

NEWS & COMMENTARY

ANALYSIS OF A CHANGING INDUSTRY

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SPECIAL EDITION

WIRELINE COMPETITION BUREAU GRANTS TIME WARNER PETITION, WITH CONDITIONS

On March 1, 2007, the Federal Communications Commission (FCC) Wireline Competition Bureau (WCB) released a Memorandum Opinion and Order addressing a petition filed by Time Warner exactly one year before. In the order, the WCB responded to Time Warner's request that it be allowed to use wholesale telecommunications carriers to interconnect and exchange traffic with incumbent local exchange carriers (ILECs). To date, Time Warner's business model has introduced voice services in ILEC markets through the use of Voice over Internet Protocol (VoIP) technology in conjunction with arrangements among underlying wholesale providers. In this fashion, Time Warner has attempted to interconnect and exchange VoIP traffic with ILECs without having to negotiate a direct interconnection agreement with the ILEC.

Background

Time Warner's petition was filed in large part as a response to decisions made by the South Carolina Public Service Commission (PSC). As noted, Time Warner provides VoIP service to its customers by "piggybacking" on competitive LECs (CLECs) that have interconnection agreements with ILECs. In South Carolina, Time Warner has piggybacked on MCI; however, MCI does not have interconnection agreements with many of the state's rural ILECs. MCI had attempted to negotiate interconnection agreements with the rural ILECs, but it failed to do so, given that its sole purpose was to exchange VoIP traffic for Time Warner.

MCI took the matter before the South Carolina PSC, and Time Warner sought to become a third party in the proceeding. When the PSC ruled against MCI/Time Warner, Time Warner asked the FCC to overturn the decision, and in the process, filed a petition asking that the FCC declare that requesting telecommunications carriers are entitled to obtain interconnection with ILECs to provide wholesale telecommunications services to other service providers that are not telecommunications carriers.

In effect, with the WCB's order the FCC granted Time Warner's petition. However, prior to the decision, members of the South Carolina Telephone Coalition (SCTC), a group of rural ILECs in the state, conducted several *ex parte* meetings with FCC staff, including holding a conference call with FCC Chairman Kevin Martin. JSI assisted the SCTC in these meetings and the

conference call on which the coalition members demonstrated to Chairman Martin that granting the petition would lead to “irresponsible competition.” The SCTC urged the FCC to address the issues raised in the Time Warner petition in its IP-enabled rulemaking proceeding in which it is considering a host of IP-related matters.

Specifically, the SCTC urged the FCC, in the context of the IP proceeding, to ensure:

- that the traffic exchanged satisfies Section 51.100(b), which states, “[a] telecommunication carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), or 251(c)(3) 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”;
- that the VoIP provider be required to comply with all number portability rules and regulations, including porting numbers to other carriers; and
- that the wholesale provider be financially and technically responsible for all the traffic originated from and terminated to the service provider.

In addition, during the call with Chairman Martin, there was discussion of the issue of whether the FCC’s Vonage order, which ruled that states are preempted from regulating Vonage’s DigitalVoice service, should be extended to cover Time Warner’s Digital Phone VoIP service and other similarly-situated cable providers’ VoIP services. As a follow up to the call, the SCTC submitted an *ex parte* letter in which it demonstrated that although Time Warner’s Digital Phone service purportedly uses VoIP technology to provide its voice service, the service characteristics and network configuration do not “share similar basic characteristics” of Vonage’s DigitalVoice service as outlined in the Vonage order.

The Impact of the Order

To understand what the order changes, we need to understand both what has been granted and the conditions that apply. The WCB’s action affirms some significant conditions for this type of interconnection, and the order’s overall effect must be viewed through a detailed examination of these conditions.

First, what the order does: The WCB stated that the Telecom Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of Section 251(a) and (b). The WCB noted that it expects its decision will spur broadband deployments as wholesale providers interconnect with ILECs for the purpose of exchanging traffic from VoIP providers. In summary, “the rights of telecommunications carriers under Section 251(a) and (b) apply regardless of whether the telecommunications services are wholesale or retail.”

Now, the conditions:

Condition 1: Wholesale Carriers Must Provide Telecommunications Services to Their Customers, Either on a Wholesale or Retail Basis.

The WCB emphasized 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.” Furthermore, the WCB noted 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.” (Emphasis in original)

It appears to JSI that with this first condition, the WCB paid at least some heed to the message communicated by the SCTC in its *ex parte* presentation; *i.e.*, the condition is based on the same rule cited by the SCTC in its *ex parte*. In the rule, 47 CFR 51.100(b), the FCC states: “A telecommunication carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), or 251(c)(3) 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.”

