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

In the Matter of	)	
	)	
American Communications Services, Inc.	)	
	)	
MCI Telecommunications Corp.	)	
	)	CC Docket No. 97-100
Petitions for Expedited Declaratory Ruling	)	
Preempting Arkansas Telecommunications	)	
Regulatory Reform Act of 1997 Pursuant	)	
to Sections 251, 252, and 253 of the	)	
Communications Act of 1934, as amended	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1999 **Released: December 23, 1999**

By the Commission:

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I. INTRODUCTION

1. American Communications Services, Inc. (ACSI)[1] and MCI Telecommunications Corp. (MCI) seek preemption of various provisions of the Arkansas Telecommunications Regulatory Reform Act of 1997[2] pursuant to the Supremacy Clause of the U.S. Constitution[3] and sections 214(e), 251, 252, 253, and 254 of the Communications Act of 1934, as amended (Communications Act or Act).[4] To support their preemption requests, ACSI and MCI argue that the challenged provisions of the Arkansas Act impermissibly conflict with federal law or unlawfully erect barriers to competitive entry into local exchange markets in the State of Arkansas.

2. ACSI and MCI also ask us, pursuant to the Supremacy Clause and section 252(e)(5) of the Communications Act,[5] to preempt and assume the jurisdiction of the Arkansas Public Service Commission (Arkansas Commission or Arkansas PSC) over all proceedings conducted under section 252 of the Communications Act. To support their request, ACSI and MCI maintain that certain provisions of the Arkansas Act improperly deprive the Arkansas Commission of the authority to carry out its duties in proceedings it conducts under section 252.

3. For the reasons explained below, we grant in part and deny in part the petitions insofar as they request preemption pursuant to the Supremacy Clause and sections 251, 252, and 253 of the Communications Act. We deny the petitions insofar as they request preemption pursuant to section 252(e)(5) of the Communications Act. Finally, we hold the petitions in abeyance insofar as they request preemption pursuant to the Supremacy Clause and sections 214(e) and 254 of the Communications Act, until such time as the Commission resolves certain outstanding issues regarding the operation of the new federal universal service program. Accordingly, in this Order, we preempt only the enforcement of the second sentence of section 9(d), the first sentence of 9(i), and the subsections 10(b) and 10(c) of the Arkansas Act. Section 9(d) concerns the extent an incumbent LEC may restrict resale of its retail telecommunications services. Section 9(i) concerns the standards governing a state commission's review and approval of negotiated interconnection agreements and Statements of Generally Available Terms

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1. ACSI now does business as e.spire Communications, Inc.

2. Act 77 of 1997, Senate Bill 54, 81st General Assembly, Regular Session; Ark. Code Ann. §§ 23-17-401 *et seq.* (Arkansas Act).

3. U.S. Const., art. VI, cl. 2 (Supremacy Clause).

4. 47 U.S.C. §§ 214(e), 251, 252, 253, 254. These provisions were added to the Communications Act of 1934 by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act), which also added many other provisions to the Communications Act. *See, e.g.*, 47 U.S.C. §§ 255-261. All citations herein to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

5. 47 U.S.C. § 252(e)(5).

(SGATs).[6] Section 10 concerns the process by which the Arkansas Commission may order a rural telephone company to comply with a bona fide request for interconnection, unbundled network elements, or services made by a telecommunications provider under section 251(c) of the Communications Act. We preempt these sections of the Arkansas Act pursuant to our conflict preemption authority.

II. BACKGROUND

A. Procedural History

4. On March 25, 1997, ACSI filed a petition for an expedited declaratory ruling preempting the Arkansas Commission and various provisions of the Arkansas Act pursuant to sections 214(e), 252(e)(5), 253, and 254 of the Communications Act.[7] In response, five parties supported all or part of ACSI's petition,[8] and six parties opposed ACSI's petition.[9]

5. On June 3, 1997, MCI filed a similar petition for an expedited declaratory ruling preempting the Arkansas Commission and various provisions of the Arkansas Act pursuant to the Supremacy Clause and sections 214(e), 251, 252, 253, and 254 of the Communications Act.[10] In response, five parties supported all or part of MCI's petition,[11] and five parties opposed MCI's

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[6] SGAT, or Statement of Generally Available Terms. A statement of the terms and conditions that a company generally will offer to competing LECs within that State to comply with the requirements of section 251 and the standards applicable under section 252. 47 U.S.C. §§ 252(e)(2)(A), 252(f).

[7] Pleading Cycle Established for Comments on ACSI Petition for Declaratory Ruling Regarding Preemption in Arkansas, CC Docket No. 97-100, Public Notice, 12 FCC Rcd 3765 (1997).

[8] The five supporting commenters are: MCI, Association for Local Telecommunications Services (ALTS), AT&T Corp. (AT&T), Sprint Communications Company, L.P. (Sprint), and Telecommunications Resellers Association (TRA).

[9] The six opposing commenters are: Aliant Communications Company (Aliant), Arkansas Attorney General (Arkansas AG), Arkansas Telephone Association (ATA), GTE Service Corp. (GTE), Northern Arkansas Telephone Company (NATC), and Southwestern Bell Telephone Company (SWBT).

[10] *Pleading Cycle Established for Comments on MCI Petition for Expedited Declaratory Ruling Regarding Preemption of Arkansas Telecommunications Regulatory Reform Act of 1997*, CC Docket No. 97-100, Public Notice, 12 FCC Rcd 7696 (1997) (establishing comment schedule and consolidating MCI's petition with ACSI's in a single docket). Henceforth in this Order, we use "ACSI" after comment citations to refer to comments and reply comments filed in response to ACSI's petition, and "MCI" to refer to comments and reply comments filed in response to MCI's petition.

[11] The five supporting commenters are: ACSI, ALTS, AT&T, the Competition Policy Institute (CPI), and TRA. MCI filed its reply comments one day late, accompanied by a motion for leave to file out of time, which no party opposed. We grant MCI's motion.

petition.[12]

B. The Telecommunications Act of 1996

6. As the Supreme Court noted, the Telecommunications Act of 1996 "was an unusually important legislative enactment" which changed the landscape of telecommunications regulation.[13] Through this comprehensive amendment to the Communications Act of 1934, Congress rejected the historic paradigm of telecommunications services provided by government-sanctioned monopolies in favor of a new paradigm that encourages the entry of efficient competing service providers into all telecommunications markets. Towards that end, the 1996 Act arms this Commission, state commissions, and potential new entrants into previously closed telecommunications markets with powerful tools to dismantle the legal, operational, and economic barriers that hindered competitive entry in the past. Many of these tools are forged by sections 251 through 253 of the Communications Act, which we summarize briefly below.

7. Section 251 of the Communications Act imposes new obligations on telecommunications carriers *vis-a-vis* competitors in local exchange markets (competing LECs). Section 251 obliges incumbent local exchange carriers (incumbent LECs) (i) to provide competing LECs with interconnection and unbundled network elements pursuant to terms, conditions, and cost-based rates that are just, reasonable, and non-discriminatory; (ii) to offer retail services to competing LECs pursuant to terms, conditions, and wholesale rates that are reasonable and non-discriminatory; and (iii) to negotiate in good faith with competing LECs the particular terms and conditions of agreements (interconnection agreements) to fulfill the foregoing obligations.[14]

8. Section 252 of the Communications Act establishes the processes by which an interconnection agreement between an incumbent LEC and a competing LEC takes shape and becomes effective. In brief, an incumbent LEC and a competing LEC may reach an interconnection agreement through voluntary negotiations, mediation brokered by a state commission, or arbitration conducted by a state commission in accordance with enumerated procedural and substantive directives.[15] All interconnection agreements, whether reached by negotiation, mediation, or arbitration, must be submitted to the applicable state commission for approval in conformity with certain specified standards.[16] If a state commission "fails to act" to

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[12] The five opposing commenters are: Arkansas AG, ATA, jointly Bell Atlantic and NYNEX (collectively Bell Atlantic), NATC, and SWBT.

[13] *Reno v. ACLU*, 117 S.Ct. 2329, 2337 (1997).

[14] 47 U.S.C. §§ 251(c)(1)-(4).

[15] 47 U.S.C. §§ 252(a)-(d).

carry out those responsibilities in a timely matter, then the Commission must preempt the state commission's jurisdiction of that matter and assume the state commission's responsibilities.[17]

9. Section 253 of the Communications Act directs the Commission to preempt the enforcement of any state or local statute, regulation, or other legal requirement that prohibits or has the effect of prohibiting any entity from providing any interstate or intrastate telecommunications service.[18] Section 253 allows for certain limited exceptions, however, if they are competitively neutral and necessary to advance certain specified public interest objectives.[19]

C. The Arkansas Act

10. In early 1997, the State of Arkansas enacted the Arkansas Act, the stated purpose of which is to "revise . . . [Arkansas'] existing regulatory regime for the telecommunications industry to ensure that it is consistent with and complementary to the Federal Telecommunications Act of 1996."[20] The provisions of the Arkansas Act challenged by ACSI and MCI in this proceeding fall into four broad categories: first, universal service funding, distribution, and eligibility, which are addressed in sections 4 and 5;[21] second, retail rate regulation and deregulation, which are addressed in sections 7, 8, and 12;[22] third, the authority of the Arkansas Commission to arbitrate and approve interconnection agreements and to order incumbent LECs to interconnect with, sell unbundled network elements to, and allow resale of their retail services by, competing LECs, which is addressed in sections 9 and 10;[23] and fourth, the Arkansas Commission's rulemaking power, which is addressed in section 11.[24]

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[16] 47 U.S.C. §§ 252(e)(1)-(4). Moreover, independent of the negotiation/arbitration processes summarized above, an incumbent LEC that is a "Bell operating company" (as defined by 47 U.S.C. § 153(4)) may seek State commission approval, in accordance with designated statutory requirements, of a statement of the terms and conditions (SGAT, or Statement of Generally Available Terms) that such company generally will offer to competing LECs within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under section 252. 47 U.S.C. § 252(f).

[17] 47 U.S.C. § 252(e)(5).

[18] 47 U.S.C. §§ 253(a), (b), (d).

[19] 47 U.S.C. § 253(b).

[20] Arkansas Act § 16. The Arkansas Act became law on the same date that the Governor of Arkansas signed it: February 4, 1997. *Id.*.

[21] Ark. Code Ann. §§ 23-17-404, 23-17-405.

[22] Ark. Code Ann. §§ 23-17-407, 23-17-408, 23-17-412.

[23] Ark. Code Ann. §§ 23-17-409, 23-17-410.

[24] Ark. Code Ann. § 23-17-411.

D. The Arkansas Commission's Implementation Activities

11. Since the Arkansas Act became law on February 4, 1997, the Arkansas Commission has engaged in several activities that may shed light on the meaning of some of the provisions of the Arkansas Act at issue in this proceeding. First, the Arkansas Commission has conducted an arbitration, and ultimately approved an interconnection agreement, between SWBT and AT&T pursuant to section 252 of the Communications Act.[25] Second, the Arkansas Commission has "revise[d] its rules so that they apply . . . equally to all providers of basic local exchange service."[26] Third, the Arkansas Commission has established rules and procedures to implement the Arkansas Universal Service Fund.[27] Finally, the Arkansas Commission has approved numerous interconnection agreements pursuant to section 9 of the Arkansas Act and section 252 of the Communications Act.[28] These activities of the Arkansas Commission inform our review of the Arkansas Act. Consistent with the Commission's preemption precedents, where the Arkansas Commission has already construed a challenged provision of the Arkansas Act in a manner that vitiates any grounds for preemption, we will decline to exercise our authority to preempt.[29]

E. Legal Bases for Preemption of Particular Provisions of the Arkansas Act

12. Pursuant to the Supremacy Clause, federal law may result in the "pre-emption of

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[25] *See AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996*, Docket No. 96-395-U, Order Nos. 1-16 (Ark. PSC rel. Nov. 22, 1996 - July 8, 1998) (SWBT/AT&T Arbitration).

[26] Ark. Code Ann. §§ 23-17-411(e). See In the Matter of a Rulemaking to Identify, Repeal, and/or Amend Rules and Regulations in Compliance with Act 77 of 1997, Docket No. 97-040-R, Order Nos. 8, 9 (Ark. PSC rel. July 24, 1997, July 29, 1997).

[27] Ark. Code Ann. §§ 23-17-404(e). See In the Matter of a Rulemaking Proceeding to Establish Rules and Procedures Necessary to Implement the Arkansas Universal Service Fund, Docket No. 97-041-R, Order No. 7 (Ark. PSC rel. Sept. 2, 1997).

[28] *See* Letter from Todd F. Silbergeld, Director, Federal Regulatory, SBC Communications Inc., to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 97-100 (August 14, 1997) (*8/14/97 SWBT Ex Parte Letter*); Letter from Geoffrey M. Klineberg to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 97-100 (March 10, 1998) (*3/10/98 SWBT Ex Parte Letter*).

[29] If we refrain from preemption based on the Arkansas Commission's interpretation of a provision of the Arkansas Act, and that interpretation is subsequently overturned by a court or rescinded by the Arkansas Commission, we may revisit our decision not to preempt. *Texas Preemption Order*, 13 FCC Rcd at 3466, ¶ 11. *See The Public Utility Commission of Texas, et. al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3464-66 at ¶¶ 7-11 (1997) (*Texas Preemption Order*), *petition for recon. pending, petition for review pending, City of Abilene, Texas v. FCC*, No. 97-1633 (D.C. Cir. filed Oct. 14, 1997).

state law either by express provision, by implication, or by a conflict between federal and state law."[30] Petitioners seek preemption "by a conflict between federal and state law," i.e., conflict between sections 214(e), 251, 252, and 254 of the Communications Act and certain portions of the Arkansas Act. Petitioners also seek preemption of various parts of the Arkansas Act " by express provision" of federal law, i.e., section 253 of the Communications Act.

1. Legal Framework for Conflict Preemption

13. A federal statute preempts a state statute under the Supremacy Clause when the state statute conflicts with the federal statute or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[31] Such conflict preemption may result not only from action taken by Congress. It may also result from action taken by a federal agency, but only when the agency acts within the scope of its congressionally delegated authority.[32] Pursuant to this conflict preemption doctrine, the Commission has on numerous occasions preempted state law that conflicted with federal law or stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[33]

14. Some commenters allege that section 2(b) of the Communications Act deprives the Commission of jurisdiction to preempt any provision of the Arkansas Act on the basis of alleged conflicts between the Arkansas Act and sections 251 and 252 of the Communications Act. In these commenters' view, section 253 provides the only possible authority for Commission preemption of the Arkansas Act, because only that section expressly empowers the Commission to address matters involving intrastate communications.[34] We disagree with the commenters' contention that only section 253 expressly empowers the Commission to address intrastate matters. First, in charging the Commission in section 253 of the Communications Act

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[30] *See, e.g., The Health Maintenance Organization of New Jersey, Inc. v. Whitman*, 72 F.3d 1123, 1127 (3d Cir. 1995); *Kinley Corp. v. Iowa Utilities Board*, 999 F.3d 354, 358 n.3 (8th Cir. 1993) (identifying four kinds of preemption: express preemption, implied preemption, conflict preemption, and field preemption).

[31] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See, e.g., Louisiana PSC v. FCC*, 476 U.S. at 368-69.

[32] *See, e.g., City of New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988); *Louisiana PSC v. FCC*, 476 U.S. at 369; *Capital Cities Cable v.Crisp*, 467 U.S. at 699; *Fidelity Federal*, 458 U.S. at 153-54.

[33] *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988) (City of New York); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); *State of California v. FCC*, 75 F.3d 1350 (9th Cir. 1996); *State of California v. FCC*, 39 F.3d 919 (9th Cir. 1994); *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989).

