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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	WC Docket No. 04-__
BellSouth Emergency Petition	)	
for Declaratory Ruling	)	

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EMERGENCY PETITION FOR DECLARATORY RULING

On March 31, 2004, the Commission came together with one voice in urging the telecommunications industry to engage in commercial negotiations. BellSouth has done so, and has seven agreements since that show the sincerity of its and its customers' efforts. The Commission's unanimous vision will be frustrated, however, if these new agreements or future agreements are or could be converted from voluntary commercial agreements into regulatory contracts. As explained in more detail below, subjecting the agreements to the state approval process of Section 252 will violate the Communications Act and stymie further negotiation. Accordingly, the Commission should declare: (1) that separate agreements for the provision of services not required under Section 251 ("Non-251 Agreements"), are not subject to Section 252 of the Telecommunications Act because such agreements do not contain services required by Section 251;[1] (2) that such agreements are federal agreements that require compliance with Section 211 of the Act and Section 43.51(c) of the Commission's rules;[2] and (3) to prevent frustration of the Commission's objectives, that inconsistent state actions are preempted.

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[1] BellSouth concurrently is filing a Petition for Forbearance from Section 252(a)(1) of the Act. *See* BellSouth's Petition for Forbearance, WC Docket No. 04-___ (filed May 27, 2004).

[2] *See* 47 U.S.C. § 211; 47 C.F.R. § 43.51(c).

I. TO FACILITIATE VOLUNTARY NEGOTIATIONS, THE COMMISSION SHOULD DECLARE THAT AGREEMENTS OUTSIDE THE SCOPE OF SECTION 251 ARE NOT GOVERNED BY SECTION 252.

After the D.C. Circuit vacated the Commission's unbundling rules,[3] the Commission encouraged incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") to commence "good faith," "commercial negotiations" "to arrive at commercially acceptable arrangements" in order to "restore certainty and preserve competition in the telecommunications market."[4] In response, BellSouth commenced such voluntary, good faith negotiations with CLECs and has since entered into commercial arrangements with seven CLECs.[5] Unfortunately, the threat of regulation is hampering more widespread commercial negotiations, and such agreements are proving to be the exception rather than the rule.

Commercial, voluntary negotiations require both parties to make concessions in the course of reaching an agreement that is tailored to the interests of both parties. Section 252, however, stands as an obstacle to the fulfillment of the Commission's goal of reaching market-based, commercially acceptable agreements and avoiding additional litigation and uncertainty. In particular, under Section 252(e), states have discretion to reject an agreement and could require that the parties modify terms and conditions of the agreements prior to approval. Section 252, therefore, poses a risk that states can trump market-based negotiations. These regulatory obstacles are preventing parties from reaching market-based solutions as urged by the

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[3] *United States Tel. Assoc. v. FCC*, No. 00-1012 (D.C. Cir. Mar. 2, 2004), *slip op.* at 31 ("*USTA II*"). Because the D.C. Circuit vacated the unbundling regulations for UNE-P, when the vacatur becomes effective ILECs will not have an obligation to provide such combination as a Section 251 network element.

[4] Press Statement of Chairman Michael K. Powell, and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin, and Jonathan S. Adelstein On Triennial Review Next Steps, rel: March 31, 2004 ("March 31st Statement").

[5] Each of these agreements includes a non-disclosure obligation.

Commission. Parties understandably are hesitant to enter into negotiations when there is a risk that the agreements will be subject to state commission modification or partial adoption by other competitors. Moreover, given the state commission interest in these agreements, it appears unlikely that litigation surrounding these agreements will decrease, further undermining the incentive of either party to negotiate such a deal. Thus, in order to "pave the way for further negotiations and contracts,"[6] the Commission should find that Section 252 does not apply to Non-251 Agreements.[7]

A. The Plain Language of the Statute and FCC Precedent Exclude Non-251 Agreements from the Obligations of Section 252.

The language of Section 252, the terms of Section 251, Commission precedent, and sound public policy all make clear that Non-251 Agreements need not be filed by state commissions pursuant to Section 252.

