

**BURNS, DAY & PRESNELL, P. A.**

**ATTORNEYS AT LAW**

**2626 GLENWOOD AVENUE, SUITE 560  
RALEIGH, NORTH CAROLINA 27608**

**JAMES M. DAY  
DANIEL C. HIGGINS  
GREG L. HINSHAW  
JULIA YOUNG KIRKPATRICK  
JAMES J. MILLS  
LACY M. PRESNELL III**

**F. KENT BURNS - RETIRED**

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**MAILING ADDRESS:  
POST OFFICE BOX 10867  
RALEIGH, NORTH CAROLINA 27605  
TELEPHONE (919) 782-1441  
FACSIMILE (919) 782-2311**

**www.burnsdaylaw.com**

**VIA HAND DELIVERY**

Ms. Frances Liles, Administrator  
North Carolina Rural Electrification Authority  
430 N. Salisbury Street  
Room 4033  
Raleigh, North Carolina 27603

RE: *TWCIS (NC) v. Star Telephone Membership Corporation*  
NCREA Docket No. TMC-5, Sub 1

Dear Ms. Liles:

Enclosed find the original and 11 copies each of the Response to Motion to Dismiss which I tender for filing on behalf of Star Telephone Membership Corporation in the above-referenced docket.

As always, please let me know if you have any questions regarding any aspect of this filing. Otherwise, please return one filed stamped copy of the enclosure via our courier.

With best regards, we remain

Sincerely yours,

BURNS, DAY & PRESNELL, P. A.

  
Daniel C. Higgins

DCH:mm  
enclosures

cc: Jo Anne Sanford, Arbitrator (via e-mail)  
Marcus Trathen (via e-mail)  
Star TMC

**NORTH CAROLINA  
RURAL ELECTRIFICATION AUTHORITY  
RALEIGH**

**Docket No. TMC-5, Sub 1**

In the Matter of	)	
Petition of Time Warner Cable Information	)	
Services (North Carolina), LLC for Arbitration	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934, as Amended, to	)	
Establish Interconnection Agreement with Star	)	STAR TMC'S RESPONSE TO TIME
Telephone Membership Corporation	)	WARNER'S MOTION TO DISMISS
	)	
AND	)	
	)	
Petition of Time Warner Cable Information	)	
Services (North Carolina), LLC to Terminate	)	
Star Telephone Membership Corporation's	)	
Rural Telephone Company Exemption	)	
Pursuant to Section 251(f)(1) of the	)	
Communications Act of 1934, as Amended	)	

Pursuant to the Authority's Order issued March 28, 2012, Star Telephone Membership Corporation ("Star TMC") hereby responds to the Motion to Dismiss Petition for Suspension or Modification filed by Time Warner Cable Information Services (North Carolina), LLC ("TWCIS") on March 23, 2012.

**INTRODUCTION**

On February 29, 2012, Star TMC filed a Petition for Modification or Suspension pursuant to Section 251(f)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act").<sup>1</sup> TWCIS moved to dismiss that Petition. Because Star TMC's Petition sufficiently sets forth a legally cognizable claim, as detailed below, the Authority must deny TWCIS's motion to dismiss and establish a procedural schedule allowing Star TMC the opportunity to offer evidence supporting its request for suspension or modification, as provided for in Section 251(f)(2) of the Act.

<sup>1</sup> 47 U.S.C. §§ 151, *et seq.*

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TWCIS's motion to dismiss is premised on its argument that the standard to be applied by the Authority in assessing the adequacy of Star TMC's Petition is the standard applied by North Carolina civil courts under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. This is a curious argument, given that the North Carolina Rules of Civil Procedure are not applicable to proceedings before the Authority, and that TWCIS points the Authority to the North Carolina Rules of Civil Procedure, rather than the Federal Rules of Civil Procedure, when the statute at issue here is a Federal one. As a practical matter, should the Authority chose to look to Rule 12(b)(6) of either the North Carolina or Federal Rules of Civil Procedure, which it is not obligated to do, it is apparent that Star TMC's Petition more than adequately states a claim for relief under Section 251(f)(2) of the Act.

In its fevered rush to deny Star TMC the opportunity to offer evidence relevant to the criteria for modification or suspension, which Star is entitled to do under Section 251(f)(2), TWCIS argues that it is effectively impossible for a rural telephone company to secure suspension or modification of any obligation to establish interconnection arrangements under Section 251(b). Nothing could be further from the truth and the Authority need look no farther than the North Carolina Utilities Commission to find a state commission decision suspending the application of the Section 251(b)(5) interconnection obligation to a half-dozen rural North Carolina ILECs for the past six years.<sup>2</sup>

Likewise, the Federal Communications Commission recently explicitly recognized that state commissions are able to suspend or modify, pursuant to Section 251(f)(2), the application of Section 251(b) and (c) obligations to small telephone companies. *In the Matter of Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, Declaratory Ruling*, WC Docket No. 10-143, GN Docket 09-51 and CC Docket 01-92, FCC 11-83, released May 26, 2011 ("*Time Warner Declaratory Ruling*").

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<sup>2</sup> *In the Matter of Petition of Rural Telephone Companies for Modification Pursuant to 47 USC 251(f)(2)*, Order Granting Modification Under Section 251(f)(2), NCUC Docket P-100, Sub 159, (issued March 8, 2006).

Specifically, the FCC recognized as follows in that ruling:

To the extent that Congress intended to relieve incumbent LECs of some of their obligations under section 251, Congress provided for that relief through section 251(f)(1)-(2). Congress further recognized the expertise of state commissions by leaving to the states determinations regarding exemptions, suspensions, and modifications pursuant to section 251(f) in the first instance.

*Time Warner Declaratory Ruling* ¶ 23, nn. 81-82.

TWCIS cites several decisions by other state commissions, contending that these decisions suggest that dismissal of Star's Petition is warranted before Star is allowed to offer evidence in support of its Petition. In fact, a number of the decisions cited by TWCIS were made by a state commission, **only after** conducting a hearing and receiving the evidence offered by the rural ILEC – thus they offer no support for the notion that dismissal of Star TMC's Petition at this point is appropriate.

