

**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 )

**RECEIVED**

**DEC 21 2012**

**REA**

**TIME WARNER CABLE INFORMATION SERVICES (NORTH CAROLINA), LLC'S  
RESPONSE TO OBJECTIONS AND COMMENTS**

Time Warner Cable Information Services (North Carolina), LLC ("TWCIS (NC)"), by its undersigned counsel, respectfully submits this response to Star Telephone Membership Corporation's ("Star TMC's") November 26, 2012 objections and comments concerning the Arbitrator's Recommended Order in this proceeding.<sup>1</sup> As discussed below, Star TMC's objections have no merit, and the Authority thus should promptly adopt the Recommended Order.

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

## EXECUTIVE SUMMARY

Star TMC fails to show that the Recommended Order erred in recommending the dismissal without prejudice of its petition for suspension or modification pursuant to 47 U.S.C. § 251(f)(2). Critically, Star TMC does not take issue with the Recommended Order’s articulation of its burden of proof. In fact, Star TMC now concedes that Section 251(f)(2) requires it to show “particularized harm” in connection with each specific Section 251(b) duty that it wants the Authority to modify or suspend, and further acknowledges that it may not simply rely on generalized claims of competitive harm. But Star TMC’s petition does not allege facts that could document such particularized harms. Instead, it merely states that Star TMC will suffer certain economic losses as a result of the competition that interconnection with TWCIS (NC) will facilitate, without asserting any nexus between those burdens and compliance with each Section 251(b) duty. Such conclusory claims are insufficient and warrant dismissal. Star TMC’s continued reliance on the nonbinding, recommended evidentiary findings from an earlier proceeding involving Sprint’s effort to lift Star TMC’s rural exemption pursuant to Section 251(f)(1)—which involved an entirely different burden of proof and cannot support the essential elements of a Section 251(f)(2) claim—does not fill this evidentiary void. In fact, Star TMC’s deference to that record merely underscores its failure in this case to include the specific allegations of harm that Star TMC agrees it must make to support its requested relief.

Apart from its failure to allege particularized harms, Star TMC glosses over a key element of any Section 251(f)(2) claim—that suspension or modification is “necessary” to avoid the burdens of complying with Section 251(b).<sup>2</sup> Under the plain meaning of the term, suspension or modification relief can only be considered “necessary” if there is no other means by which

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<sup>2</sup> 47 U.S.C. § 251(f)(2)(A).

Star TMC could alleviate the economic harms it anticipates. But Star TMC's petition is completely silent on this issue. Indeed, Star TMC does not allege that, absent Section 251(f)(2) relief, it would be unable to offset any revenue losses through other means, whether those within its own control (such as by improving its services to retain customers or increase revenues or by reducing its operating costs) or other regulatory avenues (such as by seeking universal service funding or taking other steps to raise revenue). Rather, Star TMC presumes that suspension or modification should be the Authority's first response to TWCIS (NC)'s competitive offering, despite the burdens that such relief would impose on consumers—for instance, by depriving them of their ability to port telephone numbers to a new provider. If anything, inflicting such harms on consumers could be justified, if ever, only if Star TMC could allege and show that all other means of mitigating its anticipated financial losses would be inadequate. But Star TMC has not even asserted as much.

The Recommended Order appropriately recognized that such pleading deficiencies require dismissal. In particular, because Star TMC's petition includes no allegations of the particularized harms that Star TMC expects or of the alternate means of relief that are inadequate and thus make suspension or modification essential, it fails to state a Section 251(f)(2) claim and should be dismissed. Star TMC objects to that outcome, insisting that it is entitled to an opportunity to present evidence and that any decision precluding it from doing so would violate its rights. But Star TMC overlooks the fact that, while it is entitled to seek relief pursuant to Section 251(f)(2), its right to present a full evidentiary case is not automatic, and instead turns on its ability to show at the outset, in its petition, that it is capable of mounting such a case—something which it has not done here. And while Star TMC complains that dismissal would be inequitable, there is nothing improper about requiring a Section 251(f)(2) petitioner to allege

sufficient facts that, even if taken as true, would support its claim. In fact, given that Star TMC has enjoyed a *de facto*, seven-year suspension of its Section 251(b) duties, its lament about actually being required to justify its continued insulation from competition rings hollow.

