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

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In the Matter of	)	
BRIGHT HOUSE NETWORKS, LLC,	)	
Complainant.	)	
v.	)	File No. EB-06-MD-003
TAMPA ELECTRIC COMPANY,	)	
Respondent,	)	

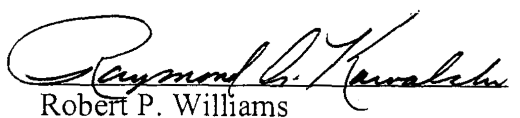
To: Enforcement Bureau
Market Disputes Resolution Division

MOTION FOR LEAVE TO FILE RESPONSE TO SUPPLEMENT TO POLE ATTACHMENT REPLY BRIEF AND REPLY DECLARATION OF EUGENE WHITE

Tampa Electric Company hereby moves for leave to file the accompanying RESPONSE OF TAMPA ELECTRIC COMPANY TO SUPPLEMENT TO POLE ATTACHMENT REPLY BRIEF AND REPLY DECLARATION OF EUGENE WHITE. Good cause exists to grant Tampa Electric's motion, and Bright House Networks, LLC, will suffer no prejudice as a result of granting it. The supplement merely responds to arguments made by Bright House Networks, LLC, in its Supplement filed April 23, 2007 and, as such, will maintain the completeness and accuracy of the record.

Respectfully submitted,

TROUTMAN SANDERS LLP



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Date: May 1, 2007

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

In the Matter of	)	
BRIGHT HOUSE NETWORKS, LLC,	)	
Complainant.	)	
v.	)	File No. EB-06-MD-003
TAMPA ELECTRIC COMPANY,	)	
Respondent,	)	

To: Enforcement Bureau
Market Disputes Resolution Division

RESPONSE OF TAMPA ELECTRIC COMPANY TO SUPPLEMENT TO POLE ATTACHMENT REPLY BRIEF AND REPLY DECLARATION OF EUGENE WHITE

In order to maintain a complete and accurate record in this proceeding, Tampa Electric Company ("Tampa Electric") hereby responds to the Supplement to Pole Attachment Reply Brief and Reply Declaration of Eugene White ("BHN Supplement") filed April 23, 2007, by Bright House Networks, LLC ("BHN").

BHN's Supplement corrects the record as to the current wholesale transport activities of Bright House Network Information Services ("BHNIS") and submits argument concerning the implications of those activities for this case.[1] BHNIS and its wholesale transport and interconnection services have already been the subject of Tampa Electric's Response (filed March 29, 2006) at pp. 10-11, and BHN's Reply (filed April 25, 2006), as well as submissions of supplemental authority by Tampa Electric on August 30 and December 15, 2006, and filings by

[1] The supplemental White declaration indicates that BHNIS, which allegedly had ceased its transport services temporarily *after* the 2001-2005 period at issue in this proceeding, has recommenced providing those services. The supplemental declaration does not address the 2001-2005 period, nor does BHN appear to dispute the evidence already submitted by Tampa Electric that BHNIS provided transport services during that period. (*See* Tampa Electric Response (filed March 29, 2006) at Exhibits 13, 14, 16, 19, 20, 21, 22.)

BHN on September 12, 2006 and January 23, 2007 objecting (ironically enough) to such submissions of supplemental authority. As all of these filings make clear, the wholesale transport and interconnection services provided by BHNIS over BHN's pole attachments are "telecommunications service" under 47 USC § 153(46). As such, BHNIS's activities constitute use of BHN's pole attachments by a telecommunications carrier for telecommunications service under 47 USC § 224(e)(1), which means that the telecommunications rate applies.

BHN argues that BHNIS's activities should make no difference in the rate because BHN is using VoIP to provide the voice services that are being transported. (BHN Supplement at 2.) But that argument misses the point: BHNIS's use of attachments for transport provides a basis for establishing "telecommunications" activity on BHN's attachments that is wholly separate and independent from whether VoIP constitutes "telecommunications." Since the filing of BHN's complaint in this proceeding, the Commission and courts have unanimously recognized that the wholesale transport of voice services and the provision of an interconnection with telecommunications carriers constitutes "telecommunications" under federal law. For instance, last year in *Berkshire Telephone Corp. v. Sprint Communications Co.*, 2006 U.S. Dist. LEXIS 78924 (W.D.N.Y. Oct. 27, 2006) (copy attached hereto), the federal district court reviewed a business arrangement between Sprint and BHN's New York affiliate, Time Warner Communications, that is remarkably similar to BHNIS's apparent arrangement with BHN. In that instance, Sprint provided interconnection to other telecommunications carriers and Time Warner provided voice services to customers via its cable television network. *Id.* at *4. Based on these facts, the court held that under *the exact same statutory definition of "telecommunications service" that applies to BHNIS in this case* (47 U.S.C. § 153(46)), Sprint was providing "telecommunications services" because it offered interconnection to the public switched telephone network. *Id.*

Perhaps even more tellingly, the issue has now been decided by the Commission itself, apparently at BHN's own request. In *In the Matter of Petition of Time Warner Cable for Declaratory Ruling*, WC Docket no. 06-55, a decision BHN attempts to sidestep in its Supplement, the Wireline Competition Bureau expressly held that the provision of wholesale transport services by a telecommunications carrier to provide Time Warner Cable (now known as BHN in Florida) with interconnection to other carriers constitutes "telecommunications service" as defined in 47 U.S.C. § 153(46). *Petition of Time Warner Cable for Declaratory Ruling*, 2007 FCC LEXIS 1752 (rel. March 1, 2007) ("*Time Warner*") (copy attached hereto)[2]. Again, that is the same statutory definition of "telecommunications service" applicable to pole attachments. *See* 47 U.S.C. § 224(e) (2007); *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 340 (2002).

Of particular note is the fact that this ruling specifically held that wholesale transport is a telecommunications service even if BHN is using VoIP to provide its voice service. *Time Warner* at 8-9. The comments filed in that proceeding by BHN's owner and manager, Advance-Newhouse Communications, were especially vocal in support of this point:

> Advanced-New House explained in its opening comments, under the relevant statutory language, CLECs serving VoIP providers are plainly acting as "telecommunications carriers," irrespective of their status as "common carriers." [footnote omitted]
>
> ***
>
> Providing PSTN [Public Switched Telephone Network] connectivity to cable-based VoIP providers – even if under the terms of a unique, privately-negotiated contract, clearly makes the PSTN connectivity "effectively" available to the public. As a result, a CLEC performing that function is a "telecommunications carrier" with full interconnection rights under Section 251....[3]

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[2] *See also, e.g.,* In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53 at 12-14 (rel. March 23, 2007) (transmission component of wireless broadband internet access service is a telecommunications service if offered on a common carrier basis).

[3] Reply Comments of Advance-Newhouse Communications, filed April 25, 2006 in *Petition of Time Warner Cable for Declaratory Ruling*, WC Docket No. 06-55 (copy attached).

The reason for BHN's past opposition to Tampa Electric's notifications of supplemental authority on this issue thus becomes clear. BHN knows that consideration of the "wholesale transport" issue in this case enables Tampa Electric to establish that BHN attachments have been used to provide telecommunications service by BHNIS and perhaps others, thus triggering the telecommunications pole attachment rate. Moreover, BHN knows that this will be the case regardless of whether it is using VoIP and regardless of whether VoIP is itself a telecommunications service.

BHN's point that *Time Warner* did not decide whether the underlying VoIP service constituted "telecommunications" is thus irrelevant. (BHN Supplement at 2n1.) BHN is simply confusing the distinction between two different ways BHN's attachments have been used. Use for wholesale transport to provide interconnection is one way, and that is what *Time Warner* and *Berkshire Telephone* say is definitely a telecommunications service. Use for VoIP may also, independently, constitute a telecommunications service, but the Commission has to date deferred a ruling on that point. As *Time Warner* expressly holds, however, the fact that BHN may be using VoIP *does not matter*: wholesale transport of VoIP is still a telecommunications service.

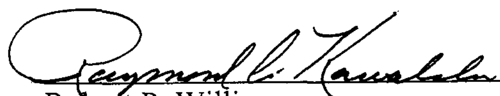
The key point, therefore, is that *Time Warner* and *Berkshire Telephone* construe the identical statutory definition of "telecommunications service" in a context identical to the facts in this case. In deciding that carriers like MCI and Sprint could provide interconnection to Time Warner Cable because those carriers' wholesale transport service was a "telecommunications service," the Commission was addressing exactly the same service that BHNIS has provided BHN. It would be hard to imagine stronger precedent.

BHN's admissions regarding BHNIS, together with the other evidence and authorities in the record, are sufficient for the Commission to conclude that regardless of the regulatory classification of VoIP, BHN's attachments have been used by a telecommunications carrier to provide telecommunications service, and that Tampa Electric is therefore entitled to charge the

telecommunications rate. A prompt ruling on this point would not jeopardize the Commission's ultimate classification of VoIP but would enable the parties to move forward in resolving their dispute.

Respectfully submitted,

TROUTMAN SANDERS LLP



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Date: May 1, 2007

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

In the Matter of Petition of Time Warner Cable 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	WC Docket No. 06-55

Reply Comments of Advance-Newhouse Communications

Advance-Newhouse Communications ("Advance-Newhouse") hereby submits its reply comments in this matter.[1] As noted in our initial comments, Advance-Newhouse manages Bright House Networks, which offers traditional cable, high-speed data, and facilities-based Voice over Internet Protocol ("VoIP") telephony in areas including Tampa Bay and central Florida; Birmingham, Alabama; Indianapolis, Indiana; Bakersfield, California; and Detroit, Michigan. Advance-Newhouse, therefore, will be directly affected by a decision in this matter regarding the interconnection rights of VoIP providers and the competitive local exchange carriers ("CLECs") that serve them.

1. The Parties Opposing The Declaratory Ruling Offer No Sound Policy Rationale For Doing So.

Several rural incumbent local exchange carriers ("ILECs"), their trade associations, and state regulators oppose Time Warner's request for a declaration that CLECs serving VoIP providers have full interconnection rights.[2] The legal theories that

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[1] Public Notice, Pleading Cycle Established for Comments on Time Warner Cable's Petition for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers, DA 06-534 (March 6, 2005).

[2] *See, e.g.*, Comments of the Independent Telephone and Telecommunications Alliance, *et al.* ("ITTA Comments") at 2; Comments of the Nebraska Public Service Commission ("Nebraska PSC Comments"); Comments of the Iowa RLEC Group ("Iowa RLEC Comments"); Comments of John Staurulakis, Inc. ("JSI Comments"); Comments of the South Carolina Telephone

these parties advance are flawed, as discussed below. But notable by its absence from these comments is any remotely sound ***policy*** rationale for denying interconnection rights to CLECs that serve VoIP providers.

Advance-Newhouse submits that this is a fatal error. As we pointed out in our opening comments, both this Commission[3] and the courts[4] have found that the key purpose of the 1996 Act is to encourage "genuine, facilities-based competition."[5] It directly frustrates this purpose for state commissions to interpret the Act in a way that either flatly blocks the ability of cable-based voice telephony to compete (as both the South Carolina and Nebraska regulators have done) or that creates uncertainty about interconnection rights – uncertainty which ILECs large and small will be quick to exploit in interconnection negotiations, arbitrations, and related matters.[6]

Coalition ("SCTC Comments"); South Dakota Telecommunications Association, *et al.*, Opposition to Petition for Declaratory Ruling ("South Dakota Telecom Comments"); Comments of Southeast Nebraska Telephone Company and the Independent Telephone Companies ("Southeast Nebraska Comments"). *See also* Comments of Qwest Communications International, Inc. ("Qwest Comments") (urging, *inter alia,* delaying a decision until other cases regarding VoIP are decided).

3 *See* In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capabilities, CC Docket Nos. 01-338 *et al., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* FCC 03-36 (rel. August 21, 2003) at ¶70 ("We reaffirm the conclusion in the UNE Remand Order that facilities-based competition serves the Act's overall goals"); In the matter of Unbundled Access to Network Elements (WC Docket No. 04-313); Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), *Order on Remand,* FCC 04-290 (rel. Feb. 4, 2005) at ¶ 3 ("By adopting this approach, we spread the benefits of facilities-based competition").

4 *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004), (the purpose of the Act "is to stimulate competition – preferably genuine, facilities-based competition."), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

5 *Id.*

6 Advance-Newhouse has had direct experience with these types of problems. During 2004 and early 2005, Advance-Newhouse's efforts to compete with Verizon in Florida were impeded by Verizon's policy of refusing to efficiently port out the telephone numbers of customers seeking to use Advance-Newhouse's VoIP service in cases where the customer had digital subscriber line ("DSL") service on the account. The dispute was eventually settled following this Commission's clear statement that the presence of DSL did not justify delays in porting out numbers. Even so, Verizon at various points raised the fact that Advance-Newhouse

In these circumstances, the purposes of the Act would be served by a swift and clear declaration that CLECs supplying cable-based VoIP providers with interconnection to the public switched telephone network ("PSTN") have full and complete interconnection rights under Section 251 of the Act – including, specifically, the rights provided for in Sections 251(b) and 251(c). Denying such rights – or simply letting the matter drag on unresolved – plays into the hands of those who would frustrate the growth of facilities-based competition, contrary to the basic objective of the Act.

