

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

In the Matter of	)	
	)	
Time Warner Cable's Petition for Declaratory	)	
Ruling that Competitive Local Exchange Carriers	)	
May Obtain Interconnection Under Section 251	)	WC Docket No. 06-55
of the Communications Act of 1934, as Amended,	)	
to Provide Wholesale Telecommunications	)	
Services to VoIP Providers	)	
	)	
Petition of Time Warner Cable for Preemption	)	WC Docket No. 06-54
Pursuant to Section 253 of the Communications	)	
Act, as Amended	)	

**REPLY COMMENTS OF T-MOBILE USA, INC.**

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Date: April 25, 2006

## SUMMARY

T-Mobile joins the overwhelming majority of commenters in urging the Commission to grant Time Warner Cable's ("TWC") Petition. Petitions for declaratory ruling relating to interconnection rights under the Act rarely generate the type of broad-scale industry support that the initial comments in this proceeding reflect. Service providers from across the communications spectrum – including ILECs, CLECs, VoIP service providers and cable companies – join in calling for grant of the TWC Petition. CLECs provide indirect interconnection and other services critical to intermodal competitors, including commercial mobile radio service ("CMRS"), providers of satellite services, cable service providers, and providers of VoIP services. Reaffirmation that CLECs are entitled to interconnection with ILECs pursuant to Section 251 of the Act, regardless of the identity or classification of the customers they serve, is crucial to the continued development of all variations of intermodal and intramodal competition. T-Mobile supports the continued development of competitive markets as a means of providing consumers with new and increased services at competitive prices.

Commenters presented extensive evidence that the availability of wholesale or third-party services facilitates entry into markets, and rural markets in particular, by providing service providers with an alternative source of the interconnection and facilities necessary to serve their customers. The resulting competition benefits the public by increasing the number of service providers in a market and encouraging innovative services at competitive prices as service providers compete for customers. The Commission must ensure that it does not hinder the development of competitive markets by requiring the identification or classification of traffic before such traffic can be exchanged. Rapid technological advances would make such a requirement difficult to enforce and would delay or prohibit the introduction of new services.

Grant of TWC's Petition is also supported by the numerous Commission orders and court decisions establishing that CLECs providing wholesale service are entitled to interconnection under Section 251 for the exchange of that wholesale traffic, as the record in this proceeding demonstrates. Moreover, the fact that a CLEC chooses to provide its wholesale services pursuant to a contract does not vitiate its common carrier status nor is the regulatory classification of a CLEC's customers' services determinative of the CLEC's common carrier status or Section 251 interconnection rights.

In order to serve the public interest and preserve the benefits of competition for consumers in all parts of the nation, whether rural or urban, T-Mobile urges the Commission to grant the TWC Petition. T-Mobile respectfully requests that the Commission grant the TWC Petition as quickly as possible in order to eliminate the regulatory uncertainty created by the decisions of the Nebraska and South Carolina State Commissions.

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**REPLY COMMENTS OF T-MOBILE USA, INC.**

T-Mobile USA Inc. (“T-Mobile”), pursuant to the Federal Communications Commission’s (“Commission” or “FCC”) March 21, 2006 Public Notice, submits these Reply Comments in support of the above-captioned Petition for Declaratory Ruling (“Petition”) filed by Time Warner Cable (“TWC”). In that Petition, Time Warner requests that the Commission rule that competitive local exchange carriers (“CLECs”) are entitled to interconnect under Section 251 of the Communications Act of 1934, as amended, (the “Act”) to provide wholesale telecommunications service to voice over Internet protocol (“VoIP”) providers. TWC filed the Petition after the state commissions in Nebraska and South Carolina ruled that the CLECs through which TWC sought indirect interconnection to the relevant incumbent local exchange carriers (“ILECs”) have no rights under Section 251 of the Act to exchange information services traffic or the traffic of third parties like TWC with ILECs.

Petitions for declaratory ruling relating to interconnection rights under the Act rarely generate the type of broad-scale industry support that the initial comments in this proceeding

reflect. Service providers from across the communications spectrum – including ILECs,<sup>1</sup> CLECs,<sup>2</sup> VoIP service providers<sup>3</sup> and cable companies<sup>4</sup> – join in calling for grant of the TWC Petition. CLECs provide indirect interconnection and other services critical to intermodal competitors, including commercial mobile radio service (“CMRS”), providers of satellite services, cable service providers, and providers of VoIP services. Reaffirmation that CLECs are entitled to interconnection with ILECs pursuant to Section 251 of the Act, regardless of the identity or classification of the customers they serve, is crucial to the continued development of all variations of intermodal and intramodal competition. T-Mobile supports the continued development of competitive markets as a means of providing consumers with new and increased services as competitive prices.

