

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Petition of CRC Communications of Maine, Inc. and Time Warner Cable, Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended</b>	)	<b>Docket No. 10-143</b>
	)	

**COMMENTS OF COMPTTEL**

COMPTTEL, through undersigned counsel, hereby supports the request of CRC Communications of Maine, Inc. and Time Warner Cable, Inc. (collectively “Petitioners”) for an order preempting the Maine Public Utilities Commission’s (“MPUC”) interpretation of the obligations of rural incumbent local exchange carriers under Sections 251(a) and (b) of the Communications Act, 47 U.S.C. §§251(a) and (b), and its authority to enforce those obligations. Specifically, Petitioners ask the Commission to preempt a MPUC Order that declined to enforce the Section 251(a) obligations of five rural incumbent local exchange carriers (“ILECs”)<sup>1</sup> to interconnect with CRC and the Section 251(b) obligations of those carriers to exchange traffic with CRC so long as the Section 251(f)(1) rural exemption remains in place.<sup>2</sup> The MPUC’s ruling impermissibly allows (indeed, invites) rural ILECs to flout their statutory interconnection and traffic exchange obligations and unilaterally bar competitors from serving voice customers in their territories simply by refusing to negotiate interconnection/traffic exchange agreements.

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<sup>1</sup> The five rural ILECs are Unitel, Inc. Oxford West Telephone Company, Oxford Telephone Company, Tidewater Telecom, Inc. and Lincolnville Telephone Company.

<sup>2</sup> *CRC Communications of Maine, Inc. Petition For Consolidated Arbitration With Independent Telephone Companies Towards An Interconnection Agreement Pursuant to 47 U.S.C. 151, 252, Docket No. 2007-611, Order (Me. Pub. Util. Comm., May 5, 2008) (“MPUC Order”).*

Because the MPUC's Order has the effect of prohibiting CRC from providing intrastate and interstate telecommunications service in the geographic areas served by the five rural ILECs, the Commission must preempt, pursuant to Section 253(d), the MPUC's erroneous interpretation of the rural exemption and its authority to enforce Sections 251(a) and 251(b).

**I. The MPUC's Order Impermissibly Relieves Rural ILECs Of Their Federal Statutory Duties**

Pursuant to Sections 251(a) and 251(b) of the Act, CRC sent each of the five rural ILECs letters in mid-2007 requesting interconnection and the exchange of traffic. CRC seeks to provide wholesale transport service between Time Warner Cable's network and the public switched telephone network to allow calls to and from Time Warner Cable's VoIP customers and the customers of the rural ILECs to be completed.<sup>3</sup> Each of the ILECs declined to enter into negotiations with CRC, alleging that Section 251(f)(1) exempted them from the duty to interconnect or exchange traffic. CRC then filed a Petition for Consolidated Arbitration with the MPUC pursuant to Section 252(b).

Section 251(a) imposes on every telecommunications carrier the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Section 251(b) imposes on each local exchange carrier, *inter alia*, the duty to provide dialing parity and number portability and to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Section 251(f)(1) states that Section 251(c), which imposes additional duties on incumbent local exchange carriers, including the duty to provide collocation, resale at wholesale rates and unbundled network elements, shall not apply to a rural telephone company until the state commission determines that a request for interconnection, services or network elements made pursuant to Section 251(c) is not unduly

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<sup>3</sup> Petition at 3.

economically burdensome, is technically feasible and is consistent with Section 254. The MPUC properly concluded that while Section 251(f)(1) exempted the rural ILECs from the obligations imposed by Section 251(c) until the exemption was lifted, it did not exempt them from the interconnection and traffic exchange obligations imposed by Sections 251(a) and 251(b).<sup>4</sup> Nonetheless, the MPUC held that it lacked authority to compel and conduct an arbitration pursuant to Section 252(b) to enforce those obligations because so long as the rural exemption remained in place, the five ILECs had no duty under 251(c)(1) to negotiate in good faith the particular terms and conditions of interconnection agreements. In the absence of negotiations, the MPUC concluded that there were no open issues to arbitrate.<sup>5</sup>

By allowing the rural ILECs to avoid their Section 251(a) and Section 251(b) statutory duties to interconnect and exchange traffic with requesting carriers simply by refusing to negotiate the terms of an interconnection agreement, the MPUC's Order prevents Petitioners from entering the ILECs' markets, preserves the ILECs' monopoly status and gives rural carriers the unilateral right to veto a competitor's market entry. Moreover, the MPUC's flawed and overly broad reading of the statute expands the coverage of the rural exemption from the obligations set forth in Section 251(c) to include the obligations set forth in Sections 251(a) and 251(b). Each of these consequences of the MPUC's Order violates section 253(a) and is contrary to the purpose and intent of Congress in opening local exchange markets to competition with the enactment of the Telecommunications Act of 1996.

