

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Application of Time Warner Cable)	
Information Services (South Carolina), LLC)	
d/b/a Time Warner Cable to Amend its)	WC Docket No. 06-54
Certificate of Public Convenience and)	
Necessity to Provide Interexchange and Local)	
Voice Services in Service Areas of Certain)	
Incumbent Carriers who Currently have a)	
Rural Exemption.)	
)	
Petition of Time Warner Cable for)	
Declaratory Ruling That Competitive Local)	
Exchange Carriers May Obtain)	WC Docket No. 06-55
Interconnection Under Section 251 of the)	
Communications Act of 1934, as Amended, to)	
Provide Wholesale Telecommunications)	
Services to VoIP Providers)	

**COMMENTS
of the
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
and the
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

April 10, 2006

SUMMARY

Time Warner Cable (TWC) asks the Commission to preempt a decision by the South Carolina Public Service Commission that denied TWC a certificate of public convenience and necessity for certain areas in South Carolina served by rural telephone companies. A second, related petition asks the Commission to declare that competitive local exchange carriers are entitled to interconnect with incumbent local exchange carriers for the purpose of exchanging traffic on behalf of Voice over Internet Protocol based providers, in circumstances where it does not appear that such providers would be entitled to interconnect directly.

In these comments, the Independent Telephone and Telecommunications Alliance, the National Exchange Carrier Association, Inc., the National Telecommunications Cooperative Association, and the Organization for the Promotion and Advancement of Small Telecommunications Companies, (collectively, the Associations) urge the Commission to deny, or at a minimum defer action on, TWC's petitions.

The state proceedings at issue here involve extensive factual and procedural issues that have been under careful examination by the state commissions involved. The Commission should not preempt or otherwise override states' public interest determinations absent clear violation of federal law or regulation.

TWC's petitions do demonstrate, however, the real need for Commission clarification of the proper treatment of long-distance interexchange telephone service being offered to the public by VoIP providers. Service providers who offer long distance calling capability to the public for a fee, who compete directly with carriers offering

traditional long distance service, and who utilize the PSTN either to originate or terminate calls, should be required to pay access charges, contribute to universal service mechanisms, and otherwise comply with the same regulatory requirements applied to similarly-situated traditional carriers.

The Commission should accordingly focus its resources on resolving, as quickly as possible, the competitive and public interest concerns underlying the state commissions' actions. In the context of its existing IP-Enabled Services, Intercarrier Compensation, and Universal Service dockets, the Commission should clarify that entities such as TWC who provide interconnected local and long-distance interexchange services to the public for a fee are either telecommunications carriers providing telecommunications services or are subject under the Commission's Title I jurisdiction to the same intercarrier compensation, universal service contribution, disabilities rights, and number portability obligations as the traditional local and long distance carriers with whom they compete.

As part of this process the Commission should also clarify, for purposes of determining appropriate intercarrier compensation payments, that jurisdiction of calls carried by IP-Enabled service providers such as TWC are determined on the same basis as calls carried by traditional providers (*i.e.*, on an end-to-end basis).

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In two petitions filed on March 1, 2006, Time Warner Cable (TWC) seeks, respectively, preemption of a decision by the South Carolina Public Service Commission (the SCPSC) to deny TWC a certificate of public convenience and necessity (CPCN) for certain areas in South Carolina served by rural telephone companies,¹ and a declaratory

¹ Application of Time Warner Cable Information Services (South Carolina), LLC d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently have a Rural Exemption, WC Docket No. 06-54 (March 1, 2006). Joining TWC in seeking preemption is its South Carolina telecommunications affiliate, Time Warner Cable Information Services (South Carolina), LLC.

ruling to the effect that competitive local exchange carriers (CLECs) are entitled to interconnect with incumbent local exchange carriers (ILECs) pursuant to section 251 of the Communications Act of 1934, as amended, for the purpose of exchanging traffic on behalf of Voice over Internet Protocol (VoIP)-based providers.²

In these comments, the Independent Telephone and Telecommunications Alliance (ITTA), the National Exchange Carrier Association, Inc. (NECA), the National Telecommunications Cooperative Association (NTCA), and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), (collectively, the Associations)³ urge the Commission to deny, or at a minimum defer action on the relief requested in TWC's petitions and instead resolve, as quickly as possible, the fundamental concerns that appear to underlie the state commissions' actions.⁴

Specifically, prior to (or coincident with) resolving issues raised by TWC's petitions, the Commission should take the pro-competitive step of clarifying in the context of its existing IP-Enabled Services,⁵ Intercarrier Compensation,⁶ and Universal

² 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 (March 1, 2006) (*TWC Declaratory Ruling Petition*).

