

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

In the Matter of)
)
Petition of Time Warner Cable Inc.)
for Preemption Pursuant to Section 252(e)(5))
of the Communications Act, as Amended, of the)
North Carolina Rural Electrification Authority)
for Failure To Arbitrate an Interconnection)
Agreement with Star Telephone Membership)
Corporation)

WC Docket No. 13-_____

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Office of the Secretary

PETITION FOR PREEMPTION

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SUMMARY

Pursuant to Sections 1.1 and 1.2 of the Commission's rules and Section 252(e)(5) of the Communications Act of 1934, as amended (the "Act"), Time Warner Cable Inc. ("TWC") hereby requests that the Commission issue an order preempting the jurisdiction of the North Carolina Rural Electrification Authority ("NCREA") for failing to arbitrate an interconnection agreement ("ICA") between TWC's telecommunications carrier subsidiary, Time Warner Cable Information Services (North Carolina), LLC ("TWCIS"), and Star Telephone Membership Corporation ("Star"). For nearly *eight years*, TWC has sought to interconnect and exchange local traffic with Star pursuant to Sections 251(a) and (b) of the Act so that it could offer competitive voice services in Star's service territory. The NCREA, however, has refused to conduct an arbitration as required under Section 252(b).

Most recently, the NCREA issued a series of orders stating that it would not initiate an arbitration because it would first require TWC to prevail in a proceeding arising from Star's petition to suspend its Section 251(b) obligations pursuant to Section 251(f)(2). Indeed, the NCREA has now stated that it is unwilling to act on TWC's pending arbitration petition at all (much less within the time frame established by Section 252), stating that TWC will be required to file a new arbitration petition even if the NCREA denies Star's suspension request.

The Act does not allow a state agency to forego arbitration based on an incumbent local exchange carrier's ("ILEC's") request for suspension of Section 251(b) duties. To the contrary, those duties are binding on Star, and even if the NCREA ultimately were to suspend each of those duties—which TWC submits would be plainly contrary to the public interest—TWC still would be entitled to an interconnection agreement under Section 252(b), as the processes established by Section 252 (unlike discrete substantive requirements under Section 251(b)) are not subject to suspension under any circumstances. Accordingly, as a result of the NCREA's

unjustified failure to act, TWC requests that the Commission preempt the jurisdiction of the NCREA and conduct an arbitration for an ICA between TWC and Star.

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Most recently, the NCREA issued a series of orders stating that it would not initiate an arbitration because it would first require TWC to prevail in a proceeding arising from Star's petition to suspend its Section 251(b) obligations pursuant to Section 251(f)(2). Indeed, the

¹ 47 C.F.R. §§ 1.1, 1.2; 47 U.S.C. § 252(e)(5).

NCREA has now stated that it is unwilling to act on TWC's pending arbitration petition at all (much less within the time frame established by Section 252), stating that TWC will be required to file a new arbitration petition even if the NCREA denies Star's suspension request.

The Act does not allow a state agency to forego arbitration based on an incumbent local exchange carrier's ("ILEC's") request for suspension of Section 251(b) duties. To the contrary, those duties are binding on Star, and even if the NCREA ultimately were to suspend each of those duties—which TWC submits would be plainly contrary to the public interest—TWC still would be entitled to an interconnection agreement under Section 252(b), as the processes established by Section 252 (unlike discrete substantive requirements under Section 251(b)) are not subject to suspension under any circumstances. Accordingly, as a result of the NCREA's unjustified failure to act, TWC requests that the Commission preempt the jurisdiction of the NCREA and conduct an arbitration for an ICA between TWC and Star.

BACKGROUND

1. The Parties

In 2003, TWC launched a facilities-based, interconnected Voice over Internet Protocol ("VoIP") service for residential customers called Home Phone, and later introduced a commercial VoIP service called Business Class Phone. TWC now serves approximately 5 million Home Phone subscribers and more than 200,000 Business Class Phone subscribers nationwide. TWC continues to expand the geographic reach of its offerings, including in rural communities, thus providing competitive alternatives for many thousands of rural consumers who had been deprived of any choice of facilities-based wireline voice service providers.

As a prerequisite to introducing its VoIP services in a given area, TWC must obtain interconnection to enable the exchange of local traffic with the relevant ILEC(s). TWC initially relied on third-party telecommunications carriers to interconnect with ILECs but is currently

transitioning to a business model under which its own carrier affiliates, including TWCIS in North Carolina, handle these intercarrier functions. TWCIS therefore has entered into ICAs with ILECs throughout most of TWC's service footprint in North Carolina (*i.e.*, in all areas except Star's service area). In addition, although the Commission has confirmed that TWC's carrier entities may obtain interconnection where they exchange VoIP traffic that is originated and terminated by a non-carrier affiliate,² TWCIS intends to offer Home Phone and Business Class Phone services as regulated telecommunications services in North Carolina, thus enabling its participation in the Lifeline program.

In October 2005, TWC requested negotiation of an ICA with Star, a rural ILEC operating as a cooperative in portions of the North Carolina counties of Bladen, Sampson, Duplin, Columbus, and Cumberland. When Star refused to negotiate (based on its belief that it was exempt from any such duty under Section 251(f)(1)), and following the statutory waiting period under Section 252(b)(1),³ TWC filed an arbitration petition with the NCREA, the state agency with jurisdiction over telephone and electric cooperatives in North Carolina.⁴

Significantly, although the NCREA is the relevant "state commission" in North Carolina with respect to telephone cooperatives, the agency operates under a statutory and administrative

² See *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended et al.*, Declaratory Ruling, 26 FCC Rcd 8259 ¶¶ 26-27 (2011) ("*CRC Declaratory Ruling*"); *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 ¶¶ 1, 13 (WCB 2007) ("*TWC Declaratory Ruling*").

