

**ORIGINAL NEW APPLICATION**



**BEFORE THE ARIZONA CORPORATION COMMISSION**

2006 JUL 31 P 4: 13

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T-03943A-06-0495  
T-04112A-06-0495  
T-04113A-06-0495

**IN THE MATTER OF THE NOTICE )  
OF INTENT OR, ALTERNATIVELY, )  
JOINT APPLICATION FOR A )  
LIMITED WAIVER OF A.A.C. R14-2- )  
803, BY TIME WARNER TELECOM )  
INC. AND XSPEDIUS )  
COMMUNICATIONS, LLC )**

Docket No. T-03943A-06-\_\_\_\_\_  
T-04112A-06-\_\_\_\_\_  
T-04113A-06-\_\_\_\_\_

**NOTICE OF INTENT OR  
ALTERNATIVELY APPLICATION  
FOR LIMITED WAIVER**

Pursuant to A.A.C. R14-2-803, Time Warner Telecom Inc. ("Time Warner Telecom"), and Xspedius Communication, LLC ("Xspedius Parent"), (collectively, "Applicants"), submit this Notice of Intent to reorganize an existing public utility holding company in connection with the proposed merger involving Time Warner Telecom and Xspedius Parent as further described below. The Applicants seek expedited review and approval of this transaction without a hearing under A.A.C. R14-2-803(B) or, alternatively, a limited wavier of A.A.C R14-2-803.

## OVERVIEW

On July 27, 2006, Time Warner Telecom and Xspedius Parent (and certain equity holders) entered into an Agreement and Plan of Merger (“Agreement”).<sup>1</sup> The proposed transaction (the “Merger”), which is described below, will create a combined competitive carrier able to more effectively compete on a national basis against established, and in some cases, rapidly expanding, incumbent local exchange providers and long distance companies. Time Warner Telecom already operates a nationwide fiber optic network and, through its subsidiaries, provides competitive telecommunications services in 44 metropolitan areas throughout the United States, including Phoenix and Tucson. Through its operating subsidiaries, Xspedius Parent provides facilities-based integrated telecommunications products and services to customers in 43 metropolitan areas across the country. In Arizona, subsidiaries of Xspedius Parent provide service in Tucson and adjacent areas of Pima County.

The proposed Merger will allow Time Warner Telecom to greatly expand its network reach and market density for serving multi-location and multi-city enterprise customers, increasing the number of markets to be served to 75, as well as enhance the ability to further fuel enterprise growth and offer customers new products and options. The Merger will also achieve significant annualized cost synergies of approximately \$40

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<sup>1</sup> The parties to the Agreement are Time Warner Telecom, Inc., XPD Acquisition, LLC, Xspedius Communications, LLC, Xspedius Management Co., LLC, and Xspedius Holding Corp.

to \$50 million, within 12 to 18 months of closing, by leveraging existing local and regional operating structures and optimizing network capabilities and costs.

## **THE PARTIES**

### **1. Time Warner Telecom Inc.**

Time Warner Telecom, a Delaware corporation headquartered in Littleton, Colorado, is a leading provider of managed networking solutions to businesses in 24 states and 44 U.S. metropolitan areas. Time Warner Telecom also supplies dedicated Internet access, and local and long distance voice services for long distance carriers, wireless communications companies, incumbent local exchange carriers, and enterprise organizations in the healthcare, finance, higher education, manufacturing, and hospitality industries.

### **2. Time Warner Telecom of Arizona LLC**

Time Warner Telecom of Arizona LLC ("TWTA") is a leading provider of "last-mile" broadband data, voice, dedicated internet access, and dedicated web hosting to business customers in the Phoenix and Tucson metropolitan areas. In 2001, TWTA entered the Phoenix and Tucson markets by purchasing out of bankruptcy substantially all of the assets of GST Telecommunications Inc. Since that time, TWTA has been committed to expanding its Arizona network, offering robust and creative new products, and superior customer care.

