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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)
) Case No. TIM-T-08-01
TIME WARNER CABLE INFORMATION)
SERVICES (IDAHO), LLC) **POST-HEARING BRIEF**
)
For a Certificate of Public Convenience and)
Necessity to Provide Competitive Facilities-)
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, submits this brief to address key legal issues in connection with its Petition for Reconsideration (the “Petition”) in the above-captioned proceeding. On February 23, 2010, the Commission issued Final Order No. 31012 (the “Order”) denying TWCIS’s request 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.¹ TWCIS timely filed the Petition on March 16, 2010, and the Commission held a hearing on June 10, 2010.

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

TWCIS respectfully submits that its Application, Supplement and Petition amply demonstrate that it is entitled to be granted the requested CPCN by the Idaho Public Utilities Commission (the “Commission”). However, the questioning at the June 10, 2010 hearing suggests there may be continuing uncertainty regarding certain legal aspects of TWCIS’s position. Accordingly, TWCIS provides herein additional legal analysis on several key points to demonstrate further that: (i) TWCIS is a “telephone corporation” entitled to apply for and be granted a CPCN under Idaho law; (ii) the Commission has the requisite legal authority to grant the requested CPCN based on TWCIS’s qualifications and proposed service offerings, which include both wholesale and retail services; (iii) the Commission already has granted CPCNs to similarly situated carriers and cannot lawfully discriminate against TWCIS by refusing its request—particularly in the absence of a reasonable justification; and (iv) the Order, if not reconsidered, invites federal preemption under at least two different legal theories. In light of this analysis, TWCIS renews its request that the Commission reconsider the Order and grant TWCIS’s request for a CPCN.

I.

ARGUMENT

A. TWCIS Is a “Telephone Corporation” Entitled To Obtain a CPCN Under Idaho Law.

As a threshold matter, TWCIS reiterates that it qualifies as a “telephone corporation” under Idaho law. Idaho Code § 61-121(1) defines a “telephone corporation” to mean “every corporation ... providing ‘telecommunications services’ for compensation” within Idaho. Idaho Code § 61-121(2), in turn, defines “telecommunications service” to include “the transmission of two-way ... messages ... which originate and terminate in [Idaho], and are offered to or for the public, or some portion thereof, for compensation.” TWCIS’s Local Interconnection Service for

example, enables two-way interconnection between the facilities of its customers and the public switched telephone network ("PSTN"). This will allow, among other things, the transport and termination of voice calls within a local calling area, thus enabling two-way interactive switched voice communications within the relevant local exchange calling area, using soft switch technology. Local Interconnection Service will also 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. Based upon the foregoing, TWCIS's Local Interconnection Service falls within the statutory definition of Idaho Code § 61-121(2). In addition, TWCIS is a "telephone corporation" as defined by Idaho law, and accordingly is entitled to apply for and receive a CPCN.²

The Order correctly recognizes as much, referring to TWCIS repeatedly as a "telephone corporation."³ Nevertheless, Staff maintains that TWCIS is not a "telephone corporation" because TWCIS will provide its Local Interconnection Service on a wholesale basis to retail service providers, rather than "directly to the consumer or end user."⁴ Staff's assertion is based upon a misreading of Idaho Code § 61-121. Nothing in that provision requires a telecommunications service to be provided directly to end users. Rather, it requires only that such a service be "offered to or for the public, or some portion thereof, for compensation." TWCIS's Local Interconnection Service is offered both *to* a class of retail providers—which surely constitutes "some portion" of the public—and *for* the benefit of the public generally. Staff

² Staff incorrectly claims that TWCIS has conceded that it is not a "telephone corporation." *See* Staff Answer to TWCIS Petition for Reconsideration at 4. In its Petition, TWCIS merely noted that *Staff* cannot claim that TWCIS is *not* a telephone corporation while simultaneously claiming that Idaho Code § 62-604, which applies only to telephone corporations, bars TWCIS from obtaining a CPCN. *See* Petition at 8 ("Accordingly, if TWCIS were not a 'telecommunications corporation,' there would be no basis for using Idaho Code § 62-604 to preclude TWCIS from seeking a CPCN.").

³ *See, e.g.*, Order at 4-5.

⁴ *See* Staff Direct Testimony at 6.

provides no legal basis for its attempt to restrict this definition; indeed, Staff admits in its testimony that this interpretation is not grounded in Commission precedent.⁵ By the same token, while Staff asserts that its interpretation of Idaho Code § 61-121 has been applied consistently, it fails to cite even a single case in which a wholesale telecommunications carrier was denied a CPCN on the ground that it did not qualify as a “telephone corporation” under Idaho law.