Further, there are a number of state commission decisions granting suspension or modification as provided for in Section 251(f)(2). As is apparent from the NCUC's suspension of the application of the Section 251(b)(5) obligation to establish reciprocal compensation arrangements to a half-dozen small North Carolina ILECs (and the NCUC's authority to do so was just recently affirmed by the Fourth Circuit Court of Appeals<sup>3</sup>), Section 251(f)(2) clearly authorizes a state commission to suspend or modify the application to a small telephone company of any obligation under Section 251(b) or (c).<sup>4</sup> Under Section 251(f)(2), a rural telephone company seeking suspension or modification has the burden of proof. Implicit in the statutory allocation of that burden to the rural ILEC is that the ILEC is entitled to an opportunity to offer evidence bearing on the relevant statutory criteria.

As a final and practical point, until TWCIS responds to the allegations of matters of fact set forth in Star TMC's Petition, by admitting, denying or otherwise pleading as to those matters, the issues will not be joined. Thus, until that time neither Star TMC nor the Authority will know

<sup>3</sup> *New Cingular Wireless PCS, LLC, et al, v. Finley, et al.*, \_\_\_ F. 3d. \_\_\_, 2012 WL 860283 \* 16-17 (4<sup>th</sup> Cir. 2012).

<sup>4</sup> In a docket related to that NCUC docket, the Authority also ruled that it has the power to entertain a request for suspension or modification pursuant to Section 251(f)(2). *In the Matter of Petition of Rural Telephone Companies for Modification Pursuant to 47 USC §251(f)(2)*, NCREA Docket TMC-100, Sub 1.

the precise scope of the issues that will need to be addressed by the evidence to be adduced in support of Star TMC's Petition. For purposes of ruling on TWCIS's motion to dismiss, the allegations set forth in Star TMC's Petition are sufficient to state a claim upon which relief may be granted under Section 251(f)(2) and TWCIS's motion to dismiss must fail.

### **PROCEDURAL HISTORY**

TWCIS is a Delaware limited liability company, certificated by the North Carolina Utilities Commission to provide service as a competing local provider ("CLP") in parts of North Carolina. However, TWCIS informed the NCUC some years ago that "TWCIS will no longer provide Digital Phone service pursuant to its North Carolina Utilities Commission certification."<sup>5</sup>

In March 2006, TWCIS filed Petitions requesting that the Authority arbitrate an interconnection agreement between TWCIS and three telephone membership corporations, including Star TMC.<sup>6</sup> At that same time, TWCIS also petitioned the Authority to terminate Star TMC's exemption as a rural telephone company under Section 251(f)(1).<sup>7</sup> TWCIS seeks interconnection with Star TMC in order to facilitate the efforts of TWCIS's affiliate, TWC Digital Phone, LLC d/b/a Time Warner Cable, to offer its "Digital Home Phone" and "Business Class Phone" Voice over Internet Protocol ("VoIP") service to residences and businesses located in only those portions of Star TMC's service area where Time Warner Cable has cable television facilities.

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<sup>5</sup> Letter to NCUC-Public Staff from Marcus Trathen, Docket P-1262, Company Folder, June 30, 2005.

<sup>6</sup> *In the Matter of Petition of Time Warner Cable Information Services (North Carolina), LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish Interconnection Agreement with Atlantic Telephone Membership Corporation*, NCREA Docket TMC-1, Sub 1; *In the Matter of Petition of Time Warner Cable Information Services (North Carolina), LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish Interconnection Agreement with Randolph Telephone Membership Corporation*, NCREA TMC-3, Sub 1.

<sup>7</sup> At the same time, TWCIS also petitioned the Authority to terminate the rural exemptions of Atlantic TMC and Randolph TMC.

Star TMC is a North Carolina telephone membership corporation organized and existing pursuant to Article 4 of Chapter 117 of the North Carolina General Statutes.<sup>8</sup> Star TMC provides local exchange telecommunications services in its service area pursuant to the laws of the State of North Carolina and subject to the jurisdiction of the Authority. Star TMC is an incumbent local exchange carrier (“ILEC”) as that term is defined in Section 251(h) of the Act. Star is also a rural telephone company as that term is defined in Section 153(37) of the Act.

On April 10, 2006, the three TMCs filed Motions to Dismiss TWCIS’s Petitions for Arbitration, Responses to TWCIS’s Petitions for Arbitration and Responses to TWCIS’s Conditional Petitions for Termination of Rural Exemption. The TMCs’ Motions to Dismiss challenged TWCIS’s standing to demand interconnection with the TMCs.

On July 19, 2006, the Authority issued its Order Consolidating Proceeding and Dismissing Proceedings. In that Order, the NCREA found that TWCIS had failed to demonstrate that it is a “telecommunications carrier” under the Act entitled to demand interconnection with the TMCs.

Some 17 months later, TWCIS moved for reconsideration of that Order.<sup>9</sup> TWCIS did not appeal that ruling until May of 2008, when it commenced an action in federal court.<sup>10</sup> As the Authority knows, an Order was issued in that case on September 23, 2009, remanding those dockets to the Authority for further proceedings not inconsistent with the Court’s Order.

By Order issued January 27, 2010, in this docket, the Authority established bifurcated proceedings to address the issues raised by TWCIS’s Petitions as to Star TMC, with Phase I of that proceeding to determine whether Star TMC’s Section 251(f)(1) rural exemption should be

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<sup>8</sup> N.C. Gen. Stat. § 117-30.

<sup>9</sup> Order Denying Request for Reconsideration ¶5, issued March 24, 2008.

<sup>10</sup> *Time Warner Cable Information Services (North Carolina), LLC v. Calvin Duncan, et al*, 656 F.Supp.2d 565 (E.D.N.C. 2009).

terminated. The Authority ruled that if it determined that Star TMC's rural exemption should be terminated as to TWCIS's request for interconnection, then Phase II would consist of arbitration of any open issues necessary for formation of an interconnection agreement between TWCIS and Star TMC. Thereafter, those parties filed direct testimony, exchanged data requests and otherwise engaged in the process of conducting the Phase I proceedings ordered by the Authority.

