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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)
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ASAP Paging, Inc.)
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Petition for Preemption of)
Public Utility Commission of Texas)
Concerning Retail Rating of Local Calls)
to CMRS Carriers)

File No. _____

PETITION FOR PREEMPTION

W. Scott McCollough
David Bolduc
STUMPF CRADDOCK MASSEY & PULMAN, PC
1250 Capital of Texas Highway South
Building One, Suite 420
Austin, TX 78746
(V) 512.485.7920
(FAX) 512.485.7921
wsmc@scmplaw.com
dbolduc@scmplaw.com

Counsel for ASAP Paging, Inc.

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EXECUTIVE SUMMARY

It should be axiomatic that CMRS carriers are entitled to obtain numbering resources and assign those numbers (NXXs) to several (but not necessarily all) of the wireline rate centers where the CMRS carrier is authorized to provide coverage. Even ILECs and state regulators should recognize by now that wireline to wireless calls are **retail rated** (*i.e.*, treating the call as “local” or “toll” by the ILEC to the wireline calling party customer of the ILEC)¹ based on the rate center assignments of the two NXXs. A call from a wireline user to a mobile user *is not* **retail rated** based on the physical location of the mobile user at the time of the call, or some arbitrary proxy for the mobile user’s physical location. It is well-accepted that a CMRS carrier with Type 2A interconnection serves a large area with a single Class 5 switch holding NXXs associated with various wireline rate centers. Even a casual observer knows that the CMRS carrier achieves **retail rated** local calling from wireline users in a particular mandatory local calling area to a CMRS customer by assigning the CMRS customer a number within an NXX that has been associated with a rate center in that mandatory local calling area. Any telecommunications industry participant other than an ILEC would be much concerned if ILECs are allowed to unilaterally refuse to honor a CMRS carrier’s rate center assignments and impose toll charges on ILEC users that call a CMRS customer with a number that is “local” to the ILEC user. How can “local dialing parity” mean anything other than that an ILEC cannot require 1+ dialing (and impose **retail rated** toll charges) when its user calls a CMRS number that is “local” to the ILEC’s customer?

¹ ASAP is not addressing the *wholesale carrier compensation* that applies to any calls. This case pertains to **retail rating** to wireline users that call wireless users, and does not have anything to do with *wholesale carrier compensation* between the LEC and the CMRS carrier. ASAP has bolded “**retail rated**” and “**retail rating**” and has italicized “*wholesale carrier compensation*” throughout this Petition in order to emphasize the difference between the two. CenturyTel and TPUC both erroneously conflated the sometimes differing principles and precedent concerning **retail rating** and *wholesale carrier compensation*.

The Texas Public Utility Commission (“TPUC”), however, has ruled that CenturyTel of San Marcos, Inc. (“CenturyTel”) can force its users to dial 1+ and pay **retail rated** toll charges when they call a number that ASAP Paging, Inc. (“ASAP”) obtained from NANPA and associated with rate centers that are “local” to San Marcos [Exhibit 1, TPUC Final Order]. These are calls to customers that are physically located in or have a legitimate need to be called from users in the mandatory local calling area that includes San Marcos.²

TPUC ruled that the physical location of the CMRS customer at the time of the call is determinative for **retail rating** purposes. Since CMRS customers are *mobile* and their physical location at the time of the call cannot be readily determined for **retail rating** purposes, TPUC then decided to use ASAP’s switch site – which serves a large geographic area that includes many rate centers and mandatory calling areas – as a proxy for the ASAP’s customers’ physical location at the time of the call.³ Given that – at the time of hearing – ASAP’s switch was located outside of the mandatory local calling area that includes San Marcos, TPUC ruled that CenturyTel can require 1+ dialing and impose toll charges on its own customers who call ASAP’s customers using numbers within NXX blocks that have been associated with rate centers inside the mandatory local calling area that includes San Marcos. Hence, ASAP’s customers cannot arrange their CMRS service to allow wireline customers in San Marcos to call them on a **retail rated** local calling basis. CenturyTel has been allowed to unilaterally ignore ASAP’s rate center assignments. CenturyTel has denied local calling parity to its customers. After the initial decision (but before the decision became final) ASAP located an additional

² As will be seen below ASAP also provides interstate access service to several ISPs, some of which were physically located in the mandatory calling area and some that were not. As to those that were not, the interstate access service that ASAP provided was a variation on “FX” like service ILECs and other LECs have provided for years.

³ TPUC also indicated that the “called party” or “customer” was ASAP’s switch, rather than the CMRS user to whom the number was assigned.

switch within the mandatory local calling area that includes San Marcos. CenturyTel still refuses to allow its users to call ASAP's users unless they dial 1+ and pay a toll.

In the course of its decision, TPUC interpreted certain statutory provisions concerning Expanded Toll-Free Local Calling Areas contained in the Texas Public Utility Regulatory Act (Tex. Util. Code ["PURA"] §§ 55.041-55.048) [Exhibit 2]. Those provisions address the creation of Expanded Local Calling Area Service ("ELCS") in Texas. TPUC has also adopted certain administrative rules to implement ELCS requests [Exhibit 3; also includes certain relevant definitions set out in TPUC substantive rules]. While these statutory and rule provisions do not on their face conflict with federal law, TPUC's application of them results in a denial of federal rights held by ASAP, ASAP's customers, and ILEC users seeking to call ASAP's customers. To that extent the state statute and the TPUC rules must be preempted.

