

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)	

REPLY COMMENTS OF THE
SOUTH CAROLINA TELEPHONE COALITION

M. John Bowen, Jr.
Margaret M. Fox
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
Telephone: (803) 799-9800

Attorneys for the South Carolina Telephone
Coalition

April 25, 2006

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)	

REPLY 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, hereby respectfully submits these reply comments, by and through its undersigned counsel. The SCTC submitted initial comments in response to the public notice issued by the Federal Communications Commission (the "Commission") in the above-captioned proceeding.¹

¹ *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).

The underlying facts of this matter are set forth in the SCTC's initial comments filed in this docket on April 10, 2006. The facts clearly demonstrate that federal preemption is not warranted in this case. Time Warner Cable Information Service (South Carolina), LLC ("Time Warner") filed an application and presented testimony requesting certification to provide telecommunications services in South Carolina. The Public Service Commission of South Carolina ("SCPSC") conducted an evidentiary hearing and made a decision based on the evidence (or lack thereof) presented to it in the context of an administrative contested case proceeding. In doing so, the SCPSC applied competitively neutral state statutes and regulations.

This matter involves nothing more than Time Warner failing to meet its burden of proof in a state administrative proceeding. Time Warner simply did not articulate with any degree of clarity the authority it was seeking from the SCPSC, and the SCPSC denied Time Warner's request accordingly. There is no policy issue here, no conflict between state and federal law, and no barrier to entry. There is simply a "failure of proof."² It would be wholly inappropriate for the Commission to preempt the SCPSC with respect to this matter and to make the sweeping policy determinations Time Warner requests.

Nothing in Time Warner's Petition or in the comments filed by other parties suggests differently. In fact, the only entity commenting specifically in support of Time Warner's request for preemption on the certification issue, Sprint Nextel Corporation ("Sprint"), clearly did not have a full grasp of the facts of the South Carolina proceeding.

First, Sprint states that the SCPSC "deemed it in the public interest to grant Time Warner Cable a [certificate] in all regions of South Carolina served by a non-rural ILEC or by Alltel, and

² SCPSC Order No. 2005-412 at p. 5. (See Appendix to Time Warner Petition at Tab 6.)

there would seem to be nothing in the record below to justify a contrary conclusion regarding Time Warner Cable's provision of service in areas served by the remaining RLECs."³ Sprint's statement suggests that the SCPSC actually drew inconsistent conclusions in the different proceedings. In fact, the SCPSC did not even reach the merits of the issue regarding whether the public interest would be harmed by Time Warner's service in the areas served by the RLECs and, therefore, no "conclusion" was reached.

Second, even if the SCPSC *had* found it was not in the public interest for Time Warner to provide competitive local exchange service in the areas served by the RLECs, Sprint's contention that this would be an unjustified "contrary conclusion" is wrong. An examination of the respective records of Time Warner's initial (non-rural) and Alltel certification proceedings reveals that in neither of those cases was the public interest questioned with respect to the areas for which Time Warner was granted certification.⁴ In the RLEC certification proceeding, on the other hand, significant concerns were raised and there was substantial testimony upon which the SCPSC could reasonably have concluded that the public interest would be harmed by the provision of competitive local service by Time Warner in the rural areas served by the RLECs.⁵ Despite the ample testimony on the public interest issue, however, the SCPSC did not reach

³ Sprint Comments at p. 3 (footnote omitted).

⁴ In fact, in the first proceeding, Time Warner initially sought statewide certification; however, when the SCTC filed testimony stating that certification was not in the public interest in rural areas, Time Warner amended its request to seek certification in non-rural areas only. As a result, the SCTC withdrew its testimony.

⁵ See Transcript of Hearing in SCPSC Docket No. 2004-280-C (attached as Exhibit C to Comments of Office of Regulatory Staff of the State of South Carolina previously filed in this docket), at pp. 139-146 and 184-195.

a conclusion on the merits of the issue because it found, as a threshold matter, that Time Warner's application could not be granted because it was unclear what authority Time Warner was seeking.

The fact that the SCPSC did not reach the public interest determination is critically important, because it underscores why preemption is so inappropriate and contrary to the provisions of the Act at this stage. By requesting preemption of the SCPSC's decision, Time Warner is seeking not only to have the Commission cure Time Warner's own failure of evidentiary proof, but to have the Commission override those provisions of federal law that clearly allow the state commissions to make specific public interest findings prior to allowing the provision of competitive local exchange service in areas served by rural telephone companies.

