

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Joint Petition for Expedited Declaratory)	
Ruling that the State of Michigan's)	
Statute 2009 PA 182 is Preempted)	WC Docket No. 10-45
Under Sections 253 and 254 of the)	
Communications Act; and)	
)	
Motion for Temporary Relief)	

OPPOSITION OF AT&T INC.

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OPPOSITION OF AT&T INC.

I. INTRODUCTION AND BACKGROUND

AT&T Inc., on behalf of its affiliates (collectively, AT&T), hereby submits comments in opposition to ACD Telecom, Inc.; DayStarr, LLC; Clear Rate Communications, Inc.; TC3 Telecom, Inc.; and TelNet Worldwide, Inc.'s joint petition for preemption of Michigan's recently enacted intrastate switched access charge reform law and their motion to stay the implementation of this Michigan law.¹ While the Petitioners ask the Commission to invalidate the entire law, they seem to take particular exception to the provision that makes available support to small rural ILECs to help offset their revenue losses associated with required reductions to their intrastate switched toll access rates. In particular, they contend that the provision limiting such support only to small rural ILECs (and thus denying support to CLECs) constitutes an unlawful barrier to

¹ 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, WC Docket No. 10-45 (filed Feb. 9, 2010) (Petition); ACD Telecom, Inc.; DayStarr, LLC; Clear Rate Communications, Inc.; TC3 Telecom, Inc.; and TelNet Worldwide, Inc.'s Motion for Temporary Relief, WC Docket No. 10-45 (filed Feb. 9, 2010) (Stay Request).

entry that should be preempted. But the Petitioners have failed to demonstrate that Michigan's new law prohibits or has the effect of prohibiting them from providing intrastate telecommunications service, as required by section 253(a) of the Communications Act of 1934, as amended (Act), and their petition therefore should be denied.² In the unlikely event that the Commission concludes that the Petitioners have made the requisite showing that Michigan's law materially inhibits or limits their ability to compete in a fair and balanced legal and regulatory environment, which they plainly have not, we explain how Michigan's law nonetheless falls within the exception set forth in section 253(b).³ Because the Petitioners have not demonstrated that they are likely to prevail on the merits, the Commission should also deny Petitioners' request for a stay of Michigan's law.

Even if the Petition were not deficient, the Commission should deny it because it runs directly counter to Congress's and this Commission's objective of encouraging states to replace the rapidly declining implicit subsidies in intrastate access charges with explicit universal service support mechanisms.⁴ Federal and state regulators designed the current intercarrier compensation regime in large measure to encourage deployment of telecommunications infrastructure across the country and ensure that all Americans have access to affordable local telecommunications services. These twin goals were accomplished, in part, by requiring carriers offering those services to recover a significant portion of their costs through access charges

² 47 U.S.C. §253(a).

³ *Id.* at §253(b).

⁴ Moreover, it is also inconsistent with a memorandum issued last year by President Obama, in which he informed the heads of executive departments and agencies that the general policy of his Administration is "that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a *sufficient legal basis* for preemption." Presidential Documents, Memorandum of May 20, 2009, *Preemption*, 74 Fed. Reg. 24693 (May 22, 2009) (emphasis added).

assessed on interconnecting interexchange carriers, thereby providing local exchange carriers an implicit subsidy to keep rates for local services low. While that regime proved workable in a monopoly environment in which access minutes remained stable, or increased, year-over-year, it could no longer provide the support necessary to sustain the underlying network infrastructure in telecommunications markets opened to competition, as Congress anticipated. For that reason, Congress directed the Commission and the states in 1996 to undertake comprehensive universal service reform to replace implicit subsidy mechanisms (including those contained in intercarrier payments – such as access charges) with explicit support mechanisms that will achieve universal service objectives in a competitive environment. In the fourteen years since the Telecommunications Act of 1996 became effective, not enough states have followed through on Congress’s directive and, to date, the Commission has been reluctant to prod the states, either through carrots or sticks, or a combination of the two, to do more. By enacting access charge reform legislation late last year, which we refer to in these comments as Act 182, the Michigan legislature joined a growing number of states that have acted responsibly and answered Congress’s call for reform. Thus, the Commission should commend Michigan for taking on the difficult issue of access charge and universal service reform, rather than overturning Act 182 as Petitioners propose.

Fortunately, this Commission seems poised finally to take on the difficult task of reforming intercarrier compensation and universal service to ensure that universal service objectives are met in the digital age, using its National Broadband Plan as the catalyst. According to recent press reports and to a hand-out provided by the Commission to congressional staff on March 4, 2010, Commission staff have indicated that the National Broadband Plan will recommend “[r]educ[ing] per-minute access charges, such as by reducing

intrastate rates to interstate levels, in equal increments over a period of time.” The telecommunications trade press has reported that the Commission will recommend a three-stage proposal for reforming intercarrier compensation. In the second stage, to begin in 2012, the Commission will establish a methodology to take intrastate access charges down to interstate levels, which will be completed by the end of 2016. Beginning in 2017, access charges will no longer be assessed on a per-minute basis but instead will be patterned on negotiated agreements such as exist today with respect to peering.⁵ This Commission clearly recognizes that it must begin the hard work of moving carriers away from implicit subsidies and arbitrage-based business models through comprehensive intercarrier compensation reform in order to shift to an IP-based framework for the exchange of all traffic down the road. Michigan’s Act 182 is completely consistent with the direction in which the Commission appears headed.

