

**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 POST-HEARING BRIEF**

The Staff supplements its Motion to Suspend Tariff and its pre-hearing Brief in Support of Continued State Jurisdiction.

**Vonage Order**

TWCIS suggests that the Vonage Order,<sup>1</sup> issued by the Federal Communications Commission (FCC) preempts state regulation of TWCIS' Digital Phone Service.

The Vonage Order preempted an order of the Minnesota Public Utilities Commission that had applied "traditional 'telephone company' regulations" to DigitalVoice, a VoIP-based service offered by Vonage Holdings Corporation. The FCC held that the Minnesota Commission could not require Vonage "to comply with its certification, tariffing or other related requirements."<sup>2</sup>

The FCC's Vonage Order is based on conflict preemption. The FCC concluded that, because of the impossibility of separating out any intrastate component of DigitalVoice, it must preempt the Minnesota Order because it outright conflicts with federal rules and policies governing interstate DigitalVoice communications.<sup>3</sup>

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<sup>1</sup> *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"), petitions for review pending, *The Minnesota Public Utilities Commission v. F.C.C.*, Nos. 05-1069, *et al.* (8<sup>th</sup> Cir.). The Eighth Circuit heard oral argument on January 12, 2006.

<sup>2</sup> Vonage Order, ¶ 46.

<sup>3</sup> *Id.* ¶ 31.

Vonage's service is fully portable; customers may use the service anywhere in the world where they can find a broadband connection to the Internet.<sup>4</sup>

In contrast, TWCIS' Digital Phone Service is stationary in that customers can only use TWCIS' service at locations with Kansas City Cable Partners and Time Warner Entertainment d/b/a Time Warner Cable facilities.<sup>5</sup>

One question presented to the Eighth Circuit in the appeal of the FCC's Vonage Order reads, "In challenging the FCC's prediction that it likely would preempt state regulation of VoIP services that have similar basic characteristics to Vonage's service, has the [intervenor] Public Service Commission of the State of New York (NYPSC) challenged a final agency order that is ripe for judicial review?"

The FCC's Brief answers that the NYPSC's argument concerning preemption of "fixed" VoIP services is premature.<sup>6</sup> The FCC's Brief notes, "The *Preemption Order* does not specifically address fixed VoIP services, but rather speaks only of services "having basic characteristics similar to DigitalVoice."<sup>7</sup> The FCC's brief continues, "The NYPSC's attempt to obtain a ruling from this Court on how the FCC's prediction would apply to fixed VoIP services should be rejected as premature."<sup>8</sup> The FCC's Brief adds, "DigitalVoice is not a fixed VoIP service, and the FCC did not have before it any particular state regulation seeking to regulate fixed VoIP services."<sup>9</sup> The FCC Brief concludes, "Moreover, VoIP services can be provided in a variety of different ways . . . , and the particular characteristics of a fixed VoIP service may

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<sup>4</sup> *Id.* ¶ 5.

<sup>5</sup> Stipulation of Facts, ¶ 16.

<sup>6</sup> Brief of the Respondents, p. 61, *Minnesota Public Utilities Commission v. FCC*, Nos. 05-1069, *et al.*

<sup>7</sup> *Id.*, p. 62

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, p. 63

bear on the FCC’s preemption analysis. ‘The presence of such fact-intensive inquiries mandates deferral of review until an actual preemption of a specific state regulation occurs.’”<sup>10</sup>

The Commission should reject TWCIS’s argument that the FCC’s Vonage Order applies to its Digital Phone Service given that the FCC itself acknowledges that the Vonage Order does address fixed VoIP services.

### **Other States**

In support of this filing, TWCIS argued that “all jurisdictions have approved the filing that we’ve made here. Missouri is the only state still pending.”<sup>11</sup>

TWCIS noticeably failed to disclose the basis on which other states have approved the filing. For example, although it is correct that the Hawaii Public Utilities Commission (HPUC) allowed Time Warner to de-tariff, at least for now, its Digital Phone Service, the HPUC did not conclude that state regulation of Digital Phone Service had been preempted. Instead, the HPUC waived the tariffing requirement pursuant to a state statute that authorizes the HPUC to waive the tariffing requirement.<sup>12</sup> And as TWCIS knows, Missouri has no such statute.

### **Telecommunications Service vs. Information Service**

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used.<sup>13</sup>

The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.<sup>14</sup>

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making

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<sup>10</sup> *Id.*

<sup>11</sup> Tr. 14

<sup>12</sup> *In the Matter of the Application of Time Warner Cable Information Services (Hawaii) LLC for Approval of Changes to its Tariff*, Docket No. 05-0290, Decision and Order No. 22257 (Feb. 1, 2006)

<sup>13</sup> 47 U.S.C. § 3(46)

<sup>14</sup> 47 U.S.C. § 3(43)

available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.<sup>15</sup>

The FCC has jurisdiction over interstate telecommunications services and, also, over intrastate telecommunications services where separating a service into interstate and intrastate communications is impossible or impractical.<sup>16</sup> Information services are subject to the FCC's long-standing national policy of nonregulation.<sup>17</sup>

Because the parties in the present case focused on the question of whether this Commission's jurisdiction over TWCIS' Digital Phone Service was preempted by the FCC's Vonage Order, and because the FCC refused to decide if Vonage's Digital Voice is a telecommunications service or an information service, the parties addressed the issue of whether TWCIS' Digital Phone Service is similar to Vonage's Digital Voice and not whether TWCIS' Digital Phone Service is a telecommunications service or an information service.

#### **Other Proposed Changes**

As noted in Staff's Motion to Suspend Tariff, TWCIS' tariff filing purports to prohibit Relay Missouri calls to informational recordings and other recorded messages such as to time and weather recordings, and attempts to exclude TWCIS from calls to Relay Missouri by stating that it contracts such call completion to an "outside provider." Also, TWCIS' tariff filing describes television standards circa 1953 and describes a non-regulated customer premise equipment denoted as "Azox Broadband Modem." The Staff continues to object to these provisions.

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<sup>15</sup> 47 U.S.C. § 3(20)

<sup>16</sup> Vonage Order, ¶ 19.

<sup>17</sup> *Id.*

**Conclusion**

WHEREFORE, the Staff asks the Commission to reject TWCIS' proposed Tariff No. 3.

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 9<sup>th</sup> day of May 2006.

/s/ William K. Haas