

PAUL R. WATKINS (1899 - 1973)
DANA LATHAM (1898 - 1974)

ATTORNEYS AT LAW
1001 PENNSYLVANIA AVE., N.W.
SUITE 1300

WASHINGTON, D.C. 20004-2505
TELEPHONE (202) 637-2200
FAX (202) 637-2201

NEW YORK OFFICE
885 THIRD AVENUE, SUITE 1000
NEW YORK, NEW YORK 10022-4802
PHONE (212) 906-1200, FAX 751-4864

ORANGE COUNTY OFFICE
650 TOWN CENTER DRIVE, SUITE 2000
COSTA MESA, CALIFORNIA 92626-1925
PHONE (714) 540-1235, FAX 755-8290

SAN DIEGO OFFICE
701 'B' STREET, SUITE 2100
SAN DIEGO, CALIFORNIA 92101-8197
PHONE (619) 236-1234, FAX 696-7419

SAN FRANCISCO OFFICE
505 MONTGOMERY STREET, SUITE 1900
SAN FRANCISCO, CALIFORNIA 94111-2562
PHONE (415) 391-0600, FAX 395-8095

SILICON VALLEY OFFICE
75 WILLOW ROAD
MENLO PARK, CALIFORNIA 94025-3656
PHONE (650) 328-4600, FAX 463-2600

SINGAPORE OFFICE
20 CECIL STREET, #25-02/03/04
THE EXCHANGE, SINGAPORE 049705
PHONE + 65-536-1161, FAX 536-1171

TOKYO OFFICE
INFINI AKASAKA, 8-7-15, AKASAKA, MINATO-K
TOKYO 107, JAPAN
PHONE +813-3423-3970, FAX 3423-3971

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OFFICE OF THE SECRETARY

February 18, 2000

CHICAGO OFFICE
SEARS TOWER, SUITE 5800
CHICAGO, ILLINOIS 60606
PHONE (312) 876-7700, FAX 993-9767

HONG KONG OFFICE
23RD FLOOR
STANDARD CHARTERED BANK BUILDING
4 DES VOEUX ROAD CENTRAL, HONG KONG
PHONE + 852-2905-6400, FAX 2905-6940

LONDON OFFICE
ONE ANGEL COURT
LONDON EC2R 7HJ ENGLAND
PHONE + 44-171-374 4444, FAX 374 4460

LOS ANGELES OFFICE
633 WEST FIFTH STREET, SUITE 4000
LOS ANGELES, CALIFORNIA 90071-2007
PHONE (213) 485-1234, FAX 891-8763

MOSCOW OFFICE
ULITSA GASHEKA, 7, 9TH FLOOR
MOSCOW 125047, RUSSIA
PHONE + 7-095 785-1234, FAX 785-1235

NEW JERSEY OFFICE
ONE NEWARK CENTER, 16TH FLOOR
NEWARK, NEW JERSEY 07101-3174
PHONE (973) 639-1234, FAX 639-7298

BY HAND

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: *Comments of CenturyTel, Inc. regarding American Communications Services, Inc., and MCI Telecommunications Corp. 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, CC Docket No. 97-100*

Dear Ms. Salas:

Enclosed please find an original and 7 copies of the Comments of CenturyTel, Inc., in the above-referenced proceeding.

Please stamp and return to me the copy provided for this purpose. If you have any questions regarding this matter, please call me at (202) 637-2225.

Sincerely,

Richard R. Cameron

cc: Janice Myles
International Transcription Services, Inc.

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

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FEB 18 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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American Communications Services, Inc.)
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MCI Telecommunications Corp.)
)
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)
)
Comments Regarding Whether the)
Universal Service Provisions of the)
Arkansas Act Comport with Federal Law)

CC Docket No. 97-100

COMMENTS OF CENTURYTEL, INC.

CENTURYTEL, INC.
John F. Jones
Director of Government Relations
100 Century Park Drive
Monroe, Louisiana 71203
(318) 388-9000

Karen Brinkmann
Richard R. Cameron
Morenike S. Kassim
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-2200
Attorneys for CENTURYTEL, INC.

