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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Hearing

March 22, 2006
Jefferson City, Missouri
Volume 2

In the Matter of Tariff No. 3 of)
Time Warner Cable Information) Case No. LT-2006-0162
Services (Missouri), LLC, d/b/a)
Time Warner Cable)

RONALD D. PRIDGIN, Presiding,
REGULATORY LAW JUDGE.

LINWARD "LIN" APPLING,
COMMISSIONER.

REPORTED BY:
KELLENE K. FEDDERSEN, CSR, RPR, CCR
MIDWEST LITIGATION SERVICES

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Grand River Mutual Telephone Corp.
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Holway Telephone Company.
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Kingdom Telephone Company.
KLM Telephone Company.
Lathrop Telephone Company.
McDonald County Telephone Company.
Mark Twain Rural Telephone Company.
Miller Telephone Company.
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1 P R O C E E D I N G S

2 JUDGE PRIDGIN: Good afternoon. We're on
3 the record. This is the on-the-record presentation for
4 Case No. LT-2006-0162, in the matter of Tariff No. 3 of
5 Time Warner Cable Information Services (Missouri), LLC,
6 doing business as Time Warner Cable.

7 I am Ron Pridgin. I'm the Regulatory Law
8 Judge assigned to preside over this hearing. It's being
9 held March 22nd, 2006 in the Governor Office Building in
10 Jefferson City, Missouri. The time is approximately
11 1:10 p.m.

12 I would like to get oral entries of
13 appearance from counsel, please, beginning with Staff.

14 MR. MEYER: Good afternoon. David Meyer
15 and William Haas for the Staff of the Missouri Public
16 Service Commission. Our address is P.O. Box 360,
17 Jefferson City, Missouri 65102.

18 JUDGE PRIDGIN: Mr. Meyer, thank you. On
19 behalf of Time Warner Cable Information Systems, please?

20 MR. DeFORD: Thank you, your Honor.
21 Paul S. DeFord with the firm of Lathrop & Gage, 2345 Grand
22 Boulevard, Kansas City, Missouri, appearing on behalf of
23 Time Warner Cable.

24 JUDGE PRIDGIN: Mr. DeFord, thank you. On
25 behalf of the Small Telephone Company Group, please?

1 MR. McCARTNEY: Thank you, your Honor.
2 Brian McCartney of the law firm Brydon, Swearingen &
3 England, P.C. Our address is 312 East Capitol Avenue,
4 Jefferson City, Missouri 65102.

5 JUDGE PRIDGIN: Mr. McCartney, thank you.
6 On behalf of the Missouri Independent Telephone Group,
7 please?

8 MR. JOHNSON: Thank you, your Honor. Craig
9 Johnson, Attorney at Law, 1648A East Elm, Jefferson City,
10 Missouri 65101, appearing on behalf of the Missouri
11 Independent Telephone Company Group.

12 JUDGE PRIDGIN: Mr. Johnson, thank you. On
13 behalf of the Office of the Public Counsel, please?

14 MR. DANDINO: Thank you, your Honor.
15 Michael Dandino, Office of the Public Counsel, Post Office
16 Box 2230, Jefferson City, Missouri 65102, representing the
17 Office of the Public Counsel and the public.

18 JUDGE PRIDGIN: Mr. Dandino, thank you.

19 I understand the parties have filed a
20 procedural history and Stipulation of Facts, and we've
21 convened this hearing for the purpose of hearing argument
22 on whether or not the Commission should approve or reject
23 that Tariff No. 3.

24 What I would like to do is take some
25 opening arguments from counsel, and you can do it either

1 from the podium or from your seat, whichever place you're
2 more comfortable. I would like to start with Mr. DeFord
3 since his client filed the tariff, and Mr. DeFord, I
4 believe Commissioner Appling will have some questions for
5 you. So if you like, if you have any kind of opening
6 statement, and then the Commissioner may interrupt you or
7 may have some questions for you afterwards.

8 MR. DeFORD: Certainly, your Honor.
9 Actually, I have no prepared remarks. We appear today to
10 answer questions from the Commission as appropriate.

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.

16 Time Warner's Digital Phone offering meets
17 the criteria set forth in paragraph 32 of the FCC's Order.
18 It would meet the requirements for FCC preemption. Those
19 requirements, of which there are only three, are first
20 that the service requires a broadband connection, second,
21 that there is a need for IP-based customer premises
22 equipment, and third, that the service provides a suite of
23 integrated services.

24 I think it's very clear from the
25 stipulation and I think the facts that we could provide

1 here today that Digital Phone meets those three criteria
2 and would be a preempted service if suggested to the FCC.
3 Thank you.

4 JUDGE PRIDGIN: Mr. DeFord, thank you. Let
5 me see if we have any questions from the Bench.
6 Commissioner Appling?

7 COMMISSIONER APPLING: Thank you very much.
8 How are you doing, sir?

9 MR. DeFORD: Very well.

10 COMMISSIONER APPLING: Good. How about --
11 I'm sorry that I'm not more prepared than I am with the
12 question that I need to ask you, but I'll do my best.
13 Okay?

14 MR. DeFORD: Certainly.

15 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
25 service that Time Warner Cable has been providing since I

1 believe 1998.

2 So what the tariff filing does is it
3 combines the offerings that Time Warner Cable had
4 previously provided, a service I think referenced as
5 EduViz, private line services, dedicated types of
6 services, and maintaining the ability to provide local
7 services in the future.

8 COMMISSIONER APPLING: It's only for the
9 future that you're filing for this tariff? You don't have
10 anything else you're offering today, in the very near
11 future here as far as services are concerned?

12 MR. DeFORD: No, your Honor. We are
13 providing services today. We're providing -- as I
14 mentioned, we're providing the EduViz type services,
15 schools, libraries, that type of thing where we're
16 connecting the facilities of a number of school districts,
17 providing certain private line services and other forms of
18 dedicated services on an individual case basis.

19 That's set forth in the tariff that we have
20 actually tried to collapse and combine into one that is
21 before the Commission today, Time Warner Tariff No. 3.

22 COMMISSIONER APPLING: Okay. Time Warner
23 is to comply with the law, the rules that you mention in
24 the Order. Have you had any other companies -- any other
25 states that you have participated in that you have been on

1 the same, or is this the only state or the first state
2 you've done this in?

3 MR. DeFORD: Actually, your Honor, I may
4 defer to Ms. Patterson, but I believe that we have
5 actually filed tariffs like this to withdraw Digital Phone
6 in every jurisdiction that Time Warner is providing
7 service in as of today. I believe there is only one where
8 the filing was contested. I believe that was Hawaii.

9 COMMISSIONER APPLING: Have they been
10 approved?

11 MR. DeFORD: Yes, in all circumstances,
12 Kansas, Maine, New York, Hawaii, Texas, California,
13 North Carolina, South Carolina, all jurisdictions have
14 approved the filing that we've made here. Missouri is the
15 only state still pending.

16 COMMISSIONER APPLING: What do you think
17 about the argument that the state law prohibit
18 customer-specific pricing for residential customers? Talk
19 to me a little bit about that.

20 MR. DeFORD: I would agree that it does,
21 and we're certainly not providing any individual case
22 basis pricing for residential services. The individual
23 case base pricing is in the existing Time Warner tariff
24 that we're collapsing into this, and it's principally for
25 the EduViz product.

