

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the Matter of the 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 and the Company as Competitive. )

Case No. LA-2004-0133

**TIME WARNER CABLE INFORMATION SERVICES (MISSOURI), LLC'S  
RESPONSE TO APPLICATIONS TO INTERVENE**

Comes now Time Warner Cable Information Services (Missouri), LLC ("TWCIS"), d/b/a Time Warner Cable ("Applicant"), by its undersigned counsel, and hereby submits the following Response to the Applications to Intervene filed by the Missouri Independent Telephone Company Group ("MITG"); Spectra Communications Group, LLC d/b/a CenturyTel and CenturyTel of MO, LLC (collectively, "CenturyTel"); AT&T Communications of the Southwest, Inc. ("AT&T"); Fidelity Communication Service I, Inc., Fidelity Communication Service II, Inc., Fidelity Communication Service III, Inc., and Fidelity Cablevisions, Inc. (collectively, the "Fidelity CLECs"); and the Small Telephone Company Group ("STCG").

**INTRODUCTION**

The issues relevant to this proceeding relate solely to the capability of the Applicant to hold a certificate of public convenience and necessity for the provision of local and interexchange voice services. Other issues, such as the regulatory classification of Voice over Internet Protocol ("VoIP") technology and the arrangements Applicant intends to utilize for the settlement of intercarrier compensation, are simply not relevant

to this or any other certification proceeding. TWCIS' Application more than satisfies the Commission's criteria for a certificate and should be granted expeditiously. Not one of the Applications for Intervention has contested TWCIS' qualifications for certification. Rather, the Applications raise issues that are not relevant to the Commission's determination of Applicant's qualifications and, therefore, do not constitute a reasonable basis for intervention or delay of the granting of the instant Application. The only issue relevant to this proceeding is whether TWCIS has demonstrated that it is qualified to hold a certificate, which it surely has. Because no other issues are relevant to the instant proceeding and because there are no contested issues relating to TWCIS' qualification to hold a certificate, the Commission should deny the Applications for Intervention and grant TWCIS' Application without delay.

## **BACKGROUND**

### **A. The TWCIS Application**

On September 12, 2003, TWCIS filed an Application for a Certificate of Public Convenience and Necessity to offer local exchange and interexchange voice telephone service as a on a competitive basis. As explained in its Application, TWCIS proposes to provide facilities-based Internet Protocol ("IP") voice service, targeted to the residential market. TWCIS' service will utilize Internet Protocol technology to provide voice service and related features similar to those offered by traditional analog telephone service. Customers will be able to call and be called by other IP voice service subscribers as well as other parties connected to the public switched telephone network ("PSTN"). At least initially, the proposed offering will be offered to customers who subscribe to Time Warner Cable's high-speed, cable modem data service. The service will be offered

on a flat-rate basis and will allow local calling in addition to operator services, directory assistance, enhanced 911 services, outbound 800 toll free calling, directory listing, and local number portability.<sup>1</sup>

TWCIS' verified Application is clear on its face and raises no new or unique issues. Rather, the Application provides all of the necessary information to demonstrate that TWCIS is, in all respects, capable, fit and qualified to provide the services for which authority is sought.

#### **B. Applications for Intervention**

The Applications for Intervention request that the Commission address issues that are not relevant to TWCIS' Application. The MITG expresses concern relating to how its members will be compensated for traffic originating on TWCIS' network. It goes on to question the ability of TWCIS to record and report call data sufficient to allow billing and appropriate compensation. The MITG therefore suggests that the Commission should reject TWCIS' Application and establish a generic docket to examine billing, recording, network and intercompany compensation issues raised by VoIP technology.

The STCG is similarly concerned with issues relating to recording and reporting interexchange traffic and intercompany compensation. In addition, the STCG suggests that TWCIS' regulatory reservation of rights requires the Commission to clarify whether the proposed VoIP-based offering constitutes an information service or a telecommunications service. The STCG further makes a vague reference to the fact that some providers of VoIP services do not offer access to emergency 911 service. Finally, the STCG requests that the Commission clarify that TWCIS is subject to Missouri's recording and reporting requirements as well as to the STCG's members' access tariffs.

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<sup>1</sup> See Application, ¶¶ 3 and 4, and Exhibit B.

The Fidelity CLECs request that the Commission determine whether the services that TWCIS proposes to offer are “basic local exchange services” within the meaning of § 386.020(4) R.S.Mo. or whether they constitute “information services” or “telecommunications” offered on a private carriage basis to a discrete class of users. To the extent that the services TWCIS seeks to provide are “basic local exchange services,” the Fidelity CLECs also ask the Commission to determine whether TWCIS must comply with § 392.451 R.S.Mo. Finally, CenturyTel and AT&T raise no specific issues but seek to intervene in this proceeding in order to assure their ability to participate in a Commission examination of the regulatory treatment of VoIP services if that issue is addressed here.