[34] Arkansas AG Comments at 18-20 (ACSI); Arkansas AG Comments at 11-13 (MCI); Arkansas AG Reply Comments at 2-3 (MCI); ATA Reply Comments at 3-10 (MCI); NATC Comments at 6-8, 10-11 (ACSI); NATC Comments at 4-7 (MCI).

to preempt state or local requirements prohibiting entities from providing telecommunications services, Congress nowhere signaled an intention to remove the Commission's authority to preempt on the basis of conflict with federal laws. Indeed, *City of New York* gives the agency very broad conflict preemption authority, regardless of whether there is an express preemption provision in the statute.[35] Moreover, Congress gave the Commission, in addition to preemption jurisdiction in the 1996 Act, direct jurisdiction over certain aspects of intrastate communications pursuant to sections 251 and 252 of the 1996 Act.[36]

15. Other commenters suggest that section 2(b) of the Communications Act precludes us from invoking section 253 to preempt the enforcement of a State or local legal requirement that pertains to intrastate telecommunications services.[37] These suggestions are moot, in that we do not rely on section 253 in this *Order* to preempt any section of the Arkansas Act. We note, however, that section 253 expressly empowers the Commission to preempt the enforcement of state or local legal requirements that prohibit or effectively prohibit the provision of any "interstate *or intrastate* telecommunications service."[38] Consequently, section 2(b)'s limitation on the Commission's authority over intrastate matters does not apply to the Commission's preemption authority under section 253.[39] Consistent with the Commission's preemption precedents, we will apply the foregoing principles in evaluating Petitioners' requests for conflict preemption in this proceeding.[40]

2. Legal Framework for Section 253 Preemption

16. Section 253 of the Communications Act ensures that no state or local authority can erect barriers to competitive entry that might frustrate the 1996 Act's national goal of opening all telecommunications markets – including all local telephone exchange markets – to competition.[41] The Commission has already explained at length in the *Texas Preemption Order*[42] and in other orders the analysis it applies when assessing whether to preempt the enforcement of

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[35] *City of New York v. FCC*, 486 U.S. 57 (1988)

[36] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 730 (1999).

[37] *See, e.g.*, NATC Comments at 5-6 (MCI).

[38] 47 U.S.C. § 253(a) (emphasis added).

[39] *See, e.g., Texas Preemption Order*, 13 FCC Rcd at 3480, ¶ 41 n.105; *Classic Telephone Preemption Order*, 11 FCC Rcd at 13094, ¶ 24; *Silver Star Preemption Order*, 12 FCC Rcd at 15648, ¶ 18. *See generally* MCI Petition at 4-5; CPI Reply Comments at 5-6 (MCI); TRA Reply Comments at 6-7 (ACSI).

[40] *See Texas Preemption Order*, 13 FCC Rcd at 3484-87, ¶¶ 50-54.

[41] *See, e.g., Texas Preemption Order*, 13 FCC Rcd at 3463, 3469, 3480, ¶¶ 4, 21, 41.

[42] *Texas Preemption Order*, 13 FCC Rcd at 3480-81, ¶¶ 41-45.

a state or local legal requirement under section 253.[43] We affirm and will apply that analysis here.

17. We emphasize that the burden of building a record sufficient to warrant preemption under section 253 rests principally on the party petitioning the Commission for such relief.[44] As the Commission has stated, "[i]t is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers['] ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a)[45] without meeting the requirements of section 253(b)[46] or (c).[47] We will exercise our authority only upon such fully developed factual records."[48]

F. Standing and Ripeness

18. According to several commenters, Petitioners lack standing to seek preemption of

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[43] *See, e,g, Silver Star Telephone Company Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15655-57 at ¶¶ 37, 40 (1997) (Silver Star Preemption Order), recon. denied, Memorandum Opinion and Order, FCC 98-205 (rel. Aug. 24, 1998*); New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19720-25 at ¶¶ 17-25 (1996) (New England Preemption Order), recon. denied, Memorandum Opinion and Order, 12 FCC Rcd 5215 (1997); *Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082, 13096-97, 13101-13104, ¶¶ 27, 35-42 (1996) (Classic Telephone Preemption Order).

[44] See *Low Tech Order*, 13 FCC Rcd at 1775-76, ¶ 38; *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21440 at ¶ 101 (1997) (Troy Preemption Order); *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1751-52, ¶ 32 (1997) (Pittencrieff Order), petition for recon. pending; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10 ¶¶ 35-42.

[45] 47 U.S.C. § 253(a): "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."

[46] 47 U.S.C. § 253(b): "Nothing in this section affects the authority of a State or local government to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunication services, and safeguard the rights of consumers."

[47] 47 U.S.C. § 253(c): Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

[48] *Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101.

the enforcement of the Arkansas Act because Petitioners purportedly fail to allege any infringement of a legally protected interest of *theirs* that is concrete and particularized, actual or imminent, and not conjectural or hypothetical. In these commenters' view, Petitioners proffer merely speculative allegations of possible future injuries and hypothesized chains of events that might eventually lead to actual injury.[49] For similar reasons, several commenters also assert that the issues raised by the petitions are not ripe for adjudication. These commenters argue that the issue whether we should preempt the enforcement of a particular provision of the Arkansas Act will not be ripe for decision unless and until that provision is construed and applied in a specific proceeding – preferably a proceeding in which the petitioner itself is a party.[50]

19. It is well established that the justiciability doctrines of standing and ripeness developed by federal courts do not apply to adjudications by federal administrative agencies such as the Commission.[51] Moreover, sections 4(i), 4(j), and 403 of the Communications Act confer upon the Commission broad power to issue orders appropriate for implementing and enforcing the Communications Act.[52] In addition, section 5(e) of the Administrative Procedure Act provides that a federal administrative agency such as the Commission, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."[53] As a result, the Commission can and does adjudicate petitions for declaratory rulings – including petitions for declaratory rulings regarding preemption – when the requirements of the standing and ripeness doctrines are not strictly met.[54]

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[49] Arkansas AG Comments at 2, 5, 7-13 (ACSI); Arkansas AG Reply Comments at 8-10 (ACSI); Arkansas AG Comments at 2-4, 10 (MCI); Arkansas AG Reply Comments at 1-4 (MCI); ATA Comments at 5-7, 11-12 (ACSI); ATA Reply Comments at 3 (ACSI); ATA Comments at 7-10, 22-25 (MCI); NATC Comments at 3-6, 8 (ACSI); SWBT Comments at 4-5, 14-17 (ACSI); SWBT Comments at 2-3, 15, 17 (MCI); *12/17/97 SWBT Ex Parte Letter*.

[50] Arkansas AG Comments at 7-13 (ACSI); Arkansas AG Reply Comments at 8-10 (ACSI); Arkansas AG Comments at 2-4, 10 (MCI); Arkansas AG Reply Comments at 1-4 (MCI); ATA Comments at 7, 11-12 (ACSI); ATA Reply Comments at 3 (ACSI); ATA Comments at 7-10, 22-25 (MCI); CPI Comments at 8-9 (MCI); CPI Reply Comments at 9 (MCI); NATC Comments at 3-6, 8 (ACSI); SWBT Comments at 4-5, 18 (ACSI); SWBT Reply Comments at 5-6 (ACSI); SWBT Comments at 2-3, 15 (MCI).

[51] *See, e.g., Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995); *Competitive Enterprise Institute v. U.S. Dept. of Transportation*, 856 F.2d 1563, 1565 (D.C. Cir. 1988); *California Association of the Physically Handicapped v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985); *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). *See generally* ACSI Reply Comments at 4 (ACSI); *10/29/97 MCI Ex Parte Letter* at 2-3; CPI Reply Comments at 8 (MCI).

[52] 47 U.S.C. §§ 154(i)-(j), 403.

[53] 5 U.S.C. § 554(e). *See* 47 C.F.R. § 1.2 ("The Commission may . . . issue a declaratory ruling terminating a controversy or removing uncertainty").

[54] *See, e.g., Operator Services Providers of America Petition for Expedited Declaratory Ruling, Memorandum Opinion and Order*, 6 FCC Rcd 4475 (1991); *Telerent Leasing Corp. Petition for Declaratory Rulings on Questions of Federal Preemption*, Memorandum Opinion and Order, 45 FCC 2d 204 (1974), *aff'd sub*

20. Similarly, we reject the contention of some commenters that we should decline to adjudicate the instant petitions because ACSI and MCI have not identified a specific application of the Arkansas Act that has caused them some concrete, particularized harm. ACSI provides competing local exchange service in Arkansas, and both ACSI and MCI have expended substantial effort and resources to enter local exchange markets elsewhere around the country.[55] Both ACSI and MCI, therefore, have a sufficient interest in removing unlawful barriers to entry into local exchange markets in Arkansas to be appropriate petitioners in this proceeding. In any event, the plain language of section 253(d) of the Communications Act empowers the Commission to preempt upon its own motion (after notice and an opportunity for public comment), so the Commission may preempt under section 253(d) in the absence of a directly aggrieved party or even a petition seeking preemption.[56] We conclude that ACSI and MCI may appropriately seek preemption of the enforcement of the Arkansas Act.[57]

21. Moreover, withholding adjudication could cause significant hardship to Petitioners and other potential competing LECs in Arkansas. Entering local exchange markets can involve considerable advance planning and substantial investments of human and financial capital. To require competing LECs to take steps to enter local exchange markets in Arkansas without allowing them to challenge the validity of key, local competition provisions of the Arkansas Act would cause undue delay and difficulty.[58] Furthermore, if Petitioners are correct that the challenged provisions of the Arkansas Act hinder competition in local exchange markets, delayed resolution would frustrate one of the primary purposes of the 1996 Act.[59] Accordingly,

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nom., North Carolina Utilities Commission v. FCC, 537 F.2d 787, 790 n.2 (4th Cir.) *cert. denied*, 429 U.S. 1027 (1976).

[55] *See* ACSI Petition at 2-3; ACSI Reply Comments at 4-5 (ACSI).

[56] *See generally 10/29/97 MCI Ex Parte Letter* at 3; TRA Reply Comments at 2-3 (ACSI).

[57] We also reject the contention of some commenters that the petitions' claims are not ripe because the Arkansas Commission has not yet applied the Arkansas Act in a manner that arguably violates federal law. Assessing a request for conflict preemption usually involves the predominantly legal task of examining and comparing the terms of the applicable federal and state laws, which can be done adequately without facts arising from a specific application of the challenged requirement. The same is true of assessing a request for preemption under section 253, which likewise ordinarily need not depend on a pre-existing application of the challenged legal requirement *See generally* ACSI Reply Comments at 5-6 (ACSI); TRA Reply Comments at 3-4 (ACSI).

[58] *See, e.g., Texas Preemption Order*, 13 FCC Rcd at 3530, ¶ 147 (holding that requiring competing LECs "to invoke the negotiation and arbitration procedures set forth in sections 251 and 252 of the Act prior to seeking redress from the Commission could hamper competitive entry by raising uncertainty as to the potential applicability of" the challenged Texas statute). *See also Operator Services Providers of America*, 6 FCC Rcd at ¶ 20; *Telerent Leasing Corp.*, 45 FCC 2d at ¶ 22. *See generally* ACSI Reply Comments at 5-6 (ACSI); TRA Reply Comments at 3-4 (ACSI); CPI Reply Comments at 4-5, 9-12 (MCI).

[59] *See, e.g., Pacific Gas and Electric Co.*, 461 U.S. at 201-02 (""if petitioners are correct that [the challenged state law] is void because it hinders the commercial development of atomic energy, 'delayed resolution would

we conclude that the issues raised in the petitions are appropriate for our review.

G. The Preemption Requests

22. We discuss each of the individual preemption requests before us in the pages that follow. In the interest of clarity, however, we briefly summarize here the Petitioners' three general approaches.[60]

23. Section 252 of the Communications Act. First, Petitioners argue that certain sections of the Arkansas Act undermine the Arkansas Commission's authority to arbitrate and approve interconnection agreements, because these sections improperly direct the Arkansas Commission "to do no more, approve no more, and permit no more than is expressly mandated by Congress and the FCC."[61] Petitioners contend that such restrictions on the Arkansas Commission's authority render the Arkansas Commission incapable of carrying out its responsibility in any proceeding or matter it conducts under section 252 of the Communications Act. Petitioners maintain, therefore, that we must preempt the Arkansas Commission's jurisdiction over all present and future proceedings or matters conducted under section 252, and assume the responsibility of the Arkansas Commission with respect to every such proceeding or matter.

24. Conflict with federal law. Second, Petitioners argue that various sections of the Arkansas Act conflict with federal law. They allege, for example, that part of section 9(d) conflicts with section 251(c)(4)(B) of the Communications Act (and our implementing regulations) because the Arkansas law permits incumbent LECs to refrain from applying a wholesale discount to the resale of promotions, whereas federal law requires incumbent LECs to apply a wholesale discount to the resale of promotions lasting longer than 90 days. Petitioners maintain, therefore, that we should preempt such sections pursuant to our "conflict" preemption authority.

25. Section 253 of the Communications Act. Third, Petitioners argue that various sections of the Arkansas Act erect barriers to competitive entry that are neither competitively neutral nor necessary to achieve any public interest objective. They allege, for example, that Section 10 creates an impermissible barrier to entry in areas served by rural telephone companies, because, according to Petitioners, it establishes unattainable prerequisites for imposing interconnection, unbundling, and resale obligations on rural telephone companies. Petitioners maintain, therefore, that we should preempt the enforcement of such sections

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frustrate one of the key purposes of the [Atomic Energy] Act'") (*quoting Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978)).

[60] To avoid redundancy, we delay citation to the relevant parts of the record, the Communications Act, the Arkansas Act, and other sources, until the we reach the substantive discussion of Petitioners' claims, *infra*.

[61] ACSI Petition at ii.

pursuant to our preemption authority under section 253 of the Communications Act. Our discussion of Petitioners' claims will track the order in which we have laid them out here: we will turn first to Petitioners' section 252 claims. Then we will review Petitioners' arguments against the Arkansas statute section-by-section. Where Petitioners apply more than one analysis – where they argue in the alternative, so to speak –we will discuss the section 253 analysis last.

III. DISCUSSION

A. Preemption of the Arkansas Commission's Jurisdiction

1. Failure to Act: Section 252(e)(5) of the Communications Act

26. Section 252(e)(5) of the Communications Act directs the Commission to preempt and assume the jurisdiction of a state commission in any proceeding or matter wherein the state commission "fails to act" to fulfill its duties under section 252.[62] We do not preempt under either section 252(e)(5) or section 253, for the reasons we set forth below.

2. The Petitions

27. Petitioners base their requests for preemption under section 252(e)(5) of the Communications Act on the alleged premise that certain sections of the Arkansas Act[63]

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[62] 47 U.S.C. § 252(e)(5) provides that "If a State commission fails to act to carry out its responsibility under this section [*i.e.*, section 252] in any proceeding or matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission."

[63] Petitioners refer to sections 9(d), 9(f), 9(g), 9(h), 9(i), and 9(j) Ark. Code Ann. §§ 23-17-409(d).

Section 9(d) of the Arkansas Act provides, in pertinent part: "Except to the extent required by the Federal Act and this Act, the Commission shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements to a competing local exchange carrier for the purpose of allowing such competing local exchange carrier to compete with the incumbent local exchange carrier in the provision of basic local exchange service."

Section 9(f) of the Arkansas Act provides: "As provided in Sections 251 and 252 of the federal act (47 USC 251 and 252), the commission's authority with respect to interconnection, resale, and unbundling is limited to the terms, conditions and agreements pursuant to which an incumbent local exchange carrier will provide interconnection, resale, or unbundling to a CLEC for the purpose of the CLEC competing with the incumbent local exchange carrier in the provision of telecommunications services to end-use customers."

