

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc.)	WC Docket No. 10-143
for Preemption Pursuant to Section 253)	
of the Communications Act, as Amended)	

**REPLY COMMENTS OF CRC COMMUNICATIONS OF MAINE, INC.
AND TIME WARNER CABLE INC.**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

INTRODUCTION AND SUMMARY 1

DISCUSSION.....4

I. THE COMMISSION HAS CLEAR LEGAL AUTHORITY TO ISSUE AN ORDER TO CORRECT THE MPUC’S MISINTERPRETATION OF SECTION 251.....4

 A. The MPUC’s Order Interpreting Sections 251(a) and (b) Constitutes a “Legal Requirement” for Purposes of Section 253(a).4

 B. The Commission Has the Authority To Issue Binding Interpretations of Section 251.....7

 C. No Deadline or Exhaustion Requirements Exist for Seeking Preemption or a Declaratory Ruling To Eliminate an Unlawful Barrier to Entry..... 11

 D. Petitioners’ Advocacy Before the MPUC Does Not Diminish Their Right To Seek Relief from This Commission.12

II. THE MPUC MISINTERPRETED THE ACT IN HOLDING THAT SECTION 251(f) IS IMPLICATED BY A REQUEST UNDER SECTIONS 251(a) AND (b) AND THAT IT LACKS AUTHORITY TO ARBITRATE SUCH A REQUEST PURSUANT TO SECTION 25214

 A. The MPUC’s Proposed Interpretation of Sections 251(a) and (b) Cannot Be Reconciled with Congress’s Procompetitive Objectives.....15

 B. Contrary to the Comments of Opposing Parties, Section 251(f)(1) Does Not Relieve RLECs from Carrying Out Their Duties Under Sections 251(a) and (b) by Negotiating Interconnection Agreements.19

 C. Regardless of an RLEC’s Duty To Negotiate Under Sections 251(a) and (b), the MPUC May Not Abdicate Its Authority To Arbitrate Interconnection Disputes Pursuant To Section 252.25

CONCLUSION.....27

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**REPLY COMMENTS OF CRC COMMUNICATIONS OF MAINE, INC. AND TIME
WARNER CABLE INC.**

CRC Communications of Maine, Inc. (“CRC”) and Time Warner Cable Inc. (“TWC”) hereby submit these reply comments in the above-captioned proceeding in support of their Petition for Preemption (“Petition”).

INTRODUCTION AND SUMMARY

The opening comments filed in response to the Petition confirm that the Maine Public Utilities Commission (“MPUC”) misinterpreted Section 251 in the *Section 251(a) Order*,¹ and thereby prohibited CRC and TWC from competing with the rural local exchange carriers (“RLECs”) at issue. Consistent with the overwhelming weight of relevant precedent, commenters supporting the Petition demonstrate that the text, structure, and purpose of the Telecommunications Act of 1996 (“1996 Act”) all compel the conclusion that CRC is entitled to interconnect and exchange local telecommunications traffic with the RLECs pursuant to Sections 251(a) and (b), irrespective of the rural exemption set forth in Section 251(f).

¹ See *CRC Commc’ns of Me., Inc. Petition for Consol. Arbitration with Indep. Tel. Cos. Towards an Interconnection Agreement Pursuant to 47 U.S.C. 251, 252*, Order, No. 2007-611 (Me. Pub. Utils. Comm’n May 5, 2008) (“*Section 251(a) Order*”).

The MPUC and the parties supporting the *Section 251(a) Order*² advance both procedural and substantive objections to the Petition, all of which miss the mark. They first seek to avoid any determination by this Commission on the theory that it lacks authority to adjudicate the Petition. But Commission precedent supports characterization of the MPUC’s *Section 251(a) Order* as a “legal requirement” subject to preemption under Section 253,³ and, in any event, the Commission unquestionably may issue a declaratory ruling that corrects the MPUC’s erroneous construction of Section 251.⁴ The related claims of the RLECs, the Maine Public Advocate, and the Telephone Association of Maine (“TAM”) that the Commission is powerless to act in furtherance of competition are equally misplaced and reflect a misunderstanding of federal supremacy and the preemption authority delegated by Congress to the Commission.

On the merits, the MPUC and the MPUC Supporters persist in asserting that Section 251(f) shields RLECs from fulfilling the duties set forth in Sections 251(a) and (b), even though the plain language of Section 251(f)(1) creates an exemption only from the discrete obligations in Section 251(c).⁵ As several other state commissions have recognized, requesting carriers are entitled to negotiate interconnection agreements with RLECs pursuant to Sections 251(a) and (b)

² See Opposition of the Maine Public Advocate and the National Association of State Utility Consumer Advocates to Petition of Time Warner Cable and CRC Communications for Preemption, WC Docket No. 10-143 (filed Aug. 30, 2010) (“Maine OPA/NASUCA Opposition”); Comments of Lincolnville Networks, Inc., Tidewater Telecom, Inc., Oxford Telephone Company, and Oxford West Telephone Company, WC Docket No. 10-143 (filed Aug. 30, 2010) (“LT/OX Comments”); Comments of UniTel, Inc., WC Docket No. 10-143 (filed Aug. 30, 2010) (“UniTel Comments”); Comments of the Telephone Association of Maine, WC Docket No. 10-143 (filed Aug. 30, 2010) (“TAM Comments”) (these parties are referred to collectively as the “MPUC Supporters”).

³ See 47 U.S.C. § 253.

⁴ 47 C.F.R. § 1.2; see also, e.g., *Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Pub. Utils. Comm’n*, Declaratory Ruling, 15 FCC Rcd 15168 (2000) (“*South Dakota Order*”).

⁵ 47 U.S.C. § 251(f)(1).

without any need to terminate the RLECs' exemption from the *additional* requirements of Section 251(c). In any event, irrespective of this duty to negotiate, state commissions are obligated to arbitrate agreements where an RLEC flatly refuses to enter an agreement, as occurred here (or this Commission must step into the relevant state commission's shoes if it fails to act).⁶

The MPUC and the MPUC Supporters advance a tortured reading of the statute under which Sections 251(a) and (b) would be drained of any meaning in situations where an RLEC does not *choose* to compete, betraying a hostility to competition that cannot be squared with the 1996 Act's core objectives. Indeed, such comments ask the Commission to disregard the widely acknowledged benefits of local competition—that is, the principal rationale underlying the 1996 Act—and exhibit a willingness to endorse any interpretation that prevents the introduction of competition in Maine's rural areas.