As one of the fastest growing nationwide wireless service providers offering digital voice, messaging and high-speed wireless data services to more than 21 million customers in the United States, T-Mobile supports TWC’s Petition as a means of encouraging the continued development of intermodal competition. T-Mobile competes directly with wireline carriers, providing wireless services that are potentially substitutable for wireline services so that consumers have a real choice between technologies and service providers. As one of only a few

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<sup>1</sup> See, e.g., Comments of Verizon at 12; Sprint Nextel Corp. (“Sprint”) at 1.

<sup>2</sup> See, e.g., Comments of Level 3 Communications, LLC (“Level 3”) at 1; BridgeCom International, Inc. et al. (“BridgeCom”) at 2.

<sup>3</sup> See, e.g., Comments of Broadwing Communications, LLC et al. (“Broadwing”) at 2; Voice on the Net (“VON”) Coalition at 2.

<sup>4</sup> See, e.g., Comments of Comcast Corporation (“Comcast”) at 1; South Carolina Cable Television Assoc. (“SCCTA”) at 2; National Cable & Telecommunications Assoc. (“NCTA”) at 1.

independent wireless service providers,<sup>5</sup> T-Mobile brings a unique perspective to the proceeding and appreciates the opportunity to add its experiences to the record.

The TWC Petition requests the Commission to "grant a declaratory ruling reaffirming that requesting telecommunications carriers are entitled to obtain interconnection with incumbent LECs to provide wholesale telecommunications services to other service providers."<sup>6</sup> For the reasons set forth in these reply comments, T-Mobile urges the Commission to grant the ruling TWC has requested. T-Mobile's reply comments focus solely upon the scope of the rights and obligations of requesting telecommunications carriers to ILECs. T-Mobile does not address the rights and obligations of any other type of service provider in these reply comments.

**I. FOSTERING INTERMODAL COMPETITION IS ONE OF THE MAIN GOALS OF THE TELECOMMUNICATIONS ACT OF 1996 AND THE COMMISSION'S POLICIES**

Congress, in enacting the original Communications Act in 1934, established as a fundamental goal of U.S. policy that consumers have access to "a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges."<sup>7</sup> When amending the Act in 1996, Congress made clear that in furtherance of this goal, it favored a competitive market that included intermodal sources of competition.<sup>8</sup> Indeed, it stated that the goal of the 1996 Act is to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by

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<sup>5</sup> The other major wireless carriers, as well as several regional wireless carriers, are affiliated with ILECs. For example, Cingular Wireless is a joint venture of AT&T Corporation and BellSouth and Verizon Wireless is affiliated with Verizon.

<sup>6</sup> TWC Petition at 11.

<sup>7</sup> The Communications Act of 1934, as amended, 47 U.S.C. §151.

<sup>8</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 *et seq.* ("1996 Act").

opening all telecommunications markets to competition,”<sup>9</sup> which Congress hoped to achieve by facilitating competition among intermodal service providers, including traditional wireline, cable, and wireless providers.

The Commission has long stressed the importance of intermodal competition, and several recent Commission orders – including those regarding unbundled network elements,<sup>10</sup> wireline broadband services<sup>11</sup> and number portability<sup>12</sup> – are based in part on the Commission’s stated goal of fostering intermodal competition. Indeed, the Commission is increasingly relying on intermodal competition to ensure that industry consolidation will not harm consumers.<sup>13</sup>

Following the lead of the Commission, various state commissions are also actively working to foster intermodal competition. For example, the New York Public Service Commission (“New York Commission”) recently released its third order addressing the status of,

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<sup>9</sup> Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., at 1 (1996) (“Joint Explanatory Statement”).

<sup>10</sup> *Unbundled Access to Network Elements*, 20 FCC Rcd 2533, ¶2 (2005) (explaining that the order “ensures that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition.”)

<sup>11</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, ¶3 (2005) (stating that its regulations “will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms”).

<sup>12</sup> *Telephone Number Portability*, 11 FCC Rcd 8352, ¶160 (1996) (stating that “service provider portability will encourage CMRS-wireline competition, creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhancing flexibility for users of telecommunications services”).

