

**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 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 )

**RECOMMENDED ORDER  
GRANTING TWCIS (NC) MOTION TO DISMISS**

**BEFORE JO ANNE SANFORD, ARBITRATOR**

**BY THE ARBITRATOR:**

This matter came before the Arbitrator on the Motion to Dismiss Petition for Suspension or Modification (the "Motion") filed by Time Warner Cable Information Services (North Carolina), LLC ("TWCIS (NC)") on March 23, 2012.

**BACKGROUND**

As recognized in previous orders in this proceeding, 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 Communications Act of 1934, as amended (the “Act”), provides that each carrier—whether incumbent local exchange carrier (“ILEC”) or competitive local exchange carrier (“CLEC”)—has a duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” In addition to this general interconnection requirement, the Act imposes other specific obligations on all LECs. Section 251(b) requires LECs, including rural incumbent local exchange carriers (“RLECs”), 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).

This proceeding was initiated in March 2006 by TWCIS (NC) by the filing, *inter alia*, of a Petition for Arbitration seeking the arbitration of an interconnection agreement with Star TMC under Sections 251(a) and (b) of the Act. Prior to the commencement of the arbitration of the interconnection agreement, the Authority directed the Arbitrator to consider Star TMC’s assertion of the rural exemption granted to RLECs under Section 251(f)(1). After considering the arguments of the parties, based on a recent Declaratory Ruling of the FCC construing the scope and effect of the rural exemption, the Arbitrator concluded that it was not necessary to terminate Star’s rural exemption in order to arbitrate the terms and conditions of interconnection under Sections 251(a) and (b).



Based on this conclusion, the Arbitrator recommended that the Authority direct the parties to proceed to the arbitration phase of this proceeding. This conclusion was adopted by the Authority in a Final Decision issued January 31, 2012.

Subsequent to the issuance of the Final Decision, Star TMC filed a Petition pursuant to Section 251(f)(2) of the Act seeking the suspension or modification of any obligation to provide one or more of the Section 251(b) interconnection arrangements requested by TWCIS (NC). TWCIS (NC) moved to dismiss this Petition on the grounds that Star TMC's Petition does not state a cognizable claim for relief under Section 251(f)(2). By Order issued March 28, 2012, the Authority directed the Arbitrator to consider Star TMC's Petition and TWCIS (NC)'s Motion prior to commencement of the arbitration of the interconnection agreement between the parties.

Having considered TWCIS (NC)'s Motion, the Response filed by Star TMC, and the Reply filed by TWCIS (NC), in addition to the arguments of counsel, the Arbitrator reviews the procedural history of this matter and presents legal analysis, as follows.

#### **PROCEDURAL HISTORY**

By letter dated October 5, 2005, TWCIS (NC) requested that Star TMC enter into negotiations for an agreement providing for interconnection and interconnection arrangements under Sections 251(a), (b) and (c) of the Act. TWCIS (NC) seeks interconnection with Star TMC in order to facilitate the efforts of TWCIS (NC)'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 the Star TMC's service area.

Citing its rural exemption, Star declined to enter into negotiations with TWCIS (NC) for an interconnection agreement and, following the waiting period specified in Section 252(b)(1) of the 1996 Act, TWCIS (NC) filed a petition with the Authority on March 14, 2006, seeking arbitration of the terms of an interconnection agreement between the parties. At that same time, TWCIS (NC) also filed a Conditional Petition for Termination of Star TMC's rural exemption pursuant to Section 251(f)(1).