TPUC also asserted regulatory jurisdiction over a service that ASAP provides to several ISPs. Those ISPs used 5 otherwise fallow numbers out of each 10,000 number NXX block in issue. TPUC has ordered ASAP to either submit to state regulatory jurisdiction or cease providing this service. This is so despite this Commission's consistent holdings that PSTN connectivity provided to ISPs is interstate access subject to exclusive FCC authority.

TPUC has unreasonably and unlawfully encroached on federal law by (1) violating ASAP's rights to interconnection and numbering resources; (2) blessing CenturyTel's violation of the local dialing parity rule; (3) violating CenturyTel customers' right to call customers of other carriers on a local **retail rated** basis; (4) violating ASAP customers' right to be called by CenturyTel customers on a local **retail rated** basis; and (5) asserting regulatory authority over an interstate service that is subject to this Commission's exclusive jurisdiction. The FCC must preempt the Texas Commission and require TPUC and CenturyTel to honor federal law as it pertains to **retail rated** local calling to CMRS users with numbers that are "local" to the landline user. The FCC must also preempt the Texas Utility Code and the TPUC rules to the extent they

are interpreted in a manner that conflicts with federal law, including an interpretation that requires ASAP to submit to state regulation for the services it provides.

The TPUC proceeding resulted in a considerable record, including prefiled testimony, exhibits admitted into hearing, cross-examination (*i.e.*, the evidentiary record) and filings by the parties, ALJ and Commission (*i.e.* the administrative record). This Petition cites to some of the information contained in the record and some of that material is attached hereto. ASAP will work with TPUC and CenturyTel to distill the administrative and evidentiary record and provide additional information as this matter proceeds.

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PETITION FOR PREEMPTION

ASAP Paging, Inc., by its counsel and pursuant to Federal Communications Commission (“Commission” or “FCC”) Rule 1.1, 47 C.F.R. § 1.1, § 253 of the Telecommunications Act of 1996, § 332(e)(3) of the Communications Act⁴ and the FCC’s inherent power to preempt state law that unlawfully intrudes on or interferes with federal authority, respectfully requests that the Commission: (1) preempt the October 9, 2003 order of the Public Utility Commission of Texas (“TPUC”) in PUC Docket 25673 [Exhibit 1]; (2) preempt certain provisions of the Texas Public Utility Regulatory Act [Exhibit 2]; (3) preempt certain TPUC substantive rules, and (4) require the TPUC and CenturyTel of San Marcos, Inc. (“CenturyTel”) to honor federal law as it pertains to **retail rated** local calling to CMRS users with numbers that are “local” to the landline user. ASAP also seeks an order preempting TPUC’s attempt to require that ASAP submit to state regulation for an exclusively interstate service over which TPUC has no jurisdiction.

⁴ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et. seq.*). ASAP also relies on § 332 of the Communications Act (which preexisted the 1996 amendments but was also slightly amended) and 47 C.F.R. Parts 20 and 51.

I. FACTS

A. Statement of Interest

ASAP is a family-owned facility-based carrier in Texas that initiated operations in 1989. ASAP provides one-way CMRS services throughout central and south Texas. Central Texas customers receive service via a Class 5 switch/paging terminal. ASAP connects to the wired world using a "Type 2" interconnection arrangement through SBC-Texas' Austin Greenwood and Homestead tandems.⁵ Since it is a CMRS carrier, ASAP is entitled to and has received NANPA-issued NXXs in several central Texas rate centers⁶ where ASAP has FCC-issued spectrum authorizations and wireless coverage.⁷ At the time of hearing, each of these NXXs "routed" to ASAP's Austin switch for termination. The subset of ASAP's Austin LATA NXXs

⁵ TPUC Final Order FOF No. 12 ASAP is therefore indirectly interconnected with CenturyTel, which is perfectly permissible. See First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15591 ¶ 997 (1996) ("Local Competition Order"); see also *In the Matter of Petition of WorldCom, Inc., et al., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Arbitration*, 17 FCC Rcd 27039, 27085 DA 02-1731 ¶ 88 (Rel Jul. 2002) ("Virginia Arbitration Order") [Wireline Competition Bureau]. CMRS carriers that interconnect via Type 2 have their own Class 5 switch that subtends a LATA tandem. The CMRS carrier directly obtains NXXs and associates them with various rate centers. Those numbers reside in the CMRS switch. Connection to the tandem provides access to all other end offices that subtend that tandem, and all other tandems that are connected to that tandem (including those of LECs other than the tandem operator). With Type 1 interconnection, the CMRS provider uses numbers that reside in an ILEC end office switch and obtains local access to all numbers that are local to the ILEC end office switch, including ELCS and mandatory EAS arrangements. See, e.g., *In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, ¶ 105 FCC 94-145, CC Docket No. 94-54, RM-8012, 9 FCC Rcd 5408, 1994 FCC LEXIS 3181 (Rel Jul. 1, 1994). ("CMRS Equal Access Obligations").

⁶ "A 'rate center' is a geographic area established by state regulators that is used to determine whether a given call is a local call or a toll call." Opposition of The Federal Communications Commission to Emergency Motion for Stay, *USTA v FCC*, No. 03-1414 Before D.C. Circuit Court of Appeals, filed Nov 26, 2003, p. 3 The significance of NXX rate center assignments to **retail rating** should be well understood by now.