³ 47 U.S.C. § 252(b)(1).

⁴ *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 Agreements with Atlantic, Randolph and Star Telephone Membership Corporations* (filed Mar. 14, 2006), attached hereto as Exhibit 1.

environment that makes it nearly impossible for a competitive provider such as TWC to exercise its federal rights over the objection of an ILEC. For example, the rules of the NCREA state that its purpose includes acting “as an *agent* for the electric and telephone member corporations” before the federal government.⁵ In addition, the NCREA’s volunteer five-member governing board is made up entirely of officers and directors of telephone and electric cooperatives (including Star) and/or the associations representing such cooperatives.⁶ The NCREA’s staff is comprised of two administrative personnel (an administrator and an administrative assistant), and, to TWC’s knowledge, the NCREA has never completed an arbitration pursuant to Section 252.

2. TWC’s Longstanding Efforts To Obtain Interconnection Under Sections 251(a) and (b)

In response to TWC’s arbitration petition, Star filed a motion to dismiss asserting that TWCIS was not a telecommunications carrier and therefore was not eligible for interconnection under the Act.⁷ TWCIS demonstrated that it held a certificate of public convenience and necessity issued by the North Carolina Utilities Commission and operated as a telecommunications carrier, and further explained that Star was conflating TWCIS’s rights as a carrier with the non-carrier status of TWCIS’s retail VoIP affiliate (TWC Digital Phone LLC).

⁵ 4 N.C. Admin. Code § 8.0101 (emphasis added).

⁶ Star currently is represented on the NCREA’s board by Commissioner Alderman, who has served on Star’s board of directors for 13 years. Commissioner Alderman has recused himself from participation in proceedings before the NCREA involving TWC and Star. The remaining members of the NCREA’s board hold positions on the boards of directors of the cooperatives the NCREA oversees, associations representing the cooperatives, or both.

⁷ Motion of Star Telephone Membership Corporation to Dismiss Time Warner Cable Information Services (North Carolina), LLC’s Petition for Arbitration, Docket No. TMC-5, Sub 1 (filed Apr. 10, 2006), attached hereto as Exhibit 2.

Nevertheless, the NCREA accepted Star's arguments and refused to conduct an arbitration proceeding.⁸

Following the NCREA's dismissal order, the Wireline Competition Bureau ("Bureau") reaffirmed the interconnection rights of wholesale carriers such as TWCIS in the *TWC Declaratory Ruling*, clarifying that (1) "wholesale providers of telecommunications services are telecommunications carriers for purposes of sections 251(a) and (b) of the Act," and (2) such wholesale carriers have the right "to interconnect for the purpose of exchanging traffic with VoIP providers."⁹ TWC accordingly asked the NCREA to reconsider its decision dismissing TWCIS's petition for arbitration.¹⁰ But in spite of the Bureau's ruling, the NCREA denied TWC's reconsideration request—claiming that reconsideration was unavailable to TWC because the Communications Act does not expressly provide for such a procedural remedy and otherwise deeming TWC's request untimely.¹¹

Faced with the NCREA's refusal to recognize its basic interconnection rights, TWC sought review in federal district court, pursuant to Section 252(e)(6) of the Act. The court rejected various efforts by the NCREA to dismiss TWC's appeal on jurisdictional and procedural grounds and subsequently vacated the NCREA's orders on the merits, finding that the agency

⁸ Order Consolidating and Dismissing Proceedings, Docket Nos. TMC-1, Sub 1 *et al.*, at 6-7 (N.C. Rural Elec. Auth. July 19, 2006) ("2006 Dismissal Order"), attached hereto as Exhibit 3.

⁹ *TWC Declaratory Ruling* ¶¶ 1, 13.

¹⁰ See Letter from Marcus W. Trathen, Counsel to TWC, to T. Scott Poole, Administrator, NCREA (filed Dec. 17, 2007), attached hereto as Exhibit 4.

¹¹ See Order Denying Request for Reconsideration, Docket No. TMC-1, Sub 1 *et al.*, at 2-3 (N.C. Rural Elec. Auth. Mar. 24, 2008), attached hereto as Exhibit 5.

erred in refusing to enforce the interconnection rights set forth in Section 251.¹² The court remanded the case to the NCREA for further proceedings.

By that time, nearly four years had elapsed since TWC first sought to negotiate an ICA with Star. TWC therefore urged the NCREA to “immediately set these proceedings for arbitration,”¹³ but the NCREA again refused. Instead, the NCREA issued an order on January 27, 2010, ruling that TWC first would have to pierce Star’s rural exemption under Section 251(f)(1) before the NCREA would proceed with arbitration to establish an ICA.¹⁴ Although TWC was confident that the NCREA’s ruling was erroneous, TWC acceded to the NCREA’s prescribed course in the interest of avoiding a further appeal to federal court or to the Commission.

While the rural exemption proceeding was underway, the Commission issued the *CRC Declaratory Ruling*, which arose out of a similar dispute between TWC (joined by its then wholesale carrier partner, CRC) and several rural ILECs in Maine. The *CRC Declaratory Ruling* confirmed 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 The Commission further held that “requests made to incumbent LECs for interconnection and services pursuant to sections 251(a) and (b) are subject to state commission

¹² *Time Warner Cable Info. Servs. (N.C.), 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”).

¹³ Comments of Time Warner Cable Information Services (North Carolina), LLC, Docket No. TMC-1, Sub 1 *et al.*, at 1 (filed Jan. 6, 2010), attached hereto as Exhibit 6.

¹⁴ Order, Docket No. TMC-5, Sub 1, at 5 (unmarked) (N.C. Rural Elec. Auth. Jan. 27, 2010), attached hereto as Exhibit 7.

