

**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) **WC Docket No. 10-45**
Declaratory Ruling that the State of Michigan’s)
Statute 2009 PA 182 Is Preempted Under Sections)
253 and 254 of the Communications Act)

COMPTTEL COMMENTS IN SUPPORT OF JOINT PETITION

COMPTTEL, through undersigned counsel, hereby supports the Joint Petition of ACD Telecom, Inc., DayStarr, LLC, Clear Rate Communications, Inc., TC3 Telecom, Inc. and TelNet Worldwide, Inc. (“Petitioners”) For A Declaratory Ruling that Michigan Statute 2009 PA 182 (“Michigan Act 182”) is preempted under Sections 253 and 254 of the Communications Act, 47 U.S.C. §§253, 254.¹ The Petitioners have persuasively shown that Michigan Act 182 violates Section 253 of the Act because it (1) is not competitively neutral; (2) impermissibly discriminates in favor of small incumbent local exchange carriers (“ILECs”); and (3) has the effect of prohibiting competitive carriers from providing telecommunications service in the territories of the small ILECs that will be compensated from the Rate Restructuring Fund created by the statute and administered by the Michigan Public Service Commission. The Commission should preempt Act 182 expeditiously to ensure that the competitive landscape in Michigan is not inappropriately tilted for the benefit of small incumbents and to remove the financial

¹ COMPTTEL member Sprint Nextel Corporation does not join in these Comments.

disincentive for telecommunications service providers to offer competitive service in the territories of those small incumbents.

I. Michigan Act 182 Creates An Impermissible Barrier To Entry

Section 253(a) of the Communications Act prohibits states from adopting or enforcing statutes that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. *See e.g., Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *Puerto Rico Telephone Company, Inc. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2005). Michigan Act 182 requires all carriers providing intrastate service to reduce their intrastate switched access rates to the interstate level over a period of five years.² In addition to reforming intrastate access rates, Michigan Act 182 establishes a barrier to entry prohibited by Section 253(a) by creating a state administered Rate Restructuring Fund to reimburse small ILECs, but not competitors, for intrastate switched access revenues lost due to the mandatory rate reductions³ and by requiring carriers providing service or who wish to provide service in competition with the small ILECs, including the Joint Petitioners,⁴ to subsidize the operations of those ILECs through contributions to the fund.⁵

² Joint Petition, Exhibit 1, Section 310(2). COMPTTEL takes no position on the provisions of Michigan Act 182 that require reductions in intrastate access charges. It is the non-competitively-neutral nature of the Rate Restructuring Fund to which COMPTTEL objects.

³ *Id.*, Sections 310(7), (8), and (23)(c).

⁴ Joint Petition, Exhibits 4-8.

⁵ Joint Petition, Exhibit 1, Section 310(12).

In evaluating whether a state statute has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, the Commission looks at whether it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."⁶ Clearly, Michigan Act 182 has such an impermissible effect by creating an unfair and unbalanced legal and regulatory environment that favors small ILECs over new entrants providing competitive service in their service territories. By requiring both ILECs and competitive providers to reduce their intrastate access rates to the interstate level and by reimbursing the ILECs, and only the ILECs, for the revenues lost as a result of the rate reductions, Michigan Act 182 forces competitors who wish to offer consumers an alternative to the ILECs' services to compete at a state mandated financial disadvantage in violation of Section 253(a).

Ten years ago the Commission opined that state subsidy mechanisms, such as that created by Michigan Act 182, that are available only to ILECs materially inhibit the ability of competitors and potential competitors to compete in a fair and balanced legal and regulatory environment by giving the ILECs an unfair price advantage:

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 support provided to ILECs that was not available to their competitors. Thus non-ILECs would be left with 2 choices – match the ILEC's price charged to the customer, even 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 may give customers a strong incentive to choose service

⁶ *In re TCI Cablevision of Oakland Country, Inc.*, 12 FCC Rcd 21396 at ¶98 (1997).

from ILECs rather than competitors. Further, we believe it is unreasonable to expect an unsupported carrier to enter a high cost market and provide a service that its competitor already provides at a substantially supported price. . . . Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of Section 253(a).⁷

If the Commission determines that a state government has enacted a statute that violates Section 253(a) or (b), Congress has directed the Commission to preempt the enforcement of the statute. 47 U.S.C. §253(d). While Section 253(b) preserves the ability of the states to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, ensure the continued quality of telecommunications service and safeguard the rights of consumers, there is nothing in the language of Michigan Act 182 that would indicate that the Rate Restructuring Fund established to benefit ILECs only is intended to achieve any of these purposes.. As a result, the Commission must preempt enforcement of the statute pursuant to Section 253(d).

II. Michigan Act 182 Does Not Fall Within Section 253(b)'s Safe Harbor

Michigan Act 182 was enacted to reform intrastate access rates,⁸ not to preserve and advance universal service. Section 316a of the Michigan Telecommunications Act, MCL 484.2316a, authorizes the Michigan Public Service Commission to establish a state universal service fund

⁷ *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 (2000) at ¶ 8.

