

**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. 13-204
North Carolina Rural Electrification Authority)	
for Failure To Arbitrate an Interconnection)	
Agreement with Star Telephone Membership)	
Corporation)	

REPLY COMMENTS OF TIME WARNER CABLE INC.

Pursuant to the Public Notice issued in the above-referenced docket, Time Warner Cable Inc. (“TWC”) hereby submits this reply to the comments filed by the North Carolina Rural Electrification Authority (“NCREA”) and Star Telephone Membership Corporation (“Star”).¹ In its petition, TWC demonstrated that the NCREA’s refusal to arbitrate an interconnection agreement between Star and TWC’s telecommunications carrier subsidiary in North Carolina constitutes a “fail[ure] to act” that requires the Commission to preempt the NCREA’s jurisdiction and conduct an arbitration itself.² The NCREA and Star argue that the agency has taken sufficient action to avoid preemption, but the NCREA’s various efforts to respond to *Star’s* requests for relief under Section 251(f) of the Act in no way discharge its entirely independent duty to conduct and complete an arbitration in response to *TWC’s* petition under Section 252(b). Nor does the Act permit the NCREA to forego arbitration merely because the agency would prefer to address *Star’s* Section 251(f)(2) petition first. Because the NCREA indisputably has

¹ *Pleading Cycle Established for Comments on Petition of Time Warner Cable Inc. for Preemption Pursuant to Section 252(e)(5)*, Public Notice, WC Docket No. 13-204, DA 13-1772 (rel. Aug. 16, 2013).

² 47 U.S.C. § 252(e)(5).

not arbitrated an interconnection agreement—and indeed has not even commenced an arbitration years after TWC’s request that it do so—preemption is necessary to effectuate TWC’s statutory rights and to introduce facilities-based voice competition in Star’s service territory.

DISCUSSION

I. THE NCREA HAS NOT CARRIED OUT ITS RESPONSIBILITY TO ARBITRATE AN INTERCONNECTION AGREEMENT

The NCREA argues that there has been no “failure to act” under Section 252(e)(5) because the agency “has acted pursuant to the authority provided for in Section 251(f)(2).”³ But that argument misconstrues the statutory provisions at issue. Section 252(e)(5) requires preemption of a state commission’s jurisdiction to arbitrate an interconnection agreement if it “fails to act to carry out its responsibility *under this section in any proceeding or other matter under this section.*”⁴ The “section” of the Act that contains the relevant duties a state commission must carry out to avoid preemption is Section 252, not Section 251. In particular, Section 252(b)(4)(C) provides that, where a requesting carrier has been unable to negotiate an interconnection agreement with an incumbent local exchange carrier (“LEC”), a state commission must conduct an arbitration within nine months of the interconnection request.⁵ The NCREA plainly has failed to carry out *that* responsibility, and anything it has done pursuant to Section 251(f) of the Act is beside the point.⁶

³ NCREA Comments to Time Warner Cable Inc.’s Petition for Preemption, WC Docket No. 13-204, at 8 (filed Sept. 6, 2013) (“NCREA Comments”).

⁴ 47 U.S.C. § 252(e)(5) (emphasis added); *see also* Petition for Preemption, WC Docket No. 13-204, at 10 (filed Aug. 8, 2013) (“TWC Pet.”).

⁵ 47 U.S.C. § 252(b)(4)(C).

⁶ *See Global NAPs, Inc. v. FCC*, 291 F.3d 832, 838 (D.C. Cir. 2002) (confirming that a state commission’s “responsibility” is “to make a determination—that is, to mediate, to arbitrate, to approve, and (possibly) to interpret and enforce an interconnection agreement”).

For similar reasons, Star’s reliance on the NCREA’s issuance of “25 orders” in the last eight years “relating to various aspects of the proceedings” is unavailing.⁷ In fact, that series of orders only underscores the NCREA’s failure to carry out its responsibility under Section 252(b), as the various rulings were all means of *thwarting* TWC’s ability to obtain an interconnection agreement. Specifically, most of the orders in question pertained to Star’s motions and petitions seeking to (a) block TWC’s telecommunications carrier affiliate from interconnecting on the theory that it was not in fact a telecommunications carrier, despite its holding a certificate of public convenience and necessity and otherwise complying with all federal and state common carrier requirements;⁸ (b) invoke the rural exemption provision in Section 251(f)(1), even though that exemption has no application to requests for interconnection pursuant to Sections 251(a) and (b);⁹ and (c) suspend Star’s Section 251(b) duties pursuant to Section 251(f)(2), in what would amount to an unprecedented application of that provision to prevent interconnection. Far from carrying out the arbitration responsibilities prescribed by Section 252(b), the NCREA’s various orders issued in response to these requests by Star were all means of avoiding those responsibilities.

Moreover, where the NCREA’s orders actually have addressed TWC’s request to arbitrate an interconnection agreement (as opposed to Star’s requests for relief), those orders have confirmed the NCREA’s unwillingness to do so—based on its unlawful position, discussed below, that it is entitled to complete its adjudication of Star’s Section 251(f)(2) petition before

⁷ Comments of Star Telephone Membership Corporation, WC Docket No. 13-204, at 11 (filed Sept. 6, 2013) (“Star Comments”).

⁸ See *Time Warner Cable Info. Servs. (N.C.), LLC v. Duncan*, 656 F. Supp. 2d 565 (E.D.N.C. 2009).