¹⁵ *CRC Declaratory Ruling* ¶ 14.

arbitration as set forth in section 252.”¹⁶ TWC promptly informed the NCREA of this controlling precedent,¹⁷ and on January 31, 2012, the NCREA terminated the rural exemption proceeding.¹⁸

Based on the Commission’s affirmation of the rights of competitive carriers to compel arbitration pursuant to Section 252 and the corresponding duty of state commissions to conduct such arbitrations,¹⁹ TWC believed that it had cleared the final hurdle to exercising its interconnection rights under Sections 251(a) and (b). But before the NCREA moved forward with an arbitration proceeding, Star filed a petition to suspend its Section 251(b) obligations pursuant to Section 251(f)(2) and requested that the NCREA forego arbitration of an ICA pending adjudication of Star’s suspension petition.²⁰

TWC filed a motion to dismiss Star’s suspension petition and opposed Star’s proposal to forestall the commencement of arbitration.²¹ In particular, TWC argued that Section 252 obligates the NCREA to proceed with arbitration regardless of the disposition of Star’s petition, and that nothing in Section 251(f)(2) authorizes a state commission to forego arbitration while a

¹⁶ *Id.* ¶ 19.

¹⁷ *See* Motion to Terminate Phase 1 of Proceeding in Conformance with Intervening and Controlling Decision of the Federal Communications Commission, Docket No. TMC-5, Sub 1 (filed June 6, 2011), attached hereto as Exhibit 8.

¹⁸ Final Decision, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. Jan. 31, 2012), attached hereto as Exhibit 9.

¹⁹ *See CRC Declaratory Ruling* ¶¶ 19, 23.

²⁰ *See* Non-Confidential Petition of Star Telephone Membership Corporation Pursuant to 47 U.S.C. § 251(f)(2), Docket No. TMC-5, Sub 1, at 15 (filed Feb. 29, 2012) (requesting that the NCREA “establish a procedural schedule for conducting any discovery relating to Star TMC’s Section 251(f)(2) Petition and schedule a hearing with regard to that Petition[] prior to moving forward with [arbitration of an ICA]”), attached hereto as Exhibit 10.

²¹ Time Warner Cable Information Services (North Carolina), LLC Motion To Dismiss Petition for Suspension or Modification, Docket No. TMC-5, Sub 1 (filed Mar. 23, 2012), attached hereto as Exhibit 11.

suspension petition is being adjudicated.²² TWC further explained that refusing to arbitrate would be inconsistent with the *CRC Declaratory Ruling*.²³ TWC thus urged the NCREA to proceed with arbitration.²⁴ Acknowledging the unusual procedural posture of the case, TWC proposed that the statutory deadline for completing arbitration be reset such that the arbitration clock would restart on the date of the NCREA's January 2012 order terminating the rural exemption proceeding.²⁵ Under TWC's proposed calculation of the deadline, TWC explained that the NCREA should conclude the arbitration by June 15, 2012.²⁶

3. The NCREA's Continuing Refusal To Conduct Arbitration

Five days after TWC filed its motion to dismiss Star's Section 251(f)(2) petition, the NCREA issued its March 2012 Order consolidating Star's suspension petition with TWC's 2006 petition for arbitration.²⁷ Without acknowledging the statutory obligation to conduct an arbitration pursuant to Section 252 or addressing the arguments raised in TWC's motion to dismiss, the March 2012 Order stated that the NCREA would not initiate an arbitration before completing adjudication of Star's suspension petition.²⁸

The NCREA proceedings then remained in limbo for more than a year as the parties filed numerous pleadings addressing TWC's request to dismiss Star's suspension petition. The arbitrator (a former Chair of the North Carolina Utilities Commission ("NCUC") who served on

²² *Id.* at 28-29.

²³ *Id.* at 28.

²⁴ *Id.* at 28-29.

²⁵ *Id.* at 26-27.

²⁶ *Id.* at 27.

²⁷ Order, Docket No. TMC-5, Sub 1, at 2 (N.C. Rural Elec. Auth. Mar. 28, 2012) ("March 2012 Order") (citing Section 252(g)), attached hereto as Exhibit 12.

²⁸ *Id.* (finding "that the resolution of Star's Petition should be completed prior to proceeding to ... arbitration").

the NCUC for some eleven years during the implementation of local telephone competition) ultimately recommended that the NCREA grant TWC's motion in a detailed order released in October 2012,²⁹ but on April 2, 2013—more than a year after TWC sought a schedule for arbitration and more than 14 months after TWC stipulated that the arbitration clock should restart—the NCREA issued its April 2013 Order, which rejected the arbitrator's lengthy and detailed recommendation of dismissal but provided almost no explanation of the rationale for departing from that recommendation.³⁰ The NCREA again confirmed that it would not comply with its statutory obligation to conduct an arbitration as long as Star's suspension petition remained pending.³¹ In addition, the NCREA explained for the first time that, even after resolving Star's suspension petition, it would not act on TWC's longstanding arbitration request (from March 2006). Rather, the April 2013 Order indicates that the NCREA will commence an arbitration only in the event that (i) Star's suspension petition is denied in its entirety, and (ii) TWC files a *new* petition for arbitration (apparently after pursuing a new round of fruitless negotiations with Star, thus pushing back the relevant arbitration timeframe under Section 252 even further).³² The April 2013 Order further suggests that, if the NCREA were to suspend or modify "one or more" of Star's Section 251(b) obligations, the NCREA would not arbitrate an

²⁹ Recommended Order Granting TWCIS (NC) Motion To Dismiss, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. Oct. 25, 2012), attached hereto as Exhibit 13.

³⁰ Order, Docket No. TMC-5, Sub 1, at 3-4 (N.C. Rural Elec. Auth. Apr. 2, 2013) ("April 2013 Order"), attached hereto as Exhibit 14.