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<sup>4</sup> MPUC Order at 14. The MPUC's resolution of this issue is consistent with the conclusion of this Commission that Section 251(f)(1) does not exempt rural ILECs from Section 251(a) or (b) requirements. *In the Matter of Telephone Number Portability*, 12 FCC Rcd 7236 at n. 401 (1997).

<sup>5</sup> *Id.*

Section 253(a) provides that no state legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. This Commission has appropriately determined that the term “legal requirement” in Section 253(a) is meant to capture a broad range of state and local actions that could thwart the development of competition.<sup>6</sup> The MPUC Order is such a state action. It not only thwarts, but also prohibits, the development of competition in the service territories of the rural ILECs.

Section 253(d) mandates that if the Commission finds that a state legal requirement violates Section 253(a), it “shall preempt the enforcement of such” legal requirement to the extent necessary to correct such violation. The MPUC’s refusal to compel the rural ILECs to submit to arbitration of the terms and conditions of interconnection agreements with CRC based on the rural exemption sanctions the ILECs’ repudiation of CRC’s interconnection requests and bars Petitioners from providing competitive service in their markets. Because no language in the Act, including the rural exemption set forth in Section 251(f)(1), exempts telecommunications carriers or local exchange carriers from the obligations to interconnect and exchange traffic with other carriers, the Commission must preempt the MPUC’s Order.

Section 252(b) provides that a carrier making or receiving a request for negotiation may petition a state commission to arbitrate any open issues. Contrary to the MPUC’s conclusion, the rural ILECs’ outright refusal to negotiate the terms and conditions of interconnection and traffic exchange arrangements with CRC leaves all issues raised by CRC in its arbitration petition open and subject to resolution through arbitration. The fact that Section 251(f)(1) exempts rural

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<sup>6</sup> *In the Matter of The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, CC Docket No. 98-1, Memorandum Opinion and Order, FCC 99-402 at ¶3 (rel. Dec. 23, 1999).

ILECs from the Section 251(c)(1) duty to negotiate in good faith<sup>7</sup> does not also exempt them from the Section 251(a) and 251(b) duties to interconnect and exchange traffic with other carriers. Yet, the MPUC impermissibly has exempted the rural ILECs from their federal duties to interconnect and exchange traffic by declining to enforce those duties through arbitration and by deciding that it only has authority to arbitrate issues that remain open “after voluntary negotiations have yielded incomplete results.”<sup>8</sup>

The Commission has not hesitated in the past to preempt state statutes and state commission orders that, like the MPUC Order, protected rural ILECs from competition. In *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, 12 FCC Rcd. 15639 (1997), the Commission preempted a Wyoming statute that allowed small ILECs to block the grant of a certificate of operating authority to any carrier seeking to provide local exchange service in competition with the ILECs and a state commission order that denied a carrier’s application for such a certificate based on the statute. The Commission reasoned that Section 253(a), at the very least, proscribes state legal requirements that prohibit all but one entity from providing telecommunications services in a particular locality. *Id.* at ¶38. The MPUC’s Order declining to enforce the rural ILECs’ Section 251(a) and Section 251(b) duties to interconnect and exchange traffic with CRC prohibits all but the rural ILECs from providing telecommunications service in their particular service territories and should likewise be preempted. By enabling the rural ILECs to veto a potential competitor’s entry into their markets

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<sup>7</sup> MPUC Order at 14. The National Broadband Plan found that interpreting Section 251(f)(1) as exempting rural carriers from the duty to negotiate interconnection agreements with other carriers is wrong. National Broadband Plan at 49.

<sup>8</sup> MPUC Order at 14.

by refusing to negotiate an interconnection agreement, the MPUC has secured their monopoly positions in violation of the Act.

The Commission also preempted a Tennessee statute that barred the state commission from granting competitors certificates of operating authority in areas served by an ILEC with fewer than 100,000 lines and a state commission order implementing the statute in *Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated §65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, 14 FCC Rcd 11064 (1999). The Commission found that Tennessee's restriction on competition in service areas with fewer than 100,000 access lines shielded small, rural ILECs from competition and could not be reconciled with Section 253(a)'s ban on state requirements that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecom service. *Id.* at ¶ 15. Like the Tennessee statute and the state commission's order implementing it, the MPUC's Order improperly shields the five rural ILECs from competition in violation of Section 253(a). The Commission must, therefore, preempt. *See also, In the Matter of The Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and /or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460 at ¶¶22, 41 (1997) (Congress enacted Section 253 to ensure that no state authority could erect legal barriers to entry that would potentially frustrate the Act's goal of opening local markets to competition and Section 253(d) expressly mandates that the Commission remove such barriers).

