

EXHIBIT 5



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June 13, 2007

VIA FACSIMILE 360.321.8118
AND FEDERAL EXPRESS

Julia H. DeMartini
Whidbey Telephone Co.
14888 SR 525
Langley, WA 98260

Dear Ms. DeMartini:

This letter is written in response to your letter dated June 5, 2007.

At the outset I would note it is a bit disappointing that you have not provided me with your email address and your counsel, Robert S. Snyder, refused to provide me with his email address. I would hope and respectfully request, you will provide me with your email addresses to speed our correspondence.

Sprint CLEC is the network provider for Millenium Cable Company who will begin selling local service in your service area. With this in mind, we need to set-up wireline-to-wireline porting with your company: the reason for my original BFR. The switches owned by Whidbey Telecom within the South Whidbey rate center are currently non-portable according to the LERG. We need to ensure LNP functionality is available to Sprint in Whidbey Telecom's service area. Once again, the CLLI codes of the switching entity are listed as follows:

LNLWAXARS0
CLTNWAXARS0
LNLWAXARS1
SWHDWAXXDS0
CLTNWAXARS1
FELDWAXARS0
SWHDWAXX02T

In response to your request for legal authority on page 3, I have included the attached order (WC Docket No. 06-55). In the attached Time Warner declaratory ruling, the FCC has made it clear that wholesale providers such as Sprint are entitled to interconnect when providing services to other providers, including VOIP providers and that these rights do not depend upon the regulatory classification of the retail service offered to the end user. As a local exchange carrier, Whidbey is obligated to comply with a porting request received from another telecommunications carrier such as Sprint. The FCC's order makes it clear that Sprint's status as a wholesale provider does not relieve Whidbey of that obligation.

Page 2
Date
Subject:

The only legitimate basis for a refusal to port is if your company has been granted an LNP suspension either by the FCC or the commission in the state which your company operates. Sprint is unaware that your company has been granted such a suspension.

Please provide me one of the following a) the date when Whidbey Telecom switches will be open to support local number portability keeping in mind the six-month regulatory timeline, b) the docket number of the FCC or state commission order suspending your LNP participation and the date such suspension ends; or c) a specific technical reason your company is unable to port with Sprint CLEC and a date by which the technical obstacle will be overcome.

Please advise me when Whidbey Telephone Company switches will be open to support local number portability.

Sincerely,



Victoria A. Danilov
Sprint Communications Company L.P.

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

In the Matter of)	
)	
Time Warner Cable Request for Declaratory)	
Ruling that Competitive Local Exchange Carriers)	WC Docket No. 06-55
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

Adopted: March 1, 2007

Released: March 1, 2007

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) grants a petition for declaratory ruling filed by Time Warner Cable (TWC) asking the Commission to declare that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent local exchange carriers (LECs) when providing services to other service providers, including voice over Internet Protocol (VoIP) service providers pursuant to sections 251(a) and (b) of the Communications Act of 1934, as amended (the Act).¹ As explained below, we reaffirm that wholesale providers of telecommunications services are telecommunications carriers for the purposes of sections 251(a) and (b) of the Act, and are entitled to the rights of telecommunications carriers under that provision. We conclude that state commission decisions denying wholesale telecommunications service providers the right to interconnect with incumbent LECs pursuant to sections 251(a) and (b) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment.

II. BACKGROUND

A. TWC's Petition

2. On March 1, 2006, TWC filed a petition for declaratory ruling requesting that the Commission affirm that "requesting wholesale telecommunications carriers are entitled to obtain

¹ Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55 (filed Mar. 1, 2006) (Petition); 47 U.S.C. § 251; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act or the Act).

interconnection with incumbent LECs to provide wholesale telecommunications services to other service providers" (including VoIP-based providers).² In its Petition, TWC states that in 2003 it began to deploy a facilities-based competitive telephone service using VoIP technology, which enables it to offer a combined package of video, high-speed data, and voice services.³ TWC purchases wholesale telecommunications services from certain telecommunications carriers, including MCI WorldCom Network Services Inc. (MCI)⁴ and Sprint Communications Company, L.P. (Sprint), to connect TWC's VoIP service customers with the public switched telephone network (PSTN).⁵ MCI and Sprint provide transport for the origination and termination on the PSTN through their interconnection agreements with incumbent LECs. In addition, MCI and Sprint provide TWC with connectivity to the incumbent's E911 network and other necessary components as a wholesale service.⁶

3. TWC claims that MCI has been unable to provide wholesale telecommunications services to TWC in certain areas in South Carolina and that Sprint has been unable to provide wholesale telecommunications services to TWC in certain areas in Nebraska because, unlike certain other state commissions, the South Carolina Public Service Commission (South Carolina Commission) and the Nebraska Public Service Commission (Nebraska Commission) have determined that rural incumbent LECs are not obligated to enter into interconnection agreements with competitive service providers (like MCI and Sprint) to the extent that such competitors operate as wholesale service providers.⁷ TWC argues

