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WRITER'S DIRECT DIAL

January 10, 2013

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JAN 10 2013

REA

VIA HAND DELIVERY

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

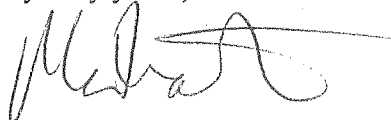
Re: *Time Warner Cable Information Services (North Carolina), LLC's
Reply to Star TMC's Response*

Dear Administrator Liles:

Enclosed for filing in the above-referenced proceeding are the original and 10 copies of TWCIS (NC), LLC's Reply to Star TMC's Response. Per the Authority's Order dated October 31, 2012, the Comments are also being submitted on a CD in Microsoft Word.

If any questions should arise in connection with this request, please contact the undersigned.

Very truly yours,


Marcus W. Trathen

cc: Daniel C. Higgins
Julie P. Laine

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)

AND)

Petition of Time Warner Cable Information)
Services (North Carolina), LLC to Terminate)
Star Telephone Membership Corporation's)
Rural Telephone Company Exemption)
Pursuant to Section 251(f)(1) of the)
Communications Act of 1934, as Amended)

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REA

TIME WARNER CABLE INFORMATION SERVICES (NORTH CAROLINA), LLC'S
REPLY TO STAR TMC'S RESPONSE

Time Warner Cable Information Services (North Carolina), LLC ("TWCIS (NC)"), by its undersigned counsel, respectfully submits this reply to Star Telephone Membership Corporation's ("Star TMC's") December 21, 2012, response to TWCIS (NC)'s comments concerning the Arbitrator's Recommended Order in this proceeding.¹ As discussed below, the arguments raised in Star TMC's response have no merit, and the Authority thus should promptly adopt the Recommended Order.

¹ Recommended Order Granting TWCIS (NC) Motion to Dismiss, Docket No. TMC 5, Sub 1 (Oct. 25, 2012) ("Recommended Order").

EXECUTIVE SUMMARY

Star TMC in its response² to TWCIS (NC)'s comments in support of the Recommended Order raises five points related to the interpretation of Sections 251(f)(1) and 251(f)(2) and the standard to be applied by the Authority in ruling on TWCIS (NC)'s Motion to Dismiss. Each of Star TMC's arguments is merely an effort to distract the Authority from the task before it—to apply the straightforward pleading standards applicable to TWCIS (NC)'s Motion to Dismiss Star TMC's Section 251(f)(2) Petition. In reply, TWCIS (NC) responds to each of Star TMC's arguments in turn.

First, Star TMC tries to revive the Petition through its erroneous interpretation of Sections 251(f)(1) and 251(f)(2).³ Yet, Star TMC still fails to show that it has alleged sufficient elements and facts to state a claim for relief under Section 251(f)(2). Notwithstanding Star TMC's argument to the contrary, the standard applicable to requests for Section 251(f)(1) relief is not the same as the standard applicable to Section 251(f)(2) relief. Star TMC tries to conflate the two by plucking out the phrase “unduly economically burdensome,” which appears in each. But the fact that both Sections 251(f)(1) and (f)(2) employ the *same phrase* does not mean that they necessarily establish the *same legal standard*. Star TMC is wrong to suggest otherwise. This phrase is but one element within the larger context of each statutory subsection, and all the words must be given meaning. Star TMC's argument concerning “undue economic burden” does nothing to rectify its defective Petition.

Second, Star TMC again tries to bootstrap the findings from a different arbitrator in a different proceeding involving a different statutory provision to demonstrate that Star TMC has

² See Star TMC Response to the Comments of Time Warner Cable Information Service (North Carolina), LLC on the Arbitrator's Recommended Order (filed Dec. 21, 2012) (“Star TMC's Response”).