As Petitioners persuasively argued, the need for preemption of the MPUC Order is exacerbated by the fact that other state commissions have reached similar results, all in reliance on the unpublished decision of a Texas district court in *Sprint Communications Company, L.P. v.*

*The Public Utility Commission of Texas, et al.*, 2006 U.S. Dist. LEXIS 96569 (W.D. Tex 2006).<sup>9</sup> In that decision, the Court found that rural ILECs are “free to refuse to negotiate anything at all with” a competitive carrier until the rural exemption is lifted. *Id.* at 15. The Court reasoned that “[t]he policy evinced in §251(f) is that rural telephone companies should be shielded from burdensome interconnection requests until the PUC has screened such requests” and that Section 251(a) and Section 251(b) do not give rise to a duty to negotiate or arbitrate. *Id.* at 15-16. In light of this unfortunate trend that is frustrating the rights of new entrants to provide competitive service in the territories of unwilling rural ILECs, the National Broadband Plan recommended that the Commission “confirm that all telecommunications carriers, including rural carriers, have a duty to interconnect their networks.”<sup>10</sup> The Commission should issue such a confirmation without further delay.

## **II. Section 253(b) Cannot Save The MPUC’s Order From Preemption**

Although Section 253(b) preserves to states the ability to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service and safeguard the rights of consumers, the MPUC’s Order cannot escape preemption based on this provision. What is at issue here is the MPUC’s misinterpretation of federal law, not an independent competitively neutral requirement necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers. For this reason, the savings provision does not come into play.

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<sup>9</sup> Petition at 21-25; *see also* MPUC order at 14.

<sup>10</sup> National Broadband Plan at 49.

Even if the Commission were to find that the MPUC’s Order should be evaluated under Section 253(b), that provision would not protect the Order from preemption. The MPUC’s Order is far from competitively neutral. It favors the rural ILECs over potential new entrants by giving the rural ILECs the unilateral power to decide whether to entertain interconnection and traffic exchange requests, thereby allowing them to hold the key to competitive entry. The MPUC’s Order also confers on rural ILECs “the ultimate competitive advantage – preservation of monopoly status—and saddles potential new entrants with the ultimate competitive disadvantage – an insurmountable barrier to entry.”<sup>11</sup> As the Commission has previously determined, “[s]uch disparity in the treatment of classes of providers violates the requirement of competitive neutrality.”<sup>12</sup>

Moreover, the MPUC’s Order does anything but protect the rights of consumers to a choice in telecommunications providers. Indeed, by refusing to enforce the rural ILECs’ obligations to interconnect and exchange traffic with CRC, the MPUC has blatantly disregarded those consumer rights as well as the consumer benefits that flow from the availability of competitive alternatives to the rural ILECs’ service offerings. In ruling on CRC’s Petition to lift the rural exemptions of the five ILECs, the MPUC affirmatively found that “**there is pent up demand for TW’s services among the rural ILECs’ customers.**”<sup>13</sup> The MPUC’s response to this pent-up demand was to impose an insurmountable barrier to entry that will ensure that the demand cannot be satisfied unless the rural ILECs voluntarily agree to allow CRC to provide

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<sup>11</sup> *Silver Star Telephone Company* at ¶ 42.

<sup>12</sup> *Id.*

<sup>13</sup> *CRC Communications of Maine, Inc. Investigation Pursuant to 47 U.S.C. §251(f)(1) Regarding CRC Communication of Maine’s Request of Unitel, et al.*, Docket Nos. 2009-40, *et al.* Order at 31 (Me. Pub. Util. Comm. July 9, 2010) (emphasis added).

service in their monopoly territories. As a result, the MPUC elevated the interests of the monopolists over the interests of consumers in a manner inconsistent with the safe harbor of Section 253(b).

**Conclusion**

For the foregoing reasons and those stated in CRC's and Time Warner Cable's Petition, COMPTTEL respectfully requests that the Commission preempt the MPUC's Order and clarify that rural carriers have an obligation to interconnect and exchange traffic under Sections 251(a) and (b) and that if they refuse to negotiate the terms and conditions of such interconnection and traffic exchange, state commissions have the authority to, and must compel them to, arbitrate.

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Respectfully submitted,

/s/

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