

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

State of Missouri)
ex rel. Time Warner Cable Information)

Services (Missouri), LLC d/b/a Time)
Warner Cable)

Relator,)

v.)

Case No. 06AC-CC00935

Public Service Commission of the)

State of Missouri, Jeff Davis, Chairperson,)

Connie Murray, Robert M. Clayton III,)

Steve Gaw and Linward Appling,)

Commissioners,)

Respondents.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The Court, upon Relator's Petition for Review, the matter having been fully briefed and argued by the parties, enters the following Findings of Fact, Conclusions of Law, and Judgment.

Issue

1. The issue of this case is whether Relator Time Warner Cable Information Service, LLC's "Digital Phone Service" constitutes a telecommunications service as defined by § 386.250(2) RSMo, thereby subject to regulation by the Missouri Public Service Commission, or whether the Federal Communications Commission has preempted the State of Missouri's authority to regulate this service.

Parties

2. Relator Time Warner Cable Information Services LLC ("TWCIS") is a limited liability company authorized to, and doing business in Missouri.

3. Respondent Missouri Public Service Commission ("MoPSC") is the state agency established in Chapter 386 RSMo, and authorized to regulate certain public utilities, including telecommunications companies and telecommunications services.

4. The Office of the Public Counsel ("OPC") is a Missouri consumer protection office created by statute.

5. Intervenor Small Telephone Company Group ("STCG") is a group of several small rural telephone companies that were granted intervention before the Commission and before this Court, which has participated as a party in all proceedings.

6. Intervenor Missouri Independent Telephone Group ("MITG") is a group of several small rural telephone companies that were granted intervention before the Commission and before this Court, which has participated as a party in all proceedings.

Proceedings Before the Commission

7. On September 12, 2003, TWCIS submitted an application for a certificate to provide local and interexchange voice service within the State of Missouri.¹ TWCIS sought authority to provide local and interexchange services under the same rules and regulations applicable to traditional telecommunications service providers while expressly reserving TWCIS' rights with respect to any later regulatory or judicial action that might clarify the regulatory requirements applicable to providers of Internet Protocol ("IP") enabled voice services, such as Time Warner Cable Digital Phone service.² In submitting its Application, Time Warner expressly agreed to comply with all applicable

¹ See *Application of Time Warner Cable Information Services (Missouri), LC, 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*, Case No. LA-2004-0133 (Mo. P.S.C.) (filed Sept. 12, 2003).

² See *Response of Time Warner Cable Information Services (Missouri), LLC to Applications to Intervene, 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*, Case No. LA-2004-0133, at 6 (Mo. P.S.C.) (filed Oct. 17, 2003).

Commission rules and to meet all relevant service standards including, but not limited to billing, quality of service, and tariff filing and maintenance in a manner consistent with the Commission's requirements for incumbent local exchange carrier(s) with whom TWCIS seeks authority to compete, while expressly reserving TWCIS' right to benefit from any later regulatory or judicial action that might clarify the regulatory requirements applicable to its VoIP-based Digital Phone service.

8. On March 2, 2004 the Commission granted TWCIS' Motion to Amend Application and to provide "Basic Local, Local Exchange, and Interexchange Telecommunications Services."³

9. On April 16, 2004, TWCIS submitted its proposed PSC Mo. No. 2 Tariff to provide local and interexchange "Digital Phone Service" service.⁴

10. PSC Mo. No. 2 Tariff became effective on June 15, 2004. PSC Mo. No. 2 Tariff contains rates for exchange services including local exchange service, local operator service, and directory assistance service. Intrastate Long Distance Message Telecommunications Service is provided at no charge to TWCIS' customers. Certain custom calling features, directory services and miscellaneous services are also provided by TWCIS to its customers at no charge. Exchange and Interexchange Private Line Services are not included as part of PSC Mo. No. 2 Tariff. TWCIS does not currently have an exchange access tariff.

