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WRITER'S DIRECT DIAL

March 23, 2012

VIA HAND DELIVERY

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

Re: TWCIS (NC) 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 Motion to Dismiss Petition for Suspension or Modification. I would note that this Motion cites to and relies on a number of decisions from other state commissions. While LEXIS cites to these cases are provided, I would be happy to supply copies of the cases should that be helpful to the Authority.

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)

#221997

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	TIME WARNER CABLE INFORMATION SERVICES (NORTH CAROLINA), LLC MOTION TO DISMISS PETITION FOR SUSPENSION OR MODIFICATION

MOTION TO DISMISS PETITION FOR SUSPENSION OR MODIFICATION

Time Warner Cable Information Services (North Carolina), LLC ("TWCIS (NC)"), hereby moves the North Carolina Rural Electrification Authority ("NCREA" or "Authority") to dismiss the Petition of Star Telephone Membership Corporation Pursuant to 47 U.S.C. § 251(f)(2) ("Petition"), filed February 29, 2012 in the above-captioned proceeding. The NCREA should dismiss the Petition filed by Star Telephone Membership Corporation ("Star") because it is defective on its face. Star has engaged in a strategy of systematic delay for more than six years to avoid compliance with its statutory duties to interconnect and exchange traffic with TWCIS (NC) pursuant to Sections 251(a) and (b) of the Communications Act of 1934, as amended (the "Act"). This delay has been highly prejudicial to TWCIS (NC) and to consumers, who have been deprived of the benefits of choice and competition. Because its Petition fails to

plead facts sufficient to support the essential elements of a claim under Section 251(f)(2) of the Act, TWCIS (NC) respectfully urges the NCREA to dismiss the Petition and direct the Arbitrator to move swiftly to arbitrate an interconnection agreement between the parties in keeping with the statutory deadline set forth in Section 252(b)(4)(C) of the Act.

INTRODUCTION

By its Petition, Star 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. Having failed to demonstrate that the rural exemption provided in 47 U.S.C. § 251(f)(1) authorizes it to refuse to arbitrate Section 251(a) and (b) arrangements with TWCIS (NC), Star now seeks—for a second time—to insulate itself from competition based on its status as a rural carrier. Yet, Star's second bite at the "rural exemption" apple is no more authorized under federal law than its first.

Contrary to Star's suggestion that Section 251(f)(2) empowers the NCREA to grant a wholesale exemption from "the various interconnection arrangements sought by TWCIS (NC),"[1] the statute authorizes only limited relief from particular duties set forth in Sections 251(b) and (c), and only where Star can satisfy its burden of proof. Here, however, TWCIS (NC) has only sought interconnection under Section 251(a) and (b), so for *each* obligation under Section 251(b) that Star seeks to suspend, it must show that suspension is *necessary* to avoid a specified harm, and *consistent* with the public interest, convenience, and necessity.[2]

The Petition does not even allege that any particular "requirement" of Section 251(b) *itself* (as opposed to competitive entry more generally) would result in harm cognizable under Section 251(f)(2) or that suspension would serve the public interest. Moreover, Star's Petition

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[1] Petition at 8.

[2] 47 U.S.C. § 251(f)(2).

fails to identify competent evidence that could support such an allegation. Similarly, Star's request that the pending arbitration be held in abeyance while its Section 251(f)(2) is being considered is not justified under the law. Section 251(f)(2) does not authorize the suspension of an arbitration proceeding and, in any event, should the NCREA elect to move forward with the Petition at all, the Section 251(f)(2) proceeding and the arbitration must proceed on separate tracks.

PROCEDURAL BACKGROUND

Star's request to suspend its Section 251(b) obligations pursuant to Section 252(f)(2) comes as the parties are on the cusp of arbitrating an interconnection agreement initially requested by TWCIS (NC) more than six years ago. The protracted proceedings between TWCIS (NC) and Star began on October 5, 2005 when TWCIS (NC) requested that Star enter into negotiations for an interconnection agreement. After Star refused to negotiate, and following the waiting period specified in Section 252(b)(1),[3] TWCIS (NC) filed a petition with the NCREA on March 14, 2006 to arbitrate the terms of an interconnection agreement between the parties.[4]

Before the initial arbitration could move forward, however, Star sought dismissal of the proceeding on the ground that TWCIS (NC) supposedly was not a telecommunications carrier and therefore not eligible for interconnection under the Act.[5] Over TWCIS (NC)'s objection, the

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[3] 47 U.S.C. § 252(b)(1).

[4] Petition of Time Warner Cable Info. Servs. (N.C.), LLC for Arbitration Pursuant to § 252(b) of the Commc'ns Act of 1934, as Amended, to Establish Interconnection Agreements with Atlantic, Randolph and Star Tel. Membership Corps. (filed March 14, 2006).

[5] Motion of Star Telephone Membership Corp. to Dismiss Time Warner Cable Info. Servs. (N.C.), LLC's Petition for Arbitration (filed April 10, 2006).

NCREA agreed with Star and dismissed the proceeding.[6] TWCIS (NC) subsequently requested reconsideration of the dismissal based on the findings of the *TWC Declaratory Ruling*, in which the Federal Communications Commission ("FCC") held that "wholesale providers of telecommunications services are telecommunications carriers for purposes of sections 251(a) and (b) of the Act,"[7] and that such wholesale carriers have the right "to interconnect for the purpose of exchanging traffic with VoIP providers."[8] The NCREA nevertheless declined to reconsider its dismissal in March 2008.[9] On appeal before the U.S. District Court for the Eastern District of North Carolina, the court agreed that TWCIS (NC) qualified as a telecommunications carrier under the Act and thus remanded the proceedings back to NCREA for reconsideration on September 23, 2009—more than *four years* after TWCIS (NC) first sought to negotiate an interconnection agreement with Star.[10]

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[6] *Petition of Time Warner Cable Info. Servs. (N.C.), LLC for Arbitration Pursuant to § 252(b) of the Commc'ns Act of 1934, as Amended, to Establish Interconnection Agreements with Atlantic, Randolph and Star Tel. Membership Corps.*, Order Consolidating and Dismissing Proceedings, Docket Nos. TMC-1, Sub 1; TMC-3, Sub 1; TMC-5, Sub 1, at 6-7 (N.C. Rural Elec. Auth. July 19, 2006).

[7] *In re Time Warner Cable, Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under § 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 ¶ 1 (WCB 2007); *see* Letter Request from Marcus W. Trathen, Counsel to TWCIS (NC), to T. Scott Poole, Administrator of NCREA (filed Dec. 17, 2007).

[8] *TWC Declaratory Ruling* ¶ 13.

[9] The NCREA determined that TWCIS (NC)'s request for reconsideration sought relief not contemplated by the Telecommunications Act of 1996 and was untimely filed under the North Carolina Rules of Civil Procedure, to the extent the request was filed pursuant to Rules 59 or 60. *See* Order Denying Request for Reconsideration, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. March 24, 2008).

[10] *Time Warner Cable Information Services (North Carolina), LLC v. Duncan*, 656 F. Supp. 2d 565, 576 (E.D.N.C. 2009) (finding a lack of "substantial evidence in the administrative record to support the NCREA's finding that TWCIS (NC) is not a telecommunications carrier").