² Petition at 11. The Petition was placed on public notice on March 6, 2006 with comments due by March 27, 2006, and reply comments due by April 11, 2006. *Pleading Cycle Established for Comments on Time Warner Cable's Petition for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Public Notice, 21 FCC Rcd 2276 (Wireline Comp. Bur. 2006). Upon Motions for Extension, the comment cycle was extended by two weeks, to April 10, 2006 for comments and April 25, 2006 for reply comments. *Wireline Competition Bureau Grants Request for Extension of Time to File Comments on Time Warner Cable's Petition for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Service to VoIP Providers*, WC Docket 06-55, Public Notice, 21 FCC Rcd 2978 (Wireline Comp. Bur. 2006). Contemporaneously with its filing of the Petition, TWC filed a Petition for Preemption requesting that the Commission preempt the South Carolina Commission's denial of TWC's application for a Certification of Public Convenience and Necessity in areas where rural LECs provide service. That preemption petition remains pending, and we do not address it here. *Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act of 1934, as Amended*, WC Docket No. 06-54 (filed Mar. 1, 2006).

³ Petition at 2-3.

⁴ As a result of the merger between MCI and Verizon, TWC's contractual arrangements with MCI have been assigned to Verizon Business. *Id.* at 4 n.5

⁵ *Id.* at 4.

⁶ *Id.*

⁷ See *Petition of MCI Metro Access Transmission Services LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company, Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Docket No. 2005-67-C, Order Ruling on Arbitration, Order No. 2005-544 (Oct. 7, 2005) (South Carolina Commission RLEC Arbitration Order); *Sprint Communications Company L.P., Overland Park, Kansas, Petition for arbitration under the Telecommunications Act, of certain issues associated with the proposed interconnection agreement between Sprint and Southeast Nebraska Telephone Company, Falls City, Application No. C-3429, Findings and Conclusions* (Sept. 13, 2005) (Nebraska Commission Arbitration Order) appeal filed, Sprint (continued....)

that the South Carolina and Nebraska Commissions misinterpreted the statute when they decided, among other things, that competitive LECs providing wholesale telecommunications services to other service providers, in this case VoIP-based providers, are not "telecommunications carriers" for the purposes of section 251 of the Act, and, therefore, are not entitled to interconnect with incumbent LECs.

4. TWC asks the Commission to grant a declaratory ruling reaffirming that telecommunications carriers are entitled to obtain interconnection with incumbent LECs to provide wholesale telecommunications services to other service providers. The Petition also requests that the Commission clarify that interconnection rights under section 251 of the Act are not based on the identity of the wholesale carrier's customer.

B. State Commission Decisions

5. *South Carolina.* On October 8, 2004, MCI initiated interconnection negotiations pursuant to section 252(a) of the Act with four rural incumbent LECs operating in South Carolina. These rural incumbent LECs claimed that they were not required to accept traffic from a third-party provider that purchases wholesale telecommunications services from MCI.⁸ On March 17, 2005, MCI filed a petition with the South Carolina Commission seeking arbitration of the unresolved issues between MCI and the rural incumbent LECs.⁹ In arbitrating this dispute, the South Carolina Commission agreed with the rural incumbent LECs that the arbitrated interconnection agreement should be limited to the traffic generated by the rural incumbent LECs' customers and MCI's direct end-user customers on their respective networks.¹⁰ The South Carolina Commission determined that MCI is not entitled to seek interconnection with the rural incumbent LECs with respect to the wholesale services MCI proposed to provide to TWC because such wholesale service does not meet the definition of "telecommunications service" under the Act and, therefore, MCI is not a "telecommunications carrier" with respect to those services.¹¹ The South Carolina Commission also found that section 251(b) obligations "relate to parallel obligations between two competing telecommunications carriers" and that MCI's intent to act as an "intermediary for a

(Continued from previous page) _____
Communications Company L.P. v. Nebraska Public Service Commission, No. 4:05CV3260 (D. Neb. Oct. 11, 2005). As explained below, this aspect of the state decisions regarding wholesale services is not specific to wholesale carriers that serve VoIP service providers.

⁸ Petition at 4-5. See also *South Carolina Commission RLEC Arbitration Order*. The four rural incumbent LECs with which MCI sought interconnection agreements were Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company. The South Carolina Commission referred to the four rural LECs collectively as "the RLECs" throughout its order. The South Carolina Commission addressed similar issues and made similar findings in the *South Carolina Commission Horry Arbitration Order. Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Order Ruling on Arbitration, Docket No. 2005-188-C (South Carolina PSC Jan. 11, 2006) (*South Carolina Horry Arbitration Order*).

⁹ *South Carolina Commission RLEC Arbitration Order* at 2.

¹⁰ *South Carolina Commission RLEC Arbitration Order* at 7. See also *South Carolina Commission Horry Arbitration Order* at 6. In addition, the South Carolina Commission denied TWC's request to intervene in the arbitration.

