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

In the Matter of	)	
	)	
Petition of CRC Communications of	)	
Maine, Inc. and Time Warner Cable,	)	Docket No. WC 10-143
Inc. for Preemption Pursuant to	)	
Section 253 of the Communications	)	
Act, as Amended	)	

Reply Comments of
the Maine Public Advocate
and the National Association of State Utility Consumer Advocates
on Petition of Time Warner Cable and CRC Communications for Preemption

I. INTRODUCTION

On August 30, 2010, the Maine Public Advocate ("Public Advocate") and the National Association of State Utility Consumer Advocates ("NASUCA") submitted an opposition to the request of CRC Communications of Maine ("CRC") and Time Warner Cable, Inc. ("Time Warner") for the Federal Communications Commission ("FCC") to preempt and reverse Orders of the Maine Public Utilities Commission ("Maine Commission") that upheld the rural exemption for five small rural local exchange carriers ("RLECs") in Maine.[1]

Comments opposing the petition were filed by the Maine Commission and by small rural carriers in the state.[2] The Public Advocate and NASUCA will not repeat here the reasonable and correct positions of those commenters.

[1] Maine Public Utilities Commission, Order, May 5, 2008, Docket No. 2007-611; add more recent order. The fact that the petition for preemption was not filed until 2010 was a key element in the Maine Public Advocate/NASUCA Opposition.

[2] The Telephone Association of Maine ("TAM"); Unitel, Inc.; and combined comments from Lincolnville Networks, Inc.; Tidewater Telecom, Inc.; Oxford Telephone Company; and Oxford West Telephone Company (collectively, "Lincolnville, et al.").

On the other hand, comments supporting preemption were filed by a number of (allegedly) competitive service providers, none of whom apparently have operations in Maine.[3] One thing those commenters have in common is that, with the exception of Verizon in states other than Maine, New Hampshire and Vermont, **none** of those providers have "provider-of-last-resort" obligations. That is, not one of them is required to serve all customers in rural areas, regardless of the profit that can be earned from a particular customer. They are free to come and go, and to "cherry-pick" while they are present. This is the key fact, and should be the key determinant in the FCC's decision **not** to preempt the Maine Commission. Throughout its processing of the Time Warner petition to lift the rural exemptions of the five Maine RLECs, the Maine Commission was carrying out its obligations under the Telecommunications Act of 1996 ("TelAct") to ensure the continued viability of small rural telephone companies that have such provider-of-last-resort obligations. The Maine Commission did so based on an extensive record, and a detailed review of the law. None of the commenters seeking preemption have provided any basis for reversing or preempting the Maine Commission's ruling.

Some of the portions of that record that commenters seek to have the FCC overlook include:

1. After a careful investigation, using data provided by TWC and using the TWC method of analyzing the financial viability of the five RLECs, Public Advocate witness Dr. Robert Loube concluded that four of the five RLECs would not be viable if Time Warner was allowed to enter their service territories. This loss of viability would eliminate the ability of those RLECs to provide voice and Internet service in their service territories. Moreover, it was obvious that TWC had no plans to replace the RLECs in the very low density areas of Maine. TWC would serve only the towns and

[3] Comments were filed by the following competitive service providers and organizations: Charter Communications, Inc.; COMPTEL; the National Cable & Telecommunications Association ("NCTA"); NTCH, Inc. ("NTCH"); Verizon; and Voice on the Net Coalition ("VON"). As this Commission and the Maine Commission both know well, by transferring its northern New England business to FairPoint Communications, Verizon abandoned its operations as anincumbent local exchange carrier (ILEC) in Maine (and Vermont and New Hampshire), and Maine customers have paid a price for Verizon's lack of interest in rural service.

would not provide service in the large portions of the countryside outside the towns.

2. With regard to the fifth RLEC, Lincolnville Telephone, the record shows that Time Warner was not in fact planning to enter the Lincolnville service territory in any meaningful way, and this formed the basis for the view of Dr. Loube that the economic viability of Lincolnville was not in question. If Time Warner had proposed to actually compete in Lincolnville territory in a meaningful way, the results of the analysis of economic burden would have been substantially different. With respect to Time Warner's decision not to enter the Lincolnville service area, it should be noted that Lincolnville's affiliate operates a cable TV network in the Lincolnville service area; it is the only one of these RLECs to do so. Thus, Time Warner sought to avoid competition an established cable network, even though (1) there is no regulatory constraint in Maine preventing cable competition (2) even though Time Warner has a substantial cost advantage in purchasing content and (3) despite Time Warner's claims that it is easy for telephone companies to enter the cable market (it said that the other RLECs would have no trouble entering the cable market in the areas where Time Warner today is the only cable TV provider).[4]

Clearly, this is factual ground sufficient to uphold the rural exemption for these RLECs, and the Maine Commission's decision to do so may not be preempted.[5]

That said, we can address some of the commenters' erroneous legal arguments.

Commenters make various remarks about the Maine proceedings. The bottom line is that CRC originally requested arbitration under § 251(b); the Maine Commission found that § 251(a) and (b) do not convey a right to arbitration; and found that the RLECs were entitled to the § 251(f) exemption.[6] The commenters, unhappy with this result, seek to create an enforcement mechanism for § 251(a) and (b) that simply does not exist (i.e., through the state commission[7]) and a right that also does not exist (for arbitration of § 251(a) and (b)

[4] MPUC Docket Nos. 2009-40 through 2009-44, Direct Testimony of Robert Loube, Ph.D., on behalf of the Office of Public Advocate (February 19, 2010); accessible at http://mpuc.informe.org/easyfile/cache/easyfile_doc230349.PDF.

