

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

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Intercarrier Compensation for ISP-Bound Traffic)	CC Docket No. 99-68
)	
IP-Enabled Services)	WC Docket No. 04-36

COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. (“TWC”) submits these comments in response to the Further Notice of Proposed Rulemaking issued by the Commission in the above-referenced dockets.¹ TWC, the nation’s second largest cable operator, offers a facilities-based VoIP service called Digital Phone across its footprint and now serves more than 3 million Digital Phone customers. These comments are limited to a single issue raised by the Further Notice, relating to the classification of interconnected VoIP under the Communications Act. As discussed below, if the Commission resolves that long-standing question by classifying interconnected VoIP as an

¹ *High-Cost Universal Service Support, et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 05-337, *et al.* (rel. Nov. 5, 2008) (“Further Notice”).

information service, as proposed in the Further Notice, it should act affirmatively to ensure that its ruling does not undermine the well-established interconnection rights that allow VoIP providers to offer competitive voice services.²

INTRODUCTION

The Further Notice represents an ambitious step in the Commission's sustained efforts to overhaul its outmoded intercarrier compensation regime and universal service rules. The Commission seeks comment on various (and sometimes alternative) proposed resolutions to a host of complex issues with which it and the industry have been grappling for many years.³ Although TWC does not specifically address most of these issues, it applauds the Commission's proposals to adopt lower and more uniform rate structures, consistent with TWC's comments during prior stages of this proceeding.⁴ The Commission properly recognizes in the Further Notice that its consideration of these matters takes place amidst unprecedented changes in the communications marketplace—in particular, the emergence of competition and increased reliance on IP-based networks—that “have benefited consumers and should be encouraged.”⁵

This approach is critical with respect to the classification of interconnected VoIP, which may have consequences not just for intercarrier compensation reform but also with respect to other important initiatives the Commission has undertaken to facilitate the growth of competition. The proposals set forth in Appendix A and Appendix C of the Further Notice

² See generally *Time Warner Cable Request 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*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) (“*TWC Interconnection Order*”).

³ See Further Notice ¶ 40 (noting that the Commission seeks comment on three specific proposals).

⁴ See Comments of Time Warner Cable, CC Docket No. 01-92 (filed Oct. 25, 2006).

⁵ Further Notice ¶ 39.

would classify interconnected VoIP as an “information service” under the Act, at least to the extent it permits calls that originate on IP networks to terminate on circuit-switched networks, or vice versa.⁶ While TWC supports confirming the Commission’s exclusive jurisdiction over interconnected VoIP, which an information service classification should accomplish, it is also concerned that addressing this complex question in a proceeding that has focused primarily on unrelated intercarrier compensation issues might cause the Commission to overlook some potential consequences of this proposed classification. TWC accordingly takes no position on the classification issue at this time, but instead focuses on the need to reaffirm critical interconnection rights irrespective of how interconnected VoIP is ultimately classified.

DISCUSSION

THE COMMISSION SHOULD ENSURE THAT ANY CLASSIFICATION OF INTERCONNECTED VOIP UPHOLDS VITAL INTERCONNECTION RIGHTS

In providing Digital Phone, TWC relies on a common type of arrangement by which it obtains interconnection and related services from a wholesale telecommunications carrier that, in turn, transmits traffic to and from the public switched telephone network (“PSTN”) by interconnecting with an incumbent local exchange carrier (“ILEC”).⁷ Such arrangements are nothing new. For example, it has long been established that Internet service providers are entitled to access the PSTN by purchasing telecommunications services from competitive

⁶ *Id.*, App. A ¶ 209; *id.*, App. C ¶ 204.

