

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

In the Matter of	)	
	)	
Time Warner Cable's Petition For	)	
Preemption Regarding the South	)	WC Docket No. 06-54
Carolina Public Service Commission's	)	
Denial of a Certificate of Public	)	
Convenience and Necessity	)	

**COMMENTS OF THE**  
**SOUTH CAROLINA TELEPHONE COALITION**

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(TWCIS), dated December 16, 2005

## SUMMARY

This matter involves a certification decision by the Public Service Commission of South Carolina ("SCPSC"). The SCPSC applied its competitively-neutral state certification statute in a case wherein Time Warner Cable Information Services (South Carolina), LLC ("TWCIS"), an affiliate of Time Warner Cable ("Time Warner"), sought to expand its certificate of public convenience and necessity in order to serve specified rural areas of the State of South Carolina.

The underlying facts of this action show that it is a simple state matter in which TWCIS failed to make a proper evidentiary showing before the SCPSC to justify granting the relief sought by TWCIS. The SCPSC, in fact, denied TWCIS' request for "failure of proof." There is nothing for the Commission to preempt here, and it is singularly inappropriate for Time Warner to extrapolate a policy issue from its own simple failure of proof in a state certification proceeding.

While there were significant public interest issues raised at the hearing before the SCPSC in this matter with respect to the provision of competitive local exchange service by a facilities-based VoIP provider like TWCIS in rural areas of the state, the SCPSC did not reach those issues because it found, as a threshold matter, that TWCIS' application could not be granted because it was unclear what authority TWCIS was seeking. Furthermore, to the extent TWCIS appeared to be requesting the authority to seek interconnection with the rural local exchange carriers at issue, it did not need the SCPSC's blessing to do so. The SCPSC properly denied TWCIS' application for "failure of proof."

Federal preemption is not warranted in this case because there is no conflict between state and federal law, and the state statute in question is competitively neutral. Furthermore, preemption is not warranted because the SCPSC acted appropriately in denying TWCIS' request for state certification, and the SCPSC's orders do not constitute a "barrier to entry" under 47 U.S.C. § 253(a). Additionally, Time Warner and TWCIS have remedies other than preemption available to them and are, in fact, pursuing those remedies.

Finally, granting Time Warner's Petition for Preemption would be contrary to federal and state telecommunications policy and to the public interest, because the effect of that preemption would be to override the SCPSC's authority under the Federal Telecommunications Act of 1996 to make the necessary public interest determinations before allowing competitive service in rural areas. Preemption by the Commission would also effectively negate the rural exemption expressly provided for by Congress in Section 251(f) of the Act.

As stated above, there is nothing here for the Commission to preempt because there simply is not a policy issue that is ripe for the Commission's determination. TWCIS failed to make a proper evidentiary showing in a state administrative proceeding, and there is no proper factual foundation upon which the Commission may make the broad policy rulings Time Warner requests.

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**COMMENTS OF THE  
SOUTH CAROLINA TELEPHONE COALITION**

The South Carolina Telephone Coalition (SCTC), an organization of rural telephone companies operating in the State of South Carolina, on behalf of its members as listed in Exhibit A, hereby respectfully submits these comments, by and through its undersigned counsel. These comments are being submitted in response to the public notice issued by the Federal Communications Commission (the "Commission") in the above-captioned proceeding.<sup>1</sup>

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<sup>1</sup> *Pleading Cycle Established For Comments on Time Warner Cable's Petition For Preemption Regarding the South Carolina Public Service Commission's Denial of a Certificate of Public Convenience and Necessity*, WC Docket No. 06-54, Public Notice, DA 06-535 (rel. Mar. 6, 2006). The Wireline Competition Bureau subsequently granted an extension of time to file comments. See DA No. 06-638 (rel. Mar. 21, 2006).

## INTRODUCTION

On October 1, 2004, Time Warner Cable Information Services (South Carolina), LLC (“TWCIS”) applied to the Public Service Commission of South Carolina (“SCPSC”) to expand its certificate of public convenience and necessity to provide service in certain rural areas of South Carolina where the incumbent rural local exchange carriers had rural exemptions pursuant to 47 U.S.C. § 251(f)(1).<sup>2</sup> TWCIS did not seek to terminate the companies’ rural exemptions.<sup>3</sup>

TWCIS’ Application described the service for which it requested certification as follows:

“TWCIS plans to provide facilities-based local and long distance Internet protocol (“IP”) voice service, targeted to the residential market in [RLECs’] service areas . . . .”<sup>4</sup> On March 3, 2005,

TWCIS pre-filed the Testimony of Julie Y. Patterson in the proceeding. In her testimony, Ms.

