

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE APPLICATION )  
OF TIME WARNER CABLE INFORMATION )  
SERVICES (IDAHO), LLC FOR A ) CASE NO. TIM-T-08-01  
CERTIFICATE OF PUBLIC CONVENIENCE )  
AND NECESSITY TO PROVIDE LOCAL )  
EXCHANGE AND INTEREXCHANGE )  
TELECOMMUNICATIONS SERVICES ) ORDER NO. 32059  
WITHIN THE STATE OF IDAHO )**

**I. PROCEDURAL HISTORY**

In November 2008, Time Warner Cable Information Services (Idaho), LLC (“Time Warner” or “Company”) filed an Application for a Certificate of Public Convenience and Necessity (“CPCN”) pursuant to *Idaho Code* §§ 61-526 through 528, Rule 111 and Commission Order No. 26665 to provide “competitive facilities-based local and interexchange telecommunications services within Idaho.” Application at 1. Commission Staff and Time Warner entered into a prolonged period of discussions regarding the Company’s initial Application. On November 14, 2009, the Company filed a supplement to its Application.

On December 4, 2009, the Commission issued a Notice of Application and Modified Procedure. Staff was the only party to submit written comments regarding Time Warner’s Application. On January 29, 2010, Time Warner submitted a written response to Staff’s comments. Subsequently, Staff and representatives of the Company entered into another series of discussions during which the parties agreed that Time Warner would be permitted to file a written reply to Staff’s comments.

On February 23, 2010, the Commission issued an Order denying Time Warner’s Application for a CPCN. Order No. 31012. The Commission found that a CPCN was not necessary because Time Warner will not be offering “basic local exchange service” to Idaho customers. On March 16, 2010, Time Warner filed a Petition for Reconsideration and the Commission set the matter for an evidentiary hearing.

On June 10, 2010, the Commission held its technical hearing and ordered the parties to file post-hearing briefs no later than July 9, 2010. Based upon the entire record in this case, the Commission affirms its initial Order that Time Warner does not need a CPCN to operate as a wholesale carrier in Idaho.

## II. TIME WARNER'S APPLICATION AND SUPPLEMENT

Time Warner is a Delaware corporation and lists its principal place of business as: 290 Harbor Drive, Stamford, Connecticut 06902-8700. Application at 2. Time Warner is registered with the Idaho Secretary of State as a foreign limited liability company and lists CT Corporation System, 300 N. Sixth Street, Boise, Idaho 83702, as its Idaho registered agent for service. *Id.* In its Application, Time Warner states that it is a “competitive telecommunications company” offering “facilities-based wholesale and retail intrastate telecommunications services” to “commercial and wholesale customers statewide.” *Id.* at 2, 5.

Time Warner is requesting authority to provide “retail and wholesale facilities-based intrastate telecommunications services to commercial customers in all existing telephone exchanges in the state of Idaho.” *Id.* at 6. The Company stated that it will utilize the facilities owned by its cable affiliate, as appropriate. *Id.* at 5. Time Warner's Application also reveals that the Company has not yet identified all of the facilities required for its services, “as the architecture will depend upon future customer location, customer demand and the outcome of interconnection agreement (“ICA”) negotiation with incumbent local exchange carriers (“ILECs”).” *Id.* at 5-6. Time Warner disclosed in its Application that it plans to enter into ICAs with Verizon<sup>1</sup> and Qwest – both ILECs operating in Idaho. *Id.* at 7.

In the supplement to its Application, Time Warner reiterated that its “Local Interconnection Service, described in Section 3.3 of its proposed tariff . . . falls within the parameters of” the *Idaho Code* § 62-603(1) definition of “basic local exchange service.” Supplement at 4-5. The Company also emphasized that granting a CPCN “will be consistent with the competition objectives embodied in federal and state law . . .” *Id.* at 11.