With the parties back at square one, the NCREA in December 2009 requested comments on the proceeding's procedural posture and the issues to be addressed on remand.[11] Following submission of comments by both parties, the NCREA issued an order on January 27, 2010 directing that the case proceed in two phases: the first would consider whether Star's rural exemption under Section 251(f)(1) should be terminated, and the second (in the event the exemption was terminated) would arbitrate any remaining open issues necessary for the parties to enter into an interconnection agreement.[12] By order dated April 30, 2010, the mutually selected Arbitrator established the procedural schedule for the first phase of the proceeding.[13] Pursuant to that schedule, the parties submitted pre-filed testimony and engaged in mutual discovery.

On May 26, 2011, the FCC issued the *CRC Declaratory Ruling*, clarifying that local exchange carriers ("LECs") "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."[14] The FCC further concluded 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)."[15] TWCIS (NC) promptly informed the Arbitrator of this controlling precedent, filing a

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[11] Order Requesting Comments, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. Dec. 7, 2009).

[12] Order Bifurcating Arbitration Proceedings, Docket No. TMC-5, Sub 1, at 5 (N.C. Rural Elec. Auth. Jan. 27, 2010).

[13] Order Establishing Procedural Schedule, Docket No. TMC-5, Sub 1 (Arbitrator Jo Anne Sanford Apr. 30, 2010).

[14] *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 ¶ 2 (2011) ("*CRC Declaratory Ruling*").

[15] *Id.* ¶ 14.

motion on June 6, 2011 seeking to terminate the rural exemption phase of the proceeding in conformity with the FCC's decision.[16] After briefing by both parties, the Arbitrator issued the Recommended Order to terminate the rural exemption phase of the proceeding.[17] Without objection from Star, the NCREA adopted the Arbitrator's Recommended Order as its Final Decision on January 31, 2012.[18] In the weeks following release of the Final Decision, consistent with the directive in the Recommended Order, TWCIS (NC) sought to obtain Star's consent to a proposed procedural schedule for arbitrating an interconnection agreement. When the parties were unable to reach agreement, TWCIS (NC) proposed a procedural schedule on February 24, 2012 to commence arbitration.[19] On February 29, 2012, Star filed its Petition requesting an indefinite suspension or modification "of all requirements of Section[s] 251(b) and (c) ... implicated by the request for interconnection arrangements" from TWCIS (NC).[20]

Pursuant to federal law, the NCREA has a duty to arbitrate an interconnection agreement within nine months after an initial request for interconnection—or approximately 135 days from the filing of the arbitration petition.[21] Given the suspension of the arbitration proceeding during Phase I of the proceeding (and the prior federal court appeal), Section 252 requires that the NCREA "conclude the resolution of any unresolved issued" by June 15, 2012.

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[16] *See* Motion to Terminate Phase I of Proceeding in Conformance with Intervening and Controlling Decision of the Federal Communications Commission, Docket No. TMC 5, Sub 1 (filed June 6, 2011) ("Motion to Terminate").

[17] Recommended Order Terminating Phase I of Proceeding, Docket No. TMC-5, Sub 1 (rel. Oct. 21, 2011) ("Recommended Order").

[18] Final Decision, Docket No. TMC 5, Sub 1 (rel. Jan. 31, 2012) ("Final Decision").

[19] TWCIS (NC) submitted its proposed schedule to the Arbitrator via electronic mail on February 24, 2012, indicating that the parties could not reach agreement on a joint schedule.

[20] Petition at 1. TWCIS (NC) has sought to negotiate an interconnection agreement pursuant to Sections 251(a) and (b) alone. Accordingly, TWCIS (NC)'s interconnection request does not implicate Section 251(c) and any suspension of such duties would have no bearing on the pending arbitration proceeding.

[21] 47 U.S.C. §§ 252(b)(4)(C) and (b)(1).

LEGAL STANDARD

Star's Petition is subject to dismissal where it fails to state a claim that is cognizable under applicable law.[22] Under accepted principles of judicial pleading, "[t]o prevent a Rule 12(b)(6) dismissal, a party must … 'state enough to satisfy the substantive elements of at least some legally recognized claim.'"[23] The NCREA is "not required … 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'"[24] A complaint therefore should be dismissed if it is clearly without merit when "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."[25] In short, TWCIS (NC) is entitled to dismissal if Star's Petition is legally insufficient.[26]

ARGUMENT

I. STAR'S PETITION SHOULD BE DISMISSED FOR FAILURE TO STATE A PLAUSIBLE CLAIM UNDER SECTION 251(f)(2)

Star's Petition is subject to dismissal because it fails to state a colorable claim for relief. Unlike the rural exemption provision set forth in Section 251(f)(1), Section 251(f)(2) presumes the universal applicability of the duties in Section 251(b) and permits temporary suspensions of

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[22] It is appropriate that the NCREA look to the North Carolina Rules of Civil Procedure for guidance with respect to applicable pleading standards. Rule 12(b)(6) of the North Carolina Rules of Civil Procedure applies in analogous circumstances in civil court actions and reflects the notion, equally applicable to administrative proceedings, that a litigant should not be permitted to proceed when it has not articulated a cognizable claim under the law. At a minimum the NCREA must apply procedural due process standards to dispositive motions. *See Duncan*, 656 F. Supp. 2d at 574-76 (discussing the procedural standards required of the NCREA when considering the dispositive motions filed by Atlantic, Randolph, and Star TMC earlier in this proceeding).

[23] *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)).

[24] *Id.*

[25] *Robertson v. Boyd,* 88 N.C. App. 437, 441, 363 S.E.2d 672, 675 (1988) (citing *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981)).

[26] *Forbis*, 301 N.C. at 701, 273 S.E.2d at 241 ("The test on a 12(b)(6) motion is "whether the pleading is legally sufficient.")

such duties only where they are shown to be unduly economically burdensome (or significantly harmful to consumers or technically infeasible) and where their suspension would be consistent with the public interest.

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.

A LEC that petitions for suspension or modification of requirements of Section 251(b) bears the burden of proof that it is entitled to such suspension or modification.[27]

The rules and precedent of the FCC make clear that network interconnection and the exchange of local telecommunications traffic pursuant to Sections 251(a) and (b) are universal default requirements to which all LECs—including rural LECs like Star—are subject absent an extraordinary showing. For example, the FCC recently issued the *CRC Declaratory Ruling* to "clarify that LECs are obligated to fulfill all of the duties set forth in Sections 251(a) and (b) of

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[27] 47 C.F.R. § 51.405(b).

the Act."[28] Indeed, as the National Broadband Plan observes, "[b]asic interconnection regulations" have been "a central tenet of telecommunications regulatory policy for over a century."[29] In fact, the FCC places such a heavy presumption in favor of compliance with Section 251(b) requirements that Star is 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.[30] Accordingly, a petition under Section 251(f)(2) is required to make a detailed showing of "particular burden or harm related to a[] particular obligation of Section 251(b)" in order "to be both cognizable under Section 251(f)(2) and consistent with the FCC's construction of the federal Act."[31]

Star's Petition seeks blanket protection from "competition" but fails to identify any specific harms flowing from compliance with any of the discreet duties set forth in Section 251(b). Its public interest arguments likewise are untethered from those duties. Star therefore

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[28] *CRC Declaratory Ruling* ¶ 2.

[29] Omnibus Broadband Initiative, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at 49 (2010).

