

Before the  
Federal Communications Commission

In the Matter of )  
 )  
ASAP Paging, Inc. ) WC Docket No. 04-6  
 )  
Petition for Preemption of Public )  
Utility Commission of Texas )  
Concerning Retail Rating of Local )  
Calls to CMRS Carriers )

**COMMENTS OF THE  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> submits these comments in response to ASAP Paging, Inc.'s (ASAP) request that the Commission preempt an order of the Public Utility Commission of Texas (Texas PUC) and provisions of Texas law and regulation relating to the routing and rating of calls.<sup>2</sup>

NTCA respectfully submits that the issues presented in the ASAP petition are not appropriate for federal preemption. Further, even if the matter were appropriately addressed in the federal jurisdiction, the result ASAP request is contrary to law, regulation and sound public policy.

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> In the Matter of ASAP Paging, Inc. Petition for Preemption of Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Carriers, WC Docket No. 04-06 (December 22, 2003).

## I. BACKGROUND

ASAP offers paging and certain other services to customers in Texas. The numbering resources it uses appear to be within the local calling area of CenturyTel of San Marcos, Inc. (CenturyTel), but the switching facilities used are (or were) physically located in Austin, Texas. Normally calls from customers in the local calling area of CenturyTel to parties served by the Austin, Texas switch are toll calls. There are costs associated with transporting the traffic and CenturyTel is entitled to reimbursement for that transport. CenturyTel has a tariff for these charges and that tariff applies to all traffic traveling over the trunks carrying ASAP's customers' toll calls. CenturyTel programmed its switches so that CenturyTel's end users calling ASAP's customers must dial a 1+ prefix and incur toll charges, just as its end users would dial a 1+ prefix to dial any other customer served by a distant switch. The Texas state commission found that it was reasonable for CenturyTel to rate calls based on the physical location of ASAP's switch, rather than on the NXX dialed by the end user. It also concluded that CenturyTel acted lawfully when charging its own customers' toll charges. ASAP now asks the Commission to preempt the Texas PUC's decision.

## II. THE FCC LACKS AUTHORITY TO PREEMPT THE TEXAS PUC

ASAP correctly cites provisions of the law that permit this Commission to preempt certain state statutes and regulations.<sup>3</sup> Section 253 of the 1996 Act provides that the Commission may preempt legal requirements that prohibit or have the effect

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<sup>3</sup> ASAP Petition, p. 15.

of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.<sup>4</sup>

ASAP fails to explain how CenturyTel's practice of charging its own customers a toll charge prevents or has the effect of preventing ASAP from providing service. In fact, ASAP has not shown that the imposition of a toll charge on CenturyTel's customers negatively impacts ASAP in any way. ASAP also fails to explain why the alternatives to toll charges, such as direct interconnection, are not feasible.

ASAP acknowledges that it may get retail rated local calling if it interconnects in the rate center where it has an NXX. ASAP argues that it must be able to offer retail rated local calling to be marketable since without local calling competitive service "is simply not possible," but never explains why it does not interconnect directly and thereby offer retail rated local calling. ASAP offers assertions, but no evidence that the costs of interconnecting at rate centers is prohibitive. The fact that it may be more expensive for a carrier to interconnect directly is not "a barrier to entry" and does not demand federal preemption.

ASAP's reading of the law would force LECs to make significant new investments in transport facilities, and incur transport costs from other carriers with no mechanism to recover those costs other than increased charges to all of the LECs' end-users. However, Section 253 expressly permits a state to impose requirements necessary to preserve and advance universal service, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. ASAP's business plan permits it take a free ride on CenturyTel's facilities at the expense of CenturyTel's

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<sup>4</sup> § 253(a).

customers. The states must be permitted to protect their consumers and allow their LECs to recover their real and substantial costs of transporting traffic.

The Texas PUC found that it was reasonable for CenturyTel to rate calls based on the physical location of ASAP's switch, rather than the NXXs and to assess toll charges to the customers utilizing the transport between the San Marcos local calling area and the Austin switch. ASAP has provided no credible basis for FCC preemption of the State's decision to respect the CenturyTel tariff.

III. IF THE COMMISSION DECIDES THIS CASE ON THE MERITS, IT MUST FIND THAT CENTURYTEL HAS THE RIGHT TO IMPOSE 1+ DIALING

Assuming *arguendo* that this case is a federal matter and the Commission must decide the outcome of this proceeding based on the merits, it must find that CenturyTel and other similarly situated carriers are entitled to compensation when they must transport a call to a distant switch.

ASAP and other wireless carriers read the law to require LECs, including very small LECs, to transport traffic to far distant areas without compensation for the transport, termination, and switching costs incurred. ASAP's petition makes much of its so-called rights to local calling, but makes no mention of the LEC's rights to be compensated. ASAP understandably would like to offer customers in distant areas the ability to use its services at "free" local calling rates. But these services are not free and require that some carrier build and maintain facilities to transport the traffic. If ASAP is not willing to maintain the facilities, but CenturyTel is, CenturyTel should be permitted to rate the calls as toll or obtain compensation directly from ASAP and similarly – situated carriers.

IV. CONCLUSION

ASAP Paging Inc. opposes the decision of the Texas PUC permitting CenturyTel to honor its tariff and charge its own customers a toll charge when they call customers of ASAP. However, ASAP offers no credible basis for federal preemption and no sound public policy argument that would justify a decision contrary to that of the Texas PUC.

Respectfully submitted,

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March 23, 2004

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 04-6, DA 04-92 was served on this 23rd day of March 2004 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail Malloy

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