³ *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).*

⁴ *See Order Approving Tariff, Case No. LT-2004-0523 (Mo. P.S.C.) (June 8, 2004).*

11. On May 27, 1998, Kansas City Cable Partners d/b/a American Cablevision obtained a certificate of service authority from the Commission to provide interexchange telecommunications services. The Commission approved tariff includes non-switched private line services.⁵

12. Effective October 30, 1999, the Commission recognized Kansas City Cable Partners' adoption of the fictitious name of Time Warner Cable.⁶

13. Time Warner Cable provides service pursuant to its PSC Mo. No. 1 Tariff. Since originally offered, this company's private line services have been tariffed both with some specific prices and on an individual case basis ("ICB"), without specific prices.⁷

14. TWCIS uses the cable television network facilities of its affiliates, Kansas City Cable Partners and Time Warner Entertainment d/b/a Time Warner Cable, to provide two kinds of services. *First*, TWCIS provides to 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." For this purpose, TWCIS provides a broadband connection and the necessary IP-compatible customer premises equipment to provide an integrated suite of services, including the ability to engage in voice communications with other on-network and off-network users. *Second*, TWCIS provides dedicated, non-switched private-line service – *i.e.*, fiber connectivity between two fixed points (*e.g.*, a cell phone tower and cell phone switch, or an automated teller machine and a central banking facility) – to various business and governmental customers.

⁵ See Order Approving Interexchange Certificate of Service Authority and Order Approving Tariff, Case No. TA-98-428 (Mo. P.S.C.) (May 27, 1998).

⁶ See Order Recognizing Change of Corporate Name and Approving Adoption Notice, Case No. TO-2000-213, (Mo. P.S.C.) (October 26, 1999).

⁷ See Time Warner Cable Tariff, Original page 39, § 3.5 (Effective May 25, 1998).

15. On November 12, 2004, the Federal Communications Commission ("FCC") released an order preempting a decision of the Minnesota Public Utilities Commission that had applied "traditional 'telephone company' regulations" to Digital Voice, a VoIP-based service offered by Vonage Holdings Corporation.⁸ The FCC held that the Minnesota Commission could not require Vonage "to comply with its certification, tariffing or other related requirements."⁹

16. On September 23, 2005, TWCIS submitted proposed Tariff No. 3, which TWCIS intends to replace its PSC Mo. No. 1 and PSC Mo. No. 2 tariffs in their entirety. Tariff No. 3 removes the exchange services and residential end user offerings, including VoIP-based Digital Phone, from TWCIS' list of tariffed services.¹⁰ TWCIS intends to continue providing Digital Phone. In addition, TWCIS sought to add to the TWCIS tariff the private line services that had been tariffed by Time Warner Cable, intending to follow the tariff filing with a withdrawal of the Time Warner Cable interexchange certificate. Thus, following this tariff filing and withdrawal of the Time Warner Cable interexchange certificate, there would be a single certificated entity and a single tariff on file relating to a single Time Warner Cable entity: TWCIS. The new PSC Mo. No. 3 Tariff contains one specific charge: a nonrecurring service connection charge for unnamed service connections that "may" apply. All other rates and charges of TWCIS are subject to customer-specific contracts found on tariff sheet 47, and individual case basis pricing

⁸ 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.).

⁹ *Id.* at ¶ 46.

¹⁰ See *Tariff No. 3 of Time Warner Cable Information Services (Missouri), LLC d/b/a Time Warner Cable*, Tariff File No. JL-2006-0231, at Original Sheet No. 41 (Mo. P.S.C.) (filed Sept. 23, 2005).

terms found on tariff sheet 50. All other TWCIS rates have been removed from the new PSC Mo. No. 3 Tariff.

17. TWCIS proposed Tariff No. 3, at the Staff of the Commission's motion, was suspended on October 18, 2005.

18. The Commission permitted the interventions by the STCG and MITG.

19. On December 23, 2005, TWCIS, the Commission Staff, OPC, STCG, and MITG filed a Procedural History and Stipulation of Facts with the Commission. The Commission held an on-the-record presentation regarding the disputed issues of the case on March 22, 2006.

Stipulated Facts Pertinent to TWCIS Voice Service

20. TWCIS offers service to its Missouri consumers through outside plant and facilities owned by its affiliates, Kansas City Cable Partners and Time Warner Entertainment, d/b/a Time Warner Cable. Vonage's customers access service through a broadband connection,¹¹ but Vonage subscribers must obtain a broadband connection to the Internet from another provider.¹²

21. TWCIS' affiliates offer internet access service. Vonage does not offer internet access service.¹³

22. TWCIS does not route calls over the public Internet. Vonage routes calls over the public Internet.¹⁴

¹¹ All descriptions of Vonage's service are taken from the Federal Communications Commission's order in *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) *Memorandum Opinion and Order*, ("Vonage Order"). See Appendix "C".

¹² Vonage Order, ¶ 5.