Similarly, Star TMC's complaint that the Recommended Order gave too much deference to established procompetitive policies—an argument that highlights Star TMC's unwavering hostility to competition of any kind—clearly lacks merit. The Recommended Order correctly construed the balancing of interests under Section 251(f)(2), which, contrary to Star TMC's attempt to treat that provision as an attempt to shield rural telephone companies from competition, establishes compliance with Section 251(b) as the default subject only to narrow and targeted relief to mitigate particular implementation challenges.

In short, Star TMC's efforts to cast doubt on the Recommended Order and to rehabilitate its defective petition are wholly unpersuasive. Accordingly, TWCIS (NC) urges the Authority to adopt the Recommended Order in order to allow TWCIS (NC) finally to interconnect and exchange traffic with Star TMC and thus facilitate the introduction of much-needed—and long-delayed—competition to North Carolina consumers.

## ARGUMENT

### I. STAR TMC FAILS TO SHOW THAT IT HAS ALLEGED SUFFICIENT ELEMENTS AND FACTS TO STATE A CLAIM UNDER SECTION 251(f)(2)

Although Star TMC would have the Authority believe TWCIS (NC) denies the very existence of relief for any rural LEC pursuant to Section 251(f)(2),<sup>3</sup> this is not the case. Rather, 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). Star TMC asserts that its petition alleged “the existence

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<sup>3</sup> See Star TMC's Objections and Comments as to Arbitrator's Recommended Order, Docket No. TMC-5, Sub 1, at 12-13 (filed Nov. 26, 2012) (“Star TMC Objections”).

of all necessary elements” of a Section 251(f)(2) claim and “sufficient factual matters to support that claim.”<sup>4</sup> In fact, the petition did neither, and Star TMC’s objections give the Authority no reason to conclude otherwise.

**A. Star TMC Did Not Allege Particularized Harms Caused By Compliance With Its Section 251(b) Duties, As It Now Concedes It Must.**

As TWCIS (NC) explained in its initial comments, 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 particular obligation in Section 251(b).”<sup>5</sup> Critically, Star TMC “does not disagree with that statement.”<sup>6</sup> In fact, Star TMC concurs in the Recommended Order’s conclusions that “[t]he analysis set forth in Section 251(f)(2) must be conducted individually as to each of the Section 251(b) obligations sought to be suspended or modified” and that “Section 251(f)(2) requirements cannot be satisfied based merely on assertions to the effect that fulfillment of the obligation will facilitate ruinous competition.”<sup>7</sup>

But Star TMC fails to realize the extent to which its petition flunks this standard. Star TMC’s petition asserts only that the “establishment of arrangements” for the five enumerated duties in Section 251(b) “would, individually and collectively,” result in economic harms that it believes align with the subparts of Section 251(f)(2), which it lists verbatim.<sup>8</sup> According to Star

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<sup>4</sup> Star TMC’s Objections at 7.

<sup>5</sup> Recommended Order ¶ 13.

<sup>6</sup> Star TMC Objections at 21.

<sup>7</sup> *Id.* at 22 (quoting Recommended Order ¶ 16).

<sup>8</sup> Petition ¶ 17.

TMC, that minimal effort should be enough.<sup>9</sup> As an initial matter, such a “[t]hreadbare recital of the elements of a cause of action” does not suffice, as the Supreme Court has emphasized.<sup>10</sup> The Court also has made clear that, to survive a motion to dismiss, a request for relief must include sufficient facts that, if accepted as true, state a claim for relief that is “plausible.”<sup>11</sup>

Star TMC’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 a claim under Section 251(f)(2). In particular, Star TMC does not deny that its petition fails to allege the specific, incremental impact of each specific Section 251(b) duty or to assert which duty will cause each supposed harm. Rather, it describes all of those duties as a bundle. And the so-called “detailed allegations of matters of fact” in its petition, which Star TMC touts as stating a plausible claim for relief,<sup>12</sup> all relate broadly to revenue losses that it anticipates would result from requiring “interconnection arrangements” that in turn would “facilitate Time Warner Cable’s offering of its services in Star TMC’s service territory.”<sup>13</sup> Such a claim is nothing more than an “assertion[] to the effect that fulfillment of [Star TMC’s Section 251(b) duties] will facilitate ruinous competition,” which Star TMC concedes is inadequate to establish a claim under Section 251(f)(2).<sup>14</sup>

Indeed, Star TMC does not allege *any* specific burdens that would result from complying with each of those duties. For example, it does not claim that providing local number portability

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<sup>9</sup> Star TMC Objections at 11.

<sup>10</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

<sup>11</sup> *Id.*

<sup>12</sup> Star TMC Objections at 3.

