

**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

**INITIAL BRIEF OF TIME WARNER CABLE INFORMATION SERVICES
(MISSOURI), LLC**

COMES NOW, TIME WARNER CABLE INFORMATION SERVICES (MISSOURI), LLC d/b/a Time Warner Cable (“TWCIS”) and respectfully submits to the Missouri Public Service Commission (the “Commission”) its Initial Brief in support of approving TWCIS’ proposed Tariff No. 3.

PROCEDURAL HISTORY

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 Commission rules and to meet all relevant

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).

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 local exchange carrier(s), while expressly reserving TWCIS’ right to benefit from any later regulatory or judicial action that might clarify the regulatory requirements applicable to its IP-enabled voice service.³ On February 13, 2004, TWCIS amended its original Application, by interlineation, to delete references to the phrase “provide local and interexchange voice service” and insert in its place the phrase “provide basic local, local and interexchange voice service.”⁴ On March 2, 2004, the Commission granted TWCIS’ Motion to Amend Application and granted TWCIS authority to provide “Basic Local, Local Exchange, and Interexchange Telecommunications Services.”⁵

On April 16, 2004, TWCIS submitted its proposed PSC Mo. No. 2 Tariff to provide local and interexchange “Digital Phone” service.⁶ PSC Mo. No. 2 Tariff became effective on June 15, 2004. PSC Mo. No. 2 Tariff contains rates for TWCIS’ Digital Phone service, which offers a bundle of local and interexchange services, as well as operator services and directory assistance. PSC Mo. No. 2 Tariff does not include local or interexchange private line services. TWCIS does not have an exchange access tariff.

On May 27, 1998, the Commission granted to Kansas City Cable Partners d/b/a American Cablevision (“Kansas City Cable Partners”) a certificate of service authority to provide interexchange telecommunications services and approved its tariff (“PSC Mo. No. 1

³ See footnote 1, paragraph 8.

⁴ Motion to Amend Application of Time Warner Cable Information Services (Missouri), LLC, Case No. LA-2004-0133; February 13, 2004, paragraph 2.

⁵ *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).

⁶ *See* Order Approving Tariff, Case No. LT-2004-0523 (Mo. P.S.C.) (June 8, 2004).

Tariff”).⁷ PSC Mo. No. 1 Tariff applies to non-switched private line services, provides certain offerings at specific prices, provides for and individual case basis (“ICB”) arrangements, without specific prices.⁸

Effective October 30, 1999, the Commission recognized Kansas City Cable Partners’ adoption of the fictitious name of Time Warner Cable.⁹ Accordingly, Time Warner Cable provides services in Missouri pursuant to its PSC Mo. No. 1 Tariff.

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 DigitalVoice, an IP-based voice service offered by Vonage Holdings Corporation (“Vonage”).¹⁰ The FCC held that the Minnesota Commission could not require Vonage “to comply with its certification, tariffing or other related requirements.”¹¹ The FCC also made clear that its holding was not limited to Vonage or to Minnesota: “for services having the same capabilities as DigitalVoice, the regulations of other states must likewise yield to important federal objectives.”¹² Moreover, the FCC made clear that cable operators providing qualifying IP-based voice services would similarly be subject to preemption of state regulatory requirements.¹³

⁷ See Order Approving Interexchange Certificate of Service Authority and Order Approving Tariff, Case No. TA-98-428 (Mo. P.S.C.) (May 27, 1998).

⁸ See Time Warner Cable Tariff, Original page 39, § 3.5 (Effective May 25, 1998).

⁹ See Order Recognizing Change of Corporate Name and Approving Adoption Notice, Case No. TO-2000-213, (Mo. P.S.C.)(October 26, 1999).

¹⁰ 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*”).

¹¹ *Id.* at ¶ 46.

¹² *Id.*

¹³ *Vonage Order* at ¶ 32 (footnotes omitted).

In light of the *Vonage Order*, TWCIS, on September 23, 2005, submitted proposed Tariff No. 3, which removes Digital Phone, its IP-based voice service, from TWCIS' list of tariffed services.¹⁴ In addition, in order to streamline the company's structure and unify its certificates and tariffs, TWCIS sought to add to the TWCIS tariff the private line services that had been tariffed by Time Warner Cable in PSC Mo. No. 1 Tariff and thereafter withdraw the Time Warner Cable interexchange certificate that the Commission had granted in 1998. This process, once complete, would result in a single certificated entity and a single tariff on file relating to a single Time Warner Cable entity: TWCIS. Although this process would result in the transfer of the provisioning of Time Warner Cable's private line services from Time Warner Cable to TWCIS, the proposed Tariff No. 3 does not reflect a change to the regulatory status or character of the private line services themselves. Accordingly, the proposed tariff continues to subject private line services to both specific and ICB pricing to the same extent that these services receive such treatment under current PSC Mo. No. 1 Tariff.

