

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Petition of Time Warner Cable Inc. Pursuant to) WC Docket No. 13-204
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

Adopted: November 1, 2013

Released: November 1, 2013

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order (Order) addresses the petition of Time Warner Cable Inc. (TWC) for preemption of the jurisdiction of the North Carolina Rural Electrification Authority (NCREA) with respect to the arbitration of an interconnection agreement between TWC's telecommunications carrier subsidiary, Time Warner Cable Information Services (North Carolina), LLC (TWCIS) and Star Telephone Membership Corporation (Star), an incumbent local exchange carrier (LEC). Specifically, TWC seeks preemption of the jurisdiction of the NCREA pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (the Act). For the reasons set forth below, we grant TWC's petition.

II. BACKGROUND

2. Section 251. Section 251 of the Act provides a graduated set of interconnection requirements and other obligations designed to foster competition in telecommunications markets, particularly local markets. Section 251(a) sets forth general duties applicable to all telecommunications carriers, including the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Section 251(b) sets forth additional duties for LECs pertaining to resale of services, number portability, dialing parity, access to rights-of-way, and the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications (i.e., arrangements for exchange of traffic terminating on another carrier's network). Section 251(c) sets forth

1 See Petition of Time Warner Cable Inc. for Preemption Pursuant to Section 252(e)(5) of the Communications Act, as Amended, of the North Carolina Rural Electrification Authority for Failure To Arbitrate an Interconnection Agreement with Star Telephone Membership Corporation, WC Docket No. 13-204 (filed Aug. 8, 2013) (TWC Petition).

2 See 47 U.S.C. § 252(e)(5).

3 Id. § 251(a)(1).

4 Id. § 251(b).

additional obligations, which apply to *incumbent* LECs.⁵ Among other things, section 251(c) includes the duty to “negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements” to fulfill the section 251(b) and (c) requirements.⁶

3. Section 251(f)(1), known as the rural exemption, states that section 251(c) “shall not apply to a rural telephone company”⁷ until the rural telephone company, or rural LEC, has received a bona fide “request for interconnection, services, or network elements,” and the relevant state commission determines that the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254.⁸

4. Section 251(f)(2) allows a LEC with fewer than 2 percent of the nation’s subscriber lines to petition a state commission to suspend or modify the application of the requirements in sections 251(b) or (c).⁹ A state commission receiving such a petition must act upon it within 180 days after receiving it, and pending such action, may “suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier.”¹⁰ A state commission may grant such petition to the extent that it determines that the suspension or modification is necessary to avoid: (1) “a significant adverse economic impact on users of telecommunications services generally”; (2) “imposing a requirement that is unduly economically burdensome”; or (3) “imposing a requirement that is technically infeasible.”¹¹ The state commission must also determine that a suspension or modification is consistent with the public interest.¹²

5. *Section 252.* Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, services, or unbundled network elements from an incumbent LEC.¹³ Section 252(b) permits a party negotiating an interconnection agreement to petition the relevant state commission to arbitrate any open issues.¹⁴ When arbitrating a dispute over a new interconnection agreement, the state commission must resolve “each issue set forth in the petition and the response,” “ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251,”¹⁵ and “conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request [for interconnection].”¹⁶ State commission determinations under section 252 are subject to review

⁵ *Id.* § 251(c); *see also id.* §§ 251(h), 252(j) (defining incumbent LEC).

⁶ *Id.* § 251(c).

⁷ *See id.* § 153(37) (defining “Rural Telephone Company”). The Federal Communications Commission (Commission) has also defined the term “rural incumbent local exchange carrier” as a carrier that is both an incumbent LEC and satisfies the definition of a rural telephone company. *See* 47 C.F.R. § 54.5.

⁸ 47 U.S.C. § 251(f)(1)(A).

⁹ *Id.* § 251(f)(2).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* § 251(f)(2)(B).

¹³ *See generally id.* § 252.

¹⁴ *See id.* § 252(b).

¹⁵ *Id.* § 252(c)(1).

¹⁶ *Id.* § 252(b)(4)(C).

in federal district court.¹⁷ When a state commission fails to act to fulfill its duties under section 252 to arbitrate interconnection agreements, it thwarts the Act's goal of opening local markets to competition. For this reason, if a state commission "fails to act to carry out its responsibility" under section 252, the Act provides that "the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter."¹⁸ If a party petitions the Commission to preempt the jurisdiction of the state commission, it is that party's burden to "prove that the state has failed to act to carry out its responsibilities under section 252 of the Act."¹⁹

6. *Procedural History.* In October 2005, TWCIS requested to interconnect with Star, a rural incumbent LEC operating as a cooperative in portions of the North Carolina counties of Bladen, Sampson, Duplin, Columbus, and Cumberland.²⁰ Star refused to negotiate an interconnection agreement.²¹ On March 14, 2006, TWCIS filed a petition for arbitration (TWCIS arbitration petition) with the NCREA, seeking arbitration of an interconnection agreement between TWCIS and Star.²² The NCREA is an agency of the state of North Carolina established to secure electric and telephone service for the rural districts of the state, and is acting as the state commission in this instance.²³

7. On April 10, 2006, Star filed a motion to dismiss TWCIS's petition, asserting that TWCIS was not a telecommunications carrier and was therefore not eligible for interconnection under the Act.²⁴ On July 19, 2006, the NCREA refused to conduct an arbitration proceeding and dismissed TWCIS's arbitration petition, claiming that TWCIS was not a telecommunications carrier entitled to invoke section 251.²⁵ Following the NCREA dismissal order, the Wireline Competition Bureau (Bureau) adopted an order making clear that wholesale carriers such as TWCIS (1) "are telecommunications carriers for purposes of section 251(a) and (b) of the Act," and (2) have the right "to interconnect for the purpose of exchanging traffic with VoIP providers."²⁶ TWCIS subsequently filed a request with the

¹⁷ *Id.* § 252(e)(6).