Patterson described the services for which TWCIS sought certification as follows:

Since the Vonage Order preempts the state from imposing certification and tariffing requirements, TWCIS intends to withdraw the retail service offerings in its current tariff once a new non-regulated entity is created to provide the retail voice services currently being offered by TWCIS. TWCIS intends to remain a certificated carrier and will obtain interconnection service from incumbent LECs and eventually offer wholesale services to the newly created non-regulated entity.<sup>5</sup>

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<sup>2</sup> The incumbent local exchange carriers whose areas TWCIS sought certification for are Farmers Telephone Cooperative, Inc., Fort Mill Telephone Company, d/b/a Comporium Communications, Home Telephone Company, Inc., PBT Telecom, Inc., and St. Stephen Telephone Company (collectively referred to as the “RLECs.” Each RLEC is a member of the South Carolina Telephone Coalition. Each RLEC is a rural telephone company as defined in 47 U.S.C. § 153(37), and each has a rural exemption pursuant to 47 U.S.C. § 251(f)(1).

<sup>3</sup> See Transcript of TWCIS hearing before the SCPSC (referred to herein as “Hearing Transcript.”), at p. 18, lines 15-23. (The Hearing Transcript is being provided as Exhibit C to the Comments of the Office of Regulatory Staff of the State of South Carolina.)

<sup>4</sup> TWCIS Application at ¶ 9. (See Appendix to Time Warner Petition at Tab 3.)

<sup>5</sup> See Hearing Transcript at p. 16.

At the hearing on the matter, Ms. Patterson was questioned regarding the services TWCIS sought certification to provide. TWCIS once again changed its description of the services for which it was seeking certification, by making vague references to seeking authority to provide “telecommunications services” as a “full-fledged CLEC.”<sup>6</sup>

On August 1, 2005, the SCPSC issued Order No. 2005-412, denying TWCIS’ request for certification. The SCPSC stated found there was a “failure of proof regarding the original application” and denied the application for expansion of TWCIS’ certificate “as originally filed by the Company.”<sup>7</sup> The SCPSC later issued Order No. 2005-484, denying TWCIS’ request for reconsideration of SPSC Order No. 2005-412. In Order No. 2005-484, the SCPSC again stated there was “a failure of proof with respect to the original Application” and noted that this finding was “clearly supported by the evidence of record.”<sup>8</sup>

On October 31, 2005, TWCIS appealed the SCPSC’s orders to the Court of Common Pleas for the State of South Carolina, 5<sup>th</sup> Judicial Circuit. The appeal is pending. On March 1, 2006, Time Warner Cable (“Time Warner Cable”) and its South Carolina affiliate, TWCIS (collectively referred to herein as “Time Warner”), brought this Petition for Preemption before the Commission.

Time Warner asserts the SCPSC’s “refusal” to grant TWCIS a certificate in the areas served by the RLECs has the effect of prohibiting Time Warner from providing telecommunications services in those markets and thus violates Section 253 of the federal Telecommunications Act of 1996 (“Act”).<sup>9</sup>

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<sup>6</sup> See, e.g., Hearing Transcript at p. 119, lines 10-12.

<sup>7</sup> SCPSC Order No. 2005-412 at p. 5. (See Appendix to Time Warner Petition at Tab 6.)

<sup>8</sup> SCPSC Order No. 2005-484 at p. 2. (See Appendix to Time Warner Petition at Tab 7.)

<sup>9</sup> Petition at p. 11.

SCTC submits that it would be inappropriate for the Commission to preempt the SCPSC's orders pursuant to Section 253(a) of the Act, because the SCPSC acted appropriately and within its authority in denying TWCIS' request for certification in the specified rural areas, and because the SCPSC's orders do not "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," as discussed in detail below.<sup>10</sup> Furthermore, the Commission should not preempt the SCPSC's orders because TWCIS is pursuing a state appeal of the orders, and because the effect of preemption would be contrary to federal and state telecommunications policy and the public interest.

## DISCUSSION

### **I. Time Warner Has Not Demonstrated That Federal Preemption of the SCPSC's Orders Denying Certification Is Warranted.**

Federal preemption is not warranted in this case because there is no conflict between state and federal law, and the state statute in question is competitively neutral. Furthermore, preemption is not appropriate because the SCPSC acted appropriately in denying TWCIS' request for state certification of its services, and the SCPSC's orders do not constitute a "barrier to entry" under 47 U.S.C. § 253(a).

