

**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	)	

**PETITION FOR ARBITRATION**

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January 27, 2014

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**PETITION FOR ARBITRATION**

Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended (the “Act”), and the recent *NCREA Preemption Order* issued by the Wireline Competition Bureau in the above-referenced proceeding,<sup>1</sup> Time Warner Cable Information Services (North Carolina), LLC (“TWCIS”) files this petition for arbitration (“Petition”) requesting resolution of the issues arising between TWCIS and Star Telephone Membership Corporation (“Star”) in the arbitration and execution of an interconnection agreement (“ICA”). In support of the Petition, TWCIS states as follows:

**THE PARTIES**

1. TWCIS is a limited liability company organized under the laws of the State of Delaware, maintaining its principal place of business at 60 Columbus Circle, New York, NY 10023.

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<sup>1</sup> 47 U.S.C. § 252(e)(5); *Petition of Time Warner Cable Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the North Carolina Rural Electrification Authority Regarding Arbitration of an Interconnection Agreement with Star Telephone Membership Corporation*, Memorandum Opinion and Order, WC Docket No. 13-204, DA 13-2117 (WCB rel. Nov. 1, 2013) (“*NCREA Preemption Order*”).

2. TWCIS, a wholly owned subsidiary of Time Warner Cable Inc. (“Time Warner Cable”), is a competitive local exchange carrier (“CLEC”), certificated to provide competitive, facilities-based telecommunications services in the telephone exchanges served by Star.

3. Star is an incumbent local exchange carrier (“ILEC”) as defined in 47 U.S.C. § 251(h) and is certificated to provide telecommunications services in the State of North Carolina.

4. The name, address, email address, telephone number, and facsimile number for Star’s representatives regarding TWCIS’s request for interconnection have been:

Lyman Horne  
STAR TELEPHONE MEMBERSHIP CORPORATION  
P.O. Box 348  
Clinton, NC 28329  
lmhorne@stmc.net  
(T): (910) 564-4194  
(F): (910) 564-4199

and

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Post Office Box 10867  
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5. TWCIS’s designated representatives in this proceeding are as follows:

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6. TWCIS intends to rely on (i) Terri Natoli, Vice President, Regulatory Affairs for Time Warner Cable; (ii) Julie P. Laine, Group Vice President and Chief Counsel, Regulatory, for Time Warner Cable; and (iii) Maribeth Bailey, Senior Director, Interconnection Policy, Regulatory, for Time Warner Cable to support its position on each of the unresolved issues.

### **JURISDICTION**

7. The Commission has jurisdiction over TWCIS's Petition pursuant to Section 252(e)(5) of the Act and the *NCREA Preemption Order*. Under the Act, parties to a negotiation for an ICA within a particular state have a right to petition the relevant state commission for arbitration of any open issues when negotiations fail to yield an agreement.<sup>2</sup> Where, as here, the state commission "has failed to act to carry out its responsibility under section 252" to arbitrate an ICA,<sup>3</sup> Section 252(e)(5) of the Act directs the Commission to "assume the responsibility of the State commission ... and act for the state commission."<sup>4</sup> The Commission has done so here,

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<sup>2</sup> 47 U.S.C. § 252(b).

<sup>3</sup> *NCREA Preemption Order* ¶ 25.

<sup>4</sup> 47 U.S.C. § 252(e)(5).

exercising its authority under Section 252(e)(5) to preempt the NCREA's authority to arbitrate the unresolved issues between TWCIS and Star.<sup>5</sup>

### **BACKGROUND AND HISTORY OF NEGOTIATIONS**

8. TWCIS's efforts to obtain interconnection and exchange local traffic with Star have been well-documented in this proceeding, including in Time Warner Cable's petition for preemption (and the voluminous exhibits thereto) and in the *NCREA Preemption Order*.<sup>6</sup> Due to their voluminous nature, TWCIS hereby incorporates those facts and exhibits by reference, as well as the Wireline Competition Bureau's factual findings.

9. In short, beginning in October 2005, TWCIS sought to initiate negotiations for ICA terms related to direct or indirect network interconnection, number portability, dialing parity, and the reciprocal exchange of local traffic pursuant to a "bill and keep" arrangement.<sup>7</sup> As part of these efforts, TWCIS provided Star with a proposed ICA template and asked Star to respond to its substantive terms.<sup>8</sup> For over eight years, Star steadfastly refused to engage in any discussions regarding an ICA with TWCIS.

10. Following the release of the *NCREA Preemption Order* on November 5, 2013, TWCIS renewed its request that Star respond to TWCIS's ICA template and, more broadly, that

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<sup>5</sup> *NCREA Preemption Order* ¶¶ 25-27.

<sup>6</sup> See Petition for Preemption, WC Docket No. 13-204, at 2-10 (filed Aug. 8, 2013) ("Preemption Petition"); *NCREA Preemption Order* ¶¶ 6-11.

<sup>7</sup> See Preemption Petition at 3 & Exh. 1.

<sup>8</sup> See *id.* at Exh. 1, Attach. 5; TWCIS (NC)'s Responses to Star TMC's First Data Requests, Docket No. TMC-5, Sub 1 (filed June 4, 2013), Data Response 1 excerpted and attached hereto as Exhibit A; Letter from Marcus W. Trathen, Local Counsel to Time Warner Cable, to Daniel C. Higgins, Counsel to Star (Nov. 5, 2013) (Enclosure) ("November 5 Letter"), attached hereto as Exhibit B.

