

**Before the  
Federal Communications Commission  
Washington, D.C.**

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

**REPLY COMMENTS OF UNITEL, INC.**

UniTel, Inc. (“UniTel”), by counsel, hereby files these Reply Comments<sup>1</sup> to those parties supporting the Petition for Preemption filed July 15, 2010 (the “Petition”) by CRC Communications of Maine, Inc. (“CRC”) and Time Warner Cable Inc. (“TWC”).<sup>2</sup> As a general matter, the parties supporting CRC and TWC base that support upon the same incomplete and inaccurate factual contentions asserted by CRC and TWC. Likewise, these parties also engage in the same efforts by CRC and TWC to overlook the requirements of the Communications Act of 1934, as amended (the “Act”) and, in particular, the interplay between sections 252(a)(1), 251(c)(1), 251(f)(1), as well Federal Communications Commission (the “Commission” or the “FCC”) decisions and FCC rules.<sup>3</sup> At the same time, some parties resort to unnecessary and otherwise improper rhetoric apparently in the hope that emotional appeals will convince the Commission to gloss over the plain words of the Act and the applicable FCC’s decisions and

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<sup>1</sup> For purposes of these reply comments, UniTel will use the name of the party to identify portions of that party’s comments.

<sup>2</sup> Parties filing in general or partial support of the Petition are: Charter Communications, Inc. (“Charter”), COMPTel (“Comptel”); NTCH, Inc. (“NTCH”); the National Cable & Telecommunications Association (“NCTA”); the Verizon companies (“Verizon”); and the Voice on the Net Coalition (“VON Coalition”).

<sup>3</sup> The fallacies underlying the Petition have been amply demonstrated in the comments filed that opposed the Petition including, in addition to those filed by UniTel, the comments filed by the Maine Public Utilities Commission (the “Maine PUC” or “MPUC”), the Maine Public Advocate and the National Association of State Utility Consumer Advocates, the Lincolnville Telephone Company *et al.* group, and the Telephone Association of Maine (“TAM”).

rules. Not to be out done, one of the commenting parties – Verizon – suggests that the Commission should now engage in the “best reading” of the Act<sup>4</sup> which disregard settled Commission interpretations and would, in turn, actually *avoid reading* the Act in its entirety and *avoid reading* the implementing words that Congress chose to trigger the requirements of section 252. Section 251(c)(1) contains the sole operative language that triggers the arbitration provisions of Section 252, unless the parties voluntarily agree otherwise (which was not the case here).

As a result, commenters supporting the Petition (and even those like Verizon that disagree with aspects of the Petition) have demonstrated that they, like CRC and TWC, would rather avoid the facts and specific wording of the applicable provisions of the Act that are required to be applied and were properly applied by the MPUC. Accordingly, based on the record, the only rational conclusion that can be reached is that the Petition should be denied and dismissed.

**I. Factually Inaccurate Assertions and Misplaced Rhetoric should be Rejected.**

Apparently, several of the commenters failed to independently validate the accuracy of the “facts” that CRC and TWC relayed in the Petition. While a number of these matters have been addressed by UniTel in its comments, the need to ensure an accurate record before the Commission in this proceeding continues.

First, one party has specifically raised the possibility that the Maine PUC failed to meet its section 251(f)(1) duty by resolving the case in 120 days.<sup>5</sup> This claim has no basis. The record before the Maine PUC is clear that the parties agreed to a schedule that extended beyond

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<sup>4</sup> Verizon Comments at 12.

<sup>5</sup> NTCH Comments at 1.

the 120 days noted in Section 251(f)(1).<sup>6</sup> Thus, because CRC and TWC explicitly waived, and repeatedly implicitly waived adherence to the 120 day time period, any criticisms of the Maine PUC in this regard are without merit. Second, commenting parties claiming that the Maine PUC improperly migrated the proceeding to a section 251(f)(1) proceeding are also wrong.<sup>7</sup> As has been shown, this was the very process that CRC sought.<sup>8</sup>

Third, some parties use unnecessary rhetoric with respect to the conduct of the rural exemption proceedings before the Maine PUC apparently in effort to distract from the issues at hand. To be clear, there is no basis that the Maine PUC was effectively in-the-pocket of the rural telephone companies, or that the Maine PUC was somehow allowing a government sanctioned monopoly by granting the rural telephone companies a “unilateral right” to stop competition by providing the rural telephone companies a “veto” over competitive entry.<sup>9</sup> The Maine PUC properly followed the procedures required of it by Congress -- CRC and TWC would come before the MPUC with whatever evidence they believed sustained their burden of proving that the rural telephone companies’ respective section 251(f)(1) should be removed, and the rural

