

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

In the Matter of )
)
The Public Utility Commission of Texas ) CCBPol 96-13
)
The Competition Policy Institute, IntelCom ) CCBPol 96-14
Group (USA), Inc. and ICG Telecom Group, )
Inc., AT&T Corp., MCI Telecommunications )
Corporation, and MFS Communications )
Company, Inc. )
)
Teleport Communications Group, Inc. ) CCBPol 96-16
)
City of Abilene, Texas ) CCBPol 96-19
)
Petitions for Declaratory Ruling and/or )
Preemption of Certain Provisions of the )
Texas Public Utility Regulatory Act of 1995 )

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1997

Released: October 1, 1997

By the Commission: Chairman Hundt and Commissioner Ness issuing separate statements.

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**I. INTRODUCTION**

**A. Overview and Summary**

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act) became law.<sup>1</sup> As the Supreme Court recently noted, the 1996 Act "was an unusually important legislative enactment" that changed the landscape of telecommunications regulation.<sup>2</sup> Through this comprehensive amendment to the Communications Act of 1934 (Communications Act or Act), Congress sought to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all markets to competition.*"<sup>3</sup> Congress thus rejected the historic paradigm of telecommunications services provided by government-sanctioned monopolies in favor of a new paradigm that encourages the entry of efficient competing service providers into all telecommunications markets. Congress envisioned the emergence of robust competition among multiple service providers in all industry segments,

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. §§ 151 *et seq.* (1996 Act). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

<sup>2</sup> *Reno v. ACLU*, No. 96-511, 1997 WL 348012, at \*7 (U.S. June 26, 1997).

<sup>3</sup> S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Conference Report) (emphasis added).

with marketplace forces supplanting regulation as markets become fully competitive.<sup>4</sup> The ultimate goal of the 1996 Act is the deregulation of these markets that historically have been regulated, in large part by state commissions, when justified by the presence of competition.

2. The 1996 Act arms new entrants into previously closed telecommunications markets as well as this Commission and state regulators with powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past. Sections 251 and 252, for example, secure to new competitors the right to enter local telecommunications markets through different avenues: (1) construction of their own networks and interconnection with incumbent local exchange carriers (incumbent LECs)<sup>5</sup>; (2) use of unbundled network elements provided by incumbent LECs; (3) resale of incumbent LEC retail services purchased at wholesale rates; or (4) any combination of these three entry methods. These provisions also obligate incumbent LECs to provide interconnection and unbundled network elements at cost-based rates and on terms that are just, reasonable and non-discriminatory.<sup>6</sup> Services for resale must be provided by incumbent LECs at wholesale rates and on terms that are reasonable and non-discriminatory.<sup>7</sup> Moreover, Congress established in section 252 a specific plan, including deadlines, under which new entrants are ensured the ability to enter into negotiated and, if necessary, arbitrated agreements with incumbent LECs in order to obtain the facilities and services that new entrants need to compete effectively with such LECs. Section 254 of the Act directs the Commission, working in concert with state commissions, to restructure the historic system for advancing universal telephone service so that it is compatible with the new national pro-competitive, deregulatory policy framework. Last November, the Federal-State Universal Service Joint Board issued its recommendations for implementing section 254 and, in May of this year, the Commission largely ratified those recommendations in adopting a plan for revamping universal service programs over the next several years.<sup>8</sup>

3. In addition to these and other market-opening provisions of the Act, section 253 directs the Commission, subject to certain limited exceptions, to preempt any state or local statute, regulation or legal requirement that "prohibit[s] or [has] the effect of prohibiting the

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<sup>4</sup> See, e.g., S. Rep. No. 23, 104th Cong., 1st Sess. at 67 (1995) (Senate Report) (additional views of Senator Hollings) ("[t]he basic thrust of the bill is clear: competition is the best regulator of the marketplace, but until that competition exists, monopoly providers of services must not be able to exploit their monopoly power . . . . Competitors are ready and willing to enter new markets, as soon as they are opened").

<sup>5</sup> Section 3(26) of the Act defines the term "local exchange carrier" to include "any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service . . . ." 47 U.S.C. § 153(26).

<sup>6</sup> See 47 U.S.C. §§ 251(c)(2)-(3) and 252(d).

<sup>7</sup> See 47 U.S.C. § 251(c)(4).

<sup>8</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157 (rel. May 8, 1997) (*Universal Service Report and Order*).

ability of any entity to provide any interstate or intrastate telecommunications service."<sup>9</sup> Section 253 ensures that no new entrant is inhibited from entering a telecommunications market because of any state law, regulation or legal requirement unless such measure is necessary to advance the public interest objectives enumerated in section 253(b) *and* is competitively neutral.<sup>10</sup> In *Huntington Park*, the Commission stated that, in addressing an alleged section 253 violation, it would consider whether the local ordinance at issue materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.<sup>11</sup>

4. Historically, state legislatures and regulatory commissions exercised broad power to regulate telecommunications markets within their borders in ways that were designed to promote various social goals such as universal service or subsidized local telephone rates at the expense of competition. Indeed, until passage of the 1996 Act, states could and did award monopoly status to certain firms to provide service in prescribed areas within the state. Pursuant to section 253, such state actions are no longer permissible. Through this provision, Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states, including, as in this case, the actions of state legislatures.

5. This proceeding involves the Texas Public Utility Regulatory Act of 1995 (PURA95).<sup>12</sup> Because the Texas statute predated the federal 1996 Act, the Texas legislature could not anticipate every aspect of the national competition policy for telecommunications that Congress subsequently adopted. Questions concerning the consistency between PURA95 and the 1996 amendments to the federal Communications Act led the Public Utilities Commission of Texas (Texas Commission) to file a petition for declaratory ruling requesting that this agency determine whether certain provisions of PURA95 violate the Act and are subject to preemption. Shortly thereafter, several other parties filed petitions with the Commission seeking federal preemption of numerous provisions of the Texas statute. These petitioners challenge various provisions of PURA95 as contrary to certain provisions of the Communications Act, including

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<sup>9</sup> 47 U.S.C. § 253(a), (d).

<sup>10</sup> See 47 U.S.C. § 253(b). We also note that, irrespective of section 253(a), a state or local government may manage the public rights-of-way, and may require fair and reasonable compensation from telecommunications providers for the use of such rights-of-way on a competitively neutral and nondiscriminatory basis. See 47 U.S.C. § 253(c).

<sup>11</sup> See *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*, CCBPol 96-26, *Memorandum Opinion and Order*, FCC 97-251 at ¶ 31 (rel. July 17, 1997) (*Huntington Park Order*).

<sup>12</sup> Tex. Rev. Civ. Stat. Ann. art. 1446c-0 (West Supp. 1996) (hereinafter PURA95).

sections 253, 251 and 252.<sup>13</sup> We address all pending petitions concerning PURA95 in this consolidated decision.<sup>14</sup>

6. As discussed in greater detail below, the exercise of our preemption authority in this as in other cases is governed primarily by two distinct, but related, standards. First, section 253 of the Act directs us to preempt any state or local requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," subject to the limited exceptions set forth in subsections 253(b), (c) and (f). Second, the Supreme Court has repeatedly affirmed federal preemption where there exists a conflict between federal and state law.<sup>15</sup> Such a conflict may arise "where compliance with both federal and state law is in effect physically impossible"<sup>16</sup> or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>17</sup> If we find that a challenged provision of PURA95 violates one or more of these standards, we preempt.

7. Our review of the Texas statute in this proceeding is informed by interpretations of the scope and meaning of specific provisions advanced by the Texas Commission and, in a few instances, its application of certain challenged provisions in state regulatory proceedings. The statements and actions of the Texas Commission, the state regulatory body charged with interpreting and implementing PURA95, have been particularly helpful with respect to several provisions that on their face appear to conflict with provisions of the federal Communications Act. In most of these instances, the Texas Commission has interpreted or applied the specific provision in a manner that avoids or minimizes conflict with section 253 and the national competition policy set forth in the federal Communications Act. We applaud the efforts by the Texas Commission to reconcile these state and federal statutes and we share its desire to avoid unnecessary conflicts between the two statutory schemes.<sup>18</sup>

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<sup>13</sup> 47 U.S.C. §§ 253, 251, 252.

<sup>14</sup> We note that portions of PURA95 have also been challenged as in conflict with sections 332 and 253 of the Act by Pittencrieff Communications, Inc. The Commission will address that petition separately. *See* Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, WTBPOL 96-2 (filed Jan. 11, 1996).

<sup>15</sup> *See, e.g., New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

<sup>16</sup> *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

<sup>17</sup> *See Fidelity Federal Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *accord, Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 370.

<sup>18</sup> We encourage other state regulatory commissions to interpret their enabling statutes, so far as possible, in a manner that is consistent with the national pro-competitive, deregulatory policy framework for telecommunications services.

8. Because the Texas Commission for the most part has interpreted and applied the challenged provisions of PURA95 so as not to conflict with section 253 and other provisions of the Communications Act, we find it necessary to preempt few sections of the state statute at this time. Specifically, we do not preempt when the Texas Commission, by its representations in the record of this proceeding or its actions in state proceedings, has interpreted or applied PURA95 in a manner that does not conflict with the federal scheme. We preempt certain other provisions of PURA95, however, when the Texas Commission has failed to proffer an interpretation of a PURA95 provision that avoids conflict with section 253 or other provisions of the Communications Act.

9. In section 253, Congress directed the Commission to preempt the enforcement of state or local statutes, regulations, or other legal requirements that prohibit, or have the practical effect of prohibiting, any entity from providing any interstate or intrastate telecommunications service. The Commission's mandate under section 253, however, is to preempt the enforcement of a statute, regulation, or legal requirement "to the extent necessary"<sup>19</sup> to correct a violation of section 253. Thus, when the relevant state agency construes its statute to avoid such an anti-competitive effect, this obviates the need to preempt enforcement of the state statute. This approach also is analogous to the consistent practice of federal courts in accepting state interpretations of state statutes that avoid conflict with federal law.<sup>20</sup>

10. In many instances our decision not to preempt enforcement of a particular provision of PURA95 is based directly on the interpretation of the provision advanced by the Texas Commission. Absent these statutory interpretations by the state agency responsible for implementing the statute, our analysis concerning the challenges to the PURA95 provisions involved would be entirely different. The interpretations of the state statute advanced by the petitioners in this proceeding, with the exception of the Texas Commission, raise serious concerns about the consistency of PURA95 with section 253 and other provisions of the Communications Act.<sup>21</sup> If PURA95 were to be implemented by the Texas Commission in the manner described by these petitioners so as to violate section 253 of the Act or otherwise conflict with federal law, such provisions would warrant preemption.

11. We therefore wish to make clear that in the event the Texas Commission's interpretation of a particular PURA95 provision on which we relied in disposing of the pending challenges is overturned by a Texas court, or is subsequently rescinded by the Texas Commission, we will preempt that provision to the extent it imposes an unlawful restriction on competitive entry contrary to the terms of section 253 of the Act. We will also preempt, consistent with relevant judicial precedent, any PURA95 provision that conflicts with other relevant provisions of the Communications Act contrary to the intent of Congress.

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<sup>19</sup> 47 U.S.C. § 253(d).

<sup>20</sup> *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 643-44 (1968).

<sup>21</sup> *See infra* n.28.

12. Pursuant to the analytical framework described above, we grant in part, and deny in part, the petitioners' requests for preemption. A complete discussion of our holding with respect to each challenged provision of PURA95 or action by the Texas Commission appears at section II.B, *infra*. In this overview section, we briefly summarize our holdings with respect to four of the most important issues in this proceeding.

13. We preempt enforcement of the build-out requirements applicable to holders of Certificates of Operating Authority (COA) set forth in PURA95 section 3.2531. These provisions generally require that COA holders serve a specified portion of their service area using facilities that do not belong to the incumbent LEC.<sup>22</sup> The COA build-out requirements are of central importance to competitive entry because these requirements impact the threshold question of whether a potential competitor will enter the local exchange market at all.<sup>23</sup> We preempt enforcement of these requirements because they restrict the means or facilities through which a party is permitted to provide service in violation of section 253, and, independently, because they impose a financial burden that has the effect of prohibiting certain entities from providing telecommunications services in violation of section 253. As an independent and alternative basis, we also preempt the enforcement of the COA build-out requirements because they unlawfully conflict with a COA holder's right to resell an incumbent LEC's retail services pursuant to section 251(c)(4)(B).

14. We do not preempt enforcement of the six percent eligibility limitation for obtaining a Service Provider Certificate of Operating Authority (SPCOA) set forth in PURA95 section 3.2532(b). This provision bars any carrier that, together with affiliates, accounted for more than six percent of the intrastate switched access minutes of use in Texas during the most recent twelve-month period prior to the company's application, from obtaining a SPCOA certificate. The six percent eligibility limitation effectively prohibits the three largest interexchange carriers (IXCs) from obtaining state authorization to provide local exchange service through resale without a facilities build-out requirement. Given our decision to preempt enforcement of the COA build-out requirement, however, the three largest IXCs may provide service as COA holders by obtaining access to unbundled network elements from an incumbent LEC, reselling incumbent LEC services, utilizing their own facilities, or employing any combination of these three options. When viewed in light of the opportunities now available to these carriers as COA holders, the six percent limitation on SPCOA eligibility, as a practical matter, no longer restricts the ability of the three largest IXCs to provide service through resale of incumbent LEC services or the use of unbundled network elements obtained from incumbent LECs. Thus, we find that the six percent eligibility limitation no longer effectively prohibits these carriers from providing any telecommunications service through the means of their choice in violation of section 253. Nor does it conflict with section 251 so as to warrant preemption.

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<sup>22</sup> See *infra* ¶ 57.

<sup>23</sup> See *infra* ¶ 95 for a discussion of this point.

15. We do not preempt the enforcement of PURA95 section 3.2532(d)(2), which makes available to SPCOA holders for resale the local exchange service of an incumbent LEC at a five percent discount from the retail rate specified in the incumbent LEC's state tariff. We accept the Texas Commission's interpretation that this provision presents an option that SPCOA holders may elect under state law, but in no way interferes with a carrier's ability to invoke the negotiation and arbitration procedures in the Communications Act to obtain from an incumbent LEC greater discounts for resold services.<sup>24</sup> We thus find no violation of section 253 on the basis of the present record. Moreover, we note that in the arbitration process pursuant to section 252, the Texas Commission has approved resale discounts exceeding twenty percent.<sup>25</sup>

16. Finally, we do not preempt the enforcement of the statutory prohibition on the provision of telecommunications services by municipalities set forth in PURA95 section 3.251(d). We conclude that Texas municipalities are not "entities" separate and apart from the state of Texas for the purpose of applying section 253(a) of the Communications Act. We also find that preempting the enforcement of this prohibition would insert this Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253.

## **B. Background**

### **1. Procedural History**

17. On May 10, 1996, the Texas Commission filed a Petition For Expedited Declaratory Ruling requesting that this Commission determine whether certain provisions of PURA95 violate section 253 of the Communications Act<sup>26</sup> and must be preempted. On May 15, 1996, the Commission placed the Texas Commission's Petition on public notice.<sup>27</sup>

18. Petitions for declaratory ruling and/or preemption claiming that certain portions of PURA95 and/or actions by the Texas Commission violate section 253 of the Act, or are otherwise inconsistent with the Act, were subsequently filed by the following parties: the Competition Policy Institute (CPI); IntelCom Group (U.S.A.), Inc. and ICG Access Services, Inc. (ICG); AT&T Corp. (AT&T); MCI Telecommunications Corporation (MCI); and MFS

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<sup>24</sup> Section 251 of the Act requires that incumbent LECs negotiate the terms and conditions of agreements which will permit new entrants to, *inter alia*, (1) interconnect with incumbent LEC networks, (2) purchase incumbent LEC services for resale, and (3) obtain access to incumbent LEC unbundled network elements. 47 U.S.C. § 251. In the event that carriers are unable to reach a negotiated agreement, either carrier may request that a state commission arbitrate any unresolved issues. 47 U.S.C. § 252(b).

<sup>25</sup> *See infra* ¶ 140.

<sup>26</sup> 47 U.S.C. § 253.

<sup>27</sup> *Pleading Cycle Established for Comments on the Petition of the Public Utility Commission of Texas for Expedited Declaratory Ruling Pursuant to Section 253, Public Notice*, CCBP01 96-13, 11 FCC Rcd 13828 (1996).



Communications Company, Inc. (MFS).<sup>28</sup> The Commission issued a *Public Notice* on June 4, 1996, consolidating these petitions into one proceeding and seeking comment on the issues raised by the petitioners.<sup>29</sup> In response to that *Public Notice*, twenty-five parties filed comments and eighteen parties filed reply comments.<sup>30</sup>

19. On June 28, 1996, Teleport Communications Group, Inc. (Teleport) submitted a Petition for Expedited Declaratory Ruling challenging certain provisions of PURA95.<sup>31</sup> Five parties filed comments and three parties filed reply comments addressing the Teleport petition. On August 15, 1996, the City of Abilene, Texas (Abilene) submitted a Petition for Expedited Declaratory Ruling challenging PURA95 section 3.251(d).<sup>32</sup> Six parties filed comments and five parties filed reply comments addressing the Abilene petition.<sup>33</sup> Separate pleading cycles were established for the Teleport and Abilene petitions because they were filed after the initial group of petitions challenging PURA95. In light of the commonality of issues, all of the petitions are addressed in this consolidated decision.

## 2. The Telecommunications Act of 1996

20. All of the petitioners ask us to determine whether various provisions of PURA95 violate the 1996 Act. In this section, we briefly summarize key provisions of the 1996 Act that are relevant to these petitions.

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<sup>28</sup> Petition of the Competition Policy Institute for Preemption under Section 253 of Certain Certification and Resale Provisions in Effect in the State of Texas, filed May 20, 1996; Petition of Intelcom Group (U.S.A.), Inc. and ICG Telecom Group, Inc. for Expedited Declaratory Ruling Regarding the Validity of a Section of the Texas Public Utility Regulatory Act of 1995 Prohibiting Provision of Telecommunications Services and for Consolidation, filed May 20, 1996; Petition of AT&T Corp. for Expedited Declaratory Ruling Preempting Texas Law, filed May 21, 1996; Petition of MCI Telecommunications Corp. for Expedited Declaratory Ruling Preempting Texas Law, filed May 22, 1996; and Petition of MFS Communications Company, Inc. for Preemption, Declaratory Ruling, and Injunctive Relief Regarding Usage Sensitive Rate for Unbundled Loops in Texas, filed May 28, 1996. We note that on August 5, 1997, ICG withdrew its petition. *See* ICG's Withdrawal of Petition for Declaratory Ruling, filed Aug. 5, 1997.

<sup>29</sup> *Pleading Cycle Established for Comments on Petitions for Preemption of Local Entry Barriers Pursuant to Section 253, Public Notice*, CCBPol 96-14, 11 FCC Rcd 6578 (1996). This *Public Notice* cancelled the separate pleading cycle previously established for the Texas Commission's Petition and rescheduled it so that all of the referenced petitions would have uniform comment and reply comment filing dates.

<sup>30</sup> A complete list of the parties is attached as Appendix A.

<sup>31</sup> *See Pleading Cycle Established for Comments on Teleport Communications Group, Inc.'s Petition for Expedited Declaratory Ruling, Public Notice*, CCBPol 96-16, 11 FCC Rcd 8126 (1996).

<sup>32</sup> *See Pleading Cycle Established for Comments on Petition of Abilene, Texas for Expedited Declaratory Ruling, Public Notice*, CCBPol 96-19, 11 FCC Rcd 10633 (1996).

<sup>33</sup> A complete list of the parties submitting comments and/or reply comments in the Teleport and Abilene proceedings is included in Appendix A.

21. As noted earlier, section 253 of the Act establishes a statutory framework to eliminate state and local measures that thwart the development of competition in the provision of telecommunications services.<sup>34</sup> Section 253(a) provides that

[n]o 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.<sup>35</sup>

Section 253(b) permits a state to impose "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," provided that such requirements are imposed "on a competitively neutral basis and consistent with section 254."<sup>36</sup> Section 253(d) requires that the Commission preempt, to the extent necessary, the enforcement of "any statute, regulation, or legal requirement that violates subsection (a) or (b) [of section 253]. . . ."<sup>37</sup>

22. In sum, section 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.<sup>38</sup>

23. Sections 251 and 252 complement and supplement section 253 by removing operational and economic barriers to entering the local market. As we stated in our *Local Competition Order*, "vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be

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<sup>34</sup> 47 U.S.C. § 253. See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, CC Docket No. 96-98, 11 FCC Rcd 14171, 14174, ¶ 5 (1996) (*Local Competition NPRM*).

<sup>35</sup> 47 U.S.C. § 253(a).

<sup>36</sup> 47 U.S.C. § 253(b).

<sup>37</sup> 47 U.S.C. § 253(d).

<sup>38</sup> See *Huntington Park Order* at ¶ 31.

equal in quality to the offerings of incumbent LECs."<sup>39</sup> Thus, the *Local Competition Order* contributes to the removal of operational barriers to competition by promulgating rules addressing the expeditious provisioning of resale of local telephone service and unbundled network elements<sup>40</sup> to new entrants in the provision of local telephone service.<sup>41</sup> We addressed other significant operational barriers to competition through rulemaking decisions concerning number portability.<sup>42</sup>

### 3. Texas Public Utility Regulatory Act of 1995 (PURA95)<sup>43</sup>

24. Originally enacted in 1975, the Texas Public Utility Regulatory Act established a comprehensive scheme for regulating the rates and services of local telecommunications providers based on the assumption that "the normal forces of competition do not operate" and that public utilities "are by definition monopolies in the areas they serve."<sup>44</sup> Under this traditional regulatory scheme, local telecommunications services in Texas could only be offered pursuant to a certificate of convenience and necessity (CCN) granted by the Texas Commission.

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<sup>39</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15510, ¶ 16 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.*, 120 F.3d 753 (1997) (*Iowa Utils. Bd.*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996) (*Local Competition First Reconsideration Order*), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996) (*Local Competition Second Reconsideration Order*), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, FCC 97-295 (rel. Aug. 18, 1997) (*Local Competition Third Reconsideration Order*), *further recon. pending*.

<sup>40</sup> The Act defines the term "network element" as

a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29).

<sup>41</sup> *Local Competition Order*, 11 FCC Rcd at 15511, ¶ 18.

<sup>42</sup> *See Telephone Number Portability*, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (1996) (*Number Portability Order*), *First Memorandum Opinion and Order on Reconsideration*, FCC 97-74 (rel. March 11, 1997) (*Phase I Reconsideration Order*), *pet. for review pending, further recon. pending, Second Report and Order*, FCC 97-289 (rel. Aug. 18, 1997) (*NANC Recommendations Order*). Number portability refers to the ability of users of telecommunications services to retain their existing telephone numbers when switching from one carrier to another carrier. *See* 47 U.S.C. § 153(30).

<sup>43</sup> Sections of PURA95 relevant to this proceeding are set forth in the attached Appendix B.

<sup>44</sup> Texas Commission Petition at 3.

The Texas Commission could grant an application for a CCN only if it found that the certificate was "necessary for the service, accommodation, convenience, or safety of the public."<sup>45</sup> This remains the standard under which CCNs are granted under Texas law. In addition, before granting a CCN, the Texas Commission must consider, among other factors, the adequacy of existing service, the need for additional service, and the effect on any similar public utility already serving the proximate area.<sup>46</sup> According to several commenters, the Texas Commission has never granted a CCN to a telephone company proposing to compete in an area already served by an incumbent LEC.<sup>47</sup>

25. Recognizing that "significant changes [had] occurred in telecommunications,"<sup>48</sup> PURA95 was enacted by the Texas legislature in May 1995 for the stated purpose of fostering competition in the local exchange marketplace. PURA95 section 3.001 provides that "[t]he legislature hereby finds that it is the policy of [Texas] to promote diversity of providers and interconnectivity and to encourage a fully competitive telecommunications marketplace . . . ."<sup>49</sup> Specifically, the Texas legislature established two new types of certificates under which an interested party may provide local exchange service,<sup>50</sup> basic local telecommunications service,<sup>51</sup> or switched access service<sup>52</sup> in competition with an incumbent LEC. The first certificate, a Certificate of Operating Authority (COA), requires that the new entrant provide a certain proportion of its service over facilities that are not owned by the

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<sup>45</sup> PURA95 § 3.254(b).

<sup>46</sup> PURA95 § 3.254(c).

<sup>47</sup> *See, e.g.*, Southwestern Bell Telephone Company (SWBT) Comments at 4; CPI Comments at 10.

<sup>48</sup> PURA95 § 3.001.

<sup>49</sup> *Id.*

<sup>50</sup> "Local exchange telephone service" is defined in PURA95 as "telecommunications service provided within an exchange to establish connections between customer premises within the exchange, including connections between a customer premises and a long distance provider serving the exchange. . . ." PURA95 § 3.002(6).

<sup>51</sup> "Basic local telecommunications service" is defined as "(A) flat rate residential and business local exchange telephone service, including primary directory listings; (B) tone dialing service; (C) access to operator services; (D) access to directory assistance services; (E) access to 911 service where provided by a local authority or dual party relay service; (F) the ability to report service problems seven days a week; (G) lifeline and tel-assistance services; and (H) any other service the commission, after a hearing, determines should be included in basic local telecommunications service." PURA95 § 3.002(1).

<sup>52</sup> Switched access services use local exchange facilities for the origination and termination of interstate and intrastate toll calls. *See Access Charge Reform*, CC Docket No. 96-262, *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, FCC 96-488 (rel. Dec. 24, 1996) at ¶ 24.

incumbent LEC.<sup>53</sup> The second certificate, a Service Provider Certificate of Operating Authority (SPCOA), authorizes the holder to resell the services of an incumbent LEC.<sup>54</sup> PURA95 did not eliminate CCNs. Rather, it established COAs and SPCOAs as alternative avenues through which a carrier can provide competitive local telecommunications services in Texas. A single entity, however, may not hold more than one type of certificate.<sup>55</sup>

26. The Texas Commission states in its petition that "[d]espite the availability of the COA and the SPCOA as alternatives to the traditional CCN, entry into the local exchange is not unfettered. Each of these certificates contains its own set of conditions and obligations."<sup>56</sup> For example, subject to certain limited exceptions, a COA "may be granted only for an area or areas that are contiguous and reasonably compact and cover an area of at least 27 square miles."<sup>57</sup> Moreover, an applicant seeking to provide service via a COA must, *inter alia*, submit a description of its plans for deploying facilities throughout the geographic area over a six-year period. The build-out plan must provide that at least ten percent of the proposed service area will be served with facilities other than those of the incumbent LEC by the end of the first year, at least fifty percent of the proposed service area must be served with facilities other than those of the incumbent LEC by the end of the third year, and the entire service area must be served by facilities other than those of the incumbent LEC by the end of the sixth year.<sup>58</sup> Notwithstanding these general build-out requirements, the Texas statute permits "not more than forty percent of the applicant's service area to be served by resale of the incumbent [LEC's]" unbundled loops obtained by a COA holder under an intrastate tariff.<sup>59</sup>

27. Pursuant to PURA95, these build-out requirements are eliminated in areas served by an incumbent LEC when that LEC is permitted to enter the interLATA market.<sup>60</sup> In addition,

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<sup>53</sup> PURA95 § 3.2531.

<sup>54</sup> PURA95 § 3.2532.

<sup>55</sup> *See* PURA95 § 3.2532(e).

<sup>56</sup> Texas Commission Petition at 6.

<sup>57</sup> PURA95 § 3.2531(g).

<sup>58</sup> PURA95 § 3.2531(c).

<sup>59</sup> PURA95 § 3.2531(d).

<sup>60</sup> *See* PURA95 § 3.2531(i). InterLATA service refers to telecommunications between a point located in a local access and transport area, or LATA, and a point located outside that LATA. *See* 47 U.S.C. § 153(21). Pursuant to the terms of the AT&T Consent Decree, entered August 24, 1982, in the antitrust action *United States v. Western Electric*, Civil Action No. 82-0192 (D.C. Cir.), Bell Operating Companies, such as SWBT, were precluded from offering interLATA service. The 1996 Act, however, permits the BOCs to provide interLATA service originating within their local service area once they have demonstrated that they have satisfied certain conditions set forth in section 271 of the Act, 47 U.S.C. § 271. *See generally Application of Ameritech Michigan*

the Texas Commission "may administratively and temporarily waive compliance with the six-year build-out plan on a showing of good cause."<sup>61</sup> In a series of separate orders, the Texas Commission found that, as a policy matter, it is appropriate to grant such waivers of the COA build-out requirements to Sprint, AT&T and MCI.<sup>62</sup> These Supplemental Preliminary Waiver Orders expressly provide that these waivers are effective until either: (1) the FCC rules that the COA build-out requirements are preempted by the 1996 Act; or (2) Southwestern Bell Telephone Company (SWBT) is authorized to provide in-region interLATA services in Texas.<sup>63</sup> The Texas Commission made it clear, however, that the waivers are preliminary in nature and entered without prejudice to any party expressing a contrary view before the administrative law judges (ALJs) responsible for evaluating each specific COA application.

28. According to the Texas Commission, "[t]he ALJ, upon his or her own motion or upon the motion of any party, may deviate from [the Supplemental Preliminary Waiver Orders] when the ALJ finds that circumstances dictate it is reasonable to do so."<sup>64</sup> The ALJs evaluating the COA applications of Sprint, AT&T, and MCI, recommended to the Texas Commission that these applications be granted, with waivers of the build-out requirements. The Texas Commission adopted the ALJs' recommendations in approving the subject applications.<sup>65</sup> We note, however, that the ALJs' recommendations with respect to the waiver issue, and the Texas Commission's approval of these COA applications, are fact specific. Based on the text of the Supplemental Preliminary Waiver Orders, the Texas Commission could reach a different result with respect to a different application.

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*Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, CC Docket 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997).*

<sup>61</sup> PURA95 § 3.2531(f).

<sup>62</sup> See *Application Of Sprint Communications Company L.P. for a Service Provider Certificate of Operating Authority or, in the Alternative, Certificate of Operating Authority in the Territory of Southwestern Bell Telephone Company*, Texas PUC Docket No. 15990, *Supplemental Preliminary Order* (June 26, 1996); *Application of AT&T Communications of the Southwest, Inc., for a Certificate of Operating Authority*, Texas PUC Docket No. 16658, *Supplemental Preliminary Order* (Dec. 10, 1996); *Application of MCI Metro Access Transmission Services, Inc., For A Facilities-Based Certificate of Operating Authority*, Texas PUC Docket No. 16744, *Supplemental Preliminary Order* (Jan 8, 1997) (collectively, "Supplemental Preliminary Waiver Orders"). These Supplemental Preliminary Waiver Orders are discussed in greater detail in Section II.B.1 of this Order.

<sup>63</sup> See Supplemental Preliminary Waiver Orders.

<sup>64</sup> See Supplemental Preliminary Waiver Orders.

<sup>65</sup> See *infra* ¶ 63. We note that SWBT has challenged the validity of these waivers in Texas state court. See *infra* ¶ 63.

29. PURA95 prohibits the Texas Commission from granting a COA in an exchange of an incumbent LEC serving fewer than 31,000 access lines prior to September 1, 1998.<sup>66</sup> Finally, PURA95 requires COA holders, among other things, to "offer to any customer in its certificated area all basic local telecommunications services and . . . render continuous and adequate service within the area or areas."<sup>67</sup>

30. PURA95 specifically authorizes SPCOA holders to provide local telecommunications services by reselling the services of an incumbent LEC.<sup>68</sup> According to the Texas Commission, SPCOA holders may, in addition to resale, use their own facilities to provide local exchange services.<sup>69</sup> PURA95, however, bans certain carriers from obtaining a SPCOA. Specifically, the Texas statute precludes a carrier from obtaining a SPCOA if the carrier, together with its affiliates, "had in excess of six percent of the total intrastate switched access minutes of use" in Texas in the year preceding the filing of its SPCOA application.<sup>70</sup> We refer to this limitation hereinafter as the "six percent eligibility limitation."<sup>71</sup> This provision has the practical effect of prohibiting the three largest interexchange carriers (IXCs) -- AT&T, MCI and Sprint -- from providing service pursuant to a SPCOA. PURA95 also contains a variety of additional restrictions and limitations affecting SPCOA holders. These measures, for example: mandate certain resale discounts;<sup>72</sup> impose resale restrictions in rural areas;<sup>73</sup> preserve to incumbent LECs the provision of access service and "1+" intraLATA toll service;<sup>74</sup> limit resale for extended area service and expanded local calling service;<sup>75</sup> and, in certain circumstances, impose limitations on the use of resold local exchange service.<sup>76</sup>

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<sup>66</sup> PURA95 § 3.2531(h).

<sup>67</sup> PURA95 § 3.258(a).

<sup>68</sup> PURA95 § 3.2532(d).

<sup>69</sup> See Texas Commission Petition at 5. The Texas Commission has expressly rejected the view that PURA95 prohibits SPCOA holders from constructing and operating their own facilities. For a discussion of this issue, see *infra* ¶ 121.

<sup>70</sup> As noted above, switched access services use local exchange facilities for the origination and termination of interstate and intrastate toll calls. See *supra* n.52. Switched access "minutes of use" refers to minutes of IXC switched access traffic as measured for purposes of applying switched access charges.

<sup>71</sup> PURA95 § 3.2532(b).

<sup>72</sup> PURA95 § 3.2532(d)(2).

<sup>73</sup> PURA95 §§ 3.2532(d)(1) and (d)(2)(c).

<sup>74</sup> PURA95 § 3.2532(f).

<sup>75</sup> PURA95 § 3.2532(d)(2)(E).

<sup>76</sup> PURA95 §§ 3.2532(d)(5), (d)(6) and (d)(8).