Based on the *Time Warner Declaratory Ruling*, issued in May 2011, TWCIS later moved the Authority to terminate Phase I proceedings in this docket. The Arbitrator subsequently recommended termination of Phase I, and the Authority issued its Final Decision on January 31, 2012, adopting the Arbitrator's Recommended Decision. As a consequence, on that date proceedings on TWCIS's Petition to terminate Star TMC's rural exemption pursuant to Section 251(f)(1) in this docket came to a close. At all times during the pendency of this docket, TWCIS has been free to, and in fact has, provided its VoIP services to customers in Star TMC's service area without the requested interconnection.

On February 29, 2012, Star TMC filed, pursuant to Section 251(f)(2), a Petition for suspension or modification of the application to its telephone exchange service facilities of the interconnection arrangements which TWCIS seeks to establish pursuant to Section 251(b) and/or (c). Star TMC was completely within its rights under the Act in doing so. Because Star TMC's Petition states a cognizable claim for the relief available under Section 251(f)(2), TWCIS's motion to dismiss must be denied, and the Authority should issue its order establishing a procedural schedule and setting Star TMC's Petition for hearing.

## RESPONSE TO TWCIS's MOTION TO DISMISS

At the outset, Star TMC points out the fundamental inaccuracy in TWCIS's gratuitous assertion that Star has "engaged in a strategy of systematic delay for more than six years to avoid compliance with statutory duties...." (Motion to Dismiss p. 1). Any frustration that TWCIS has as to the history of proceedings in this docket is a product of the protection for rural and small telephone companies built into the Act. Star TMC's presentation of issues arising from TWCIS's request to terminate Star TMC's rural exemption under Section 251(f)(1), and the Authority's Orders over the last several years relating to TWCIS's efforts to terminate Star's rural exemption, are not systematic delay; rather they are the product of Star TMC's exercise of its rights under the Act as a rural telephone company. The Authority's approach to the issues arising from TWCIS's request that Star TMC's rural exemption be terminated was consistent with federal court decisions and the decisions of other state commissions, including but not limited to the North Carolina Utilities Commission. *See In the Matter of Petition of Sprint Communications Company for Arbitration with Pineville Telephone Company*, NCUC Docket P-120, Sub 26, Order Holding Sprint's Petition to Establish an Interconnection Agreement in Abeyance, issued January 14, 2010, pp. 6-12 ("*Sprint v. Star TMC*") (NCUC reviews federal court decisions construing Section 251(f)(1) rural exemption and holds that Pineville has no obligation to negotiate the terms of the interconnection agreement requested by Sprint unless and until the NCUC first terminates Pineville's rural exemption.)

Pejorative characterizations as to Star TMC's assertion of good faith arguments as to its rights under the Act serve no purpose, other than to explain TWCIS's feverish rush to now try to deny Star TMC its right to offer evidence as to the criteria for suspension or modification set



forth in Section 251(f)(2) of the Act. Finally, in ascribing to Star TMC all of what it characterizes as “delay” in the procedural history of this docket, TWCIS fails to mention that it delayed its appeal of the Authority’s ruling on Star’s Motion to Dismiss TWCIS’s Petition for a year and a half. On that point, as with other aspects of the arguments presented by TWCIS in its motion to dismiss, the reality is far different than what is suggested in that motion.

**1. Under the Legal Standard Applicable to a Motion to Dismiss in Civil Court, TWCIS’s Motion to Dismiss Fails.**

In its effort to deny Star TMC the opportunity to seek modification or suspension of interconnection obligations set forth in Section 251(b) or (c), TWCIS invites the Authority to look to rulings based on the North Carolina Rules of Civil Procedure. While the Authority has not adopted those rules, and is not required to look to them, it is well settled in North Carolina that a motion to dismiss “does not present the merits, but only whether the merits may be reached. As the United States Supreme Court has stated with respect to the similar provisions of F.R.Civ.P. 12(b), ‘[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.’” *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758 (1986).

In arguing that Star TMC failed to state a legally sufficient claim under the North Carolina Rules of Civil Procedure, TWCIS conflates the requirements of Rule 8(a) regarding pleading and Rule 12(b)(6) regarding dismissal for failure to state a claim upon which relief can be granted. As the Court recognized in *Time Warner Cable Information Systems v. Duncan, et al.*, 656 F. Supp. 2d. 565, 575 (E.D.N.C. 2009), “the NCREA has not formally adopted the Federal Rules of Civil Procedure.” In fact, the Authority has not adopted the North Carolina

Rules of Civil Procedure either, and it is under no obligation to pay them heed, as they technically apply only to civil actions in the courts of North Carolina. Should the Authority choose, however, to look to Rule 12(b)(6) of either the North Carolina or Federal Rules of Civil Procedure, it is apparent that Star TMC's Petition more than adequately states a claim for relief under Section 251(f)(2) of the Act. Quite simply, application of the concepts enunciated by North Carolina appellate courts in analyzing these two rules of civil procedure make it quite apparent that Star TMC's Petition is more than adequate to satisfy the pleading requirements set forth in Rule 8, and that TWCIS's motion to dismiss premised on Rule 12(b)(6) must fail.

