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February 9, 2010

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
ATTN: Enforcement Bureau
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: In the matter of ACD Telecom, Inc.; DayStarr, LLC; Clear Rate Communications, Inc.; TC3 Telecom, Inc.; and TelNet Worldwide, Inc. Joint Petition for Declaratory Ruling that the State of Michigan's Statute 2009 PA 182 is Preempted Under Section 253 and 254 of the Communications Act.

Dear Ms. Dortch:

Enclosed for filing is an original and 6 copies of ACD Telecom, Inc., DayStarr, LLC, Clear Rate Communications, Inc., TC3 Telecom, Inc., and TelNet Worldwide, Inc.'s ***Joint Petition for Expedited Ruling that the State of Michigan's Statute 2009 PA 182 is Preempted Under Sections 253 and 254 of the Communications Act.*** Also enclosed is the Proof of Service. Please contact me if you have any questions.

Very truly yours,

FIELD LAW GROUP, PLLC

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FRN: 0014574552

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enc.

Petitioners: ACD Telecom, DayStarr,
Clear Rate Communications,
TC3 Telecom, and TelNet Worldwide
State Entity: State of Michigan
Date: February 9, 2010

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

In the Matter of

ACD Telecom, Inc.; DayStarr, LLC; Clear Rate Communications, Inc.; TC3 Telecom, Inc.; and TelNet Worldwide, Inc.

Joint Petition for Expedited Declaratory Ruling that the State of Michigan's Statute 2009 PA 182 is Preempted Under Sections 253 and 254 of the Communications Act

Docket No. _____

_____/

JOINT PETITION FOR EXPEDITED DECLARATORY RULING THAT THE STATE OF MICHIGAN'S STATUTE 2009 PA 182 IS PREEMPTED UNDER SECTIONS 253 AND 254 OF THE COMMUNICATIONS ACT

February 9, 2010

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Petitioners: ACD Telecom, DayStarr,
Clear Rate Communications,
TC3 Telecom, and TelNet Worldwide
State Entity: State of Michigan
Date: February 9, 2010

SUMMARY

Pursuant to §§ 253 and 254 of the Communications Act of 1934 (the "Federal Act"), 47 U.S.C. §§ 253 and 254, ACD Telecom, Inc, ("ACD"); DayStarr, LLC, ("DayStarr"); Clear Rate Communications, Inc. ("Clear Rate"); TC3 Telecom, Inc. ("TC3"); and TelNet Worldwide, Inc. ("TelNet") (collectively "Petitioners") respectfully petition the Federal Communications Commission ("FCC" or "Commission") to preempt Michigan statute 2009 PA 182 ("Act 182") in its entirety, a copy of which is attached as Exhibit 1. Act 182 prohibits or has the effect of prohibiting the ability of the Petitioners, and other competitive local exchange carriers ("CLECs"), from providing interstate and intrastate telecommunications service because it establishes a state subsidy for a select group of incumbent local exchange carriers ("ILECs"), while excluding CLECs from the subsidy, even where CLECs otherwise meet all of the same criteria as the eligible ILECs. Thus, the Petitioners, all of whom are licensed telecommunications providers in the State of Michigan, are prohibited or effectively prohibited from providing competitive telecommunications services to customers of the select group of ILECs. Because on its face Act 182 limits the subsidy to *only* certain ILECs, Act 182 is not competitively neutral, and as such is not permitted under § 253(b) of the Federal Act, 47 U.S.C. § 253(b), and is contrary to § 254 of the Federal Act, 47 U.S.C. § 254. In addition, good cause exists for the Commission to expedite its consideration of the instant Petition. If the Commission does not act in an expedited manner, the public will be harmed because competition will not be able to exist in the smaller ILEC territories, and Petitioners will be harmed in that they will be required to make significant, unrecoverable expenditures to comply with Act 182's reporting and

tariffing requirements, they will be required to pay into the fund, and they will be placed at a severe competitive disadvantage.

I. Statement of Facts

Act 182, which became effective on December 17, 2009, amends § 310 of the Michigan Telecommunications Act ("MTA"), MCL § 484.2310. Exhibit 2 is the version of Act 182 as passed by the Michigan State Senate showing the revisions that Act 182 made to § 310 of the MTA.