³¹ *See id.* at 4 (bifurcating the consideration of Star's suspension petition and TWC's 2006 arbitration petition into two phases, with adjudication of Star's suspension petition to proceed first).

³² *See id.* (explaining that, if the NCREA denies Star's suspension petition, and the parties are unable to agree to interconnection terms, "a Petition will be filed with the Authority requesting arbitration for the disputed issues").

ICA between the parties *at all*.³³ TWC subsequently sought reconsideration of the NCREA's refusal to conduct an arbitration,³⁴ which the NCREA summarily denied in the Reconsideration Order issued June 10, 2013.³⁵ TWC's arbitration petition, dated March 14, 2006, remains pending before the NCREA.

ARGUMENT

I. THE NCREA'S REFUSAL TO ARBITRATE COMPELS PREEMPTION UNDER SECTION 252(e)(5)

Section 252(e)(5) of the Act provides for preemption of a state commission's jurisdiction to arbitrate an ICA if it "fails to act to carry out its responsibility under ... [Section 252]."³⁶ The Commission's assumption of jurisdiction in such circumstances is compulsory, as the statutory language provides that "the Commission *shall* issue an order preempting the State commission's jurisdiction of that proceeding ... within 90 days after being notified (or taking notice) of such failure, and *shall* assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission."³⁷ As shown below, the NCREA "failed to act" within the meaning of Section 252(e)(5), and its ongoing consideration of Star's suspension petition does not justify that refusal to arbitrate an ICA.

³³ *Id.* (directing the arbitrator to conduct an arbitration only to the extent "the Authority determine[s] that Star's 47 USC § 251(b) obligations should not be suspended or modified").

³⁴ Petition for Partial Reconsideration of Order Issued April 2, 2013, Docket No. TMC-5, Sub 1 (filed May 3, 2013), attached hereto as Exhibit 15.

³⁵ Order Denying Time Warner's Petition for Partial Reconsideration, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. June 10, 2013) ("Reconsideration Order"), attached hereto as Exhibit 16.

³⁶ 47 U.S.C. § 252(e)(5).

³⁷ *Id.* (emphasis added).

A. The NCREA Has Failed To Act.

The NCREA's refusal to conduct an arbitration for an ICA between TWC and Star epitomizes the type of "fail[ure] to act" that requires Commission preemption under Section 252(e)(5). Indeed, the NCREA has failed to act in two distinct respects: (i) by refusing even to *initiate* an arbitration in response to TWC's pending petition, and (ii) by substantially exceeding the statutory time frame for completing an arbitration under Section 252.

First, the NCREA's April 2013 Order triggers preemption under Section 252(e)(5) because it "unequivocally expresses the ... intent not to act" on TWC's March 2006 arbitration petition.³⁸ Rather, the NCREA has indicated that, at most, it will entertain a *new* arbitration petition, and only if TWC persuades the agency to reject Star's suspension request in its entirety.³⁹ Requiring TWC to file a new arbitration petition (if it is permitted to do so at all) necessarily will leave TWC's March 2006 arbitration petition pending and unadjudicated—*i.e.*, in perpetual limbo—and thus subject to mandatory preemption under Section 252(e)(5).

Second, the NCREA's delays over the last several years independently warrant preemption, even apart from the agency's statement that it will not carry out its responsibility under Section 252(b) to adjudicate TWC's pending petition. The Commission's rule implementing Section 252(e)(5) provides that a state commission "fails to act" within the

³⁸ *Petition of Northland Networks, Ltd. for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, Memorandum Opinion and Order, 19 FCC Rcd 2396 ¶ 9 (WCB 2004) ("*Northland Preemption Order*").

³⁹ As discussed further below, leaving aside the public interest obstacles to suspending any of Star's Section 251(b) obligations—let alone all of them—the NCREA appears to have mistakenly assumed that TWC's entitlement to an ICA turns on the resolution of Star's suspension petition. TWC's entitlement to an ICA under Section 252 will remain in full force irrespective of the outcome of the suspension proceeding, and nothing in Section 251(f) authorizes a state commission to forego arbitration while a suspension petition is under consideration. *See infra* Section II.A.

meaning of the statute if it does not “complete an arbitration within the time limits established in section 252(b)(4)(C).”⁴⁰ That latter provision provides that a state commission must resolve the issues set forth in the arbitration petition and response “not later than 9 months after the date on which the local exchange carrier received the request [for an ICA].”⁴¹ Given the *years* that have passed since TWC sought an interconnection agreement with Star and since the federal court remanded the case to the NCREA for further proceedings, this test for preemption unquestionably has been met. And if the Commission were to reset the arbitration clock (as TWC proposed) to January 31, 2012 (the date on which the NCREA terminated the rural exemption proceeding involving Star, thus clearing the way to arbitrate an ICA), the NCREA still has far exceeded the statutory deadline for conducting an arbitration proceeding.

Under the relevant precedent, the NCREA’s statement that it will not act on TWC’s pending arbitration petition, paired with its longstanding refusal to do so based on its misinterpretations of Sections 251 and 252, compels preemption under Section 252(e)(5). The D.C. Circuit has noted with approval the Commission’s determination that a state commission’s “responsibility” under Section 252 is “to make a determination — that is, to mediate, to arbitrate, to approve, and (possibly) to interpret and enforce an interconnection agreement.”⁴² Thus, where a state commission simply declines to arbitrate an ICA, as the NCREA has here, the Commission has consistently recognized its obligation to preempt the state commission’s authority.⁴³

⁴⁰ 47 C.F.R. § 51.801(b).

⁴¹ 47 U.S.C. § 252(b)(4)(C).

