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VIA HAND DELIVERY

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

RE: *TWCIS (NC) v. Star Telephone Membership Corporation*
NCREA Docket No. TMC-5, Sub 1

Dear Ms. Liles:

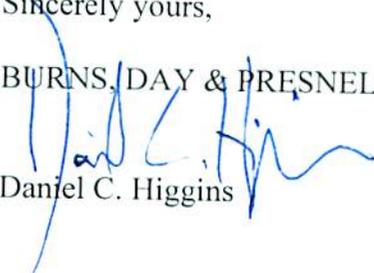
Enclosed find the original and 11 copies of Star TMC's Reply to the Response Recommended Arbitration Order filed by Time Warner Cable Information Services (North Carolina), LLC on December 21, 2012, which I tender for filing in the above-referenced docket.

As always, please let me know if you have any questions regarding any aspect of this filing. Otherwise, please return one filed stamped copy of the enclosure via our courier.

With best regards, we remain

Sincerely yours,

BURNS, DAY & PRESNELL, P. A.


Daniel C. Higgins

DCH:mm
enclosures

cc: Marcus Trathen (via e-mail)
Jo Anne Sanford, Arbitrator (via e-mail)
Star TMC

**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 REPLY TO THE RESPONSE FILED BY TIME WARNER CABLE INFORMATION SERVICES (NORTH CAROLINA), LLC)

Pursuant to the Authority’s Order issued October 31, 2012, and the Order Extending Time issued January 11, 2013, Star Telephone Membership Corporation (“Star TMC” or “Star”) replies to the Response to Star TMC’s Objections and Comments filed by Time Warner Cable Information Services (North Carolina), LLC (“TWCIS”) on December 21, 2012. As shown in Star TMC’s previous filings, the Authority should grant Star’s Objections to the Arbitrator’s Recommended Order, deny TWCIS’s Motion to Dismiss, and direct the Arbitrator to schedule an evidentiary hearing in this docket on Star TMC’s Petition for Suspension or Modification.

EXECUTIVE SUMMARY

TWCIS’s Response addressed Star TMC’s Objections and Comments as to the Arbitrator’s Recommended Order. The Arbitrator recommended that the Authority grant TWCIS’s Motion to Dismiss the Petition for Suspension or Modification filed by Star TMC. 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 the specific Section 251(b) interconnection arrangements requested by TWICS.

¹ 47 U.S.C. §§ 151, *et seq.*

TWCIS moved to dismiss Star's Petition, claiming that Star failed to allege a legally sufficient and cognizable claim for relief under Section 251(f)(2). If the Authority grants the motion to dismiss, it 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 Objections and Comments, the Authority should deny TWCIS's 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) of the Act, Star TMC exercised its right to petition the Authority for suspension or modification of the interconnection arrangements sought by TWCIS. In paragraph 17 of its Petition, Star TMC 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 relevant matters of fact set forth in paragraphs 15-32 of Star's Petition, more than adequately plead a claim for the relief available under Section 251(f)(2). Because the Recommended Order would deny Star any opportunity to offer evidence in support of its request, the Authority should reject it and direct the Arbitrator to conduct an evidentiary hearing on Star's Petition.

TWCIS continues to fail to recognize the significance of the allegations in Star TMC's Petition as to the Arbitrator's Recommended Decision 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*"). Star TMC's allegations as to Judge Moore's recommended ruling in that docket reflect the existence of relevant evidence establishing that the very same interconnection arrangements requested by TWCIS would impose an undue economic burden on Star TMC.

Finally, proper application of the standard for dismissal advocated by TWCIS, and adopted by the Arbitrator here, does not support dismissal of Star TMC's Petition. In fact, dismissal of Star's Petition for failure to state a claim would be directly contrary to North Carolina law governing motions to dismiss, which is the standard urged by TWCIS and adopted by the Arbitrator. For the reasons set forth in Star TMC's Objections and Comments, and its Response to TWCIS's Comments, the Authority should grant Star's previously filed objections as to the Arbitrator's Recommended Order, deny TWCIS's Motion to Dismiss, and direct the Arbitrator to schedule an evidentiary hearing on Star TMC's Petition for Suspension or Modification.

REPLY TO TWCIS RESPONSE

Star's Petition States a Claim Upon Which Relief Can be Granted Under Section 251(f)(2).

TWCIS leads its response to Star TMC's Objections with the claim that Star failed "to show that that it has alleged sufficient elements and facts to state a claim to state a claim under Section 251(f)(2)." (TWCIS Response p. 4). As part of this argument TWCIS asserts that Star "did not allege particularized harms caused by the compliance with its Section 251(b) duties."

