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DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
TIME WARNER CABLE INFORMATION)
SERVICES (HAWAII), LLC)
For Approval of Changes to its)
Tariff. Transmittal No. 05-01.)
_____)

DOCKET NO. 05-0290

ORDER NO. 22127

Filed November 17, 2005
At 1:30 o'clock P.M.

for Michen S.U.M. Kau
Chief Clerk of the Commission.

ATTEST: A True Copy
for KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.
Michen S.U.M. Kau

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
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TIME WARNER CABLE INFORMATION)	
SERVICES (HAWAII), LLC)	Docket No. 05-0290
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For Approval of Changes to its)	Order No. 22127
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_____)	

ORDER

By this Order, the commission suspends in part and allows to take effect in part Transmittal No. 05-01 filed by TIME WARNER CABLE INFORMATION SERVICES (HAWAII), LLC ("Applicant" or "Time Warner Cable") on October 26, 2005. Specifically, the commission suspends Time Warner Cable's proposal to withdraw its existing Packaged Local and Interexchange Services Tariff filed with the commission on November 10, 2004 ("Tariff No. 1") and allows Time Warner Cable's Local and Interexchange Services Tariff ("Tariff No. 2") to take effect as proposed, effective from November 27, 2005.

I.

Background

A.

Time Warner Cable

Time Warner Cable holds a certificate of authority ("COA") to provide intrastate telecommunications services within the State of Hawaii ("State") as a reseller and facilities-based

carrier.¹ Time Warner Cable is a member-managed Delaware limited liability company authorized to do business in the State as a foreign limited liability company. Its principal place of business is in Stamford, Connecticut. Time Warner Entertainment Company, L.P., dba Oceanic Time Warner Cable, which provides cable television services in the State, owns one hundred (100) percent of the membership interest in Time Warner Cable. Time Warner Cable is also affiliated with Time Warner Communications of Hawaii, L.P., dba Oceanic Communications, which presently holds a certificate of public convenience and necessity in the State to provide intrastate telecommunications services.²

As explained by the commission in Decision and Order No. 21427:

[Time Warner Cable] intends to provide intrastate telecommunications services within the State as a reseller and facilities-based carrier. Specifically, [Time Warner Cable] intends to provide local and long distance Internet Protocol ("IP") voice services (aka, Voice over Internet Protocol or V[o]IP) targeted to Hawaii customers who reside in Oceanic Time Warner Cable's Road Runner service areas. In the provisioning of these services, [Time Warner Cable] will also be utilizing Time Warner Cable's cable television plant and facilities, as well as its own facilities and equipment.

Initially, [Time Warner Cable] plans to market its services solely to residential customers, and these services will be offered on a flat-rate basis for local and domestic long distance calls. In the provisioning of these services, [Time Warner Cable's] customers will be

¹See Decision and Order No. 21427, filed on October 22, 2004, Docket No. 04-0135.

²See Decision and Order No. 14145, filed on August 17, 1995, in Docket No. 94-0093.

able to call and be called by other IP voice subscribers of [Time Warner Cable]. [Time Warner Cable's] IP voice service subscribers will also have access to the public switched telephone network ("PSTN"), and, thus, will be able to call and be called by anyone connected to the PSTN.

[Time Warner Cable] represents that it will also provide operator services, directory assistance, white page directory lists, enhanced 911 services, outbound 800 toll free calling, international calls, local number portability and access to telecommunications relay services.

Decision and Order No. 21427, at 3 - 4 (footnotes, text, and citations therein omitted).

Tariff No. 1, Time Warner Cable's existing Packaged Local and Interexchange Services Tariff, filed with the commission on November 10, 2004, took effect on December 10, 2004,³ shortly after the commission's issuance of a COA to Time Warner Cable.

The scope of Time Warner Cable's telecommunications services in the State is described in Tariff No. 1 as follows:

SERVICE OFFERING SUMMARY

[Time Warner Cable's] Digital Phone Service is offered solely to residential Customers who are subscribers to Time Warner Cable's Cable Modem Service and/or Standard Cable television service. Customers may subscribe for Service under one of two flat-rate plans both of which will provide unlimited, non-usage-sensitive, non-time-of-day-sensitive local and long distance calling throughout the United States. Service, features and functions will be provided where [Time Warner Cable's] facilities, including, but not limited to, billing and technical capabilities, are available.

³See Order No. 21484, filed on November 30, 2004.

[Time Warner Cable] will offer Digital Phone Service to its Cable Modem Service and Standard Cable television service customers in all Road Runner service areas throughout the State of Hawaii.

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1.2 Definition of Terms

Cable Modem Service - Time Warner Cable's standard high-speed cable modem service marketed as Road Runner High-Speed On-line, EarthLink High Speed Internet and AOL for Broadband services.