In its comments, Sprint apparently makes its own "finding" that certification of Time Warner by the SCPSC is in the public interest because Time Warner agreed to contribute to universal service funds, to pay access charges "where applicable," and to provide E911 service.⁶ Again, the SCPSC did not reach the public interest issues raised in the case. However, if it had, it would have done so on the complete record before it and not just on the "sound bite" seized upon by Sprint. A full review of the record shows that the SCPSC certainly would have been justified in finding that Time Warner's promises are empty. Time Warner's agreement to voluntarily and temporarily comply with "applicable" rules regarding the payment of access charges, contributions to universal service, etc., must be balanced with and tempered by its full reservation of rights to take a contrary position and to argue that there are no "applicable" rules

⁶ Sprint Comments at 3.

with respect to its VoIP service.⁷ There is more than one side to this story, which demonstrates why it is so important for state commissions to build a complete record and to make important public interest determinations based on the evidence presented. That is exactly what is provided for in the Act, particularly with respect to the provision of competitive local service in rural areas. The responsibilities and rights of the states to make such determinations cannot legally be abrogated through preemption of a state certification decision.

Sprint cites a number of cases in which the Commission has preempted state commissions and argues that the cited cases are analogous to the present case. As stated in the SCTC's initial comments filed in this docket, the cases already cited by Time Warner are distinguishable on the basis that they involved state statutes which, on their face, restricted competitive entry in specific markets.⁸ Similarly, in the *New England Public Communications Council Preemption Order*⁹ cited by Sprint, the Connecticut Dept. of Public Utility Control prohibited all entities except ILECs and certified LECs from providing pay telephone service in

⁷ See Transcript of Hearing in SCPSC Docket No. 2004-280-C at p. 17. Likewise, Comcast claims that interconnected VoIP services have demonstrated their commitment to providing services "by working within the existing regulatory framework of common carrier regulation during this transition period in which the regulatory treatment of IP-enabled service remains undecided." Comcast Comments at 7 (emphasis added). Again, any concession to be subject to the same requirements as a telecommunications carrier are temporary in nature.

⁸ 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); *The Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (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).

⁹ *New England Public Communications Council Petition for Preemption Pursuant to Section 243*, 11 FCC Rcd 19713 (1996), reconsideration denied, 12 FCC Rcd 5215 (1997).

Connecticut, a decision that, on its face, prohibits certain entities from providing telecommunications service. The Commission is not faced with such a situation in this case.

The other preemption case cited by Sprint, *Classic Telephone Preemption Order*,¹⁰ is also easily distinguished. In that case, the Commission found there was insufficient evidence to justify the denial of a franchise by city authorities. By contrast, in the instant case, there was insufficient evidence upon which the SCPSC could have *granted* a certificate. The Commission also found in *Classic Telephone* that the cities had not applied their franchise requirements in a competitively neutral manner, because the cities denied the franchise on the basis that they wanted only one company to provide telephone service in the cities, and they preferred another carrier to the one requesting the franchise.¹¹ Again, by contrast, in the instant case the certification statutes were applied in a competitively neutral manner. Another distinction is that the Commission found that federal provisions which specifically recognize that rural areas are subject to special considerations, such as Sections 251(f) and 253(f) of the Act, could not justify the cities' actions in *Classic Telephone* because determinations under those provisions are to be made by state and not local authorities and, even if the authority could be delegated to the cities, there was no evidence in the record to indicate that the federal provisions had any bearing on the issues.¹² In the instant case, it was a state commission making the decision, and, although there was evidence in the record that federal provisions regarding rural areas had significant bearing on the issues, those issues were not reached on their merit because of a threshold lack of proof with respect to Time Warner's application.

¹⁰ *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082 (1996).

¹¹ See *Classic Telephone* at paras. 26-27 and 37.

CONCLUSION

As fully discussed in the SCTC's initial comments, the Commission should deny Time Warner's Petition for Preemption of the SCPSC's orders denying an expanded certificate to Time Warner. It is not appropriate for the Commission to preempt a state commission decision in a state evidentiary administrative proceeding in which Time Warner simply failed to meet its burden of proof to articulate clearly the services for which it was seeking authority. There is no policy issue here, no conflict between state and federal law, and no barrier to entry. The SCPSC acted appropriately and within its authority in denying Time Warner's request for certification in the specified rural areas, and nothing in Time Warner's Petition or in supporting comments dictates a different result.

Respectfully Submitted,



M. John Bowen, Jr.
Margaret M. Fox
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
Telephone: (803) 799-9800
Email: jbowen@mcnair.net;
pfox@mcnair.net

Attorneys for the South Carolina Telephone
Coalition

April 25, 2006
Columbia, South Carolina

¹² See *Classic Telephone* at paras. 44-45.

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

In the Matter of)
)
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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Comments of the South Carolina Telephone Coalition** was served this 25th 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

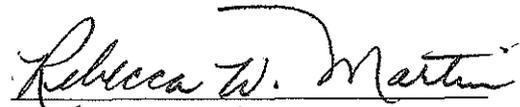
Best Copy and Printing, Inc.
Federal Communications Commission Copy Contractor
fcc@bcpiweb.com

Renee Crittendon, Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
renee.crittendon@fcc.gov

I hereby certify that a copy of the foregoing **Reply Comments of the South Carolina Telephone Coalition** was served this 25th 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