Star agree to discuss TWCIS's ICA template with the goal of reducing the burdens associated with the impending arbitration, or even eliminating the need for an arbitration altogether.<sup>9</sup>

11. On December 6, 2013, Star's counsel responded to TWCIS's request by providing a mark-up of TWCIS's ICA template.

12. On December 17, 2013, TWCIS provided Star with a further mark-up of the ICA template in which it agreed to some of Star's proposals in the interest of limiting the disputed issues between the parties. On December 18, 2013, counsel for the parties met via conference call to identify and discuss unresolved issues based on their exchanges of drafts to that point. Subsequently, the parties agreed to extend the deadline for filing an arbitration petition for 30 days, in order to permit continued negotiations. However, Star did not provide a further mark-up indicating its positions on updated terms proposed by TWCIS until January 20, 2014. On January 24, 2014, TWCIS informed Star of its intention to proceed with arbitration to resolve the remaining open issues.<sup>10</sup>

#### **STATEMENT OF UNRESOLVED ISSUES AND RELEVANT AUTHORITY**

13. A copy of the current draft of the ICA being negotiated by the parties is attached hereto as Exhibit C.<sup>11</sup> Language to which both parties have assented appears in black.<sup>12</sup>

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<sup>9</sup> See November 5 Letter at 2.

<sup>10</sup> Notably, negotiations between Star and TWCIS did not commence until after the Commission preempted the authority of the NCREA, and in Star's most recent mark-up of the draft ICA, Star exhibited no willingness to compromise regarding the issues described below. Accordingly, TWCIS has chosen to move forward with this Petition, but TWCIS remains willing to negotiate further with Star in an attempt to resolve open issues and will endeavor to do so.

<sup>11</sup> The ICA is cited herein as "TWCIS-Star Draft ICA."

<sup>12</sup> The language appearing in black thus represents the "issues that have been resolved by the parties." Public Notice, *Procedures Established for Arbitration of an Interconnection Agreement Between Time Warner Cable Information Services and Star Telephone Membership Corporation*, DA 14-87, at 2 (rel. Jan. 27, 2014).

Language proposed by TWCIS to which Star does not agree appears in blue. Language proposed by Star to which TWCIS does not agree appears in red with a strikethrough. For ease of reference, each unresolved issue is presented below, including the disputed language as described above, in the order in which the issue is first presented in the TWCIS-Star Draft ICA.

14. TWCIS requests that the Commission arbitrate each of the issues identified below. With respect to each of the unresolved issues, TWCIS is not aware of any proceeding pending before the Commission or the NCREA related to any of the unresolved issues with the exception of the ongoing suspension/modification proceeding related to Star's Section 251(b) obligations more generally or as set forth below.

**ISSUE 1: TERM OF ICA**

15. Issue 1 concerns the length of the initial term of the ICA. TWCIS has proposed an initial term of three years for the ICA with Star. Star has insisted on a term of only one year.

16. The disputed language is as follows:

Term. This Agreement shall be effective as of the Effective Date and, unless cancelled or terminated earlier in accordance with the terms hereof, shall continue in effect until ~~one~~ **three** (~~1~~ **3**) ~~year~~ **years** after the Effective Date (the "*Initial Term*")

...<sup>13</sup>

17. An initial ICA term of only one year would be unreasonable and contrary to standard industry practice. Given the time it typically takes to establish network interconnection and the exchange of local traffic after an ICA becomes effective (up to six months or more in many cases), a one-year term would enable Star to force TWCIS (and the Commission) into a

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<sup>13</sup> TWCIS-Star Draft ICA, General Terms and Conditions § 1.2.

new arbitration mere months after the ICA is fully effectuated. In such circumstances, the Commission and the parties would be required to arbitrate a new ICA right on the heels of this proceeding, for no sound reason, and any new arbitration following so closely after this one would not even present a meaningful picture of how effectively the previous ICA operated. The upshot of terminating the agreement just one year after it became final would be to impose unreasonable and unnecessary burdens on all involved. In contrast, a three-year initial term would provide greater certainty and would enable the parties to exchange local traffic for a reasonable period of time before either party could initiate arbitration for a new agreement. Put another way, an initial term of three years would allow the parties sufficient time to establish a productive business relationship and work out any implementation issues arising from the initial ICA before resorting to a new arbitration proceeding and imposing the resulting burdens on the Commission and the parties.

18. Moreover, given the significant delays TWCIS experienced in the years preceding the instant arbitration as a result of Star's repeated efforts to avoid compliance with its statutory interconnection duties, TWCIS submits that an initial ICA term of three years is appropriate, as it would give the parties an opportunity to bring years of protracted litigation to a meaningful close. In contrast, given Star's stated unwillingness to interconnect absent regulatory compulsion, a one-year term would provide only a brief respite before litigation would resume once again. TWCIS therefore submits that a one-year initial term would not be "just and reasonable" as required under Sections 201 and 202 of the Act,<sup>14</sup> and urges the Commission to adopt a three-year initial term.

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<sup>14</sup> 47 U.S.C. §§ 201(b), 202(a).

**ISSUE 2: AUTOMATIC TERMINATION FOR FAILURE TO MAKE TIMELY PAYMENT**

19. Issue 2 concerns whether the parties' ICA should automatically terminate in the event of an unresolved billing dispute. Star has insisted on a right of automatic termination in the event a party fails to satisfy an overdue balance within 45 days of receiving notice from the other party of the deficiency. TWCIS has proposed language that would allow the billing party to initiate termination procedures under the default section of the ICA in such circumstances.