## III. COMMISSION ORDER NO. 31012

In our prior Order, the Commission found that “[Time Warner's] filing does not satisfy the cumulative requirements for the issuance of a CPCN as set out in the Idaho Code, the Commission's Rules and Commission Order No. 26665.” Order No. 31012 at 4. In doing so, the Commission found that the express language of *Idaho Code* § 62-604 mandates that Time Warner's Application “shall be exempt from the provisions of Title 61, Idaho Code.” *Id.* (quoting *Idaho Code* § 62-604). The Commission's finding responded to Time Warner's

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<sup>1</sup> On July 1, 2010, Frontier Communications Corporation acquired control of Verizon's basic local and intrastate toll operations in Idaho. For purposes of this case we shall continue to refer to Verizon.

argument that the Company could opt to be governed by Title 61 if it so chooses. The Commission noted that 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.” *Id.*

Title 62 is applicable to Time Warner because the Company had not been issued a Certificate of Public Convenience and Necessity, on or before January 1, 1988, to provide basic local exchange service in Idaho. *Id.* at 5. The Commission noted Time Warner’s patent acknowledgement that it would “offer its services on a ‘wholesale basis’ and will merely ‘enable other service providers to offer residential and small business customers a competitive choice in telephone services. . . .’” *Id.* (quoting Time Warner’s Supplement to Application at 5). Thus, “the services [Time Warner] proposes to offer do not meet the statutory definition of ‘basic local exchange services’ as the term is defined in *Idaho Code* § 62-603(1).” Order No. 31012 at 5. Instead of offering access lines to residential and small business customers, the Company “will enable other service providers to do so.” *Id.*

Time Warner also requested that the Commission issue a statement declaring that a CPCN is not a prerequisite to operate as a wholesale telecommunications provider or for interconnection with an Idaho ILEC. *Id.* (citing Time Warner’s Reply Comments at 6). In response, “the Commission reiterate[d] its long-standing judgment that a CPCN is not required for telephone corporations offering non-basic local exchange services or to obtain interconnection with the network of an Idaho ILEC.” *Id.* “Telephone corporations ‘providing other non-basic local exchange telecommunications services as defined in *Idaho Code* § 62-603’ need only comply with the notice and price list or tariff requirements found in *Idaho Code* §§ 62-604 and 62-606.” *Id.* (quoting Commission Order No. 30991 at 3).

#### **IV. TIME WARNER’S PETITION FOR RECONSIDERATION**

Time Warner’s Petition requests that the Commission “reconsider its findings” in Order No. 31012 and “grant [Time Warner’s] Application [for a CPCN] in an expeditious manner.” Petition for Reconsideration at 2. In its Petition, Time Warner alleges that the Commission made several legal errors. Time Warner argued that the Commission’s denial of its Application is “unduly discriminatory.” *Id.* at 3. Time Warner cited the applications of ALEC Telecom, Inc. (“ALEC”), Case No. ALE-T-09-01; and Eltopia Communications, LLC

(“Eltopia”), Case No. ECL-T-07-01, as evidence that the Commission has granted CPCNs to wholesale telecommunications providers offering similar services in Idaho. *Id.* at 3-4.

Time Warner explained that its “Local Interconnection Service satisfies the definition of ‘basic local exchange services.’” *Id.* at 7. Alternatively, Time Warner argues that the Commission has the discretion to grant a CPCN to the Company even if it finds that the Company does not actually provide “basic local exchange service.” *Id.* Time Warner believes that the Commission “should apply Idaho law in a manner that advances the strong public policy interests that favor granting [Time Warner’s] application . . .” *Id.* at 7-8.

Time Warner believes that there is nothing in the Idaho Code that exempts the Company from “taking advantage of Title 61 benefits.” *Id.* at 8. Time Warner avers that it should be allowed to participate in the benefits that accrue under Title 61 “provisions when it is beneficial to do so.” *Id.* at 8-9. Time Warner states that it is “seeking a CPCN because, in its experience, incumbent LECs will refuse to interconnect with an entity that does not hold a CPCN . . .” and “. . . would be unable to obtain other essential inputs and assistance from entities that administer numbering and call-routing processes.” *Id.*

Time Warner also accuses the Commission of ignoring “the clear legislative intent behind *Idaho Code* § 62-604.” *Id.* Time Warner believes that “the Commission’s Order conflicts with well-defined federal law and policy, and would be subject to preemption if not reconsidered.” *Id.* at 10. “[D]enying [Time Warner’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 . . .” and “may leave [Time Warner] without the ability to obtain telephone numbers, route calls, and obtain whatever other inputs are necessary to operate as a CLEC.” *Id.* at 11.