A. Michigan Responds To Congress’s Call For Access Charge Reform By Enacting Act 182.

After convening approximately a dozen legislative hearings and industry workshops, which took place throughout 2009, the Michigan legislature enacted a law, Act 182, that finally satisfied Congress’s 1996 directive that states eliminate implicit subsidies contained in high intrastate switched access rates. Act 182 did several things. First, it required all local exchange carriers with intrastate switched toll access rates that were in excess of their interstate switched access rates to eliminate that difference. Small rural ILECs are required to eliminate any difference in a flash-cut on or before September 13, 2010. All other providers (e.g., the Petitioners) are required to reduce any such difference in equal increments over a five-year

⁵ See, e.g., Kamala Lane, Michael Dolan, *FCC Proposes Major Overhaul of USF High-Cost Fund*, Comm. Daily, March 8, 2010, at 1-2 (March 8, 2010 Comm. Daily USF Article).

period, beginning January 1, 2011.⁶ No action is required by those carriers, such as AT&T Michigan and Verizon, that already have reduced their intrastate switched toll access rates to mirror their interstate switched access rates.

Second, Act 182 requires the Michigan Public Service Commission (Michigan Commission) to administer an intrastate switched toll access rate restructuring mechanism (Restructuring Mechanism or RM) to compensate eligible providers (i.e., smaller rural ILECs) for their lost revenue associated with the reductions in their intrastate switched toll access rates.⁷ “[A]ll providers of retail intrastate telecommunications and all providers of commercial mobile service” are required to contribute to that mechanism.⁸ Interconnected VoIP providers are expressly excluded from any RM contribution obligations.⁹ AT&T conservatively estimates that it will be the largest contributor to this fund, yet, since its intrastate switched toll access rates have mirrored its interstate switched access rates for almost two decades, it will receive no support from the RM. Unlike the Petitioners, however, AT&T does not find this outcome objectionable. The smaller rural ILECs have demonstrated to the legislature and the Michigan Commission that they serve the most rural, high-cost areas in the state and that RM support is necessary in order for them to continue offering affordable basic rates and meeting their obligations to provide services to all customers in their service territories. Moreover, as a policy

⁶ Act 182 at § 310(2), (9). *See also* Petition at Exh. 1.

⁷ Act 182 at § 310(9).

⁸ *Id.* at § 310(12).

⁹ *Id.* *See also id.* at § 310(13) (permitting the Michigan Commission to revisit this exclusion if the Commission determines that interconnected VoIP providers are subject to state regulation for universal service purposes). AT&T is already on record at the Commission supporting Commission action that would permit states to impose universal service contribution obligations on all interconnected VoIP providers. *See* Comments of AT&T, WC Docket No. 06-122 (filed Sept. 9, 2009).

matter, AT&T believes that it is important that state commissions and the Commission do more to eradicate the implicit subsidies in access charges since they are an impediment to competition and to ubiquitous broadband deployment.

CLECs participated throughout the legislative process but, to the best of our knowledge, failed to provide any financial data in the industry workshops on the impact of the proposed legislation on their ability to compete in Michigan, let alone data establishing that the proposed legislation (and, in particular, their exclusion from the RM) would have the effect of prohibiting them from providing intrastate telecommunications services (and, as discussed below, they have again failed to do so here). And while they now complain vociferously that Act 182 unlawfully discriminates against them by rendering them ineligible for RM support, they neglect to mention the Act affords them more favorable treatment in other respects, as well as other significant benefits. For example, CLECs are permitted to collect the significant implicit subsidies embedded in their switched toll access charges by delaying the full mirroring of their intrastate switched toll access rates with their interstate rates for another five years – while small, rural ILECs are required to flash cut their intrastate rates by September, and AT&T Michigan and Verizon (the Petitioners' principal competitors) were required to reduce their intrastate access rates to interstate levels almost twenty years ago and thus have no such subsidy mechanism. In addition, the CLECs will benefit as their switched access charges payments made to rural ILECs and other CLECs are reduced. Finally, those CLECs that provide services using interconnected VoIP are not required to contribute to the RM.¹⁰

¹⁰ It appears that one of the petitioners considers itself to be a VoIP provider. In a December 2009 interview, Petitioner ACD's President stated, "we're not going to contribute to the fund because guess what we're a VOIP company. Everybody and their brother now is going to be calling their network a VOIP network." Upstart Phone Companies Upset With New Telecom Tax, Great Lakes IT Report (Dec. 9, 2009), available at <http://www.wwj.com/pages/5855888.php>.

Of course, Petitioners' real objective is not simply to obtain funding for CLECs under the access relief mechanism. Rather, it is to maintain the existing intrastate access charge regime so that they may continue charging AT&T Michigan and others inflated, non-cost-based, intrastate switched toll access charges for as long as possible. Most telling in this regard is that Petitioners' request the Commission to take the unprecedented step of preempting all of Act 182 and not simply what the Petitioners view as the offending provision – i.e., essentially the definition of “eligible provider” since that term excludes CLECs.¹¹ If the Petitioners were sincere in their purported concern that their exclusion from the access replacement mechanism hindered their ability to compete in smaller rural ILEC study areas, they would have asked the Michigan legislature for permission to draw from the RM – but only to the extent of their operations (if any) in rural ILEC exchanges – rather than asking the Commission to preempt Act 182 in toto. CLECs attempt to justify the broad scope of their petition on the ground that, under Michigan law, as interpreted by Michigan courts, the Michigan legislature would not have passed Act 182 had it been aware that portions of it would be declared invalid and excised from the Act.¹² But, even if the Commission disagrees with everything in these comments, surely it should agree that it is in no position to opine on Michigan law governing the severability of a statute and thus must respectfully decline Petitioners' request to invalidate Act 182 in its entirety.¹³

¹¹ Act 182 at § 310(23)(c) (“‘Eligible provider’ means an incumbent local exchange carrier . . .”).

¹² Petition at 18.

¹³ *See id.* at 18-19.