1 COMMISSIONER APPLING: Does Time Warner
2 plan to apply for ETC designation by any chance?

3 MR. DeFORD: That's an easy one. No.

4 COMMISSIONER APPLING: You don't plan to
5 file for that?

6 MR. DeFORD: No.

7 COMMISSIONER APPLING: Okay. I think I've
8 run through most of the questions I had, Judge.

9 JUDGE PRIDGIN: Commissioner Appling, thank
10 you. I think I might have a few questions, Mr. DeFord.
11 If the Commission decides to reject the tariff and you're
12 wanting the Digital Phone service detariffed, how would
13 you be harmed?

14 MR. DeFORD: I'm not sure I understand the
15 question. I think that the -- obviously by not approving
16 the tariff, we would be in a position in Missouri that
17 would be inconsistent with all of the other jurisdictions
18 in the nation and would arguably be in a position where we
19 would have to comply with requirements that are
20 unnecessary in light of what the FCC has done with respect
21 to their Order.

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.

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.

22 JUDGE PRIDGIN: Okay.

23 MR. DeFORD: What we're looking for here is
24 consistency.

25 COMMISSIONER APPLING: Excuse me, Judge,

1 but it seem to me that -- you know, I'm trying to come to
2 grips here, why would you need the tariff. I really am
3 trying to get down to the grass roots of why you would
4 need the tariff, because it seem to me that if you -- if
5 you're not going to operate under that, then what good is
6 the tariff? You can bypass us.

7 MR. DeFORD: No, your Honor. We still have
8 services under the tariff, under Tariff No. 3.

9 COMMISSIONER APPLING: Right.

10 MR. DeFORD: If you look at it, there are
11 schedules of rates for the private line type services, the
12 EduViz services, which are offered on an individual case
13 basis depending upon the needs of the particular school
14 district, other types of private line services where we
15 may connect cellular tower to a switch. There are any
16 number of other services within the tariff.

17 The only thing that is missing from
18 Tariff 3, the current filing, is the Digital Phone
19 offering. We've only taken out one piece of what was
20 under the existing two tariffs. So we've collapsed --

21 COMMISSIONER APPLING: Yeah, I understand.
22 I read all that this morning, but -- okay. Is there
23 anything else you wanted to add to that?

24 MS. PATTERSON: I'm Julie Patterson with
25 Time Warner Cable.

1 JUDGE PRIDGIN: Are you counsel?

2 MS. PATTERSON: Counsel, Time Warner Cable
3 Information Services.

4 We -- I think that just to answer the
5 question of if this application is denied, then the effect
6 would be we would still have a tariff on file, so we would
7 have to go through the process of attempting to pull that.
8 Does that get to the question in terms of how we're
9 harmed?

10 Procedurally, there are two different ways
11 to do it, approve this tariff or allow us to withdraw the
12 existing tariff.

13 COMMISSIONER APPLING: Well, it's nothing
14 to yanking your certificate and your tariff and sending
15 that to you in the mail.

16 MS. PATTERSON: Right. It's more in this
17 case because we offer two distinct types of services, one
18 to residential customers that's a VOIP-based service and
19 one to business customers that are undoubtedly tariffable
20 and regulated private line type services that we need the
21 certificate to remain active, and it's the tariff that,
22 you know, we could pull, but we would expect, I would
23 imagine, the same type of contest if we were to go that
24 route.

25 COMMISSIONER APPLING: Okay.

1 JUDGE PRIDGIN: Commissioner Appling, thank
2 you. We may have -- understand I have Commissioners
3 listening from other places, so they may send questions to
4 me later, so we may -- I'll try not to jump around too
5 much, but at least for now I do want to move on to another
6 party. Mr. DeFord, I may have other questions for you
7 later.

8 Mr. Meyer, I don't know if you had prepared
9 any type of opening statement or you simply had any --
10 wanted to be available for Commission questions.

11 MR. MEYER: I do actually have an opening
12 statement which I would be happy to read.

13 JUDGE PRIDGIN: Please do.

14 MR. MEYER: May it please the Commission?
15 Staff has requested the Commission reject Time Warner's
16 tariff filing that delineates its two existing tariffs and
17 replaces them with a single new tariff. The new tariff
18 does not contain the same details for exchange services
19 and residential end user offerings, including Time
20 Warner's Digital Phone Service that its current tariffs
21 contain and, most importantly, the rates for those
22 service.

23 Time Warner's Digital Phone Service is Time
24 Warner's basic local telecommunications service provided
25 to residential customers that essentially includes local

1 and long distance service and a number of calling features
2 under the brand name Digital Phone Service.

3 If the existing tariffs are supplanted by
4 the new tariff, Time Warner will no longer have tariffs on
5 file and maintained in the same manner as the ILEC with
6 which the company seeks to compete in violation of
7 Section 392.450 of the Revised Statutes of Missouri.

8 Further, the company will not have
9 schedules on file with the Commission showing the rates,
10 rentals and charges for service over its facilities in
11 violation of Section 392.220. The Commission's own rule
12 at 4 CSR 240-3.545 subsection 1 also requires a
13 telecommunications company to have tariffs on file
14 containing the specific rates related to regulated
15 intrastate offerings.

16 Finally, in the Commission's Order granting
17 Time Warner's certificate to provide basic local, local
18 and interexchange voice service in Case No. LA-2004-0133,
19 the Commission explicitly found that Time Warner
20 demonstrated the services it proposed to offer satisfied
21 the minimum standards associated with basic local
22 certification. The newly proposed tariff in this case
23 does not comport with these minimum standards.

24 Based on the nature of the service that
25 Time Warner has indicated that it is providing, removal of

1 the contents of its existing tariffs and replacement with
2 a proposed new tariff will lead to violations of state
3 statutes, the Commission rule and a Commission Order. The
4 only way to avoid this violation is to argue that somehow
5 the Commission's requirements do not apply, an argument
6 Time Warner now makes before you.

7 As you are aware, Time Warner's filing and
8 this case were instigated by an Order of November 2004 by
9 the Federal Communications Commission where the FCC
10 preempted the Minnesota PUC from requiring Vonage, a
11 provider of voice communications services via the
12 Internet, to abide by Minnesota's traditional telephony
13 company -- sorry -- telephone company regulations.

14 Time Warner's Digital Phone Service that is
15 before you in this case for consideration contains
16 significant differences in comparison to Vonage's service.
17 In the stipulation in this case in paragraph 17 the
18 parties have agreed that Time Warner's product does not
19 permit customers to have geographically independent
20 telephone numbers.

21 Time Warner requires its customers to use
22 telephone numbers associated with the customer's local
23 rate center. This significantly differs from the facts
24 before the FCC in the Vonage case because Vonage permits
25 its customers to use geographically independent telephone

1 numbers, and this point was heavily relied upon by the FCC
2 in its Order.

3 Other differences between Time Warner and
4 Vonage as reflected in the stipulation include the fact
5 that Time Warner's service is stationary and that
6 customers can only use Time Warner's Digital Phone Service
7 at locations with Time Warner's facilities. In contrast,
8 Vonage's service is mobile.

9 For example, the Vonage subscriber can plug
10 in Vonage's service at any location with a broadband
11 connection anywhere in the world and be able to make and
12 receive phone calls. Stated differently, Time Warner
13 subscribers can only use Time Warner's broadband
14 connection, while Vonage subscribers can use any
15 provider's broadband connection.

