

**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 § 252(b) of the)
Communications Act of 1934, as Amended, to)
Establish Interconnection Agreement with Star)
Telephone Membership Corporation)

**TWCIS (NC) RESPONSE TO PETITION OF STAR TELEPHONE MEMBERSHIP
CORPORATION PURSUANT TO 47 U.S.C. § 251(f)(2)**

Time Warner Cable Information Services (North Carolina), LLC (“TWCIS (NC)”) hereby responds to the petition for suspension or modification (“Petition”) filed by Star Telephone Membership Corporation (“Star”) pursuant to Section 251(f)(2) of the Communications Act of 1934, as amended (the “Act”).

Section 251 does not require an answer or response to a petition for modification or suspension of Section 251(b) requirements. Nor does the Petition lend itself to a formal answer to specific factual allegations or claims made by Star. Rather, the Petition presents primarily legal argument concerning Star’s request for Section 251(f)(2) relief. Accordingly, this Response briefly provides TWCIS (NC)’s response to the legal arguments raised in the Petition and the limited factual allegations therein. TWCIS (NC) will respond in detail through pre-filed testimony and at the hearing in this matter and in post-hearing filings that may be permitted.

I.
GENERAL RESPONSE TO PETITION

Although the Authority chose not to adopt the Arbitrator's recommendation to dismiss Star's Petition,¹ the Arbitrator's interpretation of the legal standard under Section 251(f)(2), which is based on a reasonable and straightforward reading of the statutory text, demonstrates the heavy and particularized burden of proof that Star must satisfy.

Star seeks to foreclose facilities-based competition by indefinitely extinguishing *all* of its obligations under Section 251(b), meaning that it would now and forever be permitted to deny any request from TWCIS (NC) to exchange local telecommunications traffic, provide dialing parity, port a customer's telephone number, or comply with the other basic obligations imposed on all local exchange carriers ("LECs") by Congress. But as the Arbitrator recognized, Section 251(f)(2) does not authorize state commissions to suspend *competition*, and granting such sweeping relief would be unprecedented.² Indeed, the purpose of Section 251(f)(2) is to *facilitate* competition by allowing limited modifications or suspensions of obligations to the extent they present undue compliance burdens for rural LECs, in contrast to the rural exemption provision in Section 251(f)(1), which excuses compliance with Section 251(c) duties unless and until the relevant state agency lifts the exemption.³ Thus, although TWCIS (NC) disagrees with the Authority's decision to move forward with the adjudication of Star's Petition, TWCIS (NC) urges the Arbitrator to strictly enforce the procedural schedule proposed by the parties so that the Authority may conclude this proceeding in an expeditious and timely manner, as required by

¹ Order, Docket No. TMC-5, Sub 1, at 3 (rel. Apr. 2, 2013).

² See, e.g., Recommended Order Granting TWCIS (NC) Motion to Dismiss, at 13-15 (rel. Oct. 25, 2012) ("Recommended Order").

³ Compare 47 U.S.C. § 251(f)(2) with *id.* § 251(f)(1).

federal law.⁴ Upon completion of the proceeding, for the reasons discussed below, TWCIS (NC) requests the Authority enter an order denying the Petition.

Star's Petition, as well as its latest filings in this proceeding, demonstrate its intent to rely solely on the purported burden of operating in a competitive marketplace as the cornerstone of its direct case.⁵ While the Authority should await the presentation of evidence and argument before reaching any conclusions, Star's position should at least prompt skepticism about whether Star will be able to (i) identify any particularized burden (or "significant adverse economic impact on users of telecommunications services generally") that would be proximately caused by compliance with a Section 251(b) requirement (or requirements); (ii) demonstrate that suspension or modification of Section 251(b) duties is "necessary" to avoid any such burdens or impact; (iii) show that permitting Star to continue to avoid complying with the basic requirements of Section 251(b)—more than *seven years* after TWCIS (NC) first sought such compliance—is somehow consistent with the compelling public interest in enforcing those requirements; *and* (iv) justify the grant of a suspension or modification that would unlawfully discriminate against *only* TWCIS (NC) among competitors in the marketplace.⁶

In further response to Star's Petition, TWCIS (NC) states the following:

⁴ See *id.* § 251(f)(2) ("The State Commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition.").

