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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 ) **PETITION FOR RECONSIDERATION**  
Necessity to Provide Competitive Facilities- )  
Based Local and Interexchange )  
Telecommunications Services within the )  
State of Idaho )

Pursuant to Idaho Code § 61-626 and Commission Rule of Procedure 331, Time Warner Cable Information Services (Idaho), LLC, d/b/a Time Warner Cable (“TWCIS”), by and through its attorneys, submits this petition for reconsideration of the order adopted by the Commission on February 23, 2010 in the above-captioned proceeding (the “Order”). The Order denied TWCIS’s application for a certificate of public convenience and necessity (“CPCN”) to provide statewide, competitive facilities-based local and interexchange telecommunications services within the State of Idaho.<sup>1</sup>

<sup>1</sup> TWCIS’s Application was submitted on November 14, 2008. A Supplement to the Application was submitted on November 9, 2009.

**ORIGINAL**

The Commission should reconsider the Order because it is unreasonable, unlawful, erroneous, unduly discriminatory and not in conformance with the facts of record and applicable law. As explained herein, the Order rests on the erroneous conclusions that: (i) TWCIS has not satisfied the cumulative requirements for issuance of a CPCN under Title 61 (presumably based on the Staff's incorrect finding that TWCIS will not offer "basic local exchange services," and thus is not a "telephone corporation" under Title 61 of the Idaho Code); and (ii) Title 62 of the Idaho Code thus forecloses the Commission from granting a CPCN to TWCIS.

In fact, the record demonstrates that TWCIS has met the requirements necessary to obtain a CPCN from the Commission, as set forth in the Idaho Code and the Commission's Rules and Orders. In particular, TWCIS *is* a "telephone corporation" under Idaho law, and *will* offer "basic local exchange services," as that term is defined in Idaho Code § 62-603(1). Therefore, TWCIS is entitled to the same treatment that the Commission has afforded similarly situated carriers in granting their CPCN applications. Further, while Title 62 *exempts* TWCIS from certain requirements under Title 61, nothing in Title 62 *forecloses* the Commission from allowing TWCIS to take advantage of benefits otherwise available to it under Titles 61 and 62. In fact, federal and state law and policy obligate the Commission to permit TWCIS to properly exercise such rights. Accordingly, the Commission should reconsider its findings in the Order and grant TWCIS's Application in an expeditious manner.

## I.

### STANDARDS FOR RECONSIDERATION

Reconsideration allows a party to bring to the Commission's attention any issue previously determined, and thereby provides the Commission with an opportunity to rectify any mistake or omission.<sup>2</sup> In those instances where an aggrieved party asks the Commission to reconsider its decision based upon the record, it may simply do so. The Commission may also grant reconsideration by rehearing if it intends to take additional evidence or argument. If reconsideration is granted, the Commission must complete its reconsideration within thirteen weeks after the date for filing petitions for reconsideration.<sup>3</sup> If the Commission grants reconsideration, it "must issue its order upon reconsideration within twenty-eight (28) days after the matter is finally submitted for reconsideration."<sup>4</sup>

## II.

### ARGUMENT

#### A. The Commission's Decision to Deny TWCIS a CPCN Is Unduly Discriminatory

As TWCIS has noted previously, the Commission recently granted CPCNs to carriers that proposed to offer services comparable to those proposed by TWCIS, and there is no justification for taking a different approach in this case. For example, in its application for a CPCN, ALEC Telecom, Inc. ("ALEC") proposed to "provide facilities-based and resold local exchange and interexchange services to the extent the network and transmission facilities of its

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<sup>2</sup> *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979).

<sup>3</sup> Idaho Code § 61-626(2).

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

facilities-based competitive suppliers permit.”<sup>5</sup> In particular, ALEC represented that it would offer “wholesale switching and interconnection services to other telephone service providers and similarly-positioned wholesale business customers,” and that in the future it *might* provide services that fell within the category of “basic local exchange service.”<sup>6</sup> The Staff supported, and the Commission granted, ALEC’s request for a CPCN.