16 Another distinction, Time Warner and Vonage
17 do not have a similar suite of capabilities and features.
18 These differences are identified in the stip and -- in the
19 stipulation at paragraphs 18 and 19.

20 In contrast to Time Warner, Vonage does not
21 offer Internet access service. That's paragraph 14. Time
22 Warner does not route calls over the Internet, while
23 Vonage, in fact, does route calls over the Internet.
24 That's at paragraph 15.

25 Time Warner and its affiliates are

1 considered to be a facility-based provider of
2 telecommunications services. Specifically, Time Warner
3 has constructed its own outside plant and a soft switch
4 serving its customers. In contrast, Vonage does not have
5 such facilities.

6 All these descriptions of Vonage's service
7 come from the factual findings in the FCC's Order where
8 they preempted Minnesota's attempt at regulation. But let
9 me address the Order also by drawing your attention to the
10 preemption principles that are key to the underlying
11 motivations and the arguments in this case.

12 Staff believes these principles are
13 actually dispositive of the controversy now before you.
14 In the Vonage case, the FCC's issued an Order in an
15 adjudication of a dispute between two parties, the State
16 of Minnesota's PUC, our equivalent, and Vonage. The
17 question raised for you today is whether that Order has
18 caused a preemptive effect on this Commission's activities
19 relative to Time Warner.

20 Quite simply, adjudications resolve
21 disputes among specific individuals; whereas, rulemakings
22 affect the rights of broad classes of unspecified
23 individuals. The Vonage case was an adjudication and has
24 no binding effect on non-parties such as the Missouri
25 Commission or Time Warner.

1 Of course, the Vonage Order did entail
2 preemption of a state's regulatory structure by the
3 Federal Government and was grounded in the conflict
4 preemption principle that if it is impossible to comply
5 with both state and federal requirements, the federal
6 requirements dominate and the state requirements are
7 preempted.

8 Some language in the Order even purports to
9 predict future FCC action regarding preemption if the FCC
10 were faced with comparable services. But the FCC's own
11 counsel in the appeal process -- and, of course, you're
12 all well aware that that case is still on appeal and has
13 not been ultimately decided by the Court of Appeals. The
14 FCC's own counsel stated that the Vonage Order did not
15 specifically address services other than those with basic
16 characteristics similar to Vonage's own digital voice
17 service.

18 It's important to note that the FCC's Brief
19 before the 8th Circuit cited in Staff's Brief in this case
20 concluded with the statement that VOIP services can be
21 provided in a variety of different ways, and the
22 particular characteristics of a fixed VOIP service may
23 bear on the FCC preemption analysis. The presence of such
24 fact-intensive inquiries mandates deferral of review until
25 an actual preemption of a specific state regulation

1 occurs.

2 Here the Commission's been presented with
3 service that is factually distinguishable from the type of
4 service considered by the FCC in the Vonage case.

5 Mr. Voight is here to discuss the
6 technicalities further with you, but as you're aware, the
7 parties have entered into a Stipulation of Fact, and those
8 facts establish those fundamental differences. Primarily,
9 again, the customer's service will only work at the
10 customer's home location. Telephone numbers are
11 associated with the local rate center. Time Warner can
12 identify a call between interstate and intrastate calling.

13 In the FCC Order, the FCC repeatedly noted
14 that because of the inability to distinguish between
15 interstate and intrastate calling, the FCC was required to
16 preempt state regulation. They said where separating a
17 service into interstate and intrastate communications is
18 impossible or impractical, the Supreme Court recognized
19 this Commission's, the FCC's, authority to preempt state
20 regulation that would thwart or impede the lawful exercise
21 of federal authority over the interstate component of the
22 communications.

23 That's the legal basis for the FCC's entire
24 action relative to the Minnesota PUC, the fact that it is
25 indistinguishable between intrastate and interstate

1 decision is on appeal to the 8th Circuit. That decision
2 will potentially impact this case, and actions taken by
3 this Commission will ultimately have to be reflected
4 through whatever action that court may take.

5 That's all I have to say, and if there are
6 any questions, I'd be happy to answer them.

7 JUDGE PRIDGIN: Mr. Meyer, thank you.
8 Commissioner Appling?

9 COMMISSIONER APPLING: Mr. Meyer, I take
10 from your statement that you recommend that we do not
11 approve this?

12 MR. MEYER: That's correct, Commissioner.

13 COMMISSIONER APPLING: Are you telling me
14 that Time Warner does not need this tariff in order to do
15 what they have submitted to you, to the Staff?

16 MR. MEYER: We believe that the existing
17 tariffs are in place at this time, 1 and 2, which are
18 currently on the books of the Commission, are what is
19 required.

20 COMMISSIONER APPLING: So there is no need
21 for 3?

22 MR. MEYER: Correct.

23 COMMISSIONER APPLING: Mr. Voight, how you
24 doing?

25 MR. VOIGHT: Fine, Commissioner.

1 COMMISSIONER APPLING: It's been a long
2 time since I seen you.

3 JUDGE PRIDGIN: If you're going to ask
4 questions of Mr. Voight, let me swear him in.

5 (Witness sworn.)

6 JUDGE PRIDGIN: Thank you, very much, sir.
7 I'm sorry, Commissioner.

8 WILLIAM VOIGHT testified as follows:

9 QUESTIONS BY COMMISSIONER APPLING:

10 Q. Mr. Voight, if we approve this tariff as
11 requested by Time Warner, if they decide to do some other
12 services, what would they have to do? Would they have to
13 come back to this Commission to get approval for those
14 services which they would be providing under this tariff?
15 Am I asking a sensical question here?

16 If we approve the tariff as they have
17 requested and they decided at a later date in the future
18 as they're requesting just as a holding pattern for this
19 tariff, could they or could they not provide other service
20 here without coming back to this Commission?

21 A. I think their answer would be they do not
22 have to seek Commission approval for providing their
23 Digital Phone telephone service. I think -- I think
24 that's an inappropriate response on their behalf.

25 Q. And what harm would that do to the small

1 ILECs and all?

2 A. It's simply inconsistent with Missouri
3 laws. Approval of this tariff also raises concerns, as
4 Mr. Meyer has said, of certain aspects of the tariff, not
5 the least of which is Relay Missouri and some of those
6 things. That's the primary harm that would be done. They
7 would be offering basic local telephone service and not
8 putting that in their tariff, their rates, terms and
9 conditions. That is inconsistent with the requirements of
10 Missouri law.

11 Q. Don't our rules specifically speak to that?

12 A. They require that they should be put in the
13 tariff, along with the laws. And that's the primary
14 concern, those have not been included in this new tariff.

15 Q. And if they did offer them, how would I
16 know that they are not offering some people, against the
17 Missouri law, a different price on the services which
18 they're providing?