⁷ A CMRS carrier's "'coverage area' is the area in which wireless service can be received from the wireless carrier." Memorandum Opinion and Order, *In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket 95-115, FCC 03-284 ¶ 22 (Nov. 10, 2003) ("Wireline-Wireless Portability Order").

in issue in this case are those associated with the Kyle, Fentress and Lockhart⁸ rate centers, and listed as such in the Local Exchange Routing Guide (“LERG”) and Business Integrated Routing and Rating Database System (“BIRRD”).⁹

ASAP operates 20 transmitters throughout central and south Texas.¹⁰ These transmitters are part of ASAP’s extensive physical network that provides “coverage” in – among other places – Kyle, Fentress, San Marcos¹¹ and Lockhart.¹² ASAP has paging customers that are physically located in, or have a specific need to be reachable on a “local” **retail rated** basis from, wireline end users in each of those communities. ASAP has facilities in (or near enough to “cover”) each of those communities. Even though it does not make any difference, ASAP does have many customers that are physically present in those communities, at least part of the time, and calls from San Marcos to those customers often do both originate and complete within the ELCS area

⁸ Kyle, Fentress and Lockhart are part of an extended local calling area that includes San Marcos (where CenturyTel operates) that was created by TPUC pursuant to PURA §§ 55.041-55.048 in TPUC Project No. 13267. This Commission has ruled that ELCS is “traditional local service” for federal purposes for so long as any surcharge is flat-rate and non-optional. *In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations* FCC 97-244, CC Docket No. 96-159, File Nos. NDS-LM-97-2 through NDS-LM-97-25, Memorandum Opinion and Order, note 4 and ¶¶ 14, 18, 20-21 (Jul. 1997) (“*ELCS LATA Modifications*”).

⁹ CenturyTel is the only Texas ILEC with who ASAP has had any difficulty. SBC and Verizon route calls to ASAP’s NXXs in ELCS areas, and both **retail rate** calls as local, including calls within the ELCS area in question

¹⁰ TPUC Final Order FOF No. 17 (this TPUC Final Order FOF incorrectly refers to “paging terminals” rather than “transmitters”).

¹¹ This is not just an “ELCS” (*i.e.*, San Marcos to Kyle, Fentress or Lockhart) case. ASAP has San Marcos paging and ISP customers and needs its San Marcos customers to be reachable on a local calling basis by callers in San Marcos. ASAP can conserve NXXs by using its Kyle, Fentress or Lockhart numbers to provide service to ASAP customers who have a specific relationship to San Marcos. ASAP at one point had a San Marcos NXX but relinquished that NXX to NANPA. This relinquishment contributed to the industry’s efforts to avoid NXX exhaust within the 512 NPA. Int. Hng. Tr. p. 46; ASAP Exh. 44 (Gaetjen Reb.) p. 10.

¹² TPUC Final Order FOF 18 contains the revelation that “there is no landline connection between San Marcos and ASAP’s Lockhart transmitter. Instead, all broadcast pages are directed to this transmitter from a satellite to a satellite dish located at the transmitter.” But clearly, there are facilities in the area that provide service in the area to customers in the area; they are not wireline facilities because ASAP is a wireless carrier. TPUC is punishing ASAP for being wireless and not having wireline facilities “in” the ELCS area.

at the time of the call.¹³

ASAP's switch/paging terminal connects to its transmitters over the Internet. When a call comes in from the PSTN, it hits the switch and, after processing by the switch/terminal,¹⁴ the information that needs to reach a particular pager is routed over an Internet connection to a satellite uplink in Chicago. The satellite transponder then broadcasts to ASAP's transmitters, each of which "fire" simultaneously in an attempt to reach the paging unit in issue and deliver the information. ASAP's paging customers can also receive pages launched from the Internet. The Internet and connections to ISPs are essential to ASAP's core paging operations.

ASAP also provides connections to five ISPs. Each ISP uses **one** number in ASAP's 10,000 number NXX blocks in issue. When a wireline customer calls one of these ISPs in order to access the Internet, ASAP processes the call and hands it off to the ISP over a dedicated DS1 connection. The ISP takes it from there. One of the ISPs is San Marcos Internet. San Marcos Internet's "premise" (as defined in PUC Subst. R. 26.5(156)) *see* Exhibit 3) is physically located in San Marcos.¹⁵

¹³ At the time of the hearing, for example, ASAP had 83 "paging" customers using an ASAP Lockhart number. Customers like doctors and electric utility personnel that use pagers in their important work. Customers like medical patients on organ transfer lists that are waiting for "the call" and to whom ASAP provides free service. ASAP Exh. 9 (Gaetjen Direct) p. 2. Contrast this to the 5 ISPs that used a Lockhart number. ISPs only use 6% of ASAP's "in use" Lockhart numbers. *Cf.*, TPUC Final Order FOF No. 41.

¹⁴ With a paging call, the calling party can leave a call back number or a voice message. If the calling party chooses to leave a call back number, then the system records that number and sends a signal to alert the paging unit with the number to be called. If the calling party leaves a voice message, the system sends a signal to alert the paging unit that a message is waiting. The paging customer then dials in to the system – by dialing the paging customer's number – and retrieves the message. ASAP also supports Internet-based paging and a number of other "information" services such as text-based alerting or news and information. ASAP Exh. 44 (Gaetjen Reb.) pp. 14-15. The Internet is an integral part of ASAP's core services. The TPUC Final Order wrongly differentiates ASAP's use of spectrum from the Internet that supports it and the ISPs that are inexorably linked to the way that ASAP does business.

