

**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 BRIEF IN SUPPORT OF CONTINUED
STATE JURISDICTION**

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

Introduction

Time Warner Cable Information Services (Missouri), LLC d/b/a Time Warner Cable (hereafter TWCIS) has certificate of service authority to provide basic local, local exchange, and interexchange telecommunications services in Missouri.¹ TWCIS' PSC Mo. No. 2 Tariff offers residential customers a Voice over Internet Protocol (VoIP) based service, which includes local and long distance voice service and a number of calling features, under the brand name "Digital Phone Service."²

On September 23, 2005, TWCIS submitted a proposed PSC Mo. No. 3 Tariff, which, *inter alia*, removes Digital Phone Service from TWCIS' list of tariffed services. TWCIS intends to continue providing Digital Phone Service.³

On October 13, 2005, the Staff filed a motion asking the Commission to suspend and to

¹ *Application of Time Warner Cable Information Services (Missouri), LLC for a Certificate of Service Authority to Provide Local and Interexchange Voice Service in Portions of the State of Missouri and to Classify Said Services as Competitive*, Order Granting Certificates to Provide Basic Local, Local Exchange and Interexchange Telecommunications Services and Order Granting Motion to Amend Application, Case No. LA-2004-0133 (Mo. P.S.C.) (Sept. 12, 2003).

² Procedural History and Stipulation of Facts (Stipulation), ¶s 5, 6, 10.

³ Stipulation, ¶ 12.

enter upon a hearing concerning the propriety of TWCIS' proposed tariff. On October 18, 2005, the Commission suspended the tariff to allow sufficient time to study its effect. On October 25, 2005, TWCIS filed a motion asking the Commission to reconsider the suspension; TWCIS suggests that the Vonage Order,⁴ 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."⁵

On December 23, 2005, the parties filed a stipulation of facts that described Vonage's DigitalVoice and TWCIS Digital Phone. Also, a copy of the FCC's Vonage Order was attached to the Stipulation.

Federal Preemption

The basis for federal preemption comes from the Supremacy Clause of the Constitution.

The following summary explains the various types of federal preemption:

Congress's intent to preempt state law may be explicitly stated in the language of a federal statute or implicitly contained in the structure and purpose of the statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Bearing in mind this distinction between express and implied preemption, the Supreme Court has identified three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82, 115 L.Ed.2d 532 (1991); *This That & The Other Gift & Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319, 1322 (11th Cir.2002). "Express preemption" occurs when Congress has manifested its intent to preempt state law explicitly in the language of the statute. If Congress does not explicitly preempt state law, however,

⁴ 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"), petitions for review pending, *The Minnesota Public Utilities Commission v. F.C.C.*, Nos. 05-1069, *et al.* (8th Cir.). The Eighth Circuit heard oral argument on January 12, 2006.

⁵ *Id.* at ¶ 46.

preemption still occurs when federal regulation in a legislative field is so pervasive that we can reasonably infer that Congress left no room for the states to supplement it—this is known as “field preemption” or “occupying the field.” *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). And even if Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law. “Conflict preemption,” as it is commonly known, arises in two circumstances: when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73, 120 S.Ct. 2288, 2294, 147 L.Ed.2d 352 (2000).⁶

Preemption may result not only from an action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.⁷ In looking at the preemptive effect of a federal regulation, the proper inquiry is whether the administrative agency intended to preempt state law, and if so, whether the preemption was within the scope of authority delegated by Congress.⁸

Federal Agency Rule Making versus Adjudication

The federal Administrative Procedure Act provides two procedures for action by a federal agency: rule making and adjudication. 5 U.S.C. §§ 553, 554. The following summary explains the difference:

A rule is:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency 5 U.S.C. § 551(4). An adjudication (which results in an order) is virtually any agency action that is not rulemaking. 5 U.S.C. § 551(6)-(7). Two principal characteristics distinguish rulemaking from adjudication. First, adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals. *See United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-45, 93 S.Ct. 810, 820-21, 35 L.Ed.2d 223 (1973); *Ford Motor Co. v. FTC.*, 673 F.2d 1008, 1010 (9th Cir. 1981), *cert. denied* 459 U.S. 999, 103 S.Ct. 358, 74 L.Ed.2d 394 (1982). Second, because

⁶ *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004)

⁷ *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1898-99, 90 L.Ed. 2d 369 (1986)

⁸ *Hughes v. Attorney General of Florida*, 377 F.3d 1258, 1266 (11th Cir. 2004)

adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17, 109 S.Ct. 468, 476, 102 L.Ed.2d 493 (1988) (the “central distinction” between rulemaking and adjudication is that rules have legal consequences “only for the future”) (Scalia, J., concurring) (emphasis added); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908).⁹

Substantive rules create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress, and are subject to notice and comment procedures.¹⁰ An agency cannot avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as adjudication.¹¹

Vonage Order vis-à-vis TWCIS’ Digital Phone Service

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.¹²

The FCC’s Vonage Order does not result in express preemption, field preemption or conflict preemption of this Commission’s traditional telephone company regulation of TWCIS’ Digital Phone Service.