Such comments underscore the need for this Commission to grant the relief requested in the Petition and to clearly and definitively explain the rights and obligations set forth in Section 251. At a minimum, the Commission should (1) clarify RLECs' basic obligations to interconnect and exchange local telecommunications traffic pursuant to Sections 251(a) and (b); (2) declare that a state commission has the affirmative duty to arbitrate interconnection agreements under Section 252 (or that this Commission will act in its stead); and (3) direct the MPUC to allow CRC to interconnect and establish reciprocal compensation arrangements with the RLECs. Failure to correct the MPUC's errors would set back the competition that has finally begun to take root in rural areas and, in turn, would result in substantial harm to consumers.

⁶ *Id.* §§ 252(b), (e)(5).

DISCUSSION

I. THE COMMISSION HAS CLEAR LEGAL AUTHORITY TO ISSUE AN ORDER TO CORRECT THE MPUC'S MISINTERPRETATION OF SECTION 251

In an attempt to avoid any ruling on the merits of the Petition, the MPUC and the MPUC Supporters assert that a host of procedural issues prevent the Commission from granting any relief. These commenters argue that the Commission should deny preemption or declaratory relief on the grounds that: (1) Section 253 does not authorize the Commission to preempt a state commission order that is grounded in an interpretation (however erroneous) of federal law; (2) the Commission lacks authority to take corrective action where a state commission is purporting to act pursuant to a congressional delegation of authority; (3) the Petition is untimely; and (4) CRC and TWC “abandoned” their request for interconnection and the exchange of traffic under Sections 251(a) and (b) before the MPUC. Each of these arguments is meritless. Preemption under Section 253 is a procedurally appropriate means for the Commission to enable CRC to interconnect and exchange local traffic with the RLECs but, in any event, the Commission also is empowered to issue binding interpretations of the 1996 Act via declaratory ruling.

A. The MPUC's Order Interpreting Sections 251(a) and (b) Constitutes a “Legal Requirement” for Purposes of Section 253(a).

The MPUC is incorrect that the Commission's authority under Section 253 does not include the power to preempt state or local requirements that are based on a misreading of federal law. Section 253 broadly authorizes the Commission to preempt whenever “a State or local government has permitted or imposed *any . . .* legal requirement that violates subsection (a) or (b).”⁷ As the Petition notes, Congress intended this language to be construed expansively in

⁷ *Id.* § 253(d) (emphasis added). *See also id.* § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of

the interest of breaking down any and all barriers to telecommunications competition.⁸ Read in light of that purpose, the *Section 251(a) Order* plainly qualifies as a “legal requirement” that violates Section 253(a). All that matters under the text of Section 253 is that the MPUC (a state agency) issued an order that had the effect of prohibiting an entity from providing telecommunications services; it is irrelevant whether the MPUC grounded that legal requirement in its understanding of federal law or relied on some independent state law basis. Indeed, it would make no sense for Congress to go so far as to empower the Commission to override state sovereignty in the interest of promoting competition, while depriving it of any ability to correct a state agency’s misinterpretation of federal law—something that federal agencies routinely do in carrying out their statutory responsibilities. Were that the law, a state agency easily could circumvent Section 253’s market-opening mandate by framing an anticompetitive policy as arising under federal, rather than state, authority. Congress plainly did not intend Section 253 to be subject to evasion.

Accordingly, in closely analogous circumstances, the Commission has found that a state commission’s interpretation of federal law was a “legal requirement” subject to preemption. Specifically, the Commission determined that “the South Dakota PUC’s requirement that, pursuant to Section 214(e), a carrier may not receive a designation as an ETC unless it is providing service throughout the service area”—*i.e.*, the PUC’s interpretation of the 1996 Act—

prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”).

⁸ See *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21706-07 ¶ 18 (1999) (concluding that “Congress intended that the phrase, ‘State or local statute or regulation, or other State or local legal requirement’ in section 253(a) be interpreted broadly”).

was a “state ‘legal requirement’” subject to preemption under Section 253.⁹ In arguing for a more limited construction of Section 253, the MPUC misreads this precedent.¹⁰ Contrary to the MPUC’s characterization, the Commission found that “[t]he resolution of a carrier’s request for designation as an ETC by a state commission is legally binding on the carrier” and accordingly concluded that “any such requirement constitutes a ‘legal requirement’ under Section 253(a).”¹¹ By the same token, the MPUC’s requirement that CRC pierce the rural exemption before it may enforce its rights under Sections 251(a) and (b) constituted a legally binding interpretation of the 1996 Act that is subject to preemption under Section 253(a). Indeed, the MPUC not only misconstrued Section 251 but also relied on its statutory interpretation as the basis for requiring a needless—and ultimately time-consuming and burdensome—rural exemption proceeding.¹² As the Commission found in the *South Dakota Order*, it is authorized to eliminate such entry barriers pursuant to Section 253.

Independent of Section 253, the Commission also has the authority to issue a declaratory ruling to “terminat[e] a controversy” or “remove[e] uncertainty” either in response to a petition

⁹ *South Dakota Order*, 15 FCC Rcd at 15169-70, 15172-73 ¶¶ 3, 11. Western Wireless’s petition sought preemption of a May 19, 1999 South Dakota PUC Order. *Western Wireless Corp. Petition for Preemption of An Order Of the South Dakota Pub. Utils. Comm’n* (filed June 23, 1999) (seeking preemption of *Filing by GCC License Corp. for Designation as an Eligible Telecomms. Carrier*, Findings of Fact and Conclusions of Law; Notice of Entry of Order, TC98-146 (Pub. Utils. Comm’n of S.D. May 19, 1999) available at <http://puc.sd.gov/commission/orders/telecom/1998/Tc98-146ff.pdf>).

¹⁰ Comments of the Maine Public Utilities Commission, WC Docket No. 10-143, at 5 & n.3 (filed Aug. 30, 2010) (“MPUC Comments”).

¹¹ *South Dakota Order*, 15 FCC Rcd at 15172-73 ¶ 11.

¹² *Section 251(a) Order* at 14 (“[H]aving found that [Section] 251(f)(1) presently exempts the rural ILECs from a duty to negotiate, ... [t]he Hearing Examiner shall schedule evidentiary hearings and such additional proceedings as will enable us to determine whether the rural exemption should be terminated as to each rural ILEC within 120 days of this Order.”).

or on its own initiative.¹³ Although the Petition focuses primarily on Section 253, it also requests relief pursuant to the rule that authorizes declaratory rulings.¹⁴ The Petition also identifies Section 251(d)(3) as a further basis for preemption.¹⁵ Therefore, even if the MPUC were correct that Section 253 authorizes preemption only with respect to orders grounded in state or local law—which it does not—that would by no means deprive the Commission of authority to issue a declaratory ruling correcting the MPUC’s misinterpretation of the 1996 Act, as described further below. The formal mechanism through which the Commission provides relief is ultimately academic; what matters most is the Commission’s vindication of the procompetitive rights conferred by Congress, not the procedural vehicle it chooses to do so.