¹¹ See *South Carolina Commission RLEC Arbitration Order* at 11.

facilities-based VoIP service provider” is a type of non-parallel relationship not contemplated or provided for under the Act.¹²

6. *Nebraska*. On December 16, 2004, Sprint commenced interconnection negotiations with Southeast Nebraska Telephone Company (SENTCO), a rural incumbent LEC, pursuant to section 252(a) of the Act.¹³ In its September 13, 2005 arbitration decision, the Nebraska Commission determined that Sprint is not a “telecommunications carrier” under the *NARUC I* and *Virgin Islands* test for common carriage because the relationship between Sprint and TWC is an “individually negotiated and tailored, private business arrangement” that is an untariffed offering to a sole user of this service,¹⁴ and, therefore, Sprint cannot assert any rights under sections 251 and 252 of the Act. In addition, the Nebraska Commission held that because TWC operates the switch that “directly serves the called party,” Sprint was not entitled to exercise rights under section 251(b).¹⁵

7. *Other State Proceedings*. TWC asserts that, in contrast to the South Carolina and Nebraska decisions, public utility commissions in Illinois, Iowa, New York and Ohio have recognized that wholesale service providers, such as Sprint and MCI, are telecommunications carriers with rights under section 251 of the Act.¹⁶ In addition, TWC and other commenters point to other state commissions that have before them pending proceedings on this same issue.¹⁷

¹² *Id.* at 9.

¹³ See *Nebraska Commission Arbitration Order*.

¹⁴ *Id.* at 7-9 (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (*NARUC I*), *cert. denied*, 425 U.S. 992 (1976); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999)).

¹⁵ *Id.* at 7-8.

¹⁶ Petition at 8-9 (citing *Cambridge Telephone Company, et al. Petitions for Declaratory Relief and/or Suspensions for Modification Relating to Certain Duties under §§ 251(b) and (c) of the Federal Telecommunications Act*, Case Nos. 050259, *et al.*, Order (Illinois Commerce Commission Aug. 23, 2005), *appeal pending Harrisonville Telephone Company, et al. v. Illinois Commerce Commission, et al.*, Case No. 3:06-CV-00073, GPMDGW, Complaint for Declaratory and Other Relief (S.D. Ill. filed Aug. 16, 2006); *Arbitration of Sprint Communications Co. v. Ace Communications Group, et al.*, Docket No. ARB-05-02, Order on Rehearing (Iowa Utilities Board Nov. 28, 2005); *Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Inter-carrier Agreement with Independent Companies*, Case 05-C-0170, Order Resolving Arbitration Issues (New York Public Service Commission May 24, 2005), *on appeal Berkshire Telephone Corp. v. Sprint Communications Co. L.P.*, Civ. Action No. 05-CV-6502 (CJS)(MWP)(W.D.N.Y. filed Sept. 26, 2005); *Application and Petition in Accordance with Section II.A.2.B of the Local Service Guidelines Filed by: The Champaign Telephone Co., Telephone Services Co., the Germantown Independent Telephone Co., and Doylestown Telephone Co.*, Case Nos. 04-1494-TP-UNC, *et al.*, Finding and Order (Public Utility Commission of Ohio Jan. 26, 2005), *reh'g denied in pertinent part*, Order on Rehearing (Public Utilities Commission of Ohio Apr. 13, 2005)).

¹⁷ See Petition at 9. See, e.g., Letter from Cherie R. Kiser, Counsel for IDT Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55, Appendix (filed Sept. 25, 2006) (providing an updated overview of pending state and court proceedings in Illinois, Iowa, New York, North Carolina and Texas).

III. DISCUSSION

8. The Bureau grants TWC's request to the extent described below. Because the Act does not differentiate between retail and wholesale services when defining "telecommunications carrier" or "telecommunications service," we clarify that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services.¹⁸ The Bureau finds that a contrary decision would impede the important development of wholesale telecommunications and facilities-based VoIP competition, as well as broadband deployment policies developed and implemented by the Commission over the last decade, by limiting the ability of wholesale carriers to offer service.

A. "Telecommunications Service" Can Be Either a Wholesale or Retail Service

9. Consistent with Commission precedent, we find that the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), and we confirm that providers of wholesale telecommunications services enjoy the same rights as any "telecommunications carrier" under those provisions of the Act.¹⁹ We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251.

10. The Act defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."²⁰ The Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."²¹ Finally, any provider of telecommunications services is a "telecommunications carrier" by definition under the Act.²²

11. It is clear under the Commission's precedent that the definition of "telecommunications services" is not limited to retail services, but also includes wholesale services when offered on a common carrier basis. The South Carolina Commission's contrary interpretation – that services provided on a

¹⁸ Because neither of the primary state commission proceedings underlying the Petition relied on or even interpreted section 251(c) of the Act, we do not read the Petition to seek clarification on the ability to interconnect pursuant to that provision. As such, we only address the issues raised in the Petition as they apply to sections 251(a) and (b) of the Act.

¹⁹ To resolve the confusion over the meaning of "wholesale," we affirm the longstanding Commission usage of a wholesale transaction of a service or product as an input to a further sale to an end user, in contrast to a retail transaction for the customer's own personal use or consumption. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237, 19423, para. 13 (1999) ("Black's Law Dictionary defines retail as '[a] sale for final consumption in contrast to a sale for further sale or processing (i.e., wholesale) . . . to the ultimate consumer.'" (quoting Black's Law Dictionary 1315 (6th ed. 1990))).