⁴² *Global NAPs, Inc. v. FCC*, 291 F.3d 832, 838 (D.C. Cir. 2002) (internal quotation marks omitted).

⁴³ *See, e.g., Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 15 FCC Rcd 11277 ¶ 7 (2000) (preempting the Virginia State Corporation Commission when the Virginia

In addition, the NCREA's refusal to conduct an arbitration in response to TWC's pending petition is readily distinguishable from cases in which the Commission or Bureau declined to find a failure to act. In several instances, carriers have sought preemption of state commission jurisdiction after the commission dismissed an arbitration petition on procedural grounds, and the Commission has held that such procedural dismissals constitute "action," rather than a "failure to act" under Section 252(e)(5).⁴⁴ But the key underpinnings of that precedent are that (1) a carrier faced with a final dismissal order has a right of review in federal district court under Section 252(e)(6),⁴⁵ and (2) the two remedies authorized in Section 252(e) (*i.e.*, preemption and federal

commission "explicitly declined to take any action with respect to Starpower's petitions"); *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 6224 ¶ 5 (2001) (preempting the Virginia commission for "fail[ing] to carry out its section 252 responsibilities" when it refused to arbitrate an ICA pursuant to the federal standards of Section 252); *Northland Preemption Order* ¶ 9 (finding that the New York Public Service Commission "failed to act" when it determined that it would "not ... act to resolve interconnection disputes regarding reciprocal compensation for ISP-bound traffic").

⁴⁴ See, e.g., *Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, for Preemption of the Jurisdiction of the Arizona Corporation Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation et al.*, Order on Review, 25 FCC Rcd 13825 ¶ 10 (2010) ("*Autotel Order*") (finding that Section 252(e)(5) did not apply because "[t]he six state commissions acted by dismissing [Autotel's arbitration] requests after either finding that Autotel had not identified open issues for arbitration or finding that Autotel had failed to follow state procedures"); *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission et al.*, Memorandum Opinion and Order, 13 FCC Rcd 1755 ¶ 33 (1997) ("*Low Tech Order*") (holding that "a state commission does not 'fail to act' when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding").

⁴⁵ See, e.g., *Autotel Order* ¶ 12 (finding that, when a state commission "administratively reject[s] [a] complaint *without prejudice* because it did not meet the minimum requirements to be accepted for filing[,] ... section 252(e)(6) provides a remedy in the form of federal court review; section 252(e)(5) provides no alternative forum for appeal" (emphasis in original)).

court review) are mutually exclusive.⁴⁶ Critically, the NCREA in this case did not *dismiss* TWC's pending arbitration petition; nor has the agency suggested that TWC's arbitration petition is procedurally defective in any respect. Instead, the agency has simply declared its unwillingness to adjudicate that petition, apparently based on its misunderstanding of Section 251(f)(2) (and, previously, its misunderstanding of Section 251(f)(1)). As a result, there is no final NCREA order subject to federal court review under Section 252(e)(6)—unlike the situation in 2006, when the NCREA initially dismissed TWC's petition on the ground that TWC supposedly was not a telecommunications carrier and TWC successfully appealed that ruling to federal court.⁴⁷ Because TWC cannot pursue judicial review under Section 252(e)(6) in response to the NCREA's orders declining to proceed with arbitration, preemption under Section 252(e)(5) is the proper remedy to address the NCREA's refusal to act. Indeed, absent

⁴⁶ See, e.g., *id.* ¶ 3 (“Because a state commission cannot both act and ‘fail to act,’ section 252(e)’s remedies are mutually exclusive.”).

⁴⁷ Numerous federal district courts have determined that they lack jurisdiction until the state commission approves a final agreement or dismisses the arbitration petition. See, e.g., *AT&T Commc'ns of the Southwest v. Southwestern Bell Tel. Co.*, 38 F. Supp. 2d 902, 904 (D. Kan. 1999) (“There is no authority to review orders by [a state commission,] even if [it] has made a final ruling on the issues, until a final interconnection agreement is approved.”); *GTE Southwest Inc. v. Graves*, 989 F. Supp. 1148, 1151 (W.D. Okla. 1997) (“[T]he language of section 252(e)(6) referencing judicial review of an ‘agreement’ means a *final* agreement which has been approved or rejected by the [state commission].” (emphasis in original)); *Atlantic Alliance Telecommc'n, Inc. v. Bell Atlantic*, No. 99-cv-4915, 2000 U.S. Dist. LEXIS 19649, at *12 (E.D.N.Y. Apr. 19, 2000) (collecting cases). See also *Low Tech Order* ¶ 37 (noting that an aggrieved party whose arbitration petition is dismissed may “attain [judicial] review of state commission determinations under the Act”) (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997) (internal quotation marks omitted)).

preemption, TWC would be left without any means of enforcing its rights under Sections 251 and 252—an outcome the Commission previously has rejected in an analogous context.⁴⁸

The Bureau also has declined to preempt where the state commission *did* act in response to an arbitration petition, but a party sought to second guess the commission's resolution of an issue or to have the FCC address purportedly unresolved issues.⁴⁹ In such cases, as with the procedural dismissals at issue in *Autotel* and related proceedings, "section 252(e)(6) provides for a remedy in the form of federal court review" and "section 252(e)(5) provides no alternative forum for appeal."⁵⁰ As described above, TWC is not asking the Commission to second guess the NCREA's resolution of any interconnection-related issue (as there has been no such resolution), and it is not seeking "an alternative forum for appeal." Rather, the sole impetus for this preemption petition is the NCREA's *refusal* to act and TWC's consequent inability to obtain any relief in federal court.