Star TMC offers service in ten rural exchanges spread over parts of five counties in Southeastern North Carolina. Star TMC is a rural telephone company, as defined in Section 153(37) of the Act. On April 10, 2006, Star TMC moved to dismiss TWCIS (NC)'s petition for arbitration, on the ground that TWCIS (NC) was not a telecommunications carrier and therefore was not eligible for interconnection under the Act. Over TWCIS (NC)'s objection, the Authority agreed with Star TMC and dismissed TWCIS (NC)'s Petition for Arbitration by Order issued July 19, 2006. By letter to the Authority dated December 17, 2007, TWCIS (NC) requested reconsideration of the dismissal based on the findings of the FCC in a Declaratory Ruling in which the FCC held that "wholesale providers of telecommunications services are telecommunications carriers for the purposes of sections 251(a) and (b) of the Act," and that such wholesale carriers have the right "to interconnect for the purpose of exchanging traffic with VoIP providers." See *Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513, DA 07-709, ¶¶ 1, 13 (WCB 2007). The Authority declined to reconsider its dismissal. In May 2008, TWCIS (NC) filed an appeal in the United States Court for the Eastern District of North Carolina. By decision issued September 23, 2009, the federal District Court vacated the Authority's dismissal of



TWCIS (NC)'s petition and its order denying reconsideration and remanded the proceedings back to the Authority for further consideration. See *Time Warner Cable Information Services (North Carolina), LLC v. Duncan et al.*, 656 F. Supp. 2d 565 (E.D.N.C. 2009).

On remand, the Authority in December 2009 requested comments on the proceeding's procedural posture and the issues to be addressed on remand. Following submission of comments by both parties, the Authority issued an order on January 27, 2010, directing that the case proceed in two phases: Phase I would consider whether Star's rural exemption under Section 251(f)(1) should be terminated, and Phase II would arbitrate any remaining open issues necessary for the parties to enter into an interconnection agreement. By order dated April 30, 2010, the undersigned Arbitrator established the procedural schedule for the first phase of the proceeding. Pursuant to that schedule, the parties submitted pre-filed testimony and engaged in mutual discovery.

On May 26, 2011, the FCC issued a Declaratory Ruling clarifying that local exchange carriers are obligated to fulfill all of the duties set forth in Sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, regardless of their rural exemption. See *CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act*, Declaratory Ruling, 26 FCC Rcd 8259, FCC 11-83 (2011). The FCC ruled there 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). TWCIS (NC) promptly informed the Arbitrator of this ruling, filing a motion on June 6,

2011, seeking to terminate the rural exemption phase (Phase I) of the proceeding in conformity with the FCC's decision. After briefing by both parties, the Arbitrator issued a Recommended Order to terminate the rural exemption phase of the proceeding. Without objection from Star, the Authority adopted the Arbitrator's Recommended Order as its Final Decision on January 31, 2012.

Consistent with the Final Decision, on February 24, 2012 TWCIS (NC) proposed a procedural schedule to govern the commencement of Phase II of the Arbitration.

On February 29, 2012, prior to the issuance of a further order regarding the procedural schedule for Phase II, Star filed a Petition pursuant to 47 U.S.C. § 251(f)(2) (the "Section 251(f)(2) Petition") in which Star requested suspension or modification "of all requirements of Section[s] 251(b) and (c) ... implicated by the request for interconnection arrangements" by TWCIS (NC) "until such time as Star TMC is relieved of its carrier of last resort obligations in its service territory, or when carrier of last resort obligations are imposed on TWCIS for the entirety of Star TMC's service territory, or until such time as TWCIS meets the requirements for designation as an eligible telecommunications carrier in Star TMC's entire service area." Star Section 251(f)(2) Petition ¶ 31.

Star TMC also sought suspension of the arbitration proceeding pending resolution of its Section 251(f)(2) Petition.

On March 23, 2012, TWCIS (NC) filed its Motion seeking dismissal of Star TMC's Section 251(f)(2) Petition on the grounds that Star TMC had not stated a cognizable claim for relief under Section 251(f)(2) of the Act.



On March 28, 2012, the Authority issued an Order consolidating TWCIS (NC)'s Petition for Arbitration with Star's Section 251(f)(2) Petition and directing the Arbitrator to address the Section 251(f)(2) Petition, and TWCIS (NC)'s Motion, before proceeding to Phase II of the Arbitration.