Finally, Time Warner asserts that the Commission’s findings constitute a clear barrier to Time Warner’s entry into the Idaho market. *Id.* at 12. Thus, Time Warner contends that the Commission’s decision “is subject to preemption under federal law. . . .” *Id.*

## V. STANDARDS FOR RECONSIDERATION

Reconsideration provides an opportunity for a party to bring to the Commission’s attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may

grant reconsideration by reviewing the existing record by written briefs, or by evidentiary hearing. IDAPA 31.01.01.311.03.

If reconsideration is granted, “the matter must be reheard, or written briefs, comments or interrogatories must be filed, within thirteen (13) weeks after the date for filing petitions for reconsideration.” *Idaho Code* § 61-626(2). “The commission must issue its order upon reconsideration within twenty-eight (28) days after the matter is finally submitted for reconsideration.” *Id.* Commission Rule 311 “determines when a matter that is reconsidered is finally submitted for purposes of Section 61-626. . . .” IDAPA 31.01.01.332. A matter is deemed “submitted for decision . . . no later than twenty-eight (28) days after hearing is closed when a hearing is held. . . .” IDAPA 31.01.01.311.<sup>2</sup>

## VI. COMMISSION DECISION AND FINDINGS

The Idaho Legislature has delegated to the Commission the authority to administer the Telecommunications Act of 1988, as amended (“the Idaho Act”), and applicable federal law. *Idaho Code* §§ 62-602(5); 62-615(1). The Commission “issues Certificates of Public Convenience and Necessity to competitive local exchange carriers seeking to provide local exchange services in Idaho.” Commission Rules of Procedure 114, IDAPA 31.01.01.114. “The Commission uses the certification process to register and review applications to provide local telecommunications services.” *Id.*; *see also* Commission Order No. 26665.

Based upon our review of the entire record in this case, the Commission finds that Time Warner’s Petition for Reconsideration should be denied. Simply stated, Time Warner’s Application reveals that the Company does not plan to offer “basic local exchange service” to customers within Idaho. As explained in greater detail below, Time Warner’s proposed operation falls outside of the Commission’s jurisdiction and authority.

### *A. Background*

As competition began to emerge in long-distance telecommunications markets, the Idaho Legislature enacted the Idaho Telecommunications Act of 1988. *Idaho Code* §§ 62-601 *et seq.* The Legislature sought to introduce competition in all telecommunications services except the provision of local exchange service to residential and business customers with fewer than five (5) access lines. *Idaho Code* § 62-622 (1997). Briefly, those telephone corporations

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<sup>2</sup> The Commission ordered, and TWCIS verbally assented to, the submission of simultaneous legal briefs no later than July 9, 2010, which is more than 28 days beyond the date of the hearing, June 9, 2010. Tr. at pp. 87-88.

operating under Title 61 were subject to the Commission's traditional economic regulation authority for services. On the other hand, telephone corporations offering telecommunications services subject to the new Title 62 authority were no longer subject to the Commission's economic regulation. At that time, all telephone companies under the Commission's jurisdiction had been granted a CPCN under *Idaho Code* § 61-526.<sup>3</sup>

Section 62-604 of the Idaho Act provides that any new telephone corporation would become subject to the provisions of the Commission's Title 62 authority. In pertinent part, Section 62-604 provides:

Any telephone corporation . . . which did not on January 1, 1988, hold a certificate of public convenience and necessity issued by the commission and, which does not provide basic local exchange service, shall, on and after the effective date [July 1, 1988] of this act, be subject to the provisions of this chapter and shall be exempt from the provisions of title 61, Idaho Code.

*Idaho Code* § 62-604(1)(a) (emphasis added). In other words, those telephone corporations which did not hold a CPCN on January 1, 1988, were thereafter "exempt from the provisions of title 61." When enacted, the Idaho Telecommunications Act of 1988 provided that the existing CPCNs issued to "incumbent local exchange carriers" ("ILECs") under Section 61-526 were intended to "represent an exclusive service area franchise."<sup>4</sup> *Idaho Code* § 62-615(1) (subsequently repealed in 1997). Thus, carriers such as Qwest's predecessors became subject to both Title 61 and Title 62: Title 61 for the provision of its basic local exchange service; and Title 62 for the provision of all other telecommunications services.