#### 4. The Petitions

31. The principal PURA95 provisions and/or Texas Commission decisions that the petitioners seek to preempt include: the COA build-out requirements and associated resale restrictions;<sup>77</sup> the SPCOA six percent eligibility limitation;<sup>78</sup> the SPCOA five percent discount for resold services;<sup>79</sup> the Texas Commission's decision to permit SPCOA holders to provide service using their own facilities;<sup>80</sup> and the prohibition on the direct or indirect sale by municipalities of certain telecommunications services.<sup>81</sup> Other PURA95 provisions challenged by the petitioners include, *inter alia*: a provision stating that the Texas Commission may only approve usage-sensitive rates for the resale of local loops;<sup>82</sup> a restriction on reductions in the rates for intrastate switched access;<sup>83</sup> intraLATA toll dialing parity limitations;<sup>84</sup> a prohibition on SPCOA holders obtaining discounts from incumbent LECs when purchasing for resale optional extended area service and expanded local calling service;<sup>85</sup> and a Texas Commission decision upholding restrictions on the resale of centrex service.<sup>86</sup> Arguments raised with respect to each of these requests for preemption are discussed in greater detail below.

32. The petitioners identify two independent grounds for preemption of specified provisions of PURA95 and certain Texas Commission decisions. First, petitioners rely on the Commission's express authority under section 253 of the Act to preempt state or local statutes, regulations or legal requirements that prohibit or have the effect of prohibiting the provision of interstate or intrastate telecommunications services. Second, petitioners urge the Commission to

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<sup>77</sup> MCI Petition at 10-13; AT&T Petition at 12. In its petition, the Texas Commission requests that the Commission determine whether the COA build-out requirement and resale restrictions in PURA95 sections 3.2531(c) and (d) violate sections 253(a) and (b) of the Act, and, if so, to what extent such requirements are preempted under section 253(d). Texas Commission Petition at 3.

<sup>78</sup> MCI Petition at 13-15; AT&T Petition at 20; CPI Petition at 12-13. In its petition, the Texas Commission requests that the Commission, *inter alia*, confirm that PURA95 section 3.2532(b), which contains the six percent eligibility limitation, is not preempted by section 253 of the Act. Texas Commission Petition at 11.

<sup>79</sup> MCI Petition at 15-17; AT&T Petition at 21-23; CPI Petition at 26.

<sup>80</sup> Teleport Petition at 5-6.

<sup>81</sup> ICG Petition at 8-13; Abilene Petition at 3-6.

<sup>82</sup> MFS Petition at 3; AT&T Petition at 20.

<sup>83</sup> MCI Petition at 23-24; AT&T Petition at 23.

<sup>84</sup> MCI Petition at 20-21.

<sup>85</sup> MCI Petition at 18; AT&T Petition at 21-22.

<sup>86</sup> CPI Petition at 26.



preempt certain Texas requirements on the grounds that they conflict with sections 251 and 252 of the Act.

## II. DISCUSSION

### A. Legal Bases For Preemption

33. The Supremacy Clause of the U.S. Constitution empowers Congress to preempt state or local laws or regulations under certain specified conditions.<sup>87</sup> As explained by the Supreme Court in *Louisiana Public Service Comm'n v. FCC*:

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.<sup>88</sup>

It is also well established that "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation."<sup>89</sup> As discussed above, the petitioners challenge various PURA95 provisions and/or Texas Commission decisions as violative of section 253 of the Act, and/or as in conflict with federal law, particularly sections 251 and 252 of the Act. Each basis for preemption is addressed in turn below.

#### 1. Preemption of State Regulation Pursuant to Section 253 of the Act

##### a. Positions of the Parties

34. The parties address various issues relating to section 253, including, among other things, what analysis the Commission should undertake in determining whether a challenged law or regulation violates section 253; what constitutes a requirement that is "competitively neutral"

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<sup>87</sup> See, e.g., *Louisiana PSC*, 476 U.S. at 368.

<sup>88</sup> *Id.* at 368-369 (citations omitted).

<sup>89</sup> *Id.* at 369. *Accord Fidelity Federal Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof").

or "necessary" to promote the enumerated state interests under section 253(b); and whether section 253(b) provides an independent basis for preemption.

35. The Texas Commission argues that the Commission should undertake the following four-part analysis in evaluating whether a challenged provision of PURA95 violates section 253. First, the Texas Commission argues, the Commission must determine whether the relevant PURA95 provision violates section 253(a). If section 253(a) is violated, the Texas Commission contends that the Commission must then determine whether the provision satisfies one of the enumerated policy goals set forth in section 253(b). According to the Texas Commission, if the Commission finds that the provision satisfies one of the policy goals in subsection (b), the Commission must also determine if that provision is "competitively neutral" and consistent with the universal service obligations of section 254. Finally, the Texas Commission asserts that, if the Commission determines that the provision violates section 253(a) and does not satisfy section 253(b), it must be preempted, but only "to the extent necessary."<sup>90</sup>

36. Consistent with the Texas Commission's analysis, a number of commenters argue that section 253(b) is an exception to section 253(a). These commenters contend that, only when the Commission finds that a state law violates section 253(a), and that such law is not a competitively neutral means of protecting universal service and serving other public interest requirements which are "necessary," may the law be preempted.<sup>91</sup> SWBT, for example, argues that the plain language of section 253(b) expressly limits subsections (a) and (d).<sup>92</sup>

37. Conversely, the United States Department of Justice (Department of Justice), ICG, and Sprint argue that the Commission must preempt if a particular regulation constitutes a barrier to entry<sup>93</sup> regardless of whether the regulation was "enacted under the guise of furthering the goals outlined in section 253(b)."<sup>94</sup> The Texas Office of Public Utility Counsel (Texas OPC)

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<sup>90</sup> Texas Commission Petition at 7.

<sup>91</sup> SWBT Comments at 7-8; Ga. CUC Comments at 5; TATO Comments at 1. *See also* Texas Commission Reply Comments at 4-6.

<sup>92</sup> SWBT Reply Comments at 2-3.

<sup>93</sup> Section 253 of the Act is titled "Removal of Barriers to Entry," and the parties in this proceeding often use the term "barrier to entry" when discussing this section. We note, however, that the term "barrier to entry" does not appear in the actual language of the statute. Accordingly, we use this term in the Order only when describing the arguments made by the parties, and rely on the precise statutory language when analyzing the challenged PURA95 provisions.

<sup>94</sup> Department of Justice Comments at 5-6; ICG Reply Comments at 5; Sprint Reply Comments at 1-3. We note that the Department of Justice included as Appendix A to its comments a document obtained from SBC Communications, Inc. (SBC) in connection with the Department of Justice's investigation of a Motion to Vacate the Decree in *United States v. Western Electric Co.* Department of Justice Comments at 4-5, n.4. As described by the Department of Justice, this document is "a draft analysis, discussing the competitive implications of PURA95." *Id.* at 4. On July 5, 1996, SBC filed a "Request for Confidential Treatment" with respect to this

notes that section 253(b) of the Act preserves the states' authority to regulate in prescribed areas only so long as such regulation: does not constitute a barrier to entry; is competitively neutral; and does not conflict with any terms of the 1996 Act.<sup>95</sup> MCI similarly argues that section 253(b) was not intended to shelter state regulations that would otherwise violate section 253(a), but was intended instead to be an acknowledgement that states may continue to regulate entry on a limited basis using competitively neutral rules necessary to promote the state interests set forth in section 253(b).<sup>96</sup> Despite its contention that the Commission must preempt if a state or local law or regulation constitutes a barrier to entry even if it satisfies the requirements of section 253(b), the Department of Justice argues that this interpretation does not mean that "a state cannot restrict providers for failure to comply with permitted types of competitively neutral requirements."<sup>97</sup>

38. The Department of Justice argues that a competitively neutral requirement under section 253(b) is one that does not place a disproportionate burden on a distinct class of carriers.<sup>98</sup> The Texas Commission maintains that a state law should be regarded as competitively neutral if the law does not have an adverse impact on competition as a whole, regardless of its effect on a particular competitor.<sup>99</sup> The Texas Telephone Association (TTA) contends that, if a state regulation is deemed competitively neutral only if does not place a disproportionate burden on a distinct class of providers, as argued by the Department of Justice, obligations such as carrier of last resort requirements would fail as applying to only one class of providers.<sup>100</sup>

39. The Competitive Telecommunications Association (CompTel) urges the Commission to clarify that section 253(b) does not authorize states to adopt laws that erect entry barriers favoring incumbent LECs, since such laws are not "competitively neutral."<sup>101</sup> CompTel argues that, to the extent a state believes that a particular entry barrier is justified under section

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document. *Request of SBC Communications Inc. For Confidential Treatment*, CCBPol 96-14, DA 96-888 (July 5, 1996). SBC subsequently withdrew this request. Letter from Martin E. Grambow, Vice President and General Counsel, SBC Telecommunications, Inc., to William F. Caton, Secretary, FCC (Nov. 12, 1996).

<sup>95</sup> Texas OPC Comments at 8, 12.

<sup>96</sup> MCI Reply Comments at 7.

<sup>97</sup> Department of Justice Comments at 5-6.

<sup>98</sup> *Id.* at 18.

<sup>99</sup> Texas Commission Reply Comments at 10-11.

<sup>100</sup> TTA Reply Comments at 3.

<sup>101</sup> CompTel Comments at 5.

253(b), it bears the burden of showing that the law in question is "necessary" under section 253(b), *i.e.*, that no less restrictive alternatives would achieve the intended result.<sup>102</sup>

40. Finally, the Department of Justice contends that the Commission may preempt for a violation of section 253(b), without ever deciding if a particular provision acts as a barrier to entry under section 253(a), because section 253(d) requires preemption for violations of section 253(a) *or* (b).<sup>103</sup> TATO A argues that section 253(d) should be construed to require that the Commission preempt state laws or regulations that violate sections 253(a) *and* 253(b).<sup>104</sup>

### **b. Discussion**

41. We find that Congress enacted section 253 to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition. We further conclude that this mandate requires us to preempt not only express restrictions on entry, but also restrictions that indirectly produce that result. This reading of the statute is consistent with the text of section 253(a), which declares that no state or local requirement may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>105</sup> We find that section 253(b) excludes from the scope of the preemption powers granted to the Commission certain defined state or local requirements that are "competitively neutral," "consistent with section 254," and "necessary" to achieve the public interest objectives enumerated in section 253(b). We read section 253(b), for example, to permit a state to adopt a program necessary to preserve and advance universal service if that program is competitively neutral and consistent with section 254 of the Act.

42. Under this approach, we first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise

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<sup>102</sup> *Id.*

<sup>103</sup> Department of Justice Comments at 6.

<sup>104</sup> TATO A Comments at 1.

<sup>105</sup> 47 U.S.C. § 253(a). Section 253(a) expressly covers both interstate and intrastate services. Accordingly, the limitation on the Commission's authority over intrastate matters, set forth in section 2(b) of the Act, 47 U.S.C. § 153(b), is inapplicable. *See Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082, 13094-05, ¶¶ 23-24 (1996) (*Classic Telephone*), *petition for emergency relief, sanctions, and investigation denied* (rel. Sept. 24, 1997), *petition for review held in abeyance*, *City of Bouge, Kansas and City of Hill City, Kansas v. FCC*, No. 96-1432 (D.C. Cir. Jan 14, 1997) (denying petitioner's motion for writ of prohibition and *sua sponte* holding petition in abeyance), *petition for emergency relief, sanctions, and investigation denied*, FCC 97-335 (rel. Sept. 24, 1997). We note that no party has questioned our authority to preempt intrastate requirements pursuant to section 253.

impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d). If, however, the challenged law, regulation or requirement satisfies subsection (b), we may not preempt it under section 253, even if it otherwise would violate subsection (a) considered in isolation. This is consistent with the approach taken in prior Commission orders addressing section 253.<sup>106</sup>

43. We reject the argument made by several parties that the Commission must preempt under section 253(d) if a particular state law or requirement violates the terms of section 253(a), regardless of whether it comes within the scope of section 253(b). In making this determination, we look to the language of subsection (b), *i.e.*, "*nothing in this section shall affect the ability of a state. . .*"<sup>107</sup> It is clear that the words "this section" refer back to, and thus limit, the application of section 253 in its entirety, including the broad restrictions imposed on states in subsection (a). If the Commission were to preempt a state regulation for violating subsection (a), regardless of whether the regulation met the criteria set forth in subsection (b), it would effectively read subsection (b) out of the statute. It is a fundamental principle of statutory construction that "every word and clause must be given effect"<sup>108</sup> and thus section 253(b) must be given effect. In short, irrespective of subsection (a), states retain authority to impose on carriers the types of requirements specified in subsection (b) provided that such measures satisfy the criteria set forth in that subsection.

44. The text and structure of section 253 support the conclusion that subsection (b) operates as a limitation on subsection (a). Subsection (c) provides that, subject to certain conditions, "[n]othing in *this section* affects the authority of a State or local government" to regulate public rights-of-way provided certain conditions are met; subsection (e) provides that "[n]othing in *this section* shall affect the application of section 332(c)(3) to commercial mobile service providers"; and subsection (f) provides "[i]t shall not be a violation of *this section* for a State to require a telecommunications carrier" that seeks to provide service in an area served by a rural telephone company to meet certain requirements.<sup>109</sup> Subsection (a) is the only portion of

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<sup>106</sup> See *Silver Star Telephone Company Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order*, CCBPol 97-1, FCC 97-336 at ¶ 37 (rel. Sept. 24, 1997) (*Silver Star*) (finding that if the subject provisions "are impermissible section 253(a), and do not satisfy the requirements of section 253(b), we must preempt the enforcement of those legal requirements in accordance with section 253(d). If, however, [the provisions] satisfy section 253(b), they are not preemptible under section 253(d), even if they are inconsistent with section 253(a)"). *Accord Classic Telephone*, 11 FCC Rcd at 13096-97, 13101-13104, ¶¶ 27, 35-42; *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCBPol 96-11, *Memorandum Opinion and Order*, FCC 96-470 (rel. Dec. 10, 1996) (*New England Public Communications Council*) at ¶¶ 17-25, *recon. denied, Memorandum Opinion and Order*, FCC 97-143 (rel. April 18, 1997).

<sup>107</sup> 47 U.S.C. § 253(b) (emphasis added).

<sup>108</sup> See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed*, 3 Vand. L. Rev. 395, 401-06 (1950). See also *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990).

<sup>109</sup> 47 U.S.C. § 253(c), (e) and (f) (emphasis added).

section 253 that broadly limits the ability of states to regulate. All of the remaining subsections, including subsection (b), carve out defined areas in which states may regulate or continue to regulate, subject to certain conditions.

45. Parties also offer various recommendations as to how we should interpret the terms "competitively neutral" and "necessary" as used in section 253(b) of the Act. We believe that these terms are best defined in the context of the individual provisions of PURA95 at issue in this proceeding. Accordingly, we decline at this time to make broad interpretations of these terms and will instead interpret these terms as required to address challenges to particular provisions of PURA95.

## **2. Preemption of State Regulation That Conflicts with Federal Law**

### **a. Background**

46. As noted above, preemption of state law or regulation also occurs "when there is outright or actual conflict between federal and state law."<sup>110</sup> Various petitioners argue that the Commission should preempt specific sections of PURA95 and/or Texas Commission decisions to the extent that they conflict with various provisions of the Communications Act (in addition to section 253), in particular, sections 251 and/or 252.<sup>111</sup>

### **b. Comments**

47. Parties requesting that the Commission preempt certain PURA95 provisions generally contend that, in adopting sections 251 and 252 of the Act, Congress intended that inconsistent state laws or regulations be preempted. While recognizing that section 601(c)(1) of the Act authorizes the preemption of state law pursuant to the 1996 Act only where expressly permitted by Congress, AT&T argues that section 261 of the Act provides such authority because it permits state commissions to enforce pre-existing regulations and impose new intrastate requirements only to the extent that such regulations are not inconsistent with sections 251 through 261.<sup>112</sup> Moreover, the Department of Justice and several other commenters submit

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<sup>110</sup> *Louisiana PSC*, 476 U.S. at 368, citing *Free v. Bland*, 369 U.S. 663 (1962).

<sup>111</sup> See AT&T Petition at 17-19; CPI Petition at 19-20; MCI Petition at 4-5; MFS Petition at 5-6.

<sup>112</sup> AT&T Reply Comments at 12 n.23. See also ALTS Comments at 5-7; CPI Reply Comments at 3; MCI Reply Comments at 4-5. Section 601(c)(1) of the 1996 Act states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Section 261(b) and (c) provide:

(b) Existing State Regulations. - Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, *if such regulations are not inconsistent with the provisions of this part.*

that section 261 of the Act overrides the more general preexisting limitation on the Commission's jurisdiction over intrastate matters set forth in section 2(b) of the Act.<sup>113</sup> The Department of Justice argues that the dual system of regulation under the 1934 Act, as recognized by the Supreme Court in *Louisiana PSC*, no longer has force with respect to sections 251-261 of the Act.<sup>114</sup> According to the Department of Justice, "the distinction between interstate and intrastate telecommunications under [s]ection 2(b) no longer holds where the provisions of the . . . Act and Commission regulations adopted thereunder are the basis for the inconsistency, because Congress in adopting [s]ection 261(b) and (c) has expanded the scope of the Commission's delegated preemption authority. . . ."<sup>115</sup> The Department of Justice and other commenters also contend that, because sections 251 through 261 of the Act are clearly directed at intrastate telecommunications, as well as interstate telecommunications, Congressional intent would be frustrated if inconsistent state regulations were not preempted.<sup>116</sup>

48. Conversely, the Texas Commission, SWBT, GTE and John Staurulakis, Inc. (JSI) argue that, although the 1996 Act gives the Commission jurisdiction over certain intrastate matters traditionally reserved to the states, Congress narrowly prescribed the circumstances under which the Commission is permitted to preempt state regulations.<sup>117</sup> SWBT contends that section 601(c)(1) of the 1996 Act makes clear that the Commission may not preempt by implication and that the 1996 Act authorizes preemption of state law only where Congress expressly provides for it.<sup>118</sup> SWBT and the Texas Commission submit that section 261 of the Act does not amount to an independent or express grant of preemption authority.<sup>119</sup> The Texas

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(c) Additional State Requirements. - Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements *are not inconsistent with this part* or the Commission's regulations to implement this part.

47 U.S.C. §261(b) and (c) (emphasis added).

<sup>113</sup> Department of Justice Comments at 9. *See also* CompTel Comments at 3; ALTS Comments at 6; MCI Reply Comments at 4. The more general preexisting limitation on the Commission's jurisdiction over intrastate matters set forth in section 2(b) of the Act is discussed *infra* ¶ 53.

<sup>114</sup> Department of Justice Comments at 9. *See also* CompTel Comments at 4.

<sup>115</sup> Department of Justice Comments at 9-10.

<sup>116</sup> *Id.* *See also* ALTS Comments at 5; CPI Reply Comments at 6.

<sup>117</sup> SWBT Comments at 7-8; Texas Commission Reply Comments at 13-16; GTE Reply Comments at 4-5; and JSI Comments at 12.

<sup>118</sup> SWBT Comments at 7. *See also* JSI Comments at 12. The text of section 601(c)(1) of the 1996 Act is set forth *supra* n.112. Section 601(c)(1) was specifically designed to prevent affected parties from asserting that the 1996 Act impliedly preempts other laws. *See* Conference Report at 201.

<sup>119</sup> Texas Commission Reply Comments at 13-14; SWBT Reply Comments at 6-7.

Commission notes that, unlike section 253 of the Act, section 261 does not expressly grant the Commission preemption power; rather, it recognizes the continuing validity of certain federal and state regulations.<sup>120</sup>

49. Similarly, GTE argues that interpreting section 261 of the Act as establishing federal supremacy over all matters addressed in sections 251 through 261 grossly overstates the modest jurisdictional changes resulting from the 1996 Act.<sup>121</sup> GTE, SWBT, and JSI note that Congress did not amend section 2(b) of the 1934 Act to give the Commission jurisdiction over matters encompassed by sections 251 through 261. These commenters conclude, therefore, that the 1996 Act did not alter the dual system of regulating intrastate and interstate services established in the 1934 Act.<sup>122</sup>

### c. Discussion

50. The Supreme Court has held that "pre-emption of state law [may occur] either by express provision, by implication, or by a conflict between federal and state law."<sup>123</sup> In *Fidelity Federal Savings & Loan Assn.*, the Supreme Court stated that

[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>124</sup>

In determining whether state law "stands as an obstacle" to the full implementation of federal law, the Supreme Court has held that

it is not enough to say that the ultimate goal of both federal and state law is the same. A state law . . . is pre-empted if it interferes

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<sup>120</sup> Texas Commission Reply Comments at 14.

<sup>121</sup> GTE Reply Comments at 4.

<sup>122</sup> *Id.* at 4-5. See also SWBT Reply Comments at 6; JSI Comments at 12.

<sup>123</sup> *New York State Conference of Blue Cross and Blue Shield Plans*, 514 U.S. at \_\_\_, 115 S.Ct. at 1676 (emphasis added). See *Fidelity Federal Sav. & Loan Ass'n*, 458 U.S. at 153 ("[f]ederal regulations have no less pre-emptive effect than federal statutes").

<sup>124</sup> *Fidelity Federal Sav. & Loan Ass'n*, 458 U.S. at 153, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977).



with the methods by which the federal statute was designed to reach that goal.<sup>125</sup>

51. The ultimate question underlying any preemption analysis is "whether Congress intended that federal regulation supersede state law."<sup>126</sup> In many cases, federal statutes contain no explicit statements with respect to Congress's preemptive intent, and courts and agencies must look to other sources to determine the extent, if any, to which Congress intended to displace state law. The 1996 Telecommunications Act, however, contains a number of provisions that are relevant to the issues before us. First, section 601(c)(1), a general provision applicable to all sections of the 1996 Act, states that the 1996 Act is not to be construed to *impliedly* preempt state or local law. That provision is of limited relevance to issues arising under sections 251 through 261 of the Communications Act, however, because sections 251 through 261 contain multiple provisions which evidence an express intent concerning when federal requirements preempt state regulations. As already noted, section 253 directs us to preempt state requirements that "prohibit or have the effect of prohibiting" the provision of an interstate or intrastate telecommunications service by any entity. In addition, section 261(c), which is entitled "additional state requirements," provides:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.<sup>127</sup>

The "part" to which section 261(c) refers is Part II of Title II of the Communications Act, entitled "Development of Competitive Markets," which consists of sections 251 through 261.<sup>128</sup> One other provision that is particularly relevant in determining the applicability of section 601(c) in this proceeding is section 251(d)(3), entitled "preservation of state access regulations." Section 251(d)(3) provides:

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<sup>125</sup> *Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 103 (1992) (holding, *inter alia*, that while the Occupational Safety and Health Act does not foreclose a state from enacting its own laws to advance the goal of worker safety, it does restrict the ways in which it can do so).

<sup>126</sup> *Louisiana PSC*, 476 U.S. at 369, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

<sup>127</sup> 47 U.S.C. § 261(c).

<sup>128</sup> We note that the Eighth Circuit has determined that section 261(c) applies only to those additional state requirements that are not promulgated pursuant to section 251 or any other section in Part II of the Act. *See Iowa Utils. Bd*, 120 F.3d at 807. Accordingly, section 261(c) is applicable here because PURA95 was enacted prior to the 1996 Act.

In prescribing and enforcing regulations to implement the requirements of [section 251], the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -- (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.<sup>129</sup>

Section 251(d)(3) essentially restates the principles that would apply under the Supreme Court's general preemption jurisprudence. In particular, it makes entirely clear, with respect to access and interconnection, that Congress intended to preempt state regulations that are inconsistent with section 251 and our regulations implementing section 251, and state regulations that are not inconsistent with section 251 and our regulations but substantially undermine the achievement of the purposes of section 251.

52. From these multiple provisions, it is possible to draw a number of conclusions concerning Congress's intent. First, although Congress "legislated comprehensively," which otherwise would support the conclusion that it was "occupying the entire field of regulation and leaving no room for the States to supplement federal law,"<sup>130</sup> Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets. Second, however, Congress did not intend to permit state regulations that conflicted with the 1996 Act. States may "impos[e] requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access," but only "as long as the State's requirements are not inconsistent with this part."<sup>131</sup> Thus, a state may not impose any requirement that is contrary to the terms of sections 251 through 261 or that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress."<sup>132</sup> Third, Congress plainly authorized agency preemption based on a conflict between validly enacted federal rules and state requirements as approved in *Fidelity Federal Savings and Loan Association v. De La Cuesta*<sup>133</sup> and *City of New York v. FCC*.<sup>134</sup> However, when prescribing and enforcing rules to implement section 251, we are to preserve state access and interconnection rules that are "consistent with the requirements

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<sup>129</sup> 47 U.S.C. § 251(d)(3).

<sup>130</sup> *Louisiana PSC*, 476 U.S. at 368.

<sup>131</sup> 47 U.S.C. § 261(c).

<sup>132</sup> *Louisiana PSC*, 476 U.S. at 369 (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

<sup>133</sup> 458 U.S. 141.

<sup>134</sup> 467 U.S. 57 (1988).

of section 251" if they "[do] not substantially prevent implementation of the requirements of this section and the purposes of this part."<sup>135</sup>

53. A federal agency may preempt when it is acting within the scope of its congressionally delegated authority.<sup>136</sup> The Communications Act, as enacted in 1934, established a dual system of state and federal regulation over telecommunications. Section 2(a) of the Act granted the Commission jurisdiction over "all *interstate* and foreign commerce in wire and radio communications," while section 2(b) expressly reserved to the states jurisdiction over "*intrastate* communications by wire or radio."<sup>137</sup> In light of this jurisdictional division, in *Louisiana PSC* the Supreme Court stated that the Commission's power to preempt state regulation of intrastate communications is limited to situations where: (1) it is impossible to separate the interstate and intrastate components of the Commission's regulation; and (2) the state regulation would negate the Commission's lawful authority over interstate communications.<sup>138</sup>

54. In *Iowa Utilities Board v. FCC*, the United States Court of Appeals for the Eighth Circuit addressed the scope of the Commission's congressionally delegated authority under section 251.<sup>139</sup> Although the Eighth Circuit viewed our authority under this section more narrowly than we did, the court explicitly recognized our authority under section 251(c)(4)(B) of the Act to prevent discriminatory conditions on resale.<sup>140</sup> Our preemption decisions are fully consistent with the court's decision in *Iowa Utilities Board* because, to the extent that we preempt provisions of the Texas statute due to a conflict with the 1996 Act, we do so based on a conflict between the Texas statute and section 251(c)(4)(B).

## **B. Application of Preemption Analysis To Challenged Provisions of PURA95 and Texas Commission Decisions**

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<sup>135</sup> 47 U.S.C. § 251(d)(3).

<sup>136</sup> *Louisiana PSC*, 476 U.S. at 369, citing *Fidelity Federal Sav. & Loan Ass'n*, 458 U.S. at 141 and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

<sup>137</sup> 47 U.S.C. § 152(a) and (b) (emphasis added).

<sup>138</sup> *Louisiana PSC*, 476 U.S. at 375 n.4. The "impossibility exception" standard is met when:

(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would 'negate the [FCC's] exercise . . . of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects. *Maryland Pub. Serv. Comm'n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations omitted).

<sup>139</sup> See *Iowa Utils. Bd.*, 120 F.3d 753.

<sup>140</sup> *Iowa Utils. Bd.*, 120 F.3d at 794 n.10.

55. The petitioning parties seek preemption of various provisions of the Texas statute. Two provisions in particular directly restrict the manner in which certain carriers may enter local telecommunications markets in Texas to compete with incumbent LECs. First, as noted above, holders of COAs are required to construct, or obtain from providers other than incumbent LECs, facilities needed to provide competitive local exchange services within prescribed geographic areas. Second, the SPCOA six percent eligibility limitation prohibits the three largest IXCs from obtaining a SPCOA, thereby requiring these carriers to enter Texas markets as COA holders. Taken together, the COA build-out requirements and the SPCOA six percent eligibility limitation effectively require the three largest IXCs to enter Texas markets as facilities-based providers and significantly limit their ability to provide service via the resale of incumbent LEC services.

56. We first address whether the COA build-out requirements and other obligations imposed on COA holders violate section 253 or other provisions of the Communications Act. We then examine challenges to the Texas statutory provisions governing SPCOAs. Finally, we analyze several challenges to various other provisions of PURA95 and Texas Commission decisions.

## **1. Certificate of Operating Authority (COA)**

### **a. Build-Out Requirements**

#### **i. Background**

57. PURA95 section 3.2531 requires, *inter alia*, that COA applicants commit to serve a minimum area covering at least 27 square miles and that they submit to the Texas Commission proposed build-out plans demonstrating how they plan to deploy facilities throughout their proposed service area over a six-year period.<sup>141</sup> By the end of the first year of deployment, ten percent of the service territory must be served through the use of facilities other than those of the incumbent LEC.<sup>142</sup> By the end of the third year, fifty percent of the territory must be served with facilities not provided by the incumbent LEC.<sup>143</sup> By the end of the sixth year, none of the facilities used by a COA holder may be purchased from the incumbent LEC, with the exception of local loops obtained under state tariff from the incumbent LEC at usage sensitive rates, which may be utilized in up to forty percent of the served territory.<sup>144</sup> The build-out requirements are eliminated in any area served by an incumbent LEC having more than one million access lines

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<sup>141</sup> PURA95 § 3.2531(c)(g).

<sup>142</sup> PURA95 § 3.2531(c)(1).

<sup>143</sup> PURA95 § 3.2531(c)(2).

<sup>144</sup> PURA95 §§ 3.2531(c)(3), (d).

when all prohibitions on the incumbent LEC's provision of interLATA service are removed.<sup>145</sup> As a practical matter, this sunset of the build-out provisions is triggered only by the removal of the prohibitions on SWBT's provision of interLATA services. GTE is already authorized to provide interLATA services, and SWBT is the only other carrier serving at least one million access lines in Texas.

58. In their petitions, AT&T and MCI challenge the build-out requirements and restrictions on access to incumbent LEC facilities<sup>146</sup> as barriers to entry in violation of section 253(a) and argue that such provisions should be preempted under section 253(d).<sup>147</sup> AT&T and MCI further assert that such requirements violate sections 251(c)(3) and 251(c)(4) of the Act.<sup>148</sup> The Texas Commission asks the Commission to determine whether the build-out requirements are preempted by the 1996 Act.<sup>149</sup>

59. AT&T, in its comments, also urges the Commission to preempt PURA95 sections 3.1555(a), 3.258(a), and 3.2531(c) because these provisions are inextricably intertwined with the build-out obligations and cannot survive on their own.<sup>150</sup> PURA95 section 3.1555(a) requires COA holders to provide periodic minimum quality of service upgrades. Specifically, this section requires, in part, that all COA and CCN holders provide the following services or features to all customers no later than December 31, 2000:

- (1) single party service;
- (2) tone-dialing service;
- (3) basic custom calling features;
- (4) equal access for interLATA interexchange carriers on a bona fide request; and

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<sup>145</sup> PURA95 §§ 3.2531(i).

<sup>146</sup> We note that the Texas statute refers to the sale of local loops as "resale" of those facilities, rather than as the sale and purchase of unbundled elements, and that commenters specifically refer to the term "resale" in setting forth their arguments. While we recognize that the Communications Act and the Commission refer to such a transaction as the sale or purchase of an "unbundled network element," in order to avoid confusion, we retain the Texas language only when referring to the commenters' arguments, and use the Communications Act and the Commission's terminology in our discussion sections.

<sup>147</sup> AT&T Petition at 12; MCI Petition at 10-13.

<sup>148</sup> AT&T Petition at 17-21; MCI Petition at 10-13.

<sup>149</sup> Texas Commission Petition at 18-24, 26.

<sup>150</sup> AT&T Comments at 14; AT&T Reply Comments at 13.

- (5) digital switching capability in all exchanges on customer request, provided by a digital switch in the exchange or by connection to a digital switch in another exchange.<sup>151</sup>

PURA95 sections 3.258(a) and 3.2531(c), respectively, require COA holders to offer basic service to all customers within their full certificated service area and serve customers in their build-out areas within thirty days of the date of a request for service.

60. PURA95 section 3.2531(f) authorizes the Texas Commission to "administratively and temporarily waive compliance with the six-year build-out plan on a showing of good cause."<sup>152</sup> Based on this provision, the Texas Commission adopted Supplemental Preliminary Orders granting such waivers to Sprint, AT&T and MCI, until either: (1) the FCC rules that the COA build-out requirements are preempted by the 1996 Act; or (2) SWBT is authorized to provide in-region interLATA services in Texas.<sup>153</sup> The ALJs evaluating each party's specific COA application are not, however, bound by the Supplemental Preliminary Waiver Orders. Instead, the ALJs may choose not to recommend approval of a waiver of the build-out requirements based on the specific facts of each application.

61. In an *Order on Certified Issues* dated March 14, 1997, the Texas Commission clarified the scope of its Supplemental Preliminary Waiver Orders by concluding, *inter alia*, that

(1) waiver of the build-out requirements does not eliminate the facilities based requirements of a COA; [and]

(2) COA holders are precluded from reselling service out of SWBT's flat-rated state resale tariff, but are not precluded from reselling flat-rated services under the parallel federal track, as authorized by [the 1996 Act].<sup>154</sup>

More specifically, the Texas Commission stated that references to waiving the "six-year build-out plan" in its Supplemental Preliminary Waiver Orders should be interpreted in its broadest sense to include all aspects of the build-out plan, *e.g.*, the implementation schedule for the build-out plan, the forty percent resale limitation, and the size and boundaries of the build-out plan.<sup>155</sup> The Texas Commission also held that "a COA holder's obligation to provide service may be met

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<sup>151</sup> PURA95 § 3.1555(a).

<sup>152</sup> PURA95 § 3.2531(f).

<sup>153</sup> See Supplemental Preliminary Waiver Orders.

<sup>154</sup> See *Applications of AT&T Communications of the Southwest, Inc. and MCI Metro Transmission Services, Inc., for Certificates of Operating Authority*, Texas PUC Docket No. 16658, *Order on Certified Issues* (Mar. 14, 1997) at 1.