B. The Commission Has the Authority To Issue Binding Interpretations of Section 251.

To the extent that the various MPUC Supporters assert more generally that the Commission lacks authority to correct the MPUC’s erroneous interpretation of federal law, that too is plainly wrong. For example, in arguing that the Petition improperly seeks to invoke “general appellate jurisdiction” that Congress reserved for courts,¹⁶ the MPUC echoes arguments made by state commissions in response to TWC’s 2006 petition for declaratory ruling concerning related entry barriers—which the Wireline Competition Bureau roundly rejected.¹⁷

¹³ 47 C.F.R. § 1.2.

¹⁴ Petition at 1 (requesting that the Commission issue an order “[p]ursuant to Section[] ... 1.2 of the Commission’s rules and Section 253 of the Communications Act of 1934 (the “Act”), as amended”).

¹⁵ *Id.* at 18 n.49.

¹⁶ MPUC Comments at 5.

¹⁷ *See Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Commc’ns Act of 1934, as Amended, to Provide Wholesale Telecomms. Servs. to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3513 ¶ 1 (WCB 2007) (“TWC

Similarly, the Maine Public Advocate claims that the Commission lacks authority to preempt state commission decisions where “the state commission acted pursuant to an explicit delegation of authority directly from Congress.”¹⁸ But that assertion merely begs the question: If the MPUC *had* acted within the proper scope of its authority under Section 251, then there would be no basis for preemption; of course the whole point of the Petition is that the MPUC acted *contrary to* the 1996 Act. The Maine Public Advocate therefore has merely demonstrated the unremarkable proposition that, if the Commission disagrees with petitioners (and the National Broadband Plan) as to the correct interpretation of Sections 251(a) and (b), it will have no basis for granting the Petition. But the converse is no less true: If the Commission finds that the MPUC erected a barrier to entry based on a misreading of those provisions, it will be bound to take corrective action.

There can be no serious argument that this Commission must stand idly by in the face of a state commission’s erroneous construction of the 1996 Act. In fact, in response to an early state commission challenge to FCC authority under Section 251, the Supreme Court not only made clear that the Commission has authority to “make rules governing matters to which the 1996 Act applies,” but characterized the notion that a state’s interpretation of the federal statute could trump that of the FCC as “surpassing strange.”¹⁹ Indeed, the allocation of state and federal power that the MPUC and Maine Public Advocate suggest—and the notion that this Commission

Interconnection Ruling”) (declaring that “state commission decisions denying wholesale telecommunications service providers the right to interconnect with incumbent LECs pursuant to sections 251(a) and (b) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment”); *see also* Reply Comments of Time Warner Cable, WC Docket No. 06-55, at 7 (filed Apr. 26, 2006) (explaining the distinction between the Commission’s authority to correct state commissions’ erroneous constructions of federal law and courts’ appellate jurisdiction).

¹⁸ Maine OPA/NASUCA Opposition at 4-6 (Subsection A).

¹⁹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380, 378 n.6 (1999).

is powerless to act in the event of a disagreement—would turn the Supremacy Clause on its head.²⁰

Accordingly, the Commission has not hesitated to take corrective action when, as here, a state commission issued a decision that is “inconsistent with the 1996 Act and [FCC] implementing regulations.”²¹ Addressing the specific issue of incumbent LECs’ obligations under Section 251, the Commission found that Congress “intended that federal authority super[s]ede conflicting state authority in this area.”²² The Commission likewise should exercise its authority here to determine the proper relationship among Sections 251(a), (b), and (f).

The Telephone Association of Maine (“TAM”) fares no better with its claim that “the FCC is bound by the [*Brazos*] [c]ourt’s interpretation of [the] federal statutory language” at issue.²³ Of course, the Commission is not bound by the *Brazos* decision or any other case in which it was not a party. Indeed, TAM fails to recognize that two federal courts subsequently rejected the *Brazos* court’s reasoning based on Congress’s procompetitive purposes in enacting

²⁰ See, e.g., *South Dakota Order*, 15 FCC Rcd at 15171-72 ¶ 8 (explaining the scope of federal preemption authority and citing *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986)).

²¹ E.g., *BellSouth Telecomms., Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Servs. by Requiring BellSouth to Provide Wholesale or Retail Broadband Servs. to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, 6840 ¶ 21 (2005).

²² *Id.* at 6841-42 ¶ 23 & n.73; *id.* at 6842 ¶ 23 n.74 (“[S]tate commission decisions that ‘establish[] access and interconnection obligations of incumbent local exchange carriers’ are constrained by the limitations on state authority enumerated in section 251(d)(3).”); see also *TWC Interconnection Ruling*, 22 FCC Rcd at 3513 ¶ 1 (ruling that state commission decisions that thwarted interconnection rights under Sections 251(a) and (b) were “inconsistent with the Act and Commission precedent”).

²³ TAM Comments at 3 (citing *Sprint Commc’ns Co. L.P. v. Pub. Util. Comm’n of Tex.*, No. A-06-CA-065-SS, 2006 U.S. Dist. LEXIS 96569 (W.D. Tex. Aug. 14, 2006) (“*Brazos*”).

Section 251,²⁴ consistent with the arguments advanced by petitioners here and the decisions of several state commissions.²⁵ The Commission is no more bound to follow *Brazos* than it is required to adhere to the procompetitive rulings in *Vermont Telephone* and *Harrisonville Telephone*. Rather, the Commission is plainly entitled to rely on its own expert judgment in interpreting the Act, after which federal courts must defer to the *Commission's* interpretation as long as it is reasonable.²⁶ In short, TAM's argument fails as a matter of law and common sense.²⁷

²⁴ See *Vt. Tel. Co., Inc. v. Comcast Phone of Vt., LLC*, No. 2:09-cv-00198, slip op. at 13-14 (D. Vt. Feb. 5, 2010) (“*Vermont Telephone*”) (explicitly rejecting the *Brazos* decision as a “mistaken” interpretation of law); *Harrisonville Tel. Co. v. Ill. Comm. Comm’n*, Civil No. 06-73-GPM, slip op. at 8 (S.D. Ill. Sept. 5, 2007) (“*Harrisonville Telephone*”) (“Section 251(b) establishes obligations of all LECs independent of any exemption of Section 251(c) for rural ILECs.”).

²⁵ See Petition at 22-23 nn.64-65 (citing judicial and state commission decisions endorsing petitioners’ proposed construction of Section 251).

²⁶ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (finding that, because “a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, ... the agency may, consistent with the court’s holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes”).

