

**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

**Post-Hearing  
Brief of the MITG**

Comes now the MITG and submits the following post-hearing brief in opposition to the proposed tariff of Time Warner Cable Information Service (TWCIS).

**Introduction**

TWCIS does possess a certificate from the Missouri Public Service Commission to provide local telecommunications service.<sup>1</sup> At hearing TWCIS made it clear that this tariff proceeding was designed to “detariff” its Digital Phone Service offering.<sup>2</sup>

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<sup>1</sup> Stipulation, paragraph 2.

<sup>2</sup> MR. DeFORD:

11 I would take this opportunity to urge the  
12 Commission to follow the FCC's lead and approve Time  
13 Warner's proposed tariff, which would withdraw Digital  
14 Phone, which is Time Warner's IP-based voice service, from  
15 its tariffed offerings.

COMMISSIONER APPLING: What are you seeking  
16 here, Mr. DeFord, other than just the tariff itself? And  
17 again, why do you need the tariff if you're not seeking  
18 anything beyond just the Digital Phone? What do you hope  
19 to gain?

20 MR. DeFORD: Essentially, your Honor,  
21 that's a very good question. We're doing several things  
22 here. To be consistent throughout the nation, we are  
23 detariffing the Digital Phone offering. That doesn't mean  
24 that we're not going to continue to provide the types of

TWCIS made it clear that it will continue to offer Digital Phone Service, but it wants to do so free from regulation by the Missouri Public Service Commission.<sup>3</sup> This action, if approved, would remove Digital Phone Service from regulation. The basis for TWCIS' request is that its Digital Phone Service is not a telecommunications service.<sup>4</sup>

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25 service that Time Warner Cable has been providing since I  
1 believe 1998.

3  
22 JUDGE PRIDGIN: But if the purpose or at  
23 least one of the purposes of filing Tariff No. 3 is to  
24 remove Digital Phone from the tariff and the Commission  
25 doesn't reject -- or the Commission rejects the tariff,  
1 can you not offer that Digital Phone service?

2 MR. DeFORD: I'm sure we would continue to  
3 offer the Digital Phone service.

4 JUDGE PRIDGIN: In Missouri?

5 MR. DeFORD: In Missouri.

6 JUDGE PRIDGIN: So again, if the Commission  
7 rejects this tariff, how would Time Warner be harmed?

8 MR. DeFORD: We would be subject to  
9 unnecessary regulation. I would believe that there would  
10 be requirements that would be imposed on Time Warner that  
11 would be burdensome and wholly unnecessary.

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12 JUDGE PRIDGIN: By whom? If Missouri  
13 rejects the tariff, then why do you even need -- why do  
14 you need to even answer to the Missouri Commission? Why  
15 do you even need a Missouri certificate? I guess that's  
16 where I'm -- that's my threshold question.

17 MR. DeFORD: Well, your Honor, we would  
18 continue to offer services in Missouri. We have an  
19 existing tariff. I think the point would be that the  
20 Digital Phone offering would not be considered a telephone  
21 communications service offered in Missouri.

### **Summary of MITG Position**

TWCIS's proposed tariff combines changes to private line services with the detariffing of basic local service.<sup>5</sup> The detariffing of basic local should be rejected. TWCIS can later submit separate tariff changes to its private line services.

If the state of Missouri is preempted from regulating TWCIS' Digital Phone Service, the appropriate remedy would be to deny the tariff. Services the Commission is preempted from regulating should not be permitted to be provided pursuant to a telecommunications certificate of authority, or pursuant to a telecommunications service tariff. If the Commission believes preemption exists, the Commission should cancel the existing Digital Phone tariff.

If, however, Missouri is not preempted from regulating TWCIS' Digital Phone Service, the Commission should reject the tariff. "Detariffing" of basic local telecommunications service should not be permitted.

TWCIS' Digital Phone Service does not constitute a service for which state regulation has been preempted by the FCC's *Vonage* decision. Under the *Vonage* test, Digital Phone Service constitutes telecommunications service, and Missouri is not preempted from regulating it. Under Missouri law Digital Phone Service must be offered pursuant to tariffs the same as other LECs tariff their services. Detariffing should be rejected, as it is inconsistent with the regulatory requirements protecting consumers certificated LECs are required to abide by.<sup>6</sup>

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<sup>5</sup> See statement of TWCIS counsel, Transcript page 19.

<sup>6</sup> The MITG does not oppose those aspects of the tariff filing that do not involve detariffing of Digital Phone Service, i.e. private line, EduViz services.

## Argument

The real question of this case is whether the VOIP nature of Digital Phone Service meets the test of a service for which states have been preempted from regulating under the FCC's *Vonage* Decision.<sup>7</sup>

At hearing TWCIS suggested that all other jurisdictions had approved similar filings, and that Missouri's granting of the tariff would be consistent.<sup>8</sup> This may not be entirely true. On December 14, 2005, TWCIS sent a letter to the Public Service Commission of South Carolina in Dockets 2003-362-C and 2004-280-C, attached hereto. In that letter TWCIS stated that "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." Apparently in South Carolina, as in Missouri, TWCIS currently offers Digital Phone Service pursuant to certificate and tariff.