A. No Express Preemption

The Vonage Order does not expressly preempt state regulation of VoIP services such as TWCIS’ Digital Phone Service. The Vonage Order states “to the extent that other VoIP

⁹ *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994), (internal footnote omitted).

¹⁰ See *Yesler*, 37 F.3d at 449; and 5 U.S.C. § 55. By contrast, interpretive rules simply clarify or explain existing law or regulations, do not conclusively affect the rights of private parties, and do not require notice and comment procedures. *Yesler*, 37 F.3d at 449.

¹¹ *Yesler*, 37 F.3d at 449.

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 state regulation of those services to the same extent.”¹³

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.¹⁴ 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.”¹⁵ 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.¹⁶ 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.”¹⁷ 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 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.’”¹⁸

¹² Vonage Order, ¶ 31.

¹³ Vonage Order, ¶ 1.

¹⁴ Brief of the Respondents, p. 61, *Minnesota Public Utilities Commission v. FCC*, Nos. 05-1069, *et al.*

¹⁵ *Id.*, p. 62

¹⁶ *Id.*

¹⁷ *Id.*, p. 63

¹⁸ *Id.*

That the Vonage Order did not purport to preempt state regulation of services similar to Vonage's surely reflects the FCC's understanding (1) that adjudications resolve disputes among and have an immediate effect on those specific individuals involved in the dispute (i.e., the Minnesota Public Utilities Commission and Vonage Holdings Corporation), and (2) that the notice-and-comment procedures that apply to statements that prescribe law or policy, i.e., rules, that affect the rights of broad classes of individuals were not followed in that adjudication.

B. No Field Preemption

The Vonage Order notes that Congress has set up a dual regulatory regime for communications services:

. . . In section 2(a) of the Act, Congress has given the Commission exclusive jurisdiction over "all interstate and foreign communication" and "all persons engaged . . . in such communication. Section 2(b) of the Act reserves to the states jurisdiction "with respect to intrastate communication service . . . of any carrier."¹⁹

In other words, the Vonage Order correctly recognizes that Congress has not occupied the field of intrastate telecommunications regulation.

C. No Conflict Preemption

The FCC's Vonage Order held that unless it is possible to separate a Minnesota-only component of DigitalVoice from the interstate component - - and the FCC held there was no practical means to do so - - Minnesota's order produces a direct conflict with federal law and policies.²⁰ In particular, the FCC found Congress's directives in sections 230 and 706 of the 1996 Act to be consistent with its decision to preempt Minnesota's Order.²¹

Section 230 provides, in pertinent part:

(a) Findings

¹⁹ Vonage Order, ¶ 16.

²⁰ Vonage Order, ¶ 22.

²¹ Vonage Order, ¶ 33.

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States –

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.²²

²² 47 U.S.C. § 230

Section 230 provides the following pertinent definitions:

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

* * *

Section 706, as amended, reads:

(a) In general.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

“(b) Inquiry.—The Commission shall, within 30 months after the date of enactment of this Act. [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

“(c) Definitions.—For purposes of this subsection:

“(1) Advanced telecommunications capability.—The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or ‘technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

“(2) Elementary and secondary schools. – The term ‘elementary and secondary schools’ means elementary and secondary schools, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7801].²³

The Vonage Order refused to decide if Vonage’s DigitalVoice is a telecommunications service or an information service. The FCC stated, “Were DigitalVoice to be classified a telecommunications service, Vonage would be considered a nondominant, competitive telecommunications provider for which the [FCC] has eliminated entry and tariff filing requirements with respect to services like DigitalVoice.”²⁴ The FCC then stated, “On the other hand, if DigitalVoice were to be classified as an information service, it would be subject to the [FCC’s] long-standing national policy of nonregulation of information services, particularly regarding economic regulation such as the type imposed on Vonage in the *Minnesota Vonage Order*.²⁵

The FCC concluded, “Thus, under existing Commission precedent, regardless of its definitional classification, and unless it is possible to separate a Minnesota-only component of DigitalVoice from the interstate component, Minnesota’s order produces a direct conflict with

²³ Section 706 of the Act is located in the notes of 47 U.S.C. § 157.

²⁴ Vonage Order, ¶ 20.

