

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of)	
)	
Petition of Time Warner Cable for Declaratory)	WC Docket No. 06-55
Ruling That Competitive Local Exchange)	
Carriers May Obtain Interconnection Under)	
Section 251 of the Communications Act of 1934,)	
as Amended, to Provide Wholesale)	
Telecommunications Services to VoIP Providers)	
)	
Petition of Time Warner Cable for Preemption)	WC Docket No. 06-54
Pursuant to Section 253 of the Communications)	
Act, as Amended)	

REPLY COMMENTS OF



NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Richard L. Cimerman
Vice President
State Government Affairs

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Daniel L. Brenner
Neal M. Goldberg
Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903
(202) 775-3664

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments in support of the above-captioned petitions filed by Time Warner Cable (“TWC”).

INTRODUCTION & SUMMARY

In both its Petition for Declaratory Ruling and its Petition for Preemption, TWC sought Commission relief from actions by state commissions that had the effect of inhibiting – indeed preventing – the continued development of facilities-based voice competition in certain areas of those states. The Commission must take prompt action and grant these petitions.

The initial comments in this proceeding demonstrate broad support by a variety of parties for the TWC petitions.¹ The relatively few opposition comments – comments filed by rural local exchange carriers (or their consultants) fearful of competition or state commissions concerned about maintaining their ability to limit competition in certain areas of their states – do not withstand scrutiny.²

Accordingly, the Commission should act expeditiously to grant the TWC petitions. That action will help insure the continued development of voice competition – via either interconnected Voice-over-Internet Protocol (“VoIP”) or circuit-switched service. It is axiomatic that the right of competitive local exchange carriers (“CLECs”) to interconnect with incumbent local exchange carriers (“ILECs”), whether as certified carriers themselves, through affiliated certified carriers, or through wholesale arrangements with unaffiliated or third-party telecommunications carriers, is critical to voice competition. States should not be permitted to second guess and/or dictate the entry strategies used by interconnected VoIP providers or other CLECs.³

¹ See Comments of Comcast; Advance-Newhouse Communications; the South Carolina Cable Television Association; AT&T; Verizon; Sprint Nextel; the VON Coalition; Global Crossing; Level 3; Neutral Tandem; Comments of Broadwing Communications, Fibertech Networks, Integra Telecom, Lightyear Communications, McLeodUSA Telecommunications Services, MPower Communications, Norlight Telecommunications, and Pac-West Telecomm; Joint Comments of BridgeCom International, Broadview Networks, CTC Communications, Nuvox Communications, Xspedius Communications and COMPTTEL; Comments of Alpheus Communications, Paetec Communications and Telepacific Communications. See also Comments of Pine Tree Networks (as long as network costs are appropriately assessed and recovered, “the method by which a competitor enters ...any ILEC territory ... should not be an issue.”).

² See Comments of the South Carolina Public Service Commission; South Carolina Telephone Coalition; Home Telephone Company, Inc. and PBT, Inc.; Nebraska Public Service Commission; Southeast Nebraska Telephone Company et al.; Iowa Utilities Board; Iowa RLEC Group; South Dakota Telecommunications Association, et al.; Comments of the Independent Telephone and Telecommunications Alliance, National Exchange Carrier Association, National Telecommunications Cooperative Association, and OPASTCO; Qwest Communications; TCA, Inc.; and John Staurulakis, Inc. See also Comments of the Pennsylvania PUC (since all but two states agree with TWC’s legal interpretation, preemption may not be warranted; interpretation should be emphasized over preemption).

³ Any Commission conclusions with respect to CLEC interconnection rights should apply to any of the interconnection approaches discussed above.

I. STATE COMMISSION ACTION CAN THWART DEVELOPMENT OF FACILITIES-BASED VOICE COMPETITION

Interconnection is a necessary predicate for voice competition. But the state commission actions described in the TWC petitions have denied TWC the ability to transmit traffic to and from the Public Switched Telephone Network (“PSTN”). The TWC Petition for Declaratory Ruling explains that some state commissions have prohibited competitive local exchange carriers such as MCI and Sprint from interconnecting with incumbent local exchange carriers for purposes of exchanging a cable interconnected VoIP provider’s traffic. The primary rationale for these decisions is that wholesale carriers (such as Sprint and MCI) are not “telecommunications carriers” because they are providing interconnection on a wholesale basis for the traffic from a cable interconnected VoIP provider’s customers, rather than serving their own “end-user” customers. As a result, the state commissions concluded, those CLECs have no interconnection rights under Section 251 of the Communications Act.⁴

Alternatively, the state commissions indicated that, even if the intermediary interconnecting CLEC could deliver the traffic of another provider’s end users, the ultimate service provided to the end user must be a “telecommunications service.” Since VoIP has not yet been classified as such a service (or something else), the state commissions have concluded that VoIP providers will have no interconnection rights unless and until VoIP is classified as a “telecommunications service.”⁵

Grant of the TWC Petition for Declaratory Ruling will resolve these controversies.