⁹ 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 (2011) (“*CRC Declaratory Ruling*”).

commencing an arbitration. As TWC’s petition explains, that categorical refusal to initiate, let alone complete, an arbitration in anything remotely approaching the nine-month statutory deadline requires preemption.¹⁰ Indeed, the NCREA’s orders indicate that it has no intention of acting on TWC’s pending petition at all, as the agency at most contemplates directing TWC to file a *new* petition if it denies Star’s Section 251(f)(2) petition.¹¹

Star argues that the nine-month statutory deadline for completing an arbitration proceeding under Section 252(b) is merely advisory.¹² But the applicable Commission rule unequivocally provides that preemption is required pursuant to Section 252(e)(5) where a state commission “fails to complete an arbitration *within the time limits established in section 252(b)(4)(C) of the Act.*”¹³ Thus, notwithstanding Star’s argument that exceeding the nine-month deadline is not grounds for preemption, TWC is entitled to preemption under the plain language of Section 51.801 of the Commission’s rules. Notably, the facts here are a far cry from cases where a state commission worked diligently toward the completion of a complex arbitration and understandably exceeded the nine-month period prescribed by the statute as a result (and where preempting the state’s jurisdiction thus would only cause further delay).¹⁴ Rather, as explained in TWC’s petition and above, the NCREA has spent nearly eight years

¹⁰ TWC Pet. at 11.

¹¹ *See id.* at 9-10.

¹² Star Comments at 12.

¹³ 47 C.F.R. § 51.801.

¹⁴ *See, e.g., UTEX Communications Corporation Petition for Preemption*, Memorandum Opinion and Order, 25 FCC Rcd 14168, 14169-70 (WCB 2010). While Star asserts that “nothing in Section 252 suggests that Congress intended for a petition for arbitration to be immediately granted if the state commission does not act by the statutory deadline,” Star Comments at 12, TWC has not sought an “immediate grant” of its arbitration petition; rather, it has asked the Commission to conduct the arbitration pursuant to Section 252(e)(5), invoking that safety valve in the precise circumstances intended by Congress.

avoiding its arbitration duty, in response to Star’s various efforts to prevent interconnection. Thus, while Star asserts that “the NCREA has demonstrated that it can timely complete the arbitration if given the opportunity,”¹⁵ the problem is that it has been given opportunity after opportunity to conduct an arbitration, only to assert one excuse after another for refusing to do so. And given that proceedings in response to Star’s Section 251(f)(2) petition have been ongoing for 18 months without even initial testimony having been filed, it appears that it could take several more years for the NCREA even to consider commencing an arbitration (in light of its refusal to proceed with an arbitration as long as Star’s petition is pending). That prospect of indefinite delay—on top of the years of delay that have already occurred—is what prompted TWC to petition for preemption.¹⁶

¹⁵ Star Comments at 15.

¹⁶ Star’s attempt to blame TWC for the delays that have occurred before the NCREA, *see id.* at 15, is nonsensical. Star’s theory is that, by resisting Star’s efforts to block interconnection (based on its discredited theories that TWC’s telecommunications carrier affiliate is not *really* a carrier, that the rural exemption in Section 251(f)(1) bars interconnection pursuant to Sections 251(a) and (b), and so forth), TWC has only itself to blame for the years of delay. But, of course, it was Star’s persistent refusal to negotiate an interconnection agreement based on a series of anticompetitive and baseless objections that forced TWC to engage in the legal proceedings at issue. Since 2006, TWC has sought nothing more than to persuade the NCREA to promptly carry out its arbitration duties pursuant to Section 252(b). Even more absurd is Star’s suggestion that TWC deliberately sought to delay proceedings before the NCREA to justify “mov[ing] on to . . . a more favorable forum.” *Id.* The notion that TWC would sabotage its efforts to obtain interconnection (while thereby preventing its own launch of competitive services) to support a petition for preemption *years* down the road is downright silly. TWC reluctantly filed the preemption petition, as a last resort, once it became clear that the NCREA would use Star’s filing of a Section 251(f)(2) petition as an excuse to evade its statutory responsibility to arbitrate an interconnection agreement. Ironically, while Star now characterizes TWC’s request for preemption as “gamesmanship,” *id.*, Star itself initially suggested that option before the NCREA when TWC objected to the agency’s refusal to proceed with arbitration, noting that TWC “has been free for years” to pursue preemption and suggesting that, if anything, TWC should have done so earlier. Star TMC’s Response to the Comments of Time Warner Cable Information Services (North Carolina), LLC on the Arbitrator’s Recommended Order, Docket No. TMC-5, Sub 1, at 16 (filed Dec. 21, 2012), attached hereto as Reply Exhibit 1.

Finally, to the extent the NCREA is arguing that its authority under Section 251(f)(2) “to suspend enforcement of the requirements of [Section 251(b)]” on an interim basis excused it from proceeding with an arbitration proceeding under Section 252(b),¹⁷ that is incorrect. As TWC’s petition explained, a state commission’s authority to order an interim suspension of one or more of a carrier’s *Section 251(b)* duties (e.g., local number portability or dialing parity) in no way authorizes suspension of its own arbitration obligation in *Section 252(b)*.¹⁸

II. THE NCREA’S PREFERENCE TO ADDRESS STAR’S SUSPENSION REQUEST BEFORE PROCEEDING WITH ARBITRATION DOES NOT EXCUSE ITS FAILURE TO ACT

The NCREA and Star further argue that the agency acted “reasonably” in foregoing arbitration until it has addressed Star’s request that it suspend or modify Star’s Section 251(b) duties pursuant to Section 251(f)(2), based on the assumption that any suspension or modification could impact the terms of an interconnection agreement.¹⁹ But that too misapprehends the relevant statutory provisions.

The rationale for a state commission’s failure to act is irrelevant to the legal analysis under Section 252(e)(5), which focuses only on whether such a failure has occurred—as clearly is the case here.²⁰ And even if the reasoning were pertinent, the particular justification offered by the NCREA and Star is *ultra vires*. Neither Section 252(b) nor Section 251(f) authorizes the NCREA to make its own policy judgment about whether to proceed with arbitration in light of

¹⁷ NCREA Comments at 8.

