

**NORTH CAROLINA
RURAL ELECTRIFICATION AUTHORITY
RALEIGH**

DOCKET NO. TMC 5, Sub 1

BEFORE THE NORTH CAROLINA RURAL ELECTRIFICATION AUTHORITY

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 an)
Interconnection Agreement with)
Star Telephone Membership Corporation)

AND

FINAL DECISION

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)

BY THE AUTHORITY: On October 21, 2011, the Arbitrator filed her Recommended Order Terminating Phase 1 of Proceeding in this matter. The recommendation of that Order is that the Authority should terminate Phase I of this matter and direct the parties to proceed to arbitration of the terms and conditions of an interconnection agreement.

On October 25, 2011, the Authority issued an Order Requesting Objections or Comments to be filed by December 8, 2011. On December 8, 2011, Time Warner Cable Information Services (North Carolina), LLC ("TWICS (NC)") filed a letter with the Authority stating that it had no objection to the Recommended Order. Star Telephone Membership Corporation ("Star") did not file anything with the Authority by the December 8, 2011, deadline.

On January 20, 2012, TWICS (NC) and Star informed the Authority that they did not wish to present oral argument regarding the Recommended Order in response to the Order issued by the Authority dated January 6, 2012.

On January 30, 2012, the above referenced filings came before the North Carolina Rural Electrification Authority (Authority) for consideration. Authority members in attendance were L. Calvin Duncan, Chairman, Joseph G. Justice, Vice-Chairman, J. Ronnie Alderman, Edith C. Cox, and Buddy G. Creed. Prior to the discussions on the filings, Authority member J. Ronnie Alderman who is also a board member of Star Telephone Membership Corporation recused himself. The remaining members of the Authority then discussed the above-captioned matter.

Pursuant to those discussions, the Authority enters the following ORDER:

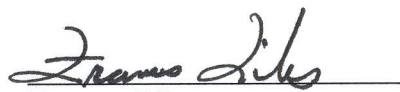
Pursuant to the Authority's Resolution on Arbitration Policies for Telecommunications Interconnection Agreements, the Authority hereby accepts and adopts the Recommended Order Terminating Phase 1 of Proceeding without modification as the Final Decision of the Authority. A copy of the Recommended Order is attached to this Final Decision and incorporated by reference as if contained herein.

IT IS SO ORDERED.

ISSUED BY THE ORDER OF THE AUTHORITY.

This the 31st day of January, 2012.

The North Carolina Rural
Electrification Authority

A handwritten signature in dark ink, appearing to read "Frances Liles", is written over a horizontal line.

Frances Liles
Administrator

CERTIFICATE OF SERVICE

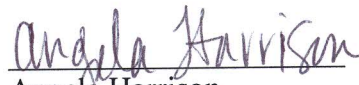
I hereby certify that a true and exact copy of the foregoing document has been served to all addressees listed below by electronic mail and by depositing same, postage prepaid, in the U.S. Mail this the 31st day of January, 2012.

Marcus W. Trathen
Brooks, Pierce, McLendon, Humphrey & Leonard
Attorney for Time Warner Cable Information Services (NC)
P.O. Box 1800
Raleigh, NC 27602

Daniel C. Higgins
Burns, Day & Presnell
Attorney for Star Telephone Membership Corporation
P.O. Box 10867
Raleigh, NC 27605

This 31st day of January, 2012.

The North Carolina Rural
Electrification Authority


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October 21, 2011

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

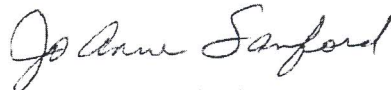
RE: Arbitration---Time Warner Cable Information Service & Star
Telephone Membership
Docket No. TMC-5, Sub 1

Dear Mrs. Liles:

Attached please find the signed Original of my Recommended Order in this matter. In summary, I found persuasive the FCC's Declaratory Ruling in a case involving Time Warner Cable and CRC Communications of Maine [see *CRC Communications of Maine, Inc. Petition for Consolidated Arbitration with Independent Telephone Companies Towards an Interconnection Agreement Pursuant to 47 U.S.C. 151, 252, Order, Docket No. 2007-611 (Maine Pub. Util. Comm'n., May 5, 2008)*]. Therefore, my recommendation is that the Authority should terminate Phase 1 of this matter and direct the parties to proceed to arbitration of the terms and conditions of an interconnection agreement.

Please feel free to contact me if there are any questions or suggestions, and thank you for the courtesy and assistance of your office in this matter.