³ See 47 C.F.R. §§ 251(f)(1); 251(f)(2).

met its pleading requirements for Section 251(f)(2) relief in this case. The *Sprint v. Star TMC* Recommended Arbitration Order, which is not even binding authority in its own Section 251(f)(1) proceeding, is not persuasive in this proceeding involving Section 251(f)(2). The Recommended Order correctly discounted the *Sprint v. Star TMC* Recommended Arbitration Order in resolving TWCIS (NC)'s Motion to Dismiss.

Third, Star TMC seeks to recast TWCIS (NC)'s observation that Star TMC has enjoyed a *de facto* seven-year exemption from interconnection with TWCIS (NC) to provide Section 251(b) arrangements into an attempt to "deny" Star TMC the ability to seek Section 251(f)(2) relief. However, TWCIS (NC) has not sought to deny Star TMC any statutory rights. Rather, TWCIS (NC) supports the Recommended Order's decision that Star TMC has failed to meet the threshold pleading requirements to move forward with pursuing Section 251(f)(2) relief. Star TMC had its opportunity to plead its Section 251(f)(2) claim, but it failed to meet the applicable pleading standard.

Fourth, Star TMC appears to invite TWCIS (NC) to take its petition for arbitration to the FCC, pursuant to Section 252(e)(5). TWCIS (NC)'s entitlement to take its arbitration petition to the FCC is not at issue here. The Authority should properly maintain its focus on where we are at this procedural standpoint—ruling on TWCIS (NC)'s Motion to Dismiss, and not consideration of some imaginary ancillary proceeding.

Finally, Star TMC attempts to show, unpersuasively, how it meets the applicable Section 251(f)(2) pleading standards. Contrary to Star TMC's argument, the Recommended Order properly applies the governing legal standards to TWCIS (NC)'s Motion to Dismiss. Star TMC failed to plead facts sufficient to support a claim that suspension or modification is *necessary* to avoid certain *specified harm(s)* resulting from *particular Section 251(b) duties*. Instead, Star

TMC (1) claimed only generalized harms resulting from the competition enabled by interconnection with TWCIS (NC), (2) never claimed which specific interconnection duties would cause the supposed harms, as it was required to do, and (3) failed to show (or even allege) that others forms of relief would be inadequate, such that suspension or modification would be necessary to avoid these unnamed harms.

For all of these reasons, and those discussed in TWCIS (NC)'s Motion to Dismiss, the Recommended Order, and TWCIS (NC)'s comments and response, TWCIS (NC)'s Motion to Dismiss Star TMC's Section 251(f)(2) Petition should be granted.

ARGUMENT

I. STAR TMC FAILS TO DISTINGUISH SECTIONS 251(f)(1) AND 251(f)(2)

To survive a motion to dismiss, a rural carrier, such as Star TMC, is required to state a proper claim for relief under Section 251(f)(2). As discussed in TWCIS (NC)'s response to Star TMC's objections to the Recommended Order and its Motion to Dismiss, Star TMC's petition does not state an adequate claim for relief because it does not allege burdens relating to each specific Section 251(b) requirement at issue, but instead alleges generalized economic harms,⁴ and it does not show that it lacks other forms of relief (such as universal service subsidies, or other means of increasing revenues) and that suspension or modification of any particular Section 251(b) duty thus is "necessary" to avoid such economic harms.⁵

The Recommended Order correctly found that the "most compelling interpretation" of Section 251(f)(2) requires a petitioner to allege burdens relating to each specific Section 251(b) requirement at issue, as opposed to offering "generalized notions of burden unconnected to any

⁴ See TWCIS (NC) Response at 5-9.

⁵ See TWCIS (NC) Response at 9-11.

particular obligation in Section 251(b).”⁶ Star TMC in its objections to the Recommended Order and again in its response to TWCIS (NC) *agreed* with this assessment.⁷ Star TMC repeatedly argues that it has met this requirement when it has done nothing of the kind.

