

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 6th day of  
November, 2007.

Staff of the Public Service Commission )  
of the State of Missouri, )  
 )  
Complainant, )  
 )  
v. )  
 )  
Time Warner Cable Information )  
Services (Missouri), LLC, )  
 )  
Respondent. )

**Case No. TC-2007-0413**

**ORDER GRANTING PARTIAL DETERMINATION ON THE PLEADINGS**

Issue Date: November 6, 2007

Effective Date: November 16, 2007

**Syllabus:** This order determines, on the basis of the pleadings currently before the Commission and the applicable law, that Time Warner Cable Information Services (Missouri), LLC is collaterally estopped from denying that the Commission has jurisdiction to regulate the voice over internet protocol (“VoIP”)-based telephone services the company provides its Missouri customers.

**Background and Procedural History**

The Staff of the Missouri Public Service Commission (“Staff”) filed a complaint against Time Warner Cable Information Services (Missouri), LLC, d/b/a Time Warner Cable (“TWC”) on April 23, 2007. According to the complaint, even though Staff had previously sent TWC two letters concerning the issue and received assurances that the reports would

be filed forthwith, TWC failed to file a series of quarterly Quality of Service Reports in violation of Commission Rule 4 CSR 240-3.550(5), which requires each company providing basic local telecommunications service to file such reports with the Commission “no later than forty-five (45) days following the end of each quarter.” Staff further sought authorization to bring a penalty action against TWC in circuit court to recover “the maximum statutory forfeiture allowed by section 386.570 RSMo. for each separate, distinct, and continuing violation.”

On April 25, 2007, the Commission notified TWC of the complaint and allowed it thirty days in which to answer as provided by 4 CSR 240-2.070(7). TWC filed its answer on May 25, 2007, in which it admitted that it had not filed the reports for certain quarters as required by the Commission’s rules, but denied that the Commission has jurisdiction over the voice over internet protocol (“VoIP”)-based telephone services TWC provides its Missouri customers. Nevertheless, TWC also certified that it would “file quality of service reports for the fourth quarter of 2006, the first quarter of 2007, and every quarter thereafter in accordance with Commission rules.” TWC also pledged to “file the fourth quarter 2006 and first quarter 2007 reports not later than June 15, 2007,” and requested that the Commission dismiss Staff’s complaint upon receipt of those reports.<sup>1</sup>

By order dated July 12, 2007, the Commission adopted a procedural schedule requiring the parties to file a list of issues and witnesses by September 21, 2007. In the same order, the Commission set the matter for an evidentiary hearing on October 23, 2007.

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<sup>1</sup> No one has yet filed a formal pleading indicating whether TWC honored its pledge and met that deadline. However, at a prehearing conference held on August 27, 2007, counsel for both Staff and TWC both stated that TWC had filed certain quality of service reports. Transcript of Second Prehearing Conference at 14-15. The question, as framed by counsel for Staff during that prehearing conference, “is whether or not the reports [TWC has filed] are actually complying with the rules, not that they haven’t filed anything at all.” *Id.* at 14.

At the outset of that hearing, which commenced as scheduled on October 23, counsel for TWC orally moved for a continuance,<sup>2</sup> which was later granted.<sup>3</sup>

Also during that hearing, the Regulatory Law Judge orally issued an order directing Staff to file a pleading regarding a former Commission case (Case No. LT-2006-0162) in which the Commission expressly decided that it had jurisdiction to regulate TWC's VoIP-based telephone services, as well as a judgment of the Circuit Court of Cole County affirming the Commission's decision in that case.<sup>4</sup> In its "Response to Order Directing Filing," which was filed on October 23, 2007, Staff promptly complied with the order. On October 24, 2007, the Commission shortened the amount of time TWC and OPC would be given to reply to Staff's pleading, giving them until October 29, 2007, to do so. TWC filed its reply on October 29, and OPC did not file a reply.

### **Determination on the Pleadings**

Commission Rule 4 CSR 240-2.117(2), which is titled "Determination on the Pleadings," authorizes the Commission to "determine a contested case on the pleadings in appropriate circumstances."<sup>5</sup> Those circumstances are set forth in the text of the rule as follows:

Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

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<sup>2</sup> Transcript of October 23, 2007 Hearing at 24, 26.

<sup>3</sup> By order dated November 1, 2007, the Commission granted TWC's motion and rescheduled the hearing for November 30, 2007.

<sup>4</sup> Transcript of October 23, 2007 Hearing at 29-30, 33-35, 41, 46-47.

<sup>5</sup> Determination on the Pleadings, *In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc.*, Case No. TD-2003-0582 (Nov. 4, 2004).

This is not a case seeking a rate increase, or a case subject to an operation of law date. The public interest clearly favors the quick and efficient resolution of matters before the Commission on the pleadings without an evidentiary hearing when the circumstances dictate.<sup>6</sup> Moreover, to do so in this particular case will not be “otherwise contrary to law” since no genuine factual dispute remains for hearing,<sup>7</sup> one of the parties is entitled to a determination in its favor as a matter of law,<sup>8</sup> and the contents of the parties’ pleadings make it plain that the merits of the jurisdictional defense raised by TWC can be fully and fairly decided in a summary manner. Indeed, the Commission has previously recognized that “[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest.”<sup>9</sup> Therefore, the Commission may dispose of TWC’s jurisdictional defense on the basis of the pleadings before it.