[30] 47 C.F.R. § 51.715 (emphasis supplied).

[31] *Petition for Suspension or Modification of the Application of 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* et al., Recommended Decision, Docket Nos. 2011-294 *et al.*, at 19 (rel. Feb. 10, 2012) ("Maine Recommended Decision"); *see also, e.g., Tennessee Coalition of Rural Telephone Companies and Cooperatives Request for Suspension of Wireline to Wireless Number Portability Obligations Pursuant to § 251(f)(2) of the Communications Act of 1934, as Amended*, Order Denying Amended Petition and Establishing Dates for Implementation of Local Number Portability, No. 03-00633, 2005 Tenn. PUC LEXIS 255, at *32 (Tenn. Reg. Auth. Sept. 6, 2005) ("*Tennessee LNP Order*") ("Section 251 of the Act … require[s] more than the anecdotal and general policy statements contained in this record."); *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) ("*Montana Order*") ("A petitioner asking for an unlimited exemption from the requirements of the Act would have an extremely difficult, if not impossible, burden before this Commission.").

fails to provide more than "mere[] conclusory, unwarranted deductions of fact, [and] unreasonable inferences.'"[32] Accordingly, the NCREA should dismiss Star's Petition for failure to state a claim upon which relief may be granted under the applicable federal standard.

A. Star Fundamentally Misconstrues Section 251(f)(2) and the Relief It Authorizes.

The plain language of Section 251(f)(2) makes clear that merely alluding to competition-related burdens and seeking a blanket exemption from whatever may be included in a request for an interconnection agreement is insufficient to make the required showing. Rather, suspension or modification may be sought only from a particular "requirement or requirements of subsection (b) or (c)."[33] And 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—satisfies the appropriate legal standard.[34] Accordingly, as discussed in more detail below, Star must, to avoid dismissal, allege how each specific provision of Section 251(b) that purportedly warrants suspension satisfies the relevant legal standard.

Star repeatedly states that its Petition seeks to suspend or modify its Section 251 obligations "as a consequence of the various interconnection arrangements sought by TWCIS."[35] However, Section 251(f)(2) requires the petitioning carrier to plead a claim for suspension or modification of specific Section 251(b) duties; the statute does not authorize a carrier to obtain a

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[32] *Strickland v. Hendrick*, 194 N.C. App. 1, 20 (N.C. Ct. App. 2008) (citing *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (N.C. Ct. App. 2005)).

[33] 47 U.S.C. § 251(f)(2).

[34] *Id.*

[35] Petition at 8; *see also id.* at 9 ("as a consequence of the interconnection requested by TWCIS"; *id.* at 12 ("interconnection sought by TWCIS"); *id.* at 13 ("facts and circumstances relevant to TWCIS's request for interconnection arrangements"); *id.* at 14 ("the Section 251(b) interconnection arrangements sought by TWCIS"); *id.* at 15-16 ("requirements of 47 USC § 251(b) and (c) implicated by TWCIS's request for interconnection").

general exemption from negotiating an interconnection agreement, as Section 251(f)(1) allows. Tellingly, Star maintains that findings in a Section 251(f)(1) proceeding somehow warrant relief from Section 251(b), even though the rural exemption applies *only* to the separate duties of Section 251(c). Indeed, Star asserts that, based on the recommended decision issued in *Sprint v. Star*—a preliminary ruling now under review as a result of the *CRC Declaratory Ruling*[36]—the Authority should treat Section 251(f)(2) as an alternative means of exempting it from all forms of facilities-based competition.[37] This and similar assertions, mischaracterize the relevant statutory requirements at issue in this proceeding. Those requirements proceed from the premise that interconnection and the exchange of traffic are universally required, and thus represent the *opposite* of the "rural exemption" provided by Section 251(f)(1).

Consistent with the text of Section 251(f)(2), state commissions have uniformly rejected attempts to convert Section 251(f)(2) into a generalized "rural exemption" from Section 251(b) duties. Indeed, no state commission has ever granted the type of indefinite exemption from all of Section 251(b) pursuant to Section 251(f)(2), as Star appears to seek here. State commissions consistently have rejected rural carriers' demands for such "blanket exemptions."[38] And in those

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[36] *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, as Amended*, Order, Docket No. TMC-5, Sub-2 (rel. Jan. 31, 2012) (directing Sprint and Star "to file supplemental briefs … on the effect … of the [*CRC Declaratory Ruling*]") ("Sprint Recommended Decision").

[37] *See* Petition at 10-12 (characterizing the Petition as "not the first time" the Authority has been asked to address the competitive impact of "Time Warner Cable's offering of its 'Digital Home Phone' and 'Business Class Phone' products in Star TMC's service territory").

[38] *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."); *see also Montana Order at *34*; *Woodhull Community Telephone Company: Petition for suspension of rural carriers of Section*

instances where state commissions have granted any sort of relief pursuant to Section 251(f)(2), they generally have done so only for a brief period of time, in connection with specific requirements, and for the purpose of permitting the requesting rural carrier to undertake certain steps it demonstrated were necessary to facilitate compliance.[39] Critically, these state commissions made clear that they were *not* providing protection from competition, but rather sought to enable it.

This Section 251(f)(2) precedent contrasts starkly with rural exemption cases under Section 251(f)(1). As an initial matter, while Section 251(f)(1) provides for a continuing exemption from Section 251(c) obligations, Section 251(f)(2) plainly authorizes only temporary relief, if any. Indeed, as the Montana Public Service Commission held in rejecting a request for relief based on the petitioning carrier's assertion that competition would result in a "death spiral," "[t]he word 'duration' is important, because it implies that any [suspension] granted from the requirements of § 251(b) and (c) should be *finite and limited*, not indefinite."[40] That commission accordingly determined that "[a] petitioner asking for an unlimited exemption from the requirements of the Act would have an extremely difficult, if not impossible, burden before this Commission."[41]

251(b) and (c) of the Federal Telecommunications Act of 1996, No. 96-0146 *et al.*, 1996 Ill. PUC LEXIS 445, at *25, 37 (Ill. Commerce Comm'n Sept. 5, 1996).

[39] *See, e.g., Request of Belmont Telephone Company for Approval of Its Plan to Implement IntraLATA Dialing Parity, Pursuant to 47 U.S.C. § 251(b)(3)*, No. 450-TI-101, 1999 Wisc. PUC LEXIS 174 (Pub. Serv. Comm'n of Wis. June 17, 1999) (granting 180-day extension to allow 860-line telephone company more time to plan and implement dialing parity change); *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 extension to obligation to implement local number portability to allow for installation of new switch).

[40] *See Montana Order* at *12, *29-30 (emphasis supplied).

[41] *Id.* at *30.

