Phone

¹ See Stipulation of the Parties, paragraph 2.

² See Stipulation of the Parties, paragraph 2.

³ See Stipulation of the Parties, paragraphs 5-6, 10.

⁴ See Stipulation of the Parties, paragraph 12.

Service, from Time Warner's list of tariffed services.⁵ Tariff No. 3 would eliminate rates except for one specific charge – a nonrecurring service connection charge for unnamed services that “may” apply.⁶ All other rates and charges would be detariffed and subject to customer-specific contracts and individual case basis pricing.⁷

Summary of MITG Opposition

TWCIS obtained its original certificate to provide basic local telecommunications service upon the assumption that its Digital Phone Service met the statutory definition of telecommunications service. TWCIS did reserve the right to later contest that it was subject to Missouri statutory and regulatory control if the FCC later decided the nature of its service made it an informational service.⁸ Apparently TWCIS has made some determination to the effect it no longer has to tariff Digital Phone Service, or else it would not be attempting to detariff Digital Phone Service.⁹

There is no dispute that Digital Phone Service provides two-way voice service within a local calling scope. This is the definition of basic local telecommunications service.¹⁰ Digital Phone Service meets the statutory definition of basic local telecommunications service as defined by §386.020 (4) RSMo. ILECs and CLECs providing basic local services are not permitted to have “ICB” tariffs. They are required to tariff basic local rates. They are required to offer basic local service to all similarly situated customers at the same rate. If approved, the tariff at issue would not require

⁵ See Stipulation of the Parties, paragraph 12.

⁶ See Stipulation of the Parties, paragraph 12.

⁷ See Stipulation of the Parties, paragraph 12, Tariff Sheets 47, 50.

⁸ See the Stipulation of the Parties, paragraph 2.

⁹ Unfortunately, TWCIS has chosen not to explicitly state the basis for its proposed tariff change.

¹⁰ See the Stipulation of the Parties, paragraph 10.

TWCIS to tariff specific rates for basic local service. If approved, TWCIS could charge different customers different rates for the same basic local service.

The real question of this case is whether the VOIP nature of Digital Phone Service meets the definition of the FCC of “information services” for which states have been preempted from regulations as telecommunications services under the FCC’s *Vonage* Decision¹¹.

The MITG believes that, under the FCC’s *Vonage* analysis, TWCIS’ Digital Phone service is telecommunications service, not information service, and the regulation thereof has not been preempted. It must be offered pursuant to MoPSC certificate of authority. If the Commission agrees, the tariff filing should be rejected because certificated LECs providing similar telecommunications services are not permitted to “detariff”, and are not permitted to have “ICB” pricing to residential customers.

If the Commission disagrees, and concludes that, under the *Vonage* analysis, TWCIS’ Digital Phone service constitutes information service, the appropriate remedy is not to approve the proposed tariff. The appropriate remedy is to determine that TWCIS is not providing telecommunications service, is not subject to the jurisdiction of the Commission, to cancel TWCIS certificates and tariffs, and to reject the proposed tariff.

TWCIS should not be permitted to enjoy the benefits of being certificated to provide telecommunications service, which could include ETC designation and receipt of

¹¹ See the November 12, 2004 Memorandum Report and Order of the FCC *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket no. 03-211; 19 FCC recd 22404, petitions for review pending in *The Minnesota Public Utilities Commission v. F.C.C.*, Nos. 05-1069, et al. (8th Circuit Court of Appeals)

USF funds, without also being subject to the burdens of Missouri law and regulations applicable to other providers of basic local telecommunications service. 0

Vonage Decision Analysis

In its *Vonage* decision, the FCC attempted to set forth an analytical framework for state Commissions to utilize in determining whether other VOIP services share characteristics sufficiently similar to Vonage's "Digital Voice" service upon which to conclude that the FCC would preempt state regulation thereof. The MITG has reviewed this analytical framework, and concludes that the FCC has failed to present one which is clearly capable of practical application. The MITG agrees with the concurring statements of FCC Commissioners Michael J. Copps and Jonathan S. Adelstein to the effect that the FCC's *Vonage* decision fails to set forth adequate direction.

Nevertheless, the MITG will set forth the *Vonage* decision analysis, and attempt to apply that analysis to TWCIS' "Digital Phone" Service.¹² Paragraph (¶) references are to paragraphs of the *Vonage* decision.

