

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Time)
Warner Cable Information Services) Case No. 03-2229-TP-ACE
(Ohio), LLC to Offer Local and)
Interexchange Voice Services.)

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**MEMORANDA CONTRA OF TIME WARNER CABLE
INFORMATION SERVICES (OHIO), LLC**

I. Introduction

Pursuant to Rule 4901-1-35 of the Ohio Administrative Code, Time Warner Cable Information Services (Ohio), LLC ("TWCIS" or "the Applicant") submits this Memoranda Contra to the applications for rehearing of SBC Ohio, Cincinnati Bell Telephone Company ("CBT"),¹ and the Ohio Telecom Association ("OTA").

The Applicant proposes to bring to consumers in Ohio a competitive, facilities-based, residential phone offering using Voice over Internet Protocol ("VoIP") technology. Despite regulatory uncertainty relating to VoIP-based services, a pending investigation (Case No. 03-950) before this Commission relating to the appropriate regulatory treatment of such services, and a forthcoming investigation of VoIP technology and its appropriate regulatory treatment by the Federal Communications Commission, TWCIS filed an Application, along with requests for waivers of Commission rules where its services may not be precisely in line with existing legacy regulatory regimes. Recognizing that the threshold issue in Case No. 03-950 was the Commission's jurisdiction over VoIP providers—an issue that has yet to be decided—the Commission, in this case, did not assert jurisdiction over the services that TWCIS proposes to

¹ As a threshold matter, while acknowledging in footnote 8 of its Application for Rehearing that the Office of Ohio Consumers' Counsel moved to intervene, CBT failed to certify that it served the Office of Consumers' Counsel as one of the parties of record in this case with its Application for Rehearing as mandated by Section 4903.10, Revised Code. Accordingly, the Commission should dismiss CBT's Application for Rehearing because it is not in compliance with Ohio statutory requirements.

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provide, did not conclude that the proposed service constituted telephone service, and did not grant the requested waivers. Instead, the Commission acknowledged that TWCIS was acting in good faith by notifying the Commission of its proposal to offer VoIP-based services to the public and to substantially comply with Commission rules. Instead of making specific determinations and drawing specific conclusions in this case that would affect the entire industry, the Commission authorized TWCIS to operate as described in its application, contingent upon the outcome of Case No. 03-950. The Commission's approach in this case is both lawful and reasonable, and TWCIS urges the Commission to affirm its December 17, 2003 Entry and deny the Applications for Rehearing.

II. Argument

A. The Commission Correctly Reserved The Jurisdictional Issue Until Case No. 03-950 Can Be Decided.

At pp. 2-6 of its Application for Rehearing, CBT claims that the Commission erred by not asserting jurisdiction over TWCIS and its proposed services. Relying upon federal law and federal definitions, CBT claims that the services proposed by the Applicant make it a "telephone company."

First, the Commission did not err in declining to assert jurisdiction over TWCIS and its services. The Commission carefully reserved this determination for Case No. 03-950 and merely subjected TWCIS to the outcome of Case No. 03-950. Case No. 03-950 is an industry-wide generic investigation where many different stakeholders have submitted comments. The Commission is analyzing those comments. There is nothing unreasonable or unlawful about this reasoned approach.

Additionally, whether the services TWCIS proposes to provide are services that would render TWCIS a “telephone company,” is not a question raised by TWCIS’ application or this proceeding. TWCIS filed its application and agreed to be bound by the rules and service requirements applicable to telephone companies in order to enter the Ohio market and begin providing customers with a competitive choice in phone service. Where its proposed services do not fit squarely within the confines of rules adopted with legacy services in mind, TWCIS respectfully requested waivers of such rules. TWCIS’ approach in this regard was intended to permit it to enter the market and begin serving customers during the necessary pendency of a regulatory proceeding or proceedings examining and determining the proper classification of VoIP-based services. Were TWCIS to be required to wait until such proceedings are concluded before entering the market, it would be prevented from providing customers with an innovative, competitive service for an indefinite period of several months and perhaps years. Rather than simply entering the market without any Commission countenance or approval, TWCIS took the only step it could—it requested that the Commission approve its application without the necessity of determining the ultimate jurisdictional nature of the service at issue. When the jurisdictional issue is resolved, TWCIS will abide by the applicable rulings. Until then, however, it should not be prevented from providing service to consumers in accordance with Commission rules, as it proposes to do.