<sup>155</sup> *Id.* at 5.

by the use of unbundled elements or by the resale of service (obtained under the parallel track provided by [the 1996 Act]) where the build-out requirements have been waived. However, where such elements or resale are unavailable to the COA holder . . . the COA holder would be required to construct its own facilities to meet its statutory obligations."<sup>156</sup>

62. Finally, in its *Order on Certified Issues*, the Texas Commission specifically rejected arguments that: (1) it lacks authority to waive the build-out requirements; and (2) a waiver pending specified action by the FCC or SWBT authorization to provide interLATA service is not a temporary waiver.<sup>157</sup>

63. Sprint's COA application, including its request for a waiver of the build-out requirements, was granted by the Texas Commission on October 14, 1996.<sup>158</sup> In separate orders dated May 6, 1997, administrative law judges recommended that the Texas Commission approve the COA applications of AT&T and MCI, including their requests for waivers of the build-out requirements.<sup>159</sup> The Texas Commission approved the ALJ's recommendations and granted the subject COA applications in decisions dated June 5, 1997.<sup>160</sup> On August 19, 1997, SWBT filed suit in Texas state court challenging the validity of the waivers of the build-out requirements granted to AT&T and MCI by the Texas Commission.<sup>161</sup>

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<sup>156</sup> *Id.* at 7.

<sup>157</sup> *Id.* at 6.

<sup>158</sup> *Application of Sprint Communications Company, L.P. For a Facilities-Based Certificate of Operating Authority within Texas*, Texas PUC Docket No. 15990, *Order* (Oct. 14, 1996).

<sup>159</sup> *Application of AT&T Communications of the Southwest, Inc. For a Certificate of Operating Authority*, Texas PUC Docket No. 16658, *Proposal for Decision* (ALJ May 6, 1997); *Application of MCI Metro Access Transmission Services, Inc. For a Certificate of Operating Authority*, Texas PUC Docket No. 16744, *Proposal for Decision* (ALJ May 6, 1997).

<sup>160</sup> *Application of AT&T Communications of the Southwest, Inc. For a Certificate of Operating Authority*, Texas PUC Docket No. 16658, *Order* (June 5, 1997); *Application of MCI Metro Access Transmission Services, Inc. For a Certificate of Operating Authority*, Texas PUC Docket No. 16744, *Order* (June 5, 1997).

<sup>161</sup> *See Southwestern Bell Telephone Company v. Public Utilities Commission of Texas*, Nos. 97-09505 and 97-09506 (D. Ct. Travis County, TX, August 19, 1997).

## ii. Comments

64. Several parties favoring preemption argue that the build-out requirements operate as a barrier to entry and should be preempted pursuant to section 253(a).<sup>162</sup> AT&T, the Department of Justice, Excel, and OPC claim that the build-out requirements, in combination with the restrictions on resale of incumbent LEC facilities and the inability of the three largest IXC's to obtain a SPCOA, make entry into the local exchange market prohibitively expensive.<sup>163</sup> The Department of Justice asserts that the key question is not whether these companies can legally enter the market under a COA, but whether they are effectively restricted from entering local markets to provide any combination of services and facilities as authorized by Congress.<sup>164</sup> The Department of Justice maintains that requiring COA holders to fund a six year facilities deployment plan over a minimum of 27 square miles may prohibit entry by IXC's given that IXC's have no established local customer base and are prohibited from obtaining for resale more than forty percent of their local loops from the incumbent LEC.<sup>165</sup>

65. Many parties also argue that the build-out obligations do not meet the requirements of section 253(b) of the Act because the obligations are neither "competitively neutral" nor "necessary" to preserve and advance the policy goals enumerated in that section.<sup>166</sup> The Department of Justice, AT&T, and OPC assert that, because the build-out requirements are imposed only on COA holders, as opposed to CCN or SPCOA holders, and the three largest IXC's are prohibited from obtaining a SPCOA, the build-out requirements are not competitively neutral.<sup>167</sup> Most parties challenging the build-out requirements also argue that the fact that these restrictions are lifted once SWBT receives authority to provide in-region interLATA services demonstrates that these requirements are not necessary to advance any legitimate state policy goals.<sup>168</sup> The Department of Justice and MCI further claim that, because the build-out

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<sup>162</sup> AT&T Comments at 7; Department of Justice Comments at 14, 18; Excel Comments at 5-6; CompTel Comments at 9; NTIA Reply Comments at 13-14, 15-17; GSA/DOD Comments at 8-9; OPC Comments at 5; MCI Reply Comments at 8; Sprint Reply Comments at 5.

<sup>163</sup> AT&T Comments at 7-8; Department of Justice Comments at 14, 18; Excel Comments at 5-6; OPC Comments at 5.

<sup>164</sup> Department of Justice Comments at 14, 18.

<sup>165</sup> *Id.* at 16.

<sup>166</sup> Department of Justice Comments at 14, 18-19; CompTel Comments at 11; AT&T Comments at 9; MCI Reply Comments at 8; OPC Reply Comments at 2.

<sup>167</sup> Department of Justice Comments at 14, 18-19; AT&T Comments at 11; OPC Comments at 5.

<sup>168</sup> Department of Justice Comments at 14, 18-19; CompTel Comments at 11; AT&T Comments at 9; MCI Reply Comments at 8.



requirements are neither competitively neutral nor necessary to promote universal service, they violate section 253(b), and should be independently preempted pursuant to that section.<sup>169</sup>

66. In addition to arguing for preemption under section 253, several parties contend that the build-out requirements and resale restrictions in PURA95 section 3.2531 should be preempted as inconsistent with sections 251(b) and (c) of the Act.<sup>170</sup> The Department of Justice, AT&T, Excel, and OPC maintain that the build-out requirements violate sections 251(b)(1), (c)(3) and/or (c)(4) of the Act because they restrict the means by which carriers can enter the local exchange market.<sup>171</sup> Sprint maintains that Congress, as evidenced by section 271, intended local competition to begin before the BOCs, such as SWBT, are permitted to provide in-region interLATA service.<sup>172</sup> Thus, Sprint argues that the build-out requirements are contrary to the general purposes of the 1996 Act because they do not permit certain competing providers of local service to enter the local exchange marketplace as resellers or purchasers of unbundled incumbent LEC network elements until SWBT has been permitted to enter the interLATA market.<sup>173</sup>

67. In claiming that PURA95 sections 3.1555(a), 3.258(a), and 3.2531(c), which impose certain universal service and service quality obligations,<sup>174</sup> must be preempted, AT&T argues that each of these provisions is premised on the assumption that the COA holder will be required to enter as a facilities-based provider.<sup>175</sup> AT&T also argues that these common carrier obligations violate section 253(f) of the Act because they apply indiscriminately to all service areas, not just those served by rural LECs.<sup>176</sup> SWBT supports continued enforcement of these obligations on the grounds that they were enacted to promote universal service and service quality goals and that COA holders can comply with such obligations even if the build-out

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<sup>169</sup> Department of Justice Comments at 14, 18-19; MCI Reply Comments at 8.

<sup>170</sup> AT&T Comments at 12; Excel Comments at 7; Sprint Comments at 4; CompTel Comments at 9, 13; OPC Comments at 4-5.

<sup>171</sup> Department of Justice Comments at 14, 20-22; AT&T Comments at 12; Excel Comments at 6-7; CompTel Comments at 9, 13; OPC Comments at 4-5.

<sup>172</sup> Sprint Comments at 5. BOC provision of interLATA service is discussed *supra* n.60.

<sup>173</sup> *Id.* at 3-6.

<sup>174</sup> *See supra* ¶ 59.

<sup>175</sup> AT&T Comments at 14; AT&T Reply Comments at 13. *See also* NTIA Reply Comments at 22 (recommending preemption of the requirements that COA holders serve any customer in their operating territory within thirty days of a request and make certain quality of service upgrades).

<sup>176</sup> AT&T Reply Comments at 14. Section 253(f) of the Act permits states to impose universal service obligations on carriers in areas served by a rural LEC. *See* 47 U.S.C. § 253(f).

requirements are not applied to COA holders.<sup>177</sup> Similarly, the Texas Commission argues that, even if the build-out requirements are preempted, "the large, established interexchange carriers should be required to satisfy quality of service and universal service standards when providing local exchange service within [Texas]."<sup>178</sup>

68. The Texas Commission argues that, if the build-out requirements can be shown to serve a pro-competitive purpose, they are fully consistent with the 1996 Act.<sup>179</sup> The Texas Commission, however, acknowledges that if the build-out requirements do not promote competition, but rather unreasonably deter competitive entry, such requirements may be preempted under section 253 of the Act.<sup>180</sup> The Texas Commission also notes that, in recognition of the concerns raised over the build-out requirements, it issued an order granting Sprint a temporary waiver of the requirements.<sup>181</sup> The Texas Commission states that it granted Sprint's petition for waiver because of the serious preemption question raised by section 253 of the Act, and because the build-out requirements are eliminated as soon as SWBT is authorized to provide in-region, interLATA service in Texas, which would likely occur prior to Sprint's completion of the six year build-out required by PURA95.<sup>182</sup>

69. SWBT maintains that the Texas Commission decision granting Sprint a waiver of the build-out requirements effectively permits all COA holders to operate free of those requirements in SWBT's region until such time as the Texas Commission decision is overturned on appeal.<sup>183</sup> Although SWBT asserts that the Texas Commission does not have the authority to waive the build-out requirements, SWBT nevertheless argues that, in light of the Texas Commission's waiver policy, the Commission should dismiss as moot any petitions seeking a declaration that the build-out requirements are preempted.<sup>184</sup> Alternatively, SWBT states that the Commission should defer any consideration of this issue until such time as the requirements under Texas law are settled.<sup>185</sup>

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<sup>177</sup> SWBT Reply Comments at 13-14.

<sup>178</sup> Texas Commission Comments at 22. *See also* Texas Commission Reply Comments at 12, n.8 ("COA holders have service obligations that are entitled to be preserved independently of the build-out requirements").

<sup>179</sup> Texas Commission Comments at 19.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 20.

<sup>182</sup> *Id.* As discussed *supra* ¶ 63, the Texas Commission has also granted waivers of the COA build-out requirements to AT&T and MCI.

<sup>183</sup> SWBT Comments at 14; SWBT Reply Comments at 11-12.

<sup>184</sup> SWBT Comments at 14; SWBT Reply Comments at 11-12.

<sup>185</sup> SWBT Comments at 14; SWBT Reply Comments at 11-12.

70. SWBT further claims that the build-out requirements should not be preempted because they place only a modest burden on carriers, and are in fact complementary to the 1996 Act.<sup>186</sup> SWBT argues that the build-out area is small, and that the build-out requirements may be satisfied through use of personal communications services (PCS) or other wireless technology, leasing of non-incumbent LEC facilities, or resale of the incumbent LEC's unbundled local loops in up to forty percent of the COA holder's service area.<sup>187</sup> SWBT notes that, contrary to the assertion of AT&T, PURA95 does not require the construction of any facilities -- where and whether to construct facilities is left entirely to the discretion of the applicant.<sup>188</sup> SWBT also argues that the COA build-out requirements are designed to encourage facilities-based competition (a preference that SWBT argues is also shared by Congress), that the IXCs have vast resources and can easily satisfy these modest requirements, and that the requirements are analogous to requirements imposed by the Commission on PCS licensees.<sup>189</sup> Finally, SWBT maintains that neither AT&T nor MCI has sufficiently demonstrated that the COA requirements prohibit or have the effect of prohibiting them from providing telecommunications services in Texas.<sup>190</sup>

71. The Department of Justice, AT&T, MCI, and Sprint argue that the Texas Commission's decision temporarily waiving the build-out requirements for Sprint does not obviate the need for federal preemption, because: (1) the challenged provisions are still in force and the state regulator's exercise of discretion to waive them is not sufficient grounds to save the statute from preemption; (2) waivers have not been granted for AT&T and MCI; and (3) the waivers are temporary in nature and the Texas Commission has requested that the Commission affirmatively determine on an expedited basis whether such requirements are unlawful.<sup>191</sup>

72. The Department of Justice also argues that the Commission may bring the Texas legislation into compliance with the 1996 Act by eliminating the statutory prohibition on the grant of SPCOAs to large IXCs, because in that event the build-out obligations and resale restrictions would no longer affect them. Alternatively, the Department of Justice contends, the Commission could preempt the build-out requirements and resale restrictions in PURA95.<sup>192</sup>

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<sup>186</sup> SWBT Comments at 15.

<sup>187</sup> *Id.* at 17-19.

<sup>188</sup> SWBT Reply Comments at 13.

<sup>189</sup> SWBT Comments at 18-20.

<sup>190</sup> *Id.* at 21-22; SWBT Reply Comments at 12-13.

<sup>191</sup> Department of Justice Comments at 17; MCI Reply Comments at 9; Sprint Reply Comments at 3-5; AT&T Reply Comments at 4-6. We note that these comments were filed prior to the Texas Commission's decision to grant COA build-out waivers to AT&T and MCI.

<sup>192</sup> Department of Justice Comments at 15.

### iii. Discussion

#### (a) COA Build-Out Provisions

73. We find that the COA build-out requirements set forth in PURA95 section 3.2531 violate the terms of section 253(a) of the Act standing alone and do not fall within the protected class of state regulation described in section 253(b). We, therefore, preempt these requirements pursuant to section 253(d).<sup>193</sup> Because the Texas Commission has "administratively and temporarily" waived the COA build-out requirements for Sprint, AT&T, and MCI -- which effectively removes the limitations on the use of incumbent LEC unbundled network elements and the resale of incumbent LEC services -- we build on the actions of the Texas Commission and preempt the enforcement of these provisions pursuant to section 253(d) of the Act to the extent that these statutory provisions might be applied to Sprint, AT&T, or MCI in the future. Our decision also prohibits the enforcement of these provisions against any other carriers that seek a COA. We believe that this action is consistent with, and lends supports to, the pro-competitive steps already taken by the Texas Commission in granting Sprint, AT&T, and MCI waivers of the COA build-out requirements.

74. In reaching this decision, we find that section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, *i.e.*, new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options. In section 253(a), Congress decreed that no state or local statute or regulation may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The statutory definition of "telecommunications service" provides, in relevant part, that a telecommunications service is "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used.*"<sup>194</sup> Thus, these two provisions, read together, provide that no state or local requirement may prohibit or have the effect of prohibiting any entity from providing any offering of telecommunications directly to the public for a fee regardless of the facilities used. A state may not, therefore, require that an entity provide telecommunications services via its own facilities and limit the entity's ability to resell incumbent LEC services or restrict the use of unbundled network elements provided by the incumbent.

75. While our interpretation of section 253 is based on a textual analysis of the language of section 253(a) and the definition of telecommunications service contained in the Act, we find that other provisions of the 1996 Act lend support to our conclusion. Specifically, we find that this is the most reasonable interpretation of section 253(a) in light of the express

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<sup>193</sup> We preempt PURA95 section 3.2531 only insofar as various aspects of this section require COA holders to provide service through non-incumbent LEC facilities. Elsewhere we specifically preempt the COA rural prohibition set forth in section 3.2531(h). *See infra* ¶ 106.

<sup>194</sup> 47 U.S.C. § 153(46) (emphasis added).

obligations imposed on incumbent LECs by section 251 to enable new competitors to enter local markets by: (1) constructing their own facilities and interconnecting with the incumbent LEC through, for example, collocation; (2) obtaining unbundled network elements; (3) purchasing incumbent LEC retail services at wholesale for resale to end users; or (4) some combination of these three strategies. Congress did not favor any one of these entry strategies over another in section 251, and in our view, section 253(a) prohibits a state from overriding this Congressional framework by restricting the use of resale or unbundled network elements by certain carriers. Given our conclusion that section 251 of the Act is intended to ensure the availability of incumbent LEC services for resale by new entrants and the availability of incumbent LEC unbundled network elements to new competitors, it is reasonable to read section 253(a) in conjunction with the definition of telecommunications service as barring restrictions by states or localities on the means through which an entity may enter the local exchange market.<sup>195</sup>

76. Moreover, our interpretation is consistent with the decision in *Iowa Utilities Board*. In discussing section 251, the Eighth Circuit recognized that new competitors may choose resale, access to unbundled network elements or access to interconnection arrangements offered by incumbent LECs as an entry strategy and stated that "[a] company seeking to enter the local telephone service market may request an incumbent LEC to provide it with any one or any combination of these three services."<sup>196</sup> In sum, under our reading of section 253, an entity is free to choose whether to enter the market by using its own facilities, reselling the services of an incumbent LEC, obtaining incumbent LEC unbundled network elements or a combination of these options. The opposite interpretation -- concluding that a state may restrict a new entrant's use of resale or incumbent LEC unbundled network elements in the provision of service, provided that the new entrant is permitted to offer local service via its own facilities -- would be contrary to section 251.

77. PURA95 requires COA holders to meet specific build-out requirements over a six-year period through use of their own facilities or facilities of an entity other than the incumbent LEC, thereby imposing corresponding limitations on the right of COA holders to serve customers through the resale of incumbent LEC services or use of incumbent LEC unbundled network elements. PURA95, therefore, expressly and directly restricts the ability of COA holders to provide service to end users by reselling incumbent LEC services or by using the unbundled network elements of an incumbent LEC to provide telecommunications services. Thus, we conclude that the COA build-out requirements violate section 253(a) of the Act.

78. In addition to the direct restriction on the means or facilities through which an entrant is permitted to provide service, we further find, as an independent basis for preemption

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<sup>195</sup> In this context, we focus on the fact that both unbundled network elements and services offered for resale involve the use of LEC facilities in some manner. In other contexts, we distinguish between unbundled network elements as involving LEC facilities, whereas resale involves the resale of services and not resale of the LEC's underlying facilities.

<sup>196</sup> *Iowa Utils. Bd.*, 120 F.3d at 791.

under section 253, that enforcement of the build-out requirements would "have the effect of prohibiting" AT&T, MCI and Sprint from providing service contrary to section 253(a) due to the substantial financial investment involved and the comparatively high cost per loop sold by a new entrant.<sup>197</sup> In making this finding, we reject SWBT's argument that the COA build-out requirements do not violate section 253(a) of the Act because "with their vast resources and access to capital, [AT&T, MCI, and Sprint] can easily satisfy the modest build-out requirements associated with a COA."<sup>198</sup> Although PURA95 permits COA holders to enter local exchange markets in Texas in areas as small as 27 square miles, as national carriers, the business plans of AT&T and MCI may reasonably contemplate entry on a statewide basis and, indeed, AT&T alleges in this proceeding that its plans call for statewide entry.<sup>199</sup> Further, statewide entry is consistent with Congress' goal of rapid and widespread entry by new competitors in the local exchange market.<sup>200</sup> And Congress expressly recognized that construction of redundant networks would be very costly and time-consuming, and therefore provided requesting carriers with the right to obtain non-discriminatory access to unbundled network elements and to resell the services of incumbent LECs.<sup>201</sup>

79. Under PURA95, statewide entry by COA holders would require massive investment.<sup>202</sup> For example, AT&T estimates that complying with PURA95's COA build-out

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<sup>197</sup> See AT&T Comments at 7-8 ("The Texas Law . . . requires a monopoly-sized investment for carriers that not only have no monopoly themselves, but that will be able to obtain customers only to the extent they can win them away from an entrenched monopolist. No rational business will invest capital under such conditions."); MCI Petition at 12 ("Before a potential new entrant will be permitted to serve a single customer, these provisions force the company to spend millions of dollars to begin to build out to all customers in a 27 square mile area, *regardless of the number of customers in that area actually served by the new entrant*. The effect of these requirements is to make entry into most local exchange markets economically impossible.") (emphasis in original).

<sup>198</sup> SWBT Comments at 17-19. See also SWBT Reply Comments at 13.

<sup>199</sup> See AT&T Reply Comments at 8-9 ("AT&T intends, and has the statutory right, to enter Texas on a statewide basis, and not even SBC can dispute that as applied to that service area the build-out requirement imposes massive and prohibitive costs of entry."). See also MCI Reply Comments at 8 ("No new entrant will have the resources to build-out the entire state of Texas, so these requirements will surely have the effect of prohibiting entry into some service areas).

<sup>200</sup> See Conference Report at 113.

<sup>201</sup> See Conference Report at 148 ("This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant."). In addition, the Eighth Circuit similarly noted that "Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business." *Iowa Utils. Bd.*, 120 F.3d at 816.

<sup>202</sup> See PURA95 § 3.2531(c).

requirements in order to offer service throughout Texas would cost approximately \$5.3 billion.<sup>203</sup> This estimate is based on a predicted thirty percent market share and the assumption that AT&T would obtain forty percent of the local loops needed to provide service as unbundled network elements from the incumbent LEC, as permitted by PURA95.<sup>204</sup> AT&T notes that in such a scenario, its monthly total element long-run incremental cost (TELRIC)<sup>205</sup> per switched line actually sold would be \$50.48<sup>206</sup> versus \$17.11 for SWBT.<sup>207</sup> We conclude that this cost differential under a state-wide build-out would effectively prevent AT&T from entering the local exchange market in Texas contrary to the requirements of section 253(a).

80. AT&T also contends that, despite SWBT's assertion to the contrary, the COA build-out requirements would have the effect of preventing COA holders from providing telecommunications services even though a COA holder may limit its entry to an area of 27 square miles and may limit its first year build-out obligations to ten percent of that total, or 2.7 square miles.<sup>208</sup> We conclude that a build-out requirement would violate the requirements of section 253(a) if competitive entry were economically viable only when it was limited to a very confined geographic area. We further conclude that, under the PURA95 build-out requirements, entry in fact is not economically viable even when confined to such a limited geographic area. Specifically, AT&T estimated the costs of the COA build-out requirements when the provision of service is limited to the area served by a particular urban, suburban, and rural wire center. AT&T found that when the build-out is limited to ten percent of the subscribers in the urban wire center area, it would have a monthly cost per sold line of \$335.30 vs. SWBT's cost of \$12.51. In the case of the suburban area, the relationship would be \$336.60 per sold line for AT&T to \$14.87 for SWBT, and for the rural area the ratio would be \$2,208.40 for AT&T to

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<sup>203</sup> See Letter from Albert M. Lewis, Director and Senior Attorney, Federal Government Affairs, AT&T, to A. Richard Metzger, Jr., Deputy Chief, Common Carrier Bureau, FCC (September 10, 1997) (AT&T *ex parte* letter) at 3.

<sup>204</sup> *Id.*

<sup>205</sup> This would include both capital costs and operating expenses such as maintenance.

<sup>206</sup> This represents the average cost per subscriber if AT&T were to offer service in Texas under these assumptions. Loop costs are weighted to reflect the relative portion of loops built by the CLEC and unbundled SWBT loops resold by the CLEC. *Id.* at Attachment 1, p. 7.

<sup>207</sup> *Id.* at 3. This represents SWBT's TELRIC cost of local loops and traffic sensitive switched network elements assuming a 100 percent share in the SWBT serving areas. *Id.* at Attachment 1, p. 7.

<sup>208</sup> *Id.* at 3-4.

\$47.73 for SWBT.<sup>209</sup> Under a more conservative alternative set of assumptions,<sup>210</sup> Commission staff estimates of AT&T's cost for the urban area range from \$47.27 per sold line assuming thirty percent penetration to \$141.80 per sold line assuming a ten percent penetration rate. In the case of the suburban area, Commission staff estimates of AT&T's costs range from \$62.70 per sold line with thirty percent penetration to \$188.20 per sold line with ten percent penetration. In the rural area, Commission staff estimates of AT&T's costs range from \$486.53 per sold line at thirty percent penetration to \$1459.60 per sold line at ten percent penetration. Although the total dollar cost involved in building out a single limited service area would be much less than building out throughout the entire state, all of these figures indicate that high cost differentials between AT&T's cost per line sold and SWBT's cost per line would make it uneconomic for AT&T to enter the market and thus have the practical effect of prohibiting AT&T from providing service.

81. While we do not necessarily endorse all of the underlying assumptions used by AT&T, our experience with industry investment patterns by other CLECs and the data supplied by AT&T, lead us to conclude that the COA build-out requirements are prohibitively expensive and would clearly prevent COA holders from competing in a fair and balanced environment. We also conclude that the economic impact of the build-out requirements are great enough to have the effect of prohibiting entities subject to these requirements from providing competitive local exchange service in Texas.

82. Moreover, we conclude that the COA build-out requirements are not preserved under section 253(b) of the Act. The Texas Commission's assertion that these requirements advance the public interest goals enumerated in section 253(b) ignores the statutory mandate that the means chosen to further those goals must be competitively neutral. The build-out requirements, however, are not neutral on their face -- they single out only COA holders and require them to construct their own facilities or purchase access to non-incumbent LEC network elements. SPCOA holders, however, are free to enter local markets through resale of incumbent LEC services without incurring these expenses.<sup>211</sup> Further, by imposing the costs of providing facilities-based service only on COA holders, the build-out provisions significantly affect the ability of COA holders to compete against other certificated carriers for customers in the local exchange market.

83. Permissible state or local requirements under section 253(b) also must be "necessary" to achieve the public interest purposes listed in that section. The Texas Commission

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<sup>209</sup> *Id.* at 4. In calculating these figures, it appears that AT&T has assumed that it would build facilities to ten percent of the subscribers in the 27 square mile area rather than build out facilities only in a 2.7 square mile area because it interprets PURA95 as prohibiting use of unbundled loops outside the build-out area. *Id.* at 4, n.6.

<sup>210</sup> These figures assume that the build-out is limited to 2.7 square miles and that the density of subscribers is the same in the 2.7 square mile area as in the 27 square miles of the entire wire center.

<sup>211</sup> As noted earlier, an entity may not hold both a SPCOA and COA for the same area. PURA95 § 3.2532(e). *See supra* ¶ 25.



asserts that the COA build-out requirements are intended to "preserve and advance universal service, protect the public welfare, ensure the continued quality of telecommunications services, and safeguard consumer rights."<sup>212</sup> The Texas Commission, and parties arguing against the preemption of this provision fail to demonstrate, however, that requiring certain carriers to enter local exchange markets in part through the construction or lease of non-incumbent LEC facilities is "necessary" to the achievement of these goals. Indeed, Congress reached a different conclusion in establishing a national framework for competitive entry into the local exchange marketplace since it did not impose any build-out obligations on carriers. Accordingly, we conclude that PURA95's COA build-out requirements fail to satisfy the "necessary" criterion set forth in section 253(b) of the Act.

84. Claims that the COA build-out requirements are necessary to achieve the public interest goals set forth in section 253(b) of the Act are also belied by PURA95 section 3.2531(i), which eliminates *all* build-out requirements after SWBT is permitted to enter the in-region, interLATA market. No party has shown, or even attempted to show, that the build-out obligations are necessary to further universal service, promote high quality telecommunications services, and protect consumers before SWBT enters the in-region interLATA market, and then are no longer necessary to serve these purposes after SWBT has entered that market. Indeed, AT&T asserts that the sunset of the build-out provisions upon the removal of the restrictions on SWBT's provision of interLATA services demonstrates that the actual purpose of the build-out requirements is to deter entry into the local market by SWBT's competitors until SWBT is authorized to offer interLATA services that originate in Texas.<sup>213</sup>

85. We note that in implementing section 251(c)(6) of the Act, which requires incumbent LECs to provide for physical collocation of equipment "necessary" for interconnection or access to unbundled elements, we applied a different interpretation of "necessary" than we do here, finding that this term "does not mean 'indispensable' but rather 'used' or 'useful.'"<sup>214</sup> In so doing, we determined that

[t]his interpretation is most likely to promote fair competition consistent with the purposes of the Act. . . . A strict reading of the term 'necessary' in these circumstances could allow LECs to avoid collocating the equipment of the interconnectors' choosing, thus undermining the procompetitive purposes of the 1996 Act.<sup>215</sup>

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<sup>212</sup> Texas Commission Petition at 15.

<sup>213</sup> AT&T Comments at 9. *See also* MCI Reply Comments at 8.

<sup>214</sup> *Local Competition Order*, 11 FCC Rcd at 15794, ¶ 579.

<sup>215</sup> *Id.*

We also distinguish the use of the term "necessary" in section 253(b) from the standard for determining whether access to proprietary network elements is "necessary" under section 251(d)(2)(A).<sup>216</sup> In our *Local Competition Order*, we declined to adopt a general rule prohibiting access to proprietary network elements, or making access available only upon a carrier demonstrating a heavy burden of need. We interpreted the term "necessary" as it appears in section 251(d)(2)(A) to mean "that [a network] element is a prerequisite for competition."<sup>217</sup>

86. As a matter of statutory construction, it is generally accepted that the same language used multiple times in a statute is presumed to have the same meaning. This rule of construction, however, does not apply when assigning different meanings to the same word is consistent with the overall purpose of the statute. For example, in *Atlantic Cleaners and Dyers, Inc. v. United States*, the Supreme Court held that the same word may be variously construed even "when used more than once in the same statute or even in the same section" and that the presumption of the same word having the same meaning is not rigidly applied

[w]here the subject matter to which words refer is not the same in the several places where they are used, or the conditions are different . . . the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.<sup>218</sup>

87. In the case of section 253(b), interpreting the word "necessary" in the same manner as in section 251(c)(6) and (d)(2)(A) could well thwart the procompetitive intent of section 253. This approach would allow states and local governments overly broad discretion to adopt policies or regulations that "prohibit or have the effect of prohibiting" competitive entry in local telecommunications markets with only a minimal link between the challenged regulation

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<sup>216</sup> See *New England Public Communications Council* at ¶ 24.

<sup>217</sup> *Local Competition Order*, 11 FCC Rcd at 15641-42, ¶ 282.

<sup>218</sup> *Atlantic Cleaners and Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). *Accord Calderon v. Witvoet*, 999 F.2d 1101, 1104 (7th Cir. 1993). *Chugach Natives v. Doyon, Ltd.*, 588 F.2d 723, 725-26 (9th Cir. 1978); *United States v. Thompson*, 452 F.2d 1333, 1345 (D.C. Cir. 1971) *cert. denied*, 405 U.S. 998 (1972); see also Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are To Be Constructed*, 3 Vand. L. Rev. 395, 401-406 (1950). Black's Law Dictionary similarly states that the word "necessary"

must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient [or] useful. . . . [I]ts force and meaning must be determined with relation to the particular object sought. . . .

and the purported public interest objective. Such a result could enable the exception contained in section 253(b) to undermine the general rule set forth in section 253(a).<sup>219</sup> As stated in *New England Communications Council*, "[o]ur goal in interpreting the term 'necessary' in this specific context is to foster the overall pro-competitive, de-regulatory framework that Congress sought to establish through the 1996 Act and the directive in section 253 to remove barriers to entry."<sup>220</sup> Accordingly, we conclude that it is appropriate to interpret the term "necessary" in the context of section 253(b) in a different manner than we did with respect to sections 251(c)(6) and (d)(2)(A).

88. We reject SWBT's claim that the PURA95 build-out provisions should not be preempted because they are analogous to the build-out obligations imposed by the Commission on PCS licensees. Section 309(j)(4)(B) of the Act requires the Commission, in promulgating regulations regarding the establishment of a competitive bidding methodology, to

include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling and warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.<sup>221</sup>

89. We conclude that the circumstances involved in the PCS build-out requirements are clearly distinguishable from those involved in competitive entry into the local exchange market. The Commission's grant of a PCS license confers on the licensee an exclusive right to use a designated portion of the electromagnetic spectrum for the term of the license. The PCS build-out requirements are a reasonable way of fulfilling the explicit statutory mandate that the Commission prevent a licensee from stockpiling or warehousing spectrum and ensuring that the licensee promptly constructs the facilities necessary to use the designated spectrum for the authorized purposes. In the case of competitive entry into the local exchange, the new competitive entrant obtains no exclusive rights to provide service. Neither the Commission nor state regulatory officials have given the new entrant any such exclusive rights. If a particular carrier chooses not to enter the local exchange market, other carriers remain free to do so. In fact, any grant of exclusive market entry rights by state or local officials would raise serious questions under section 253(a) of the Act, which, subject to certain limitations, bars state and local requirements that prohibit or have the effect of prohibiting any entity from providing a

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<sup>219</sup> See *New England Public Communications Council* at ¶ 25.

<sup>220</sup> *Id.*

<sup>221</sup> 47 U.S.C. § 309(j)(4)(B). See also *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5570 (1994).

telecommunications service.<sup>222</sup> Moreover, AT&T and MCI assert that the COA build-out requirements actually deter competitive entry.<sup>223</sup>

90. For these reasons, we find that the COA build-out requirements prohibit or have the effect of prohibiting COA holders from providing telecommunications service in violation of section 253(a) of the Act. Since we conclude that these requirements do not fall within the protected class of state regulation under section 253(b), we find that action preempting the enforcement of these sections is required by section 253(d).<sup>224</sup>

91. We also conclude that the COA build-out requirements, which restrict the resale of incumbent LEC services by COA holders, must be preempted on the independent ground that they conflict with section 251(c)(4)(B) of the Act.<sup>225</sup> Section 251(c)(4) is designed to allow new entrants to obtain for resale, at wholesale rates, any telecommunications service offered by incumbent LECs to retail subscribers. Specifically, section 251(c)(4)(B) imposes on incumbent LECs the duty:

[N]ot to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.<sup>226</sup>

92. The COA build-out requirements set forth in PURA95 section 3.2531, by their terms, restrict COA holders from determining for themselves the means by which they serve local markets. Specifically, by requiring that COA holders serve a certain portion of their build-out area using facilities other than those of the incumbent LEC,<sup>227</sup> PURA95 significantly limits a

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<sup>222</sup> 47 U.S.C. § 253. See generally *Classic Telephone*, 11 FCC Rcd at 13096, ¶ 26.

<sup>223</sup> For example, prior to receiving waivers of the COA build-out requirements, AT&T and MCI stated that they had not yet entered the Texas local exchange market, in large part because of these restrictions. See AT&T Petition at 12; MCI Petition at 2.

<sup>224</sup> In light of these conclusions, we do not reach the contention that the build-out requirements should be preempted as independently violating section 253(b).

<sup>225</sup> We note that the Eighth Circuit decision in *Iowa Utils. Bd.* specifically recognized our authority to promulgate rules governing the prevention of discriminatory conditions on resale pursuant to section 251(c)(4)(B). See *Iowa Utils. Bd.*, 120 F.3d at 794 n.10.

<sup>226</sup> 47 U.S.C. § 251(c)(4)(B). Section 251(c)(4)(A) imposes a duty on each incumbent LEC "to offer for resale at wholesale rates any telecommunications service that the [incumbent LEC] provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A).