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<sup>6</sup> See, e.g., UniTel Comments, Exhibit 3, *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; Maine Public Utilities Commission Investigation pursuant to 47 U.S.C. § 251(f)(1) regarding CRC Communications of Maine’s request of UniTel, Inc., et al., Docket Nos. 2007-611, 2008-214, et al., Procedural Order*, issued May 12, 2008 at 2 n.1 (“The parties explicitly waived any objections they may have in connection with the fact that this schedule would result in a Commission decision beyond 120 days from the date of the Commission’s May 5, 2008 Order in Docket 2007-611.”); CRC Communications of Maine, Inc.’s Request for a Rural Exemption Investigation Pursuant to 47 U.S.C. 251(f)(1) Regarding UniTel, Inc., Docket No. 2009-40, dated January 30, 2009 (MPUC) at 4 and attached “Proposed Schedule for Rural Exemption Proceeding (Proposing a schedule of at least 160 days); see also TAM Comments at 3-4.

<sup>7</sup> See, e.g., Charter Comments at 4; VON Coalition Comments at 1.

<sup>8</sup> See, e.g., UniTel Comments at 3-8.

<sup>9</sup> See, e.g., NTCH Comments at 2-3; Comptel Comments at 5, 8 and 1; see also NCTA Comment at 7; VON Coalition at 2.

companies would respond. This adjudicatory proceeding resulted in the Maine PUC issuing a fact-intensive, legally sound decision.

While some commenting parties would rather rely on emotion to divert attention from the facts and applicable law, such parties have no substantive basis to criticize the Maine PUC's actions at issue. Accordingly, these commenting parties' assertions should be rejected.

**II. Contrary to Some Parties' Positions, the Act was followed by the Maine PUC in a Manner also Consistent with the Applicable FCC Rules and Decisions.**

Congress enacted section 251(c)(1) with specific language that triggers the negotiation and arbitration process outlined in section 252. The section 251(c)(1) language creates the trigger with respect to section 252's time frames for negotiations and, absent agreement, arbitrations as confirmed by both the Commission's decisions and FCC rules. In the face of these facts, commenting parties supporting the Petition appear to believe that repetition of unfounded claims somehow brings credibility to them. These assertions should be rejected. The Maine PUC followed the actual wording of the Act in a manner fully consistent with applicable FCC decisions and rules.

First, contrary to some claims in the comments, the section 251(f)(1) rural exemption is not "provisional" or "temporary".<sup>10</sup> By the words it used, Congress specifically indicated that the exemption from the section 251(c) additional interconnection obligations *remains* until lifted.

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).<sup>11</sup>

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<sup>10</sup> NCTA Comment at 3; Verizon Comments at 2, 5.

<sup>11</sup> 47 U.S.C. § 251(f)(1).

There is nothing temporary or provisional included within the language Congress used in section 251(f)(1). Such efforts to place some gloss on the language Congress chose should be rejected.<sup>12</sup>

Second, commenting parties try in vain, as did CRC and TWC, to create a right of negotiation under section 251(a) and/or section 251(b) out of whole cloth.<sup>13</sup> The premise of these independent rights has already been addressed and properly rejected by the Commission in *Z-Tel*<sup>14</sup> as well as the Commission's *LNP Reconsideration Order*.<sup>15</sup> Efforts to avoid acknowledging the specific language of these decisions (as well as the plain language of section

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<sup>12</sup> Effectively, these types of assertions amount to nothing more than an effort to advance the notion that the Act's sole objective is competition. *See, e.g.*, NTCH Comments at 3. There is no basis for this notion, and the United States Court of Appeals for the Eighth Circuit has already rejected it. "*In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the congressional debates. See* 142 CONG.REC. S687-01 (Feb. 1, 1996) (statements by Sen. Hollings and Sen. Burns); 142 CONG.REC. H1145-06 (Feb. 1, 1996) (statement by Rep. Orton)." *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744, 762 (8th Cir. 2000) (emphasis added). In addition, the "competition for competition's sake" position also effectively turns a blind eye to the Universal Service aspects of the Act that are equal in stature to any pro-competitive policies the 1996 revisions to the Act were intended to foster. Not surprisingly, therefore, the need to encourage Universal Service has not gone unnoticed.

