Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

JOINT PETITION OF ACD TELECOM, INC., DAYSTARR, LLC, CLEAR RATE COMMUNICATIONS, INC., TC3 TELECOM, INC., AND TELNET WORLDWIDE, INC., FOR DECLARATORY RULING THAT THE STATE OF MICHIGAN'S STATUTE 2009 PA 182 IS PREMPTED UNDER SECTIONS 253 AND 254 OF THE COMMUNICATIONS ACT	)	**Docket No. 10-45**

COMMENTS OF THE

INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

To the Commission:

I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits these comments in response to the above-captioned Joint Petition of ACD Telecom, Inc., DayStarr, LLC, Clear Rate Communications, Inc., TC3 Telecom, Inc., and TelNet Worldwide, Inc.[1] (collectively, Petitioners). ITTA is an alliance of mid-size telephone companies that collectively serve 24 million access lines in 44 states, and which offer subscribers a broad range of high-quality wireline and wireless voice, data, Internet, and video services. The Petitioners have requested the Commission to preempt a Michigan statute that imposes different intrastate access regulatory structures for

[1] *Joint Petition of ACD Telecom, Inc., DayStarr, LLC, Clear Rate Communications, Inc., TC3 Telecom, Inc., and TelNet Worldwide, Inc., for 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. 10-45 (filed Feb. 9, 2010) (Petition).

incumbent local exchange (ILEC) and other carriers. For the reasons set forth herein, ITTA opposes the relief sought by the Petition.

II. DISCUSSION

The Commission embarked nearly a decade ago[2] on an ambitious plan to overhaul a system of intercarrier compensation (ICC) that was becoming eclipsed by evolving market conditions. Since then, declining access minutes have combined with opportunities for arbitrage that include phantom traffic and access stimulation. As access revenues decline and access minutes contemporaneously escape recovery, carriers have encouraged the Commission to introduce meaningful regulatory amendments that will reduce incentives for arbitrage while ensuring mechanisms sufficient to support viable networks in rural and high-cost areas. The need for reform is becoming clearer as time marches on without reform; in the past month alone, judicial decisions emanating from the District of Columbia Circuit and the Federal District Court in South Dakota highlight a growing threat of access anarchy as carriers' ability to recover access fees are thwarted by providers who avoid tendering payment for use of the networks upon which their services rely.[3]

ITTA supports ICC reform that is premised upon terminating access rate unification which reflects the needs and dynamics of different types of carriers. Accordingly, in 2008, ITTA proposed to the Commission an equitable rate unification

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[2] *Developing a Unified Intercarrier Compensation Regime: Notice of Proposed Rulemaking,* CC Docket No. 01-92, FCC 01-132 (2001).

[3] *See, Paetec Communications, Inc. vs. CommPartners, LLC,* Civ. 08-0397 (JR) (D.D.C. 2010), and *Alliance Communications Cooperative, Inc., et al., vs. Global Crossing Telecommunications, Inc.,* Civ. 06-4221-KES (D.S.D. 2010).

plan that minimizes the impact on consumers and reduces the total amount needed from an alternative recovery mechanism by blending reasonable increases in subscriber line charges with a tiered cost recovery mechanism.[4] Consequently, the ITTA proposal enables all carriers to maintain affordable rates while fostering conditions for further network deployment, including the increased provision of broadband and other advanced services to rural America. ITTA proposed a five-year transition period that includes a mid-course re-examination of ICC policies in order to determine whether additional steps are necessary.

Concurrently, the State of Michigan has also recognized the need for reform, and accordingly enacted 2009 Public Act 182 (Act 182).[5] In pertinent part, Act 182 requires access rate unification by providers of intrastate service. "Eligible providers," which include ILECs, are required to implement the rate unification in a single step on or before September 13, 2010; "non-eligible" providers, which include CLECs, are to achieve rate unification over a five-year period, with annual reductions of 20 percent. Eligible providers, which are required to "flash cut" their rates, are eligible to obtain disbursements (of an as-yet undetermined amount) from a restructuring mechanism; non-

[4] *High-Cost Universal Service Support (Docket No. 05-337); Federal-State Joint Board on Universal Service (Docket No. 96-45); Lifeline and Link-Up (Docket No. 03-109); Universal Service Contribution Methodology (Docket No. 06-122); Numbering Resource Optimization (Docket No. 99-200); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Docket No. 99-68); Developing a Unified Intercarrier Compensation Regime (Docket No. 01-92); Intercarrier Compensation for ISP-Bound Traffic (99-68); IP-Enabled Services (Docket No. 04-36): Comments of the Independent Telephone & Telecommunications Alliance* (filed Nov. 26, 2008).