¹⁸ See TWC Pet. at 19-21.

¹⁹ See, e.g., NCREA Comments at 8 (claiming that it is “procedurally appropriate” to first determine whether any duties will be suspended or modified before arbitrating an interconnection agreement); Star Comments at 14 (stating that the NCREA’s two-phased procedural schedule is “reasonable”).

²⁰ TWC Pet. at 19.

potential future decisions that could impact the interconnection arrangements.²¹ Rather, the statute gives TWC clear and unconditional rights to interconnection and to a specific process and time frame for effectuating it. Contrary to the NCREA's and Star's assertions, those rights are not subject to any "conditions precedent"—as Star characterizes its suspension/modification request²²—but instead represent the default state of affairs. Indeed, as COMPTTEL's comments point out, a petition to suspend Section 251(b) duties based on purportedly undue economic burdens cannot even be meaningfully evaluated (much less granted) absent a completed interconnection agreement, as the burdens at issue necessarily will turn on the manner of implementation.²³ Otherwise, any suspension/modification order would be impermissibly grounded in the purported burdens associated with competitive entry, as opposed to burdens flowing specifically from the provision of resale, number portability, dialing parity, access to rights of way, or reciprocal compensation arrangements.²⁴

Moreover, treating the resolution of Star's request for suspension/modification under Section 251(f)(2) as a condition precedent to interconnection would unlawfully convert Section 251(f)(2) into a rural exemption provision, thus ignoring the critical distinction between Section 251(f)(2) and Section 251(f)(1). The Commission has made clear that Section 251(f)(2) does not operate in that manner,²⁵ and, more fundamentally, the Act does not permit the NCREA to prevent TWC from exercising its existing Section 251(b) rights based on the speculative prospect

²¹ *Id.* at 19-21.

²² Star Comments at 13.

²³ Comments of COMPTTEL, WC Docket No. 13-204, at 3 (filed Sept. 6, 2013).

²⁴ *Id.*

²⁵ *See CRC Declaratory Ruling* ¶ 23 (explaining that a primary purpose of the *CRC Declaratory Ruling* was to establish a "clear path" for "seeking implementation of . . . [the] local competition obligations under sections 251(a) and (b)" of rural incumbent LECs, which the NCREA's refusal to arbitrate negates); *see also* TWC Pet. at 17-19.

that they could be suspended or modified at some future point. Indeed, possible future decisions (by courts of appeals, Congress, etc.) always have the potential to affect interconnection arrangements, but such possibilities cannot justify a preemptive refusal to enforce the duties that are in force today. Instead, interconnection agreements routinely include change-of-law provisions to deal with such potential developments. The NCREA need only have included such a provision in an agreement between Star and TWC to address any changes resulting from its rulings in response to Star's Section 251(f)(2) petition.

Finally, as explained in TWC's petition, the NCREA's discretion under Section 252(g) to consolidate its proceeding to address TWC's arbitration request with its proceeding to address Star's suspension/modification request does not permit the agency to ignore the statutory deadlines applicable to arbitrations. To the contrary, Section 252(g) makes clear that any decision to consolidate cannot be "inconsistent with the requirements of this Act."²⁶

²⁶ 47 U.S.C. § 252(g).

CONCLUSION

For all of the foregoing reasons and those set forth in TWC's petition, TWC respectfully 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 interconnection agreement between TWC and Star pursuant to Section 252(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alexandra S. Liopiros, hereby certify that on this 20th day of September, 2013, a true and correct copy of the foregoing Petition for Preemption was served, via first-class mail, upon the following:

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Reply Exhibit 1

**NORTH CAROLINA
RURAL ELECTRIFICATION AUTHORITY
RALEIGH
Docket No. TMC-5, Sub 1**

In the Matter of
Petition of Time Warner Cable Information Services (North Carolina), LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish Interconnection Agreement with Star Telephone Membership Corporation) STAR TMC’S RESPONSE TO THE COMMENTS OF TIME WARNER CABLE INFORMATION SERVICES (NORTH CAROLINA), LLC ON THE ARBITRATOR’S RECOMMENDED ORDER

Pursuant to the Authority’s Order issued October 31, 2012, Star Telephone Membership Corporation (“Star TMC”) provides its Response to the Comments on Recommended Arbitration Order filed by Time Warner Cable Information Services (North Carolina), LLC (“TWCIS”).

TWCIS’s Comments concern the Arbitrator’s Recommended Order, which recommends that the Authority grant TWCIS’s Motion to Dismiss the Petition for Suspension or Modification filed by Star TMC on February 29, 2012. In its Petition, Star TMC requested that the Authority suspend or modify, as provided for in Section 251(f)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“the Act”),¹ any obligation to provide specific Section 251(b) interconnection arrangements requested by TWICS.

TWCIS moved to dismiss Star’s Petition, claiming that Star failed to allege a legally sufficient and cognizable claim for relief. The Arbitrator’s recommendation that the Authority grant that motion would wrongly deprive Star TMC of any opportunity to offer evidence establishing that it is entitled to the relief provided for in Section 251(f)(2). As shown in Star’s previously filed Objections and Comments, the Authority should reject the Recommended Order

¹ 47 U.S.C. §§ 151, *et seq.*

and deny the Motion to Dismiss because Star TMC's Petition states a legally sufficient claim for relief under Section 251(f)(2)

Section 251(f)(2) allows a state commission to suspend or modify the application to a small incumbent local exchange carrier ("ILEC") of any obligation to establish interconnection arrangements described in Sections 251(b) and (c) of the Act. The state commission may suspend or modify any of the said requirements if it determines that such is necessary to avoid a significant adverse economic impact on users of telecommunications services generally, or to avoid imposing a requirement that is unduly economically burdensome, and that such suspension or modification would be consistent with the public interest, convenience, and necessity.