February 18, 2000

SUMMARY

The Commission's review of Sections 4 and 5 of the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act") should be narrowly circumscribed to preserve the discretion of the Arkansas Commission to implement the universal service goals of the Telecommunications Act of 1996 and the Arkansas Act in a competitively neutral manner. In these comments, CenturyTel supports the broad authority of the Arkansas Commission to require carriers to meet nondiscriminatory state-imposed criteria in addition to those specified in the Communications Act in order to receive designation as an ETC. CenturyTel encourages the Commission to recognize that the Arkansas Commission is the most appropriate entity to evaluate local conditions relevant to the ETC designation process and the qualifications necessary to meet local requirements.

Nevertheless, CenturyTel urges the Commission narrowly to preempt both the requirement that the Arkansas Commission make an affirmative public interest finding before designating additional ETCs in the service territory of a non-rural incumbent local exchange carrier ("ILEC"), and the requirement that a rural ILEC affirmatively assent to the designation of additional ETCs within its service territory. Both of these requirements are in conflict with controlling federal law. In addition, the Commission should preempt the provisions of the Arkansas Act that limit ETCs to explicit federal and state universal service support only for those facilities that they own and maintain, and not for unbundled network elements ("UNEs") or supported services provided using resale. In contrast, the Commission should uphold the authority of the Arkansas Commission under the Arkansas Act to establish competitively neutral funding levels for all Arkansas ETCs.

CenturyTel supports the Arkansas Commission's authority to calculate Arkansas Universal Service Support under Section 4 of the Arkansas Act. CenturyTel believes that the Commission should affirm the Arkansas Act's methodology for computing explicit support levels under the state mechanism, and reserve judgment on the competitive neutrality of Section 4 of the Arkansas Act until the Arkansas Commission has had the opportunity more fully to consider universal service support issues for non-ILEC ETCs.

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

In the Matter of)	
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MCI Telecommunications Corp.)	
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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)	CC Docket No. 97-100
)	
Comments Regarding Whether the Universal Service Provisions of the Arkansas Act Comport with Federal Law)	
)	

COMMENTS OF CENTURYTEL, INC.

CenturyTel, Inc. ("CenturyTel"), through its attorneys, hereby offers the following comments in connection with the above-captioned Public Notice ("Notice") released January 14, 2000.¹

I. INTRODUCTION

CenturyTel, headquartered in Monroe, Louisiana, is a leader in providing integrated communications services to rural markets. CenturyTel provides a variety of high quality communications services to more than 2 million customers in rural communities in 20 states, including local exchange and advanced services, wireless cellular telephone service, personal communications services ("PCS"), long distance, security monitoring, data, and broad-

¹ *American Communications Services, Inc. and MCI Telecommunications Corp.*, CC Docket No. 97-100, Public Notice, DA 00-50 (rel. January 14, 2000).

band and dial-up Internet access services. CenturyTel is a leader in providing a full range of communications and information services to rural America. CenturyTel's rural exchanges provide local exchange service to 1.3 million access lines, but approximately half of its exchanges have fewer than 1,000 access lines each. Very few of its exchanges have greater than 10,000 access lines. All of CenturyTel's operating companies meet the statutory definition of a "rural telephone company" contained in section 3 of the Communications Act of 1934, as amended ("Communications Act").² CenturyTel has entered into an agreement to purchase 105 Arkansas exchanges from GTE, more than quadrupling its Arkansas operations to serve approximately 275,000 lines.³

CenturyTel's provision of telecommunications services in Arkansas is governed by both the Communications Act and the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act"). In 1997, MCI and American Communications Services, Inc. ("ACSI") petitioned the Commission to issue a declaratory ruling preempting various provisions of the Arkansas Act. The Commission subsequently preempted certain interconnection provisions contained in the Arkansas Act, but held in abeyance the challenges relating to universal service.⁴ Sections 4 and 5 of the Arkansas Act respectively address the administration of the Arkansas Universal Service Fund ("AUSF") and the designation of Eligible Telecommunications Carriers ("ETCs") for purposes of receiving both federal and AUSF

² 47 U.S.C. § 153(37).