⁸ Joint Petition Exhibit 1, Sections 310(2), (7).

when certain criteria are met.⁹ Michigan Act 182 makes no reference to Section 316a, nor does the Michigan Commission's Opinion and Order directing telecommunications providers to provide the financial data necessary for the Commission to calculate the amount of intrastate access revenues the small ILECs will lose as a result of the rate reduction and the size of the Rate Restructuring Fund.¹⁰

There are other reasons to believe that the Rate Restructuring Fund created by Michigan Act 182 was not designed to preserve and advance universal service. Section 316a(1)(b) defines "intrastate universal service fund" as "a fund created by the Michigan Public Service Commission to provide a subsidy to *customers* for the provision of supported telecommunications services *provided by any telecommunications carrier.*"¹¹ Unlike the Rate Restructuring Fund which compensates only ILECs, Michigan law requires any intrastate universal service fund to be competitively neutral by offering a subsidy to *customers* for supported services provided by any telecommunications carrier, not merely ILECs. Section

⁹ In 2002, the Michigan Commission commenced an investigation pursuant to Section 316a to determine whether it should create an intrastate universal service fund. Section 316a states that the Michigan Commission should establish a universal service fund if it determines that the forward looking economic cost of providing a supported service would exceed the affordable rate for that service. After the investigation, the Michigan Commission concluded that there was no need to create an intrastate universal service fund in part because of the availability to Michigan carriers of federal universal service support. *In the Matter, On The Commission's Own Motion, To Consider Issues Related To The Creation Of A State Universal Service Fund*, Case No. U-13477 (Feb. 6, 2003). Section 316a(7) provides that Section 316a does not apply if an interstate universal service fund exists on the federal level unless otherwise approved by the Commission.

¹⁰ Joint Petition Exhibits 1 and 3.

¹¹ MCL 484.2316a(1)(b) (emphasis added).

316a is thus consistent with federal universal service provisions which recognize that the purpose of universal service is to benefit the customer, not the carrier, and that universal service “is a goal that requires sufficient funding of *customers*, not *providers*.” *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (emphasis in original). Moreover, Section 316a(4) provides that any state universal service fund shall be administered by an independent third party administrator selected by the Michigan Public Service Commission. In contrast, Michigan Act 182 provides that the Rate Restructuring Fund shall be administered by the Michigan Commission.¹² These conflicting provisions in Michigan Act 182 and Section 316a of the Michigan Telecommunications Act confirm that Michigan Act 182 and the Rate Restructuring Fund it authorizes were not created for the purpose of preserving and advancing universal service.

Nor does Michigan Act 182 contain any language indicating that the Rate Restructuring Fund is necessary to ensure the continued quality of telecommunications service. The Act does not mention quality of telecommunications service, let alone state that ILECs, but not competitors, must be compensated for lost intrastate access revenues to ensure the continued quality of such services.

Finally, the Rate Restructuring Fund cannot be found necessary to safeguard the rights of consumers. Consumers have the right to a choice of telecommunications service providers. Rather than safeguard that right, Michigan Act 182 is likely to have the effect of eliminating consumer choice in providers by inhibiting the ability of competitors to offer alternative services

¹² Joint Petition Exhibit 1, Section 310(9), MCL 484.2310(9).

in the territories of the small ILECs who will be compensated from the fund. In addition, because the Fund only compensates ILECs, consumers of competitive telecommunications services are likely to see a rate increase while consumers of ILEC services will not. Because of the disparate impact of the Fund on consumers of competitive services and consumers of ILEC services and the role of the State in picking winners and losers, Michigan Act 182 does anything but safeguard the rights of consumers.

Even if the Commission were to find that the Rate Restructuring Fund was necessary to preserve and advance universal service, ensure the continued quality of telecommunications service or safeguard the rights of consumers, which it should not, preemption of Michigan Act 182 is nonetheless compelled. Section 253(b)'s safe harbor does not protect from preemption state statutes that are not competitively neutral or that are applied in a discriminatory manner. *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000). The Commission has defined competitively neutral to mean requirements and regulations that "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776 at ¶¶46-48 (1997). To survive preemption, a requirement must be "competitively neutral with respect to, and as between, *all of the participants and potential participants* in the market at issue." *In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, 13 FCC Rcd 16356 at ¶11 (1998) (emphasis added), *aff'd sub. nom. RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000). Michigan Act 182 is definitely not competitively neutral. On the contrary, it unfairly favors small ILECs over competitors and potential competitors by establishing a mechanism to reimburse small ILECs for

the revenue lost due to the mandatory intrastate access rate reductions while requiring their competitors to absorb the loss (or raise end user rates to recover the difference). Because Michigan Act 182 gives an unfair financial advantage to small ILECs that is denied to their competitors and potential competitors, there is no question that Section 253(b)'s safe harbor does not protect Michigan Act 182 and the Commission must preempt under Section 253(d).¹³

Conclusion

For the foregoing reasons, and those set forth in the Joint Petition for Declaratory Ruling, COMPTTEL respectfully requests that the Commission preempt Michigan Act 182.

Respectfully submitted,

March 9, 2010

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¹³ *Western Wireless, supra*, at ¶9 (If a requirement violates section 253(a) and does not fall within the safe harbor of section 253(b), the Commission must preempt enforcement of the requirement in accordance with section 253(d)).