Section 252. By its terms, Section 252 applies only to interconnection agreements negotiated after the ILEC receives "a request for interconnection, services, or network elements *pursuant to Section 251*."[8] This critical limitation governs all the Section 252 obligations. Thus, only agreements requested "pursuant to Section 251" "shall be submitted to the State commission" for approval under Section 252(e).[9] Similarly, only those agreements filed

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[6] *See* FCC Chairman Michael Powell's Comments on SBC's Commercial Agreement with Sage Telecom Concerning Access to Unbundled Network Elements (April 5, 2004).

[7] BellSouth will continue to file agreements negotiated pursuant to Section 251 with state commissions for approval.

[8] 47 U.S.C. §252(a)(1) (emphasis added). The fact that Section 252(a)(1) provides that such agreements may be negotiated "without regard to the standards set forth in subsections (b) and (c) of Section 251" does not impact the necessary precondition: the request for interconnection must be for network elements and services required under Section 251 of the Act. If the contract is not requested pursuant to Section 251, Section 252(a)(1) does not apply.

[9] 47 U.S.C. §§ 252(a)(1) & (e). And, a state may only reject an agreement "if it finds that the agreements do not meet the requirements of Section 251." 47 U.S.C. §252(e)(2)(B).

pursuant to Section 252(e) are required to be available for public inspection under Section 252(h),[10] and only such agreements are available to other telecommunications carriers under Section 252(i).[11] Likewise, the competitive carrier's initial "request" for an agreement "pursuant to Section 251" triggers the state arbitration period in Section 252(b),[12] and only such agreements are available for arbitration by state commissions under Section 252(c) and (d).[13] In short, if the agreement is not requested for network elements and services required "pursuant to Section 251," Section 252 does not apply by its express terms.

A request "pursuant to 251" must be for resale, unbundled elements or interconnection to be offered by Section 251. To constitute a Section 251 unbundling obligation, the Commission must make an affirmative finding of impairment. 47 U.S.C. § 251(d)(2)(B). The Act obligates the Commission "in determining what network elements should be made available for purposes of subsection (c)(3)" to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[14]

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[10] 47 U.S.C. §252(h) ("A State commission shall make a copy of each agreement approved under subsection (e) ... available for public inspection and copying within 10 days after the agreement or statement is approved").

[11] 47 U.S.C. §252(i) ("A local exchange carrier shall make available any interconnection, service, or network elements provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement").

[12] 47 U.S.C. § 252(b)(1).

[13] 47 U.S.C. §§ 252(b) & (c).

[14] *Id.*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587. 9596, ¶ 16 (2000) (Commission must determine "impairment" "before imposing additional unbundling obligations on incumbent LECs" rather than "impos[ing] such obligations first and conduct[ing] [its] 'impair' inquiry afterwards"), *petitions for review denied, Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

In *USTA II*, the D.C. Circuit confirmed that the responsibility for determining 251 elements rests solely with the FCC. *USTA II*, slip. op. at 18 ("[w]e therefore vacate, as an unlawful subdelegation of the [FCC's] responsibilities, those portions of the Order that delegate to the state commissions the authority to determine whether CLECs are impaired without access to network elements..."). If the Commission makes an affirmative finding of "no impairment" for a particular element, or in the absence of any Commission finding at all, the element is not a Section 251 element and, therefore, Section 252 does not apply.

