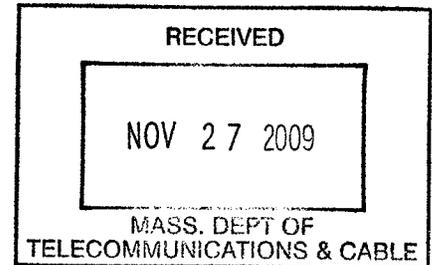


60 Columbus Circle  
New York, NY 10023  
Tel 212-364-8482  
Fax 704-973-6239  
julie.laine@twcable.com

*Julie P. Laine*  
Group Vice President & Chief Counsel, Regulatory



November 25, 2009



**VIA OVERNIGHT MAIL**

Michael A. Isenberg  
Director  
Competition Division  
Massachusetts Department of Telecommunications and Cable  
Two South Station  
Boston, MA 02110

**Re: Department Letter Dated October 28, 2009**

Dear Mr. Isenberg:

On behalf of Time Warner Cable, I am writing in response to your letter to John Mucha, dated October 28, 2009, in which you state the Department's intention to regulate the interconnected Voice over Internet Protocol ("VoIP") services offered by TWC Digital Phone LLC ("TWC") in Massachusetts as a traditional telephone service. As far as TWC is aware, complying with the terms of the Department's letter would make TWC the only VoIP provider subject to such regulation in Massachusetts. In any event, for the reasons discussed below, TWC believes that the Department lacks the authority to impose tariffing and registration requirements on its interconnected VoIP service.

By way of background, TWC began offering interconnected VoIP services in Massachusetts in 2007. TWC offers two such services in Massachusetts—Digital Phone for residential customers and Business Class Phone for business customers. These services offer competitive, facilities-based alternatives to the traditional landline telephone services that for many years represented the only service option for consumers. In providing these services, TWC is subject to significant regulation by the Federal Communications Commission ("FCC"). Among other things, under federal law, TWC must provide E911 service; comply with the Communications Assistance for Law Enforcement Act ("CALEA"); contribute to the federal universal service support mechanisms; comply with regulations governing carrier proprietary network information; provide access to telecommunications relay services ("TRS") and contribute to the TRS fund; comply with local number portability requirements; and pay annual regulatory fees. TWC also operates in a manner consistent with state regulations applicable to competitive local exchange carriers. For example, TWC complies with state and federal consumer protection requirements relating to slamming, billing, and customer complaints. TWC also remits the Department's annual regulatory assessment based upon its retail interconnected VoIP revenues. In addition, the highly competitive environment compels TWC at all times to provide high-quality service to customers pursuant to reasonable terms and conditions.

In light of its successful operation in the state thus far, TWC was surprised to learn that the Department, without commencing a proceeding and developing a factual and legal record on the subject, suddenly has determined that TWC will be found in violation of state rules if it does not submit to regulation as a telephone service and file a tariff and registration statement. The Department bases this action on its “opinion” that any “fixed VoIP telephone service” like TWC’s is subject to the Department’s regulatory authority. That position, however, conflicts with federal law and policy.

The FCC has sought to establish a uniform, national regulatory framework for interconnected VoIP services, whether fixed or nomadic. In its *Vonage Order*, the FCC declared its goal to avoid the “patchwork regulation” of such services, under which regional and national providers finally challenging incumbent LECs’ entrenched dominance would “have to satisfy the requirements of more than 50 jurisdictions with more than 50 different sets of regulatory obligations.”<sup>1</sup> While the FCC emphasized that “states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices . . . and generally responding to consumer inquiries and complaints,”<sup>2</sup> it specifically sought to preempt state “economic regulations”—including, in particular, the type that the Department would now impose on TWC.

This preemption ruling did not hinge on whether the interstate and intrastate portions of a call could be separated, as the Department has incorrectly asserted elsewhere.<sup>3</sup> Rather, the FCC concluded that the imposition of certification and tariffing requirements “could stifle new and innovative services” and thus impede the development of competition, contrary to the FCC’s open-entry policy for non-dominant providers, the “express mandates and directives” of the Telecommunications Act of 1996, and “the pro-competitive deregulatory policies the [FCC] is striving to further.”<sup>4</sup> Thus, the FCC relied on its “authority to preempt state regulation that would thwart or impede the lawful exercise of federal authority over the interstate component of the communications” to preempt state public utility regulation of VoIP services.<sup>5</sup>

---

<sup>1</sup> *Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm’n*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶¶ 32, 41 (2004) (“*Vonage Order*”), *aff’d*, *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007)).