³ ITTA is an organization of midsize incumbent local exchange carriers ("ILECs"), primarily rural, that collectively serve over ten million access lines in over 40 states. NECA is a non-stock, non-profit association formed in 1983 pursuant to the Commission's Part 69 access charge rules. NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of over 1200 ILECs that choose to participate in these arrangements. NTCA and OPASTCO are national trade associations that represent more than 560 rural rate-of-return regulated telecommunications providers.

⁴ As discussed below, the factual record in these proceedings is less than clear, making it difficult to comment in detail on the specific issues raised in TWC's petitions. The Associations look forward to reviewing comments of other parties in the South Carolina and Nebraska proceedings that should provide the Commission with additional perspective on TWC's claims.

⁵ IP-Enabled Services, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004) at ¶ 33 (*IP-Enabled Services NPRM*).

⁶ Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Further Notice of*

Service⁷ docketed that entities such as TWC, who provide interconnected local and long-distance interexchange services to the public for a fee, are either telecommunications carriers providing telecommunications services or are subject under the Commission's Title I jurisdiction to the same intercarrier compensation, universal service contribution, disabilities rights, and number portability obligations as the traditional local and long distance carriers with whom they compete. In addition, the Commission should clarify, for purposes of determining appropriate intercarrier compensation payments, that jurisdiction of calls carried by IP-Enabled service providers such as TWC are determined on the same basis as calls carried by traditional providers (*i.e.*, on an end-to-end basis).

I. Introduction

A. TWC's Petition for Preemption

TWC's Petition for Preemption was filed in response to a decision by the SCPCS issued on August 1, 2005, in which the state commission denied TWC's request for a CPCN in areas served by certain rural telephone companies.⁸ According to TWC, it

Proposed Rulemaking, 20 FCC Rcd 4685 (2005) (*ICC Further Notice*); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001) (*ICC Notice*).

⁷ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, CC Docket No. 98-171, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, CC Docket No. 92-237, NSD File No. L-00-72, Number Resource Optimization, CC Docket No. 99-200, and Telephone Number Portability, CC Docket No. 95-116, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9892 (2001); *Further Notice of Proposed Rulemaking and Report and Order*, 17 FCC Rcd 3752 (2002); *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952 (2002).

⁸ Application of Time Warner Cable Information Services (South Carolina), LLC to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently Have a Rural Exemption, *Order Ruling on Expansion of Certificate*, Docket No. 2004-280-C (Aug. 1, 2005) (*August 2005 SC PSC Order*); *Order Denying Rehearing or Reconsideration*, Docket No. 2004-280-C (Sept. 26, 2006).

offers a facilities-based competitive telephone service called “Digital Phone” using VoIP technology.⁹ Supposedly as a result of regulatory uncertainty that prevailed at the time TWC deployed its Digital Phone service, TWC asserts it “chose to comply” with state regulations and “through its telecommunications carrier affiliates”, obtained numerous state certifications to operate as a competitive local and interexchange voice services provider.¹⁰

After TWC filed its applications at the state level, this Commission issued its decision in the *Vonage Order* to preempt state regulation of VoIP providers.¹¹ TWC asserts it continued to seek certification from the SCPSC on the theory it needed such certifications to enter into negotiations with incumbent LECs directly (*i.e.*, without using a CLEC such as MCI as an intermediary), and also planned to offer additional telecommunications services not covered by the *Vonage* order.¹²

The SCPSC nevertheless denied TWC’s petition to expand its existing certificate, finding TWC’s position on certification “confusing, to say the least.”¹³ According to the SCPSC, TWC’s affiliate TWCIS had originally sought authority to expand its existing

⁹ Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act, As Amended (Mar. 1, 2006) at 2-3 (*TWC Preemption Petition*).

