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THE COMMONWEALTH OF MASSACHUSETTS

OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

DEPARTMENT OF TELECOMMUNICATIONS & ENERGY

ONE SOUTH STATION

BOSTON, MA 02110

(617) 305-3500

ARGEO PAUL CELLUCCI
GOVERNOR

JANE SWIFT
LIEUTENANT GOVERNOR

DANIEL A. GRABAUSKAS
DIRECTOR OF CONSUMER AFFAIRS
AND BUSINESS REGULATION

JANET GAIL BESSER
CHAIR

JAMES CONNELLY, ESQ.
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W. ROBERT KEATING
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January 6, 2000

VIA ECFS AND OVERNIGHT DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Petition of Global NAPS, Inc. for Preemption of the Jurisdiction of the Massachusetts Department of Telecommunications and Energy
CC Docket No. 99-354

Dear Secretary Salas:

Enclosed for filing please find one original and five (5) copies of the Commonwealth of Massachusetts' Department of Telecommunications and Energy's Initial Comments in the above-referenced matter. Kindly file-stamp one copy and return it to me in the enclosed, self-addressed stamped envelope.

Sincerely,

Anthony Quincy Vale

A. Quincy Vale, Esq.

Enc.

cc: Mary Cottrell, DTE, Secretary
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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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

Initial Comments Of The
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Commonwealth of Massachusetts
Department of Telecommunications and Energy

James Connelly, Commissioner
W. Robert Keating, Commissioner
Paul B. Vasington, Commissioner
Eugene J. Sullivan, Jr., Commissioner

One South Station
Boston, Massachusetts 02110
(617) 305-3500

January 6, 2000

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

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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

Initial Comments Of The
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Pursuant to the Public Notice released December 14, 1999 as corrected,[1] the Commonwealth of Massachusetts' Department of Telecommunications and Energy ("Department") files these comments in response to the Petition of Global NAPs, Inc. ("GNAPs") for preemption of the Department's jurisdiction concerning GNAPs' dispute with New England Telephone and Telegraph Company d/b/a/ Bell Atlantic - Massachusetts ("Bell Atlantic"). For the reasons set forth below, the Department respectfully submits that the preemption provisions of section 252(e)(5) of the 1996 Act are not applicable in this situation

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1 Pleading Cycle Established for Comments on Global NAPs, Inc. Petition for Preemption of the Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5), CC Docket No. 99-354, DA 99-2808 Public Notice (rel. Dec. 14, 1999); Correction -- Pleading Cycle Established for Comments on Global NAPs, Inc. Petition for Preemption of the Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5), CC Docket No. 99-354, DA 99-3005 (rel. Dec. 23, 1999). Pursuant to the correction, initial comments in this matter are due January 6, 2000, and reply comments on January 13, 2000.

and the Commission, therefore, should deny GNAPs' Petition for Preemption.[2] Moreover, assuming for the sake of argument that the subject dispute is an "open issue" susceptible to compulsory arbitration, the Department contends that in all material respects, it has complied with the requirements of the 1996 Act and the Commission should deny GNAPs' Petition for Preemption. In the alternative, the Department requests that the Commission should hold in abeyance any decision in this matter until the Department has completed its deliberations concerning the outstanding motions for reconsideration of its final Order in the reciprocal compensation case, MCI WorldCom v. Bell Atlantic.[3]

I. GNAPs' ongoing dispute with Bell Atlantic concerns the interpretation of terms contained in those parties' existing interconnection agreement. Such a dispute is not a request to obtain interconnection, resale services or unbundled network elements from an incumbent local exchange carrier subject to the compulsory arbitration provisions of section 252 of the 1996 Act. Accordingly, the authority of the Department to adjudicate the GNAPs/Bell Atlantic dispute may not be preempted pursuant to section 252(e)(5).

The Commission should not countenance a plain attempt by GNAPs to re-cast its ongoing dispute with Bell Atlantic over existing interconnection agreement terms as an arbitration proceeding. Congress adopted sections 251 and 252 of the 1996 Act to foster local exchange competition by imposing certain requirements on incumbent local exchange carriers ("LECs") that are designed to facilitate the entry of competing telecommunications carriers. Section 251 describes the various requirements designed to promote market entry, including incumbent LECs' obligations to provide requesting telecommunications carriers interconnection, unbundled network elements, and services for resale.[4] Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, unbundled network elements, and services for resale from an incumbent LEC pursuant to section 251.[5] Specifically, sections 252(a) and (b) establish a scheme whereby telecommunications carriers may obtain interconnection with the incumbent according to

---

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), codified at 47 U.S.C. §§ 151 et seq. Hereafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934.