The Commission has suspended TWCIS' tariff withdrawing the Digital Phone offering. On December 23, 2005, all parties jointly filed a Procedural History and Stipulation of Facts and have agreed to submit this case on briefs.

ARGUMENT

TWCIS' proposed tariff change makes clear that Digital Phone is no longer provided pursuant to state tariff. This change is consistent with the FCC's preemption of State authority to impose tariff requirements on IP-enabled voice services. Specifically, the FCC indicated that a State may not require IP-enabled voice service providers "to comply with its

¹⁴ 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).

certification, *tariffing* or other related requirements as conditions to offering [service] in that state.”¹⁵

1. Digital Phone Bears the “Basic Characteristics” that Warrant Federal Preemption.

The FCC clearly established that only a single inquiry need be conducted to determine if an IP-enabled voice service offered by a cable operator is subject to the preemption ordered in the *Vonage* case: whether the service in question bears the three “basic characteristics similar to [Vonage’s] DigitalVoice” identified in the FCC’s Order. These characteristics are: “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.”¹⁶ In extending the preemption it ordered with respect to Vonage to the IP-enabled voice services provided by cable operators, the Commission was clear that these three criteria constitute the entirety of the inquiry. Nowhere in the Order did the Commission indicate that there should be additional consideration given to the extent to which an IP-enabled voice service offered by a cable operator exhibits additional similarities or differences as compared to Vonage’s service.

It would have been contrary to the FCC’s support for innovation and the deployment of advanced and new communications services if it had hinged its preemption decision on ephemeral service characteristics. Rather, the FCC recognized that if an IP-enabled voice

¹⁵ *Vonage Order* at ¶ 46) (emphasis added).

¹⁶ *Vonage Order* at ¶ 32.

service offered by a cable operator satisfied the three specific criteria identified in the Order, then, by definition, state regulatory authority over that service would be preempted to the same extent as with Vonage.

Digital Phone, TWCIS' IP-enabled voice service, bears these three defining characteristics. Accordingly, it is subject to federal preemption pursuant to the FCC's *Vonage Order*. Specifically, customers subscribing to TWCIS' Digital Phone service must have a broadband connection enabling the transmission of voice packets in IP format from their service address to TWCIS' broadband cable network. In addition, Digital Phone customers must have installed in their homes special IP-compatible equipment, known as a voice-enabled embedded multimedia terminal adapter ("eMTA"). This 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 Time Warner Cable's existing coaxial cable network (which Time Warner Cable also uses to provide to its customers access to video and high speed Internet access services). Finally, Digital Phone service provides a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, allowing customers to originate and receive voice communications and access other features, including voicemail management, Caller-ID, Caller-ID for Call Waiting, Caller-ID on TV, Call Forwarding, Call Waiting, and Speed Call.¹⁷ Accordingly, pursuant to Paragraph 32 of the *Vonage Order*, TWCIS' Digital Phone service is clearly subject to the FCC's preemption of state tariffing requirements.

¹⁷ See Procedural History and Stipulation of Facts, ¶ 19.

2. The Vonage Order Preempts the Application of Certain State Regulatory Requirements to All IP-Enabled Voice Services that Bear the “Basic Characteristics” Identified Therein.

The FCC’s *Vonage Order* is unequivocal: if a cable operator provides IP-enabled voice services that satisfy the three specific criteria identified in paragraph 32, then the FCC would preempt state tariffing, certification, and other related requirements to the same extent it has preempted these requirements with respect to Vonage’s Digital Voice service.¹⁸ The FCC did not condone any additional inquiry, examination or comparison of services, and none is necessary.

Certainly, Vonage’s DigitalVoice service differs from TWCIS’ Digital Phone service in some respects.¹⁹ However, the FCC made it clear that if an IP-enabled voice service provider other than Vonage satisfies three basic characteristics, then state regulation would be preempted.²⁰ Accordingly, the *Vonage Order* provides no basis for conducting an inquiry into whether and to what extent TWCIS’ IP-enabled voice service differs from or resembles Vonage’s offering. Rather, an inquiry pursuant to the *Vonage Order* need only consider whether TWCIS’ offering satisfies the criteria in paragraph 32 therein. As demonstrated above, TWCIS’ offering clearly does so.