<sup>13</sup> See, e.g., *Verizon Communs. Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶4 (2005) (finding that Verizon-MCI merger will not decrease competition in mass market due to “increasingly important role” of intermodal competition); *SBC Communs. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶4 (2005) (finding same); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶2 (2005) (finding that “increasing competition from intermodal sources” has decreased CLEC reliance on ILEC broadband-related facilities for the mass market).

and ways to improve, competition in the New York intermodal telecommunications market.<sup>14</sup> In that Order, the New York Commission explained that it has “pursued competitive telecommunications markets because competition spurs innovation, promotes investment, encourages efficiency, and maximizes customer choice.”<sup>15</sup> However, the New York Commission also noted that wholesale services are generally not competitive, therefore requiring continued price and service regulation, and that continued monitoring was especially important where ILECs control monopoly bottleneck facilities.<sup>16</sup> This finding echoes the arguments underlying TWC’s Petition – that there is a continued need for wholesale services in order to attain a fully competitive intermodal market.

T-Mobile fully supports the efforts of the FCC and state commissions like the New York Commission to foster intermodal competition because it is one of the best ways to ensure that consumers reap the benefits of efficient prices and innovative new services, technologies and service packages. When consumers are able to choose freely between service providers, technologies and service offerings, the rewards of Congressional and Commission goals of intermodal competition are realized by all.

## **II. GRANT OF TWC’S PETITION IS CRUCIAL TO THE DEVELOPMENT OF INTERMODAL COMPETITION AND IS IN THE PUBLIC INTEREST**

T-Mobile agrees with the overwhelming majority of commenting parties that granting TWC’s Petition and affirming the right of CLECs to interconnect under Section 251 of the Act to

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<sup>14</sup> *Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings, Case No. 05-C-0616 (NYPSC April 11, 2006) (“New York Competition Order”).

<sup>15</sup> *New York Competition Order* at 6.

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

provide needed wholesale or other services to third-party service providers would serve the public interest.<sup>17</sup> Among other things, grant of the TWC Petition would further the goals of the Act by fostering intermodal competition, thus benefiting consumers, as explained below.

**A. The Availability of Wholesale Services and Indirect Interconnection Is Crucial to the Development and Sustainability of True Intermodal Competition.**

CLECs provide critical services, frequently on a wholesale basis, that are necessary for CMRS, cable, satellite, VoIP and other providers of telecommunications and information services to offer their own services and compete with the ILECs. As many commenters noted, these competing providers typically rely on interconnection agreements with CLEC wholesale service providers to interconnect indirectly to the public switched telephone network (“PSTN”) and to obtain necessary interconnection facilities, particularly in areas, such as rural areas, where service had not been available prior to such interconnection.<sup>18</sup> Neutral Tandem and Sprint noted

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<sup>17</sup> See, e.g., Comments of Alpheus et al. at 14-15 (explaining that wholesale telecommunications services serve the public interest by contributing to a competitive market); Broadwing et. al. at 3-4 (same); Comcast at 3-5 (stating that wholesale services are necessary to the provision of VoIP services which promote broadband development and voice competition); Level 3 at 1-3, 9 (wholesale service providers facilitate competition in the local market); NCTA at 4-5 (stating that the ability to interconnect is essential to voice competition”); Neutral Tandem at 2-5 (wholesale services contribute to a competitive market which results in decreased service prices); Sprint Nextel at 3-7 (wholesale carrier services facilitate easy entrance to telephony markets and promotes competition in rural areas); Verizon at 5-7, 12 (wholesale services increase competitive offerings by enabling the provision of VoIP services); VON Coalition at 3 (wholesale services contribute to VoIP which provides “a competitive, feature-rich alternative to traditional voice services”).

<sup>18</sup> See, e.g., Comments of Advance-Newhouse Communications (“Advance-Newhouse”) at 4 (“Cable operators commonly rely on third-party competitive local exchange carriers (“CLEC”) as, in effect, wholesale providers of connectivity to the PSTN.”); Broadwing et al. at 4 (“By providing information service providers the critical telecommunications inputs, wholesale telecommunications carriers promote the development of new and innovative Internet applications and deployment of broadband facilities by providing information service providers the ability to access customers and deliver information to those customers.”); Comcast at 4 (“[B]ehind every provider of interconnected VoIP service is a local exchange carrier that provides the wholesale telecommunications services and functions that are necessary components of the retail offering.”); NCTA at 6

the many benefits that their wholesale services provide including facilitating market entry by providing an alternative to the costs and complexities of direct interconnection with ILECs.<sup>19</sup> Furthermore, the existence of these competitive sources of wholesale services can act as a check on the prices and service quality of the ILECs' wholesale service offerings.<sup>20</sup> Because a fully competitive wholesale market facilitates entry by intermodal retail competitors, consumers will benefit from the resulting competitive pricing and innovative service offerings.