¹⁸ *Id.* § 252(e)(5).

¹⁹ 47 C.F.R. § 51.803(b); *ACS of Anchorage, Inc. and ACS of Fairbanks, Inc.; Emergency Petition for Declaratory Ruling and Other Relief Pursuant to Section 201(b) and 252(e)(5) of the Communications Act*, WC Docket No. 02-201, Memorandum Opinion and Order, 17 FCC Rcd 21114, 21117, para. 7 (Wireline Comp. Bur. 2002) (*ACS Order*).

²⁰ See Affidavit of Julie P. Laine at 2, attached to TWC Petition.

²¹ Star Comments at 5 (stating that such decision was based on Star's "understanding of its Section 251 interconnection obligations to apply only to telecommunications carriers").

²² See TWC Petition at 3.

²³ NCREA Comments at 2; N.C. Gen. Stat. § 117-29 (2013). The NCREA board consists of five members, who are officers and directors of telephone and electric cooperatives (including Star) and/or associations representing such cooperatives. NCREA Comments at 3. Each member is required by law to recuse himself from matters that present a conflict or potential conflict. *Id.* One of NCREA's board members has served on Star's board of directors for 13 years; he recused himself from participation in any and all proceedings before the NCREA involving TWCIS and Star. *Id.* at 3 n.6.

²⁴ See TWC Petition at 4; Motion of Star Telephone Membership Corporation to Dismiss Time Warner Cable Information Services (North Carolina), LLC's Petition for Arbitration, Docket No. TMC-5, Sub 1 (filed Apr. 10, 2006).

²⁵ See Order Consolidating and Dismissing Proceedings, Docket Nos. TMC-1, Sub 1 *et al.*, at 6-7 (N.C. Rural Elec. Auth. July 19, 2006) (2006 Dismissal Order).

²⁶ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale* (continued....)

NCREA asking it to reconsider its decision to dismiss TWCIS's petition for arbitration.²⁷ The NCREA denied TWCIS's reconsideration request, holding that the request "was not filed within a reasonable time," and that the Telecommunications Act of 1996 does not include reconsideration as a remedy for aggrieved parties in arbitration proceedings.²⁸ TWCIS subsequently sought review of the NCREA's dismissal in federal district court. The court vacated the NCREA's order on the merits and remanded the case to the NCREA for further proceedings.²⁹

8. On January 27, 2010, the NCREA issued an order ruling that TWCIS would have to overcome Star's rural exemption under section 251(f)(1) of the Act before the NCREA would proceed with arbitration to establish an interconnection agreement.³⁰ State commissions are required to determine whether to terminate a rural exemption under section 251(f)(1)(A) within 120 days of receiving notice of the request.³¹ In this instance, 120 days from TWCIS's request for interconnection expired on July 12, 2006.³² On May 26, 2011, while the rural exemption proceeding was underway, the Commission issued a declaratory ruling holding that "a rural carrier's exemption under section 251(f)(1) offers an exemption only from the requirements of section 251(c) and does not impact its obligations under sections 251(a) or (b)."³³ TWCIS informed the NCREA of this controlling precedent,³⁴ and on January 31, 2012, the NCREA terminated the rural exemption proceeding.³⁵

9. On February 29, 2012, Star filed a petition requesting that the NCREA suspend its section 251(b) obligations pursuant to section 251(f)(2) of the Act,³⁶ and requested that the NCREA defer

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_____ *Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3513, 3519, paras. 1, 13 (Wireline Comp. Bur. 2007) (*TWC Declaratory Ruling*).

²⁷ See Letter from Marcus W. Trathen, Counsel to TWC, to T. Scott Poole, Administrator, NCREA (filed Dec. 17, 2007); TWC Petition at 5.

²⁸ See Order Denying Request for Reconsideration, Docket No. TMC-1, Sub 1 *et al.*, at 2-3 (N.C. Rural Elec. Auth. Mar. 24, 2008); TWC Petition at 5.

²⁹ See *Time Warner Cable Info. Servs. (N.C.), LLC v. Duncan*, 656 F. Supp. 2d 565, 576 (E.D.N.C. 2009); TWC Petition at 5-6.

³⁰ See Order, Docket No. TMC-5, Sub 1, at 5 (unmarked) (N.C. Rural Elec. Auth. Jan. 27, 2010); TWC Petition at 6.

³¹ 47 U.S.C. § 251(f)(1)(B).

³² In its January 27, 2010 order, the NCREA made an affirmative determination that the interconnection request was "bona fide," as provided in section 251(f)(1). See Order, Docket No. TMC-5, Sub 1, at 4 (unmarked) (N.C. Rural Elec. Auth. Jan. 27, 2010). Thus, even using that order as the trigger date, the 120 days would have expired on May 27, 2010.

³³ See *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended et al.*, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92, Declaratory Ruling, 26 FCC Rcd 8259, 8267, para. 14 (2011) (*CRC Declaratory Ruling*).

³⁴ See Motion to Terminate Phase 1 of Proceeding in Conformance with Intervening and Controlling Decision of the Federal Communications Commission, Docket No. TMC-5, Sub 1 (filed June 6, 2011); TWC Petition at 7.