Moreover, in contrast to the decisions of state commissions that relied on the adverse effects of competition for rural LECs in upholding the rural exemption from Section 251(c) obligations pursuant to Section 251(f)(1),[42] Section 251(f)(2), as explained above, is intended to permit suspension or modification only of discrete obligations that pose particular implementation challenges. Most recently, the Maine Public Utilities Commission ("MPUC") voted to adopt a Recommended Decision to dismiss the suspension/modification petitions filed by a group of rural LECs, concluding that evidence of competitive harm that may have been sufficient to warrant retaining the rural exemption from complying with "the heightened pro-competitive requirements set forth in Section 251(c)" cannot be sufficient, as a general matter, to satisfy the legal standard of Section 251(f)(2) with respect to the universally applicable Section 251(b) requirements.[43] Indeed, the MPUC agreed that the Hearing Examiner appropriately rejected the conclusory assertion "that ruinous competition will be the result [of] an interconnection agreement," based on the finding that such a claim was "unmoored from any *particular* burden or harm related to any *particular* obligation of Section 251(b)."[44] In adopting the Maine Recommended Decision, the MPUC therefore determined that the rural LECs' suspension/modification petitions were "far too generalized to be both cognizable under Section 251(f)(2) and consistent with the FCC's construction of the federal Act."[45]

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[42] *See, e.g., Midcontinent Communications/Mo. Valley Communications, Inc. Rural Exemption Investigation; Mo. Valley Communications, Inc. Suspend/Modify Interconnection Requirements Application*, Findings of Fact, Conclusions of Law, and Order, Nos. PU-08-61, PU-08-176, at 30 (Oct. 8, 2008), *aff'd Midcontinent Commc'ns v. North Dakota Pub. Serv. Comm'n*, Case No. 1:09-cv-017, Order Denying Plaintiff's Motions and Granting Defendant Missouri Valley Communications Motion for Summary Judgment (D. N.D. Apr. 15, 2010).

[43] Maine Recommended Decision at 18-19.

[44] *Id.* at 19 (emphasis supplied).

[45] *Id.*

B. The Petition Does Not Remotely Justify Relief From Any Particular "Requirement" Under Section 251(b).

Star's fundamental disregard of the governing statutory standard warrants dismissal of its Petition in this case. Star makes no effort to allege facts in support of the broad suspension it seeks, other than to list the requirements of Section 251(b) and assert, without more, that these obligations "individually and collectively" would cause harm by "facilitat[ing] the offering of Time Warner Cable's 'Digital Home Phone' and Business Class Phone' service in Star TMC's service area."[46] As discussed below, such bare allegations do not come close to stating a claim capable of surviving dismissal with respect to *any* Section 251(b) obligation.

Number Portability. Section 251(b)(2) requires LECs to provide number portability to competitive carriers so that customers have the ability to keep the same telephone number when changing providers.[47] The Petition fails to explain why continuing to comply with number portability obligations pursuant to Section 251(b)(2) would impose any economic burden—much less an *undue* economic burden—or why suspension of that requirement would be consistent with the public interest. Other state commissions have refused to grant requests under Section 251(f)(2) when the requesting carrier fails to provide evidence relating to the specific "requirements" at issue.[48] For example, the Tennessee Regulatory Authority ("TRA") denied a

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[46] Petition at 8.

[47] 47 U.S.C. § 251(b)(2) ("The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."). Star's Petition does not seek suspension or modification of the first requirement under Section 251(b), *see* Petition at 7-8, which requires Star to permit resale of its telecommunications services. *See* 47 U.S.C. § 251(b)(1).

[48] *See, e.g., Tennessee LNP Order*; *Cambridge Telephone Company et al. Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under §251(b) and (c) of the Federal Telecommunications Act, pursuant to § 251(f)(2) of that Act*, Order, Nos. 05-0259-0265, 0270, 0275, 0277, 0298, 2005 Ill. PUC LEXIS 379, at *36-37 (deferring consideration of the LECs' requests for suspension/modification of §§ 251(b)(2) and (5) after considering and dismissing the applicability of § 251(f)(1) to Sprint's requests under §251(a) and (b), because "the Commission does not

request for suspension of a group of carriers' local number portability obligation, noting their failure to submit detailed cost data and financial impact analyses.[49] The TRA stated that "Section 251 of the Act and the Authority's instructions to file company-specific data require more than the anecdotal and general policy statements contained in this record."[50]

Moreover, Star concedes that it competes with CMRS carriers, among other entities.[51] Because the FCC's number portability rules extend to intermodal competition between wireline and wireless carriers—and Star thus is required to support number portability irrespective of whether it competes with TWCIS (NC)—the notion that suspending the requirement is "necessary" within the meaning of Section 251(f)(2) is implausible on its face.[52] Indeed, Star has acknowledged that it possesses the technical capability to port numbers by admitting in discovery that it has fulfilled at least one number portability request from a CMRS carrier.[53] A blanket suspension of Section 251(b)(2) would risk undercutting existing competition with

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have sufficient information" and instead requiring that the suspensions "be addressed in the newly-initiated arbitration" proceeding).

[49] *Tennessee LNP Order* at *32; *see also id.* (finding that the Tennessee carriers "did not carry [their] burden to demonstrate that the users of telecommunications services would suffer significant adverse economic impact or that the LNP implementation requirement is unduly economically burdensome" because the costs of LNP implementation could be covered using "extremely reasonable" customer surcharges and "[t]here was no quantifiable showing demonstrating that the LNP surcharges are not just and reasonable or that the assessment of such is not financially viable").

[50] *Id.*

[51] Petition at 6 (admitting that Star faces competition from other telecommunications providers, which presently consist largely of inter-modal providers such as commercial mobile radio service providers offering wireless service, and nomadic Voice over Internet Protocol … service providers (such as Vonage, MagicJack, etc.)).

[52] *See generally Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996) (first establishing intermodal porting obligations); *see also Telephone Number Portability for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; Numbering Resource Optimization*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 ¶¶ 50-51 (2007) (requiring small wireline carriers to provide intermodal LNP).

[53] *See* Star Response to TWCIS (NC) Data Request No. 29 (filed May 25, 2010).

wireless carriers. Alternatively, if Star seeks suspension only vis-à-vis TWCIS (NC), it has offered no evidence that the public interest would be served by barring facilities-based wireline competition when alternative forms of competition already exist.[54] To the contrary, it would turn congressional intent on its head to discriminate against TWCIS (NC) (vis-à-vis other competitors) on the ground that it seeks to invoke basic interconnection rights necessary to enable facilities-based competition, given that Congress's fundamental goal in the 1996 Act was to promote the development of such facilities-based competition.[55]

Dialing Parity. Section 251(b)(3) requires LECs to provide dialing parity—*i.e.*, functionality that permits a LEC's customers to call a competitive carrier's customers, and visa-versa, without impediment or delay, in addition to providing nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing.[56] Star does not specify which of these particular obligations it seeks relief from nor does it even allege, much less demonstrate, why its obligation to provide dialing parity pursuant to Section 251(b)(3) imposes any particular burden (beyond the generalized burden of having to compete). Nor does

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[54] In an analogous context, the New Hampshire PUC recently noted that "determining whether a competitor's entry will be for the public good requires the Commission to consider the interests of competition" and concluded that denying competitive entry because it "would negatively affect the RLEC's opportunity to earn a return … could lead to the absurd result that inept competitors would be provided the opportunity to compete directly with an RLEC … while adept competitors … would be barred from competing." *CLEC Registrations Within RLEC Exchanges*, Order on the Merits, DT 10-183, at 28-29 (N.H. Pub. Utils. Comm'n Oct. 21, 2011). The PUC thus held that "[t]he threat of financial harm cannot serve to deny entry to competitors," as "[i]t would not promote competition, for example, for a single competitor to be allowed entry but subsequent competitors rejected because their combined presence could have a greater impact on the incumbent." *Id.* at 29-30.