Before the enactment of Act 182, § 310 of the MTA stated that access service rates that did not exceed the rates allowed for the same interstate services by the federal government were just and reasonable. *See* Exhibit 2, § 310(2). However, § 310 exempted basic local exchange service providers that had 250,000 or fewer customers in Michigan. *Id.* at deleted § 310(7). Thus, pursuant to the previous § 310, large Michigan LECs' intrastate access rates did not exceed their interstate access rates. However, because of their exemption, the smaller CLECs and ILECs were permitted to establish their intrastate access rates irrespective of their interstate access rates.[1] As a result, most smaller ILECs and CLECs in Michigan have historically set their intrastate access rates at levels higher than their interstate access rates.

Act 182 revised § 310 to remove the exemption upon which the smaller LECs had relied, and thus required that the Michigan LECs who had previously enjoyed the exemption to reduce their intrastate access rates to rate levels no higher than their interstate access rates. For "eligible providers," which, as will be discussed, are the smaller ILECs, the reduction commences within 270

[1] The rates that the smaller LECs can charge in Michigan are subject to other restrictions in the MTA. For example, § 311, MCL § 484.2311, requires providers to impute to themselves their access pricing.

days after the effective date of Act 182, or by September 13, 2010. *See* MCL § 484.2310(9). For the providers that are not "eligible providers," which are the smaller CLECs, the intrastate access rate reduction begins to be phased in on January 1, 2011. *See* MCL § 484.2310(2). This requirement will result in a significant loss of intrastate access revenues for those smaller ILECs and CLECs.

Act 182 explicitly discriminates against the smaller CLECs and explicitly favors the smaller ILECs. Act 182 establishes a state fund, called a "restructuring mechanism," to reimburse the smaller ILECs for their lost intrastate access revenues by paying them equal replacement revenues from the state fund. In contrast, the smaller CLECs cannot draw from this state fund under any circumstances, and, in fact, must contribute a percentage of their intrastate revenues to maintain and support the state fund and hence their ILEC competitors.

The only LECs eligible to receive monthly disbursements from the "restructuring mechanism" under Act 182 are "eligible providers." MCL § 484.2310(8) states:

> An eligible provider is entitled to receive monthly disbursements from the restructuring mechanism[2] as provided in subsection (11) in order to recover the lost intrastate switched toll access service revenues resulting from rate reductions under subsection (2).

Act 182 defines "eligible providers" as follows:

> "Eligible provider" means an *incumbent local exchange carrier* as defined in section 251 of the telecommunications act of 1996, 47 USC 251, that as of January 1, 2009 had rates for intrastate switched toll access services higher than its rates for the same interstate switched toll access services, and that provides the services and functionalities identi-

[2] The "restructuring mechanism" is "created and supported by a mandatory contribution by all providers of retail intrastate telecommunications services and all providers of commercial mobile service." MCL § 484.2310(12).

> fied by rules of the federal communications commission described at 47 CFR 54.101(a).

MCL § 484.2310(23)(c) (emphasis supplied).

From the above, it is clear that the Michigan Legislature restricted the ability to draw from the state fund (to replace lost intrastate access revenues), only to LECs that are able to meet the following three requirements: (1) as of January 1, 2009, the provider's intrastate access rates were higher than the provider's interstate access rates; (2) the provider offers services that would be eligible for federal universal service support as listed at 47 C.F.R. § 54.101; and (3) the provider is an ILEC. Accordingly, a CLEC that meets the first two conditions still cannot obtain funding under Act 182 because a CLEC is not an ILEC, and therefore cannot satisfy the third criterion.

On January 11, 2010, the Michigan Public Service Commission ("MPSC") issued an order initiating its implementation of Act 182. *In re the Commission's own motion, to implement 2009 PA 182, MCL 484.2310*, Case No. U-16183 (Jan. 11, 2010 Order) (the "MPSC Order"). The MPSC Order is attached as Exhibit 3. As the MPSC stated:

> The [MPSC] has been charged with establishing "the procedures and timelines for organizing, funding, and administering the restructuring mechanism." MCL 484.2310(10). As part of the administrative duties, the [MPSC] needs to collect data, including confidential data, from providers, determine eligible providers' distributions, and issue an order establishing the contribution percentage.

