

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

In the Matter of Tariff No. 3 of Time)
Warner Cable Information Services)
(Missouri), LLC d/b/a Time Warner Cable)

Case No. LT-2006-0162
Tariff File No. JL-2006-0231

**STAFF'S RESPONSE IN OPPOSITION TO
MOTION TO RECONSIDER SUSPENSION OF TARIFF**

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

1. On September 23, 2005, Time Warner Cable Information Services (Missouri) LLC d/b/a Time Warner Cable (Time Warner) submitted its proposed tariff P.S.C. Mo. No. 3 to replace its existing tariffs, P.S.C. Mo. Nos. 2 and 3, in their entirety.
2. On October 13, 2005, the Staff filed a motion requesting the Commission to suspend and to enter upon a hearing concerning the propriety of Time Warner's proposed P.S.C. Mo. No. 3 tariff.
3. On October 18, 2005, the Commission issued an order suspending the tariff to August 20, 2006, or until otherwise ordered by the Commission, and scheduling a prehearing conference for October 27, 2005.
4. On October 25, 2005, Time Warner filed a motion requesting the Commission to reconsider its order and to lift the suspension.
5. Pursuant to 4 CSR 240-2.080 (15), the Staff files this response to Time Warner's motion.

6. Time Warner suggests that it submitted proposed Tariff No. 3, which removes its VoIP-based Digital Phone offering from its list of tariffed services, based on the *Vonage Order*.¹ The Staff anticipated this argument and addressed it in its motion requesting suspension. Time Warner, argues that the Staff overlooked and failed to address paragraph 32 of the *Vonage Order*. Time Warner is mistaken.

Paragraph 32 states, in its entirety:

32. Indeed the practical inseparability of other types of IP-enabled services having **basic characteristics similar to [Vonage’s] 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. [Footnotes omitted.] [Emphasis added.]

The FCC further softened this ambiguous statement at paragraph 1 where it stated, in part, “Similarly, to the extent that other VoIP services are not the same as Vonage’s but share similar basic characteristics, we believe it **highly unlikely** that the Commission would fail to preempt regulation of those services to the same extent.” (Emphasis added.)

Four pages of the Staff’s motion explain how Time Warner’s service has basic characteristics **dissimilar** to Vonage’s Digital Voice.

7. In its motion, the Staff noted that the *Vonage Order*, having been appealed to the United States Court of Appeals for the Eighth Circuit, is not final. Time Warner responded that

¹ See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (“*Vonage Order*”).

under settled principles of law, a pending appeal does not stay a federal agency order's effectiveness.

Time Warner missed the point. The Staff was not suggesting that the Minnesota Public Utilities Commission could, absent a stay, regulate Vonage during the appeal of the FCC's *Vonage Order*.

Time Warner proposes to de-tariff its Digital Phone offering based upon an advisory opinion included in the *Vonage Order*. The FCC stated that it "would" preempt state regulation to an extent "comparable" to the what it did in that Order, to the extent other entities, such as cable companies, provide VoIP services having basic characteristics similar to Vonage's DigitalVoice.

The advisory opinion hinges upon "comparable" treatment for Vonage and for these cable companies providing service similar to Vonage's service. If the Eighth Circuit reverses the FCC's *Vonage Order*, then comparable treatment is regulation for both Vonage and those cable companies providing similar services.

8. In its motion, the Staff noted that the *Vonage Order* "speaks to preemption of state regulation and not merely of preemption of state regulations requiring tariffed rates." Time Warner responded that it is unclear what Staff meant to say, but if the point is that the *Vonage Order* preempted state regulation even beyond tariff requirements, Time Warner agrees. The Staff's point is that if the *Vonage Order* is ultimately affirmed; and if when presented with an actual controversy involving state regulation of a cable company providing similar VoIP services, the FCC does follow through with its probable intention to preempt state regulation; and if Time Warner's Digital Phone offering has basic characteristics similar to Vonage's DigitalVoice; then state regulation even beyond tariffing would be preempted. Yet here, Time

Warner appears to be suggesting that the extent of that possible future preemption of state regulation is at its discretion. Time Warner wants the benefits of keeping its basic local certificate without the supposed detriment of tariffing basic local rates. The *Vonage Order* is clear that preemption is an all-or-nothing proposition when the FCC declared that “the Minnesota Commission may not require Vonage to comply with its certification, tariffing or other related requirements as conditions to offering DigitalVoice in that state.”²

WHEREFORE, because Time Warner relies upon an advisory opinion included in the *Vonage Order* which order is itself still on appeal, and because Time Warner’s services do not have basic characteristics similar to Vonage’s, the Staff recommends that the Commission deny Time Warner’s Motion to Reconsider Suspension of Tariff.

Respectfully submitted,

DANA K. JOYCE
General Counsel

/s/ William K. Haas
William K. Haas
Deputy General Counsel
Missouri Bar No. 28701

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-7510 (Telephone)
(573) 751-9285 (Fax)
william.haas@psc.mo.gov

² *Vonage Order*, at ¶ 46.

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 4th day of November 2005.

/s/ William K. Haas