[5] This distinguishes the instant situation from the Wyoming and Tennessee statutes cited by COMPTEL (at 5-6).

[6] Maine Commission Comments at 1-2.

[7] See COMPTEL Comments at 5.

disputes[8]). Verizon, while asserting that arbitration is required, acknowledges that § 251(a) does not **require** an ILEC even to negotiate.[9]

The issue here is not that CRC and Time Warner "have no ability to obtain interconnection under any provision in Section 251…"[10] (because they do have that ability). But they do lack the ability to force the Maine Commission to enforce whatever rights they may have under §§ 251(a) and (b), including via arbitration.[11] This Commission simply does not have the power to rewrite Congress' statute to give the commenters the remedy they seek, by "filling the regulatory gap."[12] And the commenters' formulation of the "key question" here does not match the factual or legal status of the case.[13]

NTCH, not having been there, complains about the delay in the Maine proceedings.[14] But it appears that the delay can be attributed to Petitioners, not the RLECs or the Maine Commission.[15] There is no basis in the record of the Maine proceedings for NTCH's general arguments about "regulatory capture," about RLEC service, and about RLEC profits.[16]

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[8] See NCTA Comments at 4.

[9] Verizon Comments at 7, quoting § 251(c) (an ILEC "may negotiate").

[10] NTCH Comments at 3; Verizon Comments at 2; Charter Comments at 3. The *Time Warner Declaratory Ruling* (23 FCC Rcd 3513 (2007)) cited by Verizon (at 2) simply did not touch on the issues key to this proceeding. Verizon's attempt to make this a VoIP issue (at 4-5) is a red herring.

[11] See COMPTEL Comments at 4; Charter Comments at 1. Notably, the Maine Commission notes that CRC and Time Warner do currently interconnect with the RLECs. Maine Commission Comments at 7-8; see also Verizon Comments at 9. And Verizon acknowledges (at 5) that CRC and Time Warner do have other means to enforce their § 251(a) and (b) rights, just not ones that are as effective as arbitration.

[12] NTCA Comments at 4; Verizon Comments at 12.

[13] See NCTA Comments at 3.

[14] NTCH Comments at 1.

[15] Unitel Comments at 4-8.

[16] NTCH Comments at 2, 3. NTCH's whining that it "frequently finds itself bumping up against inequities" in various states (id. at 3; see also Charter Comments at 6-8) should have no relevance here.

NTCH's request for general "relief"[17] also goes well beyond the four corners of the petition under consideration here.

Commenters also assert that the Maine Commission's actions are not protected by § 253(b).[18] They are wrong. There are few issues closer to the universal service protections allowed by § 253(b) than provider-of-last-resort, which was intimately bound up in the Maine proceeding. The Maine Commission ruling was, in fact, competitively neutral because neither CRC nor Time Warner had, or would accept, a provider-of-last-resort obligation. Indeed, **lifting** the rural exemption in this instance would have given a competitive advantage to CRC and Time Warner, because they do not bear the provider-of-last-resort obligation. And it can hardly be said that by refusing to create new law to allow it to arbitrate a § 251(a) and (b) dispute, the Maine Commission has created a requirement that violates § 253(b). Verizon correctly points out that the FCC "cannot 'preempt' the Maine Commission's decision, which was grounded in federal, not state or local law."[19]

As expected, commenters argue about the National Broadband Plan ("NBP") discussion of this issue as if it were black-letter law.[20] As explained in the Public Advocate/NASUCA Opposition, the NBP is only an FCC staff recommendation, and on the issue relevant here, the NBP's recommendation was based on a one-sided presentation of the issue.[21] The Commission should proceed with the inquiries prompted by the NBP,[22] but

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[17] Id. at 4-5.

[18] NCTA Comments at 5; COMPTEL Comments at 7-8.

[19] Verizon Comments at 13.

[20] See, e.g., NCTA Comments at 4-5; Verizon Comments at 1, 4; COMPTEL Comments at 5, n.7 and at 7; Charter Comments at 5.

[21] Public Advocate/NASUCA Comments at 14-15.

[22] NCTA Comments at 8. Indeed, Charter recommends delay on this aspect of the NBP. Charter Comments at 8-9.

should not allow those staff recommendations to influence this docket. The federal statute must control.

In the end, this case is not about whether "the people of Maine have waited long enough for the benefits of competition to arrive."[23] After all, CRC and Time Warner had originally asked twenty-one Maine RLECs for interconnection, and got it with sixteen of those RLECs.[24] There were five RLECs, however, as to which the Maine Commission found that the "cherry-picking" form of competition that CRC and Time Warner would provide would not be of benefit, because it would eliminate the RLECs by depriving them of the ability to continue to attract sufficient capital to meet their universal service or "provider-of-last-resort" obligations. Thus the effect of competition would be to leave the customers of these Maine RLECs without a provider willing and required to serve them. That is scarcely a benefit.

III. CONCLUSION

For the foregoing reasons, the Maine Public Advocate and the National Association of State Utility Consumer Advocates again urge the Commission to dismiss the Petition for Preemption of Time Warner and CRC.

September 13, 2010

Respectfully submitted,

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[23] NCTA Comments at 7; see also VON Comments at 2.

[24] See VON Comments at 1.

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