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 IDAHO PUBLIC  
 UTILITIES COMMISSION

*Attorney for Time Warner Cable  
 Information Services (Idaho), LLC*

**Before the  
 IDAHO PUBLIC UTILITIES COMMISSION**

Application of	)	
	)	
TIME WARNER CABLE INFORMATION	)	Case No. TIM-T-08-01
SERVICES (IDAHO), LLC	)	
	)	
For a Certificate of Public Convenience and	)	<b>RESPONSE TO COMMENTS OF</b>
Necessity to Provide Competitive Facilities-	)	<b>COMMISSION STAFF</b>
Based Local and Interexchange	)	
Telecommunications Services within the	)	
State of Idaho	)	

Time Warner Cable Information Services (Idaho), LLC, d/b/a Time Warner Cable (“TWCIS”), by and through its attorneys, hereby submits this response to the comments filed by Commission Staff on December 28, 2009 in this proceeding. On November 14, 2008, TWCIS filed an Application for a Certificate of Public Convenience and Necessity (“CPCN”) to provide competitive facilities-based local and interexchange telecommunications services within the State of Idaho. Following informal discussions with Commission Staff, TWCIS filed a Supplement to that Application on November 9, 2009, further explaining the justification for granting a CPCN. As the Staff has acknowledged, the Application and Supplement contain “all

requisite information” to facilitate grant of the requested CPCN by the Idaho Public Utilities Commission (the “Commission”).<sup>1</sup>

The Staff Comments assert that TWCIS is not a “telephone corporation” under Idaho law, and thus is not obligated to obtain a CPCN to operate.<sup>2</sup> As explained below, however, the Staff Comments fail to appreciate that TWCIS requires a CPCN in order to interconnect with incumbent LECs and to exercise other rights as a telecommunications carrier. Moreover, even assuming *arguendo* that TWCIS is not *compelled* to obtain a CPCN under Idaho law, the Staff Comments overlook the fact that TWCIS is nevertheless *permitted* to do so. In fact, failure to grant TWCIS’s request would constitute unlawful discrimination, given the recent grant of CPCNs to similarly situated carriers, and would erect barriers to entry in violation of Section 253 of the Federal Communications Act. The Commission therefore should grant TWCIS a CPCN as requested in its Application expeditiously.<sup>3</sup>

**I. THE STAFF COMMENTS FAIL TO APPRECIATE THAT TWCIS REQUIRES A CPCN TO OBTAIN INTERCONNECTION**

In its comments, the Staff indicates that it is “somewhat perplexed” by the Application because, in the Staff’s view, TWCIS “is seeking more regulatory oversight than the Staff believes is warranted,” whereas most companies “seek reduced oversight.”<sup>4</sup> To be clear: TWCIS is not seeking certification for the purpose of subjecting itself to additional regulatory

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<sup>1</sup> Comments of the Commission Staff at 4.

<sup>2</sup> *Id.*

<sup>3</sup> **Exhibit A**, attached to TWCIS’s Supplement contains a list of the state authorizations TWCIS competitive local exchange affiliates have obtained in other jurisdictions.

<sup>4</sup> *Id.* at 6.

oversight by the Commission.<sup>5</sup> Rather, TWCIS is seeking a CPCN because, incumbent LECs need not, and therefore choose not to interconnect with entities that do not hold a CPCN granted by the relevant state commission. Moreover, carriers without a CPCN are disadvantaged in the exercise of other core rights necessary to provide local exchange services, including access to telephone numbers and connections with 911 public service answering points (“PSAPs”). While TWCIS believes that its Application and Supplement made these objectives clear, there should be no doubt that denial of a CPCN would have the effect of barring TWCIS from providing local exchange services. As discussed further below, such an outcome not only would be contrary to the public interest, but would violate federal and state law.