This stark reality – the fact that, in the real world, denying interconnection rights to CLECs serving VoIP providers would directly impede the growth of competition – necessarily frames the Commission's ***legal*** task in this proceeding. The question before the Commission is not an abstract exercise in applying common carrier law to a novel fact situation. Getting the right answer – that is, the pro-competitive answer – goes to the core of the Commission's task in implementing the 1996 Act. As a result, the Commission should resolve this matter by asking whether anything ***precludes*** the Commission from construing Section 251 and related provisions to grant CLECs the interconnection rights they need to serve VoIP providers. Unless granting such rights is forbidden by the Act – which, plainly, it is not – then the only result consistent with the on-the-ground reality of facilities-based competition as it is actually developing – that is, by means of cable-based VoIP services – is to grant Time Warner's request for a declaratory ruling.[7]

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obtained its PSTN connectivity by means of a third-party CLEC as a basis for denying Advance-Newhouse's standing even to complain about the problem. *See also* Sprint Nextel Corporation's Comments in Support of Petition for Declaratory Ruling ("Sprint-Nextel Comments") at 7-10 (noting delay and uncertainty caused by ILECs opposing interconnection rights of CLECs serving VoIP providers); Comments of Alpheus Communications, LP, *et al.* at 13-17.

[7] Some commenters allude to the special protections from interconnection obligations provided to rural ILECs by Section 251(f). *See, e.g.*, Comments of Home Telephone Company, Inc. and PBT, Inc. at 3; Southeast Nebraska Comments at 9 n.31; SCTC Comments at 3 n.5, 14 n.40, & 15. This matter, however, does not implicate that statutory provision. Granting Time Warner's petition is necessary for getting the interconnection process ***started.*** To the extent that an ILEC has, and chooses to assert, rights under Section 251(f), nothing in Time Warner's declaratory ruling request would affect those rights.

2. Parties Opposing Time Warner's Declaratory Ruling Rely On Flawed Legal Arguments, Which The Commission Should Reject.

Parties opposing Time Warner's declaratory ruling rely on two key legal arguments to assert that CLECs serving cable VoIP providers do not have full interconnection rights under Section 251 of the Act. First, they claim that because CLECs serving VoIP providers are not traditional "common carriers," they lack interconnection rights under Section 251. Second, Qwest in particular claims that traffic to and from information service providers is not subject to interconnection obligations under Section 251. The Commission should reject these arguments.

a. Time Warner's Petition Turns On How To Interpret The Communications Act, Not The Common Law Of Common Carriage.

Several parties oppose Time Warner's request for a declaratory ruling by arguing that CLECs serving VoIP providers are not really "common carriers" as that term has evolved at common law.[8] If such a CLEC is not acting as a "common carrier," they argue, the CLEC has no interconnection rights under Section 251, and state commissions and ILECs are justified in refusing to acknowledge such rights.

This argument is wrong for two reasons. First, CLECs serving VoIP providers are indeed "common carriers." But second – and more fundamentally – the argument is misplaced. The scope of the interconnection rights granted by Section 251 is determined by the specific language and terminology that Congress used in that provision – language that pointedly does ***not*** refer to the term "common carrier," even though that term has been in the Act since its enactment in 1934. What matters is not the scope of the common law doctrine of common carriage, but, rather, the meaning and purpose of the specific language in Section 251 (and the statutory terms that section uses). While there is some overlap between these concepts, it is not appropriate to deny CLEC

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[8] *See, e.g.*, Nebraska PSC Comments at 10-13; Qwest Comments at 4-5 & 7 n.15; Southeast Nebraska Comments at 7 n.23, 19-25; Iowa RLEC Comments, *passim*.

interconnection rights based on a narrow or strict reading of the common law of common carriage.

As just noted, the claim that CLECs serving VoIP providers are not common carriers is wrong on its own merits, as various commenters explain. CLECs serving VoIP providers ***are*** "common carriers." Being a carrier does not require serving end users directly. Instead, a carrier may provide wholesale services to third parties, who then serve end users. As a result, CLECs serving VoIP providers count as "common carriers," even if they themselves do not serve, or even offer to serve, any end user customers. The VoIP provider(s) they serve are the only customers they need for common carrier status.[9]

The Nebraska PSC and others, however, make a slightly more subtle claim. They argue that whether a CLEC serving a VoIP provider is a common carrier is inherently a fact-specific question, based on such considerations as whether the CLEC offers the precise services it supplies to the VoIP provider indifferently to all comers, under tariff, etc.[10] Since the common law of common carriage normally requires such an indifferent "holding out," they argue, a CLEC that negotiates an individual contract with a VoIP provider loses common carrier status and therefore, according to these commenters, loses its statutory interconnection rights.

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[9] *See, e.g.*, Joint Comments of BridgeCom International, Inc. *et al.*, *passim*. In particular, there is no merit to the claim that offering services under contract disqualifies the provider as a common carrier. *See, e.g.*, Sprint-Nextel Comments at 13-20; Comment of Alpheus Communications, LP, *et. al.*, *passim*; Comments of Global Crossing North America, Inc. at 5. This Commission has either permissively or mandatorily detariffed a variety of interstate common carrier services, including both traditional long distance service and CLEC switched access service, without ever suggesting that the providers ceased being common carriers for that reason. Moreover, back when long distance services were tariffed, the Commission permitted "individual case basis" arrangements to be filed as tariffs even though in practical terms many such arrangements were only provided to the original party buying them. *See* Sprint-Nextel Comments at 16 (citing cases showing that common carrier status is not lost because services provided under contract, not tariff). Still another example is commercial mobile radio services. The Act directly states that CMRS providers are common carriers, *see* 47 U.S.C. § 332(c)(1), but that did not prevent the Commission from detariffing them. Similarly, the common carrier status of CMRS does not forbid individual haggling over contract terms. *See Orloff v. Vodafone Airtouch Licenses LLC,* 17 FCC Rcd. 8987 (2002). So it just doesn't matter that a CLEC serving a VoIP provider might choose to do so under an individually-negotiated contract.

[10] Nebraska PSC Comments at 6, 9, 10-12; Southeast Nebraska Comments at 10, 18-22; South Dakota Telecom Comments at 9-12.

This argument leads to the second point noted above, *viz.*, that the interconnection rights established by Section 251 do not come from the common law of common carriage at all, and are not limited by that concept. To the contrary, they exist because Congress enacted a specific statute to create them, and their scope is determined by examining the specific statutory language that Congress used to establish them – read in light of Congress's purpose in enacting the statute in the first place. So, even if the common law would not deem CLECs serving VoIP providers, in some situations, to be "common carriers," that does not matter. What matters is the statutory language.[11]

Focusing, then, on the statutory language, it is notable that in creating new interconnection rights and obligations in Section 251, Congress did not refer to or rely on the notion of common carriage – despite the fact that the Communications Act has contained a definition of "common carrier" that has remained unchanged since 1934.[12] In establishing the new interconnection rights and obligations in Section 251, Congress studiously ignored that term – and, instead, used ***new*** statutory terms with specific, ***new*** statutory definitions. Congress spoke of the rights and obligations of "incumbent local exchange carriers," "local exchange carriers," and "telecommunications carriers."[13] Moreover, in establishing those rights and obligations, Congress did not refer to "carriage" or to any "common carrier" service. Instead, Congress referred to specific, newly-defined types of service – "telecommunications service," "telephone exchange

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[11] Put another way, the Commission's decision here will be reviewed in court for compliance with the *Chevron* standard – that is, the question on review will be whether the Commission's interpretation of its statute is reasonable. Traditional principles of common carriage may be relevant to some aspects of this issue, but the statutory language and purpose, not the common law of common carriage, controls. In this regard, Advance-Newhouse's opening comments explained that, under the relevant statutory terms – primarily the definitions of "telecommunications carrier," "telephone exchange service," and "exchange access" – CLECs providing PSTN connectivity to cable-based VoIP providers have full interconnection rights under Sections 251(b) and (c). *See* Advance-Newhouse Comments at 4-7.

[12] *See* 47 U.S.C. § 153(10) (defining "common carrier); M. Paglin, Ed., A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (New York: 1989) at 922 (text of original definition of "common carrier").

[13] The definition of each of these terms was added to the Communications Act by the Telecommunications Act of 1996. *See* 47 U.S.C. § 251(h) (new definition of ILEC); 47 U.S.C. § 153(26) (new definition of "local exchange carrier"); 47 U.S.C. § 153(44) (new definition of "telecommunications carrier").

service," and "exchange access."[14] The only reasonable conclusion to be drawn from this drafting history is that the scope of the new Section 251 obligations must be determined by reference to the actual statutory language Congress used, not generic common law principles of "common carriage."

Of course, the new statutory terminology is not a complete break with history. To the contrary, in most situations, there is no real distinction between whether an entity is a "common carrier" under common-law principles or a "telecommunications carrier" under the statutory language of 47 U.S.C. § 153(44).[15] But when someone argues that the new, pro-competitive ***statutory*** interconnection rights do not apply to CLECs serving VoIP operators because those entities are not ***common law*** "common carriers" – exactly what some claim here – alarm bells should go off. The term "common carrier" simply does not appear in Section 251, so it makes no sense to claim that Section 251 rights and duties are delimited based on that pointedly absent term. To the contrary, Section 251 defines interconnection rights and duties using other statutorily-defined terms – "telecommunications carrier," "local exchange carrier," "telephone exchange service," etc. As a result, arguments that seek to rely on the common law notion of common carriage to circumscribe statutory rights in Section 251 are, inherently, beside the point.

In this regard, the law is clear that – despite the overlap between them – "the two terms, 'telecommunications carrier' and 'common carrier' are not necessarily identical." *Virgin Islands Telephone, supra,* 198 F.3d at 927. The court in that case said that it "need not decide today what differences, if any, exist between the two." *Id.* Fair enough, in the context of that case. But when, as here, parties seek to limit the statutory interconnection rights of "telecommunications carriers" by arguing that the affected

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[14] The statutory definitions of "telecommunications service" and "exchange access" are entirely new in the 1996 Act. *See* 47 U.S.C. § 153(16) (new definition of "exchange access"); 47 U.S.C. § 153(46) (new definition of "telecommunications service"). The original Communications Act included a definition of "telephone exchange service," but that definition was substantially amended by the 1996 Act. *See* 47 U.S.C. § 153(47)(B) (new, expanded definition of "telephone exchange service").

[15] *See Virgin Islands Telephone Corp. v. FCC,* 198 F.3d 921, 926 (D.C. Cir. 1999).

entities are not common-law "common carriers," the differences between the two concepts becomes critical indeed.

As a result, if (as it should do) the Commission concludes that CLECs serving VoIP providers are indeed "common carriers" under traditional principles, then there is no need to explore the differences between the two terms. But if the Commission gives any credence to claims that a CLEC serving a VoIP provider is not a traditional "common carrier" that does not end the inquiry. Instead, it would just highlight the need to consider the specific statutory definitions in light of the purposes of the 1996 Act. As Advance-Newhouse explained in its opening comments, under the relevant statutory language, CLECs serving VoIP providers are plainly acting as "telecommunications carriers," irrespective of their status as common-law "common carriers."[16]

Because what matters is the statute, not common law principles of common carriage, the Nebraska PSC is wrong when it asserts that a CLEC serving a VoIP provider lacks interconnection rights if it does not offer its wholesale services on a traditional "common carrier" basis.[17] The statutory definition of "telecommunications carrier" (and, more precisely, the related definition of "telecommunications service") does not require the affected entity to offer services under tariff, or indifferently to all similarly situated customers, whether wholesale or retail. It requires that the telecommunications functionality (transmitting end user information between points designated by the user) either be literally or "effectively" available to the public. Providing PSTN connectivity to cable-based VoIP providers – even if under the terms of a unique, privately-negotiated contract – clearly makes the PSTN connectivity "effectively" available to the public. As a result, a CLEC performing that function is a "telecommunications carrier" with full interconnection rights under Section 251, irrespective of the status of its activity under the common law of common carriage.

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[16] *See* Advance-Newhouse Comments at 4-7.

[17] Nebraska PSC Comments at 10-13.