Rule 8 of the North Carolina Rules of Civil Procedure, which is entitled "General Rules of Pleading," provides in pertinent part in section (a) as follows:

A pleading which sets forth a claim for relief ... shall contain ... [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and ... [a] demand for judgment for the relief to which he deems himself entitled.<sup>11</sup>

As the North Carolina Court of Appeals recognized in *Benfield v. Costner*, 67 N.C. App. 444, 445, 313 S.E.2d 203, 205 (1984): "North Carolina is a notice pleading State, and detailed fact pleading generally is no longer required." That Court has likewise recognized the liberal standard applicable under notice pleading in assessing the adequacy of pleadings in civil court actions:

Under our modern practice only claims for fraud, duress, libel and slander have to be pleaded with any particularity at all. In all other instances the complaint is sufficient if it gives 'the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief....' Plaintiff's complaint provides that notice, in our opinion...defendants have been

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<sup>11</sup> N.C. Gen.Stat. § 1A-1, Rule 8(a) (2009).

notified of both the factual and legal basis for the claim - all that they need to know in order to answer the complaint and test its allegations through discovery. Further allegations are not required. **The unlikelihood of plaintiff being able to prove that the acts which allegedly injured him were wrongful is irrelevant at this juncture; as a complaint is dismissable for want of proof under Rule 12(b)(6), N.C. Rules of Civil Procedure, only when it appears that the proof needed is beyond the realm of possibility.**

*Newton v. Whitaker*, 83 N.C.App. 112, 114-15, 349 S.E.2d 333 (1986) (citations omitted) (emphasis added).

In its Petition, Star TMC alleges the following:

[E]stablishment of arrangements for number portability pursuant to Section 251(b)(2), dialing parity pursuant to Section 251(b)(3), access to rights of way pursuant to Section 251(b)(4) and/or reciprocal compensation pursuant to Section 251(b)(5), in order to facilitate the offering of Time Warner Cable's "Digital Home Phone" and "Business Class Phone" service in Star TMC's service area would, individually and collectively, impose a significant adverse economic impact on users of Star TMC's telecommunications services generally, would impose requirements on Star TMC that are unduly economically burdensome and would be inconsistent with the public interest, convenience and necessity.

(Star Petition ¶ 17).

Section 251(f)(2) provides as follows:

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification -

(A) is necessary -

- (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
- (ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible;  
and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

Thus, under Section 251(f)(2), a state commission may modify or suspend 251(b) or (c) requirements, if the ILEC requesting such relief meets its burden of proof. Star TMC's claim requests suspension or modification, as provided for in Section 251(f)(2), and this claim is supported by detailed allegations of factual matters set forth in ¶¶ 15-32 of the Petition. Star TMC's Petition gives full and adequate notice to the Authority and TWCIS of the matters "intended to be proved [by Star TMC] showing that the pleader is entitled to relief." Section 251(f)(2) provides for the relief requested by Star TMC and paragraphs 15 through 32 of its Petition more than adequately state the facts upon which Star TMC bases its request. Thus, TWCIS's motion to dismiss must be denied.

In ruling on a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the question for a court is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted **under some legal theory.**" *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)) (emphasis added). For purposes of that analysis, the allegations set forth in Star's petition must be treated as true.

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief. *Nucor Corp. v. Prudential Equity Group, LLC*, 189 N.C.App. 731, 735, 659 S.E.2d 483, 486 (2008) (citation omitted). Our Supreme Court has further stated that '[d]ismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

*Stunzi v. Medlin Motors, Inc.*, \_\_\_ N.C. App. \_\_\_, 714 S.E.2d 770, 773-74 (2011) (emphasis added).

TWCIS's argument that Star has failed "to identify competent evidence which support" the allegations set forth in its Petition intentionally overlooks the obvious.<sup>12</sup> That is not the standard to be applied on a motion to dismiss for failure to state a legally cognizable claim. Star TMC has pled a claim for the relief, in the form of suspension or modification, which is available to small ILECs under Section 251(f)(2). Star has alleged matters which, if proved, will entitle it to the relief provided for by law. Having pleaded its claims sufficiently to provide TWCIS with adequate notice, Star TMC is entitled to an opportunity to offer proof to support its petition for relief.

Under Section 251(f)(2) a carrier such as Star TMC that petitions for suspension or modification of Section 251(b) requirements has the burden of proof as to the requested suspension or modification.<sup>13</sup> Logically implicit in the statutory allocation of that burden to the

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<sup>12</sup> TWCIS Motion p. 3.

<sup>13</sup> 47 CFR §51.405(b).

small ILEC, is that the ILEC is entitled to an opportunity to offer evidence bearing on the relevant statutory criteria. TWCIS's effort to foreclose Star TMC's right to petition for relief, and to in effect render Section 251(f)(2) meaningless as to Star TMC, must be recognized for what it is; an effort by TWCIS to deny Star TMC its opportunity to exercise its legal right to seek relief provided for it in the Act.

## **2. The NCREA's Authority Under Section 251(f)(2) of the Act.**

Star TMC petitioned the Authority pursuant to Section 251(f)(2) to suspend or modify its obligation to provide the Section 251(b) and (c) interconnection arrangements requested by TWCIS. In its Petition Star TMC alleges that it serves "fewer than 2 percent of the Nation's subscriber lines." (Petition ¶ 14). Thus, for purposes of Star TMC having stated a legally sufficient claim, it is eligible to petition the Authority for suspension or modification under Section 251(f)(2) of the Act.

TWCIS argues that establishment of the Section 251(b) interconnection arrangements it seeks with Star TMC "are universal default requirements" to which all LECs, including small rural LECs are subject. In advancing that argument TWCIS relies on the *Time Warner Declaratory Ruling, supra*, specifically the statement therein "that LECs are obligated to fulfill all of the duties set forth in Sections 251(a) and (b) of the Act."<sup>14</sup> While that statement is true as a general proposition, in citing that portion of the Order, TWCIS fails to acknowledge that the FCC recognized in that same Order that small telephone companies retain the right to petition for relief from Section 251(b) and (c) obligations pursuant to Section 251(f)(2).

Specifically, the FCC echoed the language cited by TWCIS in the following general statement in that Order:

Consistent with Commission precedent, we reaffirm that all telecommunications carriers, including rural carriers covered by section 251(f)(1), have a basic duty to interconnect their networks under section 251(a) and that all LECs, including rural LECs covered by section 251(f)(1), have the obligation to comply with the requirements set forth in section 251(b).

(*Time Warner Declaratory Ruling* ¶ 14, 26 FCC Record 8267). Interestingly, the FCC then included the following acknowledgment in a footnote to that very statement:

We note, of course, that carriers might obtain relief from the section 251(b) obligations in some instances pursuant to section 251(f)(2).

