Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Michigan CLEC Petition for Declaratory Ruling and Motion for Temporary Relief	)	WC Docket No. 10-45
	)	

OPPOSITION OF CENTURYLINK

INTRODUCTION

The Michigan legislature adopted a reasonable and responsible approach to reforming intercarrier compensation. The state commission is now acting to implement those reforms. The Petitioners, however, now call on the Commission to overrule and preempt those efforts, based on faulty claims.

The Joint Michigan CLEC Petition for Declaratory Ruling and Motion for Temporary Relief should be denied. The petition and motion fail to establish that the statute about which the Petitioners complain—2009 Public Act 182 (Act 182)—actually erects any barrier to entry or otherwise violates competitive neutrality. Nor do Petitioners establish any basis for injunctive relief. Rather than frustrate Michigan's access reform law, the Commission should recognize that Act 182 (i) promotes competition, protects consumers, and is consistent with Commission policies; (ii) does not create a barrier to entry; (iii) is competitively neutral; and (iv) creates no basis for temporary relief.

I. MICHIGAN ACT 182 PROMOTES COMPETITION, PROTECTS CONSUMERS, AND IS WHOLLY CONSISTENT WITH COMMISSION POLICIES.

Historically, the Commission has encouraged and supported state intercarrier compensation reform that moves implicit subsidies to explicit support and reduces access charges. The Commission has stated on many occasions that such reforms of intercarrier compensation promote competition and investment. Act 182 enacts a substantial reform of intercarrier compensation in Michigan. Specifically, it reduces intrastate access charges and moves implicit subsidies contained in those charges to explicit support in the form of a state universal service fund.

Act 182 reduces intrastate access charges in two ways. First, it removes a favorable exemption that had permitted small CLECs operating in areas where AT&T or Verizon are the ILECs to charge intrastate access charges that are higher than the interstate access charges that apply to all providers in those areas. AT&T and Verizon have not been permitted this competitive advantage of charging higher intrastate access charges. Second, the statute requires all providers in areas other than those served by AT&T and Verizon to reduce intrastate charges to the relevant interstate levels, which varies depending on the ILEC and how it is regulated in the federal jurisdiction.

For ILECs such as CenturyLink, intrastate access charges have been critical to cover the costs of providing carrier of last resort ("COLR") service. The costs of providing ubiquitous service through rural areas with low population densities are too great to be covered through end-user revenue. Consequently, the telecommunications providers that also use the local networks in those areas have historically been required to compensate the COLR network providers—rural ILECs—for using those rural networks at rates reflecting the higher costs of building, maintaining, and operating networks in low-density areas. As competition has developed, those access revenues and the support for high-cost networks contained therein, have come under pressure, which inhibits competition by leaving one provider with the risk of an unfunded mandate and harms consumers by threatening universal service.

CLECs, such as the Petitioners, do not have and never have had COLR obligations. Instead, they have been free to deploy networks and offer service where it is economically feasible to do so, without any reliance on implicit or explicit support. They generally have avoided high-cost areas, which are characterized by low population densities and few telecommunications customers. CLECs in Michigan have, therefore, focused their businesses on the areas served by AT&T and Verizon ILECs, and collectively they appear to have gained considerable business and market share. Presumably, the ability to charge higher intrastate access charges has been beneficial to CLECs in AT&T and Verizon areas.

The CLECs primary complaint, therefore, appears to be that they are unable to look to the access replacement fund for revenues lost because they no longer will have the ability to charge more than AT&T and Verizon in areas where those ILECs operate. This is hardly the kind of harm that section 253 was intended to combat. Instead, the remedy provided to the Petitioners—a five-year phase out of access charges—seems to be a just and reasonable solution to the problem of ending Petitioners ability to charge higher access charges than their competitors for most customers in Michigan. In fact, even if the CLECs were right (and they are not) that Act 182 creates a barrier to entry, the remedy logically would not be preemption but, rather, a very limited change permitting them to draw from the access replacement fund only for lines in areas served by small ILECs, which is only a small number of lines.

Michigan is not the first state to set up a universal service and/or access replacement mechanism under which no CETC is receiving support.[1] Nor is Act 182 unique in seeking to

[1] *See*, *e.g.*, NM Admin Code 17.11.10.8 (available at http://www.nmcpr.state.nm.us/nmac/parts/title17/17.011.0010.htm); *The Development Of Rules And Regulation Applicable To The Entry And Operations Of, And The Providing Of Services By, Competitive And Alternate Access Providers In The Local, Intrastate And/Or Interexchange Telecommunications Market In Louisiana*, Docket No. U-20883-Subdocket C, General Order (Louisiana Mar. 23, 2005).

limit support to a single network provider in each area needing universal service support. Indeed, the Commission itself has clearly stated that USF support should not be provided to multiple network providers, because it does not make sense to support multiple networks where it is uneconomic to build and operate even one network.