Similarly, in its application for a CPCN, Eltopia Communications, LLC (“Eltopia”) represented that it would be primarily providing high-speed data services and IP protocol-conversion that did not require certification.<sup>7</sup> Yet, the Staff supported, and the Commission granted, Eltopia’s application after noting that Eltopia had the capability to provide both voice and data services over the same trunk and recognizing the company’s desire to maintain the flexibility to configure its service according to its customer’s specifications.<sup>8</sup>

TWCIS’s wholesale interconnection services justify grant of a CPCN based on these decisions. The Commission does not contest TWCIS’s analysis on this point, and does nothing to distinguish in any way these applications from that submitted by TWCIS.<sup>9</sup> Thus, based on these past cases, the Commission should grant TWCIS a CPCN subject to similar terms and conditions. Accordingly, the Commission’s summary conclusion that the services that TWCIS proposes to offer do not meet the statutory definition of “basic local exchange services” is

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<sup>5</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>6</sup> *Id.* at 4-5

<sup>7</sup> *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).

<sup>8</sup> *Id.*

<sup>9</sup> See *Citizens Utilities Company v. Idaho Public Utilities Commission*, Idaho, 739 P. 2d 1061, 1063, 360, 363 (1987).

arbitrary and capricious (as is the conclusion, discussed below, that Idaho Code § 62-604 does not allow for TWCIS to obtain a CPCN), and should be abandoned. Simply put, such blatant discrimination against TWCIS cannot be justified and should not be allowed to stand by the Commission.

**B. The Order Erroneously Concludes that TWCIS Fails to Satisfy the Cumulative Requirements for a CPCN**

Even apart from the Commission's disregard for such precedent, the Order is erroneous. In the Order, the Commission finds that TWCIS's filing does not satisfy "the cumulative requirements for the issuance of a CPCN . . . ."<sup>10</sup> The Commission does not clearly explain the basis for this finding, and neither the Commission nor the Staff disputes that TWCIS has satisfied the conditions for grant of a CPCN set forth in the Commission's Rules and Order No. 26665.<sup>11</sup> However, the Commission does appear to agree with the Staff's conclusion that TWCIS will not offer "basic local exchange services," and that TWCIS therefore cannot be deemed a "telephone corporation" to which a CPCN may be granted under Title 61 of the Idaho Code.<sup>12</sup>

There is no basis for this finding, however, as TWCIS's services *do* satisfy the definition of "basic local exchange services."<sup>13</sup> Contrary to the Staff's position, TWCIS is "telephone corporation" that will provide "telecommunications services" in the State of Idaho.<sup>14</sup> Idaho Code § 61-121(1) defines a "telephone corporation" as "every corporation or person, . . . providing

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<sup>10</sup> Order at 4.

<sup>11</sup> See Staff Comments at 3; Order at 2. Order No. 26665 helped to streamline the process to obtain a CPCN as outlined by Commission Rule of Procedure 111.

<sup>12</sup> Order at 5.

<sup>13</sup> See Supplement at 4-6.

<sup>14</sup> See Idaho Code § 61-121(1) & (2).

‘telecommunications services’ for compensation in this state.” Idaho Code § 61-121(2) defines

“telecommunication service” as:

[T]he transmission of two-way interactive switched signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means (*which includes* message telecommunication service and *access service*), which originate and terminate in this state, and are offered to or for the public, or some portion thereof, for compensation.<sup>15</sup>

TWCIS will provide statewide, competitive, facilities-based wholesale and retail local intrastate telecommunications services for compensation within the State of Idaho.<sup>16</sup> Such services may include point-to-point, private line, access and transport services, for which the Company intends to seek compensation.<sup>17</sup> More specifically, TWCIS’s Local Interconnection Service will enable two-way interconnection between the facilities of TWCIS’s customers and the public switched telephone network (“PSTN”). This service will be offered on a wholesale basis to facilities-based providers of interconnected VoIP services, and will provide for, among other things, two-way interactive switched voice communications that will be transported and terminated in Idaho. Local Interconnection Service also will provide TWCIS’s interconnected VoIP provider customers with access to domestic and international toll services, operator services, telephone number resources, 911 calling, and related services and features. This service, in addition to the other services TWCIS intends to offer in Idaho, all fall within the

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<sup>15</sup> Idaho Code § 61-121(2) (emphasis supplied); *see also* Idaho Code § 62-603(13). In specifying that “telecommunications services” must be offered to or for the public, “or some portion thereof,” this section strongly suggests that the Legislature intended to include services provided directly to the public as well as those provided to other carriers and ultimately delivered services to end users. TWCIS is proposing to do both in the State of Idaho.