²⁷ In addition to TAM’s incorrect legal assertions, its comments also misrepresent certain facts pertaining to the MPUC’s rural exemption proceedings. First, TAM claims without support that TWC seeks to engage in “cherry picking” in Maine. This claim is patently false. As TWC demonstrated in seeking to lift the Maine RLECs’ rural exemption, it offers its services to all homes passed by its network without regard to the location of those potential customers, their income, or any other distinguishing characteristic. Second, TAM’s claim that the Petition discloses confidential information likewise is untrue. All information provided by CRC and TWC regarding the RLECs was drawn from publicly filed testimony. Specifically, the information that TAM claims is confidential is available online through the MPUC’s online docket system. See *Investigation Pursuant to 47 U.S.C. § 251(f)(1) Regarding CRC Commc’ns of Me.’s Request of Tidewater Telecom, Inc.*, Direct Testimony of Warren R. Fischer, C.P.A., on behalf of CRC Commc’ns of Me., Inc. d/b/a Pine Tree Networks, Docket No. 2009-42, at 20 (filed Oct. 14, 2009) (Corrected Public Version). The Commission should disregard these attempts to divert attention from the important legal questions raised by the Petition.

C. No Deadline or Exhaustion Requirements Exist for Seeking Preemption or a Declaratory Ruling To Eliminate an Unlawful Barrier to Entry.

Contrary to the arguments of the Maine Public Advocate and Lincolnville and Oxford RLECs,²⁸ there is no deadline by which a party must seek preemption or a declaratory ruling to break down a barrier to competition that violates federal law. While these commenters complain that petitioners should have sought relief earlier, they offer no legal authority or logical support for the proposition that CRC and TWC were required to seek Commission or court intervention immediately following the MPUC's issuance of the *Section 251(a) Order*.

Relatedly, to the extent these commenters intend to suggest that the Commission should deny the Petition because CRC and TWC could have pursued remedies in other forums and failed to exhaust those opportunities prior to seeking preemption, these claims also fail. Nothing in Section 253 remotely suggests such a requirement, and the Commission has never imposed one. To the contrary, the Commission has granted preemption or issued a declaratory ruling interpreting federal law while a petitioner's judicial appeal remained pending.²⁹

Moreover, the purpose behind Section 253 would be thwarted if CRC and TWC first had to pursue alternative remedies at either the state or federal level every time a state commission erroneously interpreted the provisions of Section 251. Indeed, the prospect of litigating the same issue of federal law before each state commission, and in state and federal courts, would severely

²⁸ Maine OPA/NASUCA Opposition at 13 (asserting without legal basis that the "reasonable time for seeking preemption ... has long since passed"); LT/OX Comments at 4.

²⁹ See *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15645 ¶ 14 (1997) (preempting the Wyoming Public Service Commission and noting that Silver Star's district court appeal of the denial of its certificate was pending), *aff'd*, *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000); *South Dakota Order*, 15 FCC Rcd at 15168-70 ¶¶ 1-3 (issuing a declaratory ruling to interpret Section 214(e) and noting the procedural posture of various appeals relating to the South Dakota PUC decision that Western Wireless sought to preempt).

impair—and, in fact, has impaired—the ability of competitive carriers to introduce services in rural markets. Absent intervention by the Commission, there simply is no assurance that a court would correct the MPUC’s errors. Requiring petitioners to pursue numerous complaints thus would contradict Section 253’s core purpose of swiftly eradicating legal barriers that restrict entry into local markets.³⁰

As the history of petitioners’ protracted proceedings before the MPUC makes clear, CRC and TWC made concerted efforts—over the course of *more than three years*—to gain entry to the RLECs’ markets.³¹ Yet at every turn, the MPUC’s actions frustrated those efforts, ultimately ruling that CRC was not permitted to obtain an interconnection agreement pursuant to Sections 251(a)/(b) *or* Section 251(c). Far from being penalized for seeking to accommodate the MPUC’s view of the rural exemption, CRC and TWC should be commended for exercising restraint in asking this Commission to intervene only as a last resort when it became crystal clear that the MPUC would not otherwise approve an interconnection agreement with any RLEC that objects to competition.

D. Petitioners’ Advocacy Before the MPUC Does Not Diminish Their Right To Seek Relief from This Commission.

Finally, there is no substance to UniTel’s suggestion that CRC and TWC “abandoned” their request to obtain interconnection and the exchange of local traffic pursuant to Sections 251(a) and (b).³² As with the procedural objections discussed above, UniTel cites no law in

³⁰ See *Pub. Util. Comm’n of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3480 ¶ 41 (1997).

³¹ Petition at 4-14.

³² UniTel Comments at 8.

support of its novel theory that a party seeking preemption or declaratory relief from the Commission must “reserve” its right to do so before the applicable state commission.³³

In any case, CRC *did* inform the MPUC that it was not abandoning any of its rights under Sections 251(a) and (b). Once it became clear that the MPUC was poised to rule that CRC would be required to pierce the rural exemption to obtain an interconnection agreement under any subpart of Section 251, CRC sought to withdraw its petition for arbitration *without prejudice*.³⁴ While CRC understandably sought to avoid an adverse ruling, the relevant fact is that the MPUC nevertheless chose to reach the question of CRC’s rights under Sections 251(a) and (b), and it issued a binding determination that frustrated CRC’s ability to provide wholesale telecommunications services in competition with the RLECs. Thereafter, CRC explained to the MPUC that it would seek to invoke its rights under Section 251(c) and pierce the rural exemption pursuant to Section 251(f)(1), believing that to be “the most expeditious path to interconnection.”³⁵ Although that belief later proved to be misplaced, it by no means bars CRC from seeking to vindicate its wholly independent rights under Sections 251(a) and (b). In short, the procedural history described in the Petition is factually correct, consistent with the record before the MPUC, and irrelevant to petitioners’ entitlement to seek relief from the Commission.

³³ *Id.*

³⁴ Letter of Alan M. Shoer, Esq., Attorney for CRC Communications of Maine, Inc., to Karen M. Geraghty, Administrative Director, Maine Public Utilities Commission, Docket No. 2007-611, at 2 (filed Apr. 18, 2008) (“CRC Letter”) (CRC’s Exceptions to the Examiner’s Report issued April 2, 2008) attached to UniTel Comments as Exhibit 2.

