Before the
Federal Communications Commission
Washington, D.C. 20554

Time-Warner Petition for Preemption Pursuant to Section 253 of the Communications Act, as Amended	)))	Docket No. 06-54

Petition of Time Warner Cable for Declaratory Order Ruling That Competitive Local Exchange Carriers May Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services To VoIP Providers	))))))	Docket No. 06-55

THE COMMENT OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Pennsylvania Public Utility Commission (PaPUC) hereby submits this Comment in response to the two Petitions of Time Warner Cable (TW). The first TW Petition seeks preemption of a decision of the South Carolina Public Service Commission (the TW Preemption Petition). The second Petition seeks a Declaratory Ruling that CLECs may interconnect under Section 251 in order to provide wholesale telecommunications services to VoIP Providers (TW Declaratory Order Petition).

Comment of the
Pennsylvania Public Utility Commission

The PaPUC appreciates the opportunity to file this Comment. As an

initial matter, the PaPUC Comment should not be construed as binding on the PaPUC in any proceeding before the PaPUC. Moreover, the suggestions contained in this Comment may change in response to subsequent events. This includes developments at the federal or state level.

The PaPUC Comment makes four suggestions. First, the PaPUC suggests that the FCC recognize that some states are also examining this complex legal issue in contested proceedings. For example, the PaPUC is currently dealing with a number of certification applications by wireline entities that will provide Internet Protocol (IP) based services. These entities seek market entry certification as competitive local exchange telecommunications carriers (CLECs), and their applications are under evaluation in accordance with the PaPUC's standards and procedures for implementing the Telecommunications Act of 1996 (TA-96). Moreover, the PaPUC has refrained from imposing any state regulatory requirements on Voice over Internet Protocol (VoIP) providers, such as Vonage, until there is greater clarity as the federal level regarding the scope and degree of state jurisdiction over such service providers. *Investigation into VoIP as a Jurisdictional Service,* Docket No. M-00031707 (Order entered May 24, 2004); *Vonage Petition to Preempt Minnesota PUC, CC Docket No. 03-211 (Appeal Pending).* The PaPUC suggests that an FCC interpretation of TA-96 would prove useful to states or commonwealths, like Pennsylvania, currently examining these issues.

In addition, the PaPUC suggests that the alleged "barrier to entry" arising from decisions of the South Carolina and Nebraska utility commission, identified in the TW Preemption Petition and on page 2 of the

TW Declaratory Order Petition, may not constitute effective grounds for preemption. In particular, the PaPUC urges the FCC to note that the Annex attached to the TW Declaratory Order Petition demonstrates that a majority of states take the alternative view that wholesale services, including those provided by cable companies like TW, constitute telecommunications under Section 251 as a matter of federal law. Moreover, this is the view proposed by in the TW Declaratory Order Petition. The fact that so many states apparently agree with the legal interpretation proposed in the TW Declaratory Order Petition may make it difficult for the FCC to persuade the states or the courts that preemption is warranted under Section 253. The fact that two states reach a minority, though understandable, legal conclusion in the absence of federal guidance may not persuade the courts that preemption is warranted. That may particularly be the case when, as here, the FCC has an effective alternative e.g., the issuance of a federal agency interpretation of federal law, that could resolve the problem.

The PaPUC suggests that the FCC consider a form of "cooperative federalism" in which interpretation is emphasized over preemption. This approach may prove more useful to the market and the states than preemption, centralization, and litigation.

Moreover, Pennsylvania already refrains from imposing any state law obligations on Internet protocol (IP) enabled services, such as VoIP, until there is greater clarity at the federal level on this nascent technology. The PaPUC takes this approach given the dynamic nature of the technology and the fact federal clarity on federal law is more cost-effective

than litigation. This considered approach and the proceedings already in Pennsylvania suggest that the FCC consider issuing an interpretation of federal law, as opposed to preemption, to provide guidance to the states. States with federal agency interpretations of federal law are less likely to issue the quantitative number of contrary decisions required before preemption is warranted under Section 253.

However, in the event the FCC preempts the states from addressing the issues presented by the TW Petition, the PaPUC suggests that preemption should be consistent with prior preemption orders. In the *Vonage* decision, the FCC does not preempt the states from addressing consumer protections, public safety, general consumer fraud, and taxes and assessments. The PaPUC suggests that this approach to

preemption may be more acceptable to the states and the courts as opposed to a broader preemption.

Finally, the PaPUC notes that the FCC already issued multiple IP-related decisions. These decisions include the *pulver.com*, *CALEA*, *Vonage*, and *E-911* decisions. The PaPUC suggests that the FCC consider resolving complex policy matters in more generic proceedings, such as the *IP-Enabled Services* and *Intercarrier Compensation* rulemakings, as opposed to limited decisions in case-specific pleadings.
A case-specific approach may provide less certainty than general pronouncements.

Respectfully submitted,
Pennsylvania Public Utility Commission

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