Moreover, Staff’s position contrasts sharply with the FCC’s construction of comparable definitions in the Communications Act of 1934, as amended (the “Act”). The Act defines “telecommunications service” as service “to the public, or to such classes of users as to be effectively available directly to the public.”⁶—a formulation similar to that reflected in Idaho Code § 61-121. Critically, the FCC has squarely rejected the view that the reference to “the public” in this statutory definition was intended to exclude wholesale telecommunications services.⁷ Indeed, in analyzing the very type of local interconnection service at issue here, the FCC’s Wireline Competition Bureau observed that “[i]t is clear ... that the definition of telecommunications services ... includes wholesale services when offered on a common carrier basis.”⁸ In turn, that decision made clear that “providers of wholesale telecommunications services enjoy the same rights as any ‘telecommunications carrier’ under ... the Act.”⁹

⁵ See Hearing Transcript at 72 lines 16-18 (“I’m unaware that [this interpretation] is in any Commission Order; however, it has been the consistent application of that interpretation with Staff as they review CPCN Applications.”).

⁶ 47 U.S.C. § 153.

⁷ See, e.g., *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Second Order on Reconsideration, 12 FCC Rcd 8653, at ¶ 33 (1997).

⁸ *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, at ¶ 11 (2007) (“*TWC Declaratory Ruling*”).

⁹ *Id.* at ¶ 9.

The Commission should construe Idaho Code § 61-121 in a manner consistent with this federal precedent. As an initial matter, the FCC has established a body of law on this issue through careful deliberation over a period of years. In contrast, the record introduced in this case by Staff does not demonstrate that Staff's interpretation of Idaho Code § 61-121 is the result of careful statutory interpretation (which would focus on the text, purpose and legislative history of the provision) or other deliberative process. Moreover, the Idaho legislature has provided support for the proposition that the Commission should read Idaho Code § 61-121 in harmony with federal law; most notably, Idaho Code § 62-615 provides that "[t]he commission shall have full power and authority to implement the federal telecommunications act of 1996,"¹⁰ which includes the definition of "telecommunications service" described above.

Further, following the FCC's pro-competitive precedent in interpreting Idaho Code § 61-121 would advance Idaho's stated policy objectives by ensuring that TWCIS and similar service providers may obtain critical inputs and thereby compete in the Idaho market. By contrast, the interpretation favored by Staff would deny these critical inputs, for no apparent purpose, and "would impede the important development of wholesale telecommunications and facilities-based VoIP competition, as well as broadband deployment ... by limiting the ability of wholesale carriers to offer service."¹¹ As explained below, that interpretation would needlessly invite federal preemption.

B. The Commission Has the Authority to Grant the Requested CPCN.

Staff also proposes that a CPCN may not be granted because "the services TWCIS proposes to offer do not meet the statutory definition of 'basic local exchange services' as the

¹⁰ Idaho Code § 62-615(1).

¹¹ *TWC Declaratory Ruling* at ¶ 8.

1996 Act codified Section 251, which guarantees the right of telecommunications carriers—including wholesale carriers such as TWCIS—to enter local markets and obtain interconnection, numbers and other critical inputs from ILECs. Accordingly, Idaho Code § 62-615 grants the Commission the authority to take measures to ensure that competitive entrants can vindicate those rights by, for example, granting CPCNs upon application. Nevertheless, the Order achieves the opposite result by thwarting TWCIS's ability to exercise its federal rights and by empowering ILECs and other entities to deny TWCIS the inputs that it needs to provide service. Again, both the Commission and Staff fail to consider the Commission's independent authority to act pursuant to Idaho Code § 62-615.

C. The Commission Previously Has Granted CPCNs to Similarly Situated Service Providers

Further bolstering TWCIS's entitlement to a CPCN, the Commission has granted CPCNs to a number of providers that did not offer "basic local exchange service" at the time of certification. As TWCIS has noted previously, the Commission has granted CPCNs to ALEC Telecom, Inc. ("ALEC") and Eltopia Communications, LLC ("Eltopia")—carriers that proposed to offer services comparable to those proposed by TWCIS. Staff attempts in vain to distinguish these cases. The simple fact is that both ALEC and Eltopia did not provide, or even agree to provide, retail services at the time they were certified. Yet the Commission (with the Staff's full support) granted these carriers CPCNs anyway. The rationalization that these carriers may have indicated the intent to provide retail service at some point *in the future* is irrelevant, as they received CPCNs without actually offering such services.¹⁹ If Staff were correct that the

