

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition of Global NAPs, Inc. for Preemption of)
the Jurisdiction of the Massachusetts Department)
of Telecommunications and Energy Pursuant to)
Section 252(e)(5) of the Telecommunications Act)
of 1996)

CC Docket No. 99-354

OPPOSITION OF BELL ATLANTIC-MASSACHUSETTS, INC.

Global NAPs, Inc. ("GNAPs") is at it again – trying to get this Commission to overturn state decisions with which it disagrees. For the fifth time in less than a year, GNAPs has abused Commission processes by coming to Washington when it cannot persuade state commissions to accept its untenable positions. The Commission has rejected three of its earlier attempts¹ and the fourth was withdrawn before decision. It should likewise rebuff this end run around the jurisdiction of the Massachusetts Department of Telecommunications and Energy ("DTE").

Here, GNAPs asks the Commission to resolve an alleged dispute about the proper interpretation of the parties' interconnection agreement on compensation for ISP-bound calls, claiming that the DTE has not acted in a timely manner. In support of its Petition,

¹ *Global NAPS, Inc. Petition for Preemption of the New Jersey Department of Public Utilities Regarding Interconnection Dispute With Bell Atlantic-New Jersey, Inc.*, 14 FCC Rcd 12530 (1999); *Global NAPS, Inc. Petition for Preemption of the Virginia State Corporation Commission Regarding Interconnection Dispute With Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, DA 99-1552 (rel. Aug. 5, 1999); *Bell Atlantic v. Global NAPs, Inc.*, File No. E-99-22, FCC 99-381 (rel. Dec. 2, 1999) ("GNAPs Tariff Order").

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GNAPs attaches a copy of a “Motion for Complaint” that it filed on April 16, 1999, in which it asks the DTE to “issue a declaratory ruling that calls to ISPs are subject to reciprocal compensation under the terms of the BA-GNAPs interconnection agreement” and to require Bell Atlantic to pay an outstanding bill for such compensation. Motion for Complaint at 5, reproduced in Exh. 1 of the Petition.

Just over one month after GNAPs filed that “Motion for Complaint,” the DTE issued a ruling addressing the reciprocal compensation issue, but it found just the opposite from what GNAPs wanted. In ruling on language in an MCI WorldCom interconnection agreement that is identical to language in GNAPs’ agreement with Bell Atlantic, the DTE said, unequivocally, “[r]eciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic).”² That ruling essentially denied the declaratory ruling requested in GNAPs “Motion for Complaint” and mooted the request that Bell Atlantic pay the outstanding invoice. Therefore, this request for preemption is moot, because there is no pending dispute between GNAPs and Bell Atlantic on this issue before the Massachusetts DTE.

The DTE left the door open, however, for additional arguments that could induce it to find differently: “Unless *and until* some future investigation of a complaint, if one is filed ... there presently is no Department order of continuing effect or validity in support of the proposition that such an obligation [payment of reciprocal compensation for ISP-

² *Complaint of MCI WorldCom Against New England Tel. and Tel. Co d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered Into Under Sections 251 and 251 of the Telecommunications Act of 1996*, D.T.E. 97-116-C at 28 (Mass. D.T.E., rel. May 19, 1999) (“DTE Order”).

bound calls] arises between MCI WorldCom and Bell Atlantic.” DTE Order at 25 (emphasis in the original). In the intervening seven months since that decision, however, GNAPs has made no effort either to prosecute its earlier “Motion for Complaint” or to file anew with the DTE. Indeed, in numerous filings with the DTE complaining about the May 19th Order, GNAPs did not once refer to its “Motion for Complaint” but instead repeatedly urged the DTE to reconsider its Order and reinstate Bell Atlantic’s obligation to compensate competitors for ISP-bound traffic. GNAPs recognized the obvious – its “Motion for Complaint” was superceded by the DTE’s May Order. If it was going to pursue a claim against Bell Atlantic-Massachusetts, Inc., it was required to do so under the terms of that Order and subject to the findings made in that Order.

Besides failing to pursue a complaint, GNAPs also failed to avail itself of the DTE’s preferred approach – negotiation of mutually-agreeable interconnection terms. Instead, it tried to gain before this Commission what it could not obtain from the DTE by filing a defective federal tariff at the same rate it could not get in the state, a tariff which the Commission properly found unlawful. *See* GNAPs Tariff Order. And at the state level, instead of negotiating in good faith, GNAPs spent months quibbling about language of a proposed non-disclosure agreement – language that every other carrier that entered into negotiations has signed.