³ *Joint Petition for Waiver of the Definition of "Study Area" contained in the Appendix to Part 36 of the Commission's Rules (Glossary) of: CenturyTel of Northwest Arkansas, LLC, CenturyTel of Central Arkansas, LLC, GTE Arkansas Incorporated, GTE Midwest Incorporated and GTE Southwest Incorporated*, Joint Petition for Waiver (filed January 21, 2000).

⁴ *American Communications Services, Inc. and MCI Telecommunications Corp.*, CC Docket No. 97-100, Petitions for Expedited Declaratory Ruling Preempting Arkansas

universal service support. The Commission's Notice seeks comment on whether Sections 4 and 5 of the Arkansas Act, as implemented by the Arkansas Commission, are consistent with the universal service mandate of the Communications Act and the Commission's implementing orders.

II. THE COMMISSION SHOULD DEFER TO STATE COMMISSION AUTHORITY TO IMPOSE NON-BURDENSOME REQUIREMENTS ON THE ELIGIBILITY OF TELECOMMUNICATIONS CARRIERS TO RECEIVE UNIVERSAL SERVICE SUPPORT

Section 5 of the Arkansas Act imposes a variety of conditions on the eligibility of telecommunications carriers to receive universal service support. Section 5 echoes the provisions contained in Section 214(e)(1) of the Communications Act, which require that an ETC: 1) offer services either using its own facilities or a combination of its own facilities and resale; and 2) advertise the availability of and charges for such services, using media of general distribution.⁵

In general, states may impose on carriers seeking ETC status additional eligibility requirements beyond those contained in Section 214(e)(1).⁶ The Arkansas Act, in Section 5(b), sets forth three additional conditions for ETC eligibility beyond those contained in the Communications Act. First, Section 5(b)(1) requires that a CLEC must accept the obligation to serve all customers within the ILEC's service area in order to be designated as an ETC. This provision is within the scope of state authority to impose additional ETC eligibility requirements. However, the Arkansas Act then sets forth two additional requirements that are inconsistent with federal law. Section 5(b)(5) conditions the approval of an additional ETC upon a finding by the

Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended, FCC 99-386 (rel. December 23, 1999).

⁵ Ark. Code Ann. §§ 23-17-405(b)(1,4).

⁶ *Texas Office of Public Utility Counsel*, 183 F.3d 393 (5th Cir. 1999), *petitions for cert. filed*, Nos. 99-1072 (filed Dec. 23, 1999), 99-1244 (filed Jan. 26, 2000), 99-1249 (filed Jan 26, 2000).

Arkansas Commission that designation of an additional ETC, even within the territory of a non-rural LEC, is in the public interest. Similarly, Section 5(d) forbids the Arkansas Commission from designating additional ETCs in areas served by a rural telephone company, unless the rural telephone company voluntarily surrenders its right to be the sole ETC.

A. Federal Preemption Authority is Highly Limited

In general, the Commission's authority to preempt state law is extremely circumscribed. Federal law, through the Supremacy Clause of the Constitution, may preempt state law only: (1) where state law is in actual conflict with federal law; (2) where federal law expressly preempts state action; or (3) where the scheme of federal regulation is so comprehensive, or the federal interest so dominant, that the intent to preempt supplementary state action may be implied.⁷ In applying these principles, however, the Commission is bound by the longstanding presumptions that Congress does not intend to supplant state law,⁸ and that state law can be displaced only to the extent that it actually stands in irreconcilable conflict with a controlling federal authority.⁹ Even where compliance with both laws is a physical impossibility, a state statute should be invalidated to the least extent necessary to remove the conflict.¹⁰

In the 1996 Act, Congress codified the broad purposes of federal universal service mechanisms to preserve and advance access to high-quality telecommunications services at

⁷ U.S. CONST. art. VI, cl. 2; *See Hillsborough County v. Automated Medical Lab.*, 471 U.S. 707, 713 (1985); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

⁸ *New York State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

⁹ *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996); *Ford Motor Co. Bronco II Products Liability Litigation*, 909 F. Supp. 400, 404 (E.D. La 1995) ("preemption is not to be lightly presumed and any doubt as to congressional purpose should be resolved against preemption").