B. The Commission Was Within its Authority to Authorize TWCIS to Provide Services Pending Resolution of Docket 03-950.

At pp. 7-9 of its Application for Rehearing, CBT argues that the Commission acted unreasonably and unlawfully by authorizing TWCIS to provide telephone service in Ohio without a certificate. The Commission, however, did not authorize TWCIS to provide regulated telephone service in Ohio. Rather, the Commission carefully reserved the question as to whether

the proposed service constitutes a regulated telephone service for determination in Case No. 03-950 and authorized TWCIS to provide the IP-based voice services described in its application. In doing so, the Commission committed no error. It is squarely within the Commission's statutory authority to permit TWCIS to provide the proposed services in accordance with Commission rules while it undertakes the broader question of the Commission's jurisdiction over these services.

CBT argues that regardless of whether the Commission has jurisdiction over TWCIS' proposed services, the December 17, 2003 Entry was in error. CBT states that if the Commission does not have jurisdiction over such services, then "it had not power to authorize TWCIS to do anything and the Entry is a nullity." Similarly, if the Commission does have jurisdiction over such services, CBT argues, then the Commission could not authorize TWCIS to provide service in Ohio without a certificate. The Commission's determination to defer consideration of whether the services at issue constitute regulated telecommunications until resolution of the 03-950 docket and to permit TWCIS' market entry in the meantime, however, was entirely lawful.

If the Commission ultimately determines in the 03-950 docket that the services at issue fall outside of its jurisdiction, then the December 17, 2003 Entry would in no event be a nullity. Moreover, in such a circumstance, it is clear that there would have been no justifiable reason to prevent, as CBT would have the Commission do, TWCIS' entry into the market. During the pendency of the 03-950 docket, TWCIS will be, in effect, voluntarily submitting to the Commission's jurisdiction until the jurisdictional classification of the proposed services is resolved. If the Commission determines that a certificate is necessary, then the Commission would be required to determine whether TWCIS is qualified to hold a certificate. Until such

time, however, the Commission is within its power to permit TWCIS to provide the proposed services, in accordance with Commission rules, with or without a certificate.

Again, were TWCIS to be required to wait until the regulatory classification issues are resolved before entering the market, it effectively would be prevented from providing customers with a facilities-based, competitive phone service for an indefinite period of time. Indeed, had TWCIS determined to enter the market without Commission approval, it would likely be the subject of a complaint proceeding brought by other providers for offering phone services to Ohio consumers without proper authorization from the Commission. To avoid such a scenario, TWCIS sought Commission authority to enter the market, which authority the Commission is entitled to grant while the jurisdictional nature of the service is under consideration.

Finally, TWCIS submits that the December 17, 2003 Entry authorizes the same type of market entry permitted by the Commission in the Verizon Select Services Case, which entry was not contested by CBT or any of the other applicants for rehearing of this case. CBT argues that this case is distinguishable from the Verizon case because Verizon proposed to offer “only a customized voice over broadband product to business customers,” whereas TWCIS proposes “a mass-market residential product, using ordinary telephone equipment over cable television lines.” First, although it is true that TWCIS proposes to offer service only to residential customers, it is not clear why this distinction should weigh against TWCIS. Indeed, both federal and state regulators have long held that it is squarely within the public interest to permit competitive entry into residential phone markets. Second, it is not at all clear that Verizon’s approved offering utilizes equipment any different from “ordinary telephone equipment.” Finally, it is not clear how the provision of service over “cable television lines” should cause the

Commission to treat TWCIS different from Verizon, which provides its VoIP-based services over a broadband connection, as does TWCIS.

