

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition of Time Warner Cable for a)	
Declaratory Ruling That Competitive)	WC Docket No. 06-55
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)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (“Qwest”) hereby files these comments in response to a Petition by Time Warner Cable (“Time Warner”) for a declaratory ruling that “competitive LECs are entitled to interconnect with incumbent LECs for the purpose of exchanging traffic on behalf of VoIP providers.”¹

Basically Time Warner recites interconnection problems that it has been facing in two states with regard to interconnection for its Voice over Internet Protocol (“VoIP”) services. Time Warner offers VoIP as a telecommunications service (and apparently has obtained proper competitive local exchange carrier (“CLEC”) certification to provide VoIP on this basis), but generally does not interconnect with incumbent local exchange carriers (“ILECs”) directly, choosing instead to interconnect through other CLECs. Two state commissions have denied Time Warner the right to interconnect with some rural ILECs, either because Time Warner was

¹ Petition for Declaratory Ruling, WC Docket No. 06-55, filed Mar. 1, 2006 at 23. *See* Public Notice, DA 06-534, rel. Mar. 6, 2006. *See also*, Public Notice, DA 06-639, rel. Mar. 21, 2006, granting an extension of time to file comments.

not entitled to such interconnection, or because the intermediate CLEC was not entitled to use its interconnection facilities to serve Time Warner, or a combination of both. Time Warner requests a declaratory ruling to the effect that it is entitled to the interconnection that it seeks as a matter of federal law.²

While the Time Warner Petition raises interesting and important issues concerning interconnection rights and state authority, at the heart of the confusion that is disrupting Time Warner's business operations is the inability of state commissions to determine a consistent and coherent definition of VoIP and to properly classify VoIP as a telecommunications service or an information service. The responsibility for making such a determination obviously rests with the Commission. Time Warner's Petition demonstrates again the need for the Commission to take clear and decisive action in order that a number of ambiguities that plague the current telecommunications marketplace can be eliminated as quickly as possible, including the proper regulatory classification of VoIP service. The difficulties pointed out in the Time Warner Petition are not the only areas where decisive and timely Commission action is necessary.³

² Time Warner has also filed a Petition for Preemption dealing with one of the state commission actions. *See In the Matter of Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, Petition for Preemption, WC Docket No. 06-54, filed Mar. 1, 2006. Because the authority of the Federal Communications Commission ("Commission") to preempt in this area is dependent on the Commission issuing a decision with sufficient clarity to permit preemption, and such an order has not yet been issued, Qwest submits that preemption is premature at this time.

³ *See, e.g.,* VarTec Telecom, Inc. Petition for Declaratory Ruling, WC Docket No. 05-276, filed Aug. 20, 2004 and Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276, filed Sept. 19, 2005 (correction filed Sept. 21, 2005), both regarding the application of access charges to IP-transported calls; Qwest's *ex parte* presentation, CC Docket No. 01-92, filed Mar. 23, 2006 regarding the problem of phantom traffic; Comments of Qwest Communications International Inc. on Further Notice of Proposed Rulemaking, CC Docket No. 01-92, filed May 23, 2005 at 33-56, regarding unresolved VNXX and ESP exemption issues. All of these issues require immediate and decisive action by the Commission.

The necessity for action on the question of the proper regulatory classification of VoIP is highlighted by the Time Warner Petition, because Time Warner's problems are to a very large extent caused by the fact that various states have made conflicting determinations as to the proper regulatory classification of VoIP services. It is accordingly vital that this Commission move immediately to define VoIP and to state definitively whether VoIP is a telecommunications service, an information service, or some combination of both. Only in the context of a meaningful and coherent definition of VoIP is it possible for the telecommunications industry (including ILECs, CLECs, VoIP providers and state regulators) to react rationally to the interconnection issues presented by VoIP in general, and by the Time Warner Petition in particular.⁴

The statutory and regulatory structure in which Time Warner finds itself should be clear, or at least could be if the classification issue were addressed in a meaningful and comprehensive manner. Interconnection rights under Section 251 of the Act are available only to "telecommunications carriers." This is an express statutory command. Because providers of information services are not, by definition, telecommunications carriers,⁵ an information service provider ("ISP") may not obtain interconnection under that Section of the Act. Instead, for most regulatory purposes an ISP is treated as an end user.⁶ As such, the ISP must purchase common carrier services from the tariffs or other schedules of carriers, subject to certain unbundling rights

⁴ The necessity of a Commission determination of the regulatory status of VoIP service is also apparent in the area of carrier's carrier charges for switched access service. Without guidance from the Commission, LECs and IP voice providers alike must make their best interpretative guesses as to what the Commission's policy ultimately will be.