None of the Applications to Intervene raises issues that warrant intervention in this proceeding, and, accordingly, each Application should be denied.

## **ARGUMENT**

### **A. Despite Regulatory Uncertainty Surrounding VoIP Services, The Commission Should Neither Delay Granting TWCIS’ Application Nor Use this Proceeding as a Forum to Open a Generic Proceeding**

The MITG urges the Commission to open a generic proceeding to determine the regulatory classification of the services that TWCIS proposes to deploy prior to making a determination regarding TWCIS’ Application. Several additional parties seek to intervene in TWCIS’ Application proceeding because they wish to participate in the event that the Commission uses the proceeding to examine the regulatory issues surrounding VoIP services and to set regulatory policy relating to the deployment of VoIP-based services. Additionally, the STCG appears to find TWCIS’ position in this

proceeding to be contradictory and requests clarification from the Commission. None of these is a proper ground for intervention in this proceeding.

Not one of these parties has demonstrated that its interest in determining the regulatory classification of VoIP based services would be adversely affected by the grant of TWCIS' Application, nor has there been any demonstration that turning this Application into a generic proceeding addressing broad policy issues would be in the public interest. Accordingly, pursuant to 4 C.S.R. § 240-2.075(4)(A) and (B), the Applications should be denied.

Although there is no disagreement that there are open questions regarding the regulatory framework applicable to VoIP-based services, regulatory uncertainty is an insufficient basis for granting intervention and delaying grant of TWCIS' certificate. In its Application, TWCIS affirmed its intention to voluntarily comply with all applicable Commission rules relating to the provision of local service and sought only the waivers of applicable rules and statutes routinely granted to such applicants. TWCIS has not asked the Commission to address or resolve broad regulatory issues regarding VoIP, preferring instead to enter the market and begin providing customers with services now, under the existing rules, rather than wait for these issues to be debated and resolved at some point in the future. VoIP-based services remain in their infancy, and the regulatory nature of those services will be considered and determined over time as the services are more widely deployed and experience in the marketplace is gained. Because TWCIS has filed an application requesting Commission certification, however, this proceeding is, by definition, limited to the criteria governing Commission review of applications for certification. The only issue to be decided in this proceeding is whether TWCIS

possesses the qualifications to hold a certificate, and, as demonstrated in its Application, TWCIS has made the required showing.

Additionally, the STCG's concerns regarding TWCIS' regulatory reservation of rights<sup>2</sup> neither provide grounds for intervention in the present proceeding nor raise any contested issue with respect to the present Application. TWCIS makes abundantly clear in its Application and the accompanying affirmation that it is voluntarily agreeing to abide by the Commission's jurisdiction and to the rules applicable to holders of a certificate. This fact is in no way negated by TWCIS' reservation of its regulatory rights should circumstances change, nor is there any contradiction in TWCIS' position. Although TWCIS is voluntarily seeking the state's authority to provide local voice service in Missouri and has sworn that it will abide by the laws and rules applicable to certificate holders, it is not waiving--nor should it be forced to waive<sup>3</sup>--its right to make clear that, in the event that this Commission, the FCC, or some other competent administrative or judicial body determines that some or all of the existing regulatory requirements governing telecommunications services do not apply to providers of VoIP-based services, TWCIS has not waived its rights to the benefits of such a determination.<sup>4</sup> This Commission could determine at a future date, for instance, that providers of services

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<sup>2</sup> In its Application, TWCIS stated as follows: In recognition of the currently unsettled nature of the issues surrounding the appropriate regulatory treatment of IP-based voice services such as those proposed by the Applicant, nothing in this submission should be construed as a concession or agreement by TWCIS that the services at issue in this Application constitute telecommunications services, local exchange services, common carrier offerings, or services that are otherwise subject to federal or state regulation, nor that the entity or entities providing them constitute telecommunications carriers, telecommunications providers, local exchange carriers, common carriers, or other regulated entities.

<sup>3</sup> It is well established that the government may not require a private citizen to waive its rights as a precondition to obtaining a government bestowed privilege. *See, e.g., Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Home Ins. Co. v. Morse*, 87 U.S. 445 (1874).