Unless the Commission grants Time Warner's Petition and reaffirms that CLECs have the right to utilize their Section 251 interconnection rights to exchange and terminate traffic of third parties, including information service traffic, all service providers would have to incur the time and expense of becoming certificated CLECs as a prerequisite to exchanging and terminating traffic pursuant to Section 251 or forego providing reasonably-priced competitive services to consumers. This outcome would hinder the development of intermodal competition, stifle innovation, and potentially drive up consumer prices.

Unfortunately, as evidenced by the state commission decisions at issue here, there is no guarantee that a service provider could exercise its interconnection rights even if it did obtain state certification. The Nebraska Commission decision finding that Sprint was not entitled to interconnection because it was not providing service indiscriminately to the public<sup>21</sup> and the South Carolina decision that wholesale providers are not entitled to interconnect to exchange

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(noting that some cable companies "connect to the PSTN through wholesale arrangements with unaffiliated or third-party telecommunications carriers").

<sup>19</sup> Comments of Neutral Tandem Inc. ("Neutral Tandem") at 2; Sprint at 4-7.

<sup>20</sup> *See, e.g.*, Comments of Neutral Tandem at 3 (stating that the availability of tandem switching provides an alternative to ILEC services and forces ILECs to decrease their rates).

<sup>21</sup> *See* Comments of the Nebraska Public Service Commission at 10-13.

third party traffic and VoIP traffic in particular<sup>22</sup> illustrate that states may act unreasonably even in cases where Commission orders and court decisions clearly suggest a different result.<sup>23</sup> The alternative, including requiring service providers to purchase special access services from the relevant ILECs at often highly inflated prices, is likewise unacceptable.<sup>24</sup> Accordingly, T-Mobile agrees with the vast majority of commenters that the Commission must take affirmative steps to facilitate intermodal competition by ensuring the continued availability of wholesale services and indirect interconnection.

**B. The Availability of Wholesale Services and Indirect Interconnection Also Ensure the Development and Sustainability of True Wireline Intramodal Competition, Which In Turn Fosters Intermodal Competition.**

The grant of Time Warner's Petition is also critical to fostering continued wireline competition, which is important to ensuring that the prices intermodal service providers must pay to gain access to wireline facilities remains reasonable. Many wireline carriers rely on the ILEC's "last mile" facilities to reach their customers and often obtain these facilities by purchasing wholesale services from the ILEC.<sup>25</sup> As the Commission noted in its *SBC/AT&T Merger Order*, "carriers face substantial fixed and sunken costs, as well as operational barriers, when deploying loops" and "are generally unwilling to invest in deploying their own loops unless they have a long-term retail contract that will generate sufficient revenues to allow them

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<sup>22</sup> See Time Warner Petition at 4-7.

<sup>23</sup> See Discussion at Section III *infra*.

<sup>24</sup> See, e.g., Comments of T-Mobile USA, Inc. in WC Docket No. 04-313 (filed October 4, 2004) and Reply Comments of T-Mobile USA, Inc. in WC Docket No. 04-313 (filed October 19, 2004).

<sup>25</sup> See, e.g., *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, ¶110 (2005) (finding that "competitors in the Omaha MSA continue to need access to Qwest's facilities to serve many locations . . . The record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market.")

to recover the cost of their investment.”<sup>26</sup> The availability of alternative sources of the wholesale “last-mile” facilities, enables additional wireline carriers to enter the market<sup>27</sup> and these wireline carriers in turn provide wholesale services to intermodal competitors. If the Commission fails to reaffirm the interconnection rights of CLECs providing wholesale or other services to third-party providers, T-Mobile and other interested parties will lose a source of competitive choice for wholesale operations and indirect interconnection.

**C. The Public Interest Would Best Be Served By Granting the TWC Petition.**

Congress, the FCC and state commissions all share the goal of fostering intermodal competition, and T-Mobile agrees with commenting parties that the best means for advancing these goals and serving the public interest is to grant the TWC Petition.<sup>28</sup> Ensuring that CLECs can use their section 251 interconnection rights to provide wholesale service to, and terminate traffic of, third parties is crucial to promoting that intermodal competition, which the Commission has found repeatedly is in the public interest.<sup>29</sup> Alpheus accurately summarized the importance of the availability of wholesale services when it commented that “a vigorously competitive market for wholesale telecommunications services serves the public interest by promoting attractive pricing and innovative features. . . . Retail carriers are then able to offer innovative services that benefit consumers.”<sup>30</sup> Similarly, Verizon noted that “[c]ustomers benefit from the increased competition resulting from the introduction of VoIP, which can occur

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<sup>26</sup> *In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶39 (2005) (“SBC/AT&T Merger Order”).