3 MCI WorldCom v. Bell Atlantic, D.T.E. 97-116-D (ongoing). Additional discussion of this case and its predecessor Orders appears *infra* at footnote 23 and accompanying text.

4 See generally 47 U.S.C. § 251(c).

5 See generally 47 U.S.C. § 252.

agreements fashioned through (1) voluntary negotiations between the carriers, (2) mediation by state commissions, or (3) arbitration by state commissions.[6] These interconnection agreements must then be submitted for approval to the appropriate state commission.[7]

Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252. Section 252(e)(5) provides:

> COMMISSION TO ACT IF STATE WILL NOT ACT.-- If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.[8]

In the Local Competition Order, the Commission adopted "interim procedures" to exercise preemption authority under section 252(e)(5) in order to "provide for an efficient and fair transition from state jurisdiction should [the Commission] have to assume the responsibility of the state commission. . . ."[9] In the Local Competition Order, the Commission concluded that it would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5).[10] The Local Competition Order limited the instances under which Commission preemption under 252(e)(5) is appropriate to "when a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)." [11] Under the Commission's rules, "[t]he party seeking preemption must prove that the state [commission] has failed to carry out its responsibilities under section 252 of the Act."[12]

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6 See 47 U.S.C. § 252(a) and (b).

7 47 U.S.C. § 252(e)(1).

8 47 U.S.C. § 252(e)(5).

9 Local Competition Order, 11 Fcc Rcd at 16127, ¶ 1283.

10 Id. at 16128, ¶ 1285.

11 Id. at 16128, ¶ 1285; see also 47 C.F.R. § 51.801(b).

12 47 C.F.R. § 51.803(b); see also, Local Competition Order, 11 Fcc Rcd at 16128,

(continued...)

The adjudication of the instant dispute between GNAPs and Bell Atlantic is not subject to preemption by the Commission pursuant to section 252(e)(5) because that section is applicable only to requests for interconnection, services, or network elements that progress to a petition for arbitration of open issues.[13] Rather, the instant dispute concerns the proper interpretation of terms contained in an existing and approved interconnection agreement. Specifically, as stated by GNAPs, "the parties disagree[] about whether their interconnection agreement - which refers generally to 'local' traffic, but does not identify ISP-bound calls as a separate category - covers ISP-bound calls as 'local' calls subject to the reciprocal compensation provisions of the agreement."[14]

The Department has previously adjudicated other disputes concerning the proper interpretation of terms contained in approved interconnection agreements. Because the 1996 Act enables requesting telecommunications carriers to "opt-in" to existing interconnection agreements, and because negotiated agreements tend to use other previously-negotiated agreements as models, many terms, indeed whole provisions, contained within differing interconnection agreements are identical to one another.[15] For this reason, the Department has not conducted such proceedings (meaning adjudications of disputed terms within approved interconnection agreements) as private arbitrations open only to the two disputants, but has in fact provided the opportunity for full intervention to any entity that can demonstrate that it will be substantially and significantly affected by the proceeding.[16]

The Commission's rules limit participation in arbitration proceedings preempted pursuant to section 252(e)(5) to "the requesting telecommunications carrier and the incumbent

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12 (...continued)
¶ 1285.

13 47 U.S.C. § 252(a) and (b).

14 GNAPs' Petition at 2.

15 See 47 U.S.C. § 252(i). Pursuant to section 252(i), LECs must "make available any interconnection, service, or network element 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."

16 See 220 C.M.R. § 1.03 (providing standards for intervention and participation in Department proceedings); see also, MCI WorldCom v. Bell Atlantic, D.T.E. 97-116 Legal Notice (1998). We note that GNAPs sought, and was granted, full party status in D.T.E. 97-116-D, the ongoing portion of D.T.E. 97-116. See footnote 23, *infra*, for a historical summary of that proceeding.