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<sup>10</sup> Time Warner apparently also is seeking to have the Commission preempt the SCPSC's decision in SCPSC Docket No. 2005-67-C regarding the arbitration of an interconnection agreement between MCImetro Access Transmission Services, LLC ("MCI") and certain rural local exchange carriers. *See* Petition at p. 1. As Time Warner states, those issues are described in Time Warner's Petition for Declaratory Ruling in WC Docket No. 06-55. We limit our discussion here to preemption of the SCPSC's decision with respect to certification of TWCIS. Issues raised regarding the SCPSC's decision in the MCI arbitration are fully discussed in the SCTC's Comments in response to Time Warner's Petition for Declaratory Ruling in WC Docket No. 06-55. Those arguments are incorporated herein, and the Commission should deny Time Warner's request for preemption accordingly.

Federal preemption is permissible, pursuant to the Supremacy Clause of Art. VI of the United States Constitution, only under certain circumstances.<sup>11</sup> State law should be preempted only where Congressional intent to do so is clear.<sup>12</sup> The Commission should preempt a state statute, regulation or legal requirement only when an actual conflict exists, and only to the extent necessary to advance the goals of the federal statute.<sup>13</sup> Time Warner has alleged that preemption is appropriate in this case because the SCPSC's orders constitute a barrier to entry pursuant to 47 U.S.C. § 253(a).<sup>14</sup> As discussed below, this contention has no merit. The cases cited by Time Warner in support of its claim are all distinguishable because each involved a state statute that clearly prohibited entry in specific markets.<sup>15</sup> In the instant case, on the other hand, Time Warner does not argue that the South Carolina certification statute, which is competitively neutral on its face, should be preempted. Rather, it is the SCPSC's decision to deny Time Warner a certificate that Time Warner takes issue with. The SCPSC appropriately decided the matter before it based on the evidence presented, and preemption is not appropriate.

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<sup>11</sup> See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, *rehearing denied*, 512 U.S. 1247 (1994).

<sup>12</sup> See *id.*

<sup>13</sup> See *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973).

<sup>14</sup> See Petition at pp. 11-13.

<sup>15</sup> See *In the Matter of Silver Star Telephone Company*, CCB Pol 97-1, Memorandum Opinion and Order (rel. Sept. 24, 1997) (Wyoming statute prohibited competition in the service areas of incumbent LECs with fewer than thirty thousand access lines); *In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee Petition for Preemption*, CC Docket No. 98-92, Memorandum and Order (rel. May 27, 1999) (Tennessee statute prohibited entry by a CLEC in areas served by incumbent LECs with fewer than 100,000 access lines except upon specified conditions); Public Utility Commission of Texas, Memorandum Opinion and Order (rel. Oct. 1, 1997) (Texas statute provided for moratorium on entry of CLECs into areas served by incumbent LECs with fewer than 31,000 access lines).

**A. The SCPSC Acted Appropriately and Within Its Authority in Denying Time Warner's Request for Certification.**

The SCPSC clearly has the authority to grant or deny requests for certification, provided it does not do so in a manner that is inconsistent with the Act. The certification statute, S. C. Code Ann. § 58-9-280, provides in pertinent part:

- (A) No telephone utility shall begin the construction or operation of any telephone utility plant or system, or of any extension thereof, . . . without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation. . . .
- (B) After notice and an opportunity to be heard, the commission may grant a certificate to operate as a telephone utility . . . to applicants proposing to furnish local telephone service in the service territory of an incumbent LEC, subject to the conditions and exemptions stated in this section and in applicable federal law. . . . In determining whether to grant a certificate under this subsection, the commission may require, not inconsistent with the federal Telecommunications Act of 1996, that the:
  - (1) applicant show that it possesses technical, financial, and managerial resources sufficient to provide the services requested;
  - (2) service to be provided will meet the service standards that the commission may adopt;
  - (3) provision of the service will not adversely impact the availability of affordable local exchange service;
  - (4) applicant, to the extent it may be required to do so by the commission, will participate in the support of universally available telephone service at affordable rates; and
  - (5) provision of the service does not otherwise adversely impact the public interest.