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Digital Phone Service - The provision to the Customer of access to [Time Warner Cable's] Internet Protocol voice network and the public switched telephone network for the purpose of sending and receiving calls. This access is achieved through the use of Time Warner Cable's facilities.

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Standard Cable television service - Oceanic Time Warner Cable Basic Service (as defined in 47 U.S.C.A. Sec. 522(3)) together with Oceanic Time Warner Cable Value Services. Value Services include all program channels that are not included in Basic Service, but are not separately offered as per-channel or per-program services. Basic and Value service channels are listed on [Time Warner Cable's] website and literature available at all [Time Warner Cable's] business offices.

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Tariff No. 1 at 7 and 9 - 10.

B.

Transmittal No. 05-01

By Transmittal No. 05-01, filed on October 26, 2005 ("Transmittal No. 05-01"), Time Warner Cable seeks to: (1) withdraw Tariff No. 1; and (2) replace Tariff No. 1 with its

proposed Local and Interexchange Services Tariff ("Tariff No. 2"). As explained by Time Warner Cable:

The purpose of this filing is to withdraw Applicant's existing Hawaii PUC Tariff, which is applicable to its Internet Protocol services (the "VoIP Tariff"), and to replace the VoIP Tariff with Hawaii PUC Tariff No. 2 for Local and Interexchange Services ("Tariff No. 2"). A copy of Applicant's proposed Tariff No. 2 is attached hereto as Exhibit "A".

In Decision and Order No. 21427 in Docket No. 04-0135, the [PUC] granted Applicant a [COA] to provide intrastate telecommunications services in the State as a reseller and a facilities-based carrier. Pursuant to that order, Applicant filed its VoIP Tariff on November 10, 2004. Subsequently, the Federal Communications Commission ("FCC") issued an order preempting state jurisdiction with regard to tariffing and certification of VoIP-based services.⁴ Based upon the FCC's order, Applicant is withdrawing its VoIP Tariff. However, Applicant will continue to maintain its COA and its status as a certificated local exchange carrier subject to the [PUC's] jurisdiction, and will continue to operate accordingly as it develops its telecommunications business activities in Hawaii. Tariff No. 2 is intended to set forth the terms and conditions generally applicable to the PUC regulated local and interexchange services that may be offered by Applicant from time to time.

Time Warner Cable's Transmittal No. 05-01, at 2 (emphasis added) (footnote, citation, and text included herein).

Time Warner Cable: (1) makes its request in accordance with Hawaii Administrative Rules ("HAR") chapter 6-61 and §§ 6-80-39 and 6-80-40; and (2) requests an effective date of

⁴In the Matter of Vonage Holdings Corporation, WC Docket No. 03-211, FCC 04-267, Memorandum Opinion and Order released November 12, 2004 ("Vonage MO&O"). In Paragraphs 32 and 46 of the Vonage MO&O, the FCC stated that "to the extent other entities, such [as] cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order."

November 27, 2005. Time Warner Cable served copies of its Transmittal No. 05-01 upon the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate")(collectively, the "Parties").

II.

Discussion

A.

Tariff No. 1

Time Warner Cable proposes to withdraw its Tariff No. 1, citing Paragraphs 32 and 46 of the Federal Communications Commission's ("FCC") decision in *In re Vonage Holdings Corp.*, FCC 04-0267, Memorandum Opinion and Order, in WC Docket No. 03-211 ("*In re Vonage*"), released November 12, 2004 (the "*FCC's Vonage Order*").

In the *FCC's Vonage Order*, the FCC preempted a Minnesota Public Utilities Commission order that applied Minnesota's traditional telephone company regulations to Vonage Holdings Corporation's ("Vonage") DigitalVoice service (the "*Minnesota Vonage Order*"). The FCC concluded that Vonage's DigitalVoice service, which provides VoIP service and other communications capabilities, could not be separated into interstate and intrastate communications for compliance with Minnesota's requirements, without negating valid federal policies and rules:

31. There is, quite simply, no practical way to sever DigitalVoice into interstate and intrastate communications that enables the Minnesota Vonage Order to apply only to intrastate calling

functionalities without also reaching the interstate aspects of DigitalVoice, nor is there any way for Vonage to choose to avoid violating that order if it continues to offer DigitalVoice anywhere in the world. Thus, to whatever extent, if any, DigitalVoice includes an intrastate component, because of the impossibility of separating out such a component, we must preempt the *Minnesota Vonage Order* because it outright conflicts with federal rules and policies governing interstate DigitalVoice communications.

32. Indeed, the practical inseverability of other types of IP-enabled services having basic characteristics similar to DigitalVoice would likewise preclude state regulation to the same extent as described herein. Specifically, these basic characteristics include: a requirement for a broadband connection from the user's location; a need for IP-compatible [customer premises equipment]; and a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, even video. In particular, the provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication and counsels against patchwork regulation. Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.