20. The disputed language is as follows:

If any payment is not made when due, the Billing Party may send a written notice (the "*Failure to Pay Notice*") to the Billed Party that provides the following: ...

notice that if payment is not received within forty-five (45) days of the date of this Failure to Pay Notice, ~~that this Agreement will automatically terminate~~ **the Billing Party is entitled to invoke the termination procedures under Section 1.6 of this Agreement.**<sup>15</sup>

21. In TWCIS's view, neither party should be exposed to the risk that the ICA would be deemed to have terminated *automatically* merely because some (potentially *de minimis*) invoice was inadvertently not paid within the relevant deadline. As an initial matter, it is highly unlikely that either party will accrue any significant monetary obligations to the other party under the proposed ICA terms relating to compensation. Indeed, under undisputed ICA provisions, the parties will exchange local traffic using a bill-and-keep arrangement, and any interstate or intrastate access charges are outside the scope of the ICA. Based on the foregoing,

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<sup>15</sup> TWCIS-Star Draft ICA, General Terms and Conditions §§ 6.3.1, 6.3.1.3.

Star's proposed language would supply a draconian remedy that is grossly disproportionate to the very limited financial harm that either party is likely to incur as a result of any late payment. Moreover, Star's proposal would punish North Carolina *consumers* for a party's failure to timely remit payments due, no matter the amount, and effectively would terminate (at least temporarily) a party's Section 251 obligations to the other party. The Act does not provide for any such termination. To the extent that one party fails to timely respond to a notice of an overdue balance, the billing party should be allowed to invoke the default procedures found in Section 1.6 of the ICA, but in the meantime, the ICA should remain effective. Accordingly, TWCIS urges the Commission to reject the language proposed by Star and to adopt TWCIS's proposed language that would avoid automatic termination of the ICA.

**ISSUE 3: COMPLIANCE WITH STATE UNIVERSAL SERVICE FUND REQUIREMENTS**

22. Issue 3 concerns Star's proposal to include language regarding TWCIS's obligation to participate in the North Carolina universal service fund or any state universal service fund that one day may be adopted in North Carolina.

23. The disputed language is as follows:

~~CLEC shall participate, in any fund or plan established by the NCREA or other state commission with jurisdiction as to CLEC, designed to support universal service in North Carolina, in accordance with the rules, regulations or orders of the NCREA or any other state commission with jurisdiction as to CLEC. If CLEC provides wholesale services to any third-party service provider in ILEC's service area (i.e., a last mile provider), then CLEC shall~~

~~implement procedures to ensure that any such contributions are paid by such third-party.~~<sup>16</sup>

24. The language as proposed by Star is superfluous and potentially would impose obligations that contradict TWCIS's duties under state law. To the extent that TWCIS has a legal duty to contribute to a state universal service support mechanism, it must do so irrespective of its ICA with Star. The ICA should no more recite independently applicable legal obligations to which TWCIS is subject than it should reiterate each of Star's legal obligations, such as its interconnection duties. Further, Star's proposed language could be read to require TWCIS to contribute to any state universal service fund regardless of whether the applicable rules require such contributions by TWCIS. Relatedly, Star's proposal would require TWCIS to "ensure" that any universal service contributions are "paid" by any wholesale customers served by TWCIS, which would seem to impose a substantive funding requirement on TWCIS (and/or TWCIS's wholesale customers) irrespective of what the law provides. At bottom, Star's proposed language seems nothing more than a blatant attempt to use the arbitration process to extract a commitment from TWCIS regarding unrelated regulatory obligations that have no bearing on the ICA. Moreover, there is no legal or policy basis for requiring a competitive carrier (and any wholesale customers it may have) to participate in state subsidy programs as a *condition* of obtaining interconnection—a federal right granted to TWCIS under Section 251 of the Act. Indeed, the North Carolina Utilities Commission ("NCUC") has rejected nearly identical language proposed by another rural North Carolina local exchange carrier ("LEC") in an arbitration with TWCIS.<sup>17</sup>

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<sup>16</sup> *Id.* § 25.4.

<sup>17</sup> *Petition for Arbitration of Time Warner Cable Information Services (North Carolina), LLC, of an Interconnection Agreement with Pineville Telephone Company Pursuant to*

25. Including a universal service fund requirement in an arbitration proceeding (as opposed to a proceeding of general applicability in which all parties similarly situated to TWCIS would be treated the same and have the same obligations) also would violate Sections 201 and 202.<sup>18</sup> ICAs are not the appropriate vehicle for debating policy issues that apply on an industry-wide basis. And, as noted above, Star’s proposed language has nothing to do with the matters at issue in this proceeding—the terms pursuant to which the parties will interconnect their networks and exchange local traffic. Accordingly, because Star’s proposed language falls outside the scope of Section 251 and could single out TWCIS for disadvantageous treatment vis-à-vis other CLECs, it could not be considered “just and reasonable” or nondiscriminatory and should be rejected.

#### **ISSUE 4: INDIRECT INTERCONNECTION**

26. Issue 4 concerns language proposed by Star that would require the point of interconnection (“POI”) to be located on Star’s network and thus could negate TWCIS’s right to rely on indirect interconnection pursuant to Section 251(a).

27. The disputed language is as follows:

- POINT OF INTERCONNECTION (POI).

“Point of Interconnection” or “POI” means the physical location ~~on ILEC’s network~~ mutually agreed upon and designated by the Parties for the purpose of exchanging

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*Section 252(b) of the Communications Act of 1934, as Amended, Docket No. P-1262, Sub 5, 2012 N.C. PUC LEXIS 845, at \*36-37 (N.C. Utils. Comm’n June 1, 2012) (agreeing that “Pineville’s proposed [language] concerning contributions by TWCIS (NC) to any future universal service fund is not appropriate for inclusion in the ICA between the parties,” because “the ICA ... should address only interconnection issues between TWCIS (NC) and Pineville” and “the language proposed by Pineville is outside the scope of the interconnection relationship”).*

<sup>18</sup> 47 U.S.C. §§ 201(b), 202(a).

traffic in the event of either direct or indirect interconnection. Each Party shall be responsible for all facilities and costs on its respective side of the POI.