³⁵ See Final Decision, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. Jan. 31, 2012); TWC Petition at 7.

³⁶ See Non-Confidential Petition of Star Telephone Membership Corporation Pursuant to 47 U.S.C. § 251(f)(2), Docket No. TMC-5, Sub 1, at 7, 15 (filed Feb. 29, 2012). Specifically, Star requested that the NCREA suspend its number portability, dialing party, access to rights of way, and/or reciprocal compensation obligations in section 251(b). *Id.*

arbitration of an interconnection agreement pending adjudication of Star's suspension petition.³⁷ The statute requires state commissions to act on any petition filed under section 251(f)(2) within 180 days of receiving such a petition.³⁸ Accordingly, the deadline by when the NCREA should have concluded the section 251(f)(2) proceeding was August 27, 2012. On March 23, 2012, TWCIS filed a motion to dismiss Star's suspension petition and opposed Star's proposal to forestall the commencement of arbitration.³⁹ Acknowledging the unusual procedural posture of the case, TWCIS proposed that the statutory deadline for completing arbitration be reset so that the arbitration clock would start on the date of the NCREA's January 2012 order terminating the rural exemption proceeding.⁴⁰ On March 28, 2012, the NCREA issued an order consolidating Star's suspension petition with TWCIS's 2006 petition for arbitration, and stated that the NCREA would not initiate an arbitration proceeding before completing adjudication of Star's suspension petition.⁴¹

10. For over a year, the parties filed numerous pleadings addressing Star's suspension petition and TWCIS's motion to dismiss that petition.⁴² On October 25, 2012, the arbitrator in the proceeding recommended that the NCREA grant TWCIS's motion to dismiss.⁴³ However, on April 2, 2013, the NCREA issued an order rejecting the arbitrator's recommendation and confirming that it would first determine if suspension or modification of any of Star's section 251(b) obligations was appropriate. Then, "should the [NCREA] determine that Star's [section 251(b)] obligations should not be suspended or modified," the parties should attempt to agree to terms of an interconnection agreement."⁴⁴ The NCREA further held that, if the parties are unable to come to an agreement, "a Petition will be filed with the Authority requesting arbitration for the disputed issues."⁴⁵ On May 3, 2013, TWCIS filed a petition for partial reconsideration of the NCREA's April 2, 2013 order.⁴⁶ The NCREA summarily denied TWCIS's petition for partial reconsideration on June 10, 2013.⁴⁷ TWCIS's arbitration petition, dated March 14, 2006, remains pending before the NCREA.

11. On August 8, 2013, TWC filed the present petition requesting that the Commission preempt the jurisdiction of the NCREA over the arbitration of an interconnection agreement between

³⁷ See *id.*; TWC Petition at 7. State commissions are required to act upon section 252(f)(2) suspension petitions within 180 days after receiving such a petition. 47 U.S.C. § 251(f)(2)(B).

³⁸ See 47 U.S.C. § 251(f)(2)(B).

³⁹ See Time Warner Cable Information Services (North Carolina), LLC Motion To Dismiss Petition for Suspension or Modification, Docket No. TMC-5, Sub 1 (filed Mar. 23, 2012).

⁴⁰ *Id.* at 26–27; TWC Petition at 8.

⁴¹ See Order, Docket No. TMC-5, Sub 1, at 2 (N.C. Rural Elec. Auth. Mar. 28, 2012); TWC Petition at 8.

⁴² TWC Petition at 8.

⁴³ See Recommended Order Granting TWCIS (NC) Motion To Dismiss, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. Oct. 25, 2012); TWC Petition at 9.

⁴⁴ See Order, Docket No. TMC-5, Sub 1, at 3–4 (N.C. Rural Elec. Auth. Apr. 2, 2013).

⁴⁵ See *id.*; see also TWC Petition at 9.

⁴⁶ See Petition for Partial Reconsideration of Order Issued April 2, 2013, Docket No. TMC-5, Sub 1 (filed May 3, 2013); TWC Petition at 10.

⁴⁷ See Order Denying Time Warner's Petition for Partial Reconsideration, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. June 10, 2013); TWC Petition at 10.

TWCIS and Star.⁴⁸ On August 16, 2013, the Bureau released a Public Notice, seeking comment on TWC's preemption petition.⁴⁹

III. DISCUSSION

12. We grant TWC's petition and, pursuant to section 252(e)(5), assume the NCREA's jurisdiction over the interconnection arbitration proceeding between TWCIS and Star in North Carolina. We find that the NCREA has failed to act to carry out its responsibility under section 252 by failing to arbitrate TWCIS's March 2006 request for arbitration.

13. Section 252(b) allows any party negotiating an interconnection agreement under section 252 to "petition a State commission to arbitrate any open issues" in that proceeding.⁵⁰ Section 252(b)(4)(C) provides that "[t]he State commission shall resolve each issue set forth in the petition and the response, if any," and "shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section."⁵¹ Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission "fails to act to carry out its responsibility under [section 252]."⁵² Under the Commission's rules, a state commission "fails to act" if the state commission "fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act."⁵³ The party seeking preemption bears the burden of proving that the state commission has failed to act.⁵⁴

14. The Commission evaluates whether a state commission has fulfilled its responsibilities under section 252 based on the particulars of each case.⁵⁵ In light of states' important role under section 252, the Commission does not take an "expansive view" of what constitutes a state commission's failure to act.⁵⁶ "Instead, the Commission interprets 'failure to act' to mean a state's failure to complete its duties in a timely manner."⁵⁷ A state commission's responsibility under section 252(b) is "to make a

⁴⁸ See TWC Petition at 1–2.