(*Time Warner Declaratory Ruling*, 26 FCC Record 8267, n. 49). An ILEC's obligation to provide Section 251(b) arrangements is, while considered a default, subject to the right of the small telephone company to petition for suspension or modification pursuant to Section 251(f)(2). It is thus apparent that even after the *Time Warner Declaratory Ruling*, Section 251(f)(2) still means what it says, and that Star TMC can still petition for, and the Authority can still grant, a suspension or modification pursuant to Section 251(f)(2).<sup>15</sup>

TWCIS is either unwilling or unable to recognize that the public interest in competition cannot be given preeminent weight when the evidence shows that the requested interconnection arrangements will imperil the ability of the small rural ILEC to survive. If it is a "either/or" choice, then there is no public benefit in exchanging spotty, limited VoIP service for universal, and more reliable, service from a rural ILEC. Competition is preferable only when competition can be sustained and when the choices enabled by competition will be continuously available to the full customer base. Star TMC is entitled to offer evidence that individually or collectively, the interconnection arrangements sought by TWCIS will threaten its survival and imperil the

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<sup>14</sup> *Time Warner Declaratory Ruling* ¶2.

<sup>15</sup> *Midcontinent Communications v. North Dakota Public Service Com'n*, 2009 WL 3722898 \*2 (D. N.D. 2009).

provision of universal service, neither of which results would be consistent with the public interest.

### **3. TWCIS Misconstrues Section 251(f)(2).**

TWCIS also repeatedly and erroneously refers to the modification or suspension sought by Star TMC as "permanent." Star realizes that, by definition, a suspension is for a period of time. That is why Star TMC described in paragraph 31 of its Petition events that it proposes as triggering termination of the suspension or modification requested by Star.

The other general theme found in TWCIS's motion to dismiss is an argument attempting to expand the criteria for relief under Section 251(f)(2); TWCIS attempts to superimpose a new requirement for the relief requested under Section 251(f)(2) that is not based on the statute. Specifically, TWCIS argues that Star TMC's Petition must specify on an item-by-item basis the specific requirements that would be suspended and provide the specific justification for each such suspension, apparently with a separate undue economic burden and public interest analysis for each requirement. At the same time, TWCIS ignores the fact that its own interconnection request was worded in general terms, with the familiar amorphous preamble of "including but not limited to." Star TMC believes it important to note up front that the repeated use of the phrases "particular duties," "particular requirement," and "particular requirements," which appear throughout TWCIS's motion to dismiss is a reference to language and requirements not found in Section 251(f)(2). If one were to read the text of that motion, without actually reading the governing statute, one might believe that the word "particular" appears in Section 251(f)(2). That is not the case and the Authority should reject this effort to engraft non-existent requirements onto Section 251(f)(2). The Authority must apply Section 251(f)(2) as it was written and adopted



by Congress.

TWCIS offers an analysis of different statutory language than what is found in Section 251(f)(2) and the judicial opinions reviewing it. TWCIS reviews a statutory provision that it has created to include new phrases within it - "temporary relief, "particular requirement"<sup>16</sup> - that simply are not there. Whether it be couched in terms of "competition" as the sole objective of the 1996 revisions to the Act or whether it is an effort to mischaracterize the relief that Star TMC seeks as an exemption under Section 251(f)(2), in its motion to dismiss TWCIS engages in "strawman" advocacy by creating non-existent positions, attributing them to Star TMC, and simply trying to strike them down.

Section 251(f)(2) does not include the word "temporary" but rather uses the phrase "such duration." Webster's New World Dictionary defines the word "duration" as "1: continuance in time; 2: the time that a thing continues or lasts." However long something continues, exists or lasts is the time within which such suspension is to be in place; no temporal adjective is appropriate or necessary. Thus, the duration of a suspension or modification would be based on the Authority's determination of how long the standards of Section 251(f)(2) are met based on the conclusions it makes in light of the evidence adduced at a hearing on Star TMC's Petition.

TWCIS contends that any resolution of a Section 251(f)(2) petition must be based on the premise that competition is the controlling directive of the Act, to the exclusion of all others. This is simply the argument that "competition-for-competition's-sake" is the governing mantra of

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<sup>16</sup> In making this contention, TWCIS effectively writes out of Section 251(f)(2) the words "or requirements", the collective impact of which are to be considered under the factors enunciated under Section 251(f)(2)(A)(i)-(ii) and Section 251(f)(2)(B). And, in doing so, TWCIS attempts to end-run the fact that it is the whole of the economic burden of meeting the interconnection request that is to be addressed. *Iowa Utilities Board v. FCC*, 219 F.3d 744, 761 (8<sup>th</sup> Cir. 2000). TWCIS's argument is nothing more than the "cramped" reading of Section 251(f) that the Eighth Circuit rejected in that case.

the 1996 revisions to the Act. Of course, that claim is not true. Competition is not an end, in and of itself. If that were correct (and it is not) then Congress would not have established the fundamental Universal Service statutory requirements in Section 254, let alone made provision for the specific and distinct treatment of smaller and rural LECs in Sections 251(f)(1) and 251(f)(2).