¹⁰ *Dalton*, 516 U.S. at 476.

affordable and reasonably comparable rates among all states. Even as it did so, however, Congress expressly *preserved* broad state discretion to pursue state universal service goals, by “adopt[ing] regulations not inconsistent with the Commission's rules to preserve and advance universal service.”¹¹ Therefore, the Commission should preempt only those provisions of the Arkansas Act that substantially limit the ability of the Arkansas Commission to lawfully exercise its discretion, or that are irreconcilable with the requirements of the Communications Act.

Similarly, the Commission’s express preemption authority is extremely limited. Section 253(d) authorizes the Commission to preempt all state and local regulations only to the extent that they “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹² With respect to universal service, Section 253 is even more limited, expressly preserving state authority to “impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service . . . , ensure the continued quality of telecommunications service, and safeguard the rights of consumers.”¹³ Reflecting the narrow authority this statute grants, the Commission has stated that it will only preempt a universal service provision of state law that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”¹⁴

The Arkansas Act contains few provisions that the Commission may lawfully preempt under these standards. Accordingly, except as discussed specifically below, the

¹¹ 47 U.S.C. § 254(f).

¹² 47 U.S.C. § 253(a).

¹³ 47 U.S.C. § 253(b).

¹⁴ *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, FCC 97-343 (rel. October 2, 1997).

Commission should uphold the vast majority of the provisions of Sections 4 and 5 of the Arkansas Act.

B. The Arkansas Commission May Require a CLEC to Serve All Customers Within the ILEC's Service Area in Order to be Designated as an ETC

Under Section 214(e)(1) of the Communications Act, an ETC must do the following throughout its service area: 1) offer the services that are supported by federal universal service support, subject to certain requirements; and 2) advertise the availability of these services and the charges therefor through media of general distribution. Section 5(b)(1) of the Arkansas Act states that, in order to be designated as an ETC, a CLEC must also accept the obligation to serve all customers within the ILEC's service area. This obligation is in addition to the conditions imposed by the Communications Act on CLECs seeking ETC status. ACSI and MCI both object to this additional requirement on the basis that any state requirement beyond the two section 214(e)(1) requirements is inconsistent with the Communications Act and must be preempted.¹⁵

Subsequent to the filing of the ACSI and MCI Petitions, the Fifth Circuit held explicitly that state commissions may impose additional eligibility requirements beyond those contained in Section 214(e)(1) on carriers seeking ETC status. State commission authority is limited only to the extent that it may not impose "such onerous eligibility requirements that no otherwise eligible carrier could receive designation."¹⁶

The Arkansas Act's Section 5(b)(1) requirement that non-ILEC ETCs agree to serve all areas within an ILEC's service area is competitively neutral and consistent with the

¹⁵ ACSI Petition at 16; MCI Petition at 17. Although MCI also objects to the Arkansas Act's provision deeming all Arkansas ILECs to be ETCs, MCI Petition at 15, MCI offers no evidence that any Arkansas ILEC fails to meet the ETC requirements. Given that, since 1997, virtually every ILEC in the nation has been certified as an ETC, this legislative finding that all Arkansas ILECs meet the ETC designation requirements is eminently reasonable.

Fifth Circuit's ETC eligibility standards. Section 5(b)(1) applies to all ETCs, regardless of whether they are CLECs or ILECs or what type of network technology they use, and imposes an additional, competitively neutral eligibility requirement on potential ETCs that in no way forecloses the ability of CLECs or other carriers to gain ETC status. The Fifth Circuit standard, in contrast, precludes only eligibility requirements that completely foreclose entry to the market by an otherwise qualified carrier.

The Arkansas legislature made an informed decision that, in order to best provide universal service at reasonable and affordable rates, all potential ETCs must agree to serve all customers within the ILEC's service area. This obligation reflects the Arkansas legislature's judgment that Section 5(b)(1) of the Arkansas Act promotes several fundamental policy objectives.

First, requiring all potential ETCs to agree to serve the ILEC's entire exchange area permits the Arkansas Commission better to manage the transition from implicit to explicit support mechanisms. Section 5(b)(1) attempts to mitigate the threat to universal service of the premature erosion of implicit support mechanisms, as support becomes increasingly explicit and deaveraged. Further, the requirement is an effort on the part of the Arkansas Commission to prevent the "cream-skimming" of low-cost rural service areas by CLECs. The Commission and the Common Carrier Bureau have previously recognized the threat to universal service presented by CLEC "cream skimming" of low-cost customers of rural ILECs and has embraced efforts to reduce cream-skimming opportunities.¹⁷

¹⁶ *Texas Office of Public Utility Counsel*, 183 F.3d 393 at 418, n.31.