<sup>4</sup> Nor should TWCIS be required to waive its rights to participate as it sees fit in any such future proceedings.

such as those provided by TWCIS are exempt from some or all of the obligations that currently apply to certificate holders, and TWCIS should be permitted to enjoy the benefits of any such determination. Nonetheless, TWCIS has affirmed its intention to comply with the applicable requirements in the meantime, and the suggestion that Commission clarification is necessary in this regard is unfounded.<sup>5</sup>

The only issue to be decided in this proceeding is whether TWCIS has complied with the Commission's requirements governing competitive providers of local service and the threshold eligibility requirements for certification—which it undeniably has. The fact that regulatory uncertainty exists and that to date no regulatory body has ruled upon the proper classification of the variety of VoIP-based services Applicant plans to provide does not alter this fact.

Moreover, the existence of regulatory uncertainty has not prevented several states from issuing certificates for the provision of VoIP-based services without having to rule on the service's ultimate regulatory classification. See *Application of Verizon Select Services, Inc. for New Operating Authority as a Local Provider, Local Exchange Carrier Registration Form*, Public Utilities Commission of Ohio, Case No. 03-581-TP-ACE, Request for Waivers, p.2 (filed Mar. 3, 2003) (certificate granted June 10, 2003); *Time Warner Cable Information Services (Maine), LLC, Application to Provide Local and Interexchange Internet Protocol Voice Services*, Maine Public Utilities Commission,

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<sup>5</sup> In addition, other state commissions have granted certificates for VoIP-based services subject to similar reservations of rights. See *Application of Verizon Select Services, Inc. for New Operating Authority as a Local Provider, Local Exchange Carrier Registration Form*, Public Utilities Commission of Ohio, Case No. 03-581-TP-ACE, Request for Waivers, p.2 (filed Mar. 3, 2003) (certificate granted June 10, 2003); *Time Warner Cable Information Services (Maine), LLC, Application to Provide Local and Interexchange Internet Protocol Voice Services*, Main Public Utilities Commission, Docket No. 2002-792, at 5 (filed Dec. 19, 2002), (certificate granted Feb. 17, 2003); *Application for Certificate to Provide Alternative Local Exchange Telecommunications Service by Time Warner Cable Information Services (Florida), LLC, Letter Transmitting Application*, Docket No. 011617-TX (filed Nov. 30, 2001) (certificate granted Jan. 10, 2002).

Docket No. 2002-792, at 5 (filed Dec. 19, 2002), (certificate granted Feb. 17, 2003); Application for Certificate to Provide Alternative Local Exchange Telecommunications Service by Time Warner Cable Information Services (Florida), LLC, *Letter Transmitting Application*, Docket No. 011617-TX (filed Nov. 30, 2001) (certificate granted Jan. 10, 2002).

Finally, it would be contrary to the public interest to consider in the context of a single application proceeding broad regulatory issues that potentially affect a multitude of service providers. It would be prejudicial not only to TWCIS, but also to other interested parties in the industry, to examine broad VoIP related issues through this proceeding. A variety of providers use VoIP technology in many ways to deliver a multitude of services. Focusing on a single provider's use of VoIP technology would limit the discussion of legitimately related issues. CenturyTel and AT&T have moved to intervene in this proceeding, for instance, and they are not unique in their interest in VoIP services. Other incumbent and local providers, in addition to interexchange carriers and providers of alternative services, would similarly desire to participate in such a proceeding, yet the notice of TWCIS' Application did not indicate to the industry that VoIP technology itself would be an issue in this Docket.

TWCIS neither supports nor opposes the creation of any such broad-based industry proceeding regarding VoIP services. Nonetheless, it emphasizes that any such industry-wide proceeding should be initiated only *after* grant of the instant Application. TWCIS' Application raises no regulatory issues that require resolution prior to grant and, in fact, the entire purpose of TWCIS' decision to voluntarily submit an application for certification was its desire to defer consideration of such issues until the necessity of such



a determination became apparent.<sup>6</sup>

**B. The MITG's and STCG's Concerns Regarding Call Data Records and Intercarrier Compensation Fail to Raise any Issue Warranting Intervention**

The filings of both MITG and STCG both raise hypothetical concerns regarding the ability of TWCIS to record call data and administer intercarrier compensation. The STCG, for instance, requests that the Commission make clear that TWCIS' interexchange services are subject to the current intercarrier access compensation regime, and the MITG urges the Commission to initiate a generic docket to address these issues. Not only are these issues beyond the scope of the present proceeding, but they are also, put simply, "red herrings" that appear to be designed to do little more than distract the Commission from its examination of TWCIS' straightforward application. Neither party has demonstrated, as required by 4 C.S.R. § 240-2.075(4)(A), that it would be adversely affected by an order granting TWCIS' Application, and, in fact, there is simply no basis for such a conclusion.