⁵ See, e.g., Petition at 6-7 (asserting that competition resulting from "the introduction of Time Warner Cable's [retail voice offering], which would be facilitated by the interconnection arrangements requested by TWCIS, would cause an undue economic burden"); Star TMC's Objections and Comments as to Arbitrator's Recommended Order, at 25 (filed Nov. 26, 2012) ("Star Objections") (asserting that the purpose of Section 251(f)(2) is to protect incumbent LECs from competition).

⁶ See 47 U.S.C. § 251(f)(2).

(1) *The Preliminary Findings in a Rural Exemption Proceeding Cannot Satisfy Star's Burden of Proof.*

Star now acknowledges that, “[f]or each obligation under Section 251(b) that [it] seeks to suspend or modify, [it] must show that suspension or modification is necessary to avoid a specified harm, and that such relief is consistent with the public interest, convenience, and necessity.”⁷ Nevertheless, Star continues to insist that it may satisfy that rigorous standard by relying on the nonbinding, preliminary findings from an earlier proceeding related to Sprint’s efforts to lift Star’s rural exemption pursuant to Section 251(f)(1).⁸

As the Arbitrator correctly held, “it is plain that Section 251(f)(2) establishes a different legal standard than that set forth in Section 251(f)(1).”⁹ Indeed, there is no legitimate basis to import preliminary findings from a prior, mooted proceeding involving a different legal standard and different parties. As an initial matter, a preliminary finding that Sprint failed to carry its burden of *disproving* undue economic harm pursuant to Section 251(f)(1) does not mean that such harm *actually* would occur unless Star is granted relief from its Section 251(b) obligations—the legal standard to which Star is subject here. In addition, the parties in the Sprint case did not have occasion to examine the particular burdens associated with any specific Section 251(b) duty. Rather, as the Arbitrator in this case recognized, Section 251(f)(1) applies only to the “more burdensome interconnection requirements” of Section 251(c).¹⁰ Similarly, the arbitrator in the Sprint case was not required to consider whether preserving Star’s rural

⁷ Star Objections at 9 (quoting the Recommended Order and stating that “the Arbitrator correctly identifies the standard which Star TMC must meet”); *see also id.* at 21.

⁸ *See* Petition at 11-12, 14-15; Star TMC Response to Motion to Dismiss at 22-25 (filed Apr. 23, 2012); Star Objections at 15-18.

⁹ Recommended Order at 12 (listing differences between the two legal standards).

¹⁰ *Id.* at 16.

exemption was “consistent with the public interest, convenience, and necessity,” a statutory prong that is unique to Section 251(f)(2).¹¹ And perhaps most importantly, the preliminary findings in the Sprint case gave no consideration to the procompetitive benefits of Star’s interconnection and exchange of local traffic with a facilities-based competitive carrier, a fact that would severely limit the application of those findings, even if the Authority was permitted to consider them. Accordingly, Star’s continued assertion that it is entitled to a suspension of its Section 251(b) duties on the basis of the preliminary findings in the Sprint case is fatal to Star’s Petition.

(2) *Star’s Failure To Mitigate the Burdens It Alleges Requires Denial of the Petition.*

Congress limited suspension or modification relief to circumstances in which the petitioning LEC demonstrates that a suspension or modification is “*necessary ... to avoid imposing a requirement that is unduly economically burdensome.*”¹² In other words, suspension or modification relief is warranted only where a petitioner can show that a particular Section 251(b) requirement is unduly economically burdensome *and* that suspension of the requirement is essential to avoiding that burden.¹³ Showing necessity thus is a prerequisite to obtaining relief under Section 251(f)(2). And satisfying the necessity requirement requires consideration of the alternative forms of relief—apart from suspension or modification—that are or would be available to mitigate the anticipated economic losses. For example, the availability of universal service subsidies and utilizing other means to increase revenues could well be viable alternatives

¹¹ 47 U.S.C. § 251(f)(2)(B).

¹² *Id.* § 251(f)(2)(A) (emphasis added).

¹³ See The Merriam-Webster Dictionary (defining “necessary” as “of an inevitable nature,” “inescapable,” “logically unavoidable,” “compulsory,” “absolutely needed,” or “required”).

for offsetting any financial burdens that Star believes it may incur as a result of complying with each Section 251(b) duty at issue. In addition, Star conceivably could respond effectively to the burdens it claims will flow from compliance by improving the quality or diversity of its services in order to increase revenues, or by reducing operational costs that would give it a bigger margin.