²⁰ 47 U.S.C. § 153(43).

²¹ 47 U.S.C. § 153(46).

²² 47 U.S.C. § 153(44).

wholesale basis to carriers or other providers are not telecommunications services because they are not offered "directly to the public"²³ has been expressly rejected by the Commission in the past, as we explain below.²⁴

12. The definition of "telecommunications services" in the Act does not specify whether those services are "retail" or "wholesale," but merely specifies that "telecommunications" be offered for a fee "directly to the public, or to such classes of users as to be effectively available directly to the public."²⁵ In *NARUC II*, the D.C. Circuit stated that "[t]his does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users."²⁶ Thus, the question at issue in this proceeding is whether the relevant wholesale telecommunications "services" are offered "directly to the public, or to such classes of users as to be effectively available directly to the public." Indeed, the definition of "telecommunications services" long has been held to include both retail and wholesale services under Commission precedent. In the *Non-Accounting Safeguards Order*, the Commission concluded that wholesale services are included in the definition of "telecommunications service."²⁷ To reach this result, the Commission determined that the term "wholesale" in section 251(c)(4) "implicitly recognizes that some telecommunications services are wholesale services."²⁸ The *Non-Accounting Safeguards Order* went on to find that the legislative history of the Act also supports this determination, as it "indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services, which include wholesale services to other carriers" and that "the term 'telecommunications service' was not intended to create a retail/wholesale distinction."²⁹ The Commission affirmed these conclusions in the *Non-Accounting Safeguards Reconsideration Order* where it found "no basis in the statute, legislative history, or FCC precedent for finding the reference to 'the public' in the statutory definition to be

²³ *South Carolina Commission Arbitration Order* at 7 (stating that "[t]he carrier directly serving the end user customer is the only carrier entitled to request interconnection for the exchange of traffic under Section 251(b) of the Act."), 11 (concluding that "MCI is not entitled to seek interconnection with the RLECs with respect to the service MCI proposed to provide indirectly to TWCIS' end user customers.").

²⁴ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22033, para. 264 (1996) (subsequent history omitted) (*Non-Accounting Safeguards Order*); see also *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, Second Order on Reconsideration, 12 FCC Rcd 8653, 8670-71, para. 33 (1997) (*Non-Accounting Safeguards Reconsideration Order*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9177-8, para. 785 (1997) (*Universal Service Order*) (subsequent history omitted).

²⁵ 47 U.S.C. § 153(46).

²⁶ *National Ass'n of Regulatory Utility Com'rs v. FCC*, 533 F.2d 601, 608 (C.A.D.C. 1976) (*NARUC II*).

²⁷ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22033, para. 264.

²⁸ *Id.* See also 47 U.S.C. § 251(c)(4) (requiring incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers") (emphasis added).

²⁹ *Id.* at 22032-33, 22033-34, paras. 263, 265.

intended to exclude wholesale telecommunications services.³⁰ Further, in the *Universal Service Order*, the Commission determined that, while “telecommunications services” are intended to encompass only telecommunications provided on a common carrier basis, “common carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.”³¹ In *Virgin Islands*, the D.C. Circuit stressed that the Commission did not rely on a wholesale-retail distinction, stating that “the focus of its analysis is on whether AT&T-SSI offered its services indiscriminately in a way that made it a common carrier . . . and the fact that AT&T-SSI could be characterized as a wholesaler was never dispositive.”³²

13. We further find that our decision today is consistent with and will advance the Commission’s goals in promoting facilities-based competition as well as broadband deployment. Apart from encouraging competition for wholesale services in their own right,³³ ensuring the protections of section 251 interconnection is a critical component for the growth of facilities-based local competition.³⁴ Moreover, as the Commission has recognized most recently in the *VoIP 911 Order*, VoIP is often accessed over broadband facilities, and there is a nexus between the availability of VoIP services and the goals of section 706 of the Act.³⁵ Furthermore, as the Petition and some commenters note, in that order the Commission expressly contemplated that VoIP providers would obtain access to and interconnection with the PSTN through competitive carriers.³⁶ Therefore, we also rely on section 706 as a basis for our determination today that affirming the rights of wholesale carriers to interconnect for the purpose of exchanging traffic with VoIP providers will spur the development of broadband infrastructure.³⁷ We further conclude that such wholesale competition and its facilitation of the introduction of new

³⁰ *Non-Accounting Safeguards Reconsideration*, 12 FCC Rcd at 8670-71, para. 33.

³¹ *Universal Service Order*, 12 FCC Rcd at 9177-8, para. 785.

³² *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 930 (D.C. Cir. 1999) (*Virgin Islands*).