The obligations in Section 252, including filing with the state commission and pick-and-choose, only apply to 251 elements. Section 252 sets forth the procedures for negotiation, arbitration and approval of agreements. Under Section 252, there are two types of agreements, voluntarily negotiated agreements and arbitrated agreements. Both types of agreements regulated by Section 252, by definition, only govern Section 251 elements. Section 252(a)(1), which defines voluntarily negotiated agreements, provides that carriers may enter into such agreements "upon receiving a request...pursuant to Section 251." As discussed above, elements for which there is no impairment finding are not Section 251 elements and therefore not subject to a request "pursuant to section 251." Similarly, Section 252(b), which defines arbitrated agreements, refers back to "a request for negotiation under this section" – in other words, a "request pursuant to Section 251." Thus, the statute expressly provides that both types of agreements defined in Section 252, to which the Section 252 obligations apply, involve Section 251 elements.

Subsections (c), (d), (e) and (i) of 252 all set forth procedures for handling "the agreements" defined in Section 252, i.e. either negotiated or arbitrated. Because "the

agreements" by definition must relate to 251 elements, it necessarily follows that the subsections of 252 do not apply to agreements that cover non-251 elements and services. The Non-251 Agreements, therefore, do not need to be filed with the state commissions under 251(e). Moreover, and importantly, the agreements are not subject to the pick-and-choose obligations of Section 251(i). Finally, if the parties are unable to agree on commercial terms, neither party is entitled to invoke the state commission's authority under Section 252(b) to arbitrate the dispute.

Any other reading of Section 252(a)(1) (or 252(b), which refers back to 252(a)(1)) would impermissibly negate the clause "pursuant to section 251." This clause limits the applicability of the requirements of 252 to those agreements entered into pursuant to the obligations of section 251. Interpreting 252(a)(1) as requiring parties to comply with Section 252 for Non-251 Agreements would impose obligations on commercial negotiations that Congress did not intend and would stymie the parties' ability to enter into these agreements and achieve the marketplace certainty that BellSouth and the CLECs need.

Section 251. The plain language of Section 251 also demonstrates that Non-251 Agreements need not be filed under Section 252. Section 251(c)(1) explains that ILECs have an obligation to negotiate "in accordance with Section 252 the particular terms and conditions of the agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251] (b) and this subsection [251(c)]."[15] Accordingly, if the agreement does not include the ILEC's "duties" in Sections 251(b)(1-5) or Section 251(c), it falls outside the ILEC's Section 252 duty to negotiate and corresponding Section 252 obligations.

FCC Precedent. Further, the Commission's precedent confirms that Section 252 does not apply to Non-251 agreements. For example, in the *Qwest ICA Order*, the Commission

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[15] 47 U.S.C. § 251(c)(1).

found that "*only* those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under [section] 252(a)(1)."[16] The Commission reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under section 252(a)(1)," "settlement contracts that *do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed.*"[17]

In the *Triennial Review Order,* the Commission reaffirmed the conclusion that section 252 applies only to 251 elements.[18] Specifically, the Commission held that that the pricing standard set forth in Section 252(d) applies only to Section 251 elements. The Commission held that "[w]here there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to *section 271* and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements."[19] The Commission went on to hold that "[s]ection 252(d)(1)

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16 *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) ("Qwest ICA Order") (emphasis added). This finding is consistent with the Commission's recent Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations. *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004).

17 Qwest ICA Order, ¶ 12 (emphasis added); *see also Id*, ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c)" must be filed under Section 252).

18 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capabilities*, Report And Order And Order On Remand And Further Notice Of Proposed Rulemaking, 30 CR 1, ¶ 657 (2003) (emphasis added).

19 *Triennial Review Order,* ¶ 656 (emphasis added).

provides the pricing standard 'for network elements for purposes of [section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under section 271."[20]

Public Policy. Sound public policy also supports the conclusion that Non-251 Agreements are not subject to the obligations of Section 252. For example, in the course of commercial negotiations, the parties may enter into region-wide agreements. While individual state commissions may view the negotiated region-wide provisions more or less favorably depending on the state, the parties negotiated around those state differences on a region-wide basis. It would defeat the efforts of the parties, and chill negotiations, if individual state commissions had the right to reform those contracts. Such state-by-state regulation could deprive the parties of the benefit of their bargain. Moreover, commercial negotiations involve a substantial amount of give and take during which parties may choose to make certain concessions in exchange for benefits elsewhere in the agreement. If these agreements are subject to Section 252(i) pick-and-choose, the willingness and ability of both parties to make such concessions is hindered. For these reasons, Congress did not intend commercial agreements to be subject to the obligations of Section 252.