Advance-Newhouse submits that the entire argument about common carrier status shows why it is essential that the Commission grant Time Warner's petition. Various commenters note that the question of whether a particular entity is a "common carrier" is highly fact-intensive.[18] If the Commission were to erroneously link Section 251 statutory interconnection rights to common law "common carriage," that would mean that every slight variation in the entity or business models used to connect facilities-based VoIP providers to the PSTN would provide yet another opportunity for opponents of competition to argue that the new variation fails the fact-specific "common carrier" test. By contrast, the Commission clearly has the authority – and the duty – to declare how its own statute – the Communications Act – is to be interpreted. It would severely frustrate the objective of a nationwide pro-competitive policy to make the scope of federal statutory interconnection rights dependent on the vagaries of individual fact-finding inquiries about whether particular business models do or do not comport with traditional common-law notions of "carriage."

For these reasons, the Commission should reject the claim that an entity's interconnection rights turn on its status as a common law common carrier. Instead, the Commission should make clear that the scope of the interconnection rights under Section 251 depends entirely on the statutory language that Congress used to define those rights, and that it would frustrate the development of facilities-based competition to limit interconnection rights based on a strict or narrow application of common law notions of common carriage.

b. The Commission Should Reject Qwest's Effort To Limit The Interconnection Rights Of CLECs Based On The Nature Of Their Customers Services.

Qwest makes a particularly pernicious argument that the Commission should expressly reject. Qwest argues that if a CLEC serves an entity that provides information services, the resulting traffic is not "telecommunications" traffic to which interconnection

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18 *See* note 10, *supra*.

obligations apply.[19] Under this logic, if this Commission finds that VoIP is an information service rather than a telecommunications service, that automatically means that CLECs serving VoIP providers have no right to exchange that traffic with ILECs.

The Commission should rule that Qwest's argument is without merit. Whether a CLEC is providing "telecommunications service" depends on whether the CLEC is offering a telecommunications function, such as connectivity to the PSTN – not on what its customers (in this case, VoIP providers) ***do*** with that connectivity.

The fallacy of Qwest's position is perhaps clearer by initially considering point-to-point services rather than switched services. Suppose that an information service provider has two different locations with computers that need to communicate with each other in order to make the information service work. If the information service provider buys a "pipe" to link those two locations (*i.e.*, a special access service), the pipe is plainly "telecommunications," since it entails "transmission" of "information of the user's choosing" between the locations specified by the user – in this case, the information service provider's two facilities. Now suppose that instead of linking two of its own locations, the information service provider wants the pipe to connect its computers with the location of one of its large customers. Clearly, the pipe provides telecommunications functionality – transmitting customer-provided information between points designated by the customer – so, again, the entity that sells the pipe is selling telecommunications, which makes it a telecommunications carrier.

Now suppose that the amount of data that needs to go between the information service provider and any one customer is not so great as to require a dedicated pipe. In this case the information service provider will buy dial-up lines so that it can send and receive individual calls. Going from a dedicated pipe to a circuit-switched arrangement dos not change the underlying nature of the activity – sending data between and among

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[19] Qwest Comments at 5 ("almost all aspects of interconnection between a VoIP provider and an ILEC are dependent on whether the VoIP provider is providing a telecommunications service or an information service"); *id.* at 6-7. *See also* JSI Comments at 11 (referring to Time Warner as seeking to exchange "non-telecommunications traffic with the RLECs").

customer-specified locations. So, the information service provider is ***still*** buying "telecommunications service" when it connects to the public ***switched*** network – and the entity selling those connections is still a "telecommunications carrier."

This is exactly the result that Qwest is trying to avoid. Qwest says that when a CLEC meets the PSTN connectivity needs of information service providers, somehow that means that the CLEC is not providing telecommunications service. Therefore, under this logic, the traffic to and from the information service provider is not telecommunications traffic, and Qwest has no obligation to interconnect with respect to it. This is obviously wrong, for the reasons just discussed.

Qwest's argument is especially pernicious because under it, interconnection rights only apply to "plain old telephone service." Any CLEC that tries to meet the PSTN connectivity needs of information service providers would see its interconnection rights – and, therefore, its ability to serve its customers – evaporate. So if (as directly relevant to Time Warner's petition) the Commission were to conclude that VoIP service is an information service rather than a telecommunications service, under this argument an ILEC would have no obligation to exchange VoIP-originated or –terminated traffic with the CLEC providing PSTN connectivity.

The inevitable effect of this argument is to impede the growth of competition and new technologies. Every time a CLEC tried something new – or served a new class of provider – the issue of interconnection rights would need to be relitigated. Some ILECs may like this argument because it slows down competition and innovation. But, for that very reason, the argument is contrary to the language and purposes of the 1996 Act.[20]

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[20] For example, as noted in Advance-Newhouse's opening comments, Congress expressly expanded the definition of "telephone exchange service" to include any service, using any "system of switches, transmission equipment, or other facilities (or combination thereof)" that is "comparable" to traditional telephone service. 47 U.S.C. § 153(47). Similarly, a telecommunications service is a telecommunications service "regardless of the facilities used." 47 U.S.C. § 153(464).

The purpose of the 1996 Act is to make it easier and more efficient for innovative technologies and service providers to obtain seamless interconnection to the PSTN – not to set up artificial barriers to such interconnection. So, the Commission should hold that the way to decide if an entity is offering telecommunications service is by assessing the functions that the entity itself performs in light of the relevant statutory definitions – not be looking at what the entity's ***customers*** do with the services they receive. The Commission should also specifically hold – following up on its observations in *Vonage*[21] and the E911 ruling[22] – that a CLEC supplying PSTN connectivity to an interconnected VoIP provider is providing a "telecommunications service," completely irrespective of whether the VoIP provider is deemed to be offering an "information service."[23]

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[21] In the matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion And Order,* 19 FCC Rcd 6429 (2004) at ¶ 8.

[22] In the matter of IP-Enabled Services; E911 Requirement for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, WC Docket Nos. 04-36, 05-196 (rel. June 3, 2005) at ¶ 38.

[23] For this reason, among others, the Commission should not defer action on Time Warner's petition for declaratory ruling while all the regulatory details surrounding interconnected VoIP services are worked out. *See, e.g.*, ITTA Comments at 2, 12; Qwest Comments at 6-7. The right of CLECs serving VoIP providers to seamless interconnection with ILECs is simply not affected by whether VoIP providers are information services or not.

3. Conclusion.

As noted in Advance-Newhouse's opening comments, competition from cable-based VoIP services is the only presently viable form of landline facilities-based competition in the residence market. The Commission should do everything within its power to facilitate such competition. That means that the Commission should promptly grant Time Warner's request for a declaratory ruling that CLECs providing PSTN connectivity to VoIP providers are, indeed, "telecommunications carriers" under the Act, with full interconnection rights under Section 251.

Respectfully submitted,

ADVANCE-NEWHOUSE COMMUNICATIONS

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LEXSEE 2006 U.S. DIST. LEXIS 78924

BERKSHIRE TELEPHONE CORPORATION, et al., Plaintiffs, -vs- SPRINT COMMUNICATIONS COMPANY, L.P., NEW YORK PUBLIC SERVICE COMMISSION, et al., Defendants.

No. 05-CV-6502 CJS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

2006 U.S. Dist. LEXIS 78924

October 27, 2006, Decided
October 30, 2006, Filed

COUNSEL: **[*1]** For plaintiff: Jerauld E. Brydges, Esq., Harter, Secrest & Emery LLP, Rochester, New York; Thomas J. Moorman, Esq., Woods & Aitken LLP, Washington, D.C.

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For defendant New York Public Service Commission: Dawn Jablonski Ryman, Esq., General Counsel, Diane T. Dean, Assistant Counsel, John C. Graham, Assistant Counsel, Public Service Commission of the State of New York, Albany, New York.

JUDGES: Charles J. Siragusa, United States District Judge.

OPINION BY: Charles J. Siragusa

OPINION:

DECISION AND ORDER

INTRODUCTION

This is an action pursuant to *§ 252(e)(6)* of the Telecommunications Act of 1996 ("the Act"), *47 U.S.C. § 251 et seq.,* in which plaintiffs seek judicial review of a decision by the New York Public Service Commission ("PSC") pertaining to interconnection agreements between plaintiffs and Sprint, who are competing providers of local telephone service. The following applications are now before the Court: 1) plaintiffs' motion for summary judgment [# 25]; 2) PSC's cross-motion for summary judgment [# 30]; and 3) Sprint's cross-motion for summary judgment [# 33]. For **[*2]** the reasons that follow, plaintiffs' motion is denied and defendants' motions are granted.

BACKGROUND

This action involves a dispute between plaintiffs and defendant Sprint, all of whom are "local exchange carriers" ("LECs") within the meaning of the Act. Such LECs "are companies that provide local telephone service." *Global NAPs, Inc. v. Verizon New England, Inc., 454 F.3d 91, 93 n. 1 (2d Cir. 2006).* The act "established two types of local-exchange carriers: incumbents (or ILECs) and competitors (or CLECs). Before the 1996 Act, the ILECs held exclusive local telephone franchises. The 1996 Act, however, preempted local laws establishing the franchises and permitted the CLECs to interconnect their networks to that of the ILECs." *Id.* In this regard, the Act was intended

> to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies. A major purpose of the 1996 Act was to end local telephone monopolies and develop a national telecommunications policy that strongly favored local telephone market competition. **[*3]** Toward this end, the 1996 Act imposes, among other things, a duty on ILECs (such as [plaintiffs]) to provide interconnection with their networks and to negotiate in good faith the terms and conditions of the agreements with CLECs (such as [Sprint]). *47 U.S.C. § 251(a)(1), (c)(1) (2006).* If the parties cannot agree, either party may petition the state commission charged with regulating

> intrastate operations of carriers to arbitrate any unresolved issues. [*47 U.S.C.]* § *252(b)(1)*.

Id. at 94 (citations omitted). In the instant case, Sprint petitioned defendant PSC to arbitrate various issues, after Sprint and plaintiffs were unable to come to terms on an interconnection agreement. The PSC eventually resolved those issues in Sprint's favor, which led plaintiffs to commence the subject proceeding.

Before addressing the specific legal issues raised by plaintiffs, it is necessary to discuss Sprint's relationship to another key player in this dispute, Time Warner Communications ("Time Warner"). Essentially, Sprint and Time Warner have entered into an agreement whereby they each provide to the other certain aspects **[*4]** of local telephone service. Sprint provides certain "telecommunications services," namely: "interconnection to the public switched telephone network (PSTN), number acquisition and administration, submission of local number portability orders to the ILEC, inter-carrier compensation for local and toll traffic, 911 connectivity, operator services, directory assistance and the placement of orders for telephone directory listings." (Joint Record, Ex. 1, p. 6) Time Warner provides the remaining aspects of local telephone service, consisting of "the 'last mile' network over Hybrid Fiber Coaxial [cable], marketing and sales, end user billing and customer service." (Joint Record Ex. D, p. 2) Under this arrangement, Sprint does not have a direct business relationship with the end-user consumers who will be benefitting from Sprint's services, but rather, those consumers deal directly with Time Warner.

Pursuant to its agreement with Time Warner, Sprint was required to obtain all necessary interconnection agreements, including those at issue here. n1 That is, Sprint and Time Warner agreed that Sprint would negotiate and enter into interconnection agreements on their behalf with ILECs. Accordingly, **[*5]** Sprint requested that the plaintiff ILECs enter into such agreements. Plaintiffs and Sprint negotiated but were unable to come to terms, in large part because plaintiffs objected to the fact that Sprint did not have a direct relationship with Time Warner's end-user customers. As a result, Sprint petitioned defendant PSC to arbitrate the dispute.

> n1 "Sprint's business arrangements as a provider of PSTN services requires Sprint to meet all intercarrier contractual obligations, including obtaining all necessary ICAs." (Joint Record, Ex. D, p. 6)

The parties raised various issues before the PSC, but only three are significant to the instant action. First, plaintiffs argued that, under *47 U.S.C. § 251(a)*, they were not required to enter into interconnection agreements with Sprint because Sprint was not a "telecommunications carrier." Second, plaintiffs asserted that, even if Sprint was a telecommunications carrier, Sprint was not able to assert rights under *47 U.S.C. § 251(b)*, **[*6]** since those rights belonged only to Time Warner. And finally, plaintiffs maintained that the definition of "local traffic" in the interconnection agreements, which definition affects reciprocal compensation obligations under *47 U.S.C. § 251(b)(5)*, should not include "extended area service" ("EAS") calls, which are inter-exchange calls billed as local calls, rather than as toll calls.