Likewise, federal law provides that states have the ability:

to impose, on a competitively neutral basis and consistent with Section 254 [of the Act], requirements necessary to preserve and advance universal service, protect

the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.<sup>16</sup>

The state certification statute is designed to do just that, and the SCPSC properly denied TWCIS' request for a certificate pursuant to the state statute.

As described above, TWCIS changed its description of the services for which it sought certification at least twice during the course of the SCPSC's certification proceeding. As the SCPSC found, "[t]here was a major discrepancy between the Application, the prefiled testimony, and the testimony presented at the hearing as to what authority the Company was seeking."<sup>17</sup>

The Commission's rules require that "Applications shall state clearly and concisely the authorization or permission sought . . . ."<sup>18</sup> Yet, it is no wonder the Commission stated: "Time Warner's [TWCIS] position in this case is confusing, to say the least,"<sup>19</sup> and, later: "Upon reflection, it is still not clear exactly what authority TWCIS is seeking in this proceeding."<sup>20</sup> TWCIS never sought to amend its original Application except on a *de facto* basis through testimony, which itself was vague and unclear. As the Commission stated, "it is not clear from the references to being a 'full-fledged' or 'fully regulated' CLEC as to exactly what services TWCIS seeks to provide."<sup>21</sup>

In fact, because of a "failure of proof" with respect to TWCIS' Application,<sup>22</sup> the SCPSC did not even have a chance to reach any substantive issues regarding whether it is in the public interest for TWCIS to provide competitive services in the rural areas of South Carolina.

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<sup>16</sup> 47 U.S.C. § 253(b).

<sup>17</sup> SCPSC Order No. 2005-484 at p. 2.

<sup>18</sup> S. C. Code Ann. Regs. § 103-834.A.

<sup>19</sup> SCPSC Order No. 2005-412 at p. 5.

<sup>20</sup> SCPSC Order No. 2005-484 at p. 3.

<sup>21</sup> SCPSC Order No. 2005-484 at p. 2 (citing to Hearing Transcript at pp. 29, 35, and 119).

<sup>22</sup> SCPSC Order No. 2005-412 at p. 5; SCPSC Order No. 2005-484 at p. 2.

While it was not necessary to go beyond TWCIS' failure to state a *prima facie* case for certification, the Commission further noted that TWCIS' application, as amended on a *de facto* basis by testimony, appeared to be seeking only the authority to enter into negotiations toward interconnection agreements with the RLECs.<sup>23</sup> The SCPSC cited numerous statements by TWCIS' witness in the record.<sup>24</sup> Again, while it was clear that TWCIS wanted the right to obtain interconnection agreements from the RLECs, it was not really clear to the SCPSC what services TWCIS was seeking to provide as a telecommunications service provider. The SCPSC properly denied TWCIS' request as a matter of state law, because it was vague and unclear. Such a decision by a state commission, based on the evidentiary record before it, does not rise to the level of a policy issue ripe for determination by the Commission simply because TWCIS is dissatisfied with the result it achieved.

**B. The SCPSC's Orders Do Not Prohibit or Have the Effect of Prohibiting the Ability of Any Entity to Provide Any Interstate or Intrastate Telecommunications Service.**

Time Warner asserts that the SCPSC's denial of a certificate for TWCIS constitutes a barrier to entry in violation of Section 253 of the Act. This contention is without merit. 47 U.S.C. § 253(a) provides:

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<sup>23</sup> See SCPSC Order No. 2005-412 at p. 5; SCPSC Order No. 2005-484 at p. 3.

<sup>24</sup> See SCSC Order No. 2005-484 at pp. 3-4, *citing, e.g.*, Hearing Transcript at 8-9 ("One reason we want to be certified is . . . we want to be able to negotiate Interconnection Agreements"); 16 ("TWCIS intends to remain a certificated carrier and will obtain interconnection services from incumbent LECs and eventually offer wholesale services to the newly created non-regulated entity"); 56-57 ("[R]eally what we're looking to do here is to be able to step in and provide all of those transport and other telecommunications services that you show on the board that are provided [to TWCIS] today by MCI"); 70 ("We need certification in order to obtain interconnection rights"); 128 ("What we seek through this proceeding is the ability on our own, as full-fledged telecommunications carriers to obtain interconnection agreements on our own").