~~For purposes of this Agreement, the POI is defined as the mid-span meet point where ILEC's facilities connect with the CenturyLink facilities connected to CenturyLink's Fayetteville tandem, or at some other mutually agreed upon technically feasible location on ILEC's network.~~<sup>19</sup>

- ILEC shall provide Interconnection for CLEC's facilities and equipment for the transmission and routing of Telecommunications Traffic and Interconnected VoIP Service Traffic ~~at any technically feasible point within the ILEC's existing network~~ at a level of quality equal to that which ILEC provides itself, a Subsidiary or Affiliate, if any, and any other party to which ILEC provides Interconnection, and on rates, terms and conditions that are just, reasonable and non-discriminatory. ILEC will not impose any restrictions on CLEC that are not imposed on its own

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<sup>19</sup> TWCIS-Star Draft ICA, Glossary § 2.43.

traffic with respect to trunking and routing options afforded to CLEC.<sup>20</sup>

- ILEC's network includes, but is not limited to, End Office switches that serve IntraLATA, InterLATA, and Local/EAS traffic. ~~CLEC will interconnect with ILEC at any technically feasible point within the ILEC's existing network.~~<sup>21</sup>
- ~~A Point of Interconnection (POI) is a technically feasible point within ILEC's network where the Parties deliver Local/EAS Traffic to each other and also~~ **The POI shall** serve as a demarcation point between the facilities that each Party is responsible to provide. ~~CLEC~~ **The Parties** must establish a minimum of one (1) POI at any **mutually agreed upon** technically feasible ~~location point on ILEC's network.~~ In addition, CLEC ~~shall~~ **may** establish additional POIs under the following circumstances:  
...<sup>22</sup>
- Regardless of the number of Location Routing Numbers (LRNs) used by a CLEC in a LATA, ILEC will route traffic destined for CLEC's End-User

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<sup>20</sup> *Id.*, Interconnection Attachment § 2.1.3.

<sup>21</sup> *Id.* § 2.2.1.

<sup>22</sup> *Id.* § 2.2.2.

Customers via direct trunking where direct trunking has been established. In the event that direct trunking has not been established, such traffic shall be routed to the POI, ~~which shall in all events be on the ILEC's~~ **network.**<sup>23</sup>

28. TWCIS and Star have discussed the possibility of interconnecting their networks either directly or indirectly (through CenturyLink's Fayetteville, North Carolina tandem switch). Although Star has agreed to include some language in the ICA that purports to acknowledge the parties' ability to utilize indirect interconnection,<sup>24</sup> Star has proposed other language that would require the parties' POI to be located "in all events" on Star's network.<sup>25</sup> Such language would effectively nullify TWCIS's right to indirect interconnection, despite Section 251(a)'s clear mandate that telecommunications carriers interconnect either "directly or indirectly,"<sup>26</sup> as requiring the parties to interconnect at a point on Star's network would seem to preclude any agreement to designate the CenturyLink tandem office (or any other such location) as the POI. Moreover, it is common practice throughout the industry to establish indirect interconnection as the means of exchanging local traffic unless and until the traffic exchanged between the interconnecting parties equals or exceeds 240,000 minutes (DS1) each month for a period of three consecutive months. Because TWCIS does not expect to exchange such volumes of traffic with Star, including language in the ICA that would compel direct interconnection has the potential to waste the resources of both parties and create a barrier to competition. Star's

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<sup>23</sup> *Id.*, Local Number Portability Attachment § 2.5.

<sup>24</sup> *See, e.g., id.*, Interconnection Attachment §§ 3.3.1-3.3.3.

<sup>25</sup> *Id.*, Local Number Portability Attachment § 2.5.

<sup>26</sup> 47 U.S.C. § 251(a).

language requiring that the POI be defined as a point on Star's network therefore should be rejected.

**ISSUE 5: ALLOCATION OF TRANSPORT/TRANSIT CHARGES IMPOSED BY A THIRD PARTY**

29. Issue 5 concerns Star's proposal to compel TWCIS to pay any transport or transit charges imposed by a third-party transit provider for local traffic exchanged between TWCIS's and Star's networks. In particular, TWCIS has proposed language providing that each party would be responsible for costs arising on its side of the POI.<sup>27</sup> Although Star has agreed to this language, Star has proposed additional language that would effectively compel direct interconnection, as discussed above, and has explained in discussions with TWCIS that Star is unwilling to agree to indirect interconnection unless TWCIS accepts responsibility for transport/transit charges that CenturyLink may impose on Star for transporting calls between the CenturyLink tandem and Star's end offices. In addition, Star has proposed language that would make TWCIS responsible for any transport or transit charges—even in the event the parties utilize direct interconnection—in the event of a traffic overflow situation.

30. The disputed language is as follows:

- Threshold Trigger. ... ILEC will not under any circumstances be responsible for the costs associated with facilities located outside of the ILEC's network local exchange or the transport and third-party transit cost of any Local/EAS Traffic outside of the ILEC local

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<sup>27</sup> See TWCIS-Star Draft ICA, Glossary § 2.43, Interconnection Attachment § 3.3.2.

exchange **once direct interconnection has been established** ... .<sup>28</sup>

- After a Party has established Direct Interconnection between the Parties' networks, neither Party may continue to transmit its originated Local/EAS Traffic and ISP-Bound Traffic indirectly except on an overflow basis to mitigate traffic blockage, equipment failure or emergency situations. If there is any such overflow traffic, then **CLEC each Party** shall be responsible for any transport or transit charges assessed by any third party for facilities or services provided on **CLEC's its respective** side of the POI associated with such traffic.<sup>29</sup>

31. Issue 5 presents a question of first impression for the Commission.<sup>30</sup> It is TWCIS's position that forcing a competitive carrier to bear the additional cost of an incumbent

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<sup>28</sup> *Id.*, Interconnection Attachment § 3.3.3.