<sup>16</sup> *See Application* at p. 2, 5.

<sup>17</sup> *Id.*

statutory definition of “telecommunication service” under the Idaho Code. Accordingly, there should be no question that the Company is a “telephone corporation” as defined by Idaho law.

Further, as TWCIS has explained, and contrary to the Staff’s assertions, TWCIS’s Local Interconnection Service satisfies the definition of “basic local exchange services.”<sup>18</sup> TWCIS also may later introduce additional retail telecommunications services in Idaho that also qualify as “basic.”<sup>19</sup> Therefore, to the extent that the actual provision of basic local exchange service at the time a CPCN is granted is required under Title 61, TWCIS has satisfied that requirement.

However, as discussed above, it does not appear based on Commission precedent that the actual provision of “basic local exchange service” is a prerequisite to being granted a CPCN. Rather, Staff and the Commission have recognized in other CPCN cases that a certificate may be granted to a carrier that does not yet offer any basic local exchange service.

**C. The Order Erroneously Concludes that Competitive Telecommunications Carriers May Not Seek a CPCN**

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>20</sup> including taking the actions necessary to ensure that Title 62 does not have the perverse effect of depriving a carrier of the core inputs it requires to provide competitive local exchange service. Thus, while TWCIS continues to believe that its proposed services are “basic local exchange services” under Idaho law, and that it is therefore entitled to obtain a CPCN under Title 61, nothing in the Idaho Code would preclude the grant of a CPCN to TWCIS even if the Commission were to reach a different conclusion. To the contrary, the Commission should apply Idaho law in a manner that

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<sup>18</sup> *Idaho Code* § 62-603(1).

<sup>19</sup> *See Application* at 4.

<sup>20</sup> *Idaho Code* § 61-501.

advances the strong public policy interests that favor granting TWCIS's application, as authorizing TWCIS to operate as a CLEC will enable it to bring the benefits of facilities-based competition and advanced services to Idaho consumers. Indeed, by obtaining certificates from many other states, TWCIS's affiliates are now benefiting consumers in many areas of the country; there can be no legitimate reason for withholding such authority in Idaho alone.

In the Order, the Commission does not disclaim its broad authority under the Idaho Code, but does conclude that "the inclusion of conditional language followed by the word 'shall' in *Idaho Code* § 62-604 strongly suggests that the legislative intent was to remove any discretion as to whether a telephone corporation could opt to be governed by Title 61."<sup>21</sup> As a result, the Commission finds that it may not grant TWCIS's Application.<sup>22</sup> Respectfully, there are several critical flaws with this analysis:

***By the Commission's own reasoning, Section 62-604 is inapplicable to TWCIS.*** By its terms, Idaho Code § 62-604 applies *only* to the extent that a carrier is a "telephone corporation" under Idaho law. The Staff's analysis, which the Commission appears to adopt, concludes that TWCIS is not a "telephone corporation."<sup>23</sup> Accordingly, if TWCIS were not a "telephone corporation," there would be no basis for using Idaho Code § 62-604 to preclude TWCIS from seeking a CPCN.

***Exemption from Title 61 requirements does not foreclose TWCIS from taking advantage of Title 61 benefits.*** The plain language of Idaho Code § 62-604 provides that TWCIS "shall be exempt" from the provisions of Title 61. The mere fact that a party is *exempt* from a set of provisions does not *foreclose* that party from taking advantage of those provisions

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<sup>21</sup> Order at 4.

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

<sup>23</sup> *See* Order at 2, 5.

when it is beneficial to do so. In fact, to “exempt” a party simply is “to free [that party] from an obligation, a duty, or a liability to which others are subject.”<sup>24</sup> Nothing in that definition, or Idaho Code § 62-604, requires an exempt party to forego, or precludes the Commission from facilitating, benefits or advantages otherwise available to similarly situated entities.