⁴⁹ See *Pleading Cycle Established for Comments on Petition of Time Warner Cable Inc. for Preemption Pursuant to Section 252(e)(5)*, WC Docket No. 13-204, Public Notice, 28 FCC Rcd 12301 (Wireline Comp. Bur. 2013).

⁵⁰ 47 U.S.C. § 252(b)(1).

⁵¹ *Id.* § 252(b)(4)(C).

⁵² *Id.* § 252(e)(5); see also 47 C.F.R. § 51.801(b).

⁵³ 47 C.F.R. § 51.801(b).

⁵⁴ 47 C.F.R. § 51.803(b); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16128, para. 1285 (1996) (*Local Competition Order*) (subsequent history omitted).

⁵⁵ See, e.g., *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11280, para. 8 (2000) (*Starpower Preemption Order*); *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1758–59, paras. 5, 33 (1997), *recons. denied*, 14 FCC Rcd 7024 (1999) (*Low Tech Order*).

⁵⁶ *Local Competition Order*, 11 FCC Rcd at 16128, para. 1285; see also Star Comments at 9.

⁵⁷ *Global NAPs, Inc. v. FCC*, 291 F.3d 832, 837 (D.C. Cir. 2002), citing *Local Competition Order*, 11 FCC Rcd at 16128, para. 1285 ("This would limit Commission action to instances where a state commission fails to respond, (continued....)")

determination – that is, to mediate, to arbitrate, to approve, and (possibly) to interpret and enforce an interconnection agreement”⁵⁸ or, if unable to resolve the merits of a section 252 proceeding, to “dismiss[] such a proceeding on jurisdictional or procedural grounds.”⁵⁹ Moreover, “the Act requires timely arbitration, even where there is uncertainty in the law because the Commission has not addressed a particular question.”⁶⁰ Section 252, however, does not authorize the Commission to “sit as an appellate tribunal to review the correctness of state resolution” of such disputes.⁶¹

15. The Commission has declined to preempt where doing so would result in a substantive review of a state commission’s actions in an arbitration proceeding—thus encroaching on federal district courts’ appellate jurisdiction under section 252(e)(6). For example, carriers have sought preemption of state commission jurisdiction after the relevant commissions dismissed their arbitration petitions on procedural grounds. In those cases, the Commission has held that such procedural dismissals constitute action rather than a failure to act under section 252(e)(5).⁶² The Bureau has also declined to preempt where the state commission did act in response to an arbitration petition, but where a party sought to appeal the commission’s resolution of an issue or to have the FCC address purportedly unresolved issues.⁶³ In such cases, as with the procedural dismissals, the Bureau has held that section 252(e)(6) provides for a remedy in the form of federal court review, and section 252(e)(5) provides no alternative forum for appeal.⁶⁴

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within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).”); *see also* NCREA Comments at 7; Star Comments at 8–9, 19–20.

⁵⁸ *Global NAPs, Inc. v. FCC*, 291 F.3d at 838.

⁵⁹ *Id.*, 291 F.3d at 835.

⁶⁰ *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134, Memorandum Opinion and Order, 24 FCC Rcd 12573, 12577, para. 10 (Wireline Comp. Bur. 2009) (*First UTEX Order*).

⁶¹ *Global NAPs, Inc. v. FCC*, 291 F.3d at 837; *see also* NCREA Comments at 7; Star Comments at 8–9, 19–20. Section 252(e)(6) authorizes a party “aggrieved” by a state commission “determination under [section 252]” to bring an action in federal district court. 47 U.S.C. § 252(e)(6). As the United States Court of Appeals for the District of Columbia Circuit ruled in *Global NAPs, Inc. v. FCC*, these sections are mutually exclusive, and paragraph (5) preemption applies only where the state commission fails or refuses to make a “determination” that is reviewable under paragraph (6). *Global NAPs, Inc. v. FCC*, 291 F.3d at 836–37.

⁶² *See, e.g., Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, for Preemption of the Jurisdiction of the Arizona Corporation Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation et al.*, WC Docket Nos. 06-134, 07-240, Order on Review, 25 FCC Rcd 13826, 13830, para. 10 (2010) (*Autotel Order*) (finding that section 252(e)(5) did not apply because “[t]he six state commissions acted by dismissing [Autotel’s arbitration] requests after either finding that Autotel had not identified open issues for arbitration or finding that Autotel had failed to follow state procedures”); *Low Tech Order*, 13 FCC Rcd at 1774, para. 33 (holding that “a state commission does not ‘fail to act’ when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding”).

⁶³ *See Petition of Supra Telecommunications & Information Systems, Inc., (“Supra”) Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Florida Public Service Commission*, WC Docket No. 02-238, Memorandum Opinion and Order, 17 FCC Rcd 22884, 22889, para. 10 (Wireline Comp. Bur. 2002) (*Supra Order*) (finding no failure to act when the Florida Public Service Commission “conducted a full evidentiary hearing on the contested issues and approved a signed final agreement”).

⁶⁴ *See Autotel Order*, 25 FCC Rcd at 13831, para. 12.

16. In the instant proceeding, we find that the NCREA failed to complete an arbitration between TWCIS and Star within the time limits prescribed by section 252(b)(4)(C) of the Act.⁶⁵ Nearly eight years have passed since TWCIS first sought to negotiate an interconnection agreement with Star, and it has been four years since a federal district court remanded the case to the NCREA for further proceedings. Under the statute and the Commission's rules, this constitutes a failure to act.⁶⁶ Given that finding, the Act requires us to assume the jurisdiction of the arbitration between TWCIS and Star.⁶⁷ This outcome advances the larger goals of the Communications Act. One of the principal objectives of the 1996 Act is opening local exchange and exchange access markets to competition.⁶⁸ In this instance, potential competition enabled by interconnection between TWCIS and Star has been denied to consumers in these markets through inaction.