**3. XPD Acquisition, LLC**

XPD Acquisition, LLC (“XPD”) is a Delaware limited liability company which is a wholly-owned subsidiary of Time Warner Telecom and has been established for the purpose of completing the Merger and other transactions contemplated by the Agreement.

**4. Xpedius Communications, LLC (Xpedius Parent)**

Xpedius Parent is a Delaware limited liability company headquartered in O’Fallon, Missouri. Xpedius Parent brings integrated telecommunications services to small and medium-sized enterprise customers in 20 states across the Southern and Southwestern United States. The integration of local, data and long distance telecommunication service, combined with a very cost effective delivery method, create a compelling value for customers.

**5. Xpedius Management Co. Switched Services, LLC and Xpedius Management Co. of Pima County, LLC**

Xpedius Management Co. Switched Services, LLC and Xpedius Management Co. of Pima County, LLC (“Xpedius Certificated Subsidiaries”) are limited liability companies formed under the laws of the State of Delaware, with their principal address at 5555 Winghaven Boulevard, Suite 300, O’Fallon, Missouri 63368-1116. Both companies were certified as competitive local exchange carriers by the Arizona Corporation Commission in Decision No. 65124 (August 23, 2002). Xpedius Certificated Subsidiaries provide local, long distance, integrated, and Internet access solutions to small and medium-sized business customers.

## THE TRANSACTION

The Agreement provides that Xspedius Parent will become a wholly owned subsidiary of Time Warner Telecom. To facilitate this transaction, Time Warner Telecom has created a wholly owned subsidiary called XPD. Under the Agreement, XPD will merge with and into Xspedius Parent, with Xspedius Parent continuing as the surviving entity and as a wholly owned subsidiary of Time Warner Telecom.

At the time of the Merger, all of the ownership interests of Xspedius Parent immediately prior to the Merger shall cease to exist in exchange for consideration consisting of Time Warner Telecom stock and cash received by the owners of Xspedius Parent pursuant to the Merger. As a result of XPD merging into Xspedius Parent, Time Warner Telecom will own one hundred percent (100%) of the membership interest of Xspedius Parent. The surviving parent company of the Xspedius Certificated Subsidiaries is Xspedius Parent, which will be wholly owned by Time Warner Telecom.

The Merger will not change the ownership of the Xspedius Certificated Subsidiaries. The Merger will not affect the Commission's ability to regulate the intrastate operations of these two Arizona subsidiaries. At the time of approval, customers of the Xspedius Certificated Subsidiaries will continue to obtain service from these same certificated entities, but the ownership of their parent company, Xspedius Parent, will change to Time Warner Telecom. Upon consummation of the Merger, each subsidiary will continue to hold the same certificates of convenience and necessity it held prior to the transaction. No assets will be transferred from one certified carrier to another as a result of the Merger.

Immediately after close, Time Warner Telecom and its subsidiaries will continue to operate under the same tariffs, rates, contract terms and conditions as prior to the Merger. Time Warner Telecom will continue to assess the benefits of post-close consolidations and/or mergers of the operating entities. When and if Time Warner Telecom determines that it will pursue such plans, it will seek all required regulatory approvals.

### CONTACT INFORMATION

For the purposes of this Application, contacts for the Applicants are as follows:

<b>For Time Warner Telecom:</b>	<b>For Xspedius:</b>
<p>Brian D. Thomas            VP of Regulatory Affairs West            Time Warner Telecom            223 Taylor Avenue North            Seattle, WA 98109            Tel: (206) 676-8090            Fax: (206) 676-8001            e-mail: brian.thomas@twtelecom.com</p> <p>Joan S. Burke            Osborn Maledon PA            2929 North Central Avenue, Suite 2100            Phoenix, AZ 85012            Tel: (602) 640-9356            Fax: (602) 640-6074            jburke@omlaw.com</p>	<p>James C. Falvey            SVP, Regulatory Affairs            Xspedius Communications, LLC            14405 Laurel Place            Suite 200            Laurel, MD 20707-6102            Tel: 301-361-4298            Fax: 301-361-7654            Jim.Falvey@xspedius.com</p> <p>Lawrence P. Beilenson            SVP &amp; General Counsel            Xspedius Communications, LLC            5555 Winghaven Blvd.            Suite 300            O'Fallon, MO 63368-3626            Tel: (636)-625-7080            Fax: (636)-625-7681            Larry.Beilenson@xspedius.com</p>

## **A.A.C. R14-2-803 INFORMATION**

### **A. Names and Business Address of the Proposed Officers and Directors of the Holding Company**

Attached as Exhibit A is a list of Time Warner Telecom's officers and directors.