[55] *See Verizon Cal. v. FCC*, 555 F.3d 270, 274 (D.C. Cir. 2009) ("*Verizon Cal.*") (readily accepting the FCC's reading of the 1996 Act "as having the promotion of facilities-based local competition as its fundamental policy"); *see also U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) ("After all, the purpose of the [1996] Act … is to stimulate competition—preferably *genuine, facilities-based competition*") (emphasis supplied).

[56] 47 U.S.C. § 251(b)(3) ("The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.").

it attempt to justify relief from the obligations to provide nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings—all of which also must be provided pursuant to Section 251(b)(3). In fact, Star does not even mention these additional duties. And again, because Star must provide these functions with respect to the wireless carriers it competes against,[57] a blanket suspension would risk undermining that competition. In addition, if Star is seeking suspension only vis-à-vis TWCIS (NC), it would make no sense to assert that the same functions provided to competing wireless carriers warrant suspension when requested by TWCIS (NC).

Access to Rights-of-Way. Section 251(b)(4) requires LECs to provide competitive carriers with access to poles and rights-of-way.[58] Nothing in Star's Petition remotely provides a basis for suspending Star's obligation to provide access to poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are consistent with Section 224. While it remains unclear in the absence of negotiations between TWCIS (NC) and Star regarding specific interconnection arrangements (and in the absence of arbitration proceedings) whether TWCIS (NC) would need to invoke these rights, the fact remains that Star has failed to allege any facts that would justify any suspension of Section 251(b)(4). Again, the Petition does not come close to justifying either a blanket suspension or any type of TWCIS (NC)-specific suspension.

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[57] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas; Administration of the North American Numbering Plan; Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392 ¶ 68 (1996) (rejecting the argument "that the §251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS providers" (subsequent history omitted)).

[58] 47 U.S.C. §251(b)(4) ("The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.")

Reciprocal Compensation. Section 251(b)(5) requires Star to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[59] This provision ensures that both carriers have a mechanism for recovering the costs incurred by them for terminating traffic originated by the other. Star's Petition fails to supply any grounds for suspending its core duty to provide for reciprocal compensation—it does not allege that this obligation imposes any particular burden, nor does it identify any specific aspect of this requirement from which it is seeking relief.

As the FCC has squarely held, the Act defines "telecommunications" expansively.[60] The term's "scope is not limited geographically ('local,' 'intrastate,' or 'interstate') or to particular services ('telephone exchange service,' 'telephone toll service,' or 'exchange access')."[61] As a result, the FCC determined that Section 251(b)(5) encompasses *all* voice traffic, whether local or toll, wireline or wireless.[62] Given the broad scope of the provision, a blanket exemption from Section 251(b)(5) could be read as an authorization for Star to block any telecommunications traffic originated by any telecommunications carrier—or at a minimum by any customers of TWCIS (NC). To TWCIS (NC)'s knowledge, no state commission has ever endorsed such a

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[59] 47 U.S.C. § 251(b)(5).

[60] *Id.* § 153(43) ("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.").

[61] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 ¶ 8 (2008) (citations omitted); *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 *et al.*, FCC 11-161, at ¶¶ 761-62 (rel. Nov. 18, 2011) ("*CAF Order*").

[62] *See CAF Order* ¶¶ 761-62.

radical outcome, and the FCC consistently has held that call-blocking is anticompetitive and contrary to the public interest.[63]

Even if Star's suspension request is read in a narrower fashion, in the context of its recent comprehensive reform of the intercarrier compensation system, the FCC has specifically cautioned state commissions against suspending or modifying Section 251(b)(5) obligations, stating that it would be "highly unlikely" that any such suspension or modification could satisfy the public interest prong of Section 251(f)(2).[64] In light of that precedent, even if Star's Petition had requested suspension of some specific aspect of its reciprocal compensation obligation, the NCREA could not reasonably find that suspending Section 251(b)(5) is "consistent with the public interest, convenience, and necessity" as required under Section 251(f)(2).

TWCIS (NC) has identified two instances where a state commission has granted any relief under Section 251(f)(2) that implicates Section 251(b)(5), and those limited suspensions are readily distinguishable from the blanket suspensions that Star seeks here. Specifically, two commissions—one of which was the North Carolina Utilities Commission ("NCUC")—granted temporary relief from the requirement to perform TELRIC studies to set reciprocal compensation rates.[65] But those suspensions were based on the concrete burdens of undertaking cost studies,[66]

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[63] *See id.* ¶¶ 734, 973-74 (emphasizing the importance of the FCC's longstanding prohibition on call blocking and making clear that the prohibition includes call blocking with respect to VoIP-PSTN traffic); *Developing a Unified Intercarrier Compensation Regime; Establishing Just and Reasonable Rates for Local Exchange Carriers*, Declaratory Ruling, CC Docket No. 01-92, WC Docket No. 07-135, at ¶¶ 11-12 (WCB rel. Feb. 6, 2012) (reaffirming the principle that blocking telecommunications service traffic violates Sections 201 and 202 of the Act).

[64] *CAF Order* ¶ 824.

[65] *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) ("*North Carolina Modification Order*"); *Petition of the Tennessee Rural Independent Coalition for Suspension and Modification Pursuant to 47 U.S.C.§ 251(f)(2)*, Order Granting Suspension of Requirement To Utilize TELRIC Methodology in Setting

and, critically, they did *not* interfere with those rural carriers' obligation to negotiate interconnection agreements as a general matter.[67] Rather the LECs in question remained bound by their obligations pursuant to Sections 251(a) and (b); they simply complied with those obligations without calculating TELRIC rates. In fact, the NCUC granted the suspension in part because reasonable alternatives to TELRIC studies existed.[68] In so doing, the NCUC implicitly acknowledged the need to ensure the LECs' continued compliance with the remaining obligations of Section 251, even when a limited suspension was found to be appropriate.

By the same token, the Tennessee commission distinguished among different requirements of Section 251(b) based on the impact any suspension or modification would have on consumers and the ability of other voice providers to enter the marketplace. In particular, the TRA granted a limited suspension of carriers' obligations to perform TELRIC studies under Section 251(b)(5) because such suspension "does *not* involve a service provided to consumers at all" or "any requirement to provide a service to an interconnecting carrier."[69] In sharp contrast,

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Transport and Termination Rates, Docket No. 06-00228, 2008 Tenn. PUC LEXIS 112 (Tenn. Reg. Auth. June 30, 2008) ("*Tennessee Suspension Order*").

[66] *See North Carolina Modification Order* at *8 (summarizing the North Carolina rural LECs arguments that "the imposition of a TELRIC requirement would impose both undue financial burdens, in terms of the direct cost, and operational burdens, in terms of the personnel and resources that would have to be diverted"); *Tennessee Suspension Order* at *22 (noting that the Tennessee rural LECs presented evidence of the "quantifiable costs associated with preparing and defending the TELRIC studies" and "the operational burden which would result from the necessary use of managerial and employee resources to undertake such studies").

[67] *See North Carolina Modification Order* at *3 (noting the North Carolina's existing interconnection agreements with the CMRS provider parties); *Tennessee Suspension Order* at *37-38 (noting that "[TELRIC] studies are [not] the exclusive avenue for promoting competition" because the Tennessee rural LECs would "continue productive negotiations" toward interconnection arrangements with the CMRS providers and that suspension of the obligation to utilize TELRIC methodology "may in fact promote the expansion of end-user services and technology" by resolving a major dispute between the parties).