(TWCIS Response p. 5). TWCIS makes this claim in a void, as it continues to ignore the fact that Star's Petition for relief under Section 251 included the following allegations, which allege the existence of all elements necessary to state a claim for relief under Section 251(f)(2):

Star TMC alleges that establishment 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' services in Star TMC's service area would, **individually and collectively**, impose a significant adverse impact on users of Star TMC's telephone communication 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 Petition ¶ 17) (emphasis added).

The allegations in paragraphs 15 and 16 of Star's Petition concern Star's access line losses, revenue losses, and its worsening financial condition, and include the following allegations:

Star TMC submits that the evidence to be adduced as to this Petition will demonstrate that the introduction of Time Warner Cable's 'Digital Home Phone' and 'Business Class Phone' services, which would be facilitated by the interconnection arrangements requested by TWCIS, would cause an undue economic burden as well as dramatic and irrevocable harm to Star TMC and the public interest in universal service. The extent of the undue economic burden that would result from acquiring provision of interconnection arrangements requested by TWCIS must be evaluated in the context of Star TMC's circumstances. In addition to access line losses and declining access revenues, recent regulatory developments further imperil Star TMC's ability to cover its operational costs.

(Star Petition ¶ 16).

It is disingenuous for TWCIS to contend that Star TMC has not alleged particularized harms that would be caused by establishment of one or more of the Section 251(b)

interconnection arrangements requested by TWCIS. Star TMC takes particular exception to TWCIS's assertion that Star's Petition "does not state a plausible claim for relief because it alleges none of the facts that even Star TMC agrees are essential to state a claim under Section 251(f)(2)." (TWCIS Response p. 6). Nothing could be further from the truth.

Paragraphs 15-32 of Star's Petition allege matters of fact supporting Star TMC's claim that suspension or modification of one or more of the interconnection arrangements sought by TWCIS is warranted, as provided for in Section 251(f)(2). As shown in Star TMC's Objections and its later Response to TWCIS's Comments, Star TMC's Petition states a claim upon which relief can be granted under the standard advocated by TWCIS, which is law of North Carolina applicable to motions to dismiss in civil cases. Nothing in Section 251(f)(2) or anywhere else in the Act requires Star "to allege the specific incremental impact of each specific Section 251(b) duty or to assert which duty will cause each supposed harm," as TWCIS claims. (TWCIS Response p. 6). TWCIS attempts to engraft a non-existent requirement onto Section 251(f)(2) in a fevered effort to deny Star TMC any opportunity to offer evidence in support of its Petition.

TWCIS seeks to strand Star in some sort of pleading quagmire, by alleging that Star has not come forward with sufficiently specific allegations, or "shown" adequate "proof" of its allegations, when there is nothing in Section 251(f)(2) which requires the kind of detailed pleading that TWCIS now advocates, and the time for offering proof is though evidence produced at a hearing. Star has repeatedly acknowledged that it has the burden of proving that one or more of the interconnection arrangements requested by TWICS would, in fact, impose an undue economic burden on Star and be inconsistent with the public interest. TWCIS's argument that Star has not met its burden of proof is premature, as Star has had no opportunity to bring

forward evidence supporting its request for suspension or modification. However, for purposes of pleading its request for the relief provided for in Section 251(f)(2), Star has more than adequately alleged the existence of the requisite elements for relief under Section 251(f)(2). The allegations in the Petition **must be assumed to be true** for purposes of the Motion to Dismiss. TWCIS simply wants to deny Star TMC any chance to offer proof in support of its Petition.

TWCIS's repeated claims that Star has "not shown" some aspect of what must ultimately be proven for Star to obtain a suspension or modification suggest that Star was obligated to have already proven at this stage in this proceeding, without ever being allowed to offer evidence, that it is entitled to relief under Section 251(f)(2). For example, TWCIS argues that Star TMC "fails to show that suspension or modification is 'necessary' to avoid harm." (TWCIS Response p. 9). The very title of this section of TWCIS's argument confirms TWCIS's fundamental failure to understand the standard to be applied as to a motion to dismiss. The correct inquiry at this point is not whether Star has proved anything; only whether it has stated a claim upon which relief can be granted. Star has adequately stated a legally valid claim and TWCIS's Motion to Dismiss should be denied.

TWCIS's claim that Star TMC failed to "show" something suggests that Star has had an opportunity of offer evidence in support of its Petition – which it has not. This is the sort of argument one might expect in a post-hearing brief, after the parties have had the chance to offer evidence. Obviously that is not the situation here, and TWCIS desperately seeks to preempt Star from having any opportunity to offer evidence proving the allegations in its Petition. The standard on a motion to dismiss is not whether Star has "**shown**" that it is entitled to relief at this preliminary point; rather the standard is simply whether Star has **alleged** the existence of the

necessary elements for relief under Section 251(f)(2), and alleged the existence of matters which would support relief under that statute.