As provided for in Section 251(f)(2), Star TMC exercised its right to petition the Authority for suspension or modification of the interconnection arrangements sought by TWCIS. Paragraph 17 of Star's Petition includes the following allegations:

[E]stablishment of arrangements for number portability pursuant to Section 251(b)(2), dialing parity pursuant to Section 251(b)(3), access to rights of way pursuant to Section 251(b)(4) and/or reciprocal compensation pursuant to Section 251(b)(5), in order to facilitate the offering of Time Warner Cable's "Digital Home Phone" and "Business Class Phone" service in Star TMC's service area would, individually and collectively, impose a significant adverse economic impact on users of Star TMC's telecommunications services generally, would impose requirements on Star TMC that are unduly economically burdensome and would be inconsistent with the public interest, convenience and necessity.

Thus, Star alleged the existence of all elements essential to state a claim for the relief made possible by Section 251(f)(2). Those allegations, which are supported by detailed allegations of matters of fact set forth in paragraphs 15-32 of Star's Petition, more than adequately state a claim for the relief available under Section 251(f)(2). Because the

Recommended Order would deny Star any opportunity to offer evidence, the Authority should reject it and direct the Arbitrator to conduct an evidentiary hearing on Star's Petition.

The TWCIS Comments which Star TMC addresses here relate to the proper interpretation of the provisions of Sections 251(f)(1) and (f)(2), and the standard to be applied by the Authority in ruling on TWCIS's Motion to Dismiss. First, Subsections 251(f)(1) and (f)(2) both include an identical criterion – that the requested interconnection arrangements not be “unduly economically burdensome” to the ILEC that is the subject of the request for interconnection. The undue economic burden criterion is the same in both these subsections of Section 251(f).

Second, in support of its request Star TMC described the Arbitrator's Recommended Decision in *Sprint v. Star TMC*. That ruling reflects the existence of relevant evidence establishing that the interconnection arrangements requested by TWCIS would impose be unduly economically burdensome as to Star TMC. Third, Star TMC's right to seek suspension or modification as provided for in Section 251(f)(2) is unaffected by the history of this docket. Fourth, TWCIS is free to take its Petition for arbitration of an interconnection agreement with Star TMC to the FCC, if it so chooses. Finally, proper application of the standard for dismissal advocated by TWCIS, and adopted the Arbitrator here, does not support dismissal of Star TMC's Petition for failure to state a claim upon which relief can be granted.

BACKGROUND

TWCIS is certificated by the North Carolina Utilities Commission to provide service as a competing local provider (“CLP”) in parts of North Carolina. Star TMC is a North Carolina telephone membership corporation existing pursuant to N.C. Gen. Stat. § 117-30. Star TMC provides local exchange telecommunications services in its service area, which covers 1,458

square miles yet includes only one incorporated area (with a population of approximately 200 residents). (Star Petition ¶ 3). As Star TMC serves “fewer than 2 percent of the Nation’s subscriber lines,” it is eligible to seek relief under Section 251(f)(2).

TWCIS seeks interconnection with Star TMC to facilitate the efforts of its affiliate, Time Warner Cable, to offer its “Digital Home Phone” and “Business Class Phone” VoIP communications service to residences and businesses located in those parts of Star TMC’s service area where Time Warner offers cable television service. Star TMC has petitioned the Authority, pursuant to Section 251(f)(2) of the Act, to suspend or modify any obligation to provide the Section 251(b) interconnection arrangements requested by TWCIS.

RESPONSES TO SPECIFIC TWCIS COMMENTS

The Not “Unduly Economically Burdensome” to the Rural ILEC Criterion in Subsections 251(f)(1) and (f)(2) Means the Same Thing in Both Subsections.

A rural ILEC such as Star TMC that seeks modification or suspension under Section 251(f)(2) must establish at least two criteria. One of those criteria is that an interconnection arrangement requested by TWCIS would impose “a requirement that is unduly economically burdensome.” Section 251(f)(2)(A)(ii). Star alleged that individually and collectively the interconnection arrangements requested by TWCIS would impose an undue economic burden upon it.

Section 251(f)(1) requires that a carrier seeking certain interconnection arrangements with a rural telephone company must secure termination of that company’s exemption under Section 251(f)(1). That is what Sprint Communications sought in *In the Matter of Petition of Sprint Communications Company L.P. for Arbitration of an Interconnection Agreement with Star*

Telephone Membership Corporation Pursuant to Sections 251(a), (b) and 252 of the Communications Act of 1934, as Amended, NCREA Docket TMC-5, Sub 2 (“*Sprint v. Star TMC*”). While Section 251(f)(1) differs from Section 251(f)(2) in several ways, both subsections include the same identically-phrased criterion relating to the extent of the economic burden that the requested interconnection would impose. Under both provisions, the rural ILEC is protected from the requested interconnection if the result would be “unduly economically burdensome.”

Under Section 251(f)(1), a competing carrier requesting interconnection has the burden of proof as to that criterion, whereas under Section 251(f)(2), the rural ILEC seeking suspension or modification has the burden of proof – that is the situation here. While the burden of proof is on a different party here than it was in *Sprint v. Star TMC*, the underlying economic burden standard is identical, and the test is the same. In other words, the “unduly economically burdensome” criterion for suspension or modification under Section 251(f)(2) is the same as the “unduly economically burdensome” criterion found in Section 251(f)(1). If Star proves that any one of the interconnection arrangements requested by TWCIS would be “unduly economically burdensome” to Star, and Star proves that a suspension or modification “is consistent with the public interest, convenience, and necessity,” then the Authority should suspend or modify the application of that requirement to Star.