19 A. You would have no idea.

20 Q. And what would -- what could keep them from
21 doing that? Nothing really?

22 A. No. Different prices for different
23 customers and so forth.

24 Q. But that goes directly to the Missouri law,
25 doesn't it?

1 A. It's counter to Missouri law in my view.

2 Q. So is Time Warner asking to keep one foot
3 in the boat and one on land here?

4 A. I believe that's an accurate
5 characterization, yes.

6 Q. You can't do that in Missouri, can you?

7 A. No one else has been permitted to do so.

8 COMMISSIONER APPLING: Judge, thank you.

9 JUDGE PRIDGIN: Commissioner, thank you. I
10 think I have a few questions for Mr. Meyer. Is it your
11 understanding that paragraph 32 of the Vonage Order is
12 what the FCC articulated as its test? I believe that's
13 the paragraph that Mr. DeFord quoted from as that
14 three-part test. Mr. DeFord, did I understand you
15 correctly?

16 MR. DeFORD: That's correct, your Honor.

17 JUDGE PRIDGIN: And Mr. Meyer, didn't you
18 also use that same?

19 MR. MEYER: Paragraph 32 is certainly the
20 centerpiece of the FCC Order as far as their decision in
21 the Vonage case itself. That's where they characterize
22 the nature of that particular Vonage service.

23 JUDGE PRIDGIN: And I wasn't able to take
24 notes quickly enough. Was it your contention that Time
25 Warner doesn't meet the third part of the test, that its

1 service offering does not include a suite of integrated
2 capabilities and features, et cetera? Is that the portion
3 of the test that you think is lacking here?

4 MR. MEYER: I believe -- and, of course,
5 Mr. Voight is here also to explain it, but I think there
6 are some differences between the Time Warner service and
7 the Vonage service. I think it's not an identical
8 characterization if you look at the statement of facts.
9 There's a paragraph --

10 JUDGE PRIDGIN: I guess let me ask it this
11 way: For Digital Phone, is there a requirement for a
12 broadband connection from the user's location?

13 MR. MEYER: I believe Time Warner provides
14 that broadband connection.

15 JUDGE PRIDGIN: So the answer to the
16 question would be yes, that they do need a broadband
17 connection to use Digital Phone, Time Warner's customer
18 does?

19 MR. VOIGHT: The answer is yes, Judge.

20 JUDGE PRIDGIN: Okay. So is there also a
21 need for IP compatible CPE to use Time Warner's Digital
22 Phone?

23 MR. VOIGHT: Yes, there is.

24 JUDGE PRIDGIN: So then you're -- if I
25 understand correctly, Staff's contention is that the third

1 part of that test is what the problem is. Do I understand
2 Staff's position correctly?

3 MR. VOIGHT: Forgive me, Judge. I'm -- the
4 third part of the test?

5 JUDGE PRIDGIN: I'm sorry. Which would
6 be -- and I'm reading directly from paragraph 32 of the
7 Vonage Order. And a service offering that includes a
8 suite of integrated capabilities and features able to be
9 invoked sequentially or simultaneously, and it's a rather
10 lengthy sentence.

11 But if I understood Mr. Meyer correctly, he
12 was going through some portions of the stip to point out
13 what he believed what was lacking from Digital Phone that
14 was present in Vonage, and maybe I misunderstood.

15 MR. VOIGHT: I think Mr. Meyer was correct
16 in the -- his references to the stipulation. I'm
17 uncertain how that -- how that plays into the three
18 criteria of the FCC.

19 JUDGE PRIDGIN: And Mr. Meyer, maybe this
20 is a question better for you. What is it about Digital
21 Phone that does not fit into this three-part test in
22 paragraph 32 of the Vonage Order?

23 MR. MEYER: I guess what I would qualify
24 is, that while there is this three-part test set forth by
25 the FCC governing how they perceive the Vonage service, I

1 think it's an overstatement to say that that's the only
2 thing they considered was just these limited criteria.

3 I think leading up to this in the Order and
4 then following thereafter there's a continual reliance on
5 the fact that because of this structure that's created,
6 it's difficult to tell whether a call is interstate or
7 intrastate, and a fundamental difference that we're very
8 concerned with is that in Time Warner's case you can tell
9 the difference.

10 JUDGE PRIDGIN: So if I'm not mistaken, at
11 least as far as Vonage -- and I understand we've got
12 Mr. DeFord and Mr. McCartney want to speak. But in
13 Vonage, if I understand correctly, somebody who was a
14 Vonage customer and used this VOIP service could place a
15 call anywhere in the world with a broadband connection; is
16 that correct?

17 MR. MEYER: That's the interpretation the
18 FCC used, so I guess that's the construct we're working
19 with.

20 JUDGE PRIDGIN: You can't possibly tell
21 where the call's coming from as far as differentiating
22 between interstate and intrastate, and that was one reason
23 for federal preemption; is that correct?

24 MR. MEYER: That's how I read the Order,
25 yes.

1 JUDGE PRIDGIN: It's your position in
2 contrast, as far as Time Warner's Digital Phone, we know
3 the physical location or can reasonably find out the
4 physical location of the caller and can therefore
5 reasonably find out whether that call is interstate versus
6 intrastate. Is that your understanding, Mr. Meyer?

7 MR. MEYER: That's my understanding, and
8 also I think implicit in the Order.

9 JUDGE PRIDGIN: But be that as it may, even
10 if we can reasonably determine if a call's interstate or
11 intrastate, how does that change things? What difference
12 does that make as far as paragraph 32 of the Vonage Order?

13 And I'm trying to discern -- and I realize
14 it can be hard to do from an FCC Order. I'm trying to
15 find a test out of this Order, and if you think paragraph
16 32 isn't the test, you know, please tell me what other
17 portions of the Order you're relying on to say, well,
18 here's -- here's a reason that the Vonage service should
19 be preempted by federal law and Time Warner shouldn't.

20 I think I understand the technological
21 differences. I'm just trying to find something from the
22 Vonage Order which says that that matters.

23 MR. MEYER: I could point you to, I mean,
24 for example, like paragraph 19, paragraph 25, there's
25 several paragraphs through the course of the Order where

1 they draw that distinction between the two levels of
2 preemption or the situations when states are preempted and
3 situations where states aren't. So certainly that's
4 throughout. But as far as the technicalities of the
5 service itself....

6 MR. VOIGHT: As far as the technical
7 aspects, the broadband connection referenced in page 32 --
8 excuse me -- paragraph 32 of the FCC's Order, Judge,
9 that's referring to an Internet, a public Internet
10 connection, and that's simply not the case with Time
11 Warner's service. It's a private broadband connection. I
12 would draw that first of all as a distinguishing
13 characteristic, comparisons with paragraph 32.

14 JUDGE PRIDGIN: But did the FCC say it
15 matters if the broadband connection is private or public?

16 MR. VOIGHT: Not in this paragraph.

17 JUDGE PRIDGIN: Did it do so somewhere
18 else?

19 MR. VOIGHT: Yes, I believe so. If you'll
20 bear with me a moment.

21 JUDGE PRIDGIN: Sure.

22 MR. VOIGHT: I would point, Judge, to the
23 Staff's Brief filed on January 13th of this year, page 5,
24 under the caption occurs on page 4, no express preemption.
25 There what the Staff is addressing is what the FCC itself

1 has said about the Vonage Order, and in particular the
2 references of the FCC attorneys in their Briefs filed at
3 the 8th Circuit that Digital Voice, that is Vonage's
4 service, is not a fixed VOIP service, and the FCC did not
5 have before it any particular state regulation seeking to
6 regulate fixed VOIP services.