On a motion to dismiss . . . the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted **under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.**

Stunzi v. Medlin Motors, Inc., ___ N.C. App. ___, 714 S.E.2d 770, 773-74 (2011) (emphasis added). Thus, when TWCIS alleges that “showing necessity thus is a prerequisite to a pending relief under Section 251(f)(2),” Star agrees with that assertion. In order to obtain a suspension or modification as provided for in Section 251(f)(2) Star will have to meet its burden of proving that such suspension or modification is necessary.

At the pleading stage, however, the question is not whether Star has “shown” the necessity for suspension or modification. Star has alleged that such relief is necessary, and TWCIS seeks to impose a pleading standard on Star TMC that does not exist under either the Act nor North Carolina law relating to motions to dismiss – the latter being the standard that TWCIS urged upon the Authority here. No requirement can be found in the Act or otherwise that obligates Star to “show” or allege a negative, as TWCIS now contends, *i.e.*, that “it could not employ other measures to alleviate the purported harms associated with its compliance with each of its duties under Section 251(b) **before** it can show entitlement to suspension or modification.” (TWCIS Response p. 10) (emphasis in original). There is no requirement of such in the Act and certainly none under North Carolina law. Whether Star can demonstrate that a suspension or modification is necessary will depend on the evidence brought forward at an evidentiary hearing.

However, it is patently unfair for TWCIS to take Star to task for “failing to show” such things, or failing to allege negatives, when it has no obligation to do so at this point, and has had no opportunity to bring forward evidence.

The fundamental failure to understand the difference between a motion to dismiss and a party’s failure to meet its burden of proof is perfectly illustrated in this TWCIS statement:

The Authority should likewise find that Star TMC has failed to carry its burden of proof – not only for misapplying the Section 251(f)(2) burden standard, but also for failing to demonstrate that its requested suspension of any Section 251(b) duty is ‘necessary’ as required by the statute.

(TWCIS Response p. 11).

The question presented by TWCIS’s Motion to Dismiss is not whether Star TMC has met its burden of proof; it has had no opportunity to attempt to meet its burden of proof. TWCIS’s suggestions that Star has not met its burden of proof on some point, or shown some point, are misguided and premature, and reflect a failure to appreciate the very standard that TWCIS contends should be applied at this stage in the proceedings.

In the same vein, TWCIS also argues in its Response that “Star TMC does not allege any specific burdens that would result from complying with each of those duties [under Section 251(b)].” (TWCIS Response p. 6) (emphasis added). This assertion simply cannot be reconciled with the allegations set forth in Star’s Petition. In addition to the economic matters alleged in paragraph 16 of the Petition (quoted on page 4 of this Reply), Star alleged in its Petition that TWCIS would only offer service in those areas where Time Warner has cable TV facilities, and that Star’s business customers tend to be concentrated in those areas. Star thus alleged the following:

[T]his means that as a consequence of the various interconnection arrangements sought by TWCIS, Star TMC would be at increased risk of losing its largest and most profitable customers (its business customers). . . . This reality only serves to elevate the risk of severe economic losses to Star TMC that would result from establishment of the interconnection arrangements for number portability, dialing parity, access to rights-of-way and/or reciprocal compensation which TWCIS seeks to establish.

(Star Petition ¶ 18).

Star further alleges in its Petition that it would “bear the economic losses resulting from Time Warner Cable being allowed to selectively offer service only” in those more populous areas where Star’s most profitable customers are located, while leaving Star TMC to provide service to harder-to-serve customers located in the sparsely populated majority of Star’s service area. Star alleges this would threaten its ability to bear the cost of continuing to offer advanced services to all of its customers, especially broadband service. (Star Petition ¶ 18). These are all harms which Star contends would flow from establishment of the interconnection arrangements requested by TWCIS.

While TWCIS urges the Authority to apply a hyper-technical analysis to the allegations in Star’s Petition, such an analysis is not provided for in the Act nor is it required by any decision applying the Act or the North Carolina decisions cited by TWCIS in its Motion to Dismiss. In its Motion, TWCIS argued that the Authority should apply the same standard that a North Carolina 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). As detailed in Star TMC’s prior filings, under North Carolina court decisions concerning motions to dismiss Star TMC’s Petition

is not subject to dismissal for failure to state a claim. The North Carolina Supreme Court articulated the standard for dismissal as follows:

Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford County, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

Star's Petition is not subject to dismissal under the standard set by the Supreme Court in *Wood v. Guilford County*, *supra*. First, Star's Petition cites law (Section 251(f)(2)) that affirmatively provides for the relief sought by Star TMC. Second, Star's Petition alleges the existence of facts sufficient to support the essential elements of a claim under Section 251(f)(2). Third, the Petition does not disclose any fact that "necessarily defeats" 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." Thus, under well-settled North Carolina law concerning motions to dismiss, Star TMC's Petition is not properly dismissed. No one can credibly argue that it is "beyond a doubt" that Star could not prove the elements for suspension or modification under Section 251(f)(2) of one or more of the interconnection arrangements sought by TWCIS. The allegations in Star TMC's Petition are more than sufficient to state a claim for relief upon which relief can be granted under Section 251(f)(2).