B. Background on the Competitive and Regulatory Environment In Michigan.

Historically, the two largest local exchange carriers in Michigan have been AT&T Michigan and Verizon.¹⁴ AT&T Michigan is the incumbent LEC in most of the urban areas in Michigan, such as Detroit, Grand Rapids, Lansing and Flint, as well as in many rural exchanges throughout the state. In fact, AT&T Michigan provides services in over 100 predominantly rural exchanges. Verizon is the ILEC in Muskegon and a few suburban exchanges on the outskirts Detroit, Flint and Lansing, but it is chiefly a rural provider. It serves roughly 150 predominantly rural exchanges in the state. Michigan's remaining ILECs serve rural exchanges that are scattered throughout the state, with only about 185,000 access lines combined.¹⁵ It is undisputed that the overwhelming majority of telecommunications services are provided to customers residing within the traditional operating territories of AT&T Michigan and Verizon. Any inquiry into the ability of CLECs to offer services should therefore include a review of their operations in the AT&T Michigan and Verizon areas.

CLECs have naturally focused their efforts in the areas served by AT&T Michigan and Verizon rather than the rural areas served by the small ILECs. This focus has served them well. According to the Michigan Commission's most recent "Status of Telecommunications Competition" report, at the end of 2008, there were over 200 licensed CLECs in the state, 67 of which were providing local service.¹⁶ CLECs serve roughly 860,000 access lines in the state –

¹⁴ The Verizon ILECs in Michigan are Verizon North, Inc., and Contel of the South, Inc. d/b/a Verizon North Systems (hereinafter, Verizon).

¹⁵ Status of Telecommunications Competition in Michigan, at 6 (June 2009) (Report). *See* Opposition of the Telecommunications Association of Michigan to the Motion for Temporary Relief of Joint Petitioners, WC 10-45, at Exh. 3 (filed Feb. 18, 2010) (TAM Opposition).

¹⁶ Report at 5

about 20 percent of the total.¹⁷ These figures understate the extent of competition because they do not reflect VoIP services that these providers, and others, offer.¹⁸

The success of CLECs in Michigan is not surprising given the advantages they enjoy. CLECs have the flexibility to offer service in the areas of their choosing. Incumbent carriers, on the other hand, serve customers across the state, including those in remote, difficult to serve rural areas.¹⁹ Even within exchanges that CLECs choose to serve, competitive carriers are able to target their services to only the most desirable high-revenue, low-cost customers. By contrast, ILECs serve all customers within their exchanges – including unprofitable, high-cost and low-revenue customers.

In addition, prior to Act 182, the Michigan Commission had no authority to review the intrastate switched access rates of any carrier with less than 250,000 access lines. As a result, CLECs have been able to set the level of their intrastate switched access rates as high as they like. For example, some CLECs have intrastate tariff rates as high as 4 to 6 cents per minute of use (MOU). In the case of ACD, one of the petitioners, those rates are approximately 2.5 cents per MOU, recently reduced from about 10 cents per MOU. This advantage is phased out by Act 182, but only after five years. By contrast, the intrastate switched access rates of AT&T

¹⁷ Report at 6. While CLEC access lines increased from about 268,000 to 860,000 between 1999 and 2008, AT&T Michigan went from about 5,449,000 to 2,752,000 over the same period – a loss of over 2,700,000 lines. *Id.* at 8.

¹⁸ *Id.* at 17.

¹⁹ It is important to note that Michigan has historically recognized the higher costs that rural incumbents incur to serve their rural customers, and has acknowledged a policy goal of moderating the retail rates that rural customers must pay for their service. *See, e.g.*, Comments of the Michigan Public Service Commission, WC Docket No. 05-337, and related proceedings, at 12 (filed Nov. 26, 2008). One mechanism that achieved this goal was high intrastate switched toll access rates charged by small rural carriers. This mechanism is eliminated by the “mirroring” requirements of Act 182.

Michigan and Verizon were required to match their interstate switched access rates. AT&T Michigan's rates are around half a penny per MOU.

II. DISCUSSION

A. Petitioners Have Not Met Their Burden Of Proof Under § 253(a).

1. Petitioners Fail To Provide *Any* Evidence That Act 182 Will Materially Inhibit Or Limit Their Ability To Provide Intrastate Telecommunications Services.

To prevail on a preemption claim brought under section 253, a complainant must first establish that the challenged provision violates section 253(a) – i.e., it “prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”²⁰ If the law or regulation at issue does not involve an express legal prohibition of service then the Commission must consider whether the law or regulation “has the effect of prohibiting” the entity from providing service. In making that determination, the Commission considers whether the state or local statute or regulation “materially inhibits or limits the ability of any competitor to compete in a fair and balanced legal and regulatory environment.”²¹ The Petitioners do not contend, nor could they, that Act 182 expressly precludes an entity or class of entity from providing telecommunications services in rural ILECs’ study areas. Consequently, to resolve this Petition, the Commission must determine whether Petitioners have met their burden of proving that Act 182 “*materially* inhibits or limits” their ability to compete in a fair and balanced regulatory environment. Plainly, the Petitioners’ bald assertion that Act 182 will prevent them from being able to “match the rates of the smaller

²⁰ 47 U.S.C. § 253(a).

²¹ See, e.g., *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*, CC Docket No. 96-26, 12 FCC Rcd 14191, at ¶ 31 (1997) (*California Payphone Order*).