MPSC Order at 3. Accordingly, the MPSC Order requires all providers to submit substantial data to the MPSC by February 16, 2010. *Id.* at 6-7.

II. Argument

A. Section 253(d) of the Federal Act requires the Commission to preempt state statutes that violate § 253(a) of the Federal Act.

Section 253(d) of the Federal Act, 47 U.S.C. § 253(d), states:

> 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) of this section, the Commission *shall preempt* the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. (Emphasis supplied.)

Thus, the Commission is required to preempt a state statute where the Commission finds that the statute violates §§ 253(a) or (b).

Section 253(a) of the Federal Act, 47 U.S.C. § 253(a), states:

> 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.

Because Act 182 prohibits or has the effect of prohibiting the ability of the Petitioners and other CLECs to provide interstate and intrastate telecommunications service, Act 182 violates § 253(a) of the Federal Act.

If the Commission finds that Act 182 is "proscribed by section 253(a) considered in isolation, [it] must then determine whether, nonetheless, [it falls] within the reservation of state authority set forth in section 253(b)." *In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting to Provide Service in Tennessee Rural LEC Service Areas*, 14 FCC Rcd. 11064,

FCC 99-100, ¶ 8 (rel'd May 27, 1999) ("*Hyperion*"). Section 253(b) of the Federal Act, 47 U.S.C. § 253(b), states:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, 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.

Act 182 is not imposed on a "competitively neutral basis," and as such it is not permitted under § 253(b).

Therefore, § 253 of the Federal Act requires the Commission to preempt Act 182.

1. Act 182 violates § 253(a) of the Federal Act.

Act 182, by requiring *all* LECs, as of January 1, 2011, to cap their intrastate access rates, but only permitting *ILECs* to obtain funding to replace the lost revenues, violates § 253(a) of the Federal Act. On its face, Act 182 "prohibits or has the effect of prohibiting" the CLECs' ability to compete with the smaller ILECs. Act 182 provides a subsidy to the smaller ILECs that is not available to the smaller CLECs. Such a subsidy inhibits CLECs from entering into the smaller ILECs' territory to provide the ILECs' customers with a competitive alternative. Please see attached Exhibits 4 through 8.

The Commission has already found that a state law such as Act 182 almost certainly violates § 253(a) of the Federal Act. *See 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, FCC 00-309 (rel'd Aug. 28, 2000) ("*Western Wireless*"). In *Western*

Wireless, a Kansas Act required "all local exchange carriers in Kansas to reduce their intrastate access charges to interstate rate levels." *Id.* at ¶ 2. The statute permitted the Kansas Corporation Commission ("KCC") to "offset the access charge and toll charge reductions required by the Kansas Act through rebalancing of local residential and business rates, with any remaining portion initially being paid out from the Kansas Universal Service Fund." *Id.* The KCC issued an order implementing the Kansas Act and establishing the Kansas Universal Service Fund ("KUSF") whereby, in addition to providing for High Cost Funding to all ETCs,[3] the KCC "provided ILECs additional support based on their revenues lost due to intrastate access charge reform." *Id.* at ¶ 3. In the first two years, "the KUSF distributed approximately $158 million, of which approximately $152 million, or 96 percent, was distributed to ILECs to offset the revenues they lost due to intrastate access charge reform." *Id.*

Western Wireless filed a petition with the FCC for preemption asking the Commission to declare that § 253 of the Federal Act preempted the Kansas Act and KCC order "that served to limit the ability of carriers other than ILECs to receive universal service support under the Rate Cut Funding program in exchange areas with more than 10,000 access lines." *Id.* at ¶ 4. Western Wireless alleged that the Rate Cut Funding program "discriminated against new entrants and deterred competitive entry," and that the program was not protected by § 253(b) because it "was not competitively neutral and not related to the cost of providing universal service." *Id.* Before the Commission issued a decision on Western Wireless's petition, the KCC adopted a series of orders chang-

[3] "ETCs" or "eligible telecommunications carriers" are carriers eligible to receive universal service support as defined at 47 C.F.R. § 54.201. The FCC does not limit ETC designations to only ILECs,

ing the operation of the KUSF, including holding that "on a going-forward basis, all KUSF funding would be fully portable to competing carriers; *i.e.*, if a competing carrier obtained a customer that was previously served by an ILEC, all funding that would previously have gone to the ILEC as a result of serving that line would instead be paid to the competing carrier." *Id.* at ¶ 5. This principle of portability applied not only to the large ILECs, "but also to the funding for rural ILECs that continue[d] to be calculated under the High Cost Funding program and the previously non-portable Rate Cut Funding program." *Id.*