²⁵ Vonage Order, ¶ 21.

our federal law and policies, and impermissibly encroaches on our exclusive jurisdiction over interstate services such as DigitalVoice.”²⁶

Regarding the preemption of similar services, the FCC stated:

1. In this Memorandum Opinion and Order (Order), we preempt an order of the Minnesota Public Utilities Commission (Minnesota Commission) applying its traditional “telephone company” regulations to Vonage’s DigitalVoice service, which provides voice over Internet protocol (VoIP) service and other communications capabilities. We conclude that DigitalVoice cannot be separated into interstate and intrastate communications for compliance with Minnesota’s requirements without negating valid federal policies and rules. In so doing, we add to the regulatory certainty we began building with other orders adopted this year regarding VoIP – the *Pulver Declaratory Ruling* and the *AT&T Declaratory Ruling* - by making clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities. For such services, comparable regulations of other states must likewise yield to important federal objectives. 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 state regulation of those services to the same extent. We express no opinion here on the applicability to Vonage of Minnesota’s general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices. We expect, however, that as we move forward in establishing policy and rules for DigitalVoice and other IP-enabled services, states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints.

* * *

32. 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

²⁶ Vonage Order, ¶ 22.

patchwork regulation. Accordingly, to the extent other entities, such as cable companies, provide VoIP services,²⁷ we would preempt state regulation to an extent comparable to what we have done in this Order.

* * *

46. For the reasons set forth above, we preempt the *Minnesota Vonage Order*. As a result, 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. Moreover, for services having the same capabilities as DigitalVoice, the regulations of other states must likewise yield to important federal objectives. 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.

TWCIS' Digital Phone is not similar to Vonage's DigitalVoice.

Vonage's DigitalVoice is a service that enables subscribers to originate and receive voice communications and provides other features over the Internet.²⁸ TWCIS' Digital Phone does not route calls over the Internet.²⁹

²⁷ See, e.g., Letter from J.G. Harrington, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 1-2 (filed Oct. 27, 2004) ("This network design also permits providers to offer a single, integrated service that includes both local and long distance calling and a host of other features that can be supported from national or regional data centers and accessed by users across state lines In addition to call setup, these functions include generation of call announcements, record-keeping, CALEA, voice mail and other features such as *67, conferencing and call waiting. . . . [T]here are no facilities at the local level of a managed voice over IP network that can perform these functions."); Letter from Henk Brands, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 2, 9 (filed Oct. 29, 2004) (Time Warner Oct. 29 *Ex Parte* Letter) ("[T]he Commission should take a broader approach by recognizing additional characteristics of IP-based voice services and extend the benefits of preemption to all VoIP providers. . . . [B]y its nature, VoIP is provided on a multistate basis, making different state regulatory requirements particularly debilitating."); NCTA Oct. 28 *Ex Parte* Letter, Attach. at 1 ("Cable VoIP offers consumers an integrated package of voice and enhanced features that are unavailable from traditional circuit-switched service. . . . A cable company may have no idea whether a customer is accessing these features from home or from a remote location. The integral nature of these features and functions renders cable VoIP service an interstate offering subject to exclusive FCC jurisdiction. . . . Not every cable VoIP service has the same mix of features and functionalities . . . , but all cable VoIP offers the types of enhancements that render it an interstate service. Similarly, while the network architecture of each cable VoIP system will not be identical, they share the same centralized network design that impart an interstate nature."); Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 1 (filed Oct. 27, 2004) ("Functions integral to every call, such as CALEA compliance, voicemail recording, storage, and retrieval, call record-keeping, 3-way calling and other functions are provided from these central facilities. These facilities are often located in a state different from the origin of the call.") (Other internal footnotes are omitted.)

²⁸ Vonage Order, ¶ 4.

²⁹ Stipulation, ¶ 15.

Because Vonage does not offer Internet access services, DigitalVoice customers must obtain a broadband connection to the Internet from another provider.³⁰ TWCIS provides a broadband connection to its Digital Phone customers; but as noted above, the broadband connection is not to the Internet.³¹

Vonage's service is fully portable; customers may use the service anywhere in the world where they can find a broadband connection. According to Vonage, it does not know where in the world its users are when using DigitalVoice.³² The FCC declared, "Indeed, it is the total lack of dependence on *any* geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is based on the geographic end points of the communications."³³

TWCIS' service is stationary in that customers can only use its service of locations with its affiliates' cable facilities.³⁴

Conclusion

They lynchpin in the FCC's decision to preempt Minnesota's regulation of Vonage's DigitalVoice service is that there is no practical means to separate the service into its interstate and intrastate components because Vonage's customers may access the service anywhere in the world through a broadband connection to the Internet.

Because customers of TWCIS' Digital Phone service use telephone numbers associated with the customer's local rate center and because that service is not portable, TWCIS knows the geographic locations of its customers. In other words, TWCIS can identify a call as being

³⁰ Vonage Order, ¶ 5.

³¹ Stipulation, ¶ 13.

³² Vonage Order, ¶ 5.

³³ Vonage Order, ¶ 25.

³⁴ Stipulation, ¶ 16.

intrastate or interstate.

Accordingly, the conflict which the FCC found to exist between state and federal regulation of Vonage's DigitalVoice service does not exist between state and federal regulation of TWCIS' Digital Phone service.

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

Respectfully submitted,

/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

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 13th day of January 2006.

/s/ William K. Haas