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WRITER'S DIRECT DIAL

May 7, 2012

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REA

VIA HAND DELIVERY

Ms. Frances Liles
Administrator
North Carolina Rural Electrification Authority
4321 Mail Service Center
Raleigh, NC 27699-4321


**Re: TWCIS (NC) Reply in Support of Motion to Dismiss
Petition for Suspension or Modification, Docket No. TMC 5, Sub 1**

Dear Administrator Liles:

Enclosed for filing in the above-referenced proceeding are the original and 10 copies of Time Warner Cable Information Services (North Carolina), LLC's Reply in Support of Motion to Dismiss Petition for Suspension or Modification. Pursuant to the Authority's Order dated March 28, 2012, this Reply has been submitted to Arbitrator Sanford for issuance of a recommended decision on TWCIS (NC)'s Motion to Dismiss.

If any questions should arise in connection with this filing, please do not hesitate to contact me.

Very truly yours,



Marcus W. Trathen

cc: Daniel C. Higgins (via email)
Jo Anne Sanford, Arbitrator (via email)
Melissa Taylor (via email)

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)

AND)

Petition of Time Warner Cable Information)
Services (North Carolina), LLC to Terminate)
Star Telephone Membership Corporation's)
Rural Telephone Company Exemption)
Pursuant to § 251(f)(1) of the)
Communications Act of 1934, as Amended)

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REA

**TWCIS (NC) REPLY IN SUPPORT OF MOTION TO DISMISS
PETITION FOR SUSPENSION OR MODIFICATION**

Time Warner Cable Information Services (North Carolina), LLC ("TWCIS (NC)"), hereby submits this reply in support of the Motion to Dismiss ("Motion to Dismiss") the Petition ("Petition") of Star Telephone Membership Corporation ("Star") to suspend or modify its obligations pursuant to Section 251(f)(2) of the Communications Act of 1934, as amended (the "Act").¹ Star's Response to TWCIS (NC)'s Motion to Dismiss ("Response") does nothing to

¹ Time Warner Cable Information Services (North Carolina), LLC Motion to Dismiss Petition for Suspension or Modification, Docket No. TMC-5, Sub 1 (filed Mar. 23, 2012); Petition of Star Telephone Membership Corporation Pursuant to 47 U.S.C. § 251(f)(2), Docket No. TMC-5, Sub 1 (filed Feb. 29, 2012).

correct the fatal deficiencies of Star's Petition.² To the contrary, Star continues to cling to inapposite recommended findings made pursuant to a different statutory provision—Section 251(f)(1)—which incorporates a different legal standard, applies to a distinct set of obligations, and allocates the burden of proof to the opposite party. In so doing, Star mischaracterizes the language, purpose, and scope of Section 251(f)(2), and ignores the reasons why the allegations in its Petition cannot give rise to a cognizable claim to relief. TWCIS (NC) thus is entitled to dismissal as a matter of law and, further, arbitration of an interconnection agreement with Star on or before June 15, 2012.

Star's latest filing can only be fully understood in the context of its seven-year long campaign to deny TWCIS (NC) its rights, established under federal law, to interconnect with Star. Since TWCIS (NC)'s original request to interconnect with Star in October 2005, Star has put forward one legal argument after another to avoid its obligations under the law. First, Star argued that TWCIS (NC) was not a "telecommunications carrier" despite the fact that TWCIS (NC) sought to offer telecommunications services, on a wholesale basis, to its retail partners. This argument was laid to rest by the FCC in a 2007 declaratory ruling,³ culminating in a federal court remand of this proceeding back to the Authority in 2009.⁴ Next, on remand from federal court, Star argued that it was immunized from interconnection as a result of its "rural exemption" under Section 251(f)(1), despite the fact that the (f)(1) exemption only applied to

² Star TMC's Response to Time Warner's Motion to Dismiss, Docket No. TMC-5, Sub 1, (filed Apr. 23, 2012).

³ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007).

⁴ *Time Warner Cable Information Services (North Carolina), LLC v. Duncan et al.*, 656 F. Supp. 2d 565 (E.D.N.C. 2009).

subsection 251(c) rights and TWCIS (NC) only sought interconnection under Sections 251(a) and (b). This argument was laid to rest by the FCC in a 2011 declaratory ruling⁵ and subsequently adopted by the Authority.⁶ Now, with its prior arguments having been repudiated by the FCC, Star is left with its new argument that it is immunized from having to interconnect with TWCIS (NC) as a result of Section 251(f)(2)—despite the fact that Section 251(f)(2) provides no general immunity from interconnection or from competition generally.

Accordingly, the extraordinary delay in the exercise of TWCIS (NC)'s federally-granted interconnection rights in this proceeding has not been the “product of protection for rural and small telephone companies built into the Act,” as Star seeks to characterize it, Response at 7; rather, the delay has been the product of Star's repeated assertion of erroneous legal arguments and mis-constructions of federal law. With its Section 251(f)(2) Petition Star resorts to yet another example of this tactic. For the reasons set forth in TWCIS (NC)'s Motion to Dismiss and herein, Star has asserted a fundamentally flawed and legally insufficient justification for immunity from interconnection, and its Petition should be dismissed.

A. Star's Petition Fails To Plead the Essential Elements of a Claim Under Section 251(f)(2)

Star attempts to seek refuge in the liberal pleading standard under Rule 8 of the North Carolina and Federal Rules of Civil Procedure, but, even under the most forgiving notice pleading standard, Star's Petition does not demonstrate entitlement to relief under Section 251(f)(2). At bottom, Star mistakenly proceeds as if TWCIS (NC)'s Motion to Dismiss were premised on a failure of *proof* in support of suspension or modification of Star's Section

⁵ *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, 26 FCC Rcd 8259 (2011).

⁶ See Final Decision, Docket No. TMC 5, Sub 1 (Jan. 31, 2012).

251(b) duties. *See generally* Response at 8-13. But TWCIS (NC) never asserted that Star had an obligation to present its case in chief in the Petition. Rather, the Motion to Dismiss makes clear that the fundamental flaw that undermines Star's Petition is the absence of the kind of *allegations* that could state a claim for either suspension or modification of any Section 251(b) requirement under the governing statutory standard of Section 251(f)(2).

As TWCIS (NC) explained in its Motion to Dismiss, suspension or modification under Section 251(f)(2) may be sought only from a particular "*requirement or requirements* of subsection (b) or (c)." 47 U.S.C. § 251(f)(2) (emphasis added). And a suspension or modification is justified only "to the extent that" the Commission finds "such suspension or modification"—of the particular requirement or requirements in question—"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* "is consistent with the public interest, convenience, and necessity." *Id.* Star, however, failed to allege facts that could support suspension or modification of any provision of Section 251(b). Indeed, Star's Petition focuses on the alleged "adverse impact on a *rural telephone company*[]" (not "users of telecommunications services") and "irreparable harm to ... the public interest in universal service" that would result from "*competition*." Petition at 6-7 (emphasis added). The only economic burdens discussed in Star's Petition are those resulting from "the introduction of Time Warner Cable's 'Digital Home Phone' and 'Business Class Phone,'" *id.* at 7—not from its compliance with one or more duties imposed by Section 251(b). Star repeats this erroneous construction of Section 251(f)(2) in its Response, asserting that "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.” See Response at 25. While TWCIS (NC) would dispute any assertion that its competitive entry would impose an undue burden, the relevant point is that Star’s Petition utterly fails to allege *any* burden associated with Section 251(b) requirements themselves.