¹⁵ When a CenturyTel San Marcos user dials a number used by San Marcos Internet, the call is handed off from ASAP to San Marcos Internet and San Marcos Internet hauls the call to San Marcos. San Marcos Internet performs authentication in San Marcos. San Marcos Internet's customers retrieve email from an email server in San Marcos (regardless of wherever in the world the email was originated). San Marcos Internet's Domain Name Server is in San Marcos. If the NXX rate center assignment is not important and the physical location of the ISP at the time of the call is determinative, then San Marcos

B. Actions Leading To This Petition

CenturyTel voluntarily began to route calls to ASAP's Lockhart NXX on a **retail rated** "local" basis in October of 2001. This continued until April 1, 2002, at which point CenturyTel unilaterally changed the translations in its San Marcos switch. After the retranslation, CenturyTel end users who attempted to dial an ASAP Lockhart NXX were required to dial 1+, and if the 1+ call was made, the CenturyTel end user was assessed intraLATA toll charges.¹⁶

ASAP filed a complaint with TPUC on April 2, 2002, and asked the state commission to order CenturyTel to stop requiring its users to dial 1+ and pay toll to reach ASAP's Kyle, Fentress or Lockhart numbers. An Administrative Law Judge ("ALJ") granted interim relief to ASAP on April 18, 2002 [Exhibit 4]. The case was then tried on the merits. The ALJ issued a Proposal for Decision ("PFD") on April 24, 2003 [Exhibit 5] denying relief to ASAP. TPUC issued its Final Order [Exhibit 1] on October 9, 2003. In large part the Final Order reached the same result as recommended by the PFD, but TPUC changed some of the findings and conclusions and provided an explanation for the changes it made. ASAP filed a motion for rehearing raising many of the same points addressed in this Petition on October 30, 2003 [Exhibit 6]. TPUC did not consider ASAP's motion for rehearing and it was overruled by operation of state law on November 27, 2003.

After the Final Order was issued, but ASAP's motion for rehearing was overruled by operation of law, ASAP notified CenturyTel that it had placed a new switch within the ELCS area. This was done in an attempt to secure **retail rated** local calling from San Marcos to ASAP's Kyle numbers. The TPUC Final Order held that the location of the CMRS switch would

Internet was not in Austin but is instead in San Marcos. ASAP Exh. 43 (Goldstein Reb.) p. 4; ASAP Exh. 44 (Gaetjen Reb.) pp. 9-13. Obviously, San Marcos is "local" to San Marcos. The TPUC Final Order wrongly "deems" San Marcos Internet to not be in San Marcos.

¹⁶ TPUC Final Order FOF No. 42. The retranslation occurred in the dark of night on April 1, without notice. In fact, the retranslation was performed the day before ASAP received CenturyTel's notice that it intended to begin imposing toll thirty days later, or on May 3 unless the parties entered into a § 252 interconnection agreement. ASAP Exh. 44 (Gaetjen Reb.) p. 18, lines 15-20.

be used as a proxy for the CMRS user's location to determine **retail rating**. Since ASAP's initial switch was in Austin, and Austin is not "local" to San Marcos, TPUC had reasoned that calls from San Marcos to ASAP's Kyle, Fentress and Lockhart NXXs were not local for **retail rating** purposes. ASAP's additional switch was placed in Kyle, which *is* within the ELCS area. Under TPUC's holding, calls from San Marcos that were processed by ASAP's Kyle switch should be **retail rated** local since the switch is located in the ELCS area. CenturyTel still refused to **retail rate** calls from San Marcos to ASAP's new switch as local [Exhibit 7]. CenturyTel indicated that unless and until ASAP entered into an interconnection agreement with CenturyTel, calls from San Marcos to ASAP's NXXs would continue to be **retail rated** as toll, regardless of the location of ASAP's switch.

TPUC also ruled that the service that ASAP provides to ISPs was one that required TPUC regulation. TPUC ordained that "ASAP is ORDERED to file for registration with the (Texas Public Utility) Commission under PURA § 52.103 and P.U.C. Subst. R. 26.107 for the wireline service that ASAP provides to Internet service providers. Alternatively, ASAP shall cease such services." This Commission has held on several occasions that service to ISPs is an interstate access service and subject only to federal authority.

II. ARGUMENT

A. Authority for Federal Preemption of State Law, Regulation or Ruling

The Supremacy Clause in Article VI of the U.S. Constitution provides Congress with the power to preempt state law.¹⁷ Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an actual or outright conflict between federal and state law, where compliance with federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively (thus occupying an entire field of regulation and leaving no room

¹⁷ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

for the States to supplement federal law), or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.¹⁸

Congress specifically provided for Commission preemption of state law in § 253 of the 1996 Act:

SEC. 253. [47 U.S.C. 253] REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL.--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.

(b) STATE REGULATORY AUTHORITY.--Nothing in this section shall affect the ability of a State 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.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY.--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.

(d) PREEMPTION.--If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) COMMERCIAL MOBILE SERVICE PROVIDERS.--Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers.

(f) RURAL MARKETS.--It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and

(2) to a provider of commercial mobile services.

Section 253(a) is an express preemption provision. It was added as part of the 1996 amendments. The Commission was also granted express authority to preempt state entry and rate

¹⁸

Id. at 368-69.

regulation of CMRS service in the Omnibus Budget Reconciliation Act of 1993, which provides in pertinent part:

[§ 332(c)](3) STATE PREEMPTION.--(A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services...