<sup>13</sup> Petition ¶ 24.

<sup>14</sup> Recommended Order ¶ 16.

("LNP") pursuant to Section 251(b)(2) would result in particular costs or implementation challenges that would satisfy the elements of Section 251(f)(2). Nor is it clear that Star TMC could do so at all: In its petition, Star TMC conceded that it competes with wireless providers and nomadic voice-over Internet Protocol providers,<sup>15</sup> meaning that Star TMC likely has already developed the capability to port numbers—and, like other incumbents, it may well have already collected surcharges from its customers to pay for the effort. In fact, Star TMC acknowledged in discovery in the earlier Section 251(f)(1) portion of this proceeding that it had successfully fulfilled at least one number portability request from a CMRS carrier.<sup>16</sup> Further, Star TMC does not allege that suspension or modification of any specific duty would avoid the harms it describes. Again using number portability as an example, if customers would switch services even without the ability to port numbers, then suspending Star TMC's duty to provide LNP would do nothing to avoid its anticipated economic harms, even if they were cognizable. While Star TMC need not prove in its petition what choices customers would make in the absence of number portability, it must at least make allegations that, if accepted as true, would permit the individualized analysis Section 251(f)(2) requires. But it does not do that.

The recommended evidentiary findings from Star TMC's separate rural exemption proceeding (which TWCIS (NC) was not a party to) do nothing to fill this void. In that proceeding, an arbitrator found that Sprint had not met its burden of showing that lifting Star TMC's rural exemption to require it to comply with Section 251(c) duties would not be "unduly economically burdensome" under Section 251(f)(1). Star TMC continues to insist that those nonbinding findings, which were ultimately mooted by order of the Authority, support its claim

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<sup>15</sup> Petition ¶ 16.

<sup>16</sup> See Star TMC Response to TWCIS (NC) Data Request No. 29 (filed May 25, 2010).

for relief from its Section 251(b) duties, pointing to the fact that the same three-word phrase appears in Section 251(f)(2).<sup>17</sup> But the notion that the recommended findings from the prior, mooted proceeding, involving a *stranger* to this case (namely, Sprint), should be imported into this one overlooks the differing legal standard between Sections 251(f)(1) and 251(f)(2), which the Recommended Order set forth in detail.<sup>18</sup> As an initial matter, a finding that Sprint failed to carry its burden of *disproving* undue economic harm does not mean that such harm *actually* would occur. In addition, the previous arbitrator did not have occasion to examine the particular burdens associated with any specific Section 251(b) duty, and instead made a more general finding about the consequences of interconnection for Star TMC. Further, that arbitrator was not required to consider whether preserving Star TMC’s rural exemption was “consistent with the public interest, convenience, and necessity,” a standard that necessarily confines any determination under Section 251(f)(2).<sup>19</sup> While Star TMC purports to acknowledge some of the differences between the two provisions,<sup>20</sup> it fails to appreciate the consequence of them—namely, that findings from a Section 251(f)(2) proceeding are not dispositive in a Section 251(f)(2) proceeding. Thus, the Recommended Order properly found Star TMC’s reliance on

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<sup>17</sup> Star TMC endeavors to create a sense of internal inconsistency in the text of the Recommended Order and footnote 3, which states that the dismissal of the Petition does not mean that evidence from the Star TMC-Sprint proceeding could not be relevant to Star TMC’s Section 251(f)(2) claims in relation to TWCIS (NC). *See* Star TMC Objections at 16-17. Star TMC argues that this statement demonstrates that the Arbitrator may have been improperly “weighing the evidence’ at the motion to dismiss stage,” thus compromising the validity of the Recommended Order. Footnote 3 does nothing of the sort. In fact, as Star TMC well knows, Star TMC is the party that insisted on this footnote’s inclusion in the Recommended Order in the first instance and can hardly be heard to complain about language it sponsored.

<sup>18</sup> Recommended Order ¶ 11.

<sup>19</sup> 47 U.S.C. § 251(f)(2)(B).

<sup>20</sup> Star TMC Objections at 20.

the prior proceeding to be unpersuasive.<sup>21</sup> In fact, Star TMC’s continued insistence that the prior findings be taken into account only underscores that the factual allegations in its petition relate solely to generalized concerns about competition, rather than particularized burdens associated with specific Section 251(b) obligations. Accordingly, Star TMC’s petition fails to state a claim on which relief can be granted.