⁷ *See, e.g., TWC Interconnection Order* ¶ 13 (“expressly contemplat[ing] that VoIP providers would obtain access to and interconnection with the PSTN through competitive carriers”); *see also Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 ¶ 3 (2008) (“*Retention Marketing Order*”) (noting that TWC and two other cable operators provide VoIP “by relying on wholesale competitive local exchange carriers . . . to interconnect with incumbent LECs and to provide transmission services” and related functionalities).

carriers.⁸ More recently, the Commission has observed that such wholesale relationships are essential to allowing VoIP providers to port telephone numbers,⁹ and to provide their customers with E911 functionality.¹⁰

The *TWC Interconnection Order* underscored the importance of these wholesale arrangements, specifically rejecting rural ILECs' anticompetitive efforts to exploit the unsettled classification of interconnected VoIP as a basis for refusing interconnection requests. That order confirmed that "telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs . . . for the purpose of providing wholesale telecommunications services" to VoIP providers.¹¹ It made clear that "[t]he regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251."¹² Indeed, no matter how VoIP providers are classified, the wholesale carriers from which they purchase service will continue to provide them

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151 ¶ 11 (2001).

⁹ *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 ¶ 20 (2007) (noting that interconnected VoIP providers "may make numbers available to their customers through commercial arrangements with carriers (*i.e.*, numbering partners)"); *see also TWC Interconnection Order* ¶ 16 n.46 ("Because our number portability rules apply to all local exchange carriers, customers effectively are able to port numbers to VoIP providers today by virtue of their relationship with a wholesale local exchange carrier.").

¹⁰ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 ¶ 52 (2005) (stating that interconnected VoIP providers "often enlist a competitive LEC partner in order to obtain interconnection to the Wireline E911 Network") (citation omitted).

¹¹ *TWC Interconnection Order* ¶ 8.

¹² *Id.* ¶ 15; *see also id.* ("[T]he statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b).").

with two-way transmission, for a fee, between the circuit-switched network and VoIP providers’ local switching and transmission facilities—satisfying the statutory definition of a “telecommunications service.”¹³

Despite this consistent and unequivocal precedent, many rural ILECs and some state commissions persist in the misconception that interconnection is not always mandated for carriers that provide wholesale services to VoIP providers. For example, earlier this year, Vermont Telephone Company (“VTel”) requested from the Commission a “policy clarification”—in the form of a declaratory ruling—concerning its obligation to interconnect with VoIP providers.¹⁴ As TWC and others explained in response to that petition, the *TWC Interconnection Order* (and the Commission precedent on which it relied) made unmistakably clear that VTel and other ILECs must provide such interconnection.¹⁵ Similar exchanges have played out at various state commissions, in spite of the Commission’s efforts to promote facilities-based competition.

The Commission should take care to ensure that any ruling that interconnected VoIP is an “interstate information service” does not fuel additional arguments—however misguided and anticompetitive—that ILECs are not required to interconnect with carriers that provide wholesale services to VoIP providers. Regardless of what direct interconnection rights VoIP providers may

¹³ 47 U.S.C. § 153(46).

¹⁴ See Vermont Telephone Company, *Petition for Declaratory Ruling Whether Voice over Internet Protocol Services Are Entitled to the Interconnection Rights of Telecommunications Carriers*, WC Docket No. 08-56, at 1 (filed Apr. 11, 2008); see also *Pleading Cycle Established for Comments on Vermont Telephone Company’s Petition for Declaratory Ruling Regarding Interconnection Rights*, Public Notice, WC Docket No. 08-56 (rel. Apr. 18, 2008).

¹⁵ See, e.g., Reply Comments of Time Warner Cable Inc., WC Docket No. 08-56 (filed June 9, 2008) (“TWC VTel Reply Comments”); Comments of Time Warner Cable Inc., WC Docket No. 08-56 (filed May 19, 2008).

have, there should be no doubt about the continuing ability of a wholesale carrier—whether or not it is affiliated with the VoIP provider¹⁶—to obtain interconnection in its own right for the purpose of providing these wholesale transmission services to the VoIP provider. Accordingly, the Commission should not adopt the Further Notice’s proposed resolution of this issue without reaffirming the existence and importance of these interconnection rights. The Commission also should make clear that an ILEC’s obligation to interconnect applies when the traffic exchanged originates or terminates in IP format, regardless of whether the end user customer is receiving an interconnected VoIP service or whether the ILEC itself is using IP-based equipment to provide voice service. Indeed, even if an ILEC provides interconnected VoIP services that are classified as information services, the Commission must make clear that the entity involved in the provision of the underlying telecommunications transport service will be entitled to all of the interconnection rights of Section 251. The Commission should expressly affirm the continued applicability of these rights and obligations. To do otherwise “would impede the important development of wholesale telecommunications and facilities-based VoIP competition, as well as broadband deployment policies developed and implemented by the Commission over the last decade, by limiting the ability of wholesale carriers to offer service.”¹⁷

