

**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

APPLICATION FOR REHEARING

COMES NOW, TIME WARNER CABLE INFORMATION SERVICES (MISSOURI), LLC d/b/a Time Warner Cable (hereafter "TWCIS") and respectfully submits to the Missouri Public Service Commission (the "Commission") this Application for Rehearing. In support of this application, Respondent states as follows:

1. On September 23, 2005, TWCIS filed a tariff, which bore an effective date of October 23, 2005. TWCIS offers IP based voice services, branded as "Digital Phone," to residential customers within the exchanges where its affiliate, Time Warner Cable, offers cable television service.

2. The Staff of the Commission filed a Motion to Suspend on October 13, asserting that the tariff's pricing violated §§ 392.200.8, 392.220 and 392.450, RSMo. The Commission granted the Staff's motion on October 18. On October 25, 2005, TWCIS filed a Motion for Reconsideration of that suspension, asserting that the services provided were IP enabled voice services that utilize voice over internet protocol ("VoIP") technology and that qualify for preemption of state certification, tariffing, and related requirements under the Federal Communications Commission's ruling in *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (hereafter "Vonage Order").

3. TWCIS, the Staff of the Commission, the Small Telephone Company Group, the Missouri Independent Telephone Company Group, and the Office of the Public Counsel filed a Procedural History and Stipulation of Facts on December 23, 2005. The Commission held an on-the-record presentation on March 22, 2006.

4. The Commission's Report and Order is based, in part, on the FCC's recent *Universal Service Order*.¹ This reliance, however, is misplaced. The FCC's Vonage Order, which preempted state certification, tariffing, and related requirements with respect to IP enabled VoIP-based services, including those of the type provided by TWCIS, was based on the FCC's authority to preempt state regulation "[w]here separating a service into interstate and intrastate communications is impossible or impractical[.]" The fact that the FCC recognized the same precondition to its preemption power in the *USF Order* cited by the Commission is not a basis for this Commission to determine that TWCIS' services are telecommunications services subject to the Commission's jurisdiction.

5. In addition, the FCC's language quoted by this Commission addressed a topic (preemption) that is remote from the issue that was being addressed in the FCC's order (universal service), and there is no indication that the FCC meant for its language to have legal effect. If the FCC did intend the quoted language to have legal effect, it would nonetheless be vulnerable to challenge: it contains no explanation for any about-face.² Therefore, the FCC's *USF Order* is not pertinent to the proceeding before this Commission.

¹ See *Report and Order* at 4.

² See *Brock v. Dun-Par*, 843 F.2d 1135, 1137-38 (8th Cir. 1988).

6. Moreover, the Commission's Report and Order concludes that TWCIS' Digital Phone offering is subject to the Commission's jurisdiction pursuant to Chapter 392, RSMo without providing any analysis in reaching such a conclusion. There has been no showing in this proceeding that TWCIS' Digital Phone offering meets the definition of a telecommunications service under Missouri law. The lack of analysis and silence as to how the Commission reached this conclusion of law constitutes reversible error.

7. Finally, the Commission's decision fails to follow a strict application of the factors established in the Vonage Order for preemption of state jurisdiction over services provided by cable operators and their affiliates, such as TWCIS. The fact that TWCIS' service offering differs from that of Vonage in terms of features and functionalities offered to consumers has no bearing on whether TWCIS meets the preemption criteria set forth by the FCC (i.e., 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.). TWCIS clearly satisfies these criteria, and this Commission made no findings to the contrary. This Commission's failure to adhere to the preemption criteria set forth by the FCC in the Vonage Order constitutes reversible error and warrants a rehearing in this case.

WHEREFORE, for all of the foregoing reasons, TWCIS requests the Commission to grant a rehearing upon its decision to reject TWCIS' proposed tariff sheets.

Respectfully submitted,

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Dated: August 17th, 2006

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post Hearing Brief has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 17th day of August, 2006, to:

Case No. LT-2006-0162

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