**B. Star TMC Fails To Show that Suspension or Modification Is “Necessary” to Avoid Harm.**

The requirement that Star TMC’s alleged burdens share a nexus with each Section 251(b) requirement at issue is not the only component of the Section 251(f)(2) burden standard that Star TMC ignores. Congress limited suspension or modification relief to circumstances in which the petitioning LEC demonstrates that a suspension or modification is “*necessary . . . to avoid imposing a requirement that is unduly burdensome.*”<sup>22</sup> In other words, suspension or modification relief is warranted only where the petitioner can show that a particular Section 251(b) requirement is unduly economically burdensome *and* that suspension of the requirement is essential to avoiding that burden.<sup>23</sup>

Showing necessity thus is a prerequisite to obtaining relief under Section 251(f)(2). And satisfying the necessity requirement requires consideration of the alternative forms of relief—apart from suspension or modification—that are or would be available to mitigate the anticipated economic losses. For example, the availability of universal service subsidies and utilizing other means to increase revenues could well be viable alternatives for offsetting any financial burdens

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<sup>21</sup> Recommended Order ¶ 17.

<sup>22</sup> See 47 U.S.C. § 251(f)(2)(A) (emphasis added).

<sup>23</sup> See The Merriam-Webster Dictionary (defining “necessary” as “of an inevitable nature,” “inescapable,” “logically unavoidable,” “compulsory,” “absolutely needed,” or “required”).

that Star TMC believes it may incur as a result of complying with each Section 251(b) duty at issue. In addition, Star TMC conceivably could respond effectively to the burdens it claims will flow from such compliance by improving the quality or diversity of its services in order to increase revenues, or by reducing operational costs that would give it a bigger margin.

In short, under the standard as articulated in the statute, Star TMC has an obligation to at least allege 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 could show entitlement to suspension or modification. Star TMC cannot demonstrate that suspending these duties is “necessary” merely by identifying purported burdens that it asserts would be undue. Rather, necessity—under the plain meaning of that term—requires Star TMC to allege that alternative forms of relief have been tried and failed, or would necessarily be unavailable, unsuccessful, or insufficient.

The importance of preserving suspension or modification under Section 251(f)(2) as a last resort is reinforced by the harms that such relief can cause for consumers. For instance, as noted above, suspending Star TMC’s duty to provide number portability would result in customers being deprived of a basic consumer entitlement. Making matters worse, many customers have been required to pay surcharges to fund the implementation of number portability processes. Given the costs to consumers, suspension or modification should not be the first response to competitive entry, but the final one, after all other alternatives have been exhausted.

Even if Star TMC had alleged that it could show that suspension is necessary, such claims, standing alone, would not have been plausible. For instance, Star TMC has not alleged that it would be unable to respond to TWCIS (NC)’s entry by reducing costs or expanding or

improving services to reduce the impact of its projected revenue losses. And it has made no reference to other forms of regulatory relief, such as seeking additional subsidies or taking other steps to raise revenue, that could offset those harms. And more generally, Star TMC has not identified any other instance in which competitive entry as facilitated by one or more of its Section 251(b) duties has caused a rural telephone company to become insolvent or suffer other harms. As a result, Star TMC cannot reasonably be deemed to have alleged facts showing that suspension or modification is “necessary” as required by Section 251(f)(2).

A recent ruling in the Maine proceeding that the Recommended Order deemed “particularly persuasive” and “the closest factually” to this case reinforces the importance of requiring exhaustion before turning to the last resort of suspension or modification relief.<sup>24</sup> On December 13, 2012, the staff of the Maine Public Utilities Commission issued a decision recommending the denial of petitions that sought suspension or modification relief in connection with the petitioning LECs’ LNP duties.<sup>25</sup> Among other rulings, the staff concluded that suspension was “unnecessary” because the financial losses that the petitioners’ claimed they would experience as a result of providing LNP (and thus facilitating competition) would be offset by universal service benefits.<sup>26</sup>

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.

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<sup>24</sup> Recommended Order ¶ 14.

<sup>25</sup> Examiner’s Report, Docket Nos. 2012-218-221, at 1 (Maine Pub. Utils. Comm’n Dec. 13, 2012).

<sup>26</sup> *Id.* at 21.

## II. STAR TMC'S OTHER CRITICISMS OF THE RECOMMENDED ORDER ARE UNAVAILING

Star TMC makes several other arguments, the upshot of which seems to be a plea that the Authority look past the deficiencies in its petition and allow Star TMC to present its case in chief regardless of whether it has adequately stated a claim. This effort is not persuasive.