<sup>227</sup> PURA95 § 3.2531(c), (d).

COA holder's right to resell the services of an incumbent LEC. In contrast, the 1996 Act establishes a broad framework under which incumbent LECs must make certain services available for resale by requesting telecommunications carriers. In this regard, the 1996 Act places no restrictions on the eligibility of telecommunications carriers to resell local exchange services of incumbent LECs, and as noted above, section 251(c)(4)(B) explicitly prohibits any "unreasonable or discriminatory conditions" on the resale of incumbent LEC services. Because PURA95's COA build-out requirements effectively preclude COA holders from reselling incumbent LEC services, we find that these requirements are "discriminatory conditions" which conflict with section 251(c)(4)(B) such that PURA95 section 3.2531 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>228</sup> Accordingly, we preempt the enforcement of the PURA95 build-out provisions in their entirety.

93. The petitioning parties also have challenged PURA95 section 3.2531 on the grounds that it conflicts with sections 251(b)(1) and 251(c)(3) of the Act. In light of our decision to preempt the COA build-out requirements pursuant to section 253(d) and because they conflict with 251(c)(4)(B), we find that it is not necessary to address these additional arguments.

94. We reject SWBT's contention that the Texas Commission's waiver of the build-out requirements obviates the need for the Commission to take any preemption action. By granting waivers of the build-out requirements, the Texas Commission has indicated that it does not believe that application of these requirements would serve the public interest at the present time. There can be no assurances, however, that these waivers, which have been challenged by SWBT in Texas state court, will not be overturned.<sup>229</sup> Our preemption of the build-out requirements is intended to make permanent the "temporary" waivers granted by the Texas Commission. Thus, we view our preemption action as consistent with the action of the Texas Commission. Given the critical nature of this PURA95 provision to the development of competition in Texas, we specifically conclude that it is necessary to remove the regulatory uncertainty concerning future application of the COA build-out requirements.

95. In other sections of this *Order*, we rely on interpretations of certain provisions of PURA95 advanced by the Texas Commission that avoid conflict with federal requirements and thus we do not preempt.<sup>230</sup> While we acknowledge that these decisions will inevitably leave some degree of regulatory uncertainty, we believe that our decision to preempt the COA build-out requirements is distinguishable. The COA build-out requirements are of central importance to competitive entry because these requirements impact the threshold question of whether a new entrant enters the local exchange market at all by limiting the rights of new entrants to compete in the provision of all services through resale of incumbent LEC services and the purchase of

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<sup>228</sup> *Federal Fidelity Sav. & Loan Ass'n*, 458 U.S. at 153.

<sup>229</sup> *See supra* ¶ 63.

<sup>230</sup> *See e.g.*, Section II.B.2, *infra*.

access to unbundled network elements provided by incumbent LECs. In contrast, provisions where we do not preempt based on interpretations proffered by the Texas Commission generally involve the manner in which competitive services are provided or involve the provision of discrete services. Thus, we believe that the regulatory uncertainty associated with the COA build-out requirements is more harmful than those instances where we do not preempt because the COA build-out requirements could have a much greater impact on competition. Finally, we note that if we were not to preempt, relying on the current waivers, aggrieved parties would be forced to refile their preemption petitions in order to seek relief from these provisions if circumstances change in the future. Because a full record has already been developed on this issue, failure to resolve this issue now, in addition to possibly delaying significantly local exchange competition in Texas, would unnecessarily waste the resources of the parties and the Commission.<sup>231</sup>

### (b) Non-Build-Out COA Provisions

96. AT&T has argued that three additional PURA95 provisions should be preempted because they presume that carriers must satisfy the COA build-out obligations.<sup>232</sup> These provisions require that COA holders: (1) serve customers within their build-out area within thirty days of the date of a request;<sup>233</sup> (2) offer service to all customers within their certificated area;<sup>234</sup> and (3) provide minimum quality of service upgrades.<sup>235</sup> Alternatively, AT&T argues that the requirements that COA holders serve customers within their build-out area within thirty days of the date of a request, and offer service to all customers within their certificated area, should be preempted because they are inconsistent with section 253(f) of the Act, which preserves a state's right to impose universal service obligations on a carrier serving an area that is also served by a rural telephone company.<sup>236</sup>

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<sup>231</sup> See also *infra* ¶ 147 (rejecting SWBT's argument that any claim of a conflict between certain PURA95 SPCOA provisions and the 1996 Act are not "ripe" until particular PURA95 provisions have been applied in a way that conflicts with the 1996 Act).

<sup>232</sup> AT&T Comments at 14; AT&T Reply Comments at 13. Because no party has raised preemption of these provisions under section 253(a) of the Act, we decline at this time to analyze such provisions under that section.

<sup>233</sup> PURA95 § 3.2531(c).

<sup>234</sup> PURA95 § 3.258(a).

<sup>235</sup> PURA95 § 3.1555. See *supra* at ¶ 59.

<sup>236</sup> Section 253(f) of the Act provides, in part:

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) [concerning universal service obligations] for designation as an eligible telecommunications carrier for that

97. AT&T has not attempted to demonstrate that each of these provisions substantively violates the terms of section 253(a). Rather, AT&T claims, in effect, that these requirements should be preempted solely because they are closely related to the COA build-out requirements. We are not persuaded by AT&T's bare assertion that PURA95 sections 3.2531(c), 3.258(a), and 3.1555 are so "inextricably tied to the build-out requirements" that they "cannot logically be maintained absent the build-out requirement and resale restriction."<sup>237</sup> AT&T has not shown, for example, that requiring a COA holder to offer service to all customers in its certificated area or to provide service to a customer within thirty days of a request prohibits or has the effect of prohibiting an entity from providing a telecommunications service as required by section 253(a). Similarly, AT&T has not attempted to show that the minimum service standards applicable to COA holders prohibit or have the effect of prohibiting an entity from providing a telecommunications service as required by section 253(a).

98. Although these provisions appear clearly related to the COA build-out requirements, based on the plain statutory language of PURA95, we conclude that each of these provisions can stand independently of the build-out requirements. For example, absent restrictions on resale, the mandate of PURA95 section 3.2531(c) that COA holders provide service within thirty days of a request for service, and the requirement in PURA95 section 3.258(a) that a COA holder offer service to all customers within their certificated areas, could be satisfied by resale of incumbent LEC services. The minimum service standards specified in PURA95 section 3.1555 can also stand independently of the build-out requirements to the extent that these standards can be satisfied without requiring a new entrant to construct facilities when it would not otherwise do so.<sup>238</sup> Accordingly, we decline to preempt these provisions at this time based on the limited record before us.<sup>239</sup>

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area before being permitted to provide such service.

47 U.S.C. § 253(f).

<sup>237</sup> AT&T Comments at 13-14.

<sup>238</sup> We note that a new entrant providing service through resale cannot provide service upgrades, as required by PURA95 section 3.1555, that go beyond the quality of service provided by the incumbent LEC.

<sup>239</sup> AT&T raises this issue briefly, and with the exception of NTIA, no party other than AT&T has argued for the preemption of these provisions. *See* NTIA Reply Comments at 22 (stating that the Commission should preempt the requirements that a "COA holder serve any customer in its operating territory within 30 days of a request for service and . . . make certain quality-of-service upgrades."). SWBT specifically opposes AT&T's suggestion, stating without elaboration that, "in the absence of a build-out requirement, holders of COAs can satisfy these common carrier obligations in several ways." SWBT Reply Comments at 14. In its petition, the Texas Commission argues that, if the COA build-out requirements are preempted, the principal remaining difference between a SPCOA holder and a COA holder would be that a COA holder must satisfy these PURA95 requirements. *See* Texas Commission Petition at 15, 24 n.22. The Texas Commission implicitly argues, therefore, that these PURA95 provisions may continue to exist absent the COA build-out requirement.

99. Moreover, based on this record, we are not persuaded by AT&T's bare assertion that these three PURA95 provisions should be preempted on the grounds that they are inconsistent with section 253(f) of the Act. Section 253(f) provides that "[i]t shall not be a violation of [section 253] for a State" to impose universal service obligations on carriers in areas served by a rural LEC.<sup>240</sup> AT&T implicitly argues that because section 253(f) permits states to impose universal service requirements on carriers in rural areas, such universal service requirements are barred in other, non-rural areas. We believe that AT&T's interpretation of section 253(f) is incorrect. By its terms, section 253(f) of the Act is a savings clause, which preserves from preemption state or local requirements that may otherwise violate section 253(a). AT&T, however, has not attempted to show that PURA95 sections 3.2531(c), 3.258(a), or 3.1555, in and of themselves, violate section 253(a). We decline to preempt based on contentions that these requirements are inconsistent with the Act given the very limited record in this proceeding. In addition, we note that neither AT&T, nor any other party, has suggested that these provisions conflict with section 251 or any other provisions of the Act.

100. In sum, we decline to preempt these three COA non-build-out requirements at this time, based on the limited record developed in support of AT&T's request. We are prepared, however, to reevaluate this conclusion in the future, based on a substantive showing that these provisions violate section 253 of the Act or otherwise conflicts with any provision of the Communications Act over which we have authority pursuant to applicable law.

**b. The COA Rural Prohibition**

**i. Background**

101. PURA95 section 3.2531(h) prohibits the Texas Commission from granting a COA, before September 1, 1998, in an exchange of an incumbent LEC serving fewer than 31,000 access lines.<sup>241</sup> MCI argues that this moratorium is inconsistent with the process established by the 1996 Act for exempting rural telephone companies from the obligations of section 251(c).<sup>242</sup> MCI and AT&T further argue that such a moratorium, in conjunction with the resale limitation on AT&T, MCI, and Sprint, would completely prohibit those carriers from serving these exchanges until September 1, 1998, and, therefore, should also be preempted under section 253(a) of the Act.<sup>243</sup>

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<sup>240</sup> 47 U.S.C. § 253(f).

<sup>241</sup> PURA95 § 3.2531(h).

<sup>242</sup> MCI Comments at 22 n.12.

<sup>243</sup> *Id.* at 22; AT&T Comments at 12.



## ii. Comments

102. The Department of Justice, CompTel, Sprint, and NTIA contend that the Commission should preempt the moratorium challenged by AT&T and MCI on the grounds that it is a barrier to entry that has the effect of prohibiting an entity from providing an interstate or intrastate telecommunications service in the affected areas.<sup>244</sup> JSI argues, however, that PURA95 section 3.2531(h), relating to small, rural LECs, is justified under section 253(b) of the Act because the Texas legislature is more knowledgeable about local market conditions than the Commission.<sup>245</sup>

103. Sprint argues that PURA95 section 3.2531(h) is violative of sections 253(f) and 251(b), (c), and (f) of the Act.<sup>246</sup> It claims that the obligations in section 251(b) and (c) of the Act apply to all local exchange carriers, not just carriers in larger markets.<sup>247</sup> Sprint also asserts that Congress has already provided a mechanism for excepting rural telephone companies from the obligations imposed by section 251(c) in sections 251(f) and 253(f) of the Act.<sup>248</sup> Sprint urges us to find that the Texas moratorium provision is inconsistent with sections 251(f) and 253(f).<sup>249</sup>

104. The Texas Commission and the Texas Telephone Association (TTA) argue that consideration of MCI's and AT&T's requests for preemption of PURA95 section 3.2531(h) is premature because no carrier has made a *bona fide* request for interconnection, under section 251(f)(1) of the Act (the rural exemption), which is necessary before any determination regarding preemption of the PURA95 section can be made.<sup>250</sup> MCI disputes the Texas Commission's argument that the Commission may not preempt the moratorium provision until a *bona fide* request for interconnection has been made pursuant to section 251(f)(1)(A) of the Act.<sup>251</sup> MCI maintains that while the 1996 Act and PURA95 are similar in that they both "exempt rural [LECs] from competition for a period of time," the two statutes are in conflict as

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<sup>244</sup> Department of Justice Comments at 25; CompTel Comments at 8; Sprint Comments at 7; NTIA Reply Comments at 17-18.

<sup>245</sup> Comments of John Staurulakis, Inc., Valley Telephone Cooperative, Inc., and Central Texas Telephone Cooperative, Inc. at 15 (collectively, JSI Comments).

<sup>246</sup> Sprint Comments at 7-8. *See also* CompTel Comments at 8 (challenging PURA95 section 3.2531(h) as violative of section 251(c) of the Act).

<sup>247</sup> Sprint Comments at 7-8.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Texas Commission Comments at 16-17; TTA Comments at 9; TTA Reply Comments at 7-8.

<sup>251</sup> MCI Reply Comments at 12.

to when the exemption ends.<sup>252</sup> Because that conflict exists, MCI contends that the Commission should preempt now.<sup>253</sup>

105. TTA further argues that PURA95 section 3.2531(h) does not bar the three largest IXCs from entering markets served by an incumbent LEC with fewer than 31,000 access lines, as argued by AT&T, but rather permits entry by such carriers under a CCN.<sup>254</sup> TTA also notes that, despite AT&T's argument to the contrary, incumbent LECs serving these smaller areas are not exempted from making services available for resale, but rather are required, pursuant to PURA95 sections 3.2532(d)(2) and 3.453, to permit resale of non-discounted local services by SPCOA holders, and, effective September 1, 1998, to file a loop resale tariff upon a *bona fide* request by a COA or SPCOA holder.<sup>255</sup> Finally, TTA argues that PURA95 section 3.2532(d)(1), which exempts small LECs from having to resell local loops until September 1, 1998, is consistent with section 251(f) of the Act and thus should not be preempted.<sup>256</sup>

### iii. Discussion

106. We find that the moratorium on the grant of COAs in exchanges of incumbent LECs serving fewer than 31,000 access lines, set forth in PURA95 section 3.2531(h), violates the terms of section 253(a) of the Act standing alone. We also find that this PURA95 provision does not fall within the protected class of state regulation described in section 253(b) of the Act, and we therefore preempt the enforcement of this provision pursuant to section 253(d).<sup>257</sup>

107. PURA95 section 3.2531(h) flatly prohibits the Texas Commission from granting a COA in the specified territories, thus precluding an entity holding a COA from providing *any* service in such markets. This result is in direct conflict with section 253(a), which is designed prevent such restrictions on entry. Moreover, we conclude that PURA95 section 3.2531(h) is not otherwise permissible under section 253(b). First, no party has demonstrated that the prohibition is necessary to achieve any of the policy goals enumerated in section 253(b). Second, the rural prohibition of PURA95 section 3.2531(h) is not competitively neutral because it restricts only *COA holders* from providing service in these rural territories. SPCOA holders, on the other hand, are free to offer service in exchanges of incumbent LECs serving fewer than 31,000 access lines. Because the three largest IXCs are ineligible to obtain a SPCOA, the

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> TTA Comments at 7, 12.

<sup>255</sup> *Id.* at 7-8, 13.

<sup>256</sup> *Id.* at 8-11.

<sup>257</sup> *Cf. Silver Star* at ¶ 38 (preempting provision of a Wyoming statute that gave rural incumbent LECs with fewer than 30,000 access lines the ability to veto entry by potential competitors).

practical impact of PURA95 section 3.2531(h) is that AT&T, MCI, and Sprint cannot enter markets in these rural exchanges. No party has offered any justification for this disparity.

108. PURA95 section 3.2531(h) has also been challenged on the grounds that it conflicts with sections 251(b), (c), and (f) of the Act. We conclude that PURA95 section 3.2531(h) must also be preempted on the independent ground that it conflicts with section 251(c)(4)(B) of the Act.<sup>258</sup> As described above, section 251(c)(4)(B) prohibits incumbent LECs from imposing unreasonable or discriminatory conditions or limitations on the resale of telecommunications services, permitting new entrants to obtain for resale, at wholesale rates, any telecommunications service offered by incumbent LECs to retail subscribers.<sup>259</sup> PURA95 section 3.2531(h) flatly prohibits the Texas Commission from granting a COA in the specified territories, thus precluding an entity holding a COA from providing *any* service in such markets. As a result, PURA95 section 3.2531(h) precludes COA holders from reselling incumbent LEC services, and we find that these requirements are "discriminatory conditions" which conflict with section 251(c)(4)(B) such that PURA95 section 3.2531(h) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>260</sup> Accordingly, we preempt the enforcement of this PURA95 provision. In light of our decision to preempt PURA95 section 3.2531(h) pursuant to section 253(d) and because it conflicts with 251(c)(4)(B), we find that it is not necessary to address the additional grounds for preemption raised by the parties.

## 2. Service Provider Certificate of Operating Authority (SPCOA)

109. PURA95 section 3.2532 sets forth the requirements governing SPCOAs. As discussed above, SPCOA holders are authorized to provide local telecommunications services in Texas through resale, and the Texas Commission has found that SPCOA holders may also combine resale with the use of their own facilities.<sup>261</sup> Several petitioners have challenged discrete aspects of PURA95 section 3.2532. Each challenged provision is discussed separately below.

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<sup>258</sup> We note that the Eighth Circuit decision in *Iowa Utils. Bd.* specifically recognized our authority to promulgate rules governing the prevention of discriminatory conditions on resale pursuant to section 251(c)(4)(B). See *Iowa Utils. Bd.*, 120 F.3d at 794 n.10.

<sup>259</sup> See *supra* ¶ 91.

<sup>260</sup> *Federal Fidelity Sav. & Loan Ass'n*, 458 U.S. at 153.

<sup>261</sup> See *supra* ¶ 30.

**a. PURA95 section 3.2532(b) -- The Six Percent Eligibility Limitation**

**i. Background**

110. PURA95 section 3.2532(b) prohibits certain carriers from obtaining a SPCOA, and as a consequence, restricts the ability of those carriers to offer local telecommunications services through the resale of an incumbent LEC's services.<sup>262</sup> Specifically, this state statutory provision excludes any carrier that, together with affiliates, had more than six percent of the intrastate switched access minutes of use in Texas during the most recent twelve-month period prior to the company's application.<sup>263</sup> The record indicates that this restriction precludes only the three largest IXCs -- AT&T, MCI and Sprint -- from obtaining SPCOAs. In its petition, the Texas Commission asks the Commission to declare that the six percent eligibility limitation does not violate section 253(a) of the Act because carriers that are ineligible for a SPCOA may provide telecommunications services pursuant to a COA or CCN.<sup>264</sup>

111. Moreover, the Texas Commission argues that the SPCOA eligibility limitation serves important universal service, quality-of-service, and consumer protection goals and is therefore permissible under section 253(b).<sup>265</sup> In an *Order on Certified Issues*, the Texas Commission concluded that the six percent eligibility limitation did not violate section 253 of the Act and that the legislative policy of excluding certain IXCs from obtaining SPCOAs was premised on the theory that

larger telecommunications carriers, which possess more extensive resources, are required to invest in the state's telecommunications infrastructure in order to further the public policy goals of protecting the public welfare, advancing universal service, and ensuring continued quality of service.<sup>266</sup>

112. AT&T, MCI, and CPI argue in their petitions that the SPCOA eligibility limitation is an entry barrier that violates section 253(a) of the Act and should be preempted

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<sup>262</sup> A carrier that is ineligible to receive a SPCOA may instead seek a COA. As discussed *supra* ¶ 77, PURA95's COA build-out provisions have the effect of restricting the ability of COA holders to resell incumbent LEC services.

<sup>263</sup> PURA95 § 3.2532(b).

<sup>264</sup> Texas Commission Petition at 11.

<sup>265</sup> *Id.*

<sup>266</sup> *Applications of AT&T Communications of the Southwest, Inc. and MCI Metro Access Transmission Services For Service Provider Certificate of Operating Authority*, Texas PUC Docket Nos. 15445 and 15606, *Order on Certified Issues* (May 8, 1996) at 6.

pursuant to section 253(d).<sup>267</sup> Despite the Texas Commission's claim that the availability of entry through a COA prevents the Commission from finding that the six percent eligibility limitation is an entry barrier, AT&T and MCI contend that the "enormous capital investment" associated with meeting the build-out requirements imposed on COA holders "effectively make[s] it impossible" to enter the local exchange market through this means.<sup>268</sup> Consequently, these petitioners argue that their inability to obtain a SPCOA effectively prohibits them from providing competitive local telecommunications services in Texas.<sup>269</sup> CPI asserts that the six percent eligibility limitation, which has the effect of forcing the three largest IXC's to make an infrastructure investment in order to provide local exchange service in Texas, constitutes a *de facto* entry barrier which Congress intended the Commission to preempt.<sup>270</sup> MCI also claims that the six percent eligibility limitation places it at a disadvantage relative to other new entrants and therefore this provision is not competitively neutral as required to come within the scope of section 253(b) of the Act.<sup>271</sup>

Additionally, AT&T and MCI argue that the SPCOA eligibility limitation should be preempted as inconsistent with the duty imposed on LECs and incumbent LECs not to prohibit or unreasonably restrict resale pursuant to sections 251(b)(1) and (c)(4) of the Act.<sup>272</sup> We note that no arbitration decisions rendered to date by the Texas Commission address the six percent eligibility limitation.<sup>273</sup>

## ii. Comments

113. CompTel asserts that because the six percent eligibility limitation discriminates against carriers based on their market share or size, it is anticompetitive and should be regarded as a *per se* violation of section 253(a) of the Act. CompTel also contends that the six percent eligibility limitation is contrary to the requirement that any requesting telecommunications carrier may obtain the same co-carrier arrangement available to any other carrier as set forth in section 252(i) of the Act.<sup>274</sup> On reply, the Texas Commission states that "competitive neutrality" does not require that all market participants be treated identically because "a State law should be regarded as competitively neutral . . . so long as the law does not have an adverse impact on

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<sup>267</sup> AT&T Petition at 12-17; MCI Petition at 13-15; CPI Petition at 11-16.

<sup>268</sup> AT&T Petition at 12; MCI Petition at 14.

<sup>269</sup> AT&T Petition at 12; MCI Petition at 14.

<sup>270</sup> CPI Petition at 13.

<sup>271</sup> MCI Petition at 14-15.

<sup>272</sup> AT&T Petition at 20-21; MCI Petition at 15.

<sup>273</sup> The arbitration process is discussed *supra* n.24.

<sup>274</sup> CompTel Comments at 8.

competition as a whole, apart from how particular individual competitors may or may not be affected."<sup>275</sup> The Texas Commission argues that the six percent eligibility limitation "is not a *per se* violation of the competitive neutrality requirement in section 253(b)" of the Act because requiring AT&T, MCI and Sprint to obtain a COA, rather than a SPCOA, will not adversely affect competition as a whole since they are large carriers that will be able to comply with the COA requirements.<sup>276</sup>

114. SWBT argues that the six percent eligibility limitation does not violate section 253(a) of the Act essentially for the same reasons advanced by the Texas Commission. Specifically, SWBT contends that, although certain entities are prohibited from obtaining a SPCOA and, thus, from entering the local exchange market purely as a reseller of incumbent LEC services, such entities remain eligible to obtain a COA and are not prohibited from providing telecommunications services in violation of section 253(a).<sup>277</sup> Moreover, SWBT contends that the SPCOA six percent eligibility limitation is justified as a competitively neutral means of preserving and advancing universal service, protecting the public safety and welfare, and ensuring the quality of telecommunications service in the state in accordance with section 253(b) of the Act.<sup>278</sup>

115. The Texas Commission claims in its comments that the fact that AT&T, MCI and Sprint may not purchase local exchange service for resale under intrastate tariffs pursuant to PURA95 is not significant, because those carriers can obtain such services for resale under the federal scheme set forth in sections 251 and 252.<sup>279</sup> The Texas Commission also states that a COA holder, but not a SPCOA holder, would be required to offer to any customer within its certificated area all basic telecommunications services, render continuous and adequate service within the area or areas, and provide minimum quality-of-service upgrades within five years after receipt of its authorization.<sup>280</sup> The Texas Commission claims that the distinction between the obligations imposed on a COA holder and on a SPCOA holder is significant, and argues that the 1996 Act is not meant to preempt the Texas legislature's determination that the large, established IXCs should be required to satisfy quality-of-service and universal service standards when providing local exchange services within the state.<sup>281</sup>

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<sup>275</sup> Texas Commission Reply Comments at 11.

<sup>276</sup> *Id.* at 13.

<sup>277</sup> SWBT Comments at 16.

<sup>278</sup> *Id.* at 23.

<sup>279</sup> Texas Commission Comments at 22.

<sup>280</sup> *Id.* at 21-22.

<sup>281</sup> *Id.*

116. The Texas Office of Public Utility Counsel argues that the six percent eligibility limitation prohibits certain carriers from competing in Texas through resold services in contravention of sections 251(b), 251(c)(4), and 253(a) of the Act and should be preempted.<sup>282</sup> The Texas Office of Public Utility Counsel further states that the restriction on resale is not excepted under section 253(b) of the Act because the restriction applies only to one class of carriers and thus is not "competitively neutral," and does not further the universal service obligations in section 254 of the 1996 Act.<sup>283</sup> The General Services Administration and the United States Department of Defense (GSA/DOD), in joint comments, also argue that the six percent eligibility limitation should be preempted because it prevents large IXCs from participating in local markets primarily as resellers in conflict with the 1996 Act.<sup>284</sup>

117. MCI and Sprint contend that even if the Commission were to preempt the COA build-out requirements, the six percent SPCOA eligibility limitation should still be preempted.<sup>285</sup> These commenters note that PURA95 imposes obligations on COA holders that are not imposed on SPCOA holders, such as the duty to serve all customers who request service within their authorized areas, to provide all basic local telecommunications services, and to provide minimum quality of service upgrades.<sup>286</sup> In contrast, MCI and Sprint note that there are virtually no service obligations imposed on SPCOA holders, and consequently, the inability of a large IXC to obtain a SPCOA is not "competitively neutral."<sup>287</sup> Finally, according to MCI and Sprint, the six percent eligibility limitation cannot be defended as necessary to achieve any of the permissible purposes of state regulation under section 253(b).<sup>288</sup>

### iii. Discussion

118. Pursuant to section 253(a), no state or local statute or regulation may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>289</sup> Given our decision to preempt the COA build-out requirements and the COA rural prohibition,<sup>290</sup> we do not preempt PURA95 section 3.2532(b), which bars

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<sup>282</sup> Texas OPC Comments at 6.

<sup>283</sup> *Id.* at 8-9.

<sup>284</sup> GSA/DOD Comments at 7-8. *See also* NTIA Reply Comments at 21.

<sup>285</sup> MCI Reply Comments at 10; Sprint Reply Comments at 7.

<sup>286</sup> MCI Reply Comments at 10; Sprint Reply Comments at 5-6.

<sup>287</sup> MCI Reply Comments at 10; Sprint Reply Comments at 5-7.

<sup>288</sup> Sprint Reply Comments at 7; MCI Reply Comments at 8. *See also* NTIA Reply Comments at 19-20.

<sup>289</sup> 47 U.S.C. § 253(a).

<sup>290</sup> *See supra* ¶¶ 73 and 106.

carriers with greater than six percent of the intrastate access minutes of use in Texas from obtaining a SPCOA. Although this restriction renders the three largest IXCs ineligible to hold SPCOAs, we find that as COA holders these carriers are able to provide any telecommunications service.

119. Our decision to preempt enforcement of the COA build-out requirements enables COA holders to choose to provide telecommunications services in Texas by obtaining unbundled network elements from incumbent LECs, reselling incumbent LEC services, utilizing their own facilities, or employing any combination of these three options.<sup>291</sup> Thus, although the three largest IXCs may not obtain a SPCOA, an alternative certificate, the COA, is available under which these carriers may provide any interstate or intrastate telecommunications service through the means of their choice. So long as COA holders are free to provide all these services, the SPCOA six percent eligibility limitation does not "prohibit or have the effect of prohibiting" AT&T, MCI or Sprint from providing any telecommunications service. Similarly, based on the present record, we conclude that the SPCOA six percent eligibility limitation is not in conflict with section 251 of the Act because the eligibility limitation does not interfere with the ability of any carrier to exercise its rights pursuant to section 251 whether that carrier is authorized in Texas under a COA or a SPCOA.

120. The parties advocating that we preempt both the COA build-out requirements and the SPCOA six percent eligibility limitation note that COA holders face obligations -- related to universal service within their authorized service area and quality of service upgrades -- which are not imposed on SPCOA holders. We have concluded that on the record before us, these additional COA requirements have not been shown to violate the terms of section 253(a).<sup>292</sup> Accordingly, even though the three largest IXCs are subject to certain requirements as COA holders to which SPCOA holders are not subject, this differing state regulatory treatment has not been shown on this record to "prohibit or have the effect of prohibiting" a COA holder from providing any telecommunications service. As we stated previously, however, we are prepared to reevaluate the COA non-build out requirements in the future based on a showing that these provisions violate section 253, or conflict with any provisions of the Communications Act over which we have authority pursuant to applicable law.<sup>293</sup> Therefore, we conclude that we need not preempt the SPCOA six percent eligibility limitation based on the current record in this proceeding.

**b. PURA95 Section 3.2532 -- Authority under a SPCOA to Provide Local Exchange Service via Resale in Combination with the Use of a New Entrant's Own Facilities**

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<sup>291</sup> See *supra* ¶ 74.

<sup>292</sup> See *supra* ¶ 98.

<sup>293</sup> See *supra* ¶ 100.



(i) **Background**

121. PURA95 section 3.2532 specifically authorizes SPCOA holders to provide local telecommunications services by reselling the services of incumbent LECs.<sup>294</sup> Although PURA95 does not directly address the issue, the Texas Commission has held that SPCOA holders may also use their own facilities in combination with the resold services of an incumbent LEC in order to provide local exchange services.<sup>295</sup> The Texas Commission expressly rejected the view, advanced by SWBT, GTE, and AT&T, that PURA95 prohibits SPCOA holders from constructing and operating their own facilities.<sup>296</sup> SWBT has appealed the Texas Commission's decision on this issue in Texas state court.<sup>297</sup>

122. In its petition, TCG seeks a declaratory ruling from the Commission affirmatively stating that, in accordance with section 253 of the Act, PURA95 section 3.2532 "cannot be construed in a manner so as to prohibit TCG from offering both resold and facilities-based local exchange service."<sup>298</sup> In addition, TCG argues that the Commission should declare that SWBT's appeal is,

in and of itself, a barrier to entry, because [TCG] is compelled to use its resources to defend its ability to provide local telephone service in Texas in litigation that SWBT knows . . . is inconsistent with the 1996 Act. . . . [T]he specter of continuous litigation will

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<sup>294</sup> PURA95 § 3.2532(d).

<sup>295</sup> See *Application of Metropolitan Fiber Systems of Dallas, Inc., et al., For Service Provider Certificates of Operating Authority*, Texas PUC Docket No. 14665, *Order* (Nov. 21, 1995), *aff'd*, *Order on Rehearing* (Mar. 1, 1996). See also *Application of Teleport Communications Houston, Inc. For Service Provider Certificate of Operating Authority Within Harris County, Texas*, Texas PUC Docket No. 14633, *Order* (Feb. 23, 1996) and *Application of TCG Dallas For Service Provider Certificate of Operating Authority*, Texas PUC Docket No. 14634, *Order* (Feb. 23, 1996).

<sup>296</sup> See *Application of Metropolitan Fiber Systems of Dallas, Inc., et al., For Service Provider Certificates of Operating Authority*, Texas PUC Docket No. 14665, *Order* (Nov. 21, 1995), *aff'd*, *Order on Rehearing* (Mar. 1, 1996).

<sup>297</sup> See *Southwestern Bell Telephone Company v. Public Utility Commission of Texas*, No. 96-05325 (D. Ct. Travis County, TX, May 7, 1996) (appealing the certifications of Metropolitan Fiber Systems of Dallas, Inc. and Metropolitan Fiber Systems of Houston, Inc. to provide both facilities-based and resold local exchange service pursuant to SPCOAs) and *Southwestern Bell Telephone Company v. Public Utility Commission of Texas*, Nos. 96-05426 and 96-05327 (D. Ct. Travis County, TX, May 7, 1996) (appealing the certifications of Teleport Communications Houston, Inc. and TCG Dallas to provide both facilities-based and resold local exchange service pursuant to SPCOAs). These appeals are currently pending.

<sup>298</sup> TCG Petition at 15-16.

delay, or even prevent altogether, the development of local exchange competition in many states.<sup>299</sup>

TCG claims that a declaration from the Commission that PURA95 section 3.2532 allows SPCOA holders to "offer both resold and facilities-based local exchange services would prevent any possible interpretation from the state court that might prevent local competition in Texas."<sup>300</sup>

## (ii) Comments

123. MCI argues that the 1996 Act contemplates three paths of market entry and allows new entrants to combine these paths in any manner they choose. As such, MCI contends that SWBT's interpretation of PURA95 directly conflicts with the 1996 Act.<sup>301</sup> MCI also asserts that SWBT's appeal, "which requires potential new entrants to incur substantial costs and considerable delays merely to confirm the rights already granted them by Congress, is [contrary to Congress' goal] of rapidly opening the local exchange market to competition."<sup>302</sup> Keller and Heckman also support TCG's petition, arguing that the Texas Commission decision at issue is pro-competitive and that the Commission should support such state efforts to the greatest extent possible.<sup>303</sup>

124. While not taking a position as to whether the Commission should issue a declaratory ruling as requested by TCG, the Texas Commission notes that "the [Texas Commission] and [TCG] are aligned in their interpretation of PURA95 in the state court appeals."<sup>304</sup> In addition, the Texas Commission states that under Texas law, the filing of an appeal of a Texas Commission order does not operate to stay or vacate the challenged order. Thus, TCG's Texas affiliates have been authorized, and remain authorized, to provide local exchange service using their own facilities in combination with resold services obtained from SWBT pursuant to its SPCOA authorizations.<sup>305</sup> Moreover, according to the Texas Commission, Texas law provides that when a Texas Commission order is appealed to state district court, it

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<sup>299</sup> *Id.* at 14.

<sup>300</sup> *Id.* at 12. *See also* Keller and Heckman Reply Comments at 5.

<sup>301</sup> MCI Comments at 2-3. *See also* TCG Reply Comments at 3-7. Unless otherwise noted, all citations to comments and reply comments in this section refer to pleadings filed in CCBPol 96-16.