Relatedly, the Commission should take this opportunity to confirm that a wholesale carrier that offers wholesale service indiscriminately to facilities-based VoIP providers (and/or any other class of similarly situated customers) is a common carrier under Commission precedent. The law is clear that a carrier that holds itself out as willing to serve all similarly

¹⁶ As TWC has elsewhere explained, the application of the *TWC Interconnection Order* does not turn on whether the wholesale carrier is affiliated with the VoIP provider; rather, both affiliated and third-party carriers are entitled to interconnect. See *TWC VTel Reply Comments* at 1-3.

¹⁷ *TWC Interconnection Order* ¶ 8.

situated customers on comparable terms qualifies as a common carrier.¹⁸ Nevertheless, rural ILECs have taken to challenging the common carrier status of VoIP providers' wholesale suppliers as a further means of squelching competition. The Commission should put a halt to such efforts by reaffirming that self-certification is sufficient to establish a prima facie showing of common carriage.¹⁹ After such a prima facie case has been established, a rural ILEC should be permitted to challenge a requesting carrier's status as a telecommunications carrier if, and only if, it has a concrete evidentiary basis for doing so. Indeed, no reported case in history appears to have rejected a carrier's claim of common carriage; in contrast, court cases invariably focus on an entity's *denial* that it is a common carrier. It makes no difference if a wholesale carrier provides service to a single VoIP provider, as long as it has stated its willingness to *offer* comparable service to other potential customers. Moreover, the D.C. Circuit has made clear that a carrier does not "vitiating its common carrier status merely by entering into private contractual relationships with its customers."²⁰ By the same token, customized service offerings that are "based on contractual negotiations with a single customer and are specifically designed to meet

¹⁸ See, e.g., *Retention Marketing Order* ¶ 39.

¹⁹ *Id.* ("We give significant weight [to self-certification] because being deemed a 'common carrier' . . . confers substantial responsibilities as well as privileges, and we do not believe these entities would make such statements lightly."); see also *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 91 (2005) (facilities-based providers of broadband Internet access may simply declare whether they will provide the "telecommunications" underlying their broadband service as a private carrier or common carrier). Thus, federal district courts in Texas and Nebraska have determined that TWC's wholesale telecommunications supplier (in those instances, Sprint) functions as a common carrier because it "offers indiscriminate service to whatever public its service may legally and practically be of use." *Consol. Commc'ns of Fort Bend Co. v. Pub. Util. Comm'n of Tex.*, 497 F. Supp. 2d 836, 845 (W.D. Tex. 2007); *Sprint Commc'ns Co. L.P., v. Neb. Pub. Serv. Comm'n*, 2007 WL 2682181, at *23 (D. Neb. 2007).

²⁰ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

the needs of only that customer” are not inconsistent with the nondiscrimination obligations applicable to common carriers.²¹

By reiterating the continued application of its established precedent, the Commission will be able to preempt any confusion that may result from a ruling that VoIP is an information service or any efforts by ILECs to evade their interconnection obligations.

CONCLUSION

While TWC commends the Commission for its commitment to making comprehensive change a reality, it urges the Commission not to take any action that would threaten to undermine the important initiatives it has taken in other contexts to ensure that competitive voice providers are able to obtain interconnection and thus enter the market. Accordingly, the Commission should not decide that VoIP is an information service without reaffirming the scope of wholesale interconnection rights and the proper application of the common carrier standard.

Respectfully submitted,

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November 26, 2008

²¹ *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 34 (D.C. Cir. 1990).