[5] 2009 P.A. 182 amended § 310 of the Michigan Telecommunications Act, MCL 484-2310.

eligible providers, which phase in their reductions over a five-year transition period, do not obtain distributions from the restructuring mechanism.

The Petitioners request the Commission to preempt Act 182, arguing that the disparate treatment of eligible and non-eligible providers creates a barrier to entry for competitive carriers and accordingly violates Section 253 of the Communications Act of 1934, as amended (Act). Although the statute is not yet wholly implemented, the Petitioners seek injunctive relief based upon the four-prong standard articulated in *Virginia Petroleum Jobbers vs. Southwestern Cable Co.*[6] Specifically, those standards accommodate injunctive relief where the petitioner can demonstrate several conjunctive conditions, including, *inter alia,* likelihood of success on the merits. For the reasons set forth below, the Petition is not likely to succeed on the merits. Accordingly, ITTA opposes the Petition, and commends the Commission to reject it.

Section 253(a) of the Act requires that "[n]o State or local statute or regulation, or other state or local legal requirements, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[7] The Petitioners maintain that the provision of access replacement support that is provided to ILECs but not to CLECs "inhibits CLECs from entering into the smaller ILECs' territory to provide the ILECs' consumers with a competitive alternative."[8] In support of their position, the Petitioners rely heavily on a nearly decade-old advisory opinion issued by the Commission that addressed the proposition that barriers to entry can arise if one

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[6] *Virginia Petroleum Jobbers vs. Southwestern Cable Co.,* 382 U.S. 157 (168).

[7] 47 USC § 253(a).

[8] Petition at 4.

entity receives "substantial support" from a state government "that is not available" to the other entity.[9]

In that proceeding, the Commission addressed a Kansas Corporation Commission (KCC) Order that directed certain access and toll reductions to be rebalanced against local residential and business rates, while a remaining portion would be paid out of the state universal service fund. The KCC Order "provided ILECs additional support based on their revenues lost due to intrastate access charge reform."[10] Western Wireless Corporation, a commercial mobile radio services (CMRS) provider, filed a petition with the Commission seeking preemption of the state order. While the petition was pending, the KCC adopted changes to the state regulatory regime that effectively mooted the petition. The Commission, however, issued an advisory opinion to provide guidance for other situations that might arise.

In *Western Wireless,* the Commission stated that it would "be concerned about a universal service fund mechanism that provides funding only to ILECs."[11] The Commission continued, "[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

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[9] *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: Memorandum Opinion and Order,* File No. CWD 98-90, FCC 00-309, at para. 8 (2008) (*Western Wireless*).

[10] *Western Wireless* at para. 3.

[11] *Western Wireless* at para. 8. ITTA leaves aside at this juncture the question of whether access revenues are categorically within the gambit of high-cost universal service support.

to the new entrant."[12] In the Michigan proceeding, however, it is not possible to discern the gap, if any, between funds available to ILECs and resources available to CLECs. As described above, ILECs are required to "flash cut" and implement rate unification in a single step. By contrast, the CLECs have a five-year period in which they are to phase-in access reductions, with 20 percent annual decreases. The Petitioners did not quantify the supposed gap in access-oriented revenues between eligible providers and non-eligible providers. The lack of that data renders impossible the ability of any adjudicator to determine at this point whether the ILEC or the CLEC will emerge with a larger proportion of access-oriented funding, and whether such difference rises to the standard of a barrier to entry.

Those considerations aside, however, the Commission must consider the relevance of *Western Wireless* to the instant Petition. *Western Wireless* filed its petition for preemption in July 1998, barely one year after the Commission issued its first Order on Universal Service pursuant to the Telecommunications Act of 1996.[13] Since that time, however, the Commission and the courts have had opportunity to reassess the landscape of Universal Service Fund policies, and have moved the pendulum away from the proposition that mathematical equivalence is necessary to achieve regulatory parity and eradicate barriers to entry.