<sup>302</sup> MCI Comments at 3.

<sup>303</sup> Keller and Heckman Comments at 4-5.

<sup>304</sup> Texas Commission Comments at 1-2.

<sup>305</sup> *Id.* at 3. *See also* SWBT Comments at 10 (noting that the Texas Commission's order ruled in favor of TCG and therefore TCG is free to provide service via its own facilities).

must be named as the defendant, and in this case, the Office of the Attorney General of Texas will brief and argue the case in support of the Texas Commission. While TCG is "entitled to intervene and may submit additional briefing and argument," the Texas Commission asserts that TCG is not required to do so.<sup>306</sup>

125. SWBT argues that it is premature for the Commission to address the question of whether PURA95 prohibits TCG from using its own facilities for two reasons. First, despite the pending appeal, SWBT notes that TCG is authorized to use its own facilities pursuant to the SPCOAs granted by the Texas Commission. Because no state law, regulation or legal requirement has the effect of prohibiting TCG from providing a telecommunications service, SWBT asserts that TCG "has nothing to complain about" at this time.<sup>307</sup> Second, SWBT claims that Commission action on TCG's petition would violate principles of federalism and abstention because the petition raises a question of state law currently being litigated in state court.<sup>308</sup>

126. SWBT also argues that its appeal of the TCG order is not, in and of itself, a barrier to entry under section 253 of the Act.<sup>309</sup> SWBT states that, because section 253(a) of the Act applies only to state or local statutes or regulations, or other state or local legal requirements, and its appeal is none of these things, its "petition for review of the Texas PUC order cannot qualify as a barrier to entry under section 253."<sup>310</sup> Furthermore, SWBT submits that it is merely exercising its rights under state law to petition for review of an adverse administrative ruling, and nothing in the 1996 Act suggests that Congress intended to preempt state laws of general applicability governing judicial review of state administrative orders.<sup>311</sup> According to SWBT, the fact that TCG chooses to commit resources to defend the Texas Commission order does not mean that SWBT's appeal has the effect of prohibiting TCG from providing any telecommunications service.<sup>312</sup> Finally, SWBT argues that even if the Texas courts accept SWBT's position that SPCOA holders may provide local exchange service only through resale and vacates the Texas Commission orders, such an interpretation would not violate section 253 of the Act.<sup>313</sup>

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<sup>306</sup> Texas Commission Comments at 3-4.

<sup>307</sup> SWBT Comments at 10.

<sup>308</sup> *Id.* at 10-12.

<sup>309</sup> *Id.* at 8-10.

<sup>310</sup> *Id.* at 9.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 9-10.

<sup>313</sup> *Id.* at 1-2.

127. On reply, TCG disputes SWBT's assertion that it is premature for the Commission to review PURA95's certification scheme during the pendency of SWBT's appeal. TCG asserts that the core issue raised in its petition is the interplay between PURA95 and the 1996 Act, and given the Commission's "expertise in federal communications law issues . . . its view will be informative, if not dispositive, of the Texas district court's consideration of SWBT's appeal."<sup>314</sup> Similarly, Keller and Heckman argue that clarifying the rights of carriers pursuant to the 1996 Act as suggested by TCG "avoids the possibility that a state court will issue a ruling that might prevent or impede local competition."<sup>315</sup> Moreover, Keller and Heckman submit that such guidance would promote administrative efficiency by relieving the Texas Commission of the obligation to defend its decision in court.<sup>316</sup>

### (iii) Discussion

128. In our review of PURA95's COA build-out requirements, we concluded that section 253(a) of the Act bars state or local governments from restricting the means by which a new entrant chooses to provide telecommunications services.<sup>317</sup> Specifically, we determined that the 1996 Act requires that new entrants be permitted to offer services via resale, incumbent LEC unbundled network elements, the new entrant's own facilities, or any combination thereof.<sup>318</sup> We, therefore, held that Texas may not require a COA holder to provide telecommunications services via its own facilities and limit that carrier's ability to resell the services of an incumbent LEC or use unbundled network elements provided by an incumbent LEC.<sup>319</sup> Consistent with this reasoning, we find that a state may not prohibit an entity from offering both resold services and services provided via their own facilities. The Texas Commission has ruled that PURA95 section 3.2532 does not bar SPCOA holders from using their own facilities in combination with the resold services of an incumbent LEC in order to provide local exchange services.<sup>320</sup> We find that the Texas Commission's construction of this statutory provision is consistent with the Act. We further conclude that in the event PURA95 section 3.2532 is interpreted or applied to

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<sup>314</sup> TCG Reply Comments at 7-8.

<sup>315</sup> Keller and Heckman Reply Comments at 5.

<sup>316</sup> *Id.* at 6.

<sup>317</sup> *See supra* ¶ 74.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *See Application of Metropolitan Fiber Systems of Dallas, Inc., et al., For Service Provider Certificates of Operating Authority*, Texas PUC Docket No. 14665, *Order* (Nov. 21, 1995), *aff'd*, *Order on Rehearing* (Mar. 1, 1996). *See also Application of Teleport Communications Houston, Inc. For Service Provider Certificate of Operating Authority Within Harris County, Texas*, Texas PUC Docket No. 14633, *Order* (Feb. 23, 1996) and *Application of TCG Dallas For Service Provider Certificate of Operating Authority*, Texas PUC Docket No. 14634, *Order* (Feb. 23, 1996).

prohibit SPCOA holders from offering both resold and facilities-based local exchange services, this provision would violate the terms of section 253(a) of the Act standing alone, and we would preempt the enforcement of the provision absent a showing that the measure satisfies the requirements of section 253(b). We note that we find nothing in the record of this proceeding that indicates that such a limitation on the use of unbundled network elements in conjunction with resold services would be permissible under section 253.

129. We are unpersuaded by SWBT's claim that, because a state court is currently reviewing the Texas Commission's interpretation of PURA95 section 3.2532, it is premature for this Commission to issue a declaratory ruling in response to TCG's request. SWBT's appeal challenges the Texas Commission's interpretation of PURA95 section 3.2532. The fact that SWBT has asked a Texas state court to pass judgment on the manner in which the Texas Commission has interpreted a state statute does not prevent the Commission from addressing the relationship between that state statute and sections 251 and 253 of the Communications Act. Our decision today does not infringe on any judicial determination by the state court. Instead, our ruling merely clarifies that if the court were to adopt SWBT's interpretation of PURA95 section 3.2532, that section would be at odds with the Communications Act. Thus, our decision does not infringe on the ability of the Texas court to carry out its judicial functions. Moreover, we see no public interest benefit to delaying consideration of this issue. To the contrary, we believe that the public interest would best be served by Commission action removing uncertainty concerning the status of PURA95 section 3.2532 under the Communications Act.<sup>321</sup>

130. We reject, however, TCG's claim that SWBT's appeal, in and of itself, violates the terms of section 253(a) of the Act. Section 253(a) of the Act 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."<sup>322</sup> SWBT's appeal of an administrative order is outside the scope of section 253(a) of the Act because the appeal does not constitute a state or local statute, regulation, or legal requirement. Moreover, as noted by the Texas Commission, SWBT's appeal has not stayed or vacated the Texas Commission's orders granting TCG's SPCOA applications. Thus, in the present circumstances, TCG has failed to demonstrate that the appeal by SWBT "prohibit[s] or [has] the effect of prohibiting [it from providing] any interstate or intrastate telecommunications service."<sup>323</sup>

**c. PURA95 section 3.2532(d)(2) -- The Five Percent Resale Discount**

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<sup>321</sup> In CCBPol 96-14, SWBT argued that any claim of a conflict between PURA95 and the 1996 Act is not "ripe" until a particular PURA95 provision has been applied in a way that conflicts with the 1996 Act. For the reasons discussed *infra* at ¶ 147, we reject SWBT's ripeness argument.

<sup>322</sup> 47 U.S.C. § 253(a).

<sup>323</sup> 47 U.S.C. § 253(a).

### i. Background

131. PURA95 section 3.2532(d)(2) permits SPCOA holders to obtain for resale from an incumbent LEC "monthly recurring flat rate local exchange telephone service and associated nonrecurring charges, including any mandatory extended area service . . . at a five percent discount to the tariffed rate."<sup>324</sup> PURA95 section 3.2532(d)(2)(B) states that SPCOA holders and incumbent LECs may agree to rates lower than the tariffed rates or discounted rates.<sup>325</sup> In their petitions, AT&T, MCI and CPI contend that the five percent discount specified by PURA95 section 3.2532(d)(2) is inconsistent with the wholesale pricing standards set forth in sections 251(c)(4) and 252(d)(3) of the Act and should therefore be preempted.<sup>326</sup> MCI states that even though SPCOA holders and incumbent LECs are not prohibited from negotiating rates lower than the five percent discount, an incumbent LEC has no incentive to do so. As a result, SPCOA holders would have no choice but to accept the five percent discount or request arbitration under section 252 of the Act. MCI asserts that in arbitration, the Texas Commission will likely apply the five percent discount as the default rate.<sup>327</sup> MCI also claims that a five percent discount is so low that it would have the effect of prohibiting carriers from reselling incumbent LEC services in violation of section 253(a) of the Act and should therefore be preempted pursuant to section 253(d).<sup>328</sup>

### ii. Comments

132. The Texas Commission maintains that the five percent resale discount set forth in section 3.2532(d)(2) is not a "maximum" discount, but is a safety net, *i.e.*, a minimum discount, available to competitors at their option.<sup>329</sup> According to the Texas Commission,

[t]he five percent discount tariff operates on a 'parallel track' with [sections 251 and 252 of the Act] and provides an optional, alternative procedure for competitors to obtain local exchange

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<sup>324</sup> PURA95 § 3.2532(d)(2).

<sup>325</sup> PURA95 § 3.2532(d)(2)(B).

<sup>326</sup> AT&T Petition at 21-22; MCI Petition at 15-16; CPI Petition at 6, 20 (arguing that the Commission should preempt as inconsistent with sections 251(c)(4) and 252(d)(3) of the 1996 Act a Texas Commission decision upholding the five percent discount).

<sup>327</sup> MCI Petition at 17.

<sup>328</sup> *Id.*

<sup>329</sup> Texas Commission Comments at 6.

services for resale. The state tariff does not supersede or negate the federal provisions.<sup>330</sup>

In short, the Texas Commission submits that, because nothing in PURA95 restricts SPCOA holders from obtaining services for resale from an incumbent LEC pursuant to the federal scheme of negotiation, mediation, and arbitration established in sections 251 and 252 of the Act, preemption is unnecessary.<sup>331</sup> The Texas Commission disagrees with MCI's claims that it will use the five percent discount as the default rate in the event of arbitration under section 252 of the Act, claiming that such speculation is unfounded and "contradicts not only Texas Commission orders, but Congress' vision that state commissions will assist the Commission in implementing the requirements of sections 251 and 252."<sup>332</sup>

133. In contrast, several commenters contend that PURA95 section 3.2532(d)(2) should be preempted because establishing a five percent discount from the tariffed retail rate without reference to an avoided cost determination directly conflicts with the wholesale pricing provisions of sections 251(c)(4) and 252(d)(3) of the Act.<sup>333</sup> For example, TRA notes that, under the 1996 Act, incumbent LECs are required to make all telecommunications services available for resale at wholesale rates, and that state commissions have an obligation to determine those rates by subtracting avoided costs from the incumbent LEC's retail rates. TRA argues, therefore, that the wholesale rate as determined by the state commission should be the starting point for any negotiation between SPCOA holders and incumbent LECs. TRA is concerned that PURA95's statutory five percent discount rate would be offered by incumbent LECs when SPCOA holders seek to obtain services for resale, and new entrants would then be forced to negotiate simply to obtain wholesale rates that satisfy the requirements of section 252 of the Act (rates to which SPCOA holders are already entitled). In sum, TRA claims that the Texas Commission may not justify the five percent discount by asserting that carriers may negotiate with incumbent LECs for resale terms that are more beneficial.<sup>334</sup> Moreover, TRA

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<sup>330</sup> *Id.* at 7. This interpretation of section 3.2532(d)(2) has been adopted in two Texas Commission orders. *See Application of Southwestern Bell Telephone Company, GTE Southwest, Inc., and Contel of Texas, Inc. for Approval of Flat-Rated Local Exchange Resale Tariffs Pursuant to PURA 1995 § 3.2532*, Texas PUC Docket No. 14658, *Order Addressing Certified Issues* (Apr. 10, 1996) and *Application of AT&T Communications of the Southwest, Inc. et al., for a Service Provider Certificate of Operating Authority*, Texas PUC Docket No. 15445, *Order Addressing Certified Issues* (May 8, 1996) at 5.

<sup>331</sup> Texas Commission Comments at 8. *See also* SWBT Comments at 24; SWBT Reply Comments at 16.

<sup>332</sup> Texas Commission Comments at 8, n.10.

<sup>333</sup> TRA Comments at 5-6; GSA/DOD Comments at 10-11; Excel Comments at 4; OPC Comments at 10, Reply Comments at 5.

<sup>334</sup> TRA Reply Comments at 4.

argues that the five percent discount is not based on retail rates less avoided costs and, if not preempted, will preclude the resale of telecommunications services.<sup>335</sup>

134. CompTel urges the Commission to clarify whether PURA95 section 3.2532(d)(2) interferes with the ability of SPCOA holders to obtain local exchange services from incumbent LECs at wholesale rates, as required by sections 251(c)(4) and 252(d)(3) of the Act.<sup>336</sup> CompTel argues that preemption of the five percent discount is required under section 253(a) of the Act if the provision is interpreted to impose a maximum five percent discount for local exchange resale. As a maximum discount, CompTel submits that the provision would be a barrier to entry.<sup>337</sup>

135. Similarly, the Department of Justice argues that the five percent resale discount should be preempted to the extent that it is not used merely as an option, but also limits the ability of competitors to obtain services for resale based on the avoided cost standard set forth in the 1996 Act.<sup>338</sup> The Department of Justice notes that while the Texas Commission regards the five percent discount standard as optional, an incumbent LEC may insist on following the Texas statutory discount while SPCOA holders insist on applying the avoided cost standard established in the federal legislation. The Department of Justice contends that this result highlights the appropriateness of preempting PURA95's five percent discount provision.<sup>339</sup>

136. GTE asserts that preemption of the five percent resale discount is not warranted. According to GTE, Commission preemption of the five percent resale discount provision would impermissibly infringe on the authority of the federal district courts to decide matters relating to arbitrated agreements pursuant to section 252(e)(6) of the Act. Although various parties have argued that PURA95 section 3.2532(d)(2) is inconsistent with the 1996 Act, GTE notes that the pricing standard in section 252(d)(3) of the Act is applicable only to arbitrated agreements. If a state approves a voluntary agreement with a discount inconsistent with the standards set forth in section 252(d)(3), GTE contends that there is no basis for challenge.<sup>340</sup>

137. MCI argues that the 1996 Act does not give the states the option of adopting the federal wholesale pricing standard under 252(d)(3) or implementing a different one. According

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<sup>335</sup> *Id.* at 6.

<sup>336</sup> CompTel Comments at 5.

<sup>337</sup> *Id.* at 6. CompTel argues that the Commission should preempt under section 253(a) of the Act all restrictions on local exchange resale beyond the single restriction authorized by Congress in section 251(c)(4) regarding the resale of class-limited services. *See id.* at 7.

<sup>338</sup> Department of Justice Comments at 23-24.

<sup>339</sup> *Id.*

<sup>340</sup> GTE Comments at 3-4; GTE Reply Comments at 2.



to MCI, federal law mandates a specific standard for wholesale pricing, and there can be no alternative state standard under those circumstances.<sup>341</sup> MCI argues that the critical question in a preemption analysis is not whether the state legislature intended that the state regulation supersede federal law, but "whether Congress intended that federal regulation supersede state law."<sup>342</sup> Consequently, MCI asserts that the existence of parallel tracks "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>343</sup>

### iii. Discussion

138. We find that PURA95 section 3.2532(d)(2) does not prohibit or have the effect of prohibiting an entity from providing a telecommunications service. While this provision states that SPCOA holders may obtain tariffed flat rated local exchange service for resale at a five percent discount from the rate specified in the state tariff, PURA95 section 3.2532(d)(2)(B) explicitly permits SPCOA holders to negotiate with incumbent LECs to obtain larger discounts from the incumbent LECs' tariffed retail rates. We agree with the Texas Commission that PURA95 section 3.2532(d)(2) does not establish a fixed "maximum" discount, but instead effectively establishes a minimum discount, available to SPCOA holders upon request.<sup>344</sup> If the five percent discount is unattractive, there is nothing in PURA95 section 3.2532(d)(2) that prohibits SPCOA holders from seeking to obtain flat rated local exchange services for resale from the incumbent LEC pursuant to the negotiation and arbitration provisions contained in sections 251 and 252 of the Act. Although PURA95 was enacted prior to the 1996 Act, PURA95 section 3.2532(d)(2)(B) effectively authorizes new entrants to obtain resale discounts in excess of five percent through the federal negotiation and arbitration procedures set forth the Act.

139. Even assuming, as several parties have argued, that a maximum five percent discount would have the effect of prohibiting an entity from providing an interstate or intrastate telecommunications service through resale, section 253(a) of the Act standing alone would not be violated so long as this discount is merely an option. No party contends that SPCOA holders are required to purchase flat rated local exchange service at the five percent discount provided for under the Texas statute. We agree with the Texas Commission's construction that PURA95 section 3.2532(d)(2) provides an optional resale avenue that does not interfere with the ability of SPCOA holders to invoke sections 251 and 252 of the Act. Accordingly, we find no violation of section 253(a) of the Act, and thus we do not preempt PURA95 section 3.2532(d)(2) pursuant to

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<sup>341</sup> MCI Reply Comments at 5.

<sup>342</sup> *Id.* at 2-3.

<sup>343</sup> MCI Reply Comments at 3, citing *Jones v. Rath Packing*, 430 U.S. at 525-26 and *Hines v. Davidowitz*, 312 U.S. at 67.

<sup>344</sup> See *infra* n.346 (noting SWBT challenge in state court that, "[t]o the extent the [Texas Commission] was acting under state law, it was not authorized under Texas law to adopt any aggregate discount greater than five percent for those entities entitled to receive this discount").

section 253(d) of the Act. For the same reason, we believe that the five percent resale discount is not in conflict with sections 251(c)(4) or 252(d)(3) of the Act -- irrespective of PURA95 section 3.2532(d)(2), as the Texas Commission maintains, SPCOA holders have the right to invoke the negotiation and arbitration procedures contained in sections 251 and 252 of the Act to obtain flat rated local exchange services for resale.

140. We note that, to date, the Texas Commission has not relied upon PURA95's statutory five percent discount provision in reviewing arbitrated agreements. Pursuant to section 252 of the Act, the Texas Commission has approved arbitration awards specifying resale discounts ranging from 21.6% to 22.99%.<sup>345</sup> Various aspects of the arbitration decisions, the resulting interconnection agreements, and the Texas Commission's approval of these decisions, including, *inter alia*, the resale discounts specified in the Arbitration Awards, however, have been challenged in state and federal court.<sup>346</sup> These challenges are currently pending.

141. We stress, however, that our decision not to preempt PURA95 section 3.2532(d)(2) is based explicitly on the Texas Commission's determination of the scope of this provision. In the event that the Texas Commission or a Texas court were to adopt a different reading of this provision that limits the ability of a SPCOA holder to avail itself of the provisions of sections 251 and 252 of the Act in a manner that violates section 253, or conflicts

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<sup>345</sup> See *Petitions of MFS, Teleport, AT&T, MCI and ACSI for Arbitration to Establish Interconnection Agreements with Southwestern Bell Telephone Company*, Texas PUC Docket Nos. 16189, 16196, 16226, 16285, and 16290, *Consolidated Arbitration Award* (Nov. 7, 1996) at 19 (requiring, *inter alia*, that SWBT make available to the petitioners a resale discount of 21.6%). The Texas Commission subsequently approved the individual interconnection agreements filed in response to this consolidated Arbitration Award in a series of Orders dated December 19, 1996 and January 29, 1997. See *Orders Approving Interconnection Agreements*, Texas PUC Dockets Nos. 16189, 16196, 16226, 16285, and 16290. See also *Petitions of AT&T and MCI for Arbitration to Establish Interconnection Agreements with GTE*, Texas PUC Docket Nos. 16300 and 16355, *Consolidated Arbitration Award* (Dec. 12, 1996) at 103 (requiring that GTE make available to AT&T and MCI a resale discount of 22.99%). The Texas Commission subsequently approved the individual interconnection agreements filed in response to this Arbitration Award. See *Orders Approving Interconnection Agreements*, Texas PUC Dockets Nos. 16300 and 16355. See also *Petitions of American Communications Services, Inc. and Sprint Communications Company for Arbitration of Unresolved Interconnection Issues with GTE Southwest Incorporated and Contel of Texas, Inc.*, Texas PUC Docket Nos. 16473 and 16476, *Consolidated Arbitration Award* (Jan. 17, 1997) at 7 (adopting the same resale discount, *i.e.*, 22.99%, as specified in the AT&T/MCI-GTE Arbitration Award).

<sup>346</sup> See *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc., et al.*, Docket No. 97-CA-44 (W.D. TX filed Jan. 21, 1997) ("These unlawful decisions include allowing competitors to resell Southwestern Bell's services at a 21.6% discount. . ."). SWBT also challenged the arbitration decision, its approval by the Texas Commission, and the resulting interconnection agreements in state court, arguing, *inter alia*, that "[t]o the extent the PUC was acting under state law, it was not authorized under Texas law to adopt any aggregate discount greater than five percent for those entities entitled to receive this discount." *Southwestern Bell Telephone Company v. Public Utilities Commission of Texas et al.*, Docket No. 9700771 (D.C. Travis County, TX filed Jan. 21, 1997) at ¶ 53. See also *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company, et al.*, Docket No. 97-CA-029 (W.D. TX filed Jan. 10, 1997); *GTE Southwest Incorporated v. Woods, et al.*, Docket No. M-97-003 (S.D. TX filed Jan. 7, 1997) (according to GTE, the Texas Commission "set an arbitrary 22.99% discount for services sold at wholesale.").

with any provision of the Communications Act over which we have authority pursuant to applicable law, we would preempt the enforcement of this provision.

**d. PURA95 section 3.2532(d)(6) -- Limitation on the Use of Resold Local Exchange Service to Provide Access Services to Other Carriers**

**i. Background**

142. PURA95 section 3.2532(d)(6) prohibits SPCOA holders from using resold flat rated local exchange telephone services to provide access services to IXC's or to other retail telecommunications providers.<sup>347</sup> In its petition, MCI states that the 1996 Act clearly contemplates that new entrants will combine interconnection, unbundled elements, and resold services in any way the carrier chooses. As such, MCI submits that the limitation on the use of resold services, as set forth in PURA95 section 3.2532(d)(6), is contrary to sections 251(b)(1) and 251(c)(4) of the Act and should be preempted.<sup>348</sup> MCI also argues that prohibiting the use of resold service in this manner should be preempted because it conflicts with section 253(a) of the Act.<sup>349</sup> We note that no arbitration decisions rendered to date by the Texas Commission address this issue.

**ii. Comments**

143. The Texas Commission interprets PURA95 section 3.2532(d)(6) to preclude SPCOA holders from using resold flat rate local exchange telephone services, obtained under state tariff, to provide access services to IXC's, cellular carriers, competitive access providers, or other retail telecommunications providers.<sup>350</sup> However, the Texas Commission submits that this restriction applies only to service obtained under state tariff and need not be preempted because this provision does not restrict the use by a SPCOA holder of flat rate local exchange service obtained from an incumbent LEC pursuant to sections 251 and 252 of the Act.<sup>351</sup> SWBT argues that the restriction set forth in PURA95 section 3.2532(d)(6) is not contrary to section 253(a) of the Act, but simply makes it clear that resold flat rated local exchange telephone service cannot be used as a substitute for access.<sup>352</sup> SWBT also asserts that there is no actual conflict between

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<sup>347</sup> PURA95 § 3.2532(d)(6).

<sup>348</sup> MCI Petition at 19-20.

<sup>349</sup> *Id.* at 20.

<sup>350</sup> Texas Commission Comments at 15.

<sup>351</sup> *Id.*

<sup>352</sup> SWBT Comments at 25.

this PURA95 provision and the 1996 Act, and a preemption inquiry is not ripe until such time as there is an actual conflict.<sup>353</sup>

144. TRA agrees with MCI that PURA95 section 3.2532(d)(6) violates section 253(a) of the Act and must be preempted pursuant to section 253(d). TRA argues that, by restricting the manner in which a carrier may offer service, this provision has the effect of limiting the ability of any entity to provide any interstate or intrastate telecommunications service.<sup>354</sup>

### iii. Discussion

145. We find that the resale restriction set forth in PURA95 section 3.2532(d)(6) does not violate the terms of section 253(a) of the Act, and we therefore do not preempt under section 253(d). This statutory provision prohibits SPCOA holders from using one type of resold service (*i.e.*, flat rate local exchange service), to provide a different type of resold service (*i.e.*, access service), to other telecommunications carriers. This provision does not, however, preclude SPCOA holders from independently purchasing access services for resale pursuant to section 251(b)(1) of the Act. Thus, SPCOA holders are not prohibited by PURA95 section 3.2532(d)(6) from providing "any interstate or intrastate telecommunications service" through resale.

146. We also note that prohibiting SPCOA holders from using resold flat rate local exchange telephone service to provide access service is consistent with our interpretation of sections 251(b)(1) and 251(c)(4) of the Act. As we stated in the *Local Competition Order*, "[n]ew entrants that purchase retail local exchange services are entitled to resell only those retail services, and not any other services -- such as exchange access -- the LEC may offer using the same facilities."<sup>355</sup> In this respect, resale of a particular service differs from the purchase of an unbundled network element, such as the local loop, which permits the purchasing carrier to provide whatever services it wishes over the facility involved. Moreover, we concluded in the *Local Competition Order* that because access services are not typically sold at retail to subscribers who are not telecommunications carriers, "exchange access services are not subject to the resale requirements of section 251(c)(4)."<sup>356</sup> We therefore conclude that PURA95 section 3.2532(d)(6) does not conflict with the 1996 Act.

147. We reject SWBT's contention that any claim of a conflict between PURA95 and the 1996 Act "is not ripe until after the period of good faith negotiations has failed to yield a satisfactory agreement or until arbitration."<sup>357</sup> While SWBT argues that we should not consider

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<sup>353</sup> *Id.* at 26-27.

<sup>354</sup> TRA Comments at 8.

<sup>355</sup> *Local Competition Order*, 11 FCC Rcd at 15982-83, ¶ 980.

<sup>356</sup> *Local Competition Order*, 11 FCC Rcd at 15934-35, ¶ 873.

<sup>357</sup> SWBT Comments at 27.

preemption challenges to PURA95 until a particular PURA95 provision has been applied in a way that conflicts with the 1996 Act, we note that SWBT has not claimed that we are barred as a matter of law from ruling on such issues at this time. Thus, we find that there is no statutory reason that we cannot address all PURA95 preemption issues raised by the petitioners at this time.<sup>358</sup> We also note that sections 4(i) and 4(j) of the Act specifically grant the Commission broad discretion in ordering the disposition of the proceedings before it.<sup>359</sup> Moreover, we conclude that rendering a decision on these preemption challenges at this time is appropriate under the circumstances. Requiring SPCOA holders to invoke the negotiation and arbitration procedures set forth in sections 251 and 252 of the Act prior to seeking redress from the Commission could hamper competitive entry by raising uncertainty as to the potential applicability of PURA95. Such a result would be contrary to Congress' intent to promote competition in local exchange and exchange access markets and to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies."<sup>360</sup>

**e. PURA95 section 3.2532(d)(1), (d)(2)(C) --  
Restrictions on Resale in Rural Areas**

**i. Background**

148. PURA95 section 3.2532(d)(1) provides that SPCOA holders may not obtain services under the usage sensitive resale tariffs ordered by the Texas Commission in exchanges of companies serving fewer than 31,000 access lines.<sup>361</sup> PURA95 section 3.2532(d)(2)(C) provides that, in exchanges of companies serving fewer than 31,000 access lines, SPCOA holders may not obtain for resale flat rated local exchange service at the five percent discount provided for in PURA95 section 3.2532(d)(2).<sup>362</sup> AT&T argues that these provisions constitute a barrier to entry in violation of section 253 of the Act.<sup>363</sup> AT&T also argues that PURA95

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<sup>358</sup> Courts have consistently held that "[t]he ripeness doctrine derives from the Article III limitations on federal judicial power that are inapplicable to administrative agencies." *NAACP v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995). See also *California Ass'n of Physically Handicapped v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985) (noting that "the Article III restrictions under which this court operates do not, of course, apply to the FCC").

<sup>359</sup> Section 4(i) of the Act states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 4(j) of the Act states, in relevant part, "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j).

<sup>360</sup> Conference Report at 1.

<sup>361</sup> PURA95 § 3.2532(d)(1).

<sup>362</sup> For a detailed discussion of PURA95's five percent resale discount provision, see *supra* ¶ 131.

<sup>363</sup> AT&T Petition at 15.

sections 3.2532(d)(1) and (d)(2)(C) should be preempted because these provisions violate the prohibition against unreasonable resale restrictions contained in sections 251(b)(1) and 251(c)(4) of the Act.<sup>364</sup> MCI contends that, to the extent PURA95 section 3.2532(d)(2)(C) creates an exception to the wholesale pricing requirements for incumbent LECs serving fewer than 31,000 access lines, it should be preempted as contrary to section 251(c)(4) of the Act.<sup>365</sup> We note that no arbitration decisions rendered to date by the Texas Commission address this issue.

## ii. Comments

149. The Department of Justice asserts that prohibiting SPCOA holders from obtaining a five percent resale discount in exchanges of fewer than 31,000 access lines is a barrier to entry in violation of section 253(a) and must be preempted.<sup>366</sup> TRA argues that the provision prohibiting SPCOA holders from obtaining the five percent resale discount in such exchanges should be preempted because it is inconsistent with section 251(c)(4) of the Act.<sup>367</sup> Excel argues that PURA95 restricts SPCOA holders from reselling local exchange services in areas where the incumbent LEC serves fewer than 31,000 access lines, and is therefore preempted by sections 251(b) and 251(c) of the Act, which requires that such services be freely available for resale.<sup>368</sup>

150. The Texas Commission challenges AT&T's representation that PURA95 section 3.2532(d)(1) bars SPCOA holders from reselling local exchange services in areas served by incumbent LECs with fewer than 31,000 access lines.<sup>369</sup> The Texas Commission asserts that SPCOA holders are authorized under PURA95 section 3.2532(d) to purchase flat rated local exchange service from an incumbent LEC for resale in such areas, and that SPCOA holders are prohibited only from obtaining services from an incumbent LEC's usage sensitive loop tariff filed pursuant to PURA95 section 3.453.<sup>370</sup> In any event, the Texas Commission maintains that PURA95 section 3.2532(d)(1) is applicable only to obtaining service via state tariff and does not restrict a SPCOA holder from obtaining such service by negotiating with an incumbent LEC pursuant to the 1996 Act.<sup>371</sup> In addition, the Texas Commission argues that, while PURA95 section 3.2532(d)(2)(C) precludes SPCOA holders from utilizing PURA95's five percent resale

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<sup>364</sup> *Id.* at 21.

<sup>365</sup> MCI Petition at 19.

<sup>366</sup> Department of Justice Comments at 25.

<sup>367</sup> TRA Comments at 6-7.

<sup>368</sup> Excel Comments at 4.

<sup>369</sup> Texas Commission Comments at 4-5.

<sup>370</sup> *Id.* at 5.

<sup>371</sup> *Id.*

discount from a rural LEC's tariffed rate, nothing in that section prevents SPCOA, COA, or CCN holders from obtaining discounts under sections 251 and 252 of the Act.<sup>372</sup> The Texas Commission also states that preemption of section 3.2532(d)(2)(C) is unwarranted because section 251(f)(1) of the Act "prohibits a new entrant from providing service in rural exchange areas at all."<sup>373</sup>

### iii. Discussion

151. We do not preempt PURA95 sections 3.2532(d)(1) or 3.2532(d)(2)(C). Under these provisions, in exchanges of incumbent LECs serving fewer than 31,000 access lines, SPCOA holders are not entitled to obtain tariffed flat rated local exchange service from the incumbent LEC for resale at the five percent discount from the *tariffed rate* as specified in PURA95 section 3.2532(d)(2), and SPCOA holders are precluded from obtaining usage sensitive local exchange service from the resale *tariffs* of the incumbent LEC. The plain language of PURA95 sections 3.2532(d)(1) and 3.2532(d)(2)(C) only limits SPCOA holders from obtaining service via *tariff*. Because incumbent LECs and SPCOA holders are subject to the negotiation and arbitration procedures contained in sections 251 and 252 of the Act, PURA95's rural area resale restrictions do not "prohibit or have the effect of prohibiting" SPCOA holders from providing any interstate or intrastate telecommunications service. Accordingly, we find that neither PURA95 section 3.2532(d)(1) nor PURA95 section 3.2532(d)(2)(C) violates the terms of section 253(a) of the Act. Similarly, we believe that these rural area resale restrictions are not in conflict with sections 251(b)(1), 251(c)(4) or 252(d)(3) of the Act because they do not interfere with the ability of SPCOA holders to obtain services for resale through the negotiation and arbitration procedures contained in sections 251 and 252 of the Act.

152. We emphasize, however, that our decision not to preempt PURA95 sections 3.2532(d)(1) or 3.2532(d)(2)(C) is based explicitly on the Texas Commission's interpretation of the scope of this provision. In the event that the Texas Commission or a Texas court were to adopt a different reading of this provision that limits the ability of a SPCOA holder to avail itself of the provisions of sections 251 and 252 of the Act in a manner that violates section 253, or conflicts with any provision of the Communications Act over which we have authority pursuant to applicable law, we would preempt the enforcement of this provision.

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<sup>372</sup> *Id.* at 10-11.

<sup>373</sup> *Id.* at 11 n.13.