<sup>27</sup> *See, e.g.*, Comments of Neutral Tandem at 8.

<sup>28</sup> *See, e.g.*, Comments of Alpheus et al. at 14, 16; Broadwing et al. at 3-4; Comcast at 4-6; Level 3 at 9; Sprint at 3; SCCTA at 13-15.

<sup>29</sup> *See* footnotes 10-13 *supra*.

<sup>30</sup> Comments of Alpheus at 14.

‘quickly and efficiently’ through a competitive LEC’s wholesale offerings that utilize its existing systems and equipment.”<sup>31</sup> The wholesale services provided by commenters like Neutral Tandem, Sprint and Level 3 encourage and enable the entry of competitive providers of telecommunications and information services resulting in: (i) lower prices for consumers as service providers vie for customers, (ii) continued innovation and development of new services to retain those customers; and (iii) additional sources of service for customers in rural areas.<sup>32</sup>

Consumers directly benefit from interconnection arrangements between CLECs and third-parties. As some commenting parties correctly noted, CLECs that offer wholesale services provide a relatively simple means for intermodal competitors to interconnect to the PSTN, which in turn allows those competitors to offer services to consumer at lower prices.<sup>33</sup> CLECs that offer wholesale services also facilitate entry by smaller service providers that otherwise might not have attempted to serve the market,<sup>34</sup> as well as service providers that, for whatever reason, are not certificated as CLECs, or do not exchange enough traffic to justify direct interconnection. Further, the availability of alternative sources of wholesale services can exert downward pressure on the prices charged for, and increase the reliability of, similar services provided by ILECs.<sup>35</sup>

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<sup>31</sup> Comments of Verizon at 5.

<sup>32</sup> See, e.g., Comments of Level 3 at 2; Neutral Tandem at 2-5; Sprint at 3-7.

<sup>33</sup> See, e.g., Comments of Broadwing et al. at 3-4; Sprint at 6.

<sup>34</sup> See, e.g., Neutral Tandem at 4-5; Sprint at 4-5.

<sup>35</sup> See, e.g., Comments of Alpheus et al. at 16; Broadwing et al. at 4-5; Neutral Tandem at 3. See also, e.g., *In re Applications of NYNEX Corporation*, 12 FCC Rcd 19985, ¶200 (1997) (stating that “We also anticipate that the forward-looking cost requirement will encourage efficient competitive entry and lead competitors to exert downward pressure on prices. . . . Requiring Bell Atlantic-NYNEX to set prices based on forward-looking costs will create an environment in which competitors may enter on an effective basis and drive prices down toward forward-looking costs.”); *Local Exchange Carriers’ Rates, Terms, And Conditions For Expanded Interconnection Through Physical Collocation For Special Access And Switched Transport*, 12 FCC Rcd 18730, ¶1 (1997) (“We believe that expanded interconnection at reasonable rates, terms, and conditions will bring numerous public interest benefits, including expanded service choices for telecommunications users, heightened incentives for efficiency, technological innovations, rapid deployment

T-Mobile also agrees with commenting parties that reaffirmation of the right of CLECs to provide wholesale service and indirect interconnection pursuant to Section 251 is important in order to spur the deployment of advanced services at competitive prices. For example, Level 3 noted that the “availability and take up of broadband services has encouraged the introduction of VoIP services that compete with traditional local voice services.”<sup>36</sup> As more service providers are able to enter the market using indirect interconnection obtained from CLECs, these providers will be pressured to develop novel services in order to differentiate themselves from other service providers and attract new customers.<sup>37</sup> Competition in the wholesale service market and the security inherent in a known business model can free intermodal service providers to devote additional resources to introducing innovative advanced services and foster investment in innovative new technologies and service providers.<sup>38</sup>

Rural customers will also benefit from the availability of wholesale services as service providers use indirect interconnection to enter rural markets.<sup>39</sup> Although service providers are always seeking to expand their customer bases, as noted by Sprint, the costs of providing service in rural markets can discourage service providers from seeking to enter rural markets.<sup>40</sup> By simplifying the interconnection process, wholesale CLECs enable service providers to enter rural markets in a more timely and cost-efficient manner.<sup>41</sup> If CLECs are unable to exercise their Section 251 interconnection rights to provide indirect interconnection, fewer service providers

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of new technology, and pressure on LECs to offer certain interstate access services at prices closer to economic cost.”).

<sup>36</sup> Comments of Level 3 at 9.

<sup>37</sup> *See, e.g.*, Comments of Alpheus et al. at 14; Broadwing et al. at 3-4.