Star’s failure to assert that any Section 251(b) obligation (either in isolation or in combination) would satisfy the applicable legal standard of Section 251(f)(2) therefore necessitates dismissal of the Petition. As the Maine Public Utilities Commission (“MPUC”) recently confirmed, “a generalized claim (even if taken as true) that competitive entry into the local exchange market of a Rural ILEC would be unduly economically burdensome and/or inconsistent with universal service goals, [and/or] the public interest, convenience, and necessity[,] does not, *per se*, warrant suspension or modification, pursuant to Section 251(f)(2), of the particular requirements of Section 251(b).”⁷ The MPUC held that “the analysis under Section 251(f)(2) must be tied to the particular requirements of Section 251(b) that are sought to be suspended or modified.” MPUC Order at 13. As a result, the MPUC agreed that dismissal of the Section 251(f)(2) Petitions of five Maine LECs—on which Star’s Petition appears based—was appropriate, finding their claim that “ruinous competition will be the result of an interconnection agreement ... *unmoored* from any particular burden or harm related to any particular obligation of Section 251(b), and ... therefore far too generalized to be both cognizable under Section 251(f)(2) and consistent with the FCC’s construction of the ... Act.” *Id.*

⁷ *Petition for Suspension or Modification of the Application of the Requirements of 47 U.S.C. § 251(b) and (c) pursuant to 47 U.S.C. § 251(f)(2) Regarding CRC Communications of Maine, Inc.’s Request*, Order, Docket Nos. 2011-294 *et al.*, at 11 (rel. Mar. 30, 2012) (“MPUC Order”).

The fact that Star already competes with wireless carriers and VoIP providers—and in doing so must fulfill its obligations under Section 251(b) (such as the provision of local number portability and the exchange of traffic pursuant to Sections 251(b)(2) and (b)(5))—further underscores its failure to allege any basis for modifying or suspending those duties. By the same token, Star’s assertion that TWCIS (NC) has “provided its VoIP services to customers in Star TMC’s service area without the requested interconnection,” Response at 6, albeit erroneous, undercuts its claim that “competition” generally (as opposed to the burdens of complying with particular Section 251(b) duties) warrants relief under Section 251(f)(2). Star cannot explain how or why entering into an interconnection agreement to enable what it portrays as a different form of competition warrants suspension of one or more requirements of Section 251(b).

That the Authority “has not formally adopted” either the North Carolina or Federal Rules of Civil Procedure cannot save Star’s facially defective Petition. Response at 8. Nor can the permissive pleading standard articulated under Rule 8 of the North Carolina or Federal Rules be stretched so far such that Star may ignore the text of Section 251(f)(2). North Carolina law states that Star, as petitioner, must “state enough to satisfy the substantive elements of at least some legally recognized claim” and that, where “there is no law to support the claim[,] ... an absence of facts sufficient to make a good claim, or the disclosure of facts which will necessarily defeat the claim,” the defending party is entitled to dismissal.”⁸ Likewise, as the Supreme Court has held in construing the analogous federal pleading standard, plaintiffs are required to plead factual

⁸ *Strickland v. Hendrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (N.C. Ct. App. 2008) (quoting *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E.2d 120, 121 (N.C. Ct. App. 1983)); *Robertson v. Boyd*, 88 N.C. App. 437, 441, 363 S.E.2d 672, 675 (N.C. Ct. App. 1988) (citing *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981)).

allegations sufficient “to state a claim to relief that is *plausible on its face*.”⁹ Star has failed to meet this basic plausibility standard by refusing to plead “factual content that allows the [Arbitrator] to draw the reasonable inference” that Star seeks—namely, that any purported burdens associated with competition generally are relevant to a consideration of whether (and how) compliance with any particular Section 251(b) “requirement or requirements” would impose such burdens.¹⁰

By the same token, there is no basis to permit Star’s defective Petition to move beyond the pleading stage merely because *other* Section 251(f)(2) requests were allowed to proceed to the evidentiary and/or hearing phases. *See* Response at 18-22. As an initial matter, Star fails to state whether each of the proceedings it cites involved a petition that was the subject of a motion to dismiss or, for that matter, contested at all. Even assuming that the petitioners in those cases did face a motion to dismiss, Star also does not assert that its Petition is similar to those petitions in the manner in which it addresses the Section 251(f)(2) legal standard, such that the treatment of those cases would be appropriate in its case. Absent such a showing, it simply is immaterial that other petitioners apparently alleged sufficient facts to avoid dismissal when Star’s Petition does not.