17. The NCREA contends that it has not failed to act under section 252, because it has "acted pursuant to the authority provided for in section 251(f)(2)."⁶⁹ In particular, the NCREA claims that a section 252(f)(2) proceeding might result in the suspension or modification of Star's obligations under section 251(b). The NCREA also argues that various provisions of section 252—specifically section 252(c)(1), section 252(b)(4)(C), and section 252(e)(2)(B)—direct a state commission to ensure that agreements it arbitrates "meet the requirements" of section 251(b).⁷⁰ The NCREA and Star argue, therefore, that it is "procedurally appropriate" to determine the scope of Star's section 251(b) obligations—*i.e.*, determine whether to suspend or modify any provisions pursuant to section 251(f)(2)—before arbitrating an interconnection agreement between TWCIS and Star.⁷¹ Consequently, in its April

⁶⁵ 47 U.S.C. § 252(b)(4)(C).

⁶⁶ 47 C.F.R. § 51.801(b) ("For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act."); *see* TWC Reply Comments at 6 ("The rationale for a state commission's failure to act is irrelevant to the legal analysis under Section 252(e)(5), which focuses only on whether such a failure has occurred.").

⁶⁷ 47 U.S.C. § 251(e)(5); *see also* 47 C.F.R. § 51.801(a).

⁶⁸ As the Commission explained in the order that adopted rules implementing section 252(e)(5), because incumbent LECs "serve[] virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network, or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers." *Local Competition Order*, 11 FCC Rcd at 15508, para. 10.

⁶⁹ NCREA Comments at 8; *see also id.* at 11 (stating that state commissions must act upon petitions filed under section 251(f)(2) "within 180 days" and that "[p]ending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers").

⁷⁰ NCREA Comments at 12, *citing* 47 U.S.C. §§ 252(b)(4)(C), 252(c)(1), and 252(e)(2)(B).

⁷¹ *See, e.g.*, NCREA Comments at 8–9, 11–13; Star Comments at 3–5, 15–18 (arguing that section 251(f)(2)'s grant of authority to a state commission to suspend enforcement of section 251(b) and (c) obligations during pendency of the suspension proceeding counsels in favor of permitting the NCREA to proceed in a two-phased framework, since if it suspended all section 251(b) obligations, the TWCIS interconnection petition would arguably be rendered moot); Star Reply Comments at 3–5.

2013 Order, the NCREA determined that it would initiate an arbitration only if: (1) Star's suspension petition is denied; and (2) TWCIS submits a new petition for arbitration.⁷²

18. Nothing in section 251(f) authorizes the state agency to extend the statutory deadline set by Congress for arbitrations set forth in section 252(b)(4)(C). The Commission's *Worldcom* decision makes clear that the uncertain status of certain section 251(b) legal obligations—in that case, the legal uncertainty whether the section 251(b)(5) reciprocal compensation obligation applies to traffic delivered to Internet Service Providers (ISPs)—does not affect the Commission's analysis of whether a state commission has “failed to act” for purposes of section 252(e)(5).⁷³ We thus agree with TWCIS that its right to arbitration pursuant to the procedures of section 252(b) would remain even if there were uncertainty about Star's substantive duties under section 251(b) as a result of the pending section 251(f)(2) petition.⁷⁴ A contrary determination would ignore the deadline for concluding arbitrations that Congress imposed. Further, we observe that, unless and until the NCREA acts on Star's section 251(f)(2) petition, Star's section 251(b) obligations are fully in effect.

19. We also reject Star's contention that, because Congress gave a shorter timeline for determining suspension proceedings than arbitrations (*i.e.*, 180 days versus nine months), Congress intended section 251(f)(2) suspension issues to be decided prior to arbitration.⁷⁵ Congress might have had any number of reasons for selecting these particular deadlines and we decline to presume, without statutory support, that Congress intended or authorized state commissions to defer the arbitration deadline while section 251(f)(2) petitions are pending. In any event, the 180 day period has long passed, and the NCREA has not reached a decision on the section 251(f)(2) petition.⁷⁶ We reject the suggestion that the NCREA may indefinitely defer the arbitration deadline by delaying a decision on the applicability of section 251(f)(2).

20. We do not question the NCREA's decision to consolidate the section 251(b) and section 251(f)(1) proceedings under section 251(g), and we recognize that such consolidation could reduce administrative burdens.⁷⁷ However, such consolidation does not relieve the NCREA of its statutory duty

⁷² See Order, Docket No. TMC-5, Sub 1, at 4 (N.C. Rural Elec. Auth. Apr. 2, 2013); TWC Petition at 9; see also NCREA Comments at 6 (stating that NCREA “will move forward with arbitration, but only after it determines whether any of Star's Section 251(b) obligations should be modified or suspended”).