Even before §§ 253(a) and 332(c)(3) existed, the FCC had the implied power to preserve its authority in the face of state encroachment. For example, in 1988 the Commission preempted a TPUC decision that prevented a user from exercising its rights to employ private microwave facilities to connect to the PSTN via Southwestern Bell in Dallas, even though much of the customer's usage occurred in Plano, which was certificated to GTE.¹⁹

Regardless of whether one proceeds under §§ 253 and/or 332(c)(3) or the Commission's preexisting implied authority, it is clear that if a state statute or regulation or ruling prevents an entity from providing a competitive service, including a CMRS service, it must fall. The competitive services in issue here are paging services to "customers who carry a pager" and number aggregation service (the functional equivalent of LEC-provided foreign exchange service) to ISPs. Both of these services must be able to offer **retail rated** local calling to those persons that wish to communicate with the recipient; otherwise the service will not be marketable. **Retail rated** local calling to competitive carriers' numbers is an essential aspect of the service and without it competitive service is simply not possible.

¹⁹ This was back in the comfortable old monopoly days when areas were singly certificated to incumbent LECs. GTE and TPUC asserted that SWBT was intruding on GTE's territory by providing connectivity to the customer in Dallas, who then used private microwave facilities to extend service into Plano. The FCC preempted, and the courts affirmed. Memorandum Opinion and Order, *In Re Atlantic Richfield Co.*, 3 FCC Rd. 3089 (1988), *aff'd PUC of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989). TPUC is once again acting like "a modern day King Canute seeking to hold back new technological waves." 886 F.2d at 1335, n.10.

The TPUC Final Order requires ASAP to expend unnecessary resources to place a switch in every rate center where it has an NXX, if it wants **retail rated** local calling to its customers.²⁰ But CMRS carriers are not required to replicate the landline network; they are entitled under federal law to interconnect at the LATA tandem and collect **retail rated** local calls to various NXXs associated with each local calling area in the LATA. The expenditure that would be required to redesign ASAP's wireless network in order to create a wireline replicant would be significant and necessary only for non-technical reasons. TPUC has effectively eliminated Type 2 interconnection and has overturned the rate center assignments ASAP made to various areas where it has spectrum authority, by functionally reassigning all of ASAP's NXXs to only those rate centers where ASAP has a switch. TPUC, however, does not have this power. TPUC has also allowed CenturyTel to ignore ASAP's rate center assignments and impose **retail rated** toll charges on CenturyTel customers when they call an ASAP customer. TPUC and CenturyTel have simply ignored the Commission's dialing parity rule. TPUC's decision and interpretation of state law has the effect of preventing ASAP from providing its CMRS services to customers within its licensed area unless it gives up several important federal rights.

States cannot intrude on the FCC's exclusive authority over *interstate* services. The FCC's exclusive jurisdiction over interstate communications "indicates an intent by Congress to occupy the field to the exclusion of state law."²¹ "Interstate communications are totally entrusted to the FCC...The dividing line between the regulatory jurisdictions of the FCC and states depends on 'the nature of the communications which pass through the facilities [and not on] the

²⁰ Even if ASAP does place a switch in each such area, it is clear that CenturyTel will still refuse to **retail rate** calls as local unless and until it is compelled to do so. See Exhibit 7.

²¹ See *Ivy Broadcasting v. AT&T*, 391 F.2d 486, 490 (2nd Cir. 1968). This exclusive jurisdiction is grounded in the Communications Act, as amended. 47 U.S.C. § 152(a) applies to "all interstate and foreign communication by wire or radio." The savings clause in § 152(b) is no help, because it reserves state jurisdiction only to "intrastate" communications.

physical location of the lines.”²² “It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC.”²³ “The states do not have jurisdiction over interstate communications.”²⁴ The FCC has preempted state statutes and state regulatory actions that attempted to intrude on the FCC’s exclusive interstate authority.²⁵ ASAP’s service to ISPs is incidental to its core CMRS services. In any event, PSTN connectivity to ISPs is an interstate access service not subject to state regulation.

TPUC and CenturyTel have functionally prevented ASAP from providing its CMRS service by eliminating **retail rated** local calling to ASAP’s local numbers and frustrating ASAP’s exercise of its interconnection rights. TPUC’s assertion of regulatory power over ASAP’s incidental CMRS service to ISPs is a clear attempt to regulate and prevent competitive entry. This Commission must preempt in order to preserve ASAP’s rights, ASAP’s customers’ rights and the rights of CenturyTel’s customers who desire to reach ASAP’s customers on a **retail rated** local basis.

B. Specific Violations of Federal Rights.

There are four basic problems with the TPUC Final Order. First, the TPUC Final Order wrongly imposes wireline concepts on wireless, mobile service²⁶ and by doing so it deprives

²² *NARUC v. FCC*, 746 F.2d 1492, 1498 (DC Cir. 1984) (and cases cited therein).

²³ *AT&T Communications v. Wyo. PSC*, 625 F.Supp. 1204, 1208 (USDC Wyo., 1985).

²⁴ *AT&T and the Associated Bell Sys Cos Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exchange Service in Common Control Switching Arrangements (CCSA)*, 46 F.C.C.2nd 14, 20 (1975), *aff’d California v FCC*, 567 F.2d 84 (D.C.Cir.1977) *cert. den.* 434 U.S 1010.

²⁵ *In the Matter of Operator Services Providers of America Petition for Expedited Declaratory Ruling*, FCC 91-185, 6 F.C.C.R 4475 (Rel. Jul. 1991); Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp.*, 7 F.C.C. Rcd 1619 (1992) (“*MemoryCall*”)

²⁶ “[T]he services provided by LECs and CMRS carriers have an essential difference: the wireline phone is tied to a single physical location, whereas the wireless phone can travel at will.” Opposition of The Federal Communications Commission to Emergency Motion for Stay, *USTA v. FCC*, No. 03-1414 Before D.C. Circuit Court of Appeals, filed Nov. 26, 2003, p. 15.