## **II. NOTHING IN THE IDAHO CODE PREVENTS THE COMMISSION FROM GRANTING THE REQUESTED CERTIFICATE**

TWCIS’s Application and Supplement explain why its Local Interconnection Service should be classified as a basic local exchange service under Idaho law. *See* Supplement at pp. 6-7. Even if the Commission were to adopt a different classification, however, the Staff Comments overlook the fact that nothing in the Idaho Code would preclude the grant of a CPCN to TWCIS. *Id.* To the contrary, as TWCIS has explained, the Commission has broad authority under the Idaho Code to “do all things necessary to carry out the spirit and intent of the provisions of this act,”<sup>6</sup> which certainly include actions necessary to ensure that the grant of regulatory flexibility does not have the perverse effect of depriving a carrier of the core inputs it requires to provide competitive local exchange service.

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<sup>5</sup> However, it should be noted that TWCIS has previously represented that it would comply with all applicable rules of the Commission if it were granted a CPCN. *See* Application at p. 7.

<sup>6</sup> Idaho Code § 61-501.

The Staff Comments fail to grapple with this argument, taking the view that TWCIS is exempt from the certification process and that is the end of the matter.<sup>7</sup> However, the relevant question is whether, in light of TWCIS's need to obtain a CPCN in order to interconnect with incumbent providers, the law allows the Commission to grant the requested authority. As TWCIS has explained at length, and the Staff Comments fail to rebut, the Commission plainly does possess sufficient authority to issue a CPCN to TWCIS.

**III. REFUSAL TO GRANT A CPCN WOULD CONSTITUTE UNLAWFUL DISCRIMINATION AND WOULD BE SUBJECT TO PREEMPTION UNDER FEDERAL LAW**

Making matters worse, the Staff Comments propose denying TWCIS's Application despite the recent grant of CPCNs to several similarly situated carriers. For example, in September 2007 the Commission granted a CPCN to Eltopia Communications LLC, which, like TWCIS, stated that it would offer *wholesale* telecommunications services following certification, and *possibly* provide VoIP services at a later date (which would not require certification in any event).<sup>8</sup> More recently, in November 2009 the Commission granted a CPCN to ALEC Telecom, Inc., which stated that it would offer "wholesale switching and interconnection services to other telephone service providers and similarly-positioned wholesale business customers," and *possibly* local telecommunications services at a later date.<sup>9</sup> Just like these carriers (among others that have obtained CPCNs in Idaho), TWCIS initially intends to provide wholesale local exchange services. TWCIS also will provide retail interexchange services to business customers

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<sup>7</sup> Comments of the Commission Staff at 6.

<sup>8</sup> See *Application of Eltopia Communications LLC for a Certificate of Public Convenience and Necessity to Provide Local Exchange and Telecommunications Services*, Case No. ECL-T-07-01, Order No. 30442 (Sep. 24, 2007).

and may later introduce other retail telecommunications services that qualify as “basic.” as the Commission Staff has defined the term. The Staff Comments identify no conceivable basis for distinguishing TWCIS’s Application from these carriers’ applications, and there is none. Such discrimination cannot be justified and would not be sustained by any court of law.

In addition, denying TWCIS’s request for a CPCN would create a barrier to entry in violation of federal law. As TWCIS noted in its Supplement, a key pillar in Congress’s effort to open local telecommunications markets to competition was its enactment of Section 253 of the Federal Communications Act, which provides that “[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>10</sup> Thus, any interpretation of Titles 61 and 62 of the Idaho Code that would thwart a competitive carrier’s ability to enter the Idaho market by interconnecting with incumbent carriers would be subject to preemption under Section 253.<sup>11</sup> More generally, and even apart from the dictates of Section 253, the strongly pro-competitive principles of federal and state law counsel against any such reading.<sup>12</sup>

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<sup>9</sup> See *Application of ALEC Telecom, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange and Telecommunications Services*, Case No. ALE-T-09-01, Order No. 30944 (Nov. 13, 2009).

<sup>10</sup> 47 U.S.C. § 253(a).

<sup>11</sup> The FCC has made clear that wholesale telecommunications carriers are entitled to obtain interconnection to the same degree as retail carriers. See, e.g., *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*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007). Accordingly, depriving TWCIS of that federal right, which is essential to its ability to provide telecommunications services, would squarely conflict with Section 253.