Star cannot demonstrate that suspending its Section 251(b) duties is “necessary” merely by identifying purported burdens that it asserts would be undue. Rather, necessity—under the plain meaning of that term—requires Star to prove that alternative forms of relief have been tried and failed, or would be unavailable, unsuccessful, or insufficient. The Maine Public Utilities Commission (“Maine PUC”), which recently addressed this precise issue, explained that petitioning LECs must “actually and not hypothetically [seek] to shore up their revenues” to enable a state commission to determine “whether [an] economic burden is in fact an unavoidable consequence of [a Section 251(b) duty] or an artifact of other forces.”¹⁴ In a subsequent order denying the petitioning LECs’ petition for reconsideration, the Maine PUC found “no reason to change the conclusions reached” in its previous order, because “the Companies have as yet made no effort to avail themselves of remedies currently available to them, including a proceeding before this Commission for approval of an increase in regulated rates.”¹⁵ Star likewise has failed to identify any basis to conclude that suspension of any Section 251(b) duty is “necessary” as required by the statute.

¹⁴ Petition for Suspension or Modification of Application of the Requirements of 47 U.S.C. § 251(b) and (c), pursuant to 47 U.S.C. § 251(f)(2) regarding Time Warner Cable Information Services (Maine), LLC’s Request, Order, Docket Nos. 2012-00218 *et al.*, at 15 (rel. Feb. 22, 2013) *aff’d*, Petition for Suspension or Modification of Application of the Requirements of 47 U.S.C. § 251(b) and (c), pursuant to 47 U.S.C. § 251(f)(2) regarding Time Warner Cable Information Services (Maine), LLC’s Request, Order on Reconsideration, Docket Nos. 2012-00218 *et al.* (rel. Apr. 12, 2013) (“Maine Order on Reconsideration”).

¹⁵ Maine Order on Reconsideration at 3.

(3) *Granting the Blanket Suspension Sought by Star Would Be Contrary to the Public Interest.*

With respect to the public interest prong of Section 251(f)(2), Star faces a particularly high hurdle. The relevant precedent makes clear that enforcing the procompetitive duties in Section 251(b) is consistent with the public interest, and that any blanket suspension would contravene that interest. In particular, the FCC has long held that “Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule,” thus making clear that Section 251(b) obligations are universal default requirements to which all LECs are subject absent an extraordinary showing.¹⁶ More recently, the FCC determined in the *CRC Declaratory Ruling* that the public interest is strongly advanced by enforcing competitive carriers’ interconnection rights, explaining that requiring incumbent LECs to interconnect and exchange local traffic pursuant to Sections 251(a) and (b) “will promote competition and spur investment in communications networks and services, *particularly in rural areas*, by encouraging the deployment of facilities-based voice services.”¹⁷ Consistent with these findings, the Arbitrator acknowledged that Star’s efforts “to effectively insulate itself from competition with TWCIS (NC) ... would be inconsistent with the procompetitive goals of the Act.”¹⁸

¹⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 ¶ 1262 (1996).

¹⁷ *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended; A National Broadband Plan for Our Future; Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling, 26 FCC Rcd 8259 ¶ 1 (2011) (“*CRC Declaratory Ruling*”) (emphasis added).

¹⁸ Recommended Order at 17.

Although Star notes that it already is subject to competition from wireless providers and non-facilities-based VoIP providers,¹⁹ Star's admission serves only to undermine its request for suspension relief. Congress never intended that Section 251(f)(2) would be used to pick winners and losers in the marketplace. Indeed, using Section 251(f)(2) to bar one competitor from the marketplace merely because it seeks to invoke basic rights to interconnect and exchange local traffic would turn congressional intent on its head. As a result, Star cannot show how the public interest would be served by barring facilities-based wireline competition when alternative forms of competition already exist.

(4) *The Act Prohibits Suspension or Modification in the Discriminatory Manner Proposed by Star.*

Finally, well-established principles of non-discrimination preclude the Authority from authorizing Star to satisfy some Section 251(b) obligations as to all competitors other than TWCIS (NC). Star concedes that it competes with wireless carriers and does not seek suspension of its Section 251(b) obligations as to such carriers. Moreover, Star admitted in the previous rural exemption proceeding that it has ported at least one number to a wireless carrier in fulfillment of its Section 251(b)(2) obligation.²⁰ Denial of Star's Petition thus is warranted, because granting Star's Petition would enshrine blatant discrimination in violation of the Act and FCC precedent.