Star TMC filed a Response to TWCIS's Motion on April 23, 2012.

TWCIS (NC) filed a Reply to Star TMC's Response on May 7, 2012.

The Arbitrator held oral argument on TWCIS (NC)'s Motion on August 23, 2012.

### **LEGAL ANALYSIS**

1. TWCIS (NC) properly instituted this proceeding on March 14, 2006, when it filed its Petition for Arbitration of an interconnection agreement with Star TMC.

2. 47 U.S.C. § 252(b)(4)(C) provides that a state commission shall resolve each issue set forth in an arbitration petition and response within nine months after the LEC received the request for negotiation of an interconnection agreement. This deadline has not been applied in the instant proceeding.<sup>1</sup> Regardless, the Arbitrator is mindful of the clearly stated federal policy requiring the efficient and prompt resolution of interconnection requests and associated disputes.

3. In its Section 251(f)(2) Petition, Star TMC seeks the suspension or modification of all obligations under Section 251(b) and (c) implicated by TWCIS (NC)'s

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<sup>1</sup> Section 251(f)(1) operates as an automatic stay of obligations imposed by Section 251(c), so an interpretation that would effectuate both Section 251(f)(1) and the mandatory time frame for resolution of the arbitration proceeding under Section 252(b)(4)(C) would be that the nine month requirement is effectively stayed during the pendency of the Section 251(f)(1) proceeding. By contrast, Section 251(f)(2) does not automatically stay any obligations under Section 251. While a state commission is permitted by Section 251(f)(2)(B) to "suspend enforcement of the requirement or requirements to which the petition applies" during the pendency of an (f)(2) petition, this provision— if read literally— only stays the enforcement of any obligation arising under Section 251(b) or (c).

request for Section 251(b) interconnection arrangements. Because TWCIS (NC) is not seeking interconnection with Star TMC under Section 251(c) of the Act, Star's Petition implicates only those obligations set forth under Section 251(b).<sup>2</sup>

4. Section 251(f)(2) provides as follows (in pertinent part):

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.

5. Star TMC serves "fewer than 2 percent of the Nation's subscriber lines," and it is eligible to petition the Authority for suspension or modification under Section 251(f)(2) of the Act. A rural carrier such as Star TMC that petitions for suspension or

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<sup>2</sup> In its letter to Star TMC which TWCIS (NC) describes as its "*bona fide* request" for interconnection, TWCIS (NC) stated that it "seeks the following rights under Sections 251(a), (b) and (c) of the Communications Act: interconnection, number portability, dialing parity, access to rights of way, reciprocal compensation, and collocation." Collocation is required only under Section 251(c). TWCIS (NC) subsequently depicts itself as only seeking interconnection pursuant to Section 251(a) and various interconnection arrangements pursuant to Section 251(b).



modification of Section 251(b) requirements bears the burden of proof that it is entitled to such suspension or modification. 47 C.F.R. § 51.405(b) For purposes of TWCIS (NC)'s instant Motion to Dismiss, however, Star TMC does not bear any burden of "proving" its entitlement to relief under Section 251(f)(2); rather, TWCIS (NC) bears the burden of demonstrating that Star TMC has not stated a cognizable claim for relief.

6. TWCIS (NC) alleges in its Motion to Dismiss that Star TMC's Petition is "defective on its face" and "fails to plead facts sufficient to support the essential elements of a claim under Section 251(f)(2) of the Act." (TWCIS (NC) Motion to Dismiss pp. 1-2). TWCIS (NC) contends that Star TMC's Section 251(f)(2) Petition should be dismissed because Star TMC is seeking, in essence, a "rural exemption" from facilities-based competition even though the statute on which it relies, 47 U.S.C. § 251(f)(2), authorizes nothing of the sort. TWCIS(NC)'s contends that because the argument that the Section 251(f)(1) rural exemption authorized Star to refuse to arbitrate Section 251(b) interconnection arrangements with TWCIS (NC) has been precluded by the FCC's 2011 Declaratory Ruling, Star now seeks—for a second time—to insulate itself from competition based on its status as a "two percent" rural carrier. TWCIS (NC) further contends that Section 251(f)(2) does not empower the Authority to grant a wholesale exemption from "the various interconnection arrangements sought by TWCIS (NC)," as it contends Star TMC requests, but rather this statute authorizes only limited relief from particular duties set forth in Sections 251(b), and only where Star TMC can satisfy its burden of proof with respect to each such duty. Here, however, TWCIS (NC) has only sought interconnection under Section 251(a) and (b), so for each obligation under Section 251(b) that Star TMC seeks to suspend or modify, Star TMC