But grant of the Petition for Declaratory Ruling will not be sufficient to provide complete relief to TWC as it tries to provide competition to incumbent voice providers. In addition, action

⁴ TWC Declaratory Ruling Pet. at 5-6.

⁵ *Id.* at 6-7.

on the TWC Petition for Preemption is necessary. As noted above, the South Carolina PSC denied CLECs the right to interconnect with ILECs for the purpose of delivering TWC voice traffic (the subject of the TWC Declaratory Ruling request). But it also has denied TWC the means to obtain interconnection on its own by denying it a certificate of public convenience and necessity (“CPCN”) to provide service in certain areas served by independent rural ILECs (“RLECs”)(the subject of the TWC Preemption request). The combination of these actions makes it impossible for TWC to exchange traffic with rural ILECs except through likely futile negotiations into which RLECs have refused to enter.

The PSC’s initial rationale was that TWC did not need a CPCN in order for it to enter negotiations with RLECs under Section 251 of the Act. But, as TWC itself has demonstrated, “[t]hat conclusion has since proven incorrect” with RLECs refusing to enter into negotiations with TWC because it did not have a CPCN to serve their areas. Subsequently, in a related matter, the PSC indicated that it would not grant TWC a CPCN because “VoIP providers do not have rights or obligations under Section 251.” It also appears that the South Carolina PSC has concluded that competitive entry should not be permitted until the PSC has terminated the RLECs’ rural exemption under Section 251(f)(1).⁶

For the reasons stated in the TWC Preemption Petition⁷ and the comments filed in support of that petition, neither of these conclusions is correct as a matter of law, or applicable to the TWC requests to the PSC. There can be no doubt that, under section 253 of the Act, such actions have the effect of prohibiting the provision of TWC’s voice services (including the provision of telecommunications services to its enterprise customers or the provision of a

⁶ See TWC Preemption Pet. at 9-10, 14.

⁷ *Id.* at 14, 17-19.

wholesale common carrier offering for its own retail VoIP-based service). Therefore, the Commission should expeditiously grant the TWC Preemption Petition.

II. THE COMMISSION SHOULD CONTINUE ITS EFFORTS TO FOSTER VOICE COMPETITION BY GRANTING THE TWC PETITIONS

The Commission has taken commendable steps to encourage the development of facilities-based voice competition. But there is still work to be done. The voice market can hardly be called competitive. Incumbent telephone companies still control 85 percent of the residential and small business markets,⁸ and more importantly, the PSTN. When the Bell companies still own the only ubiquitous phone network and serve as the “hub” to which all other carriers must interconnect in order to reach each others’ customers, further Commission action to spur voice competition is necessary.

This is especially the case when the Commission has taken prompt action to facilitate video competition – particularly efforts to streamline entry by telephone companies – even though cable’s market share of the multichannel video market has fallen to 68.3 percent of multichannel video households according to November 2005 statistics from Kagan Research.⁹

When Congress ordered an annual video report in the 1992 Cable Act, cable – then a one-way service with about 39 analog channels and no digital channels – commanded 95 percent of the multichannel television market.¹⁰ Today, it is only one of many interactive broadband platforms that provide a variety of services. As the Commission recently concluded, “almost all

⁸ See Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition Status as of June 30, 2005*, at Table 2 (April, 2006).

⁹ See Kagan Research, LLC, *Kagan Media Money*, January 4, 2006 at 7. Older statistics used by the Commission put that figure at 69.4% as of June, 2005. See *Twelfth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*, MM Docket No. 05-255, FCC 06-11 at Appendix B, Table B-1 (2006).

¹⁰ *Fourth Annual Report on the Status of Competition in Markets for Delivery of Video Programming*, 13 FCC Rcd 1034, Appendix E, Table E-1 (1998).

consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers” as well as “emerging technologies, such as digital broadcast spectrum, fiber to the home, or video over the Internet.”¹¹ Whatever the rationale for providing further relief for telephone company entry into video, on the basis of incumbent market share alone, there is clearly a more urgent need for FCC action to foster facilities-based competitive entry into the local voice market.