ILECs” does not provide a sufficient factual basis for the Commission to conclude that it should preempt a state law.²²

“Materially” is defined as “to a significant extent or degree; substantially.”²³ At least one court has interpreted the Commission’s “materially inhibit or limit” standard to mean the imposition of “substantial costs” on the entity seeking to provide service.²⁴ Even in the Commission’s *Western Wireless Order*, upon which the Petitioners rely to support their claims, the Commission expressed concern about a new entrant’s “main competitor [] receiving *substantial* support from the state government that is not available to the new entrant.”²⁵ Since the thrust of the Petitioners’ argument is that they will be unable to “match the rates” of the smaller ILECs that will receive RM support (and thus, they will be unable to provide service in those areas), at a minimum, the Petitioners should have included information about their current rates as compared to the smaller ILECs’ rates for those same services. The Petitioners provided no such data to enable the Commission to evaluate their claim. But even if they had, to give meaning to the Commission’s use of “materially” in its standard of review, a mere showing that they are unable to “match” a competitor’s rates – even if true – would be insufficient in order for the Commission to take the extraordinary step of invalidating a state’s law. Instead, the

²² See Petition, Exh. 4 at 2 (“the smaller ILECs will have the ability to price its [sic] services at rates lower than TelNet can provide;” “TelNet’s inability to match the rates of the smaller ILECs will also inhibit TelNet’s ability to expand its services into additional smaller ILECs’ territories in the future.”). The unsupported claims contained on the second page of all of the affidavits are identical. See Exhs. 4-8 at 2.

²³ The American Heritage Dictionary of the English Language, Fourth Edition (2009).

²⁴ *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) (explaining that the resulting cost increase associated with the challenged ordinance would have nearly *quadrupled* Qwest’s cost of doing business in Santa Fe).

²⁵ *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*, File No. CWD 98-90, 15 FCC Rcd 16227, ¶ 8 (2000) (*Western Wireless Order*).

Petitioners would have to demonstrate that Act 182 will place them at a “substantial” cost disadvantage.

Like their unsupported claim about rates, the Petitioners have made no attempt to demonstrate that their costs are comparable to, let alone greater than, the costs of the small rural ILECs that are eligible for support under Michigan’s RM.²⁶ Michigan’s smaller ILECs tend to serve the less densely populated areas of the state and, as we have explained previously, low population density is what makes an area a “high cost” one for a carrier to serve.²⁷ Unlike the Petitioners, these rural ILECs *have* demonstrated to the Michigan Commission in a number of cost proceedings, which lasted several years, that their costs of serving all the customers in their service areas are high, and it is likely that Michigan’s legislators (who were advised by Michigan Commission staff) were well aware that this class of carriers incur much higher costs than other carriers serving more densely populated areas when it decided to limit explicit RM support to smaller rural ILECs.²⁸ The Michigan legislature convened over half a dozen industry workshops to discuss and review the proposed legislation, including the access replacement mechanism, in detail. While the Michigan House Committee on Energy and Technology was considering the proposed legislation, it, together with the Michigan Commission, repeatedly asked the CLEC industry to submit financial data to demonstrate the impact of the proposed legislation on their

²⁶See *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1103-04 (DC Cir. 2009) (*RCA v. FCC*) (in rejecting petitioners’ challenge to the Commission’s imposition of a cap on CETC high-cost funding, the court noted that petitioners provided no cost data supporting their claim that uncapped high-cost support is necessary for them to continue meeting their universal service obligations).

²⁷ See, e.g., Comments of AT&T Inc., WC Docket No. 05-337, CC Docket No. 96-45, at 33 (filed May 8, 2009). See also *id.* at n.61 (noting that terrain and climate conditions also contribute to a carrier’s costs in providing service but these factors are the exception, not the rule, in driving carrier costs).

²⁸ See, e.g., In the Matter of the Commission’s Own Motion to Consider the Total Service Long Run Incremental Costs of the Michigan Exchange Carriers, *et al.*, Case No. U-14781 (July 5, 2007); In the Matter of the Commission’s Own Motion to Examine the Total Service Long Run Incremental Costs of the Bloomington Telephone Company, *et al.*, Case No. U-15035 (August 26, 2008).

businesses. To the best of AT&T Michigan's knowledge, CLECs – including the Petitioners – did not submit any such data.

Moreover, insofar as CLECs in Michigan receive far more favorable regulatory treatment than ILECs,²⁹ as discussed below in section II.A.2 *infra*, and are not subject to carrier of last resort or other service obligations (and thus generally have chosen to compete only in low cost/higher revenue areas), it is fair to question whether their costs could ever be comparable to Michigan's small rural ILECs. Tellingly, the Petitioners fail to address whether any of the areas they serve – or are considering to serve – are high cost. Based on their previous behavior, it seems unlikely that these Petitioners would *ever* enter rural ILECs' highest-cost areas. AT&T is not criticizing these carriers for acting in an economically rational manner (e.g., for providing service primarily in AT&T Michigan's territory and selectively targeting customers in other areas of the state) but it is fair for the Commission to consider the types of services these CLECs actually provide, and where they offer those services, as it evaluates Petitioners' claims of economic hardship as a result of Act 182.³⁰ It is certainly less costly to provide service to a handful of business customers clustered in a town than to provide service to a handful of residential subscribers on the outskirts of that town. This information is relevant since it has a bearing on what their costs are and what they will be should the Petitioners go forward with their plans to enter or expand service in rural ILEC study areas, as claimed in their affidavits. Similarly, AT&T believes that the Commission should review whether each Petitioner offers

²⁹ See, e.g., TAM Opposition at 7-9.