As a general proposition, the issue of appropriate regulatory treatment for VoIP services is unsettled. The FCC's *Vonage* decision fails to provide a bright line for distinguishing telecommunications services from information services.<sup>9</sup> The FCC never decided if the *Vonage* service was an information service or a telecommunications service. What the FCC did decide was that, as *Vonage* VoIP communications could not

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<sup>7</sup> See the November 12, 2004 Memorandum Report and Order of the FCC *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket no. 03-211; 19 FCC recd 22404, petitions for review pending in *The Minnesota Public Utilities Commission v. F.C.C.*, Nos. 05-1069, et al. (8th Circuit Court of Appeals).

<sup>8</sup> Transcript, pages 13-14.

<sup>9</sup> See the concurring opinions of FCC Commissioners Michael J. Copps and Jonathan S. Adelstein in *Vonage*.

be separated into interstate and intrastate calls, the FCC preempted state regulation of such communications.

Under the *Vonage* decision, apparently each VoIP service must be evaluated on its individual characteristics. The characteristics of TWCIS' Digital Phone Service do not possess the characteristics of the Digital Voice service that justified preemption according to the *Vonage* decision.

The basis for the FCC's decision in *Vonage* to preempt state regulation was that "the characteristics of Digital Voice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota's regulations would thwart federal law and policy" (see *Vonage*, ¶ 14).

The FCC relied heavily upon the fact that the Vonage service was not limited to use at a single geographic location, but instead could be used "anywhere in the world". (¶ 17). Because the traditional "end to end" analysis for determining the interstate or intrastate jurisdiction of calls did not work with the Vonage service, this was the basis for preempting regulation of the Vonage service.

TWCIS' Digital Phone Service is different from the Vonage Service. TWCIS does not route Digital Phone calls over the internet.<sup>10</sup> Digital Phone service is stationary, which means TWCIS Digital Phone service does not provide the ability to enjoy geographically independent telephone numbers.<sup>11</sup> Because Digital Phone service calls are not routed over the internet, and Digital Phone customer phone numbers are

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<sup>10</sup> Stipulation of the Parties, paragraph 15.

<sup>11</sup> Stipulation of the Parties, paragraphs 16 and 17.

geographically fixed, Digital Phone does not possess the most important characteristics the FCC based preemption upon. Digital Phone service is not portable and capable of use anywhere in the world. It must be used at the subscriber's premise. Digital Phone service is more akin to traditional circuit switched telephony, as it is not only "relevant" where the subscriber is located, it is necessary for the subscriber to have a discrete geographic location.

Digital Phone subscribers obtain telephone numbers that correlate to the actual physical location of the CPE. Digital Phone subscribers do not obtain a number which is associated with an Internet Protocol address. Unlike the Vonage IP address-based numbers, Digital Phone subscribers' NANP number is specifically tied to the user's physical location. Digital Phone subscribers are required to remain at a single location in order to use their service.

Therefore, unlike the Vonage service, Digital Phone Service is identical to traditional telephony in terms of identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme. It is only at the subscriber's location that Digital Phone service can be used. As the Digital Phone service has a discrete location corresponding with the subscriber's telephone number, calls from the subscriber have a discrete origination point at which the call can be rated. Calls to the subscriber have a discrete termination point at which the call can be rated. Under ¶ 17 of the FCC *Vonage* analysis, where an "end-to-end" analysis of the physical beginning and ending points of a communication can be separated into interstate and intrastate communications, the traditional telephony federal/state regulation should be applied.

The *Vonage* decision also heavily relied upon the customer having a broadband connection accessible at locations other than the customer's home premise, with internet service provided by a provider other than Vonage. It appears the fact that Vonage did not provide any facilities other than its IP "CPE" equipment heavily influenced the FCC's decision Vonage service was not traditional telephony.

The situation with TWCIS is different. TWCIS customers must have cable facilities into their premise to subscribe to the TWCIS service. In addition they must have a broadband connection they must purchase from TWCIS, who in turn utilizes the broadband facilities of its affiliate.<sup>12</sup> TWCIS also provides the location-specific CPE. Unlike Vonage, TWCIS is a facility-based provider, whereas Vonage provided no access facilities.

Vonage offers its service to anyone anywhere in the world. TWCIS only offers its service to customers in its areas where it also offers cable television service. Vonage service must be routed via the internet, and the FCC relied heavily upon its policy of non-regulation of the internet. TWCIS service is not routed on the internet.

In sum, the TWCIS service does not possess the characteristics of an information service justifying preemption under the *Vonage* decision.

### **Policy**

The tariff at issue would remove exchange services and residential end user offerings, including Digital Phone Service, from Time Warner's tariffs.<sup>13</sup> Tariff No. 3 would eliminate rates except for one specific charge – a nonrecurring service connection

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<sup>12</sup> Stipulation of the Parties, paragraphs 10, 14, 19, 20.

