

**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 Mo. JL-2006-0231

**POST HEARING 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 Post Hearing Brief in support of approving TWCIS’ proposed Tariff No. 3.

The procedural history of this case, as well as an analysis of the stipulated facts and legal arguments, have been adequately set forth in TWCIS’ Initial Brief. The purpose of this brief is to address certain matters that were raised in the Post Hearing Briefs of the other parties and to clarify TWCIS’ position on questions that arose during the March 22, 2006 on the record presentation in this case.

A careful review of the Post Hearing Briefs of all the parties opposing TWCIS’ proposed tariff reveals a critical and very interesting point: there is not a single reference to the most important provisions of *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”). In fact, no party even mentions or references Paragraph 32 of that Order, which sets forth the inquiry to determine if an IP-enabled voice service offered by a cable operator is subject to preemption. TWCIS suggests that the parties failed to address these provisions because they cannot reasonably

reconcile the applicable provisions of the FCC Vonage Order with their assertion that Digital Phone does not completely satisfy the FCC's stated criteria.<sup>1</sup>

To reiterate, the FCC identified the following characteristics that would render VoIP service offered by a cable operator subject to the same preemption applicable to Vonage's service: "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."<sup>2</sup> In extending the preemption it ordered with respect to Vonage to the IP-enabled voice services provided by cable operators, the FCC was clear that these three criteria constitute the entirety of the inquiry. Nowhere in the Order did the FCC indicate or refer to additional factors to be taken into account. In particular, the Vonage Order is devoid of indication that the FCC established as a fourth criteria a subjective assessment by state regulators regarding the similarities and differences between an IP-enabled voice service offered by a cable operator and the IP-enabled voice service offered by Vonage.

The opposing parties have nonetheless devoted much effort to a wide ranging discussion of their perceptions regarding various differences between Vonage's IP-based service and TWCIS' Digital Phone service. None of the identified differences is pertinent to the analysis endorsed by the FCC. The record clearly demonstrates that Digital Phone possesses the only three characteristics relevant to federal preemption. The Commission should follow the FCC's lead and approve the proposed tariff.

---

<sup>1</sup> *Vonage Order* at ¶ 43.

<sup>2</sup> *Vonage Order* at ¶ 32.

In fact, TWCIS' Digital Phone utilizes the same underlying voice over IP technology as Vonage's IP-enabled service. The fact that TWCIS has chosen to place certain restrictions on its Digital Phone offering does not affect or change the ultimate FCC conclusion that state certification and tariffing requirements are preempted for IP enabled voice services

It also appears there remains confusion about what purpose the proposed tariff is intended to accomplish. Simply, the proposed tariff includes in a single document all telecommunications service offerings provided by a Time Warner Cable affiliated entity, which have heretofore been provided under two separate tariffs and by two separate entities. Streamlining and combining these services into a single tariff filed by a single entity (TWCIS) benefits customers and the Commission by making available in a cohesive and efficient manner the variety of telecommunications offerings that are presently subject to multiple tariffs filed by multiple TWCIS affiliates. Accordingly, this portion of the challenge to TWCIS' tariff should be dismissed as inappropriate and without basis.

The proposed tariff does not contain provisions relating to Time Warner Cable Digital Phone, a IP-enabled voice service offering. Exclusion of Digital Phone from the TWCIS tariff is consistent with the FCC's direction and the regulatory treatment of Digital Phone in the various jurisdictions in which it is offered. As pointed out during the on the record presentation, some states have requested that Digital Phone tariffs filed by TWCIS' affiliates be withdrawn because otherwise applicable state tariff requirements have been preempted by the FCC and that pending TWCIS affiliate certification applications relying on Digital Phone service be withdrawn. (Tr. p.51). In fact, relief similar to that requested here has been granted in at least Kansas, Maine, New York, Hawaii, Texas, California and North Carolina. (Tr. p. 14). Counsel for TWCIS erroneously included South Carolina in the foregoing list during the on the record presentation. However, the South Carolina tariff for Digital Phone

remains in place not because of any state commission action or ruling on the issue of the Vonage Order, but because incumbent LECs in South Carolina refuse to interconnect with a carrier that does not provide services directly to end users. While not relevant to this proceeding, that practice—and its sanction by the South Carolina PSC—is currently the subject of a pending proceeding at the FCC.<sup>3</sup> Missouri is the only jurisdiction in which these issues remain pending in connection with TWCIS’ services.