In one case, the Bureau declined to preempt the jurisdiction of the Public Utility Commission of Texas ("PUCT") after that commission held an arbitration proceeding involving UTEX Communications in abeyance due to uncertainty regarding the appropriate treatment of VoIP traffic.⁵¹ But in that case: (1) the PUCT had "quickly initiat[ed] proceedings" in response

⁴⁸ See *CRC Declaratory Ruling* ¶ 22 (rejecting "the arguments of some commenters that oppose state arbitration of section 251(a) and (b) requirements without recognizing any alternative forum for enforcement of those requirements").

⁴⁹ See, e.g., *Petition of Supra Telecommunications & Information Systems, Inc.* ("Supra") Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Florida Public Service Commission, Memorandum Opinion and Order, 17 FCC Rcd 22884 ¶ 10 (WCB 2002) (finding no failure to act when the Florida Public Service Commission "conducted a full evidentiary hearing on the contested issues[] and approved a signed final agreement").

⁵⁰ *Autotel Order* ¶ 12.

⁵¹ *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission*

to UTEX's arbitration petition and thereafter engaged in an "energetic discharge" of its responsibilities under Section 252,⁵² (2) UTEX and AT&T consented to several extensions of the nine-month statutory deadline for completing an arbitration proceeding,⁵³ and (3) the PUCT abated the proceeding "without a decision indicating an unwillingness ... to act."⁵⁴ Indeed, the Bureau found not only that "the PUCT actively conducted the arbitration proceeding, and did so in a timely manner" until the VoIP-related issues arose, but that even after UTEX sought preemption, the PUCT "affirmed its willingness to complete the arbitration."⁵⁵ Here, in stark contrast: (1) the NCREA never initiated arbitration proceedings, despite repeated requests from TWC to do so and a federal district court's vacatur of the NCREA's initial effort to avoid carrying out its statutory responsibility; (2) TWC stipulated that the arbitration deadline should be reset to June 15, 2012 following the renewal of proceedings on remand, but TWC did not consent to any extension of proceedings beyond that deadline; and (3) the NCREA, in orders released in March 2012, April 2013, and June 2013, "unequivocally expresse[d] the ... intent *not*

of Texas Regarding Interconnection Disputes with AT&T Texas, Memorandum Opinion and Order, 24 FCC Rcd 12573 (WCB 2009).

⁵² *Id.* ¶ 7 & n.22 (quoting AT&T Texas Comments at 3-4).

⁵³ *Id.* ¶ 7.

⁵⁴ *Id.* (emphasis added).

⁵⁵ *Id.* ¶ 9. The Bureau similarly rejected a subsequent request for preemption where "[t]he record indicate[d] that the PUCT staff ha[d] acted to complete the arbitration, and continue[d] to devote extensive time and resources[] ... [towards an] arbitration [that was] in its final stages." *UTEX Communications Corporation Petition for Preemption*, Memorandum Opinion and Order, 25 FCC Rcd 14168 ¶ 4 (WCB 2010) (internal quotation marks omitted). As a result, the Bureau determined that preempting the jurisdiction of the PUCT at such a late stage would have been "extremely wasteful and inefficient," given that "the PUCT ha[d] been acting expeditiously to resolve the large number of complex issues raised in th[e] arbitration;" indeed, preemption would have "unnecessarily delay[ed] a final resolution of th[e] arbitration." *Id.* ¶¶ 4-5.

to act” on TWC’s pending arbitration petition.⁵⁶ Because the NCREA has consistently refused to act, unlike the PUCT in the UTEX case (which not only conducted extensive proceedings but reaffirmed its willingness to complete the arbitration proceeding), preemption is necessary under Section 252(e)(5) and Section 51.801(b) of the Commission’s rules.

Finally, it also bears emphasis that the NCREA’s ongoing adjudication of Star’s suspension petition (and before that, its consideration of TWC’s request to terminate Star’s rural exemption) does not constitute “act[ion]” within the meaning of Section 252(e)(5). Rather, Section 252(e)(5) provides that the Commission is required to preempt when a state commission “fails to act to carry out its responsibility *under this section*”—i.e., Section 252—whereas suspension/modification and rural exemption proceedings are conducted pursuant to Section 251(f).⁵⁷

B. The NCREA’s Refusal to Arbitrate Based on a Pending Section 251(f)(2) Request Conflicts With the *CRC Declaratory Ruling*.

As TWC pointed out in its filings with the NCREA, refusing to arbitrate an ICA between TWC and Star is particularly inappropriate in light of the *CRC Declaratory Ruling*. The NCREA’s refusal to arbitrate has the effect of eliminating the “clear path” established in the *CRC Declaratory Ruling* for “seeking implementation of ... [the] local competition obligations under sections 251(a) and (b)” of a rural ILEC such as Star.⁵⁸

As noted above, the Commission confirmed in that ruling that (1) Sections 251(a) and (b) are default requirements with which all ILECs must comply, irrespective of the rural exemption

⁵⁶ *Northland Preemption Order* ¶ 9 (emphasis added).

⁵⁷ 47 U.S.C. § 252(e)(5) (emphasis added); *see id.* § 251(f); *Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and Request for Additional Relief*, Memorandum Opinion and Order, 13 FCC Rcd 871 ¶ 17 (CCB 1998).