C. The Commission Did Not Err In Permitting TWCIS To Provide Service Prior To The Resolution of Case No. 03-950.

At pp. 9-10 of its Application for Rehearing, CBT argues that the Commission acted unlawfully and unreasonably by allowing TWCIS to go into business before addressing the merits of the Application and the waiver requests and issuing a certificate. Again, the Commission was careful not to make a determination in this case as to whether the proposed service constituted telephone service or whether the Commission had jurisdiction, but rather reserved the question of whether or not the provision of VoIP service constituted telephone service for Case No. 03-950. TWCIS requested authority from the Commission to enter the market, regardless of the resolution of the ultimate question of whether the Commission has jurisdiction over VoIP-based services of the type that TWCIS wishes to offer. It is entirely within the Commission's authority to permit TWCIS' entry into the market—with or without a certificate—pending resolution of the jurisdictional question, and CBT has not demonstrated otherwise. Additionally, it was entirely reasonable for the Commission to do so, particularly given the public interest benefits that would result from the offering of a competitive, facilities-based service in the residential phone market in Ohio.

D. The Commission Is Not Required To Grant Intervention Or Expressly Address The Objections Of Intervenors In Certificate Cases.

At p. 11 of its Application for Rehearing, CBT argues that the Commission should have granted the various motions to intervene in its December 17, 2003 Entry. SBC Ohio also argues that the Entry failed to address and grant its motion to intervene.

There is no requirement for the Commission to grant intervention. Rule 4901:1-6-9(J)(1) of the O.A.C. provides that interested entities who can show good cause why such application should not be granted must file with the Commission a written statement detailing the reasons as well as a motion to intervene, within 15 days after the application is docketed. The Commission made no finding in its December 17, 2003 Entry that the interested entities showed good cause why the application should not be granted. The Commission did not act unreasonably and unlawfully by not addressing the motions to intervene or the objections.

E. The Commission Did Not Provide TWCIS With Unjustified Regulatory Advantages.

Ad pages 11-13 of its application for rehearing, CBT argues that the Commission has implicitly acknowledged that TWCIS will not be competing on an equal footing with other telephone companies. This is simply not true.

The waivers that the applicant sought in this case are virtually identical to those sought by Verizon Select Services in Case No. 03-581-TP-ACE where the applicant proposed offering a service to business customers using VoIP technology. None of the intervenors in this case has argued that Verizon was given an unjustified regulatory advantage and, indeed, none has shown that TWCIS would be gaining a regulatory advantage by entering the Ohio market as proposed. TWCIS has agreed to abide by all rules and regulations to which telephone companies in Ohio are subject. Where its proposed service, which uses a different technology and platform than service providers that have traditionally been subject to the Commission's rules, does not fit squarely within existing, legacy rules applicable to those service providers, TWCIS requested relief from those requirements. The Commission acted in a lawful and reasonable manner in permitting TWCIS to provide service as proposed pending resolution of its generic VoIP docket.

Indeed, the Commission has reasonably and lawfully treated TWCIS in the same manner as it treated Verizon Select Services.

Moreover, CBT's unfounded allegation that TWCIS would conduct "regulatory arbitrage" is entirely unjustified and contradicted by TWCIS' own statements in its application, in its December 1, 2003 filing, and herein. TWCIS has noted its intent to pass and terminate traffic in accordance with existing intercarrier compensation regimes and has given no indication that it would conduct its business in any manner that would raise "state and local tax implications," as alleged by CBT. Indeed, TWCIS has gone to great lengths to ensure that its provision of VoIP-based services is accomplished with Commission approval and, where at all possible, in accordance with Commission rules.