⁷³ There is no indication in the record that the NCREA to date has actually suspended any of Star's obligations under section 251(b). See 47 U.S.C. § 251(f)(2) (“[T]he State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier” pending action on the suspension petition.); see *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, 16 FCC Rcd 6224, 6227, para. 5 (2001) (preempting the Virginia State Corporation Commission for “fail[ing] to carry out its section 252 responsibilities” when it refused to arbitrate an interconnection agreement pursuant to section 252) (*WorldCom Preemption Order*); *Starpower Preemption Order*, 15 FCC Rcd at 11280, para. 7; see also *First UTEX Order*, 24 FCC Rcd at 12577–78, para. 10 (stating that “the Act requires timely arbitration, even where there is uncertainty in the law” and that the state commission “must proceed to arbitrate this interconnection agreement in a timely manner, relying on existing law” rather than waiting for the Commission to clarify the substantive legal requirements).

⁷⁴ TWC Petition at 20.

⁷⁵ Star Comments at 19.

⁷⁶ The 180 day period expired on August 27, 2012. See *supra* para. 9.

⁷⁷ Star Comments at 18; see also 47 U.S.C. § 252(g) (“Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this (continued....)”).

to carry out its responsibilities under section 252. Further, we observe that preempting the authority of the NCREA to arbitrate an interconnection agreement between TWCIS and Star in no way affects the authority of the NCREA to conduct a section 251(f)(2) proceeding and to suspend or modify the obligations in section 251(b) if the statutory criteria are satisfied.

21. Star contends that preemption is unwarranted because it asserts that statutory deadlines “are generally considered directory, rather than mandatory,”⁷⁸ and that “courts are ‘most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action.’”⁷⁹ Star further states that “nothing in Section 252 suggests that Congress intended for a petition for arbitration to be immediately granted if the state commission does not act by the statutory deadline,” and reiterates that the state commission loses jurisdiction only if the Commission determines that a failure to act has occurred.⁸⁰ Star argues further that in the *UTEX* proceeding, the Commission declined to preempt a state commission where it diligently “acted to complete the arbitration, and continues to devote extensive time and resources” to resolve the petition.⁸¹ Star correctly notes that the Bureau declined to grant preemption in the *UTEX* proceeding notwithstanding that the state commission had not completed the arbitration by the deadline set forth in section 252(b)(4)(C).⁸²

22. While there may be circumstances in which a state commission could fail to meet the statutory deadline and the Commission would find preemption unwarranted based on the particulars of that case, we must address the facts at issue in this proceeding, taking into account the statute and the Commission’s implementing rules. Although the Bureau declined to preempt the state commission in the *UTEX* proceeding, that case involved special circumstances that are readily distinguishable from the instant proceeding.⁸³ In *UTEX*, the Bureau declined to preempt the jurisdiction of the Public Utility Commission of Texas (PUCT) after that commission held an arbitration proceeding in abeyance due to uncertainty regarding the appropriate treatment of VoIP traffic, and did not resolve the arbitration within the 9-month statutory deadline.⁸⁴ In that case, the PUCT had “quickly initiat[ed] proceedings” in response to *UTEX*’s arbitration petition and thereafter engaged in an “energetic discharge” of its responsibilities under section 252.⁸⁵ *UTEX* and AT&T had also consented to several extensions of the 9-

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title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.”).

⁷⁸ *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd 746, 798 (2010), *vacated in part on other grounds*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 722 (D.C. Cir. 2011); Star Comments at 12.

⁷⁹ *Brock v. Pierce Cnty.*, 476 U.S. 253, 260, 262 (1986); Star Comments at 12.

⁸⁰ Star Comments at 12.

⁸¹ Star Comments at 12–13 (quoting *UTEX Communications Corporation Petition for Preemption*, WC Docket No. 09-134, Memorandum Opinion and Order, 25 FCC Rcd 14168, 14169–70 (2010) (*Second UTEX Order*) (finding that “preemption of the [state commission’s] jurisdiction . . . would be extremely wasteful and inefficient”)); Star Reply Comments at 2–3.

⁸² Star Comments at 12–13.

⁸³ *See, e.g., Second UTEX Order*, 25 FCC Rcd at 14169, para. 4 (declining to preempt where the record indicates that the state commission staff “has acted to complete the arbitration, and continues to devote extensive time and resources” towards an arbitration that is “in its final stages”); *Supra Order*, 17 FCC Rcd at 22889, para. 10 (finding no failure to act when the Florida commission “conducted a full evidentiary hearing on the contested issues and approved a signed final agreement”).

⁸⁴ *See First UTEX Order*, 24 FCC Rcd 12573.

⁸⁵ *Id.* at 12576, para. 7 & n.22 (quoting AT&T Texas Comments at 3–4).

month statutory deadline for completing an arbitration proceeding,⁸⁶ and the PUCT had abated the proceeding “without a decision indicating an unwillingness . . . to act.”⁸⁷ The Bureau found that “the PUCT actively conducted the arbitration proceeding, and did so in a timely manner” until the VoIP-related issues arose, and that, even after UTEX sought preemption, the PUCT “affirmed its willingness to complete the arbitration.”⁸⁸ The Bureau rejected a subsequent request for preemption where “[t]he record indicate[d] that the PUCT staff ha[d] acted to complete the arbitration, and continue[d] to devote extensive time and resources[] . . . [towards an] arbitration [that was] ‘in its final stages.’”⁸⁹ The Bureau determined that preempting the jurisdiction of the PUCT at such a late stage would have been “extremely wasteful and inefficient,” given that “the PUCT ha[d] been acting expeditiously to resolve the large number of complex issues raised in th[e] arbitration,” and would have “unnecessarily delay[ed] a final resolution of th[e] arbitration.”⁹⁰