<sup>2</sup> *Id.* ¶ 1.

<sup>3</sup> See Letter from Michael A. Isenberg, Director, Competition Division, Massachusetts Department of Telecommunications and Cable, to Stacey L. Parker, Senior Director, Regulatory Affairs, Comcast Cable Communications, Inc., at 2 (Nov. 14, 2008).

<sup>4</sup> *Vonage Order* ¶¶ 20-21, ¶¶ 33-37.

<sup>5</sup> *Id.* ¶ 19; see also *id.* (noting that preemption is appropriate where “state regulation would negate[] the exercise by the FCC of its own lawful authority”) (quoting *Public Serv. Comm’n of Md. v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990)) (internal quotation marks omitted) (brackets in original).

Although the Department has argued that this preemption ruling does not apply to fixed VoIP services,<sup>6</sup> that is incorrect. At no time—either in the *Vonage Order* or afterwards—has the FCC limited the scope of preemption in this manner. To the contrary, the FCC emphasized that preemption would apply to *any* VoIP service that (1) requires a broadband connection from the user’s location; (2) requires IP-compatible customer premises equipment (“CPE”); and (3) offers a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including the ability to originate and receive voice communications and access other features and capabilities, even video.<sup>7</sup> The FCC recognized that state entry regulation of any service with these basic characteristics risked “‘negating’ federal policy and rules,”<sup>8</sup> which it stated includes VoIP services “offered or planned by facilities-based providers.”<sup>9</sup>

Accordingly, 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.”<sup>10</sup> To remove any conceivable doubt, Commissioner Abernathy emphasized the Commission’s intention to make clear that “all VoIP services that integrate voice communications capabilities with enhanced features and entail the interstate routing of packets—whether provided by application service providers, cable operators, LECs, or others—will not be subject to state utility regulation.”<sup>11</sup>

In addition to conflicting with the *Vonage Order*, regulating TWC’s VoIP service as a telephone service under Massachusetts law would risk encroaching on the FCC’s prerogative to classify interconnected VoIP services. In its *IP-Enabled Services* proceeding, the FCC has asserted exclusive authority to achieve a delicate balance between competing interests in fashioning a regulatory scheme for VoIP services, imposing a series of discrete requirements on interconnected VoIP providers but refraining from resolving definitively their appropriate statutory classification. In that proceeding, the Department has conceded that the classification of VoIP remains an open question.<sup>12</sup> Accordingly, unless and until the FCC affirmatively rejects an information service classification for VoIP services like TWC’s, the imposition of any public utility regulations by the Department would pose a significant risk of precipitating a conflict, with the attendant costs of litigation that inevitably would follow.

TWC is eager to engage in a productive dialogue with the Department concerning these issues and to provide additional information regarding its interconnected VoIP service, and we

---

<sup>6</sup> See, e.g., Reply Comments of the Massachusetts Department of Telecommunications and Cable, WC Docket No. 05-337, at 4 n.10 (FCC filed Dec. 22, 2008) (“Mass. Dep’t FCC Reply Comments”).

<sup>7</sup> *Vonage Order* ¶ 32.

<sup>8</sup> *Id.* ¶ 23 (quoting *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986)).

<sup>9</sup> *Id.* ¶ 25 n.93.

<sup>10</sup> *Id.* ¶ 32 (emphasis added); *id.* ¶ 46 (same).

<sup>11</sup> *Id.*, Separate Statement of Commissioner Kathleen Q. Abernathy.

<sup>12</sup> Mass. Dep’t FCC Reply Comments at 3.

look forward to working with the Department to address its concerns. In the meantime, however, TWC believes it may lawfully provide interconnected VoIP service in Massachusetts without being required to file a tariff or registration statement, and that the Department has no authority to require it to do otherwise. The fact that major service providers including Comcast and Verizon are offering fixed VoIP services without having filed tariffs undermines the Department's assertion that TWC must submit a tariff. At a minimum, TWC asks that the Department extend the 30-day deadline set forth in its October 28 letter as necessary to permit further discussions on these issues.

Sincerely,



Julie P. Laine