Section 9(g) of the Arkansas Act provides, in pertinent part: "The Commission shall approve, as permitted by the Federal Act, resale restrictions which prohibit resellers from purchasing retail local exchange services offered by a local exchange carrier to residential customers and reselling those retail services to nonresidential customers, or aggregating the usage of multiple customers on resold to the extent permitted by the Federal Act."

effectively require the Arkansas Commission to "fail to act" to carry out its mediation and arbitration responsibilities in proceedings it conducts under section 252.[64] To support this allegation, Petitioners first contend that the foregoing provisions preclude the Arkansas Commission from imposing on incumbent LECs interconnection, unbundling, or resale obligations beyond those specified in the *Local Competition Order*.[65]

28. Petitioners then maintain that the Arkansas Commission's alleged inability to exceed the *Local Competition Order* in proceedings it conducts under section 252 equates to a "failure to act" within the meaning of section 252(e)(5).[66] According to Petitioners, federal law contemplates that state commissions will have the authority to act in section 252 proceedings to impose on incumbent LECs obligations beyond those specified in the *Local Competition Order*. Because the Arkansas Commission allegedly cannot lawfully impose such obligations, Petitioners argue that the Arkansas Commission simply cannot "act" within the meaning of section 252(e)(5).[67]

Section 9(h) of the Arkansas Act provides that "[i]ncumbent local exchange carriers shall provide CLECs, at reasonable rates, nondiscriminatory access to operator services, directory listings and assistance, and 911 service only to the extent required in the Federal Act." *Id.* The Arkansas Act defines a "CLEC" or "competing local exchange carrier" as "a local exchange carrier that is not an incumbent local exchange carrier."

Section 9(i) of the Arkansas Act provides: "The Commission shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the Federal Act unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the Federal Act (47 USC 251). In no event shall the Commission impose any interconnection requirements that go beyond those requirements imposed by the Federal Act or any interconnection regulations or standards promulgated under the Federal Act."

Section 9(j) of the Arkansas Act provides that, "[i]n the event the [Arkansas] Commission is requested to arbitrate any open issues pursuant to Section 252 of the Federal Act . . . , the parties to the arbitration proceeding shall be limited to the persons or entities negotiating the agreement." *Id.*

[64] ACSI Petition at ii, iv, 2, 5, 8-13; ACSI Reply Comments at 2, 7-13 (ACSI); MCI Petition at 18-20; *5/8/98 ACSI Ex Parte Letter*; *4/16/98 ACSI Ex Parte Letter*; *10/29/97 MCI Ex Parte Letter*.

[65] ACSI Petition at ii-iv, 3-15, 20-21; ACSI Reply Comments at i-ii, 1-5, 7-10, 12-13, 15-16 (ACSI); MCI Petition at 18-20.

[66] ACSI Petition at ii, 3-15, 20-21; ACSI Reply Comments at i-ii, 1-5, 7-10, 12-13, 15-16 (ACSI); MCI Petition at 18-20.

[67] ACSI Petition ii, 3-15, 20-21; ACSI Reply Comments at i-ii, 1-5, 7-10, 12-13, 15-16 (ACSI); MCI Petition at 18-20. *See generally* ALTS Comments at 1-6, 10 (ACSI); Sprint Comments at 3, 5-8 (ACSI); TRA Comments at 8-13 (ACSI); TRA Reply Comments at 5-6 (ACSI) (all supporting ACSI's request for preemption pursuant to section 252(e)(5)). ACSI's pleadings also seem to suggest that the Communications Act gives State commissions the absolute right to impose on incumbent LECs obligations exceeding those required by the Communications Act itself (as opposed to obligations specified by the *Local Competition Order*). *See* ACSI Petition at 3; ACSI Reply Comments at 5, 8, 12, 15 (ACSI). In an *ex parte* meeting, however, ACSI disavowed that view. *See generally*

29. ACSI acknowledges that section 252(e)(5) and our implementing rules refer to preemption only in the context of a particular, ongoing proceeding or matter conducted by a state commission under section 252. ACSI also acknowledges that it is not at present a party to such a proceeding or matter.[68] ACSI argues that its request for preemption under section 252(e)(5) should be granted, nevertheless, because the Arkansas Act deprives the Arkansas Commission of the ability to conduct any such proceeding or matter in the manner contemplated by federal law. In ACSI's view, requiring it or any other petitioner to initiate a proceeding or matter under section 252 and await a specific failure to act by the Arkansas Commission would exalt form over substance, deter competitive entry, and cause undue delay, uncertainty, and expense.[69] We note that, because they do not ask the Commission to address a particular proceeding, Petitioners in effect request the Commission to preempt the Arkansas Commission's jurisdiction over all present and future proceedings under section 252.[70]

3. Analysis

30. Section 252(e)(5) consists of a single sentence, but it refers specifically to a "proceeding or matter" under section 252 three times: it posits a state commission's failure to act in a "proceeding or matter;" it directs us to preempt the state commission's jurisdiction "of that proceeding or matter;" and it requires us to assume the state commission's responsibility "with respect to the proceeding or matter."[71] Section 252(e)(5) clearly contemplates, therefore, that we exercise our authority to preempt the jurisdiction of a state commission only in the context of a particular, ongoing proceeding or matter under section 252. Only in that setting can a state commission "fail to act," and can we rectify such failure, within the meaning of section

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Letter from Danny E. Adams, counsel for ACSI, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 97-100 (Oct. 2, 1997).

[68] ACSI Petition at 14-15; ACSI Reply Comments at 8-10 (ACSI).

[69] ACSI Petition at 13-15; ACSI Reply Comments at 5, 8-10 (ACSI). MCI seems to seek a different remedy under section 252(e)(5) than does ACSI. MCI's Petition, like ACSI's, appears to seek immediate and across-the-board preemption of the Arkansas Commission's jurisdiction pursuant to section 252(e)(5) of the Communications Act. *See* MCI Petition at 18-20. In a subsequent *ex parte* filing, however, MCI essentially withdraws any prior request for such preemption at this time. *10/29/97 MCI Ex Parte Letter.* For now, MCI asks us only to monitor the Arkansas Commission's administration of section 252 of the Communications Act. *10/29/97 MCI Ex Parte Letter* at 6. In MCI's view, if *and only if* the Arkansas Commission indicates in some future proceeding that sections 9(d) and 9(f) of the Arkansas Act limit its ability to carry out its responsibilities under section 252 of the Communications Act, then we should preempt the Arkansas Commission's jurisdiction of *that proceeding* pursuant to section 252(e)(5). *10/29/97 MCI Ex Parte Letter* at 4-6.

[70] ACSI Petition at 13-15; MCI Petition at 19-20.

[71] 47 U.S.C. § 252(e)(5).

252(e)(5).[72]

31. Neither petition for preemption pursuant to section 252(e)(5) arises in the context of a particular, ongoing proceeding or matter conducted by the Arkansas Commission under section 252. Instead, the petitions simply allege that, given the terms of the Arkansas Act, the Arkansas Commission inevitably will fail to act in future proceedings or matters it conducts under section 252. In post-petition *ex parte* letters, ACSI does reference the Arkansas Commission's conduct in the *SWBT/AT&T Arbitration* to support its preemption request.[73] Those *ex parte* letters, however, do not qualify as perfected requests for section 252(e)(5) preemption under our rules.[74] Accordingly, we deny Petitioners' requests for preemption under section 252(e)(5), because those requests do not arise in the context of a particular, ongoing proceeding or matter conducted by the Arkansas Commission under section 252.[75]

32. Petitioners' requests for preemption pursuant to section 252(e)(5) lack validity for another reason: they rest on an erroneous interpretation of the phrase "fails to act" in section 252(e)(5). In Petitioners' mistaken view, a state commission "fails to act" if it fails (due to legal inability or otherwise) to reach a result required by federal law. The Commission has adopted a rule, however, that a state commission "fails to act" within the meaning of section 252(e)(5) only if it "fail[s] to complete its duties in a timely manner."[76] Consequently, as long as a state commission completes its mediation or arbitration duties within the time permitted by federal

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[72] *See generally* Arkansas AG Comments at 11-15, 20 (ACSI); Arkansas AG Comments at 21-22 (MCI); ATA Comments at v, 3-4 (MCI); ATA Reply Comments at 1, 10 (MCI); Bell Atlantic Comments at 3-4 (MCI); NATC Comments at iii, 8-9 (ACSI); SWBT Comments at 14-16 (ACSI); SWBT Reply Comments at 5 (ACSI); SWBT Comment at 15 (MCI).

[73] 4/16/98 ACSI Ex Parte Letter; 5/8/98 ACSI Ex Parte Letter.

[74] 47 C.F.R. § 51.803.

[75] *See generally* Arkansas AG Comments at 11-15, 20 (ACSI); Arkansas AG Comments at 21-22 (MCI); Arkansas AG Reply Comments at 1 (MCI); ATA Comments at v, 3-4 (MCI); ATA Reply Comments at 1, 10 (MCI); Bell Atlantic Comments at 3-4 (MCI); CPI Comments at 8 (MCI); NATC Comments at iii, 8-9 (ACSI); SWBT Comments at 14-16 (ACSI); SWBT Reply Comments at 5 (ACSI); SWBT Comment at 15 (MCI).

[76] *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285. See 47 C.F.R. § 51.801(b). *See also Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission*, CC Docket No. 97-163, *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission*, CC Docket No. 97-164, *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina*, CC Docket No. 97-362, Memorandum Opinion and Order, 13 FCC Rcd 1755 (1997) (*Low Tech Order*); *Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 12 FCC Rcd 15594 (1997); *Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and Request for Additional Relief*, Memorandum Opinion and Order, 13 FCC Rcd 871 (Com. Car. Bur. 1998) (Armstrong Order) .

law, our current rules prevent preemption pursuant to section 252(e)(5), even if the state commission "fails" to impose on incumbent LECs obligations required by federal law.[77] Thus, even assuming, *arguendo*, that the Arkansas Act precludes the Arkansas Commission from imposing interconnection, unbundling, or resale obligations beyond those specified by the *Local Competition Order*, such preclusion does not mean that the Arkansas Commission has failed to act within the meaning of our rules implementing section 252(e)(5).[78]

33. Petitioners do not allege that the Arkansas Commission has failed to respond timely to a specific mediation request under section 252(a)(2), to respond timely to a specific arbitration request under section 252(b), or to complete timely a specific arbitration under section 252(b)(4)(C). Moreover, ACSI's and MCI's petitions for preemption pursuant to section 252(e)(5) were neither supported by affidavits nor served on the Arkansas Commission on the day that they were filed with us, as plainly required by our rules.[79] Accordingly, Petitioners are not entitled to relief under section 252(e)(5) and our implementing rules.

34. We disagree, in any event, with Petitioners' fundamental premise that sections 9(d), 9(f), 9(g), 9(h), 9(i), and 9(j) of the Arkansas Act, singly or in combination, improperly restrict the Arkansas Commission's authority to implement sections 251 and 252 of the Communications Act, and thus should be preempted.[80] In Petitioners' view, when the Arkansas Act directs the Arkansas Commission to refrain from imposing any obligation that exceeds the

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[77] *See Low Tech Order*, 13 FCC Rcd at 1774-75, ¶ 36.

[78] *See generally* Arkansas AG Comments at 12-15, 20 (ACSI); Arkansas AG Comments at 1-4, 20-22 (MCI); Arkansas AG Reply Comments at 1-3 (MCI); ATA Comments at v, 3-4 (MCI); ATA Reply Comments at 1, 7-10 (MCI); Bell Atlantic Comments at 3-4 (MCI); CPI Comments at 8 (MCI); NATC Comments at iii, 8-9, 13 (ACSI); SWBT Comments at 14-16 (ACSI); SWBT Reply Comments at 5 (ACSI); SWBT Comments at 15-16 (MCI).

[79] 47 C.F.R. § 51.803(a). *See generally* SWBT Comments at 15 (ACSI); SWBT Comments at 15-16 (MCI). Given that ACSI and MCI failed to perfect their requests for section 252(e)(5) preemption in accordance with 47 C.F.R. § 51.803(a), the Commission was not required to issue orders resolving those requests within 90 days of receiving the petitions. *See* 47 C.F.R. § 51.803(d) ("The Commission shall issue an order determining whether it is required to preempt the state commission's jurisdiction of a proceeding or matter within 90 days after being notified *under paragraph (a) of this section* . . . of a state commission's failure to carry out its responsibilities under section 252 of the Act") (emphasis added). We note, again, that neither Petitioner sought preemption in the context of an Arkansas Commission proceeding in which the Petitioner was a party. Therefore, the exigent circumstances that the 90-day deadline in section 252(e)(5) was designed to redress -- a petitioning party trapped in limbo by a State commission's failure to conduct a section 252 proceeding promptly -- do not exist here. That is perhaps why neither of the Petitioners and none of the commenters stated that the Commission had a statutory obligation to resolve these petitions within 90 days.

[80] *See generally* Aliant Comments at 1-3 (ACSI); Arkansas AG Comments at 1-21 (ACSI); Arkansas AG Reply Comments at 10 (ACSI); ATA Comments at ii-iii, 1-16, 21-22 (ACSI); ATA Reply Comments at 3 (ACSI); GTE Reply Comments at 3 (ACSI); NATC Comments at 3-8, 18 (ACSI); NATC Reply Comments at 1-2, 6-7 (ACSI); NATC Comments at 14 (MCI); SWBT Comments at 4-18 (ACSI); SWBT Reply Comments at 4 (ACSI); SWBT Comments at 16-17 (MCI).

"requirements" of the Communications Act, the Arkansas Act effectively directs the Arkansas Commission to refrain from imposing any obligation that does not appear in our rules.[81]

35. We reject Petitioners' position. Sections 251 and 252 of the Communications Act create a partnership between the Commission and state commissions in defining the precise parameters of those sections' requirements. State commissions are statutorily authorized to decide for themselves what sections 251 and 252 require, as long as their decisions do not (i) conflict with other requirements of section 251, (ii) substantially prevent implementation of the requirements of section 251 and the purposes of sections 251-261, (iii) violate section 253, or (iv) at least in the context of arbitrating and approving interconnection agreements, contradict the Commission's implementing rules.[82] Indeed, in at least two of its references to the "requirements" of section 251, the Communications Act identifies our rules as a subset, not a complete set, of the requirements of section 251.[83] Therefore, one of the very "requirements" of the Communications Act is that state commissions have the authority to decide for themselves (within the previously described limits) exactly what sections 251 and 252 require.[84]

36. We have carefully reviewed the Arkansas Commission's orders in the arbitration proceeding between SWBT and AT&T, and, in our view, those orders lack a clear indication that the Arkansas Commission feels constrained by the Arkansas Act to refrain from imposing on incumbent LECs any interconnection, unbundling, or resale obligations that go beyond such obligations stated in our rules. During the course of the arbitration proceeding, the Arkansas Commission did change its findings -- sometimes more than once -- regarding issues on which it originally had ruled in AT&T's favor.[85] In doing so, however, the Arkansas Commission never stated unambiguously that those changes stemmed from its belief that the Arkansas Act precluded it from granting AT&T's requests to exceed or supplement our rules. As far as we can determine, those changes may have stemmed, instead, from the Arkansas Commission's evolving notions of what requirements are imposed by sections 251 and 252. We conclude, therefore, that

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[81] *See* ACSI Petition at ii, iv, 2, 5, 8-13; ACSI Reply Comments at 2, 7-13 (ACSI); MCI Petition at 18-20.

[82] 47 U.S.C. §§ 251(d)(3), 252(c)(1), 252(e)(2)(B), 253, 261(b).

[83] *See* 47 U.S.C. §§ 252(c)(2), 252(e)(2)(B) (both referring to "the requirements of section 251, *including* the regulations prescribed by the Commission pursuant to section 251") (emphasis added).