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

There is no barrier to entry here for two simple reasons. First, as the SCPSC expressly recognized, TWCIS does not need a certificate in order to request interconnection for the provision of its services.<sup>25</sup> TWCIS itself testified that it does not believe it needs a certificate from the SCPSC in order to provide its competitive Digital Phone VoIP service.<sup>26</sup> Thus, the SCPSC's denial of a certificate neither prohibits TWCIS from seeking interconnection nor does it prohibit TWCIS from providing its competitive Digital Phone service. The SCPSC's orders do not prohibit or have the effect of prohibiting TWCIS from providing any interstate or intrastate telecommunications service.<sup>27</sup>

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<sup>25</sup> See SCPSC Order No. 2005-412 at p. 5 (“This Commission already considers [TWCIS] to possess the ability to enter into [negotiations toward interconnection agreements with the RLECs] under Section 251 of the Telecommunications Act of 1996. No expanded Certificate is needed. The Commission recognizes this ability, and [TWCIS] may enter into such negotiations without further approval of this Commission.”) In SCPSC Order No. 2005-484 at p. 6, the Commission clarified its earlier finding, stating that “TWCIS either has the right to request interconnection under Section 251 of the Act or it does not, depending on whether the services TWCIS seeks to provide are telecommunications services or not, which is an unsettled question under Federal law. *Again, TWCIS does not need this Commission's approval to request interconnection under Section 251 of the Act.*” (Emphasis added.)

<sup>26</sup> Hearing Transcript at p. 16 (wherein Ms. Patterson testified with respect to the services TWCIS sought certification for in its Application: “Since the Vonage Order preempts the state from imposing certification and tariffing requirements, TWCIS intends to withdraw the retail service offerings in its current tariff once a new non-regulated entity is created to provide the retail voice services currently being offered by TWCIS.”) It is interesting to note that, although Ms. Patterson testified that the referenced “new non-regulated entity” could likely be set up in a single day [*see* Hearing Transcript at p. 39], TWCIS has yet to do so.

<sup>27</sup> Time Warner argues that the lack of a certificate is a barrier to entry because the RLECs have “refused to negotiate” with TWCIS on the ground that TWCIS does not have a certificate. See Preemption Petition at pp. 10-11. This is simply not true. As shown in the letter attached hereto as Exhibit B, the RLECs have offered to enter into a traffic exchange agreement with TWCIS, but have expressed the opinion that TWCIS will not operate as a telecommunications service provider in the RLEC areas and, therefore, Section 251 of the Act does not apply to TWCIS' request. Again, the fact of certification, or lack thereof, is simply not relevant to this analysis.

Second, even if TWCIS did need a certificate in order to request interconnection or to provide its Digital Phone VoIP service, and assuming the SCPSC fully considered TWCIS' request on the merits, including making all of the appropriate and necessary determinations regarding service in rural telephone company areas, TWCIS' VoIP service is not "an interstate or intrastate telecommunications service" and, therefore, there is no barrier to entry under 47 U.S.C. § 253(a).<sup>28</sup>

Time Warner is trying to play both sides of the fence by arguing on the one hand that its VoIP service is not a telecommunications service for purposes of state regulation, while at the same time arguing that it is a telecommunications service for purposes of applying Section 253's barrier to entry provisions. Time Warner appears to argue that it is entitled to a certificate so that it can cloak itself as a telecommunications carrier for purposes of obtaining interconnection with the RLECs under Section 251 of the Act. Once it has obtained interconnection, the only telecommunications service it apparently intends to provide is to itself – i.e., TWCIS or another affiliated non-regulated entity – in order to provide a retail service it continues to maintain is a non-regulated service. As part of its twisted logic, Time Warner argues it is entitled to a certificate for regulated service because it is in the public interest for Time Warner to provide a competitive non-regulated service (i.e., the competitive VoIP service). While it is true that TWCIS has stated it will agree to be "treated as" a telecommunications carrier until the nature of its VoIP service has been classified at the federal level, it is clear that this acquiescence is temporary in nature, and TWCIS has reserved all rights to argue (and has in fact argued) that its

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<sup>28</sup> Additionally, it is interesting to note that TWCIS has not sought to re-file its request for an expanded certificate before the SCPSC to cure its "failure of proof," despite the fact that there does not appear to be an impediment to doing so.

