

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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)

POST-HEARING BRIEF
OF THE SMALL TELEPHONE COMPANY GROUP

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I. INTRODUCTION AND SUMMARY

Time Warner Cable Information Services Missouri (“Time Warner”) wants to keep its Missouri certificate and continue to have a Missouri tariff, but Time Warner does not want to specify the rates, terms, and conditions of its “Digital Phone” residential voice service in its Missouri tariff. The Missouri Public Service Commission (“Commission”) should reject the tariff revision because Time Warner cannot have it both ways.

The only authority cited by Time Warner for its tariff proposal is the Federal Communications Commission’s (“FCC”) *Vonage Order*, but *Vonage* is not on point here. In the *Vonage* case, the Minnesota PUC issued an order imposing its traditional telephone regulation on Vonage, which did not have a Minnesota certificate or tariff. The FCC held that Vonage was not subject to state regulation because its Digital Voice service “cannot be separated into interstate and intrastate communications.”

In this case, Time Warner is not seeking to preempt Missouri Commission authority. Rather, Time Warner will continue to maintain its Missouri certificate of service authority and tariffs. Time Warner’s tariff filing would simply delete its Digital Phone service from its tariff and thus remove all provisions related to Time Warner’s primary residential voice service offering from the Missouri tariff. Therefore, it does not appear that the *Vonage Order*, which completely preempted state certificate and tariff provisions, is appropriate authority for what Time Warner is seeking to do in this case.

Moreover, the Stipulation of Facts in this case demonstrates that the Digital Phone Service offered by Time Warner appears to be very different than Vonage service addressed by the FCC. The FCC’s rationale for its *Vonage Order* was that “the

characteristics of Digital Voice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating the dual federal/state regulatory regime.”¹ In this case, a comparison of the characteristics of Vonage’s service and Time Warner’s service demonstrates that the FCC’s rationale in the *Vonage Order* is not applicable here. Indeed, Time Warner’s telephone service can be separated into interstate and intrastate communications because it is: (1) facilities-based; (2) only available on a stationary basis from the customer’s home; and (3) not offered with geographically independent telephone numbers. Thus, the FCC’s *Vonage Order* is simply not on point here. *Vonage* does not stand for the proposition that a competitive carrier can pick and choose among state regulations.

Time Warner itself has recognized that the treatment of VOIP services is still very much in flux before the FCC and federal courts, as evidenced by its withdrawal of a similar tariff proposal in South Carolina. (See Attachment A.)

Time Warner’s tariff revision is also barred by Section 392.200.8 of Missouri’s Revised Statutes, which prohibits customer-specific pricing for residential services.

Time Warner cannot have its cake and eat it too. If Time Warner wants to maintain its Missouri certificate and tariffs, then it must comply with the Commission’s tariff requirements for residential voice service offerings. If Time Warner seeks to preempt Commission authority under *Vonage*, then Time Warner should move to cancel its Missouri certificates and tariffs completely. For these reasons, the Commission should deny Time Warner’s tariff filing.

¹ *In the Matter of Vonage Holdings Corporation*, WC Docket No. 03-211, Memorandum Opinion and Order, rel. Nov. 12, 2004 (hereinafter the “*Vonage Order*”), ¶14 (emphasis added).

II. DISCUSSION

A. The *Vonage* Case Is Not On Point Here.

The *Vonage* case is not appropriate authority for Time Warner's proposed detariffing of its Digital Phone service offering. In *Vonage*, the FCC completely preempted the Minnesota commission's certificate and tariff authority. The FCC explained that it was impossible to identify the intrastate and interstate nature of Vonage's service. In this case, Time Warner seeks to keep its Missouri certificate and tariff, yet remove all references to its primary residential voice service – "Digital Phone" in its Missouri tariff. In other words, Time Warner wants to have its cake and eat it too by keeping all of the benefits of a Missouri certificate and tariff yet without including any provisions in that tariff related to its Digital Phone service. The *Vonage* case is not appropriate authority for what Time Warner is seeking to do here, and Time Warner has abandoned a similar effort before the South Carolina PSC.

B. Time Warner Still Provides Service under Tariff in South Carolina.

Although Time Warner argues that its Digital Phone service is clearly entitled to preemption in Missouri, Time Warner's position has been quite different before other state public utility commissions. For example, on December 14, 2005, Time Warner filed a letter with the South Carolina Public Service Commission that stated:

"Due to the unsettled nature of the issues surrounding the appropriate regulatory treatment of VOIP services, Time Warner Cable intends to continue to offer its Digital Phone service in South Carolina on a regulated basis through its tariff currently on file."