In any event, as TWCIS (NC) explained in its Motion to Dismiss, no state commission has ever granted the type of blanket exemption from competition that Star apparently seeks here. *See* Motion to Dismiss at 11-12. Accordingly, the cases cited in Star’s Response plainly do not support a grant of the unprecedented and overbroad suspension sought in the Petition. Indeed, the Mississippi Public Service Commission (“PSC”) decision cited by Star as the lone decision

⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added).

¹⁰ *Ashcroft v. Iqbal*, 129 S.3d 1937, 1949 (2009).

supporting its proposed suspension of all Section 251(b) obligations, in fact, did no such thing. Response at 20. Rather, the Mississippi PSC directed the rural carriers to take steps “to prepare for the introduction of local competition in [their] service areas,” explaining that the suspension period it was granting was intended to *facilitate* the introduction of competition, not to avoid it.¹¹ Star also neglects to acknowledge that, in granting a limited suspension of a carrier’s local number portability requirement, the Vermont Public Service Board noted that the requesting carrier and Comcast already had “negotiated and reached agreement on a comprehensive interconnection agreement.”¹² Similarly, Star apparently would have the Arbitrator believe that, in 2006, the North Carolina Utilities Commission (“NCUC”) granted (and that the Fourth Circuit recently upheld) a complete suspension of all Section 251(b)(5) obligations. *See* Petition at 3 (asserting incorrectly that the NCUC suspended “application of the Section 251(b)(5) obligation to establish reciprocal compensation arrangements to a half-dozen small North Carolina ILECs”). To the contrary, the NCUC merely *modified* the requesting carriers’ Section 251(b)(5)

¹¹ *Petition of the Mississippi Independent Group for Commission Action Pursuant to Section 253(b) of the Telecommunications Act of 1996*, Final Order, Docket No. 96-UA-298, at 9 (Miss. Pub. Serv. Comm’n Dec. 31, 1996). The Mississippi PSC instead granted a limited suspension of Section 251(b) that expired “twelve months following the FCC’s promulgation of [rules in] the ... ‘trilogy.’” *Id.* at 10. The Mississippi PSC subsequently extended the suspensions beyond the FCC’s release of initial orders in the “trilogy” proceedings (*i.e.*, those dealing with local competition, universal service, and access charge reform), *see Telecommunications Act of 1996*, Clarification Order, Docket No. 96-UA-298, 1998 WL 987458 (Miss. Pub. Serv. Comm’n June 2, 1998), but, in any event, a review of records publicly available through the Mississippi PSC’s website reveals that each of the RLECs that received a suspension has since complied with its obligations under Section 251 by entering into one or more interconnection agreements with competitors.

¹² *Petition of Waitsfield-Fayston Telephone Company, Inc.*, Order, Docket No. 7798, at 15 (Vt. Pub. Serv. Bd. Apr. 27, 2012).

obligation by excusing them from the duty to perform TELRIC studies.¹³ The remaining “requirements” of Section 251(b)(5) remain in full effect.

Finally, Star’s apparent assertion that its failure to properly plead a Section 251(f)(2) claim is somehow excusable because TWCIS (NC)’s “interconnection request was worded in general terms” is equally meritless. Response at 15. Unlike Section 251(f)(2) petitions, interconnection requests need not comply with pleading requirements under the Act. Indeed, that approach impermissibly seeks to shift Star’s pleading burden to TWCIS (NC). Section 251(f)(2) requires the *petitioning carrier* to identify the requirements it seeks to suspend. *See* 47 U.S.C. § 251(f)(2). In any event, the legal standard applicable in Section 251(f)(2) proceedings (unlike a Section 251(f)(1) rural exemption case) plainly does not turn on the details of a request to enter into an interconnection agreement; rather, it focuses on the compliance burdens (if any) of fulfilling Section 251(b) duties, and most petitions have been filed without regard to any particular competitor’s interconnection request.

