STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NOS. 2005-402-C, 2005-403-C, 2005-404-C, 2005-205-C, 2005-406-C

In Re: Complaint of Time Warner Cable Information Services (South Carolina), LLC, Complainant/Petitioner v. St. Stephen Telephone Company, Defendant/Respondent	)	**PROPOSED ORDER**
Complaint of Time Warner Cable Information Services (South Carolina), LLC, Complainant/Petitioner v. Farmers Telephone Cooperative, Inc., Defendant/Respondent	)	
Complaint of Time Warner Cable Information Services (South Carolina), LLC, Complainant/Petitioner v. Home Telephone Company, Inc., Defendant/Respondent	)	

Complaint of Time Warner Cable Information Services (South Carolina), LLC,	)
Complainant/Petitioner	)
v.	)
PBT Telecom, Inc.,	)
Defendant/Respondent	)

Complaint of Time Warner Cable Information Services (South Carolina), LLC,	)
Complainant/Petitioner	)
v.	)
Fort Mill Telephone Company,	)
Defendant/Respondent	)

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the complaint of Time Warner Cable Information Services (South Carolina), LLC (Time Warner, TWCIS, or Complainant) against five incumbent Rural Local Exchange Carriers; St. Stephen Telephone Company, Farmers Telephone Cooperative, Inc., Home Telephone Company, Inc., PBT Telecom, Inc., and Fort Mill Telephone Company (RLECs or Defendants). The Commission granted consolidation of the respective dockets in Order No. 2006-149.

Time Warner's complaint, filed on December 28, 2005, alleged that each of the Defendants had violated 47 U.S.C. § 251(c)(1) by failing to negotiate interconnection in good faith in accordance with 47 U.S.C. § 252. The Defendants' answer denied that they had any duties under § 251(c) due to their status as rural carriers, noted that Time Warner was and is not certificated to provide service in their respective areas, and called into question whether the services being offered by Time Warner were in fact 'telecommunications services' under the Act.

The Defendants then moved to dismiss the proceeding, or, in the alternative, hold it in abeyance. They contended that because their rural exemptions found in 47 U.S.C. § 251 (f)(1)(a) had never been formally pierced by the Commission, they were therefore exempt from any duties found in § 251(c) and the Commission should dismiss the complaint for failure to state a claim upon which relief could be granted. In the alternative, the Defendants moved that the proceeding be held in abeyance in light of two ongoing proceedings at the Federal level. The FCC's IP-Enabled Services[1] proceeding (which may clarify the statutory rights and duties of Voice Over Internet Protocol "VoIP" providers) and Time Warner's own petitions filed with the FCC[2] (seeking preemption of this Commission and a declaratory ruling that CLECs have the right to interconnect with incumbent carriers for the purpose of reselling that connection to a third party such as a VoIP provider). The Defendants argued that the FCC's decisions would impact this matter and therefore "any decision of the Commission that precedes a final ruling by the FCC may be premature."[3]

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[1] *See generally In the Matter of IP-Enabled Services*, FCC WC Docket No. 04-36

[2] *See generally In the Matter of Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act*, FCC WC Docket No. 06-54, and *In the Matter of 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*, FCC WC Docket No. 06-55.

[3] *See* Defendant's *Joint Motion to Dismiss or, In the Alternative, Hold Proceedings in Abeyance*, Filed May 12, 2006 at p. 4.

Time Warner filed its own motion seeking summary disposition that it had the right, as a telecommunications carrier, to negotiate interconnection with the Defendants pursuant to Section 251 of the Telecommunications Act. It cited the language of a previous Commission Order as conclusive proof that it was in fact a telecommunications carrier providing telecommunications services. Oral arguments on all three motions were heard on June 28, 2006. The three matters addressed by this order are:

1. Time Warner's motion for summary disposition on whether it has the right as a telecommunications carrier to negotiate interconnection agreements with the Defendants under Section 251 of the Telecommunications Act.
2. Defendants' motion to dismiss this complaint for failure to state a claim on which relief may be granted.
3. Defendants' motion to hold this proceeding in abeyance in light of ongoing and possibly relevant proceedings at the Federal Communications Commission.