ASAP, ASAP's customers and CenturyTel's customers that call one of ASAP's numbers several rights related to CMRS that are guaranteed by federal law. Second, the TPUC Final Order confuses the essential distinction between **retail rating** and *wholesale carrier compensation* concerning calls from a wireline customer to a customer that may or may not be physically located within the same mandatory local calling area at the time of the call. Third, the TPUC Final Order misconstrues the character of "ELCS" and the duties of ILECs servicing an "ELCS" area, at least for federal purposes: ELCS is basic local service and cannot be some special arrangement reserved only to ILEC customers that call other ILEC customers. Fourth, the TPUC Final Order errs in its conclusions concerning state regulatory authority over the service that ASAP provides to its ISP customers.

The TPUC Final Order cannot be reconciled with prevailing law. The Texas statutes and administrative rules [Exhibits 2 and 3] addressing the creation of ELCS are merely the procedural method to expand a previously existing mandatory local calling scope for basic service to wireline customers; they are not substantive criteria that apply to individual calls after the mandatory local calling area is expanded. Once the scope is expanded, then the entire area becomes – at least for federal purposes – a "single local calling area" for service "within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange."²⁷ After expansion of a local calling area, all the regular rules concerning competition – for both CLECs and CMRS – must be applied. Calls to an NXX associated with the same mandatory local calling area (including an "ELCS" area) must be **retail rated** as local.²⁸ "ELCS"

²⁷ See 47 USC § 153(47) [definition of "Telephone Exchange Service"].

²⁸ There are *wholesale carrier compensation* issues that arise when the called party is not physically located within the calling party's local calling area at the time of the call. A **retail rated** local call may – on occasion – not be subject to § 251(b)(5) reciprocal compensation. This case revolves entirely around **retail rating** to a wireline customer calling a CMRS number. The TPUC Final Order confuses **retail**

is not an interexchange or “telephone toll” service. It is basic local service; every basic service customer receives the expanded local calling scope and is required to pay the mandatory flat monthly surcharge for local service.²⁹ An ILEC’s basic local service end user cannot opt out of ELCS.

Not only is the TPUC Final Order inconsistent with federal law and precedent, it adopts a clearly improper policy approach. ILECs will now be able to ignore the rate center assignments of NXXs held by competitive carriers and obtained pursuant to federal authorizations. The decision to “deem” ASAP’s Kyle, Fentress and Lockhart numbers to “really” be Austin numbers is wholly contrary to ASAP’s federal right to numbering resources, over which this Commission has exclusive jurisdiction.³⁰ ILECs will be able to retranslate their switches for entire NXX blocks in the dark of night, without notice. ILECs will have the unilateral right to refuse “local” **retail rating** for calls to disfavored competitors.

Competitive carrier networks are considerably different from ILEC networks in that a single Class 5 switch will hold NXXs that are rate centered in several different local calling areas.³¹ Under the TPUC Final Order, however, calls from ILEC end users to competitive carrier customers will be **retail rated** as toll unless the competitive carrier’s switch happens to be located within the same mandatory local calling area (including ELCS) as the calling ILEC customer.³² The automated BIRRDS call rating system based on NXXs and rate centers

rating with the *wholesale carrier compensation* principles the TPUC Final Order correctly rules are not in issue in this case.

²⁹ *ELCS LATA Modifications*, note 4 and ¶ 14 [Texas ELCS is basic local service]. The fact that ELCS has a separately stated surcharge does not make it “un” basic. ELCS charges and ELCS “service” are all part of telephone exchange service, *i.e.*, traditional basic local service.

³⁰ *See* 47 USC § 251(e)(1); 47 C.F.R. § 52.15.

³¹ *See* ASAP Exh. 10 (Goldstein Dir.) pp. 6-7; ASAP Exh. 43 (Goldstein Reb.) pp. 23-25.

³² CenturyTel has indicated it will still not local **retail rate** calls routed to ASAP’s new switch that is inside the ELCS area, despite what the TPUC Final Order says. *See* Exhibit 7. Therefore, the Commission must also expressly grant relief against CenturyTel.

uniformly used by the entire industry will no longer be the authoritative source for determining **retail rating**.³³

All of this will occur merely so that CenturyTel can exercise some perceived entitlement to abuse its own end users by imposing additional costs when those users have the temerity to call someone who uses a disfavored competitor. It is uncontested that when CenturyTel routes a call to one of ASAP's numbers, CenturyTel incurs exactly the same costs as it does when it routes an "ELCS" call to SWBT or Verizon. CenturyTel does not have any "out of San Marcos" transport responsibility.³⁴

