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November 12, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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**Re: Ex Parte Submission of Time Warner Cable Inc.,
A National Broadband Plan for Our Future, GN Docket No. 09-51**

Dear Ms. Dortch:

On October 20, 2009, Julie Laine and Terri Natoli of Time Warner Cable Inc. (“TWC”), together with Amanda Potter and the undersigned of Latham & Watkins LLP, met with William Dever of the Wireline Competition Bureau and Rebekah Goodheart and Thomas Koutsky of the Commission’s Omnibus Broadband Initiative Team to discuss TWC’s efforts to provide competitive telephone services in rural areas and several legal impediments it has encountered. We agreed to make this supplemental filing to provide specific information regarding the entry barriers that have arisen in various states in which TWC has sought to launch its Digital Phone and Business Class Phone services in areas served by rural incumbent local exchange carriers (“RLECs”). We provide such information below and in the attached table. We also suggest corrective measures that the Commission should take to promote facilities-based VoIP competition and we explain the adverse effects that these roadblocks have on the business case for expanding broadband network facilities and services in rural communities.

As the attached table describes in detail, TWC and the wholesale telecommunications carriers from which it obtains interconnection-related services have encountered significant, costly barriers to entering rural areas within several states. While TWC has been confronted with a variety of anticompetitive tactics, this letter focuses on three arguments that RLECs have advanced—and that some state commissions and courts have credited—in violation of the plain language and unmistakably pro-competitive intent of the Telecommunications Act of 1996. If the Commission reaffirms the rights of competitive telecommunications carriers in these areas, it will not only promote voice competition but bolster the case for deploying additional broadband facilities and upgrading existing broadband capabilities in rural areas, as explained further below.

First, the Commission should clarify that a competitive carrier seeking to interconnect with an RLEC pursuant to Section 251(a) need not pierce the rural exemption contained in Section 251(f). Section 251(a), which applies broadly to all telecommunications carriers, imposes a basic duty to “interconnect directly or indirectly with the facilities and equipment of

other telecommunications carriers.”¹ Section 251(f), by its plain terms, grants a provisional exemption only from the duties in Section 251(c)—not from any requirement under Section 251(a) or (b).² Thus, if a requesting carrier does not choose to invoke its right to interconnect under Section 251(c)(2)—or any other rights under Section 251(c), such as those relating to unbundled network elements (“UNEs”) and collocation—the rural exemption simply is not implicated. Indeed, the fact that an interconnection request pursuant to Section 251(a) also could have arisen under Section 251(c)(2) neither requires *nor permits* a state commission to initiate a rural exemption proceeding under Section 251(f).

While Section 251(a) does not afford competitors the full range of market-opening provisions available under Section 251(c), requesting carriers often seek interconnection under Section 251(a) as a means of streamlining entry. Indeed, requests to interconnect and exchange traffic pursuant to Sections 251(a) and (b) were at issue in the *TWC Declaratory Ruling* (discussed further below), in which the Wireline Competition Bureau addressed other barriers to entry.³ That decision accordingly reaffirmed wholesale providers’ right to interconnect with RLECs pursuant to Sections 251(a) and (b), leaving no doubt about the viability of that mode of competitive entry.⁴ Many state commissions likewise have recognized that competitive carriers seeking only to interconnect and exchange traffic—without requesting UNEs, collocation, or other more complex relationships with an incumbent carrier—are free to rely on Sections 251(a) and (b) alone and thereby avoid implicating the rural exemption under Section 251(f).⁵

Despite the text of Section 251(f) and such state commission decisions, a federal court ruled in 2006 that a Section 251(a) request for interconnection requires the requesting carrier to pierce the rural exemption.⁶ That erroneous ruling prevented Sprint from obtaining interconnection with the RLEC at issue, and TWC in turn has been unable to provide its voice

¹ 47 U.S.C. § 251(a).

² *Id.* § 251(f).

³ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Commc’ns Act of 1934, as Amended, to Provide Wholesale Telecomms. Servs. To VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) (“*TWC Declaratory Ruling*”).

⁴ *Id.* at 3521 ¶ 15 (finding “that a carrier is entitled to interconnect with another carrier pursuant to sections 251(a) and (b) in order to provide wholesale telecommunications service”). *See also id.* at 3513, 3517 ¶¶ 1, 8.

⁵ *See, e.g., Cambridge Tel. Co. et al. Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecomms. Act., Pursuant to Section 251(f)(2) of that Act; and for any Other Necessary or Appropriate Relief*, Order, Docket No. 05-0259 (Ill. Commerce Comm’n July 13, 2005) (“*ICC Section 251(a) Ruling*”) (explaining that RLECs exempt from Section 251(c) are nonetheless obligated to negotiate terms and conditions for interconnection with requesting carriers); *Level 3 Commc’ns, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions with CenturyTel of Wis., LLC*, Arbitration Award, Docket No. 05-MA-130, at 8 (Wis. Pub. Serv. Comm’n Dec. 2, 2002) (“*Wisc. PSC Section 251(a) Ruling*”) (holding that interconnection pursuant to Section 251(a) “does not except any carrier from the reach of” Section 252).

⁶ *Sprint Commc’ns Co. L.P. v. Pub. Util. Comm’n of Tex.*, No. A-06-CA-065-SS, 2006 U.S. Dist. LEXIS 96569, *13-15 (W.D. Tex. Aug. 14, 2006) (“*Brazos*”).

services in that area. And, in a proceeding involving TWC, the Maine Public Utilities Commission recently followed *Brazos* and refused to permit the requesting telecommunications carrier, CRC Communications of Maine, to obtain interconnection pursuant to Section 251(a) without first piercing the rural exemption.⁷ Such decisions force competitors to endure significant delays and costs without any statutory basis and threaten to thwart competitive entry altogether. The Commission should repudiate the holding of *Brazos* and restore Section 251(a) as an efficient means of entering rural areas.

Second, to give meaning to this Section 251(a) interconnection option, the Commission should confirm that such requests are subject to Section 252's negotiation and arbitration procedures. The plain language of Section 252 authorizes state commissions to arbitrate disputes arising from requests for interconnection under Section 251(a). Section 252(b) specifically authorizes a party to seek arbitration of "any open issues" from Section 252(a) negotiations, which include negotiations regarding a "request for interconnection ... pursuant to section 251."⁸ Furthermore, Sections 252(c) and (e), which establish standards for arbitration prescribed in Section 252(b), both refer to "the requirements of Section 251" without any limitations.⁹

Based on this statutory text and Congress's strongly pro-competitive purposes, most state commissions that have considered the issue have compelled incumbent LECs to arbitrate interconnection requests pursuant to Section 251(a).¹⁰ The U.S. Court of Appeals for the Sixth Circuit also observed that the duty to interconnect pursuant to Section 251(a) is enforceable through Section 252 arbitration.¹¹ The *Brazos* court, however, in addition to holding that Section 251(a) interconnection requests trigger the rural exemption under Section 251(f), held that such

⁷ *CRC Commc'ns of Me., Inc. Petition for Consolidated Arbitration with Independent Tel. Cos. Towards an Interconnection Agreement Pursuant to 47 U.S.C. 251, 252*, No. 2007-611, Order, at 14 (Me. Pub. Utils. Comm'n May 5, 2008) (following *Brazos*).

⁸ 47 U.S.C. §§ 252(b)(1), (a)(1).

⁹ *Id.* §§ 252(c), (e).