Indeed, it is clearly apparent that the FCC meant for its preemption analysis to apply to both non-facilities based providers of IP-enabled voice services (*i.e.*, those transmitting

¹⁸ *Vonage Order*, ¶ 32.

¹⁹ Those differences, however, relate to product offering decisions and the facilities used to transmit voice packets. For instance, Vonage’s DigitalVoice service 1) permits “nomadic” usage, allowing customers to use their CPE to access its IP enabled voice service from any location that has a broadband connection; 2) assigns NANPA telephone numbers that are out of their assigned regions; and 3) routes IP traffic over the public Internet. TWCIS’ services have none of these characteristics. When establishing preemption, the FCC noted that VoIP technology facilitates “tightly integrated communications” and that such capability “counsels against patchwork regulation.” It would contradict such counsel to look to product offering decisions to justify inconsistent “patchwork” regulatory treatment of different VoIP offerings. The FCC would not have made this statement if it intended that its state preemption would apply narrowly to only the subcategory of companies that provide IP-based services in exactly the same manner as Vonage.

²⁰ *Vonage Order*, ¶ 32.

calls over the public Internet) and to facilities-based providers, including cable companies. First, the FCC indicated that its findings address not only Vonage’s DigitalVoice service, but also “services like DigitalVoice.”²¹ In fact, the FCC specifically referred to “VoIP services” “like Digital Voice” provided by “cable companies.”²² Most importantly, the FCC simply and plainly stated that “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.”²³

Finally, it is unreasonable to suggest that, contrary to the FCC’s clear statements in the *Vonage Order*, the FCC’s findings and preemption analysis somehow do not apply to cable IP-enabled voice services but only to IP-enabled voice services provided by Vonage. There is no factual basis from which to draw the conclusion that state certification and tariffing are less daunting barriers to entry for cable operators than for Vonage or providers

²¹ *Vonage Order*, ¶ 20.

²² *Id.* ¶ 46 (“[F]or services having the same capabilities as DigitalVoice, [state regulation] 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.”; *see also id.* ¶ 1, n.3 (“VoIP services of other providers, including facilities-based providers”); *id.* ¶ 4, n.9 (“Although the Commission has adopted no formal definition of ‘VoIP,’ we use the term generally to include any IP enabled services offering real time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony.”).

²³ *Vonage Order*, ¶ 32. The Commission supported this statement by acknowledging a number of comments filed by cable and other facilities-based VoIP-based service providers, including Cox Communications, Inc., (“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.”); Time Warner Inc., (“[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.”); and NCTA (“Cable VoIP offer 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 interstate nature.”), (“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.”). *Id.* at n. 113.

offering services identical to those offered by Vonage.²⁴ Accordingly, there is no legal basis for this Commission to require TWCIS' Digital Phone service to adhere to state tariffing requirements.

Conclusion

For the reasons set forth above, the Order Suspending Tariff should be lifted and the proposed tariff should be approved.

Respectfully submitted,

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²⁴ Even if the FCC had not specified that its preemption would apply to cable companies, a narrow interpretation of preemption that excludes facilities-based VoIP providers would contradict the FCC's well-established policies. Specifically, the competitive playing field would become steeply tilted if "over the top" VoIP-based service providers were to benefit from federal preemption because their calls traverse the public Internet or because they do not assign telephone numbers in conformance with NANPA guidelines while facilities-based VoIP providers that utilize privately managed networks and follow NANPA guidelines remain subject to state regulation. Certainly the FCC did not intend to undermine its settled policy to promote investment in facilities by saddling facilities-based providers with a heavier regulatory burden than that born by their facilities-less competitors. See e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report & Order, 19 FCC Rcd 13494, 13533 (2004) (separate Statement of Chairman Powell) ("One of the Commission's most important goals is to advance competition that is meaningful and sustainable, and that will eventually achieve Congress' goal of reducing regulation and promoting facilities based competition."). *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 1673, Para. 2 (2004) (noting the commission's "commitment to promoting the development of facilities-based competition"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report & Order, 14 FCC Rcd 20918, 20916 (1999) (noting the goal of the Telecommunications Act of 1996 to "promot[e] facilities-based entry").

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Reconsider Suspension of Tariff has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 13th day of January, 2006, to:

Case No. LT-2006-0162

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