¹⁰ *Id.* Relationships between TWC, its affiliates (in particular, Times Warner Cable Information Services, Inc or “TWCIS”), and certain CLECs are of particular significance. According to TWC’s petition for preemption, in South Carolina TWC entered into a business relationship with MCI WorldCom Network Services, Inc. (“MCI”), a CLEC, whereby MCI agreed to “provide transport necessary to terminate” TWC’s VoIP-originated traffic to the PSTN and deliver PSTN-originated traffic to TWC by, among other things, entering into interconnection agreements with ILECs. MCI also apparently agreed “to assist” in providing E911-related connectivity, local number portability, administering, paying, and collecting intercarrier compensation, transporting and terminating long-distance traffic, and providing operator services and directory assistance. According to TWC, this arrangement permitted it to begin offering services quickly, without the need to enter into “drawn-out” negotiations with multiple ILECs.

¹¹ *Id.* at 6 (*citing* Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, *Memorandum Opinion and Order*, 19 FCC 22404 (2004)) (*Vonage Order*).

¹² *TWC Preemption Petition* at 6.

¹³ *August 2005 SC PSC Order* at 5.

CPCN so it could directly serve customers in rural ILEC territories, but then seemed to claim it planned to act as a wholesaler to a non-regulated subsidiary, who would actually serve the proposed areas.¹⁴ Moreover, TWCIS apparently represented to the SCPSC it was not seeking a waiver of the rural ILECs' rural exemptions.¹⁵ Absent a request for exemption under section 251(f) of the Act, the SCPSC determined it had no choice but to deny TWCIS' petition for a CPCN.¹⁶ In response to arguments that TWC needed a CPCN to enter into interconnection negotiations with rural ILECs, the SCPSC found that such an order was unnecessary because, to the extent TWC operated as a telecommunications carrier, it already had the ability to enter into negotiations with carriers under section 251 of the Act.¹⁷

B. TWC's Petition for Declaratory Ruling

TWC's Petition for Declaratory Ruling was filed in response to decisions issued by the SCPSC and the Nebraska Public Service Commission (NPSC) that determined, among other things, that CLECs providing wholesale services to other service providers are not entitled to local interconnection under section 251 (b)(5) because they were not proposing to exchange local traffic that originated on their own networks.¹⁸

According to TWC's Petition for Declaratory Ruling, the underlying dispute in South Carolina involved situations where MCI sought to obtain interconnection with

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* TWC asserts that South Carolina rural ILECs have nevertheless refused to enter into negotiations with TWC for interconnection, supposedly because TWC does not have a CPCN to serve rural ILEC areas. See *TWC Preemption Petition* at 9.

¹⁸ 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, *Public Notice*, DA 06-534 (Mar. 6, 2006) at 1.

rural ILECs for the purpose of acting as an intermediary to TWCIS, an entity which the SCPSC determined does not provide telecommunications services under the Act.¹⁹ In the SCPSC's view, until such time that the FCC acts to classify VoIP as a telecommunications service, VoIP providers do not have rights or obligations under section 251 of the Act. Further, according to the SCPSC, since South Carolina rural ILECs would not be required to provide interconnection services to such providers directly, they should not be required to provide such services indirectly (*i.e.*, via CLECs such as MCI) to those entities.²⁰ Consistent with this approach, the SCPSC also determined that rural ILECs were not required to port telephone number to MCI where the numbers would be assigned to TWC's VoIP customers.²¹

In Nebraska, the NPSC similarly concluded that rural ILECs in that state were not required to negotiate interconnection agreements with Sprint Communications Company L.P. (Sprint), a certificated CLEC, to support Sprint's provision of wholesale voice services to TWC.²² As it had done in South Carolina, TWC sought in Nebraska to provide interconnected VoIP services to customers via its interconnection arrangements with Sprint. Finding that Sprint did not provide sufficient factual evidence to support a conclusion it was a telecommunications carrier with respect to services offered to TWC,

¹⁹ Petition of MCI Metro 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, *Order Ruling on Arbitration*, Docket No. 2005-67-C (Oct. 7, 2005) at 11 (*October 2005 SCPSC Order*).

²⁰ *Id.*

²¹ *Id.* at 16.