23. The circumstances here are quite different. The NCREA has not begun to arbitrate any issues, several years after the arbitration petition was filed.⁹¹ Moreover, the NCREA indicates that it will not begin to arbitrate until (1) it has resolved the section 251(f)(2) petition and (2) the parties attempt, again, to negotiate an interconnection agreement. Granted, the NCREA “has not been dormant”⁹² and, according to Star, has “issued a total of 25 orders in this docket and consolidated the arbitration with Star’s suspension petition.”⁹³ This activity, however, is distinct from arbitrating an interconnection agreement. We find the NCREA’s ongoing adjudication of Star’s suspension petition insufficient basis to decline to preempt under section 252(e)(5). We also find the *UTEX* rationale inapt (*e.g.*, it is not the case that both parties here consented to extension of the nine month deadline), and we do not find any other compelling basis in the record to depart from our statutory mandate to preempt. We conclude, therefore, that the NCREA has failed to comply with the 9-month statutory deadline set by section 252(b)(4)(C) for resolving issues in an arbitration petition and thus, consistent with Commission rules, leads us to preempt its jurisdiction under section 252(e)(5).⁹⁴

24. Finally, the NCREA and Star contend that because the NCREA has not explicitly declined to act on TWCIS’s pending arbitration petition, as was the case in *Starpower* and *WorldCom*, the NCREA has not failed to act within the meaning of section 252.⁹⁵ As explained above, we evaluate

⁸⁶ *Id.* at 12576, para. 7.

⁸⁷ *Id.*

⁸⁸ *Id.* at 12577, para. 9.

⁸⁹ *Second UTEX Order*, 25 FCC Rcd at 14169, para. 4.

⁹⁰ *Id.* at 14170, paras. 4–5.

⁹¹ Star Comments at 13 (indicating that the NCREA has sought to address the section 251(b) suspension and modification issues not as part of resolving an arbitration proceeding under section 252(b), as contemplated by section 252(c)(1), but as a “condition precedent to initiating an arbitration proceeding in the first place”).

⁹² NCREA Comments at 7.

⁹³ Star Comments at 14; Star Reply Comments at 2. The NCREA states that it “has energetically moved the matter between Star and TWCIS along. . . . The case has, however, taken on a life of its own.” NCREA Comments at 10.

⁹⁴ We also reject as without merit and unsubstantiated by evidence Star’s argument that much of the delay in the consolidated proceedings is attributable to TWC’s “delaying tactics” done in an attempt to forum shop, including filing a motion to dismiss Star’s suspension petition, a petition for reconsideration of the NCREA’s dismissal of that motion, and this preemption petition. Star Comments at 15.

⁹⁵ NCREA Comments at 9; Star Comments at 11. In *Starpower*, Starpower filed a petition with the Virginia State Corporation Commission (Virginia Commission) seeking a declaratory ruling directing a carrier to pay reciprocal (continued....)

whether a state commission has fulfilled its responsibilities under section 252 based on the particulars of each case.⁹⁶ While a state commission's statement explicitly declining to address an arbitration petition is relevant evidence, such a statement is not the totality of the inquiry, and the Commission may deduce a failure to act from other statements and actions (or inactions) by the state commission. In the instant proceeding, however, we find that the NCREA has "unequivocally expresse[d]" its "intent not to act" to carry out its responsibilities under section 252 with respect to TWCIS's 2006 arbitration petition.⁹⁷ Specifically, we find that the NCREA's April 2013 order declines to consider TWCIS's 2006 arbitration petition by establishing a framework that does not provide for consideration of TWCIS's pending petition for arbitration. Instead, it requires TWCIS to file a new petition for arbitration after the NCREA concludes its section 251(f)(2) proceeding if TWCIS and Star's post-proceeding attempts to negotiate an interconnection agreement fail.⁹⁸ Requiring TWCIS to file a new arbitration petition would leave its arbitration petition from March 2006 pending and unadjudicated, and thus subject to mandatory preemption under section 252(e)(5). Even if we did not find the NCREA's April 2013 Order to be an express statement declining to carry out its responsibilities under section 252 regarding TWCIS's 2006 Petition, we would still find that the NCREA has failed to act within the timeline for action set forth in section 251(b)(4)(C).⁹⁹ In other circumstances where the Commission was persuaded that a state commission was not going to act to carry out its responsibilities under section 252, as we find to be the

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compensation to Starpower for delivering that carrier's traffic to Internet Service Providers (ISPs) served by Starpower. The Virginia Commission declined jurisdiction over the petition and specifically stated they would "take no action." *Starpower Preemption Order*, 15 FCC Rcd 11278, para. 4. The Commission recognized that the Virginia Commission had failed to act and under those "unique circumstances" decided to assume the jurisdiction of the state commission. *Id.* at 11280, para. 7. In *WorldCom*, WorldCom filed a petition with the Virginia Commission seeking arbitration of the terms of an interconnection agreement with Verizon. The Virginia Commission expressly failed to act by issuing an order refusing to arbitrate the terms of the parties' interconnection agreement, and encouraged WorldCom and Verizon to seek relief from the Commission in lieu of the Virginia Commission. *WorldCom Preemption Order*, 16 FCC Rcd 6225, para. 3.

⁹⁶ See, e.g., *Starpower Preemption Order*, 15 FCC Rcd at 11280, para. 8; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1758-59, paras. 5, 33 (1997), *recons. denied*, 14 FCC Rcd 7024 (1999).

⁹⁷ See *Petition of Northland Networks, Ltd. for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, WC Docket No. 03-242, Memorandum Opinion and Order, 19 FCC Rcd 2396, 2400, para. 9 (Wireline Comp. Bur. 2004) (*Northland Preemption Order*).