JSI, however, does not believe that the WCB evaluated fully the implication of the rule. The WCB’s explanation suggests that it failed to recognize that the use of the interconnection arrangement for information services is conditioned on its concurrent use for telecommunications service. A wholesale provider may not use the interconnection arrangement solely for the exchange of non-telecommunications services. Instead, the FCC’s rules contemplate that the parties to the interconnection arrangement must exchange some telecommunications service traffic before the interconnection arrangement can also be used for the exchange of information service traffic. The WCB order appears to focus on offering wholesale telecommunications *without* tying this offer to the interconnection arrangement. A wholesale carrier can offer many services, but to use the interconnection arrangement with an ILEC for the exchange of traffic, some portion of the traffic must be telecommunications service traffic. Moreover, adding to the problems with the WCB decision, there is nothing in the FCC rules or the order addressing the exchange of VoIP traffic – traffic that is neither “information service” nor “telecommunications service” – when there is no telecommunications traffic exchanged between the parties to the interconnection arrangement.

The WCB suggested that it did not need to determine whether VoIP is a telecommunications service or an information service to clarify the Act and the FCC rules in this order. This statement appears correct so long as the wholesale provider is exchanging telecommunications service through the interconnection arrangement with the ILECs. It is JSI’s belief that if the wholesale provider is not using the interconnection arrangement for the exchange of telecommunications traffic, presumably it would not be permitted to use the interconnection arrangement solely for information services traffic or VoIP traffic.

The WCB Order does not address whether a wholesale carrier offers a telecommunications service. It leaves it up to state commissions to make this determination. In our view, state commissions must address the interconnection arrangement and whether telecommunications service traffic is to be exchanged between the parties. This deferral by the WCB is important because JSI believes many state commissions will be able to recognize attempts to avoid the requirement that telecommunications service traffic must be exchanged prior to exchanging other types of traffic within a Section 251 arrangement and will therefore reject such arrangements.

Condition 2: Wholesale Carriers Must Be Technically Responsible for the Traffic

In the SCTC's *ex parte* meetings with FCC staff, the coalition indicated that in the arbitration disputes which were the subject of Time Warner's petition, MCI had refused to take any technical or financial responsibility for the traffic it delivered on behalf of Time Warner. The order addresses these concerns by requiring that wholesale providers be both technically and financially responsible for the traffic they deliver to ILECs on behalf of other carriers.

In ruling that wholesale carriers are technically responsible for the traffic they exchange, the WCB required wholesale carriers to comply with any technical requirements imposed by the FCC, such as number portability, as well as technical requirements imposed by a state commission. Considering the *two-way aspect* of number portability, it would appear the SCTC's message to Chairman Martin about the importance that customers be able to port to an ILEC was heard loud and clear. Chairman Martin had expressed concern during the conference call that customers who port their numbers from ILECs to VoIP providers may not be able to port back if they so desire. For instance, an ILEC end-user can port a local number to a VoIP service provider *via* a wholesale carrier; however, if that same end-user wishes to port the other way (*i.e.*, from the VoIP service provider back to the ILEC), under current number portability rules, there is no requirement for the VoIP provider to port the number back to the ILEC.

Accordingly, because of the efforts of the SCTC, the order specifically requires 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." A VoIP provider using a wholesale carrier may not refuse to port numbers to other carriers.

Condition 3: Wholesale Carriers Must Be Financially Responsible for the Traffic

In addition to technical responsibility for the traffic, the order requires that wholesale providers be financially responsible for the traffic they exchange with ILECs. The WCB required that the wholesale carrier be responsible for compensating the ILECs for the termination of traffic under a Section 251 arrangement. Typically, such an arrangement addresses the extent to which traffic exchanged is subject to access charges (*e.g.*, using a percentage of inter-MTA traffic for CMRS traffic arrangements) or reciprocal compensation charges.

In the order, the WCB affirmed the responsibility of the wholesale provider for compensation associated with traffic exchange and quoted the position of Sprint Nextel in a footnote stating the wholesale provider is "offering to provide for its wholesale customers 'intercarrier compensation, including exchange access and reciprocal compensation.'" It is clear that the WCB intends for the wholesale provider to be financially responsible for the exchange of traffic. However, JSI expects new fights to arise over the appropriate intercarrier compensation regime that should apply to VoIP traffic. These issues will likely form the new front line with CLECs and VoIP providers.

Initial Assessment: At First Glance, Looks Can Be Deceiving

In general, newspaper and trade reports have declared Time Warner, and VoIP providers in general, the big winners in this ruling, reasoning that the WCB's order ultimately solves the dispute in their favor. To JSI, however, these three specific conditions, suggest that the fanfare is not justified and indeed may be a bit premature. Of particular note, JSI observes, is the FCC's (or, for that matter, the WCB's) failure to extend the Vonage order to Time Warner. However, as discussed, there is still a long road ahead to make sure that competition is established on a level basis without bias or preference toward one carrier type or technology.

As clients would expect, JSI will continue to monitor this issue closely. Given that this order came from the WCB and not from the FCC, we believe a strong possibility exists that parties may seek FCC review, especially if it is believed the issues raised in the order exceed the concept of a "clarification" and, thus, would exceed the WCB's delegated authority. If you have any questions about this article or the WCB's Time Warner order, contact John Kuykendall (jkuykendall@jsitel.com) in our Greenbelt, Maryland office, at 301-459-7590, or Douglas Meredith (dmeredith@jsitel.com) in Salt Lake City, at 801-294-4576.

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