[68] *See North Carolina Modification Order* at *34-35 (granting suspension based on reasons advanced by rural LECs, one of which focused on available alternatives to TELRIC studies).

[69] *Tennessee Suspension Order* at *27 (emphasis supplied).

the TRA explained that it denied a previous request by the Tennessee LECs to suspend implementation of their obligation to provide local number portability pursuant to Section 251(b)(2),[70] because granting the request would have "delay[ed] a service from which end users would receive a tangible benefit."[71] Viewed from the perspective of this case, Star's Petition plainly seeks to block competitive entry as a general matter and thus deny North Carolina consumers "a tangible benefit." As a result, TRA's analysis indicates that any suspension of Star's Section 251(b) duties is inappropriate.

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In short, the NCREA should dismiss Star's Petition because it ignores the relevant statutory standard and does not attempt to show that any specific "requirement" results in an undue economic burden, or that its suspension would serve the public interest. Because Star already must comply with Section 251(b) in competing with CMRS carriers, and those bedrock requirements have been found vital to advancing the public interest, Star's Petition does not—and cannot—justify suspension of any statutory requirement.

C. The Preliminary Findings From the Sprint Rural Exemption Proceeding Are Insufficient As a Matter of Law to Justify Suspension of Any Obligation Under Section 251(b).

Rather than attempting to make the kind of showing required by Section 251(f)(2), Star seeks a shortcut: It wants to bootstrap the Arbitrator's preliminary findings from Sprint's rural exemption proceeding involving Star into a basis for suspending its obligations to interconnect with TWCIS (NC) under Section 251(b).[72] That gambit fails for several different reasons.

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[70] *See generally Tennessee LNP Order, supra.*

[71] *Tennessee Suspension Order* at *27.

[72] *See* Petition at 12 (requesting suspension/modification "[b]ased on the finding[s]" in the Sprint Recommended Decision).

First, to justify application of the preliminary findings of the Sprint Recommended Decision against TWCIS (NC) in this proceeding, Star bears the burden of demonstrating that those findings should have preclusive effect. It is well settled that the doctrine of issue preclusion (or collateral estoppel) only applies where (i) there is a 'final and valid judgment" (ii) "resulting from a prior proceeding in which the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue," among other factors.[73] The Sprint Recommended Decision fails to meet either requirement. As an initial matter, the Sprint Recommended Decision is not a "final and valid judgment," it is only a recommendation and, as noted above, is currently under review as a result of the FCC's *CRC Declaratory Ruling*, which casts significant doubt on the validity of its preliminary findings. Moreover, TWCIS (NC) is not a party to Sprint's rural exemption proceeding and thus has had *no* opportunity—much less a "full and fair opportunity"—to litigate the undue economic burden issue in that proceeding.

Likewise, whereas Sprint had the burden of proof in its rural exemption proceeding with Star, *Star* has the burden of proof under Section 251(f)(2). The divergent allocation of the burden of proof under Sections 251(f)(1) and 251(f)(2) also is critical to the issue of issue preclusion. Under both North Carolina and federal law, an issue determined in an earlier case in which one party has the burden of proof does not have preclusive effect in a subsequent case in which the burden of proof rests with the other party.[74] That precedent confirms the proposition that Sprint's failure to demonstrate the *absence* of an undue economic burden does not mean that

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[73] *McHan v. C.I.R.*, 558 F.3d 326, 331 (4th Cir. 2009) (internal quotation marks omitted); *see also Cobb v. Pozzi*, 363 F.3d 89, 113-14 (2d Cir. 2004); *Wiggins v. Rhode Island*, 326 F. Supp. 2d 297, 307-08 (D.R.I. 2004).

[74] *See, e.g., McHan*, 558 F.3d at 331-32 (citing the Restatement (Second) of Judgments §28(4), which disallows the use of collateral estoppel when "the party against whom the doctrine is invoked had the burden [of persuasion] in the first proceeding, but the party seeking to invoke the doctrine has the burden in the second proceeding"); *In re Kane*, 254 F.3d 325, 328 (1st Cir. 2001) (same); *Tsoras v. Manchin*, 2010 U.S. Dist. LEXIS 33210 (N.D.W.V. 2010) (same).

Star would in fact suffer an undue economic burden, just as a "not guilty" verdict in a criminal case does not mean that the defendant is actually innocent. Although Star asserts that the findings of the Sprint Recommended Decision should be applied here,[75] it does not cite any contrary authority that would justify the Authority's departure from this basic legal principle.

Second, Sprint's rural exemption proceeding under Section 251(f)(1) and Star's suspension/modification Petition under Section 251(f)(2) involve distinct statutory obligations. The Section 251(f)(1) proceeding concerns Sprint's efforts to lift Star's continuing exemption from complying with the obligations imposed on incumbent LECs under Section 251(c), which are the most onerous obligations contained in Section 251. In stark contrast, the baseline for *all* LECs is that Section 251(b) is fully applicable. As noted above, the FCC has determined that compliance with the obligations of Section 251(b)(5) is so fundamental that its rules provide for interim transport and termination arrangements pending negotiation and/or arbitration of interconnection agreements.[76] Specifically, Star is required to "provide transport and termination of telecommunications traffic *immediately* under an interim arrangement, pending resolution of negotiation or arbitration" of an interconnection agreement pursuant to Sections 251 and 252.[77]

Third, as explained above, the legal standard under Section 251(f)(2) is not the same as that under Section 251(f)(1). Star has the affirmative obligation to demonstrate that complying with any "requirement or requirements" of Section 251(b) will impose an undue economic burden. Yet the Arbitrator was not required to make any such determination in the Sprint

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[75] *See* Petition at 11-12.

[76] 47 C.F.R. § 51.715.

[77] *Id.* § 51.715(a) (emphasis supplied). The FCC's rule provides additional guidance regarding the manner in which Star is to comply with its interim transport and termination obligations. *See, e.g., 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").

Recommended Decision regarding the impact on Star of complying with any duty set forth in Section 251(b). Star strays even farther afield in claiming entitlement to relief under Section 251(f)(2)(A)(i); it argues that the Sprint Recommended Decision "also supports a finding here that the interconnection sought by TWCIS (NC) would cause 'a significant adverse economic impact on users of telecommunications services generally.'"[78] It is simply false that the Arbitrator made any "findings" regarding the meaning or application of that prong of the Section 251(f)(2) standard.

Moreover, Star must satisfy its burden of proof with respect to an additional criterion that the Arbitrator did not consider under Section 251(f)(1): whether the suspension of its Section 251(b) obligations would be "consistent with the public interest, convenience, and necessity."[79] Even apart from the fact that the parties and the Arbitrator addressed only Section 251(c) obligations in the Sprint rural exemption proceeding, the Sprint Recommended Decision gives no consideration to the pro-competitive *benefits* of Sprint's planned entry in that proceeding and thus severely limits the significance of those prior findings even in the unlikely event the NCREA were to adopt them. As the FCC has recognized, the public interest weighs decidedly in favor of *applying* Section 251(b) to all LECs, rather than establishing suspensions or exemptions.[80]

The relevant precedent makes clear that enforcing the pro-competitive duties in Section 251(b)—including in particular in rural areas—is consistent with the public interest and that any

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[78] Petition at 12.