³⁵ CRC Letter at 2; *see also, e.g., Investigation Pursuant to 47 U.S.C. § 251(f)(1) Regarding CRC Commc’ns of Me.’s Request of UniTel, Inc., CRC Commc’ns of Me., Inc.’s Statement of Request for Interconnection with UniTel, Inc., Docket No. 2008-214, at 2 (filed May 14, 2008) attached to UniTel Comments as Exhibit 4.*

II. THE MPUC MISINTERPRETED THE ACT IN HOLDING THAT SECTION 251(f) IS IMPLICATED BY A REQUEST UNDER SECTIONS 251(a) AND (b) AND THAT IT LACKS AUTHORITY TO ARBITRATE SUCH A REQUEST PURSUANT TO SECTION 252

On the merits, a diverse group of commenters—including not only cable operators and CLECs but Verizon (with whom CRC and TWC compete)—recognize that the MPUC’s *Section 251(a) Order* is based on a clear misreading of the 1996 Act and has the effect of prohibiting entry by CRC and TWC. These commenters uniformly agree that the Commission should clarify the rights and duties under Sections 251(a) and (b) in light of Congress’s procompetitive objectives.³⁶ By contrast, the MPUC and the supporters of the *Section 251(a) Order* rely on a cramped reading of Section 251 that ignores Congress’s core purposes. Even assuming the superficial plausibility of their arguments as a textual matter, they fail because they ignore the structure and purpose of Section 251 as a whole. Read in light of the statute’s animating objectives, Sections 251(a) and (b) plainly confer a right on competitive carriers to negotiate interconnection agreements; indeed, the Commission has held that carriers *must* implement Section 251(b) duties through interconnection agreements (a point the MPUC and its allies completely ignore).³⁷ Moreover, even if an RLEC were permitted to flatly refuse to negotiate in response to a request under Sections 251(a) and (b), Section 252 entitles the requesting carrier to arbitration, contrary to the MPUC’s holding.

³⁶ See Comments of Verizon, WC Docket No. 10-143, at 1-3 (filed Aug. 30, 2010) (“Verizon Comments”); Comments of Charter Communications Inc., WC Docket No. 10-143, at 1 (filed Aug. 30, 2010); Comments of NTCH, Inc. in Support of Preemption Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc., WC Docket No. 10-143, at 4-5 (filed Aug. 27, 2010) (“NTCH Comments”); Comments of National Cable & Telecommunications Association, WC Docket No. 10-143, at 7-8 (filed Aug. 30, 2010); Comments of COMPTTEL, WC Docket No. 10-143, at 9 (filed Aug. 30, 2010).

³⁷ See *infra* at 22-23 & nn.71-72.

A. The MPUC’s Proposed Interpretation of Sections 251(a) and (b) Cannot Be Reconciled with Congress’s Procompetitive Objectives.

Commenters opposing the Petition are united by their striking disregard for the well-established benefits of competition that undergird Section 251. Indeed, while the MPUC claims that its “conservative interpretation” of the 1996 Act “does not relieve any carrier of its general, federal statutory obligation to interconnect pursuant to [Section] 251(a),”³⁸ it reveals its misguided take on the introduction of competition in rural areas in opining that “[t]he rural ILECs *properly* refused to negotiate” an interconnection agreement under Sections 251(a) and (b).³⁹ Likewise, the comments of the Maine Public Advocate betray a basic disagreement with Congress’s judgment, describing competition as “ruinous” and treating it as something to be avoided at all costs in rural areas.⁴⁰

In essence, the MPUC’s proposed interpretation of Section 251 would elevate the limited exception granted in Section 251(f) to the point of eviscerating Congress’s primary goal of opening local markets to competition. For example, the MPUC notes CRC’s admission that it does, “in fact, presently interconnect with the rural ILECs” via the FairPoint tandem switch and that TWC’s customers in Maine currently have the ability to “place a call to, or receive a call

³⁸ MPUC Comments at 12.

³⁹ *Id.* at 10 (emphasis added).

⁴⁰ Maine OPA/NASUCA Opposition at 3-4, 8-9. Consistent with its anticompetitive reading of Sections 251(a) and (b), the Maine Public Advocate expressly conceded in the rural exemption proceedings before the MPUC that it did not take into account any benefits that might flow from competitive entry, but rather considered only the burdens that might affect the RLECs. Maine Public Advocate Office Response to CRC Data Request 1-4, *CRC Commc’ns of Me., Inc. Request for Exemption Investigation Regarding UniTel, Inc., Lincolnville Tel. Co., Tidewater Telecom, Inc., Oxford Tel. Co., and Oxford West Tel. Co.*, Docket Nos. 2009-40 through 2009-44 (filed Mar. 3, 2010) (stating that “[a]n analysis of the consumer benefits [of competition] was beyond the scope of [Maine Public Advocate witness] Dr. Loube’s testimony”).

from, a customer of the rural ILECs.”⁴¹ Based on the MPUC’s misreading of Section 251, nothing more of the RLECs would be required. Under this mistaken view, interconnection with the PSTN alone—without the ability to exchange local traffic via Section 251(b)—would satisfy Congress’s procompetitive policy objectives. Moreover, according to the MPUC, such arrangements—whereby end users are forced to place long-distance calls and forego dialing parity to communicate with others in the same rate center—is the “type of interconnection upon which broadband providers rely to ‘capture voice revenues that may be necessary to make broadband entry economically viable.’”⁴²

Such claims reflect a clear rejection of the almost universally held view that interconnection for the purpose of exchanging *local* telecommunications traffic is “a central tenet of telecommunications regulatory policy,” without which competition will not succeed.⁴³ Contrary to the MPUC’s assertion, CRC’s ability to terminate *toll* calls to customers in the RLECs’ service territories via the RBOC tandem is no substitute for the establishment of reciprocal compensation arrangements and dialing parity under Section 251(b), and it is manifestly *not* how CLECs or facilities-based providers like TWC compete with incumbent carriers or support broadband investment.⁴⁴

⁴¹ MPUC Comments at 7-8.

⁴² *Id.* at 12 (quoting Omnibus Broadband Initiative, *Connecting America: The National Broadband Plan* (2010) (“National Broadband Plan”)).

⁴³ National Broadband Plan at 49; *see also* Petition at 16-21 (explaining how CRC’s inability to exchange local traffic constitutes a prohibition on entry).

⁴⁴ *See TWC Interconnection Ruling*, 22 FCC Rcd at 3519-20 ¶ 13 (describing interconnection and the exchange of local traffic under Sections 251(a) and (b) as “a critical component for the growth of facilities-based local competition”); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15991 ¶ 997 (1996) (“*Local Competition Order*”) (characterizing such rights as “central to the 1996 Act” and its policy objectives).