With regard to this first issue, in the proceeding before the PSC, plaintiffs admitted that Sprint would be a "telecommunications carrier" if it was acting as "the ultimate provider of end user services." However, they claimed that Sprint was not a telecommunications carrier when it acted as a mere "'transit provider' for other service providers", such as Time Warner. (Joint Record, Ex. B, p. 5) Plaintiffs argued that when Congress enacted the Act, it did not "contemplate[] that end user service providers [such as Time Warner] could [use such arrangements as that between Sprint and Time Warner to] skirt their obligations to request and negotiate competitive interconnection agreements with the ILEC." (*Id.* at 6) Rather, plaintiffs stated, the Act requires "a Telecommunications **[*7]** Carrier [such as Time Warner] that provides end user services to request . . . interconnection agreements *directly* with the ILEC." (*Id.*) (Emphasis added) In short, plaintiffs argued that under the Act, they had the right to "deal directly with the requesting telecommunications carrier [i.e. Time Warner] that intends to serve the end user for which that carrier and the [plaintiffs] will compete." *Id.* n2

> n2 Plaintiffs did not contend that there was anything improper about the contract between Sprint and Time Warner *per se,* but argued that Time Warner was the appropriate party with whom they were entitled to negotiate the interconnection agreement: "Nothing stops the ultimate provider of end user service from utilizing Sprint, but the competitive interconnection is only between the third party (i.e., the ultimate provider of end user service) and the [ILECs]. The only thing stopping that from occurring is Sprint's insistence that, contrary to law, its private 'third party business arrangements' trump the rights and obligations of the [ILECs] to deal directly with the requesting telecommunications carrier that intends to serve the end user for

> which that carrier and the [ILEC] will compete." (Joint Record, Ex. B, p. 6); *(see also, Id.* at 8) ("Generally, the Act requires negotiation under the Act by the ultimate providers of end user service and clearly does not require and [ILEC] to accommodate . . . novel 'third party business arrangements.'")

[*8]

In their initial brief before the PSC, plaintiffs argued that Sprint was not a telecommunications carrier, solely because Sprint had no direct relationship with Time Warner's end-user customers. (Joint Record, Ex. B) Plaintiffs did not make any argument as to whether or not Sprint was a common carrier. (In that regard, and as will be discussed further below, it is undisputed that a telecommunications carrier must also be a common carrier.) However, in a footnote in their reply brief, plaintiffs raised the common carrier issue, stating: "Conspicuously absent from Sprint's Petition and Submission is any demonstration of whether, when Sprint acts as a 'facilitator' for a third party carrier like [Time Warner], those arrangements will be provided on a common carrier basis." (Joint Record, Ex. E, p. 2 n. 4)

Following the submission of briefs to the PSC, the parties met with an Administrative Law Judge ("ALJ") to discuss the issues. Counsel for the parties informed the ALJ that they would rely on their briefings, and the ALJ specifically agreed that the PSC would consider plaintiffs' reply brief as part of the record. (*Id.* at 52)

On May 24, 2005, the PSC issued a decision in which **[*9]** it rejected plaintiffs' arguments and found, in relevant part, that Sprint was a "telecommunications carrier" because the services that it provided to Time Warner "[met] the definition of 'telecommunications services." (Joint Record, Ex. K, p. 5) The PSC further stated that "Sprint's arrangement with Time Warner enables it to provide service directly to the public," and that "the function that Sprint performs is no different than that performed by other competitive local exchange carriers with networks that are connected to the [ILECs]." (*Id.*) Significantly, in finding that Sprint was a telecommunications carrier, the PSC did not specifically discuss whether Sprint was a "common carrier," though such a finding is implicit in the determination that one is a telecommunications carrier under the Act. The PSC further found that Sprint was entitled to assert the rights set forth under *47 U.S.C. § 251(b)*, and that the term ""local traffic" in the interconnection agreements should include "extended area service" ("EAS") calls. With regard to the definition of local traffic, the PSC stated:

> Sprint proposes to use a broad definition of 'local traffic' **[*10]** that includes calls between telephone numbers in the same rate center, and calls between telephone numbers in different rate centers that have an established local calling area approved by the Commission. The Independents, on the other hand, support a more restrictive definition of local traffic, limiting local calls to single telephone exchanges, not extending to local calling areas . . . .
>
> ***
>
> Our regulations and orders (in *16 NYCRR § 602.1* and Cases 00-C-0789 and 01-C-0181) define local exchange service and provide the requirements for the exchange of local traffic. To comply with our regulations and requirements, the interconnection and the traffic exchange agreements provided by incumbent and competitive local exchange carriers have defined the local service exchange areas and the local calling areas. Thus, the applicable regulations establish the basis for the definition of local traffic that we are requiring here. We find that Sprint's definition of local traffic should be used in the interconnection agreements as it conforms best to the stated requirements.

(Joint Record, Ex. K, pp. 7-8)

Plaintiffs moved for reconsideration before the PSC, arguing, in relevant **[*11]** part, that Sprint could not be a telecommunications carrier because it was not a common carrier. (Joint Record, Ex. L, pp. 5-8) The PSC denied the application, finding that Sprint was a common carrier. n3 (Joint Record, Ex. Q, pp. 5-7) As to that, the PSC found first that Sprint "indiscriminately offers its services to potential users," meaning that "Sprint will offer the same services it will provide to [Time Warner] to any cable company provider desiring those services." (*Id.* at 6) The PSC further concluded that the services that Sprint provided would "be available to any end user within the specified service territory, albeit through a business relationship with [Time Warner]." (*Id.*)

n3 At oral argument before this Court, PSC's counsel stated that this was a decision on the merits which this Court could review, and that PSC only grants motions for reconsideration when it intends to reverse its earlier decision.

In moving for reconsideration, plaintiffs also argued, *inter alia,* that the PSC **[*12]** had erroneously included EAS calls within the definition of local service:

> [T]he commission has failed to explain how its decision in this proceeding can be reconciled with its prior decisions in Cases 00-C-0789 and 01-C-0181. Longstanding Commission decisions in these cases have enunciated that traffic subject to *Section 251(b)(5)* must both originate and terminate within the certificated service area of an Independent. Further, EAS, in turn, is a distinct traffic type that the Commission has specifically found is not subject to *Section 251(b)(5)* because the LECs providing EAS do not compete for the end users making the EAS calls.

(Petition for Rehearing, Joint Record Ex. L, p. 15)(citing 00-C-0789 and 01-C-0181) The PSC rejected this argument, and explained its holdings in cases 00-C-0789 and 01-C-0181, referred to as the "Virtual NXX Case," as follows:

> [I]n the Virtual NXX Order, we determined that calls to an NXX code n4 within an established local calling area should be treated as local calls for rating purposes. . . . These calls were defined as local, but we did not require reciprocal compensation for several reasons. First, CLECs were not located **[*13]** within the same geographic territory as the Independent telephone companies. Second, the CLECs did not directly compete with the independent telephone companies for local customers. . . . In this case, however, [Time Warner] will compete directly with the Independents for local customers and extended area service [EAS] (which classifies telephone traffic that is geographically beyond the defined local service area as local) that is the equivalent of local exchange service.

(Joint Record, Ex. Q, p. 11)

n4 An NXX code is the first three digits of a seven-digit local phone number, which identifies the specific telephone company central office which serves that number. PSC Decision 00-C-0789 at 1 n.1.

Plaintiffs commenced the subject action pursuant to *§ 252(e)(6)* of the Act, seeking review of the PSC's determination. The parties subsequently filed the subject motions for summary judgment, and counsel for the parties appeared before the undersigned for oral argument on September 13, 2006. n5

n5 The Court's Law Clerk also held a telephone conference call with counsel on October 5, 2006.

[*14]

ANALYSIS

In an action such as this brought pursuant to *§ 252(e)(6)* of the Act, the Court reviews the PSC's rulings on issues of Federal Law *de novo,* and reviews all other issues, including rulings on issues of state law, using the arbitrary and capricious standard. *Global Naps, Inc. Verizon New England, Inc., 454 F.3d 91, 96 (2d Cir. 2006) (citing Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc., 235 F.3d 493, 498 (10th Cir. 2000)).* At oral argument, counsel agreed that in making its review, this Court is limited to the record that was before the PSC.

Whether Sprint is a Telecommunications Carrier

Plaintiffs contend that Sprint is not a telecommunications carrier for two reasons: because it is not a "common carrier", and because it does not have a direct relationship with the end users of its services.

47 U.S.C. § 153(44) states, in relevant part, that "[t]he term 'telecommunications carrier' means any provider of telecommunications services." "Telecommunications service," on the other hand, is defined as follows: "[T]he offering of telecommunications for a fee directly to the **[*15]** public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *47 U.S.C. § 153(46).* In this case, the parties concede that Sprint does not provide its services "directly to the public." Therefore, in deciding whether Sprint is a telecommunications carrier, the issue is whether it offers its services "to such classes of users as to be effectively available directly to the public." That issue turns upon whether Sprint offers its telecommunications services as a "common carrier." *Virgin Islands Telephone Corp. v. FCC ("VITELCO"), 339 U.S. App. D.C. 174, 198 F.3d 921, 922, 926 (D.C. Cir. 1999)* (Holding that the FCC's interpretation, that the term "telecommunications carrier" "means essentially the same as common carrier," was reasonable.); *see also,*

Iowa v. F.C.C., 342 U.S. App. D.C. 389, 218 F.3d 756, 758 (D.C. Cir. 2000) ("[A] carrier that provides a service on a non-common carrier basis is not a 'telecommunications carrier.'")

To qualify as a common carrier, a telecommunications service provider must satisfy two requirements: 1) first, it must hold itself out to the public, meaning that it must "offer indiscriminate **[*16]** service to whatever public its service may legally and practically be of use"; and 2) second, it must allow its customers to "transmit intelligence of their own design and choosing." *United States Telecom Ass'n v. Federal Communications Comm'n, 353 U.S. App. D.C. 59, 295 F.3d 1326, 1332-33, 1335 (D.C. Cir. 2002)*; *see also, FTC v. Verity Int'l, Ltd., 443 F.3d 48, 58 (2d Cir. 2006)* ("[T]he definition of a common carrier [has] coalesced into two requirements: (1) the entity holds itself out as undertaking to carry for all people indifferently; and (2) the entity carries its cargo without modification. . . . This definition does not differ meaningfully for our purposes from the definition of "common carrier" under the Communications Act.") (citations omitted). Here, it is not disputed that customers would be able to transmit intelligence of their own design and choosing over the facilities provided by Sprint and Time Warner. Accordingly, the only issue is whether Sprint offers its services indiscriminately "to whatever public its service may legally and practically be of use."

Applying these principles to the instant case, it appears clear, at the outset, that Sprint **[*17]** could qualify as telecommunications carrier even if it did not deal directly with Time Warner's end-user customers. In *VITELCO,* the Second Circuit reaffirmed that common carriers "need not serve the whole public," that "common carriers' customers need not be end users and that common carrier services include services offered to other carriers." *VITELCO, 198 F.3d at 926, 929* (citations and internal quotation marks omitted). Consequently, the fact that Sprint did not deal directly with Time Warner's customers would not be determinative of whether it was a telecommunications carrier within the meaning of *47 U.S.C. § 251.*

However, Sprint must be a common carrier in order to qualify as a telecommunications carrier. As to that, the Court agrees with plaintiffs that the PSC's finding, that Sprint is a common carrier, is unsupported in the record, insofar as that finding pertains to the services that Sprint provides to other telecommunications companies such as Time Warner. n6 In finding that Sprint was such a common carrier, the PSC stated that, "Sprint will offer the same service it will provide to [Time Warner] to any cable company provider **[*18]** desiring those services." That may be true. However, it is unclear how the PSC made that finding, since there is no support for it in the record. As to that, the administrative record contains only the following statements concerning Sprint's business: "Sprint has entered into agreements with service providers that intend to compete with ILEC local voice services." (Joint Record, Ex. A, p. 8); "[I]n New York, Sprint has entered into a business arrangement with Time Warner. . . to support its offering of local and long distance voice services." (*Id.*, Ex. D, p. 1); "Sprint currently has . . . ICAs [interconnection agreements] with RBOCs and other ILECs in 12 other states." (*Id.*, p. 2). The Court does not believe that these statements establish that Sprint is operating as a common carrier to telecommunications companies such as Time Warner in the specified service territory. n7

n6 Sprint contends that plaintiffs waived the "common carrier" argument, because it was only raised in plaintiff's motion for reconsideration. However, as previously mentioned, that is incorrect. While it was not plaintiffs' main argument before the PSC, and in fact was only raised in a footnote in their reply brief, it is clear that plaintiffs raised the issue prior to PSC's initial ruling. Moreover, even if the argument had only been raised in plaintiffs' motion for reconsideration, PSC nonetheless considered it and issued a decision on the merits of the argument.