[79] 47 U.S.C. § 251(f)(2)(B).

[80] *See CAF Order* ¶ 824.

blanket suspension would contravene that interest.[81] The FCC specifically determined that the public interest is strongly advanced by enforcing the rights TWCIS (NC) have invoked in its request to negotiate interconnection agreements implementing Section 251(b). The FCC explained that requiring incumbent LECs to interconnect and exchange traffic "will promote competition and spur investment ... *particularly in rural areas*, by encouraging the deployment of facilities-based voice services."[82] As a result, unlike the rural exemption provision, there can be no dispute that the "fundamental policy" of Sections 251(a) and (b) is to open local telecommunications markets and "the promotion of facilities-based local competition."[83] Star ignores the compelling public interest benefits of that fundamental policy.[84] Those benefits, which have been recognized by Congress and the FCC, are dispositive of the public interest prong under Section 251(f)(2) and warrant dismissal of the Petition.

In light of the key differences between Sections 251(f)(1) and 251(f)(2), it would constitute clear error to suspend any requirement under Section 251(b) based on the Sprint Recommended Decision.[85] Star cannot rely on the "undue burden" aspects of the preliminary analysis in that case given that no final judgment has been rendered in that case and, in any event, TWCIS (NC) is not a party to that proceeding. In addition, Section 251(f)(2) entails a different burden of proof and authorizes suspension of entirely different statutory requirements

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[81] *See, e.g., Montana Order* at *30 ("A petitioner asking for an unlimited exemption from the requirements of the Act would have an extremely difficult, if not impossible, burden before this Commission.").

[82] *CRC Declaratory Ruling* ¶ 1 (emphasis supplied).

[83] *Verizon Cal.*, 555 F.3d at 274 (D.C. Cir. 2009).

[84] Petition at 14 (asserting incorrectly that the "paramount public interest concern at stake in any proceeding under Section 251(f)(2) is the protection of universal service, which is synonymous with the public interest").

[85] *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir. 1999) (applying *de novo* review to NCREA's interpretations of the Telecommunications Act). *Duncan*, 656 F. Supp. 2d at 574 (same).

(*i.e.*, those duties set forth in Section 251(b), rather than Section 251(c) alone). Nor can Star satisfy the public interest prong under Section 251(f)(2), because the public interest plainly is served by continued enforcement of Section 251(b) requirements, rather than any type of suspension. Accordingly, Star's Petition should be dismissed.

II. THE AUTHORITY IS REQUIRED TO COMPLY WITH FEDERAL STATUTORY DEADLINES FOR COMPLETING ARBITRATION OF AN INTERCONNECTION AGREEMENT BETWEEN TWCIS (NC) AND STAR

A. The NCREA Should Direct the Arbitrator To Adopt an Expedited Procedural Schedule in This Proceeding To Ensure That Arbitration Concludes within 135 Days of Its Final Decision.

Regardless of the disposition of Star's Section 251(f)(2) Petition, the Arbitrator has a statutory duty to proceed with the arbitration proceeding. The NCREA has a federal statutory obligation to arbitrate an interconnection agreement "not later than 9 months after the date" on which Star first received TWCIS (NC)'s request to interconnect and exchange local traffic.[86] In addition, the Act compels the Authority to conclude arbitration approximately 135 days after receiving TWCIS (NC)'s petition for arbitration.[87] Due to the unusual procedural posture of this proceeding, discussed above, calculating the applicable deadlines entails more complexity than in most arbitration proceedings. TWCIS (NC) considers the date of the Final Decision directing the Arbitrator to commence arbitration in this case—January 31, 2012—to be the most

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[86] 47 U.S.C. § 252(b)(4)(C).

[87] *See id.* § 252(b)(1) (requiring that a petition for arbitration be filed "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation"). Nine calendar months equal approximately 270 days, which dictates that, in order to comply with Section 252(b)(4)(C), a state commission is required to complete arbitration of interconnection agreements within 135 days after receiving a petition for arbitration pursuant to Section 252(b)(1). *Id.* §§ 252(b)(4)(C), 252(b)(1).

appropriate date on which to restart the arbitration clock. By this measure, Section 252 requires that the NCREA "conclude the resolution of any unresolved issues" by June 15, 2012.[88]

TWCIS (NC) also believes that this deadline requires the adoption of an expedited arbitration schedule in this matter. TWCIS (NC) already has submitted such a schedule to the Arbitrator. TWCIS (NC)'s proposed schedule represents a reasonable approach to ensure timely completion of this proceeding. Indeed, the proposed schedule is consistent with schedules adopted by the NCUC in analogous proceedings, including the procedural schedule currently being followed in TWCIS (NC)'s arbitration with Pineville Telephone Company.[89] To the extent that arbitration of an interconnection agreement between TWCIS (NC) and Star is not complete by June 15, 2012, TWCIS (NC) reserves its right to seek preemption of the NCREA pursuant to Section 252(e)(5).[90]

B. Section 251(f)(2) Does Not Authorize Suspension of the Statutory Deadline for Completing Arbitration Proceedings Commenced Under Section 252(b).

Star is incorrect in suggesting that the NCREA may suspend the Section 252 arbitration proceeding prior to addressing its Section 251(f)(2) Petition. Although its Petition is unclear on this point, it appears that Star would have the NCREA adopt a bifurcated process whereby its Section 251(f)(2) Petition would be addressed first, followed by arbitration of an interconnection agreement.[91] Star offers no legal support for its preferred approach, and there is none.

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[88] *Id.* § 252(b)(4)(C).

[89] *See* NCUC Docket No. P-1262, Sub 5 (Petition for Arbitration filed Oct. 26, 2011; hearing originally scheduled for March 20, 2012).

[90] 47 U.S.C. § 252(e)(5).

[91] *See* Petition at 15 (asserting that the Authority should "establish a procedural schedule for conducting … discovery … and schedule a hearing with regard to th[e] Petition, *prior to moving forward* with" the arbitration process (emphasis supplied)).

A bifurcated procedure such as that previously adopted in this proceeding would be inappropriate in light of the findings in the *CRC Declaratory Ruling*. As discussed above, the FCC has now made clear that network interconnection and the exchange of local telecommunications traffic pursuant to Sections 251(a) and (b) are default universal requirements with which Star is required to comply. Unlike Section 251(c) requirements subject to the rural exemption, compliance is the *rule*, not the exception. Thus, there is no preliminary issue or procedural hurdle for TWCIS (NC) to overcome before it has the right to arbitrate an interconnection agreement; as the Recommended Decision adopted by the NCREA acknowledges, "TWCIS (NC) (NC) has satisfied the only statutory prerequisite to invoke compulsory arbitration by making a bona fide request for interconnection."[92]

Furthermore, Section 252—not Section 251(f)(2)—establishes the procedures for arbitration proceedings conducted pursuant to that Section. Although Section 251(f)(2) empowers the NCREA to suspend an incumbent LEC's *obligations* under Sections 251(b) and (c) while it considers a suspension/modification petition (and based on an appropriate showing by the petitioning party),[93] it does not provide any basis for suspending *arbitration proceedings* commenced under Section 252(b). The statutory language makes clear that a state commission has no authority to suspend a Section 252 arbitration proceeding, and any attempt to do so would constitute a "failure to act" under Section 252(e)(5), as noted above.