[84] The Commission has already reached this conclusion in the *Local Competition Order*. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15513, 15514-15, 15520, 15527, 15529-30, 15534, 15567, 15609, 15624-27, 15631-33, 15640-43, 15648, 15657-58, 15683, 15696, 15698-99, 15707, 15739, 15748, 15750-51, 15783-84, 15971, 15975, 15977, ¶¶ 24, 27, 41, 54, 57, 58, 66, 135-36, 212, 241, 243, 244, 248, 259, 262, 277, 282-85, 295, 310, 311, 366, 391, 396, 414, 480, 496, 502, 558, 952, 962, 968. (1996) (Local Competition Order), *rev'd in part and aff'd in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (1997) (8th Cir. Iowa), *rev'd in part and aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999) (S. Ct. Iowa).

[85] *See SWBT/AT&T Arbitration Order Nos. 5, 6, 11, 12, and 13.*

the Arkansas Commission has not interpreted the challenged sections of the Arkansas Act in such a manner as to create, plainly and incontrovertibly, an impermissible diminution in the Arkansas Commission's authority to implement sections 251 and 252 of the Communications Act.[86]

4. Failure to Act: Section 9(h), the First Sentence of Section 9(d), and the Second Sentence of Section 9(i) of the Arkansas Act

37. As a second means to the same result, ACSI requests that we preempt the enforcement of section 9(h), the first sentence of section 9(d), and the second sentence of section 9(i) of the Arkansas Act pursuant to section 253 of the Communications Act.[87] ACSI attacks these specific portions of the Arkansas Act for the same reason that it seeks preemption of the overall jurisdiction of the Arkansas Commission pursuant to section 252(e)(5): these portions of the Arkansas Act allegedly preclude the Arkansas Commission from imposing on incumbent LECs any interconnection, unbundling, or resale obligations beyond those already specified in our rules.[88] ACSI concludes that although these portions of the Arkansas Act "do[] not set up a conventional 'barrier' to entry, [they] do[] set up barriers to developing viable competitive businesses by limiting access to the full range of network elements."[89]

38. We do not preempt the enforcement of section 9(h), the first sentence of section 9(d), or the second sentence of section 9(i) of the Arkansas Act pursuant to section 253 of the Communications Act. We have already addressed ACSI's allegation that these provisions of the Arkansas Act impose impermissible restrictions on the Arkansas Commission. More to the point, however, for ACSI's section 253 challenge, is that ACSI offers no evidence that those portions of the Arkansas Act prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service. ACSI in effect asks us to see fire without producing any smoke. ACSI neither applies the requirements of section 253 to these provisions of Arkansas law, nor proffers an example of an entity lacking the ability to provide a telecommunications service due to the operation of those portions of the Arkansas Act.

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[86] If in the future the Arkansas Commission states unambiguously that, in its view, one or more of the sections of the Arkansas Act challenged in this proceeding precludes it from imposing on incumbent LECs any interconnection, unbundling, or resale obligation not provided in our rules, we may revisit whether some form of preemption is appropriate.

[87] ACSI Petition at ii-iv, 2-3, 5, 7-16, 20-21; ACSI Reply Comments at i-ii, 2-13, 15-16 (ACSI). Three commenters express support for ACSI's request for preemption of the enforcement of the second sentence of section 9(i) of the Arkansas Act. ALTS Comments at 1-2 (ACSI); Sprint Comments at 4 (ACSI); TRA Comments at 10-11, 13 (ACSI). Only one commenter expresses supports ACSI's request for preemption of the enforcement of the first sentence of section 9(d) of the Arkansas Act. TRA Comments at ii-iii, 1-2, 7-10, 14 (ACSI); TRA Reply Comments at 2-9 (ACSI). No commenter expresses support for ACSI's request for preemption of the enforcement of section 9(h) of the Arkansas Act.

[88] ACSI Petition at ii-iv, 2-3, 5, 7-16, 20-21; ACSI Reply Comments at i-ii, 2-13, 15-16 (ACSI).

[89] ACSI Reply Comments at i (ACSI).

Therefore, ACSI fails to make even the threshold showing that those portions of the Arkansas Act fall within the proscription of entry barriers set forth in section 253(a) of the Communications Act.[90] Accordingly, we deny ACSI's petition insofar as it requests preemption of the enforcement of section 9(h), the first sentence of section 9(d), and the second sentence of section 9(i) of the Arkansas Act pursuant to section 253 of the Communications Act.[91]

B. Challenged Provisions of the Arkansas Act

1. Resale of Promotional Offerings: The Second Sentence of Section 9(d) of the Arkansas Act

a. Background

39. Both Petitioners request that we preempt the second sentence of section 9(d) of the Arkansas Act pursuant to our conflict preemption authority and pursuant to section 253 of the Communications Act.[92] The second sentence of section 9(d) provides that "[p]romotional prices, service packages, trial offerings, or temporary discounts offered by the [incumbent] local exchange carrier to its end-user customers are not required to be available for resale."[93] In other words, it concerns the extent to which an incumbent LEC may restrict resale of its retail telecommunications services.

40. Section 251(c)(4) of the Communications Act[94] addresses the same general subject-matter as the second sentence of section 9(d), *i.e.*, the extent to which an incumbent LEC may restrict resale of its retail telecommunications services. Section 251(c)(4) requires an

[90] *See Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101; *Pittencrieff Order*, 13 FCC Rcd at 1751-52, ¶ 32; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10, ¶¶ 35-42.

[91] Our denial of ACSI's petition in this regard is without prejudice. If ACSI, MCI, or any other appropriate party petitions for preemption of the enforcement of section 9(h), the first sentence of section 9(d), or the second sentence of section 9(i) of the Arkansas Act and presents a sufficient record demonstrating that the challenged provision, as applied, satisfies the conditions for preemption set forth in section 253 of the Communications Act, the Commission may preempt. For example, if in the future the Arkansas Commission clearly holds that one or more of these provisions of the Arkansas Act precludes it from imposing on incumbent LECs any interconnection, unbundling, or resale obligation not specified in our rules, we may revisit the propriety of preemption.

[92] MCI Petition at 1-2, 4-8; MCI Reply Comments at 1-5 (MCI). We note that ACSI mentions the second sentence of section 9(d) of the Arkansas Act only in its Chart. Thus, we can only speculate about the grounds on which ACSI seeks preemption of the second sentence of section 9(d). Because ACSI filed cursory comments endorsing MCI's petition as a whole, we will assume that ACSI proffers the same grounds as MCI. *See* ACSI Comments (MCI).

[93] Ark. Code Ann. § 23-17-409(d).

[94] 47 U.S.C. § 251(c)(4). We implemented the statutory requirement through our *Local Competition Order*, 11 FCC Rcd at 15930-15936, 15964-15979, ¶¶ 863-77, 935-71; 47 C.F.R. § 51.613.

incumbent LEC "to offer for resale *at wholesale rates* any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[95] It also requires an incumbent LEC "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service. . . ."[96]

41. To implement the Communications Act's prohibition of unreasonable limitations on resale, the *Local Competition Order* holds that an "incumbent LEC [must] make available [to competing carriers] at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings."[97] The *Local Competition Order* also holds that incumbent LECs must apply the wholesale discount rate to promotional offerings, *i.e.*, temporarily reduced prices.[98] The *Local Competition Order* so holds because "[a] contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[99] The *Local Competition Order* creates an exception, however, for promotions lasting no longer than 90 days. Therefore, when an incumbent LEC sells to a competing carrier a retail service offered to the incumbent LEC's end-user customers at a temporarily reduced price, the incumbent LEC must apply the wholesale discount to the special reduced rate rather than to the ordinary retail rate, unless the promotional offering is available to end-user customers for fewer than 91 days.[100]

42. Petitioners argue that we should preempt the second sentence of section 9(d) pursuant to our conflict preemption authority, because that section of the Arkansas Act allegedly contradicts section 251(c)(4)(B) of the Communications Act and our implementation thereof in at least two ways. First, according to Petitioners, the second sentence of section 9(d) exempts all of an incumbent LEC's promotional offerings from the wholesale discount requirement, whereas federal law exempts only promotional offerings lasting fewer than 91 days.[101] Second, according to Petitioners, the second sentence of section 9(d) allows an incumbent LEC to decline to make available to competing carriers at wholesale rates any bundled retail service offering, whereas

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[95] 47 U.S.C. § 251(c)(4)(A) (emphasis added).

[96] 47 U.S.C. § 251(c)(4)(B). For the purposes of these resale requirements of the Communications Act, the term "wholesale rates" means "retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier. 47 U.S.C. § 252(d)(3).

[97] *Local Competition Order*, 11 FCC Rcd at 15936, ¶ 877.

[98] *Local Competition Order*, 11 FCC Rcd at 15970-71, ¶¶ 948-50.

[99] *Local Competition Order*, 11 FCC Rcd at 15970, ¶ 948.

[100] *Local Competition Order*, 11 FCC Rcd at 15970-71, ¶¶ 948-50; 47 C.F.R. § 51.613(a)(2).

[101] ACSI Comments (MCI); MCI Petition at 6-8.

federal law requires such availability of all bundled retail service offerings.[102]

43. In Petitioners' view, these alleged inconsistencies between the second sentence of section 9(d) and federal law will make it far more difficult, if not impossible, for potential competitors to compete with incumbent LECs through resale in the manner contemplated by the 1996 Act.[103] Petitioners contend that incumbent LECs will stifle such competition by diverting retail services to bundled packages or to promotional offerings of indefinite length and then pricing these services to end-user customers at below-wholesale rates.[104] Petitioners maintain, therefore, that we must preempt the second sentence of section 9(d) pursuant to our conflict preemption authority in order to eliminate a state-created obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[105] Petitioners argue that we should preempt the enforcement of the second sentence of section 9(d) pursuant to section 253 of the Communications Act, as well.[106]

b. Analysis

44. As discussed below, we preempt the enforcement of the second sentence of section 9(d) of the Arkansas Act pursuant to our conflict preemption. Given our decision to preempt pursuant to our conflict preemption authority, we need not and do not reach the question of whether we should also preempt pursuant to section 253 of the Communications Act.

45. The second sentence of section 9(d) purports to regulate, *inter alia*, the authority of the Arkansas Commission to impose resale obligations on incumbent LECs pursuant to section 251(c)(4)(B) of the Communications Act. We have jurisdiction to implement and enforce that section of the Communications Act.[107] Consequently, we have jurisdiction to preempt the second sentence of section 9(d) pursuant to our conflict preemption authority to the extent that it impermissibly contradicts section 251(c)(4)(B) of the Communications Act or our implementation thereof.

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[102] ACSI Comments (MCI); MCI Petition at 6-8.

[103] ACSI Comments (MCI); MCI Petition at 7.

[104] ACSI Comments (MCI); MCI Petition at 7.

[105] ACSI Comments (MCI); MCI Petition at 6-8. *See generally* AT&T Comments at 5 (MCI); Sprint Comments at 4-6 (ACSI); TRA Comments at 3-5 (MCI).

[106] ACSI Comments (MCI); MCI Petition at 6-8; MCI Reply Comments at 5 (MCI); *10/29/97 MCI Ex Parte Letter* at 7-8.

[107] *See, e.g., 8th Cir. Iowa,* 120 F.3d at 794 n.10, 802 n.23, 819. Thus, we reject the contrary assertions of some commenters. *See* Arkansas AG Comments at 14-16 (MCI); ATA Reply Comments at 8 (MCI); NATC Comments at iii, 13 (MCI).

46. As described above, the second sentence of section 9(d) permits an incumbent LEC to refrain from making available to competitors for resale any "[p]romotional prices, service packages, trial offerings, or temporary discounts offered by the [incumbent] local exchange carrier to its end-user customers. . . ."[108] The second sentence of section 9(d) apparently means that an incumbent LEC need not make available to competing LECs at wholesale rates any bundled retail service offering. It also apparently means that, whenever an incumbent LEC sells to a competitor a retail service offered to the incumbent LEC's end-user customers at a promotional price, trial offering, or temporary discount, the incumbent LEC may apply the wholesale discount to the ordinary retail rate rather than to the special reduced rate. The second sentence of section 9(d) makes no express exception for promotional offerings lasting longer than 90 days.[109]

47. The second sentence of section 9(d) thus plainly contradicts our implementation of section 251(c)(4)(B)'s prohibition of unreasonable limitations on resale. First, this portion of section 9(d) exempts all of an incumbent LEC's promotional offerings from the wholesale discount requirement, whereas federal law exempts only promotional offerings lasting fewer than 91 days. In other words, in connection with offering to competing carriers a retail service that an incumbent LEC markets to its end-user customers at a promotional price for longer than 90 days, the second sentence of section 9(d) allows the incumbent LEC to apply the wholesale discount to the ordinary retail rate, whereas our rules require the incumbent LEC to apply the wholesale discount to the special reduced rate.[110] Second, this portion of section 9(d) allows an incumbent LEC to decline to make available to competing carriers at wholesale rates any bundled retail service offering, whereas our rules require such availability of all bundled retail service offerings.[111]

48. Section 9(d)'s inconsistency with federal law is not benign. By excluding service packages from the federal resale requirement, and by exempting *all* of an incumbent LEC's promotional or discount prices – including those lasting longer than 90 days – from the federal wholesale requirement, the second sentence of section 9(d) impedes the complete achievement of Congress' goal of assisting the efforts of new competitors seeking to enter local

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[108] Ark. Code Ann. § 23-17-409(d).

[109] It merits mention that, in the arbitration proceeding between SWBT and AT&T, the Arkansas Commission ruled that SWBT must make available for resale any service that it markets to end-user customers, even a service that is the subject of a short-term promotion. *SWBT/AT&T Arbitration Order No. 5* at 7; *SWBT/AT&T Arbitration Order No. 13* at 9. No party argues that this ruling constitutes a violation or misinterpretation of the second sentence of section 9(d) of the Arkansas Act.

[110] 47 C.F.R. § 51.613(a)(2). *See Local Competition Order*, 11 FCC Rcd at 15970-71, ¶ 950. Consequently, we reject the contention of one commenter that the Communications Act does not impose wholesale requirements on promotions. *See* NATC Comments at iii, 13 (MCI).

[111] *Local Competition Order*, 11 FCC Rcd at 15936, ¶ 877.

telecommunications markets through resale.[112] As the *Local Competition Order* states, exemptions such as those created by the second sentence of section 9(d) would permit incumbent LECs "to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[113]

49. Certain commenters opposing preemption argue that the terms used in the second sentence of section 9(d) (*i.e.*, "promotional," "trial," and "temporary") refer to inherently short-term activities and thereby implicitly include a 90-day ceiling.[114] They further argue that any perceived conflict with federal law evaporates when the second sentence of section 9(d) is read in conjunction with the first sentence of section 9(d)[115] and with several other portions of the Arkansas Act that expressly defer to the supremacy of the Communications Act.[116] According to these commenters, when section 9(d) is read in this manner, it effectively incorporates the federal 90-day and bundled-services rules described above. In a similar vein, certain of these same commenters also urge us to refrain from preempting the second sentence of section 9(d) until the Arkansas Commission has had an opportunity to "save" it by reading into it the foregoing limitations on resale restrictions required by federal law.[117] One commenter even contends that, in the arbitration proceeding between SWBT and AT&T, the Arkansas Commission has already construed the second sentence of section 9(d) in such a saving manner.[118]

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[112] *See Local Competition Order*, 11 FCC Rcd at 15970-15971, ¶¶ 948-53. As CPI aptly observes, "[g]iven that Congress identified service resale as one of the three modes of competitive entry, the FCC should be especially vigilant in ensuring that resale competition is permitted to develop as Congress intended." CPI Comments at 5 n.6 (MCI).

[113] *Local Competition Order*, 11 FCC Rcd at 15970, ¶ 948.