More fundamentally, TWCIS seeks to have the Authority ignore the fact that the standards under Section 251(f)(1) and Section 251(f)(2) for undue economic burden are the same, and the United States Court of Appeals for the 8<sup>th</sup> Circuit has said so.<sup>17</sup> So too, the overarching objective of universal service has already been acknowledged to be the ultimate objective under the Act. As stated by the District Court in *Wireless World, LLC v. Virgin Islands Public Service Commission*, 2008 WL 5635107 \*7 (D. Virgin Islands 2008), after referencing aspects of Section 254(b), "[b]y enacting these three related provisions, Congress ensured that the competition-promoting aspects of the 1996 Act would not undermine its most fundamental purpose. **That fundamental purpose, as confirmed by § 254(b), is to promote, provide, and sustain affordable telecommunications service for all citizens; and, this is what is meant by "universal service."** (emphasis added). See *Indiana Bell Telephone Co. Inc. v. Smithville Telephone Co., Inc.*, 31 F.Supp.2d 628, 642-43 (S.D. Ind. 1998) ("By allowing the state commission to exempt rural LECs from the § 251 requirements, or modify those requirements for small or rural LECs, **Congress recognized the need to balance the goal of increased competition with the state's interest in maintaining universal service.** This is why the Act

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<sup>17</sup> *Iowa Utilities Board*, 219 F.3d at 760 (Addressing then-proposed 47 C.F.R. § 51.405 and stating that a request for interconnection "must not cause an undue economic burden in order to justify a termination of an exemption under § 251(f)(1) *or* to justify the denial of a petition for suspension or modification under § 251(f)(2).") (emphasis added).

allows different treatment, at the state commission's discretion, of interconnection requirements for rural LECs.”) (emphasis added). In terms of the universal service issue at stake here, Star TMC has exhibited its commitment to universal service since its creation in 1959, long before TWCIS or Time Warner Cable even existed.

#### **4. Decisions by Other State Commissions.**

TWCIS points to several state commission decisions which it suggests support its motion asking that Star TMC’s Petition be dismissed, and to thereby deny Star TMC an opportunity to offer evidence in support of its Petition. Even a cursory review of several of these decisions reveals that the state commission denied the small ILEC’s request for relief under Section 251(f)(2) **only after** receiving and reviewing evidence offered by the ILEC. For example, TWCIS cites the Montana Public Service Commission decision in *Petition of Ronan Telephone Company For Suspension of Provisions of the 1996 Telecommunications Act, pursuant to 47 USC §251(f)(2) and 253(b)*, Docket D-99.4.111 (1999), as suggesting dismissal at this stage in the instance docket is appropriate. In that docket, the Montana Public Service Commission ultimately denied Ronan Telephone Company’s Section 251(f)(2) Petition, but only after receiving evidence, issuing a conditional denial of the Petition and then providing that petitioner ILEC “the opportunity to provide additional evidence and argument pursuant to a supplemental procedural order and through arbitration proceedings.” (Order on Reconsideration, Order Denying Petition Enclosing Docket December 21, 1999, p.1). Thus, while the Montana PSC denied that small telephone company’s petition, it did so only after conducting a hearing. In fact, as the Montana PSC noted in that Order “the extraordinary interest in the docket expressed by members of the public tipped the scales in favor of a supplemental proceeding.” Thus, in that

docket, the petitioner not only had a hearing where it offered expert and public witness testimony, the state commission thereafter conducted a further supplemental proceeding. That approach is hardly consistent with TWCIS's request that Star TMC's Petition be dismissed before Star TMC has an opportunity to offer evidence.

TWCIS also cites *In re: Tennessee Coalition of Rural Incumbent Telephone Companies and Cooperatives Request for Suspension of Wireline Wireless Number Portability Obligations Pursuant to Section 251(f)(2)*, Tennessee Regulatory Authority ("TRA") Docket 03-00633, as supporting its motion to dismiss. In that docket, a coalition of rural Tennessee ILECs sought a blanket extension of their exemption from any obligation to acquiring the capability of providing wireline to wireless number local number portability ("LNP"). That docket did not concern a request for interconnection from any carrier or a request for provision of LNP – which is one of the interconnection arrangements TWCIS seeks to establish with Star TMC.

The TRA appointed a Hearing Officer and directed the ILEC Coalition to file an amended petition setting forth allegations of matters specific to each petitioning ILEC. The Hearing Officer found that an evidentiary hearing would be necessary and a procedural schedule was established. The parties later agreed to submit the matter decision based on the evidentiary record which would include the pleadings, the parties' discovery responses, the parties' prefiled direct and rebuttal testimony and the parties' briefs.

While the TRA concluded that it should not suspend the obligations of the members of the ILEC Coalition to become LNP capable (that is, to acquire the capability to provide local number portability), it did so only after conducting a hearing and receiving and reviewing evidence. The TRA's finding that the ILEC Coalition "did not carry its burden" is far different

than the result TWCIS seeks here, where it is trying to deny Star TMC any opportunity to meet its burden of proof. Thus, nothing about the TRA's decision in that docket would support TWCIS's motion to dismiss here.

Likewise, in another ruling cited by TWCIS, the Illinois Commerce Commission's decision in *Cambridge Telephone Company, et al. Petitions for Declaratory Relief and/or Suspension of Modification Relating to Certain Duties Under §251(b) and (c)*, ICC Docket Nos. 05-0259, et al., the Illinois Commerce Commission simply deferred consideration of the rural ILEC's request for suspension or modification after concluding that Sprint was a telecommunications carrier entitled to demand interconnection and deferring further proceedings to be addressed in connection with arbitrations.

Despite TWCIS's suggestion that it is impossible as a practical matter for a state commission to grant a suspension or modification under Section 251(f)(2), as shown by the decision of the NCUC in Docket 100, Sub 159, it is quite possible for a state commission to find that suspension or modification is warranted. While the decisions of other state commissions have no bearing on Star TMC's Petition, which must be judged based on the record evidence produced through a hearing, the point is that other state commissions have granted such requests. Another example of such relief is the decision of the Mississippi Public Service Commission to suspend, at the request of a group of petitioning small ILECs, and pursuant to Section 251(f)(2), the requirements of Section 251(b) and (c) to a date 12 months after the Mississippi PSC determined that the FCC had taken several specific actions. *In re: Petition of the Mississippi Independent Group for Commission Action Pursuant to Section 253(b) of the Telecommunications Act of 1996*, Final Order issued December 31, 1996; Clarification Order

issued June 2, 1998, Docket 96-UA-298.