¹⁰ See, e.g., *Petition for Arbitration of an Interconnection Agreement Between Level 3 Commc'ns, and CenturyTel of Wash., Pursuant to 47 U.S.C. Section 252*, Third Supplemental order Confirming Jurisdiction, Docket No. UT-023043, 2002 Wash. UTC LEXIS 418, at *4 (Wash. Utils. & Transp. Comm'n Oct. 25, 2002) ("*Wash. UTC Section 251(a) Ruling*") (explaining that "the mechanisms for negotiation, mediation, and arbitration provided by Section 252 apply to requests to negotiate made under Section 251(a)," because "[n]othing in Section 252(a) limits the negotiation and arbitration processes to matters falling within Section 251(c)"); *Petition for Arbitration of Cellco P'ship d/b/a Verizon Wireless*, Order of Arbitration Award, Docket No. 04-00585, 2006 Tenn. PUC LEXIS 10, at *35 (Tenn. Reg. Auth., Jan. 12, 2006) (holding that interconnection pursuant to Section 251(a) falls within the TRA's arbitration jurisdiction under Section 252(b) because "Section 252(b) ... encompasses 'interconnection, services, or network elements pursuant to section 251'"). See also *ICC Section 251(a) Ruling* (explaining that RLECs must negotiate terms and conditions for interconnection with requesting carriers); *Wisc. PSC Section 251(a) Ruling* (holding that interconnection requests under Section 251(a) are subject to arbitration under Section 252).

¹¹ *Bellsouth Telecomms., Inc. v. Universal Telecom., Inc.*, 454 F.3d 559, 560 (6th Cir. 2006) (explaining that the 1996 Act requires ILECs to provide interconnection via Section 251(a)(1) either through negotiations (Section 252(a)), arbitration (Section 252(b)), or adoption of an interconnection agreement between the incumbent and another telecommunications company (Section 252(i))).

requests are not subject to the negotiation or arbitration provisions of Section 252.¹² Even if a carrier could seek interconnection under Section 251(a) without triggering the Section 251(f) rural exemption, an inability to obtain arbitration would undercut that option. The Commission should reject the flawed reasoning of the *Brazos* court and instead clarify that (a) a competitor's right to interconnect under Section 251(a) compels an incumbent carrier to negotiate such a request,¹³ and (b) in any event, state commissions' broad arbitration jurisdiction under Section 252 encompasses requests for interconnection under Section 251(a), regardless of whether the incumbent agreed to negotiate or altogether refused.¹⁴

Finally, the full Commission should reaffirm what the Wireline Competition Bureau took pains to clarify in the *TWC Declaratory Ruling*: that competitive carriers are entitled to interconnect with incumbent LECs for the specific purpose of providing wholesale telecommunications services to interconnected VoIP providers. Fortunately, in the wake of the *TWC Declaratory Ruling*, some state commissions that had resisted authorizing wholesale carriers to interconnect have reversed course, or federal courts have ordered them to do so.¹⁵ And the U.S. Court of Appeals for the D.C. Circuit upheld the Commission's subsequent determination that a certificated carrier that serves only a single VoIP provider can self-certify its status as a common carrier.¹⁶

While such rulings should have been more than adequate to put to rest any lingering doubts about wholesale carriers' entitlement to interconnection, some RLECs continue to argue that the *TWC Declaratory Ruling* did not authorize interconnection by a wholesale carrier that only serves an interconnected VoIP provider (as opposed to a CLEC that *also* provides retail telecommunications services or sells wholesale services to circuit-switched providers). In Maine, for example, where TWC is participating in a rural exemption proceeding that was commenced after CRC Communications of Maine was unable to interconnect pursuant to Section 251(a), the RLECs involved continue to maintain that CRC does not qualify as a *bona fide* telecommunications carrier—in spite of its certificate of public convenience and necessity and its tariffed services—based on the tortured theory that CRC must provide some other form of

¹² See *Brazos*, 2006 U.S. Dist. LEXIS 96569, at *16 (noting that “[t]he only duty to negotiate arises under Section 251(c)” and that Sections 251(a) and (b) “say nothing at all about ‘agreements,’ ‘negotiations,’ or ‘arbitration’”). See also *Petition of Level 3 Commc'ns, LLC for Arbitration Pursuant to Section 252(b) of the Telecomms. Act of 1996 with CenturyTel of Eagle, Inc. Regarding Rates, Terms, and Conditions for Interconnection*, Decision Denying Exceptions, Docket No. 02B-408T, 2003 Colo. PUC LEXIS 109, at *23 ¶ 34 (Colo. Pub. Utils. Comm'n Jan. 17, 2003) (concluding that issues arising under Section 251(a) fall outside arbitration jurisdiction because the duty to negotiate is found only in Section 251(c), which incorporates 251(b)'s duties but not those in Section 251(a)).