First, § 254(b)(1) provides that "quality service should be available at just, reasonable, and affordable rates." Second, § 254(b)(2) articulates the goal of providing access to telecommunications and information services "in all regions of the Nation." Third, § 254(b)(3) expresses the policy of providing service to subscribers in "rural and high cost areas" which is comparable in both price and sophistication to those offered in urban areas. *By enacting these three related provisions, Congress ensured that the competition-promoting aspects of the 1996 Act would not undermine its most fundamental purpose. That fundamental purpose, as confirmed by § 254(b), is to promote, provide, and sustain affordable telecommunications service for all citizens; and, this is what is meant by "universal service."*

*Wireless World, L.L.C. v. Virgin Island Public Services Commission*, No. Civ.A. 02-0061STT (Feb 28, 2008), 2008 WL 5635107 (D.Virgin Islands) at 6 (footnote omitted)(emphasis added).

<sup>13</sup> *See, e.g.*, Charter Comments at 4; Comptel Comments at 2-3; NCTA Comments at 4; Verizon Comments at 2.

<sup>14</sup> *In the Matter of CoreComm Communications, Inc., and Z-Tel Communications, Inc. v. SBC Communications, Inc. et al., Order on Reconsideration*, File No. EB-01-MD-017, 19 FCC Red 8447 (2004) ("Z-Tel"); *see also* Maine PUC Comments at 6-7, n.4; UniTel Comments at 10-12. Even Verizon acknowledges the controlling nature of *Z-Tel*. *See* Verizon Comments at 8, n.31.

251(c)(1)<sup>16</sup>) are without merit. So too, Verizon's effort at page 11-12 to suggest a "best reading" of Footnote 393 from the *LNP Reconsideration Order* is anything but the "best reading."<sup>17</sup>

Verizon effectively claims that footnote 393's use of the phrase "negotiate in good faith" must refer to the conduct of negotiations and not the initiation of them.<sup>18</sup> Verizon's position fails to note that the phrase "negotiate in good faith" as stated by the Commission in footnote 393 of the *LNP Reconsideration Order* is the very same phrase that Congress included within section 251(c)(1).<sup>19</sup> Verizon's internally inconsistent interpretation is nothing more than an effort to establish an independent section 252 trigger for section 251(b) requests, even though section 251(b) provides no such trigger. The only place within section 251 that creates a section 252 trigger is the language that Congress placed in section 251(c)(1).

Likewise, some commenting parties apparently want the text of footnote 401 of the *LNP Reconsideration Order*,<sup>20</sup> *i.e.*, that the exemption found in section 251(f)(1) does not apply to section 251(a) and section 251(b) duties, to trump the Commission's statements in footnote 393 of the same decision. Footnote 401 within the Commission's *LNP Reconsideration Order* speaks for itself and merely reiterates the discussion contained in the text of paragraph 117 of the FCC discussion before footnote 393, with footnote 393 representing the more specific, and therefore controlling, FCC-declared qualification of that discussion.

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<sup>15</sup> See *In the Matter of Telephone Number Portability, First Memorandum Opinion and Order on Reconsideration*, CC Docket No. 95-116, RM-8535, 12 FCC Rcd 7236 (1997) ("LNP Reconsideration Order").

<sup>16</sup> See, *e.g.*, Charter Comments at 3-4.

<sup>17</sup> Verizon Comments at 11-12.

<sup>18</sup> *Id.*

<sup>19</sup> Compare *LNP Reconsideration Order*, 12 FCC Rcd 7304, n. 393 and 47 U.S.C. § 251(c)(1).

<sup>20</sup> See, *e.g.*, NCTA Comments at 3, n 6.

Further, Verizon's efforts to parse the words of section 252(b)(4)(C) and section 252(c)(3) cannot stand.<sup>21</sup> Setting aside the fact that nowhere in section 254(b)(4)(C) is there any language regarding "the 251(b) duties" that Verizon suggests,<sup>22</sup> Verizon's efforts, like those of many of the supporters of CRC and TWC, ignore the fact that section 252(b)(4)(C) and section 252(c)(3) do not apply until section 251(c)(1) triggers review under section 252.