Instead, Star TMC compounds its pleading failure by continuing to collapse Section 251(f)(1), the rural exemption standard, with Section 251(f)(2), the suspension or modification standard at issue here, into one. In its Response, Star TMC argues that the meaning of the phrase “unduly economically burdensome,” which appears in both Section 251(f)(1) and Section 251(f)(2), means the same thing in each statutory provision—as if this alone would entitle it to relief.⁸ In other words, Star TMC has plucked the phrase “unduly economically burdensome” from two distinct subsections of the statute, unmoored the phrase from the context of the distinct Section 251(f)(1) and Section 251(f)(2) regimes, and proclaimed that the “identically-phrased criteria”⁹ somehow demonstrate it has met the pleading standards applicable to Section 251(f)(2). Yet, it is not the *meaning* of “unduly economically burdensome,” in a vacuum, that is at issue here. It is the distinct statutory provisions in which this phrase is used—codifying two distinct legal standards—that is at issue.

As the Recommended Order recognized, the legal standard applicable to evaluating requests for Section 251(f)(2) relief is plainly different from the legal standard applicable for Section 251(f)(1) relief. Congress established different statutory schemes for Section 251(f)(1) and Section 251(f)(2) relief, and principles of statutory construction, as discussed in the Recommended Order, necessitate recognition of the textual differences. The phrase “unduly

⁶ Recommended Order ¶ 13.

⁷ See Star TMC Objections at 21; Star TMC Response at 9.

⁸ See Star TMC’s Response at 4-9.

⁹ See Star TMC’s Response at 5.

economically burdensome” appears in each provision, but the words around the phrase have significance, too, and must be given effect.¹⁰ The differing standards are properly expressed in the Recommended Order.¹¹

Star TMC was required, but failed, to allege the elements and facts necessary to state a claim for Section 251(f)(2), not Section 251(f)(1), relief—namely, specific harms that would result from complying with particular Section 251(b) duties and a showing that suspension or modification was necessary to avoid such harms. Star TMC failed to do so, and the Petition must be dismissed on this basis.

II. THE RECOMMENDED ARBITRATION ORDER IN *SPRINT V. STAR TMC* IS NOT A COMPELLING REASON TO DENY TWCIS (NC)’S MOTION

Star TMC continues to trumpet the now vacated Recommended Arbitration Order from the *Sprint v. Star TMC* proceeding in support of its claim that the Petition at issue here stated sufficient elements and facts to survive TWCIS (NC)’s Motion to Dismiss. Yet, what Sprint could not prove when it had the burden of proof in a Section 251(f)(1) proceeding says nothing about what Star TMC would be able to prove in meeting its own burden of proof in this proceeding involving a separate party and a different legal standard. As stated in TWCIS (NC)’s response, the previous arbitrator did not examine the particular burdens associated with any specific Section 251(b) duty, as would be required in a Section 251(f)(2) proceeding, and instead made a more general finding about the consequences of interconnection for Star TMC. Moreover, the *Sprint v. Star TMC* Recommended Arbitration Order did not consider whether preserving Star TMC’s rural exemption was “consistent with the public interest, convenience,

¹⁰ See, e.g., *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (“[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.”) (citing *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955)).

¹¹ See Recommended Order at ¶¶ 11-12.

and necessity,” which would be required in a Section 251(f)(2) proceeding. In any event, the *Sprint v. Star TMC* Recommended Arbitration Order was not a ruling on a motion to dismiss but was issued at a later procedural stage. Thus, the now moot *Sprint v. Star TMC* Recommended Arbitration Order remains unpersuasive in resolving TWCIS (NC)’s Motion to Dismiss.

III. STAR TMC HAD AN OPPORTUNITY TO PLEAD ITS CLAIM BUT FAILED TO PROPERLY DO SO

Star TMC seeks to turn TWCIS (NC)’s observation that Star TMC has enjoyed a *de facto* exemption from interconnection with TWCIS (NC) to provide Section 251(b) arrangements into an attempt to “somehow deny Star the ability to assert its rights under Section 251(f)(2).”¹² But in pointing out the prolonged history of this proceeding, TWCIS (NC) did not seek to deny Star TMC any statutory rights. Rather, TWCIS (NC) sought to hold Star TMC to the legal standards applicable to its Petition. TWCIS (NC) supports the Recommended Order’s decision that Star TMC has failed to meet the threshold pleading requirements to move forward with pursuing Section 251(f)(2) relief. Star TMC had its opportunity to plead the Section 251(f)(2) claim, but it failed to properly do so. Dismissal on this basis is justified and appropriate.