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. In sum, TWCIS (NC) contends that Star TMC's Section 251(f)(2) Petition does not contain sufficient allegations to entitle Star TMC to offer evidence in support of its request for suspension or modification under Section 251(f)(2).

7. The Authority has not adopted either the North Carolina or Federal Rules of Civil Procedure. TWCIS (NC) asserts in its Motion to Dismiss that the standard to be applied by the Authority in assessing the adequacy of Star TMC's Petition is the same standard applied by North Carolina civil courts in connection with a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

8. Star TMC contends that should the Authority chose to look to court decisions applying Rule 12(b)(6) of either the North Carolina or Federal Rules of Civil Procedure that Star TMC's Section 251(f)(2) Petition states a legally cognizable claim for relief under Section 251(f)(2) of the Act. Star contends that under the North Carolina Rules of Civil Procedure, which is the standard urged by TWCIS (NC), that Star's Petition is to be liberally construed and that it states a claim under Section 251(f)(2). Star argues that it has presented sufficient allegations to be entitled to offer evidence intended to establish that one or more of the Section 251(b) interconnection arrangements sought by TWCIS (NC) will threaten Star's survival, will imperil the provision of universal service by Star TMC and would be contrary to the public interest. Star TMC also points to decisions of other state commissions where the petitioning parties were permitted to present evidence in support of their petitions.



Among the allegations in Star's Petition are those regarding a separate proceeding brought before the Authority by Sprint Communications, which sought arbitration of an interconnection agreement with Star TMC and termination of Star's rural exemption under Section 251(f)(1). Star alleges here that the arbitrator in that proceeding determined that Sprint had not met its burden of demonstrating that its interconnection request would not impose an undue economic burden on Star TMC. *See Petition of Sprint Communications Company, L.P. for Arbitration of an Interconnection Agreement with Star Telephone Membership Corporation Pursuant to Sections 251(a), (b) and 252 of the Communications Act of 1934*, Docket No. TMC-5, Sub 2, Recommended Decision (April 13, 2011).

9. While the Authority has not formally adopted the North Carolina or federal Rules of Civil Procedure, under accepted principles of judicial pleading recognized in the courts of this State, the standard for determining whether a claim has been stated sufficiently to survive a motion to dismiss for failure to state a claim 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)). For purposes of that analysis, the allegations set forth in Star TMC's Section 251(f)(2) Petition are treated as true. In short, Star TMC's Section 251(f)(2) Petition is subject to dismissal if it, on its face, fails to state a claim for relief that is cognizable under applicable law.

10. There appears to be no controlling federal interpretation of Section 251(f)(2) by the FCC or the federal courts that would govern resolution of TWCIS (NC)'s

Motion. Given that there is no controlling interpretation, the Arbitrator looks to the plain language of Section 251(f)(2) for guidance.