Finally, granting BellSouth's Petition advances the purpose of the Act: promoting facilities-based competition and reducing regulation.[21] When wholesale services are provided on a voluntary rather than a mandatory basis—as is true for services that replace network elements that no longer satisfy the impairment standard—negotiations should occur in a commercial

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[20] *Id.*, ¶ 657 (brackets in original).

[21] The primary goal of the Act, as Congress made clear in the Preamble, is to "provide for 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 telecommunications markets to competition ..." H.R. Rep. No. 104-458, 104th Cong., 2d Sess., at 1 (emphasis added). As the D.C. Circuit held recently, "the purpose of the Act ... is to stimulate competition – preferably genuine, facilities-based competition." *See USTA II, slip op.* at 31.

setting, without regulatory overhang. Injecting the threat of regulatory intervention is not only unwarranted, but also inimical to achieving economically rational results. To ensure that these negotiations can continue in a productive manner, the Commission should declare that agreements that do not involve Section 251 elements are not subject to Section 252.

While these commercial agreements are not subject to Section 252, because they are federal agreements, they are governed by Section 211 of the Communications Act. Section 211(a) provides that "[e]very carrier subject to this Act shall file with the [FCC] copies of all contracts, agreements, or arrangements with other carriers...in relation to any traffic affected by the provisions of this Act to which it may be a party." 47 U.S.C. § 211(a). Commission Rule 43.51(c), which implements Section 211(a), provides in relevant part as follows:

> [w]ith respect to contracts coming within the scope of paragraph (a)(1)(ii) of this section between subject telephone carriers and connecting carriers...such documents shall not be filed with the Commission; but each subject telephone carrier shall maintain a copy of such contracts to which it is a party in appropriate files at a central location upon its premises, copies of which shall be readily accessible to Commission staff and members of the public upon reasonable request therefore; and upon request by the Commission, a subject telephone carrier shall promptly forward individual contracts to the Commission.[22]

In turn, Commission Rule 43.51(a)(1)(ii) provides, in relevant part, that:

> The interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances, except as provided in paragraph (c) of this section.

In compliance with Section 211 and the Commission's rules, BellSouth will make its Non-251 Agreements available in appropriate files at a central location in Atlanta, and will make copies readily accessible to FCC staff and members of the public upon reasonable request.

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[22] 47 C.F.R § 43.51(c).

B. The Commission Must Preempt States from Circumventing the Act and Frustrating the Commission's Objectives.

BellSouth already has received an inquiry from one state commission within its territory, the Florida Public Service Commission, inquiring as to whether BellSouth plans to file its commercial agreements pursuant to Section 252.[23] *See Letter from Beth W. Salak to Nancy Sims*, May 11, 2004, at 1 ("[c]ertain ILECs...have taken the position that Section 252 does not require the filing of the provisions of agreements not negotiated per Sections 251 and 252...I would like to know your position on this issue..."). Unfortunately, Florida is not alone. As SBC has detailed, the Michigan Public Service Commission ordered SBC to file its Non-251 Agreements and other commissions, including the California Public Utilities Commission, Kansas Corporation Commission, and Texas Public Utilities Commission have made inquiries similar to the Florida PSC.[24] It is therefore imperative that the Commission act now and preempt state commissions from thwarting voluntary, commercial negotiations for services not required under Section 251.[25]

The FCC has the authority to preempt inconsistent state regulations under two independent statutory provisions, as well as settled precedent requiring preemption in the case of a conflict.