[*19]

n7 PSC mistakenly contends that support for Sprint's common carrier status is found in the Joint Record at Exhibit D, p.2. (PSC Memo at 17-18: "Sprint has entered into the same type of agreement that it has with [Time Warner] with other parties in other service territories in New York.") Actually, the portion of the record cited by PSC merely shows that Sprint has similar contracts *with Time Warner* in those territories. (Joint Record, Ex. D, p. 2: "Sprint provides telecommunications services *to enable [Time Warner] to offer* local exchange and long distance voice services to New York consumers under interconnection agreements ('ICAs') with Frontier, Citizens Communications, AllTel and Verizon.") (emphasis added); (see also, Joint Record, Ex. D, p. 1) (According to Sprint, it has contracted with only one company, Time Warner, with which to provide service in the State of New York).

Nonetheless, the Court finds that the PSC's alternate basis for finding that Sprint was a common carrier was correct. As to that, the PSC stated, in relevant part, that "the services Sprint is providing . **[*20]** . . will be available to any end user within the specified service territory,

albeit through the business relationship with [Time Warner]." (Joint Record Ex. Q, p. 6). Plaintiffs argue that the Court "cannot rely upon [Time Warner's] end users . . . as indicia of Sprint's purported common carrier role," and in that regard, they cite the *VITELCO* case, in which, according to plaintiffs, the court "rejected the use of services provided by the customers of an entity for purposes of determining that entity's status as a 'telecommunications carrier.'" (Pl. Memo, Petitioner 21) However, while the Court agrees with plaintiffs' description of the holding in the *VITELCO* case, the Court finds that the *VITELCO* decision is not dispositive here.

The *VITELCO* case involved a situation where AT&T was installing an underwater telecommunications cable between St. Thomas and St. Croix in the Virgin Islands. AT&T intended to sell capacity in the cable to common carriers of telecommunications services. A competing telecommunications company argued that AT&T should be regulated as a common carrier, arguing that AT&T was "making a service effectively available directly to the public because **[*21]** AT&T's . . . customers will use the capacity to provide a service to the public." *Id., 198 F.3d at 924*. In other words, the competitor argued that AT&T should be treated as a common carrier, because its customers were in turn making use of the cable to provide telecommunications services to their customers on a common carrier basis. However, the court rejected this argument, affirming the FCC's determination that it would be improper to "look to the customer's customers to determine the status of a carrier." *Id., 198 F.3d at 926*.

However, the Court finds that this aspect of the *VITELCO* decision is not applicable in the instant case. That is because, here, Sprint is not merely selling services to Time Warner, which Time Warner will then use to provide services to its customers. Rather, Sprint and Time Warner are together providing local exchange service to the end users. As discussed more fully below, neither Sprint nor Time Warner, by themselves, will be providing all of the network components of a competitive local exchange company. Rather, Time Warner will provide the local loop, and Sprint will provide the end office switch and interconnection **[*22]** trunk. (Joint Record, Ex. Q, p. 5). This is an undisputedly new type of business arrangement, which is unlike the situation presented in *VITELCO*. In short, the Court finds that it was not erroneous for the PSC to consider the provision of services to "Time Warner's customers" in deciding that Sprint is acting as a common carrier, since, under this new business arrangement, the services being purchased are being provided only through the combined efforts of both companies, even though the end users deal directly only with Time Warner.

> *Whether CLEC telecommunications carriers need to have direct relationships with end users in order to utilize 47 U.S.C. §§ 251(b)(2), (3) & (5) and 47 U.S.C. § 222*

Plaintiffs further contend that PSC erred by holding, pursuant to *47 U.S.C. § 251(b)*, that they were required to provide number portability, dialing parity, reciprocal compensation, and subscriber list information to Sprint, because Sprint does not have a direct relationship with Time Warner's end-user customers. Plaintiffs contend that, even if Sprint is found to be a telecommunications carrier within the **[*23]** meaning of *§ 251(a)*, plaintiffs are not necessarily required to provide the services listed under *§ 251(b)*, since the two sections involve "separate analyses." (Pl. Memo p. 24) According to plaintiffs, it was Congress' intent, clearly expressed, that the rights under *§ 251(b)* "may be asserted *solely* by the telecommunications carrier/common carrier that is the *ultimate provider of end user services." (Id.* at 25) (Emphasis in original).

In that regard, plaintiffs cite two sections of the Act: *47 U.S.C. § 153(26)* (definition of Local Exchange Carrier) and *47 U.S.C. § 153(47)* (definition of Telephone Exchange Service). (Pl. Memo, p. 25) Those sections state, in relevant part:

> **Local Exchange Carrier** The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access n8.
>
> ***
>
> **Telephone exchange service** The term "telephone exchange service" means (A) service within a telephone exchange , or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character **[*24]** ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. §§153(26) & (47). Plaintiffs also cite, *inter alia, 47 C.F.R. § 51.205*, which states, in relevant part,

that LECs "shall provide local . . . dialing parity to competing providers of telephone exchange service." In short, plaintiffs contend that even if Sprint is a telecommunications carrier, it has no rights under *§ 251(b)* because it does not provide "exchange service."

> n8 The term "exchange access," as used above, means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." *47 U.S.C. § 153(16).*

The PSC rejected this argument, essentially finding **[*25]** that Sprint and Time Warner *together* were providing "exchange service" to Time Warner's customers. As to that, the PSC set forth Sprint's argument as follows:

> Pointing to the five network components of a competitive local exchange company (CLEC) service (the local loop, the end office switch, the interconnection trunks, and the incumbent local exchange company (ILEC) switch and loop) Sprint states that it will provide end office switching and interconnection to end users. The only difference in the model proposed here by Sprint and [Time Warner] is that [Time Warner] will provide the CLEC local loop and the telecommunications services will be provided under [Time Warner's] name. End users will be connected to Sprint's end office switch using the interconnection trun[k]s that it obtains from the ILECs.

(Joint Record, Ex. Q, p. 5). Ultimately, the PSC concluded that "the reality of the business arrangement presented here [between Sprint and Time Warner] is that an alternative network will originate and terminate local traffic." (Joint Record, Ex. Q, p. 7)

The Court finds that PSC's determination was not erroneous. In that regard, the Court understands PSC **[*26]** to have held that, in the ordinary case, a CLEC provides three components of local exchange service: 1) the local loop; 2) the end office switch; and 3) the interconnection trunks. However, here, these components are being provided by two companies working together, as opposed to a single CLEC. In other words, here there is no single company providing competitive local exchange service, but rather, there are two companies, each providing a portion of the exchange service. That being the case, the Court agrees that Sprint, acting on behalf of itself and Time Warner, is entitled to request the services listed under *§ 251(b)*. The Court has considered all of plaintiffs' arguments on this point and finds that they lack merit.

Whether PSC correctly determined that the term "local traffic" should include extended area service (EAS) traffic

The parties do not dispute that, as a matter of federal law, state commissions such as the PSC have the authority to define local calling areas. *See, Global Naps, Inc. v. Verizon New England, Inc., 454 F.3d at 97* ("[T]he FCC clearly indicated that it intended to leave authority over defining local calling areas where it always **[*27]** had been - squarely within the jurisdiction of the state commissions.") However, plaintiffs contend that the PSC's decision to include EAS calls within the definition of local traffic was arbitrary and capricious. As to that, plaintiffs state, *inter alia,* that the PSC's *Virtual NXX* decision stands for the proposition that "the Act's *Section 251(b)(5)* reciprocal compensation structure did not apply to the provision of EAS between an Independent and a CLEC," and that the PSC's determination in the instant case represents an arbitrary and capricious "mid-stream departure":

> The only finding upon which the NY PSC based its mid-stream departure from its prior decisions regarding intercarrier treatment of EAS traffic is . . . [that Time Warner] will compete directly with the Independents for local customers and extended area service . . . . Since the Independents do not 'compete directly' for end users in an adjacent EAS exchange, the NY PSC's justification for its mid-stream change in the treatment of EAS by the Independents is without basis.

(Pl. Memo of Law, p. 34)

The Court disagrees with plaintiffs' arguments on this point, and finds that the PSC's determination **[*28]** was not arbitrary or capricious. As to that, the Court notes, at the outset, that the *Virtual NXX* case did not involve an interconnection agreement under *47 U.S.C. § 251*. Rather, it is clear that no such agreement existed between the carriers involved in that matter. Nor were the carriers in the *Virtual NXX* case competing to provide local exchange access service. The issue in that case was how to treat calls, for rating purposes, made to telephone numbers assigned by a CLEC to internet service providers ("ISPs"), where the ISPs were assigned NXX codes

within an Independent's local calling area, even though the CLEC and ISPs were physically located outside the calling area. The PSC ruled that such calls should be treated as local for rating purposes, since the NXX code corresponded to the local calling area. The PSC then addressed the issue of inter-carrier compensation, and found that the Independent and the CLEC should handle the calls on a "bill and keep" basis. n9 As to that, the PSC determined that "bill and keep", and not reciprocal compensation, the method provided for in *47 U.S.C. § 251(b)(5)*, was the appropriate means of **[*29]** intercarrier compensation: "[S]ince the CLEC is not located within the same geographic territory as the independent and is not directly competing with the Independent for local customers, treatment of the call as local for the purpose of reciprocal compensation does not appear warranted." (00-C-0789 at 8) However, the PSC further stated, in its subsequent clarifying decision, that, "if a different arrangement is presented as a result of the interconnection arrangement process, the Commission may consider the appropriateness of bill-and-keep for that situation." (00-C-0789, 01-C-0181 at 10)

n9 "'Bill and keep' is a compensation method whereby each carrier is responsible for its own costs and recovers those costs from its end users." PSC Decision 00-C-0789 at 8 n. 9

This Court interprets the discussion in the *Virtual NXX* case concerning the lack of competition as merely reflecting the idea that there, the ILEC and the CLEC were not competing to provide local exchange service. Therefore, the *Virtual NXX* **[*30]** case did not involve a situation where *47 U.S.C. § 251* was applicable, and consequently, it would have been inappropriate for the PSC to direct the payment of reciprocal compensation under *47 U.S.C. § 251(b)(5)*. The instant case is clearly distinguishable, since here, plaintiffs and Sprint are competitors for local exchange service and, as such, are entering into interconnection agreements under *47 U.S.C. § 251*. Plaintiffs focus on the fact that they and Sprint are not technically competing for customers in EAS areas, since ILECs can only operate within the geographic confines of their certificated area, and EAS calls either originate or terminate outside of that area. In other words, an ILEC cannot provide service or compete for service in an EAS area, since the EAS area is part of a neighboring exchange. However, the Court finds that plaintiffs are attempting to construe the *Virtual NXX* decision in an overly-narrow manner. The determinative factor is that plaintiffs and Sprint are competing for customers within each plaintiff's certificated area. Moreover, as discussed above, the PSC indicated that it might **[*31]** reconsider the appropriateness of using reciprocal compensation if a "different arrangement" was presented as a result of interconnection under *47 U.S.C. § 251*, which is exactly the situation presented here. Consequently, the Court finds that PSC's determination to include EAS within the definition of "local traffic" was neither arbitrary nor capricious.

CONCLUSION

Plaintiffs' motion for summary judgment [# 25] is denied, defendants' cross-motions for summary judgment [# 30][# 33] are granted, and this action is dismissed.

SO ORDERED.

Dated: Rochester, New York

October 27, 2006

ENTER:

/s/ Charles J. Siragusa

United States District Judge

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Troutman Sanders LLP
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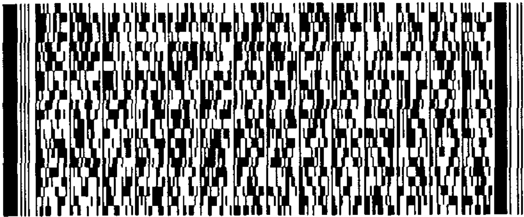

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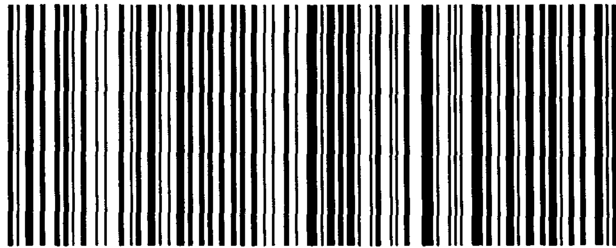

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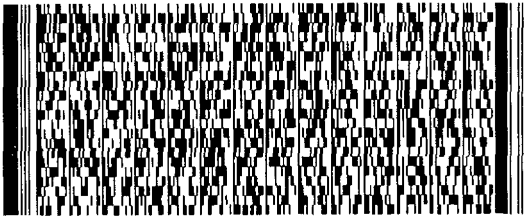

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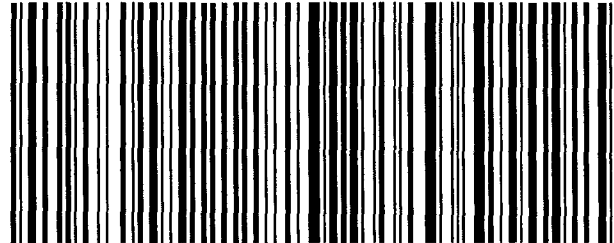

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LEXSEE 2007 FCC LEXIS 1752

In the Matter of 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

WC Docket No. 06-55

FEDERAL COMMUNICATIONS COMMISSION

2007 FCC LEXIS 1752; 40 Comm. Reg. (P & F) 646

RELEASE-NUMBER: DA 07-709

March 1, 2007 Released; Adopted March 1, 2007

ACTION: [*1] MEMORANDUM OPINION AND ORDER

JUDGES:

By the Chief, Wireline Competition Bureau

OPINIONBY: NAVIN

OPINION:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) grants a petition for declaratory ruling filed by Time Warner Cable (TWC) asking the Commission to declare that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent local exchange carriers (LECs) when providing services to other service providers, including voice over Internet Protocol (VoIP) service providers pursuant to sections 251(a) and (b) of the Communications Act of 1934, as amended (the Act). n1 As explained below, we reaffirm that wholesale providers of telecommunications services are telecommunications carriers for the purposes of sections 251(a) and (b) of the Act, and are entitled to the rights of telecommunications carriers under that provision. We conclude that state commission decisions denying wholesale telecommunications service providers the right to interconnect with incumbent LECs pursuant to sections 251(a) and (b) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment.

n1 Petition of Time Warner Cable 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, WC Docket No. 06-55 (filed Mar. 1, 2006) (Petition); *47 U.S.C. § 251;* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act or the Act).