11. In this regard, it is plain that Section 251(f)(2) establishes a different legal standard than that set forth in Section 251(f)(1). Among other differences: (a) Section 251(f)(1) applies automatically to qualifying rural carriers, while Section 251(f)(2) relief applies only to the extent that it is determined by the relevant state commission that the two percent carrier has met its burden of proof as to such relief; (b) TWCIS (NC) would bear the burden of proof to obtain relief from the Section 251(f)(1) rural exemption, while Star TMC would bear the burden of proof under Section 251(f)(2); (c) Section 251(f)(1) applies automatically as a broad exemption from all the obligations of Section 251(c), while Section 251(f)(2) applies only to specific obligations of Section 251(b) or (c) where the movant has made the showing required by the statute; (d) Section 251(f)(2) relief may be granted only where the movant satisfies its burden with respect to the additional element that suspension of the 251(b) obligation would be “consistent with the public interest, convenience, and necessity,” (the latter criteria permits consideration of all aspects of the public interest presented, including the pro-competitive benefits of competitive entry in addition as well as any counterbalancing facts presents by the rural carrier); and (e) Section 251(f)(2) relief may only be granted for the duration determined by the state commission to be necessary.

12. These differences in the legal standards are relevant and material to resolving the instant Motion to Dismiss. Based on the plain language of the two statutes, Congress appears to have intended to adopt broad and presumptive protections for rural carriers as to the particular obligations of Section 251(c) but, by



contrast, expected that rural carriers would comply with the obligations under Section 251(b) unless they could demonstrate particularized harm. In opposing the Motion to Dismiss its Section 251(f)(2) Petition Star TMC argues that it alleged in its Petition that the Section 251(b) interconnection arrangements sought by TWCIS (NC) “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. TWCIS (NC) contends that Star offers only generalized notions of economic burden in support of its Section 251(f)(2) Petition rather than specific allegations relating to the specific burden imposed by any particular obligation under Section 251(b). Yet, the “test” for economic burden under Section 251(f)(1) cannot be the same standard that is to be utilized in Section 251(f)(2) because, otherwise, the two statutory standards would collapse into one. Congress plainly chose to enact provisions with differing language. It is a general principle of statutory construction that statutes should be construed so as to avoid rendering superfluous any statutory language. See, e.g., *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

13. Moreover, the statutory interpretation advocated by TWCIS (NC) is directly supported by the FCC’s Declaratory Ruling in *CRC Communications of Maine*. The state commission in that case had made a finding of economic burden under Section 251(f)(1), yet the FCC nonetheless concluded that such finding did not immunize the rural carriers in that case from compliance with the obligations of Sections 251(b) and (c). Stated another way, the most compelling interpretation of Section 251(f)(2) is that a showing of undue economic burden under Section 251(f)(2) must relate to the particular burden to be imposed by a specific Section 251(b) requirement (or requirements) as

opposed to generalized notions of burden unconnected to any particular obligation of Section 251(b).

14. Various state commissions have considered requests for relief under Section 251(f)(2). The decision of the Maine Public Utilities Commission is particularly persuasive as it is a recent decision that is the closest factually to the instant proceeding. In that case, the Maine PUC dismissed the Section 251(f)(2) petition of five Maine LECs, finding that their generalized claims that competitive entry into the local telephone market would be economically burdensome and/or inconsistent with universal service goals was insufficient to warrant suspension or modification under Section 251(f)(2). *See 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).* While various other state commissions have either granted relief under Section 251(f)(2), or denied requests for relief after conducting evidentiary hearings on a Section 251(f)(2) petition, it does not appear that any state commission has granted the type of *generalized* relief from competition and interconnection that Star TMC is seeking in its Section 251(f)(2) Petition. *See, e.g., Petition of Ronan Telephone Company for Suspension of Provisions of the 1996 Telecommunications Act, pursuant to 47 U.S.C. § 251(f)(2) and 253(b), No. D99.4.111, 1999 Mont. PUC LEXIS 83, at \*30 (Mont. Pub. Serv. Comm'n Nov. 2, 1999), aff'd, Petition of the Ronan Telephone Company for Suspension of Provisions of the 1996 Telecommunications Act, pursuant to 47 U.S.C. § 251(f)(2) and 253(b), Order on Reconsideration, Order Denying Petition and Closing Docket, Docket No. D99.4.111*