⁵⁸ *CRC Declaratory Ruling* ¶ 23.

from Section 251(c) duties under Section 251(f)(1),⁵⁹ and (2) state commissions have an obligation to arbitrate ICAs to effectuate Sections 251(a) and (b).⁶⁰ The NCREA's apparent treatment of Star's suspension request as a basis for refusing to act on TWC's arbitration petition thus has converted Star's suspension request into a *de facto* rural exemption. In contrast to the rural exemption provision in Section 251(f)(1), which prevents the enforcement of Section 251(c) duties unless and until a state commission affirmatively lifts the exemption, Section 251(f)(2) presumes that existing interconnection duties are in effect before any suspension may be considered.⁶¹ The NCREA's refusal to arbitrate, which apparently is based only on Star's request for suspension of its Section 251(b) obligations, ignores that critical statutory distinction. Indeed, there is no substantive difference between making the piercing of Star's rural exemption a prerequisite to arbitration and making TWC's successful defense against Star's suspension petition such a precondition. In either case, the state commission's refusal unlawfully deprives the competitive carrier of its rights under Sections 251(a) and (b)—rights that a state commission is obligated to enforce unless and until a suspension or modification is granted pursuant to Section 251(f)(2)⁶²—thereby negating a core holding of the *CRC Declaratory Ruling*. Based on these legal errors, failure to preempt the NCREA's jurisdiction would erect an insurmountable

⁵⁹ *Id.* ¶ 2 (clarifying that “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, even if the LEC has a rural exemption from the obligations set forth in section 251(c)”).

⁶⁰ *Id.* ¶ 23 (“Congress purposefully established a role for state commissions to arbitrate and approve interconnection agreements in the first instance, permitting the Commission to preempt a state commission’s jurisdiction only upon a failure to carry out its duties.”).

⁶¹ Compare 47 U.S.C. § 251(f)(1) with *id.* § 251(f)(2); see also *CRC Declaratory Ruling* ¶ 14.

⁶² Moreover, as discussed below, even if Star's suspension petition were granted in its entirety, Section 251(f)(2) does not authorize a state commission to refuse to arbitrate an ICA. See *infra* at 20-21.

barrier to entry, because, as the Commission has recognized, TWC cannot offer retail local voice service without first establishing an ICA for interconnection and the exchange of local traffic.⁶³

II. NOTHING IN SECTION 251 OR 252 REMOTELY JUSTIFIES THE NCREA'S FAILURE TO ACT

The Commission should preempt the jurisdiction of the NCREA without regard for the reasons underlying the agency's failure to act, as the *rationale* for inaction is irrelevant to the legal analysis under Section 252(e)(5). In any event, the NCREA's apparent reliance on Star's filing of a suspension proceeding under Section 251(f)(2) plainly cannot justify its refusal to proceed with arbitration.

A. Section 251(f)(2) Does Not Authorize the NCREA to Suspend or Forego Arbitration Proceedings.

Although the NCREA has not stated any rationale for refusing to act on TWC's March 2006 petition, it appears to regard Star's suspension request as a justification for refusing to arbitrate an ICA. But the Act provides no such authority for refusing to conduct an arbitration. In fact, Section 252(b) *forecloses* the NCREA's apparent theory that the pendency of a separate suspension petition relieves a state commission of its duties under Section 252(b). The directive in Section 252(b)(4)(C) to complete an arbitration resolving all open issues within nine months of a request for an ICA is unconditional and unequivocal—there is no exception for situations where a rural ILEC has filed a petition for suspension/modification under Section 251(f)(2).⁶⁴ And while Section 251(f)(2) does not govern arbitration proceedings at all, it does not purport to authorize any such suspension of arbitrations in any event—much less authorize a requirement

⁶³ *CRC Declaratory Ruling* ¶ 12 (“[A]s the 1996 Act recognized, without the ability to exchange telecommunications traffic with the local incumbent carrier, no competitive provider would be able to compete effectively.”).

⁶⁴ *Id.* § 252(b)(4)(C) (providing that a state commission “shall resolve each issue . . . and shall conclude [such resolution] . . . not later than 9 months after the date on which the local exchange carrier received the request [to enter into an ICA]”).

that the party requesting arbitration file a *new* arbitration petition following such adjudication, as the NCREA ordered here.⁶⁵ Therefore, Star's filing of a suspension request had no bearing on the NCREA's duty to arbitrate. Not only does the plain language of Section 252(b)(4)(C)

compel that conclusion, but, as explained above, this Commission has made clear that network interconnection and the exchange of local telecommunications traffic pursuant to Sections 251(a) and (b) are universal default obligations with which a rural ILEC is required to comply *unless and until* it can demonstrate entitlement to suspension or modification of its Section 251(b) obligations.⁶⁶

The NCREA's apparent misreading of the Act is even more fundamental, as TWC's right to arbitrate an ICA would remain fully effective even if the NCREA ultimately were to suspend or modify one or more of Star's obligations under Section 251(b). TWC's entitlement to arbitration under Section 252(b) is independent of the particular substantive duties with which Star must comply under Section 251(b). In other words, just as Section 252 does not permit a temporary cessation of arbitration proceedings while a Section 251(f)(2) petition is pending, it does not allow a state commission to forego arbitration in response to an order granting a suspension, as the NCREA apparently assumed. For example, if the NCREA were to suspend or modify Star's local number portability obligations (setting aside the legal and policy problems such a suspension would raise), TWC would remain entitled to effectuate its other Section 251 rights through an ICA—within the time frame prescribed by Section 252(b)(4)(C). Even assuming that the NCREA could suspend *all* of Star's Section 251(b) obligations—

⁶⁵ Although Section 251(f)(2) empowers a state commission to suspend an *ILEC's* obligations under Sections 251(b) and (c) while the agency considers a suspension/modification petition (and based on an appropriate showing by the petitioning carrier), *id.* § 251(f)(2), that provision does not provide any basis for a state commission's refusal to carry out its *own* obligations under Section 252(b).

⁶⁶ See generally *CRC Declaratory Ruling*.

notwithstanding the requirements that any suspension be “necessary” *and* consistent with the public interest—TWC would remain entitled to obtain an ICA that would become operative after the suspension period expired.

B. Section 252(g) Does Not Excuse the NCREA of Its Duty To Conduct an Arbitration Pursuant to the Requirements of Section 252(b).