³³ As explained above, *see supra* para. 1, we affirm today the rights of *all* wholesale carriers to interconnect when providing service to other providers, and therefore we reject the notion that we must dismiss the Petition in part with respect to the Nebraska Commission’s decision because the *Nebraska Commission Arbitration Order* did not discuss Sprint’s provision of service to VoIP providers. *See* Letter from Thomas J. Moorman and Paul M. Schudel, Counsel to SENTCO, to Mariene H. Dortch, Secretary, FCC, WC Docket No. 06-55 (filed Feb. 12, 2007).

³⁴ *E.g.*, Advance-Newhouse Comments at 3 (facilities-based residential competition); Verizon Comments at 3 (wholesale service and local competition).

³⁵ *IP-Enabled Services*, WC Docket No. 04-36; *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10264, para. 31 (2005) (*VoIP 911 Order*) (citing 47 U.S.C. §157 nt.). Section 706 directs the Commission (and state commissions with jurisdiction over telecommunications services) to encourage the deployment of advanced telecommunications capability to all Americans by using measures that “promote competition in the local telecommunications market” and removing “barriers to infrastructure investment.” *Id.*

³⁶ *See* Petition at 21 (citing *VoIP 911 Order*, 20 FCC Rcd at 10267, para.38); *see also, e.g.*, VON Coalition Comments at 3.

³⁷ Verizon Comments at 6 (“Simply put, just as the availability of VoIP drives both providers to deploy and end-user customers to purchase broadband services, state commission decisions that effectively prevent consumers from using their broadband connection for VoIP telephony discourage the deployment and use of broadband.”).

technology holds particular promise for consumers in rural areas.³⁸

14. In making this clarification, we emphasize that the rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis.³⁹ We do not address or express any opinion on any state commission's evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service. However, we make clear that the rights of telecommunications carriers under sections 251 (a) and (b) apply regardless of whether the telecommunications services are wholesale or retail, and a state decision to the contrary is inconsistent with the Act and Commission precedent.⁴⁰

B. The Section 251 (a) and (b) Rights of a Wholesale Telecommunications Carrier Do Not Depend on the Regulatory Classification of the Retail Service Offered to the End User

15. As explained above, a provider of wholesale telecommunications service is a telecommunications carrier and is entitled to interconnection under section 251 of the Act. The regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251. As such, we clarify that the statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b). Thus, we need not, and do not, reach here the issues raised in the *IP-Enabled Services* docket, including the statutory classification

³⁸ E.g., GCI Reply Comments at 4 ("offerings like those of TWC are especially valuable to rural consumers"); Sprint Nextel Comments at 4 n.6 ("Wholesale carrier services are particularly important to smaller cable operators, which often serve low density areas and lack the resources, scale or desire to enter the telephony market alone."); VON Coalition Comments at 3. See also, Letter from Vonya B. McCann, Vice President – Government Affairs, Sprint Nextel, to Marlene H. Dortch, FCC, WC Docket No. 06-55 at 2 (filed Jan. 30, 2007) ("These services enable even small cable providers to expand their service offerings -- faster and at lower cost -- and thus promote investment in areas previously under-served and lacking choices for consumers.").

³⁹ For example, under the Commission's existing rules, "[a] telecommunications carrier that has interconnected or gained access under section [] 251(a) . . . of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well." 47 C.F.R. § 51.100(b) (emphasis added). Thus, the fact that a telecommunications carrier is also providing a non-telecommunications service is not dispositive of its rights.

⁴⁰ See *South Carolina Commission RLEC Arbitration Order* at 14 (limiting the definition of end user to subscriber of telephone exchange service); *Nebraska Commission Arbitration Order* at 9, paras. 25-26 (reasoning that the exclusion of exchange access in the Commission's reciprocal compensation rules indicates that TWC's offering of exchange access is not offered to the general public). Although the Nebraska Commission's order expressly raised the issue of Sprint's entitlement to reciprocal compensation pursuant to section 251(b)(5), commenters contend that the Nebraska Commission's decision properly is interpreted to affect section 251(a) and (b) rights more broadly. See AT&T Comments at 1-2. We do not address commenters' requests for classification of other specific service offerings or traffic arrangements. See, e.g., *Neutral Tandem Comments* (seeking a declaration of section 251 rights to provide tandem switching and transit services).

of VoIP services.⁴¹ We thus reject the arguments that the regulatory status of VoIP is the underlying issue in this matter or that Commission action on this Petition will prejudice issues raised in the *IP-Enabled Services* docket.⁴² We also make clear that we do not address any entitlement of a retail service provider to serve end users through such a wholesale arrangement, nor, contrary to the views of some commenters, do we read the Petition to seek such rights.⁴³ Rather, in issuing this decision, we reiterate that we only find that a carrier is entitled to interconnect with another carrier pursuant to sections 251(a) and (b) in order to provide wholesale telecommunications service.

16. Finally, we emphasize that our ruling today is limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection *in their own right* for the purpose of transmitting traffic to or from another service provider. To address concerns by commenters

⁴¹ In the *IP-Enabled Services NPRM*, the Commission sought comment on whether VoIP should be classified as a telecommunications service or an information service. See *IP-Enabled Services NPRM*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (*IP-Enabled Services NPRM*).