TWCIS contends that “the test for an undue economic burden under Section 251(f)(2) is not the same as the test for an undue economic burden under Section 251(f)(1).” (TWCIS Comments p. 9). There no support for this contention in that statute (or elsewhere), and TWCIS’s argument on this point runs afoul of what the United States Supreme Court recognizes as a “standard principle of statutory construction” which “provides that identical words and

phrases within the same statute should normally be given the same meaning.” *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 2417, 168 L.Ed.2d 112 (2007). *See, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21, 34, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005).

In Section 251(f), Congress used the same exact phrase (“unduly economically burdensome”) in both Subsections (f)(1) and (f)(2), with absolutely no indication that this criterion was to be construed differently in 251(f)(1) than in (f)(2), or *vice versa*. To the contrary, the interrelationship and close proximity of these identical phrases at two points in Section 251(f) presents what the Supreme Court has described as “‘a classic case for application of the ‘normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.’”” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). The Supreme Court has likewise recognized that it is a “‘normal rule of statutory construction that ‘identical words used in different parts of the same act are intended to have the same meaning.’ ” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (quoting *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994)). This same rule of statutory construction has been recognized in cases interpreting and applying the provisions of the Act. *Howard v. America Online Inc.*, 208 F.3d 741, 753 (9th Cir. 2000). Simply put, there is no support for TWCIS’s argument that this criterion – that the requested interconnection arrangement not be “unduly economically burdensome” - is somehow different in Section 251(f)(2) than in 251(f)(1).

The fact that the burden of proof was on Sprint in *Sprint v. Star TMC* and is on Star here does not change the nature of this criterion or the magnitude of the burden of proof. In this case,

the Authority would be faced with the same type evidence of economic burden as was the Arbitrator in *Sprint v. Star TMC*, which will again be intended to prove that establishment of the requested interconnection arrangements with Star would be unduly economically burdensome to Star. For purposes of TWCIS's Motion to Dismiss, the point is that Star alleged the existence of directly relevant evidence supporting the existence of this Section 251(f) criterion, and the Arbitrator here recognized that that evidence would be relevant. In light of that fact alone, the Authority should deny TWCIS's Motion to Dismiss.

While Sprint had the burden of proof in the prior docket, and Star TMC has the burden of proof here, the Arbitrator's Recommended Order here improperly concludes "that the 'test' for economic burden under Section 251(f)(1) cannot be the same standard that is to be utilized in Section 251(f)(2) because otherwise, the two statutory standards would collapse into one." (Recommended Order ¶12, p. 13). With all due respect, Star submits that this statement reflects a misunderstanding of these two provisions of Section 251. There is no distinction between this criterion in the language of these two subsections of Section 251(f). Also, the Eighth Circuit Court of Appeals recognized no distinction between the "unduly economically burdensome" criteria in Section 251(f)(1) and (f)(2) when it analyzed Section 251(f) in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part on other grounds sub nom., Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) ("*IUB*"). That case involved challenges to various FCC rules relating to implementation of the Act. The rules reviewed there included FCC Rule 51.405, which interpreted the unduly economically burdensome criterion in connection with proceedings under Section 251 – including proceedings under both Section 251(f)(1) and (f)(2). As the Eighth Circuit Court of Appeals put it:

Rule 51.405 also refers to the statutory requirement that a request for interconnection, unbundled elements, or retail services for resale must not cause an undue economic burden in order to justify termination of an exemption under § 251(f)(1) or to justify the denial of a petition for suspension or modification under § 251(f)(2).

* * *

Congress provided for the granting of a petition for suspension or modification of the application of the requirements of § 251(b) or (c) if a state commission determined that such suspension or modification is necessary to avoid (1) a significant adverse economic impact, (2) imposing a requirement that is unduly economically burdensome, and (3) imposing a requirement that is technically infeasible; and is consistent with the public interest, convenience, and necessity. See 47 U.S.C. § 251(f)(2).

There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in § 251(b) or § 251(c). **Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily-granted exemption from doing so should continue unless the state commission found all three prerequisites for terminating the exemption, or determined that all prerequisites for suspension or modification were met in order to grant an ILEC affirmative relief.**

* * *

By limiting the phrase “unduly economically burdensome” to exclude economic burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. We have found no indication that Congress intended such a cramped reading of the phrase.

219 F.3d at 760-61.

Thus, Star respectfully submits that the Recommended Order is incorrect on this point, and that the unduly economically burdensome standards in Section 251(f)(1) and Section 251(f)(2) are, in fact, the same. That being the case, evidence that lead the arbitrator in *Sprint v. Star TMC* to conclude that Sprint had failed to prove that its requested interconnection would not impose an undue economic burden on Star would also support Star’s assertion here that

TWCIS's request for the same interconnection arrangements as requested by Sprint would subject Star to an undue economic burden. TWCIS's argument to the contrary is nothing more than the "cramped" reading of the Section 251(f) protections for small telephone companies that the Eighth Circuit rejected in *IUB*. *IUB* tells us that the test for whether an interconnection arrangement would be unduly economically burdensome is the same in both Section 251(f)(1) and (f)(2).

While several aspects of Section 251(f)(1) and (f)(2) are different (*e.g.*, the competitor seeking interconnection has the burden of proof under 251(f)(1); the rural telephone company has the burden of proof under 251(f)(2)); the undue economic burden analysis is the same under both provisions. Star has the burden of establishing that one or more of the Section 251(b) interconnection arrangements which TWCIS requested would be unduly economically burdensome on Star. The Recommended Order in this docket recognizes this concept:

[The] most compelling interpretation of Section 251(f)(2) is that its showing of undue economic burden under Section 251(f)(2) must relate to the particular burden to be posed by a specific Section 251(b) requirement (or requirements) as opposed to generalized notions of burden unconnected to any particular obligation in Section 251(b).