<sup>38</sup> *See, e.g.*, Comments of Neutral Tandem at 2.

<sup>39</sup> *See, e.g.*, Comments of Sprint at 6-7, 9.

<sup>40</sup> *See, e.g., id.* at 9.

<sup>41</sup> *See, e.g., id.* at 6-7.

will be able or willing to enter rural markets, leaving some consumers without any choice in service providers.

**D. Requiring Regulators To Identify and Classify All Different Types of Traffic To Determine Whether They Can Be Terminated or Exchanged Pursuant To Section 251 Would Harm the Public Interest.**

The Commission has previously acknowledged the rapid pace of technological advances. Attempting to identify and classify the traffic resulting from these new services before permitting the exchange of that traffic pursuant to Section 251 can only delay the deployment of the new services. As the Commission noted in its 1998 Report to Congress:

We are mindful of the fact that telecommunications is an industry characterized by extremely rapid changes, as technological advances lead to the introduction of revolutionary services. A few years ago, few consumers in this country were aware of the Internet and the notion that a packet-switched network could be used to complete a long distance call placed from a residential telephone probably would have been regarded as far-fetched. Today, millions of consumers, both in the United States and around the world, daily obtain access to the Internet for a wide variety of services. We can only speculate about the technologies and services that will be offered in the future. We must take care to preserve the vibrant growth of these new technologies and services.<sup>42</sup>

It is no easier now to forecast the services that will result from current technological advances than it was in 1998, and the Commission should not inadvertently create obstacles to the deployment of new services by adopting a rule that, in effect, requires all traffic to be classified before it can be exchanged pursuant to Section 251 interconnection rights.

Should an ILEC refuse to accept certain types of traffic or traffic from certain providers<sup>43</sup> it could inhibit competition and even force competitive providers out of the market. Wholesale

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<sup>42</sup> *In re: Federal-State Joint Board on Universal Service*, Report to Congress, ¶12, 13 FCC Rcd 11501 (1998).

<sup>43</sup> *See, e.g.*, Comments of South Carolina Telephone Coalition (“SCTC”) at 8-9 (arguing that RLECs are not obligated to exchange traffic with VoIP providers).

carriers likely would make their wholesale services available to fewer types of service providers or services if there was a chance that the ILEC would not accept traffic from the particular originating service provider. Service providers would then be forced to deal directly with the ILECs, and the ILECs may impose onerous terms or prices to exchange certain types of traffic. Even if a service provider incurred the time and expense of becoming a certificated service provider, the ILEC could still reject the provider's traffic. The end result would be a decrease in competitive choice and an increase in prices to consumers as fewer providers chose or were able to enter the market. Service providers are also less likely to develop new services and innovative products if there is no reasonable guarantee that they would be able to actually provide those services to customers.

**E. The Commission Should Reject Interpretations of the Act that Would Be Impossible To Enforce.**

A Commission ruling that only certain types of traffic could be exchanged pursuant to Section 251 would be difficult to enforce in a consistent or accurate manner. As explained above, it is not always possible to identify the services that generate the particular traffic being scrutinized and, as a result, the Commission would not be able to discern if traffic was eligible for exchange. This could lead to inconsistent rulings and uncertainty for service providers depending on how the FCC classified a particular type of traffic. Further, the Commission would be unable to keep up with the rapid advances in technology and the resulting new services. The Commission would have to constantly identify and review any new services to determine if the traffic resulting from the service was eligible for exchange under Section 251. This outcome would waste Commission resources, delay the introduction of new services and harm the public interest.

**III. REQUESTING CARRIERS HAVE THE RIGHT UNDER THE ACT AND THE COMMISSION'S RULES TO TERMINATE WHOLESALE, THIRD-PARTY SERVICE, AND INFORMATION SERVICE TRAFFIC PURSUANT TO SECTION 251**

As numerous commenters have noted, the text of the Act, the Commission's orders interpreting and implementing the Act, and the Court decisions reviewing the Commission's orders all confirm that telecommunications carriers have the right to interconnect with other telecommunications carriers,<sup>44</sup> including ILECs, and that telecommunications carriers providing wholesale services to third parties are telecommunications carriers.<sup>45</sup> The Act defines telecommunications carriers as providers of telecommunications – the transmission of information of a user's choosing without any change in the format or content of the information<sup>46</sup> - for a fee to the public<sup>47</sup> and essentially incorporates the definition of "common carrier" as established by the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in the *NARUC I* case.<sup>48</sup> In that decision the D.C. Circuit established a two-part test of common carrier status: the carrier (i) holds itself out to serve all users indifferently and (ii) permits customers to transmit intelligence of their own choosing.<sup>49</sup> As explained in detail by several commenters, a common carrier does not need to serve the entire public and the term "service to the public" does not exclude the provision of wholesale service.<sup>50</sup>

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<sup>44</sup> See, e.g., Comments of Advance-Newhouse at 7; BridgeCom, et al. at 3-4; SCCTA at 5.

