BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

BRIEF OF THE SMALL TELEPHONE COMPANY GROUP

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I. INTRODUCTION AND SUMMARY

On September 12, 2003, Time Warner Cable Information Services Missouri ("Time Warner") filed an application with the Missouri Public Service Commission ("Commission") for a certificate to provide local and interexchange voice telecommunications services under the same rules and regulations that applied to traditional telecommunications providers.[1] At that time, Time Warner agreed to comply with all of the Commission's applicable rules and service standards, including but not limited to: billing, quality of service, and tariff filing requirements.[2] Time Warner's application was granted, and Time Warner subsequently began offering a "Digital Phone" service pursuant to its Tariff PSC Mo. No. 2 that includes local and long-distance voice service and calling features to Missouri customers.[3] Time Warner's "Digital Phone" service is based, at least in part, upon Voice over Internet Protocol ("VoIP").[4] Time Warner also offers private line service pursuant to its Tariff PSC Mo. No. 1.[5]

On September 23, 2005, Time Warner filed with the Commission Tariff PSC Mo. No. 3 designed to replace its Missouri Tariff PSC Mo. Nos. 1 and 2 in their entirety.[6] Tariff No. 3 would remove exchange services and residential end user offerings, including "Digital Phone", from Time Warner's list of tariffed services.[7] It also appears that Tariff No. 3 would

1 Stipulation of Fact, ¶2.
2 Stipulation of Fact, ¶2.
3 Stipulation of Fact, ¶¶ 5-6, 10.
4 Stipulation of Fact, ¶10.
5 Stipulation of Fact, ¶9.
6 Stipulation of Fact, ¶12.
7 Stipulation of Fact, ¶12.

remove provisions for 911 service.[8]

Finally, Tariff No. 3 would eliminate rates except for one specific charge – a nonrecurring service connection charge for unnamed services that "may" apply.[9] All other rates and charges for Time Warner's residential voice service would be subject to customer-specific contracts and "individual case basis" pricing.[10] This change is significant as it would appear to allow Time Warner to offer local voice service to residential customers at different prices and under different terms and conditions within the same local calling scope.

On October 13, 2005, the Commission's Staff filed a motion to suspend Time Warner's proposed Tariff PSC Mo. No. 3 on the grounds that the tariff filing would violate various provisions of Missouri law as well as the commitment made by Time Warner when it made its application for certificate of service authority. On October 18, 2005, the Commission issued an order suspending Time Warner's tariff filing. On November 15, 2005, the Missouri Small Telephone Company Group ("STCG") [11] filed its application to intervene in the above-captioned matter. The Commission granted the STCG's intervention on December 6, 2005. On December 23, 2005, the parties filed a joint procedural history and stipulation of facts.

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8 *Compare* PSC Mo. No. 1, §3.4 ("911 Service") *with* PSC Mo. No. 3, §2.2.1A.5 ("Limits of Liability").
9 Stipulation of Fact, ¶12.
10 Stipulation of Fact, ¶12, citing Tariff Sheets No. 47 and 50.
11 Attachment A.

II. DISCUSSION

The STCG opposes Time Warner's proposed Tariff No. 3 for the following reasons. First, Time Warner's operations in Missouri appear to differ significantly from the operations of Vonage in Minnesota, and Time Warner's "Digital Phone" service is both factually and legally distinguishable from the VoIP service offered by Vonage. Therefore, it does not appear that Time Warner qualifies for a VoIP exemption or preemption of state regulation. Second, if the Commission does conclude that Time Warner's service is similar enough to Vonage's service to qualify for VoIP regulation and detariffing, then it is unclear why Time Warner should be allowed to continue to maintain certificates and tariffs with the Missouri Commission. In other words, Time Warner should not be allowed to keep the benefits of local exchange carrier ("LEC") status and Missouri PSC regulation without the related obligations such as maintaining local exchange residential service tariffs.

