

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matters of	)	
	)	
Petition of Time Warner Cable for Declaratory 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	)	WC Docket No. 06-55
	)	
Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act, as Amended	)	WC Docket No. 06-54
	)	

**REPLY COMMENTS OF EARTHLINK, INC.**

EarthLink, Inc. (“EarthLink”), by its attorneys, files these reply comments in the above-captioned proceedings in support of the TWC Petition.<sup>1</sup> As the overwhelming majority of commenters have pointed out, voice-over-IP (“VoIP”) services represent a significant opportunity for Americans to enjoy state-of-the-art telephony and other communications functionality and a superior alternative to the switched telephony offered by incumbent LECs. To facilitate VoIP deployment, EarthLink joins the chorus of commenters urging the Federal Communications Commission (“FCC” or “Commission”) to act quickly and confirm the interconnection rights of wholesale telecommunications service providers currently supporting many retail VoIP offerings.

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<sup>1</sup> Petition of Time Warner Cable for Declaratory 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, WC Dkt. 06-55 (filed Mar. 1, 2006) (“TWC Petition”).

EarthLink also files these reply comments to stress that it is well within the statutory framework of Title II of the Act, and the relevant precedent, for providers of wholesale transmission services to be classified as telecommunications service providers, regardless of the FCC's ultimate regulatory classification of retail VoIP services. Thus, the Commission should expressly confirm that providers such as Sprint, Level 3, and other major carriers offering local access, long haul transmission and PSTN interconnection services in support of VoIP retailers are telecommunications service providers entitled to full rights to interconnect with incumbent LECs under Section 251(c) of the Act.

The comments of the Nebraska Public Service Commission ("PSC") in these proceedings assert that the basis of its denial of the Sprint request for Section 251 interconnection was that, based on its review of the Sprint-TWC agreements, "Sprint had failed to demonstrate it was providing its service indiscriminately so as to make its service effectively available to end users."<sup>2</sup> According to the Nebraska PSC, "the record demonstrated Sprint individually negotiates its arrangements with potential customers for its network services. The needs of its customers vary, therefore the contracts are tailored to those individual needs."<sup>3</sup> Nebraska urges the FCC to review the confidential agreement, if it chooses to re-try the underlying merits, and determine whether the agreement was so highly specialized to TWC.

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<sup>2</sup> Comments of the Nebraska Public Service Commission, WC Dkt. 06-55, at 6 (filed Apr. 10, 2006).

<sup>3</sup> Id., at 11.

EarthLink believes, however, that the Nebraska PSC may have misconstrued common carriage law when it evaluated the Sprint-TWC wholesale contract. An offering to provide wholesale transmission to one or more customers does not automatically render an arrangement “private carriage” simply because it is tailored to the needs of the individual customer. This is especially true of wholesale transmission arrangements, which by their very nature are oftentimes complex and are heavily negotiated between wholesaler and retailer. For example, such arrangements would typically encompass operational support systems (“OSS”) between the two entities that are necessarily unique to the customer’ ordering systems technology and locations; service level commitments or interconnection with a retailer’s own equipment or other vendors are also necessarily specific to each customer arrangement. These required specifics do not render the transmission provider’s underlying offering a “private carriage” arrangement, which the Nebraska PSC seems to have assumed.

Rather, the hallmark of a common carriage arrangement is the deliberate offering of transmission for a fee on an indiscriminate basis to a group or class of users. In this case, as the Sprint Comments describe, the Sprint wholesale service would appear to meet the traditional test for a common carriage offering of telecommunications.<sup>4</sup> Thus, Sprint has described: the specific transmission and carrier-related services it offers to a class of potential VoIP retailers (or retailers of other technologies);<sup>5</sup> that it offers such

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<sup>4</sup> Comments of Sprint Nextel, WC Dkt. 06-55 (filed Apr. 10, 2006).

<sup>5</sup> Id., at 5.

services “indifferently to all users within the same class of wholesale customers;”<sup>6</sup> and it even “promotes its services at trade shows, markets them through direct sales contacts, and displays promotional information on its web site . . . [and] has broadcast its eagerness to provide these services to an even larger percentage of potential customers.”<sup>7</sup>

Given these circumstances, applicable case law requires that Sprint’s offering is properly classified as a telecommunications service. First, while the Nebraska PSC would seem to require a telecommunications service to be a static tariffed offering available to all members of the public, this is simply not a requisite of common carriage. Rather, the Commission has detariffed both the interstate access and interexchange service portions of Sprint’s offering in part to permit carriers to be flexible to the changing demands of the marketplace.<sup>8</sup>

Likewise, that the terms of a transmission services contract are worked out through negotiation in a fully competitive market, instead of the customer’s acceptance of the carrier’s unilaterally established terms in a tariff, is no basis to vitiate a conclusion of a common carriage arrangement. As the D.C. Circuit has noted, “market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and

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<sup>6</sup> Id., at 14. Sprint Nextel further explains that the “class consists of cable companies and any other entities that desire Sprint Nextel’s services and have comparable ‘last mile’ network facilities capable of supporting voice telephony.” Id.

<sup>7</sup> Id., at 16.

<sup>8</sup> Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order, 11 FCC Rcd. 20730, ¶ 54 (1996) (“Eliminating tariff filings by nondominant interexchange carriers will prevent such carriers from refusing to negotiate with customers based on the Commission’s tariff filing and review processes. As a result, carriers may become more responsive to customer demands, and offer a greater variety of price and service packages that meet their customers’ needs.”)

conditions of service set by carriers who lack market power.”<sup>9</sup> Indeed, in the Commission found and the D.C. Circuit agreed that, in a fully competitive market, the facts of service contract negotiations and haggling are to be expected and may lead to somewhat different arrangements for each customer. Where the market is fully competitive, these different and customer-specific terms, however, do not violate the carrier’s fundamental obligation to treat all customers indiscriminately and not to engage in “unreasonable discrimination.”<sup>10</sup>

For the foregoing reasons, and as argued by the majority of commenters, the Commission should act expeditiously to grant the TWC Petition.

Respectfully submitted,

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<sup>9</sup> Orloff v. FCC, 352 F.3d 415, 419, 421 (D.C. Cir. 2003).

<sup>10</sup> Orloff v. Vodafone AirTouch Licenses LLC d/b/a Verizon Wireless, Memorandum Opinion and Order, 17 FCC Rcd. 8987, ¶ 23 (2002), *aff’d*, Orloff v. FCC, 352 F.3d 415 (D.C. Cir. 2003) (rejecting the contention that, in a fully competitive market, Section 202(a) of the Act means that “a haggling policy must result in all customers who haggle being treated exactly the same”).