Nor can the NCREA rely on its authority under Section 252(g) to “consolidate proceedings under sections ... 251(f)[] ... and [252]” as a basis for refusing to act on TWC’s pending arbitration petition.⁶⁷ While the NCREA was entitled to consolidate the proceedings under Sections 252(b) and 251(f)(2) for the sake of efficiency, that means it was permitted to conduct an arbitration and suspension proceedings in a single, consolidated docket, as opposed to conducting two entirely separate proceedings concurrently.⁶⁸ But however a state commission chooses to structure such proceedings, it has an unequivocal duty to conduct and complete an arbitration within nine months of the request for interconnection.⁶⁹ In other words, the discretion to “consolidate” is not a basis for refusing to act within the statutory time frame (or altogether, as has occurred here), and any such refusal requires preemption under Section 252(e)(5). That conclusion again flows from the unconditional nature of a state commission’s obligation under Section 252(b)(4)(C), and it is further reinforced by the language in Section 252(g) stating that any consolidation of separate proceedings must not be “inconsistent with the requirements of [the Act].”⁷⁰

⁶⁷ 47 U.S.C. § 252(g).

⁶⁸ See Black’s Law Dictionary 350 (9th ed. 2009) (defining “consolidate” to mean “[t]o combine or unify into one mass or body” and “to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment or, sometimes, in separate judgments”).

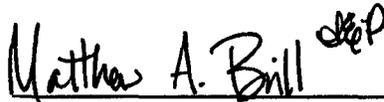
⁶⁹ 47 U.S.C. § 252(b)(4)(C); see *supra* Section II.A.

⁷⁰ 47 U.S.C. § 252(g).

CONCLUSION

The NCREA has determined that it will not act on TWC's 2006 arbitration petition at all, much less within the time limit specified by Section 252(b). That failure to carry out its responsibility requires preemption of the NCREA's arbitration jurisdiction under Section 252(e)(5). Accordingly, TWC requests that the Commission preempt the NCREA's jurisdiction over the proceeding currently docketed at TMC-5, Sub 1, and conduct an arbitration for an ICA between TWC and Star pursuant to Section 252(b).

Respectfully submitted,

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August 8, 2013

CERTIFICATE OF SERVICE

I, Karen R. Sprung, hereby certify that on this 8th day of August, 2013, a true and correct copy of the foregoing Petition for Preemption was served, via first-class mail, upon the following:

Frances Liles
Administrator
North Carolina Rural Electrification Authority
120 Penmarc Drive
Suite 104
Raleigh, NC 27603

Daniel C. Higgins
Burns, Day & Presnell, P.A.
P.O. Box 10867
Raleigh, NC 27605


Karen R. Sprung

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

In the Matter of)
)
Petition of Time Warner Cable Inc.)
for Preemption Pursuant to Section 252(e)(5))
of the Communications Act, as Amended, of the) WC Docket No. 13-_____
North Carolina Rural Electrification Authority)
for Failure To Arbitrate an Interconnection)
Agreement with Star Telephone Membership)
Corporation)

AFFIDAVIT OF JULIE P. LAINE

I, Julie P. Laine, state as follows:

1. I am employed by Time Warner Cable Inc. ("TWC") as Group Vice President and Chief Counsel, Regulatory. My business address is 60 Columbus Circle, New York, New York 10023. In my position, I oversee all state regulatory activities of the company, including the submission and adjudication of petitions for arbitration of interconnection agreements with incumbent local exchange carriers ("ILECs"), such as Star Telephone Membership Corporation ("Star").
2. I have knowledge of the facts set forth herein, and I make this affidavit in support of TWC's Petition for Preemption of the North Carolina Rural Electrification Authority ("NCREA") for its failure to arbitrate an interconnection agreement ("ICA") between TWC's subsidiary Time Warner Cable Information Services (North Carolina), LLC ("TWCIS") and Star.
3. TWCIS operates as a telecommunications carrier in North Carolina pursuant to a certificate of public convenience and necessity issued by the North Carolina Utilities Commission. Pursuant to this authority, TWCIS intends to offer retail Voice over Internet Protocol ("VoIP") services as regulated telecommunications services in Star's service territory.

4. Star is an ILEC operating as a cooperative in the North Carolina counties of Bladen, Sampson, Duplin, Columbus, and Cumberland.
5. The NCREA is the state agency in North Carolina with jurisdiction over public utility cooperatives.
6. On October 5, 2005, TWC requested negotiation of an ICA with Star pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended.
7. When Star refused to negotiate, TWC filed a petition for arbitration with the NCREA on March 14, 2006, 160 days after TWC's request to Star.
8. The NCREA has not issued an order resolving TWC's petition for arbitration or any interconnection-related issue. Nor has the NCREA dismissed TWC's pending arbitration petition or suggested that it is procedurally defective in any respect. Rather, the NCREA has indicated that it will commence an arbitration only in the event that (i) Star's separate suspension petition under Section 251(f)(2) is denied in its entirety, and (ii) TWC files a *new* petition for arbitration. As a result, TWC's 2006 arbitration petition remains pending before the NCREA.
9. To the best of my knowledge and belief, all other assertions of fact (including, but not limited to, references made to the procedural history of NCREA Docket TMC-5, Sub 1) that are contained in TWC's Petition for Preemption are true and correct.
10. To the best of my knowledge and belief, each document attached as a numbered Exhibit to the Petition for Preemption is a true and correct copy of the document cited in the Petition for Preemption as that numbered Exhibit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed August 7 2013.


Julie P. Laine
Group Vice President and Chief Counsel,
Regulatory
Time Warner Cable Inc.

Signed and acknowledged before
me this 7th day of August 2013



WILLIAM C. WESSELMAN
Notary Public, State of New York
Registration #01WE6265360
Qualified in New York County
Commission Expires July 8, 2016