<sup>45</sup> See, e.g., Comments of Alpheus, et al. at 2-3; BridgeCom et al. at 4; Level 3 at 6-7; NCTA at 7; Sprint at 13-14, 17.

<sup>46</sup> 47 U.S.C. §153(43).

<sup>47</sup> 47 U.S.C. §153(44).

<sup>48</sup> *National Assoc. of Regulatory Utils. Comm'rs v. FCC*, 525 F.2d 630, 640-641 (D.C. Cir. 1976) ("NARUC I").

<sup>49</sup> *Id.* at 640-641.

<sup>50</sup> See, e.g., Comments of Alpheus et al. at 3-5; AT&T Inc. at 3; Broadwing et al. at 6-12; BridgeCom et al. at 5-9.

Numerous FCC and court decisions have held that telecommunications carriers providing wholesale services to third parties are telecommunications carriers and thus are entitled to interconnection under Section 251.<sup>51</sup> The D.C. Circuit has ruled that the term “telecommunications service” was not intended create a distinction between wholesale and retail service and thus wholesale service providers can be classified as telecommunications carriers.<sup>52</sup> Even the Nebraska Public Service Commission (“Nebraska PSC”), whose order permitting rural LECs to refuse to interconnect with wholesale service providers is the subject of TWC’s Petition, does not dispute this issue. As the Nebraska PSC stated in its comments, “[t]he NPSC has never held that wholesale telecommunications service providers could not obtain interconnection. Rather, the NPSC acknowledged that service can be offered indirectly by telecommunications carriers.”<sup>53</sup> Further, nowhere in Section 251 does the statute limit interconnection to the exchange of retail service traffic.<sup>54</sup> Consequently, CLECs providing wholesale services to third parties are entitled to Section 251 interconnection.

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<sup>51</sup> See, e.g., *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, 11 FCC Rcd 21905, ¶263 (1996) (explaining that the “definition of telecommunications services is intended to clarify that telecommunications services are common carrier services, which include wholesale services to other carriers.”); *Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶785 (1997) (stating that “Common carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.”)

<sup>52</sup> *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 930 (D.C. Cir. 1999).

<sup>53</sup> Comments of the Nebraska Public Service Commission at 10.

<sup>54</sup> 47 U.S.C. §251. See also, Comments of Sprint at 12.

**A. Wholesale CLECs Providing Service Pursuant To A Contract Are Common Carriers.**

Contrary to the arguments of opposing commenters,<sup>55</sup> a CLEC's decision to offer wholesale services pursuant to a contract is not determinative of the CLEC's status as a common carrier.<sup>56</sup> The D.C. Circuit has already addressed this issue and explained that "a carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers."<sup>57</sup> The determinative factor is whether the carrier "offer[s] the service to all takers on a common carrier basis."<sup>58</sup> The Commission has held that a carrier can remain a common carrier even when individually negotiating with a customer and then creating a contract "specifically designed to meet the needs of only that customer" as long as the contract was made "generally available' to all potential customers with the same or similar communications needs."<sup>59</sup> Following in this vein, the Iowa Utilities Board recently held that Sprint operates as a common carrier when providing wholesale service even though Sprint enters into individual contracts with each customer and considers the rates and terms of the contracts to be confidential.<sup>60</sup> The Iowa Board explained that the contracts are not unexpected since "the business of selling these wholesale services has not evolved into a standardized offering."<sup>61</sup> The Board further stated that the confidentiality of the contract rates and terms is not surprising since the 1996 Act was intended to "create and foster competition" and "[c]ompetitors typically do not want their

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<sup>55</sup> See e.g., Comments of Iowa RLEC Group, Attach. B. at 9; South Dakota Telecom Assoc. at 10.

<sup>56</sup> See, e.g., Comments of Alpheus et al. at 8; BridgeCom et al. at 9-11; Global Crossing at 4; Level 3 at 7; Sprint at 16.

<sup>57</sup> *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

<sup>58</sup> *Id.*

<sup>59</sup> *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 34 (1990).

<sup>60</sup> *In re Arbitration of Sprint Communications Co., L.P., v. Ace Communications Group, et al.*, Order on Rehearing, Docket No. ARB-05-2, 14-15 (IUB 2005).