**f. PURA95 section 3.2532(d)(5) -- Termination of Resold Local Exchange Services at the Same End User Premises**

**i. Background**

153. PURA95 section 3.2532(d)(5) prohibits SPCOA holders from terminating both flat rated local exchange telephone service, and services obtained under the incumbent LEC's usage sensitive loop resale tariff, at the same end user customer's premises.<sup>374</sup> MCI contends that the 1996 Act clearly contemplates that new entrants should be able to combine interconnection, unbundled elements, and resold services in any way they choose. Consequently, MCI submits that limitations on the use of resold services, as set forth in PURA95 section 3.2532(d)(5), are contrary to sections 251(b)(1) and 251(c)(4) of the Act and should be preempted.<sup>375</sup> MCI also argues that the prohibition on the use of resold service established in PURA95 section 3.2532(d)(5) is a barrier to entry in violation of section 253(a) of the Act and must be preempted pursuant to section 253(d).<sup>376</sup> We note that no arbitration decisions rendered to date by the Texas Commission address this issue.

**ii. Comments**

154. The Texas Commission argues that the restriction specified in PURA95 section 3.2532(d)(5) is limited to services obtained pursuant to state tariff. The Texas Commission contends that preemption is not warranted because a carrier may avoid the restriction with respect to terminating both flat rated local exchange telephone service and service obtained under the usage sensitive loop resale tariff at the same end user customer's premises by obtaining service from an incumbent LEC pursuant to the negotiation and arbitration procedures set forth in sections 251 and 252 of the Act.<sup>377</sup> SWBT asserts that there is no actual conflict between this PURA95 provision and the 1996 Act, and a preemption inquiry is not ripe until such time as there is an actual conflict.<sup>378</sup>

**iii. Discussion**

155. The plain language of PURA95 section 3.2532(d)(5) indicates that the restriction applies only when SPCOA holders seek to terminate, at the same end user customer's premises, flat rated local exchange service and services *obtained under the usage sensitive loop resale tariff* of the incumbent LEC. The Texas Commission interprets this provision to apply only to

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<sup>374</sup> PURA95 § 3.2532(d)(5).

<sup>375</sup> MCI Petition at 19-20.

<sup>376</sup> *Id.* at 20.

<sup>377</sup> Texas Commission Comments at 14-15. *See also* SWBT Comments at 26-27.

<sup>378</sup> SWBT Comments at 26-27.



cases in which a SPCOA holder obtains service under the terms of an incumbent LEC's intrastate tariff. We find, therefore, that PURA95 section 3.2532(d)(5) does not interfere with the ability of SPCOA holders to obtain services for resale through the negotiation and arbitration procedures contained in sections 251 and 252 of the Act and to terminate such services at customers' premises as they choose. Consequently, the restriction contained in PURA95 section 3.2532(d)(5) does not violate the terms of section 253(a) of the Act because SPCOA holders can obtain the service they desire pursuant to sections 251 and 252. In short, PURA95 section 3.2532(d)(5) does not "prohibit or have the effect of prohibiting a telecommunications carrier from providing any interstate or intrastate telecommunications service." For the same reason, we believe that this provision does not conflict with sections 251(b)(1) or (c)(4) of the Act.<sup>379</sup>

156. We emphasize that our decision not to preempt PURA95 section 3.2532(d)(5) is based on the Texas Commission's interpretation of the scope of this provision. In the event that the Texas Commission or a Texas court were to adopt a different reading of this provision that limits the ability of a SPCOA holder to avail itself of the provisions of sections 251 and 252 of the Act in a manner that violates section 253, or conflicts with any provision of the Communications Act over which we have authority pursuant to applicable law, we would preempt the enforcement of this provision.

**g. PURA95 section 3.2532(d)(8) -- Tariff Rate for Resale Services at Rate of Online Digital Communications**

**i. Background**

157. PURA95 section 3.2532(d)(8) provides that SPCOA holders "may obtain for resale single or multiple line flat rated intraLATA calling service when provided by the local exchange company at the tariffed rate for online digital communications."<sup>380</sup> MCI argues that this provision prevents SPCOA holders from obtaining services for resale at wholesale rates and should therefore be preempted as inconsistent with sections 251(c)(4) and 252(d)(3) of the 1996 Act.<sup>381</sup> We note that no arbitration decisions rendered to date by the Texas Commission address this issue.

**ii. Comments**

158. AT&T and TRA agree with MCI that PURA95 section 3.2532(d)(8) conflicts with sections 251(c)(4) and 252(d)(3) of the Act by requiring a different pricing standard for

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<sup>379</sup> For the reasons discussed *supra* ¶ 147, we reject SWBT's claim that this issue is not ripe for consideration.

<sup>380</sup> PURA95 § 3.2532(d)(8).

<sup>381</sup> MCI Petition at 17-18.

resale of online digital communications.<sup>382</sup> The Texas Commission, however, contends that preemption is not warranted. Although PURA95 section 3.2532(d)(8) specifies that a SPCOA holder may purchase, for resale, flat rated intraLATA calling services at the tariffed rate for online digital communications, the Texas Commission argues that this provision does not preclude SPCOA holders from eschewing the state tariff and negotiating with the incumbent LEC for a different rate pursuant to section 251(c)(4) of the Act.<sup>383</sup>

### iii. Discussion

159. We do not preempt PURA95 section 3.2532(d)(8). The plain language of PURA95 section 3.2532(d)(8) specifies that SPCOA holders may obtain for resale certain flat rated intraLATA calling services when provided by the LEC at the "tariffed rate" for online digital communications. We agree with the Texas Commission that this provision does not preclude SPCOA holders from ignoring the state tariff and negotiating with the LEC for a different rate under the negotiation and arbitration procedures of sections 251 and 252 of the Act. Consequently, we believe that PURA95 section 3.2532(d)(8) does not conflict with sections 251(c)(4) or 252(d)(3) of the Act.

160. We emphasize, however, that our decision not to preempt PURA95 section 3.2532(d)(8) is based on the Texas Commission's interpretation of the scope of this provision. In the event that the Texas Commission or a Texas court were to adopt a different reading of this provision that limits the ability of a SPCOA holder to avail itself of the provisions of sections 251 and 252 of the Act in a manner that violates section 253, or conflicts with any provision of the Communications Act over which we have authority pursuant to applicable law, we would preempt the enforcement of this provision.

## h. PURA95 section 3.2532(d)(2)(E) -- Optional Extended Area Service and Expanded Local Calling Service

### i. Background

161. PURA95 section 3.2532(d)(2)(E) authorizes SPCOA holders to purchase optional extended area service (EAS) and expanded local calling service<sup>384</sup> from incumbent LECs for

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<sup>382</sup> AT&T Comments at 4; TRA Comments at 8.

<sup>383</sup> Texas Commission Comments at 11.

<sup>384</sup> EAS and expanded local calling service refer to larger than normal local telephone calling areas. For example, a customer subscribing to EAS or expanded local calling service may pay a higher monthly flat rate charge, but have a larger calling area. Alternatively, a customer without EAS or expanded local calling service would pay less per month for a smaller calling area and pay extra per individual call outside that area. See Newton's Telecom Dictionary at 221 (1991).

resale, but also provides that "those services may not be discounted."<sup>385</sup> In its petition, MCI asserts that because SPCOA holders are unable to purchase EAS and expanded local calling service from an incumbent LEC at discounted rates, SPCOA holders will be unable to resell those services to their customers at competitive rates. Accordingly, MCI argues that PURA95 section 3.2532(d)(2)(E) is a barrier to entry in violation of section 253(a) of the Act and should be preempted pursuant to section 253(d).<sup>386</sup> In addition, AT&T and MCI argue in their petitions that PURA95's prohibition on resale discounts for EAS and expanded local calling service should be preempted as contrary to sections 251(b)(1), 251(c)(4) and 252(d)(3) of the Act.<sup>387</sup> We note that no arbitration decisions rendered to date by the Texas Commission address this issue.

## ii. Comments

162. The Texas Commission argues that, although PURA95 section 3.2532(d)(2)(E) does not permit resale of EAS and expanded local calling service at a discounted rate, it should not be preempted because carriers are free to negotiate to obtain such a discount pursuant to the 1996 Act, and, if necessary, may submit unresolved disputes over such discounts to the mediation and arbitration process established in section 252.<sup>388</sup> MCI disagrees with this conclusion, arguing that "where federal law imposes a single, uniform rule of national conduct, states may not override Congressional intent by introducing conflicting alternate rules."<sup>389</sup>

163. SWBT states that, because SPCOA holders are free to negotiate the terms and conditions of resale under the 1996 Act, whether and to what extent there is a conflict between the federal and state schemes cannot be answered until an agreement has been achieved. According to SWBT, "[a]ny claim that a conflict exists between PURA95 and the 1996 Act is not ripe until after the section 252 procedures have been exhausted."<sup>390</sup>

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<sup>385</sup> Specifically, PURA95 provides that "the holder of a service provider certificate of operating authority may purchase for resale optional extended area service and expanded local calling service but those services may not be discounted." PURA95 § 3.2532(d)(2)(E). Although not explicitly stated, we find that this provision is reasonably read to mean that the subject services may not be offered to SPCOA holders for resale at a discount *by an incumbent LEC*. Thus, while this PURA95 provision is aimed primarily at SPCOA holders, it also imposes a limitation on the rates under which an incumbent LEC may make available its services.

<sup>386</sup> MCI Petition at 18. *See also* AT&T Petition at 5.

<sup>387</sup> AT&T Petition at 21-22; MCI Petition at 18.

<sup>388</sup> Texas Commission Comments at 10.

<sup>389</sup> MCI Reply Comments at 6.

<sup>390</sup> SWBT Comments at 26-27.

164. CompTel, the Department of Justice, and the Telecommunications Resellers Association (TRA) argue that PURA95 section 3.2352(d)(2)(E) is contrary to section 251(c)(4) of the Act and should be preempted.<sup>391</sup> The Department of Justice also asserts that the prohibition on discounts for EAS and expanded local calling service should be preempted as a barrier to entry pursuant to section 253.<sup>392</sup> Excel argues that the restriction on discounts for optional EAS and expanded local calling service should be preempted because it conflicts with sections 251(b)(1) and 252(d)(3) of the Act.<sup>393</sup>

### iii. Discussion

165. We do not preempt PURA95 section 3.2532(d)(2)(E), which governs the availability of resale discounts to SPCOA holders for optional EAS and expanded local calling services.<sup>394</sup> The Texas Commission states that this prohibition is not an entry barrier because it is applicable only to discounts from "the tariffed rate."<sup>395</sup> We recognize that the language of PURA95 section 3.2532(d)(2)(E), considered in isolation, appears to prohibit discounts for optional EAS and expanded local calling services when provided to SPCOA holders for resale. When considered in the context of the provision as a whole, however, we conclude that the Texas Commission is correct in its contention that PURA95 section 3.2532(d)(2)(E) need not be preempted because, irrespective of this provision, carriers may seek to obtain a discount for optional EAS and expanded local calling services pursuant to the negotiation and arbitration procedures set forth in sections 251 and 252 of the Act.<sup>396</sup>

166. PURA95 section 3.2532(d)(2) allows SPCOA holders to obtain an automatic five percent discount from an incumbent LEC's intrastate *tariffed* rates for certain services. PURA95 section 3.2532(d)(2)(E), a subsection of PURA95 section 3.2532(d), reasonably can be read to provide that SPCOA holders are not eligible to receive this automatic five percent discount from the tariffed rate for optional EAS and expanded local calling services purchased for resale. Accordingly, we accept the Texas Commission's assertion that the prohibition contained in PURA95 section 3.2532(d)(2)(E) is limited to state tariffs, and does not interfere with the rights and duties of parties pursuant to the resale provisions of the 1996 Act. Because SPCOA holders have available to them the negotiation and arbitration procedures contained in sections 251 and 252 of the Act, PURA95's prohibition on discounts for optional EAS and expanded local calling

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<sup>391</sup> CompTel Comments at 7; Department of Justice Comments at 24; TRA Comments at 7.

<sup>392</sup> Department of Justice Comments at 24.

<sup>393</sup> Excel Comments at 5.

<sup>394</sup> For the reasons discussed *supra* ¶ 147, we reject SWBT's claim that this issue is not ripe for consideration.

<sup>395</sup> Texas Commission Comments at 10.

<sup>396</sup> *Id.*

service purchased for resale does not "prohibit or have the effect of prohibiting" SPCOA holders from providing any interstate or intrastate telecommunications service. Accordingly, we do not preempt PURA95 section 3.2532(d)(2)(E) insofar as it is interpreted and applied in this manner. Interpreted as described above, PURA95 section 3.2532(d)(2)(E) does not violate section 253(a) of the Act, or conflict with the resale provisions set forth in sections 251(b)(1), 251(c)(4) and 252(d)(3), as alleged by AT&T and MCI.

167. We emphasize, however, that our decision not to preempt PURA95 section 3.2532(d)(2)(E) is based on the Texas Commission's determination of the scope of this provision. In the event that the Texas Commission or a Texas court were to adopt a different reading of this provision that limits the ability of a SPCOA holder to avail itself of the provisions of sections 251 and 252 of the Act in a manner that violates section 253, or conflicts with any provision of the Communications Act over which we have authority pursuant to applicable law, we would preempt the enforcement of this provision.

**i. PURA95 section 3.2532(f) -- Access Service and 1+ intraLATA toll service**

**i. Background**

168. PURA95 section 3.2532(f) provides that an incumbent LEC "that sells flat rate local exchange telephone service to a holder of a [SPCOA] may retain all access service and "1+" intraLATA toll service originated over resold flat rate local exchange telephone service."<sup>397</sup> MCI asserts that this provision operates to allow an incumbent LEC to refuse to offer SPCOA holders its access service and "1+" intraLATA toll service for resale, and is therefore in conflict with sections 251(b)(1) and 251(c)(4) of the Act concerning resale and should be preempted.<sup>398</sup> MCI also argues that, to the extent SPCOA holders are unable to offer these services without obtaining them from the incumbent LEC for resale, this provision violates section 253(a) of the Act.<sup>399</sup> We note that no arbitration decisions rendered to date by the Texas Commission address this issue.

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<sup>397</sup> PURA95 § 3.2532(f). There is no indication that the reference to "all access" is limited to intrastate access. We note that PURA95 § 3.2532(f) governs whether an incumbent LEC is required to make certain services available to SPCOA holders for resale. In contrast, PURA95 § 3.2532(d)(6), discussed *supra* ¶ 142, applies to the manner in which a SPCOA holder may use flat rated local exchange service obtained from an incumbent LEC.

<sup>398</sup> MCI Petition at 21.

<sup>399</sup> *Id.*

## ii. Comments

169. MFS agrees with MCI that the restrictions established in PURA95 section 3.2532(f) should be preempted as inconsistent with section 251(c)(4) of the Act.<sup>400</sup> MFS states that incumbent LECs in Texas "should not be permitted to avoid their resale obligations under federal law by seeking shelter behind a state statute that has the effect of relieving them of those obligations."<sup>401</sup> AT&T and TRA also assert that this provision should be preempted. They argue that, by providing an incumbent LEC with the discretion to refuse to offer for resale access service and "1+" intraLATA toll service, PURA95 section 3.2532(f) violates the requirement of section 251(b)(3) of the Act that all LECs provide dialing parity.<sup>402</sup>

170. While the Texas Commission concedes that PURA95 section 3.2532(f) gives an incumbent LEC the discretion to refuse to offer for resale access service and "1+" intraLATA toll service, it nevertheless submits that this provision should not be preempted because it is applicable only in connection with the sale of flat rate local exchange service obtained by a SPCOA holder pursuant to state tariff.<sup>403</sup> According to the Texas Commission, SPCOA holders are not required to obtain service from the incumbent LEC under state tariff, but may instead negotiate for the purchase of flat rate local exchange service without restriction pursuant to the procedures set forth in sections 251 and 252 of the Act.<sup>404</sup> Consequently, the Texas Commission concludes that there is no conflict between PURA95 section 3.2532(f) and the 1996 Act that warrants preemption.<sup>405</sup> SWBT asserts that absent a conflict between PURA95 and the 1996 Act, evaluating this preemption request is premature.<sup>406</sup>

## iii. Discussion

171. We do not preempt PURA95 section 3.2532(f).<sup>407</sup> This provision provides that incumbent LECs may retain all access services and "1+" intraLATA toll services "originated over resold flat rate local exchange telephone service" obtained by SPCOA holders. MCI

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<sup>400</sup> MFS Comments at 3-4. *See also* AT&T Comments at 3-4; TRA Comments at 8-9.

<sup>401</sup> MFS Comments at 4.

<sup>402</sup> AT&T Comments at 3-4; TRA Comments at 8-9.

<sup>403</sup> Texas Commission Comments at 12.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* *See also* SWBT Comments at 26-27.

<sup>406</sup> SWBT Comments at 26-27.

<sup>407</sup> For the reasons discussed *supra* ¶ 147, we reject SWBT's claim that this issue is not ripe for consideration.

argues, and the Texas Commission concedes, that this PURA95 provision gives an incumbent LEC the discretion to refuse to offer for resale access service and "1+" intraLATA toll service to SPCOA holders. However, we conclude that discretion afforded incumbent LECs pursuant to PURA95 section 3.2532(f) is circumscribed by the 1996 Act because incumbent LECs are subject to the resale obligations contained in sections 251(b) and 251(c), despite PURA95 section 3.2532(f). Interpreted in this manner, PURA95 section 3.2532(f) does not "prohibit or have the effect of prohibiting" SPCOA holders from providing any interstate or intrastate telecommunications service and we find no violation of the terms of section 253(a) of the Act. Similarly, we believe that PURA95 section 3.2532(f), as interpreted in this manner, is not in conflict with the resale provisions set forth in sections 251(b)(1), 251(c)(4) and 252(d)(3) of the Act, as alleged by AT&T and MCI, because this PURA95 provision does not interfere with the ability of SPCOA holders to obtain services for resale through the negotiation and arbitration procedures contained in the Act.

172. We emphasize, however, that our decision not to preempt PURA95 section 3.2532(f) is based on the Texas Commission's interpretation of the scope of this provision. In the event that the Texas Commission or a Texas court were to adopt a different reading of this provision that limits the ability of a SPCOA holder to avail itself of the provisions of sections 251 and 252 of the Act in a manner that violates section 253, or conflicts with any provision of the Communications Act over which we have authority pursuant to applicable law, we would preempt the enforcement of this provision.

### **3. Prohibition on Entry by Municipalities**

#### **a. Background**

173. PURA95 section 3.251(d) generally prohibits municipalities or municipally-owned electric utilities from offering for sale, directly or indirectly, certain telecommunications services. Specifically, that section states that

a municipality may not receive a [CCN], [COA], or a [SPCOA] under this Act. In addition, a municipality or municipal electric system may not offer for sale to the public, either directly or indirectly, through a telecommunications provider, a service for which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.<sup>408</sup>

Both ICG and the City of Abilene, Texas filed petitions seeking preemption of PURA95 section 3.251(d) under section 253 of the Communications Act. On August 5, 1997, ICG withdrew its

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<sup>408</sup> PURA95 § 3.251(d). Under PURA95 section 3.251(c), a "service for which a certificate is required" includes "local exchange telephone service, basic local telecommunications service, or switched access service." PURA95 § 3.251(c).

petition.<sup>409</sup> Because the number of comments submitted in response to the Abilene petition is limited, and many of the issues raised in the filings on the ICG petition are relevant to the Abilene petition as well, we address herein the arguments raised in response to the ICG petition insofar as they are relevant to the facts of the Abilene petition and the proper interpretation of section 253.

174. In its petition, Abilene argues that PURA95 section 3.251(d) violates section 253(a) of the Act to the extent it prevents the city from: (1) engaging in the provision of telecommunications services; and (2) "owning fiber or wires and leasing the fiber or wires or the capacity to telecommunications providers."<sup>410</sup> Abilene challenges PURA95 section 3.251(d) because the city believes that the availability of two-way audio, video and data transmission capabilities for all of Abilene's businesses and residents is critical to maintain Abilene's economic vitality,<sup>411</sup> and SWBT has stated that its facility upgrades for the foreseeable future will not meet this goal.<sup>412</sup> Abilene contends that PURA95 section 3.251(d) is subject to preemption under section 253(a) of the Communications Act because it prohibits the city from obtaining certification to provide telecommunications services, or from contracting with telecommunications providers to furnish such services.

#### **b. Comments**

175. Several commenters argue that PURA95 section 3.251(d) should be preempted because it prohibits Texas municipalities from providing telecommunications services under section 253(a) of the Act and does not otherwise satisfy section 253(b).<sup>413</sup> Parties arguing for preemption generally contend that the phrase "any entity" in section 253(a) is unambiguous and

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<sup>409</sup> See ICG's Withdrawal of Petition for Declaratory Ruling, filed Aug. 5, 1997. ICG filed its Petition for Declaratory Ruling on May 20, 1996 seeking a declaratory ruling that PURA95 section 3.251(d) contravenes and is preempted by section 253 of the Act. In November 1995, ICG and the San Antonio City Public Service Board (CPS), a municipally-owned electric utility, entered into an agreement in which CPS allowed ICG to use half of the dark fiber on CPS's system for 25 years so that ICG could provide telecommunications services in the San Antonio area. In May 1996, the Texas Attorney General issued an opinion finding the agreement unlawful under PURA95 section 3.251(d).

<sup>410</sup> Abilene Petition at 2. Abilene does not specifically indicate how it would enter telecommunications markets, were it permitted to do so under Texas law. For example, Abilene does not state whether it would provide telecommunications services by constructing its own facilities and providing service directly to end users, or by leasing wholesale capacity to an independent telecommunications provider.

<sup>411</sup> *Id.* The Mayor of Abilene established a Task Force to explore the technological needs of Abilene. *Id.* at 1. The City of Abilene is a "home rule" city under the Constitution and laws of the State of Texas. *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> See UTC Comments at 4-5; ALTS Comments at 9-10; APPA Comments at 10; TATO Comments at 3. Unless otherwise noted, all citations to comments and reply comments in this section refer to pleadings filed in CCBPol 96-13 and 96-14.



does not exclude municipalities.<sup>414</sup> The Texas Cities also argue that, if the Commission does not preempt PURA95 section 3.251(d), small and remote communities will not realize the benefits of competition that participation by municipalities can provide.<sup>415</sup> TATO A argues that PURA95 section 3.251(d) is "unworkably vague" because it could operate to make illegal existing agreements between telecommunications providers and municipal utilities, such as pole rental agreements and other facilities usage agreements.<sup>416</sup>

176. UTC argues that PURA95 section 3.251(d) "is an even more explicit barrier to entry" than the franchising decisions the Commission reviewed in *Classic Telephone, Inc.*, and, therefore, contends that it should be preempted under section 253.<sup>417</sup> UTC also contends that, because the Commission has previously found that the plain meaning of "any corporation," as used in the 1934 Act, as amended, includes public corporations on Guam, the Commission similarly should find that the term "any entity" in section 253 of the Act includes public or municipal corporations.<sup>418</sup> ICG contends that, while "home rule" cities are subject to state law, they derive their authority directly from the Texas Constitution and thus have status as an entity separate and apart from the State of Texas.<sup>419</sup> ICG further argues that "Abilene's decision to provide telecommunications services or to own infrastructure that would be used to provide telecommunications services is a proprietary activity."<sup>420</sup> Consequently, ICG argues that, even if section 253 were intended to apply to entry into telecommunications only by private entities, states cannot prohibit cities from exercising their proprietary functions and providing telecommunications services.<sup>421</sup> ICG also maintains that, rather than imposing on municipalities an outright prohibition on entry into telecommunications, Texas may preclude municipalities from owning utilities or take other measures to address potential discrimination by municipalities.<sup>422</sup>

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<sup>414</sup> See Texas Cities Reply Comments at 4; UTC Reply Comments at 2-4.

<sup>415</sup> Texas Cities Reply Comments at 2; see also Abilene Reply Comments (in CCBPol 96-19) at 3 (arguing that permitting states to prohibit municipalities from providing telecommunications services would hamper competitive entry in less densely populated areas).

<sup>416</sup> TATO A Comments at 4 n.12.

<sup>417</sup> Comments of UTC (in CCBPol 96-19) at 5-6; see also APPA Comments (in CCBPol 96-19) at 2; ICG Reply Comments (in CCBPol 96-19) at 2-3.

<sup>418</sup> UTC Reply Comments at 4-5.

<sup>419</sup> ICG Reply Comments (in CCBPol 96-19) at 3-4.

<sup>420</sup> *Id.* at 4.

<sup>421</sup> *Id.*; see also Abilene Reply Comments at 8 (in CCBPol 96-19)..

<sup>422</sup> ICG Reply Comments at 13; see also Abilene Reply Comments at 3-4 (municipalities have been authorized to provide telecommunications services and charge franchise fees to competing phone companies, and

177. Moreover, ICG argues that preemption of PURA95 section 3.251(d) would not impermissibly interfere with the sovereignty of the State of Texas.<sup>423</sup> ICG asserts that the Supreme Court, in *Garcia v. San Antonio Metropolitan Transit Authority*, held that Congress is empowered under the Commerce Clause to "regulate States as States" when they engage in proprietary activities within the stream of commerce, because the Constitution does not create any "sacred province of state autonomy."<sup>424</sup> Consequently, ICG suggests, the Commission may exercise its authority under section 253 to prevent Texas from prohibiting its political subdivisions from providing, directly or indirectly, telecommunications services.<sup>425</sup>

178. Conversely, SWBT, the State of Texas and TCTA argue that PURA95 section 3.251(d) should not be preempted. SWBT maintains that the Commission's decision in *Classic Telephone, Inc.* is not dispositive of the issue presented in Abilene. According to SWBT, the fact that a municipality may not exercise its franchising authority in such a manner as to prevent a private entity from providing competitive local exchange service "says nothing about whether the Commission may require a [s]tate to permit its own political subdivisions to compete with private telecommunications providers."<sup>426</sup> According to SWBT, section 253 of the Act was intended to eliminate prohibitions on market entry by parties subject to state regulation and does not impose an affirmative obligation on states to enter telecommunications markets.<sup>427</sup> SWBT also argues, contrary to TATO's suggestion, that nothing in PURA95 section 3.251(d) prohibits agreements between municipalities and telecommunications providers that would facilitate the provider's furnishing of telecommunications services to the public.<sup>428</sup> The State of Texas and TCTA also contend that a conflict of interest arises where a municipality is permitted to act as both a regulator and a competitor.<sup>429</sup> The State of Texas also argues that the issue of whether PURA95 section 3.251(d) violates section 253 of the Act is not ripe because Abilene requests

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thus PURA95 section 3.251(d) may not be justified as a means of preventing a conflict of interest that would arise if municipalities were to both regulate and provide telecommunications services).

<sup>423</sup> ICG Reply Comments at 12; *see also* ICG *ex parte*, filed July 17, 1997.

<sup>424</sup> ICG *ex parte*, filed July 17, 1997, citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985), quoting *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 287-88 (1981).

<sup>425</sup> ICG *ex parte*, filed July 17, 1997, at 4-7.

<sup>426</sup> SWBT Reply Comments (in CCBPol 96-19) at 1-4.

<sup>427</sup> SWBT Comments at 11-12.

<sup>428</sup> In this regard, SWBT points out that PURA95 section 3.2555(b) imposes on municipalities certain rules when granting "consent, franchises, and permits for the use of public streets, alleys, or rights-of-way within its corporate municipal limits." SWBT Reply Comments at 8.

<sup>429</sup> State of Texas Comments at 3; TCTA Comments at 4-8.

the Commission to preempt Texas law "to the extent that it *may* be interpreted in various ways," and no Texas court has interpreted this section of PURA95.<sup>430</sup>

**c. Discussion**

179. We do not preempt the enforcement of PURA95 section 3.251(d) because we conclude that the city of Abilene is not an "entity" separate and apart from the state of Texas for the purpose of applying section 253(a) of the Act. We also find that preempting the enforcement of PURA95 section 3.251(d) would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253. Given that ICG has withdrawn its petition, we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility.

180. "Home rule" cities such as Abilene are authorized by the Texas Constitution and subject to acts of the Texas legislature that define the scope of their delegated authority.<sup>431</sup> Consistent with this limitation, a home rule city has authority to govern itself or take any action that the Texas legislature could theretofore have authorized. Specifically, home rule cities have authority to adopt or amend their charters, provided that such charters or amendments are not inconsistent with the Texas Constitution or state law.<sup>432</sup> Indeed, municipalities such as Abilene have been recognized as "creatures . . . of the state."<sup>433</sup> In addition, the United States Supreme Court has recognized that

[p]olitical subdivisions of States . . . never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate

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<sup>430</sup> State of Texas Comments at 5-6 (in CCBPol 96-19).

<sup>431</sup> See *Zachry v. City of San Antonio*, 296 S.W.2d 299 (Tex. Civ. App. 1956), *aff'd*, 305 S.W.2d 558; *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975).

<sup>432</sup> Article XI, section 5 of the Texas Constitution provides:

Cities having more than [5000] inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State . . . .

Tex. Const. art. XI, § 5.

<sup>433</sup> See *United Bldg. and Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 215 (1984); *Houston Chronicle Pub. Co. v. Hardy*, 678 S.W.2d 495, 501 (Tex. App. 1984), *cert. denied*, 470 U.S. 1052 (1985).

governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . .<sup>434</sup>

PURA95 section 3.251(d), which precludes a municipality or municipal electric system from providing telecommunications services, is an exercise of the Texas legislature's power to define the contours of the authority delegated to the state's political subdivisions. In this case, the Texas legislature defined those contours by denying its municipalities the authority to engage in certain activities.

181. The scope of the authority delegated by a state to its political subdivisions is an area that traditionally has been within the purview of the states. Indeed, the Supreme Court has held that political subdivisions are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and the "number, nature and duration of the powers conferred upon [them] . . . rests in the absolute discretion of the State."<sup>435</sup> In *Gregory v. Ashcroft*, the Supreme Court upheld a Missouri constitutional provision which mandated retirement for certain judges at the age of seventy, as not violative of the federal Age Discrimination in Employment Act of 1967 (ADEA), which made it unlawful for any employer to discharge an individual at least forty years old due to the individual's age.<sup>436</sup> In so doing, the Court emphasized that the Missouri constitutional provision was a "decision of the most fundamental sort for a sovereign entity," and concluded that if Congress intends to remove the state's prerogatives in such areas, it must make its intentions clear.<sup>437</sup> With regard to such fundamental state decisions, including, in our view, the delegation of power by a state to its political subdivisions, therefore, *Ashcroft* suggests that states retain substantial sovereign powers "with which Congress does not readily interfere" absent a clear indication of intent.<sup>438</sup>

182. Contrary to ICG's suggestion, we are not persuaded that the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority* is so broad as to permit us to prohibit the state of Texas from restricting entry into telecommunications markets by its own political subdivisions under section 253 of the Act. In *Garcia*, the Court rejected Texas' sovereignty claim in upholding the application of the Fair Labor Standards Act's (FLSA) minimum wage and overtime provisions to employees of the San Antonio Metropolitan Transit

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<sup>434</sup> *Sailors v. Bd. of Educ. of Kent County.*, 387 U.S. 105, 107-108 (1967), quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>435</sup> *Id.*

<sup>436</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1990).

<sup>437</sup> *Id.* at 460.

<sup>438</sup> *Id.* at 461.

Authority, a municipally-owned mass transit system.<sup>439</sup> The Court concluded that it had "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause,"<sup>440</sup> because state sovereign interests are "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."<sup>441</sup>

183. Unlike *Garcia*, however, this case does not involve the question of whether federal standards may be applied to an arm of a Texas municipality that is engaged in the provision of a service in competition with private entities. Rather, at issue in this proceeding is whether section 253 bars the State of Texas from deciding that it will not permit its municipalities to compete in the provision of certain telecommunications services, a fundamental issue concerning the relationship between a state and its political subdivisions. Despite ICG's contention, we find that the Court's holding in *Garcia* may not be read so broadly as to permit us to preempt state measures that define the scope of the authority delegated to a state's own political subdivisions, such as PURA95 section 3.251(d). To the contrary, as noted above, the scope of the powers delegated to state municipalities is an area that traditionally has been within the ambit of state authority.

184. While a number of parties note that the term "any entity" in section 253 of the Act is not expressly limited to private entities, we conclude that the term was not intended to include political subdivisions of the state, such as the city of Abilene. Section 253(a) is directed at state and local statutes, regulations and legal requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services. Section 253(a) thus appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation, not to political subdivisions of the state itself. If we were to construe the term "entity" in this context to include municipalities, which, we noted above, are merely "instrumentalities" of the state, section 253 effectively would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects. Based on this reasoning, we conclude that section 253(a) does not bar the State of Texas from restricting entry into telecommunications markets by its political subdivisions, including the city of Abilene.

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<sup>439</sup> See *Garcia*, 469 U.S. 528 (1985). *Garcia* overturned *Nat'l League of Cities v. Usery*, in which the Court held that the FLSA's minimum wage and overtime provisions could not be applied to state employees under the Commerce Clause. In *Usery*, the Court had reasoned that, insofar as extension of the FLSA's provisions to all state employees operates to displace the states' abilities to structure employer-employee relationships in areas of "traditional governmental functions," they are not within the authority granted Congress by the Commerce Clause. See *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>440</sup> *Garcia*, 469 U.S. at 550.

<sup>441</sup> *Id.* at 551.

185. We are also unpersuaded by UTC's argument that the term "any entity" in section 253 of the Act should be interpreted to include public or municipal corporations because the Commission found the term "any corporation," as used in the 1934 Act, to include public corporations on Guam.<sup>442</sup> UTC suggests that, if the term "any entity" were construed to include public entities, then the State of Texas could not prevent the city of Abilene from providing telecommunications services consistent with section 253. Unlike the present case, *IT&E Overseas* addressed the issue of whether a Guam statute, which purported to confer jurisdiction on the Guam Public Utilities Commission over interstate and foreign communications originating or terminating on Guam, displaced FCC authority as provided for in the 1934 Act. Our conclusion that GTA was a "corporation" under the 1934 Act and thus subject to the requirements of the Communications Act was based, in part, on Congress' intent, in adopting section 1 of the Act, to centralize authority over interstate and foreign communications in the FCC. In that case, the exercise of concurrent jurisdiction by the Guam PUC and the FCC over interstate and foreign communications originating and terminating on Guam would have undermined congressional intent. In contrast, there is no reason to conclude that our interpretation of the term "any entity" as excluding municipalities such as Abilene is inconsistent with the fundamental underlying purpose of section 253, which is designed to eliminate state and local prohibitions on the provision of telecommunications services.