³⁰ Similarly, AT&T also believes that it is appropriate for the Commission to consider whether any of the Petitioners are engaged in traffic stimulation schemes. We note that Chairman Waxman of the U.S. House of Representatives' Committee on Energy and Commerce sought information from one of the Petitioners regarding "traffic pumping schemes." See http://energycommerce.house.gov/Press_111/20100216/Mattausch.TC3.2010.2.16.pdf.

basic local exchange services in exchanges served by rural ILECs. While each Petitioner submitted an affidavit asserting that it provides telecommunications services in certain rural ILEC exchanges, no Petitioner provided any details regarding the extent of their offerings.³¹

This is not the first time that a petitioner has filed a substantively deficient section 253 petition with the Commission. In its *California Payphone Order*, the Commission denied the California Payphone Association's (CPA) request to preempt the City of Huntington Park's ordinance that all payphones located on private property in the Central Business District be within an enclosed building and at least ten feet away from any pedestrian opening into the building.³² CPA alleged that this ordinance had the effect of "erecting a virtually absolute barrier to entry" in the market for payphone services in the Central Business District and conferred an unfair benefit on Pacific Bell, which had, several years earlier, entered an agreement with the City to maintain its existing payphones on the City's public rights-of-way.³³ While not ruling out that such a showing could be made, the Commission concluded that "CPA has not sufficiently supported its allegation that operation of indoor payphones on private

³¹ ACD, Clear Rate and Telnet, for example, have tariffs that identify their service territories as coterminous with those of AT&T Michigan and Verizon. It is not at all clear how these companies could be offering service in rural ILEC exchanges without effective tariffs on file. In its affidavit, DayStarr asserts that it provides telecommunications services in the exchange served by TDS affiliate, Shiawassee Telephone Company, but does not identify the services provided. Of course, the most pertinent service for this discussion is basic local exchange service, which is the typical service ordered by residential and small business customers. Pointedly, DayStarr does not claim to be providing this service, and its tariff only states that it offers primary basic local exchange service in two Verizon exchanges. Primary basic local exchange service must be offered in any area in which a carrier provides residential basic local exchange service (MCL 484.2301a), so it appears that DayStarr is only offering residential basic local exchange services in those two exchanges. TC3, for its part, claims only to be in the "planning" stages.

³² *California Payphone Order* at ¶ 7 (explaining that the ordinance was designed to ensure publicly accessible telephone service while minimizing potential public nuisances).

³³ *Id.* at ¶ 5.

property in the Central Business District would be ‘impractical and uneconomic.’”³⁴ Included among the documents submitted by CPA that the Commission found unpersuasive was a signed declaration by a corporate officer of a private payphone provider stating that a City official informally told the payphone company that the “company is welcome to submit a proposal to install sidewalk phones but that the City sees no need to add more sidewalk phones”³⁵ In discussing this declaration, the Commission dismissively stated that it was “one declaration purporting to describe unofficial conversations with one City employee.”³⁶ AT&T recommends that the Commission afford similar weight to the Petitioners’ unsupported assertions contained in their affidavits.

2. Act 182 Preserves The Fair And Balanced Legal and Regulatory Environment In Michigan.

Falling far short of what is required under the Commission’s “materially inhibit or limit” standard, the Petitioners also miss the mark in their attempt to show that the legal and regulatory environment in Michigan is not fair and balanced. The legal and regulatory environment in Michigan *is* fair and balanced and will remain so as Act 182 is fully implemented. Not surprisingly, the Petitioners do not discuss the significant legal and regulatory benefits that the State of Michigan has conferred on CLECs, including in Act 182. For example (and, perhaps, most significantly), CLECs can select where to provide service, which services to offer, and to whom (i.e., which class of customer). ILECs in Michigan simply do not have the same flexibility. Due to these freedoms, it is not a coincidence that most Michigan CLECs are competing against AT&T Michigan for customers and not the smaller ILECs that are eligible to

³⁴ *Id.* at ¶¶ 41-42.

³⁵ *Id.* at ¶ 35.

³⁶ *Id.* at 37.

receive RM support. AT&T Michigan, after all, serves most of the densely-populated areas in which higher-margin, lower-cost customers reside. That is precisely why, for example, most of Petitioner ACD's collocation locations are located in Lansing, Grand Rapids, Ann Arbor, Battle Creek, Jackson, Saginaw and Benton Harbor – all cities served by AT&T Michigan.³⁷ Since neither AT&T Michigan nor Verizon is eligible for RM support, there can be no claim of competitive harm to the overwhelming majority of CLECs providing service in Michigan once Act 182 is implemented.

Not only have CLECs had the significant advantage of deciding where and which customers to serve, since 2000, CLECs providing service in AT&T Michigan's and Verizon's territories have been permitted to assess high intrastate switched access charges, charges that are significantly higher than those of AT&T Michigan and Verizon, which have mirrored our interstate switched access rates since at least the early 1990s. The CLECs will continue to enjoy this preferential treatment (in the form of significant access subsidies) until January 2015, when the phase-down of CLECs' intrastate switched access charges to interstate levels will be completed. This preferential treatment for CLECs also must be factored into the Commission's evaluation of the merits of this Petition.

Moreover, the Michigan legislature plainly factored in these regulatory differences as it considered access charge reform. Most importantly, the legislature required the rural ILECs eligible for RM support to reduce their intrastate switched access charge rates to interstate levels no later than September, 2010. By contrast, the Petitioners have over *five years* to reduce their rates and that five-year period does not begin until next year. This preferential glide path is particularly beneficial to CLECs since they are providing most of their services in AT&T

³⁷ See www.acd.net/map/co.cfm.

Michigan's and Verizon's territories and it has been almost two decades since these two carriers' lowered their intrastate switched access rates to mirror their interstate rates. Additionally, CLECs have not endured cost proceedings and thus they have *never* demonstrated that their high intrastate switched access charge rates have any relation to their actual costs. The balanced puts and takes contained in Act 182 are understandably downplayed by the Petitioners.