¹⁹ Staff has alleged in this case that Eltopia was granted a CPCN for the reasons stated in the Direct Prefiled Rebuttal Testimony of Grace Seaman at pp. 8-9. However, the record in that case clearly demonstrates it was granted largely because: 1) Eltopia's Application satisfied the requirements outlined in Commission Rule of Procedure 111, IDAP A 31.01.01. 111, and Procedural Order No. 26665; and 2) Eltopia's service

provision of retail services were an absolute prerequisite to obtaining a CPCN, then the grants of such authority to ALEC and Eltopia would have been improper. The far more plausible reading of the law is that those grants were permissible in light of the Commission's broad authority, discussed above, to issue CPCNs in its discretion.

If Idaho law truly precluded the Commission from granting a CPCN to a wholesale provider, the Commission presumably would have informed ALEC and Eltopia of that fact and stayed their proceedings until they offered retail services. The mere fact that those carriers *might* provide retail services at some future point, which would remove any doubt as to the Commission's authority, would not have been sufficient under Staff's reasoning to confer authority with respect to *wholesale* services in the present. The Commission's authority simply cannot be grounded in speculation as to future conduct, particularly in the absence of a procedural mechanism for verifying that ALEC and Eltopia have ever offered retail services.²⁰ It would be a perverse result to award CPCNs based upon vague statements of future intent, while punishing carriers like TWCIS that are entirely forthcoming in describing the telecommunications services they will provide.

In addition, the Commission has granted CPCNs to a number of service providers that are not even demonstrably *telephone corporations*—including Cox Idaho Telecom, LLC and Millennium Networks, LLC—without any apparent concerns about its authority to do so. As Staff has admitted, the Commission does not “regulate VoIP service providers.” But if such providers “on [sic] their own volition, apply for a CPCN,” Staff will evaluate such requests—and

has the capability to provide both voice and data services over the same trunk even though at the outset, it would be providing unregulated services. Order No. 30442.

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See Hearing Transcript at 70.

D. The Order Will Invite Federal Preemption if Reconsideration Is Denied.

The Supremacy Clause of the Constitution provides that “the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁴ Here, federal law preempts the Order under the doctrine of “conflict preemption,” as well as under Section 253 of the federal Communications Act of 1934, as amended.²⁵

1. The Order Is Preempted under the Doctrine of “Conflict Preemption.”

Under the “conflict preemption” doctrine, federal law preempts state law “where the state law stands as an obstacle to the accomplishment and execution of the full objectives” of federal policy.²⁶ Preemption is particularly appropriate where “compliance with both federal and state regulations is a physical impossibility.”²⁷ The Supreme Court has held that preemption may result not only from action taken by Congress but also from a federal agency action that is within the scope of the agency’s congressionally delegated authority.²⁸

Both Congress and the FCC have established a clear federal policy in favor of competitive entry into local telecommunications markets. For example, Sections 251 and 271 of the Act are designed to open local markets to new service providers.²⁹ Moreover, Section 706

²⁴ U.S. Const. art. VI, cl. 2.

²⁵ 47 U.S.C. § 253.

²⁶ *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368-69 (1986). *See also Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2003) (where State law frustrates the purposes and objectives of Congress, conflicting State law is “nullified” by the Supremacy Clause); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof.”).

²⁷ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

²⁸ *See Fidelity Federal Savings & Loan Ass’n v. De la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

²⁹ 47 U.S.C. §§ 251, 271.

of the 1996 Act directs the FCC to adopt “measures that promote competition in the local telecommunications market.”³⁰ Pursuant to these statutory mandates, the FCC’s implementing orders have consistently sought to encourage competition in local markets. Further, the FCC has made clear that the federal regulatory scheme affords wholesale providers the same ability as retail providers to enter local markets on a competitive basis. In particular, the *TWC Declaratory Ruling* recently reaffirmed that wholesale carriers are fully entitled to exercise the critical rights granted by Section 251 of the Act, including interconnection.