Accordingly, in the event that the NCREA determines that Star's Petition should move forward at all, that proceeding cannot be used as a basis to further delay arbitration in this proceeding. Rather, the NCREA should open a separate docketed proceeding to examine the Section 251(f)(2) issues, and that case should move forward in parallel with the parties'

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[92] Recommended Decision at 8.

[93] 47 U.S.C. § 251(f)(2).

arbitration of an interconnection agreement. In the alternative, the Authority could adopt a procedure similar to that proposed by the Maine Recommended Decision, according to which the NCREA would "open an arbitration proceeding pursuant to Section 252 of the Act" and "address concrete concerns" of the incumbent LEC, if any, through the arbitration process.[94]

Whatever procedural approach the NCREA chooses, it should not grant Star's request for interim relief of it Section 251(b) obligations—during the pendency of this Motion, the arbitration proceeding, or Star's Petition. Indeed, Star's request for a temporary suspension of its obligations fails based on the same flaws that doom its efforts to obtain indefinite suspension of Section 251(b). Star's mere filing of a defective Petition for suspension plainly cannot be sufficient to warrant the interim suspension it seeks. Notably, Star provides no additional argument or precedent in support of interlocutory relief. Whether or not the traditional injunctive relief standard applies in these circumstances, any type of "good cause" standard by its nature should entail some inquiry into Star's likelihood of success on its Petition, the threat of irreparable harm, and the public interest implications of the requested relief. Yet Star makes no showing of any kind that would warrant displacement of the core Section 251(b) duties that Congress intended to apply universally.[95]

C. Section 253(f) Also Provides No Legal Basis To Further Delay Star's Compliance with Sections 251(a) and (b).

Finally, Star again misconstrues the Act when it asserts that Section 253(f) permits the Authority to relieve Star of its duty to comply with Section 251(b) requirements until such time

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[94] Maine Recommended Decision at 20.

[95] Indeed, given the FCC's requirement that incumbent LECs begin exchanging telecommunications traffic "without unreasonable delay" even before entering into a formal interconnection agreement, 47 C.F.R. § 51.715(b), TWCIS (NC) believes that Star could not show that an order *barring* the exchange of local traffic would advance the public policy interests at stake (even apart from its failure to supply any argument or authority in support of such an outcome).

as (i) TWCIS (NC) is designated as a carrier of last resort ("COLR") or eligible telecommunications carrier ("ETC") throughout Star's service area, or (ii) Star is relieved of its state COLR duties.[96] The language of Section 253(f) is clear: a state commission may "require a telecommunications carrier that *seeks to provide* telephone exchange service or exchange access ... to meet the requirements in section 214(e)(1) ... for designation as an [ETC] for that area *before being permitted to provide* such service."[97] Contrary to Star's suggestion, TWCIS (NC) has not requested, nor does it seek, authorization to provide service in this proceeding. Rather, the sole purpose of *this* proceeding is to arbitrate an interconnection agreement between TWCIS (NC), in keeping with TWCIS (NC)'s rights, and Star's obligations, under Sections 251 and 252.

Star's reliance on Section 253(f) in this case thus is misplaced and woefully late. To the extent Star believes that TWCIS (NC)'s operating authority should be conditioned on TWCIS (NC)'s status as an ETC, the time for making such an argument passed in 2003, when TWCIS (NC) received its certificate of public convenience and necessity in North Carolina.[98] In any event, the NCUC would have placed any such limitations on TWCIS (NC)'s operating authority that it believed to be necessary at that time, but it did not do so.

Star's suggestion that TWCIS (NC) lacks the requisite authority to operate in areas served by Star as a result of under Section 62-110(f3) of the General Statutes of North Carolina,

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[96] Petition at 15.

[97] 47 U.S.C. § 253(f) (emphasis supplied).

[98] Application of Time Warner Cable Information Services for a Certificate of Public Convenience and Necessity to Offer Long Distance Telecommunications Service by a Reseller, Order Granting Certificates, Docket No. P-1262, Sub 0,1 (N.C. Utils. Comm'n, May 16, 2003). Pursuant to the certificate issued by the NCUC, TWCIS (NC) holds statewide operating authority to provide intrastate local exchange and exchange access telephone service throughout the State of North Carolina. *See id.*

is equally untenable.[99] Indeed, the NCUC Public Staff has made clear its position that the interpretation of Section 62-110(f3) proposed by Star "almost certainly violate[s] section 253 [of the Act] and would be preempted by the FCC if challenged,"[100] and FCC precedent confirms the Public Staff's conclusion.[101] Likewise, Star's apparent belief that Section 251(f)(2), Section 253(f), or some combination thereof, authorizes the NCREA to require TWCIS (NC) to build out its network to every corner of every Star exchange *before* TWCIS (NC) may exercise its rights to basic interconnection and exchange of local traffic is contrary to settled law and would erect an insurmountable barrier to entry.[102]

The FCC has made clear that competitive carriers may be certified as ETCs in rural areas even when they cannot provide service throughout the incumbent's territory.[103] In other words, competitors with more limited footprints than the incumbent (which of course is true of virtually all new entrants) are not only *allowed* to compete, they are eligible to receive *federal subsidies* to do so (provided they otherwise are eligible under 47 U.S.C. § 214(e)). The FCC held that "requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry in those areas where

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[99] N.C. Gen. Stat. § 62-110(f3); *see* Petition at 3 n.3.

[100] *Telephone Competition Summary of Proceedings*, Report to the Joint Legislative Utility Review Committee Pursuant to Chapter 27 of the 1995 Session Laws, at 41 (Oct. 1999).

[101] *See, e.g., Silver Star Tel. Co., Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15658-60 ¶¶ 42-46 (1997) (Wyo.) *recon. denied*, 13 FCC Rcd 16356, 16356 ¶ 1 (1998); *Pub. Util. Comm'n of Tex., et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3566 ¶ 227 (1997) (Tex.).

[102] *See* Petition at 9 (alleging that interconnection and exchange of traffic with TWCIS (NC) would result in "cream skimming"); *see also id.* at 15 (arguing that TWCIS (NC) should be denied access to rights under Sections 251(a) and (b) until it becomes an ETC or COLR).

[103] *See Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Pub. Utils. Commission*, Declaratory Ruling, 15 FCC Rcd 15168 ¶¶ 12-13 (2000).

universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC."[104] The FCC further held that "[*s*]*uch a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition.*"[105] If a carrier can be a *subsidized* entrant in a rural area without covering the entire territory, there can be no legitimate basis for suspending the Section 251(b) rights of a facilities-based provider that does not seek government funding simply because its network does not overlap completely with the incumbent's.

CONCLUSION

The Commission should dismiss Star's Petition because it does not state a cognizable claim under federal law. TWCIS (NC) therefore respectfully urges the NCREA to take immediate steps to commence arbitration of an interconnection agreement between the parties.

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[104] *Id.* ¶ 12.

[105] *Id.* (emphasis supplied).

Respectfully submitted,

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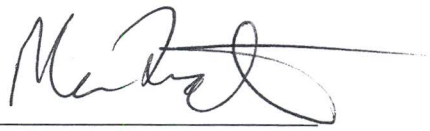
Of Counsel

March 23, 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 **Motion to Dismiss Petition for Suspension or Modification** via electronic mail to counsel of record.

This 23rd day of March, 2012.



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