(Mont. Pub. Serv. Comm'n Dec. 27, 1999) (denying blanket Section 251(f)(2) request); and *Application and Petition of The Western Reserve Telephone Company in Accordance with Section II.A.2.D of the Local Service Guidelines*, Nos. 99-1542-TP-UNC, 00-430-TP-UNC, 2000 Ohio PUC LEXIS 310, at \*12 (Pub. Utils. Comm'n of Ohio May 18, 2000) ("The Commission is not inclined to consider granting such a blanket exemption and delay the ability of the petitioners' customers to gain access to competitive telecommunications services as the petitioners propose."). To the contrary, the relief that has been granted by other state commissions has been of a specified duration---temporary and targeted in nature. See, e.g., *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) (granting relief from TELRIC cost requirements for what turned out to be six years based on specific showing of economic burden); *Avista Communications of Idaho, Inc.'s Petition for Temporary Local Number Portability Relief Pursuant to 47 U.S.C. § 251(f)(2)*, No. AVC-T-00-1, 2000 Ida. PUC LEXIS 78 (Idaho Pub. Utils. Comm'n Mar. 23, 2000) (granting short, 6-month extension to obligation to implement local number portability to allow for installation of new switch).

15. Based on the plain language of Section 251(f)(2), and looking to the decisions of other state commissions for guidance, the persuasive reading of Section 251(f)(2)'s standard is the interpretation advocated by TWCIS (NC)—that generalized requests for suspension/modification of Section 251(b) obligations cannot be granted and that, instead, the inquiry required under the suspension/modification provisions of Section 251(f)(2) of the Act must be tied to each particular requirement of Section

251(b) that the movant is seeking to suspend or modify. For example, to the extent that Star TMC seeks suspension or modification of the obligation to provide number portability under Section 251(b)(2), Star TMC has the burden of demonstrating that suspension or modification of this requirement is necessary to “avoid a significant adverse economic impact on users of telecommunications generally” or “to avoid imposing a requirement that is unduly economically burdensome,” or “to avoid a requirement that is technically infeasible” and that the grant of the suspension or modification is “consistent with the public interest, convenience, and necessity.”

16. As stated, the Section 251(f)(1) rural exemption provides a broad exemption from the requirements of Section 251(c), which includes more burdensome interconnection requirements than the arrangements described in Section 251(b). The analysis set forth in Section 251(f)(2) must be conducted individually as to each of the Section 251(b) obligations sought to be suspended or modified, and Section 251(f)(2) requirements cannot be satisfied based merely on assertions to the effect that fulfillment of the obligation will facilitate ruinous competition. A two percent ILEC making such a claim has the burden of proving it.

17. The Arbitrator does not find Star TMC’s reliance on the Recommended Decision in the *Sprint v. Star TMC* proceeding to be persuasive. The Recommended Decision in the *Sprint v. Star* case concerned Section 251(f)(1), which is a different legal standard than that in Section 251(f)(2). Moreover, the Recommended Decision was ultimately rejected by the Authority in its Final Decision and, therefore, is not binding authority in the *Sprint v. Star* proceeding, much less in this proceeding involving different parties and a different legal standard. See Final Decision (N.C. Rural



Electrification Auth., March 27, 2012).<sup>3</sup> Furthermore, our strong national public policy in favor of competition in telecommunications markets also supports finding that Section 251(f)(2) relief requires a particularized showing of harms as a result of provision of Section 251(b) interconnection arrangements. Allowing Star TMC a hearing on its Petition might allow Star to effectively insulate itself from interconnection with TWCIS (NC) for some period of time. This would be inconsistent with the procompetitive goals of the Act. . Public policy favors removing barriers to entrance by TWCIS (NC) into Star TMC's territory so that consumers may be offered a new facilities-based voice alternative. See *Verizon Cal. v. FCC*, 555 F.3d 270, 274 (D.C. Cir. 2009) (accepting the FCC's reading of the Act "as having the promotion of facilities-based local competition as its fundamental policy").