¹³ *Id.*

¹⁴ *Id.* at ¶ 4.

23. TWCIS' 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. Vonage's service is portable in that customers can use Vonage's service on any broadband connection.¹⁵

24. TWCIS does not allow its customers to have geographically independent telephone numbers. For example, TWCIS has chosen to require customers to use telephone numbers associated with the customer's local rate center. Vonage offers customers the ability to use geographically independent telephone numbers.¹⁶

25. Vonage's DigitalVoice offers a suite of integrated capabilities and features, including but not limited to real-time multidirectional voice functionality.

26. TWCIS' Digital Phone possesses the following characteristics. First, it is necessary that customers have a broadband connection from their service address to TWCIS' broadband cable network for the transmission of voice packets in Internet protocol format. In addition, Digital Phone requires the use of special IP-compatible equipment, a voice-enabled embedded multimedia terminal adapter ("eMTA") installed in the customer's home. The eMTA converts the analog telephone signals generated and received by the customer's telephone to IP data packets that are transmitted over a designated broadband channel on TWCIS's existing coaxial cable network (which supplies video and high speed internet services to the home), and then may be handed off through telephone partners for call completion. In addition, Digital Phone offers a suite of integrated capabilities and features able to be invoked sequentially or simultaneously that allows customers to manage personal communications and access other features and

¹⁵ *Id.* at ¶ 5.

¹⁶ *Id.* at ¶ 9.

capabilities including the ability to manage voicemail messages, Caller-ID, Call Forwarding, Call Waiting, and Speed Calling.

27. TWCIS offers "Digital Phone" service to residential customers within the exchanges where it offers cable television service. The company does not offer the same or similar service to business customers. TWCIS uses the cable television facilities of TWC to connect to a residential customer's premise. TWCIS supplies an eMTA to each subscriber which is placed at the subscriber's residence. The adaptor interfaces with the customer's existing inside wiring so that the customer can use existing telephone equipment and jacks. TWCIS routes some calls to Sprint Communications Company L.P. ("Sprint") which interfaces with the public switched network. Calls to other TWCIS subscribers ("on-net calls") stay on the TWCIS network and do not traverse Sprint's network. TWCIS owns and operates a soft switch that performs the switching for all calls. In addition, TWCIS has a contract which provides that Sprint performs additional switching for routing and termination of off-net calls. Sprint also performs the function of directing calls from the public switched telephone network to TWCIS' network. Sprint has a currently effective exchange access tariff. TWCIS owns a gateway device that converts each off-net call's format between the Internet protocol format and the time division multiplex format used by the public switched telephone network. Sprint obtains telephone numbers for TWCIS and places the telephone numbers for TWCIS in the appropriate 911 database. Sprint also provides such services as operator services and directory assistance services for TWCIS. Sprint does not bill TWCIS subscribers. Instead, Sprint is reimbursed for the wholesale services it provides to TWCIS based on a private contract between the two entities.

28. After submission of the case to the Commission on March 22, 2006, on June 27, 2006, the FCC released a *Report and Order and Notice of Proposed Rulemaking* in a combined docket that included WC Docket No. 04-36, *In the Matter of IP-Enabled Services*. On page 29, ¶ 56 of that Order, the FCC stated:

Under this alternative, however, we note that an interconnected VOIP provider with the capability to track the jurisdictional nature of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.

Commission Decision

29. By *Report and Order* of August 8, 2006, the Commission entered Findings of Fact and Conclusions of Law, and TWCIS' proposed Tariff No. 3 was rejected.

30. As paragraph 2 of the Stipulation established that on September 12, 2003 Time Warner recognized MoPSC jurisdiction over its IP service by requesting, and receiving, a certificate of authority from the MoPSC. Paragraph 12 indicated that this proceeding was initiated when Time Warner asked to remove its Digital Phone Service from its list of services tariffed pursuant to MoPSC certification.

31. Paragraphs 16-19 of the Stipulation factually established that TWCIS' Digital Phone Service, unlike Vonage's service, was stationary. TWCIS customers could only use the service at their business or residence, and assigned telephone number that were geographically fixed within a local rate center. Vonage's service was portable in that Vonage customers could take their "phone" anywhere in the world, and hook it up to a broadband connection to make calls. Vonage phone numbers were not geographically fixed.