²² Sprint Communications Company, L.P., Overland Park, Kansas, Petition for Arbitration under the Telecommunications Act, of Certain issues Associated with the Proposed Interconnection Agreement between Sprint and Southeast Nebraska Telephone Company, Falls City, *Findings and Conclusions*, Application No. C-3429 (Sept. 13, 2005) (*September 2005 NPSC Order*).

the NPSC determined that Sprint was not entitled to seek interconnection under section 251 of the Act with respect to those services.²³

II. Discussion

TWC's petitions involve complex service arrangements between and among TWC, certain third-party wholesale service providers,²⁴ and affected rural ILECs within the states of South Carolina and Nebraska. The South Carolina petitions, in particular, appear to involve a number of procedural and factual disputes that make it difficult for the Associations to provide detailed comment on the merits of TWC's arguments. The Commission will be unable to preempt the South Carolina decisions without an adequate basis in the record, and that record appears to be insufficient regarding the procedural and factual disputes to support a Commission determination.²⁵

It is not entirely clear from TWC's petitions whether TWC considers itself to be a telecommunications carrier, whether it provides telecommunications services, or what intercarrier compensation rules it believes apply to its relationships with involved rural ILECs.²⁶ TWC appears to claim that it currently pays access charges for its services and contributes to universal service,²⁷ but the basis on which these payments and contributions are supposedly made is not explained. Possibly, TWC considers payments

²³ *Id.* at ¶ 21. While the NPSC stated that it "wholeheartedly" supported Time Warner's and Sprint's goals to provide competitive alternatives to consumers, it found that TWC was the proper party to negotiate with incumbent carriers because the telecommunications traffic at issue originates on Time Warner's network.

²⁴ E.g., MCI and Sprint, as described above.

²⁵ This assumes, *arguendo*, the Commission has the legal authority to preempt the state public service commission decisions presented in this case. That authority is unclear.

²⁶ See e.g., *TWC Declaratory Ruling Petition* at 3, n. 2 ("Nonetheless, Time Warner Cable continues to comply with 911 regulations, state and federal universal service payment requirements, intercarrier compensation regimes, numbering rules, and the Communications Assistance for Law Enforcement Act, among other things.")

²⁷ *Id.*

made by MCI and Sprint to qualify as its own,²⁸ but it is not clear what form these payments take. TWC also states that it complies with various carrier-type requirements²⁹ but it is again unclear whether TWC fulfils those requirements directly or indirectly, on what basis these requirements apply, or whether it agrees that obligations such as number portability apply to its services.³⁰

What is clear from TWC's petitions, however, is that the services TWC seeks to offer provide the same basic functionalities as traditional local and long distance telecommunications services and compete directly with those offered by traditional local and long distance telecommunications service providers. The 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 that utilize the Public Switched Telephone Network (PSTN) to terminate their voice traffic.

TWC's own description of its service offerings leave no room for doubt on this point. In both petitions, TWC explains that "Digital Phone" service provides subscribers with "unlimited local, in-state, and long distance calling to the U.S. and Canada, as well as call waiting, caller ID, and additional features for a flat monthly fee", including the

²⁸ *See id.* at 4 (explaining its reliance on CLECs), "These carriers [Sprint and MCI] provide transport necessary for such origination and termination by entering into interconnection agreements with incumbent LECs. Sprint and MCI also assist Time Warner Cable in providing 911-related connectivity; performing local number portability; administering, paying and collecting intercarrier compensation; transporting and terminating long-distance traffic; and providing operator services and directory assistance."

²⁹ These factual questions must be clarified before the Commission and interested parties can analyze more precisely the specific interconnection and compensation questions raised by TWC's petitions. The Commission should not make determinations regarding the merits of TWC's claims under sections 251 and 253 of the Act until such factual questions, and the broader policy issues described above, are resolved.

³⁰ *See TWC Declaratory Ruling Petition* at 3, n. 2 ("As a result of the Commission's decision in *Vonage* . . . , Time Warner Cable has notified each of the utility commissions in the states in which it operates that it is no longer providing its Digital Phone VoIP-based service pursuant to a CPCN or retail tariff.")

ability to “make and receive calls using virtually any commercially available handset”, with access to “toll-free calling, international calling, directory assistance, operator services, and telecommunications relay services” and the ability for subscribers to “keep their existing landline telephone numbers and retain or change their current directory listings.”³¹ Plainly, Digital Phone service is functionally equivalent to the basic telecommunications services offerings of traditional local and long distance carriers and should be treated in the same manner for regulatory purposes to the extent it relies on the PSTN to terminate traffic.

In its *IP Enabled Services NPRM* issued over two years ago, the Commission made clear its fundamental belief that

[a]ny service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.³²

In comments in that proceeding, the Associations respectively urged the Commission to adopt its tentative conclusion and require all interstate service providers delivering voice traffic to LECs for termination to provide fair compensation to LECs on the same basis that other service providers pay such compensation. The Associations also agreed that such service providers must be required to contribute to federal Universal Service Fund (“USF”) mechanisms on the same basis as the carriers with whom they compete.