Even assuming *arguendo* these parties’ reading of the statute is a plausible construction as a textual matter (and, as shown below, it is not), it is completely at odds with legislative intent. As a federal district court recently recognized in rejecting nearly identical arguments, crediting such a cramped reading of the Act would “ignore[] the canon of statutory interpretation that you must view a specific provision in light of the statutory whole.”⁴⁵ And there can be no doubt that “the promotion of facilities-based local competition [is the] fundamental policy” underlying the 1996 Act.⁴⁶ That is why the *TWC Interconnection Ruling* declared that “state commission decisions denying wholesale telecommunications service providers the right to interconnect with incumbent LECs pursuant to sections 251(a) and (b) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment.”⁴⁷ As Verizon notes, the Commission should reaffirm and expand on that holding in this context in light of the MPUC’s continued refusal to carry out the procompetitive purposes of Sections 251(a) and (b).⁴⁸

The Act’s core procompetitive objectives are not limited to urban areas, as the MPUC and its supporters appear to contend. As the Eighth Circuit held, “[i]t is clear that Congress intended that all Americans, *including those in sparsely settled areas served by small telephone companies*, should share the benefit of the lower cost of competitive telephone service and the

⁴⁵ *Vermont Telephone*, slip op. at 11 (rejecting construction of Section 251 now advanced by the MPUC and other Maine parties).

⁴⁶ *Verizon California, Inc. v. FCC*, 555 F.3d 270, 274 (D.C. Cir. 2009) (citing *Bright House Networks, LLC, et al., Complainants, v. Verizon California, Inc., et al., Defendants*, Memorandum Opinion and Order, 23 FCC Rcd 10704, 10714 ¶ 27 (2008)).

⁴⁷ *See TWC Interconnection Ruling*, 22 FCC Rcd at 3513 ¶ 1.

⁴⁸ Verizon Comments at 3-5.

benefits of new telephone technologies which the [1996] Act was designed to provide.”⁴⁹ The Wireline Competition Bureau echoed this sentiment when it concluded that “wholesale competition and its facilitation of the introduction of new technology hold[] particular promise for consumers in rural areas.”⁵⁰

The recommendations of the National Broadband Plan therefore should have come as no surprise to the MPUC or its defenders.⁵¹ Quite simply, without the ability to enter into interconnection agreements implementing the provisions in Sections 251(a) and (b), the fledgling wholesale competition emerging in certain rural areas would not exist. In turn, the efforts of TWC and others to introduce innovative, facilities-based voice services in competition with legacy offerings also would be thwarted. Based on these facts, the OBI Staff appropriately recognized that decisions like *Brazos* and the *Section 251(a) Order* are “anticompetitive” and also create a “barrier to broadband deployment.”⁵² The Commission should confirm these findings and interpret Section 251 in a manner that—like the *Vermont Telephone* and *Harrisonville Telephone* decisions and the majority of state commission rulings—is most faithful to Congress’s procompetitive purposes.

⁴⁹ See *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 761 (8th Cir. 2000).

⁵⁰ *TWC Interconnection Ruling*, 22 FCC Rcd at 3519-20 ¶ 13.

⁵¹ Contrary to the assertions of MPUC and the other MPUC Supporters, CRC and TWC plainly have relied on Commission and judicial precedent—not the National Broadband Plan itself—in seeking preemption. Recommendation 4.10 of the National Broadband Plan presents a persuasive analysis of the proper interpretation of Section 251 and is based on accurate representations of the facts that were provided to the staff of the Omnibus Broadband Initiative during the fact-gathering leading up to the issuance of the Plan. Nevertheless, petitioners have never claimed that the National Broadband Plan constitutes binding law; to the contrary, the Petition properly describes the pertinent analysis as a recommendation for full Commission action. Petition at 10.

⁵² National Broadband Plan at 49.

B. Contrary to the Comments of Opposing Parties, Section 251(f)(1) Does Not Relieve RLECs from Carrying Out Their Duties Under Sections 251(a) and (b) by Negotiating Interconnection Agreements.

Section 251 as a whole makes clear that, as the MPUC acknowledges, subsections (a) and (b) impose affirmative duties that apply to all LECs irrespective of the rural exemption.⁵³

Section 251(f)(1), by its plain terms, grants a provisional exemption *only* from the duties in Section 251(c)—not from any requirement under Section 251(a) *or* (b). If Congress had intended to expand the reach of the rural exemption to the general duties in Sections 251(a) and (b), it would have said so explicitly.⁵⁴ It would have been a simple and straightforward matter to decree that the rural exemption applies to *all* of the duties set forth in Section 251. Congress, however, chose to establish an exemption only from Section 251(c).⁵⁵ When the Maine Public Advocate complains that “Congress has plainly and specifically provided an exemption from the very type of competition that Time Warner [Cable] seeks to provide in Maine,”⁵⁶ it overlooks the fact that Congress did not create an exemption from “competition” at all. Instead, Congress created a narrow exemption from the specific duties in Section 251(c)—not the distinct

⁵³ *Section 251(a) Order* at 14 (“A rural ILEC is not exempt from the obligations set forth in [Section] 251(a) and [Section] 251(b).”); MPUC Comments at 2.

⁵⁴ *See Director of Revenue of Missouri v. CoBank ACB*, 521 U.S. 316, 325 (2001) (explaining that if Congress had intended to grant the asserted exemption, “it would have done so expressly as it had done elsewhere in the [Act].”); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

⁵⁵ NTCH correctly points out in its comments that the legislative history of Section 251 confirms the intent of Congress to limit the scope of the rural exemption to the duties of subsection (c). Specifically, the Conference Report mentions only Section 251(c) in its discussion of the rural exemption, and it explains that the bill superseded a broader version of the exemption. *See* NTCH Comments at 3-4 (citing *Conference Report 104-458 to accompany S.652*, Jan. 31, 1996, pages 121-22).

⁵⁶ Maine OPA/NASUCA Opposition at 13.

provisions in Sections 251(a) and (b) that CRC and TWC are seeking to enforce through the Petition.

The structure of Section 251 confirms this interpretation. Subsections (a) and (b) impose baseline duties and obligations on all LECs, including a general duty to interconnect and specific duties relating to number portability, dialing parity, and other requirements.⁵⁷ Subsection (c), in contrast, imposes duties on incumbent LECs “[i]n addition to the duties contained in subsection (b),”⁵⁸ reflecting their historical (and, in the case of the RLECs, current) status as wireline monopolies. So, for instance, Section 251(a) contains a “general duty . . . to interconnect” for all LECs, while Section 251(c)’s provision on “interconnection” contains heightened duties for ILECs regarding interconnection. Similarly, Sections 251(a) and (b) contain a baseline expectation for LECs to negotiate interconnection agreements pursuant to those provisions, while Section 251(c)’s provision on the “duty to negotiate” also imposes a heightened duty—in that case, a “duty to negotiate *in good faith*.”⁵⁹ Just as a provisional exemption from the special interconnection right in Section 251(c)(2) does not negate the general interconnection rights conferred by Section 251(a), such an exemption from the heightened duty to negotiate under Section 251(c)(1) does not disturb the baseline expectation that *all* LECs will negotiate in fulfillment of their duties under Sections 251(a) and (b).