(Recommended Order ¶13, pp. 13-14). This is correct, but absent the opportunity to offer evidence supporting its allegation of undue economic burden, Star is prevented from even attempting to meet its burden of proof.

The Relevance of the Recommended Decision in *Sprint v. Star TMC*.

TWCIS asserts the following in its Comments: "TWCIS (NC) generally agrees with the Arbitrator that the Authority's Recommended Decision in a separate *Sprint v. Star TMC* proceeding is not persuasive authority in this case and need not be considered here." (TWCIS Comments p. 3). Star submits that this statement is neither correct nor consistent with the

would be unduly economically burdensome on Star.

Star also does not contend that Judge Moore's Recommended Decision in *Sprint v. Star TMC* constitutes some sort of binding authority that is controlling in this case. Instead, the point of Star's allegations as to the Recommended Decision in that docket is to buttress its allegation that the interconnection arrangements requested by TWCIS would impose an undue economic burden on Star TMC. Star did so by pointing out that in a prior arbitration proceeding initiated by another carrier (Sprint) that sought the *exact same interconnection arrangements* with Star TMC that TWCIS now seeks, the Arbitrator concluded that Sprint failed to establish that its requested interconnection with Star would not impose undue economic burden on Star. Star included allegations as to the arbitrator's decision in that proceeding because Judge Moore's Recommended Decision forecasts the production of evidence by Star in this docket sufficient to meet its burden of proof as to one of the elements that Star must establish in order to secure a suspension or modification - that the interconnection arrangements requested by TWCIS would impose an undue economic burden.

Star's Petition for suspension or modification includes the following allegations in paragraph 24 regarding Judge Moore's Recommended Decision:

The Recommended Decision in *Sprint v. Star TMC* reflects a finding that the effects of the interconnection arrangements sought by Sprint there (which are effectively the same as what is sought by TWCIS here) will dramatically reduce the revenues, net income and return on investment of Star TMC, to the detriment of its ability to continue to make the investments and expenditures necessary to provide the quality service it currently provides and to maintain the benefits of universal service in its service territory. This evidences the fact that requiring the interconnection arrangements sought in order to facilitate Time Warner Cable's offering of its services in Star TMC's service territory would impose an economic burden on Star TMC and be inconsistent with the public interest. This finding also supports a finding here that the interconnection sought by TWCIS would cause "a

significant adverse economic impact on users of telecommunications services generally." See Section 251(f)(2)(A)(i). The detrimental effects on Star TMC recognized in that Recommended Decision would cause a significant adverse economic effect on Star TMC's customers, who will face higher rates for services, thereby increasing the market price for services, and customers in the more remote portions of Star TMC's service territory would be at risk for even higher costs, service reductions or loss of service.

The bottom line on this point is that, in its Petition, Star TMC has not only alleged the existence of the criteria for suspension or modification under Section 251(f)(2), one of which is that the interconnection arrangements requested by TWCIS would be unduly economically burdensome as to Star TMC; Star has also alleged the existence of matters of fact which tend to support its allegations. One of the matters of fact alleged springs from the fact that in a virtually identical arbitration proceeding, the arbitrator evaluated extensive data concerning Star's line losses, revenue losses, expenses and overall financial condition and concluded that the requested interconnection would dramatically reduce the revenues, net income and return on investment of Star TMC, thereby creating an undue economic burden on Star. Star TMC respectfully asserts that its submission of the same type evidence here as brought forward in *Sprint v. Star TMC* will allow it to meet its burden of proving that establishment of one or more of the interconnection arrangements requested by TWCIS will result in an undue economic burden. At a minimum, however, Star should not be deprived of the opportunity to make this argument and present this evidence to support it. Adoption of the Recommended Order, however, would do just that.

In a related argument, TWCIS contends "the Recommended Order properly contextualizes the Recommended Decision in the *Sprint v. Star TMC* proceeding as irrelevant to the instant case." (TWCIS Comments p. 11). This claim is neither accurate nor supportable. Contrary to

TWCIS's claim, the Recommended Order explicitly acknowledged the potential relevance of the evidence of undue economic burden described in Star's Petitions:

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

(Recommended Order n. 3, p. 17). Thus, the Recommended Order recognizes that the prior finding that the same interconnection arrangements requested by TWCIS would be unduly economically burdensome to Star could "be relevant to a claim by Star under Section 251(f)(2)," but recommends that TWCIS's Motion to Dismiss be granted. Recognition of the relevance of *Star TMC v. Sprint* is inconsistent with the notion that Star's Petition fails to state a claim upon which relief may be granted, or that Star "failed to plead facts sufficient to support a claim for suspension or modification as necessary to avoid certain specified harms resulting from particular Section 251(b) duties." (TWCIS Comments p. 8). Star should be allowed to offer evidence in this matter, instead of its request for relief being prematurely and summarily disposed of.

In *Sprint v. Star TMC*, Sprint sought to establish interconnection with Star TMC for the same reason that TWCIS seeks interconnection - to facilitate Time Warner Cable's effort to offer "Digital Home Phone" and "Business Class Phone" services to in parts of Star's service area. The findings recommended by Judge Moore in *Sprint v. Star TMC*, and the evidence recited in his Recommended Decision, document the fact that requiring the interconnection arrangements sought by TWCIS would impose an undue economic burden on Star TMC and be inconsistent with the public interest. The findings and analysis set forth in Judge Moore's decision also show that there would be evidence supporting a finding here that one or more of the arrangements sought by TWCIS would cause "a significant adverse economic impact on users of telecommunications

services generally." Star's Petition states a legally sufficient claim for that relief and the Authority should deny TWCIS's Motion to Dismiss and direct that Star TMC's Petition be set for hearing.