<sup>29</sup> *Id.* § 3.3.6.

<sup>30</sup> *See New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 244 n.15 (4th Cir. 2012) (“The FCC has yet to specifically address whether the terminating or originating carrier is responsible for paying transit charges ... .” (quoting the Commission’s amicus brief)). In that case, although the Fourth Circuit acknowledged the default rule that each party to an ICA bears its own costs of delivering traffic originated on its network to the POI, *id.* at 232, the court nevertheless upheld an NCUC decision, readily distinguishable from the facts presented here, requiring certain CMRS providers to pay transit charges imposed on incumbent LEC-originated calls. *Id.* at 236. The Commission generally has sought comment about issues related to transit services in its pending intercarrier compensation rulemaking, although it did not specifically raise the question of which party should bear these transit charges. *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 ¶¶ 1313-14 (2011).

LEC's transport and transit fees (in addition to the competitive LEC's own costs) as a condition of interconnection is starkly anticompetitive and contrary to the intent of the Act. Congress enacted Sections 251 and 252 to open local telephone markets to competition.<sup>31</sup> Yet requiring a competitive LEC to bear an incumbent carrier's transport/transit costs—in addition to the costs of transporting traffic on its own side of the POI—effectively would impose an additional tax on new entrants, and thus would act as a barrier to competitive entry. Moreover, there is no sound policy reason why TWCIS should bear the entire traffic-sensitive cost of enabling Star's customers to place local calls to and receive local calls from TWCIS customers. Because such cost-shifting would violate the competitive principles underlying Sections 251 and 252, it also would not be “just and reasonable” as required under Sections 201 and 202.<sup>32</sup> Accordingly, the Commission should reject Star's proposal to shift any transit costs entirely to TWCIS and should approve of TWCIS's language stating the each party would bear its costs on its side of the POI.

**ISSUE 6: TIME INTERVAL FOR RETURNING PORTED NUMBERS FOLLOWING SUBSCRIBER'S TERMINATION OF SERVICE**

32. Issue 6 concerns Star's proposal to require the parties to return ported telephone numbers that become vacant to the block-holding carrier within 24 hours.

33. The disputed language is as follows:

When a ported telephone number becomes vacant, e.g., the telephone number is no longer in service by the original End-User Customer, the ported telephone number will be

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<sup>31</sup> See, e.g., *Verizon Cal. v. FCC*, 555 F.3d 270, 274 (D.C. Cir. 2009) (readily accepting the FCC's reading of the 1996 Act “as having the promotion of facilities-based local competition as its fundamental policy”); see also *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) (“After all, the purpose of the [1996] Act ... is to stimulate competition—preferably genuine, facilities-based competition.”).

<sup>32</sup> 47 U.S.C. §§ 201(b), 202(a).

released back to the carrier who is the code holder or block holder ~~within the same time interval that was applicable to the original porting out of the number.~~<sup>33</sup>

34. The Act does not require that a party return vacant ported numbers within a 24-hour period, and the Commission has never adopted such a requirement. Moreover, TWCIS follows the industry standard guidelines on aging telephone numbers. When a TWCIS subscriber with a ported number disconnects service, TWCIS releases the telephone number to the local number portability (“LNP”) Administrator, which completes the eventual return of the telephone number to the block holder.

35. In any event, there also is no sound policy reason to impose such a short interval for the return of vacant numbers, in contrast to the need for prompt implementation of port-out requests. Nor are TWCIS operational support systems set up to enable the return any vacant ported numbers within 24 hours. By the same token, requiring TWCIS (which is the party likely to submit the majority of port requests and, therefore, is the party that would be most burdened by Star’s proposal) to return any vacant ported numbers to Star within 24 hours of becoming available poses competitive concerns, as TWCIS would not be able to offer a recently terminated subscriber who changes her mind later the next day her same telephone number, while Star likely could. In such circumstances, Star would have a competitive advantage over TWCIS to win a customer back based solely on the fact that, in most cases, Star was the customer’s original carrier. TWCIS therefore urges the Commission to reject the additional language proposed by Star.

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<sup>33</sup> TWCIS-Star Draft ICA, Local Number Portability Attachment § 4.2.

## ISSUE 7: DIRECTORY LISTING OBLIGATIONS

36. Issue 7 concerns Star's obligation to provide directory listing service.
37. The disputed language is as follows:

~~The parties agree that this provision shall be effective for the initial Term of this Agreement.~~ ILEC shall be afforded the same rights as conferred on CLEC in this section at such time as CLEC commences publication of its own WP Directory, for a period of time equivalent to the length of the initial Term of this Agreement.<sup>34</sup>

38. Section 251(b)(3) makes clear that, to the extent Star offers directory listing and related services to its customers, it is obligated to provide nondiscriminatory access to TWCIS to enable TWCIS's customers to be included in Star's directories and directory databases.<sup>35</sup> The language proposed by Star would violate Section 251(b)(3), because it would treat Star's directory listing obligation as time-limited. In particular, following the initial term of the ICA (which TWCIS proposes to be three years, as discussed in connection with Issue 1 above), Star could refuse to include TWCIS's subscribers in its directories under the language it has proposed. Congress plainly did not intend to sunset an ILEC's directory listing obligations after the initial term of an ICA has expired, and the Commission therefore should strike Star's proposed language.

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<sup>34</sup> *Id.*, Ancillary Services Attachment § 3.1.1.1.

<sup>35</sup> 47 U.S.C. § 251(b)(3); *see also Implementation of the Telecommunications Act of 1996 et al.*, Third Report and Order, 14 FCC Rcd 15550 ¶ 160 (1999) (“*Directory Listing Order*”).