II. Background

Time Warner originally sought a Certificate of Public Convenience and Necessity to provide facilities-based competitive local exchange service via Voice over IP (VoIP) in December of 2003.[4] During that proceeding the South Carolina Telephone Coalition (SCTC) intervened on behalf of a number of rural carriers (RLECs) and opposed the application on various grounds. Time Warner and the SCTC later reached an agreement whereby Time Warner stipulated that it would not offer its phone service in RLEC territories after July 1,

2004. In return, the SCTC withdrew its objections and this Commission granted Time Warner a limited certificate to offer phone service in all parts of the state except those where incumbent carriers still retained their rural exemptions.[5]

In October of 2004, Time Warner petitioned to have the geographic restriction it had previously agreed to lifted, allowing it to offer competitive local exchange service in all parts of the state, regardless of whether the incumbent local exchange carrier ("ILEC") had a rural exemption.[6] During that proceeding Time Warner argued that the FCC's *Vonage Order* effectively preempted this Commission's authority to regulate its VoIP-based service, but that an expanded certificate was necessary for it to enter into interconnection agreements with the RLECs serving those areas it had previously stipulated not to serve.

This Commission denied the application,[7] on the basis that Time Warner's existing certificate was sufficient for it to enter into interconnection agreements with RLECs as a telecommunications carrier. Time Warner requested reconsideration of that decision and this Commission again refused to amend Time Warner's certificate, ruling that if the services being offered by Time Warner were in fact 'telecommunications services' under Section 251 of the Telecommunications Act, then no approval from this Commission was required for it to

[4] *In Re: Application of Time Warner Cable Information Services (South Carolina), LLC for a Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services and for Alternative Regulation pursuant to S.C. Code Section 58-9-575 and 58-9-585*. Docket No. 2003-362-C - Order No. 2004-213 (Rel. May 24, 2004).
[5] *Id. at p.2.*
[6] *In Re: Application of Time Warner Cable Information Services (South Carolina), LLC DBA Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently have a Rural Exemption.* Docket No. 2004-208-C, Order No. 2005-412 (Rel. August 1, 2005).
[7] *Id. at p.6.*

seek interconnection from the RLECs.[8] Time Warner has requested federal preemption of those decisions pursuant to 47 U.S.C. 253(d), claiming that the Commission has created an anticompetitive barrier to entry.[9] That proceeding is still pending.

III. Discussion

A. Motion for Summary Disposition

Time Warner's motion for summary disposition asks the Commission to, "grant summary disposition on the limited issue of whether TWCIS is entitled to negotiate [interconnection] with the ILECs based on the Commission's prior ruling."[10] The prior ruling to which Time Warner refers is from this Commission's August 1, 2005 Order No. 2005-412 stating, "[n]o expansion of the company's Certificate is needed for it to enter into negotiations with the RLECs. The company possesses this ability as a telecommunications carrier under Section 251 of the Telecommunications Act of 1996 and no further blessing of this Commission is needed for this undertaking."[11]

Time Warner's motion, however, omits clarifying language found in this Commission's subsequent *Order Denying Reconsideration* saying, "TWCIS either has the right to request interconnection under Section 251 of the Act or it does not, depending on whether the services

[8] *Order Denying Rehearing or Reconsideration - Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend Its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services Areas of Certain Incumbent Carriers Who Currently Have a Rural Exemption* Docket No. 2004-280-C, Order Number 2005-484, (Rel. September 27, 2005).
[9] *In the Matter of: Petition of Time Warner Cable For Preemption Pursuant to Section 253 of the Communications Act, as Amended*, WC Docket 06-54.
[10] *See* Complainant's *Motion for Summary Disposition* Filed May 24, 2006 at 12.
[11] Complainant's *Motion for Summary Judgment* at 4 (quoting Docket No. 2004-280-C, Order No. 2005-412 at 6, Released August 1, 2005).

TWCIS seeks to provide are telecommunications services or not, which is an unsettled question under Federal law."[12]

To make a legal conclusion as to Time Warner's statutory rights under §251, this Commission would first need to make a factual finding that it is a 'telecommunications carrier' offering 'telecommunications services' under the Act. Were we to make such a finding, then Time Warner would, as a matter of law, be entitled to summary disposition that the Defendants must negotiate interconnection under Sections 251 (a) and (b) at a minimum. However, as Time Warner's own motion points out, summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[13] Because the factual determination that Time Warner is a 'telecommunications carrier' providing 'telecommunications services' is a prerequisite to drawing the legal conclusion that it is entitled to interconnection rights, we must deny its motion for summary disposition.