⁵ See 47 U.S.C. § 153(44).

⁶ See *Southwestern Bell Telephone Company v. FCC*, 153 F.3d 523, 541-44 (8th Cir. 1998).

provided in the *Computer III* rules.⁷ If VoIP service is an information service, then a VoIP information service provider must obtain connection to the Public Switched Network within the constraints of its end-user status.

A CLEC, of course, is entitled to interconnection rights under Section 251 of the Act -- indeed, Section 251(c) of the Act was specifically designed to expedite and ensure rational CLEC ability to interconnect with other local exchange carriers, especially ILECs.⁸ Indirect interconnection now seems to be assured both by the language of the Act and the Commission's T-Mobile decision.⁹ However, a CLEC can only obtain Section 251(c) interconnection when it provides a telecommunications service.¹⁰ When a CLEC seeks to provide an information service via a Section 251 interconnection, it must provide the transport supporting the information service on a common carrier basis.¹¹ A CLEC cannot use its Section 251 interconnection

⁷ In 47 C.F.R. § 64.702, the Commission made the distinction between basic services and enhanced services whereas in its *Non-Accounting Safeguards Order* the Commission found that information services and enhanced services are basically identical. See *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996).

⁸ See Nuechterlein and Weiser, *Digital Crossroads*, pp. 69-74 (MIT Press 2005).

⁹ See 47 U.S.C. § 251(a)(1) and *In the Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, 4863-64 ¶ 14 (2005), *appeals pending sub nom.* No. 05-71995, *Ronan Telephone Co. v. FCC* (9th Cir., Order Granting Further Stay, Jan. 30, 2006).

¹⁰ The Act is very plain that interconnection rights are unique to carriers. 47 U.S.C. §§ 251(a)(1); 251(c)(1), (2), (3), (4).

¹¹ 47 C.F.R. § 51.100(b); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15988-89 ¶ 992, 15990 ¶ 995 (1996) (subsequent history omitted).

facilities to transmit an information service unless it offers the transport, at the very least, to other providers of information services on a common carrier basis.¹²

In fact, almost all aspects of interconnection between a VoIP provider and an ILEC are dependent on whether the VoIP provider is providing a telecommunications service or an information service. In the case of Time Warner, which interconnects with ILECs through another CLEC, this issue is especially pointed. For example, if an ISP VoIP provider is connected to an ILEC through a CLEC, the CLEC will be the originating/terminating carrier for reciprocal compensation purposes. If a telecommunications service VoIP provider is connected to an ILEC through a CLEC, the CLEC will be a transiting provider, and accordingly neither an originating nor a terminating carrier for reciprocal compensation purposes.¹³ But in the absence of a determination by the Commission as to which classification applies to VoIP providers, it is impossible to answer any of the interconnection/compensation questions raised by Time Warner -- despite the fact that answering these questions is the *sine qua non* of rational regulatory policy or compliance.

The facts of the instant Time Warner Petition highlight this fundamental gap in the federal regulatory matrix. Time Warner objects to the actions of two state regulatory agencies: the Nebraska Public Service Commission (“Nebraska”) and the South Carolina Public Service Commission (“South Carolina”). Nebraska ruled that Time Warner’s VoIP service is a telecommunications service, but that a different and unrelated CLEC seeking interconnection for

¹² Otherwise the carrier would not be offering common carrier service “through the same arrangement.” To argue otherwise would permit a carrier to discriminate in favor of its own information services in the public offering of its own common carrier services, a right that clearly does not exist even for non-dominant carriers. This does not mean that non-dominant carriers cannot combine transmission and information into a single information service where appropriate under the rules. It just means that they cannot do so and then claim the right to interconnection with a LEC as a carrier under Section 251 of the Act.