**ISSUE 8: PROVISION OF DIRECTORIES FOR TWCIS SUBSCRIBERS**

39. Issue 8 concerns Star’s obligation to provide directories to TWCIS subscribers.
40. The disputed language is as follows:

ILEC has no obligation to provide any additional WP directories above the number of directories forecast by CLEC per Sections 3.2.3.5 and 3.2.3.7, above. While ILEC has no obligation to provide WP Directories to CLEC or CLEC’s End-User Customers after the annual distribution of newly published directories, ILEC will in good faith attempt to accommodate CLEC requests for subsequent directory orders. Orders for directories above the forecast number(s) will be filled subject to availability ~~of such in excess of ILEC’s needs~~. In ~~such the~~ event, ~~that~~ ILEC ~~has excess directories~~, ~~it~~ will provide the directories in bulk to CLEC and will assess the WP Directory Charge for each directory as referenced in the Pricing Attachment of this Agreement.<sup>36</sup>

41. As discussed above with respect to Issue 7, Section 251(b)(3) requires Star to provide nondiscriminatory access to directory listing to TWCIS.<sup>37</sup> The Commission has long held that this requirement compels LECs to provide access that “is equal to the access that the

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<sup>36</sup> TWCIS-Star Draft ICA, Ancillary Services Attachment § 3.4.1. Issue 7 relates to Star’s overall obligation to provide directory listing services to TWCIS. Issue 8 relates to Star’s proposal to provide directories to TWCIS subscribers only to the extent it has “excess” directories. Issue 9 discusses the parties’ disagreement related to charges imposed by Star for the provision and delivery of its directories to TWCIS subscribers.

<sup>37</sup> 47 U.S.C. § 251(b)(3).

providing LEC gives itself.”<sup>38</sup> In addition, the Commission confirmed that “the term ‘nondiscriminatory,’ as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself.”<sup>39</sup> The Commission therefore determined that “the imposition of disparate conditions between similarly-situated carriers on the pricing and ordering of services covered by Section 251(b)(3)” would violate the Act.<sup>40</sup>

42. Consistent with this precedent, Star may not refuse to provide directories to TWCIS subscribers in order to reserve directories for the use of Star’s own subscribers, and Star may not otherwise limit TWCIS’s rights by specifying that TWCIS has access only to “excess” inventory. Such a refusal plainly would impose a “disparate condition[]” as between the customers of Star and TWCIS, because the language proposed by Star would permit Star to prefer its own customers over TWCIS’s with respect to directory distribution. To the extent Star believes that it has only enough directories to satisfy the needs of its own subscribers, it would simply withhold the directories from TWCIS subscribers. There is no reason why Star cannot obtain a sufficient number of directories to include distribution to TWCIS’s customers. TWCIS submits that Star instead should be required to provide access to directories on a nondiscriminatory basis. At a minimum, Star should be required to allow TWCIS to place bulk orders for directories through Star on the same terms and conditions that Star orders and receives directories.

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<sup>38</sup> *Directory Listing Order* ¶ 125 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order, and Memorandum Opinion and Order, 11 FCC Rcd 19392 ¶ 102 (1996) (“*Local Competition Second Report and Order*”). As an initial matter, the Commission has defined “directory listing” “as a verb that refers to the act of placing a customer’s listing information in a ... directory compilation for external use (such as a white pages).” *Directory Listing Order* ¶ 160.

<sup>39</sup> *Id.* ¶ 129.

<sup>40</sup> *Local Competition Second Report and Order* ¶ 103.

**ISSUE 9: FEES FOR DIRECTORIES AND DIRECTORY DELIVERY**

43. Issue 9 concerns the charges, if any, that Star may impose on TWCIS for Star’s compliance with its obligations under Section 251(b)(3)—namely, fees for directories and directory delivery.

44. The disputed language is as follows:

Directory	<del>\$5.00</del> 2.50 each
Directory Delivery	<del>\$5.00</del> 2.50 per Directory, <del>plus ILEC’s actual cost of delivery</del> <sup>41</sup>

45. The Commission has held that the obligation of incumbent LECs to provide nondiscriminatory access to directory listing applies to the *rates* the incumbent LEC charges its competitors.<sup>42</sup> Likewise, the NCUC and other state commissions have held that charges for directory listing services must be cost-based.<sup>43</sup> Under this precedent, Star cannot impose inflated

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<sup>41</sup> TWCIS-Star Draft ICA, Pricing Attachment § 2. As noted above, this issue concerns only the charges imposed by Star for the provision and delivery of its directories to TWCIS subscribers.

<sup>42</sup> See *Directory Listing Order* ¶ 125; see also *id.* ¶ 129 (stating that the “‘the term ‘nondiscriminatory’ as used throughout Section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself” (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and order, 11 FCC Rcd 15499 ¶ 217 (1996))).

<sup>43</sup> See, e.g., *Re ITC-DeltaCom Communications, Inc.*, Docket No. P-550, Sub 18, 2004 WL 912330, at \*10 (N.C. Utils. Comm’n Mar. 2, 2004) (requiring the incumbent LEC to “provide an electronic feed of the directory listings of ITC customers to ITC for a reasonable, supported, cost-based rate”); *Re Bell Atlantic-New Jersey, Inc.*, Docket No. TO00060356, Order, 2002 WL 31970306, at \*29 (N.J. Bd. Pub. Utils. Sept. 13, 2002) (noting that “the time associated with ... directory listing service orders for changes in an existing account is zero” and imposing a directory listing non-recurring service order charge of \$0.83); *Investigation Regarding Local Exchange Competition for Telecommunications Services*, Docket No. TX95120631, Order Regarding Interconnection and Resale, 1997 WL 795071, at \*98 (N.J. Bd. Pub. Utils. Dec. 2, 1997) (holding that directory listing service must be provided to competitive carriers “free of charge for CLEC customers that are served via the ILEC’s unbundled switch ... [and] [f]or customers that are served by the CLEC’s switch, the ... CLEC must compensate the