The FCC, and not state Commissions, have the responsibility and obligation to decide whether regulations apply to IP-enabled services. To the extent other VOIP services are not the same as Vonage's Digital Voice Service, but share similar basic characteristics, the FCC stated it was highly unlikely the FCC would fail to preempt state regulations of such similar services. ¶ 1.

The FCC described Vonage's Digital Voice Service as having the following characteristics which justified the FCC in preempting state regulation (¶ 4-9):

1. Digital Voice Service enables subscribers to originate and receive voice communications, with certain enhancements such as voicemail, thereby resembling telephone service provided by the circuit-switched network;

¹² This service is not the same service as TWCIS' "Digital Phone" Service at issue here.

2. The important differences between phone service and Vonage service justifying preemption are:

- a. Vonage customer must have access to broadband connection to the Internet to use the service;
- b. Because Vonage did not offer internet access service, Vonage customers must obtain a broadband Internet connection from another provider;
- c. In contrast to traditional circuit-switched telephony, it was not relevant to Vonage service where the broadband connection is located, or whether same broadband connection is used when subscriber access service. Vonage service is portable, and can be used anywhere in the world;
- d. Vonage service requires specialized CPE. Customers must choose between:
 - (1) a multimedia terminal adaptor that has a standard telephone jack connection and processes digital-to-audio and audio-to-digital conversion; or
 - (2) a native Internet Protocol Phone; or
 - (3) a personal computer with microphone, speakers, and software to perform the conversion.
- e. a conventional phone will not work with Vonage Digital Voice Service.

3. Vonage service offers customers a suite of integrated capabilities and features allowing user management of personal communications such as voicemail, three-way calling, online account and voicemail management, and geographically independent telephone numbers. Customer accounts can be accessed 24 hours a day through internet access to account management features. These features permit voicemail playback through a computer, or emails with the message attached as a sound file. Other features permit Digital Voice to simultaneously ring other numbers besides the Vonage number.

4. Digital Voice is capable of originating and terminating real-time voice communications via the internet and/or the public switched network. Peered calls to other Digital Voice customers via the internet are routed by Vonage servers. Calls to or from PSTN customers are converted from Internet Protocol packets to digital audio signals by the Vonage servers. This integration allow customers to control their communication needs by determining how, when, and where communications will be sent, received, saved, stored, forwarded, and organized.

5. Although Vonage's services use North American Numbering Plan numbers as the identification mechanism for the users's IP address, the NANP number is not necessarily tied to the user's physical location for assignment or use, in contrast to wireline circuit-switched calls. In contrast to circuit-switched telephony, Vonage NANP numbers can reach the customer anywhere in the world, and does not require the user to remain at a single location.

Subsequent to paragraphs 4 through 9 of the *Vonage* decision, the FCC articulated the basis for preempting regulation of the Vonage service. In ¶ 14, the FCC found that “the characteristics of Digital Voice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota's regulations would thwart federal law and policy”.

In ¶ 17, the FCC concluded that it is only where an “end-to-end” analysis of the physical beginning and ending points of a communication can be separated into interstate and intrastate communications that the dual federal/state regulation can coexist. Where services permit communications that cannot be so segregated, and are therefore “mixed use”, the FCC is authorized to preempt state regulation. As Vonage service permits communications with anyone in the world from anywhere in the world, it permitted both interstate and intrastate communications, and was therefore jurisdictionally mixed. (¶ 18).

The FCC therefore concluded that the Minnesota Order conflicted with FCC policies. (¶ 20). The FCC concluded that, if Vonage service was classified as a telecommunications service, that classification would subject the service to entry and state regulatory requirements inconsistent with FCC policies designed not to stifle innovation. (¶ 20). The FCC also concluded that, IF Vonage service was classified as an information service, that classification would mean that Vonage service would be subject to the FCC policy of nonregulation. (¶ 21).

While it appears from the discussion in paragraphs 20 and 21 that the FCC considered the Vonage service to be information service, and not telecommunications service, the FCC preempted Minnesota regulation regardless of its classification because it was not possible to separate interstate and intrastate communications. (¶¶ 22, 23) It

does not appear from the *Vonage* decision that the FCC definitively classified *Vonage* service as information service. At ¶ 32, the FCC concluded the analysis with the following attempt at guidance to state Commissions:

“Indeed, the practical inseparability 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.”

MITG Application of *Vonage* Analysis

The factual basis available to the MITG upon which to conduct the *Vonage* analysis is that contained in the Stipulation of the parties. The MITG believes that, in applying the *Vonage* analysis, TWCIS Digital Phone service does not meet the service characteristics that the FCC preempted state regulation of.