[114] ATA Comments at 16 (MCI); ATA Reply Comments at 7 (MCI); SWBT Comments at 4 (MCI); *12/17/97 SWBT Ex Parte Letter*.

[115] The first sentence of section 9(d) of the Arkansas Act provides: "*Except to the extent required by the Federal Act and this Act*, the Commission shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements to a competing local exchange carrier for the purpose of allowing such competing local exchange carrier to compete with the incumbent local exchange carrier in the provision of basic local exchange service." Ark. Code Ann. § 23-17-409(d) (emphasis added).

[116] *See* ATA Comments at 15-16 (MCI); ATA Reply Comments at 7 (MCI); *12/17/97 SWBT Ex Parte Letter*. The Arkansas Act explicitly instructs the Arkansas Commission to carry out its responsibilities "[c]onsistent with the Federal Act," Ark. Code Ann. § 23-17-409(a); "to the extent required by the Federal Act," Ark. Code Ann. §§ 23-17-409(d) and 23-17-409(h); "[a]s provided in Sections 251 and 252 of the Federal Act," Ark. Code Ann. § 23-17-409(f); "as permitted by the Federal Act," Ark. Code Ann. § 23-17-40 9(g); "to the extent permitted by the Federal Act," Ark. Code Ann. § 23-17-409(g); "pursuant to Section 252 of the Federal Act," Ark. Code Ann. § 23-17-409(j); "in accordance with the Federal Act," Ark. Code Ann. § 23-17-410(a); and "consistent with and complementary to the Federal Telecommunications Act of 1996," Arkansas Act § 16(III).

[117] Arkansas AG Comments at 9 (MCI); ATA Reply Comments at 7-8 (MCI); SWBT Comments at 4 (MCI).

[118] Arkansas AG Comments at 15-16 (MCI), citing *SWBT/AT&T Arbitration Order No. 5* at 7-11.

50. We reject all of these contentions. As explained above, the plain language of the second sentence of section 9(d) conflicts with important requirements of federal law. It permits an incumbent LEC to refrain from reselling service packages, and it lacks any distinction between short-term and long-term promotions. Neither the first clause of the first sentence of section 9(d), nor any other reference in the Arkansas Act to maintaining consistency with the Communications Act, expressly or unambiguously modifies these unlawful meanings of the second sentence of section 9(d). Moreover, although the terms used in the second sentence of section 9(d) connote activities of limited duration, they do not unambiguously refer to a maximum duration of 90 days. Finally, the Arkansas Commission has not (yet) construed the second sentence of section 9(d) in a manner that avoids conflict with federal law. In fact, in the arbitration proceeding between SWBT and AT&T, the Arkansas Commission observed that, although SWBT *volunteered* to limit its non-discounted promotions to those lasting less than 91 days, the second sentence of section 9(d) "does not place any limitation on the duration of such [promotional] offerings."[119] Thus, we cannot reasonably construe the second sentence of section 9(d) as incorporating the precise limitations on resale restrictions required by federal law.

51. The Arkansas AG also contends that our rules regarding the resale of "promotions" apply only to "temporary price discounts" and thus do not reach the "promotional prices," "service packages," and "trial offerings" referenced in section 9(d) of the Arkansas Act.[120] This contention lacks merit. Our rules expressly encompass service packages,[121] and we must assume (unless and until the Arkansas Commission holds otherwise) that the terms "promotional prices" and "trial offerings" should be given their ordinary meanings, which include some element of a temporary price discount. The Arkansas AG further argues that section 251(c)(4)(B) of the Communications Act reveals Congress' intent *not* to preempt state regulation of incumbent LECs' resale practices, because section 251(c)(4)(B) authorizes state commissions to permit a certain kind of resale restriction.[122] This argument, too, lacks merit, because section 251(c)(4)(B) of the Communications Act expressly authorizes the Commission to prescribe regulations that proscribe unreasonable and discriminatory limitations on resale.[123]

52. Based on the above analysis, and pursuant to our conflict preemption authority under the Supremacy Clause, we preempt the second sentence of section 9(d) of the Arkansas Act to the extent that it permits incumbent LECs to apply the wholesale discount to the ordinary

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[119] SWBT/AT&T Arbitration Order No. 5 at 8.

[120] Arkansas AG Comments at 9 (MCI), citing *Local Competition Order*, 11 FCC Rcd at 15970, ¶ 948.

[121] *Local Competition Order*, 11 FCC Rcd at 15936, ¶ 877 (using the synonymous term "bundled service offerings").

[122] Arkansas AG Comments at 14 (MCI).

[123] *8th Cir. Iowa*, 120 F.3d at 819.

retail rate rather than to the special reduced rate with respect to promotions lasting longer than 90 days. We also preempt the second sentence of section 9(d) pursuant to our conflict preemption authority under the Supremacy Clause to the extent that it permits incumbent LECs to refrain from making available to competing carriers at wholesale rates the same bundled service offerings made available to incumbent LECs' end-user customers. Thus, we grant MCI's petition and ACSI's petition insofar as they seek the preemption relief that we afford in this paragraph.[124]

2. Resale Restrictions: The First Sentence of Section 9(g) of the Arkansas Act

a. Background

53. To implement the Communications Act's prohibition of unreasonable limitations on resale,[125] the *Local Competition Order* holds that, as a general matter, "resale restrictions are presumptively unreasonable."[126] For example, "it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimum level of demand."[127] Our implementing rules provide, therefore, that with certain limited exceptions not applicable here, "an incumbent LEC may impose a restriction [on resale] only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."[128]

54. In ACSI's view, the first sentence of section 9(g) of the Arkansas Act[129] precludes the Arkansas Commission from evaluating incumbent LECs' resale restrictions according to the "presumptively unreasonable" standard required by the *Local Competition Order* and our implementing rules.[130] ACSI argues that the sentence is thus inconsistent with federal law

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[124] *Cf. MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 674 (E.D.N.C. 1998) (invalidating a section of an interconnection agreement which provided that "[s]hort-term promotions shall not be available for resale").

[125] 47 U.S.C. § 251(c)(4).

[126] *Local Competition Order*, 11 FCC Rcd at 15966, ¶ 939.

[127] *Local Competition Order*, 11 FCC Rcd at 15971, ¶ 953.

[128] 47 C.F.R. § 51.613(b).

[129] It provides: The [Arkansas] Commission shall approve, as permitted by the Federal Act, resale restrictions which prohibit resellers from purchasing retail local exchange services offered by a local exchange carrier to residential customers and reselling those retail services to nonresidential customers, or aggregating the usage of multiple customers on resold local exchange services, or any other reasonable limitation on resale to the extent permitted by the Federal Act. Ark. Code Ann. § 23-17-409(g).

[130] ACSI Petition at 12. *See generally* Sprint Comments at 5 (ACSI); TRA Comments at 15-16 (ACSI).

governing resale.[131] ACSI also requests that we preempt the enforcement of the first sentence of section 9(g) pursuant to section 253 of the Communications Act.[132]

b. Analysis

55. We reject the principal argument of ACSI and supporting commenters that the first sentence of section 9(g) conflicts with federal law in a manner that effectively prohibits competitive entry through resale. We also do not preempt the enforcement of the first sentence of section 9(g) pursuant to section 253 of the Communications Act.

56. The first sentence of section 9(g) expressly and in unmistakable terms defers to federal limitations on resale restrictions. It twice provides that the Arkansas Commission may approve only resale restrictions that are "permitted by the Federal Act."[133] We believe, therefore, that the first sentence of section 9(g) plainly allows the Arkansas Commission to reject any resale restriction not permitted by federal law (except those resale restrictions expressly permitted by the second sentence of section 9(d)).[134] In other words, we interpret the first sentence of section 9(g) as allowing the Arkansas Commission to reject an incumbent LEC's resale restriction unless the incumbent LEC proves to the Arkansas Commission that the restriction is reasonable and non-discriminatory.[135]

57. The Arkansas Commission apparently agrees with our interpretation of the first sentence of section 9(g).[136] In the arbitration between SWBT and AT&T, the Arkansas Commission concluded, over SWBT's objection, that resale restrictions (other than certain of those pertaining to short-term promotions) are presumptively unreasonable.[137] In so concluding, the Arkansas Commission followed the standard required by our rules implementing section

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[131] CSI Petition at 11-12.

[132] ACSI Petition at iv, 1-2, 12-16, 20-21; ACSI Reply Comments at i-ii, 10-11 (ACSI).

[133] Ark. Code Ann. § 23-17-409(g).

[134] In essence, we interpret the second sentence of section 9(d) of the Arkansas Act as an exception to section 9(g)'s admonition that the Arkansas Commission may approve only resale restrictions that are permitted by federal law. Because we preempt the second sentence of section 9(d) of the Arkansas Act, *see* Part B.1., *supra*, we need not and do not consider it in assessing whether to preempt the first sentence of section 9(g) of the Arkansas Act.

[135] *See* 47 C.F.R. § 51.613(b) ("With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory"). *See generally* Arkansas AG Comments at 9 (ACSI); Arkansas AG Reply Comments at 8 (ACSI); ATA Comments at 12 (ACSI); SWBT Comments at 5 (ACSI); SWBT Reply Comments at 3 (ACSI).

[136] *See generally* Arkansas AG Reply Comments at 9 (ACSI); SWBT Reply Comments at 3 (ACSI).

[137] SWBT/AT&T Arbitration Order No. 5 at 9-11; SWBT/AT&T Arbitration Order No. 13 at 9.

251(c)(4)(B) of the Communications Act.[138] The Arkansas Commission, therefore, implicitly construed the first sentence of section 9(g) as we do, as directing the Arkansas Commission to approve resale restrictions only to the extent permitted by the Communications Act and our implementing rules.[139]

58. Two commenters argue that the first sentence of section 9(g) conflicts with federal law because the former requires the Arkansas Commission to approve resale restrictions "aggregating the usage of multiple customers on resold local exchange services,"[140] whereas the latter specifically deems such resale restrictions "presumptively unreasonable."[141] We do not view this as an irreconcilable inconsistency. As described above, the first sentence of section 9(g) twice commands the Arkansas Commission to approve resale restrictions only "to the extent permitted by the Federal Act,"[142] and the Arkansas Commission has followed that directive strictly by incorporating the "presumptively unreasonable" standard mandated by federal law. We believe, therefore, that when the Arkansas Commission is asked to approve a resale restriction aggregating the usage of multiple customers on resold local exchange services, it will do so only if the requesting incumbent LEC proves that the restriction is reasonable and nondiscriminatory. If the Arkansas Commission clearly does otherwise, we can revisit the preemption issue in that particular context.

59. Parties seeking preemption offer almost no additional support for the proposition that we should preempt pursuant to section 253 of the Communications Act. As we explained above in our rejection of a section 253 challenge to sections 9(d), 9(h) and 9(i), failure to apply the requirements of section 253 to the Arkansas law, or to offer an example of an entity unable to provide a telecommunications service due to the operation of the sentence in question, means that the parties fail to make even the threshold showing that the sentence falls within the proscription of entry barriers set forth in section 253(a) of the Communications Act.[143]

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[138] *See* 47 C.F.R. § 51.613(b).

[139] Consistent with the Arkansas Commission's ruling in this regard, SWBT and AT&T included the following provision in their interconnection agreement: "SWBT may not retain limitations on aggregation for purposes of the resale volume discount offers. Additional tariff restrictions, other than the cross-class restriction allowed by FTA96 Section 251(c)(4)(B), are presumptively unreasonable." Letter from Geoffrey Klineberg to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 97-100 (June 23, 1998) (*6/23/98 SWBT Ex Parte Letter*) at 4.

[140] Ark. Code Ann. § 23-17-409(g).

[141] Sprint Comments at 5 (ACSI), quoting *Local Competition Order*, 11 FCC Rcd at 15971, ¶ 953; TRA Comments at 15-16 (ACSI).

[142] Ark. Code Ann. § 23-17-409(g).

[143] *See generally, Pittencrieff Order*, 13 FCC Rcd at 1751-52, ¶ 32; *Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10, ¶¶ 35-42.

Accordingly, we deny ACSI's petition insofar as it requests preemption of the enforcement of the first sentence of section 9(g) of the Arkansas Act pursuant to section 253 of the Communications Act.[144]

3. Wholesale Rates: The Second and Third Sentences of Section 9(g) of the Arkansas Act

a. Background

60. Section 252(d)(3) of the Communications Act addresses the same subject as the second and third sentences of section 9(g) of the Arkansas Act, *i.e.*, establishment of the wholesale rates at which incumbent LECs must sell their retail telecommunications services to competing carriers for resale. The federal statute provides: "[A] State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[145]

61. The second and third sentences of section 9(g) provide: "The wholesale rate of any existing retail telecommunications services provided by [LECs] that are not exempt from Section 251(c) of the Federal Act . . . and that are being sold for the purpose of resale, shall be the retail rate of the service less any net avoided costs due to the resale. The net avoided costs shall be calculated as the total of the costs that will not be incurred by the local exchange carrier due to it selling the service for resale less any additional costs that will be incurred as a result of selling the service for the purpose of resale."[146]

62. Petitioners request that we preempt the second and third sentences of section 9(g) pursuant to our conflict preemption authority and pursuant to section 253 of the Communications Act.[147] In Petitioners' view, that portion of section 9(g) allows an incumbent LEC to reduce the

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[144] Our denial of ACSI's petition in this regard is without prejudice. If ACSI, MCI, or any other appropriate party petitions for preemption of the enforcement of the first sentence of section 9(g) of the Arkansas Act and presents a sufficient record demonstrating that the first sentence of section 9(g), as applied, satisfies the conditions for preemption set forth in section 253 of the Communications Act, the Commission may preempt. For example, if in the future the Arkansas Commission clearly holds that the first sentence of section 9(g) of the Arkansas Act precludes it from applying the "presumptively unreasonable" standard or from imposing on incumbent LECs any resale obligation not specified in our rules, we may revisit whether to preempt the enforcement of that provision.

[145] 47 U.S.C. § 252(d)(3).

[146] Ark. Code Ann. § 23-17-409(g)

[147] ACSI Chart; MCI Petition at 1-2, 4-8, 21; MCI Reply Comments at 1-6, 9; *10/29/97 MCI Ex Parte Letter* at 8-9. We note that ACSI mentions the second and third sentences of section 9(g) of the Arkansas Act only in its Chart. Thus, we can only speculate about the grounds on which ACSI seeks preemption of this part of section 9(g).

wholesale discount rate by the amount of any additional costs that it will incur in selling a service for resale, whereas section 252(d)(3) permits no such reduction in the wholesale discount rate.[148] According to Petitioners, therefore, the second and third sentences of section 9(g) make resale inherently less profitable than permitted by federal law and thereby hinder potential competitors from entering local exchange markets through resale in the manner contemplated by the 1996 Act.[149] Petitioners do not advance any arguments tied to the specific requirements for preemption enumerated in section 253, but simply rest on the same grounds proffered for conflict preemption.[150]

b. Analysis

63. We do not preempt the second and third sentences of section 9(g) of the Arkansas Act under our conflict preemption authority or pursuant to section 253 of the Communications Act.

64. As discussed above, the second and third sentences of section 9(g) require the Arkansas Commission, when establishing wholesale rates, to take into account any additional costs that an incumbent LEC incurs in selling a telecommunications service for resale. These sentences are not in conflict with section 252(d)(3) of the Communications Act, as interpreted by this Commission. In the *Local Competition Order*, the Commission determined that section 252(d)(3) of the Communications Act permits state commissions to adjust wholesale discounts, and, therefore, wholesale rates, to reflect additional costs that an incumbent LEC may incur in providing a service at wholesale, i.e., "net" avoided cost methodology.[151] Thus, we reject Petitioners' claims that section 9(g) is in conflict with the Communications Act. Accordingly, we deny MCI's and ACSI's petitions insofar as they request conflict preemption of this part of section 9(g).