Grant of the TWC petitions, and a strong statement about the importance of interconnection rights to all facilities-based phone providers, would go a long way in removing remaining significant barriers to competitive voice entry. In that regard, the Commission should also recognize the importance of related requirements, including number porting, access to directory publications and E911 capabilities. With the acquisition of AT&T by SBC and MCI by Verizon (and the pending acquisition of BellSouth by AT&T), cable operators – who have invested over \$100 billion over ten years to build a two-way interactive network with fiber optic technology – are the most significant potential entrants in local telephone markets with the promise of offering innovative, high-quality affordable products and services.

However, regardless of the level of investment, without the certainty of interconnection rights and other prerequisites for serving local voice customers, cable operators and others will not be able to provide the facilities-based competitive options envisioned by the 1996 Telecommunications Act. As then-Commissioner Martin said over two years ago: “When confronted with such fundamental questions as those raised by VoIP, the Commission’s paramount task is to facilitate market certainty and stability by setting out a clear regulatory

¹¹ *Twelfth Annual Report* at ¶ 5.

framework. Regulatory certainty in this area should help continue to spur investment in facilities-based local competition and encourage the deployment of new services.”¹²

III. THE INITIAL COMMENTS DEMONSTRATE THAT GRANT OF THE TWC PETITIONS IS WARRANTED, INDEED, CRITICAL

The TWC petitions were supported by a broad range of telecommunications interests. In addition to support from cable interests (Comcast, Advance-Newhouse, NCTA, South Carolina Cable Television Association) and other CLECs (Broadwing, et al., COMPTTEL, the VON Coalition), ILECs too (AT&T, Verizon) urged prompt FCC action. So too did other parties interested in continuing the development of competitive voice services (*e.g.*, Level 3, Global Crossing, Neutral Tandem). They reiterated the key points raised in the TWC petitions: (1) in providing wholesale services to TWC and other facilities-based interconnected VoIP providers, CLECs are providing telecommunications services under the Act even though the cable VoIP providers are not the CLECs’ end user customers;¹³ (2) whether or not interconnected VoIP service is classified as a telecommunications service is irrelevant for purposes of the interconnection rights of wholesale CLEC providers;¹⁴ and (3) under the circumstances described in the TWC Preemption Petition, TWC is entitled to a CPCN.¹⁵

There are a few points worth further emphasizing. First, as Comcast, the VON Coalition, and others point out, the Commission has already recognized the utility of the type of interconnected VoIP provider/CLEC arrangement described in the TWC petitions. As the VON

¹² Opening Remarks of Commissioner Kevin J. Martin at the FCC’s Voice Over Internet Protocol (VoIP) Forum, December 1, 2003 at 1, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243026A1.pdf.

¹³ *See e.g.*, Advance-Newhouse at 4-8; AT&T at 2-3; Level 3 at 4-6; Alpheus at 2-10; Broadwing at 5-12; BridgeCom at 3-9; South Carolina Cable Television Assoc. at 5-7; NCTA at 6.

¹⁴ *See e.g.*, VON Coalition at 2; Neutral Tandem at 12; Alpheus at 10-14; BridgeCom at 11-15.

¹⁵ *See generally*, Comments of Sprint Nextel Corporation, WC Docket No. 06-54; South Carolina Television Assoc. at 10-15.

Coalition observes, in its *VoIP E911 Order*, “the Commission held that interconnected VoIP providers could satisfy their E911 service requirements ‘by interconnecting indirectly through a third party such as a competitive local exchange carrier (LEC), interconnecting directly with the Wireline E911 Network, or through any other solution that allows a provider to offer E911 service.’”¹⁶ The broadband and competition policies of the Congress and the Commission dictate that states not impose any barriers to any of the entry strategies being used by interconnected VoIP providers.

Second, some commenters argue that the Commission should abstain from action on the TWC petitions – and presumably from action on any other issues that require immediate action – until it concludes the *IP-Enabled Services Rulemaking*.¹⁷ NCTA takes a back seat to no one in urging prompt completion of that docket (and others that have been pending longer which affect competitive voice entry). But to defer action on the TWC petitions for that reason is not necessary and would frustrate and delay competitive entry, a result clearly contrary to the public interest.