186. Nor are we persuaded by ICG's argument that, even if section 253 of the Act applied only to state regulation of private entities, Texas may not prohibit municipalities from providing telecommunications services because this is a proprietary rather than governmental function, and any restrictions on the proprietary activities of municipalities "have the same effect as restrictions on private entities acting in the same area."<sup>443</sup> While the provision of telecommunications services by a municipality may be a proprietary function, the provisions of Texas law requiring that the actions of home rule cities be consistent with state law do not appear to distinguish between proprietary and governmental functions. Moreover, as noted above, states maintain authority to determine, as an initial matter, whether or to what extent their political subdivisions may engage in proprietary activities. Based on this reasoning, we do not interpret section 253 of the Act to preclude a state from exercising its authority to restrict the activities of its political subdivisions, regardless of whether such activities are governmental or proprietary in nature.

187. Although entry into telecommunications markets by municipalities may enhance the potential for competitive local exchange services in such communities, as some parties point

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<sup>442</sup> UTC Reply Comments at 4-5; see also *IT&E Overseas, Inc. and PCI Communications, Inc., Memorandum Opinion and Order*, 7 FCC Rcd 4023 (1992). In *IT&E Overseas*, we found that the term "any corporation," as used in the Communications Act, included public corporations such as the Guam Telephone Authority (GTA), and therefore GTA was subject to sections 201 and 202 of the Act.

<sup>443</sup> ICG Attachment to *ex parte* letter, filed Oct. 10, 1996.

out,<sup>444</sup> this possible pro-competitive effect does not, in our view, warrant the conclusion that section 253(a) prevents states from restricting the activities of their own political subdivisions, absent some indication in the statute or its legislative history that Congress intended such a result. Moreover, our decision not to preempt PURA95 section 3.251(d) does not contravene the fundamental pro-competitive objectives of the 1996 Act with respect to small or rural areas. Competition in such areas may be enhanced by carriers availing themselves of the various avenues of entry contemplated under the 1996 Act, including the resale of incumbent LEC services and the purchase of unbundled network elements under sections 251 and 252. In addition, competition may take hold in such areas through entry by carriers that deploy their own facilities or enter into agreements to use the facilities of cable or electric power companies. Permitting the state of Texas to restrict participation in telecommunications markets by its municipalities thus does not thwart the Act's pro-competitive purposes to an extent that warrants preemption.

188. Contrary to ICG's argument, our decision in *Classic Telephone, Inc.* does not weigh in favor of preemption of PURA95 section 3.251(d). In *Classic*, we preempted the decisions of two Kansas cities denying the franchise applications of Classic Telephone Inc. for authority to provide local telephone service in those cities under section 253 of the Act. Unlike PURA95 section 3.251(d), which prohibits municipalities from providing, directly or indirectly, telecommunications services, and is not an outright ban on entry by competing local service providers, the decisions at issue in *Classic* were outright prohibitions on the provision of competitive telecommunications services by Classic.

189. We also reject the State of Texas' contention that Abilene's request for preemption is not ripe because no Texas court has issued a decision interpreting PURA95 section 3.251(d). While no Texas court, as yet, has rendered a decision interpreting PURA95 section 3.251(d), as ICG points out, the Texas Attorney General has interpreted the provision to prevent municipalities from leasing dark fiber to local exchange carriers.<sup>445</sup> We therefore find, contrary to Texas' contention, that Abilene's request for preemption is ripe for review. We do not address, however, the issue of whether PURA95 section 3.251(d) renders illegal existing agreements between telecommunications providers and municipal utilities, such as pole rental agreements and other facilities usage agreements. Based on the sparse comments we have received relating to that issue, we decline to address that question at this time.

190. Despite our decision not to preempt, we encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in PURA95. Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services. At the same time, we recognize that entry by municipalities into telecommunications may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias when separate

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<sup>444</sup> See, e.g., Texas Cities Reply Comments at 2.

<sup>445</sup> ICG Reply Comments at 3.

arms of a municipality act as both a regulator and a competitor. We believe, however, that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition.

#### **4. Provisions Regarding Usage-Sensitive Rates for Resale of Local Loops**

##### **a. Background**

191. Under PURA95 section 3.453, certain incumbent LECs are required to file tariffs for the resale of local loops at usage-sensitive rates. In particular, PURA95 section 3.453(c)(1) provides that the Texas Commission may "only approve a usage sensitive rate that recovers the total long run incremental cost of the loop on an unseparated basis, plus an appropriate contribution to joint and common costs."<sup>446</sup> In their petitions, MFS and AT&T contend that PURA95 section 3.453(c)(1) is inconsistent with sections 251(c)(3) and 252(d)(1) of the Act and should be preempted.<sup>447</sup>

##### **b. Comments**

192. ALTS, CompTel and Excel contend that PURA95 section 3.453(c)(1) conflicts with section 252(d)(1) of the Act. In particular, each of those commenters points out that, because the cost of a loop does not vary based on usage, pricing the loop at a usage-sensitive rate is inconsistent with section 252(d)(1) of the Act, which requires that the rates for unbundled network elements be based on cost.<sup>448</sup> MFS argues that while the Commission, in the past, has adopted a usage-sensitive carrier common line charge (CCLC) to recover non-traffic sensitive loop costs, the Commission's access charge rate structure was not governed by an express statutory directive comparable to section 252(d)(1).<sup>449</sup> In addition, CompTel argues that PURA95 section 3.453(c)(1) is inconsistent with section 251(c)(3) of the Act, under which incumbent LECs have a duty to provide to any requesting telecommunications carrier nondiscriminatory access to unbundled network elements at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory.<sup>450</sup> CompTel further contends that PURA95 section 3.453(c)(1) must be preempted under section 253(a) of the Act as an unlawful barrier to entry.<sup>451</sup>

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<sup>446</sup> PURA95 § 3.453(c)(1).

<sup>447</sup> MFS Petition at 6; AT&T Petition at 20.

<sup>448</sup> ALTS Comments at 3; CompTel Comments at 14; Excel Comments at 3.

<sup>449</sup> MFS Reply Comments at 3.

<sup>450</sup> CompTel Comments at 14.

<sup>451</sup> *Id.*



193. The Texas Commission and SWBT dispute the claim that PURA95 section 3.453(c)(1) is inconsistent with section 251(c)(3) of the Act.<sup>452</sup> In particular, the Texas Commission maintains that, while PURA95 section 3.453(c)(1) requires that the usage-sensitive rate in SWBT's state resale tariff must recover the long run incremental cost of the loop on an unseparated basis, plus an appropriate contribution to joint and common costs, SPCOA holders nevertheless may independently negotiate, mediate or arbitrate for the rates they deem appropriate under sections 251 and 252 of the Act.<sup>453</sup> SWBT argues that section 3.453(c)(1) is consistent with the 1985 decision in *NARUC v. FCC* which upheld a Commission decision to recover certain non-traffic sensitive costs through usage-based rates.<sup>454</sup>

### c. Discussion

194. We find that PURA95 section 3.453(c)(1) does not "prohibit or have the effect of prohibiting" the ability of any entity to provide telecommunications services in violation of section 253(a) of the Act, and therefore we do not preempt under section 253(d). Although, as CompTel argues, charging usage-sensitive rates for non-traffic sensitive local loops may deter new entry into the local exchange market,<sup>455</sup> the usage-sensitive rates provided for in PURA95 section 3.453(c)(1) as interpreted by the Texas Commission apply only to carriers taking local loops under the incumbent LEC's state resale tariff.

195. As stated above, in cases where the Texas Commission has construed a particular PURA95 provision as a non-binding option available to competitors, we do not preempt.<sup>456</sup> We believe that competition will not be adversely affected by preserving state resale tariffs that specify terms different from those required by sections 251 or 252 of the Act, so long as such tariffs do not interfere with the rights of requesting telecommunications carriers under sections 251 and 252 of the Act, or the discharge of LEC/incumbent LEC duties under those sections.

196. CompTel argues that charging usage-sensitive rates for the resale of local loops creates a significant entry barrier in violation of section 253(a) of the Act.<sup>457</sup> Competing carriers

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<sup>452</sup> Texas Commission Comments at 13-14. SWBT argued that it would be premature to determine whether any form of usage-sensitive rate is incompatible with the 1996 Act, since, at the time of its filing, the Commission was considering in its *Local Competition* proceeding the adoption of pricing standards associated with section 252 of the Act. SWBT Comments at 30.

<sup>453</sup> Texas Commission Comments at 13-14.

<sup>454</sup> SWBT Comments at 30; *see also NARUC v. FCC*, 737 F.2d 1095, 1134-36 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

<sup>455</sup> CompTel Comments at 14.

<sup>456</sup> *See, e.g., supra* ¶ 138.

<sup>457</sup> CompTel Comments at 14.

wishing to purchase unbundled local loops from the incumbent LEC may, however, invoke the negotiation and arbitration procedures set forth in sections 251 and 252 of the Act independently of the state tariff in order to obtain more favorable rates for local loops. We therefore do not preempt the enforcement of PURA95 section 3.453(c)(1) under section 253 of the Act. While some parties argue that PURA95 section 3.453(c)(1) should be preempted as inconsistent with sections 251(c)(3) and 252(d)(1) of the Act, we do not believe that PURA95 section 3.452(c)(1) conflicts with those provisions of the Act because it does not interfere with the ability of competing carriers to negotiate or arbitrate for more favorable loop rates under sections 251 and 252.

197. Our decision not to preempt PURA95 section 3.453(c)(1) is based on the Texas Commission's interpretation of the scope of this provision. In the event that the Texas Commission or a Texas court adopts a different reading of this provision that interferes with the ability of a new entrant to avail itself of the provisions of sections 251 and 252 of the Act in a manner that violates section 253, or conflicts with any provision of the Communications Act over which we have authority, we would preempt the enforcement of this provision. For example, if the Texas Commission in a section 252 arbitration decision were to price unbundled loops at usage-sensitive rates, pursuant to state tariff, we would likely preempt PURA95 section 3.453(c)(1) as violative of section 253 because a new entrant could no longer avail itself of the section 252 arbitration process to obtain cost-based rates for unbundled local loops. In addition, allowing the Texas Commission to approve only usage-sensitive rates for unbundled local loops may well prohibit or have the effect of prohibiting the ability of new entrants to provide telecommunications services under section 253, to the extent new entrants that were required to pay such rates could not effectively compete against incumbent LECs.

## **5. Certification Requirement for IntraLATA Toll Dialing Parity**

### **a. Background**

198. PURA95 sections 3.219(a) and (b) generally allow LECs to refuse to provide dialing parity to new entrants wishing to provide intraLATA toll service in areas where such carriers have not obtained a COA or SPCOA, as long as any local exchange carrier in the state is prohibited by federal law from providing interLATA telecommunications services.<sup>458</sup>

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<sup>458</sup> PURA95 section 3.219(a) provides that

(a) [e]xcept as provided by subsection (b) of this section, while any local exchange company in this state is prohibited by federal law from providing interLATA telecommunications services, the local exchange companies in this state designated or de facto authorized to receive "0+" and "1+" dialed intraLATA calls shall be exclusively designated or authorized to receive those calls.

PURA95 section 3.219(b) provides that

(b) [a] telecommunications utility operating under a [COA] or [SPCOA] to the extent not restricted by Section 3.2532(f) of this Act is de facto authorized to receive "0+" and "1+" dialed

199. MCI argues that these subsections conflict with section 251(b)(3) of the Act, which, according to MCI, requires LECs to provide dialing parity to competing providers of telephone exchange service and telephone toll service upon enactment of the Act, and therefore should be preempted.<sup>459</sup>

**b. Comments**

200. AT&T and TRA argue that PURA95 section 3.219(a) should be preempted because it conflicts with section 251(b)(3) of the Act by allowing LECs other than SWBT to delay the implementation of dialing parity.<sup>460</sup>

201. The Texas Commission argues that, under PURA95 section 3.219(a), certificated carriers are entitled to dialing parity upon receipt of their certificates, with the single exception that LECs may retain the "1+" intraLATA toll service originated over flat rate local exchange service resold by a SPCOA holder pursuant to state tariff.<sup>461</sup> The Texas Commission also notes that MCI's concern is not an issue in SWBT's service territories because section 271(e)(2)(A) and (B) of the Act does not require a BOC to implement intraLATA toll dialing parity until such BOC is authorized to provide in-region interLATA services or three years after the date of enactment of the Act, whichever is earlier.<sup>462</sup>

**c. Discussion**

202. We decline to address the issue of whether PURA95 section 3.219(a) and (b) conflicts with section 251(b)(3) of the Act at this time.

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intraLATA calls on the date on which the utility receives its certificate.

PURA95 section 3.2532(f) provides that

[a]n incumbent local exchange company that sells flat rate local exchange telephone service to a holder of a service provider certificate of operating authority may retain all access service and "1+" intraLATA toll service originated over the resold flat rate local exchange telephone service.

*See* ¶ 168 *supra* for a discussion of PURA95 section 3.2532(f).

<sup>459</sup> MCI Petition at 20-21. None of the parties raise section 253 of the Act as a basis for preempting PURA95 sections 3.219(a) and (b).

<sup>460</sup> AT&T Comments at 3-4; TRA Comments at 9.

<sup>461</sup> Texas Commission Comments at 17 n.19. *See supra* n.458.

<sup>462</sup> 47 U.S.C. § 271(e)(2)(B).

## 6. Moratorium on Reductions in Intrastate Switched Access Charges

### a. Background

203. PURA95 section 3.352(d) effectively imposes a four-year moratorium on reductions in intrastate switched access charges for incumbent LECs governed by price cap regulation. That section specifically provides that ". . . [n]otwithstanding any other provision of this Act, the commission may not reduce the rates for switched access services for any company electing under this subtitle before the expiration of the [four-year] cap on basic network services."<sup>463</sup> In their petitions, MCI and AT&T argue that PURA95 section 3.352(d) is inconsistent with sections 251(c) and 252(d)(1) of the Act because it establishes a minimum floor for intrastate access charges that is not based on the cost of providing access.<sup>464</sup> AT&T further contends that PURA95 section 3.352(d) conflicts with section 254(k) of the Act, which prohibits incumbent LECs from using noncompetitive services to subsidize intraLATA toll or any other competitive services, and thereby requires that all subsidies built into the intrastate (and interstate) access charge structures be eliminated.<sup>465</sup>

### b. Comments

204. GTE argues that PURA95 section 3.352(d) is consistent with sections 251, 252 and 254 of the Act. According to GTE, sections 251 and 252 of the Act govern only the transmission and routing of exchange and exchange access traffic; therefore, because IXCs do not offer exchange access, sections 251 and 252 do not require that rates for IXC-LEC interconnection be based on cost.<sup>466</sup> Moreover, GTE argues that section 254 is intended to ensure that LECs do not artificially inflate universal service funding requirements by shifting the costs of competitive services to offerings that are supported by universal service subsidies.<sup>467</sup> SWBT asserts that, in passing the 1996 Act, Congress expressly limited the Commission's authority to interfere with state regulation of intrastate exchange access and made it clear that intrastate access charges remain issues for state regulation.<sup>468</sup>

205. CompTel requests that the Commission clarify that PURA95 section 3.352(d) applies only to traditional carrier-to-customer switched access charges, not to exchange access

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<sup>463</sup> PURA95 § 3.352(d).

<sup>464</sup> MCI Petition at 23-24; AT&T Petition at 23.

<sup>465</sup> AT&T Petition at 23. None of the parties raise section 253 of the Act as a basis for preempting PURA95 section 3.352(d).

<sup>466</sup> GTE Comments at 5-6.

<sup>467</sup> *Id.* at 6-7.

<sup>468</sup> SWBT Comments at 28-29.

obtained by carriers from incumbent LECs on a co-carrier basis at cost-based rates under sections 251(c) and 252(d) of the Act.<sup>469</sup>

**c. Discussion**

206. We interpret the PURA95 section 3.352(d) prohibition on reducing rates for intrastate switched access services to govern only reductions in per unit intrastate rates,<sup>470</sup> for example, the per-minute charges assessed by an incumbent LEC for use of the local switch in originating and terminating intrastate toll service. As a result, we conclude that PURA95 section 3.352(d) was not intended to address the application of intrastate access charges to the origination and termination of intrastate toll traffic over unbundled network elements. Under this interpretation, there is no need, on the basis of the present record, to preempt the enforcement of PURA95 section 3.352(d) insofar as it bars reductions in the per unit charges for intrastate access services.

207. We disagree with MCI's and AT&T's argument that PURA95 section 3.352(d) is inconsistent with sections 251(c) and 252(d)(1) of the Act because it establishes a minimum floor for intrastate access charges that is not based on the cost of providing access.<sup>471</sup> In the *Local Competition Order*, we held that the existing interstate and intrastate access charge regimes are not affected by the provisions of sections 251(c)(2) and 252(d)(1) regarding interconnection,<sup>472</sup> the provisions of sections 251(c)(3) and 252(d)(1) regarding unbundled network elements,<sup>473</sup> or the provisions of sections 251(b)(5) and 252(d)(2) regarding transport and termination of telecommunications.<sup>474</sup> We therefore believe that PURA95 section 3.352(d) is not inconsistent with sections 251 and 252 of the Act in this regard.

208. If PURA95 section 3.352(d) were interpreted to require the application of intrastate access charges to the origination and termination of intrastate toll traffic carried over

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<sup>469</sup> CompTel Comments at 11-13.

<sup>470</sup> By the term "per unit rates," we mean a charge of a certain amount per minute, for example.

<sup>471</sup> MCI Petition at 23-24; AT&T Petition at 23.

<sup>472</sup> See *Local Competition Order*, 11 FCC Rcd at 15590 ¶ 176 ("access charges are not affected by our rules implementing section 251(c)(2)"); ¶ 191 ("an IXC that requests interconnection solely for the purpose of originating or terminating its *interexchange* traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2)") (emphasis in original).

<sup>473</sup> See *id.* at 15682 ¶ 363 ("We affirm . . . that telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal *or state* exchange access charges except as described in section VII, *infra*, for a temporary period.") (emphasis added).

<sup>474</sup> See *id.* at 16012, ¶ 1033 ("The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.").

unbundled network elements, that reading of this provision would raise additional issues. In the *Local Competition Order*, we allowed incumbent LECs to continue to apply access charges to intrastate toll traffic over unbundled network elements, but required that any such transitional mechanisms based on intrastate access charges<sup>475</sup> end on the earlier of: (1) June 30, 1997; or (2) in the case of the BOCs, the date on which a given BOC is authorized under section 271 of the Act to offer in-region interLATA telecommunications services.<sup>476</sup> In the *Access Charge Reform First Report and Order*, we concluded that Part 69 interstate access charges should not be applied to the origination or termination of interstate toll traffic over unbundled network elements.<sup>477</sup> We did not address in that proceeding, however, the issue of whether incumbent LECs could continue to apply certain intrastate access charges to intrastate traffic over unbundled network elements.<sup>478</sup>

209. On June 27, 1997, the U.S. Court of Appeals for the Eighth Circuit, in *CompTel v. FCC*, specifically vacated the rules we adopted in the *Local Competition Order* permitting incumbent LECs to apply intrastate access charges to intrastate toll traffic over unbundled network elements for an interim period, on the grounds that "such an assertion of regulatory power is beyond the scope of the FCC's jurisdiction."<sup>479</sup> In addition, as noted above, the Eighth Circuit, in *Iowa Utilities Board*, similarly vacated certain pricing rules we adopted to implement sections 251 and 252 of the Act, including those not permitting intrastate access charges to be assessed on purchasers of unbundled network elements beyond an interim period, based on its view that we exceeded our jurisdiction in promulgating such rules.<sup>480</sup> In the event that PURA95 section 3.352(d) were interpreted to require the application of intrastate access charges to the origination and termination of intrastate toll traffic over unbundled network elements, however, we would consider whether that provision violated section 253 of the Act in response to a petition for preemption. As the Eighth Circuit noted in *Iowa Utilities Board*, section 253 gives the Commission express authority to preempt state and local requirements that prohibit or have

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<sup>475</sup> In the *Local Competition Order*, we defined universal service "mechanisms based on intrastate access charges" as those mechanisms that require purchasers of intrastate access services from [incumbent LECs] to pay non-cost-based charges for those access services on the basis of their intrastate access minutes of use." *Local Competition Order*, 11 FCC Rcd at 15868, ¶ 729.

<sup>476</sup> *Id.* at 15869, ¶ 731.

<sup>477</sup> *In the Matter of Access Charge Reform, First Report and Order*, CC Docket No. 96-262, FCC 97-158 at ¶¶ 336-340 (rel. May 16, 1997) (*Access Charge Reform First Report and Order*), *pets. for review pending sub nom.*, *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618 (and consolidated cases) (8th Cir., filed June 16, 1997).

<sup>478</sup> *See id.*

<sup>479</sup> *CompTel v. FCC*, 117 F.3d 1068, 1075 n.5 (1997).

<sup>480</sup> *Iowa Utils. Bd.*, 120 F.3d at 794.

the effect of prohibiting the ability of any entity to provide any interstate or *intrastate* telecommunications service.<sup>481</sup>

210. We do not decide at this time whether PURA95 section 3.352(d), if interpreted to apply to intrastate toll traffic over unbundled network elements, would prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service in violation of section 253 of the Act. No party has raised section 253 as a basis for preempting PURA95 section 3.352(d), and we believe that any decision applying section 253 should be made on the basis of a more complete record than that before us in the present proceeding.<sup>482</sup> In addition, the Texas Commission, to date, has not permitted the application of intrastate access charges to the origination or termination of intrastate toll traffic over unbundled network elements, except for an interim period.<sup>483</sup>

211. We note that the application of intrastate access charges to intrastate toll traffic carried over lines that are used to furnish resold local exchange service to end user customers is consistent with the approach we took with regard to interstate access charges in the *Local Competition Order*, and would not appear to raise questions under section 253 of the Act. In the *Local Competition Order*, we concluded that IXCs should pay interstate access charges to

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<sup>481</sup> *Id.*, 1997 WL 403401 at \*17 (emphasis added).

<sup>482</sup> We note that the application of intrastate access charges to intrastate toll traffic carried over unbundled network elements would appear to raise significant issues under section 253 if the charges for the unbundled network elements reflect unseparated costs as presently provided for in our rules.

<sup>483</sup> In two decisions dated December 19, 1996 and January 29, 1997, for example, the Texas Commission approved interconnection agreements filed in response to a section 252 consolidated Arbitration Award which stated that

[w]ith respect to the application of intrastate access charges to purchasers of unbundled network elements, under the Arbitrators' interpretations of [the 1996 Act], SWBT is not entitled to recover any access charges . . . from [local service providers] that interconnect for the provision of telephone exchange service and exchange access. . . . Interconnection rates, including transport and termination, must be based on costs. . . .

*See Petitions of MFS, Teleport, AT&T, MCI and ACSI for Arbitration to Establish Interconnection Agreements with Southwestern Bell Tel. Co., Consolidated Arbitration Award*, Texas PUC Docket Nos. 16189, 16196, 16285 and 16290 (Nov. 7, 1996) at 22-23; *Orders Approving Interconnection Agreements*, Texas PUC Docket Nos. 16189, 16196, 16226, 16285 and 16290. However, the Arbitration Award permitted SWBT to recover from purchasers of the unbundled local switch, the carrier common line charge (CCLC) and 100% of the residual interconnection charge (RIC) for all intrastate toll minutes traversing its local switch, for an interim period, to terminate on the earlier of: (a) June 13, 1997 (the date of the review of interconnection issues to be conducted by the Texas Commission); (b) the date on which SWBT is authorized to offer in-region interLATA service; or (c) the effective date of a Texas Commission decision that SWBT may not assess such charges. *Id.* The Texas Commission's approval of this aspect of the Arbitration Award has been challenged in federal court. *See Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., et al.*, Docket No. 97-CA-44 (W. Dist. Tex. filed Jan. 21, 1997) at ¶¶ 71-76. This challenge is pending.

incumbent LECs for originating or terminating interstate traffic when the end user is served by a telecommunications carrier that resells incumbent LEC local exchange services under section 251(c)(4) of the Act.<sup>484</sup> Although the *Local Competition Order* specifically addresses only interstate access charges, application of intrastate access charges when a carrier purchases incumbent LEC local exchange services for resale under section 251(c)(4) of the Act would be consistent with this approach.

212. In sum, we do not preempt the enforcement of PURA95 section 3.352(d) because we interpret that provision to govern only reductions in intrastate per unit rates. If PURA95 section 3.352(d) were interpreted more broadly as permitting or requiring the application of intrastate access charges to traffic over unbundled network elements, however, we would consider whether that provision violated section 253 of the Act in response to a request by an interested party. Finally, we do not preempt PURA95 section 3.352(d) as it applies to traffic over incumbent LEC local exchange service purchased for resale.

213. We do not decide whether the Texas intrastate access charge rates, as limited under PURA95, implicitly subsidize other services so as to conflict with the requirements of section 254 of the Act. In our *Universal Service Report and Order*, we declined to identify existing implicit universal service support presently effected through intrastate rates or other state mechanisms, or to convert such implicit intrastate support into explicit federal universal service support.<sup>485</sup> We noted in the *Order* that, in light of section 2(b) of the Communications Act, we do not have control over the state rate-setting process, which generally has been aimed at ensuring affordable residential rates.<sup>486</sup> We concluded that states, acting pursuant to section 254(f) of the Act, "must in the first instance be responsible for identifying intrastate implicit

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<sup>484</sup> *Id.* at 15982, ¶ 980; *see also* 47 C.F.R. §§ 51.617(a), (b). Sections 51.617(a) and (b) of the Commission's rules provide that

(a) . . . an incumbent LEC shall assess [the end user common line charge], and the charge for changing the designated primary interexchange carrier, upon requesting carriers that purchase telephone exchange service for resale. The specific end user common line charge to be assessed will depend upon the identity of the end user served by the requesting carrier.

(b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access charges provided in part 69, other than the end user common line charge, upon interexchange carriers that use the incumbent LEC's facilities to provide interstate or international telecommunications services to the interexchange carriers' subscribers.

47 C.F.R. § 51.617(a), (b).

<sup>485</sup> *Universal Service Report and Order* at ¶ 14.

<sup>486</sup> *Id.*



universal service support."<sup>487</sup> In addition, we stated our belief that, "as competition develops, the marketplace itself will identify intrastate implicit universal service support," and that states will be compelled by those marketplace forces to move that support to explicit, sustainable mechanisms consistent with section 254(f).<sup>488</sup>

## 7. Texas Commission Decision Upholding the Prohibition on Resale of Centrex Service

### a. Background

214. In April 1994, the Texas Commission issued a decision holding that certain resale restrictions in SWBT's centrex<sup>489</sup> tariff are lawful, including: (1) a "continuous property" restriction under which centrex service may only be made available to subscribers in a continuous property area;<sup>490</sup> and (2) a provision requiring that any centrex user have a minimum of thirty station<sup>491</sup> business lines per customer premise.<sup>492</sup> In its petition, CPI argues that the

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<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *See infra* n.492 for a definition of "centrex" service.

<sup>490</sup> The continuous property restriction is found in SWBT's Joint User Service Tariff, which provides for shared or joint use arrangements. The Joint User Service Tariff defines "joint use" as:

[A] shared service arrangement which allows the business telephone exchange service or network access line service of a customer to be used, when designated by the customer as provided by this tariff, by others not otherwise permitted use of the customer's business service by this tariff. For purposes of this tariff only, 'the customer' is the joint use service provider. Joint users are the individuals or entities obtaining service from the joint use provider/customer.

The Joint User Service Tariff restricts application of joint user service to a single continuous property area under common ownership. The continuous property restriction states:

For Joint User Service applications, a single building or multiple buildings located on a single tract or area of land, both buildings and land being the subject of the same common ownership interest. A continuous property area may also be comprised of multiple buildings located on adjacent and abutting tracts or areas of land should all buildings and land be the subject of the same common ownership interest. The continuous property area may be intersected or traversed by public thoroughfares provided that the adjacent segments so created would be continuous in the absence of the thoroughfares. In any event, the continuous property area must be wholly within the confines of a single local exchange boundary of the property.

<sup>491</sup> The term "station" is generally used to refer to a telephone. *See* Newton's Telecom Dictionary at 442 (1991).

<sup>492</sup> *See Request of Southwestern Bell Tel. Co. to Obsolete and Grandfather Centrex Services and Joint Application of the Parties to Determine if the Restrictions, Terms and Conditions Associated with the Sharing of*

Texas Commission decision, as well as the tariff provisions, preclude entities from providing a telecommunications service that SWBT provides, *i.e.*, centrex service, and should be preempted pursuant to section 253 of the Act.<sup>493</sup>

215. In two decisions dated December 19, 1996 and January 29, 1997, respectively, the Texas Commission approved interconnection agreements filed in response to a section 252 consolidated Arbitration Award which stated that "SWBT may retain the continuous property tariff restriction for Plexar . . . services, which has been found reasonable by the Commission. . . ."<sup>494</sup> The Arbitration Award also stated that "[a]dditional tariff restrictions, other than the cross-class restriction on resale allowed by [section 251(c)(4)(B) of the Act] are presumptively unreasonable."<sup>495</sup>

### b. Comments

216. ALTS, AT&T, MFS and CPI argue that SWBT's tariff provisions restricting the resale of centrex service and the Texas Commission decision upholding such restrictions are contrary to the obligations imposed on LECs and incumbent LECs under sections 251(b)(1) and/or 251(c)(4) of the Act.<sup>496</sup> In addition, ALTS, GSA/DOD and MFS argue that the tariff provisions and the Texas Commission decision have the effect of prohibiting the resale of

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*Centrex and Plexar Services are Unreasonable as a Matter of Regulatory Policy Or In Violation of Any Law, Order*, Texas PUC Docket No. 11109 (April 14, 1994) ("*Order Granting Request of Southwestern Bell Tel. Co. to Obsolete and Grandfather Centrex Services*"); CPI Petition at 26. "Centrex" is the generic name for central office-based private branch exchange (PBX)-type services that provide an end user with features and functions that a customer premises-based PBX would provide, *i.e.*, intercom, access line pooling, call transfer, conference calling, etc. At the time the Texas Commission issued its decision, SWBT offered five central office-based PBX-type services: Plexar-I, Plexar II, Plexar-Custom, Centrex-II and Centrex-III. Although SWBT Centrex and Plexar services were different in several respects, they provided virtually the same functionality. Indeed, SWBT requested that the Texas Commission grandfather its Centrex offerings to existing customers, and make them obsolete for new customers, because it argued that "Centrex and Plexar services are functionally the same service and were never intended to co-exist." The Texas Commission granted SWBT's request in the same decision. See *Request of Southwestern Bell Tel. Co. to Obsolete and Grandfather Centrex Services* at 2.

<sup>493</sup> CPI Petition at 26.

<sup>494</sup> See *Petitions of MFS, Teleport, AT&T, MCI and ACSI for Arbitration to Establish Interconnection Agreements with Southwestern Bell Tel. Co., Consolidated Arbitration Award*, Texas PUC Docket Nos. 16189, 16196, 16285 and 16290 (Nov. 7, 1996) at 11-12; *Orders Approving Interconnection Agreements*, Texas PUC Docket Nos. 16189, 16196, 16226, 16285 and 16290.

<sup>495</sup> See *Petitions of MFS, Teleport, AT&T, MCI and ACSI for Arbitration to Establish Interconnection Agreements with Southwestern Bell Tel. Co., Consolidated Arbitration Award*, Texas PUC Docket Nos. 16189, 16196, 16285 and 16290 (Nov. 7, 1996) at 11-12.

<sup>496</sup> See ALTS Comments at 10-11; AT&T Comments at 4; MFS Comments at 3; CPI Reply Comments at 12.

centrex service under section 253(a) of the Act.<sup>497</sup> CPI asserts that the centrex restrictions discriminate between large and small users by allowing large users to connect multiple locations with centrex service, an option unavailable to small users unable to satisfy the minimum station line requirement.<sup>498</sup> CPI also points out that, while the Texas Commission enforces the tariff restrictions against resellers, it does not limit SWBT's provision of centrex service to end users in this manner.<sup>499</sup> According to CPI, such a discriminatory enforcement policy has the effect of preventing resellers from providing competitive centrex service in violation of section 253 of the Act.<sup>500</sup>

217. SWBT and the Texas Commission argue that carriers wishing to provide competitive centrex service through resale may negotiate for terms and conditions other than those specified in SWBT's tariff pursuant to sections 251 and 252 of the Act.<sup>501</sup> The Texas Commission further contends that SWBT's tariff provisions should not be preempted because CPI has failed to identify any entity that has sought and been denied the opportunity to resell centrex service following the enactment of PURA95 and the 1996 Act.<sup>502</sup>

### c. Discussion

218. We preempt the enforcement of the continuous property restriction applicable to SWBT's centrex service when made available for resale. We conclude that the Texas Commission's approval of the continuous property restriction in 1994, particularly since it has been applied by the Texas Commission in the context of an arbitration conducted pursuant to sections 251 and 252, violates the terms of section 253(a) of the Act, and does not fall within the protected class of state regulation under section 253(b). We also find that enforcement of the continuous property restriction constitutes an "unreasonable or discriminatory limitation" on resale in violation of section 251(c)(4)(B) of the Act, and our implementing regulations. We do not preempt, however, the enforcement of the thirty minimum station line requirement in SWBT's centrex resale tariff.

219. Section 253(a) of the Act applies only to "[s]tate or local statute[s] or regulation[s], or other [s]tate or local legal requirement[s]."<sup>503</sup> The language of section 253 is

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<sup>497</sup> ALTS Comments at 11; GSA/DOD Comments at 11; MFS Comments at 3.

<sup>498</sup> CPI Reply Comments at 11.

<sup>499</sup> *Id.* at 12.