F. The Commission Did Not Ignore The Equal Access Rules.

At pages 13-15 of its application for rehearing, CBT argues that the Commission has acted unlawfully and unreasonably by allowing TWCIS to ignore the 1+ equal access rules. CBT is simply incorrect.

It has yet to be determined whether the VoIP-based services that TWCIS proposes to offer constitute "basic local exchange" services. Until such a determination is made, however, TWCIS made the determination to apply to the Commission and abide by the rules applicable to providers of such basic local exchange services. As described in its application, TWCIS proposes to provide customers with access to toll pre-subscription (vis-à-vis TWCIS' own toll services), access to an interexchange or toll provider (either TWCIS itself or through another provider via dial-around or calling card services), and access to networks of other telephone companies (through dial-around and calling card services and through the ability of customers to call and be called by customers served by other service providers). See Section

4927.01(A)(1)(h), Revised Code. Moreover, this is precisely what Verizon Select Services, Inc. proposed and received authority for, without objection by any of the present intervenors, in Case No. 03-581. The Commission found no violation of Section 4927.01, Revised Code where Verizon Select Services proposed to offer a bundled service in Case No. 03-581 and similarly should find no violation of Section 4927.01, Revised Code in this case. CBT's application for rehearing must be denied.

G. The Commission Did Not Grant Waivers In Its December 17, 2003 Entry.

Both SBC Ohio and OTA² argue that the Commission granted TWCIS requested waivers but not the same waivers to SBC Ohio or to all OTA members with operations in the Applicant's serving area. SBC Ohio and the OTA are mistaken. The Commission did not grant any waivers to TWCIS, but rather deferred consideration of the need for waivers and whether such waivers would be justified until resolution of Docket 03-950. In doing so, the Commission acted within its authority. Further, neither SBC Ohio nor the OTA have submitted requests for waivers in Case No. 03-2229. There was simply no duty imposed upon the Commission to address the application of waivers to other competing telephone companies.

H. The Commission Did Not Need To Issue A Concurrent Order Addressing Appropriate Compensation For Exchange Of Traffic Between TWCIS And OTA Members.

The OTA claims at pp. 3-4 of its application for rehearing that the Commission erred in failing to issue a concurrent order addressing the appropriate compensation for exchange of traffic between the Applicant and OTA members. In its November 20, 2003 objections, the OTA raised the issue of compensation arrangements for VoIP traffic. Similarly, CBT, at page 13 of its application for rehearing, raises unfounded questions regarding TWCIS' intent to conduct regulatory arbitrage with respect to its proposed service offering.

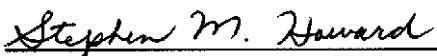
² Sprint did not join with other OTA members in this filing.

As was stated in TWCIS' December 1, 2003 Memorandum Contra, any recommendation asking for a concurrent order addressing appropriate compensation arrangements relating to TWCIS' proposed VoIP-based services is unnecessary. As it made clear in its December 1, 2003 filing, TWCIS intends to pass and terminate traffic to the public switched telephone network in accordance with existing inter-carrier compensation arrangements, and any future concerns about inter-carrier compensation issues are properly addressed not in a certification proceeding, but rather, in a complaint proceeding. See the December 1, 2003 Memorandum Contra of TWCIS at pp. 5-6. Indeed, there is simply no basis for any allegation that TWCIS would act in any way unlawfully with respect to intercarrier compensation, and OTA's and CBT's arguments must be rejected.

III. Conclusion

None of the grounds raised by CBT, SBC Ohio, or the OTA warrant a grant of rehearing. Each of these applications for rehearing should be denied and the Commission should affirm its December 17, 2003 Entry.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memoranda Contra of the applicant was served upon the following persons by first-class U.S. mail, postage pre-paid, this 26th day of January, 2004:

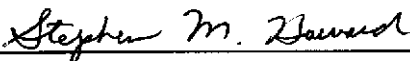
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