VoIP service is not telecommunications service subject to state regulation.<sup>29</sup> As Mr. Staurulakis testified at the certification proceeding:

[I]t is not clear to me what TWCIS is seeking from the Commission. On the one hand, TWCIS indicates that it will voluntarily comply with all applicable rules of the Commission, at least until such time as all appeals associated with the Vonage proceeding have been decided. On the other hand, TWCIS intends to move its retail VoIP services to a non-regulated entity where I presume these services will no longer be bound by Commission rules and regulations. It would appear that TWCIS wants to have its cake and eat it too. By agreeing to voluntarily comply with Commission rules and regulations, TWCIS hopes to receive its expanded authority as a telecommunications provider. Having such authority will allow it to seek interconnection with the Rural LECs and request local number portability ("LNP"). Once it obtains interconnection and LNP, TWCIS will then offer a wholesale VoIP service to the newly created non-regulated entity that will then sell VoIP service to retail customers, without having to worry about complying with any Commission rules or regulations.<sup>30</sup>

The SCPSC saw through TWCIS' arguments and understood that TWCIS sought certification as a telecommunications carrier only so that it could obtain interconnection from other carriers.

The end result TWCIS desires is that it will be entitled to interconnection under Section 251 of the Act as though it were a telecommunications carrier, but will ultimately have none of the regulatory obligations that telecommunications carriers have (e.g., payment of access, contributions to universal service, etc.)

The SCPSC correctly stated that TWCIS did not need certification in order to seek interconnection with RLECs.<sup>31</sup> In fact, the SCPSC specifically found that its denial of certification was not a barrier to entry under Section 253 of the Telecom Act.<sup>32</sup> The SCPSC cited TWCIS' own testimony that it did not need a certificate to provide the competitive service

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<sup>29</sup> See Hearing Transcript at p. 16

<sup>30</sup> Hearing Transcript at p. 139.

<sup>31</sup> See, e.g., 47 C.F.R. § 51.301(c)(4).

<sup>32</sup> SCPSC Order No. 2005-484 at p. 5.

it seeks to provide within the RLECs' service areas.<sup>33</sup> Without reaching the ultimate issue of the classification of TWCIS' service (because it was not necessary to do so), the SCPSC stated:

[I]f TWCIS' IP service is indeed a "telecommunications service," then TWCIS would be a "telecommunications carrier" and would be entitled to seek interconnection under Section 251 of the Act. . . . Assuming that TWCIS is a telecommunications carrier, then there is no barrier to entry because, as we stated, TWCIS does not need this Commission's approval to proceed under Section 251. . . . If, on the other hand, TWCIS is not a telecommunications carrier because it is not providing a telecommunications service, then Section 253 of the Act does not even apply.<sup>34</sup>

Thus, there is no barrier to entry here because, as the SCPSC properly found, TWCIS does not need a certificate to request interconnection with the RLECs. If TWCIS' service is a telecommunications service, the RLECs may be obligated to enter into negotiations with TWCIS (subject to state determinations, which have not yet been made because they have not been reached, regarding whether it is in the public interest to allow such competition in rural areas of South Carolina). If TWCIS' service is not a telecommunications service, there is no barrier to entry under Section 253 of the Act, because Section 253 applies only to telecommunications services.

Furthermore, there simply is not the urgency that Time Warner claims in order to justify the drastic remedy of preemption. Calls are being completed between SCTC company customers and TWCIS customers. In TWCIS' initial certification proceeding in SCPSC Docket No. 2003-362-C, the SCTC and TWCIS entered into a stipulation on the record that would allow those calls to be completed.<sup>35</sup> In fact, the only real issues left open in the stipulation relate to TWCIS'

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<sup>33</sup> SCPSC Order No. 2005-484 at p. 5, *citing* Hearing Transcript at p. 16.

<sup>34</sup> SCPSC Order No. 2005-484 at pp. 5-6.

<sup>35</sup> *See* Transcript of Hearing in SCPSC Docket No. 2003-362-C.

provision of competitive local exchange service in areas served by rural telephone companies – issues expressly reserved under the Act for decision by the state commissions.

## **II. Time Warner Has Adequate Remedies in Current State and Federal Proceedings.**

TWCIS has appealed the SCPSC's denial of its state certificate to state circuit court under the South Carolina Administrative Procedures Act.<sup>36</sup> That appeal is pending.<sup>37</sup> In addition, TWCIS has brought individual complaints before the SCPSC alleging that each of the five (5) RLECs at issue in the certification proceeding have failed to negotiate in good faith with TWCIS on interconnection agreements.<sup>38</sup> As discussed in the SCTC's Comments in the related Declaratory Ruling Petition,<sup>39</sup> there are also ongoing federal proceedings that will address some of the issues Time Warner attempts to interject into this state matter. Time Warner should not be permitted to pursue, nor should the RLECs be required to defend, multiple actions relating to the same subject matter at both the state and federal levels. Preemption should not be granted where Time Warner has an adequate remedy in the state courts (which it has chosen to pursue), and has not exhausted its administrative remedies before the SCPSC.