Star TMC's Right to Seek Suspension or Modification as Provided for in Section 251(f)(2) of the Act is Unaffected by the History of this Docket.

TWCIS attempts a rhetorical sleight of hand in arguing that "Star TMC has effectively already obtained a *de facto* exemption of its obligations under Section 251(b) for more than seven years," as if the history of this proceeding would somehow deny Star the ability to assert its rights under Section 251(f)(2). (TWCIS Comments p. 11). Nothing could be further from the truth. Proceedings in this docket to date, as shown by the various court and regulatory decisions consistent with and supporting the Authority's proceedings in this docket, have involved litigation of legitimate legal issues arising under Section 251(f)(1) of the Act.

TWCIS summarily asserts that "it's not in the public interest, convenience or necessity" to prolong TWCIS's proposed competitive entry." (TWCIS Comments pp. 11-12). Whether suspension or modification would be consistent with the public interest, convenience, and necessity is one of the criterion for relief under Section 251(f)(2), and it is a determination to be made by the Authority. It is presumptuous for TWCIS to assert that the public interest would be best served by denying Star TMC its statutorily-provided right to pursue suspension or modification under Section 251(f)(2). Star has the burden of establishing that its requested suspension or modification would be consistent with the public interest, convenience, and necessity. The proper forum and means for determining whether that would be consistent with the public interest, convenience, and necessity is through an evidentiary hearing.

TWCIS's argument ignores the balance struck in the Act, and the important public interests intended to be protected by Section 251(f)(2). TWCIS suggests that it would be contrary to the public interest to allow Star the opportunity to prove the criteria required for suspension or modification of one or more of the Section 251(b) interconnection arrangements sought by TWCIS. While one of the Act's goals is to promote competition, that is not the Act's sole goal. As the Eighth Circuit noted in *IUB*, "Congress enacted § 251(f) to relieve the small and rural ILECs from some of the obligations imposed by other subsections of § 251." 219 F.3d at 759. Congress enacted the protections found in Sections 251(f)(1) and (f)(2) to provide some protection for rural and smaller ILECs from the worst and most undesirable potential consequences of competition. The Eighth Circuit Court of Appeals also recognized in *IUB* that Section 251(f)(1) and (f)(2) are part of "the broad protection Congress granted to small and rural telephone companies." 219 F.3d at 761. Inclusion in the Act of protections for rural and small ILECs shows that promoting "competition" is not the Act's only objective.

TWCIS is Free to Take its Petition for Arbitration to the FCC.

TWCIS argues that the procedural history of this proceeding, and its various twists and turns, including dismissal, an appeal by TWCIS two years later, subsequent remand from federal court the following year, and other events since then, is somehow "compounding the violation" of TWCIS' rights under 47 USC §252(b)(4)(C) to have had a decision in this docket within nine months of its commencement. As previously noted, during this period Star has litigated legitimate legal issues concerning Section 251(f), which issues have been the subject of similar litigation across the country. The issues raised and the positions advocated by Star were supported by and consistent with the decisions of other state commissions and federal courts

addressing issues arising under Section 251(f).

Pursuant to Section 252(e)(5), TWCIS has been free for years to take its request for arbitration of interconnection arrangements with Star TMC directly to the FCC. Simply put, if TWCIS believes that its rights have been violated by the historic proceedings in this docket, it is and has been for some time free to pursue relief with the FCC. The Authority's approach to the issues arising from TWCIS's request that Star TMC's rural exemption be terminated was consistent with federal court decisions and the decisions of other state commissions, including, but not limited to, those of the North Carolina Utilities Commission cited in previous pleadings and orders in this docket.

Pejorative characterizations as to the motivations for Star's assertion of good faith arguments as to its rights under the Act serve no purpose, other than to explain TWCIS' feverish efforts to now deny Star TMC its right to offer evidence as to the criteria for suspension or modification set forth in Section 251(f)(2). The reality is that arbitration proceedings before the Authority, the North Carolina Utilities Commission and other State Commissions have routinely taken longer than the nine month statutory period. While inconsistent with language of that provision of the Act, that is the reality. TWCIS can at any time choose to invoke the FCC's authority under Section 252(e)(5) and the Authority should not be cowed by TWCIS' grumbling in this regard. TWCIS is free to attempt to avail itself of that course of action at any time, if it is, in fact, so inclined.

Under the Legal Standard for Dismissal Advocated by TWCIS, and Adopted by the Arbitrator, TWCIS's Motion to Dismiss Should be Denied.

TWCIS includes the following statement in its Comments:

TWCIS (NC) agrees with the Arbitrator's articulation of legal standard to

be applied to TWCIC (NC)'s Motion to Dismiss Section 251(f)(2) Petition. As set forth in the Recommended Order, under accepted principles of judicial pleading, to survive a Motion to Dismiss a party must state enough to satisfy the substantive elements of at least some legally recognized claim.

(TWCIS Comments p. 8).

In its Motion to Dismiss, TWCIS argued that the Authority should apply the same standard that a North Carolina civil court would apply in ruling on a motion to dismiss a civil suit under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. (Recommended Order ¶7). TWCIS's argument on this point is addressed in Star's Objections and Comments, which Star incorporates here by reference. Under North Carolina decisions applying those civil rules, the allegations in Star TMC's Petition are more than sufficient to state a claim upon which relief may be granted. Thus, TWCIS's Motion to Dismiss should be denied.

Under well-settled North Carolina law, the allegations in Star's Petition must be deemed true, those allegations must be liberally construed, and the Petition should not be dismissed "unless it appears beyond a doubt that [Star TMC] could not prove any set of facts to support [its] claim...." *Stunzi v. Medlin Motors, Inc.*, ___ N.C. App. ___, 714 S.E.2d 770, 773-74 (2011). Simply put, under North Carolina appellate court decisions concerning motions to dismiss (which is the standard TWCIS has advocated), Star TMC's Petition is not properly dismissed.