<sup>13</sup> See Stipulation of the Parties, paragraph 12.

charge for unnamed services that “may” apply.<sup>14</sup> All other rates and charges would be detariffed and subject to customer-specific contracts and individual case basis pricing.<sup>15</sup>

The result of the tariff, if approved, would be that TWCIS basic local service would not longer be tarified, the terms of service would no longer be tarified, and the rates would no longer be tarified. TWCIS would be without any limitation of its ability to decide whether, when, and under what terms to provide service to customers. TWCIS would be under no tariff obligation to offer service on non-discriminatory terms and conditions.<sup>16</sup>

Digital Phone Service provides two-way voice service within a local calling scope. It meets the §386.020 (4) RSMo definition of basic local telecommunications service.<sup>17</sup>

In Missouri, basic local services must be tarified. Tariffs are the way the Commission and its Staff can readily ascertain compliance with statutory requirements and consumer protection. ILECs and CLECs providing basic local services are required to tariff basic local service. They are not permitted to “detariff”. They are required to tariff basic local rates. They are required to offer basic local service to all similarly situated customers at the same terms and conditions. They are not permitted to utilize individual customer based, or “ICB” pricing. If approved, the tariff at issue would permit TWCIS to obtain whatever terms for basic local service it could negotiate with customers. If approved, TWCIS could charge different customers different rates for the same basic local service.

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<sup>14</sup> See Stipulation of the Parties, paragraph 12.

<sup>15</sup> See Stipulation of the Parties, paragraph 12, Tariff Sheets 47, 50.

<sup>16</sup> See testimony of William Voight, Transcript pages 29-31.

<sup>17</sup> See the Stipulation of the Parties, paragraph 10.



In Missouri, customer-specific or “individual case basis” (ICB) pricing is only available under limited circumstances. §392.200.8 RSMo allows customer specific pricing for dedicated, non-switched, private line and special access, central office based switching services, and business services in areas where basic local service has been declared to be competitive pursuant to § 392.245 RSMo. ICB pricing is not available to residential customers, even where basic local service has been declared competitive. As TWCIS has stipulated that it only offers “Digital Phone” service to residential customers, ICB pricing is not available.<sup>18</sup>

TWCIS is asking this Commission to agree that Missouri’s jurisdiction has been preempted by the FCC in its *Vonage* decision. For obvious reasons, federal preemption of state law is disfavored. In its January 13, 2006 Brief in Support of Continued State Jurisdiction, Staff does an excellent job of explaining why no express, field, or conflict preemption applies here.

### **Conclusion**

The Commission should determine that TWCIS’ Digital Phone Service is telecommunications service, is subject to regulation and not preempted. The tariff should be rejected.

If the Commission determines that TWCIS’ Digital Phone Service is an information service, preempted from state regulation, the tariff should be rejected, and TWCIS directed to file tariffs that apply only to its telecommunications services, and to delete any references to information services.

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<sup>18</sup>Stipulation of the parties, paragraph 20.

/s/ Craig S. Johnson  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this pleading was electronically mailed to the following attorneys of record in this proceeding this 9<sup>th</sup> day of May, 2006:

William Haas/David Meyer  
Michael Dandino  
Paul DeFord  
W.R. England and Brian McCartney

/s/ Craig S. Johnson  
Craig S. Johnson

177099



ROBINSON MCFADDEN  
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ROBINSON, MCFADDEN & MOORE, P.C.  
COLUMBIA | GREENVILLE

December 14, 2005

**VIA E-MAIL & HAND DELIVERED**

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COMMISSION

**Re: Time Warner Cable Information Services (SC), LLC  
Docket Nos. 2003-362-C & 2004-280-C**

Dear Mr. Terreni:

This letter serves as written confirmation to the Commission that Time Warner Cable Information Services (SC), LLC ("Time Warner Cable") has not withdrawn or deleted the retail portion of its S.C. Tariff No. 1 Applicable to Packaged Local and Interexchange IP Voice Services filed June 4, 2004. 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.

Nothing in this letter should be construed as an admission or agreement by Time Warner Cable that the Digital Phone services which it currently offers 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 carrier, interexchange carriers, common carriers, or other regulated entities. Time Warner Cable specifically reserves its right to contend that the FCC Order, *In the Matter of Vonage Holdings Corp.*, WC Docket No. 03-211, FCC 04-267, released November 12, 2004, preempted state regulation of its Digital Phone services in any proceedings before the Commission, the FCC, or any Court.

I hereby certify this document to be a true copy of the original.

\_\_\_\_\_  
Chief Clerk

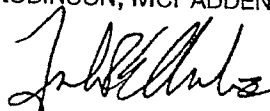
Date 4-18-06

Mr. Charles Terreni  
December 14, 2005  
Page 2

Please stamp the extra copy of this letter provided as proof of filing and return it with our courier.

Yours truly,

ROBINSON, MCFADDEN & MOORE, P.C.



Frank R. Ellerbe, III

/bds

cc: Julie Y. Patterson, Esquire (via e-mail & US Mail)  
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