¹⁷ *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 99-1844 (rel. September 9, 1999).

Second, the provision ensures the availability of telecommunications services throughout the state, even in remote, isolated or less-profitable areas, and allows the largest possible number of consumers to enjoy the benefits of competition. Without such a requirement, and given the very low density of rural ILEC service areas in Arkansas, it is improbable that a competitor would choose to serve all customers within these areas. ACSI claims that Section 5(b)(1) of the Arkansas Act impermissibly disqualifies all CLECs that cannot provide services on a large-scale.¹⁸ However, ACSI's position overlooks the fact that by requiring CLECs seeking ETC status to serve *all* customers within an ILEC's service area, the Arkansas legislature is fulfilling both state and federal mandates to promote broad expansion of *both* competition and universal service. Section 5(b)(1) assures the provision of service and the introduction of competition in *all* areas of the state, in accord with both federal law and policy.

C. Within the Territories of Non-Rural LECs, the Arkansas Act May Not Impose a Requirement that Additional ETCs are in the Public Interest

Under the terms of Section 214(e)(2) of the Communications Act, the ability of a state commission to make a public interest determination is expressly limited to areas served by rural telephone companies. Section 5(b)(5) of the Arkansas Act nonetheless conditions the approval of an additional ETC upon a finding by the Arkansas Commission that the designation of an additional ETC, even within the territory of a non-rural LEC, is in the public interest. Section 5(b)(5) is another example of Arkansas's efforts to impose more rigorous requirements for CLECs seeking ETC status than required by the Communications Act. However, unlike Section 5(b)(1), Section 5(b)(5) is in direct conflict with federal law. In the case of an area served by a non-rural carrier, the imposition of a public interest finding as a condition of ETC eligibility is inconsistent with the Communications Act. The Communications Act directs state

¹⁸ ACSI Petition at 17.

commissions to designate as an ETC each requesting carrier that meets the requirements of Section 214(e)(1).¹⁹ While state commissions may impose additional ETC designation criteria that are not directly inconsistent with the Communications Act, by the express terms of Section 214, state commissions retain no authority to require a public interest finding before designating an additional ETC in areas served by a non-rural telephone company.

D. The Arkansas Act May Not Condition the Authority of the Arkansas Commission to Designate Additional ETCs in Areas Served by Rural Telephone Companies on the Voluntarily Surrender by the Rural Telephone Company of its Right to be the Sole ETC

The Arkansas Act may not, in direct contravention of Sections 253 and 254(f) of the Communications Act, grant any rural ILEC the unconditional right to be the sole ETC within its service area. Section 5(d) of the Arkansas Act forbids the Arkansas Commission from designating additional ETCs in areas served by a rural telephone company, unless the rural telephone company voluntarily relinquishes its right to be the sole ETC. Although state commissions retain the authority to impose additional requirements for designation as an ETC, this authority is clearly circumscribed.

Section 5(d) of the Arkansas Act impermissibly constrains the discretion of the Arkansas Commission to designate additional ETCs within the territory served by a rural ILEC. Section 214 of the Communications Act, however, already establishes considerable protections for rural ILECs. Section 214(e)(2) of the Communications Act requires a public interest finding before designating an additional ETC in an area served by a rural telephone company. Further, Section 214(e)(5) of the Communications Act defines a "service area" such that a CLEC seeking ETC status in an area served by a rural telephone company must serve the entire rural study area, in the absence of a contrary decision by both federal and state authorities. To permit the rural

¹⁹ 47 U.S.C. § 214(e)(2).

ILEC itself to veto the certification of additional ETCs would be inconsistent with the express terms of Section 214 and would venture far beyond the boundaries of the Communications Act in ways neither permitted nor contemplated by federal law.