In 1996, Congress enacted the Telecommunications Act of 1996 ("the federal Act"), thereby introducing competition in all areas of telecommunications, including basic local exchange service. 47 U.S.C. § 151 *et seq.* In particular, Section 253 of the federal Act prohibits states from enacting any statute or rule which prohibits "the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253.

Following enactment of the federal Act, the Idaho Legislature amended the Idaho Telecommunications Act and repealed the monopoly franchise provision pertaining to basic local

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<sup>3</sup> The incumbent local exchange companies such as Mountain Bell, U.S. West (predecessors to Qwest) and AT&T (providing long-distance, interLATA services) had Certificates issued by the Commission pursuant to *Idaho Code* § 61-526.

<sup>4</sup> *Idaho Code* § 62-603(6) ("Incumbent telephone corporation means a telephone corporation or its successor which was providing basic local exchange service on or before February, 8, 1996.")

exchange service in *Idaho Code* § 62-615(1) (repealed in 1997). With the passage of the federal Act, telephone corporations were allowed to offer local exchange service in competition with ILECs. New telephone corporations, i.e., post-1996, desiring to offer local exchange services are generally referred to as “competitive local exchange carriers” (“CLECs”). After passage of the federal Act, the Commission issued Procedural Order No. 26665 setting out the information to be provided by new providers of local exchange service. In Order No. 26665, the Commission determined that “the certification process is the appropriate mechanism for examining applications to become a local telecommunications provider in Idaho.” *Id.* at 2. Although the Commission no longer issues CPCNs under *Idaho Code* § 61-625 to telephone corporations, it does “register” new CLECs by issuing a “certificate” under Commission Rule 114, IDAPA 31.01.01.114.

In 2005, the Legislature amended Sections 62-604 and 62-605 of the Idaho Code to allow telephone corporations that held a CPCN as of January 1, 1988, and previously regulated under Title 61, to elect to have their basic local exchange services regulated under Title 62. In other words, all ILECs could choose to remove their basic exchange service from the Commission’s Title 61 authority. In 2009, the Commission promulgated Rule 114 which delineated the information that must be furnished by CLECs when applying for a registration Certificate. As stated the Commission explained in Rule 114, *supra* p. 6, the Commission “uses the certification process to register and review applicants to provide telecommunications services.” IDAPA 31.01.01.114. The Commission no longer issues Certificates or CPCNs to telephone corporations under Section 61-526 but used the industry term “Certificate” or “CPCN” to register new CLECs.

### ***B. Issues on Reconsideration***

#### *1. Is Time Warner entitled to a CPCN pursuant to Title 61?*

Time Warner argues that the Commission erred when it found that the Company was exempt from Title 61 and therefore outside of the Commission’s jurisdictions to regulate because it does not offer “basic local exchange services.” Time Warner also argues that the Commission erred when it found the Company was not a “telephone corporation” under Title 61 as defined by *Idaho Code* § 61-121. For its part, Staff asserted in its brief that Time Warner is not a telephone corporation because the Company does not contemplate offering its wholesale telecommunications services directly to the public. Staff Brief at 3. Alternatively, Time Warner

believes that an exemption from Title 61 regulation does not, ipso facto, amount to an exemption from the benefits of that chapter.

**Commission Decision:** Both Time Warner and Staff arguments miss the mark on this point. What Time Warner does not recognize (or at least acknowledge) is that Title 61 and Title 62 both contain the identical definition for what constitutes a “telephone corporation.” As defined by our Legislature:

“Telephone corporation” means every corporation . . . providing telecommunications services for compensation within this state.

*Idaho Code* §§ 62-603(10) and 61-121(1). The Legislature has also defined “telecommunication service” as:

The transmission of two-way interactive switched signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, light waves, or other electromagnetic means . . . which originate and terminate in this state, and are offered to or for the public, or some portion thereof, for compensation.