Another such example is found in the Proposal for Decision in *Petition of Waitsfield-Fayston Telephone Company, Inc. d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom, pursuant to 47 U.S.C. § 251(f)(2), for Suspension or Modification of the interconnection requirements of 47 U.S.C. 251(b)*, Docket No. 7798, issued April 12, 2012, where the Vermont Public Service Board modified the date by which the petitioning small ILEC must implement local number portability, delaying such date until December 1, 2013. That small ILEC's request for suspension or modification pursuant to Section 251(f)(2) was triggered by a request for interconnection from Comcast Phone of Vermont LLC. The Vermont PSC established a procedural schedule, the parties filed testimony and a hearing was held thereafter. The point is not just that that state commission granted relief pursuant to Section 251(f)(2), but that it established a procedural schedule and conducted hearings affording the ILEC an opportunity to offer evidence and attempt to meet its burden of proof.

The Authority itself has previously had occasion to consider the Section 251(f)(2) *Petition for Suspension or Modification* filed by Piedmont Telephone Membership Corporation, Randolph Telephone Membership Corporation, Surry Telephone Membership Corporation, Tri-County Telephone Membership Corporation, and Yadkin Valley Telephone Membership Corporation on October 24, 2005 in Docket TMC-100, Sub 1. In that docket, the petitioning TMCs sought to be relieved from any obligation under Section 251(b)(5) to establish reciprocal compensation based on the FCC's TELRIC rules, and to further establish a default reciprocal compensation rate for their use in exchanging traffic with various CMRS providers, including Alltel, Cingular, Sprint, SunCom, and Verizon Wireless. *In the Matter of Petition of Rural*

*Telephone Companies for Modification Pursuant to 47 USC §251(f)(2)*, Docket no. TMC-100, Sub 1.

Verizon Wireless, Cingular and Sprint moved to dismiss the TMCs' Petition in that docket, arguing that the Authority did not have jurisdiction to grant the relief requested by the TMCs. By Order issued March 2, 2006, the Authority denied that motion to dismiss. In the companion docket before the NCUC, AT&T Communications and the CMRS providers made a similar motion to dismiss. In its Order Granting Modification Under Section 251(f)(2) the NCUC addressed the arguments of the various CMRS providers, including the CMRS arguments to the effect that the Commission lacked authority and "that even if legally entitled to proceed under Section 252(f)(2), the Rural ICOs have not established a case for their obligation being single 'unduly economically burdensome.'" (Order Granting Modification p. 7). The NCUC granted the small ILECs' request for suspension or modification in that docket.<sup>18</sup> As previously noted, the Fourth Circuit Court of Appeals recently affirmed the NCUC's authority to do just what it did.<sup>19</sup>

#### **5. The Relevance of the Recommended Decision in *Sprint v. Star TMC*.**

As alleged in paragraph 24 of Star TMC's Petition, the Arbitrator's Recommended Decision in *Sprint v. Star TMC* reflects a finding by that Arbitrator that Sprint could not prove that its requested interconnection would not impose an undue economic burden on Star TMC. This was based on evidence tending to show that the effects of the interconnection arrangements which Sprint sought to establish with Star TMC (which are effectively the same as what is sought by TWCIS here) would have dramatically reduced the revenues, net income and return on investment of Star TMC.

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<sup>18</sup> The Authority later adopted that result, with the consent of the parties to Docket TMC-100, Sub 1.

<sup>19</sup> See note 3, *supra*.

Such a result would be detrimental to Star TMC's ability to continue to make the investments and expenditures necessary to provide the quality service it currently provides and to maintain the benefits of universal service in its service territory.

In that docket Sprint sought to terminate Star TMC's rural exemption under Section 251(f)(1) for the same reason that TWCIS seeks to do so: to interconnect with Star TMC in order to facilitate the efforts of Time Warner Cable to offer its "Digital Home Phone" and "Business Class Phone" services to residences and businesses located only in certain portions of Star TMC's service area. By Order issued May 20, 2009, in *Sprint v. Star TMC*, the Authority established bifurcated proceedings to address the issues raised by Sprint's Petition. Phase I of that proceeding was confined to determining whether Star TMC's Section 251(f)(1) rural exemption should be terminated. The Authority ruled there that if it determined that Star TMC's rural exemption should be terminated as to Sprint's request for interconnection, then Phase II of that proceeding would resolve by arbitration any open issues necessary for formation of an interconnection agreement between Sprint and Star TMC.

On April 13, 2011, Arbitrator Hullihen W. Moore, retired Judge from the Virginia Corporation Commission, issued a Recommended Decision in *Sprint v. Star TMC*. In his Recommended Decision, the Arbitrator recommended that the NCREA deny Sprint's request to terminate Star TMC's rural exemption under the Act, based on his finding that Sprint had not met its burden of proving that its requested interconnection with Star TMC would not impose an undue economic burden on Star TMC. The Arbitrator found it unnecessary to reach the question of whether Sprint's requested interconnection would be consistent with the Act's universal



service objectives (another of the criteria established in Section 251(f)(1)), due to Sprint's failure to meet its burden of proof as to the "no undue economic burden to the rural ILEC" criteria.

Even though that proceeding involved Section 251(f)(1), and although Sprint had the burden of proof there, the Arbitrator's findings in that docket furnish reason to believe that requiring one or more of the interconnection arrangements sought by TWCIS in order to facilitate Time Warner Cable's offering of its services in Star TMC's service territory would impose an undue economic burden on Star TMC and be inconsistent with the public interest. Those findings also tend to show that the interconnection arrangements sought by TWCIS would cause "a significant adverse economic impact on users of telecommunications services generally." *See* Section 251(f)(2)(A)(i). The Recommended Decision recognized that the requested interconnection would cause an undue economic burden on Star TMC, which would, in turn, impose significant adverse economic effects on Star TMC's customers, who would face higher rates for services, thereby increasing the market price for services, and customers in the more remote portions of Star TMC's service territory would be at risk for even higher costs, service reductions or loss of service.

With respect to the applicable legal standard, the only difference between this case, and the one that was already litigated in *Sprint v. Star TMC*, is the burden of proof. While TWCIS understandably seeks to emphasize that difference, that argument does not support its motion to dismiss. For purposes of ruling on TWCIS's motion, the different burden of proof to be applied in a Section 251(f)(2) proceeding does not change the ultimate result. The underlying criteria is effectively the same as will be presented in this Section 251(f)(2) proceeding where Star TMC has the burden of proof: will establishment of the interconnection arrangements sought by TWCIS, individually and/or collectively, impose a significant adverse economic impact on users

of Star TMC's telecommunication services generally, impose requirements on Star TMC that would be unduly economically burdensome and/or be inconsistent with the public interest, convenience and necessity?