Because of the changes the KCC made to the KUSF, the Commission determined that Western Wireless's petition had been rendered moot. *Id.* at ¶ 6. However, in "order to provide guidance on these critical universal service issues which may well arise in other contexts," the Commission stated that it would "briefly discuss [its] concern that programs structured like the original Rate Cut Funding program could easily run afoul of Section 253." *Id.* at ¶ 7. In detailing such concerns, the Commission stated:

> *We would be concerned about a universal service fund mechanism that provides funding only to ILECs.* 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. Thus, non-ILECs would be left with two choices – match the ILEC's price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price based on the unsubsidized cost of providing such service. A mechanism that provides support to ILECs while denying funds to eligible prospective competitors thus

but instead opens such designations up to competitive providers. *See* 47 C.F.R. § 54.201; 47 C.F.R. § 54.307.

> may give customers a strong incentive to choose service from ILECs rather than competitors. Further, we believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide service that its competitor already provides at a substantially supported price. In fact, such a carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its state government-imposed competitive disadvantage. *Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of section 253(a).*

Id. at ¶ 8 (emphasis supplied).

The Commission's analysis in *Western Wireless* was exactly right. Act 182 erects a "substantial barrier" for the Petitioners and other CLECs to enter into and compete in a smaller ILEC's market. As shown in the declarations of the Petitioners, Exhibits 4 through 8, the Petitioners are currently providing service in seven of the smaller ILECs' territories, and plan to soon be providing service in eleven such territories. The "restructuring mechanism" established in Act 182 provides a subsidy to the smaller ILECs in their provision of telecommunications services, thereby effectively lowering the "price of ILEC-provided service relative to the price of competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that [is] not available to competitors." Accordingly, Petitioners and other CLECs currently competing against the smaller ILECs, or developing business plans to enter into the smaller ILECs' service territories, must price their services in an attempt to be competitive with the prices offered by the smaller ILECs, but without the state subsidy that the smaller ILECs receive. If such pricing results in a situation where the CLECs cannot be profitable, or are even losing money, because of the rates required to make the CLECs competitive with the smaller ILECs, the CLECs have no incentive to attempt to compete with the smaller ILECs. Consequently, Act 182 effectively prohibits competition in such areas.

Thus, Act 182's subsidy of the smaller ILECs hinders the CLECs' ability to offer competitive rates for telecommunications service, and as such gives "customers a strong incentive to choose service from ILECs rather than competitors." In addition, Act 182 discourages CLECs from entering into the markets of the smaller ILECs because it is "unreasonable to expect an unsupported carrier to enter a high-cost market and provide service that its competitor already provides at a substantially supported price." Not only will competitors entering a smaller ILEC's territory face the natural advantage the smaller ILEC enjoys (i.e., the ILEC currently has *all* of the customers and an established network), but the competitors will also be at an economic disadvantage as a result of the state's subsidization of the smaller ILECs. Thus, the CLECs are prohibited from providing telecommunications service within the smaller ILECs' service territories, contrary to § 253(a).

An "absolute bar on the provision of services is not required" to find a violation of § 253(a). "It is enough that the [statute] would 'materially inhibit' the provision of services." *Qwest Corp v City of Sante Fe*, 380 F3d 1258, 1271 (10th Cir 2004) (holding that a "massive" increase in costs were prohibitive under § 253 of the Federal Act pursuant to this standard). *See also In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd. 14191, FCC 97-251, ¶ 31 (rel'd July 17, 1997) (stating that in determining whether a law "has the effect of prohibiting" the provision of telecommunications service, the Commission "consider[s] whether the [law] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and bal-

anced legal and regulatory environment"). As discussed, Act 182 "materially inhibits or limits" the ability of competitors to compete in the smaller ILECs' service territories.