*Idaho Code* §§ 62-603(9) and 61-121(2). What distinguishes these two identical statutes regarding the definition of the term “telephone corporation” is their application.

As Staff has pointed out, the controlling statute for applicability is *Idaho Code* § 62-604(1)(a):

[a]ny telephone corporation . . . which did not, on January 1, 1988, hold a certificate of public convenience and necessity issued by the commission and, which does not provide basic local exchange service, shall, on and after the effective date [July 1, 1988] of this act, be subject to the provisions of this chapter and shall be exempt from the provisions of title 61, Idaho Code.

*Idaho Code* § 62-604(1)(a) (emphasis added).

The primary goal of construing a statute is to give effect to the intent of the Legislature. *Sherwood v. Carter*, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991). The starting point for construing a statute is the literal wording of the statute. *Wolf v. Farm Bureau Insurance*, 128 Idaho 398, 404, 913 P.2d 1168, 1174 (1996). When interpreting a statute, courts will normally give the language of the statute its ordinary, plain and rational meaning in order to determine the intent of the Legislature. *City of Boise v. Industrial Commission*, 129 Idaho 906, 935 P.2d 169 (1997). Administrative agencies are “clothed with power” to construe the law “as a necessary precedent to administrative action.” *J.R. Simplot Co. v. Idaho State Tax*

*Commission*, 120 Idaho 849, 854, 820 P.2d 1206, 1211 (1991). There is no occasion for judicial construction of a statute unless it is ambiguous, absurd or in conflict with other statutes. *Gibson v. Bennett*, 140 Idaho 270, 108 P.3d 417 (2005).

We find that *Idaho Code* § 62-604(1)(a) is unambiguous. As quoted above, Section 62-604(1)(a) sets forth two conditions: first, it applies to telephone corporations which did not hold a CPCN from the Commission on January 1, 1988; and second, “does not provide basic local exchange service.” There is no dispute that the Company does not have a CPCN issued by the Commission prior to January 1, 1988.

Turning to the facts of this case, the Commission found, and the Company does not contest, that Time Warner has not been issued a CPCN. *See* Order No. 31012 at 5. Consequently, the Commission must next determine whether Time Warner was providing or intends to provide basic local exchange service.

Idaho Code defines “basic local exchange services” in the following manner:

“Basic local exchange service” means the provision of access lines to residential and small business customers with the associated transmission of two-way interactive switched voice communication within a local exchange calling area.

*Idaho Code* § 62-603(1). An “access line” is a customer’s physical service line or cable connection running from the residential or small business customer’s premises to the carrier’s switching office. Thus, “basic local exchange service” is the provision of access lines directly to residential and small business customers.

Throughout its Application and testimony, Time Warner has consistently stated that it will not offer its services to residential and small business customers. (Emphasis added). The Company will offer its services on a purely “wholesale basis” and “enable other service providers to offer residential and small business customers a competitive choice in telephone services. . . .” Time Warner Supplement to Application at 5; *see also* Tr. at p. 22, ll. 14-16 (Emphasis added) (Testifying that Time Warner would offer its “services to its retail VoIP entity, which will provide services – VoIP services – to end-user customers.”) Time Warner “will be essentially a carrier’s carrier.” *Id.* at p. 23. Consequently, we find that Time Warner will not be offering basic local exchange service, i.e., providing access lines to residential and small business customers, but will offer its wholesale services to other telecommunications corporations.

Returning to *Idaho Code* § 62-604(1)(a), it is clear that Time Warner neither held a CPCN on January 1, 1988, nor does it provide or intend to provide basic local exchange service to Idaho customers. Consequently, Time Warner is “subject to the provisions of this chapter [Title 62, Chapter 6] and shall be exempt from the provisions of title 61, Idaho Code.” *Idaho Code* § 62-604(1)(a) (emphasis added). Because Time Warner is exempt from the provisions of Title 61, the Commission cannot grant it a CPCN pursuant to Section 61-526.