II. MICHIGAN ACT 182 DOES NOT CREATE A BARRIER TO ENTRY

The Petitioners seek a Commission finding that Act 182 violates section 253(a) of the Communications Act, which states that:

> 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.[2]

The Michigan statute does not violate section 253, however, because it does not have the effect of prohibiting any entity, including the Petitioners, from providing service. Contrary to the Petitioners' claims, Act 182 does not erect any barrier to entry in the areas served by ILECs such as CenturyLink. It is worth noting that wireless and cable competitors do not currently collect access charges, and they will not be able to draw from the access replacement fund. Nonetheless, they have been quite successful competing, including in the areas served by ILECs that are eligible for access replacement under Act 182. Consequently, nothing in the statute can be seen as having the effect of prohibiting the Petitioners from providing service.

In any event, Act 182 does not erect a barrier to entry for CLECs in areas served by ILECs that are eligible for access replacement support. It simply seeks to fulfill the state's obligation to compensate small ILECs for building, maintaining, and operating COLR networks in uneconomic areas. Those ILECs have been compensated for fulfilling the COLR mandates to

[2] 47 U.S.C. § 253(a)

date, in part, through intrastate access charges. If a CLEC such as one of the Petitioners were to seek to enter or expand service in an area served by an ILEC drawing from the access replacement fund, the CLEC would be able to avoid building in uneconomic areas and, therefore, would not be in need of support. While the handful of customers in the uneconomic areas (and there are only a handful—that is what makes the areas uneconomic to serve in the first place) may be beyond the reach of CLEC entry, the CLEC's entry is facilitated by being able to avoid building and operating in uneconomic areas. To the extent the Petitioners and other CLECs do face a practical barrier to entry in areas served by the small ILECs that can draw from the access replacement fund in Michigan, the barrier is the uneconomic nature of the low-density areas served by such ILECs, and not the absence of access replacement funding to compensate CLECs for networks in uneconomic areas. After all, with relatively few exceptions, CLECs have declined to build networks in uneconomic areas.

Nothing in section 253 requires a state to overcome an economic barrier to entry for every possible entrant. The state of Michigan may act consistent with the current Commission approach of providing support to a single network provider in areas that are uneconomic to serve in the absence of support. The Commission has rejected the idea that it must provide USF support to every provider in uneconomic low-density areas for the very sound economic reason that supporting multiple networks merely reduces support to all network providers, which harms consumers and substantially increases the amount of support needed in any given area.

For example, suppose $50,000 a year is needed above the revenue available in a particular rural community with a low population density to support a telecommunications network that served all requesting customers, including those living far outside of town. If the area has 500 customers and is served by a single provider, the amount of support would be $100 per line annually, or $8.33 per line each month. If a new entrant were to come in and take 100 of the customers, effectively the same $50,000 would be needed to support the COLR network, as the costs are largely fixed and do not decline commensurate with line loss. The alternative would be to leave the COLR network without adequate support, which would threaten the goals of universal service and harm the consumers in the community. Therefore, support to the COLR provider would increase to $125 per line annually, or $10.42 per line each month. In addition, if the entrant also received similar support, the total amount of support for the area would increase (perhaps by $12,500 annually, for a total of $62,500). This spiral of increasing support is neither economically rational nor sustainable. It was for these same reasons that the Commission abandoned the identical support rule.

Contrary to Petitioners' claims, the Commission's *Western Wireless*[3] advisory opinion did not address a situation like Act 182, where differently situated carriers are provided different remedies for access charges reductions. In that proceeding, the Commission wrote an advisory opinion (because the underlying Kansas statute had been revised to eliminate the complained-of provision) stating that it would be concerned by an access replacement regime that was available only to ILECs and not to competitors. That opinion did not address a situation where ILECs and CETCs were provided different access replacement paths based on different regulatory burdens.

The Petitioners' reliance on the *Western Wireless* advisory opinion is faulty for another reason, too. The opinion does not reflect current Commission policy on the distribution of support from the federal USF. Rather, it was based on the concept of portability of USF support, which is predicated on the identical support rule. In addition, while the facts in that case may

[3] *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, Memorandum Opinion and Order, 15 FCC Rcd 16227 (2000) (*Western Wireless*).

have some facial similarities with the current situation, the Commission no longer supports portability for USF support. On the contrary, the Commission has clearly adopted precisely the opposite policy. By adopting the CETC Cap, the Commission deliberately broke with the identical support rule and rejected the concept of portability.

III. MICHIGAN ACT 182 IS COMPETITIVELY NEUTRAL

Even assuming for argument that Act 182 were found somehow to erect a barrier to entry within the meaning of section 253(a) (which it does not), the statute would still be preserved by the section 253(b). The savings clause there states:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service ….[4]

The Michigan legislature was not writing on a blank slate when it adopted Act 182, and that fact is the most central of the flaws in Petitioner's argument about a supposed lack of competitive neutrality. In reality, it makes perfect sense that CLECs should have a different remedy for reducing their intrastate access charges—a five-year transition as opposed to a flash-cut and access replacement support—because CLECs do not face the same obligations as do the ILECs that are eligible for support. Most importantly, the CLECs are better able to respond through market competition, because they are not saddled with legacy regulation that limited, and often still limits, their ability to choose where and when to build their networks, how and where to provide their services, and how much to charge for their services. Act 182 does not violate competitive neutrality by offering different paths for reducing intrastate access charges based on the very different regulatory burdens on affected carriers.