<sup>500</sup> *Id.*

<sup>501</sup> *See* SWBT Comments at 32; Texas Commission Comments at 13.

<sup>502</sup> Texas Commission Comments at 12.

<sup>503</sup> 47 U.S.C. § 253(a).

silent as to the issue of what constitutes a "legal requirement." Similarly, the legislative history of section 253 does not address the meaning of that term. We conclude that Texas Commission approval in 1994 of the continuous property restriction, since it has been interpreted and applied through the recent Texas Commission decisions approving the Arbitration Award, constitutes a "legal requirement" under section 253(a). By virtue of the Texas Commission decisions, carriers wishing to provide competing centrex service through resale are effectively precluded from invoking the section 252 negotiation and arbitration procedures in order to obtain centrex for resale on terms more favorable than those provided under SWBT's centrex resale tariff, containing the continuous property restriction.

220. The "continuous property" provision in SWBT's centrex tariff generally permits the resale of centrex service only to subscribers in a continuous property area. By its terms, this provision does not prohibit outright competing carriers from reselling SWBT's centrex services. We find, however, that enforcement of the provision effectively precludes new entrants from providing competitive centrex services through resale due to their inability to aggregate small users into a large group, and thereby offer rates, services and features that are otherwise unavailable to a single user. Indeed, in its April 1994 decision upholding the continuous property restriction, the Texas Commission made a factual finding that two potential competing providers of centrex service, Centex Telemanagement, Inc. (CENTEX) and Enhanced Telemanagement, Inc. (ETI), "are presently unable to operate in Texas in the same manner in which they operate in other states due to restrictions in [SWBT's] General Exchange Tariff," which includes the continuous property restriction.<sup>504</sup> In this regard, ALTS points out that "[c]entrex resale has become a thriving business in many states."<sup>505</sup> Consequently, we conclude that enforcement of the continuous property restriction in SWBT's centrex resale tariff "has the effect" of prohibiting the ability of any entity to provide a telecommunications service, *i.e.*, centrex service, through resale in violation of the provisions of section 253(a) of the Act standing alone.

221. We also find that enforcement of the continuous property restriction is not otherwise permissible under section 253(b) because such enforcement is not "competitively neutral." Limiting resale of SWBT centrex service to a continuous property area has a disparate impact on the ability of new entrants to compete in the provision of centrex services. Indeed, the ALJ, in a *Proposal for Decision* subsequently adopted by the Texas Commission in its April 1994 *Order*, stated that the continuous property restriction in SWBT's tariff was intended "to remove the potential for usurpation of large portions of [SWBT's] service territory by unregulated entities."<sup>506</sup> Moreover, the continuous property restriction does not appear to apply

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<sup>504</sup> See *Order Granting Request of Southwestern Bell Tel. Co. to Obsolete and Grandfather Centrex Services* at 1.

<sup>505</sup> ALTS Comments at 11, citing CPI Petition at 21.

<sup>506</sup> See *Request of Southwestern Bell Tel. Co. to Obsolete and Grandfather Centrex Services and Joint Application of the Parties to Determine if the Restrictions, Terms and Conditions Associated with the Sharing of*

equally to resellers of SWBT's centrex service and to SWBT. According to CPI, two contracts between SWBT and two large customers demonstrate that SWBT is providing centrex service even though such customers are receiving service at several different locations.<sup>507</sup> CPI argues that these contracts also demonstrate that, while the Texas Commission enforces the continuous property restriction against resellers, it does not enforce them against SWBT.<sup>508</sup> Neither SWBT nor the Texas Commission has attempted to refute these claims in this proceeding. Consequently, we find that enforcement of the continuous property restriction is not "competitively neutral" and thus not permissible under section 253(b).

222. In contrast to PURA95 provisions which the Texas Commission claims are merely non-binding options available to competitors,<sup>509</sup> this is a case in which the Texas Commission has upheld the enforcement of a resale restriction in SWBT's centrex resale tariff in the context of a section 252 arbitration. Because the actions of the Texas Commission in the section 252 arbitration effectively preclude carriers wishing to resell SWBT's centrex service from avoiding the continuous property restriction by invoking the negotiation and arbitration procedures under sections 251 and 252 of the Act, we find that the continuous property restriction no longer can be viewed merely as a non-binding option.<sup>510</sup> We thus reject the

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*Centrex and Plexar Services are Unreasonable as a Matter of Regulatory Policy Or In Violation of Any Law, Proposal for Decision*, Docket No. 11109 at 19, citing *Application of Southwestern Bell Tel. Co. for Approval of Tariff Revisions Pertaining to Shared Tenant Services*, Docket No. 6450 (Feb. 12, 1987). Similarly, one PUC commissioner at the time the Texas Commission's decision was rendered noted in a dissenting opinion that

C[ENTEX] and ETI asked the Commission to remove restrictions that at one time had made sense in securing the operations of the local exchange carrier. . . . The Commission failed to provide [equal opportunity to all telecommunications utilities in a competitive marketplace] to the petitioners in this case. Instead, we hold to the comfortably familiar and fail to take the necessary steps that would have allowed C[ENTEX] and ETI to provide services specifically designed to benefit small businesses in this state. I can find no purpose for the application of the continuous property restriction . . . other than to ensure that the LEC continues to hold its monopoly in the provisioning of services to all customers -- large and small.

CPI Petition at 22-23, citing *Request of Southwestern Bell Tel. Co. to Obsolete and Grandfather Centrex Services and Joint Application of the Parties to Determine If the Restrictions, Terms, and Conditions Associated with the Sharing of Centrex and Plexar Services Are Unreasonable As A Matter of Regulatory Policy Or in Violation of Any Law, Dissent*, Docket No. 11109 (May 4, 1994).

<sup>507</sup> CPI Reply Comments at 10-11.

<sup>508</sup> *Id.* at 12.

<sup>509</sup> *See, e.g., supra* ¶ 138.

<sup>510</sup> We note that the Eighth Circuit, in *Iowa Utilities Board*, stated that we do not have authority, under section 208 of the Act, to review state arbitration decisions rendered pursuant to section 252. In particular, the court held that appeal to a federal district court pursuant to section 252(e)(6) of the Act provides an "exclusive means to attain review of state commission determinations under the Act." *Iowa Utils. Bd.*, 1997 WL 403401 at

contention by SWBT and the Texas Commission that SWBT's centrex resale provisions do not violate section 253(a) standing alone because carriers wishing to provide competitive centrex service through resale may negotiate for terms and conditions other than those specified in SWBT's tariff pursuant to sections 251 and 252 of the Act.<sup>511</sup> We therefore preempt, pursuant to section 253(d) of the Act, the 1994 Texas Commission decision approving the continuous property restriction since it has been interpreted and applied through the Texas Commission's decisions approving the Arbitration Award.

223. We also preempt enforcement of the continuous property restriction as an "unreasonable or discriminatory limitation" on resale contrary to section 251(c)(4)(B) of the Act and our implementing regulations.<sup>512</sup> The Eighth Circuit, in *Iowa Utilities Board*, specifically upheld our authority to promulgate regulations implementing section 251(c)(4)(B) of the Act, which imposes on incumbent LECs a duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on," the resale of certain telecommunications services, with one exception.<sup>513</sup> As we noted in the *Local Competition Order*, restrictions on resale are presumptively unreasonable and violative of section 251(c)(4)(B) of the Act. In addition, section 51.613(b) of our rules provides that, "[w]ith respect to any restrictions on resale [not otherwise permitted], an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."<sup>514</sup> As discussed above, in prescribing and enforcing regulations to implement section 251, including section 51.613(b) of our rules, we have authority to preempt the enforcement of any regulation, order, or policy of a State commission that does not meet the test set forth in section 251(d)(3) of the Act.<sup>515</sup>

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\*14. Because we are considering the Texas arbitration decisions only for the purpose of deciding whether enforcement of the continuous property restriction in SWBT's centrex resale tariff prohibits or has the effect of prohibiting the ability of new entrants to provide competing centrex services through resale under section 253, which expressly gives us authority to review and preempt certain state requirements, the Eighth Circuit holding does not affect our preemption analysis.

<sup>511</sup> See SWBT Comments at 32; Texas Commission Comments at 13. We note that SWBT and the Texas Commission raised this argument prior to the Texas Commission's arbitration decision.

<sup>512</sup> *Local Competition Order*, 11 FCC Rcd at 15966, ¶ 939.

<sup>513</sup> 47 U.S.C. § 251(c)(4)(B).

<sup>514</sup> 47 C.F.R. § 51.613(b).

<sup>515</sup> Section 251(d)(3) provides:

Preservation of State Access Regulations.-- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Assuming that enforcement of the continuous property restriction in SWBT's centrex resale tariff constitutes a LEC "access and interconnection obligation" under section 251(d)(3)(A), we conclude that such enforcement is not otherwise permissible under section 251(d)(3). As we noted in the *Local Competition Order*:

the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. . . . Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. . . . Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of [section 251(c)(4)(B)]. This presumption should reduce unnecessary burdens on resellers seeking to enter local exchange markets . . . by reducing the time and expense of proving affirmatively that such restrictions are unreasonable.<sup>516</sup>

Because requiring new entrants to demonstrate that a particular resale restriction is unreasonable under section 251(c)(4)(B) may allow incumbent LECs to preserve their market power in local markets, we find that Texas Commission enforcement of the continuous property restriction would not be "consistent with the requirements of [section 251], and may "substantially prevent implementation" of section 251(c)(4)(B) and the purposes of Part II of the Act, concerning the development of competitive markets. We note in this regard that no party has demonstrated in this proceeding that the continuous property restriction is "reasonable" and thus not in conflict with section 251(c)(4) of the Act.<sup>517</sup> Consequently, we preempt Texas Commission enforcement of the continuous property restriction in SWBT's centrex resale tariff because it conflicts with section 251(c)(4)(B) of the Act, and our implementing regulations.

224. We note that the continuous property restriction also has been challenged on the grounds that enforcement of the restriction would conflict with section 251(b)(1) of the Act. In light of our decision to preempt enforcement of the restriction pursuant to section 253(d), and as in conflict with section 251(c)(4)(B), we find it unnecessary to address these additional arguments.

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47 U.S.C. § 251(d)(3).

<sup>516</sup> *Local Competition Order*, 11 FCC Rcd at 15966 ¶ 939.

<sup>517</sup> We also note that neither the arbitration decision rendered by the ALJ nor the Texas Commission decisions approving that decision explains the basis for the ALJ's finding that the continuous property restriction is "reasonable."

225. CPI and others argue that the thirty minimum station line requirement in SWBT's centrex tariff and the Texas Commission decision upholding that requirement also violate section 253 of the Act because they prohibit a new entrant purchasing centrex service under tariff from reselling that service unless it can aggregate customers with the requisite number of business lines. Even if we were to assume that the thirty minimum station line requirement is a "legal requirement," we do not preempt the enforcement of this requirement as violative of section 253 because we conclude, based on the Texas Commission's interpretation of this provision, that new entrants wishing to engage in resale of centrex service may invoke, independently of the state tariff, the negotiation and arbitration procedures set forth in sections 251 and 252 of the Act in order to obtain more favorable terms for resale. Based on this reasoning, we also do not preempt enforcement of the thirty minimum station line requirement as in conflict with section 251(c)(4)(B) of the Act. While some parties assert that enforcement of the thirty minimum station line requirement also should be preempted as inconsistent with section 251(b)(1), we similarly do not believe that such enforcement would conflict with section 251(b)(1).

226. Our decision not to preempt enforcement of the thirty minimum station line requirement is based on the Texas Commission's determination of the scope of this restriction. We note that the ALJ, in its November 1996 Arbitration Award, stated that any tariff restrictions on resale other than those addressed specifically therein<sup>518</sup> are presumptively unreasonable under the 1996 Act, and that the Texas Commission subsequently approved that decision. However, if the Texas Commission adopts a different reading of this provision that interferes with the ability of a new entrant to avail itself of the provisions of sections 251 and 252 in a manner that violates section 253 or conflicts with any provision of the Communications Act over which we have authority pursuant to applicable law, despite the Texas Commission's suggestion in the arbitration that such provision is unreasonable under the 1996 Act, we would preempt the enforcement of this provision.

### III. CONCLUSION

227. For the reasons discussed above, we preempt the enforcement of the following Texas statutes, regulations and/or legal requirements pursuant to section 253 of the Act, and/or our authority under the Supremacy Clause of the U.S. Constitution to preempt state laws that conflict with federal laws or regulations:

- (1) the COA build-out requirements in PURA95 section 3.2531;

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<sup>518</sup> Resale restrictions addressed in the Arbitration Award other than SWBT's continuous property restriction for Plexar and Shared Tenant Services include a limitation on aggregation for purposes of the resale of volume discount offers, and cross-class restrictions. *Petitions of MFS, Teleport, AT&T, MCI and ACSI for Arbitration to Establish Interconnection Agreements with Southwestern Bell Tel. Co., Consolidated Arbitration Award*, Texas PUC Docket Nos. 16189, 16196, 16285 and 16290 (Nov. 7, 1996) at 11-12.



- (2) the prohibition on granting a COA in an exchange of an incumbent LEC serving fewer than 31,000 access lines before September 1, 1998 set forth in PURA95 section 3.2531(h); and
- (3) the 1994 Texas Commission decision approving the continuous property restriction on resale of SWBT centrex services.

228. For the reasons discussed above, we find that the Texas Commission's decision that, pursuant to PURA95 section 3.2532, SPCOA holders are not prohibited from using their own facilities in combination with the resold services of an incumbent LEC in order to provide local exchange services, is consistent with sections 251, 252 and 253 of the Act.

229. For the reasons discussed above, we do not preempt the following Texas statutes, regulations or legal requirements. In many of these cases, we do not preempt because the Texas Commission has interpreted or applied the specific provision in a manner that avoids or minimizes conflict with the Communications Act:

- (1) the prohibition on the provision of telecommunications services by municipalities and municipally-owned electric utilities in PURA95 section 3.251(d);
- (2) the six percent eligibility limitation on obtaining a SPCOA in PURA95 section 3.2532(b);
- (3) the five percent discount in PURA95 section 3.2532(d)(2) for resold services applicable to SPCOA holders;
- (4) the requirement in PURA95 section 3.2531(c) that COA holders provide service to customers within thirty days of a request;
- (5) the requirement in PURA95 section 3.258 that COA holders offer to any customer in their certificated areas all basic telecommunications services and render continuous and adequate service within such areas;
- (6) the requirement in PURA95 section 3.1555 that COA holders satisfy certain minimum service standards;
- (7) the restriction in PURA95 section 3.2532(d)(6) on the use by SPCOA holders of resold flat rate local exchange services to provide access services;
- (8) the restrictions on resale in rural areas in PURA95 sections 3.2532(d)(1) or (d)(2)(C);

- (9) the prohibition on termination of resold local exchange services and services obtained under the incumbent LEC's usage sensitive loop resale tariff on the same end user customer's premises in PURA95 section 3.2532(d)(5);
- (10) the provision in PURA95 section 3.2532(d)(8) stating that SPCOA holders may obtain for resale single or multiple line flat rate intraLATA calling service when provided by the local exchange company at the tariffed rate for on-line digital communications;
- (11) the restriction on resale discounts for EAS and expanded local calling services in PURA95 section 3.2532(d)(2)(E);
- (12) the resale restrictions in PURA95 section 3.2532(f);
- (13) the provision in PURA95 section 3.453 stating that the Texas Commission may only approve a usage-sensitive rate for the resale of local loops;
- (14) the four-year moratorium on reductions in intrastate switched access charges in PURA95 section 3.352(d); and
- (15) Texas Commission enforcement of the thirty minimum station line requirement in SWBT's centrex resale tariff.

#### IV. ORDERING CLAUSES

230. Accordingly, IT IS ORDERED that, pursuant to sections 251, 252 and 253 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 251, 252 and 253, and pursuant to Article VI of the U.S. Constitution, the petitions for preemption and/or declaratory ruling filed by the Public Utilities Commission of Texas, the Competition Policy Institute, AT&T Corp., MCI Telecommunications Corporation, MFS Communications Company, Inc., Teleport Communications Group Inc. and the City of Abilene, Texas, are GRANTED to the extent discussed herein, and are DENIED in all other respects.

231. IT IS FURTHER ORDERED that this Order and the obligations set forth herein ARE EFFECTIVE upon release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

**APPENDIX A****PARTIES TO THE PROCEEDING**

CCBPol 96-13 / CCBPol 96-14

Comments

American Petroleum Institute (API)  
American Public Power Association (APPA)  
Association for Local Telecommunications Services (ALTS)  
AT&T  
Cities of La Grange, Texas; Brenham, Texas; Georgetown, Texas;  
and Fredericksburg, Texas  
Competition Policy Institute (CPI)  
Competitive Telecommunications Association (CompTel)  
Consumers' Utility Counsel Division, Georgia Office of Consumer Affairs (Ga. CUC)  
Excel Telecommunications, Inc. (Excel)  
General Services Administration (GSA)  
GTE Service Corporation (GTE)  
John Staurulakis, Inc., Valley Telephone Cooperative, Inc., and Central  
Texas Telephone Cooperative, Inc. (JSI)  
MFS Communications Company, Inc. (MFS)  
Public Utility Commission of Texas (Texas Commission)  
Sprint Corporation (Sprint)  
Southwestern Bell Telephone Company (SWBT)  
State of Texas  
Telecommunications Resellers Association (TRA)  
Teleport Communications Group Inc. (TCG)  
Texas Association of Telecommunications Officers and Advisors (TATOA)  
Texas Cable & Telecommunications Association (TCTA)  
Texas Telephone Association (TTA)  
Texas Office of Public Utility Counsel  
United States Department of Justice  
UTC

Reply Comments

American Public Power Association  
AT&T  
Cities of La Grange, Texas; Brenham, Texas; Georgetown, Texas;  
and Fredericksburg, Texas  
City of Laredo, Texas  
Competition Policy Institute

GTE Service Corporation  
IntelCom Group (U.S.A.), Inc. and ICG Access Services, Inc.  
MCI Telecommunications Corporation  
MFS Communications Company, Inc.  
National Telecommunications and Information Administration (NTIA)  
Public Utility Commission of Texas  
Sprint Corporation  
Southwestern Bell Telephone Company  
Telecommunications Resellers Association  
Texas Cable and Telecommunications Association  
Texas Telephone Association  
Texas Office of Public Utility Counsel  
UTC

CCBPol 96-16

Comments

Keller and Heckman, L.L.P.  
MCI  
Public Utility Commission of Texas  
Southwestern Bell Telephone Company  
Sprint Corporation

Reply Comments

Teleport Communications Group Inc.  
Keller and Heckman, L.L.P.  
Southwestern Bell Telephone Company

CCBPol 96-19

Comments

American Public Power Association  
City of Garland, Texas  
IntelCom Group (U.S.A.), Inc. and ICG Telecom Group, Inc.  
Southwestern Bell Telephone Company  
State of Texas  
UTC

Reply Comments

American Public Power Association  
City of Abilene, Texas  
IntelCom Group (U.S.A.), Inc. and ICG Telecom Group, Inc.  
Southwestern Bell Telephone Company  
Cities of Garland and Lubbock, Texas

**APPENDIX B**

Selected Provisions of the Texas Public Utilities Regulatory Act of 1995  
Tex. Rev. Civ. Stat. Ann. art. 1446c-0 (West Supp. 1996)

**Section 3.001. Policy**

The legislature finds that significant changes have occurred in telecommunications since this Act was initially adopted. The legislature hereby finds that it is the policy of this state to promote diversity of providers and interconnectivity and to encourage a fully competitive telecommunications marketplace while protecting and maintaining the wide availability of high quality, interoperable, standards-based telecommunications services at affordable rates. These goals are best achieved by legislation that brings telecommunications regulation into the modern era by guaranteeing the affordability of basic telephone service in a competitively neutral manner, while fostering free market competition within the telecommunications industry. The legislature further finds that the technological advancements, advanced telecommunications infrastructure, and increased customer choices for telecommunications services generated by a truly competitive market will raise the living standards of all Texans by enhancing economic development and improving the delivery of education, health, and other public and private services and therefore play a critical role in Texas' economic future. It is the policy of this state to require the commission to do those things necessary to enhance the development of competition by adjusting regulation to match the degree of competition in the marketplace, thereby reducing the cost and burden of regulation and maintaining protection of markets that are not competitive. It is further the policy of this state to ensure that high quality telecommunications services are available, accessible, and usable by individuals with disabilities, unless making the services available, accessible, or usable would result in an undue burden, including unreasonable cost or technical feasibility, or would have an adverse competitive effect. However, the legislature recognizes that the strength of competitive forces vary widely between markets and products and services. Therefore, to foster, encourage, and accelerate the continuing development and emergence of a competitive and advanced telecommunications environment and infrastructure, the legislature declares that new rules, policies, and principles be formulated and applied to protect the public interest.

\* \* \*

**Section 3.219. IntraLATA Calls.**

(a) Except as provided by Subsection (b) of this section, while any local exchange company in this state is prohibited by federal law from providing interLATA telecommunications services, the local exchange companies in this state designated or de facto authorized to receive "0+" and "1+" dialed intraLATA calls shall be exclusively designated or authorized to receive those calls.

(b) A telecommunications utility operating under a certificate of operating authority or service provider certificate of operating authority to the extent not restricted by Section 3.2532(f)<sup>519</sup> of this Act is de facto authorized to receive "0+" and "1+" dialed intraLATA calls on the date on which the utility receives its certificate.

\* \* \*

**Section 3.251. Certificate Required.**

(a) A public utility may not in any way render service directly or indirectly to the public under any franchise or permit without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such installation, operation, or extension.

(b) Except as otherwise provided in this subtitle, a public utility may not furnish, make available, render, or extend retail public utility service to any area to which retail utility service is being lawfully furnished by another public utility, without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located.

(c) A person may not provide local exchange telephone service, basic local telecommunications service, or switched access service without a certificate of convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority.

(d) A municipality may not receive a certificate of convenience and necessity, certificate of operating authority, or a service provider certificate of operating authority under this Act. In addition, a municipality or municipal electric system may not offer for sale to the public, either directly or indirectly, through a telecommunications provider, a service for which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.

\* \* \*

**Section 3.258. Continuous and Adequate Service; Discontinuance, Reduction, or Impairment of Service.**

(a) Except as provided by this section, Section 3.259, or Section 3.2595 of this Act, a telecommunications utility that is granted a certificate of convenience and necessity or certificate

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<sup>519</sup> PURA95 section 3.2532(f) provides that "[a]n incumbent local exchange company that sells flat rate local exchange telephone service to a holder of a service provider certificate of operating authority may retain all access service and "1+" intraLATA toll service originated over the resold flat rate local exchange telephone service."

of operating authority shall be required to offer to any customer in its certificated area all basic local telecommunications services and shall render continuous and adequate service within the area or areas. In any event, as between a holder of a certificate of convenience and necessity and a holder of a certificate of operating authority, the holder of a certificate of convenience and necessity has provider of last resort obligations.

\* \* \*

**Section 3.352. Election and Baskets of Services.**

\* \* \*

(d) . . . . Notwithstanding any other provision of this Act, the commission may not reduce the rates for switched access services for any company electing under this subtitle before the expiration of the [four-year] cap on basic network services.

\* \* \*

**Section 3.453. Resale**

\* \* \*

(c) The commission shall conduct any proceeding it determines appropriate to determine the rates, terms, and conditions for this tariff within 180 days of filing. The commission may:

(1) only approve a usage sensitive rate that recovers the total long run incremental cost of the loop on an unseparated basis, plus an appropriate contribution to joint and common costs; and

(2) only permit a holder of a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority to purchase from the resale tariff, except as provided by Subsection (f)(1) or (f)(2) of this section.

\* \* \*

**Section 3.1555. Minimum Services.**

(a) Except as provided by Subsection (d) of this section, the commission shall require each holder of a certificate of convenience and necessity or certificate of operating authority in this state to provide at the applicable tariff rate, if any, to all customers, irrespective of race, national origin, income, or residence in an urban or rural area, not later than December 31, 2000:

- (1) single party service;
- (2) tone-dialing service;
- (3) basic custom calling features;
- (4) equal access for interLATA interexchange carriers on a bona fide request; and
- (5) digital switching capability in all exchanges on customer request, provided by a digital switch in the exchange or by connection to a digital switch in another exchange.

\* \* \*

**Section 3.2531. Certificate of Operating Authority.**

(a) In lieu of applying for a certificate of convenience and necessity, an applicant may apply for a certificate of operating authority.

(b) An application for a certificate of operating authority shall specify whether the applicant is seeking a facilities based certificate of operating authority under this section or a service provider certificate of operating authority under Section 3.2532. When an application for a certificate of operating authority or service provider certificate of operating authority is filed, the commission shall give notice of the application to interested parties and, if requested, shall fix a time and place for a hearing and give notice of the hearing. Any person interested in the application may intervene at the hearing.

(c) If seeking a facilities based certificate of operating authority, the applicant must include in the application a proposed build-out plan demonstrating how the applicant will deploy its facilities throughout the geographic area of its certificated service area over a six-year period. The commission may issue rules for a holder of a certificate of operating authority with respect to the time within which the holder must be able to serve customers, except that a holder must serve customers within a build-out area within 30 days of the date of a customer request for service. The commission may not require a holder to place "drop" facilities on every customer's premises or to activate fiber optic facilities in advance of customer request as part of the build-out requirement. The plan required by this subsection must meet the following conditions:

- (1) 10 percent of the area to be served must be served with facilities other than the facilities of the incumbent local exchange company by the end of the first year;
- (2) 50 percent of the area to be served must be served with facilities other than the facilities of the incumbent local exchange company by the end of the third year; and
- (3) all of the area to be served must be served with facilities other than the facilities of the incumbent local exchange company by the end of the sixth year.



(d) The build-out plan may permit not more than 40 percent of the applicant's service area to be served by resale of the incumbent local exchange company's facilities under the tariff required to be approved in Section 3.453 of this Act [usage sensitive loop resale tariff], except that during the six years immediately following the grant, a holder of a certificate of operating authority may extend its service by resale only within the area it is obligated to serve under the build-out plan approved by the commission and to the distant premises of one of its multi-premises customers beyond the build-out area but within its certificated area. . . . In no event may an applicant use commercial mobile service to meet the build-out requirement imposed by this section, but an applicant may use PCS or other wireless technology licensed or allocated by the Federal Communications Commission after January 1, 1995, to meet the build-out requirement.

(e) A certificate of operating authority shall be granted within 60 days after the date of the application on a nondiscriminatory basis after consideration by the commission of factors such as the technical and financial qualifications of the applicant and the applicant's ability to meet the commission's quality of service requirements. The commission may extend the 60-day period on good cause shown. In an exchange of an incumbent local exchange company serving fewer than 31,000 access lines, the commission shall consider:

- (1) the effect of granting the certificate on any public utility already serving the area and on the utility's customers;
- (2) the existing utility's ability to provide adequate service at reasonable rates;
- (3) the impact of the existing utility's ability as the provider of last resort; and;
- (4) the ability of the exchange, not the company, to support more than one provider of service.

(f) In addition to the factors prescribed by Subsection (e) of this section, the commission shall consider the adequacy of the applicant's build-out plan in determining whether to grant the application. The commission may administratively and temporarily waive compliance with the six-year build-out plan on a showing of good cause. The holder of a certificate shall file periodic reports with the commission demonstrating compliance with the plan approved by the commission, including the requirement that not more than 40 percent of the service area of a new certificate may be served by resale of the facilities of the incumbent local exchange company.

(g) An application for a certificate of operating authority may be granted only for an area or areas that are contiguous and reasonably compact and cover an area of at least 27 square miles. . . .

\* \* \*

(h) The commission may not, before September 1, 1998, grant a certificate of operating authority in an exchange of an incumbent local exchange company serving fewer than

31,000 access lines. The commission shall require that the applicant meet the other appropriate certification provisions of this Act.

(i) . . . In addition, in service areas served by an incumbent local exchange company having more than one million access lines which, as of September 1, 1995, is subject to any prohibition under federal law on the provision of interLATA service, the build-out requirements of this section shall be eliminated in any service area where all prohibitions on that company's provision of interLATA services are removed such that the company can offer interLATA service together with its local and intraLATA toll service.

(j) (1) On an application filed after September 1, 1997, the commission may conduct a hearing to determine:

(A) if the build-out requirements of Subsections (c), (d), and (g) of this section have created barriers to the entry of facilities based local exchange telephone service competition in exchanges in counties with a population of more than 500,000 served by companies having more than 31,000 access lines; and

(B) the effect of the resale provisions on the development of competition except in certificated areas of companies serving fewer than 31,000 access lines as provided by Section 3.2532(d)(1) of this Act.

\* \* \*

### **Section 3.2532. Service Provider Certificate of Operating Authority.**

(a) To encourage innovative, competitive, and entrepreneurial businesses to provide telecommunications services, the commission may grant service provider certificates of operating authority. An applicant must demonstrate that it has the financial and technical ability to provide its services and show that the services will meet the requirements of this section.

(b) A company is eligible to obtain a service provider certificate of operating authority under this section unless the company, together with affiliates, had in excess of six percent of the total intrastate switched access minutes of use as measured by the most recent 12-month period preceding the filing of the application for which data is available. . . .

(c) An applicant for a service provider certificate of operating authority shall file with its application a description of the services it will provide and show the areas in which it will provide those services.

(d) A service provider certificate of operating authority holder:

- 
- (1) may obtain services under the resale tariffs ordered by the commission as specified by Section 3.453 of this Act [usage sensitive loop resale tariff], except in certificated areas of companies serving fewer than 31,000 access lines;
- (2) may obtain for resale the monthly recurring flat-rate local exchange telephone service and associated nonrecurring charges, including any mandatory extended area service, of an incumbent local exchange company at a five percent discount to the tariffed rate, and:
- (A) the incumbent local exchange company shall also sell any feature service that may be provided to customers in conjunction with local exchange service, including toll restriction, call control options, tone dialing, custom calling services, and caller ID at a five percent discount to the tariffed rate, including any associated nonrecurring charges for those services, provided that the incumbent local exchange company shall make available to a holder of a service provider certificate of operating authority at an additional five percent discount any discounts made available to the customers of the incumbent local exchange company who are similarly situated to the customers of the holder of the service provider certificate of operating authority;
  - (B) service providers and incumbent local exchange companies may agree to rates lower than the tariffed rates or discounted rates;
  - (C) the 5 percent discounts provided by this subdivision do not apply in exchanges of companies having fewer than 31,000 access lines in this state;
  - (D) if the tariffed rates for the services being resold change, the changed rate is applicable to the resold service, but the commission may not, for holders of service provider certificates of operating authority, create a special class for purposes of resold services, and the discount provided to holders of service provider certificates of operating authority shall remain at five percent of the tariffed rate or discounted rate; and
  - (E) the holder of a service provider certificate of operating authority may purchase for resale optional extended area service and expanded local calling service but those services may not be discounted;
- (3) may sell the flat rate local exchange telephone service only to the same class of customers to which the incumbent local exchange company sells that service;
- (4) may not use a resold flat rate local exchange telephone service to avoid the rates, terms, and conditions of an incumbent local exchange company's tariffs;

(5) may not terminate both flat rate local exchange telephone service and services obtained under the resale tariff approved as prescribed by Sections 3.453(a)-(c) of this Act [usage sensitive loop resale tariff] on the same end user customer's premises;

(6) may not use resold flat rate local exchange telephone services to provide access services to other interexchange carriers, cellular carriers, competitive access providers, or other retail telecommunications providers, but may permit customers to use resold local exchange telephone services to access interexchange carriers, cellular carriers, competitive access providers, or other retail telecommunications providers.

(7) may obtain services offered by or negotiated with a holder of a certificate of convenience and necessity or certificate of operating authority; and

(8) may obtain for resale single or multiple line flat rate intraLATA calling service when provided by the local exchange company at the tariffed rate for online digital communications.

(e) The holder of a certificate of operating authority or certificate of convenience and necessity shall not be granted a service provider certificate of operating authority as to the same territory. A holder of a service provider certificate of operating authority who applies for either a certificate of operating authority or certificate of convenience and necessity as to the same territory must include a plan to relinquish its service provider certificate of operating authority.

(f) An incumbent local exchange company that sells flat rate local exchange telephone service to a holder of a service provider certificate of operating authority may retain all access service and "1+" intraLATA toll service originated over the resold flat rate local exchange telephone service.

\* \* \*

**STATEMENT BY FCC CHAIRMAN REED HUNDT ON FCC PREEMPTION OF  
TEXAS UTILITY ACT**

The Commission is required by Section 253 of the Communications Act to preempt any action that places burden on any competitor that is not shared equally by other competitors in the local exchange market. Congress told us to preempt any state action that tilts the competitive playing field. That is why we preempt portions of the Texas Public Utility Regulatory Act, which was passed in 1995.

We do not, however, preempt several challenged provisions of the Texas statute where the Texas Public Utilities Commission has construed those provisions in a manner consistent with the objectives of the Communications Act. Should the statute be interpreted in a contrary fashion in the future, we would be required by Section 253 of the Communications Act to preempt that action. Our decision today should promote competition in the Texas telephone market.

**Separate Statement  
of  
Commissioner Susan Ness**

*RE: Public Utility Commission of Texas, CCB Pol 96-13, 96-14, 96-16 and 96-19*

Our decision today underscores the partnership between the FCC and the state commissions in promoting competition and new entry into telecommunications. Several provisions of the Texas Telecommunications Statute PURA95 appear, on their face, to violate the federal law. But for the manner in which the Texas State Commission has interpreted and enforced these provisions, the FCC would be bound to preempt. Since the Texas Commission has used its enforcement discretion wisely and well, we do not find it necessary to preempt several actions. Nevertheless, we have found it necessary to preempt three state provisions including important facilities build out requirements and two other sections which are inconsistent with section 253 of the Telecommunications Act.

The Texas Commission has interpreted an anti-competitive state law in a pro-competitive manner. In response, the FCC has acknowledged the actions of the Texas state commission in determining whether to preempt state policies or actions that conflict with the Federal statute. The Texas Commission's enforcement, in combination with our decision to preempt particular violative provisions, will help to open markets in Texas and provide the benefits which accompany competition to consumers there.