The issue of how TWCIS will configure its network and how it will pass traffic from end user to end user is not an issue that bears on TWCIS' eligibility for certification and is necessarily an issue that will be resolved as service is deployed. There is simply

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<sup>6</sup> Although TWCIS does not oppose the creation of an industry forum or generic proceeding to investigate the regulatory issues surrounding IP telephony services, TWCIS does believe that it would be premature for the Commission to open any such proceeding at this time. The FCC has pending before it several proceedings to consider the regulatory status of IP telephony services. See *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003); *AT&T Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (filed October 12, 2002) and *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket 03-45 (filed Feb. 5, 2003). These cases are pending, and any forthcoming decision by the FCC would likely be binding on state commissions. Accordingly, any decision by the Commission on these issues could be subject to revision in light of a later FCC determination, and therefore, would be premature.

no basis and no evidence supporting the MITG's and STCG's concern that they will be harmed as a result of TWCIS' entry into the market.

More importantly, the issue of access charge payments is simply not raised by TWCIS' filing. As TWCIS has stated, it intends to voluntarily comply with all applicable requirements pertaining to the provision of local and interexchange telephone service. This includes an intent to pass traffic to the PSTN in accordance with existing intercarrier compensation regimes. Accordingly, there is no indication that either the MITG or the STCG will be adversely affected by TWCIS' entry into the local and interexchange market, and, therefore, the issue of access charges is not one warranting the grant of the Applications to Intervene. After TWCIS begins providing service to its customers, if any MITG and STCG member believes that TWCIS has acted inappropriately with respect to intercarrier billing and compensation arrangements, that party is free, as it is with respect to any carrier, to exercise its right to seek relief from the Commission at that time. Permitting this issue to delay TWCIS' Application and entry into the local and interexchange market, however, would be fundamentally unfair and contrary to the public interest.

**C. The Question of Whether TWCIS Must Comply with Section 392.451 R.S.Mo. is Moot**

The Fidelity CLECs question whether the VoIP-based services that TWCIS proposes to offer constitute "basic local exchange services" within the meaning of § 386.020(4) R.S.Mo. or whether they are "information services" or "telecommunications" offered on a private carriage basis to a discrete class of users. These concerns, however, are unfounded, as TWCIS has not requested authority to provide basic local exchange service. Rather, without conceding that the services at issue

are telecommunications services or local exchange services, TWCIS' Application seeks authority to provide local and interexchange voice services, rather than "basic" local exchange services.<sup>7</sup> By its plain and direct language, § 392.451 R.S.Mo. applies only to requests for authority to provide "basic" local exchange service in an area that is served by a small incumbent local exchange telecommunications company. By specifically limiting its request for authority to provide service only in areas served by large incumbent LECs and further limiting its request for authority to provide the separately statutorily defined "local" exchange service,<sup>8</sup> TWCIS has rendered the application of § 392.451 R.S.Mo. moot. As a result, there is no need for the Commission to find that the Applicant will provide the service throughout the service area of a small incumbent LEC, offer all services which the Commission has determined are essential for purposes of qualifying for State Universal Service Fund support and that the Applicant must advertise the availability of such essential services and the charges therefor using media of general distribution. The standards established by the subject statutory provision are intended to limit the types of services and restrict competition in areas served by small incumbent LECs. The provision is not applicable to TWCIS's Application.

### CONCLUSION

For the reasons expressed herein, the Commission should deny the Motions to Intervene and grant TWCIS' Application for certification as a local provider without delay. TWCIS' Application does not seek resolution of or otherwise raise the generic issues identified by the potential interveners concerning the regulatory status of VoIP-related services, the Application conforms with all certification requirements, and

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<sup>7</sup> See § 386.020(4) and (31).

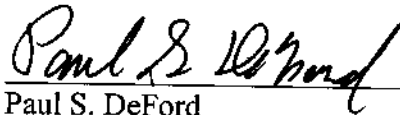
<sup>8</sup> See Application.

potential interveners have identified no issue that calls into question TWCIS' eligibility for certification.

To the extent the Commission may wish to initiate a generic, separate proceeding, after grant of the instant Application, to study the regulatory issues concerning IP telephony service, TWCIS would be pleased to participate in such a proceeding. However, TWCIS believes that any action by the Commission to attempt to resolve the issues addressed in such a proceeding would be premature at this time given the incipient nature of the service offering and the pending federal proceedings on these same issues.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a correct copy of the foregoing pleading was sent via U.S. Mail on this 17th day of October, 2003, to:

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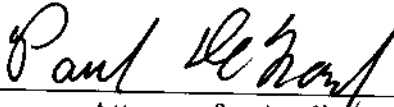
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