TWCIS does not route Digital Phone calls over the internet.¹³ Digital Phone service is stationary, which means TWCIS Digital Phone service does not provide the ability to enjoy geographically independent telephone numbers.¹⁴ Because Digital Phone service calls are not routed over the internet, and Digital Phone customer phone numbers are not geographically independent, Digital Phone does not possess the most important characteristics the FCC based preemption upon. Digital Phone service is not portable and

¹³ Stipulation of the Parties, paragraph 15.

¹⁴ Stipulation of the Parties, paragraphs 16 and 17.

capable of use anywhere in the world.¹⁵ It must be used at the subscriber's premise.

Thus Digital Phone service is more akin to traditional circuit switched telephony, as it is not only "relevant" where the subscriber is located, it is necessary for the subscriber to have a discrete geographic location.

Digital Phone subscribers obtain telephone numbers that correlate to the actual physical location of the CPE. Digital Phone subscribers do not obtain a number which is associated with an Internet Protocol address. Unlike the Vonage IP address-based numbers, Digital Phone subscribers' NANP number is specifically tied to the user's physical location. Digital Phone subscribers are required to remain at a single location in order to use their service.

Therefore, unlike the Vonage service, Digital Phone service is identical to traditional telephony in terms of identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme. It is only at the subscriber's location that Digital Phone service can be used. As the Digital Phone service has a discrete location corresponding with the subscriber's telephone number, calls from the subscriber have a discrete origination point at which the call can be rated. Calls to the subscriber have a discrete termination point at which the call can be rated. Under ¶ 17 of the FCC *Vonage* analysis, where an "end-to-end" analysis of the physical beginning and ending points of a communication can be separated into interstate and intrastate communications, the traditional telephony federal/state regulation should be applied.

¹⁵ A comprehensive reading of the *Vonage* decision suggests that this was the predominant factor in deciding that the Vonage service was sufficiently distinct from traditional telephony to justify preemption.

In its *Vonage* decision, the FCC relied most heavily upon the Vonage customers' ability to make their calls from anywhere in the world, to utilize either a standard telephone jack with multimedia terminal adaptor, or a native Internet Protocol Phone, or a personal computer to send and receive calls anywhere in the world in concluding the service was not traditional telephone service.

This ability was dependent upon the Vonage customer also having a broadband connection accessible at locations other than the customer's home premise, with internet service provided by a provider other than Vonage. It appears the fact that Vonage did not provide any facilities other than its IP "CPE" equipment heavily influenced the FCC's decision Vonage service was not traditional telephony.

The situation with TWCIS is different. TWCIS customers must have cable facilities into their premise to subscribe to the TWCIS service. In addition they must have a broadband connection they must purchase from TWCIS, who in turn utilizes the broadband facilities of its affiliate.¹⁶ TWCIS also provides the location-specific CPE. Unlike Vonage, TWCIS is a facility-based provider.

Vonage offers its service to anyone anywhere in the world. TWCIS only offers its service to customers in its areas where it also offers cable television service. Vonage service must be routed via the internet, and the FCC relied heavily upon its policy of non-regulation of the internet. TWCIS service is not routed on the internet.

Conclusion

TWCIS proposal to detariff, or have "ICB" tariffs for residential Digital Phone Service should not be allowed to go into effect.

¹⁶ Stipulation of the Parties, paragraphs 10, 14, 19, 20.

If the basis for TWCIS' proposed tariff is that the FCC has preempted Missouri regulation of its Digital Phone Service, the appropriate action would have been for TWCIS to state this as a basis for withdrawing or canceling its certificates and tariffs.

If TWCIS believes it is subject to Missouri regulation, the proposed tariff should be rejected. In Missouri, customer-specific or "individual case basis" (ICB) pricing is only available under limited circumstances. Specifically, §392.200.8, as recently amended by Senate Bill 237 ("SB 237"), allows customer specific pricing for dedicated, non-switched, private line and special access, central office based switching services, and business services in areas where basic local service has been declared to be competitive pursuant to § 392.245 RSMo. ICB pricing is not available to residential customers, even where basic local service has been declared competitive. As TWCIS has stipulated that it only offers "Digital Phone" service to residential customers, ICB pricing is not available.¹⁷

Either way, whether regulation of the service is preempted, or whether the service is within the purview of Missouri regulation, the proposed tariff should be rejected.

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¹⁷Stipulation of the parties, paragraph 20.

CERTIFICATE OF SERVICE

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 13th day of January, 2006:

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