The Commission has previously found that statutes or ordinances that resulted in limiting a competitor's ability to compete violated § 253(a) of the Federal Act. For example, in *In the Matter of the Public Utility Commission of Texas, The Competition Policy Institute, IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc., Teleport Communications Group, Inc., City of Abilene, Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 3460, FCC 97-346 (rel'd Oct. 1, 1997) ("*Texas Preemption Proceeding*"), the Commission preempted certain build-out requirement provisions of a Texas state law:

> These provisions generally require that [Certificates of Operating Authority (COA)] holders serve a specified portion of their service area using facilities that do not belong to the incumbent LEC. The COA build-out requirements are of central importance to competitive entry because these requirements impact the threshold question of whether a potential competitor will enter the local exchange market at all. We preempt enforcement of these requirements because they restrict the means or facilities through which a party is permitted to provide service in violation of section 253, and, independently, because they impose a financial burden that has the effect of prohibiting certain entities from providing telecommunications services in violation of section 253.

Id. at ¶ 13 (footnotes omitted). Also, in *In the Matter of The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, 14 FCC Rcd. 21697, FCC 99-402 (rel'd Dec. 23, 1999) ("*Minnesota Preemption Proceeding*"), the Commission rejected a Minnesota petition that requested the Commission

to find consistent with § 253 an agreement where the State had given a developer exclusive access to certain rights-of-way. The Commission held that the agreement had the effect of prohibiting competition, stating:

> As discussed below, our concern that the Agreement may have the effect of prohibiting facilities-based entry is premised on evidence in the record that utilizing rights-of-way other than the freeway rights-of-way to install telecommunications infrastructure is substantially more expensive than using the freeway rights-of-way. The evidence in the present record precludes us from concluding that the Agreement will not have the effect of prohibiting facilities-based competition because the availability of alternative rights-of-way, the existence of excess fiber optic capacity, or access to Developer's capacity. We are very concerned that giving Developer exclusive physical access to rights-of-way that are inherently less costly to use has the potential to prevent facilities-based entry by certain other carriers that cannot use these rights-of-way.

Id. at ¶ 22.

In *In the Matter of Silver Star Telephone, Inc. Petition for Preemption and Declaratory Ruling,* 12 FCC Rcd. 15639, FCC 97-336, ¶ 11 (rel'd Sept. 24 1997) ("Silver Star"), a provision of the Wyoming Telecommunications Act permitted an ILEC that had 30,000 or fewer access lines in the state to block the grant of a certificate to any carrier seeking to provide local exchange service in competition with the ILEC until at least January 1, 2005. The Commission held as follows:

> Wyoming's rural incumbent protection provision gives incumbent LECs with 30,000 or fewer access lines the ability to block the grant of CPCN applications of potential competitors. The incumbent LEC involved in this matter, Union, exercised that veto power with respect to Silver Star's CPCN application to provide competing local exchange service in the Afton exchange; in turn, as required by the Wyoming Act's rural incumbent protection provision, the Wyoming Commission denied Silver Star's application and thereby barred Silver Star from entering the Afton local exchange market. Consequently, the rural incumbent protection provision and the Denial Order clearly prohibit Silver Star from providing telecommunications service in the Afton exchange, a prohibition proscribed by section 253(a). Indeed, section

> 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality. *Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers. The express preemption authority granted to the Commission under section 253 is designed to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.*

Id. at ¶ 38 (footnotes omitted) (emphasis supplied) (upheld in *RT Communs., Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000)). *See also Hyperion,* 14 FCC Rcd. 11064, where the Commission preempted a similar Tennessee law that protected ILECs serving fewer than 100,000 access lines from competition.

Similarly, the Commission should find that Act 182 violates § 253(a) of the Federal Act because it "materially inhibits or limits" the ability of Petitioners and other CLECs to enter into the smaller ILECs' markets and to provide viable competition with the smaller ILECs.