The Commission has made progress in creating a level playing field between interconnected VoIP providers and traditional carriers since the *IP-Enabled Services*

³¹ *TWC Preemption Petition* at 3, n. 7; *TWC Declaratory Ruling Petition* at 3, n. 4.

³² *IP-Enabled Services NPRM* at ¶ 33.

NPRM was issued.³³ Unfortunately, no further action has been taken with respect to the compensation or universal service obligations of interconnected VoIP providers, at least since the Commission issued its “IP in the Middle” decision³⁴ which correctly determined that the use of IP transport technology does not transform basic telecommunications services into “enhanced” services.

In recent months the industry has been working on intercarrier compensation reform proposals that are in part designed to resolve differences among service providers who use the PSTN in similar ways yet pay different rates for such use. The Commission has also strongly signaled its intent to reform current intercarrier compensation and universal service mechanisms in ways that will require all interconnected voice service providers to contribute on an equitable basis.³⁵ Congressional leaders have likewise shown strong interest in these issues, introducing legislation that would, for example, permit the Commission to broaden the base for USF contributions to include intrastate revenues, and allow it to institute alternative numbers-based USF contribution mechanisms that would include interconnected VoIP services.³⁶

³³ See e.g., 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 (2005) (requiring VoIP providers to provide Enhanced 911 (E911) service to their customers as a mandatory feature of the service). See also, Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket No. 04-295, RM-10865, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 14989 (2005) (requiring facilities-based broadband Internet access service providers and VoIP providers that connect to the Public Switched Telephone Network (PSTN) to accommodate wiretaps).

³⁴ See Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, *Memorandum Opinion and Order*, 19 FCC Rcd 7457 (2004) (*AT&T IP-in-the-Middle Order*).

³⁵ See e.g., Remarks by Chairman Kevin J. Martin, FCC to the NARUC Summer Meeting, Austin, TX, July 26, 2006 (urging the FCC to begin assessing contributions primarily based on working telephone numbers. Chairman Martin stated this approach is competitively and technology neutral, as any phone service that uses a telephone number must contribute to universal service).

³⁶ See e.g., Universal Service Reform Act of 2006, H.R.5072, 109th Cong. (2006)

Over this same period of time the Commission has been presented with several petitions regarding disputes over payment of interstate access charges by interconnected VoIP providers. In September 2005, for example, the SBC companies found it necessary to ask the Commission to apply its “IP-in-the-Middle Order” to carriers using IP technology to transport long distance calls via third-party carriers.³⁷ Similarly, in December 2005 Frontier requested the Commission clarify that Datanet and any similarly-situated carriers pay tariffed access charges for Feature Group A calls originating from Frontier’s end users and transported via intermediate carriers using IP technology.³⁸ In both cases, the Associations urged the Commission to clarify that access charges apply to all interexchange traffic utilizing the PSTN.³⁹

VoIP services are growing at a significant pace. The number of residential VoIP subscribers in the U.S. is expected to grow from an estimated 4.2 million at year-end 2005 to 18.0 million in 2009.⁴⁰ Carriers and state regulators throughout the nation are attempting to grapple with problems created by the current unequal regulatory structure. In this context, the Associations are concerned that action by the Commission to preempt decisions made by the SCPSC and other state commissions and/or expand direct interconnection rights for VoIP providers, without concrete action to address existing

³⁷ Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276 (Sept. 21, 2005) (*SBC Petition*)

³⁸ Petition for Declaratory Ruling that USA DataNet Corp is Liable for Originating Interstate Access Charges When it Uses Feature Group A Dialing to Originate Long Distance Calls, WC Docket No. 05-276 (Nov. 23, 2005) (*Frontier Petition*).

³⁹ Petition for Declaratory Ruling that USA DataNet Corp is Liable for Originating Interstate Access Charges When it Uses Feature Group A Dialing to Originate Long Distance Calls, WC Docket No. 05-276 (Nov. 23, 2005) at 5 (*citing AT&T “IP-in-the-Middle” Order.*)

⁴⁰ Telecommunications Industry Association Press Release, “Number of VoIP Subscribers more than Triples in 2005 to 4.2 Million; Expected to Grow to 18 Million by 2009” (February 27, 2006).

intercarrier compensation and universal service obligations, will be a prescription for disaster.