Time Warner Telecom's business address is Time Warner Telecom, 10475 Park Meadows Drive, Littleton, CO 80124.

### **B. The Business Purposes for Establishing or Reorganizing the Holding Company**

See Overview at page 2 above.

### **C. The Proposed Method of Financing the Holding Company and the Resultant Capital Structure**

Time Warner Telecom is a publicly traded company with an established capital structure and significant financial resources. The methods it uses for financing will not change as a result of this transaction. The transaction (described in the Transaction section at page 5-6 above) will add a new subsidiary (and certificated subsidiaries of the subsidiary) to the Time Warner Telecom network of companies. Time Warner Telecom will issue additional equity in the company in connection with this transaction, but this will not materially impact how the company is financed.

### **D. The Resultant Effect on the Capital Structure of the Public Utility**

As a result of the Merger, the Xspedius Certificated Subsidiaries will have a new ultimate owner, Time Warner Telecom. The capital structure of the Arizona operating subsidiaries of both Time Warner Telecom and Xspedius Parent will be unaffected by the Merger.

**E. An Organization Chart of the Holding Company that Identifies all Affiliates and their Relationships within the Holding Company's Subsidiaries**

Please see attached pre-merger and post-merger charts:

Exhibit B: Time Warner Telecom and Arizona Subsidiaries Pre-Merger Structure

Exhibit C: Xspedius Parent and Arizona Subsidiaries Pre-Merger Structure

Exhibit D: Time Warner Telecom and Arizona Subsidiaries Proposed Post-Merger Structure

**F. The Proposed Method for Allocating Federal and State Income Taxes to the Holding Company's Subsidiaries**

Federal and State income tax allocations among Time Warner Telecom and its subsidiaries are consistent with the provisions of Treasury Regulation Sections 1.1552-1(a). Time Warner Telecom's approach to allocating tax liability will not change materially as a result of this transaction.

**G. The Anticipated Changes in the Utility's Cost of Service and the Cost of Capital Attributable to the Reorganization**

The Merger is not expected to have any adverse impact on the cost of services provided by TWTA and the Xspedius Certificated Subsidiaries. The Merger should improve all of the operating subsidiaries' access to capital at favorable rates through their common parent, Time Warner Telecom.

**H. A Description of Diversification Plans of Affiliates of the Holding Company**

There are no current plans for diversification or business activities unrelated to operations of the current subsidiaries.

**I. Copies of all Relevant Documents and Filings with the United States Securities and Exchange Commission and other Federal and State Agencies**

Applicants will supplement the record with copies of all relevant documents and filings.

**J. Contemplated Annual and Cumulative Investment in the Affiliate for the Next Five Years in Dollars and as a Percentage of Projected Net Utility Plant**

The Merger will not adversely affect investment in Xspedius Parent, the Xspedius Certificated Subsidiaries, or TWTA. The Merger will create a company that will be better positioned to invest and support its operating subsidiaries. The merged entity will be better able to raise capital, make capital investments and maintain a solid capital structure.

**K. An Explanation of the Manner in Which the Utility Can Assure That Adequate Capital Will Be Available for the Construction of Necessary New Utility Plant and for Improvements in Existing Utility Plant**

The Arizona operating subsidiaries of Time Warner Telecom and Xspedius Parent will be able to attract capital on terms no less favorable than prior to the Merger. Adequate capital will continue to be available for growth and development in Arizona.