As we held in Order No. 31012, *Idaho Code* § 62-604 “removed any discretion” as to whether the Commission could regulate Time Warner under Title 61 of the Idaho Code. The Commission’s authority is not limitless. “An administrative agency is a creature of statute, limited to the power and authority granted it by the Legislature. . . .” *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996). The “PUC has no authority not given it by statute.” *McNeal v. Idaho PUC*, 142 Idaho 685, 691, 132 P.2d 442, 448 (2006) quoting *Utah Power & Light v. Idaho PUC*, 107 Idaho 47, 52, 685 P.2d 276, 281 (1984). The Commission is a legislative agency and cannot exercise authority not previously given to it by the Idaho Legislature.

The Idaho Legislature has delegated to the Commission the authority to administer the Idaho Public Utilities Laws, and applicable federal law. *Idaho Code* §§ 62-602(5), 62-615(1). The relevant language of *Idaho Code* § 62-604 is plain, clear and unambiguous. Our Supreme Court has said that statutes “relating to the same subject matter, although an apparent conflict, are to be construed in harmony, if reasonably possible.” *State v. Barnes*, 133 Idaho 378, 380, 987 P.2d 290, 292 (1999). Statutes which are *in pari materia* are to be construed together to further legislative intent. *Id.* at 382, 987 P.2d 292. Although the definition of “telephone corporation” is the same for Title 61 and Title 62, it is Sections 62-604 and 62-605 that indicate when a telephone corporation is subject to Title 62. Construing Section 62-603(14) with the latter two statutes results in harmony and subjects new telephone corporations to the provisions of Title 62. As our Legislature found in Section 62-602(4): “The telecommunications industry is in a state of transition from a regulated public utility industry to a competitive industry. The legislature encourages the development of open competition in the telecommunications industry in accordance with the provisions of Idaho law and consistent with the federal telecommunications act of 1996.” (Emphasis added).

Finally, we note that the Idaho Supreme Court has long held that an agency's interpretation of its statutes is given "considerable weight" when the agency reasonably interprets a statute that it has the responsibility to administer, "the statutory language does not treat the precise issue, and . . . any of the rationales underlying the rule of deference are present." *Pearl v. Bd. of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (Idaho 2002)(citing *Simplot v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (Idaho 1991)).

The Commission agrees with Time Warner that it is a "telephone corporation," albeit a Title 62 telephone corporation. The Commission recognizes that it issues "Certificates" under Rule 114 to Title 62 telephone corporations seeking to provide "local exchange service in Idaho." Under Commission Rule 114, we use the "certification process to register and review applications to provide local telecommunications services." *See also supra* p. 5. However, as noted above, Time Warner is not seeking to provide local exchange service – the provision of access lines to residential and small business customers.<sup>5</sup>

Nevertheless, the Commission cannot go beyond its own enabling statutes and issue a Title 61 CPCN to Time Warner when it is specifically exempted from Title 61 regulation by law. The Commission cannot find on the one hand that it lacks the authority to regulate a telecommunications provider under Title 61 and then act under that Title with respect to an entity that is exempt.

2. *Whether the denial of Time Warner's Application amounts to discriminatory treatment?*

Time Warner also argued that denying its Application would subject the Company to discriminatory treatment. The Company cited ALEC and Eltopia as other wholesale providers who have previously been issued a CPCN by the Commission.

**Commission Decision:** Inasmuch as the Commission has previously issued at least two Title 62 CPCNs to other wholesale telecommunications providers who may not currently offer basic local exchange services in Idaho, the Commission is committed to appropriately addressing the matter through an investigatory process to verify that recipients of CPCNs are actually providing basic local exchange service to customers in Idaho. ALEC's Title 62 CPCN

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<sup>5</sup> Time Warner cites Cox Idaho Telecom, LLC and Millennium Networks, LLC as VoIP service providers that have been granted CPCNs by the Commission. *See* Time Warner Brief at p. 9. Time Warner neglects to mention that both Cox and Millennium are providing direct access to the public switched network to residential and small business customers.

is conditioned upon ALEC providing local exchange service within one year. Order No. 30944. Thus, if ALEC has not satisfied the condition, then the Commission may revoke ALEC's Title 62 Certificate registration.