While GNAPs was avoiding negotiations, Bell Atlantic successfully concluded revisions to its interconnection agreement with two other local exchange carriers that operate in Massachusetts, Level 3 and PaeTec, which provide compensation for ISP-

bound traffic.³ And even now, in the face of those agreements, instead of coming to the negotiating table or following the complaint process that the DTE proposed, GNAPs again is trying to dip into the Commission's well. The Commission should reject this latest attempt as having no more merit than the other three that it denied.

But even if by some stretch GNAPs' April "Motion for Complaint" before the DTE could still be found to have some life, and GNAPs' petition could be found to be a request to preempt and rule on that "Motion," the Petition is still defective. First, the "Motion for Complaint" asks the DTE to issue a declaratory ruling and to order Bell Atlantic to pay a bill. Neither of these is a request for arbitration or approval of an interconnection agreement under section 252. And this Commission has the right under section 252 to preempt only if a state "fails to act to carry out its responsibility under this section." 47 U.S.C. § 252(e)(5). A state has no "responsibility" under section 252 or any other provision of federal law to issue a declaratory ruling, any more than does this Commission. *See* 47 C.F.R. § 1.2 ("The Commission *may* ... issue a declaratory ruling") (emphasis added). Nor is a billing dispute – a request that Bell Atlantic pay an outstanding invoice – a preemptable issue. Therefore, GNAPs' "Motion for Complaint" is not subject to Commission preemption no matter how long it takes for the Massachusetts DTE to act.

But even if that complaint could somehow be considered a petition for arbitration, a state has nine months to resolve the dispute, a period which has not yet passed. 47

³ *See* Bell Atlantic and Level 3 Communications Reach Landmark Internet Agreements in Eight States and District of Columbia, Joint News Release, Oct. 21, 1999; Bell Atlantic and PaeTec Communications Reach Internet Agreements in 10 States and the District of Columbia, Joint News Release, Nov. 1, 1999. These documents are available on Bell Atlantic's Website, www.bell-atl.com.

U.S.C. § 252(b)(4)(C).⁴ Therefore, if the Commission considers the Petition a valid request for preemption, it must dismiss it as premature. If it is not dismissed, at least the 90 day period that section 252(e)(5) gives a state to act after being notified should not begin to run until 9 months after the complaint was filed, or January 19, 2000.

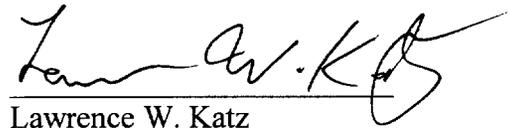
Finally, the Commission should give no weight to GNAPs' argument that the DTE should be forced to give up any claim of sovereign immunity under the Eleventh Amendment or face preemption even if it acts on the "Motion for Complaint." Petition at 6-8. GNAPs points out that some District Courts have dismissed appeals of state interconnection orders on the grounds of sovereign immunity. As a result, GNAPs claims it could be left without a judicial remedy in the event of an unfavorable state decision. *Id.*

The Commission should deny that request as well. Whether or not GNAPs will have a judicial remedy does not affect this Commission's authority to preempt a state commission under the Act. GNAPs cites no authority that would give the Commission any greater authority than it is delegated by Congress, because none exists.

⁴ GNAPs appears to have trouble counting, because it claims that it filed the instant Petition "nearly *ten months*" after it filed its "Motion for Complaint" before the DTE on April 19, 1999. Petition at 3 (emphasis in the original). The Petition was filed on December 9, which is less than eight months after it filed that "Motion."

In sum, the Commission should reject GNAPs' latest attempt to relitigate here matters properly within state jurisdiction. The Commission should also make clear that it will no longer tolerate similar abuses of process by this petitioner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lawrence W. Katz", written over a horizontal line.

Lawrence W. Katz

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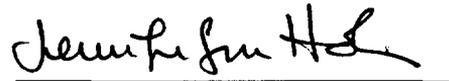
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January 6, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2000, copies of the foregoing
"Opposition" were sent by first class mail, postage prepaid, to the parties on the attached list.



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* Via hand delivery.

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