See Attachment A, *Certified Copy of Letter from Time Warner to South Carolina Public Service Commission in Docket Nos. 2003-362-C & 2004-280-C* (emphasis added).² The Missouri Commission should require the same result in this case that Time Warner agreed to in South Carolina. Time Warner's Digital Phone service should remain tariffed.

C. Time Warner's Service Differs from Vonage's Service.

In 2004, the FCC preempted an order issued by the Minnesota Public Utilities Commission that applied traditional state "telephone company" regulation to a "Digital Voice" service offered by Vonage Holdings Corporation ("Vonage").³ Time Warner claims its tariff filing to remove its residential "Digital Phone" voice telephone service from its list of tariffed services was in response to the *Vonage Order*.⁴ However, Time Warner's operations and service offering in Missouri are significantly different from the operations and service offering of Vonage in Minnesota.

1. **Time Warner's service is facilities-based**, whereas Vonage's service is not. Time Warner offers service through outside plant and facilities owned by its affiliates, whereas Vonage does not.⁵ (*i.e.* "Digital Phone" is a facilities-based service.)
2. **Time Warner offers Internet Access**; Vonage does not.⁶ In fact, "Digital Phone" service is only offered to "residential customers subscribing to Time Warner Cable's high-speed cable modem data service and/or CPST or Digital Cable Service."⁷

² The letter is also available on the South Carolina Public Service Commission's web site at:

<http://dms.psc.sc.gov/dockets/dockets.cfc?Method=DocketDetail&DocketID=95161>

³ See *Vonage Order*, *supra*.

⁴ Time Warner's *Motion to Reconsider Suspension of Tariff*, filed Oct. 25, 2005, p. 3.

⁵ Stipulation of Fact, ¶13.

⁶ Stipulation of Fact, ¶14.

⁷ Time Warner's P.S.C. Mo. No. 2, §2.1.A.

3. **Time Warner does not route calls over the public Internet**, as opposed to Vonage, which does.⁸ Instead, Time Warner contracts with Sprint to interconnect with the traditional Public Switched Telephone Network (PSTN).⁹ Therefore, the *Vonage* analysis just does not apply here.
4. **Time Warner offers service on a stationary basis, so its customers may only use the service at locations with its affiliate's cable facilities**, whereas the Vonage service is portable and may be used on any broadband connection.¹⁰ In other words, Time Warner's service is only offered and available in locations where Time Warner offers cable television service.
5. **Time Warner does not offer geographically independent telephone numbers**, while Vonage does.¹¹ Thus, a Time Warner customer is required to use a telephone number associated with the customer's local rate center, and a Kansas City "Digital Phone" customer could not have a Jefferson City telephone number.

All of these differences demonstrate that Time Warner's "Digital Phone" service is factually and legally distinguishable from service addressed by the FCC's *Vonage Order*.

For example, in the *Vonage Order*, the FCC stated:

In marked contrast to traditional circuit switched telephony, ... **it is not relevant where that broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service**. Rather, **Vonage's service is fully portable**; customers may use the service anywhere in the world where they can find a broadband connection to the Internet.¹²

Time Warner's "Digital Phone" service is clearly distinguishable because: (a) it is relevant where the broadband connection is located; and (b) the broadband connection must be

8 Stipulation of Fact, ¶15.

9 Stipulation of Fact, ¶20.

10 Stipulation of Fact, ¶16. *Compare* ¶25 of the *Vonage* order ("It is the total lack of dependence on any geographically defined location that most distinguishes Digital Voice from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications.")

11 Stipulation of Fact, ¶17.

12 *Vonage Order*, ¶5.

provided by Time Warner's affiliates. Likewise, "Digital Phone" is facilities-based and not fully portable or available for use anywhere around the world. In the *Vonage Order* the FCC observed that Vonage offered geographically independent telephone numbers,¹³ but Time Warner does not offer geographically independent telephone numbers.¹⁴ The *Vonage Order* emphasized that Vonage routes its calls over the public Internet, but Time Warner does not route calls over the public Internet.¹⁵

Unlike Vonage's service, Time Warner's "Digital Phone" subscribers obtain telephone numbers that correlate to the actual physical location of the customer.¹⁶ Thus, "Digital Phone" is identical to traditional telephone service in terms of identification of, and separation into, interstate and intrastate communications. Digital Phone service can only be used at the subscriber's location, so calls to and from the Digital Phone subscriber have a discrete origination or termination point at which the call can be rated. Therefore, Time Warner can identify a call as being either interstate or intrastate, and the traditional "end-to-end" analysis under existing federal/state regulation must continue to be applied.¹⁷

For these reasons, Time Warner's "Digital Phone" service is clearly distinguishable from the "Digital Voice" service addressed in the FCC's *Vonage Order*. Accordingly, there is no preemption issue in this case and Time Warner's proposed Tariff PSC Mo. No. 3 should be rejected.