fees for providing directories to TWCIS's subscribers or directory delivery. On information and belief, the fees that Star proposes to include in the ICA significantly exceed the actual or imputed costs it incurs to provide a directory to TWCIS's subscribers or to deliver directories. Indeed, with respect to directory delivery, Star proposes to impose a \$5 delivery charge *in addition to* requiring TWCIS to cover Star's actual delivery costs. Star's attempt to impose inflated charges on a competitor that exceed its own costs is discriminatory and therefore would be in violation of Section 251(b)(3). Star bears the burden of demonstrating that its proposed fees would not be discriminatory.<sup>44</sup> For the same reasons, Sections 201 and 202 of the Act independently prohibit the inflated directory-related charges that Star seeks to impose.<sup>45</sup> Because Star's directory-related fees are above-cost and would competitively disadvantage TWCIS, the charges are neither just nor reasonable as required by Sections 201 and 202.

46. In the interest of reaching agreement on this issue, TWCIS proposed to pay a flat fee of \$2.50 per directory and a \$2.50 directory delivery charge. Time Warner Cable has in some cases agreed to above-cost directory fees in similar circumstances when doing so would allow Time Warner Cable to avoid the substantial costs and burdens of arbitration. But such negotiated agreements, or agreements that Time Warner Cable has adopted pursuant to Section

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ILEC through a one-time charge of \$1.00 for both residence and business accounts"); *see also* *Petition of Sprint Communications Company, L.P. for Compulsory Arbitration under the FTA to Establish Terms and Conditions for Interconnection Terms with Consolidated Communications of Fort Bend Company and Consolidated Communications Company of Texas*, Docket No. 31577, Arbitration Award, at 50 (Pub. Util. Comm'n of Tex. Dec. 19, 2006), attached hereto as Exhibit D (concluding that fees included in arbitrated ICAs must be "non-discriminatory," "just and reasonable," and "based on the actual, forward-looking cost of performing the [particular] function" at issue); *Arbitration for Interconnection between 1-800-4-A-Phone and Southwestern Bell Telephone Company*, Docket No. 24547, Arbitration Award, at 8, 10 (Pub. Util. Comm'n of Tex. Jan. 25, 2002), attached hereto as Exhibit E (requiring that charges for processing service orders be based on TELRIC methodology).

<sup>44</sup> 47 C.F.R. § 51.217(e)(1).

<sup>45</sup> 47 U.S.C. §§ 201(b), 202(a).

252(i), in no way establish that such higher fees for directory listing services are appropriate or consistent with the Act’s nondiscrimination requirements. The Commission therefore should adopt directory and directory delivery charges only to the extent Star can demonstrate with appropriate cost studies that the fees would not exceed its costs, but, in all events, the Commission should reject Star’s inflated directory and directory delivery fee proposals and, at most, adopt TWCIS’s compromise proposal.

**ISSUE 10: FEE FOR LOCAL NUMBER PORTABILITY LOCAL SERVICE REQUEST**

47. Issue 10 concerns the appropriate charge, if any, for fulfilling a Local Service Request (“LSR”) to port a telephone number.

48. The disputed language is as follows:

LSR-LNP                      ~~\$25.00~~ 5.00 per LSR

49. TWCIS believes that the parties should not bill one another for porting telephone numbers or processing LSRs related to LNP. To the extent that any LSR fee is permissible, the \$25 fee proposed by Star would be excessive and in violation of Sections 251 and 201/202 of the Act and Commission precedent,<sup>46</sup> because, on information and belief: (a) Star already has recovered the costs associated with implementing LNP through an end-user surcharge, and (b) a \$25 fee would far exceed the costs associated with processing a LNP LSR, even in cases where such LSRs are processed manually. As with the directory and directory delivery charges discussed above, Star bears the burden of demonstrating that its proposed LNP LSR charge is based on a reasonable measure of its costs, particularly those charges that it seeks to impose on a

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<sup>46</sup> *Id.* §§ 251(b)(2), 201(b), 202(a); *Telephone Number Portability*, 17 FCC Rcd 2578 ¶ 62 (2002) *Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701 ¶ 72 (1998).

competitor, as such charges have the potential to harm competition and provide Star with an unfair competitive advantage by allowing it to artificially raise TWCIS's costs.

50. State commission precedent addressing this issue supports TWCIS's position. For example, in a 2009 arbitration, the Wisconsin Public Service Commission concluded that LNP service order charges that CenturyTel proposed to levy against Charter Fiberlink would be inappropriate because "charging [Charter] for each number porting request would create a financial impediment and frustrate the purpose of the underlying statute."<sup>47</sup> The Wisconsin PSC therefore adopted ICA language that prohibited either carrier from assessing service order charges on the other for number porting requests.<sup>48</sup> Although the Colorado Public Utilities Commission declined to prohibit LNP LSR fees outright, it concluded that LNP-related service order charges must be "just and reasonable, cost-based, and nondiscriminatory."<sup>49</sup> The Colorado PUC further confirmed that such charges must be based on "the use of a forward-looking cost standard"—specifically, TELRIC-based methodology—"to assure that ILECs do not have a competitive advantage over CLECs," and expressly prohibited an LNP LSR fee that would impose "greater costs on the CLEC than the ILEC experiences itself."<sup>50</sup> The state commissions

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<sup>47</sup> *Petition of Charter Fiberlink, LLC for Arbitration of an Interconnection Agreement Between the CenturyTel Non-Rural Telephone Companies of Wisconsin and Charter Fiberlink, LLC*, Arbitration Award, Docket Nos. 5-MA-148, 5-MA-149, at 130 (Pub. Serv. Comm'n of Wisc. July 28, 2009), attached hereto as Exhibit F.