7 JUDGE PRIDGIN: Do I understand correctly
8 this is the FCC's brief before the 8th Circuit?

9 MR. MEYER: That's correct.

10 JUDGE PRIDGIN: Do you have any idea,
11 Mr. Meyer, the status of that, if it's been fully briefed,
12 argued?

13 MR. MEYER: I believe it was argued in
14 January.

15 MR. DeFORD: It was argued and submitted
16 January 12th.

17 JUDGE PRIDGIN: Argued and submitted
18 January 12th of 2006. All right. Do you -- do the
19 parties have any idea of when they would expect a
20 decision? I realize nobody's here representing a client
21 in that case, but --

22 MR. DeFORD: It wasn't decided yesterday.
23 I haven't checked today.

24 JUDGE PRIDGIN: All right. I don't think I
25 have any more questions for Staff, at least not right now.

1 I may get some questions later.

2 MR. DeFORD: Your Honor, if I could?

3 JUDGE PRIDGIN: Mr. DeFord.

4 MR. DeFORD: You had asked a question about
5 the third part.

6 JUDGE PRIDGIN: Yes, sir.

7 MR. DeFORD: I would simply refer you to
8 paragraph 19 of the Stipulation & Agreement the parties
9 have submitted where the parties agree that Digital Phone
10 offers a suite of integrated services capabilities. So
11 that, I believe, is off the table.

12 As to also your question about broadband,
13 there is no distinction as to whether that's public or
14 private. That refers to the speed, and you simply can't
15 have Digital Phone without a broadband connection.

16 JUDGE PRIDGIN: But it's also in the stip
17 that to be able to use Digital Phone you have to be a Time
18 Warner Cable customer; is that correct?

19 MR. DeFORD: Correct. And actually, if we
20 don't have the coax into the house, you couldn't have the
21 service anyway.

22 JUDGE PRIDGIN: And so it would be easy to
23 identify the physical location of the user of Digital
24 Phone, would it not?

25 MR. DeFORD: It would, but it could also be

1 moved anywhere on the network.

2 JUDGE PRIDGIN: I'm sorry. Give me your
3 name again, please, ma'am.

4 MS. PATTERSON: Julie Patterson.

5 JUDGE PRIDGIN: Ms. Patterson, thank you.
6 I'm sorry. Go ahead.

7 MS. PATTERSON: I think the important point
8 there is it's absolutely true that we want to know
9 people's fixed location so we can provide them with E911
10 services. But the FCC did not say that having fixed
11 location would preclude preemption, first of all.

12 And secondly, the fact that you could, it
13 was -- that it's not impossible to determine where the
14 calls originate and terminate, in fact, the FCC recognized
15 that Vonage could as a technical matter make that
16 determination as well by looking at IP addresses and
17 determining where customers are located.

18 That wasn't the criteria as to whether you
19 could tell that it's interstate or intrastate call. The
20 determination was that it was practically inseverable as
21 they went through in the Order. This is a debate of the
22 law that I think we did in the Briefs, but it wasn't that
23 it was absolutely impossible to tell where a call
24 originated and terminated, but that the service as a whole
25 was practically inseverable.

1 And under paragraph 32 the FCC expressly
2 stated that a cable operator providing VOIP services that
3 provide the three criteria set forth in that paragraph are
4 services that are practically inseverable, thus justifying
5 and entitling them to preemption.

6 JUDGE PRIDGIN: Ms. Patterson, thank you.
7 Mr. Meyer?

8 MR. MEYER: Your Honor, I think maybe I've
9 kind of ironed out where I was missing the piece in
10 paragraph 32.

11 JUDGE PRIDGIN: Yes.

12 MR. MEYER: If you refer earlier in the
13 Order, they outline three characteristics of the digital
14 voice technology. In paragraphs 5, 6 and 7 they --
15 actually, starting at paragraph 4 of the FCC's Order, it's
16 a description of Vonage's Digital Voice service.
17 Paragraph 5 is the first. Paragraph 6 is a second.
18 Paragraph 7 is a third. Paragraph 8 is sort of a
19 description, and then paragraph 9 begins fourth and
20 discusses the nature of the telephone number physical
21 location.

22 That apparently for whatever reason did not
23 get explicitly picked up in paragraph 32. It looks like
24 the rest have drawn there. So I think that may be a point
25 where you could look in the Order and find that cross

1 reference.

2 JUDGE PRIDGIN: That's where I kind of have
3 it marked. So are you saying that the FCC, perhaps
4 someone ineloquently tried to repeat the test that it
5 listed in paragraphs 5 through 9 in paragraph 32?

6 MR. MEYER: I would say you did say that
7 eloquently, yes.

8 JUDGE PRIDGIN: Thank you. Let me move on
9 to other counsel. Mr. Johnson, did you have an opening
10 statement or do you simply want to answer questions?

11 MR. JOHNSON: I've got something to say.
12 I'm sorry. Let me make a brief presentation.

13 JUDGE PRIDGIN: Yes, sir.

14 MR. JOHNSON: With respect to the Vonage
15 Order, I think there's no doubt that, one, the FCC
16 preempted Minnesota's attempt to regulate Vonage. That's
17 what that case stands for.

18 No. 2, there was language in that FCC Order
19 that sort of was directed to state commissions and the
20 industry that suggested that in similar situations it
21 would probably preempt other states. But they did a very,
22 very, very, very poor job of giving this Commission
23 adequate guidance, and two of the commissioners if you
24 read that Order said that in their concurring opinions,
25 that they did a very poor job of giving you guidance.

1 For example, they never came out and ruled
2 whether Vonage was an information service or a telephone
3 service. Never decided that. They went through all this
4 analysis, and it's very difficult to determine exactly or
5 to pinpoint exactly what basis the FCC decided it was
6 preempting state regulation.

7 I would caution you that paragraph 32 is
8 not the test. You have to read the whole Order. And I
9 would point you, Judge, right back to the preceding
10 paragraph 31. That's where I think the FCC picked up
11 paragraphs 4, 5, 6, 7 and 8, but in paragraph 31 they
12 basically said this: There is quite simply no way, no
13 practical way to sever Digital Voice into interstate and
14 intrastate communications that enables the Minnesota Order
15 to apply only to intrastate calling functionalities
16 without also reaching the interstate aspects of Digital
17 Voice. Nor is there any way for Vonage to avoid violating
18 that Order if it continues to offer Digital Voice anywhere
19 in the world.

20 When I look at this entire Vonage Order,
21 the only thing that I can sink my teeth into that sets up
22 or specifies any specific reason, any conclusion that the
23 FCC reached that justified preemption, it was the fact
24 that the Vonage customers' numbers don't reside anywhere,
25 and that you cannot use those numbers to determine what's

1 interstate and what's intrastate.

2 And to me, that is the only thing you can
3 sink your teeth in the Vonage Order that gives you a basis
4 to understand why the feds preempted the State of
5 Minnesota. If you apply that only basis for preemption to
6 the facts of this case, you've got a different conclusion,
7 because with respect to Time Warner's digital voice
8 service, you can separate the traffic into interstate and
9 intrastate because their numbers are North American plan
10 numbers and they do reside in rate centers and the LERG
11 recognizes calls to and from those customers and can put
12 them into the interstate or intrastate jurisdiction.

13 So because that -- that inability that the
14 FCC recognized for Vonage does not exist with respect to
15 Time Warner, I think the only discrete basis for
16 preempting regulations, state regulation Vonage doesn't
17 exist in this case.