Commission precedent confirms that the “good faith” requirement of Section 251(c)(1) was intended to impose more specific and detailed obligations on ILECs *in addition to* the more general duty to negotiate that applies to requests under Section 251(b). As Verizon points out,⁶⁰

⁵⁷ 47 U.S.C. §§ 251(a), (b).

⁵⁸ *Id.* § 251(c) (emphasis added).

⁵⁹ *Id.* § 251(c)(1) (emphasis added).

⁶⁰ *See* Verizon Comments at 11-12.

such an interpretation is consistent with the Commission’s construction of Section 251(c)(1) in the *Local Competition Order*.⁶¹ There, the Commission noted that “good faith negotiation” is a term of art that entails a special duty of “honesty in fact in the conduct of the transaction concerned.”⁶² The Commission has construed “good faith negotiation” requirements similarly in analogous contexts. For instance, in the retransmission consent setting, the Commission has explained that “good faith” requirements “impose some heightened dut[ies] of negotiation . . . greater than those at common law.”⁶³ Thus, even if an RLEC is exempt from the special “duty to negotiate in good faith” under Section 251(c), it is not exempt from the baseline duty to negotiate under the terms of Sections 251(a) and (b). Indeed, if an RLEC could flatly refuse to negotiate—and thereby avoid arbitration under Section 252—the substantive rights and obligations in 251(a) and (b) would be nothing more than “rights without remedies,” which the Supreme Court has condemned since the days of *Marbury v. Madison*.⁶⁴ Accordingly, the MPUC’s (and other Maine parties’) attempt to bootstrap Section 251(b) duties to the rural exemption through Section 251(c)’s duty to negotiate in good faith is not a reasonable interpretation of the statute, as the clear majority of state commissions—and two of the three federal courts to have examined the issue—have found.

Indeed, while the MPUC devotes much of its comments to quoting *Brazos*, it ignores the two cases, *Harrisonville Telephone* and *Vermont Telephone*, that specifically refute the

⁶¹ See *Local Competition Order*, 11 FCC Rcd at 15571-78 ¶¶ 144-156.

⁶² *Id.* at 15574 ¶ 148. See also *id.* (“Even where there is no specific duty to negotiate in good faith, certain principles or standards of conduct have been held to apply.”)

⁶³ *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5455 ¶ 24 (2000).

⁶⁴ 5 U.S. (1 Cranch) 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy.”).

reasoning in *Brazos*. In *Harrisonville Telephone*, the court considered and rejected the argument that ILECs’ “duty to negotiate the obligations of 47 U.S.C. § 251(b) arise[s] from 47 U.S.C. § 251(c), so that if the latter subsection of the statute does not apply to them, neither does the former.”⁶⁵ As the court explained, “Section 251(b) establishes obligations of all LECs independent from any exemption of Section 251(c) for rural ILECs,” and those baseline obligations include the duty to negotiate substantive terms under Sections 251(a) and (b).⁶⁶ Likewise, the *Vermont Telephone* court carefully reviewed the text, structure, and history of Section 251 and concluded that the *Brazos* court was simply “mistaken.”⁶⁷ As discussed further below, the *Vermont Telephone* court recognized that the arbitration provisions of Section 252 apply irrespective of whether RLECs have any duty to negotiate in response to requests under Sections 251(a) and (b).⁶⁸ As the Petition points out, the Commission’s staff has already aligned itself with the reasoning in *Vermont Telephone* and *Harrisonville Telephone* by expressly disavowing the *Brazos* decision as “based on a misinterpretation of the Act’s rural exemption and interconnection requirements.”⁶⁹

Moreover, while the MPUC and MPUC Supporters rely on dicta in the *Local Number Portability Order* for the proposition that RLECs are exempt from negotiating Section 251(b) agreements under Section 251(f)(1),⁷⁰ this isolated statement says nothing about the applicability of Section 252’s arbitration procedures and, in any event, has been superseded by subsequent Commission precedent. Indeed, the Commission has made clear that Section 251(b) obligations

⁶⁵ *Harrisonville Telephone*, slip op. at 8.

⁶⁶ *Id.* at 8-9.

⁶⁷ *Vermont Telephone*, slip op. at 13.

⁶⁸ *Id.* at 12-14.

⁶⁹ National Broadband Plan at 49.

⁷⁰ *Telephone Number Portability*, 12 FCC Rcd 7236, 7303-04 ¶ 117 n.393 (1997).

not only may be, but *must* be, embodied in an interconnection agreement adopted pursuant to Section 252.⁷¹ Specifically, the Commission stated that “the obligations created by section 251 and our rules are effectuated through the process established in section 252 — that is, by reaching agreement through negotiation, arbitration, or opt-in.”⁷²

The Maine Public Advocate fares no better with its newly minted claim that Sections 251(f)(2) and 252(e)(2)(A) further preclude CRC from obtaining an approved interconnection agreement pursuant to its rights under Sections 251(a) and (b).⁷³ As an initial matter, Section 251(f)(2) requires an RLEC to petition for relief and places the burden of proof on the petitioning RLEC.⁷⁴ In contrast, Section 251(f)(1) places the burden of proof on the competitive carrier requesting interconnection.⁷⁵ Section 251(f)(2) also includes an express public interest prong⁷⁶ that could not reasonably be construed in the anticompetitive manner suggested by the comments

⁷¹ *Qwest Commc’ns Int’l Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19340-41 ¶ 8 (2002) (“*Qwest Order*”).

⁷² *See Core Commc’ns, Inc. v. SBC Commc’ns, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7568 ¶ 30 (2003) *vacated on other grounds*, *SBC Commc’ns Inc. v. FCC*, 407 F.3d 1223 (D.C. Cir. 2005) (internal citations omitted); *Qwest Order*, 17 FCC Rcd at 19340-41 ¶ 8 (rejecting the “cramped reading” of Section 252(a)(1) that Qwest proposed and stating that “section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions”). While the Maine RLECs attempt to argue that the obligation to interconnect under Section 251(a) does not trigger Section 252, CRC requested an interconnection agreement pursuant to both (a) *and* (b), which plainly does entitle it to arbitration under Section 252.

⁷³ Maine OPA/NASUCA Opposition at 8.

⁷⁴ 47 U.S.C. § 251(f)(2).

⁷⁵ *Id.* § 251(f)(1).

⁷⁶ *Id.* § 251(f)(2).

of the Maine Public Advocate.⁷⁷ As a result, the MPUC’s findings under Section 251(f)(1) would carry no weight in a Section 251(f)(2) proceeding, contrary to the Maine Public Advocate’s suggestion that the result of such a hypothetical proceeding would be preordained.