2. Act 182 does not fall within the reservation of state authority under § 253(b) of the Federal Act.

As discussed, if the Commission finds that Act 182 violates § 253(a), the Commission then "must determine whether it is nevertheless permissible under section 253(b)."[4] *Western Wireless,* 15 FCC Rcd. 16227, ¶ 9. A state regulation must meet each of three criteria to fall within the "safe harbor" of § 253(b): (1) it must be competitively neutral, (2) it must be consistent with § 254 of the Federal Act, and (3) it must be necessary to preserve and advance universal service, protect the pub-

[4] Section 253(c) of the Federal Act, 47 U.S.C. § 253(c), provides an additional "safe harbor" for regulations that violate § 253(a). However, § 253(c) concerns regulations specifically relating to public rights-of-way, and is thus not at issue in this Petition.

lic safety and welfare, ensure the continued quality of telecommunications services, or safeguard the rights of consumers. *Id.*; *Silver Star*, 12 FCC Rcd 15639, ¶¶ 37, 40. In addition, the Commission has noted that "[a]lthough the party seeking preemption bears the burden of proof that there is a violation of section 253(a), the burden of proving that a statute, regulation, or legal requirement comes within the exemptions found in sections 253(b) and (c) falls on the party claiming that exception applies." *Minnesota Preemption Proceeding*, 14 FCC Rcd. 21697, ¶ 11, n. 26. *See also New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3rd Cir. 2002).

In *Western Wireless*, the Commission expressed its doubts that a funding program such as the one established in Act 182 would be permissible under § 253(b):

> It appears doubtful that a program which limits eligibility for universal service funding to ILECs would be found competitively neutral, and thus within the authority reserved to the states in section 253(b). Section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter alia*, the requirement is competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue. Because, as discussed above, 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. Moreover, a state requirement which otherwise violates section 253(b) cannot be saved merely because it is transitional.

Western Wireless, 15 FCC Rcd. 16227 (quotation and footnotes omitted). The Commission has also stated that requirements that "shield the incumbent LEC from competition by other LECs" are not competitively neutral and do not fall within the reservation of state authority set forth in § 253(b). *Hyperion*, 14 FCC Rcd. 11064, ¶ 12. A state requirement is not competitively neutral "if it favors incumbent LECs over new entrants (or vice-versa)." *Id.* at ¶ 16.

As discussed, the "restructuring mechanism" of Act 182 provides to smaller ILECs a "substantial unfair price advantage in competing for customers," and thereby acts to "shield the incumbent LEC from competition by other LECs." Therefore, Act 182 is *not* "competitively neutral," and as such § 253(b) does *not* save Act 182 from preemption. See, likewise, *Silver Star*, 12 FCC Rcd. 15639, ¶ 42 (holding that the rural incumbent protection provision was not competitively neutral because it "favor[ed] certain incumbent LECs over all potential new entrants and allows those incumbent LECs, entirely at their own discretion, to determine if and when they will face competition until at least January 1, 2005"); *Minnesota Preemption Proceeding*, 14 FCC Rcd 21697, ¶ 51 (disagreeing with the State's contention that the access to rights-of-way agreement was competitively neutral because the State had followed a public procurement process in selecting the Developer, and stating that the primary purpose of § 253 is to "ensur[e] that no state or locality can erect legal barriers to entry that would frustrate the 1996 Act's explicit goal of opening all telecommunications markets to competition").

In addition to the fact that Act 182 is not competitively neutral, it is difficult to see how Act 182 is "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, or safeguard the rights of consumers," which provides another reason that § 253(b) does not save Act 182.

B. Section 254 of the Federal Act also requires the Commission to preempt Act 182.

The Commission also noted in *Western Wireless* that "a program that provides universal service funding only to ILECs could well be found invalid under traditional preemption doctrine." *Western Wireless*, 15 FCC Rcd 16227, ¶ 11. The enforcement of a state regulation may be preempted in several circumstances, including where "there is outright or actual conflict between federal and state law" and where "the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986). In addition, preemption "may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." *Id.* at 369.

Section 254(f) of the Federal Act, 47 U.S.C. § 254(f), states that a "State may adopt regulations *not inconsistent with the Commission's rules* to preserve and advance universal service." (Emphasis supplied.) Although Act 182 does not explicitly indicate that it is establishing a state universal service fund, Act 182 in effect seeks to "preserve and advance universal service." As discussed, the result of Act 182 is to provide subsidies to smaller ILECs, who are the same ILECs that typically receive federal universal service support. In addition, the smaller ILEC must be providing "the services and functionalities identified by rules of the [FCC] described at 47 CFR 54.101(a)," MCL § 484.2310(23)(c), which specifically ties a smaller ILEC's ability to receive the state subsidy to whether it provides services that would be eligible for federal universal service support as listed at 47 C.F.R. § 54.101. Also, although Act 182 declares that VoIP services are not subject to the manda-