Finally, although not determinative with respect to the proper interpretation of Section 251(f)(2), the Arbitrator is mindful that, in the event that Star TMC is able to state a claim for relief under Section 251(f)(2), the most that Star TMC would be entitled to is a suspension or modification of one or more obligations of Section 251(b) for such duration as the Authority determined to be necessary under the criteria set forth Section 251(f)(2)(a) and (B). See 47 U.S.C. § 251(f)(2) ("The State commission shall grant such petition to the extent that, and for such duration as . . . ."). Section 251(f)(2) does not afford Star TMC relief from interconnection itself, which is an obligation of all carriers under Section 251(a). The obligation to interconnect under Section 251(a) is separate from the obligation to establish interconnection arrangements provided for in Section

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<sup>3</sup> This does not mean that evidence from that proceeding could not be relevant to a claim by Star TMC under Section 251(f)(2) that one or more specific interconnection arrangements sought by TWCIS (NC) would impose an undue economic burden on Star.

251(b). It appears that, under the governing federal law as construed by the FCC, the administrative body with primary jurisdiction over the Act, TWCIS (NC) is entitled to interconnect with Star TMC, and Star TMC has cited no authority to the contrary.<sup>4</sup> Specifically, the FCC stated in its Declaratory Ruling in *CRC Communications of Maine, supra*, “that LECs are obligated to fulfill all of the duties set forth in Sections 251(a) and (b) of the Act.” The FCC went on to recognize there that a rural telephone company retains its right to petition for relief from Section 251(b) and (c) obligations pursuant to Section 251(f)(2). See 26 FCC Record at 8267, n. 49. Thus, a rural ILEC’s obligation to provide Section 251(b) arrangements is, while considered a default, subject to the right of the rural telephone company to petition for suspension or modification pursuant to Section 251(f)(2).

**WHEREUPON**, the Arbitrator reaches the following

### **CONCLUSIONS**

1. To state a claim for relief under Section 251(f)(2), Star TMC must do more than assert generalized harm from competition and interconnection.

2. Here, Star TMC’s Section 251(f)(2) Petition does not contain the necessary specificity to state a claim for relief under Section 251(f)(2). In particular, Star TMC has failed to allege facts that could support suspension or modification of any provision of Section 251(b). Rather it appears from examination of Star TMC’s Section 251(f)(2) Petition that Star is seeking a broad exemption from its interconnection

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<sup>4</sup> Star TMC contends that it is already interconnected with TWCIS (NC), as TWCIS (NC) is able to send traffic to and receive traffic from customers of Star TMC.



obligations based on generalized allegations of harm from competition rather than particularized allegations of harm relating to any specific obligation of Section 251(b).


3. Based on the foregoing, Star TMC's Section 251(f)(2) Petition should be dismissed, without prejudice.

4. Should Star TMC seek to re-assert a claim under Section 251(f)(2), the Arbitrator may be able to address specific concerns regarding any particularized harm to Star or the public interest relating to a specific obligation of Section 251(b) either by granting a suspension or modification of such, or by tailoring the terms of any resulting interconnection agreement or by incorporating such modification or suspension of the Section 251(b) obligations, as may be necessary, into the terms of the interconnection agreement.

#### **RECOMMENDATION**

BASED ON THE FOREGOING, the Arbitrator recommends that the Authority issue an order dismissing, without prejudice, Star TMC's Section 251(f)(2) Petition and directing the parties to proceed directly to arbitration of an interconnection agreement pursuant to a procedural schedule agreed upon by the parties or otherwise ordered by the Arbitrator. It is further recommended that the Authority clarify that, in the event that Star TMC seeks to further pursue its rights under Section 251(f)(2), that such assertion be referred to the Arbitrator for consideration in connection with and in the context of the arbitration proceeding.. ISSUED BY ORDER OF THE ARBITRATOR

This the 25th day of October, 2012.

  
Jo Anne Sanford  
Arbitrator Presiding