As an initial matter, these interconnection issues are ripe for decision and involve basic interconnection rights of CLECs under existing law.¹⁸ While obviously affecting VoIP providers, they are not dependent on action in the *IP-Enabled Services Rulemaking* or any other

¹⁶ VON Coalition at 3.

¹⁷ See e.g., South Dakota Telecom Assoc. at 4-6; TCA, Inc. at 6-7; Independent Telephone & Telecommunications Alliance at 12; Home Telephone Company at 3.

¹⁸ While carriers providing wholesale telecommunications services to cable VoIP providers are clearly entitled to interconnect under Section 251, the Commission has additional authority to mandate such interconnection pursuant to Section 201. See, 47 U.S.C. § 201; Verizon Comments at 11-12. See also Comments of the National Cable & Telecommunications Association, WC Docket No. 04-36, at 25-29 (May 28, 2004) (“The Commission has long asserted the authority to order incumbent local exchange carriers to interconnect with information service providers”) (“NCTA *IP-Enabled Services* Comments”); Comments of Cox Communications, WC Docket No. WC 04-36, at 24 (May 28, 2004) (“[L]ongstanding Commission precedent under Sections 201 and 202 requires ILECs to provide both information service providers and competing telecommunications carriers with reasonable and nondiscriminatory interconnection.”)

pending proceeding.¹⁹ Every day that Commission action is delayed is a day competitive voice service is denied to American consumers.

Indeed, if the Commission were not to act, state actions on these issues likely would create a patchwork quilt of decisions undermining the Commission's unquestioned authority in this area. On appeal, these very issues – including the proper interpretation of Section 251 requirements – would end up being brought before a variety of federal courts around the country, rather than having these important issues of federal communications law and policy addressed by the Commission. Moreover, failure to act will embolden ILECs to refuse interconnection, will create additional and broader problems for the Commission, and will delay or deny to consumers the benefits of competition, especially for rural consumers.

Finally, some argue that TWC – and other interconnected VoIP providers – are seeking to obtain the benefits of telecommunications service providers without any of the obligations of those providers.²⁰ Nothing could be further from the truth. Both affiliated and unaffiliated CLECs are not only looking for carrier rights, but, to the extent there is a “carrier” involved in the exchange of traffic, they are subject to the obligations of carriers, including universal service contributions, E911 functionality and number porting obligations.

More generally, cable interconnected VoIP providers are not seeking to evade regulation or the obligations of carriers on the theory that the underlying service has not been classified as a “telecommunications service.” NCTA, reflecting a consensus industry approach, has urged the Commission to adopt a framework of “responsibilities and rights” – “A Regulatory Model for

¹⁹ By contrast, the *IP-Enabled Services Rulemaking* is addressing the rights and responsibilities of VoIP providers. Nothing in that proceeding will affect the rights of CLECs serving VoIP providers depending on how VoIP is classified. Therefore, while we urge prompt resolution of the issues in that proceeding, such action is by no means necessary to the grant of the TWC petitions.

²⁰ See *e.g.*, Home Telephone Company at 2; South Dakota Telecomm Assoc. at 4; John Staurulakis Inc. at 7.

Facilities-Based VoIP Competition.”²¹ Under this approach, interconnected VoIP providers – regardless of how VoIP service is classified – would not only have certain carrier rights such as the right to interconnection, but also would have certain carrier responsibilities.²² Among those responsibilities would be compliance with requirements for (1) CALEA, (2) 911/E911, (3) disability access, including TRS funding, (4) Universal Service Fund contributions, (5) Intercarrier Compensation, and (6) consumer protection rules of general applicability. We have urged the Commission to adopt this proposal, and, of course, will comply with any requirements imposed on interconnected VoIP providers by the Commission. But until those regulations are adopted, arguments that cable interconnected VoIP providers are trying to evade regulation are unwarranted, at best.

CONCLUSION

For the reasons stated in the TWC Petitions, in NCTA’s initial comments and these reply comments, and in the comments of other parties supporting the TWC Petitions, the Commission should expeditiously grant the two TWC petitions.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Neal M. Goldberg
National Cable & Telecommunications
Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903
(202) 775-3664

Richard L. Cimerman
Vice President
State Government Affairs

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²¹ See National Cable & Telecommunications Association, *Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition*, at http://www.ncta.com/pdf_files/whitepapers/VoIPWhitePaper.pdf (Feb. 2004).

²² See NCTA *IP-Enabled Services* Comments at 15-19.