

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

In the Matter of)	
)	
AT&T Corp.)	
)	
Petition for Preemption, Pursuant to)	CC Docket No. 96-45
Section 253 of the Communications Act)	
And Common Law Principles of South)	
Carolina Statutes that Discriminate Against)	
New Entrants)	

COMMENTS OF MCI

I. Introduction

WorldCom, Inc. (d/b/a MCI) hereby files comments in support of AT&T's petition for preemption in the above-referenced matter.¹ MCI agrees with AT&T that the Federal Communications Commission (Commission) should preempt South Carolina's statutes and administrative procedures establishing an "Interim LEC Fund" – which provides subsidies to incumbent LECs (ILECs) to compensate them for reducing their intrastate access charges and is funded by interexchange carriers (IXCs) – pursuant to section 253 of the Communications Act of 1934 (Telecommunications Act) and general preemption doctrine.

¹ In the Matter of AT&T Corp. Petition for Preemption, Pursuant to Section 253 of the Communications Act and Common Law Principles, of South Carolina Statutes that Discriminate Against New Entrants, CC Docket No. 96-45, dated Oct. 7, 2002 (AT&T Petition).

The Interim LEC Fund was established pursuant to South Carolina legislation that included provisions designed to enable ILECs to lower their intrastate access charges and offset the resulting loss of revenue by drawing monies from an “Interim LEC Fund” that is supported by payments from IXCs.² In the same legislation that created the Interim LEC Fund, the South Carolina PSC was directed to establish a South Carolina Universal Service Fund (S.C. USF). The legislation stated that the Interim LEC Fund must transition into the S.C. USF when the funding for the S.C. USF is finalized and adequate to support the obligations of the Interim LEC Fund. To date, the Interim LEC Fund has not been transitioned into the S.C. USF.

The Commission should preempt South Carolina’s Interim LEC Fund pursuant to section 253 and traditional preemption doctrine. The Interim LEC Fund is a barrier to entry, is the antithesis of competitive neutrality, and runs afoul of Congressional intent. In short, the Interim LEC Fund allows ILECs to protect themselves from competition by lowering rates for services for which they face competition and recovering any lost revenues from the Interim LEC Fund. To make matters worse, the Interim LEC Fund is funded solely by IXCs, many of which are competitive LECs (CLECs) trying to compete with the ILECs for local service. This scheme is highly anti-competitive and should be preempted.³

² S.C. Code Ann. §§ 58-9-280(L)-(M).

³ We note that the anti-competitive aspects of the Interim LEC Fund are reinforced by South Carolina’s Universal Service Fund. For example, over the pleas of the competitive industry, the South Carolina PSC has implemented a Universal Service Fund that regards virtually all network costs of the ILECs as costs of “basic local service,” which will result in an overly large fund; has allowed the ILECs to apply for USF funds whenever they seek to reduce any rate for a competitive service; and has refused to audit the ILECs’ requests for funds.

II. Argument

Section 253(a) of the Telecommunications Act lays out the legal framework for the Commission to preempt any state or local statute, regulation, or legal requirement that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁴ Section 253(a) was designed to promote the local entry of new companies by prohibiting state or local regulations that act as barriers to entry.

Section 253(b) is something of a “safe harbor” in preserving states’ authority 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 telecommunications services, and safeguard the rights of consumers.” The Commission has held that a state program must meet all three of these criteria - it must be “competitively neutral,” “consistent with section 254,” and “necessary to preserve and advance universal service” in order to fall within the “safe harbor” of section 253(b).⁵ The Commission has preempted state regulations for failure to satisfy even one of these criteria.⁶ Indeed, the Commission has stated that it *must* preempt a state legal requirement that violates section 253(a) and does not fall within the section 253(b) “safe harbor” provision.⁷

⁴ 47 U.S.C. § 253(a).

⁵ In the Matter of Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934, 15 FCC Rcd 16227 (Western Wireless Order) ¶ 9.

⁶ Id.

⁷ Id.

Moreover, the Interim LEC Fund should not escape federal preemption simply because it is “interim.” The Commission has found that a state requirement that violates section 253(b) cannot be saved by being merely “transitional.”⁸

A. The South Carolina Interim LEC Fund Violates Section 253(a)

The South Carolina Interim LEC Fund conflicts with section 253(a)’s requirement that no state or local regulation have the effect of prohibiting any entity from providing intrastate or interstate service. The South Carolina Interim LEC Fund mandates that IXCs alone contribute to the Interim LEC Fund. This imposes a cost on IXCs that is not borne by ILECs, with whom IXCs such as MCI are trying to compete. As AT&T states, the effect is that “long distance carriers, especially those who are trying to introduce local service competition, effectively subsidize their entrenched competitors.”⁹ This does not provide a “fair and balanced legal and regulatory environment” in which to compete¹⁰ and has the effect of prohibiting MCI and other carriers from providing interstate and intrastate service.