### **The Parties’ Pleadings**

As mentioned *supra*, in its answer to Staff’s complaint, TWC denied that it provides basic local exchange telecommunications service in Missouri. However, TWC admitted that it does provide VoIP-based telephone services in Missouri, and also admitted that “the

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<sup>6</sup> Determination on the Pleadings, *The Staff of the Missouri Public Service Commission v. Taney County Utilities Corporation*, Case No. WC-2004-0342 (Oct. 19, 2004).

<sup>7</sup> Determination on the Pleadings, *In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc.*, Case No. TD-2003-0582 (Nov. 4, 2004). See also Order Denying Motion for Determination on the Pleadings, *Tony Walker v. Kansas City Power & Light Company*, Case No. EC-2006-0451 (Aug. 28, 2006) (denying request for determination on the pleadings under 4 CSR 240-2.117(2) as contrary to law and the public interest where it was obvious that the parties did not agree on the essential facts underlying the complainant’s claim for relief); *McGuire v. Dir. of Revenue*, 174 S.W.3d 87, 89 (Mo. App. E.D. 2005) (a motion for judgment on the pleadings should be denied where there is a genuine issue of material fact on the face of the pleadings).

<sup>8</sup> Determination on the Pleadings, *In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc.*, Case No. TD-2003-0582 (Nov. 4, 2004); *Neel v. Strong*, 114 S.W.3d 272, 274 (Mo. App. E.D. 2003) (“A motion for judgment on the pleadings is properly granted . . . if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.”)

<sup>9</sup> Determination on the Pleadings, *In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Oct. 7, 2004).

Missouri Public Service Commission has ruled that [such] services constitute basic local exchange telecommunications services, although such finding is currently the subject of an appellate judicial review.”

The materials accompanying Staff’s latest pleading demonstrate that the PSC ruling TWC was talking about is the Report and Order issued on August 8, 2006 in Case No. LT-2006-0162. In that order, the Commission found, *inter alia*, that since TWC provides VoIP-based Digital Phone service to its Missouri customers, “Time Warner is subject to the Commission’s jurisdiction pursuant to Chapters 386 and 392, RSMo, in that it provides telecommunications services in the State of Missouri and is not excepted from the definition of a telecommunications company, nor is it exempt from such jurisdiction.”<sup>10</sup>

Meanwhile, Staff’s latest pleading also shows that when TWC referred to a pending “appellate judicial review” of that Commission finding, it was speaking of Case No. 06AC-CC00935, which TWC had filed in the Circuit Court of Cole County, Missouri. The circuit court issued its judgment in Case No. 06AC-CC00935, a copy of which was included in Staff’s pleading, on September 5, 2007. It states, in relevant part:

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.

\* \* \*

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

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<sup>10</sup> Report and Order, *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 (Aug. 8, 2006).

determination that it has not been preempted by the FCC, are arbitrary or capricious, or clearly erroneous.

\* \* \*

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[.]<sup>11</sup>

Finally, in its reply, which was filed on October 29, 2007, TWC acknowledged the existence of these orders, and conceded that "[b]oth the Commission and the [Circuit] Court [have] conclude[d] that the Commission has jurisdiction to regulate [TWC's] Digital Phone service." Despite this, in its answer, TWC alleged that the Commission lacks jurisdiction to regulate the VoIP-based Digital Phone Service TWC provides its Missouri customers.

### **Analysis**

"Collateral estoppel, or issue preclusion, is used to preclude the relitigation of an issue that has already been decided in a different cause of action."<sup>12</sup> Here, of course, we are dealing with offensive collateral estoppel, which "involves a plaintiff seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost . . . in an earlier action."<sup>13</sup>

When deciding whether the application of collateral estoppel is appropriate in a given case, we consider the following four factors: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether

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<sup>11</sup> Findings of Fact, Conclusions of Law, and Judgment, *State ex rel. Time Warner Cable Information Services (Missouri), LLC d/b/a Time Warner Cable v. Public Service Commission*, Case No. 06AC-CC00935 (Circuit Court of Cole County, Sept. 5, 2007). Staff further notes that this judgment has become final and that TWC has not filed a timely notice of appeal therefrom.

<sup>12</sup> *SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP*, 128 S.W.3d 534, 541 (Mo. App. E.D. 2003).

<sup>13</sup> *Id.* at 541-42.

the party against whom collateral estoppel is asserted had a full and fair opportunity in the prior adjudication to litigate the issue for which collateral estoppel is asserted.<sup>14</sup>

Here, it is readily apparent that all four of these factors are present. Therefore, TWC's jurisdictional defense to Staff's complaint fails as a matter of law and will not be an issue at trial.

**IT IS ORDERED THAT:**

1. A partial determination on the pleadings is entered in favor of Staff and against Time Warner Cable Information Services (Missouri), LLC. The company is hereby collaterally estopped from defending Staff's complaint on the ground that the Commission lacks jurisdiction to regulate the company's Digital Phone Service.

2. This order shall become effective on November 16, 2007.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', is written over a horizontal line.

Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Clayton, Appling, and  
Jarrett, CC., concur

Lane, Regulatory Law Judge

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<sup>14</sup> *Id.* at 542.