As TWCIS has explained, it is not seeking certification for the purpose of subjecting itself to burdensome regulations, but rather is seeking a CPCN because, in its experience, incumbent LECs will refuse to interconnect with an entity that does not hold a CPCN granted by the relevant state commission, and TWCIS likewise would be unable to obtain other essential inputs and assistance from entities that administer numbering and call-routing processes. TWCIS’s ability to interconnect with other carriers is a fundamental requirement of its proposed business activities, the foreclosure of which would be contrary to the public interest, as well as federal and state law. Idaho Code § 62-604 does not compel TWCIS to forego, or the Commission to deny, this vital prerequisite to providing competitive telecommunications services.

*The Commission ignores the clear legislative intent behind Idaho Code § 62-604.* The Commission attempts to divine the legislative intent behind Idaho Code § 62-604 by analyzing its structure, yet inexplicably ignores the actual legislative history of this section, and portions of Title 62 that clearly express the legislature’s intent (*e.g.*, Idaho Code § 62-602, “Legislative Intent”). As TWCIS explained in its Supplement, the legislative history of Title 62 shows that its primary purpose was to allow certificated, rate-regulated telephone corporations to elect whether to remain rate regulated for telecommunications services other than basic local exchange service

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<sup>24</sup> See Exempt, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> Ed., retrieved Mar. 9, 2010).

(such as for interLATA services).<sup>25</sup> Nothing in that legislative history remotely suggests that Idaho Code § 62-604 was intended to *foreclose* competitive carriers from obtaining a CPCN, or deny such carriers the ability to make an election similar to rate-regulated carriers generally subject to far more restrictive regulation.<sup>26</sup>

Moreover, Idaho Code § 62-602 clearly establishes that the legislature's intent in adopting Section 62-604 was to encourage effective competition, and to give the Commission the authority to empower competitive providers to enter local markets for communications services. As noted previously by TWCIS, the Commission's interpretation of Idaho Code § 62-604 would have precisely the opposite effect—a fact that the Order does nothing to dispute. In light of this history, the Commission's discussion of legislative intent is manifestly flawed.

*The Commission ignores its independent authority to grant TWCIS a CPCN under Title 62.* The Commission ignores the fact that Title 62 grants it authority that is independent of whether Title 61 is applicable to a given carrier. For example, Idaho Code § 62-615 grants the Commission “full power and authority to implement the federal telecommunications act of 1996 . . . .” As TWCIS notes, a competitive carrier can vindicate its federal rights—including the right to interconnect with other carriers—only if it first receives a CPCN (a point that the Commission does not dispute). Thus, Idaho Code § 62-615 affords the Commission clear authority to grant TWCIS the requested CPCN, notwithstanding its interpretation of Idaho Code § 62-604.

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<sup>25</sup> See Statement of Purpose RS21609CI, Telecommunications Regulatory Reform, H.B. 687 (1988); Statement of Purpose RS 14965, H.B. 224 (2005).

<sup>26</sup> Notably, Idaho Code § 62-604 allows a telephone corporation that held a CPCN prior to January 1, 1988 to either remain regulated under Title 61 or elect to exclude all, or part of its telecommunications services from regulation under that title. Presumably, then, a telephone corporation could elect to remain regulated under Title 61 even for services that would not qualify as “basic local exchange service.” TWCIS should enjoy a similar level of flexibility.

For these reasons, the Commission should reconsider the Order, find that it has the authority to grant TWCIS the requested CPCN, and proceed to do so.