[4] 47 U.S.C. § 253(b).

If the Petitioners were somehow to prevail on their demands and be free to draw from the Michigan access replacement fund without incurring the cost of building, maintaining, and operating COLR networks in uneconomic areas, it would create an ever greater competitive neutrality problem. The CLECs would be able to receive explicit support without incurring the obligations for which the support is intended where rural ILECs such as CenturyLink would be compensated only for those obligations.

Competitive neutrality actually requires that access replacement be provided only to those carriers that have built, maintain, and operate COLR networks in uneconomic areas. In Michigan as elsewhere, CLECs have not done so in the areas served by the ILECs that are eligible to draw from the access replacement fund. Therefore, it would actually violate the competitive neutrality principle to allow the Petitioners to draw from the Michigan access replacement fund. As a practical matter and a policy matter, granting access replacement to the Petitioners would be no different than the outdated and discarded federal identical support rule. Unquestionably, it would be competitively biased and utterly inconsistent with Commission policy beginning with the enactment of the CETC cap.

CETC use of high-cost support also violates competitive neutrality, because CETCs generally serve areas that already have multiple providers. They divert USF support away from its intended purpose, which is meant to bring telecommunications service to places where it would not otherwise be available. Instead, CETCs use USF support to bolster their competitive position or perhaps modestly increase coverage in areas where customers already have telecommunications service. This is directly contrary to the principle of universal service and the mandates of section 254 of the Communications Act, under which support should be used to facilitate offering services where it is not economically feasible to build and operate networks.

The current problem of competitive disparity with CETC support is compounded by the fact that CETCs typically engage in "cream skimming," and it appears that the Petitioners would fall into this category if they were somehow permitted to draw universal service support in the form of access replacement funds. In its decisions on the *Virginia Cellular ETC Petition*[5] and *Highland Cellular ETC Petition*,[6] the Commission reviewed in detail the potential for cream-skimming in rural areas, and suggested that concerns about potential cream-skimming should factor into the public interest analysis of a petition for ETC designation in rural carriers' areas. In those orders, the Commission explained that cream-skimming "occurs when competitors serve only the low-cost, high-revenue customers in a rural telephone company's study area."[7] If the Petitioners and other CLECs were permitted to draw access replacement support under Act 182 without serving all of the areas covered by the ILECs that are eligible for support under the fund, they would be engaging in cream skimming, contrary to the Commission's express policies for ETCs. By protecting against such an outcome, Act 182 is competitively neutral and as it manifestly concerns universal service policy, it qualifies for the section 253(b) exception.

IV. THERE IS NO BASIS FOR TEMPORARY RELIEF.

Even beyond addition to seeking preemption, the Petitioners demand the extraordinary remedy of injunctive relief. They cite the standard for injunctive relief outlined in *Virginia Petroleum Jobbers*, which requires a showing of: (a) likelihood of success on the merits;

[5] *Federal-State Joint Board on Universal Service Virginia Cellular, LLC Petition for Designation as an ETC in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion & Order, 19 FCC Rcd 1563, ____ ¶¶ 31-35 (2004) (*Virginia Cellular*).

[6] *Federal- State Joint Board on Universal Service/Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Order, 19 FCC Rcd 6422, ____ ¶¶ 26-33 (2004) (*Highland Cellular*).

[7] *Id*. at ¶ 26.

(b) threat of irreparable harm absent preliminary relief; (c) lack of injury to other parties if relief is granted; and (d) that the requested relief is in the public interest.[8] The Petitioners plainly fail to meet those standards. Specifically, not only are Petitioners unlikely to succeed on the merits, but they also fail to meet the standard for injunctive relief because they cannot show irreparable harm. In particular, they have not shown, nor could they show, that the difference between the remedy they have been provided (a five-year transition) and the one they would prefer (access replacement) is of such a magnitude to rise to irreparable harm, much less risk their ability to operate and provide service. Instead, even assuming the Petitioners' somehow prevailed, the potential harm could readily be compensated through the review process.

V. CONCLUSION

The Commission should deny the Petition and the motion. Rather than frustrate Michigan's access reform law, the Commission should recognize that Act 182 (i) promotes competition, protects consumers, and is consistent with Commission policies; (ii) does not create a barrier to entry; (iii) is competitively neutral; and (iv) creates no basis for temporary relief.

Respectfully submitted,

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[8] *AT&T Corp. v. Ameritech Corporation*, File No. E-98-41, Memorandum Opinion and Order, 13 FCC Rcd. 14508 ¶ 13 (1998).