¹³ See, e.g., *Wash. UTC Section 251(a) Ruling*; *ICC Section 251(a) Ruling*.

¹⁴ See, e.g., *Wash. UTC Section 251(a) Ruling*; *Wisc. PSC Section 251(a) Ruling*.

¹⁵ See, e.g., *Sprint Commc'ns Co. L.P. v. Neb. Pub. Serv. Comm'n*, No. 4:05CV3260, 2007 U.S. Dist. LEXIS 66902, at *27-28 (D. Neb. Sept. 7, 2007) (reversing state commission decision refusing to permit Sprint to interconnect with RLECs and following the *TWC Declaratory Ruling*).

¹⁶ *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275-76 (D.C. Cir. 2009); see also *Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 748-50 (8th Cir. 2009) (relying on *Verizon Cal.* and finding that a wholesale carrier's “individually negotiated, private contracts do not outweigh [other dispositive] evidence of common carriage”).

telecommunications service in addition to its transport and termination of traffic to and from TWC. Making matters worse, the Maine PUC has signaled its intention to take this argument seriously.¹⁷ TWC also has been required to litigate over these issues in North Carolina after the North Carolina Rural Electrification Agency (“NCREA”—the agency with jurisdiction over telephone cooperatives) refused to give effect to the *TWC Declaratory Ruling*. While TWC recently prevailed in court,¹⁸ it has received no indication that either the RLECs involved or the NCREA will abandon challenges to its affiliated CLEC’s status as a telecommunications carrier.

The Commission should issue further guidance to state commissions to prevent further litigation based on such frivolous claims. The *TWC Declaratory Ruling* makes plain that, as long as a wholesale provider holds itself out as a common carrier, its provision of “transport for the origination and termination on the PSTN” to an interconnected VoIP provider “through [its] interconnection agreements with incumbent LECs” constitutes a telecommunications service.¹⁹ Indeed, the whole point of that ruling was to clarify that wholesale carriers are entitled to interconnect with incumbent LECs “for the purpose of providing wholesale telecommunications services,” and, more specifically, “for the purpose of exchanging traffic *with VoIP providers*.”²⁰ And the D.C. Circuit rejected challenges to the “telecommunications carrier” status of wholesale providers that served only their affiliated VoIP providers.²¹ Thus, there can be no legitimate contention that a wholesale provider must do something *more than* transmit telecommunications traffic to and from a VoIP provider to qualify for interconnection. While the Bureau-level *TWC Declaratory Ruling*, together with the D.C. Circuit’s analysis, forecloses such theories, the full Commission should reaffirm the validity of such arrangements in the interest of squelching these anticompetitive claims once and for all.

* * *

The entry barriers described above and in the attached table are impeding the development of facilities-based voice services in many rural areas. Just as significantly, such hurdles deter and delay broadband investment in such communities and can result in blocking expanded broadband deployment and capacity upgrades. The Commission has long recognized

¹⁷ See *Investigation Pursuant to 47 U.S.C. § 251(f)(1) Regarding CRC Commc’ns of Me.’s Request of UniTel, Inc.*, Order, Docket No. 2009-40, at 5 (Me. Pub. Utils. Comm’n Aug. 25, 2009) (opining that “there is certainly substance” to the RLECs’ challenges to CRC’s status as a telecommunications carrier and stating that the *TWC Declaratory Ruling* only “suggests that there are circumstances in which a wholesale provider of services is a telecommunications carrier” (emphasis added)).