It was also appropriate (and consistent with Commission precedent) for Michigan's legislature to balance the size of the RM with the need to ensure that telecommunications services remain affordable. The larger the RM fund, the larger the fee that end-user customers will ultimately pay in the form of a pass-through charge from their providers. Due to concerns about the rapid growth in high-cost support provided to CETCs and the resulting strain this "explosive growth" placed on the federal universal service fund, in May 2008 the Commission decided that it should cap high-cost support to CETCs.³⁸ Last year, the D.C. Circuit upheld the Commission's decision, holding, among other things, that "the Commission must consider not only the possibility of pricing some customers out of the market altogether, but the need to limit the burden on customers who continue to maintain telephone service."³⁹ In reviewing the challenge to the Commission's decision to cap CETC funding only, the D.C. Circuit agreed with Fifth Circuit that "[t]he agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service."⁴⁰ The Michigan legislature's decision to make available RM support only to those carriers (i.e., smaller rural ILECs) that have demonstrated that their costs are high

³⁸ *CETC Interim Cap Order*, 23 FCC Rcd 8834 (2008).

³⁹ *RCA v. FCC*, 588 F.3d at 1102.

⁴⁰ *Id.* at 1103 (quoting *Alenco*, 201 F.3d 608, 620-21 (5th Cir. 2000)).

and that continue to have an obligation to serve all residential and business customers in their study areas is consistent with the Commission's decision to cap CETC funding, and thus establishes reasonable and appropriate controls on the size of the RM fund.⁴¹

If the Petitioners were genuinely concerned about their continued ability to provide service in rural ILEC study areas, they could do several things: petition the Michigan Commission to establish a state high-cost fund and seek designation as a CETC. Of course the Petitioners – with one exception – have not availed themselves of either opportunity.⁴² The Michigan legislature granted its state commission the authority to establish and administer such a fund in 2000. But, apparently, the Petitioners do not believe that such a fund is necessary since they have never requested that the Michigan Commission commence such a rulemaking. Moreover, with one exception, the Petitioners have not sought CETC designation and thus are ineligible for federal high-cost support. It is fair for the Commission to consider what tools the Petitioners currently have available to them to ensure that they are able to provide telecommunications services in high-cost areas at affordable rates but that they have nonetheless declined to use.

⁴¹ *See also id.* (quoting with support *Alenco*, 201 F.3d at 620: “excessive funding may itself violate the sufficiency requirements of the Act” by “detract[ing] from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.”).

⁴² Just last month, TC3 was designated an ETC by the Michigan Commission. *See* http://www.dleg.state.mi.us/mpsc/orders/comm/2010/u-16118_02-08-2010.pdf. The Michigan Commission designated an affiliate of another petitioner, ACD North, as an ETC but its designated area is a number of “unassigned territories” (i.e., unserved by any ILEC) in Michigan's Upper Peninsula where to date there appear to be no customers. Thus, ACD has not received an ETC designation in any ILEC's study area.

B. In The Unlikely Event The Commission Concludes That The Petitioners Have Met Their Burden Of Proof Under Section 253(a), Act 182 Is Nonetheless Saved Under Section 253(b).

The Commission’s inquiry into whether Act 182 prohibits or has the effect of prohibiting any entity from providing service in Michigan need go no further than section 253(a) since the Petitioners plainly have failed to meet their burden of proof. If the Commission disagrees, which it should not, we demonstrate herein that Act 182 nonetheless is saved by section 253(b). Section 253(b) preserves a state’s authority to impose a legal requirement affecting the provision of telecommunications services but only if the legal requirement is (1) competitively neutral; (2) consistent with the Act’s universal service provisions; and (3) necessary to accomplish certain enumerated public interest goals.⁴³

1. Act 182 Is Competitively Neutral.

Petitioners are banking on the Commission performing a superficial review of whether Act 182 is “competitively neutral.” Unfortunately for the Petitioners, the Commission’s review under this first prong of section 253(b) is more nuanced than an “apples to apples” comparison. Instead, the Commission has previously found that “it is not necessary for a state to treat all entities in the same way for a requirement to be competitively neutral. In fact, treating differently situated entities the same can contravene the requirement for competitive

⁴³ 47 U.S.C. § 253(b). In its *Western Wireless Order*, the Commission seems to indicate that, in situations such as the one presently before it, the Commission will review only the following: whether the state requirement is competitively neutral, consistent with section 254, and necessary to preserve and advance universal service. *Western Wireless Order* at ¶ 9. In a footnote, the Commission notes that while section 253(b) also preserves the states’ ability to impose competitively neutral requirements that are necessary to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, “these provisions are not at issue here.” *Id.* at n.32. Although it appears that any discussion of these particular public interest goals is unnecessary, out of an abundance of caution, we will discuss them below.

neutrality.”⁴⁴ Thus, the mere fact that Petitioners are not eligible for RM support is not the end of the Commission’s inquiry into whether Act 182 is competitively neutral. Instead, the Commission must consider whether the Petitioners are differently situated from their would-be small rural ILEC competitors. For the reasons discussed above, they plainly are and the Michigan legislature accounted for those differences when it gave CLECs over five years to lower their intrastate switched access rates to interstate levels while requiring small ILECs to eliminate those differences in a flash cut and providing some RM support to account for their lost revenues.

In 1997, the Commission adopted its competitive neutrality principle, which requires that “universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”⁴⁵ As the D.C. Circuit recently stated, the “rule thus only prohibits the Commission from treating competitors differently in ‘unfair’ ways.”⁴⁶ In recognition that CLECs have virtually unfettered discretion to select which customers to serve and where to offer service, the different treatment for CLECs and smaller rural ILECs set forth in Act 182 can hardly be described as “unfair.” This is particularly true since, for over a decade, CLECs that compete against AT&T Michigan and Verizon have been permitted to assess non-cost-based, high

⁴⁴ *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*, CC Docket No. 98-1, 14 FCC Rcd 21697, ¶ 52 (1999).

⁴⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, ¶ 47 (1997).

⁴⁶ *RCA v. FCC*, 588 F.3d at 1104 (also concluding that, “based on the Commission’s findings that CETCs and not ILECs were responsible for the surge in costs, a solution targeting only CETCs was hardly unfair”).

intrastate switched access rates while AT&T Michigan and Verizon have been required to lower their intrastate access charges to interstate levels.

