

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

DECISION AND ORDER NO. 22257

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

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K. Higashi

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Docket No. 05-0290

Decision and Order No. 22257

DECISION AND ORDER

By this Decision and Order, the commission waives, pursuant to Hawaii Administrative Rules ("HAR") § 6-80-135(a), the requirement for TIME WARNER CABLE INFORMATION SERVICES (HAWAII), LLC ("TWCIS" or "Time Warner Cable") to file a tariff for its Digital Phone Service, based on the present facts and circumstances of this case.

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.<sup>1</sup> Time Warner Cable is a member-managed Delaware limited liability company authorized to do business in the State as a

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

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 percent (100%) 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.<sup>2</sup>

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 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.

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<sup>2</sup>See Docket No. 94-0093, Decision and Order No. 14145, filed on August 17, 1995.

[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,<sup>3</sup> 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.

[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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<sup>3</sup>See Order No. 21484, filed on November 30, 2004.

## 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.

. . . . .

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.

. . . . .

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.

. . . . .

Tariff No. 1 at 7 and 9 - 10.

B.

### Transmittal No. 05-01

On October 26, 2005, Time Warner Cable filed Transmittal No. 05-01 with a proposed effective date of November 27, 2005.<sup>4</sup> By Transmittal No. 05-01, Time Warner Cable

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<sup>4</sup>Time Warner Cable's Transmittal No. 05-01, Exhibit A, Verification, and Certificate of Service, filed on October 26, 2005 (collectively, "Transmittal No. 05-01").

Time Warner Cable served copies of its transmittal upon the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy.

sought to: (1) withdraw Tariff No. 1; and (2) replace Tariff No. 1 with its proposed 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.<sup>5</sup> 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).

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<sup>5</sup>In 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."

On November 17, 2005, the commission suspended in part and allowed to take effect in part Transmittal No. 05-01.<sup>6</sup> Specifically, the commission: (1) suspended 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"), relating to its Voice over Internet Protocol ("VoIP") service; and (2) allowed Time Warner Cable's Local and Interexchange Services Tariff ("Tariff No. 2") to take effect as proposed, effective from November 27, 2005.<sup>7</sup>

Because Time Warner Cable, in Transmittal No. 05-01, did not adequately explain the basis for its request to withdraw Tariff No. 1, the commission instructed Time Warner Cable to file by December 19, 2005, a position statement, with affidavit and other evidence, clearly explaining its reasons in support of the proposed withdrawal.<sup>8</sup>

On December 19, 2005, Time Warner Cable filed its Position Statement and other supporting documents in compliance with Order No. 22127.<sup>9</sup> Time Warner Cable reiterates its request for commission approval to withdraw its Tariff No. 1.

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<sup>6</sup>Order No. 22127, filed on November 17, 2005.

<sup>7</sup>Id.

<sup>8</sup>Id.

<sup>9</sup>Position Statement of Time Warner Cable, Affidavit of Kiman Wong, Exhibits A and B, and Certificate of Service, filed on December 19, 2005 (collectively, "Position Statement").

## II.

### Discussion

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:

29. . . . The [FCC] has previously recognized the significant efforts and inefficiency to attempt to separate out an intrastate component of other services for certain regulatory purposes where the provider, like Vonage here, *had no service-driven reason to incorporate such capability into its operations*. We have declined to require such separation in those circumstances, treating the services at issue as jurisdictionally interstate for the particular regulatory purpose at issue and preempting state regulation where necessary. For example, in preempting a state regulation specifying default per line blocking of a customer's "Caller ID" for intrastate calls based on "impossibility," the [FCC] found that "we need not demonstrate absolute future impossibility to justify federal preemption here. We need only show that interstate and intrastate aspects of a

regulated service or facility are inseverable as a practical matter in light of prevailing technological and economic conditions.

. . . .

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.

. . . .

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 19 - 21, ¶¶ 29 and 31 - 32, and 29, ¶ 46 (emphasis added) (footnotes, text, and citations therein omitted, italicized in original).

The FCC's Vonage Order is presently on appeal before the United States Court of Appeals for the Eighth Circuit ("8<sup>th</sup> Circuit Court").<sup>10</sup> On January 12, 2006, oral arguments were held before a three (3)-member panel of the 8<sup>th</sup> Circuit Court.<sup>11</sup>

Concomitantly, the FCC, in Paragraph No. 2 of its Vonage Order, noted that the scope and extent of the regulatory obligations of VoIP service providers is the subject of another pending proceeding before the FCC, In re IP-Enabled Services, WC Docket No. 04-36.<sup>12</sup>

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<sup>10</sup>Minnesota Public Util. Comm'n v. Fed. Comm. Comm'n, 8<sup>th</sup> Cir., Case No. 05-01069 ("Minnesota v. PUC"). Petitioners are the Minnesota Public Utilities Commission, the Public Utilities Commission of Ohio, the Public Service Commission of the State of New York, and the National Association of State Utility Consumer Advocates. Respondents are the FCC and the United States of America. Intervenors include the National Association of Regulatory Utility Commissioners.