Finally, customer-specific or "individual case basis" ("ICB") pricing is only available for business service customers in certain Missouri exchanges, but Time Warner has stipulated that it only offers service to residential customers. Neither competitive LECs ("CLECs") nor incumbent LECs ("ILECs") are allowed to offer service at different prices to residential customers in the same local exchange area under "ICB" tariffs. Rather, both CLECs and ILECs are required to offer basic residential service to all similarly situated customers under the same rates. Therefore, Time Warner's proposed tariff revisions should be rejected by the Commission.

A. Time Warner Differs from Vonage.

In 2004, the Federal Communications Commission (FCC) preempted an order issued by the Minnesota Public Utilities Commission that applied traditional state "telephone company" regulation to a "Digital Voice" service offered by Vonage Holdings Corporation ("Vonage").[12] Time Warner claims its tariff filing to remove its residential "Digital Phone" voice telephone service from its list of tariffed services was in response to the *Vonage Order*.[13] However, Time Warner's operations and service offering in Missouri are significantly different from the operations and service offering of Vonage in Minnesota.

First, Time Warner offers service through outside plant and facilities owned by its affiliates, whereas Vonage does not.[14] (*i.e*. "Digital Phone" is a facilities-based service.) Second, Time Warner offers Internet access service, whereas Vonage does not.[15] In fact, "Digital Phone" service is only offered to "residential customers subscribing to Time Warner Cable's high-speed cable modem data service and/or CPST or Digital Cable Service."[16] Third, <u>Time Warner does not route calls over the public Internet</u>, whereas Vonage does.[17] Fourth, Time Warner offers service on a stationary basis, so its customers may only use the service at locations with its affiliates' cable facilities, whereas Vonage's service is portable and Vonage customers can use Vonage's service on any broadband connection.[18] (*i.e.* Time Warner's service is only offered and available in locations where Time Warner

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12 *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, Memorandum Opinion and Order, rel. Nov. 12, 2004 (hereinafter the "*Vonage Order*").
13 Time Warner's *Motion to Reconsider Suspension of Tariff*, filed Oct. 25, 2005, p. 3.
14 Stipulation of Fact, ¶13.
15 Stipulation of Fact, ¶14.
16 Time Warner's P.S.C. Mo. No. 2, §2.1.A.
17 Stipulation of Fact, ¶15.
18 Stipulation of Fact, ¶16.

offers cable television service.) Fifth, Time Warner does not offer customers geographically independent telephone numbers, whereas Vonage does offer customers the ability to use geographically independent telephone numbers.[19]

All of these differences demonstrate that Time Warner's "Digital Phone" service is factually and legally distinguishable from the FCC order addressing Vonage's Digital Voice service in WC Docket No. 03-211 ("the *Vonage Order*"). For example, in the *Vonage Order*, the FCC stated:

> In marked contrast to traditional circuit switched telephony, … **it is not relevant where that broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service**. Rather, **Vonage's service is fully portable**; customers may use the service anywhere in the world where they can find a broadband connection to the Internet.[20]

Time Warner's "Digital Phone" service is clearly distinguishable because: (a) it is relevant where the broadband connection is located; and (b) the broadband connection must be provided by Time Warner's affiliates. Likewise, "Digital Phone" is facilities-based and not fully portable or available for use anywhere around the world. Similarly, in the *Vonage Order* the FCC observed that Vonage offered geographically independent telephone numbers,[21] but Time Warner does not offer geographically independent telephone numbers.[22] The *Vonage Order* emphasized that Vonage routes its calls over the public

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19 Stipulation of Fact, ¶17.
20 *Vonage Order*, ¶5.
21 *Vonage Order*, ¶7.
22 Stipulation of Fact, ¶17.

