

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Joint Michigan CLEC Petition for)	WC Docket No. 10-45
Declaratory Ruling and Motion for)	
Temporary Relief; and)	
)	
Motion for Temporary Relief)	

**REPLY COMMENTS OF
THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

On February 9, 2010, a group of competitive local exchange carriers (“CLECs”) in Michigan¹ filed a petition with the Federal Communications Commission (“FCC” or “Commission”) for an expedited declaratory ruling that a recently-enacted Michigan statute, 2009 PA 182 (“Act 182”) is preempted in its entirety by 47 U.S.C. § 253.² The MI CLECs also filed a “Petition for Temporary Relief” asking the Commission “to immediately prohibit the operation and effect” of Act 182 while the Commission considers the declaratory ruling. On February 22, 2010, the Commission released a Public Notice asking for public comment on both petitions.³

Although the MI CLECs seek a declaration that the entirety of Act 182 is

¹ ACD Telecom, Inc.; DayStarr LLC; Clear Rate Communications, Inc.; TC3 Telecom, Inc.; and TelNet Worldwide, Inc. (collectively, “MI CLECs.”)

² MI CLEC Petition at iv.

³ DA 10-298 (rel. February 22, 2010). The fact that the Commission asked for public comment on the Petition for Temporary Relief means, of course, that the relief – if granted – would not be as “immediate” as the MI CLECs would like.

preempted, it is clear that the MI CLECs are really complaining about the provisions of Act 182 that first, require incumbent local exchange carriers (“ILECs”) in Michigan to reduce their intrastate access charges to interstate levels by September 23, 2010, and allows those ILECs to recover the revenues lost by those reductions through a “restructuring mechanism,” and second, require CLECs to reduce their intrastate access charges over a five-year period without recourse to a restructuring mechanism. To be clear, it is the accessibility of the restructuring mechanism that is the focus of the CLEC’s complaints. The restructuring mechanism consists of dollars collected from other carriers (and their customers) and paid to the ILECs that have reduced their intrastate access charges.

The MI CLECs base their preemption claim on 47 U.S.C. § 253(a), which states:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

And 47 U.S.C. § 253(d) requires the Commission to preempt state regulations that offend § 253(a).

Based on a review of the petitions and the comments filed in support⁴ and in opposition,⁵ the National Association of State Utility Consumer Advocates

⁴ COMPTTEL; PAETEC Holding Corp, CAN Communications Services, Inc., and Sage Telecom, Inc. (“PAETEC, et al.”). The Rural Independent Competitive Alliance (“RICA”) “limit[s] its comments to the substantive policy issue of disparate treatment of ILECs and CLECs and will not address whether or not the conditions for preemption of state law exist.” RICA Comments at 1.

⁵ AT&T Inc. (“AT&T”); CenturyLink; Independent Telephone & Telecommunications Alliance (“ITTA”); Michigan Public Service Commission (“MPSC”).

(“NASUCA”)⁶ files these reply comments to oppose preemption of Act 182. The opposition is based on a general position disfavoring federal preemption,⁷ but also on the MI CLECs failure to show that Act 182 prohibits or has the effect of prohibiting their operations in Michigan, and on the fact that Act 182 recognizes the carrier-of-last-resort (“COLR”) obligations that fall on ILECs in Michigan – and elsewhere – which brings Act 182 under the exemptions of 47 U.S.C. § 253(b).⁸ The differences in treatment – under the circumstances of this specific statute – are not sufficient to require or allow preemption.

That said, NASUCA is compelled to respond to three relatively narrow points raised in the comments – of AT&T, CenturyLink, and of PAETEC, et al. These discrete issues should not be any part of the basis of the Commission’s decision here.

The first – and most important – response is to AT&T’s assertion that there is a Congressional and Commission requirement for states to eliminate implicit support mechanisms inherent in intrastate rates, including access rates.⁹ The courts have

⁶ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

⁷ See also AT&T Comments at 2, n.4, citing Presidential Documents, Memorandum of May 29, 2009, Preemption, 74 Fed. Reg. 24693 (May 22, 2009).

⁸ The MI CLECs argue that § 253(b) cannot apply because the “universal service” exemption in the statute is required to be competitively neutral, and must be available to both CLECs and ILECs. But this overlooks the fact the COLR obligation itself is uniquely imposed on ILECs.

⁹ See AT&T Comments at 2, 3, 4. Indeed, the continual reference to “subsidies” both misstates the law (47 U.S.C. § 254(e) and distorts relevant economic principles. Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 AM. ECON. REV. 966, 966–77 (1975).

specifically found that federal law includes no such requirement.¹⁰ Which means that states like Michigan may address intrastate ratemaking issues, including the role of access charges, but there is no legal requirement for them to do so.

The second is CenturyLink's description of "the current Commission approach of providing support to a single network provider in areas that are uneconomic to serve in the absence of support."¹¹ CenturyLink provides no citation to a Commission decision, because there is no such decision. NASUCA has supported such a view,¹² but would not presume that this is the Commission's word (much less final word) on the subject. In addition, regardless of the Commission's decision on the federal level, states may decide to support – with their intrastate funds – multiple providers in the same area. Or they may not.

Finally, addressing the other side of the aisle, NASUCA opposes PAETEC, et al.'s assertion that because Act 182 is not competitively neutral under § 253, it is also not competitively neutral under § 254 and must be preempted.¹³ (We do not agree that Act 182 violates the competitive neutrality requirements of § 253.) Under § 254, however, the fact that a state universal service statute collects funds from carriers (and their customers) that cannot benefit from a fund does not make it violative of competitive neutrality. On the federal level, universal service funding by law comes from carriers that have interstate revenues but goes to support local service; not all carriers that have interstate revenues provide local service. And on the state level, as AT&T points out, it

¹⁰ *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222, 1232-1233 (10th Cir. 2005).

¹¹ CenturyLink Comments at 5. CenturyLink evades the question of whether wireline and wireless networks are to be addressed separately.

¹² See, e.g., 05-337/96-45, NASUCA Comments on the Identical Support Rule (April 17, 2008) at 3-4.

¹³ PAETEC, et al. Comments at 7.

(and its customers) are required to provide support for the Michigan Restructuring Mechanism, but cannot benefit from the mechanism.¹⁴ PAETEC, et al.'s proposition fundamentally misconstrues the nature and purpose of support mechanisms (both inter- and intrastate).

The MI CLEC Petition and the request for temporary relief should be denied.

Respectfully submitted,

/s/

Charles A. Acquard,
Executive Director
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

March 19, 2010

¹⁴ AT&T Comments at 5.