³³ See CO Code Guidelines, p 5 [Attachment WR-3 to CenturyTel Exh. 3]. This Commission has referred to the fact that the calling and called NXXs are the determinant for **retail rating** of calls on several occasions. In ¶ 17 of the Memorandum Opinion and Order in *Starpower Communications v. Verizon South, Inc*, File No EB-00-MD-19, FCC 03-278 (Nov. 7, 2003) ("*Starpower Liability Order*") the Commission noted that "at all relevant times, industry practice among local exchange carriers similarly appears to have been that calls are designated as either local or toll by comparing the NPA-NXX codes of the calling and called parties." The Memorandum Opinion and Order in *In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket 95-115, FCC 03-284 (Nov. 10, 2003) ("*Wireline-Wireless Portability Order*") notes in ¶ 11 that "...because wireless service is mobile and not fixed to a specific location, while the wireless number is associated with a specific geographic rate center, the wireless service is not limited to use within that rate center." The same decision in ¶16 reiterates that the current industry practice is to **retail rate** calls based on the NXXs involved. The FCC then held, in ¶ 28: "(w)e conclude that porting from a wireline to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number does not, in and of itself, constitute location portability, because the rating of calls to the ported number stays the same. As stated above, a wireless carrier porting-in a wireline number is required to maintain the number's original rate center designation following the port. As a result, calls to the ported number will continue to be rated in the same fashion as they were prior to the port. As to the routing of calls to ported numbers, it should be no different than if the wireless carrier had assigned the customer a new number rated to that rate center." The Memorandum Opinion and Order in *In the Matter of Telephone Number Portability, Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, CC Docket 95-115, FCC 03-237 (Oct. 7, 2003) ("*Wireless-Wireless Portability Order*") provides in ¶ 22 that "(b)ecause wireless service is spectrum-based and mobile in nature, wireless carriers do not utilize or depend on the wireline rate center structure to provide service: wireless licensing and service areas are typically much larger than wireline rate center boundaries, and wireless carriers typically charge their subscribers based on minutes of use rather than location or distance." This Commission, therefore, has clearly recognized that CMRS carriers obtain and assign NXXs only to secure the desired **retail rating** of wireline-wireless calls and it has required wireline carriers to **retail rate** calls from their customers to wireless customers based on rate center assignments and not the physical location of the called wireless customer at the time of the call. These recent decisions, however, are nothing new: as demonstrated below, they merely reiterate what has been the rule ever since RCCs were first given interconnection rights.

³⁴ TPUC Final Order FOF Nos. 49, 50; Int. Hng. p. 206; Hng. Tr. pp. 473, 487-8, 494-5, 504-5, 510, 536-7; ASAP Exh. 43 (Goldstein Reb.) pp. 11, 25, 28.

This case is entirely about CenturyTel's perceived entitlement to be paid either toll or access whenever one of its users calls a competitor's customer. CenturyTel witness Smith confessed that this case was not about cost recovery, but rather a perceived revenue entitlement to toll or access for calls to competitors:

2 Q What I'm trying to say is the
 3 importance of separate trunk groups and separate
 4 terminations is that there may be separate
 5 appearances on a switch. They may be on one
 6 part of a switch as opposed to another part of a
 7 switch. But if they all ride on the same fibers
 8 and all go to the same place, and they go in the
 9 same group of fibers, as it pertains to
 10 transport, the cost is going to be the same,
 11 isn't it?
 12 A The cost from one point to another.
 13 but the recovery is different. (Emphasis added)³⁵

This discriminatory and anticompetitive result is not lawful. It is unjust, unreasonable, contrary to public policy and directly violates federal law.

The TPUC Final Order, along with PURA §§ 55.041-55.048 and PUC Substantive Rules 26.219 and 26.221 must be preempted.

C. Preemption Points.

Preemption Point No. 1: The TPUC Final Order incorrectly categorizes ELCS as it pertains to federal law. As a matter of federal law ELCS is traditional telephone exchange service once it is created under state law.

TPUC Final Order pages 5-8; Finding of Fact Nos. 20, 20A, 33, 36-39, 43-51; Conclusions of Law Nos. 18-39; Ordering Paragraphs 1-3, 5.

The TPUC Final Order denominates ELCS as a "special arrangement" that is not traditional basic local service. The TPUC Final Order effectively prevents any competitive carrier from "participating" in the **retail rating** aspect of ELCS unless both the calling and called party are physically within (or deemed to be within) the ELCS area at the time of an individual call. If this characterization is accepted, then future ELCS requests that require SBC to seek a

³⁵ Hng. Tr. p. 510 (emphasis added). See also ASAP Exh. 43 (Goldstein Reb.) p. 10, 1, 14-15.

limited modification of LATA boundaries in Texas cannot be approved, since this Commission has consistently characterized Texas ELCS as basic local service and has granted LATA boundary modifications based on that now-incorrect characterization. The fact that competitive carriers will be precluded from “participating” in ELCS areas unless they can demonstrate that the customer is physically located within the ELCS area at the time of the call, but incumbent carriers will not have that burden is so obviously discriminatory and anticompetitive that this Commission will have to deny the LATA boundary modification. What should be more troubling is that TPUC has stood by and allowed this Commission to approve LATA boundary modifications based on an incorrect understanding of the nature of Texas ELCS.

The logic of the TPUC Final Order is wrong, however. First, it incorrectly uses the statutory procedural criteria for the initial expansion of the mandatory local calling scope to develop substantive rules that apply to specific calls after the area is expanded.³⁶ After the area is expanded, then all the normal rules of local **retail rating** must apply. Second, The TPUC Final Order confuses the principles and rules of **retail rating** with those that apply to *wholesale carrier compensation*. **Retail rating** (as opposed to *wholesale carrier compensation*) does not depend and has never depended on the physical location of the called party at the time of the call. While the physical location of the calling and called parties has some relevance to *wholesale carrier compensation*, it does not affect **retail rating** in any way. The industry uses the rate center assignments of the originating and terminating NXXs – not physical location – to determine **retail rating**. This Commission³⁷ and the North American Numbering Council³⁸ both

³⁶ See TPUC Final Order at p. 6; TPUC Final Order FOF No. 19.