13 *Vonage Order*, ¶7.

14 Stipulation of Fact, ¶17.

15 *Vonage Order*, ¶8; Stipulation of Fact, ¶15.

16 Stipulation of Fact, ¶¶16-17.

D. Time Warner Cannot Have It Both Ways.

Time Warner seeks to keep one foot in the boat and one foot on land, but there is no statutory authority for such selective regulation in Missouri law. Time Warner is either a telephone company subject to certain minimum requirements (such as tariffing its basic local service offerings), or it is not. What Time Warner is really seeking in this case is a waiver of the most basic requirements mandated for all Missouri telephone companies – the obligation to file tariffs that:

1. establish uniform rates, terms, and conditions of service for all Missouri customers and ensure that there is no discrimination;¹⁸
2. ensure compliance with other requirements to offer basic local telecommunications service as a separate, stand-alone service;¹⁹ and
3. establish exchange boundaries.²⁰

Time Warner plans to continue offering “Digital Phone” service to residential customers in Missouri, and Time Warner has shown no compelling reason it should be entitled to a waiver of the most basic statutory requirements for Missouri telephone companies. Unlike other states such as Hawaii, there is no statutory provision that would allow the Missouri Commission to waive these tariff requirements.²¹ Time Warner should not be allowed to keep the benefits of local exchange carrier (“LEC”) status and Missouri PSC regulation without also complying with the associated obligations such as maintaining tariffs for local exchange residential voice service offerings.

17 *Vonage Order*, ¶17.

18 See §§ 392.200, 392.220, 392.390, and 392.480 RSMo.

19 See § 392.450 RSMo.

20 See §§ 392.200 and 392.455 RSMo.

E. Customer-Specific Pricing Is Only Allowed for Business Customers.

In Missouri, customer-specific or “individual case basis” (ICB) pricing is only available under limited circumstances. Specifically, Missouri’s statutes only allow customer specific pricing under the following conditions:

Customer-specific pricing is authorized on an equal basis for incumbent and alternative local exchange companies, and for interexchange telecommunications companies for:

- (1) Dedicated, nonswitched, private line and special access services;
- (2) Central office-based switching systems which substitute for customer premise, private branch exchange (PBX) services; and
- (3) Any **business service** offered in an exchange in which basic local telecommunications service offered to **business customers** by the incumbent local exchange telecommunications company has been declared competitive under section 392.245.

Section 392.200.8 RSMo. Supp. 2005. Accordingly, neither competitive LECs (“CLECs”) nor incumbent LECs (“ILECs”) are allowed to offer service at different prices to residential customers in the same local exchange area under “ICB” tariffs. Rather, both CLECs and ILECs are required to offer basic residential service to all similarly situated customers under the same rates. Time Warner has stipulated that it only offers “Digital Phone” service to residential customers.²² Therefore, because Missouri law prohibits Time Warner from offering “Digital Phone” with ICB pricing to residential customers, Time Warner’s proposed tariff revisions should be denied.

²¹ See Staff’s Post-Hearing Brief, p. 3.

²² Stipulation of Fact, ¶20, “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.**” (Emphasis added.)

III. CONCLUSION

The *Vonage* case cited by Time Warner is not appropriate legal authority for Time Warner's detariffing proposal that would allow it to keep a tariff but remove all references to its residential voice service offering. Time Warner's "Digital Phone" service is both factually and legally distinguishable from the VoIP service offered by Vonage, so Time Warner does not qualify for a VoIP exemption or preemption of state regulation. In fact, Time Warner has voluntarily agreed to continue offering its "Digital Phone" service under tariff and state regulation in South Carolina. Finally, ICB pricing is only available for business service customers in specific Missouri exchanges, but Time Warner's tariff would allow ICB pricing for residential customers. For these reasons, Time Warner's proposed Tariff No. 3 should be rejected by the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic mail, U.S. Mail, postage prepaid, or hand-delivered on this 9th day of May, 2006, to the following parties:

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