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[23] BellSouth responded on May 21, 2004.

[24] *See* SBC Communications Emergency Petition for Declaratory Ruling, Preemption, and For Standstill Order to Preserve the Viability of Commercial Negotiations, WC Docket 04-172, at 12-17 (filed May 3, 2004) ("SBC Petition"). State commissions have invoked state law as a basis for ordering carriers to file non-251 Agreements. *See* SBC Petition, at 15. BellSouth supports SBC's Petition and urges the Commission to grant is expeditiously.

[25] The Supremacy Clause of the United States Constitution mandates that "the Laws of the United States ...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...." U.S. Const. art. VI §2; *see also McCulloch v Maryland*, 17 U.S. 316 (1819).

First, the FCC has authority to preempt under Section 251 of the Act. By forcing ILECs to file Non-251 Agreements pursuant to section 252, states are undercutting the Commission's determination that such services need not be provided under Section 251 of the Act. Section 251(d)(2) makes clear that: "[i]n determining what network elements should be made available .. *the Commission shall*" conduct the requisite analysis.[26] Section 252 applies to agreements requested "pursuant to 251," which must be for a 251 element. The states cannot undermine the Commission's lack of impairment action by forcing ILECs to file agreements that do not contain network elements under Section 251.

None of the Act's general reservations of state authority overrides Section 251(d)(2) and enables states to trump the FCC finding of no impairment. Indeed, Section 251(d)(3) confirms that the Commission has exclusive power to define the 251 elements. Under this subsection, any state access and interconnection regulations must be "consistent with the requirements of" Section 251 and must not "substantially prevent implementation of [Section 251] and the purposes of this part."[27] As the Supreme Court explained, the Act "fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition... ."[28] If the Commission has determined that there is no impairment, any contrary finding by a state would be inconsistent with the statute, would frustrate achievement of the statutory objectives and, therefore, be preempted by the federal regulations.

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[26] 47 U.S.C. § 251(d)(2) (emphasis added). As the Supreme Court properly recognized, "the question ... is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *Iowa Utilities*, 525 U.S. at 377, n. 6.

[27] 47 U.S.C. § 251(d)(3).

[28] *Iowa Utilities*, 525 U.S. at 371.

For the same reasons, Sections 261(b) and (c) do not grant states the authority to alter the FCC's finding of no impairment. Section 261(b) prohibits the states from prescribing regulations "in fulfilling the requirements of this part" unless such regulations are "not inconsistent with the provisions of this part."[29] Likewise, Section 261(c) 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 access," except where those requirements "are not inconsistent with this part or the Commission's regulations to implement this part."[30] By their terms, these provisions do not brook any state role in establishing additional Section 251 elements or in retaining elements where the Commission has found no impairment. As a result, the Commission must preempt any state regulation that undermines the FCC's impairment finding under Section 251.

Finally, the Commission also has authority to preempt because any state regulation altering the requirements of Section 251 would necessarily conflict with the Commission's rules, frustrate the purpose of the Act, and, consequently, be preempted by the federal regulations.[31] Conflict preemption is implicated when the state law frustrates[32] or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[33]

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29 47 U.S.C. § 261(b).

30 *Id.* § 261(c).

31 The doctrine of preemption originates in the Supremacy Clause of the Constitution. U.S. CONST., art. VI, cl. 2. State law that conflicts with federal law is without effect. *See McCulloch v. Maryland*, 17 U.S. 316 (1819)

32 *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (*citing Ray*, 435 U.S. at 157-158; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 540-541 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

33 *Hines v Davidowitz*, 312 U.S. 52, 67-68 (1941).