First, Star TMC argues that dismissal would be “inequitable” because it would deny Star “any opportunity” to present evidence in support of its request and thus deprive.<sup>27</sup> Indeed, a unifying theme in Star TMC’s objections is the notion that it is “entitled” to such an opportunity—the implication being that dismissal of its petition, which would “deprive” Star TMC of that purported right, is *per se* improper.<sup>28</sup> But Star TMC fails to grasp that it has already had a chance to identify evidence that could support its case—in its petition. And while Star TMC need not make its entire evidentiary case in its petition in the interest of fully satisfying its burden of proof, it must do something more than provide “notice” that it is seeking relief.<sup>29</sup> Having declined to make the most of that opportunity, Star TMC is not automatically entitled to forge ahead. Given that Star TMC already has enjoyed a *de facto*, seven-year suspension of its statutory duties that it has never been required to justify, the Authority should not relieve Star TMC of its initial pleading burden now and allow it to remain insulated from competition. In fact, such a result would be the antithesis of fairness under these circumstances.

In addition, Star TMC complains that the Recommended Order gave “inappropriate deference” to the Communications Act’s goal of promoting competition.<sup>30</sup> As an initial matter, Star TMC overstates the emphasis that the Recommended Order placed on this issue. The

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<sup>27</sup> Star TMC Objections at 11.

<sup>28</sup> *Id.* at 2; *see also, e.g., id.* at 9, 11, 12, 14, 22.

<sup>29</sup> *Id.* at 11, 14.

<sup>30</sup> *Id.* at 24.

Recommended Order did not give “preeminent weight” to the public policy interest in competition at the expense of all other considerations,<sup>31</sup> but rather, it simply cited that policy in further support of its interpretation of Section 251(f)(2)’s text as requiring a petitioner to allege particularized harms.<sup>32</sup> In any event, Star TMC misconstrues the competitive balance that underlies Section 251(f)(2). In its discussion of the issue, Star TMC conflates Sections 251(f)(1) and 251(f)(2), and argues that they were intended to “provide some protection” from “the worst and most undesirable potential results of competition.”<sup>33</sup> But that is not at all what Section 251(f)(2) was intended to do. Rather, as the Recommended Order notes, under Section 251(f)(2), the default is compliance with Section 251(b),<sup>34</sup> subject only to narrow and targeted relief to the extent necessary to assist rural telephone companies address demonstrated implementation challenges. Section 251(f)(2) was not intended as merely an alternative route to creating a rural exemption, as Star TMC apparently believes.

In the end, this argument—like Star TMC’s petition as a whole—merely highlights Star TMC’s unwavering hostility to competition of any kind. But the Authority should not endorse that sentiment. Rather, it should fulfill its duty to promote competition in the state by holding Star TMC to the applicable pleading standard.

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<sup>31</sup> *Id.* at 26.

<sup>32</sup> Recommended Order ¶ 17.

<sup>33</sup> Star TMC Objections at 25.

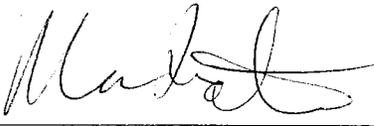
<sup>34</sup> Recommended Order ¶ 17.

**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: December 21, 2012

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

By: 

Marcus W. Trathen  
Elizabeth E. Spainhour  
Brooks, Pierce, McLendon,  
Humphrey & Leonard, LLP  
Suite 1600, Wells Fargo Capitol Center  
150 Fayetteville Street  
P.O. Box 1800 (zip 27602)  
Raleigh, NC 27601  
(919) 839-0300  
[mtrathen@brookspierce.com](mailto:mtrathen@brookspierce.com)  
[espainhour@brookspierce.com](mailto:espainhour@brookspierce.com)

Of Counsel:

Julie P. Laine  
Group Vice President & Chief Counsel, Regulatory  
Time Warner Cable Information Services  
(North Carolina), LLC  
60 Columbus Circle  
New York, NY 10023  
(212) 364-8482  
[julie.laine@twcable.com](mailto:julie.laine@twcable.com)

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 **Response of Time Warner Cable Information Services (North Carolina), LLC to Objections and Comments** via electronic mail to Daniel Higgins at [dhiggins@bdppa.com](mailto:dhiggins@bdppa.com).

This 21<sup>st</sup> day of December, 2012.



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Marcus W. Trathen