65. We further find that parties seeking section 253 preemption offer almost no additional support for that position. As we explained above, failure to apply the requirements of section 253 to the Arkansas law, or to offer an example of an entity unable to provide a telecommunications service due to the operation of the sentence in question, means that the

Because ACSI filed cursory comments endorsing MCI's petition as a whole, we will assume that ACSI proffers the same grounds as MCI. *See* ACSI Comments (MCI).

[148] ACSI Comments (MCI); MCI Petition at 8.

[149] ACSI Comments (MCI); MCI Petition at 6, 8; MCI Reply Comments at 6 (MCI); *10/29/97 MCI Ex Parte Letter* at 8-9.

[150] ACSI Comments (MCI); MCI Petition at 6-7. *See generally* AT&T Comments at 2-3, 5 (MCI); TRA Comments at 5 (MCI).

[151] *See Local Competition Order* 11 FCC Rcd at 15961, ¶ 928 (adjusting MCI's wholesale rate model because "some new expenses may be incurred in addressing then needs of resellers as customers").

parties fail to make even the threshold showing that the sentence falls within the proscription of entry barriers set forth in section 253(a) of the Communications Act.[152] Therefore, we deny MCI's and ACSI's petitions insofar as they request preemption of the enforcement of the second and third sentences of section 9(g) pursuant to section 253 of the Communications Act.[153]

4. Standards Governing Review: The First Sentence of Section 9(i) of the Arkansas Act

a. Background

66. Sections 252(e)(2)(A) and 252(f)(2) of the Communications Act address the same subject as the first sentence of section 9(i) of the Arkansas Act, *i.e.*, the standards governing a state commission's review and approval of negotiated interconnection agreements and Statements of Generally Available Terms (SGATs).[154] Section 252(e)(2)(A) provides that a state commission may reject a negotiated interconnection agreement only if the agreement discriminates against a non-party telecommunications carrier or conflicts with the public interest.[155] Section 252(f)(2) provides that a state commission may approve an SGAT only if the SGAT complies with sections 252(d) and 251 of the Communications Act and the regulations thereunder.[156]

67. The first sentence of section 9(i) provides that "[t]he [Arkansas] Commission shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the Federal Act unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the Federal

[152] *See generally, Pittencrieff Order*, 13 FCC Rcd at 1751-52, ¶ 32; *Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10, ¶¶ 35-42.

[153] Our denial of MCI's and ACSI's petitions in this regard is without prejudice. If ACSI, MCI, or any other appropriate party petitions for preemption of the enforcement of the second and third sentences of section 9(g) of the Arkansas Act and presents a sufficient record demonstrating that this portion of section 9(g), as applied, satisfies the conditions for preemption set forth in section 253 of the Communications Act, the Commission may preempt.

[154] SGAT, or Statement of Generally Available Terms. A statement of the terms and conditions that a company generally will offer to competing LECs within that State to comply with the requirements of section 251 and the standards applicable under section 252. 47 U.S.C. §§ 252(e)(2)(A), 252(f).

[155] 47 U.S.C. § 252(e)(2)(A). Section 252(e)(2)(A) of the Communications Act provides: "The State commission may only reject -- (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that -- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity. . . ." *Id.*

[156] 47 U.S.C. § 252(f)(2). Section 252(f)(2) of the Communications Act provides, in pertinent part: "A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder." *Id.*

Act . . . ."[157] Both Petitioners request that we preempt the first sentence of section 9(i) of the Arkansas Act pursuant to our conflict preemption authority.[158]

68. Petitioners argue that the first sentence of section 9(i) conflicts with the Communications Act because it changes the grounds for the Arkansas Commission's approval of SGATs: the first sentence of section 9(i) requires an SGAT to comply only with section 251 of the Communications Act, whereas section 252(f)(2) of the Communications Act requires an SGAT to comply with both section 251 and section 252(d) of the Communications Act.[159]

69. Petitioners also argue that the first sentence of section 9(i) significantly raises the evidentiary threshold for the Arkansas Commission's rejection of SGATs: the first sentence of section 9(i) permits the Arkansas Commission to reject an SGAT only if *clear and convincing evidence* demonstrates that the SGAT fails to meet certain prerequisites, whereas section 252(f)(2) of the Communications Act requires a state commission to reject an SGAT if a *preponderance of the evidence* demonstrates that the SGAT fails to meet certain prerequisites.[160] Petitioners make similar arguments with respect to the review of negotiated interconnection agreements under the first sentence of section 9(i).[161]

70. In seeking conflict preemption of the first sentence of section 9(i), MCI recognizes the hypothetical possibility that a particular SGAT or negotiated interconnection agreement meet the standard under both the Arkansas statute and the Communications Acts.[162]

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[157] Section 9(i) of the Arkansas Act provides: "The Commission shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the Federal Act unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the Federal Act (47 USC 251). In no event shall the Commission impose any interconnection requirements that go beyond those requirements imposed by the Federal Act or any interconnection regulations or standards promulgated under the Federal Act."

Ark. Code Ann. § 23-17-409(i).

[158] ACSI Petition at 1-2, 5, 13-16, 20-21; ACSI Reply Comments at 10-13 (ACSI); MCI Petition at 8-10; MCI Reply Comments at 4-7 (MCI). ACSI does not mention conflict preemption. Because ACSI filed cursory comments endorsing MCI's petition as a whole, however, we will assume that ACSI proffers the same grounds as MCI. *See* ACSI Comments (MCI).

[159] ACSI Petition at 5; ACSI Reply Comments at 12 (ACSI); MCI Petition at 9; MCI Reply Comments at 5-7.

[160] ACSI Petition at 5; ACSI Reply Comments at 12-13 (ACSI); MCI Petition at 9-10; MCI Reply Comments at 5-7.

[161] ACSI Petition at 5; ACSI Reply Comments at 12-13 (ACSI); MCI Petition at 9; MCI Reply Comments at 5-7 (MCI). *See generally* ALTS Comments at 4 (ACSI); ALTS Comments at 4, 5, 7 (MCI); AT&T Comments at 7 (MCI); TRA Comments at 5 (MCI).

[162] MCI Reply Comments at 5 (MCI).

MCI maintains, however, that such potential for equal outcomes does not counsel against preemption of the Arkansas standards.[163] In MCI's view, the first sentence of section 9(i) imposes in every case a dramatically different review and approval procedure than imposed by federal law: with respect to each SGAT and negotiated interconnection agreement submitted to the Arkansas Commission for review and approval, the first sentence of section 9(i) significantly alters Congress' statutory allocation of the risk of erroneous judgments.[164] According to MCI, therefore, we must preempt this different procedure despite the potential for congruent results.[165]

71. Petitioners suggest that the foregoing inconsistencies between the first sentence of section 9(i) and sections 252(e)(2)(A) and 252(f)(2) of the Communications Act will inevitably result in the approval of SGATs that Congress meant to be rejected, and in the rejection of negotiated interconnection agreements that Congress meant to be approved.[166] Petitioners further suggest, in turn, that these inconsistencies will hinder potential competitors' ability to enter local exchange markets in Arkansas in the manner contemplated by the 1996 Act.[167] Petitioners maintain, therefore, that we must preempt the first sentence of section 9(i) pursuant to our conflict preemption authority in order to eliminate a state-created obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[168]

b. Analysis

72. For reasons we discuss below, we find that the first sentence of section 9(i) of the Arkansas Act conflicts with the Communications Act and our implementing regulations. We therefore preempt the enforcement of the first sentence of section 9(i) pursuant to our conflict preemption authority. Given our decision to preempt pursuant to our conflict preemption authority, we need not reach the question of whether we should also preempt pursuant to section 253 of the Communications Act.

73. The first sentence of section 9(i) applies the same standard of review to both

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[163] MCI Reply Comments at 5 (MCI).

[164] MCI Reply Comments at 7 (MCI).

[165] MCI Reply Comments at 6 (MCI).

[166] ACSI Reply Comments at 12-13 (ACSI); MCI Petition at 8-10. (We assume MCI mis-speaks when, on page 10 of its Petition, MCI states that "The Federal Act . . . does not allow for *approval* of a negotiated agreement unless it can be demonstrated . . . that it should not be approved.) (emphasis added.) Clearly MCI meant to say "rejection," which is not only the only word that makes sense in the context of the sentence, but also comports with section 252 (e)(2) (Grounds for Rejection).

[167] ACSI Petition at iv, 1-2, 5, 13-16, 20-21; ACSI Reply Comments at i-ii, 10-13 (ACSI); MCI Petition at 8-10; MCI Reply Comments at 6-7 (MCI).

[168] ACSI Reply Comments at 12-13 (ACSI); MCI Petition at 8-10; MCI Reply Comments at 6-7 (MCI).

negotiated agreements and to SGATs. The Communications Act, by contrast, directs state commissions to apply two quite different standards of review to negotiated agreements and to SGATs. According to the Communications Act, the standard of review that state commissions must accord negotiated agreements is relatively lenient. A state commission may only reject negotiated agreements if the agreement discriminates against a non-party carrier,[169] or if implementation of the agreement would be inconsistent with the public interest.[170] An SGAT, on the other hand, is subject to much more stringent review. An SGAT can only gain approval from a state commission if the SGAT conforms to section 252(d) and section 251 (and our implementing regulations) – in other words, an SGAT must conform to our interconnection and pricing rules.[171] By directing the Arkansas Commission to review both negotiated agreements and SGATs by a single standard, Arkansas cannot but have gotten the standard of review for at least one of them wrong.

74. Comparing the language of section 9(i), however, with the relevant sections of the Communications Act, reveals that section 9(i) provides the wrong standard of review for *both* negotiated agreements *and* SGATS. As we have seen, the Communications Act requires state commissions to approve negotiated agreements unless they harm a non-party carrier or are inconsistent with the public interest.[172] Section 9(i), however, is silent as to these points. Instead, section 9(i) requires that negotiated agreements satisfy the Communication Act's section 251. Thus, section 9(i) omits two statutory requirements for the approval of negotiated agreements (those touching on third parties and the public interest) while introducing a new hurdle (conformity with section 251) that is nowhere to be found in Communication Act's standard for review of negotiated agreements.[173] The section 9(i) standard is therefore entirely different from, and in conflict with, the federal standard for review of negotiated agreements set forth in section 252(e)(2)(A).

75. Section 9(i) also varies from the Communications Act regarding the criteria for the approval of SGATs. As Petitioners point out, the first sentence of section 9(i) requires an SGAT to comply only with section 251 of the Communications Act, whereas section 252(f)(2) of the Communications Act requires an SGAT to comply with both section 251 and section 252(d) of the Communications Act.[174] This facial inconsistency between section 9(i) and the

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169 47 U.S.C. § 252(e)(2)(i).

170 47 U.S.C. § 252(e)(2)(ii).

171 47 U.S.C. § 252(f)(2).

172 47 U.S.C. § 252(e)(2)(A).

173 We note that the Communication Act permits State commissions to reject *arbitrated* agreements that do not meet the requirements of 251. *See* 47 U.S.C. § 252(e)(2)(B).

174 ACSI Petition at 5; ACSI Reply Comments at 12 (ACSI); MCI Petition at 9; MCI Reply Comments at 5-7.

Communications Act has the practical effect of deleting the federal requirement that SGATs conform to our pricing rules. The section 9(i) standard thus also conflicts with the Communication Act's requirements for review of SGATs as set forth in section 252(f)(2).

76. These deviations from the Communication Act's standards for reviewing negotiated agreements and SGATs suffice to place section 9(i) in conflict with federal law. We further note, however, that, with regard to SGATs, section 9(i) reverses the burden of proof. Section 252(f)(2) provides that "A state commission *may not approve* [an SGAT] unless . . . ." In other words, according to the Communications Act, the proponents of an SGAT must convince a negatively-inclined state Commission that the SGAT satisfies certain requirements.[175] Section 9(i), by contrast, states that "The commission *shall approve* [an SGAT] unless . . ." thus requiring an SGAT's opponents to convince the commission that the SGAT should be rejected.[176] Furthermore, section 9(i) not only reverses the burden of proof, but also introduces a requirement that the SGAT's opponents establish their claims by "clear and convincing evidence." The standard of proof applicable in most administrative and civil proceedings, unless otherwise prescribed by statute or where other countervailing factors warrant a higher standard, is the "preponderance of the evidence" standard.[177] The heightened "clear and convincing evidence" standard of proof, combined with the reversed burden of proof, would make it substantially more difficult for a state commission to reject a SGAT than Congress intended.[178] Thus, even if section

[175] 47 U.S.C. § 252(f)(2). (emphasis added).

[176] Ark. Code Ann. § 23-17-409(i). (emphasis added).

[177] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To provide In-Region InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20568-69, 1997, ¶¶ 45-46, n.87. *See, e.g., Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984) ("The traditional standard required in a civil or administrative proceeding is proof by a preponderance of the evidence. ... The traditional preponderance standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard.") (citations omitted); *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (D.C. Cir.) ("The use of the 'preponderance of the evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. § 556(d)."), *cert. denied*, 449 U.S. 834 (1980); *Steadman v. SEC*, 450 U.S. 91 (1981) (reversing prior law to apply the preponderance of the evidence standard to cases under the Administrative Procedures Act (APA) even where a proceeding imposes stringent sanctions); *General Plumbing Corp. v. New York Tel. Co. and MCI*, Memorandum Opinion and Order, 11 FCC Rcd 11799 (1996); *see also Gorgan v. Garner*, 498 U.S. 279, 286 (1991) (because the "preponderance of the evidence" standard results in roughly equal allocation or risks of error between litigants, the Supreme Court presumes that such a standard is applicable in civil actions between private litigants unless particularly important interests or rights are at stake) (citations omitted); Davis & Pierce, II Administrative Law Treatise § 10.7, at 171 (3rd Ed. 1994) ("the preponderance of the evidence standard applies to the vast majority of agency actions").

[178] We note that the burden of proof issue does not arise with regard to negotiated agreements, because both section 9(i) and section 252(e)(2) place the burden of proof on the opponent of the agreement: section 9(i) states that "the commission shall approve any negotiated agreement unless . . ." and section 252(e)(2) states that "the State commission may only reject . . . if . . . ." The heightened "clear and convincing" level of proof requirement is less troubling when it is not combined with a shift in the burden of proof.

9(i) incorporated the correct criteria for reviewing SGATs, application of the reversed burden of proof, coupled with the heightened level of proof, could lead to a false application of those criteria by the Arkansas Commission.

77. For the reasons stated above, the first sentence of section 9(i) conflicts with the federal statute. We therefore preempt the enforcement of the first sentence of section 9(i).

5. Arbitration Procedures: Section 9(j) of the Arkansas Act

a. Background

78. ACSI requests that we preempt the enforcement of section 9(j) of the Arkansas Act pursuant to section 253 of the Communications Act.[179] Section 9(j) concerns procedures for arbitrations conducted by the Arkansas Commission under section 252 of the Communications Act. It provides that, when "the [Arkansas] Commission is requested to arbitrate any open issues pursuant to Section 252 of the Communications Act . . ., the parties to the arbitration proceeding shall be limited to the persons or entities negotiating the agreement."[180] In seeking preemption of the enforcement of section 9(j) of the Arkansas Act, ACSI simply argues that section 9(j) "prevents participation by intervenors in arbitration proceedings, severely limiting the [Arkansas Commission's] ability to gauge the potential for discrimination against non-parties."[181]

b. Analysis

79. We do not preempt the enforcement of section 9(j) of the Arkansas Act pursuant to section 253. ACSI supplies almost no support for the proposition that we should preempt the enforcement of section 9(j) under section 253 of the Communications Act. ACSI's section 253 preemption argument consists almost entirely of ACSI's single, unsupported statement that section 9(j) "prevents participation by intervenors in arbitration proceedings, severely limiting the [Arkansas Commission's] ability to gauge the potential for discrimination against non-parties."[182] Section 9(j) does not, on its face, appear obviously to prohibit or effectively prohibit the ability of any entity to provide any telecommunications service.[183] ACSI's unsupported assertion to the contrary fails to make even the threshold showing that section 9(j) falls within

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179. ACSI Petition at iv, 2, 5, 15-16, 20-21; ACSI Reply Comments at i-ii, 10-12 (ACSI).