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46. For the reasons set forth above [in the *FCC's Vonage Order*], we preempt the *Minnesota Vonage Order*. As a result, the Minnesota Commission may not require Vonage to comply with its certification, tariffing or other related requirements as conditions to offering DigitalVoice in that state. Moreover, for services having the same capabilities as DigitalVoice, the regulations of other states must yield to important federal objectives. To the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.

FCC's *Vonage Order*, at 20 - 21, paragraphs 31 - 32, and 29, paragraph 46 (emphasis added)(footnotes, text, and citations therein omitted).

Time Warner Cable, however, does not explain: (1) whether a practical way exists to separate its VoIP service into interstate and intrastate components; and (2) how its VoIP service contains "basic characteristics" similar to Vonage's DigitalVoice service that will preempt and preclude the commission's regulation of Time Warner Cable's VoIP service. Moreover, the record in Docket No. 04-0135, Time Warner Cable's COA docket, sheds no light on these questions.

Accordingly, the commission finds it prudent to suspend Time Warner Cable's proposal to withdraw its Tariff No. 1, in accordance with HAR § 6-80-40(b).⁵ See also HAR § 6-61-111. Interested persons have the opportunity to file, within twenty (20) days from the date of this Order, motions to intervene or participate in this proceeding, pursuant to HAR § 6-61-57(3)(B).⁶

Within thirty (30) days from the date of this Order, Time Warner Cable shall file with the commission its position statement, supported by affidavit and other evidence, clearly

⁵HAR § 6-80-40(b) states in part: "A telecommunications carrier shall file its tariff for any partially competitive service or noncompetitive service at least thirty days before the effective date of the proposed service. The commission may suspend the operation of the tariff and investigate the justness and reasonableness of the tariff."

⁶HAR § 6-61-57(3)(B) states in part that a timely motion to intervene or participate shall be filed with the commission "[t]wenty days after the commission orders an investigation including an investigation of a tariff change or an initial tariff filing."

explaining its reasons in favor of federal preemption. The Consumer Advocate shall have an opportunity to file a position statement within fifteen (15) days from the date of filing of Time Warner Cable's position statement. Copies of the respective position statements shall be served on the other Parties.

B.

Tariff No. 2

Time Warner Cable's proposed Tariff No. 2 applies to local and interexchange telecommunications services Applicant may choose to offer from time to time within the State. Time Warner Cable is certified by the commission to provide intrastate telecommunications services as a reseller and facilities-based carrier.

The commission will allow Time Warner Cable's Tariff No. 2 to take effect, as proposed, effective from November 27, 2005.⁷

⁷Time Warner Cable's proposed Tariff No. 2, similar to its Tariff No. 1: (1) includes waiver of liability, duty to defend, indemnity, and hold harmless provisions; and (2) provisions assigning legal fees and court costs. The commission notes that in the event of a conflict between any provision of Time Warner Cable's Tariff No. 2 and State law, State law shall prevail. See Decision and Order No. 21427, Ordering Paragraph 3, at 9 - 10 (in the event of a conflict between any of Time Warner Cable's tariff provisions and State law, State law shall prevail).

III.

Orders

THE COMMISSION ORDERS:

1. Applicant's Transmittal No. 05-01, filed on October 26, 2005, is suspended in part and allowed to take effect in part, consistent with the terms of this Order. Specifically: (A) Applicant's proposal to withdraw its Tariff No. 1 is suspended; and (B) Applicant's Tariff No. 2 is allowed to take effect, as proposed, effective from November 27, 2005.

2. Any interested person seeking to intervene or participate in this proceeding shall file a timely motion with the commission, within twenty (20) days from the date of this Order, pursuant to HAR § 6-61-57(3)(B), with copies served on each of the Parties. Motions to intervene or participate shall comply with the applicable requirements of HAR §§ 6-61-55 and 6-61-56 of the commission's *Rules of Practice and Procedure*.


3. Unless ordered otherwise: (A) within thirty (30) days from the date of this Order, Applicant shall file with the commission its position statement, supported by affidavit and other evidence, clearly explaining its reasons in favor of federal preemption. Applicant's position statement shall include an explanation of: (A) whether a practical way exists to separate its VoIP service into interstate and intrastate components; and (B) how its VoIP service contains "basic characteristics" similar to Vonage's DigitalVoice service that will preempt and preclude the commission's regulation of Time Warner Cable's VoIP service.

4. Unless ordered otherwise, the Consumer Advocate shall have an opportunity to file a position statement within fifteen (15) days from the date of filing of Applicant's position statement.

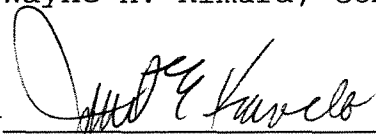
5. Copies of the respective position statements shall be served on the other Parties.

DONE at Honolulu, Hawaii November 17, 2005.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Michael Azama
Commission Counsel

TWCIS.05-01.cs

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22127 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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for Karen Higashi

DATED: November 17, 2005