**PUBLIC INTEREST**

The proposed transaction will serve the public interest. The Applicants, as a combined company, will be better equipped to devote resources to introducing new products and services, and expanding service offerings in Arizona. Time Warner Telecom's acquisition of Xspedius Parent and the Xspedius Certificated Subsidiaries (collectively "Xspedius") will invigorate Xspedius and allow it the financial resources

necessary to continue to provide high quality services and aggressively compete for customers. The Merger will also permit the combined company to deploy new products and services, including new services and options for existing customers of TWTA and Xspedius Operating Subsidiaries. Xspedius currently provides service in Arizona only in Pima County. The combined company will offer Xspedius customers access to communications facilities in both the Tucson and Phoenix metropolitan areas. The combination of Time Warner Telecom and Xspedius thus will promote competition in Arizona in the provision of intrastate local and long distance telecommunications services and data services. *See generally* Service Map, attached hereto as Exhibit D (showing where services will be available post-merger).

The Applicants believe that the integration of the Time Warner Telecom and Xspedius networks will allow the combined company to improve delivery of services to customers, reduce network costs, improve operating results, and better compete head to head with other telecommunications companies in the nationwide local telecommunications services market. The post-merger Time Warner Telecom will solidify Time Warner Telecom's position as one of the nation's largest independent competitive providers of national local telecommunications and broadband services. As such, the Merger will strengthen an independent national competitor which will inure to the benefit of both existing and prospective Time Warner Telecom and Xspedius customers and Arizona consumers in general.

In light of the recent Regional Bell Operating Company megamergers – Verizon/MCI and AT&T/SBC/BellSouth – CLECs such as Time Warner Telecom and

Xspedius need to expand to a size that will allow them to compete with the vast resources of these new mega-companies. For example, even after the Merger, Time Warner Telecom will be less than one percent (1%) of the size by revenues of the projected AT&T/SBC/BellSouth combination.

Immediately after closing, Time Warner Telecom and its merged entities will continue to operate under the same tariffs, rates, contract terms and conditions as prior to the Merger. The Merger will be virtually transparent to Xspedius customers. Time Warner Telecom will continue to assess the benefits of post closing consolidations and or mergers of the operating entities. When and if Time Warner Telecom determines that it will pursue such plans, it will seek all appropriate regulatory approvals.

### **REQUEST FOR WAIVER OF RULE 803**

The Applicants respectfully request that the Commission either approve the proposed Merger expeditiously, or grant the Applicants a limited waiver of Rule 803 of the Public Utility Holding Companies and Affiliated Interest Rules (“Rules”) as expressly permitted under A.A.C. R14-2-806. The Rules regulate the ability of Arizona public service corporations to enter into certain transactions and conduct various activities with their affiliated interests. As described by the Commission, the purpose of the Rules is fourfold: (i) to prevent the commingling of “utility funds” with “non-utility funds;” (ii) to prohibit the cross-subsidization of non-utility activities by utility ratepayers; (iii) to avert any negative impact of non-utility activities on a utility’s financial credit; and (iv) to ensure that the utility and its affiliates provide the Commission with the information

necessary to “carry out its regulatory responsibility.” See Concise Explanatory Statement, proposed Rules Docket No. R-0000-89-194.

The Rules were enacted in response to a diversification movement by Arizona’s electric utilities into areas such as savings and loan companies and hotel investments. At the time of the adoption of the Rules, there was no competitive pricing for electric companies and no competition for the provision of electric service to customers. In adopting the Rules, the Commission was attempting to protect captive customers of the monopoly utilities from having to bear the costs of such non-utility investments. See Arizona Corp. Comm’n v. State ex rel Woods, 171 Ariz. 286, 289-290, 830 P.2d. 807, 810-811 (1992).

There are a number of compelling reasons to invoke Rule 806 in this situation and waive application of the Rules for this transaction. First, Time Warner Telecom is a non-dominant carrier and, as such, does not -- and cannot following culmination of any “reorganization” subject to the Rules -- exercise monopoly power over a captive service territory or guaranteed revenue base. The Rules were promulgated to protect captive utility ratepayers from rates that “include costs associated with holding company structure, financially beleaguered affiliates, or sweetheart deals with affiliates.” See Concise Explanatory Statement. Because the regulatory environment anticipated by the Rules does not exist for Time Warner Telecom, application of the Rules to a Time Warner Telecom reorganization is not necessary.