180 Ark. Code Ann. § 23-17-409(j).

181 ACSI Petition at 5; ACSI Reply Comments at 12 (ACSI). Neither MCI nor any commenter expresses support for ACSI's request for preemption of the enforcement of section 9(j) of the Arkansas Act.

182 ACSI Petition at 5.

183 *See generally* Arkansas AG Comments at 16 (ACSI); ATA Comments at 10-11 (ACSI); NATC Comments at 3-4 (ACSI).

the proscription of entry barriers set forth in section 253(a) of the Communications Act.[184] Accordingly, we deny ACSI's petition insofar as it requests preemption of the enforcement of section 9(j) of the Arkansas Act pursuant to section 253 of the Communications Act.[185]

6. Rural Exemption: Section 10 of the Arkansas Act

a. Background

80. Section 10 of the Arkansas Act governs the process by which the Arkansas Commission may order a "rural telephone company" to comply with a bona fide request for interconnection, unbundled network elements, or services made by a "telecommunications provider"[186] under section 251(c) of the Communications Act. Section 10(a) provides that a rural telephone company need not respond to such a request until the Arkansas Commission "has determined, in accordance with the Federal Act, that the rural telephone company must fulfill such request."[187]

81. Section 10(b) further provides that, with regard to a rural telephone company that is not also a Tier One Company,[188] the [Arkansas] Commission may only determine that the rural telephone company must fulfill a request if, after reasonable notice and hearing, it is established by clear and convincing evidence that (1) the request is not unduly economically burdensome; (2) the request is technically feasible; and (3) the request is consistent with the protection of universal service and the public interest, convenience, and necessity.[189]

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[184] *See generally Pittencrieff Order*, 13 FCC Rcd at 1751-52, ¶ 32; *Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10, ¶¶ 35-42.

[185] Our denial of ACSI's petition in this regard is without prejudice. If ACSI, MCI, or any other appropriate party petitions for preemption of the enforcement of section 9(j) of the Arkansas Act and presents a sufficient record demonstrating that section 9(j), as applied, satisfies the conditions for preemption set forth in section 253 of the Communications Act, the Commission may preempt.

[186] The Arkansas Act defines the term "[t]elecommunications provider" as "any person, firm partnership, corporation, association, or other entity that offers telecommunications services to the public for compensation." Ark. Code Ann. § 23-17-403(24). In pertinent part, the Arkansas Act defines the term "[t]elecommunications services" as "the offering to the public for compensation the transmission of voice, data, or other electronic information at any frequency over any part of the electromagnetic spectrum, notwithstanding any other use of the associated facilities." Ark. Code Ann. § 23-17-403(25).

[187] Ark. Code Ann. § 23-17-410(a).

[188] The Arkansas Act defines the term "Tier One Company" as "any incumbent local exchange carrier that, together with its Arkansas affiliates that are also incumbent local exchange carriers, provide basic local exchange services to greater than one hundred fifty thousand (150,000) access lines in the State of Arkansas on the effective date of this Act." Ark. Code Ann. § 23-17-403(26).

[189] Ark. Code Ann. § 23-17-410(b).

82. Section 10(c) adds that the Arkansas Commission shall not conclude that clear and convincing evidence exists unless the Arkansas Commission has, among other relevant matters, concluded that granting the requested relief will not result in significant adverse impact on the following universal service concerns: (1) The customers of the incumbent local exchange carrier serving the area; (2) The incumbent local exchange carrier's continuing ability to provide its customers adequate service at reasonable rates; (3) The incumbent local exchange carrier's ability to continue to meet eligible carrier obligations; (4) Statewide average toll rates; (5) Customers['] cost of telephone service; (6) The goals of universal service; (7) The quality of service provided to customers; (8) The incumbent local exchange carrier's ability to attract capital and incur debt at reasonable rates and the ability to sustain sufficient revenue stream to pay existing debt; (9) The ability of the exchange to support more than one local exchange carrier; and (10) The interest of all ratepayers.[190]

83. Section 251(f)(1) of the Communications Act addresses the same subject as section 10 of the Arkansas Act, *i.e.*, the process by which a state commission may order a rural telephone company to comply with a request for interconnection, unbundled network elements, or services made by a telecommunications carrier under section 251(c) of the Communications Act.[191] According to section 251(f)(1), an incumbent LEC that is a rural telephone company is initially exempt from section 251(c).[192] Once a rural telephone company receives a bona fide request for fulfillment of the obligations of section 251(c), however, a state commission shall terminate this exemption and order the rural telephone company to comply with such request upon a determination that the request (i) is not unduly economically burdensome, (ii) is technically feasible, and (iii) is consistent with certain federal universal service rules.[193]

84. In the *Local Competition Order*, the Commission construed section 251(f)(1) to mean, *inter alia*, that a rural telephone company's compliance with a request made under section 251(c) would be "unduly economically burdensome" only if such compliance would cause "economic burdens beyond the economic burdens typically associated with efficient competitive entry."[194] The Commission also construed section 251(f)(1) to mean that the rural telephone

[190] Ark. Code Ann. § 23-17-410(c).

[191] 47 U.S.C. § 251(f)(1).

[192] We call this the "rural exemption."

[193] 47 U.S.C. § 251(f)(1). Section 251(f)(1)(A) of the Communications Act provides: "Subsection (c) of this section [251] shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." *Id.* The summary of section 251 in the text assumes that the telecommunications carrier making the request is not a cable operator. *See* 47 U.S.C. § 251(f)(1)(C).

[194] *Local Competition Order*, 11 FCC Rcd at 16118, ¶ 1262. *See* 47 C.F.R. § 51.405(c).

company bears the burden of proof justifying continuation of the rural exemption, rather than the requesting telecommunications carrier bearing the burden of proof justifying termination of the rural exemption.[195]

85. Petitioners argue that we should preempt sections 10(b) and 10(c) pursuant to our conflict preemption authority, because those sections of the Arkansas Act allegedly contradict section 251(f)(1) of the Communications Act and our implementing rules in several serious ways.[196] Petitioners first observe that section 10(b) requires the requesting entity to demonstrate to the Arkansas Commission that termination of the rural exemption would be appropriate, whereas our rules implementing section 251(f)(1) of the Communications Act require the rural telephone company to demonstrate to the state commission that continuation of the rural exemption would be appropriate.[197]

86. Petitioners next point out that section 10(b) not only shifts the burden of proof from the rural telephone company to the requesting entity, but also raises that burden to the level of "clear and convincing evidence," a standard not mentioned in either section 251(f)(1) of the Communications Act or our implementing rules.[198] Petitioners maintain, in addition, that section 10(c) imposes ten prerequisites for termination of the rural exemption that are not stated in section 251(f)(1) of the Communications Act, and at least several of those ten cannot fairly be characterized as merely more specific examples of the three prerequisites that are stated in section 251(f)(1).[199]

87. In Petitioners' view, these alleged inconsistencies between section 10 and federal law will make it far more difficult, if not impossible, for potential competitors to achieve termination of the rural exemption and obtain interconnection, unbundled network elements, and services from rural telephone companies in Arkansas pursuant to sections 251(c) and 251(f)(1) of the Communications Act.[200] Petitioners contend, in turn, that these inconsistencies fly in the face

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[195] *Local Competition Order*, 11 FCC Rcd at 16118, ¶ 1263. *See* 47 C.F.R. § 51.405(a). *See also* ¶ 0, *supra*.

[196] ACSI Comments (MCI); MCI Petition at 10-13; MCI Reply Comments at 7-8 (MCI).

[197] ACSI Comments (MCI); MCI Petition at 11-12, citing *Local Competition Order*, 11 FCC Rcd at 16118, ¶ 1263; 47 C.F.R. § 51.405.

[198] ACSI Comments (MCI); MCI Petition at 11; MCI Reply Comments at 7-8 (MCI).

[199] ACSI Comments (MCI); MCI Petition at 12-13.

[200] ACSI Comments (MCI); MCI Petition at 10-13; MCI Reply Comments at 7-8 (MCI). MCI states, for example, that "[c]arriers who would otherwise attempt to compete with rural telephone companies will certainly choose not to do so when confronted with a regulatory regime that requires them to prove a negative (that no harm will result from competition) by clear and convincing evidence that they do not have in their possession." *10/29/97 MCI Ex Parte Letter* at 11. *See generally* ALTS Comments at 5 (ACSI); ALTS Comments at 5-8 (MCI); AT&T Comments at 7-8 (MCI).

of Congress' intent that continuation of the rural exemption after a bona fide request has been made would "be the exception rather than the rule, and . . . [would] apply only to the extent, and for the period of time, that policy considerations justify such exemption. . . ."[201] To further support their contention, Petitioners rely on the Commission's conclusion in the *Local Competition Order* "that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service."[202] Petitioners assert, therefore, that we must preempt sections 10(b) and 10(c) pursuant to our conflict preemption authority in order to eliminate a state-created obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

88. Petitioners argue that we should preempt the enforcement of sections 10(b) and 10(c) pursuant to section 253 of the Communications Act, as well. Petitioners contend, in particular, that if potential competitors cannot obtain interconnection, unbundled network elements, or services from rural telephone companies pursuant to section 251(c) of the Communications Act, potential competitors will lack the ability to provide local exchange service in rural markets in Arkansas.[203]

b. Analysis

89. For the reasons discussed below, and pursuant to our conflict preemption authority, we preempt the enforcement of section 10(c) and part of section 10(b) of the Arkansas Act. Given our decision to preempt pursuant to our conflict preemption authority, we need not reach the question of whether we should also preempt pursuant to section 253 of the Communications Act.

90. Both section 251(f)(1) of the Communications Act and section 10 of the Arkansas Act concern whether and to what extent a rural telephone company must comply with section 251(c) of the Communications Act and the Commission's implementing regulations. Consequently our conflict preemption authority under the Supremacy Clause extends to preemption of sections 10(b) and 10(c) based on alleged inconsistencies with section 251(f)(1) of the Communications Act and our regulations implementing that section.[204]

91. We agree with Petitioners' assertion that sections 10(b) and 10(c) effectively

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201 *Local Competition Order*, 11 FCC Rcd at 16118, ¶ 1262; ACSI Comments (MCI); MCI Petition at 11.

202 *Local Competition Order*, 11 FCC Rcd at 16118, ¶ 1262; ACSI Comments (MCI); MCI Petition at 11.

203 ACSI Comments (MCI); MCI Petition at 10-13; MCI Reply Comments at 7-9 (MCI).

204 *See generally* Arkansas AG Comments at 19-20 (ACSI); NATC Reply Comments at 3 (ACSI); Arkansas AG Comments at 20 (MCI); ATA Reply Comments at 9 (MCI); NATC Comments at 7-9 (MCI); SWBT Comments at 10 (MCI).

prohibit the ability of any entity to provide local exchange service in competition with a rural telephone company by making it virtually impossible to obtain termination of a rural exemption.

92. Section 10(b): Section 251(f)(1) of the Communications Act does not specify an evidentiary threshold for ruling that the conditions for termination of a rural exemption have been met. We interpret this silence, combined with the overriding Congressional purpose of promoting competition in all telecommunications markets, to mean that Congress intended application of the ubiquitous "preponderance of the evidence" threshold. Section 10(b), by contrast, specifies a markedly higher evidentiary threshold: "clear and convincing evidence." This higher standard, coupled with section 10(b)'s direction to the Arkansas Commission that it may only determine that the rural telephone company must fulfill a request if the "clear and convincing" standard is met, place the burden of proof squarely on the telecommunications provider seeking to terminate the rural exemption.[205]

93. The Commission's rules, by contrast, require that upon receipt of a bona fide request for interconnection, services, or UNEs, the rural telephone company must prove to the state commission that the rural telephone company should enjoy continued exemption from the requirements of section 251(c) of the Act.[206] In short, our rules place the burden of proof on the incumbent rural telephone company. Where, as here, state and federal interpretations conflict, the federal rule must prevail. For that reason we preempt the first clause of section 10(b). The three enumerated criteria that follow the reference to the evidentiary standard, and which closely track the language Congress uses in section 251(f)(1), we do not preempt.[207]

94. Section 10(c): Section 10(c) prevents the Arkansas Commission from terminating a rural exemption if doing so will cause one or more of ten specified effects.[208] Some of those enumerated effects are broad, ambiguous, and, significantly, among the likely economic consequences of any efficient competitive entry. The Arkansas Commission, therefore, could reasonably construe section 10(c) as exceeding, rather than merely explaining, the three criteria for terminating a rural exemption set forth in section 251(f)(1) of the Communications Act.[209]

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[205] We further note that section 10(b) directs that the Arkansas Commission "*may* only determine . . . if" the three conditions are met. In section 251(f)(1), by contrast, Congress expresses its will in the imperative, and directs that a state Commission "*shall* terminate the exemption if," the conditions are met, thereby compelling a state commission to terminate the exemption if the conditions are met. (Emphasis added.)

[206] 47 C.F.R. § 51.405(a).

[207] We assume that Arkansas will interpret the phrase "unduly economically burdensome" as we have in our implementing regulations, where we determined that "unduly economically burdensome" means "economic burdens beyond the economic burdens typically associated with efficient competitive entry." *Local Competition Order*, 11 FCC Rcd at 16118, ¶ 1262. *See* 47 C.F.R. § 51.405(c).

[208] Ark. Code Ann. § 23-17-410(c).

[209] *See generally* MCI Petition at 10-13; MCI Reply Comments at 7-8 (MCI); ALTS Comments at 5 (ACSI); ALTS Comments at 5-8 (MCI); AT&T Comments at 7-8 (MCI).

Indeed, taken together, the ten enumerated effects specified in section 10(c) appear designed to shield a rural telephone company from any economic burden whatever. This section thus erects a barrier to entrants that cancels out the adjective "unduly" from the "unduly economically burdensome" standard that Congress established in section 251(f)(1) of the Communications Act.

95. We agree with Petitioners that requiring the Arkansas Commission to find that those ten enumerated effects will not occur (which puts the would-be competitor in the difficult position of having to establish ten negatives) conflicts with Congress' intent that continuation of the rural exemption after a bona fide request has been made would "be the exception rather than the rule, and . . . [would] apply only to the extent, and for the period of time, that policy considerations justify such exemption. . . ."[210]

96. We also agree with the argument that requiring the petitioning telecommunications provider to prove that the ten effects in enumerated section 10(c) will not occur cannot be reconciled with this Commission's conclusion in the *Local Competition Order* "that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service."[211] For these reasons we find that section 10(c) conflicts with section 251(f)(1) of the Communications Act and our rules, and we therefore preempt the enforcement of section 10(c).

7. Rulemaking Authority: Sections 11(c) and 11(e) of the Arkansas Act

a. Background

97. ACSI appears to request that we preempt the enforcement of sections 11(c) and 11(e) of the Arkansas Act pursuant to section 253 of the Communications Act. Those sections of the Arkansas Act concern the Arkansas Commission's rulemaking authority. Section 11(c) provides: Consistent with the policy of telecommunications competition that is implemented with this Act, other than the [Arkansas] Commission's promulgation of rules and regulations required by this Act, the [Arkansas] Commission shall promulgate no new rule or regulation that increases regulatory burdens on telecommunications service providers, except upon a showing that the benefits of such rule or regulation are clear and demonstrable and substantially exceed the cost of compliance by the affected telecommunications service providers.[212]

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[210] *Local Competition Order*, 11 FCC Rcd at 16118, ¶ 1262; ACSI Comments (MCI); MCI Petition at 11.