⁴² HTC/PBT Comments at 3 (referring to the ongoing *IP-Enabled Services* proceeding, “[t]his Commission should not fall prey to pressure from parties to issue piecemeal orders.”); ITTA et al. Comments at 8 (“[t]he Commission should accordingly declare either that TWC is a telecommunications carrier itself, or is subject to the same intercarrier compensation, universal service and other requirements imposed on similarly situated carriers”); JSI Comments at 7 (“While the treatment of interconnected VoIP service providers remains unclear, Time Warner seeks to have the Commission make declarations that would greatly favor VoIP service providers by granting them certain rights without attendant obligations.”); Pennsylvania Commission Comments at 5 (suggesting that the Commission “consider resolving complex policy matters in more generic proceeding such as the IP-Enabled Services and Intercarrier Compensation rulemakings, as opposed to limited decisions in case-specific pleadings”); Qwest Comments; NTCA Reply Comments at 4-5; SDTA Comments at 4; TCA Comments at 5-7; WTA Comments at 3. See also, Letter from Joshua Seidemann, Independent Telephone and Telecommunications Alliance, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55, Attach at 6 (filed Dec. 14, 2006) (ITTA *Ex Parte*); Letter from Keith Oliver, Vice President -- Finance, Home Telephone Company, on behalf of South Carolina Telephone Coalition, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55, Attach. at 8 (filed Jan. 30, 2007) (SCTC *Ex Parte*).

⁴³ See, e.g., JSI Comments at 12 (“Time Warner is seeking to claim specific rights without accepting attendant obligations.”); ITTA Comments at 12 (“In other words, entities that seek the benefits of carrier-type interconnection, including for example, the right to obtain numbering resources and number portability, should be subject to the same obligations as the traditional carriers with whom they compete.”); Western Alliance at 3, 6 (“TWC is not entitled to any CLBC rights under Section 251 and 252 as long as it elects to reject its former CLBC status and characterize itself instead as a non-regulated information service provider.”). Furthermore, and contrary to the position put forth in the *South Carolina Commission Arbitration Order* and the assertions of some commenters, we do not read the Act or have any policy reason to impose a requirement that telecommunications carriers seeking to interconnect must have obligations or business models parallel to those of the party receiving the interconnection request. See *South Carolina Commission Arbitration Order* at 9 (stating that “obligations imposed by Section 251(b) . . . relate to parallel obligations between two competing telecommunications carriers”); SCTC Comments at 8 (arguing that “the obligations imposed by Section 251(b) . . . relate to parallel obligations between two competing telecommunications carriers within a common local calling area.”). See also Letter from Gerard J. Duffy, Counsel for Western Telecommunications Alliance, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-55 at 6 (filed Feb. 6, 2007) (stating that the “Sprint-Time Warner Model Unfairly Tilts Competitive Playing Field” and that Time Warner is not subject to the Title II and consumer protection standards of incumbent LECs).

about which parties are eligible to assert these rights,⁴⁴ we make clear that the scope of our declaratory ruling is limited to wholesale carriers that are acting as telecommunications carrier for purposes of their interconnection request. In affirming the rights of wholesale carriers, we also make clear that today's decision in no way diminishes the ongoing obligations of these wholesalers as telecommunications carriers, including compliance with any technical requirements imposed by this Commission or a state commission.⁴⁵ In addition, we agree that it is most consistent with Commission policy that where a LEC wins back a customer from a VoIP provider, the number should be ported to the LEC that wins the customer at the customer's request,⁴⁶ and therefore we make such a requirement an explicit condition to the section 251 rights provided herein.⁴⁷ Other concerns about porting will be addressed in the *IP-Enabled Services* proceeding.⁴⁸

C. Other Issues Raised by Commenters

17. Certain commenters ask us to reach other issues, including the application of section 251(b)(5)⁴⁹ and the classification of VoIP services.⁵⁰ We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically that the Commission is currently addressing elsewhere on more

⁴⁴ See, e.g., JSI Comments at 4 ("MCI's role as an intermediary is to be largely hands-off and remote."); SCTC Comments at 11-14 (asserting that "MCI merely proposed to act as an intermediary - a 'connection' - between two facilities-based carriers - the RLEC and Time Warner," and that "Time Warner is seeking . . . to make an 'end run' around the important federal state proceedings and powers"); Western Alliance at 3 ("What TWC is asking herein is for MCI and Sprint to be authorized to use the Section 252 procedures and to negotiate Section 251(b) and/or Section 252(c) interconnection agreements in TWC's behalf . . ."). Although the Petition does refer in passing to MCI and Sprint acting "on behalf of" TWC, the focus of the Petition and even the underlying state commission decisions concern the rights of those carriers as wholesale telecommunications service providers, and we therefore do not reach the question of the rights of an agent of a VoIP service provider. See Petition at 12, 23; South Dakota Comments at 6. See also, Black's Law Dictionary (8th ed. 2004) (defining agent as "[o]ne authorized to act for or in place of another" or "representative").

⁴⁵ See, e.g., SCTC *Ex Parte*, Attach. at 9 (asserting that each wholesale provider should be "technically responsible for the traffic it delivers to an ILEC.").