As Staff witness Seaman explained in her testimony to the Commission, ALEC stated in its Application that it has "future plans . . . to expand its offering to retail, private line service, and residential customers." Application at p. 5; Tr. at 62. Eltopia's illustrative tariff stated "service offerings, rates, terms and conditions applicable to the furnishing of local exchange services to residential and small business within the Coeur d'Alene (sic), Idaho Service Area." Tr. at p. 63. Further, witness Seaman stated that Commission Staff is aware that in the past there may have been wholesale service providers that were granted Certificates. Tr. at p. 64. In order to ensure that, Title 62 CPCNs are now granted appropriately under Rule 114, they are issued on a "conditional basis" and the carrier must, inter alia, agree to, "relinquish its Certificate and telephone numbers if, within one year of the issuance of the CPCN, the Company is not offering [basic] local exchange telecommunications services in Idaho." Tr. at p. 64-65.

The Commission has subjected Time Warner to the same level of regulatory oversight as any other wholesale telecommunications provider applying for a Title 62 CPCN in Idaho. The Commission has evaluated Time Warner's Application based upon its own merits. The Commission is taking appropriate steps to verify that Title 62 Certificates are issued to carriers providing basic local exchange service. The Commission intends to investigate all holders of Title 62 CPCNs to ensure they are providing basic local service. Eltopia's status will be evaluated as part of that investigation.

3. *Whether the Commission's decision to deny Time Warner's Application for a CPCN is subject to federal preemption?*

Time Warner argues that it is effectively prohibited from operating as a telecommunications service provider in Idaho without a Title 62 CPCN. See Time Warner Brief at 13. First, Time Warner argues that its Application for a Title 62 CPCN is a prerequisite to securing interconnection agreements with incumbent local exchange carriers ("ILECs"). In essence, Time Warner contends that, but for the Commission's actions in this case, the Company would be able to successfully negotiate with third parties to secure all of the "essential inputs and assistance" it needs to provide its services in Idaho. Time Warner's Petition at 9. Because such an outcome is contrary to the fundamental purposes and intent of both federal law and Title 62 of

the Idaho Code, Time Warner believes that the Commission's actions in this case are subject to federal preemption. *Id.* at 9-12.

**Commission Decision:** A Title 62 CPCN is not necessary for a telecommunications carrier to obtain an interconnection agreement. As we noted in our prior Order, a CPCN is not a prerequisite to operation as a telecommunications provider or for interconnection with an Idaho ILEC. *See* Order No. 31012 at 5. If an Idaho local exchange company refuses to enter into an interconnection agreement with Time Warner, Time Warner's remedy is to file a complaint with this Commission. Section 251 of the federal Act requires each telecommunications carrier to interconnect directly or indirectly with another carrier and an ILEC has a duty to negotiate in good faith and to interconnect with any requesting telecommunications carrier. 47 U.S.C. § 251(a)(1) and (c)(1-2). As Time Warner correctly points out, the Commission has the authority "to implement the federal Telecommunications Act of 1996." *Idaho Code* § 62-615(1).

Both regulatory bodies, the Federal Communications Commission ("FCC") and the Commission, have held that an ILEC is prohibited from withholding interconnection based upon a CLEC's failure to receive state certification. *See Time Warner 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 (WCB 2007). Moreover, both the Ninth Circuit Court of Appeals and the Idaho Supreme Court have held that the federal Act established an affirmative duty, owed by local exchange carriers, to provide interconnection unless the incumbent carrier can prove that the interconnection is not "technically feasible." *In re Ryder*, 141 Idaho 918, 925, 120 P.3d 736, 743 (Idaho 2005) (*citing U S WEST Communications, Inc. v. Jennings*, 304 F.3d 950, 960-61 (9th Cir. 2002); 47 C.F.R. § 51.305(e).

Second, Time Warner asserts that the lack of a Title 62 CPCN will prohibit Time Warner from obtaining telephone numbers. Time Warner Brief at 14. This argument is meritless and best explained by example. Under both Title 61 and Title 62, the Commission is specifically precluded from exercising authority over paging carriers and mobile radio telecommunications services (i.e., wireless carriers). *Idaho Code* § 62-603(14) provides that "telephone corporations providing radio paging, [or] mobile radio telecommunications services . . . are exempt from any requirement of this chapter or title 61, Idaho Code." In other words, the Commission exercises no regulatory authority over paging or wireless telephone corporations.