18 And what I suggest that you do is you
19 reject this Tariff No. 3, and if Time Warner wants to take
20 that up and have the FCC tell Missouri it can't regulate
21 Time Warner's service, let's do that, but don't just leave
22 this whole thing this vague -- and I understand it's not
23 your fault, but I have a little bit of a philosophical
24 problem with the regulators making political decisions,
25 then when you read their decisions haven't decided

1 anything, and they've left it to the rest of the industry
2 and the state regulators to try to make these decisions
3 and we have a very poor basis upon which to do so.

4 And I think -- well, you can't tell the
5 feds to stop doing it, but in my opinion, that is the
6 reason for preemption, and that's the reason why
7 preemption should not be accepted by the Missouri
8 Commission here, and it's the reason why their Tariff
9 No. 3 should be rejected.

10 They offer a facilities-based telephone
11 service. They have switches. They have distribution
12 facilities, just like CLECs and just like ILECs do, and
13 they should be subject to the same certification
14 requirements and tariff requirements that the state laws
15 and this Commission's regulation impose upon CLECs and
16 ILECs.

17 And it would be inappropriate in my view to
18 allow them to offer that service without a certificate and
19 without a tariff. And because this specific Tariff No. 3
20 would allow them to do things that regular ILECs and CLECs
21 cannot do, you should reject Tariff No. 3.

22 JUDGE PRIDGIN: Mr. Johnson, thank you.
23 Let me see if we have any questions from the Bench.
24 Commissioner Appling?

25 COMMISSIONER APPLING: Mr. Johnson, are you

1 telling me that Time Warner, if we approve this tariff,
2 six, eight, ten months down the road if they wanted to
3 decide to offer other services to their customers, they
4 could?

5 MR. JOHNSON: Commissioner, I think if you
6 approve this tariff, you have sanctioned their argument
7 that their Digital Voice is not a regulated service, and
8 once you sanction that, they are free as a legal
9 proposition to assume that this is not telephone service
10 and they could do anything they want to with it. They can
11 charge customers A, B, C, D and E all different rates,
12 something we cannot do.

13 COMMISSIONER APPLING: Would they be
14 eligible under that system for ETC, application for ETC
15 status?

16 MR. JOHNSON: No, your Honor. If -- if you
17 grant approval of Tariff No. 3 which lets them deregulate,
18 detariff Digital Voice services -- is it Digital Voice or
19 Digital Phone?

20 MR. DeFORD: Digital Phone.

21 MR. JOHNSON: Digital Phone. My apologies.
22 I don't think they could then come in and get ETC status
23 because I think you're required in order to get that to
24 meet all of the obligations that a CLEC and an ILEC that
25 are certified as ETCs have to meet. So I don't think

1 that's a problem.

2 COMMISSIONER APPLING: Judge, thank you.

3 That's all I have for Mr. Johnson, I think.

4 JUDGE PRIDGIN: Commissioner Appling, thank
5 you. And I don't know if I addressed this question to
6 anybody else. Mr. Johnson, what about USF? I mean, if
7 this tariff is approved -- I'm trying to get my arms
8 around the reasons for Time Warner wanting this tariff. I
9 mean, if they just simply want to go and offer this VOIP
10 service without it being tariffed, I'm trying to think of
11 a reason for the tariff.

12 MR. JOHNSON: Well, I think there's some
13 confusion here. As I understand their existing Tariff
14 No. 3, it includes both the Digital Phone Service, which
15 is what I'm considering local telephone service, as well
16 as some point-to-point or network or private line type
17 services. And as I understand their Tariff No. 3, it
18 would keep the point-to-point and private network services
19 regulated; it would just, quote, detariff and deregulate
20 their Digital Phone Service.

21 So if you agree that you're preempted from
22 regulating their Digital Phone, then I think it's okay to
23 approve Tariff No. 3. If you think their Digital Phone is
24 telecom service or basic local telephone service in
25 Missouri, the appropriate remedy is to reject this tariff

1 because it's regulated and they've got to tariff it.

2 JUDGE PRIDGIN: And something that I might
3 want the parties -- or I will want the parties to address
4 either today or in Briefs is, you're right, I don't think
5 the FCC really said. I think they said they come to the
6 same conclusion either way, whether the Vonage is
7 telecommunications or information service, we reach the
8 same result. I would want the parties' input whether you
9 think Digital Phone is telecommunications service or
10 information service. I think that's a threshold question.

11 And Mr. Johnson, in paragraph 31 of the
12 Vonage Order where the FCC says there's -- there is quite
13 simply no practical way to sever Digital Voice into
14 interstate and intrastate, how far -- I mean, you heard
15 Mr. DeFord say, well, it's certainly physically possible
16 to tell where the call's coming from with Vonage or with
17 Time Warner, so where do we draw that line for the
18 practical way? That's what the FCC says, well, there's
19 no -- it may be physically possible, but there's no
20 practical way.

21 MR. JOHNSON: I think what the FCC was
22 speaking of was in the telecommunications side of the
23 house, the industry relies upon NPA/NXXs and their
24 physical locations in order to route, rate and exchange
25 compensation, and IP addresses don't work today. And even

1 if there's a practical way to determine origination and
2 termination points by an IP address, it's not practical,
3 practically capable of integrating into the public switch
4 telephone network systems that are used to rate and route
5 and compensate carriers for calls.

6 What I interpret paragraph 31 as saying is
7 that because of that impracticability, it's impossible for
8 the industry using today's systems to determine for Vonage
9 whether those are interstate or intrastate calls.

10 That's not true with respect to Time
11 Warner's service today. So I think the impossibility
12 basis, which I read the Vonage Order as being the real
13 basis for preemption, that it was impossible to separate
14 Vonage calls into interstate and intrastate, that does not
15 exist here.

16 The only basis that I can really see that
17 they preempted the state of Minnesota was based upon that
18 impossibility. So I don't think the preemption exists
19 with respect to Time Warner's service. The basis for
20 preemption does not exist in this case today.

21 COMMISSIONER APPLING: Judge, could I go
22 back --

23 JUDGE PRIDGIN: Absolutely.

24 COMMISSIONER APPLING: -- to the Staff?
25 Mr. Meyer, do you have the statute in front of you that

1 defines telecommunication company? Maybe, maybe not? Do
2 you have that marked someplace?

3 MR. MEYER: The Missouri statute?

4 COMMISSIONER APPLING: Yeah.

5 MR. MEYER: Yes, sir.

6 COMMISSIONER APPLING: I'm specifically
7 interested in what it says about the definition of a
8 telecommunications company. I think maybe if we get down
9 to paragraph 4.

10 MR. MEYER: Paragraph -- I guess I'm
11 looking at Chapter 386.020, sub 51.

12 JUDGE PRIDGIN: Commissioner Appling, are
13 you looking at the definitions there in Chapter 386?

14 COMMISSIONER APPLING: Yeah.

15 MR. MEYER: You're talking about basic
16 local telecommunications service? Okay.

17 COMMISSIONER APPLING: What do it say?

18 MR. MEYER: That defines it as two-way
19 switched voice service within a local calling scope as
20 determined by the Commission comprised of any of the
21 following services and their recurring and nonrecurring
22 charges, and then there's a list of eight items. Would
23 you like me to --

24 COMMISSIONER APPLING: It's a little bit
25 different than what we were discussing this morning about

1 the true definition of telecommunication company, any
2 company that is engaged in providing services. Am I in
3 the wrong place for it?