B. Star’s Continued Reliance on the Section 251(f)(1) Standard Is Fatal to Its Section 251(f)(2) Petition

Star also attempts to avoid dismissal on the theory that the preliminary findings from Sprint’s rural exemption proceeding involving Star “furnish reason to believe” and “tend to show” that the legal elements of a Section 251(f)(2) claim have been satisfied. Response at 24. Again, Star neglects to provide the Arbitrator with critical information—namely, that the Authority recently *rejected* the Recommended Decision issued in the Sprint case. *See Petition of Sprint Communications Company, L.P. for Arbitration of an Interconnection Agreement with*

¹³ *See Petition of Rural Telephone Companies for Modification Pursuant to 47 U.S.C. § 251(f)(2), Order Granting Modification Under § 251(f)(2), Docket No. P-100, Sub 159, 2006 NC PUC LEXIS 213 (N.C. Utils. Comm’n March 8, 2006).*

Star Telephone Membership Corporation Pursuant to Sections 251(a), (b) and 252 of the Communications Act of 1934, Docket No. TMC-5, Sub 2, Final Decision (N.C. Rural Electrification Auth., March 27, 2012). Nor does Star challenge TWCIS (NC)'s discussion of applicable precedent regarding the applicability of the doctrine of issue preclusion. As TWCIS (NC) explained, that doctrine cannot be applied in this proceeding for a number of reasons, including the fact that the preliminary findings made in the Sprint case are not valid and final judgments. Motion to Dismiss at 21.

Although Star concedes, as it must, that it bears the burden of proof in a Section 251(f)(2) proceeding (while Sprint bore the burden in attempting to lift Star's rural exemption under Section 251(f)(1)), it attempts to downplay that significant distinction. Response at 24. In fact, Star baldly asserts that the burden of proof is "the only difference" between the respective legal standards of Sections 251(f)(1) and (f)(2). Significantly, the Maine Public Utilities Commission ("MPUC") rejected the same argument in its recent order dismissing a number of suspension/modification petitions. The MPUC correctly recognized that "the FCC's observation [in the *CRC Interconnection Order*] that a Rural ILEC has Section 251(b) obligations even if it retains its rural exemption would be meaningless if the test for suspension under Section 251(f)(2) could be satisfied based *solely* on a conclusion that lifting the rural exemption under Section 251(f)(1) would result in economic harm." MPUC Order at 12.¹⁴ As that commission

¹⁴ The MPUC went on to acknowledge another critical difference between Section 251(f)(1) and 251(f)(2): whereas Section 251(f)(1) permits a competitive carrier to seek to lift the continuing rural exemption from complying with Section 251(c) obligations, the basic duties of Section 251(b) are universally applicable unless and until a LEC can satisfy the required elements of Section 251(f)(2). See Motion to Dismiss at 23. In particular, the MPUC held that "the fact that requiring *all* of the competition facilitating requirements of [Sections 251(b) and (c) of] the Act may lead to an 'intolerable' level of competition does not mean that requiring *some* of those measures [namely, those found in Section 251(b)] would lead to the same result.

(continued . . .)

recognized, the legal standard under Section 251(f)(2) is decidedly *not* the same as that under Section 251(f)(1), Motion to Dismiss at 23-25, because of the additional requirement that the Arbitrator consider whether the incumbent LEC's proposed blanket suspension of Section 251(b) would be "consistent with the public interest, convenience, and necessity," 47 U.S.C. § 251(f)(2)(B), among other reasons readily apparent from a comparison of the two provisions. As TWCIS (NC) explained in its Motion to Dismiss, the public interest inquiry compels consideration of the many pro-competitive benefits flowing from interconnection and exchange of traffic under Sections 251(a) and (b), Motion to Dismiss at 24-25, and Star's Petition simply ignores that important element of the statutory standard. That key omission warrants dismissal even apart from Star's failure to allege undue burdens flowing from Section 251(b) duties themselves.