Consequently, the Commission does not issue Title 62 CPCNs to these types of carriers. However, these types of carriers obtain telephone numbers from the numbering authority. Indeed, as Time Warner notes in a footnote, telephone numbers are actually assigned by a federal agency (the North American Numbering Plan Administrator (NANPA)) that provides [telephone] numbers “only to entities that are licensed or certificated as carriers under the [federal Telecommunications] Act.” Time Warner Brief at n.38. Again, the fact that the Commission cannot award paging or wireless carriers a Title 62 CPCN does not prohibit them from obtaining telephone numbers from NANPA. Likewise, the lack of a Title 62 CPCN issued under Rule 114 does not prohibit Time Warner from obtaining numbers from NANPA.

It is illustrative that Time Warner has not sought to argue that the Idaho Act should be invalidated. Rather, the Company argues that is the Commission’s denial of its Application that is subject to federal preemption. This argument betrays a fundamental misunderstanding of the doctrine. Federal preemption is an attack on the state law at issue and not the administrative action undertaken pursuant to that law. Federal preemption invalidates state laws when it is clear that Congress intended federal law to “occupy the legislative field, or if there is an actual conflict between state and federal law.” *See Altria Group, Inc. v. Good*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 538, 543 (2008).

The state law at issue in this case, *Idaho Code* § 62-604, does not, explicitly or implicitly, prohibit Time Warner’s entry into the Idaho market. Indeed, state law encourages competition in the telecommunications industry in accordance with both Title 62 and the federal Telecommunications Act. *Idaho Code* § 62-602(4). Section 62-604 merely acts as a type of eligibility “weigh-station” to determine which type of telecommunications providers will be subject to state regulation. Therefore, it is difficult to envision how a finding that an entity is exempt from state regulation could be preempted or invalidated by federal law.

Finally, Time Warner complains that it will be prohibited from routing calls to other carriers without a Title 62 CPCN. However, as explained above, there are many telephone corporations in Idaho such as wireless companies, pagers, and interexchange carriers which do not have CPCNs and are able to route calls without a Title 62 CPCN. Time Warner is free to enter the wholesale market or any telecommunications market within Idaho. That is state law. Consequently, Time Warner’s argument that lack of a CPCN constitutes a barrier to entry is without merit.

## VII. CONCLUSION

Therefore, after a careful review of the record and based upon the foregoing analysis, the Commission reaffirms its prior ruling in Order No. 31012 denying Time Warner's Application for a CPCN. The Commission finds that its prior decision is: (1) based upon substantial evidence; (2) in accordance with the clear legislative intent that the agency does not have the necessary jurisdiction and authority to regulate Time Warner in the manner it has requested; and (3) does not constitute an actual impediment to Time Warner's entry into the Idaho market.

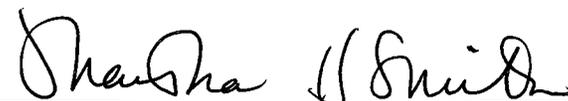
### ORDER

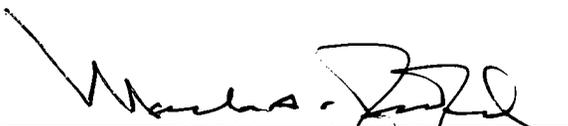
IT IS HEREBY ORDERED that Time Warner Cable Information Services (Idaho), LLC's Petition for Reconsideration of Commission Order No. 31012, denying Time Warner's Application for a Certificate of Public Convenience and Necessity to provide local exchange telecommunications services within the State of Idaho, is denied.

THIS IS A FINAL ORDER DENYING RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. TIM-T-08-01 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

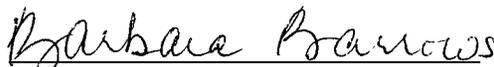
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 27<sup>th</sup>  
day of August 2010.

  
J.M.D. KEMPTON, PRESIDENT

  
MARSHA H. SMITH, COMMISSIONER

  
MACK A. REDFORD, COMMISSIONER

ATTEST:

  
Barbara Barrows  
Assistant Commission Secretary

O:TIM-T-08-01\_np4\_Reconsideration