The South Carolina requirements also run afoul of section 253(a) with respect to the requirement that only ILECs are eligible to receive monies from the Interim LEC Fund. This requirement effectively prohibits non-ILECs from providing intrastate and interstate service in that ILECs alone will be able to lower prices due to a state-sponsored subsidy not enjoyed by CLECs. CLECs’ position in the marketplace is harmed by this competitive advantage offered the ILECs. In the Western Wireless Order, where the

⁸ Western Wireless Order ¶ 10.

⁹ AT&T Petition at 16.

¹⁰ In re Public Utility Commission of Texas, 13 FCC Red. 3640 (1997), ¶ 22.

Commission addressed a Kansas regulation that limited the ability of carriers other than ILECs to receive universal service support, the Commission found it doubtful that a program providing universal service support to only ILECs could be found competitively neutral.¹¹ The Commission correctly recognized that “because...a mechanism that offers non-portable support may give ILECs a substantial unfair price advantage in competing for customers, it is difficult to see how such a program could be considered competitively neutral.”¹² The Commission further explained that, “a new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the state government that is not available to the new entrant. A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-provided service relative to competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that was not available to their competitors.”¹³ The precise barrier to entry that the Commission described in the Kansas case is present in South Carolina, and the Commission should preempt the South Carolina Interim LEC Fund accordingly.

B. South Carolina’s Interim LEC Fund Conflicts with Section 253(b)

The Interim LEC Fund also does not stand up under the “safe harbor” provision of section 253(b). Section 253(b) provides that states “may impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and

¹¹ Western Wireless Order ¶ 10. The Commission deemed Western Wireless’s preemption petition moot due to subsequent Kansas decisions that made USF funding available to all carriers, but the Commission nonetheless addressed several substantive issues raised in the petition.

¹² Id.

¹³ Western Wireless ¶ 8.

advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”¹⁴ In the context of universal service, the Commission has defined “competitive neutrality” as universal service support mechanisms and rules that “neither unfairly advantage or disadvantage one provider over another.”¹⁵ The competitive neutrality principle is embodied in the provision of section 254 addressing non-discriminatory contributions from providers of interstate telecommunications (section 254(d)) and equitable and non-discriminatory state universal service contributions mechanisms (section 254(f)), as well as section 214(e)’s requirement that any carrier can be eligible to receive support once it meets certain statutory criteria.¹⁶ Here, the South Carolina requirements are a far cry from being competitively neutral. The Interim LEC Fund disburses funds only to ILECs (in conflict with section 214(e)) and collects funds only from IXCs (in conflict with section 254(d)), many of who are trying to compete with the ILECs for local service. The ILECs in South Carolina thus gain a distinct cost advantage on two fronts, once in receiving state-sponsored monies and again in not having to pay into the fund into which their competitors pay.

Furthermore, the Interim LEC Fund is not “consistent with section 254.” Section 254(d) requires *every* telecommunications carrier that provides interstate telecommunications service to contribute to the federal fund, while the Interim LEC Fund requires contributions from IXCs alone. Section 254(e) provides that any

¹⁴ 47 U.S.C. § 253(b).

¹⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, rel. May 8, 1997 (Universal Service Order) ¶ 47.

¹⁶ Universal Service Order ¶ 48.

telecommunications carrier designated as eligible under section 214(e) may receive universal service support, whereas the Interim LEC Fund provides support only to ILECs.

C. The Commission Should Preempt the Interim LEC Fund Under Traditional Preemption Doctrine

MCI agrees with AT&T that traditional preemption doctrine, apart from section 253, provides an independent basis for preempting the South Carolina Interim LEC Fund. As the Commission found in the Western Wireless Order, a program that provides support only to ILECs could well be found to be invalid under traditional preemption doctrine.¹⁷ The Commission stated that, “a state or local provision may be preempted when, for instance, it conflicts with federal law or ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” The Commission concluded in the Western Wireless Order that, in previously interpreting section 254, competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms “is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework.”¹⁸ Here, as in the Kansas case, the collection and distribution of funds is not competitively neutral because monies are collected only from IXC’s and distributed only to ILECs. The South Carolina Interim LEC Fund should therefore be preempted under traditional preemption doctrine in addition to section 253.

¹⁷ Western Wireless Order ¶ 11.

¹⁸ Western Wireless Order ¶ 11, citing Universal Service Order ¶ 48.

CONCLUSION

For the reasons described herein, the Commission should preempt the South Carolina Legislation establishing the Interim LEC Fund and associated regulations, pursuant to section 253 and general preemption doctrine.

Respectfully submitted,

/s/

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