The guidance that the Commission provided in its *Western Wireless Order* almost eight years ago should not lead the Commission to a different conclusion. The hypothetical state universal service mechanism that the Commission discussed in that order assumed that the state law or regulation provided no beneficial treatment, however different, to the new entrant. Instead, the state rule merely provided “substantial support” to ILECs.⁴⁷ As a result, the Commission doubted that the unsupported new entrant would enter a high-cost market and noted that it “may be unable to secure financing or finalize business plans due to uncertainty surrounding its state government imposed competitive disadvantage.”⁴⁸ For these reasons, the Commission indicated that “it is difficult to see how such a program could be considered competitively neutral.”⁴⁹ Act 182 is clearly distinguishable from the Commission’s hypothetical state fund. Act 182 provides both small rural ILECs *and* CLECs competitive advantages (albeit different ones). Smaller rural ILECs will receive RM support to replace some of their lost access revenue. The anticipated amount, about \$16 million, can hardly be said to be “substantial.” Moreover, this amount will decrease during the life of the RM as these ILECs lose access lines, which they assuredly will.⁵⁰ On the other hand, CLECs were given a five-year glide path by the legislature that will favor them over their main competitors, AT&T Michigan and Verizon, both of which are ineligible for RM support. Based on their conduct to date, it is unlikely that the

⁴⁷ *Western Wireless Order* at ¶ 8.

⁴⁸ *Id.*

⁴⁹ *Id.* at ¶ 10.

⁵⁰ Indeed, access lines in general have fallen precipitously in Michigan, going from a high of roughly seven million in 2001, to just under 4,300,000 at the end of 2008. Report at 8.

Petitioners would ever enter any of the smaller ILEC's highest-cost areas under any circumstance (i.e., RM support or not) and, thus, in those areas where they are competing, Petitioners have a distinct competitive advantage over their ILEC competitors (AT&T Michigan and Verizon). In the unlikely event that they do enter the highest-cost areas of smaller ILECs' territories, these CLECs could seek CETC designation, which will make them eligible for federal high-cost support, and they could request that the Michigan establish a state high-cost support fund as an additional source of support.

It is also doubtful that Act 182 will have any bearing on the Petitioners' ability to secure financing, especially considering that the CLECs' competitive advantage over AT&T Michigan and Verizon with respect to intrastate switched access charges is guaranteed until January 2015. Additionally, it is important to keep in perspective that the Commission provided its *Western Wireless Order* guidance in 2000, which was during the infancy of competitive entry into local markets. At the time, CETC support accounted for less than \$17 million/year. By the time the Commission capped CETC support in May 2008 due to the "explosive growth" in CETC high-cost support payments, such support had grown to over \$1.18 billion/year, an average annual growth rate of over 100 percent.⁵¹ During this period of time, CLECs in Michigan similarly flourished. For example, while AT&T Michigan lost approximately 50 percent of its access lines between 1999 and 2008 (from 5,449,000 to 2,752,000), CLECs' access lines increased by approximately 220 percent (from 268,000 to 860,000).⁵² Finally, the statements contained in the *Western Wireless Order* are, at the end of the day, only guidance, and do not bind the Commission as it considers the instant Petition.

⁵¹ *CETC Interim Cap Order* at ¶ 6 (citing 2001 through 2007 data).

⁵² Report at 8.

2. Act 182 Is Consistent With The Commission's Universal Service Principles.

By passing Act 182, the Michigan legislature satisfied Congress's directive to the states to make explicit the implicit subsidies contained in high intrastate switched access rates and this action is clearly consistent with section 254. In the fourteen years since Congress issued that directive, a number of states have complied with Congress's wishes but many more have not and, therefore, it would be counterproductive for the Commission to preempt Michigan's commendable efforts in this regard, particularly since the Commission itself appears on the verge of requiring carriers to lower their intrastate switched access rates to interstate levels.⁵³ To ensure that telecommunications services remain affordable in Michigan,⁵⁴ its legislature appropriately determined that the size of the RM should be no greater than necessary, which it did by limiting access to this fund to those carriers that had demonstrated that their costs of providing service are high (i.e., smaller rural ILECs). By making available additional support to those entities with demonstrably high costs and an obligation to serve all customers within their territories, the legislature implicitly determined that some access charge replacement support is necessary for these carriers so that they may continue making available services that are reasonably comparable to those offered in urban areas and at reasonably comparable rates.⁵⁵ Not only would this action preserve universal service in these high-cost areas, it will enable these carriers to deploy facilities that support broadband services, thereby advancing universal service.⁵⁶ The Michigan legislature also made RM support specific, predictable, and sufficient:

⁵³ See, e.g., March 8, 2010 Comm. Daily USF Article.

⁵⁴ See 47 C.F.R. §254(b)(1).

⁵⁵ 47 U.S.C. § 254(b)(3).

⁵⁶ *Id.* at § 254(b)(5), (2), (3).

it targeted RM support to just those entities that have shown that their costs of providing telecommunications service is high, thereby making such support specific; it established a methodology that will provide a predictable amount of support over a predictable period of time; and it “proscribe[d] support in excess of that necessary to achieve the Act’s universal service goals,” thereby ensuring that RM support is sufficient.⁵⁷ Thus, the Michigan legislature acted well within its authority under section 254(f) when it enacted Act 182.⁵⁸

3. Act 182 Satisfies Section 253(b)’s Other Enumerated Public Interest Goals.

To guarantee that all residents in Michigan have access to at least one provider of intrastate telecommunications services and, thus, access to 911 and other essential services, the Michigan legislature obviously concluded that a small number of carriers continue to require some support (via the RM) in order to remain viable and to satisfy their service obligations. These smaller ILECs demonstrated to the legislature that this support is necessary for them to continue providing quality services in their high-cost study areas, whereas the Petitioners made no such showing. Additionally, Act 182 requires providers that receive intrastate switched access charge reductions to reduce their customers’ rates by an equal amount.⁵⁹ The

⁵⁷ *Id.* at § 254(b)(5); *CETC Interim Cap Order* at ¶ 8. *See also RCA v. FCC*, 588 F.3d at 1103 (“it is hard to imagine how the Commission could achieve the overall goal of §254 – the ‘preservation and advancement of universal service,’ 47 U.S.C. §254(b)(5), yet so large it actually makes telecommunications services less ‘affordable,’ in contravention of §254(b)(1).”).