¹⁸ *Time Warner Cable Info. Servs. (N.C.), LLC v. Duncan*, No. 5:08-CV-202-D, 2009 WL 3048410, at *10 (E.D.N.C. Sept. 23, 2009) (“[T]he court does not find substantial evidence in the administrative record to support the NCREA’s finding that TWCIS is not a telecommunications carrier”)

¹⁹ *TWC Declaratory Ruling*, 22 FCC Rcd at 3513-14 ¶ 2.

²⁰ *Id.* at 3517, 3519-20 ¶¶ 8, 13.

²¹ *Verizon Cal.*, 555 F.3d at 275-76.

that the introduction of VoIP services can boost broadband deployment,²² and the *TWC Declaratory Ruling* noted that “the rights of wholesale carriers to interconnect for the purpose of exchanging traffic with VoIP providers will spur the development of the broadband infrastructure.”²³ TWC’s experience is consistent with those observations. Whether or not TWC currently provides broadband Internet access service throughout a given rural area, its ability to launch its VoIP offerings is important to the business case for maintaining, upgrading, or expanding broadband capabilities.

As the attached declaration of Paul Lang, Group Vice President of Finance for TWC, explains, TWC’s ability to launch its Digital Phone and Business Class Phone services plays a significant role in enabling TWC to justify additional investments in broadband network facilities and services. Not surprisingly, the business case for investing in new network facilities depends on costs as well as revenues. Thus, where TWC is limited to providing broadband Internet access and video services—rather than the full triple-play that includes voice services—the lower base of revenues translates into a weaker platform to support additional investment.²⁴ As a result, TWC is not as well-positioned to upgrade broadband speeds in areas where it has been unable to launch its VoIP services.²⁵ In turn, this impact on investment opportunities may deprive consumers in such areas of cutting-edge capabilities like those enabled by DOCSIS 3.0.²⁶

Impediments to providing VoIP services may have an even greater impact on TWC’s ability to build out its broadband network to reach additional homes and small businesses. TWC routinely examines the business case for line extensions that would enable it to serve pockets of its franchise areas that its existing network facilities do not pass. In several areas, TWC’s current inability to provide Digital Phone and Business Class Phone services—based on the types of impediments described above and in the attached table—could result in lowering the priority of potential build-out projects because of the uncertain revenue streams.²⁷ Beyond outright barriers to entry, as exist where interconnection requests have been denied, the significant uncertainty regarding TWC’s prospects for entering additional rural areas *before* a request for interconnection is made also has a chilling effect on investment.

Finally, impediments to voice competition in rural areas deter broadband investment not only by TWC and other cable operators, but by RLECs as well. Where TWC cannot offer a triple play of services, it provides a less effective competitive spur to the incumbent provider,

²² See, e.g., *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540, 20578 (2004) (“[S]ubscribership to broadband services will increase in the future as new applications that require broadband access, *such as VoIP*, are introduced into the marketplace, and consumers become more aware of such applications.” (emphasis added)).

²³ *TWC Declaratory Ruling*, 22 FCC Rcd at 3519-20 ¶ 13.

²⁴ Declaration of Paul A. Lang Jr., at ¶ 3 (Nov. 11, 2009).

²⁵ *Id.* ¶ 4.

²⁶ *Id.*

²⁷ *Id.* ¶ 5.

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which in turn has a diminished incentive to upgrade its broadband capabilities as a means of retaining and winning back customers. TWC's experience shows that its entry as a voice provider in rural areas typically prompts the incumbent not only to introduce new video services or beef up existing offerings, but to enhance its broadband capabilities as well.²⁸

TWC appreciates the opportunity to provide this additional information to the Commission. Please contact the undersigned if you have any questions about these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
of LATHAM & WATKINS LLP

Enclosures

cc: William Dever
Rebekah Goodheart
Thomas Koutsky

²⁸ *Id.* ¶ 6.