LEC."[17] But, as stated above, disputes involving the interpretation of terms and clauses contained within an interconnection agreement are not properly resolved as private arbitrations because of their generalized applicability. Indeed, the Department has an open proceeding (in which GNAPs is a party) regarding the precise disagreement GNAPs has with Bell Atlantic.[18]

Despite GNAPs' protestations, its dispute is not specific to itself and Bell Atlantic and should not be equated to an arbitration proceeding susceptible to preemption via the authority granted the Commission in section 252(e)(5). The Commission should not contravene its own precedent by taking an expansive view of its own authority under section 252(e)(5) so that one company can escape the confines of a proceeding with an outcome that it does not like. The fact is that GNAPs clearly knows the difference between a petition for arbitration and its current dispute. GNAPs' filings in GNAPs' Petition for Arbitration, D.T.E. 97-35 are instructive.[19] On March 6, 1997, GNAPs submitted a Petition for Arbitration of Open Issues relating to interconnection between itself and Bell Atlantic. Unlike its pleading at issue here,[20] which GNAPs calls a "Motion for a Complaint," that 1997 Petition clearly articulates (1) those issues that remain unresolved by the parties after good faith negotiation for the required time period, (2) the position of each of the parties with respect to those issues, and (3) a list of the other issues discussed and resolved by the parties as required by section 252(b)(2)(A)(i)-(iii).[21] GNAPs' Motion for a Complaint contains none of these sections and makes no representations that it is a petition for arbitration designed in conformance with the requirements of section 252(b). GNAPs' subsequent request that its Motion for a Complaint be re-cast as a Petition for Arbitration should not accepted by the Commission.

GNAPs' concerns, moreover, regarding the 11th Amendment are wholly speculative and should have no bearing on the Commission's decision whether to preempt the Department or not. Although the Department believes that the 11th Amendment bars suits in federal court

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17 47 C.F.R. § 51.807(g). This regulation also allows the Commission to consider requests by third parties to file written pleadings.

18 MCI WorldCom v. Bell Atlantic, D.T.E. 97-116-D (ongoing).

19 GNAP's filings in D.T.E. 97-35 appear as Exhibit 1 attached to these comments.

20 See GNAPs' Petition for Preemption at Exh. 1.

21 GNAPs' Petition for Arbitration, D.T.E. 97-35 at 6-7 (1997). On April 18, 1997, GNAPs and Bell Atlantic jointly informed the Department that they had reached a settlement of the open interconnection issues, and submitted an executed interconnection agreement for Department approval. Their interconnection agreement was deemed approved on July 18, 1997 pursuant to section 252(e)(4).

against it, no definitive ruling from a court with substantive jurisdiction has yet been rendered. Finally, even if a federal court does hold that the Department is immune from suits consistent with the Supreme Court's recent ruling,[22] such a determination would not eliminate all opportunities for appellate review of our ultimate decision in accordance with applicable state law.

For the above-stated reasons, the Commission should determine that the authority of the Department to adjudicate the GNAPs/Bell Atlantic dispute may not be preempted pursuant to section 252(e)(5) because the underlying action is not a section 252 petition for arbitration. Accordingly, the Commission should deny GNAPs' Petition for Preemption.

II. The Department is in the midst of an ongoing proceeding to determine whether reciprocal compensation should be paid for calls terminated by LECs to Internet Service Providers. The conduct of that proceeding should not be disturbed by Commission preemption of related matters and GNAPs' Petition for Preemption should be dismissed. In the alternative, the Commission should hold a decision on GNAPs' Petition for Preemption in abeyance until that proceeding is completed.

As noted in GNAPs' Petition, the Department has been conducting an ongoing adjudication concerning the very subject matter identified by GNAPs as the subject of its dispute with BA-MA.[23] Although the provision at issue is nominally contained within an interconnection agreement between MCI WorldCom[24] and Bell Atlantic, the Department

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22 College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., ___ U.S. ___, 119 S. Ct. 2219 (1999).