Yours truly,



Jo Anne Sanford

c: Daniel C. Higgins
Marcus W. Trathen

**NORTH CAROLINA
RURAL ELECTRIFICATION AUTHORITY
RALEIGH**

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 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 Section 251(f)(1))
of the Communications Act of 1934, as)
Amended)

Docket No. TMC- 5, Sub 1

**RECOMMENDED ORDER
TERMINATING PHASE 1 OF PROCEEDING**

BEFORE JO ANNE SANFORD, ARBITRATOR

BY THE ARBITRATOR:

This matter came before the Arbitrator on the Motion to Terminate Phase 1 of Proceeding in Conformance with Intervening and Controlling Decision of the Federal Communications Commission (the "Motion") filed by Time Warner Cable Information Services (North Carolina), LLC ("TWCIS (NC)") on June 6, 2011. Star Telephone Membership Corporation ("Star TMC") filed a Response to the Motion on August 3, 2011, and TWCIS (NC) filed a Reply to Star TMC's Response on August 24, 2011.

BACKGROUND

The Telecommunications Act of 1996 Act ("1996 Act") fundamentally restructured local telephone markets and the state-conferred monopolies that governed them. Section 251(a) of the 1996 Act provides that each carrier—whether Incumbent Local Exchange Carrier ("ILEC"), Rural Local Exchange Carrier ("RLEC"), or Competitive Local Exchange Carrier ("CLEC")—has a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a). In addition to this general interconnection requirement, the 1996 Act imposes other specific obligations on all Local Exchange Carriers ("LECs"). Section 251(b) requires LECs, including rural incumbent local exchange carriers, to, *inter alia*: (i) provide number portability where technically feasible in accordance with the requirements of the Federal Communications Commission ("FCC"); (ii) provide dialing parity to competing providers of telephone exchange service and telephone toll service, and permit such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings; and (iii) establish reciprocal compensation arrangements for the transport and termination of telecommunications. See 47 U.S.C. §§ 251(b)(2), (3) and (5).

The 1996 Act also imposes additional duties on ILECs only. See *id.* § 251(c). Pursuant to Section 251(f)(1), certain RLECs are provisionally exempted from the unique ILEC requirements of Section 251(c) until the RLEC receives a bona fide request for interconnection, services, or network elements from a competing provider and a State commission determines that the interconnection request is not economically burdensome, is technically feasible, and is consistent with other portions of the 1996

Act. *See id.* § 251(f)(1). By its plain terms, Section 251(f)(1) exempts RLECs only from the unique requirements imposed on ILECs by Section 251(c)—it does not explicitly exempt RLECs from the obligations set forth in Sections 251(a) or (b). *See id.*

A key issue throughout this proceeding has been the scope of the rural exemption provided in Section 251(f)(1) of the Act. TWCIS (NC) has consistently argued that Section 251(f)(1) has no bearing on its request for interconnection with Star TMC because TWCIS (NC) seeks only interconnection under Sections 251(a) and (b), not Section 251(c). *See, e.g.,* Reply Comments of TWCIS (NC), 3-8 (filed Jan. 22, 2010). Star TMC, on the other hand, has consistently argued that it is under no obligation to negotiate interconnection with TWCIS (NC) pursuant to Sections 251(a) and (b), because the ILEC obligation to negotiate is imposed in Section 251(c), unless and until its Section 251(f)(1) exemption has been terminated by the Authority. *See, e.g.,* Comments of Star TMC, 5-14 (filed Jan. 6, 2010).

State commissions have been split on the scope of the rural exemption. The Authority issued an Order on January 27, 2010, in this docket ruling that this proceeding should be conducted in two phases, with the first phase to concern the question of whether Star TMC's rural exemption should be terminated. That Order further provided that if the Authority determined that Star TMC's rural exemption should be terminated, then the Authority would proceed to arbitrate the terms of an interconnection agreement between TWCIS (NC) and Star TMC.

Having reviewed and considered the Motion, the Response filed by Star TMC, and the Reply filed by TWCIS (NC), and for other good cause shown, the Arbitrator reviews the procedural history and presents legal analysis, as follows:

PROCEDURAL HISTORY

1. This proceeding began in 2006, when TWCIS (NC) filed with the Authority its Petition for Arbitration ("Petition") with Star TMC. The Petition sought to compel Star TMC to arbitrate the terms and conditions of interconnection pursuant to Sections 251(a) and (b) of the 1996 Act. While TWCIS (NC) argued that it was not necessary for the Authority to terminate Star TMC's Section 251(f)(1) exemption to proceed on the Petition, TWCIS (NC) filed a Conditional Petition for Termination of Rural Exemption, should the Authority find it necessary to terminate Star TMC's rural exemption.