The Order conflicts with these core federal policies, and therefore is subject to preemption.³¹ As TWCIS has explained in detail and repeatedly, the Commission’s refusal to grant TWCIS a CPCN effectively has precluded TWCIS from entering the Idaho market, and has kept TWCIS from exercising its federally protected rights. The Commission’s overly restrictive reading of Idaho Code § 62-604, if not reconsidered, will harm competition and ultimately restrict consumer choice. In short, the Commission’s actions will result in precisely the harms that the FCC sought to avoid through the *TWC Declaratory Ruling*, which found that denying interconnection and related rights to a wholesale provider “would impede the important development of wholesale telecommunications and facilities-based VoIP competition, as well as broadband deployment ... by limiting the ability of wholesale carriers to offer service.”³²

Any decision to deny a CPCN to TWCIS, therefore, is subject to preemption. The Commission can easily avoid such a result by interpreting the Idaho Code as TWCIS proposes, which is consistent with its own precedent. Indeed, TWCIS’s reading of the law would further

³⁰ 47 U.S.C. § 1302(a).

³¹ Notably, Staff has suggested that denying the CPCN requested by TWCIS would serve the public interest because it would prevent TWCIS from accessing numbering resources to which it is entitled under federal law. *See, e.g.*, Hearing Transcript at 78 line 11 (“We are also concerned about number exhaustion.”).

³² *TWC Declaratory Ruling* at ¶ 8.

both state and federal policy interests, and the Commission should reconsider the Order accordingly.

2. The Order is Subject to Preemption Under Section 253 of the Communications Act.

Section 253 of the Communications Act provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”³³ This provision is an essential part of Congress’s commitment to opening local telephone markets to competition.³⁴ The FCC has explained that Section 253(a) precludes not only outright prohibitions on market entry, but also any requirement that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”³⁵ The courts have likewise recognized that “a prohibition does not need to be complete or ‘insurmountable’ to run afoul of § 253(a).”³⁶

TWCIS has explained that, in its experience, without a CPCN, it simply cannot enter the Idaho market or obtain interconnection, numbers and other inputs necessary to provide service in that market. In particular, without a CPCN, TWCIS will be unable to perform the following:

- (1) Interconnect with other carriers operating in Idaho, since those carriers typically will not interconnect with any entity that does not have a CPCN,³⁷

³³ 47 U.S.C. § 253(a).

³⁴ See, e.g., *Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 41 (1997) (Congress enacted Section 253 “to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act’s explicit goal of opening local markets to competition.”).

³⁵ See *Cal. Payphone Ass’n*, 12 FCC Rcd 14191, ¶ 31 (1997).

³⁶ *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). See also *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004).

³⁷ See TWCIS Direct Testimony at Exh. A; TWCIS Rebuttal Testimony at 5-6.

- (2) Obtain numbering resources, because an entity's status as a holder of a CPCN is verified by the numbering authority before number blocks are assigned;³⁸
- (3) Route calls, because critical Operating Company Numbers and listings in the Local Exchange Routing Guide are not granted until the National Exchange Carrier Association confirms that a potential recipient holds a CPCN; or
- (4) Obtain other resources necessary to operate as a CLEC.

Neither the Staff nor the Commission itself has ever disputed these points, or that excluding TWCIS from the Idaho market would be contrary to the public interest. At most, the Commission and Staff claim that not having a CPCN poses no legal bar to providing competitive telecommunications service or obtaining interconnection. However, that sidesteps the relevant issue, which arises from the insurmountable practical impediments to obtaining interconnection and other critical inputs without a CPCN. The fact that the Commission may have the best of deregulatory intentions is unhelpful where, as here, the Commission's actions have the effect of preventing TWCIS from entering the market. Simply put, the Commission must recognize the real-world consequences of the Order and the adverse impact its findings will have on TWCIS, and ultimately consumers. 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 thwarting its ability to operate at all in Idaho.

In short, the Commission's denial of TWCIS's request for a CPCN constitutes a barrier to TWCIS's ability to enter the Idaho market, in violation of federal law and contrary to clear federal and state policies in favor of greater intrastate competition. This barrier is exacerbated by the discriminatory application of state law. As discussed above, the Commission has granted CPCNs both to: (i) carriers proposing services similar to those proposed by TWCIS (*e.g.*, ALEC

³⁸ 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.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 9th day of July, 2010, I caused a true and correct copy of the foregoing document to be served upon the following individual(s) in the manner indicated below:

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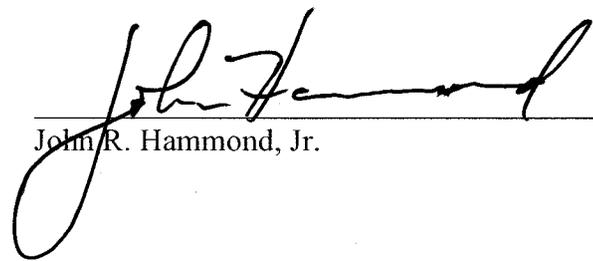
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