[*2] **II. BACKGROUND**

A. TWC's Petition

2. On March 1, 2006, TWC filed a petition for declaratory ruling requesting that the Commission affirm that "requesting wholesale telecommunications carriers are entitled to obtain interconnection with incumbent LECs to provide wholesale telecommunications services to other service providers" (including VoIP-based providers). n2 In its Petition,

TWC states that in 2003 it began to deploy a facilities-based competitive telephone service using VoIP technology, which enables it to offer a combined package of video, high-speed data, and voice services. n3 TWC purchases wholesale telecommunications services from certain telecommunications carriers, including MCI WorldCom Network Services Inc. (MCI) n4 and Sprint Communications Company, L.P. (Sprint), to connect TWC's VoIP service customers with the public switched telephone network (PSTN). n5 MCI and Sprint provide transport for the origination and termination on the PSTN through their interconnection agreements with incumbent LECs. In addition, MCI and Sprint provide TWC with connectivity to the incumbent's E911 network and other necessary components as a wholesale service. n6

n2 Petition at 11. The Petition was placed on public notice on March 6, 2006 with comments due by March 27, 2006, and reply comments due by April 11, 2006. *Pleading Cycle Established for Comments on Time Warner Cable's Petition for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, Public Notice, 21 FCC Rcd 2276 (Wireline Comp. Bur. 2006).* Upon Motions for Extension, the comment cycle was extended by two weeks, to April 10, 2006 for comments and April 25, 2006 for reply comments. *Wireline Competition Bureau Grants Request for Extension of Time to File Comments on Time Warner Cable's Petition for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Service to VoIP Providers, WC Docket 06-55, Public Notice, 21 FCC Rcd 2978 (Wireline Comp. Bur. 2006).* Contemporaneously with its filing of the Petition, TWC filed a Petition for Preemption requesting that the Commission preempt the South Carolina Commission's denial of TWC's application for a Certification of Public Convenience and Necessity in areas where rural LECs provide service. That preemption petition remains pending, and we do not address it here. Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act of 1934, as Amended, WC Docket No. 06-54 (filed Mar. 1, 2006).

[*3]

n3 Petition at 2-3.

n4 As a result of the merger between MCI and Verizon, TWC's contractual arrangements with MCI have been assigned to Verizon Business. *Id.* at 4 n.5

n5 *Id.* at 4.

n6 *Id.*

3. TWC claims that MCI has been unable to provide wholesale telecommunications services to TWC in certain areas in South Carolina and that Sprint has been unable to provide wholesale telecommunications services to TWC in certain areas in Nebraska because, unlike certain other state commissions, the South Carolina Public Service Commission (South Carolina Commission) and the Nebraska Public Service Commission (Nebraska Commission) have determined that rural incumbent LECs are not obligated to enter into interconnection agreements with competitive service providers (like MCI and Sprint) to the extent that such competitors operate as wholesale service providers. n7 TWC argues that the South Carolina and Nebraska Commissions misinterpreted the statute when they decided, among other things, that competitive LECs providing wholesale telecommunications services to other service providers, in **[*4]** this case VoIP-based providers, are not "telecommunications carriers" for the purposes of section 251 of the Act, and, therefore, are not entitled to interconnect with incumbent LECs.

n7 *See Petition of MCImetro Access Transmission Services LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company, Concerning Interconnection and Resale under the Telecommunications Act of 1996,* Docket No. 2005-67-C, Order Ruling on Arbitration, Order No. 2005-544 (Oct. 7, 2005) *(South Carolina Commission RLEC Arbitration Order); Sprint Communications Company L.P., Overland Park,*

Kansas, Petition for arbitration under the Telecommunications Act, of certain issues associated issues with the proposed interconnection agreement between Sprint and Southeast Nebraska Telephone Company, Falls City, Application No. C-3429, Findings and Conclusions (Sept. 13, 2005) *(Nebraska Commission Arbitration Order) appeal filed,* Sprint Communications Company L.P. v. Nebraska Public Service Commission, No. 4:05CV3260 (D. Neb. Oct. 11, 2005). As explained below, this aspect of the state decisions regarding wholesale services is not specific to wholesale carriers that serve VoIP service providers.

[*5]

4. TWC asks the Commission to grant a declaratory ruling reaffirming that telecommunications carriers are entitled to obtain interconnection with incumbent LECs to provide wholesale telecommunications services to other service providers. The Petition also requests that the Commission clarify that interconnection rights under section 251 of the Act are not based on the identity of the wholesale carrier's customer.

B. State Commission Decisions

5. *South Carolina.* On October 8, 2004, MCI initiated interconnection negotiations pursuant to section 252(a) of the Act with four rural incumbent LECs operating in South Carolina. These rural incumbent LECs claimed that they were not required to accept traffic from a third-party provider that purchases wholesale telecommunications services from MCI. n8 On March 17, 2005, MCI filed a petition with the South Carolina Commission seeking arbitration of the unresolved issues between MCI and the rural incumbent LECs. n9 In arbitrating this dispute, the South Carolina Commission agreed with the rural incumbent LECs that the arbitrated interconnection agreement should be limited to the traffic generated by the rural incumbent LECs' customers **[*6]** and MCI's direct end-user customers on their respective networks. n10 The South Carolina Commission determined that MCI is not entitled to seek interconnection with the rural incumbent LECs with respect to the wholesale services MCI proposed to provide to TWC because such wholesale service does not meet the definition of "telecommunications service" under the Act and, therefore, MCI is not a "telecommunications carrier" with respect to those services. n11 The South Carolina Commission also found that section 251(b) obligations "relate to parallel obligations between two competing telecommunications carriers" and that MCI's intent to act as an "intermediary for a facilities-based VoIP service provider" is a type of non-parallel relationship not contemplated or provided for under the Act. n12

n8 Petition at 4-5. *See also South Carolina Commission RLEC Arbitration Order.* The four rural incumbent LECs with which MCI sought interconnection agreements were Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company. The South Carolina Commission referred to the four rural LECs collectively as "the RLECs" throughout its order. The South Carolina Commission addressed similar issues and made similar findings in the *South Carolina Commission Horry Arbitration Order. Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996,* Order Ruling on Arbitration, Docket No. 2005-188-C (South Carolina PSC Jan. 11, 2006) *(South Carolina Horry Arbitration Order).*

[*7]

n9 *South Carolina Commission RLEC Arbitration Order* at 2.

n10 *South Carolina Commission RLEC Arbitration Order* at 7. *See also South Carolina Commission Horry Arbitration Order* at 6. In addition, the South Carolina Commission denied TWC's request to intervene in the arbitration.

n11 *See South Carolina Commission RLEC Arbitration Order* at 11.

n12 *Id.* at 9.

6. *Nebraska.* On December 16, 2004, Sprint commenced interconnection negotiations with Southeast Nebraska Telephone Company (SENTCO), a rural incumbent LEC, pursuant to section 252(a) of the Act. n13 In its September 13, 2005 arbitration decision, the Nebraska Commission determined that Sprint is not a "telecommunications carrier" under the *NARUC I* and *Virgin Islands* test for common carriage because the relationship between Sprint and TWC is an "individually negotiated and tailored, private business arrangement" that is an untariffed offering to a sole user of this service, n14 and, therefore, Sprint cannot assert any rights under sections 251 and 252 of the Act. In addition, the Nebraska Commission **[*8]** held that because TWC operates the switch that "directly serves the called party," Sprint was not entitled to exercise rights under section 251(b). n15

n13 *See Nebraska Commission Arbitration Order.*

n14 *Id.* at 7-9 (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976) (NARUC I),* cert. denied, *425 U.S. 992 (1976); Virgin Islands Tel. Co. v. FCC, 198 F.3d 921 (D.C. Cir. 1999)).*

n15 *Id.* at 7-8.

7. *Other State Proceedings.* TWC asserts that, in contrast to the South Carolina and Nebraska decisions, public utility commissions in Illinois, Iowa, New York and Ohio have recognized that wholesale service providers, such as Sprint and MCI, are telecommunications carriers with rights under section 251 of the Act. n16 In addition, TWC and other commenters point to other state commissions that have before them pending proceedings on this same issue. n17

n16 Petition at 8-9 (citing *Cambridge Telephone Company, et al. Petitions for Declaratory Relief and/or Suspensions for Modification Relating to Certain Duties under §§ 251(b) and (c) of the Federal Telecommunications Act,* Case Nos. 050259, *et al.,* Order (Illinois Commerce Commission Aug. 23, 2005), *appeal pending Harrisonville Telephone Company, et al. v. Illinois Commerce Commission, et al.,* Case No. 3:06-CV-00073, GPMDGW, Complaint for Declaratory and Other Relief (S.D. Ill. filed Aug. 16, 2006); *Arbitration of Sprint Communications Co. v. Ace Communications Group,* et al., Docket No. ARB-05-02, Order on Rehearing (Iowa Utilities Board Nov. 28, 2005); *Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Intercarrier Agreement with Independent Companies,* Case 05-C-0170, Order Resolving Arbitration Issues (New York Public Service Commission May 24, 2005), *on appeal Berkshire Telephone Corp. v. Sprint Communications Co. L.P.,* Civ. Action No. 05-CV-6502 (CJS)(MWP)(W.D.N.Y. filed Sept. 26, 2005); *Application and Petition in Accordance with Section II.A.2.B of the Local Service Guidelines Filed by: The Champaign Telephone Co., Telephone Services Co., the Germantown Independent Telephone Co., and Doylestown Telephone Co.,* Case Nos. 04-1494-TP-UNC, et al., Finding and Order (Public Utility Commission of Ohio Jan. 26, 2005), *reh'g denied in pertinent part,* Order on Rehearing (Public Utilities Commission of Ohio Apr. 13, 2005)).

[*9]

n17 *See* Petition at 9. *See, e.g.,* Letter from Cherie R. Kiser, Counsel for IDT Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55, Appendix (filed Sept. 25, 2006) (providing an updated overview of pending state and court proceedings in Illinois, Iowa, New York, North Carolina and Texas).

III. DISCUSSION

8. The Bureau grants TWC's request to the extent described below. Because the Act does not differentiate between retail and wholesale services when defining "telecommunications carrier" or "telecommunications service," we clarify that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services. n18 The Bureau

finds that a contrary decision 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. **[*10]**

n18 Because neither of the primary state commission proceedings underlying the Petition relied on or even interpreted section 251(c) of the Act, we do not read the Petition to seek clarification on the ability to interconnect pursuant to that provision. As such, we only address the issues raised in the Petition as they apply to sections 251(a) and (b) of the Act.

A. "Telecommunications Service" Can Be Either a Wholesale or Retail Service

9. Consistent with Commission precedent, we find that the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), and we confirm that providers of wholesale telecommunications services enjoy the same rights as any "telecommunications carrier" under those provisions of the Act. n19 We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251.

n19 To resolve the confusion over the meaning of "wholesale," we affirm the longstanding Commission usage of a wholesale transaction of a service or product as an input to a further sale to an end user, in contrast to a retail transaction for the customer's own personal use or consumption. *Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237, 19423, para. 13 (1999)* ("Black's Law Dictionary defines retail as '[a] sale for final consumption in contrast to a sale for further sale or processing (*i.e.,* wholesale) . . . to the ultimate consumer.'") (quoting Black's Law Dictionary 1315 (6th ed. 1990)).