2. On April 10, 2006, Star TMC filed a Motion to Dismiss, which was opposed by TWCIS (NC). The Authority granted the Motion to Dismiss on July 19, 2006.

3. On December 17, 2007, TWCIS (NC) sought reconsideration of the Authority's Order dismissing the proceeding. Star TMC opposed reconsideration. The Authority denied TWCIS (NC)'s request on March 24, 2008.

4. TWCIS (NC) later appealed the Authority's July 19, 2006, and March 24, 2008, Orders to the U.S. District Court for the Eastern District of North Carolina. Following briefing and oral argument on cross-motions for summary judgment, these Orders were vacated by the Court. See *Time Warner Cable Information Services (North Carolina), LLC v. Duncan et al.*, 656 F. Supp. 2d 565 (E.D.N.C. 2009). The Court remanded the matter back to the Authority for further consideration.

5. On December 7, 2009, the Authority issued an Order requesting comments on the procedural posture of the matter and the issues to be addressed on remand. The parties filed comments January 6, 2010, and TWCIS (NC) later filed reply comments January 22, 2010.

6. On January 27, 2010, the Authority issued an Order that, among other things, set this proceeding for arbitration ("January 2010 Order"). The January 2010 Order directed that this matter proceed in two phases. In Phase 1, the Arbitrator was ordered to consider and issue a recommended decision as to whether Star TMC's rural exemption under Section 251(f)(1)(A) should be terminated. If the Authority concluded that Star TMC's rural exemption should be terminated, then in Phase 2 the Arbitrator will arbitrate any open issues necessary for the parties to enter into an interconnection agreement.

7. By Order dated March 15, 2010, the Authority designated the undersigned to serve as Arbitrator in this proceeding.

8. By Order dated April 30, 2010, the Authority established the procedural schedule (the "Procedural Scheduling Order"). Pursuant to the Procedural Scheduling Order, as extended by the parties and authorized by the Arbitrator, each party submitted Pre-Filed Testimony on June 30, 2010.

9. Also pursuant to the Procedural Scheduling Order, as extended by the parties and authorized by the Arbitrator, the parties have exchanged their First and Second Sets of Data Requests. Objections and responses to these Data Requests have been filed and resolved by Orders of the Arbitrator. Discovery remains open at this time.

LEGAL ANALYSIS

10. During the pendency of this proceeding, on July 15, 2010, CRC Communications of Maine, Inc. ("CRC") and Time Warner Cable Inc. ("TWC"), the parent company of TWCIS (NC), filed with the FCC a Petition for Preemption Pursuant to Section 253 of the Act. See WC Docket No. 10-143 (filed July 15, 2010). In the

Petition, CRC and TWC requested that the FCC preempt an order issued May 5, 2008, by the Maine Public Utilities Commission holding that rural incumbent LECs have no obligation to negotiate in good faith under Sections 251(a) and (b) of the Act, and, until the rural exemption is lifted, there is nothing to arbitrate under Section 252 of the Act. *See CRC Communications of Maine, Inc. Petition for Consolidated Arbitration with Independent Telephone Companies Towards an Interconnection Agreement Pursuant to 47 U.S.C. 151, 252, Order, Docket No. 2007-611 (Maine Pub. Util. Comm'n., May 5, 2008).*

11. On May 26, 2011, the FCC issued a Declaratory Ruling addressing the petition filed by CRC and TCW, along with certain other related issues. *See CRC Communications of Maine, Inc. and Time Warner Cable Inc. For Preemption Pursuant to Section 253 of the Communications Act, as Amended*, 26 FCC Rcd 8259, FCC 11-83 (2011) (the “Declaratory Ruling”). The Declaratory Ruling holds, among other things, that “a rural carrier’s exemption under section 251(f)(1) offers an exemption only from the requirements of Section 251(c) and does not impact its obligations under section 251(a) and (b).” Declaratory Ruling ¶ 14.

WHEREUPON, the Arbitrator reaches the following:

CONCLUSIONS

1. The Declaratory Ruling addresses squarely the only issue presented in Phase 1 of this proceeding—which is whether Star TMC’s rural exemption should be terminated. The FCC held in the Declaratory Ruling that Section 251(f)(1) exempts rural LECs only from the requirements of Section 251(c), but “does not impact” the rural

LECs' obligations under Sections 251(a) and (b). Declaratory Ruling ¶ 14. The Declaratory Ruling states, in pertinent part:

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). We also clarify that a rural carrier's exemption under section 251(f)(1) offers an exemption only from the requirements of section 251(c) and does not impact its obligations under sections 251(a) or (b).