⁵⁸ 47 U.S.C. § 254(f) (“A State may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.”). For these reasons, Petitioners’ claim that the Commission could preempt Act 182 based on its traditional preemption doctrine should be dismissed since Act 182 does not “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Western Wireless Order* at ¶ 11 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984)) (further citations omitted).

⁵⁹ Act 182 at §310(6).

Commission may conclude that, by requiring this action and providing RM support only where necessary, the legislature believed it was safeguarding the rights of consumers by ensuring that intrastate telecommunications service rates remain affordable.

C. Petitioners Have Not Demonstrated That They Are Likely To Succeed On the Merits, Nor Have They Met The Other Criteria To Warrant A Stay of Act 182.

To qualify for the extraordinary remedy of a stay, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed if a stay is granted; and (4) the public interest would favor the grant of a stay.⁶⁰ The Petitioners' stay request fails on all accounts. First, as we have demonstrated above, particularly in Section II.A *supra*, the Petitioners are *unlikely* to prevail on the merits. We do not repeat that analysis here.

Second, the Petitioners will not suffer "irreparable harm" if the Commission addresses this Petition during its usual course of business. The Petitioners claim that they "will be required to make significant, unrecoverable expenditures to comply with Act 182's reporting and tariffing requirements, and will also be required to pay into the fund."⁶¹ In its opposition, TAM correctly pointed out that the Petitioners and other non-RM eligible providers simply had to provide (1) their 2008 total intrastate retail telecommunications service revenues, (2) their 2008 uncollectable revenues (actual or projected), and (3) the difference between those two numbers (number 1 minus number 2).⁶² Referring to such a reporting requirement as a "significant,

⁶⁰ *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁶¹ Stay Request at 14-15.

⁶² TAM Opposition at 5.

unrecoverable expenditure[]” is laughable. It is also one that the Petitioners have already incurred as this information was due at the Michigan Commission on February 16, 2010.⁶³ Their claim that altering their tariffs to reduce one number by 20 percent – on January 1 of each year, beginning in 2011 – constitutes a significant and unrecoverable expense is similarly not credible. It is true that all contributors, including the Petitioners and AT&T Michigan will begin making contributions to the RM fund in September. Such contributions, however, are not “unrecoverable” from the state in the unlikely event that Act 182 is invalidated in part or in whole since there is nothing that precludes a contributor, in those circumstances, from seeking a refund. Moreover, there is nothing in Act 182 that prevents the Petitioners from passing through their contribution costs to their end-user customers, as is the norm with respect to the federal universal service contributions, for example. The claim that the Petitioners will lose customers to small rural ILECs unless the Commission acts immediately to stay Act 182 should also be dismissed for the reasons we provided above in Sections II.A. and B (e.g., the Petitioners have provided no evidence that they will be “unable to match” the smaller rural ILECs’ rates post-implementation of Act 182 and, because these carriers can selectively target the most lucrative, least costly customers, it is more probable that these carriers’ costs are less, perhaps dramatically so, than their rural ILEC competitors’ costs).

Third, the Petitioners state that no party will be harmed if the Commission stays implementation of Act 182.⁶⁴ That is incorrect. The customers of carriers that currently have to pay high intrastate switched access charges would be harmed. Finally, Petitioners are wrong to contend that granting their stay request “will further the public interest because it will ensure that

⁶³ *Id.*

⁶⁴ Stay Motion at 16.

competition is not hindered” in Michigan while the Commission considers its Petition.⁶⁵ As we detailed above, the Petitioners have provided no evidence demonstrating that they will be unable to compete post-implementation of Act 182. In fact, Act 182 assures Petitioners of a competitive advantage vis-à-vis AT&T Michigan and Verizon for five years. Petitioners could easily apply the revenues that they receive via inflated intrastate access charges paid by AT&T Michigan and Verizon during this period of time towards entering or expanding their markets in smaller rural ILEC territories.

III. CONCLUSION

The Petitioners have provided *no* data to support their assertion that, unless the Commission takes the extraordinary step of preempting Michigan’s recently enacted access charge reform law – Act 182 – in its entirety, they will be effectively prohibited from providing intrastate telecommunications services in rural ILEC study areas. Petitioners’ utter failure to demonstrate that Act 182 will impose substantial costs on them is fatal to their request. Thus, consistent with its precedent, the Commission should summarily deny Petitioners’ request for failure to meet their burden of proof under section 253(a). If the Commission were inclined to agree with the Petitioners, which we believe is an extremely remote possibility, it is important for the Commission to recognize that, while the access charge reform action taken by the Michigan legislature and several other states is necessary and responsible, it also can be politically unpopular. If the Commission intends to enlist the assistance of the states as it seeks, at long last, to implement comprehensive intercarrier compensation reform, it should be encouraging states to act as Michigan did, not deterring them, which it would by granting Petitioners’ substantively deficient Petition. A strong federal-state partnership, as Congress

⁶⁵ *Id.* at 17.

requires, will be vital as the Commission embarks on overhauling universal service and intercarrier compensation, and granting this Petition will send the wrong message to the states.

Respectfully Submitted,

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