4 MR. VOIGHT: No, sir. You're exactly
5 right.

6 COMMISSIONER APPLING: Okay. Thank you.
7 But the bottom line of what I was trying to get to, if
8 you're not providing local service, there is really no
9 need for a tariff, then, is there? Am I correct on that?

10 MR. VOIGHT: Yes, you are correct. If
11 you're not providing basic local telephone service, there
12 is no need for a tariff.

13 COMMISSIONER APPLING: And Time Warner told
14 us they had no plans of right now to do that under this
15 tariff, right, or are you telling me that you're providing
16 services in the state and you're trying to reserve that,
17 or am I completely wrong here? Please help me out.

18 MS. PATTERSON: On the local side today,
19 without a tariff in effect for Digital Phone, we would not
20 be providing any local exchange services. Now, our view
21 on that would be that that doesn't mean that we won't do
22 so in the future, and if we did, we would certainly comply
23 with all rules and regulations applicable to that local
24 service by obtaining, for instance, an interconnection
25 agreement with an incumbent phone company and providing

1 services using interconnection that we would obtain.

2 If we were not to do so within the
3 statutory time period, we would allow the certificate to
4 lapse, as other companies would do, but we would ask to be
5 afforded that time period so as to either offer services
6 or not do so.

7 COMMISSIONER APPLING: Thank you, Julie.

8 JUDGE PRIDGIN: And before I go on to
9 Mr. McCartney, Ms. Patterson, if I remember correctly, did
10 you mention something about 911 calling, about how 911
11 calling would work under Digital Phone?

12 MS. PATTERSON: I did. I mentioned that
13 the fixed nature of our service was a choice, not for
14 regulatory purposes, but for product purposes so that we
15 could offer our customers from the start the ability to
16 have fully enhanced 911 where telephone calls and location
17 information was transmitted to public safety answering
18 points.

19 JUDGE PRIDGIN: I was going to say, would
20 the 911 track, just like a landline, would it track to the
21 local public safety answering --

22 MS. PATTERSON: In exactly the same manner.
23 And if I can also, Judge, address two of the questions
24 that you raised about universal service.

25 JUDGE PRIDGIN: Yes.

1 MS. PATTERSON: We do contribute to state
2 and federal universal service funds and are not proposing
3 to change that through this action. We would continue to
4 contribute. The FCC was clear that all it was addressing
5 was tariffing and certification requirements and not
6 taxes, fees and other issues.

7 And secondly, in terms of what we're trying
8 to gain here, it's really not special treatment. We've
9 had states that have expressly asked us to withdraw
10 tariffs or applications pending for certificates. As
11 Mr. DeFord alluded to, its consistency. Our daily
12 operations are not going to change in any significant
13 manner, and we're not trying to certainly have it both
14 ways.

15 But it's a little bit difficult with what
16 we recognize to be a very unclear order and one that
17 didn't necessarily help the situation much, but we're
18 trying to do our best to deal with that Order as it stands
19 today, at least for the time being.

20 JUDGE PRIDGIN: All right. Ms. Patterson,
21 thank you very much.

22 Mr. McCartney, did you have any type of
23 statement before we ask you questions?

24 MR. MCCARTNEY: Yes, please. Initially, we
25 would agree that the test that the Commission should look

1 at is at paragraphs 5 through 9 of the Vonage Order.
2 Paragraph 32 just kind of tries to summarize what went on
3 further.

4 We believe that the Commission should
5 reject the tariff filing. Time Warner's trying to have
6 its cake and eat it, too, in this case. It wants to keep
7 its Missouri certificate, it wants to continue to have a
8 Missouri tariff, but it doesn't want to include the
9 Digital Phone residential voice service in its Missouri
10 tariff.

11 The only authority that they cite for this
12 proposal is the FCC's Vonage Order. Vonage is just not on
13 point here. In Vonage, the Minnesota PUC issued an Order
14 imposing traditional telephone regulation on Vonage which
15 did not have a Minnesota certificate or a Minnesota
16 tariff.

17 The FCC held that Vonage was not subject to
18 state regulation because the Digital Voice Service, quote,
19 cannot be separated into interstate and intrastate
20 communications. It said that at paragraph 1, at
21 paragraph 14, paragraph 25, 31. I mean, that was where it
22 hung its hat, that you can't separate it into interstate
23 or intrastate communications.

24 First of all, in this case, Time Warner is
25 not seeking to preempt Missouri Commission authority.

1 It's going to continue to have a Missouri certificate.
2 It's going to continue to have a tariff. Thus it just
3 simply doesn't appear that the Vonage Order, which
4 completely preempted state certificate and tariff
5 provisions, is the appropriate authority for what Time
6 Warner's seeking to do here.

7 Second, the Digital Phone Service offered
8 by Time Warner appears to be very different than the
9 Vonage service that was addressed by the FCC. The FCC
10 explains that rationale at paragraph 14. It says, quote,
11 the characteristics of Digital Voice preclude any
12 practical identification of and separation into interstate
13 or intrastate communications for purposes of effectuating
14 the dual federal and state regulatory regime.

15 Mr. Meyer touched on the differences that
16 are set forth in the Stipulation of Facts, and I'll just
17 list them quickly. Time Warner's service is
18 facilities-based. That's at paragraph 13 of the
19 Stipulation. Time Warner offers Internet access. Vonage
20 does not. That's at paragraph 14 of the stip.

21 Time Warner does not route calls over the
22 public Internet. That's at paragraph 17 of the stip.
23 Rather, what Time Warner does is they contract with Sprint
24 to interconnect with the public switched
25 telecommunications network. Paragraph 20 of the

1 stipulation sets that out.

2 They offer service on a stationary basis.
3 Its customers may only use the service at locations with
4 its affiliates' cable facilities. And they do not offer
5 geographically independent telephone numbers.

6 If you take the facts that are set out in
7 the stip and then look at paragraphs 5 through 9 of the
8 Vonage Order, you'll see that the services really are
9 different here.

10 In this case, Time Warner is trying to
11 maintain a certificate and tariff with all the benefits
12 that go along with that, but they don't want to include
13 provisions about their primary residential voice service
14 offering. Time Warner shouldn't be allowed to have it
15 both ways. They shouldn't be allowed to keep these
16 benefits without the associated obligations.

17 And I'll just conclude that Vonage is not
18 on point here in this case. It does not stand for the
19 proposition that a competitive carrier can pick and choose
20 among state regulations. The treatment of VOIP service is
21 still very much in flux. As Mr. Meyer mentioned, Vonage
22 is on appeal in the Eighth Circuit.

23 The FCC has a more broader look at IP
24 enabled services. It issued a Notice of Proposed
25 Rulemaking back in March of 2004, and it's still looking

1 at those issues. So it's just not clear yet how a service
2 like Time Warner's is going to be treated.