A simple shifting of the burden of proof is not a significant shift in the magnitude of the burden of proof. In this proceeding under Section 251(f)(2) the Authority would be faced with the same basic evidence, which in turn will show that establishment of the interconnection arrangements sought by TWCIS will result in undue economic burden to Star TMC. For purposes of meeting TWCIS's motion to dismiss, the point is that there is an allegation by Star TMC of relevant evidence relating to the criteria for suspension or modification under Section 251(f)(2) for which Star TMC has petitioned. In light of that allegation alone, the Authority should deny TWCIS's motion to dismiss.

Contrary to TWCIS's arguments – the only relevant consideration is whether actual competition as carried on by TWCIS and its affiliate Time Warner Cable will result in undue economic burden to Star TMC. If enforced, Section 251(b) obligations would allow TWCIS to enter the market under its current business model, and the resulting competition would introduce the economic circumstances that would result in the non-viability of Star TMC. For purposes of the present motion to dismiss Star TMC's petition, Star is entitled to offer evidence bearing on the question of whether the establishment of one or more of the interconnection arrangements sought by TWCIS would imperil the overall public interest and the provision of universal service in Star TMC's service area.

#### **6. TWCIS's Argument as to the Time in Which the Authority Must Act.**

Finally, TWCIS proposes that arbitration of the terms of the interconnection agreement it wants should proceed on a parallel track with Star TMC's request for suspension or modification under Section 251(f)(2). Such an approach would be absurd, both in terms of logic and efficiency. TWCIS would have the parties arbitrate the terms and conditions of an interconnection agreement, the extent of which will be determined only after the result of Star TMC's petition for suspension or modification of obligations under Section 251(b) is known. Thus, proceeding with arbitration would not only serve no purpose, it would be affirmatively inefficient, as the nature and extent of the potential interconnection arrangements to which Star TMC **might** be subject can only be known **after** the Authority has issued its final ruling on Star TMC's Section 251(f)(2) petition for modification or suspension.

The Authority has already resolved this issue in its Order of March 28. Specifically, therein the Authority found "that the resolution of Star's Petition should be completed prior to proceeding to Phase II, arbitration regarding an Interconnection Agreement between TWCIS (NC) and Star." Thus, it is apparent that the Authority has already concluded that it will first take up Star's Petition and, as appropriate upon resolution of that Petition, then and only then move forward to Phase II.

With regard to TWCIS's unilateral selection of January 31, 2012 as the "starting date" for the 9 month period set out in Section 252(b)(4)(C), this is a self-serving ploy intended to simply pressure the Authority. In reality, TWCIS's Petition for Arbitration has been pending since March 2006 and while the Authority has judiciously kept this process moving forward, as a practical matter, TWCIS could have at any time since late 2006 attempted to take this docket to

the FCC. The reality is that arbitration proceedings both at the Authority and at the North Carolina Utilities Commission and other state commissions are not completed within the statutory period, while not consistent with the language of the statute, these proceedings don't lend themselves to resolutions within the timeframe set forth in the statute. TWCIS can at any time choose to invoke the FCC's authority pursuant to Section 252(e)(5) and the Authority should not be cowed by TWCIS's threat to do so. TWCIS is free to attempt to avail itself of that course of action at any time, if it is so inclined.

### **CONCLUSION**

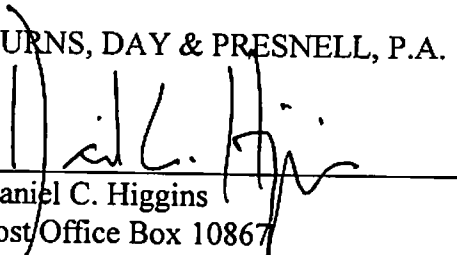
For the foregoing reasons, Star TMC respectfully requests that the Authority:

1. Deny TWCIS's motion to dismiss;
2. Establish a procedural schedule for conducting any discovery relating to Star TMC's Section 251(f)(2) Petition and schedule a hearing with regard to that Petition, prior to moving forward with the "second phase of the hearing/arbitration" as referenced in the Authority's Order of January 27, 2010;
3. Pending a final ruling on Star TMC's foregoing Petition, to "suspend enforcement of the requirement or requirements to which the petition applies with respect to" Star TMC, as provided for in Section 251(f)(2)(B); and,
4. For such other and further relief as is just, proper and consistent with Star TMC's request for suspension or modification.

Respectfully submitted, this the 23<sup>rd</sup> day of April, 2012.

BURNS, DAY & PRESNELL, P.A.

By:

  
Daniel C. Higgins  
Post Office Box 10867  
Raleigh, North Carolina 27605  
Telephone: (919)782-1441  
E-mail: [dhiggins@bdppa.com](mailto:dhiggins@bdppa.com)  
Attorneys for Star Telephone Membership Corporation

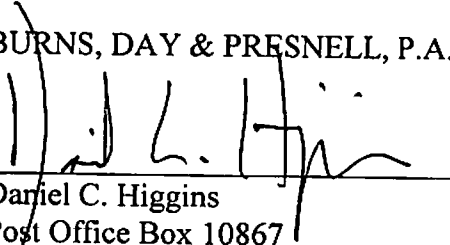
**CERTIFICATE OF SERVICE**

It is hereby certified that a true and exact copy of the foregoing Response of Star Telephone Membership Corporation was served this day by e-mailing same to counsel for Time Warner Cable Information Services (North Carolina), LLC.

This 23<sup>rd</sup> day of April, 2012.

BURNS, DAY & PRESNELL, P.A.

By:

  
Daniel C. Higgins  
Post Office Box 10867  
Raleigh, NC 27605  
Tel: (919) 782-1441