23 This matter was docketed by the Department as D.T.E. 97-116. Presently, four separate final Orders have been issued: (1) D.T.E. 97-116, issued on October 21, 1998, required Bell Atlantic to continue making reciprocal compensation payments to competitive LEC's terminating traffic to ISPs, (2) D.T.E. 97-116-A, issued on February 25, 1999, denied various motions for reconsideration and extension of the judicial appeal period, (3) D.T.E. 97-116-B, issued on March 23, 1999, authorized interim relief pending a final decision on Bell Atlantic's Motion for Modification of D.T.E. 97-116, and (4) D.T.E. 97-116-C, issued on May 19, 1999, vacated D.T.E. 97-116. Numerous motions for reconsideration were filed in D.T.E. 97-116-C. The Order addressing those motions for reconsideration will be captioned as D.T.E. 97-116-D. As a final Order, D.T.E. 97-116-D will be appealable in accordance with applicable law. See, e.g., 47 U.S.C. § 252(e)(6); M.G.L. c. 25, § 5; c. 30A, § 14.

24 MCI WorldCom, Inc. is the successor-in-interest to WorldCom Technologies, Inc., (continued...)

recognized that its determination in that matter would necessarily implicate other interconnection agreements because all of Bell Atlantic's interconnection agreements used the same definition. GNAPs also recognized that it could be affected by the final outcome of the D.T.E. 97-116-A/B/C/D series of decisions. On March 8, 1999 (before GNAPs filed its Motion for Complaint), GNAPs submitted a Petition to Intervene in D.T.E. 97-116-C. GNAPs argued that it "will be specifically and substantially affected by this proceeding because Bell Atlantic is refusing to pay reciprocal compensation . . . for [ISP-bound] calls which Bell Atlantic terminates on [GNAPs'] network."[25] The Department granted GNAPs' Petition for Intervention on July 1, 1999. Also on July 1, 1999, the Department established the procedural schedule for D.T.E. 97-116-D. That schedule required that all post-D.T.E. 97-116-C motions be submitted by July 15, 1999, and all responses to such motions by July 29, 1999.

Currently pending for Department consideration in D.T.E. 97-116-D are motions for reconsideration or comments supporting motions for reconsideration submitted by the following entities: (1) Teleport Communications-Boston, Inc., and Teleport Communications Group, as AT&T companies, and AT&T Communications of New England, Inc.; GNAPs; Sprint Communications Company L.P.; NEVD of Massachusetts, LLC; RNK, Inc. d/b/a RNK Telecom; MCI WorldCom, Inc., WorldCom Technologies, Inc., and MCI Metro (collectively as MCI WorldCom); and RCN-BecoCom, LLC, Level 3 Communications, Inc., Focal Communications Corporation, Choice One Communications, Inc., CoreComm Limited and CoreComm Massachusetts, Inc (all filed jointly). Bell Atlantic submitted a consolidated response to all motions and comments.

Assuming for the sake of argument that GNAPs Petition for Preemption is not void, Commission consideration of its merits is premature because the Department has not "fail[ed] to carry out its responsibility" within the meaning of section 252(e)(5) of the 1996 Act. The Department has acted in a timely manner to address all issues presented to it for resolution in the generic proceeding of D.T.E. 97-116-A/B/C/D.

In its Petition for Preemption, GNAPs admits that its individual claims were "put on the shelf . . . by virtue of a meta-agreement: whatever the proper interpretation of the [GNAPs/Bell Atlantic] specific agreement, [Bell Atlantic] would pay [GNAPs] for ISP-bound

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24 (...continued)
which is the successor-in-interest to MFS Intelenet Services of Massachusetts, Inc. ("MFS"). The interconnection agreement at the heart of the dispute was originally executed by MFS and Bell Atlantic.

25 MCI WorldCom v. Bell Atlantic, D.T.E. 97-116-C GNAPs' Petition for Intervention at 2 (1999).

calls if it paid other CLECs for ISP-bound calls under their other agreements."[26] The terms of this so-called "meta-agreement" are being adjudicated in D.T.E. 97-116-D. It is only after completion of D.T.E. 97-116-D that the Department can determine whether GNAPs' individual dispute against Bell Atlantic has any validity. Accordingly, if section 252 of the 1996 Act is applicable, then any relevant time limits cannot commence until the Department's generic proceeding is completed.