Second, Time Warner Telecom operates in a competitive environment. Once again, this is entirely different than the situations contemplated by the Rules. Time

Warner Telecom today participates in a telecommunications services industry that is energized by market forces such as consumer demand, competitive pricing and the drive to increase market share through added value and technological innovation. Given that Time Warner Telecom faces competition in all of the services it provides Arizona customers, there exists virtually no incentive or opportunity for Time Warner Telecom to attempt to extract from customers unduly high or above-market prices that could be used to subsidize unregulated, affiliated interests. The market effectively provides a natural safeguard against the improper exploitation of profits by Time Warner Telecom. This conclusion is consistent with this Commission's rules governing the regulation of Competitive Telecommunications Services, A.A.C. R14-2-1101, *et seq.*

Third, as described below, the completion of any reorganization by Time Warner Telecom, including this merger with Xspedius, would be designed to promote the goals of both the Telecommunications Act of 1996 (the "Act") and this Commission's commitment to bring competition to the local exchange market. By doing so, any such transactions will enhance competition in the markets currently benefiting from carrier choice, and move those benefits toward other market segments anticipated to benefit from competition. While such benefits cannot be quantified, they are certain to be significant.

The Commission promulgated the Rules to protect against cross-subsidization by a utility in the traditional monopoly environment. The Rules should be waived by the Commission for entities such as Time Warner Telecom, where there is a competitive market that is characterized by numerous alternative service providers, non-exclusive

markets, no guaranteed revenues and strong competitive pressures to keep prices low and service quality high. Furthermore, imposing unnecessary and burdensome reporting and approval requirements on competitors would be inconsistent with the Commission's commitment to opening the local service markets to competition. For all the foregoing reasons, Time Warner Telecom respectfully requests that the Commission grant a limited waiver of application of Rule 803 as applied to the Merger transaction with Xspedius.

### CONCLUSION

Based on the foregoing, Applicants respectfully submit that the public interest, convenience, and necessity would be furthered by a grant of this Application, or alternatively waiver of Rule 803 as applied to this Merger transaction. In light of the long-term benefits and economies created by the merger of two successful networks, the Commission approval of the Merger will strengthen competitive telecommunications in Arizona. Because the parties to the Merger cannot close the Merger until all regulatory approvals are received, and the full pro-competition and pro-consumer benefits of the Merger cannot be realized until the Merger closes, the Applicants request expedited review of this Application.

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RESPECTFULLY SUBMITTED this 31st day of July, 2006.

**TIME WARNER TELECOM INC.**

**XSPEDIUS COMMUNICATIONS, LLC**

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ORIGINAL + 17 copies filed this  
31<sup>st</sup> day of July, 2006:

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Brenda Wendt

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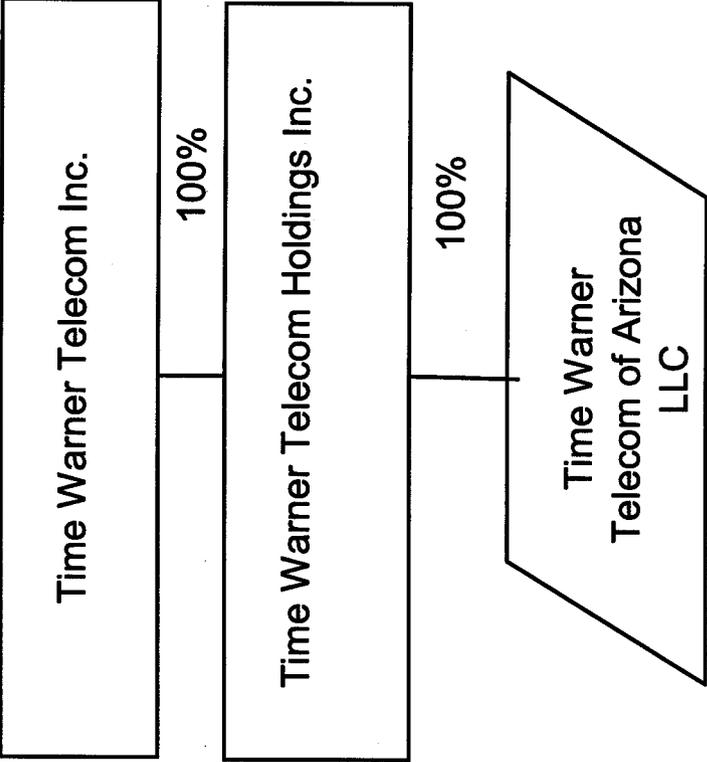
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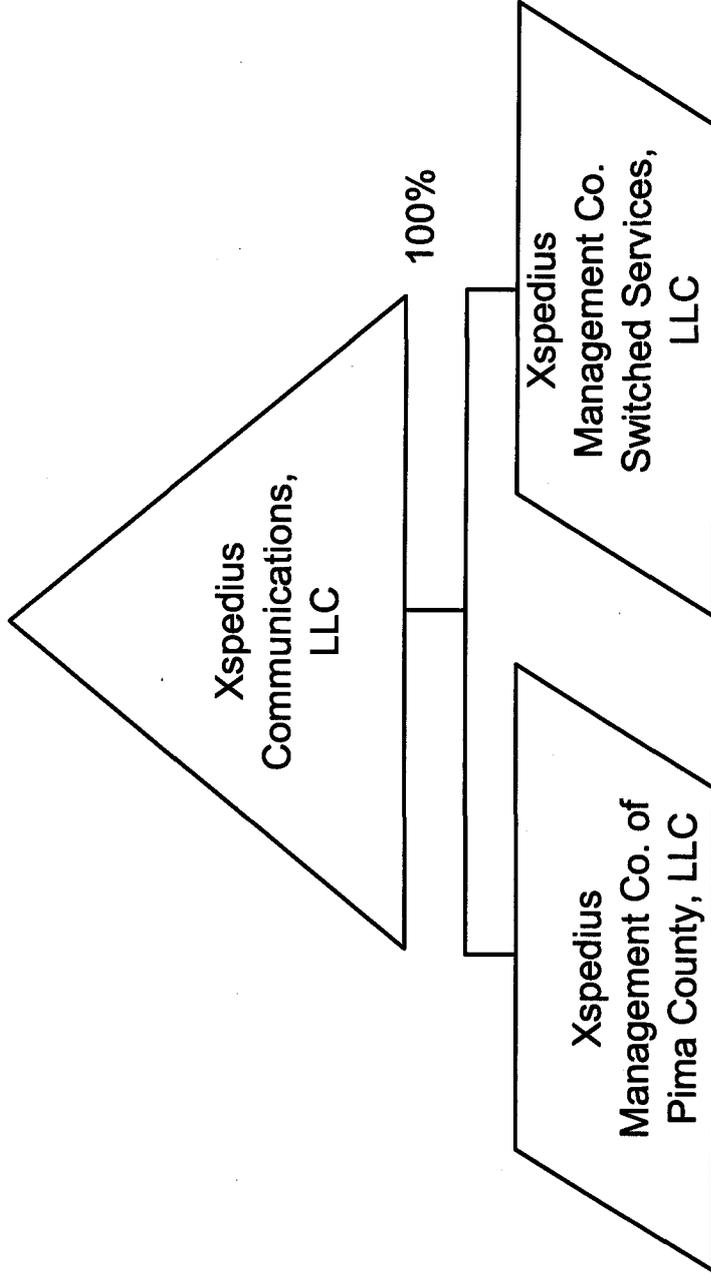
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**Time Warner Telecom Inc. & Arizona Subsidiaries  
Pre Merger Structure**