Verizon also suggests an erroneous construction of section 252(a)(1) that would afford an independent right to negotiate section 251(b) duties separate and apart from *the only trigger* provided by Congress as found in section 251(c)(1).<sup>23</sup> Verizon's position fails to note the operative language of section 252(a)(1) addresses agreements that are "without regard" to the standards under section 251(b) and section 251(c) requirements, while, at the same time, plainly stating that an incumbent local exchange carrier ("ILEC") is *not required* to undertake such an arrangement but that it "*may negotiate*" such an interconnection arrangement.<sup>24</sup> Verizon has understandably failed to explain how an exception to following the standards for section 251(b) and section 251(c) can be turned into an affirmative right to negotiate an agreement under section 251(b) when the trigger for any such section 252 negotiations is found *solely* in section 251(c)(1). Even if one were to look past this issue, Verizon's contentions still cannot be reconciled with the fact that the specific language used by Congress in section 252(a)(1) states that the provisions relate to "Voluntary Negotiations" and thus cannot be imposed upon an ILEC as the logic of Verizon's contentions would suggest.<sup>25</sup>

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<sup>21</sup> Verizon Comments at 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 7-8.

<sup>24</sup> 47 U.S.C. § 252(a)(1) (Emphasis added).

<sup>25</sup> *Id.*

Put simply, these parties want the Commission to *not* read the Act as a whole and therefore, *write out* of the statute section 251(c)(1). Such propositions are without merit, and certainly not a “best reading”.

Third, Verizon claims that the Commission can simply declare that there is a right to negotiate section 251(b) duties.<sup>26</sup> This claim has no basis as it would not only contradict and be an unexplained departure from the conclusions reached in footnote 393 of the *LNP Reconsideration Order*, but it would also conflict with the FCC’s rules – section 51.301(a). Thus, Verizon’s proposed “declaratory ruling” assertions must be rejected.<sup>27</sup>

Finally, reliance on *BellSouth Telecommunications, Inc. v. Universal Telecom, Inc.*, 454 F.3d 559 (6<sup>th</sup> Cir. 2006) to suggest an “enforceable” right to negotiate section 251(a) interconnection is misplaced.<sup>28</sup> The reference to section 251(a) is in an introductory statement<sup>29</sup> that is unrelated to the issue before the court – the scope of section 252(i).<sup>30</sup> Thus, reliance on

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<sup>26</sup> See, e.g., *id.* at 6, 14.

<sup>27</sup> *Id.*

<sup>28</sup> NCTA Comments at 4, n.11.

<sup>29</sup> Specifically, the *BellSouth* court stated:

Congress sought to enhance competition in the telecommunications industry. To that end, the Act requires incumbent providers of local phone service to offer “interconnection” services-to share their network, in other words-with other telecommunications companies, 47 U.S.C. § 251 (a)(1), and provides three mechanisms for doing so: The incumbent and the competitor may negotiate the terms of an interconnection agreement, § 252(a); they may go through arbitration to establish the terms of an interconnection agreement, § 252(b); or a carrier may adopt an existing interconnection agreement between the incumbent and another telecommunications company, § 252(i).

*BellSouth*, 454 F.3d at 560. Placed in context, therefore, the operable language in the quote is the reference to “§ 252(a)” which, by its terms, references voluntary negotiations without regard to the standards established for sections 251(b) and of section 251(c). See 47 U.S.C. § 252(a).

<sup>30</sup> *BellSouth*, 454 F.3d at 560 (“At issue here is the adoption provision, § 252(i), which permits an entrant to a local telephone market (like Universal) to forgo negotiation or arbitration with an incumbent (like BellSouth) by adopting a previously negotiated or arbitrated interconnection agreement between the incumbent and another carrier. . . .”)

the reference to section 251(a) within *BellSouth* is misplaced as it is taken out of context. Moreover, *even if* the court's reference to section 251(a) is somehow suggesting that it is implemented through section 252, that discussion is wrong, as the FCC has pronounced in *Z-Tel*.

### III. Conclusion

Nothing in the comments of those parties supporting aspects of the relief requested in the Petition can rationally support the requested preemption. Just as with CRC and TWC, the parties supporting them have failed to recognized and acknowledge controlling facts (many of which were corrected by comments like those from UniTel) while other parties tried to effectively write out of the Act the specific Congressional directives stated in section 251(c)(1) of the Act. Accordingly, for all of the reasons stated herein and the comments of those parties supporting the correctness of the Maine PUC's May 5, 2008 Order, the Petition for Preemption should be denied and dismissed.

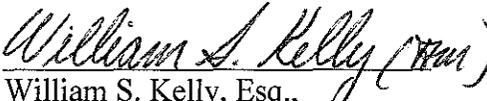
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