³⁷ *Wireline-Wireless Portability Order, supra* at ¶¶ 11, 16, 28; *Wireless-Wireless Portability Order, supra* at ¶ 22, *Starpower Liability Order, supra* at ¶ 17; Notice of Proposed Rulemaking, *In the Matter of Numbering Resource Optimization; Connecticut Department of Public Utility Control Petition for Rulemaking to Amend the Commission's Rule Prohibiting Technology-Specific or Service-Specific Area Code Overlays; Massachusetts Department of Telecommunications and Energy Petition for Waiver to Implement a Technology-Specific Overlay in the 508, 617, 781, and 978 Area Codes; California Public Utilities Commission and the People of the State of California Petition for Waiver to Implement a*

recognize this to be so. The TPUC Final Order, however, allows CenturyTel to ignore ASAP's rate center assignments; indeed, the TPUC Final Order functionally reassigns ASAP's Kyle, Fentress and Lockhart numbers to the Austin rate center. This violates ASAP's federal rights, since ASAP was entitled under federal law to obtain NXXs in the Kyle, Fentress and Lockhart NXXs and thereby obtain local **retail rating** for calls from all wireline customers within the mandatory local calling area associated with those numbers.

A. ELCS is "basic local service" since it expands the mandatory calling scope. Once ELCS is approved, calls to users – including ISPs – are "local" for retail rating purposes, at least under federal law. This applies whether the called party is served by an ILEC (such as CenturyTel) or a competitive carrier.

TPUC consistently treated ELCS as the telephone exchange service that it quite clearly is³⁹ – until now. An ELCS call is a "local" call under PUC Subst. R. 26.5(117) and a "local

Technology-Specific or Service-Specific Area Code, FCC 99-122, CC Docket No. 99-200; RM No. 9258; NSD File No. L-99-17, NSD File No. L-99-36, 14 FCC Rcd 10322, 1999 FCC LEXIS 2451, ¶ 112, n. 174 (Rel. Jun. 2, 1999) ("NRO NPRM"). See also Int. Hng. Tr. p. 199.

³⁸ North American Numbering Council LNPA Working Group Report on Wireless Wireline Integration, p. 33 May 8, 1998 (NANC Report to FCC) available at <http://www.fcc.gov/wcb/tapd/Nanc/rptnancr.doc>.

2.3 Wireless NXX Assignments

NXX codes that are assigned to wireless carriers are associated to a specific wireline rate center and are communicated via the LERG. These are assigned to wireline rate centers in order to accomplish land to mobile rating. However, once NPA-NXXs are assigned to a wireless carrier, wireless carriers may select any one of their NPA-NXXs when allocating numbers to a subscriber. The WSP may select a particular NPA-NXX value based on customer desires of calling areas for land to mobile calls, mobile to land calls, or a combination of both. Alternatively, a wireless carrier may choose to select an NPA-NXX value that is physically closest to the subscriber billing address. There are no state or federal requirements to associate an NPA-NXX for a new subscriber based on their residence, billing, or other location. (emphasis added)

Appendix D (Wireless Wireline Integration Task Force Rate Center Issue Position Paper) § 1.3, Part II.D.2:

Because most wireless applications include terminal mobility, there is no technical requirement for association of the telephone number and a geographic location of the user.

³⁹ See *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, TPUC Docket No. 16189, et al, Award at ¶ 58 (Nov. 8, 1996) ("First Mega-Arbitration Award"); *Complaint and Request for Expedited Ruling of Time Warner Communications*, TPUC Docket No. 18082, Order (Feb. 27, 1998); Project No. 16251, Order No. 55, Attachment 12 at ¶ 1.1. See also Evaluation of the Public Utility Commission of Texas, *In the Matter of Application of SBC Communications Inc., and Southwestern Bell Telephone Company, and Southwestern Bell*

message” under 26.5(121) [*see* Exhibit 3]. In federal terms, ELCS is service within a “connected system of telephone exchanges.”⁴⁰ The name alone (Expanded Local Calling Service) makes it clear that ELCS is “basic” local service. ELCS is not like optional EAS or FX and FX-like services, which are “comparable to, without becoming” local.⁴¹

This Commission has fairly routinely approved petitions by SBC for “limited modifications” of LATA boundaries in order to facilitate Texas ELCS. The FCC correctly considered ELCS to be nothing more than action by the state to expand the basic service local calling area so long as the expansion is mandatory and not optional.⁴² The TPUC Final Order’s characterization of ELCS as a “special arrangement”⁴³ instead of a simple expansion of the mandatory basic service calling area completely undercuts this Commission’s prior understanding of Texas ELCS. In any event treating ELCS as a special arrangement would still violate federal law since it would result in unreasonable discrimination and preferences and would violate the Commission’s local dialing parity rules.

Communications Services, Inc. D/B/A/ Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas Pursuant to Section 271 of the Telecommunications Act of 1996, CC Docket No. 00-4, at 88 (Jan. 31, 2000); Project No. 16251, Final Staff Report on Collaborative Process at 103-104 (Nov. 18, 1998); *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, TPUC Docket No. 21982 Revised Arbitration Award (Aug. 31, 2000); Final Order (March 5, 2001).

⁴⁰ See Federal Telecommunications Act of 1996 § 153(47).

⁴¹ *Consolidated Complaints and Requests For Post-Interconnection Dispute Resolution Regarding Inter-Carrier Compensation for “FX-Type” Traffic Against Southwestern Bell Telephone Company*, TPUC Docket No. 24015, Revised Award pp. 35-36 (Aug. 2002) (“*FX Docket*”).

⁴² *ELCS LATA Modifications, supra*. That case involved SBC in Texas. The FCC characterized ELCS, including the Texas version of ELCS, as “traditional local service.” ¶¶ 14, 18. The FCC refused to allow the modifications unless the service was mandatory. It had to be flat-rate and non-optional. ¶¶ 14, 20-21.

⁴³ TPUC Final Order p. 6.