III. THE ARKANSAS COMMISSION MUST PROVIDE UNIVERSAL SERVICE SUPPORT TO ALL ETCs IN A COMPETITIVELY NEUTRAL MANNER CONSISTENT WITH FEDERAL LAW

Beyond issues related to the ability of CLECs to obtain ETC certification under the Arkansas Act, the Commission also should preserve and enhance the authority of the Arkansas Commission to establish competitively-neutral universal service support levels. Section 5(b)(2) of the Arkansas Act, in irreconcilable conflict with federal law, limits both federal and state explicit universal service support to the portion of an ETCs facilities that it “owns and maintains.” On the other hand, the Commission should preserve Section 5(d) of the Arkansas Act which is consistent with the requirements of the Communications Act and permits the Arkansas Commission to establish competitively neutral funding levels for all ETCs.

A. The Arkansas Act May Not Limit Explicit Universal Service Support to the Portion of an ETC’s Facilities that the ETC Owns and Maintains

The Commission should preempt Section 5(b)(2) of the Arkansas Act, which prohibits ETCs from receiving universal service support except for the portion of their facilities that they own and maintain. This provision violates Section 214(e)(1)(a) of the Communications Act, which clearly states that an ETC may offer services “either using its own facilities or a combination of its own facilities and resale of another carrier’s services.” In the *Local Competition Order* and in many other proceedings, the Commission has emphasized that the Communications Act “contemplates three paths of entry into the local market – the construction

of new networks, the use of unbundled elements of the incumbent's network, and resale."²⁰ To facilitate such tripartite entry, the Commission also concluded that a carrier that offers any of the services designated for universal service support over facilities that are obtained as unbundled network elements is using its "own facilities."²¹

The requirements of the Arkansas Act, with respect to the use of unbundled network elements and resale, are clearly inconsistent Section 214(e)(1) of the Communications Act and the federal Universal Service *First Report and Order* interpretation that unbundled network elements are the purchaser's "own facilities."²² By limiting universal service support for an ETC only to the portion of its facilities that it owns and maintains, the Arkansas Act impermissibly forecloses support for service provided using UNEs and resale and, because of the economic importance of universal service support to carriers entering high cost areas, impairs the federal goals of the 1996 Act.

B. The AUSF May Impose Non-Discriminatory Funding Caps on ETCs

Under Section 5(b)(3) of Act 77, the Arkansas Commission may not fund non-ILEC ETCs at levels higher than it funds the ILEC in the same area. This requirement permits equal funding for all ETCs and, in fact, the Arkansas Commission has not interpreted this provision otherwise. The Commission has stated that it will only preempt a universal service provision of state law that "materially inhibits or limits the ability of any competitor or potential

²⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. August 8, 1996) (subsequent history omitted).

²¹ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, para. 154 (1997) (subsequent history omitted).

²² See MCI Petition at 16.

competitor to compete in a fair and balanced legal and regulatory environment."²³ Here, the Arkansas Act is susceptible to a nondiscriminatory interpretation and, as such, the Commission should give the Arkansas Commission the opportunity to reach that result as non-ILEC ETCs enter the market.

IV. THE ARKANSAS COMMISSION IS THE MOST APPROPRIATE ENTITY TO DETERMINE THE CALCULATION OF ARKANSAS UNIVERSAL SERVICE SUPPORT

For the purpose of computing universal service support, the Commission relies on a forward looking model to estimate the cost of providing telecommunications service. The Arkansas Act, however, contemplates a methodology based on actual carrier embedded costs for the purpose of calculating AUSF support and provides a number of methods by which all ETCs, including non-ILEC ETCs, may determine their costs. Section 4 of the Arkansas Act sets forth the mechanism through which funding will be allocated to offset fluctuations in federal universal fund revenue and to provide for a variety of embedded costs. Unlike the Section 5 ETC designation provisions described above, the Section 4 provisions apply only to Arkansas universal service funding and are entirely independent of the federal universal service mechanism. Therefore, the Section 4 requirements do not burden federal universal service and do not conflict with Section 254(f) of the Communications Act. Given the enforced absence until now of non-ILEC ETCs in Arkansas, it would be premature for the Commission to determine whether many of the Section 4 provisions create impermissible barriers to entry in Arkansas. Therefore, the Commission should withhold judgment on this provision to afford the Arkansas Commission an opportunity to implement this mechanism in a competitively-neutral manner.