Federal law precludes Star's proposal to evade its statutory duties as to some competitors but not others. In particular, Section 202 of the Act expressly prohibits common carriers, such as Star, from engaging in "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services" relating to the provision of communication

¹⁹ See Petition at 6.

²⁰ See Star TMC Response to TWCIS (NC) Data Request No. 29 (filed May 25, 2010).

service.²¹ As a common carrier, Star thus is forbidden from engaging in any “practice” that would discriminate against TWCIS (NC) vis-a-vis other carriers when carrying out its Section 251(b) obligations, including for example the “practice” of withholding local number portability services from TWCIS (NC) while fulfilling others’ requests. *A fortiori*, because Star’s selective request to suspend its Section 251(b) obligations only as to TWCIS (NC) would result in unlawful discrimination, it also cannot be “consistent with the public interest” as required by Section 251(f)(2)(B).

II. RESPONSE TO SPECIFIC ALLEGATIONS OF PETITION

As discussed above, TWCIS (NC) has no obligation under Section 251 of the Act to respond specifically to the enumerated allegations of Star’s Petition. Nonetheless, TWCIS (NC) provides the following additional responses:

1. TWCIS (NC) admits that Star is a North Carolina telephone membership corporation organized and existing pursuant to Article 4 of Chapter 117 of the North Carolina General Statutes and that Star is seeking to invoke the protections of Section 251(f)(2) of the Act. Accordingly, numbered paragraphs 1-2 of the Petition are admitted upon information and belief.

2. TWCIS (NC) lacks knowledge or sufficient information to form a belief as to the truth of the allegations contained in numbered paragraph 3 of the Petition and, therefore, those allegations are denied.

²¹ 47 U.S.C. § 202(a). To the extent a selective suspension of Star’s Section 251(b) duties would have the effect of prohibiting TWCIS (NC) from providing telecommunications service, such a suspension would be subject to preemption under Section 253 of the Act. *See id.* § 253.

3. Numbered paragraphs 4-12 of the Petition are admitted; provided that Star's allegations in footnote 3 concerning G.S. § 62-110(f3) are denied as the statute referenced by Star speaks for itself and, otherwise, the allegations constitute legal argument to which no response is required.

4. Star's allegations in paragraph 13 are denied, as it contains legal argument to which no response is required.

5. TWCIS (NC) admits that the language of Section 251(f)(2) is as Star represents it in paragraph 14 and, upon information and belief, admits that Star "serves 'fewer than 2 percent of the Nation's subscriber lines,' and thus ... is eligible to petition the Authority for suspension or modification under Section 251(f)(2) of the Act."

Except as stated above, TWCIS (NC) denies the remainder of the factual allegations of the Petition and denies in its entirety Star's entitlement to relief under Section 251(f)(2) of the Act.

6. TWCIS (NC)'s response to the various legal arguments and assertions in the Petition (contained in numbered paragraphs 15-32) is as stated above in Section I. Except as otherwise stated in Section I above, the legal arguments and assertions in the Petition are denied.

III. CONCLUSION

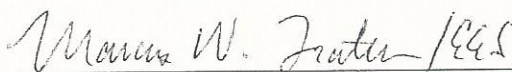
Star's Petition should be approached with a proper understanding of the legal standard applicable under Section 251(f)(2). Star's suggestion in its Petition that it can satisfy its burden of proof under Section 251(f)(2) by relying on generalized assertions of harm flowing from the purported burdens of interconnecting and exchanging local traffic with TWCIS (NC) and/or operating in a competitive marketplace is clearly incorrect and would result in an order that could not withstand judicial scrutiny. For the reasons discussed above, upon completion of this proceeding, TWCIS (NC) requests the Authority enter an order denying the Petition.

Dated: May 1, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, of the law firm Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that he has served a copy of the foregoing **TWCIS (NC) Response to Petition of Star Telephone Membership Corporation Pursuant to 47 U.S.C. § 251(f)(2)** via electronic mail to Daniel Higgins at dhiggins@bdppa.com.

This 7th day of May, 2013.

By: Marcus W. Trathen / CES
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