⁴⁶ See, e.g., *id.*, Attach. at 10 (seeking protection for "consumers that want to port numbers away from 3rd party service providers who do not have these porting responsibilities."); JSI Comments at 12-14 ("Time Warner is seeking to create a one-way approach to porting and the Commission should reject the Petition."). Because our number portability rules apply to all local exchange carriers, customers effectively are able to port numbers to VoIP providers today by virtue of their relationship with a wholesale local exchange carrier. 47 C.F.R. § 52.23.

⁴⁷ We note that Verizon already makes such a commitment under its agreements with Time Warner Cable. See Verizon Reply Comments at 11-12.

⁴⁸ See *IP-Enabled Services NPRM*, 19 FCC Rcd at 4911-12, para. 73.

⁴⁹ See, e.g., Neutral Tandem Comments at 1, 5, 7 (seeking Commission protection against incumbent LEC and state restrictions on resale and tandem competition, and for the establishment of the right of third-party providers to be defined as "users" under interconnection agreements).

⁵⁰ See, e.g., Qwest Comments at 6 ("The Nebraska position is obviously dependent on how the Commission ultimately classifies VoIP service.").

comprehensive records.⁵¹ For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket.⁵² Moreover, in this declaratory ruling proceeding we do not find it appropriate to revisit any state commission's evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law. In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein.⁵³ We do not, however, prejudge the Commission's determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket.

D. Procedural Issues

18. *Jurisdiction.* We reject SENTCO's contention that the Commission lacks jurisdiction over TWC's Petition because it is a request for preemption of state decisions on issues assigned by statute specifically to states for review.⁵⁴ TWC filed its petition as a request for declaratory ruling requesting clarification of the interpretation of the 1996 Act pursuant to section 1.2 of the Commission's rules.⁵⁵ As such, the Commission's authority over particular state decisions is not at issue here. And in any event, the Act establishes – and courts have confirmed – the primacy of federal authority with regard to several of the local competition provisions in the 1996 Act. First, section 201(b) authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act.”⁵⁶ As the Supreme Court has noted, this provision “*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies” – including issues addressed by section 251.⁵⁷ Second, except in limited cases, the Commission's authority with regard to the issues of local

⁵¹ See, e.g., *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd. 4685 (2005).

⁵² *IP-Enabled Services*, 20 FCC Rcd at 10245. Similarly, we disagree with the assertions that it is necessary to complete the proceedings pending in the IP-enabled services, intercarrier compensation, and universal service dockets in order to take action on or instead of taking action on this Petition. See, e.g., NTCA Reply Comments at 5-6.

⁵³ See, e.g., Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is “administration, payment, and collection of intercarrier compensation”); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers “intercarrier compensation, including exchange access and reciprocal compensation”).

⁵⁴ SENTCO Comments at 8.

⁵⁵ 47 C.F.R. § 1.2.

⁵⁶ 47 U.S.C. § 201(b).

⁵⁷ *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, 6841, para. 22 (2005) (*BellSouth DSL Order*) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999) (emphasis in original)).

competition specified in section 251 supersede state jurisdiction over these matters.⁵⁸ In the Supreme Court's words, "the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."⁵⁹ In clarifying existing statutory requirements under the Act as interpreted by the Commission, however, the Commission's decision may affect state decisions if state commissions have differing interpretations of the statute.

19. *Notice.* We disagree with the assertion that the Petition should be dismissed because TWC did not serve the Petition on the Nebraska Commission.⁶⁰ We do not read the Petition for Declaratory Ruling as a request for preemption of a particular order that would trigger this requirement. In its Petition, TWC requests that the Commission make a statement clarifying the conflicting interpretations among the states concerning wholesale carriers' rights under sections 251(a) and (b). Although TWC specifically describes the decisions of the Nebraska Commission and South Carolina Commission in its argument, this Petition for Declaratory Ruling does not request state preemption and we do not make any determination about whether to preempt any specific state decisions. As such, there is no notice requirement at issue.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to sections 1, 3, 4, 201-205, 251, and 252 of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, and 252, and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the petition for declaratory ruling filed by Time Warner Cable in WC Docket No. 06-55 IS GRANTED to the extent described by this Order.

⁵⁸ The Act, for example, expressly assigns to the states the authority to arbitrate interconnection disputes between carriers and incumbent LECs and, subject to the general framework set forth by the Commission, to establish appropriate rates for competitive carriers' use of unbundled network elements. *See generally* 47 U.S.C. § 252.

⁵⁹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). *See also Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) ("The new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law."); *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) ("[T]he Act limited state commissions' authority to regulate local telecommunications competition.") (emphasis in original); *MCI Telecom Corp. v. Illinois Bell*, 222 F.3d 323, 342-43 (7th Cir. 2000) (stating, "with the 1996 Telecommunications Act . . . Congress did take over some aspects of the telecommunications industry," and "Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms"). Moreover, as the D.C. Circuit has held, the Commission is entitled to Chevron deference when applying the definition of "telecommunications carrier" in the context of a wholesale service provider. *Virgin Islands*, 198 F.3d at 926 (citing *Chevron U.S.A. Inc. v. Natural Resources Council, Inc.*, 467 U.S. 837, 843 (1984)).