[*11]

10. The Act defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." n20 The Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." n21 Finally, any provider of telecommunications services is a "telecommunications carrier" by definition under the Act. n22

n20 *47 U.S.C. § 153*(43).

n21 *47 U.S.C. § 153*(46).

n22 *47 U.S.C. § 153*(44).

11. It is clear under the Commission's precedent that the definition of "telecommunications services" is not limited to retail services, but also includes wholesale services when offered on a common carrier basis. The South Carolina **[*12]** Commission's contrary interpretation -- that services provided on a wholesale basis to carriers or other providers are not telecommunications services because they are not offered "directly to the public" n23 has been expressly rejected by the Commission in the past, as we explain below. n24

n23 *South Carolina Commission Arbitration Order* at 7 (stating that "[t]he carrier directly serving the end user customer is the only carrier entitled to request interconnection for the exchange of traffic under Section 251(b) of the Act."), 11 (concluding that "MCI is not entitled to seek interconnection with the RLECs with respect to the service MCI proposed to provide indirectly to TWCIS' end user customers.").

n24 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22033, para. 264 (1996)* (subsequent history omitted) *(Non-Accounting Safeguards Order); see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, Second Order on Reconsideration, 12 FCC Rcd 8653, 8670-71, para. 33 (1997) (Non-Accounting Safeguards Reconsideration Order); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9177-8, para. 785 (1997)* (*Universal Service Order*) (subsequent history omitted).

[*13] 12. The definition of "telecommunications services" in the Act does not specify whether those services are "retail" or "wholesale," but merely specifies that "telecommunications" be offered for a fee "directly to the public, or to such classes of users as to be effectively available directly to the public." n25 In *NARUC II,* the D.C. Circuit stated that "[t]his does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users." n26 Thus, the question at issue in this proceeding is whether the relevant wholesale telecommunications "services" are offered "directly to the public, or to such classes of users as to be effectively available directly to the public." Indeed, the definition of "telecommunications services" long has been held to include both retail and wholesale services under Commission precedent. In the *Non-Accounting Safeguards Order,* the Commission concluded that wholesale services are included in the definition of "telecommunications service." **[*14]** n27 To reach this result, the Commission determined that the term "wholesale" in section 251(c)(4) "implicitly recognizes that some telecommunications services are wholesale services." n28 The *Non-Accounting Safeguards Order* went on to find that the legislative history of the Act also supports this determination, as it "indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services, which include wholesale services to other carriers" and that "the term 'telecommunications service' was not intended to create a retail/wholesale distinction." n29 The Commission affirmed these conclusions in the *Non-Accounting Safeguards Reconsideration Order* where it found "no basis in the statute, legislative history, or FCC precedent for finding the reference to 'the public' in the statutory definition to be intended to exclude wholesale telecommunications services." n30 Further, in the *Universal Service Order,* the Commission determined that, while "telecommunications services" are intended to encompass only telecommunications provided on a common carrier basis, "common carrier services include services offered **[*15]** to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers." n31 In *Virgin Islands,* the D.C. Circuit stressed that the Commission did not rely on a wholesale-retail distinction, stating that "the focus of its analysis is on whether AT&T-SSI offered its services indiscriminately in a way that made it a common carrier . . . and the fact that AT&T-SSI could be characterized as a wholesaler was never dispositive." n32

n25 *47 U.S.C. § 153*(46).

n26 *National Ass'n of Regulatory Utility Com'rs v. FCC, 533 F.2d 601, 608 (C.A.D.C. 1976)* (*NARUC II*).

n27 *Non-Accounting Safeguards Order, 11 FCC Rcd at 22033, para. 264.*

n28 *Id. See also 47 U.S.C. § 251*(c)(4) (requiring incumbent LECs "to offer for resale at *wholesale* rates any *telecommunications service* that the carrier provides at retail to subscribers who are not telecommunications carriers") (emphasis added).

n29 *Id.* at 22032-33, 22033-34, paras. 263, 265.

[*16]

n30 *Non-Accounting Safeguards Reconsideration, 12 FCC Rcd at 8670-71, para. 33.*

n31 *Universal Service Order, 12 FCC Rcd at 9177-8, para. 785.*

n32 *Virgin Islands Tel. Co. v. FCC, 198 F.3d 921, 930 (D.C. Cir. 1999) (Virgin Islands).*

13. We further find that our decision today is consistent with and will advance the Commission's goals in promoting facilities-based competition as well as broadband deployment. Apart from encouraging competition for wholesale services in their own right, n33 ensuring the protections of section 251 interconnection is a critical component for the growth of facilities-based local competition. n34 Moreover, as the Commission has recognized most recently in the VoIP 911 Order, VoIP is often accessed over broadband facilities, and there is a nexus between the availability of VoIP services and the goals of section 706 of the Act. n35 Furthermore, as the Petition and some commenters note, in that order the Commission expressly contemplated that VoIP providers would obtain **[*17]** access to and interconnection with the PSTN through competitive carriers. n36 Therefore, we also rely on section 706 as a basis for our determination today that affirming the rights of wholesale carriers to interconnect for the purpose of exchanging traffic with VoIP providers will spur the development of broadband infrastructure. n37 We further conclude that such wholesale competition and its facilitation of the introduction of new technology holds particular promise for consumers in rural areas. n38

n33 As explained above, *see supra* para. 1, we affirm today the rights of *all* wholesale carriers to interconnect when providing service to other providers, and therefore we reject the notion that we must dismiss the Petition in part with respect to the Nebraska Commission's decision because the *Nebraska Commission Arbitration Order* did not discuss Sprint's provision of service to VoIP providers. *See* Letter from Thomas J. Moorman and Paul M. Schudel, Counsel to SENTCO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55 (filed Feb. 12, 2007).

n34 *E.g.*, Advance-Newhouse Comments at 3 (facilities-based residential competition); Verizon Comments at 3 (wholesale service and local competition).

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n35 *IP-Enabled Services,* WC Docket No. 04-36; *E911 Requirements for IP-Enabled Service Providers, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10264, para. 31 (2005)* (*VoIP 911 Order*) (citing *47 U.S.C. § 157* nt.). Section 706 directs the Commission (and state commissions with jurisdiction over telecommunications services) to encourage the deployment of advanced telecommunications capability to all Americans by using measures that "promote competition in the local telecommunications market" and removing "barriers to infrastructure investment." *Id.*

n36 *See* Petition at 21 (citing *VoIP 911 Order,* 20 FCC Rcd at 10267, para.38); *see also, e.g.,* VON Coalition Comments at 3.

n37 Verizon Comments at 6 ("Simply put, just as the availability of VoIP drives both providers to deploy and end-user customers to purchase broadband services, state commission decision that effectively prevent consumers from using their broadband connection for VoIP telephony discourage the deployment and use of broadband.").

n38 *E.g.*, GCI Reply Comments at 4 ("offerings like those of TWC are especially valuable to rural consumers"); Sprint Nextel Comments at 4 n.6 ("Wholesale carrier services are particularly important to smaller cable operators, which often serve low density areas and lack the resources, scale or desire to enter the telephony market alone."); VON Coalition Comments at 3. *See also,* Letter from Vonya B. McCann, Vice President Government Affairs, Sprint Nextel, to Marlene H. Dortch, FCC, WC Docket No. 06-55 at 2 (filed Jan. 30, 2007) ("These ser-

vices enable even small cable providers to expand their service offerings -- faster and at lower cost -- and thus promote investment in areas previously under-served and lacking choices for consumers.").

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14. In making this clarification, we emphasize that the rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis. n39 We do not address or express any opinion on any state commission's evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service. However, we make clear that the rights of telecommunications carriers under sections 251 (a) and (b) apply regardless of whether the telecommunications services are wholesale or retail, and a state decision to the contrary is inconsistent with the Act and Commission precedent. n40

n39 For example, under the Commission's existing rules, "[a] telecommunications carrier that has interconnected or gained access under section[] 251(a) . . . of the Act, may offer information services through the same arrangement, *so long as it is offering telecommunications services through the same arrangement as well.*" 47 C.F.R. § 51.100(b) (emphasis added). Thus, the fact that a telecommunications carrier is also providing a non-telecommunications service is not dispositive of its rights.

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n40 *See South Carolina Commission RLEC Arbitration Order* at 14 (limiting the definition of end user to subscriber of telephone exchange service); *Nebraska Commission Arbitration Order* at 9, paras. 25-26 (reasoning that the exclusion of exchange access in the Commission's reciprocal compensation rules indicates that TWC's offering of exchange access is not offered to the general public). Although the Nebraska Commission's order expressly raised the issue of Sprint's entitlement to reciprocal compensation pursuant to section 251(b)(5), commenters contend that the Nebraska Commission's decision properly is interpreted to affect section 251(a) and (b) rights more broadly. See AT&T Comments at 1-2. We do not address commenters' requests for classification of other specific service offerings or traffic arrangements. *See, e.g.,* Neutral Tandem Comments (seeking a declaration of section 251 rights to provide tandem switching and transit services).

B. The Section 251 (a) and (b) Rights of a Wholesale Telecommunications Carrier Do Not Depend on the Regulatory Classification of the Retail Service [*21] Offered to the End User

15. As explained above, a provider of wholesale telecommunications service is a telecommunications carrier and is entitled to interconnection under section 251 of the Act. The 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. As such, we clarify that the 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). Thus, we need not, and do not, reach here the issues raised in the *IP-Enabled Services* docket, including the statutory classification of VoIP services. n41 We thus reject the arguments that the regulatory status of VoIP is the underlying issue in this matter or that Commission action on this Petition will prejudge issues raised in the *IP-Enabled Services* docket. n42 We also make clear that we do not address any entitlement of a retail service provider to serve end users through such a wholesale arrangement, **[*22]** nor, contrary to the views of some commenters, do we read the Petition to seek such rights. n43 Rather, in issuing this decision, we reiterate that we only find that a carrier is entitled to interconnect with another carrier pursuant to sections 251(a) and (b) in order to provide wholesale telecommunications service.

n41 In the *IP-Enabled Services NPRM,* the Commission sought comment on whether VoIP should be classified as a telecommunications service or an information service. *See IP-Enabled Services NPRM, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004)* (*IP-Enabled Services NPRM*).

n42 HTC/PBT Comments at 3 (referring to the ongoing *IP-Enabled Services* proceeding, " [t]his Commission should not fall prey to pressure from parties to issue piecemeal orders."); ITTA et al. Comments at 8 ("[t]he Commission should accordingly declare either that TWC is a telecommunications carrier itself, or is subject to the same intercarrier compensation, universal service and other requirements imposed on similarly situated carriers"); JSI Comments at 7 ("While the treatment of interconnected VoIP service providers remains unclear, Time Warner seeks to have the Commission make declarations that would greatly favor VoIP service providers by granting them certain rights without attendant obligations."); Pennsylvania Commission Comments at 5 (suggesting that the Commission "consider resolving complex policy matters in more generic proceeding such at the IP-Enabled Services and Intercarrier Compensation rulemakings, as opposed to limited decisions in case-specific pleadings"); Qwest Comments; NTCA Reply Comments at 4-5; SDTA Comments at 4; TCA Comments at 5-7; WTA Comments at 3. *See also,* Letter from Joshua Seidemann, Independent Telephone and Telecommunications Alliance, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55, Attach at 6 (filed Dec. 14, 2006) (ITTA *Ex Parte*); Letter from Keith Oliver, Vice President -- Finance, Home Telephone Company, on behalf of South Carolina Telephone Coalition, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55, Attach. at 8 (filed Jan. 30, 2007) (SCTC *Ex Parte*).

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n43 *See, e.g.,* JSI Comments at 12 ("Time Warner is seeking to claim specific rights without accepting attendant obligations."); ITTA Comments at 12 ("In other words, entities that seek the benefits of carrier-type interconnection, including for example, the right to obtain numbering resources and number portability, should be subject to the same obligations as the traditional carriers with whom they compete."); Western Alliance at 3, 6 ("TWC is not entitled to any CLEC rights under Section 251 and 252 as long as it elects to reject its former CLEC status and characterize itself instead as a non-regulated information service provider."). Furthermore, and contrary to the position put forth in the *South Carolina Commission Arbitration Order* and the assertions of some commenters, we do not read the Act or have any policy reason to impose a requirement that telecommunications carriers seeking to interconnect must have obligations or business models parallel to those of the party receiving the interconnection request. *See South Carolina Commission Arbitration Order* at 9 (stating that "obligations imposed by Section 251(b) . . . relate to parallel obligations between two competing telecommunications carriers"); SCTC Comments at 8 (arguing that "the obligations imposed by Section 251(b) . . . relate to parallel obligations between two competing telecommunications carriers within a common local calling area."). *See also* Letter from Gerard J. Duffy, Counsel for Western Telecommunications Alliance, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55 at 6 (filed Feb. 6, 2007) (stating that the "Sprint-Time Warner Model Unfairly Tilts Competitive Playing Field" and that Time Warner is not subject to the Title II and consumer protection standards of incumbent LECS).