Several parties have alleged that TWCIS “wants to have it both ways,” apparently referring to enjoying the benefits of being a regulated entity while at the same time providing unregulated services. The allegation is baseless. TWCIS is merely seeking to achieve consistency in regulatory treatment and to continue daily operations without any significant change. (Tr. at p.51). In fact, TWCIS will continue paying into state universal service funds and collecting and remitting all applicable taxes and fees. *Id.* Also, consistent with the regulatory treatment of the services offered by TWCIS and its affiliates in the vast majority of jurisdictions, TWCIS seeks to remove from its Missouri tariff the references to its VoIP-based Digital Phone service.

A number of parties make the circular argument that, in Missouri, basic local telephone service must, as a matter of law, be tariffed and that because TWCIS holds a certificate to provide basic local exchange service, Digital Phone must remain a tariffed service. The fallacy of this argument is obvious. As previously indicated, at the time TWCIS sought authority to provide basic local service it expressly reserved its right to benefit from any later regulatory or judicial action that might clarify the regulatory requirements applicable to its IP-enabled voice service. Simply put, that time has arrived.

---

<sup>3</sup> See *Time Warner Cable Petition for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, FCC WC Docket No. 06-55 (March 2006).

Submission of the proposed tariff was triggered by the issuance of the FCC's Vonage decision, which held that state tariffing and certification requirements were preempted for IP-based voice services. This FCC decision is currently on appeal in the Eighth Circuit Court of Appeals and was submitted on January 12, 2006. The Eighth Circuit Court has not yet rendered its decision in the matter. TWCIS suggests that the forthcoming decision from the Eighth Circuit may be enlightening and instructive in the instant case and that it would be in the interest of the parties and the Commission to wait until such a decision and order is issued before ruling on the proposed tariff. Based upon past experience with the court, TWCIS believes a decision can reasonably be expected well within the time the Commission has available to rule upon this matter.

### **CONCLUSION**

After consideration of the forthcoming decision of the 8th Circuit Court of Appeals and for the reasons set forth above and in TWCIS' Initial Brief, the Order Suspending Tariff should be lifted and the proposed tariff should be approved.

Respectfully submitted,

LATHROP & GAGE, L.C.

*/s/ Paul S. DeFord*

Paul S. DeFord      Mo. #29509  
Suite 2800  
2345 Grand Boulevard  
Kansas City, MO 64108-2612  
Telephone: (816) 292-2000  
Facsimile: (816) 292-2001  
E-mail: pdeford@lathropgage.com

*Attorneys for Time Warner Cable  
Information Services (Missouri), LLC  
d/b/a Time Warner Cable*

Dated: May 19, 2006

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post Hearing Brief has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 19th day of May, 2006, to:

### **Case No. LT-2006-0162**

<u>Name of Company</u> <u>Name of Party</u>	<u>Email</u> <u>Phone</u> <u>Fax</u>	<u>Street Address</u>	<u>Mailing Address</u>	<u>City</u>	<u>State</u>	<u>Zip</u>
Missouri Public Service Commission General Counsel	GenCounsel@psc.mo.gov	200 Madison Street, Suite 800	P.O. Box 360	Jefferson City	MO	65102
Office Of The Public Counsel Mills R Lewis	opcservice@ded.mo.gov	200 Madison Street, Suite 650	P.O. Box 2230	Jefferson City	MO	65102
Missouri Public Service Commission Haas William	William.Haas@psc.mo.gov	200 Madison Street, Suite 800	P.O. Box 360	Jefferson City	MO	65102
Missouri Independent Telephone Group (MITG) Johnson Craig	craig@csjohnsonlaw.com 573-632-1900 573-634-6018	1648-A East Elm		Jefferson City	MO	65101
Small Telephone Company Group (STCG) McCartney Brian	bmccartney@brydonlaw.com 573-635-7166 573-634-7431	312 East Capitol Ave.	P.O. Box 456	Jefferson City	MO	65102

/s/ Paul S. DeFord

Paul S. DeFord