## **III. State and Federal Policy Weigh Against Preemption**

As discussed in detail above, the Commission should decline to preempt the SCPSC in this matter because the SCPSC clearly acted appropriately and within its authority, and because the SCPSC's actions have not had the effect of prohibiting Time Warner from providing any

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<sup>36</sup> S.C. Code Ann. § 1-23-10 *et seq.*

<sup>37</sup> Action No. 2005-CP-40-5687 before the Circuit Court of South Carolina, 5<sup>th</sup> Judicial Circuit.

<sup>38</sup> See SCPSC Docket Nos. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C, which have been consolidated and set for hearing on June 27-29, 2006 before the SCPSC.

interstate or intrastate telecommunications service. In addition, even if the Commission were to find that the SCPSC's actions constitute a barrier to entry for Time Warner, the effect of preemption in this case would be contrary to federal and state telecommunications policy and to the public interest.

Congress clearly contemplated that it was not always in the public interest to have multiple competitive local service providers in areas served by rural telephone companies.<sup>40</sup> Furthermore, Congress clearly intended for states to make the necessary public interest determinations, and to place appropriate conditions on competitive local service providers, prior to allowing competitive local exchange service in rural areas.<sup>41</sup> Congress expressly recognized that states have the ability to impose requirements, on a competitively neutral basis, that are "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" even if they may have the effect of prohibiting the ability of an entity to provide telecommunications service.<sup>42</sup> If the Commission steps in to preempt a decision of a state commission regarding certification in a rural area, the effect of that preemption would be to override the state commission's authority under the Act to make the necessary public interest determinations before allowing competitive service in rural areas. Such action by the Commission would also negate the rural exemption expressly provided for by Congress in Section 251(f) of the Act.

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<sup>39</sup> WC Docket No. 06-55.

<sup>40</sup> *See, e.g.*, Section 251(f) of the Act.

<sup>41</sup> *See, e.g.*, Sections 251(f); 253(f); and 214(e) of the Act.

<sup>42</sup> *See* Section 253(b) of the Act.

Restricting competition for basic local services in rural areas based upon a finding that it is not in the public interest is the state commission's prerogative. In this case, the SCPSC did not even reach the public interest determination, although there was testimony concerning those issues, because the SCPSC could not determine from TWCIS' pleadings and testimony exactly what it was asking the SCPSC to do. The SCPSC did not need to reach the question of whether the provision of service by TWCIS in rural areas would serve the public interest because TWCIS failed to make a prima facie showing that it should be granted a certificate to serve those areas, and the application was denied for "failure of proof." At a minimum, the SCPSC must be afforded the opportunity to address the public interest issues on their merits prior to being preempted on a certification issue.

### CONCLUSION

The Commission should deny Time Warner's Petition for Preemption of the SCPSC's orders denying an expanded certificate to TWCIS. Preemption is not warranted in a case where there is not conflict between state and federal law, and the state statute in question is competitively neutral. The underlying facts of this action show that it is a simple state matter in which TWCIS failed to make a proper evidentiary showing before the SCPSC to justify the granting of a certificate. The SCPSC denied TWCIS' request for "failure of proof," and there is no overriding policy issue for the Commission to determine or preempt. The SCPSC acted appropriately and within its authority in denying TWCIS' request for certification in the specified rural areas. Furthermore, the SCPSC's orders do not "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" and, therefore, do not constitute a barrier to entry. Finally, preemption of the SCPSC's

orders in this case would be contrary to federal and state telecommunications policy and to the public interest.