tory monthly contribution to the "restructuring mechanism," Act 182 states that if the FCC "determines that interconnected [VoIP] services may be subject to state regulation for universal services purposes, the [Michigan Public Service Commission] may open a proceeding to determine who is required to participate in a universal service fund." MCL § 484.2310(13). Act 182 also links the contribution methodology for the "restructuring mechanism" to the federal universal service contribution methodology. *See* MCL § 484.2310(19). Thus, even if the Michigan Legislature did not call the "restructuring mechanism" a state universal service fund, the restructuring mechanism was clearly meant to provide state universal service support to smaller ILECs.

The FCC should choose to preempt Act 182 because it is "inconsistent with the Commission's rules," and as such not authorized under § 254(f) of the Federal Act. The Commission's universal service rules do not limit universal service funding to ILECs. On the contrary, 47 C.F.R. § 54.307(a) specifically requires that a "competitive eligible telecommunications carrier shall receive universal service support to the extent that the competitive eligible telecommunications carrier captures the subscriber lines of an [ILEC] or services new subscriber lines in the [ILEC's] service area."

In addition, § 254(f) requires that contributions be made on an "equitable and nondiscriminatory basis," which further supports the fact that § 254(f) requires that a state universal service fund be administered in a "competitive neutral" manner. Pursuant to § 254(b)(7) of the Federal Act, 47 U.S.C. § 254(b)(7), the Commission has explicitly established "competitive neutrality" as a principle upon which the Commission bases its policies for the preservation and advancement of universal service. *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, FCC 97-157, ¶

46 (rel'd May 8, 1997). The Commission defined the principle of "competitive neutrality" as follows:

> Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor one technology over another.

Id. at ¶ 47. The Commission stated that "competitive neutrality is consistent with several provisions of section 254 including the explicit requirement of equitable and nondiscriminatory contributions" found in § 254(d), 47 U.S.C. § 254(d). *Id.* at ¶ 48. Similarly, the Commission recognized that the "principle of competitive neutrality is also embodied in . . . section 254(f)'s requirement that state universal service contributions be equitable and nondiscriminatory." *Id.* The Commission also agreed that "an explicit recognition of competitive neutrality in the collection and distribution of funds and determination of eligibility in universal support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework." *Id.* (quotation omitted).

As discussed, Act 182 is not "competitively neutral" in that it provides a subsidy to only the smaller ILECs and does not permit any competitive providers to qualify for the subsidy. As the FCC has stated, "it is doubtful that a universal service funding program that restricts eligibility to ILECs could be considered competitively neutral." *Western Wireless*, 15 FCC Rcd. 16227, ¶ 11. Accordingly, Act 182 is inconsistent with § 254(f) of the Act and Congress's purposes in establishing universal service funding, and thus must be preempted.

C. Preemption of Act 182 in its entirety is the least intrusive action necessary to correct the violation of § 253.

The FCC must preempt Act 182 in its entirety. Act 182 essentially does two things: (1) it requires all providers to set their intrastate access rates to the same rates as their interstate access rates, and (2) it establishes the "restructuring mechanism" to permit smaller ILECs to "recover the lost intrastate switched toll access service revenues resulting from rate reductions under" Act 182. *See* MCL § 484.2310(8). As discussed, the establishment of the "restructuring mechanism" to subsidize the smaller ILECs for their lost intrastate access amounts, while failing to make such subsidy available to any CLECs, is contrary to §§ 253 and 254 of the Federal Act. The question is then whether the FCC can preempt only the "restructuring mechanism" while leaving the intrastate access rate reduction in place. According to Michigan law, Act 182 is not severable in such a manner.

The following statutory provision applies to the severability of statutes in Michigan:

> If any portion of any act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the courts to be inoperable, and to this end acts are declared to be severable.

MCL § 8.5. The Michigan Court of Appeals has held as follows regarding the doctrine of severability of Michigan statutes:

> To be capable of separate enforcement, the valid portion of the statute must be independent of the invalid sections, forming a complete act within itself. After separation of the valid parts of the enactment, the law enforced must be reasonable in view of the act as originally drafted. One test applied is whether the law-making body would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act.