The Significance of *Sprint v. Star TMC*.

TWCIS continues to refuse to acknowledge the relevance of the Recommended Decision in *Sprint v. Star TMC*. TWCIS also continues to wrongly argue that Star suggests that the

recommended findings in that docket “should be imported into” this one. Star does not advocate that those findings should be “imported” into this case; however, as the Arbitrator recognized in the Recommended Order here, the matters addressed in the Recommended Decision in *Sprint v. Star TMC* do show the existence of evidence potentially relevant to Star’s claim that the interconnection arrangements sought by TWCIS would impose an undue economic burden on Star.

This does not mean that evidence from that proceeding [referring to *Sprint v. Star TMC*] could not be relevant to a claim by 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).

The Recommended Order in the present docket thus recognizes the potential relevance of evidence from the *Sprint v. Star TMC* docket, where the arbitrator found that Sprint had not shown that the interconnection arrangements it sought to establish with Star (which were identical to those now requested by TWCIS) would not be unduly economically burdensome to Star TMC. The same evidence supporting that finding would be relevant to Star’s assertion here that TWCIS’s request for those same interconnection arrangements would be unduly economically burdensome as to Star. Star TMC does not contend that the findings in that Section 251(f)(1) proceeding are dispositive in this Section 251(f)(2) proceeding. As to TWCIS’s incessant demand that Star “allege facts that could document such particularized harms,” the Arbitrator’s recommendation in *Sprint v. Star TMC* reflects the existence of evidence that the requested arrangements would impose an undue economic burden on Star TMC. There is no difference between the “unduly economically burdensome” criterion in Section 251(f) and

251(f)(2), and Star TMC's allegations as to *Sprint v. Star TMC* buttress the claim of undue economic burden.

Other TWCIS Arguments.

Finally, TWCIS is reduced to arguing that even if "Star TMC had alleged that it could show that suspension is necessary, such claims, standing alone, would not have been plausible." (TWCIS Response p. 10). This statement is telling for two reasons. First, it suggests a standard of review which is inconsistent with well-settlement jurisprudence: the allegations in the pleading are to be treated as true, and to be liberally construed, and the pleading is not subject to dismissal for failure to state a claim "**unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.**" *Stunzi v. Medlin Motors, Inc.*, 714 S.E.2d at 773-74. TWCIS suggests that Star was obligated to "allege and show that all other means of mitigating its anticipated financial losses would be inadequate." (TWCIS Response p. 3). No provision in Section 251 or elsewhere in the Act imposes such a requirement on an ILEC seeking suspension or modification. TWCIS takes Star to task for not making extensive allegations regarding the necessity for suspension or modification, none of which is required by the Act, but then says that even if such allegations had been made, they would have been implausible. The plausibility of Star's claims can only be judged after its evidence is heard, not before.

Second, this statement reveals that TWCIS assigns to itself the task of serving as both judge and jury as to Star's Petition, before the merits are ever reached. While TWCIS can choose to summarily reject Star's allegations, it is the duty of the Authority - not TWCIS - to ultimately determine whether Star TMC meets its burden of proving the elements of Section

251(f)(2) for suspension or modification.

CONCLUSION

For the reasons set forth above, and in its Objections and Comments and its previously filed Response, Star TMC respectfully requests that the Authority enter its Order rejecting the Recommended Order, denying TWCIS's Motion to Dismiss, suspending enforcement of the 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 14th day of January, 2013.

BURNS, DAY & PRESNELL, P.A.

By:



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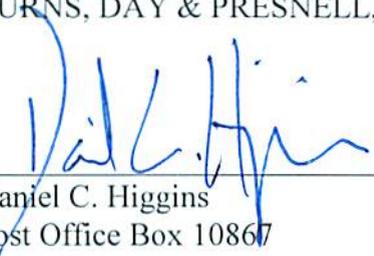
CERTIFICATE OF SERVICE

It is hereby certified that a true and exact copy of the foregoing Reply 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 14th day of January, 2013.

BURNS, DAY & PRESNELL, P.A.

By:



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