¹³ *Texcom, Inc. v. Bell Atlantic Corp.*, Order on Reconsideration, 17 FCC Rcd 6275 (2002).

the sole purpose of serving Time Warner was not thereby providing a telecommunications service. As far as we can determine, the major problem that Nebraska had with the Time Warner position is that Time Warner did not seek the interconnection itself -- as Time Warner is clearly entitled to interconnection with ILECs, either directly or indirectly, if it is a telecommunications carrier actually providing telecommunications service. Under Nebraska's theory, Time Warner is able to interconnect with an ILEC under Section 251, but an unrelated CLEC is unable to interconnect with that same ILEC for the sole purpose of serving Time Warner.¹⁴

The Nebraska position is obviously dependent on how the Commission ultimately classifies VoIP service. If the Time Warner service is a telecommunications service, Time Warner's interconnection rights seem secure, although there is a procedural question raised by Nebraska. The Commission's rules would currently prohibit this type of interconnection if the Time Warner VoIP service were classified as an information service, because federal law does not grant Section 251 interconnection rights to non-carriers. On the other hand, under federal law a CLEC may use its interconnection facilities with an ILEC solely to provide service to another CLEC, provided, of course, that the second CLEC had the appropriate warrants from the Nebraska Commission. But in any event the Nebraska issue cannot be resolved in the absence of a determination of the regulatory status of VoIP service.

On the other hand, South Carolina simply ruled that, because Time Warner's VoIP service is an information service, it is not entitled to interconnection at all under Section 251. Under current law, if an unrelated CLEC proposed to use its own interconnection facilities with an ILEC for the sole purpose of serving an information service (including VoIP service classified as an information service), a state is precluded by federal law from ordering such interconnection

¹⁴ While Qwest is a LEC serving much of Nebraska, the proceeding cited by Time Warner did not involve Qwest, and Qwest was not a party before the Nebraska Commission.

under Section 251(c).¹⁵ Time Warner would, of course, be entitled to purchase interconnection for its information service/VoIP service via the ONA tariffs of the local ILEC.

What this means is that, in order to answer the conflicts posed by Nebraska and South Carolina, the Commission must determine the underlying threshold question of the regulatory status of VoIP service. This is because the answer to both questions is totally dependent on this regulatory status, and a coherent answer must necessarily address both questions. While we agree that Time Warner is entitled to a timely review of its request for a declaratory ruling, the request cannot be meaningfully resolved in the absence of a resolution of the question of the regulatory status of VoIP service.

This status is currently before the Commission in the proceeding involving IP-enabled services.¹⁶ Reply comments in that docket were filed on July 14, 2004, 21 months ago. Qwest, for a variety of reasons, supported the conclusion that VoIP services were properly classifiable (and classified under existing rules) as information services.¹⁷ Qwest currently treats VoIP services consistent with that conclusion. Others take the opposite position, as is evidenced by the position of Nebraska shown in this docket. But we have reached the point where almost any answer is preferable to the current environment of uncertainty caused by the Commission's inaction.

Qwest requests that the Commission immediately issue an order in WC Docket No. 04-36 definitively classifying VoIP services (as defined in the Commission's order) as either

¹⁵ Such an approach would violate the Act and Section 51.100(b) of the Commission's rules because the CLEC would not be providing common carrier/telecommunications services over the interconnection facility.

¹⁶ See *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

¹⁷ See Comments of Qwest Communications International Inc., WC Docket No. 04-36, filed May 28, 2004.

information services or telecommunications services. This definition can be applied to the instant Time Warner Petition. In all events, it is imperative that the Commission move quickly and decisively to resolve this and the other critical pending issues relating to interconnection and intercarrier compensation that are so vital to the telecommunications industry.¹⁸

Respectfully submitted

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¹⁸ Some of the relevant dockets are listed in footnote 3 above.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 06-55; 2) served, via e-mail on Ms. Janice Myles, Competition Policy Division, Wireline Competition Bureau at janice.myles@fcc.gov; and 3) served, via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier
Richard Grozier

April 10, 2006