[211] *Id.*

[212] Ark. Code Ann. § 23-17-411(c).

98. Section 11(e) provides: Not later than 180 days after the effective date of this Act, the [Arkansas] Commission shall revise its rules so that they apply, except as expressly provided in this Act, equally to all providers of basic local exchange service. All future rule changes promulgated by the [Arkansas] Commission shall apply equally to all providers of basic local exchange service.[213]

99. ACSI mentions sections 11(c) and 11(e) of the Arkansas Act only in its Chart. Thus, we can only speculate about the grounds on which ACSI seeks preemption pursuant to section 253 of the Communications Act. ACSI apparently believes that sections 11(c) and 11(e) of the Arkansas Act somehow restrict or modify the rulemaking authority of the Arkansas Commission in a manner that bars competitive entry into local exchange markets.

100. The record provides little enlightenment regarding what ACSI's basis for seeking preemption of the enforcement of sections 11(c) and 11(e) might be. Neither MCI nor any commenter expresses support for ACSI's request for preemption of the enforcement of section 11(c) of the Arkansas Act pursuant to section 253 of the Communications Act. Only one commenter, Sprint, expresses support for ACSI's request for preemption of the enforcement of section 11(e) pursuant to section 253 of the Communications Act. Sprint argues that section 11(e) is a misguided attempt to "level the playing field" between competing LECs and incumbent LECs.[214] In Sprint's view, section 11(e) runs afoul of the Commission's conclusion in the *Local Competition Order* that it would be "'inconsistent with the . . . [Communications Act]' for states to be allowed to impose upon non-incumbent LECs obligations which the Communications Act imposes only on incumbent LECs."[215]

b. Analysis

101. We do not preempt the enforcement of section 11(e) of the Arkansas Act pursuant to section 253.

102. ACSI supplies little support for the proposition that we should preempt the enforcement of section 11(c) pursuant to section 253 of the Communications Act. Neither ACSI nor any other party presents any analysis of the application of the myriad requirements of section 253 to this provision of Arkansas law. Moreover, neither ACSI nor any other party proffers an example of an entity lacking the ability to provide a telecommunications service due to the operation of section 11(c). Finally, section 11(c) does not, on its face, appear obviously to prohibit or effectively prohibit the ability of any entity to provide any telecommunications service. Therefore, ACSI fails to make even the threshold showing that section 11(c) of the

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[213] Ark. Code Ann. § 23-17-411(e).

[214] Sprint Comments at 7 (ACSI).

[215] Sprint Comments at 7 (ACSI), quoting *Local Competition Order*, 11 FCC Rcd at 16109-16110, ¶ 1247.

Arkansas Act falls within the proscription of entry barriers set forth in section 253(a) of the Communications Act.[216] Accordingly, we deny ACSI's petition insofar as it requests preemption of the enforcement of section 11(c) of the Arkansas Act pursuant to section 253 of the Communications Act.[217]

103. The only argument in the record supporting preemption of the enforcement of section 11(e) is that section 11(e) allegedly directs the Arkansas Commission to impose on non-incumbent LECs (*i.e.*, competing LECs) the obligations of section 251(c) of the Communications Act. Such a directive allegedly would be inconsistent with section 51.223(a) of our rules, which provides, in pertinent part, that "[a] state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC. . . ."[218] This inconsistency allegedly would create such substantial burdens for competing LECs that it would effectively prohibit the ability of competing LECs to provide local exchange service in Arkansas.

104. We disagree with this argument. Section 11(e), as written, perhaps could be interpreted reasonably to require the Arkansas Commission to revise its rules so that all LECs – incumbents and non-incumbents – would have to comply with all of the same regulatory obligations, including the obligations imposed by section 251(c) of the Communications Act. The Arkansas Commission has not chosen to interpret section 11(e) in that potentially unlawful manner, however.

105. In the rulemaking proceeding mandated by section 11(e), the Arkansas Commission chose, instead, only to revise certain of its rules dealing with matters other than those addressed in section 251(c) of the Communications Act.[219] Specifically, the Arkansas Commission revised only its "Telecommunications Providers Rules," which concern the relationship between telecommunications providers and end-user customers, and its "Rules of Practice and Procedure," which concern the relationship between telecommunications providers and the Arkansas Commission. Neither the Telecommunications Providers Rules nor the Rules of Practice and Procedure concern the relationship between one telecommunications carrier and another. As a result, neither set of revised rules concerns the inter-carrier interconnection, unbundling, resale, or other obligations specified in section 251(c) of the Communications Act.

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[216] *See generally Pittencrieff Order*, 13 FCC Rcd at 1751-52, ¶ 32; *Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10, ¶¶ 35-42.

[217] Our denial of ACSI's petition in this regard is without prejudice. If ACSI, MCI, or any other appropriate party petitions for preemption of the enforcement of section 11(c) of the Arkansas Act and presents a sufficient record demonstrating that the challenged provision, as applied, satisfies the conditions for preemption set forth in section 253 of the Communications Act, the Commission may preempt.

[218] 47 C.F.R. § 51.223(a). *See Local Competition Order*, 11 FCC Rcd at 16109-16110, ¶¶ 1247-48.

[219] *In the Matter of a Rulemaking to Identify, Repeal, and/or Amend Rules and Regulations in Compliance with Act 77 of 1997, Order Nos. 8, 9*, Docket No. 97-040-R (Ark. PSC rel. July 24, 1997, July 29, 1997).

In other words, section 11(e), as construed and applied by the Arkansas Commission, does not impose on competing LECs the obligations of section 251(c) of the Communications Act.[220]

106. Furthermore, the parties seeking preemption supply no additional support for the proposition that we should preempt the enforcement of section 11(e) under section 253 of the Communications Act. No party presents any analysis of the application of the myriad requirements of section 253 to this provisions of Arkansas law. No party proffers an example of an entity lacking the ability to provide a telecommunications service due to the operation of section 11(e). Therefore, the parties seeking preemption fail to make even the threshold showing that section 11(e) falls within the proscription of entry barriers set forth in section 253(a) of the Communications Act.[221] Accordingly, we deny ACSI's petition insofar as it requests preemption of the enforcement of section 11(e) of the Arkansas Act pursuant to section 253 of the Communications Act.[222]

8. Rate Regulation: Sections 7, 8, and 12(j) of the Arkansas Act

a. Background

107. ACSI requests that we preempt the enforcement of sections 7(a), 7(c), 7(d), 8(a), 8(c), and 12(j), of the Arkansas Act[223] pursuant to section 253 of the Communications Act. Those

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220 *See generally* NATC Reply Comments at 9-10 (ACSI).

221 *See generally Pittencrieff Order*, 13 FCC Rcd at 1751-52, ¶ 32; *Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10, ¶¶ 35-42.

222 Our denial of ACSI's request for preemption of the enforcement of section 11(e) of the Arkansas Act pursuant to section 253 of the Communications Act is without prejudice. If ACSI, MCI, or any other appropriate party petitions for preemption of the enforcement of section 11(e) of the Arkansas Act and presents a sufficient record demonstrating that a particular application of section 11(e) satisfies the conditions for preemption set forth in section 253 of the Communications Act, the Commission may preempt.

223. Section 7(a) of the Arkansas Act provides: "The rates for basic local exchange service and switched access services that were in effect in the date twelve months prior to the date of filing of a notice of election by a local exchange carrier pursuant to Section 6 shall be the maximum that such electing local exchange carrier may charge for such services for a period of three years after the date of filing, excluding rate increases ordered by the [Arkansas] Commission pursuant to Section 4. An electing company may decrease or, subsequent to a decrease, increase up to the rate that was effective at the time of election pursuant to this Section. Such rate changes shall be effective immediately, without [Arkansas] Commission approval, by filing a tariff or notice with the [Arkansas] Commission." Ark. Code Ann. § 23-17-407(a).

Section 7(c) of the Arkansas Act provides that "[a]s long as an electing company is in compliance with paragraphs (a) and (b) of this Section, such rates are deemed just and reasonable." Ark. Code Ann. § 23-17-407(c).

Section 7(d) of the Arkansas Act provides: "Notwithstanding the provisions of this Section, if, at any time following the three year anniversary of the date of election pursuant to this Section, another telecommunications provider is providing basic local exchange service or switched access service within an electing company's local exchange area, the electing company may, within any exchange of the electing company in which another

sections of the Arkansas Act concern regulation and deregulation of rates charged by certain local exchange carriers to end-user customers for intrastate telecommunications services.

108. In seeking preemption of the enforcement of sections 7(a), 7(c), 7(d), 8(a), and 8(c), ACSI simply argues that those sections permit immediate deregulation of certain local exchange rates of incumbent LECs, which ACSI maintains is somehow hostile toward the federal policy of competition.[224] With respect to section 12(j), ACSI seems to suggest that section 12(j) prices unbundled network elements at "actual cost" in a manner that conflicts with the cost-based pricing of unbundled network elements mandated in the Commission's *Local Competition Order*.[225]

b. Analysis

109. Once again, the record adds no meat to ACSI's bare-bones request for preemption of the enforcement of sections 7(a), 7(c), 7(d), 8(a), 8(c), and 12(j) pursuant to section 253 of the Communications Act. Indeed, neither MCI nor any commenter expresses support for ACSI's request. Indeed, neither ACSI nor any other party applies the requirements of section 253 to

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telecommunications provider is providing these services, commence determining its rates for basic local exchange service and switched access services in the same manner that it determines its rates for services other than basic local exchange service and switched access service, pursuant to Section 8(c)." Ark. Code Ann. § 23-17-407(d).

Section 8(a) of the Arkansas Act provides: "The earnings of an electing company shall not be subject to rate of return or rate base monitoring or regulation, and the [Arkansas] Commission shall not consider rate of return, rate base, or the earnings of an electing company in connection with rate changes made pursuant to this Section or Section 7." Ark. Code Ann. § 23-17-408(a).

Section 8(c) of the Arkansas Act provides: "An electing company may increase or decrease its rates for telecommunications services other than basic local exchange service and switched access services and establish rates for new services by filing a tariff or a price list with the [Arkansas] Commission. Such rates shall not require [Arkansas] Commission approval. The tariff or price list shall be effective upon filing or at such future time as the electing company shall designate. So long as rates for services are in accordance with this Section and Section 7, such rates are deemed just and reasonable. Any service that is not a telecommunications service is not subject to [Arkansas] Commission regulation, and rates for such services need not be filed with the [Arkansas] Commission." Ark. Code Ann. § 23-17-408(c).

Section 12(j) of the Arkansas Act provides: "For purposes of this Section, the [Arkansas] Commission may not require a company that is subject to this Section, to set its rates below the actual cost of the company providing the service. The actual cost shall, if requested by the company, be determined to include a ratable portion of administrative expenses and overhead incurred by the company in its operations and the appropriate amortization of previously deferred accounting costs." Ark. Code Ann. § 23-17-412(j).

[224] ACSI Petition at 12.

[225] ACSI Chart at 3, citing *Local Competition Order*, 11 FCC Rcd at 15844, ¶ 672. We note that ACSI mentions sections 8(a) and 12(j) of the Arkansas Act only in its Chart. Thus, we can only speculate about the grounds on which ACSI seeks preemption of those sections of the Arkansas Act.

these provisions of Arkansas law, or proffers an example of an entity unable to provide a telecommunications service due to the operation of section 7, 8, or 12(j). Finally, sections 7, 8, and 12(j) do not, on their face, appear obviously to prohibit or effectively prohibit the ability of any entity to provide any telecommunications service. Therefore, ACSI fails to make even the threshold showing that section 7, 8, or 12(j) of the Arkansas Act falls within the proscription of entry barriers set forth in section 253(a) of the Communications Act. Accordingly, we deny ACSI's petition insofar as it requests preemption of the enforcement of section 7, 8, or 12(j) of the Arkansas Act pursuant to section 253 of the Communications Act.[226]

C. Deferral of Universal Service Issues

110. As previously noted, Petitioners seek preemption of several provisions of the Arkansas Act that regard universal service. Petitioners claim that the Arkansas Act "impermissibly attempts to preserve revenue streams for incumbent local exchange carriers in violation of the 1996 Act."[227] According to Petitioners, section 5(b) of the Arkansas Act imposes more onerous conditions on competitive carriers to receive universal service support than the conditions mandated by section 214(e) of the Telecommunications Act. For example, Petitioners maintain that Arkansas, in apparent contrast to federal policy, (1) requires carriers seeking universal service support to assume carrier-of-last-resort obligations; (2) allows carriers to receive support only for the facilities they own and maintain; and (3) requires the Arkansas Commission to conduct a public interest inquiry into whether a competing carrier should receive funds, whether or not that carrier is operating in a rural area.[228] MCI further maintains that section 5(d) of the Arkansas Act designates incumbent LECs as the only carriers eligible for universal service funding in rural areas.[229] In short, Petitioners argue that the Arkansas Act improperly guarantees the incumbent's funding while unlawfully frustrating competing carriers' access to universal service support.

112. With respect to the Commission's actions concerning universal service, the first issuance of regulations implementing the pertinent provisions of the 1996 Act occurred on May 8, 1997.[230] ACSI's petition was filed several weeks before that date, however (on March 25,

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[226] Our denial of ACSI's petition in this regard is without prejudice. If ACSI, MCI, or any other appropriate party petitions for preemption of the enforcement of section 7, 8, or 12(j) of the Arkansas Act and presents a sufficient record demonstrating that the challenged provision, as applied, satisfies the conditions for preemption set forth in section 253 of the Communications Act, the Commission may preempt.

[227] MCI Petition at 13. *See generally*, MCI Petition at 13-18; ACSI Petition at 16-19.

[228] ASCI Petition at 17-18; MCI Petition at 17.

[229] MCI Petition at 17.

[230] *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997) (*Universal Service Order*), *as corrected by, Federal-State Joint Board on Universal Service, Errata,*

1997), and comments and reply comments thereto were filed by May 5, 1997 and May 20, 1997, respectively.[231] Consequently, neither ACSI itself nor any other interested party had a formal opportunity to analyze ACSI's universal service issues in light of the Commission's *Universal Service Order* and subsequent litigation.[232] The Commission has also issued numerous orders regarding the *Universal Service Order*, all of which post-date or nearly post-date the close of the entire record in this proceeding on July 22, 1997. Hence, the present record provides an insufficient basis on which to adjudicate Petitioners' requests in this matter. We will therefore issue a separate Public Notice seeking comment on whether provisions of the Arkansas Act regarding universal service, as implemented by the Arkansas Commission, are consistent with the Telecommunications Act of 1996 and the Commission's implementing orders.

IV. ORDERING CLAUSES

113. ACCORDINGLY, IT IS ORDERED, pursuant to Article VI of the U.S. Constitution and sections 214(e), 251, 252, 253, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214(e), 251, 252, 253, and 254, that the petitions for preemption and/declaratory ruling filed by American Communications Services, Inc. and MCI Telecommunications Co., Inc. are GRANTED or DEFERRED to the extent discussed herein and are DENIED in all other respects.

114. IT IS FURTHER ORDERED that MCI's Motion for Leave to File Out of Time IS GRANTED.

115. IT IS FURTHER ORDERED that this Order and the obligations set forth herein ARE EFFECTIVE upon release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. filed June 25, 1997).

[231] *Pleading Cycle Established for Comments on ACSI Petition for Declaratory Ruling Regarding Preemption in Arkansas*, CC Docket No. 97-100, Public Notice, 12 FCC Rcd 3765 (1997).

[232] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Texas PUC et al. v. FCC*, 183 F.3d 393 (5th Cir. 1999).