The Petitioners argue that an absolute bar on entry is not required to trigger Section 253, but that any act that "materially inhibits" the provision of service is

[12] *Western Wireless* at para. 8.

[13] *Federal-State Joint Board on Universal Service: Report and Order*, FCC 97-157 (1997).

sufficient.[14] ITTA submits that even if implementation of Act 182 were to result in funding disparities between disbursements for ILEC and CLEC providers, those would not materially inhibit the ability of the CLECs to provide service. The crux of the Petitioners' argument is that lack of access-oriented support in amounts equal to that obtained by the ILECs will impede the CLECs' ability to offer service to an extent that rises to the level of a statutorily-barred barrier to entry. This line of reasoning, however, approaches the issue as if both sectors of the industry were bound by similar obligations. That, however, is not the case. As noted by the Telecommunications Association of Michigan, "No evidence whatsover has been offered to demonstrate that the reimbursements received by ILECs from the restructuring mechanism may be used to offer lower prices or otherwise offset the significant cost disadvantages ILECs face because of their legacy obligations and higher costs to repair and maintain their network facilities."[15] This construct was recognized by the United States Court of Appeals when it upheld the Commission's 2008 interim cap on support for competitive eligible telecommunications carriers (CETCs).[16] The Court noted incisively that, "[t]he pertinent question is whether the interim cap will undercut adequate telephone service for customers, since '[t]he purpose of universal service is to benefit the customer, not the carriers.'"[17]

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[14] Petition at 7.

[15] Telecommunication Association of Michigan, at 9 (emphasis in original).

[16] *Rural Cellular Association, et al. vs. Federal Communications Commission,* Case No. 08-1284 (D.C. Cir. 2009) (*RCA vs. FCC*).

[17] *RCA vs. FCC* at *citing Allenco Communications vs. FCC,* 201 F.3d 608, 621 (5th Cir. 2000).

Petitioners in the instant proceeding have not demonstrated that possible lack of access to revenues equal to those obtained by the ILECs is necessary to provide basic service to customers who have none. Although the Petitioners cite principles of competitive neutrality,[18] competitive neutrality does not require precise parity of treatment, and the Commission is not required to provide the same levels of support.[19] Likewise, the varying structures of access reductions and subsequent treatment for ILECs and CLECs introduced by Act 182 are not fatal to the statute. Indeed, the notions of regulatory parity are tempered by the *disparate* requirements to which the ILECs and CLECs are each bound. CLECs are not constrained by COLR obligations, and can accordingly tailor their business models and deployment plans in a manner that reflects general economic standards than differ from those that govern regulated COLRs. COLRs maintain facilities sized to meet demands of entire network, and mechanisms are crafted to reflect those needs; a COLR incurs costs consistent with its mandated obligations. By contrast, a competitor need only achieve recovery for its discretionarily localized costs for the fewer, lower cost lines it might serve.[20]

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[18] Petition at 15.

[19] *TCG New York v. City of White Plains,* 305 F.3d 67, 80 (2d Cir 2002).

[20] *See, e.g., Federal-State Joint Board on Universal Service: Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Appendix B, "The Rural Difference," at 28 (rel. Sep. 29, 2000) ("Operationally, isolation increases costs since more resources are required to produce the self-reliance necessary to provide any level of network reliability. This demand on self-reliance may range from increased levels of back-up power, larger fuel tanks, larger inventories of materials and spares, and even increases in manpower to respond timely to emergencies. Insular and remote service conditions may also require expenditures because of the poor regional infrastructure often associated with those areas.")

III. CONCLUSION

The lack of quantitative data renders impossible the task of determining whether Act 182 creates a barrier to entry in violation of Section 253 of the Act. Moreover, the disparity in obligations assumed by eligible provider ILECs and non-eligible CLECs undermines the proposition that competitive carriers without COLR obligations should obtain access-oriented support in equal measures as do the ILECs. For these reasons, the Petitioners' claims are not likely to be successful on the merits, and the Petition for injunctive relief should accordingly be rejected.

Respectfully submitted,

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