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16. Finally, we emphasize that our ruling today is limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection *in their own right* for the purpose of transmitting traffic to or from another service provider. To address concerns by commenters about which parties are eligible to assert these rights, n44 we make clear that the scope of our declaratory ruling is limited to wholesale carriers that are acting as telecommunications carrier for purposes of their interconnection request. In affirming the rights of wholesale carriers, we also make clear that today's decision in no way diminishes the ongoing obligations of these wholesalers as telecommunications carriers, including compliance with any technical requirements imposed by this Commission or a state commission. n45 In addition, we agree that it is most consistent with Commission policy that where a LEC wins back a customer from a VoIP provider, the number should be ported to the LEC that wins the customer at the customer's request, n46 and therefore we make such a requirement an explicit condition to the section 251 rights provided herein. n47 Other concerns about porting **[*25]** will be addressed in the *IP-Enabled Services* proceeding. n48

n44 *See, e.g.,* JSI Comments at 4 ("MCI's role as an intermediary is to be largely hands-off and remote."); SCTC Comments at 11-14 (asserting that "MCI merely proposed to act as an intermediary -- a 'connection' -- between two facilities-based carriers -- the RLEC and Time Warner," and that "Time Warner is seeking . . . to make an 'end run' around the important federal state proceedings and powers"); Western Alliance at 3 ("What TWC is asking herein is for MCI and Sprint to be authorized to use the Section 252 procedures and to negotiate Section 251(b) and/or Section 252(c) interconnection agreements in TWC's behalf . . . ."). Although the Petition does refer in passing to MCI and Sprint acting "on behalf of" TWC, the focus of the Petition and even the underlying state commission decisions concern the rights of those carriers as wholesale telecommunications service providers, and we therefore do not reach the question of the rights of an agent of a VoIP service provider. *See* Petition at 12, 23; South Dakota Comments at 6. *See also,* Black's Law Dictionary (8<th> ed. 2004) (defining agent as "[o]ne authorized to act for or in place of another" or "representative").

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n45 *See, e.g.,* SCTC *Ex Parte,* Attach. at 9 (asserting that each wholesale provider should be "technically responsible for the traffic it delivers to an ILEC.").

n46 *See, e.g., id.,* Attach. at 10 (seeking protection for "consumers that want to port numbers away from 3<rd> party service providers who do not have these porting responsibilities."); JSI Comments at 12-14 ("Time Warner is seeking to create a one-way approach to porting and the Commission should reject the Petition."). 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. 47 C.F.R. § 52.23.

n47 We note that Verizon already makes such a commitment under its agreements with Time Warner Cable. *See* Verizon Reply Comments at 11-12.

n48 *See IP-Enabled Services NPRM, 19 FCC Rcd at 4911-12, para. 73.*

C. Other Issues Raised by Commenters

17. Certain commenters ask us to reach other issues, including the application of **[*27]** section 251(b)(5) n49 and the classification of VoIP services. n50 We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically that the Commission is currently addressing elsewhere on more comprehensive records. n51 For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket. n52 Moreover, in this declaratory ruling proceeding we do not find it appropriate to revisit any state commission's evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law. In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein. n53 We do not, however, prejudge the **[*28]** Commission's determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket.

n49 *See, e.g.,* Neutral Tandem Comments at 1, 5, 7 (seeking Commission protection against incumbent LEC and state restrictions on resale and tandem competition, and for the establishment of the right of third-party providers to be defined as "users" under interconnection agreements).

n50 *See, e.g.,* Qwest Comments at 6 ("The Nebraska position is obviously dependent on how the Commission ultimately classifies VoIP service.").

n51 *See, e.g., Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd. 4685 (2005).*

n52 *IP-Enabled Services, 20 FCC Rcd at 10245.* Similarly, we disagree with the assertions that it is necessary to complete the proceedings pending in the IP-enabled services, intercarrier compensation, and universal service dockets in order to take action on or instead of taking action on this Petition. *See, e.g.,* NTCA Reply Comments at 5-6.

[*29]

n53 *See, e.g.,* Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is "administration, payment, and collection of intercarrier compensation"); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers "intercarrier compensation, including exchange access and reciprocal compensation").

D. Procedural Issues

18. *Jurisdiction.* We reject SENTCO's contention that the Commission lacks jurisdiction over TWC's Petition because it is a request for preemption of state decisions on issues assigned by statute specifically to states for review. n54 TWC filed its petition as a request for declaratory ruling requesting clarification of the interpretation of the 1996 Act pursuant to section 1.2 of the Commission's rules. n55 As such, the Commission's authority over particular state decisions is not at issue here. And in any event, the Act establishes -- and courts have confirmed - the primacy of federal authority with regard to several of the local competition provisions in the 1996 Act. First, section 201(b) authorizes the Commission **[*30]** to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act." n56 As the Supreme Court has noted, this provision "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies" -- including issues addressed by section 251. n57 Second, except in limited cases, the Commission's authority with regard to the issues of local competition specified in section 251 supersede state jurisdiction over these matters. n58 In the Supreme Court's words, "the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." n59 In clarifying existing statutory requirements under the Act as interpreted by the Commission, however, the Commission's decision may affect state decisions if state commissions have differing interpretations of the statute.

n54 SENTCO Comments at 8.

n55 47 C.F.R. § 1.2.

n56 *47 U.S.C. § 201*(b).

[*31]

n57 *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, 6841, para. 22 (2005)* (*BellSouth DSL Order*) (quoting *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 380 (1999)* (emphasis in original)).

n58 The Act, for example, expressly assigns to the states the authority to arbitrate interconnection disputes between carriers and incumbent LECs and, subject to the general framework set forth by the Commission, to establish appropriate rates for competitive carriers' use of unbundled network elements. *See generally 47 U.S.C. § 252.*

n59 *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 379 n.6 (1999). See also Southwestern Bell Tel. Co. v. Connect Communications Corp., 225 F.3d 942, 946-47 (8th Cir. 2000)* ("The new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state

commissions, the scope of that role is measured by federal, not state law."); *Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1127 (9th Cir. 2003)* ("[T]he Act *limited* state commissions' authority to regulate local telecommunications competition.") (emphasis in original); *MCI Telecom Corp. v. Illinois Bell, 222 F.3d 323, 342-43 (7th Cir. 2000)* (stating, "with the 1996 Telecommunications Act . . . Congress *did* take over some aspects of the telecommunications industry," and "Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms"). Moreover, as the D.C. Circuit has held, the Commission is entitled to Chevron deference when applying the definition of "telecommunications carrier" in the context of a wholesale service provider. *Virgin Islands, 198 F.3d at 926* (citing *Chevron U.S.A. Inc. v. Natural Resources Council, Inc., 467 U.S. 837, 843 (1984)).*

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19. *Notice.* We disagree with the assertion that the Petition should be dismissed because TWC did not serve the Petition on the Nebraska Commission. n60 We do not read the Petition for Declaratory Ruling as a request for preemption of a particular order that would trigger this requirement. In its Petition, TWC requests that the Commission make a statement clarifying the conflicting interpretations among the states concerning wholesale carriers' rights under sections 251(a) and (b). Although TWC specifically describes the decisions of the Nebraska Commission and South Carolina Commission in its argument, this Petition for Declaratory Ruling does not request state preemption and we do not make any determination about whether to preempt any specific state decisions. As such, there is no notice requirement at issue.

n60 Nebraska Commission Comments at 7-8. The Nebraska Commission argues that the Petition effectively seeks to preempt state or local regulatory authority. As such, pursuant to Note 1 in section 1.1206(a) of the Commission's rules, the Nebraska Commission asserts that TWC is required to serve the original petition on the state "the actions of which are specifically cited as a basis for requesting preemption." 47 C.F.R. § 1.1206(a) NOTE 1 TO PARAGRAPH.

[*33] IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, and 252 of the Communications Act, as amended, *47 U.S.C. §§ 151,* 153, 154, 201-205, 251, and 252, and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the petition for declaratory ruling filed by Time Warner Cable in WC Docket No. 06-55 IS GRANTED to the extent described by this Order.

21. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

Thomas J. Navin

Chief, Wireline Competition Bureau

LIST OF COMMENTERS

Commenter	Abbreviation
Alpheus Communications, L.P. PAETEC Communications, Inc. U.S. Telepacific Corp. D/B/A Telepacific Communications	Alpheus et al.
AT&T Inc.	AT&T
Bridgecom International, Inc. Broadview Networks, Inc. CTC Communications Corp. NuVox Communications Xspedius Communications LLC	Bridgecom et al.

Commenter	Abbreviation
COMPTEL Broadwing Communications, LLC Fibertech Networks, LLC Integra Telecom, Inc. Lightyear Communications, Inc. McLeodUSA Telecommunications Services, Inc. Mpower Communications Corp. Norlight Telecommunications, Inc. Pac-West Telecomm, Inc.	Broadwing et al.
Comcast Corporation	Comcast
Global Crossing North America, Inc.	Global Crossing
Home Telephone Company, Inc. BPT, Inc.	HTC/BPT
Independent Telephone and Telecommunications Alliance National Exchange Carrier Association, Inc. National Telecommunications Cooperative Association Advancement of SmallTelecommunications Companies	ITTA et al.
Iowa RLEC Group	Iowa RLEC
Iowa Utilities Board	IUB
John Staurulakis, Inc.	JSI
Level 3 Communications, LLC	Level 3
National Cable & Telecommunications Association	NCTA
Nebraska Public Service Commission	Nebraska Commission
Neutral Tandem, Inc.	Neutral Tandem
Pennsylvania Public Utility Commission	Pennsylvania Commission
Pine Tree Networks	PTN
Qwest Communications International Inc.	Qwest
South Carolina Cable Television Association	SCCTA
South Carolina Telephone Coalition	SCTC
South Dakota Telecommunications Association Townes Telecommunications, Inc. ITS Telecommunications Systems, Inc. Public Service Telephone Company Smart City Telecom South Slope Cooperative Telephone Co., Inc. Yadkin Valley Telephone Membership Corporation	SDTA et al.
Southeast Nebraska Telephone Company	SENTCO
The Independent Telephone Companies	
Sprint Nextel Corporation	Sprint Nextel
TCA, Inc.	TCA
Time Warner Cable	TWC
Verizon	Verizon

Commenter	Abbreviation
Voice On The Net (VON) Coalition	VON
Western Telecommunications Alliance	WTA

[*34]

LIST OF REPLY COMMENTERS

Commenter	Abbreviation
Advance-Newhouse Communications	Advance-Newhouse
Berkeley Cable TV and PBT Cable Services	Berkeley and PBT
Bridgecom International, Inc. Broadview Networks, Inc. CTC Communications Corp. NuVox Communications Xspedius Communications LLC COMPTEL	Bridgecom et al.
Broadwing Communications, LLC Fibertech Networks, LLC Integra Telecom, Inc. Lightyear Communications, Inc. McLeodUSA Telecommunications Services, Inc. Norlight Telecommunications, Inc. Pac-West Telecomm, Inc.	Broadwing et al.
Earthlink, Inc.	Earthlink
General Communication, Inc.	GCI
Home Telephone Company, Inc. and PBT, Inc.	HTC/PBT
John Staurulakis, Inc.	JSI
Level 3 Communications, LLC	Level 3
Midcontinent Communications	Midcontinent
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
Nebraska Public Service Commission	Nebraska Commission
Neutral Tandem, Inc.	Neutral Tandem
Rock Hill Telephone Company d/b/a Comporium Lancaster Telephone Company d/b/a Comporium Communications Fort Mill Telephone Company d/b/a Comporium Communications	Comporium
South Carolina Cable Television Association	SCCTA
South Carolina Telephone Coalition	SCTC
Southeast Nebraska Telephone Company The Independent Telephone Companies	SENTCO
Southern Communications Service, Inc. d/b/a SouthernLINC Wireless	SouthernLINC Wireless
Sprint Nextel Corporation	Sprint Nextel
Time Warner Cable	TWC
T-Mobile USA, Inc.	T-Mobile
United States Telecom Association	USTA
Verizon	Verizon

[*35]

CERTIFICATE OF SERVICE

I, Raymond A. Kowalski, hereby certify that a copy of the foregoing Motion for Leave to File Response to Supplement Reply Brief and Reply Declaration of Eugene White and Response of Tampa Electric Company to Supplement Pole Attachment Reply Brief and Reply Declaration of Eugene White have been served upon the persons listed below by first class mail, this 1st day of May, 2007, postage prepaid or by hand delivery (*).

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