<sup>11</sup>*Extent of State Preemption at Issue in VoIP Case*, Telecommunications Reports, Jan. 12, 2006, at 1 - 4.

<sup>12</sup>In re IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, released March 10, 2004 ("In re IP-Enabled Services"). See also In re IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers, WC Dockets No. 04-36 and No. 05-196, First Report and Order and Notice of Proposed Rulemaking, released June 3, 2005.

In the commission's view, the appropriate regulatory treatment of VoIP service is presently in a state of uncertainty and flux. As the FCC readily acknowledges:

. . . The proper statutory classification of VoIP services raises complex technical and policy issues, and the resolution of the classification question (i.e., telecommunications vs. information service) could have significant and far-reaching consequences for the industry and the development of the Internet. The FCC has initiated a comprehensive rulemaking proceeding to explore the regulatory questions raised by VoIP technology, but it has not yet reached a final determination on how VoIP services should be classified under the [federal] Communications Act. See IP-Enabled Services, 19 FCC Rcd 4863 (2004) (IP NPRM).

Minnesota PUC v. FCC, Answering Brief of Respondents FCC and the United States of America, dated December 1, 2005, at 5. See also FCC Vonage Order, at 2, ¶ 2; at 8, ¶ 14 n.46; and at 12 - 15, ¶¶ 20 - 22.

Given this present state of uncertainty with respect to the appropriate regulatory treatment of VoIP service, the commission, in this instance, will waive the requirement for Time Warner Cable to file a tariff for its Digital Voice service (i.e., Tariff No. 1), pursuant to HAR § 6-80-135(a).<sup>13</sup> The commission, however, will await further clarification and guidance from the pending Minnesota PUC v. FCC and In re IP-Enabled Services proceedings on the states' role and

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<sup>13</sup>HAR § 6-80-39 requires a telecommunications carrier to file a tariff with the commission before it offers, initiates or provides any telecommunications service, whether at wholesale or retail. Conversely, HAR § 6-80-135(a) authorizes the commission to exempt or waive certain requirements set forth in HAR chapter 6-80, including HAR § 6-80-39, upon a determination that an exemption or waiver is in the public interest.

responsibilities over VoIP service, consistent with the public interest.<sup>14</sup>

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. The requirement for Time Warner Cable to file a tariff for its Digital Phone Service (Tariff No. 1) under HAR § 6-80-39 is waived, pursuant to HAR § 6-80-135(a) and the present facts and circumstances of this case. Accordingly, Time Warner Cable may withdraw its Tariff No. 1.

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<sup>14</sup>Time Warner Cable makes the following comments in support of its request to withdraw its Tariff No. 1:

1. "Because TWCIS currently provisions its Digital Phone service to a fixed location, unless the subscriber violates the terms of its service agreement, TWCIS is able to provide Enhanced 911 service, which some other types of VoIP providers are presently unable to do." Affidavit of Kiman Wong, at 2, ¶ 8. See also Time Warner Cable's Position Statement, at 9. "TWCIS should not be penalized with an increased regulatory burden because it has responsibly deployed its VoIP service in a manner that supports these vital public safety capabilities." Time Warner Cable's Position Statement, at 9.
2. If "TWCIS is not permitted to withdraw its tariff, it will be the only provider of VoIP service in Hawaii providing VoIP service under a tariff. Numerous other providers of VoIP service, including Verizon and PacificLightNet [Communications], offer their services in Hawaii. To TWCIS' knowledge, none of them has filed a tariff for these VoIP services." Time Warner Cable's Position Statement, at 9 (footnotes and text therein omitted). See also Affidavit of Kiman Wong, at 2 - 3, ¶ 9. Time Warner Cable attaches as exhibits to its Position Statement copies of pages from Verizon's and Pacific LightNet Communication's ("PLC") websites, which describe their respective broadband service offerings, Verizon VoiceWing and PLC's 808NetFone, respectively.

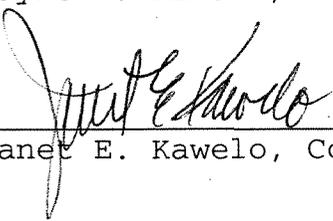
2. The commission reserves the right to re-visit the waiver granted, and the issues addressed, in this Decision and Order upon the resolution of Minnesota PUC v. FCC, In re IP-Enabled Services, or any other relevant VoIP-related proceedings.

DONE at Honolulu, Hawaii FEB - 1 2006.

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

05-0290.cs

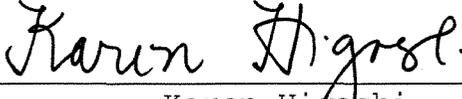
CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22257 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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DATED: FEB - 1 2006