First, Section 251(f)(2) of the Act affirmatively provides for suspension or modification – which is the relief sought by Star. Second, Star's Petition alleges the existence sufficient facts to support the essential elements of a claim for relief under Section 251(f)(2). Third, Star's Petition does not disclose any facts that "necessarily defeat" Star's request for suspension or modification. Under the standard recognized in *Stunzi v. Medlin Motors, Inc.*, *surpa*, the

Authority should not dismiss Star’s Petition “unless it appears beyond a doubt that [Star] could not prove any set of facts to support [its] claim.” Even TWCIS cannot credibly contend that it is “beyond a doubt” that Star could not prove the elements necessary for suspension or modification under Section 251(f)(2) of one or more of the interconnection arrangements it seeks. As explained in its Objections and Comments, Star respectfully submits that under North Carolina cases applying Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, Star TMC’s Petition more than adequately states a claim for relief that can be granted under Section 251(f)(2).

TWCIS argues that Star seeks a “generalized exemption” from competition, and claims that Star has “failed to plead facts sufficient to support a claim for suspension or modification as necessary to avoid certain specified harms resulting from particular Section 251(b) duties.” (TWCIS Comments p. 8). TWCIS bases this argument on its assertion that Star TMC has not identified which specific interconnection duties under Section 251(b) will cause the specific harm alleged in Star’s Petition. This argument exalts form over substance, as Star has clearly identified in its Petition the four interconnection arrangements requested by TWCIS: number portability, dialing parity, access to rights-of-way, and/or reciprocal compensation. (Star TMC Petition ¶ 17). In its Petition Star alleges the following:

[E]stablishment of these requested interconnection arrangements would, individually and collectively, impose a significant adverse economic impact on users of Star TMC’s telecommunication services generally, would impose requirements on Star TMC that are unduly economically burdensome and would be inconsistent with the public interest, convenience and necessity.

(Star TMC Petition ¶ 17).

While TWCIS argues that Star “has not claimed which interconnection duties will cause this supposed harm, as it is required to do,” in paragraph 17 of its Petition Star alleged that the establishment of the four interconnection arrangements sought by TWCIS would “individually and collectively,” cause the harms specified in Section 251(f)(2). For purposes of pleading, Star TMC has provided more than adequate notice to TWCIS that Star contends that those four interconnection arrangements, either individually or collectively, will impose a significant adverse economic impact on the users of Star’s telecommunication services generally, or would impose requirements on Star TMC that are unduly economically burdensome and would be inconsistent with the public interest, convenience, and necessary. Those are the criteria for suspension and modification under Section 251(f)(2). Having sufficiently alleged matters of fact to support the claims in its Petition (See ¶¶ 3, 6 and 15-31), Star has stated a claim on which relief can be granted.

Star’s allegation that the Authority should suspend or modify any obligation of Star to provide **all of** the Section 251(b) arrangements requested by TWCIS does not preclude relief to Star as to **some or all of** those obligations, provided Star meets its burden of proving the Section 251(f)(2) criteria **as to each**. Obviously, if Star met its burden of proof as to some of the requested arrangements, but not as to others, then the Authority could only suspend or modify those arrangements as to which Star meets its burden of proof.

The fact that Star requests suspension or modification as to all of the arrangements requested by TWCIS does not somehow foreclose relief for Star as to any of the requested arrangements. The determining factor can only be whether, either “individually or collectively, one or more of the interconnection arrangements requested by TWCIS would impose an undue

economic burden on Star and be contrary to the public interest, convenience and necessity.” The Recommended Order recognized this concept.

The analysis set forth in Section 251(f)(2) must be conducted individually as to each of the Section 251(b) obligations sought to be suspended or modified, and Section 251(f)(2) requirements cannot be satisfied based merely on assertions to the effect that fulfillment of the obligation will facilitate ruinous competition. A two percent ILEC making such a claim has the burden of proving it.

(Recommended Order ¶ 16, p. 16).

This statement supports the point that Star should not be precluded from an opportunity to offer evidence intended to establish that each of the requested interconnection arrangements should be suspended or modified; whether all, some, or none of those requirements were ultimately suspended or modified by the Authority would depend on the proof brought forward by Star. The Recommended Order both recognizes that Star would have the burden of proof in order to secure modification or suspension under Section 251(f)(2), but then recommends granting TWCIS’s Motion to Dismiss, which would deny Star any opportunity to attempt to meet its burden of proof.

CONCLUSION

Based on the foregoing, Star TMC respectfully requests that the Authority enter its order rejecting the Recommended Order, denying TWCIS’s Motion to Dismiss, suspending enforcement of the requirement or requirements to which Star’s Petition applies, pending resolution of Star’s Petition, and directing the Arbitrator to schedule Star’s Petition for evidentiary hearing.

Respectfully submitted, this the 21st day of December, 2012.

BURNS, DAY & PRESNELL, P.A.

By:


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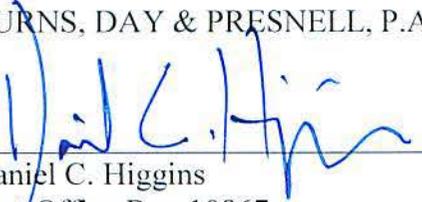
CERTIFICATE OF SERVICE

It is hereby certified that a true and exact copy of the foregoing Response of Star Telephone Membership Corporation was served this day by e-mailing same to counsel for Time Warner Cable Information Services (North Carolina), LLC.

This the 21st day of December, 2012.

BURNS, DAY & PRESNELL, P.A.

By:


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