<sup>61</sup> *Id.*

competition to know their costs.”<sup>62</sup> The use of interconnection agreements, a form of contract, is the norm in the telecommunications industry, and, if this were not the case, the many ILECs that offer services in their often individually negotiated and customized interconnection agreements would not be classified as common carriers.<sup>63</sup> These FCC and court cases and general telecommunications industry practices confirm that CLECs offering service pursuant to contracts are still common carriers and are entitled to interconnection pursuant to Section 251.

**B. A Wholesale Carrier’s Customers and the Regulatory Classification of the Customer’s Services are Irrelevant to a Determination of the Wholesale Carrier’s Section 251 Interconnection Rights.**

As many commenters have noted, the Section 251 interconnection rights of a CLEC providing wholesale services are not determined by the identity of the CLEC’s wholesale customers nor the services provided by those customers.<sup>64</sup> Alpheus correctly notes that “nowhere in the Act is there any reference to the classification or type (or number) of customers that a service provider must have to meet the definitions of a ‘telecommunications service’ or to ‘offer telecommunications’” and that the Commission recently explained in its *Triennial Review Order* that “[c]ommon carrier services may be offered on a retail or wholesale basis because common carrier status turns not on *who* the carrier serves, but on *how* the carrier serves its customers, *i.e.*, indifferently and to all potential users.”<sup>65</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g.*, Comments of BridgeCom et al at 9-11; Global Crossing at 4; and Level 3 at 7.

<sup>64</sup> *See, e.g.*, Comments of Alpheus et al. at 10-11; Broadwing et al. at 14-15; Global Crossing at 2; BridgeCom et al. at 5-6, 11-12; Level 3 at 8; Sprint at 22-24; VON Coalition at 2.

<sup>65</sup> Comments of Alpheus at 10; *citing In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶153 (2003) (emphasis in the original).

Nor is the type of service provided by a CLEC's wholesale customers relevant to the CLEC's interconnection rights. The right to interconnect under Section 251 of the Act is not limited to specific types of traffic<sup>66</sup> and thus once a telecommunications carrier has the right to interconnect it can exchange any type of traffic.<sup>67</sup> Contrary to opposing commenters's arguments that they do not have to terminate certain types of traffic, VoIP in particular,<sup>68</sup> recent Commission decisions illustrate that the Commission clearly expects that telecommunications carriers will use their interconnection rights to provide telecommunications services to entities that may or may not use the services to provide telecommunications services. For example, in its order requiring VoIP providers to provide E911 service to their customers, the Commission explained that "[i]nterconnected VoIP providers may satisfy this requirement *by interconnecting indirectly through a third party such as a competitive LEC*, interconnecting directly with the Wireline E911 Network."<sup>69</sup> Thus, although the Commission has not yet classified VoIP services as either telecommunications or information services, it expects that CLECs will provide interconnection to VoIP providers. In fact, a Commission determination that a wholesale provider's interconnection rights could be limited based on the type of traffic generated by the wholesale provider's customer involved would render meaningless the Commission's recent *Wireline Broadband Order*.<sup>70</sup> In that order, the Commission ruled that wireline broadband services are information services<sup>71</sup> and explicitly stated that "our classification determinations in this Order have no effect whatsoever on the section 251 interconnection obligations of

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<sup>66</sup> 47 U.S.C. §251.

<sup>67</sup> This principle is made explicit at 47 CFR Section 51.100(b).

<sup>68</sup> *See., e.g.*, SCTC at 6-12; South Dakota Telecommunications Association et al. at 4.

<sup>69</sup> *In re: IP-Enabled Services*, 20 FCC Rcd 10245, ¶38 (2005) (emphasis added).

<sup>70</sup> *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) ("Wireline Broadband Order").

<sup>71</sup> *Id.*, ¶¶1, 12-17.

incumbent LECs or on competitive LECs' rights to obtain such interconnection."<sup>72</sup> Consequently, limiting interconnection rights based on the traffic, presumably information traffic, generated by a wholesale provider's customer would be contrary to Commission policy, seriously hinder the ability of certain providers to exchange traffic, and would negatively affect intermodal competition.

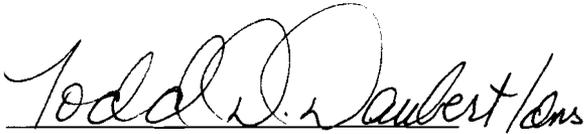
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<sup>72</sup> *Id.*, ¶127, n.400.

**IV. CONCLUSION**

For the reasons described above, T-Mobile respectfully requests that the Commission grant the TWC Petition.

Respectfully submitted,

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