<sup>12</sup> Cf., e.g., *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) (stating that the goal of promoting facilities-based competition must guide the FCC’s implementation of the Communications Act).

In response to these arguments, the Staff says that it “does not see how the state’s lack of regulatory requirements . . . can be viewed as a barrier to entry.”<sup>13</sup> As noted above, that misses the point: TWCIS of course has never claimed that it would be harmed by the absence of regulatory requirements. Once again, TWCIS is seeking a CPCN so that it can exercise its federally conferred *rights* as a competitive local exchange carrier, including in particular the right to obtain interconnection under Section 251 of the Federal Communications Act.

**IV. IF THE COMMISSION DETERMINES THAT A CPCN IS NOT REQUIRED TO OBTAIN INTERCONNECTION IN IDAHO, IT SHOULD ISSUE A BINDING ORDER TO THAT EFFECT**

A key premise of the Staff Comments is that TWCIS does not require a CPCN to obtain interconnection or to exercise related rights.<sup>14</sup> As explained above, TWCIS is convinced, based on its substantial experience, that incumbent LECs in fact will refuse to interconnect with a non-certificated carrier. Therefore, if the Commission does not believe that a CPCN is or should be required to obtain interconnection and is determined to withhold a CPCN on that basis, it should at least issue an order making unequivocally clear that TWCIS may interconnect with incumbent LECs in Idaho and operate as a wholesale telecommunications carrier regardless of whether it possesses a CPCN. Any other outcome would subject TWCIS to arbitrary and capricious treatment vis-à-vis wholesale providers that have obtained a CPCN from this Commission and, in violation of established law, would deny TWCIS the opportunity to compete.

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<sup>13</sup> Comments of the Commission Staff at 6.

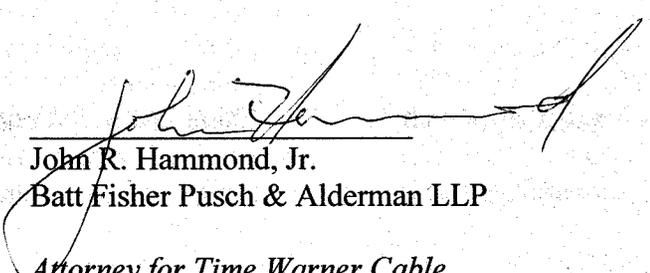
## CONCLUSION

The Application and the Supplement demonstrate TWCIS's entitlement to obtain a CPCN to provide competitive facilities-based local and interexchange telecommunications services within the State of Idaho.

WHEREFORE, TWCIS respectfully requests that the Commission:

1. Process this Application by Modified Procedure under the Commission's Rules of Procedure;
2. Grant TWCIS's request for a CPCN to provide competitive facilities-based local and interexchange telecommunications services within the State of Idaho; and,
3. Grant such other relief as it deems necessary and appropriate.

Dated this 27 day of January, 2010.



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<sup>14</sup> *See id.* at 2 (“The absence of a CPCN does not preclude TWCIS from entering the Idaho market as a wholesale service provider, nor *should it* prevent the Company from entering into interconnection agreements.”) (emphasis added).

**CERTIFICATE OF SERVICE**

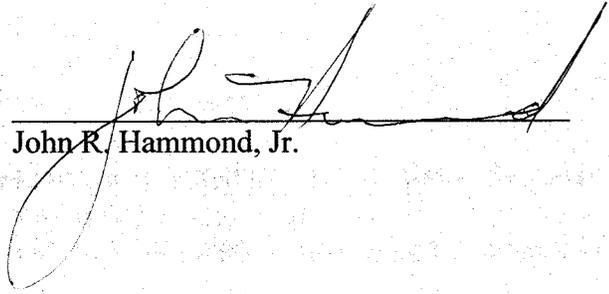
I HEREBY CERTIFY that on this 27<sup>th</sup> day of January, 2010, a true and correct copy of the foregoing document was served on the following individuals by the method indicated below:

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