²³ *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, FCC 97-343 (rel. October 2, 1997).

A. The States Are Not Required to Adopt the Same Methodology as the Commission Did to Compute Universal Service Support

The method of calculating Arkansas universal support does not burden federal universal service mechanisms impermissibly under Section 254(f). Although the Arkansas Act contemplates a different mechanism for calculating Arkansas universal support than that adopted by the Commission as a basis for federal universal support, the Arkansas method is nonetheless consistent with the Commission's interpretation of Section 254(b)(3). Under Section 254(b)(3), the federal mechanism seeks to preserve affordable and reasonably comparable rates *among* states, while state mechanisms should ensure affordable and reasonably comparable rates *within* the state.²⁴ States may adopt any universal service support mechanism that does not burden the federal mechanism.²⁵ In this case, Arkansas has not implicated either the distribution of federal universal service support or the funding levels produced by the federal mechanism.

Therefore, although the Commission has worked hard to develop the federal mechanism, the Commission cannot and should not mandate the adoption of a mechanism based on forward looking costs by all state commissions to provide intrastate universal service support. The Arkansas legislature and commission are best positioned to determine what methods best achieve these goals within Arkansas, taking into account local conditions, carrier and state commission resources, local rate designs and other factors. In addition, as discussed below in greater detail, the Commission should not, at this time, find that Section 4 creates impermissible barriers to entry under Section 253.

²⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report & Order and Eighteenth Order on Reconsideration, FCC 99-306 (rel. Nov. 2, 1999), para. 38.

²⁵ 47 U.S.C. § 254(f).

B. The Arkansas Act Reasonably Calculates AUSF Support

The Arkansas Act contains a variety of provisions allocating the AUSF among various carriers that represents a reasonable exercise of the state's legislative discretion. Under Section 4(e)(4)(A) of the Arkansas Act, the Arkansas Commission may adjust an ILEC's AUSF revenues to compensate for a change in the ILEC's federal universal service fund revenues. MCI objects to this provision on the basis that: 1) the section preserves the level of funding received by ILECs at the same level of funding they received prior to the passage of the Communications Act; 2) Section 4(e)(4)(C)'s prohibition on the use of rate case proceedings conflicts with the Communications Act's requirement that universal service funding calculations be based on cost; and 3) the allocation of the AUSF, under Section 4 of the Arkansas Act, discriminates against CLECs.²⁶

MCI's challenge to Section 4 of the Arkansas Act fundamentally misapprehends the purposes of the AUSF. As structured, the AUSF permits the Arkansas Commission to adjust both local rates and state universal service support, taking into account the effect of changes in federal support and both federal and state pooling settlements on local exchange customers. While the new federal mechanism may indicate that some amount of support previously provided is no longer necessary to meet the federal universal service goals of affordable and reasonably comparable rates among states, Arkansas may reasonably conclude that this reduction is an appropriate measure of the need for state-level support. A state may therefore use its state universal service funds to offset fluctuations in federal universal support for ILECs. Such a mechanism permissibly prevents pressure on local rate structures. The Arkansas legislature's decision not to condition Section 4(e)(4)(A) funding on extensive rate case proceedings is a valid

²⁶ MCI Petition at 14.

exercise of its discretion to provide universal service in a manner that does not unduly burden the Arkansas Commission or Arkansas telecommunications carriers.

The fact that Section 4 is framed in terms of universal service support for ILECs reflects the fact that, until now, CLECs have faced significant challenges under the Arkansas Act to becoming designated as ETCs. If, as CenturyTel suggests above, the Commission preempts the Section 5 requirements that have hampered non-ILEC ETC certification, the Commission need not take action on the Section 4(e)(4) funding mechanism at this time. Rather, the Commission should afford the Arkansas Commission the opportunity to interpret this provision in a nondiscriminatory manner or fashion other complementary support mechanisms for non-ILEC ETCs. The Commission should give the Arkansas Commission sufficient opportunity to regulate CLECs and to interpret the Act in a procompetitive and nondiscriminatory manner.