32. Based upon this Stipulation, the MoPSC's August 8, 2006 Report and Order, at Findings of Fact 1-5, found that: (a) Time Warner was a telecommunications company, (b) Digital Phone was a telecommunications service, (c) Time Warner offered Digital Phone service to Missouri customers, (d) Digital Phone service was stationary, (e) Time Warner had the ability to track the interstate or intrastate jurisdiction of calls made by its customers, and (f) Time Warner customers' telephone numbers were associated with a specific geographic rate center.

33. At Conclusions of Law 1-3, the Commission found the service at issue to be subject to its jurisdiction, and that statutes and MoPSC rules required Time Warner to tariff the prices for its Digital Phone service.

34. At Conclusion of Law 4, the MoPSC's Report and Order determined that the FCC's "*Vonage Order*"¹⁷ did not except or exempt Time Warner's service from MoPSC jurisdiction. At pages 3-4 of the Report and Order, the Commission rejected Time Warner's legal arguments as to the effect of the *Vonage Order*. In the *Vonage Order*, the FCC purported to preempt state jurisdiction over VOIP service that was mobile, thus preventing the determination of whether "calls" were interstate or intrastate in scope. The MoPSC distinguished the *Vonage Order* and relied in part upon a June 27, 2006 FCC Report and Order stating that a VOIP provider with capability to track the jurisdictional nature of customer calls would not qualify for the preemptive effects of the *Vonage Order*.

35. TWCIS filed timely application for rehearing of the August 8 Order, which the Commission denied.

¹⁷ Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC 22404 (2004);

36. TWCIS filed timely Petition for Review before this Court.

Conclusions of Law

1. §386.020 (53) RSMo defines "Telecommunications Service" as:

the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. As used in this definition, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.

2. TWCIS' Digital Phone Service permits its customers to initiate

communications of voice sounds over wires, which communications may terminate within the originating local exchange, to other exchanges in Missouri, to other exchanges outside Missouri in the United States, or to other locations outside the United States.

This service meets the above statutory definition of "telecommunications service"

Missouri law requires be subject to MoPSC jurisdiction and control.

3. §386.250 (2) RSMo confers jurisdiction to the MoPSC over

telecommunications services, facilities, and companies. §392.190 RSMo specifies that the provisions of Chapter 392 RSMo apply to intrastate telecommunications services. Specifically TWCIS is required by §§392.220 and 392.450 RSMo to list the charges for its service in published tariffs.

4. Missouri has not been preempted by the FCC from regulating TWCIS'

Digital Phone Service. Unlike the nomadic Vonage-type services the FCC indicated it might preempt states from regulating, TWCIS service is stationary. TWCIS has the ability to track and separate intrastate and interstate calls to the same extent other state and federally regulated local exchange telecommunications companies can track and jurisdictionalize calls. The basis for possible preemption identified by the FCC in its Vonage order is not applicable here.

5. The Eighth Circuit's Decision in the Vonage Order Appeal. On March 21, 2007, the Eighth Circuit Court of Appeals issued an opinion specifically reviewing the FCC's *Vonage Order* and discussing the issues related to VoIP telephone service and the FCC's *Vonage* order. *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007). In its decision, the Eighth Circuit clearly distinguished the "nomadic" VoIP telephone service offered by Vonage from the "fixed/interconnected" VoIP telephone service offered by cable television companies such as Time Warner:

A distinction can be drawn, however, between what is referred to as "nomadic" VoIP service and "fixed" VoIP service. Nomadic service is ... where a VoIP customer can use the service "nomadically" by connecting with a broadband internet connection anywhere in the universe to place a call. Fixed VoIP service describes the use of the same technology, that is, converting a voice communication into digital packets before transmitting it to another location, but in a way where the service is used from a fixed location. For example, cable television companies offer VoIP service to their customers, but when they do so the ensuing transmissions use the cable running to and from the customer's residence. As a result, the geographic originating point of the communications can be determined. Thus, when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished.

Id. at 578 (emphasis added). Thus, the Eighth Circuit's review of the *Vonage Order* factually distinguished the "fixed" or "interconnected" VoIP telephone service offerings by cable television companies such as Time Warner from the VoIP service at issue in the *Vonage* case.

6. As a part of the Eighth Circuit appeal, the New York Public Service Commission challenged the FCC's decision to the extent it might have been applied to "fixed/interconnected" VoIP service offered by cable television providers. The Eighth Circuit found that the New York PSC's challenge was not ripe for review because the

FCC had not yet decided that issue, and the Eighth Circuit specifically cited the FCC's more recent Universal Service order:

"[T]he FCC has since indicated VoIP providers who can track the geographical end-points of their calls do not qualify for the preemptive effects of the Vonage order. As a consequence, NYPSC's contention that state regulation of fixed VoIP services should not be preempted remains an open issue."