**D. The Order Conflicts with Well-Defined Federal Law and Policy, and Would Be Subject to Preemption If Not Reconsidered**

In each of its prior pleadings, TWCIS has noted that denying TWCIS's request for a CPCN would create a barrier to entry in violation of federal law and contrary to clear federal and state policies in favor of greater intrastate competition. As TWCIS has explained, it is seeking a CPCN because, in its experience, incumbent LECs will refuse to interconnect with an entity that does not hold a CPCN granted by the relevant state commission. Further, the denial of a CPCN may leave TWCIS without the ability to obtain telephone numbers, route calls, and obtain whatever other inputs are necessary to operate as a CLEC.<sup>27</sup> For instance, when a carrier requests telephone number blocks, that entity's status as a holder of a CPCN is verified by the numbering authority before number blocks are assigned. Similarly, TWCIS will not be able to be listed in the Local Exchange Routing Guide, which is essential to routing local calls, without an Operating Company Number, which is issued by the National Exchange Carrier Association and is only provided to entities that hold CPCNs. A CPCN is required before such an identification code will even be issued. Nor will TWCIS be able to obtain company codes that identify it and permit it to pay and collect access charges for the traffic it intends to carry or to be listed in industry databases that are necessary for the provision of service to customers. Providing the local interconnection services that TWCIS intends to offer therefore involves much more than simply obtaining an interconnection agreement with an incumbent LEC. Without a

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<sup>27</sup> See, e.g., *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, 22 FCC Rcd 19531, at ¶ 12 (2007) (noting that NANPA "provides numbers only to entities that are licensed or certificated as carriers under the [Federal Communications] Act.").

CPCN, TWCIS will not be able to obtain several inputs that are essential to its ability to offer service.

Neither the Staff nor the Commission itself has ever disputed this point, or that such an outcome would be contrary to the public interest. Yet, the Commission fails to recognize the real-world consequences of the Order and the adverse impact that its findings will have on TWCIS and, ultimately, consumers. In short, the Commission's choice is not between granting TWCIS a CPCN or allowing it to operate on a deregulated basis without one, but rather between granting TWCIS a CPCN and impairing its ability to operate at all.

For this reason, the Order as it stands erects a clear barrier to TWCIS's ability to enter the Idaho market, and as such is subject to preemption under federal law (a point that the Commission fails to address). 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>28</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>29</sup>

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<sup>28</sup> 47 U.S.C. § 253(a).

<sup>29</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.

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>30</sup>

In order to ensure consistency between Commission action and federal and state law and policy, the Commission should reconsider the Order and grant TWCIS the requested CPCN.

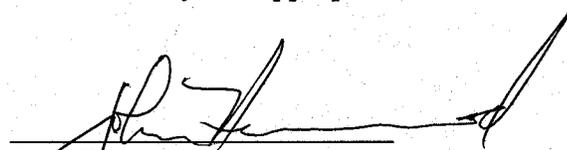
### CONCLUSION

For the reasons set forth herein, TWCIS is entitled to reconsideration of the Order, and grant of 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. Reconsider the order it adopted on February 23, 2010 in this proceeding;
2. Process TWCIS's Application by Modified Procedure under the Commission's Rules of Procedure;
3. Grant TWCIS's request for a CPCN to provide competitive facilities-based local and interexchange telecommunications services within the State of Idaho; and,
4. Grant such other relief as it deems necessary and appropriate.

Dated this 16th day of March, 2010.

  
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John R. Hammond, Jr.  
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*Attorney for Time Warner Cable  
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<sup>30</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).

**CERTIFICATE OF SERVICE**

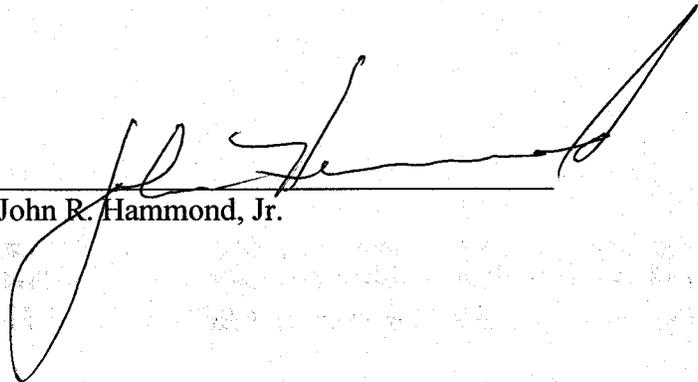
I HEREBY CERTIFY that on this 16<sup>th</sup> day of March, 2010, a true and correct copy of the foregoing document was served on the following individuals by the method indicated below:

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