C. The Arkansas Act Relies on Permissible Measures of Cost in Allocating Future Increases in Support.

Section 4(e)(5) of the Arkansas Act provides for increases in state-level universal service support in the future, to the extent that such increases are necessary for: a) investments and expenses required to provide, maintain and support universal services; b) infrastructure expenditures in response to facility or service requirements; and c) for other purposes deemed necessary by the Commission to preserve and advance the public education and welfare. Increases in AUSF support for these purposes is permissibly based on embedded costs, measured under section 4(e)(6) by carriers using embedded cost studies, fully-distributed cost and revenue allocations to high-cost areas it serves, or reasonable cost proxies developed by the Arkansas Commission. The Arkansas Commission has not implemented this section, and has not developed cost proxies for this use, because it has found that no funding under this section is

needed to respond to the narrow purposes of this section.²⁷ It has held however, that non-ILEC ETCs are eligible to receive support from this mechanism.²⁸

Section 4(e)(5) is capable of being implemented in a nondiscriminatory manner. Accordingly, until the Arkansas Commission implements Section 4(e)(5), the Commission should reserve judgment on its application, because, on its face, Section 4(e)(5) creates no impermissible barrier to entry under Section 253 of the Communications Act. The Commission should not second-guess the legislative judgment reflected in the Arkansas Act that universal service support provided in this manner will achieve the affordable and reasonably comparable rate goals of the legislation in a manner that does not unduly burden the Arkansas Commission or Arkansas telecommunications carriers. Through the careful establishment of proxies for use in conjunction with section 4(e)(5), the Arkansas Commission can implement this support mechanism, when it becomes necessary to do so, in a nondiscriminatory manner that does not materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.²⁹

V. CONCLUSION

The designation of ETCs, as well as the administration and calculation of the AUSF, are matters which implicate a unique array of local and state-wide concerns. The Commission is in a position to promote the availability of universal service by recognizing that state commissions are often in a better position than the Commission to evaluate and implement local criteria relevant to the designation of ETCs and the allocation of state sponsored universal

²⁷ *Universal Service Fund*, Arkansas Public Utilities Reports, Docket No. 97-041-R, Order No. 7, (rel. September 2, 1997).

²⁸ *Id.*

²⁹ *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, FCC 97-343 (rel. October 2, 1997).

service support. In reviewing the relevant portions of the Arkansas Act, the Commission should endeavor to preserve the authority of the Arkansas Commission, while adhering to the Communications Act's universal service mandate and pro-competitive policies.

Specifically, with respect to the Arkansas Act's eligibility requirements, the Commission should preserve the Arkansas Commission's authority, under Section 5(b)(1), to require a CLEC to accept the obligation to serve all customers within the ILEC's service area in order to be designated as an ETC. However, the Commission should preempt the Section 5(b)(5) requirement that within the territories of non-rural LECs, additional ETCs must be in the public interest. The Commission should also preempt Section 5(d) of the Arkansas Act which forbids the Arkansas Commission from designating additional ETCs in areas served by a rural telephone company unless the rural telephone company voluntarily relinquishes its right to be the sole ETC. In addition, the Commission should preempt Section 5(b)(2) of the Arkansas Act, which limits ETCs to explicit federal and state universal service support only for those facilities that they own and maintain. In contrast, the Commission should uphold the authority of the Arkansas Commission under Section 5(b)(3) of the Arkansas Act to establish competitively neutral funding levels for all Arkansas ETCs.

With regard to the calculation of Arkansas universal service support, CenturyTel urges the Commission to preserve the Arkansas Commission's discretion to use embedded costs to calculate explicit state-level universal support. Further, the Commission should affirm the Arkansas Act's methodology for computing explicit support levels under the state mechanism, and reserve judgment on the competitive neutrality of Section 4 of the Arkansas Act until the Arkansas Commission has had the opportunity more fully to consider universal service support issues for non-ILEC ETCs.

Respectfully submitted,
CENTURYTEL, INC.



Karen Brinkmann
Richard R. Cameron
Morenike S. Kassim
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-2200
Attorneys for CENTURYTEL, INC.

John F. Jones
Director of Government Relations
CENTURYTEL, INC.
100 Century Park Drive
Monroe, Louisiana 71203
(318) 388-9000

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