Id. Under the FCC's determination, the rural exemption provided in Section 251(f)(1) does not shield Star TMC from having to interconnect with TWCIS (NC) under Sections 251(a) and (b).

2. The Declaratory Ruling rejects the argument advanced by Star TMC in this proceeding that, because Section 251(f)(1) exempts rural LECs from the duty to negotiate in good faith which is imposed in Section 251(c) as to the terms and conditions of agreements to fulfill the duties of Section 251(b), rural LECs are not obligated to negotiate and cannot be compelled to negotiate or arbitrate pursuant to Section 252, unless the rural exemption is terminated. *Id.* ¶ 24. The Declaratory Ruling speaks clearly to the proposition that negotiations are not a statutory prerequisite for arbitration, and the FCC makes clear its opinion that the only statutory prerequisite for petitioning a state commission for arbitration is a bona fide request for interconnection. *Id.* & n. 86.

3. Under this construction, TWCIS (NC) is not required to first persuade the Authority to terminate Star TMC's rural exemption to enforce Section 251(a) and (b) interconnection obligations. Declaratory Ruling ¶ 25. According to the FCC,

....such an approach would subject the rural incumbent LEC to the full range of section 251(c) obligations, in addition to those of sections 251(a) and (b). By contrast, our approach [which does not require termination to arbitrate section 251(a) and (b) arrangements] allows the rural incumbent LEC to retain its exemption from more rigorous section 251(c)(2) interconnection, as well as unbundling and wholesale access requirements, while still providing it the procedural protections of having state commissions arbitrate section 251(a) and (b) interconnection and services requests.

Id. In other words, it is not necessary to terminate the rural exemption to arbitrate the terms and conditions of interconnection under Sections 251(a) and (b), whereas the rural exemption remains intact with respect to the requirements of Section 251(c) unless and until the state commission lifts the exemption. According to the Declaratory Ruling, arbitration under Section 252 is the appropriate mechanism to implement and enforce the obligations of Sections 251(a) and (b). See Declaratory Ruling ¶ 18. TWCIS (NC) has satisfied the only statutory prerequisite to invoke compulsory arbitration by making a bona fide request for interconnection. See, e.g., January 2010 Order ¶ 5.

4. The FCC's construction of the scope and effect of the rural exemption is a specific and compelling interpretation of federal law on this issue. A significant ruling by the FCC, it presents a formidable barrier to parties supporting the construction proposed by Star TMC in this case. Star TMC has been unable to surmount this bar with respect to showing why the FCC's interpretation should be disregarded or why the interpretation is otherwise in error. The FCC is the federal authority with primary jurisdiction to interpret and apply the interconnection provisions of the Communications Act, as amended. See e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 & n.6 (1999); *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126-27 (9th Cir.

2003); *Southwestern Bell Tel. Co. v. Connection Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000). The Declaratory Ruling speaks to the precise issue under review in Phase 1 of this proceeding and, under these circumstances, should be given deference. See, e.g., *MCI Telecomm's Corp. v. Bell Atlantic Pa.*, 271 F.3d 491, 516 (3d Cir. 2001); *Iowa Telecomm's Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 748 (8th Cir. 2008); *WWC License, L.L.C. v. Boyle*, 459 F.3d 880, 890 (8th Cir. 2006); *Southwestern Bell*, 225 F.3d at 946-47.

5. As clarified by the Declaratory Ruling, arbitration under Section 252 is the appropriate mechanism to implement and enforce the obligations of Sections 251(a) and (b). See Declaratory Ruling ¶ 18. The FCC wrote:

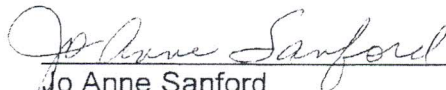
[W]e conclude that requests made to incumbent LECs for interconnection and services pursuant to sections 251(a) and (b) are subject to state commission arbitration as set forth in section 252, and that section 251(f)(1) does not exempt rural incumbent LECs from the compulsory arbitration process established in that provision.

RECOMMENDATION

BASED ON THE FOREGOING, the Arbitrator recommends that the Authority terminate Phase 1 and order that this matter proceed to arbitration of the terms and conditions of an interconnection agreement between these parties.

Should the Authority agree and issue an order terminating Phase 1, the Arbitrator shall direct the parties to propose a procedural schedule for arbitration of an interconnection agreement between them.

Respectfully submitted, this the 21st day of October, 2011.


Jo Anne Sanford
Arbitrator Presiding