IV. THE AUTHORITY SHOULD IGNORE STAR TMC’S INVITATION TO TWCIS (NC) TO PROCEED TO THE FEDERAL COMMUNICATIONS COMMISSION

Star TMC appears to invite TWCIS (NC) to take its petition for arbitration to the FCC, pursuant to Section 252(e)(5), presumably rather than following this state commission proceeding through to its conclusion. But TWCIS (NC)’s entitlement to take its arbitration petition to the FCC is not at issue here, and the availability of that option for TWCIS (NC) has no bearing on whether Star TMC has satisfied its own pleading standard. The role of the Authority at this procedural juncture is to determine whether or not Star TMC has alleged

¹² See Star TMC’s Response at 14.

sufficient elements and facts to state a claim for relief under Section 251(f)(2). Accordingly, the Authority should resist Star TMC's attempt to shift the focus away from its pleading failure.¹³

V. THE ARBITRATOR PROPERLY APPLIED THE LEGAL STANDARDS APPLICABLE TO A MOTION TO DISMISS

For the reasons stated in TWCIS (NC)'s initial comments in support of the Recommended Order, and those stated in Section I above and in TWCIS (NC)'s response to Star TMC's objections to the Recommended Order, the Arbitrator properly applied the legal standards applicable to TWCIS (NC)'s Motion to Dismiss. Accordingly, the Recommended Order should be adopted as the Order of the Authority.

Star TMC is truly grasping at straws when it finds support for its attempt to revive its Petition in the Recommended Order's observation that "the analysis set forth in Section 251(f)(2) must be conducted individually as to each of the Section 251(b) obligations to be suspended or modified," and that a "two percent ILEC making such a claim has the burden of proving it."¹⁴ TWCIS (NC) agrees that a two percent ILEC making a Section 251(f)(2) claim has the burden of proving it. But a two percent ILEC, such as Star TMC, must as an initial matter state a legally cognizable claim for relief before it has the opportunity to come forward with evidence to meet its burden of proof. Critically, Star TMC has failed to meet this initial threshold showing, and its Petition must be denied on this basis.

¹³ Any need for TWCIS (NC) to avail itself of its rights under Section 252(e)(5)—including the preemption ruling that necessarily would underlie it—would be avoided by adopting the Recommended Order, dismissing Star TMC's petition, and moving on to Phase 2 of this proceeding.

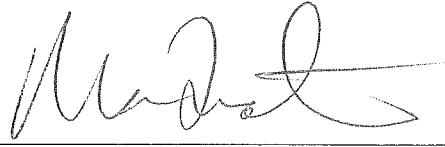
¹⁴ See Star TMC's Response at 20 (quoting Recommended Order ¶ 16).

CONCLUSION

For the foregoing reasons, TWCIS (NC) respectfully requests that the Authority issue an order dismissing Star TMC's 251(f)(2) petition and ordering the parties to proceed directly to Phase 2 of this proceeding to commence arbitration.

Dated: January 10, 2013

**TIME WARNER CABLE INFORMATION
SERVICES (NORTH CAROLINA), LLC**

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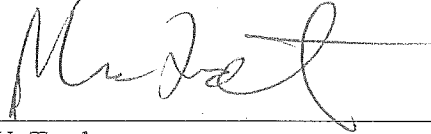
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Its Attorneys

CERTIFICATE OF SERVICE

The undersigned, of the law firm Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that he has served a copy of the foregoing **Reply of Time Warner Cable Information Services (North Carolina), LLC to Star TMC Response** via electronic mail to Daniel Higgins at dhiggins@bdppa.com.

This 10th day of January, 2013.



Marcus W. Trathen