3 In conclusion, we think that the Commission
4 should deny Time Warner's tariff filing. Thank you.

5 JUDGE PRIDGIN: Mr. McCartney, thank you.
6 Commissioner Appling, any questions for counsel?

7 COMMISSIONER APPLING: I think I'm okay.
8 Thank you very much.

9 JUDGE PRIDGIN: Mr. McCartney, I don't know
10 that I have any additional questions for you, other than,
11 I mean, you've heard Mr. Meyer's and Mr. Johnson's. I'm
12 trying to ask them about the same questions. Is there
13 anything that you would add or disagree with in their
14 answers?

15 MR. McCARTNEY: No. We concur with Staff
16 and MITG.

17 JUDGE PRIDGIN: Okay. Mr. Dandino, did you
18 have any statements?

19 MR. DANDINO: Just briefly, your Honor.
20 This case shows how attorneys can reasonably and in good
21 faith reach a different conclusion reading the same case.
22 And I think that the jurisdictional issue in this case,
23 the jurisdictional ruling, I think the word that comes to
24 mind is smudged. The lines are not sharp, concise or
25 practically established.

1 And with this and because of this, the
2 preemption issue, it's not crystal clear, and I think if
3 you're going to have preemption, you should be clear and
4 unambiguous. One of the reasons is this is an important
5 transgression or interference with the states' rights and
6 the state partnership for the regulation of
7 telecommunications services under the Federal
8 Communications Act and under Missouri statute.

9 I think that the State has -- the Staff has
10 raised strong legal arguments that the preemption through
11 the Vonage case are not present. Appellant, however, does
12 point to other states which approved this detariffing. So
13 you're going to have a question, a different question of
14 whether there's jurisdiction, whether there's preemption
15 or not.

16 One of the problems that the Commission
17 should remember is that if you decline jurisdiction, if
18 you relinquish jurisdiction, it is difficult to reinstate
19 it and to reverse course.

20 I think when we -- once again, I always
21 point to the issue that the Commission should consider.
22 You go back to Section 392.185, RSMo, which provides for
23 the legislative goals and the context of which the leg--
24 or this Commission needs to look at not only the
25 Chapter 392 and 386, but anything that comes before them.

1 Primary and foremost, I think the duty is
2 the protection of customers, especially the residential
3 customers. One of the things that offers protection for
4 the customers is the tariffing of conditions, the
5 tariffing of prices.

6 Time Warner does present a different type
7 of animal in the telecommunications environment, and I
8 recognize that. We should not let technology sway this
9 Commission one way or the other in how to treat it.

10 I think when I come down to looking at
11 this, the company holds itself out to offer local basic
12 telecom service through its Digital Phone. It has
13 different -- it has different aspects of
14 telecommunications service, but it also has some
15 similarities, and it is essentially being offered as a
16 substitute for local basic service.

17 Your Honor, you talked about whether this
18 service is a -- Digital Phone is a telecommunications
19 service or an information service. Well, if you look at
20 what the -- the Federal Communications Commission has
21 defined what's information service. To me a lot of those
22 look like telecommunications services, and I wouldn't use
23 the FCC's definition of what's a telecommunication service
24 at all.

25 I think let's look at what the very

1 practical matter is. Look at the Missouri statute. I
2 think that provides excellent guidance. Also look at
3 what -- at the whole range of services that tech-- no
4 matter what type of technology, whether it's packet
5 service or just a regular digital service over -- through
6 the lines, whether it's copper wire, whether it's optical,
7 I don't know, optical fiber, it's a telecommunication
8 service. It's using the public network that my clients,
9 the customers, paid for and expected even under a
10 competitive environment.

11 I think -- for that reason I think it's
12 telecommunications because it was necessary to the whole
13 infrastructure that all of these use at some point whether
14 it's the cable connecting into a -- into Sprint's network
15 and terminating a call outside the cable company to a
16 customer in Tucson, you're using a public network. You're
17 using a switched network. And even the Internet
18 eventually at some point to transmit a phone call is using
19 the switch network, perhaps just even if it's being
20 transferred from one company to another.

21 That may not be exactly technical, but in
22 any event, I think that this Commission owes -- should
23 retain jurisdiction. And as far as what issue they want,
24 I think they should retain jurisdiction and protect the
25 ratepayer. Thank you.

1 JUDGE PRIDGIN: Mr. Dandino, thank you.
2 Commissioner Appling?

3 COMMISSIONER APPLING: Mr. Dandino, two
4 questions.

5 MR. DANDINO: Yes, sir.

6 COMMISSIONER APPLING: The first one, what
7 is the purpose of a tariff?

8 MR. DANDINO: To me, the purpose of a
9 tariff is to publicly define what the terms of service,
10 the conditions of service between a tel-- between a
11 utility and its customer. It sets out not only the price
12 but the various rights and duties of the customer and of
13 the company toward that customer.

14 COMMISSIONER APPLING: Second question.
15 You kind of talked around it, but you never came to it.
16 Reject or not this tariff?

17 MR. DANDINO: I would -- I would have to
18 say reject it on the basis of that jurisdictional. I
19 think the Commission needs to assert its jurisdiction. To
20 assert jurisdiction means it should not let Digital Phone
21 be detariffed.

22 COMMISSIONER APPLING: Thank you, sir.

23 JUDGE PRIDGIN: Commissioner Appling, thank
24 you. I don't believe I have any questions for
25 Mr. Dandino. Let me see if there is anything else from

1 counsel. First of all, Mr. Voight was sworn in, and I
2 haven't had anybody ask to cross-examine him. Any counsel
3 wish to cross-examine Mr. Voight? Not seeing any
4 volunteers.

5 Is there anything else counsel would like
6 to add?

7 (No response.)

8 All right. I understand that the
9 transcript will be ready in roughly two weeks. I will
10 wait on the transcript to arrive, and I will issue an
11 Order on briefing.

12 If I understand the tariff -- the tariff
13 has been suspended and will be suspended for several
14 months yet. I mean, we're not -- I don't want to just
15 delay it just because we can, but we do seem to have some
16 time. I do want to give the parties a chance to read the
17 transcript and send in Briefs, particularly in light that
18 we don't have that many Commissioners on the Bench and I
19 think the Commissioners would appreciate the benefit of
20 your Briefs.

21 So I'll wait for the transcripts to come in
22 and order Briefs. I'll probably look at something like
23 ordering Briefs around 20 days or so if there's anything
24 that you want to add to this, because we did have some
25 testimony. Mr. Meyer?

1 MR. MEYER: Just to clarify, then, the
2 Briefs, among other things, should identify the parties'
3 positions regarding the nature of the service?

4 JUDGE PRIDGIN: Right. If there's --
5 that's correct, between telecommunications and
6 information. If you really don't have much to add, you
7 know, past what you've already submitted in Briefs, you're
8 certainly not required to simply file a Brief for the sake
9 of Briefs. I wanted to do that, give you -- because again
10 Mr. Voight testified, and you did have questions, and we
11 didn't have Commissioners on the Bench. There may be
12 something in there that would catch their eye that would
13 persuade them one way or the other.

14 Mr. DeFord?

15 MR. DeFORD: Yes, your Honor. We may not
16 file an initial Brief, but we may wish to respond if other
17 parties do.

18 JUDGE PRIDGIN: We have plenty of time, so
19 that's certainly not a problem.

20 Anything else from the parties? All right.
21 Seeing nothing further, that concludes this hearing. We
22 are off the record in Case No. LT-2006-0162. Thank you
23 very much.

24 WHEREUPON, the hearing of this case was
25 concluded.