Likewise, the Maine Public Advocate misconstrues the MPUC’s authority under Section 252(e)(2). That provision applies only to interconnection agreements negotiated pursuant to Section 252(a).⁷⁸ Given the RLECs’ refusal to negotiate with CRC at all, any interconnection agreement reached with the RLECs likely would be reviewed by the MPUC under Section 252(e)(2)(B), which applies to arbitrated interconnection agreements.⁷⁹ Under subsection (e)(2)(B), a state commission may reject an interconnection only to the extent it “does not meet the requirements of section 251” or does not meet the pricing standards set forth in Section 252(d).⁸⁰

Leaving aside these textual errors, the suggestion that the MPUC may use Sections 251(f)(2) and 252(e)(2) to thwart competitive entry is fundamentally inconsistent with Congress’s procompetitive goals in the 1996 Act, for all the reasons explained above. Specifically, the Maine Public Advocate’s proposed interpretation of Section 251(f)(2) takes no account of the many consumer benefits associated with a competitive marketplace. Similarly, its reading of Section 252(e)(2) would give state commissions carte blanche to block interconnection agreements based on their preference for a regulated monopoly model, notwithstanding Congress’s unmistakable preference for competition. Such a reading of Section

⁷⁷ See Maine OPA/NASUCA Opposition at 8-9 (Section “251(f)(2) constitutes Congress’[s] clear intent to protect RLECs from [Section] 251(b) interconnection as well as [Section] 251(c) interconnection because the standard for modifying [Section] 251(b) obligations is the very same ‘unduly economically burdensome’ standard found in [Section] 251(c).”).

⁷⁸ 47 U.S.C. § 252(e)(2)(A).

⁷⁹ *Id.* § 252(e)(2)(B).

⁸⁰ *Id.*

252 is inconsistent with the Commission’s previous interpretations of that provision, which viewed state commission approval of interconnection agreements as a way to “best promote[] Congress’s stated goals of opening up local markets to competition.”⁸¹ The Maine Public Advocate thus attempts to justify the anticompetitive outcome of the *Section 251(a) Order* using the very statutory provisions intended to ensure the opposite results. In short, just as the public interest compels the interpretation of Sections 251(a) and (b) advanced in this petition, it would require adoption of any interconnection agreement implementing those provisions.

To avoid further attempts to frustrate compliance with Sections 251(a) and (b), the Commission should clarify the purpose and meaning of Sections 251(f)(2) and 252(e)(2) in light of Congress’s overarching purposes in the 1996 Act. The Commission should expressly reject the proposed interpretations of Sections 251(f)(2) and 252(e)(2) that the Maine Public Advocate advances, which expressly encourage the MPUC to search for yet additional barriers to rural competition.

C. Regardless of an RLEC’s Duty To Negotiate Under Sections 251(a) and (b), the MPUC May Not Abdicate Its Authority To Arbitrate Interconnection Disputes Pursuant To Section 252.

Even if the MPUC were correct that the RLECs have no duty to negotiate in response to a request under Sections 251(a) and (b), that would not affect the MPUC’s independent obligation under Section 252 to arbitrate disputes over such matters as CRC’s request for reciprocal compensation arrangements under Sections 251(b)(2), (3), and (5). The arbitration provisions in Section 252 apply to requests for interconnection agreements without regard for the rural exemption. The plain language of Section 252 requires state commissions to arbitrate disputes arising from requests for interconnection and the exchange of traffic under Sections 251(a) and

⁸¹ See *Local Competition Order*, 11 FCC Rcd at 15583-84 ¶¶ 166-67.

(b), or this Commission must act in their stead. Section 252(b) specifically authorizes a party to seek arbitration of “any open issues,” which include the requesting carrier’s unfulfilled “request for interconnection . . . pursuant to section 251.”⁸² And Section 252(b)(4)(C) provides that the state commission “shall resolve each issue set forth in the petition.”⁸³ Accordingly, contrary to the MPUC’s holding (following *Brazos*) that there is “nothing to arbitrate” in instances where an RLEC refuses to negotiate pursuant to Section 252(a),⁸⁴ requests for interconnection agreements under Sections 251(a) and (b) are eligible for arbitration regardless of whether the RLEC engaged in any give and take.

The MPUC’s reading of the statute incongruously would reward RLECs for refusing to engage in voluntary negotiations and would subject ILECs to arbitration proceedings only if they choose to engage with the requesting carrier. As the *Vermont Telephone* court recently recognized, such an approach would nullify the rights Congress conferred on competitive carriers.⁸⁵ Indeed, as discussed above, the interpretation adopted by the MPUC in its *Section 251(a) Order* flouts the 1996 Act’s core objective of promoting competition.

It is thus disingenuous for the MPUC to claim that its interpretation of Section 251 poses no threat to rural competition.⁸⁶ In those rural areas where competition now exists among

⁸² 47 U.S.C. § 252(b)(1), (a)(1).

⁸³ *Id.* § 252(b)(4)(C).

⁸⁴ *Section 251(a) Order* at 14.

⁸⁵ *See Vermont Telephone*, slip op. at 13-14 (stating that the *Brazos* court was “mistaken” because its decision “allows a rural ILEC to avoid their duties under the Act simply by choosing not to negotiate”); *id.* at 14 (noting that the *Brazos* court’s interpretation improperly “remove[d] the only way the substantive obligations under §§ 251(a) and (b) can be fulfilled”).

⁸⁶ MPUC Comments at 12 (asking the Commission to be skeptical of any claim that the *Section 251(a) Order* “will result in the nationwide deprivation of the [basic] type of interconnection [under Sections 251(a) and (b)] upon which broadband providers rely to

providers of local wireline voice services, it has emerged largely because of the willingness of state commissions to enforce the obligations of Sections 251(a) and (b) on recalcitrant RLECs. Of course, the various state commission decisions cited in the Petition were necessary because the RLEC in each case refused to interconnect and exchange traffic voluntarily. Without the procompetitive decisions of these state commissions (and two federal courts upholding their actions), the competitive landscape would be quite different.

CONCLUSION

For the foregoing reasons, the Commission should issue an order preempting the MPUC's *Section 251(a) Order* and granting declaratory relief to the extent necessary to clarify the rights and obligations of carriers under Section 251. Definitive action by this Commission is required to eliminate barriers to competition unlawfully erected by the MPUC and, more broadly, to solidify the progress of voice providers competing in the local marketplace today. Without such action, anticompetitive interpretations of federal law such as those found in *Brazos* and the MPUC's *Section 251(a) Order* likely will embolden RLECs that seek to resist competitive entry, which would further stifle the introduction of competition and curtail broadband investment in rural markets throughout the nation. The Commission should uphold congressional intent and decisively reject the anticompetitive reasoning espoused by the MPUC and its supporters.

'capture voice revenues that may be necessary to make broadband entry economically viable'').

Respectfully submitted,

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