Internet, but Time Warner does not route calls over the public Internet.[23]

Unlike Vonage's service, Time Warner's "Digital Phone" subscribers obtain telephone numbers that correlate to the actual physical location of the customer.[24] Thus, "Digital Phone" is identical to traditional telephone service in terms of identification of, and separation into, interstate and intrastate communications for purposes of the dual interstate and intrastate regulatory regime. Digital Phone service can only be used at the subscriber's location, so calls to and from the Digital Phone subscriber have a discrete origination or termination point at which the call can be rated. Therefore, Time Warner can identify a call as being either interstate or intrastate, and the traditional "end-to-end" analysis under existing federal/state regulation must continue to be applied.[25]

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

B. Time Warner Cannot Have It Both Ways.

If the Commission does conclude that Time Warner "Digital Phone" service is similar enough to Vonage's service offering to qualify for VoIP regulation and detariffing, then it is unclear why Time Warner should be allowed to maintain a certificate and tariffs with the Missouri Commission. In other words, Time Warner should not be allowed to keep the benefits of Missouri PSC regulation without also complying with the associated obligations such as maintaining tariffs for residential voice service offerings. If Time Warner's "Digital

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23 *Vonage Order*, ¶8; Stipulation of Fact, ¶15.
24 Stipulation of Fact, ¶¶16-17.

Voice" service is indeed similar enough to Vonage's service to qualify it for federal preemption, then why is Time Warner not seeking to abandon or relinquish its Missouri certificate and tariffs altogether?

C. Customer Specific Pricing Is Only Allowed for Business Customers.

In Missouri, customer-specific or "individual case basis" (ICB) pricing is only available under limited circumstances. Specifically, §392.200.8, as recently amended by Senate Bill 237 ("SB 237"), only allows customer specific pricing under the following limited circumstances:

> Customer-specific pricing is authorized on an equal basis for incumbent and alternative local exchange companies, and for interexchange telecommunications companies for:
>
> (1) Dedicated, nonswitched, private line and special access services;
>
> (2) Central office-based switching systems which substitute for customer premise, private branch exchange (PBX) services; and
>
> (3) Any **<u>business service</u>** offered in an exchange in which basic local telecommunications service offered to **<u>business customers</u>** by the incumbent local exchange telecommunications company has been declared competitive under section 392.245.

Section 392.200.8 RSMo. Supp. 2005. Time Warner has stipulated that it <u>only</u> offers "Digital Phone" service to residential customers.[26] Therefore, because Missouri law prohibits Time Warner from offering "Digital Phone" with ICB pricing to residential customers, Time Warner's proposed tariffs should be denied.

III. CONCLUSION

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25 *Vonage Order*, ¶17.

26 Stipulation of Fact, ¶20, ""TWCIS offers 'Digital Phone' service to residential customers within the

Time Warner's "Digital Phone" service is both factually and legally distinguishable from the VoIP service offered by Vonage, so Time Warner does not qualify for a VoIP exemption or preemption of state regulation. However, if the Commission does conclude that "Digital Phone" service is similar enough to Vonage's service to qualify for VoIP regulation and detariffing, then Time Warner should no longer be allowed to maintain a certificate and tariffs with the Missouri Commission. Finally, ICB pricing is only available for business service customers in specific Missouri exchanges, but Time Warner's tariff would allow ICB pricing for residential customers. For these reasons, Time Warner's proposed Tariff No. 3 should be rejected by the Commission.

Respectfully submitted,

__***/s/* Brian T. McCartney**____________________

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exchanges where it offers cable television service. **The company does not offer the same or similar service to business customers**." (Emphasis added.)

ATTACHMENT A

BPS Telephone Company
Citizens Telephone Company
Craw-Kan Telephone Cooperative, Inc.
Ellington Telephone Company
Fidelity Telephone Company
Goodman Telephone Company, Inc.
Granby Telephone Company
Grand River Mutual Telephone Corporation
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
McDonald County Telephone Company
Mark Twain Rural Telephone Company
Miller Telephone Company
New Florence Telephone Company
New London Telephone Company
Orchard Farm Telephone Company
Oregon Farmers Mutual Telephone Company
Ozark Telephone Company
Peace Valley Telephone Company
Seneca Telephone Company
Steelville Telephone Exchange, Inc.
Stoutland Telephone Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 13th day of January, 2006, to the following parties:

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