⁶⁰ Nebraska Commission Comments at 7-8. The Nebraska Commission argues that the Petition effectively seeks to preempt state or local regulatory authority. As such, pursuant to Note 1 in section 1.1206(a) of the Commission's rules, the Nebraska Commission asserts that TWC is required to serve the original petition on the state "the actions of which are specifically cited as a basis for requesting preemption." 47 C.F.R. § 1.1206(a) NOTE 1 TO PARAGRAPH.

21. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief, Wireline Competition Bureau

LIST OF COMMENTERS

WC Docket No. 06-55

<u>Commenter</u>	<u>Abbreviation</u>
Advance-Newhouse Communications	Advance-Newhouse
Alpheus Communications, L.P. PAETEC Communications, Inc. U.S. Telepacific Corp. D/B/A Telepacific Communications	Alpheus <i>et al.</i>
AT&T Inc.	AT&T
Bridgecom International, Inc. Broadview Networks, Inc. CTC Communications Corp. NuVox Communications Xspedius Communications LLC COMPTEL	Bridgecom <i>et al.</i>
Broadwing Communications, LLC Fibertech Networks, LLC Integra Telecom, Inc. Lightyear Communications, Inc. McLeodUSA Telecommunications Services, Inc. Mpower Communications Corp. Norlight Telecommunications, Inc. Pac-West Telecomm, Inc.	Broadwing <i>et al.</i>
Comcast Corporation	Comcast
Global Crossing North America, Inc.	Global Crossing
Home Telephone Company, Inc. BPT, Inc.	HTC/BPT
Independent Telephone and Telecommunications Alliance National Exchange Carrier Association, Inc. National Telecommunications Cooperative Association The Organization for the Promotion and Advancement of Small Telecommunications Companies	ITTA <i>et al.</i>
Iowa RLEC Group	Iowa RLEC
Iowa Utilities Board	IUB
John Staurulakis, Inc.	JSI
Level 3 Communications, LLC	Level 3
National Cable & Telecommunications Association	NCTA
Nebraska Public Service Commission	Nebraska Commission
Neutral Tandem, Inc.	Neutral Tandem
Pennsylvania Public Utility Commission	Pennsylvania Commission
Pine Tree Networks	PTN
Qwest Communications International Inc.	Qwest
South Carolina Cable Television Association	SCCTA
South Carolina Telephone Coalition	SCTC
South Dakota Telecommunications Association Townes Telecommunications, Inc.	SDTA <i>et al.</i>

ITS Telecommunications Systems, Inc. Public Service Telephone Company Smart City Telecom South Slope Cooperative Telephone Co., Inc. Yadkin Valley Telephone Membership Corporation	
Southeast Nebraska Telephone Company The Independent Telephone Companies	SENTCO
Sprint Nextel Corporation	Sprint Nextel
TCA, Inc.	TCA
Time Warner Cable	TWC
Verizon	Verizon
Voice On The Net (VON) Coalition	VON
Western Telecommunications Alliance	WTA

LIST OF REPLY COMMENTERS

WC Docket No. 06-55

<u>Commenter</u>	<u>Abbreviation</u>
Advance-Newhouse Communications	Advance-Newhouse
Berkeley Cable TV and PBT Cable Services	Berkeley and PBT
Bridgecom International, Inc. Broadview Networks, Inc. CTC Communications Corp. NuVox Communications Xspedius Communications LLC COMPTEL	Bridgecom <i>et al.</i>
Broadwing Communications, LLC Fibertech Networks, LLC Integra Telecom, Inc. Lightyear Communications, Inc. McLeodUSA Telecommunications Services, Inc. Mpower Communications Corp. Norlight Telecommunications, Inc. Pac-West Telecomm, Inc.	Broadwing <i>et al.</i>
Earthlink, Inc.	Earthlink
General Communication, Inc.	GCI
Home Telephone Company, Inc. and PBT, Inc.	HTC/PBT
John Staurulakis, Inc.	JSI
Level 3 Communications, LLC	Level 3
Midcontinent Communications	Midcontinent
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
Nebraska Public Service Commission	Nebraska Commission
Neutral Tandem, Inc.	Neutral Tandem

Rock Hill Telephone Company d/b/a Comporium Lancaster Telephone Company d/b/a Comporium Communications Fort Mill Telephone Company d/b/a Comporium Communications	Comporium.
South Carolina Cable Television Association	SCCTA
South Carolina Telephone Coalition	SCTC
Southeast Nebraska Telephone Company. The Independent Telephone Companies	SENTCO
Southern Communications Service, Inc. d/b/a SouthernLINC Wireless	SouthernLINC Wireless
Sprint Nextel Corporation	Sprint Nextel
Time Warner Cable	TWC
T-Mobile USA, Inc.	T-Mobile
United States Telecom Association	USTA
Verizon	Verizon