<sup>48</sup> *Id.* at 126, 130.

<sup>49</sup> *Sprint Communications Company L.P.'s Petition for Arbitration with CenturyTel of Eagle, Inc., Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 08B-121T, Decision No. C08-1059, 2008 Colo. PUC LEXIS 853, at \*95, 82 (Colo. Pub Utils. Comm'n Sept. 22, 2008).

<sup>50</sup> *Id.* at \*95-96.

in Massachusetts, New York, and Washington have reached similar conclusions.<sup>51</sup> Moreover, state commissions in other states have held that processing service orders in analogous contexts

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<sup>51</sup> See, e.g., *Complaint of Verizon New England, Inc. d/b/a Verizon Massachusetts concerning customer transfer charges imposed by Broadview Networks, Inc.*, D.T.E. 05-4, 2006 WL 1223146, at 6 (Mass. Dep't of Telecomm'ns and Energy Apr. 26, 2006) (invalidating Broadview Networks' "Service Transfer Charge" and "Manual Processing Charge" as "unreasonable" because they were not supported by a cost study); *Complaint of Verizon New York Inc. Concerning Customer Transfer Charges Imposed by TC Systems, Inc.*, Case 03-C-0636, 2004 N.Y. PUC LEXIS 61, at \*7-8 (N.Y. Pub. Serv. Comm'n Feb. 13, 2004) (rejecting so-called "customer transfer charges" included in competitive LEC's tariffs and levied against incumbents or other competitive LECs because the administrative costs for such transfers were "negligible" and because "[t]he coordination of discontinuing billing is clearly a retail function and "are more appropriately recovered ... in retail rates, or in up front connection charges, but not in a separate charge" levied against a competitor); *Complaint and Petition of Verizon New York Inc. Concerning Service Transfer Charges Imposed by Broadview Networks, Inc.*, Case 05-C-0066, 2005 N.Y. PUC LEXIS 277, at \*10-11 & n.6 (N.Y. Pub. Serv. Comm'n June 29, 2005) (rejecting administrative charges of the competitive LEC because, although "there may be some costs associated with performing [administrative] functions, [competitive carrier] has not quantified those costs" and finding that, to the extent competitive LEC filed cost studies justifying its administrative charges, it must also "demonstrate that the costs associated with customer transfers are not already built into existing connection charges"); *Qwest Corp. v. McLeodUSA Telecomm'ns Servs., Inc.*, Docket UT-090892, Order 05, 2010 Wash. UTC LEXIS 737, at \*45 n.148 (Wash. Utils. & Transp. Comm'n Aug. 30, 2010) ("Should Qwest seek to modify or eliminate application of the [LNP service order charge] as part of a prospective arbitration proceeding, the Commission would certainly be required to consider the preponderance of evidence presented by both parties concerning the [charge] including ... its appropriate cost-basis, if any."). Although TWCIS has identified two state commissions with contrary precedent (Texas and Missouri), the state commissions in those cases focused primarily on the permissibility of LNP administrative fees under the FCC's rules and appeared to accept the asserted costs of the incumbents without much, if any, scrutiny. See *Petition of Charter Fiberlink TX-CCO, LLC for Arbitration of an Interconnection Agreement with CenturyTel of Lake Dallas, Inc. Pursuant to Section 252 of the Federal Communications Act of 1934, as Amended, and Applicable State Laws*, Arbitration Award, Docket No. 35869, at 14 (Pub. Util. Comm'n of Tex. July 22, 2009), attached hereto as Exhibit G; *Petition of Charter Fiberlink-Missouri, LLC for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with the CenturyTel of Missouri, LLC Pursuant to 47 U.S.C. § 252(b)*, Final Arbitrator's Report, Case No. TO-2009-0037, at 93-97 (Pub. Serv. Comm'n of Mo. Jan. 6, 2009), attached hereto as Exhibit H.

impose little, if any, cost burden on incumbent carriers, and that service order charges must be cost-based.<sup>52</sup>

51. In the interest of reaching agreement on this issue, TWCIS proposed to pay a \$5 LNP LSR charge for each port request it submits. Time Warner Cable has in some cases agreed to above-cost LNP LSR fees in similar circumstances when doing so would allow Time Warner Cable to avoid the substantial costs and burdens of arbitration. But such negotiated agreements, or agreements that Time Warner Cable has adopted pursuant to Section 252(i), in no way establish that such higher fees for processing LNP LSRs are appropriate or are cost-based as the Act requires. Indeed, Star's stated labor rate for typical business hours—*i.e.*, \$25 per half hour—demonstrates that Star's proposed \$25 LNP LSR fee would greatly exceed its costs, as processing a port request from TWCIS should not require 30 minutes to complete, even if processed manually. TWCIS therefore urges the Commission to reject Star's proposal and to prohibit any LNP LSR fee or, to the extent it determines that any such fee is appropriate, adopt a fee that is commensurate with Star's costs, as demonstrated by appropriate cost studies.

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<sup>52</sup> See *supra* n.43.

## CONCLUSION

TWCIS respectfully requests that the Commission arbitrate an ICA consistent with the foregoing.

Respectfully submitted,

/s/ Matthew A. Brill

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January 27, 2014

**CERTIFICATE OF SERVICE**

I, Karen R. Sprung, hereby certify that on this 27th day of January, 2014, a true and correct copy of the foregoing Petition for Arbitration was served, via overnight delivery, upon the following:

Daniel C. Higgins  
Burns, Day & Presnell, P.A.  
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/s/ Karen R. Sprung  
Karen R. Sprung