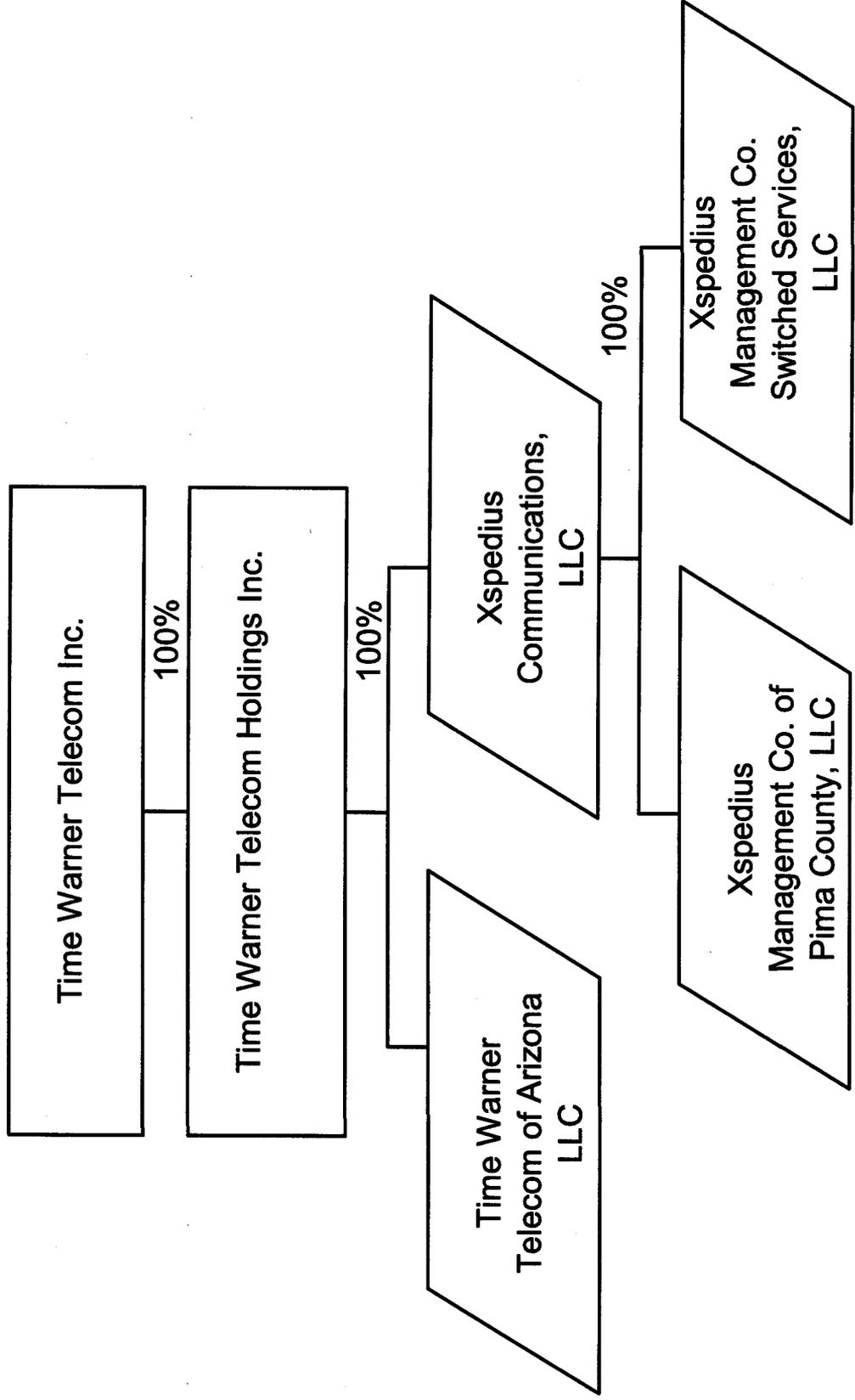
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# Xspedius Communications, LLC & Arizona Subsidiaries Pre Merger Structure



D

# Time Warner Telecom Inc. & Arizona Subsidiaries AZ Proposed Post Merger Structure



E

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