Time Warner itself has changed its stated position on this issue at least twice, as evidenced by the conflicting testimony filed in the Application for expansion of its Certificate and this motion. Ms. Julie Y. Patterson, Time Warner's Vice President of Telephony, testified in March of 2005 that the FCC's *Vonage Order* caused a change in her company's application, saying, "TWCIS does not want anything in the application or docket to be construed as a concession or agreement by TWCIS that the services at issue constitute telecommunications services."[14] However, Time Warner's filing in this matter asserts that, "TWCIS is operating as a telecommunications carrier."[15] If the current state of the law allows Time Warner sufficient

[12] *In Re: Application of Time Warner Cable Information Services (South Carolina), LLC d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently have a Rural Exemption*, Docket No. 2004-280-C, Order No. 2005-484 at 6 (Released September 28, 2005) ('*Order Denying Reconsideration*').
[13] Complainant's *Motion for Summary Disposition* at 3.
[14] Direct Testimony of Julie Y. Patterson at 17, Docket No. 2004-280-C, March 31, 2005.
[15] Complainant's *Motion for Summary Disposition* at 5.

latitude to argue that it is, is not, and finally that it is, a telecommunications carrier, then this Commission cannot reasonably be expected to make such a determination without an evidentiary hearing. Accordingly, Complainant's motion for summary disposition is hereby denied.

An evidentiary hearing is necessary to establish that the services Time Warner is currently offering or plans to offer are, in fact, telecommunications services.

B. Motion to Dismiss

Defendants' motion to dismiss asserts that they are exempt from the interconnection duties found in §251(c) by virtue of their rural exemptions found in §251(f). Assuming that this is correct, Defendants ask that this Commission dismiss the complaint for failure to state a claim upon which relief can be granted.

As an opening matter, Sections 251 (a), (b), and (c) each impose interconnection duties upon incumbent carriers. Rural carriers are exempt from the more burdensome unbundling obligations of subsection (c), but must still negotiate interconnection with other telecommunications carriers upon request under subsections (a) and (b). If the Commission determines that Time Warner is a telecommunications carrier providing a telecommunications service, the Commission could find, if supported by sufficient evidence, that the Defendants failed to negotiate interconnection. However, because the statutory classification of Time Warner's services under the Telecommunications Act is a disputed issue at this time, we cannot reach the question of whether the Defendants did or did not have a duty to negotiate, and whether they did in fact breach that duty. As discussed above, Time Warner may attempt to prove through an evidentiary proceeding that it is such a carrier, but until that possibility is foreclosed, the complaint against the Defendants cannot be summarily dismissed. Accordingly, Defendants' motion to dismiss must be denied.

C. Motion to Hold in Abeyance

Defendants' argue that in light of Time Warner's pending petitions before the FCC and the FCC's open rulemaking proceeding dealing with the rights and duties of interconnected VoIP providers, this Commission should hold this matter in abeyance pending one or more outcomes at the FCC.

The Commission finds that holding this matter in abeyance pending the FCC's action serves administrative and judicial economy. Time Warner has sought a parallel avenue of relief before the FCC and a ruling by the FCC on Time Warner's petitions will have a direct impact on the proceedings in this matter.

For the reasons stated above, we grant Defendant's motion to hold proceedings in abeyance for a period of 120 days or until the FCC rules on Time Warner's petitions whichever occurs first. If the FCC has not ruled on Time Warner's petitions within the 120 day period, then the Commission will review its decision to hold this matter in abeyance and make a determination as to whether to schedule an evidentiary hearing.

IV. Conclusion

FOR THE REASONS STATED ABOVE, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. Complainant's motion for summary disposition is hereby DENIED.
2. Defendants' motion to dismiss is hereby DENIED.
3. Defendants' motion to hold in abeyance is GRANTED for a period of 120 days or until the FCC rules on the Time Warner pending petitions whichever occurs first. If the FCC has not ruled within the 120 day period, the Commission will review its decision and determine whether to schedule this matter for hearing.

BY ORDER OF THE COMMISSION:

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G. O'Neal Hamilton, Chairman

ATTEST:

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C. Robert Moseley, Vice-Chairman

(SEAL)