Respectfully Submitted,



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Attorneys for the South Carolina Telephone  
Coalition

April 10, 2006

Columbia, South Carolina

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

In the Matter of	)	
	)	WC Docket No. 06-54
Time Warner Cable's Petition For	)	
Preemption Regarding the South	)	<b>CERTIFICATE OF SERVICE</b>
Carolina Public Service Commission's	)	
Denial of a Certificate of Public	)	
<u>Convenience and Necessity</u>	)	

I hereby certify that a copy of the foregoing Comments of the South Carolina Telephone Coalition was served this 10th day of April, 2006, by e-mailing true and correct copies thereof to the following persons:

Janice Myles  
Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
[janice.myles@fcc.gov](mailto:janice.myles@fcc.gov)

Best Copy and Printing, Inc.  
Federal Communications Commission Copy Contractor  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)

Renee Crittendon, Chief  
Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
[renee.crittendon@fcc.gov](mailto:renee.crittendon@fcc.gov)

I hereby certify that a copy of the foregoing Comments of the South Carolina Telephone Coalition was served this 10th day of April, 2006, by mailing true and correct copies thereof, postage prepaid, to the following persons:

Marc J. Lawrence-Apfelbaum  
Executive Vice President, General Counsel & Secretary  
Julie Y. Patterson  
Vice President & Chief Counsel, Telephony  
Time Warner Cable  
290 Harbor Drive  
Stamford, CT 06902

Steven H. Teplitz  
Vice President & Associate General Counsel  
Time Warner Inc.  
800 Connecticut Avenue, N.W.  
Washington, D.C. 20006

A handwritten signature in cursive script that reads "Rebecca W. Martin". The signature is written in black ink and is positioned above a horizontal line.

Rebecca W. Martin  
McNair Law Firm, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

# EXHIBIT A

## EXHIBIT A

### South Carolina Telephone Coalition Member Companies

Bluffton Telephone Company, Inc.

Chesnee Telephone Company

Chester Telephone Company

Farmers Telephone Cooperative, Inc.

Ft. Mill Telephone Company, d/b/a Comporium Communications

Hargray Telephone Company, Inc.

Home Telephone Company, Inc.

Horry Telephone Cooperative, Inc.

Lancaster Telephone Company, d/b/a Comporium Communications

Lockhart Telephone Company

McClellanville Telephone Company

Norway Telephone Company

Palmetto Rural Telephone Cooperative, Inc.

Piedmont Rural Telephone Cooperative, Inc.

PBT Telecom

Ridgeway Telephone Company

Rock Hill Telephone Company, d/b/a Comporium Communications

Sandhill Telephone Cooperative, Inc.

St. Stephen Telephone Company

West Carolina Rural Telephone Cooperative, Inc.

Williston Telephone Company

# EXHIBIT B



Brookside Court, Suite 135  
4625 Alexander Drive, Alpharetta, GA 30022  
phone: 770-569-2105, fax: 770-410-1608

December 16, 2005

Maribeth Bailey  
Time Warner Cable Information Services  
290 Harbor Drive  
Stanford, CT 06902

Re: *TWCIS Request for Interconnection with PBT, Home, Farmers, Ft. Mill, and St. Stephen*

Maribeth:

We have reviewed the applicable state and federal rules and regulations regarding TWCIS' request for interconnection with PBT Telecom, Inc., Home Telephone Company, Inc., Farmers Telephone Cooperative, Inc., Ft. Mill Telephone Company and St. Stephen Telephone Company (collectively "RLECs"). While we are willing to continue discussions to negotiate an agreement for the exchange of traffic with TWCIS, particularly with respect to telecommunications services that TWCIS provides in those areas where it is a certified telecommunications carrier, we do not believe TWCIS' request falls within Section 251 of the Telecommunications Act because TWCIS does not appear to be a telecommunications carrier in the areas of the state served by the RLECs.

Finally, regarding St. Stephen, have you been able to investigate further where Time Warner Cable actually provides service in St. Stephen territory? I believe we discussed in our last meeting that St. Stephen is not aware of any Time Warner Cable facilities in its service area, and you were going to see if you could provide some more specific information on that.

Sincerely,

J. Lans Chase  
John Staurulakis, Inc.

cc: PBT Telecom, Inc.  
Home Telephone Company, Inc.  
Farmers Telephone Cooperative, Inc.  
Ft. Mill Telephone Company  
St. Stephen Telephone Company

7852 Walker Drive, Suite 200, Greenbelt, MD 20770  
phone: 301-459-7590, fax: 301-577-5575  
internet: www.jsitel.com, e-mail: jsit@jsitel.com

Echelon Building II, Suite 200  
9430 Research Boulevard, Austin, TX 78759  
phone: 512-338-0473, fax: 512-346-0822

Egandale Corporate Center, Suite 310  
1380 Corporate Center Curve, Eagan, MN 55121  
phone: 651-452-2660, fax: 651-452-1909

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Bountiful, UT 84010  
phone: 801-294-4576, fax: 801-294-5124