⁹⁸ See Order, Docket No. TMC-5, Sub 1, at 4 (N.C. Rural Elec. Auth. Apr. 2, 2013) (directing that if the NCREA determines that Star's section 251(b) obligations should not be suspended or modified in the section 251(f)(2) proceeding, TWCIS and Star should "proceed to" negotiate an interconnection agreement and "[i]f they are unable to agree to the terms and conditions of an interconnection agreement, a Petition will be filed with the Authority requesting arbitration for the disputed issues. . . . After the comments or objections are filed and oral argument is held, the [NCREA] will make a final determination regarding the interconnection agreement."); Order Denying Time Warner's Petition for Partial Reconsideration, Docket No. TMC-5, Sub 1 (N.C. Rural Elec. Auth. June 10, 2013).

⁹⁹ *Petition of AT&T Communications of Virginia, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-251, Memorandum Opinion and Order, 16 FCC Rcd 2326, 2329, para. 6 (Common Carrier Bur. 2001) (rejecting a request to defer a preemption petition for at least 90 days so as not to undermine then current negotiations, stating that the "Commission has a statutory obligation to intervene where, as here, a state commission fails to act to carry out its responsibility under section 252").

case here, it has consistently recognized its obligation to preempt the state commission's authority.¹⁰⁰ Moreover, because there is no final order adjudicating TWCIS's arbitration petition, either granting or dismissing it, TWCIS is unable to seek review in federal district court under section 252(e)(6), making preemption under section 252(e)(5) the company's only avenue for relief.¹⁰¹

IV. CONCLUSION

25. For the reasons set forth above, we conclude that the NCREA has failed to act to carry out its responsibility under section 252 with respect to TWCIS's arbitration petition within the meaning of section 252(e)(5). The statutory deadline by when the NCREA must have concluded the resolution of issues raised in TWCIS's section 252(b) petition has long since passed.¹⁰² The NCREA has neither acted to resolve TWCIS's petition for arbitration on the merits, nor has it dismissed TWCIS's petition on procedural or jurisdictional grounds. Accordingly, under section 252(e)(5) and the Commission's rules, we find that the NCREA failed to carry out its section 252 responsibilities in this case, and we therefore preempt the jurisdiction of the NCREA in the TWCIS/Star interconnection arbitration proceeding in North Carolina.

26. TWCIS may now petition the Federal Communications Commission for arbitration of the interconnection disputes that were the subject of the NCREA proceeding addressed herein. Prior to filing its Petition for Arbitration, TWCIS shall contact the Wireline Competition Bureau (Bureau) to schedule a joint pre-filing conference.¹⁰³ Once the pre-filing conference has been held, the Bureau will issue a Public Notice establishing procedures and a pleading schedule specific to the arbitration proceeding. TWCIS should also be prepared to file the Petition for Arbitration no more than 30 days after the pre-filing conference.

27. Finally, we reiterate the finding in the *Local Competition Order* that the Commission retains exclusive jurisdiction over any proceeding or matter over which it assumes responsibility under section 252(e)(5).¹⁰⁴ Similarly, after the Commission assumes responsibility over a proceeding, the

¹⁰⁰ See *Starpower Preemption Order*, 15 FCC Rcd at 11280, para. 7 (preempting the Virginia State Corporation Commission when the Virginia Commission "explicitly declined to resolve [Starpower's] petitions"); *WorldCom Preemption Order*, 16 FCC Rcd at 6227, para. 5 (preempting the Virginia State Corporation Commission for "fail[ing] to carry out its section 252 responsibilities" when it refused to arbitrate an interconnection agreement pursuant to section 252); *Northland Preemption Order*, 19 FCC Rcd at 2400, para. 9 (finding that the New York Public Service Commission "failed to act" when it determined that it would "not . . . act to resolve interconnection disputes regarding reciprocal compensation for ISP-bound traffic").

¹⁰¹ See *Autotel Order*, 25 FCC Rcd at 13827-28, para. 3 (noting that "[b]ecause a state commission cannot both act and 'fail to act,'" section 252(e)'s remedies are mutually exclusive"). Note that in this instance, TWCIS is not asking the Commission to review the NCREA's resolution of any interconnection-related issue, or seeking an alternative forum for appeal. In this case there is no final NCREA order subject to federal court review under section 252(e)(6).

¹⁰² 47 U.S.C. § 252(b)(4)(C).

¹⁰³ For the purposes of the initial contact, the parties shall contact John Visclosky, Wireline Competition Bureau, at (202) 418-1580. Parties should refer to the procedures established for the Commission's previous arbitration to determine what they should be prepared to discuss at the pre-filing conference. See, e.g., *Procedures Established for Arbitration of Interconnection Agreements Between Verizon and AT&T, Cox, and WorldCom*, CC Docket Nos. 00-218, 00-249, 00-251, Public Notice, 16 FCC Rcd 3957, 3958 (2001).

¹⁰⁴ See *Local Competition Order*, 11 FCC Rcd at 16129, para. 1289. We note that Star's section 251(f)(2) petition to suspend or modify its section 251(b) and (c) obligations remains pending before the NCREA.

Commission's actions and any judicial review of those actions shall be the exclusive remedies available to the parties.¹⁰⁵

V. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, 47 U.S.C. § 252, and sections 0.91, 0.291, and 51.801(b) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(b), the petition filed by Time Warner Cable Inc. on August 8, 2013 for the preemption of the jurisdiction of the North Carolina Rural Electrification Authority IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief
Wireline Competition Bureau

¹⁰⁵ See 47 U.S.C. § 252(e)(6).