Id. at 583 (emphasis added). Thus, the Eighth Circuit confirmed that the FCC has not preempted state regulation of "fixed" or "interconnected" VoIP services offered by cable telephone companies such as Time Warner's service.

7. The U.S. District Court's (W.D. Mo.) 2007 Comcast Decision. On September 21, 2006, the Missouri PSC Staff filed a complaint against Comcast IP Phone ("Comcast") alleging that Comcast was offering a cable television "fixed" or "interconnected" VoIP service known as "Digital Voice" in Missouri without the necessary authority and certificates from the Missouri PSC. In response, Comcast filed a request for an injunction against the Missouri PSC with the U.S. District Court for the Western District of Missouri. In that case, Comcast cited the *Vonage Order* and raised substantially the same arguments that Time Warner raises in this appeal.

8. On January 18, 2007, the District Court issued its *Order* denying Comcast IP Phone's request for an injunction.¹⁸ The District Court observed, "[T]he FCC has not yet adopted any VoIP rule. At this time, there is no certainty about when or if a comprehensive rule covering the issue before the MoPSC will be adopted by the FCC."¹⁹

¹⁸ *Comcast v. Missouri PSC*, Case No. 06-4233, 2007 U.S. Dist. LEXIS 3628 (W.D. Mo. 2007).

¹⁹ *Id.* at p. 4.

The District Court's decision concluded that the FCC has not preempted state regulation of cable-based "fixed" or "interconnected" VoIP services:

[T]he Court is unable to find that the FCC has preempted the entire field of VoIP services or that allowing state regulation of intrastate telecommunications services, which also happen to be VoIP services, stands as an obstacle to the accomplishment and execution of the full objectives of Congress.²⁰

Accordingly, the U.S. District Court denied Comcast IP Phone's motion for injunction and closed the case.²¹ This recent U.S. District Court case demonstrates that the FCC has not preempted the Missouri PSC's regulation of "fixed" or "interconnected" VoIP telephone services offered by cable television companies.

9. **The FCC's 2006 USF Order.** This conclusion is further buttressed by the FCC's June 27, 2006 *Report and Order and Notice of Proposed Rulemaking*, WC Docket No. 04-36, page 29, ¶ 56, in which the FCC clarified and further interpreted its *Vonage Order* by stating that an interconnected VOIP provider with the capability to track the jurisdictional nature of customer calls does not qualify for the preemptive effects of the FCC's *Vonage Order*.

10. **The D.C. Circuit's Decision in the USF Order Appeal.** Various VOIP providers appealed the FCC's 2006 *USF Order* that required VOIP providers to contribute to Universal Service.²² On June 1, 2007, the United States Court of Appeals for the District of Columbia upheld the FCC's decision that interconnected VOIP services constituted "telecommunications service" under federal statutes, thus requiring VOIP

²⁰ *Id.* at p. 11.

²¹ The Missouri PSC is currently proceeding with the complaint case against Comcast in Case No. TC-2002-0111.

²² *In re Universal Service Contribution Methodology*, 21 F.C.C.R.7518 (2006).

providers to contribute to the Universal Service Fund. *Vonage v. FCC*, Case No. 06-1276, 2007 U.S. App. LEXIS 12634 (D.C. Cir. 2007).

11. Giving due deference to the Missouri Public Service Commission, it does not appear that its determination that TWCIS' Digital Phone Service constitutes telecommunications service under Missouri law, or that the PSC's determination that it has not been preempted by the FCC, are arbitrary or capricious, or clearly erroneous.

12. Neither the FCC nor the PSC have ruled as to whether the VOIP service of the type at issue here constitute an "information service", and thereby cannot constitute "telecommunications service". See e.g. *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007); *Vonage v. FCC*, Case No. 06-1276, 2007 U.S. App. LEXIS 12634 (D.C. Cir. 2007).

WHEREFORE, on the basis of the foregoing, TWCIS' Petition for Review is denied, and the Commission's Order of August 8, 2006 is affirmed. Final Judgment is entered in favor of the Commission, and against TWCIS, in accordance with the foregoing findings of fact and conclusions of law.

Dated this 5 day of September, 2007.


Circuit Court Judge