The Associations accordingly urge the Commission to deny, or at a minimum defer action on TWC's petitions pending clarification of the record below and to incorporate these issues into its existing IP-Enabled Services, Intercarrier Compensation and Universal Service dockets. The Associations urge the Commission not to reflexively grant preemptive relief and provide additional opportunities for uneconomic regulatory arbitrage without resolving, as quickly as possible, competitive imbalances caused by unequal regulation of VoIP and traditional service providers. Specifically, the Commission should take the pro-competitive step of clarifying that entities such as TWC, who provide interconnected local and long-distance interexchange services to the public for a fee, are either telecommunications carriers or are subject, under the Commission's Title I jurisdiction, to the same intercarrier compensation, universal service contribution, number portability, disabilities rights, and CALEA obligations as traditional local and long distance carriers. 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.⁴¹

In addition, the Commission should clarify, for purposes of determining appropriate intercarrier compensation payments, that jurisdiction of calls carried by IP-Enabled service providers such as TWC are determined on the same basis as calls carried by traditional providers: that is, on an end-to-end basis. It is clear from the South

⁴¹ Association members involved in the state-level disputes at issue in these proceedings also express concern over the lack of any procedural mechanism for securing balanced agreements with entities, such as TWC, who interconnect indirectly via intermediate carriers.

Carolina and Nebraska cases that the traffic at issue is not entirely intraLATA. As TWC explains, its Digital Phone service permits end users to make both local and long distance interconnected voice calls, originating and terminating in both different states and different countries.⁴² As the SCPSC concluded, the physical location of the calling and called customers determines the proper jurisdiction of calls, not the location of the ISP node.⁴³ The Commission has repeatedly confirmed the use of this “end-to-end analysis” is the correct method for determining jurisdiction of calls.⁴⁴ The Commission should reaffirm the applicability of its end-to-end analysis to determine the proper jurisdiction of this traffic.

III. Conclusion

The state proceedings at issue here involve extensive factual and procedural issues that have been under careful examination by the state commissions involved. The Commission should not preempt or otherwise override states’ public interest determinations absent clear violation of federal law or regulation. TWC’s petitions do demonstrate, however, the real need for Commission clarification of the proper treatment

⁴² *TWC Preemption Petition* at 3, n. 7; *TWC Declaratory Ruling Petition* at 3, n. 4.

⁴³ *October 2005 SCPSC Order* at 23. As explained in previous Association filings, the ESP exemption was never intended to apply to voice calls terminating on the PSTN. *See e.g., Comments* of the National Exchange Carrier Association, Inc., *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exemption from Access Charges*, WC Docket No. 02-361 (Jan. 24, 2003) at 2; *See also, Comments* of the National Telecommunications Cooperative Association, *Level 3 Communications, LLC Petition for Forbearance from the Payment of Interstate and Intrastate Access Charges on its Voice Communications*, WC Docket No. 03-266 (Mar. 1, 2004) at 6-7. Accordingly, there is no basis for treating an ISP node through which calls terminate on the PSTN as an “end user premises” or other stopping point for determining the jurisdiction of calls.

⁴⁴ *See e.g., AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-38, *Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 4826 (2005) at ¶ 5; *The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, *Memorandum Opinion and Order*, 11 FCC Rcd 1186 (1996) at ¶ 29; *Teleconnect v. Bell Tel. of Pennsylvania*, File No. E-88-83, et al, *Memorandum Opinion and Order*, 10 FCC Rcd 1626 (1995) at ¶12.

of long-distance interexchange telephone service being offered to the public by VoIP providers. Service providers who offer long distance calling capability to the public for a fee, who compete directly with carriers offering traditional long distance service, and who utilize the PSTN either to originate or terminate calls, should be required to pay access charges, contribute to universal service mechanisms and otherwise comply with the same regulatory requirements applied to similarly-situated traditional carriers. The Commission should therefore deny, or at a minimum defer action on TWC's petitions until it addresses the fundamental issues underlying these disputes, as presented in the Commission's IP-Enabled Services, Intercarrier Compensation and Universal Service dockets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Comments was served this 10th day of April 2006, by electronic filing and e-mail to the persons listed below.

By: /s/ Elizabeth R. Newson
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The following parties were served:

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