Congress enacted the Act to "promote competition and reduce regulation."[34] The Commission properly has encouraged carriers to "utilize all means at their disposal" to negotiate commercial agreements for wholesale services and "restore certainty and preserve competition in the telecommunications market."[35] If state commissions force carriers to file Non-251 Agreements for review and, further, if such agreements are subject to the "pick-and-choose" rule, there is no question that the Commission's objective of encouraging the negotiation of commercial agreements and reducing litigation will be thwarted. Thus, preemption is necessary because state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[36] Likewise, preemption is necessary because it frustrates

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34 H.R. Rep. No. 104-458, 104th Cong., 2d Sess. at 1.

35 *See* March 31st Statement.

36 *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) (preempting a state law which undermined intended purpose and "natural effect" of at least three provisions of the federal Act). For example, the Second Circuit upheld regulations enacted pursuant to Section 251(e) that prevented states from enacting conflicting regulations. *See People of the State of New York v. Federal Communications Commission*, 267 F.3d 91 (2nd Cir. 2001). In that case, the court evaluated the Commission's authority to bar states from enacting conflicting regulations pursuant to the Commission's Section 251(e)(1) authority. In relevant part, Section 251(e)(1) explains that *"[t]he Commission shall* create or designate one or more impartial entities to administer telecommunications numbering and to make numbers available on an equitable basis." (emphasis added). The Commission promulgated rules to implement Section 251(e) and specified the rules governing the introduction of an area code overlay. While reconsideration and waiver petitions were pending, the NYPSC issued an order concluding that it would implement an overlay area code to relieve impending central office code shortages within New York City, which conflicted with the Commission's rules. Thereafter, the Commission rejected the NYPSC's arguments and the NYPSC appealed. The Second Circuit upheld the Commission's action, explaining that Congress expressly gave the Commission the authority to promulgate regulations and the Commission's action withstood judicial scrutiny.

Likewise, a federal district court found that Section 541(a)(1) of the Cable Act preempted states from enacting contrary legislation regarding the grant of franchises to cable companies. *Qwest Broadband Serv., Inc. v. City of Boulder, Colorado*, 151 F. Supp. 2d 1236 (D. Col. 2001). Section 541 imposed numerous and specific requirements on franchising authorities. The court evaluated whether a local franchising statute that gave voters the authority to approve the grant of franchises was preempted by Section 541. The court found that the local franchise statue conflicted with Section 541 and was preempted by the federal regulation for two reasons: it directly conflicted with the Cable Act and, further, it stood as an obstacle to Cable Act's objective of fostering competition and reducing regulation. The court made this finding,

the Commission's objectives.[37] Accordingly, under the Supremacy Clause, the Commission must preempt inconsistent state regulations that require carriers to file Non-251 Agreements.

II. CONCLUSION

For the foregoing reasons, the Commission expeditiously should grant this Emergency Petition for Declaratory Ruling.

Respectfully Submitted,

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May 27, 2004

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notwithstanding the so-called savings clause for state commissions, that: "[n]othing in this subchapter shall be construed to restrict from exercising jurisdiction with regard to cable services consistent with this subchapter." *See also Media One Group Inc. v. County of Henrico*, 257 F 3d 356 (4th Cir. 2001) (County's open access provision that required cable company to provide telecommunications facilities to any internet service provider as condition for county's approval of transfer of control of cable franchise was inconsistent with Section 541(b)(3)(D) and was preempted).

[37] *See Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (*citing Ray*, 435 U.S. at 157-158; Jones v. Rath Packing Co., 430 U.S. 519, 525, 540-541 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In addition, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *see also Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981).

CERTIFICATE OF SERVICE

I do hereby certify that I have this 27th day of May 2004 served the foregoing **EMERGENCY PETITION FOR DECLARATORY RULING** via hand-delivery or by electronic mail addressed to the following parties:

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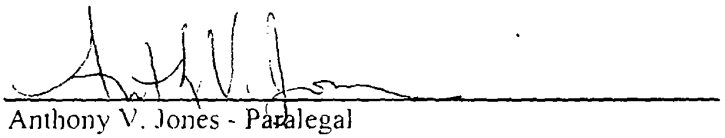

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