C. Federal Law Requires the Authority To Arbitrate an Interconnection Agreement On or Before June 15, 2012

In a final effort to forestall timely arbitration of an interconnection agreement between the parties, Star urges the Arbitrator and Authority to move forward with arbitration only after addressing its Petition. If the Arbitrator dismisses the Petition, that approach will follow automatically, but if the Arbitrator were to deny the motion to dismiss, delaying action in the pending arbitration would be inconsistent with federal law. As TWCIS (NC) explained in the Motion to Dismiss, Section 252—not Section 251(f)(2)—establishes the procedures for arbitration proceedings, and there is no provision that would allow for the suspension of arbitration proceedings. Moreover, the FCC's rules make clear that network interconnection and the exchange of local telecommunications traffic pursuant to Sections 251(a) and (b) are

A contrary reading of the statute[,] ... that a finding of economic harm under Section 251(f)(1) requires a suspension or modification under Section 251(f)(2)[,] would as a matter of statutory construction make Section 251(f)(2) superfluous." MPUC Order at 12.

universal default requirements to which all LECs, including Star, are subject absent the extraordinary showing required under Section 251(f)(2). Indeed, the FCC places such a heavy presumption in favor of compliance with Section 251(b) requirements that all LECs are required pursuant to Section 51.715 of the FCC's rules to fulfill "interim transport and termination" obligations *even in the absence of* a negotiated or arbitrated interconnection agreement. 47 C.F.R. § 51.715. Under the FCC's rule, Star thus is required to "provide transport and termination of telecommunications traffic *immediately* to TWCIS (NC) under an interim arrangement, pending resolution of negotiation or arbitration" of an interconnection agreement. *Id.* § 51.715(a) (emphasis added).¹⁵

While a grant of TWCIS (NC)'s Motion to Dismiss (which is the appropriate disposition of Star's Petition) would enable the Arbitrator to comply with both the Authority's March 28 Order *and* the statutory deadline imposed by Congress in Section 252(b)(5), TWCIS (NC) remains concerned that any other outcome would result in the effective suspension of arbitration proceedings that would be contrary to law and tantamount to a "failure to act" under Section 252(e)(5). Accordingly, TWCIS (NC) reserves its rights to pursue appropriate relief before the FCC in the event that it becomes clear that arbitration of an interconnection agreement will not occur in a timely manner (i.e., by June 15, 2012 or another deadline to which TWCIS (NC) consents).

¹⁵ The FCC's rule provides additional guidance regarding the manner in which the RLECs are to comply with their interim transport and termination obligations. *See id.* § 51.715(b), (d) (providing for "symmetrical rates" during the interim period and directing state commissions to require carriers to true up their accounts to "allow each carrier to receive the level of compensation it would have received had the rates in the interim arrangement equaled the rates later established by the state commission").

Conclusion

TWCIS (NC) has shown that Star's Petition fails to state a claim upon which relief can be granted pursuant to Rules 12(b)(6) of the North Carolina and Federal Rules of Civil Procedure and therefore urges the Arbitrator to dismiss the Petition and immediately pursue arbitration of an interconnection agreement between the parties in accordance with the June 15, 2012 deadline for completing such arbitration.

Respectfully submitted,

**TIME WARNER CABLE INFORMATION
SERVICES (NORTH CAROLINA), LLC**



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Of Counsel

May 7, 2012

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) Reply in Support of Motion to Dismiss Petition for Suspension or Modification** via electronic mail to counsel of record.

This 7th day of May, 2012.



Marcus W. Trathen