The generic proceeding of D.T.E. 97-116-A/B/C/D continues. The four Orders issued thus far were timely -- most were issued within one or two months of the particular triggering event. Even after D.T.E. 97-116-C, the Department has twice called for updates on the status of the required commercial negotiations. In two instances, these negotiations have borne fruit, and both of the negotiated amendments have been approved by the Department.[27] GNAPs, however, has chosen to litigate rather than negotiate. That is its right. But that does not mean that the Department has failed to act. While we recognize that GNAPs has requested mediation, D.T.E. 97-116-C expected carriers to commence the voluntary negotiation process provided in section 252(a)(1) of the 1996 Act to establish, insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic.[28] We stated that, if need be, we would be willing to provide a Department mediator to facilitate agreement, pursuant to the mediation provision of section 252(a)(2).[29]

Section 252(a)(2) provides that "[a]ny party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation

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26 GNAPs' Petition for Preemption at 2.

27 Two companies, Level 3 Communications, Inc. ("Level 3") and PaeTec Communications, Inc. ("PaeTec"), have negotiated amendments to their interconnection agreements with Bell Atlantic for a new class of traffic to be called "compensable Internet traffic." The rate will be $0.003/minute declining to $0.0015/min depending on Bell Atlantic meeting some provisioning metrics. After July 2000, "compensable Internet traffic" in excess of a 10:1 ratio will be paid at a $0.0012/min rate. The rates established in these agreements will be in effect for three years. The agreements include compensation for historical traffic at $0.003/minute back to February 1, 1999. Terms of compensation for traffic prior to that are undisclosed at this time. The Department approved the Level 3 amendment on October 29, 1999 and the PaeTec amendment on November 23, 1999.

28 MCI WorldCom v. Bell Atlantic, D.T.E. 97-116-C at 30 (1999).

29 Id.

and to mediate any differences arising in the course of the negotiation." Obviously, this section presupposes actual ongoing negotiations before a State commission will enter the discussions as a mediator. GNAPs admits that it asked for Department mediation immediately following the issuance of D.T.E. 97-116-C and prior to any actual negotiation.[30] Thus, GNAPs could not (and still may not) appropriately invoke the proffered mediation because it has yet to engage in any negotiations with Bell Atlantic. Additionally, the Department's offer of mediation presupposed that its D.T.E. 97-116-C Order was final -- subsequent motions for reconsideration (described above) have made it impossible for the Department to mediate a dispute that remains subject to an open proceeding. In sum, for the reasons provided above, the Department has not failed to act in any material way with the requirements of the 1996 Act, and the Commission should deny GNAPs' Petition for Preemption.

In the alternative, if it be supposed that the Department has failed to act, the only attributable defect can be a minor procedural one, i.e., not to have timely ruled on the motions for reconsideration of D.T.E. 97-116-C. The final relevant pleadings were filed on July 29, 1999. Pursuant to section 252(b)(4)(C) of the 1996 Act, the Department should then have nine months to resolve the issues presented in the pleadings, or until April 29, 2000. Accordingly, GNAPs' Petition for Preemption is untimely and should be denied. As a final alternative, the Department requests that the Commission hold any decision on GNAPs' Petition for Preemption in abeyance until the final Order in D.T.E. 97-116-D is issued. In this way, the Commission may avoid unduly disrupting the conduct of that proceeding in which the Department is deliberating over identical issues and which includes the same parties.

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30 GNAPs' Petition for Preemption at 4-5.

WHEREFORE, for the foregoing reasons, the Department respectfully requests that the Commission deny the 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, or, in the alternative, hold in abeyance any decision in this matter to allow the Department to conclude its deliberations and issue its decision in D.T.E. 97-116-D.

Respectfully submitted,

Commonwealth of Massachusetts
Department of Telecommunications and Energy

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Commissioner

One South Station
Boston, Massachusetts 02110

January 6, 2000

EXHIBIT 1

DPU.97-35

RECEIVED
MASS. DEPT. OF
PUBLIC UTILITIES
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LAW OFFICES OF
WILLIAM J. ROONEY, JR.
TEN WINTHROP SQUARE
BOSTON, MASSACHUSETTS 02110

TEL. (617) 350-0100
FAX (617) 426-5251

WILLIAM J. ROONEY, JR.
MARGARITA YONG

March 5, 1997

Mary L. Cottrell, Secretary
Department of Public Utilities
100 Cambridge Street, 12th Floor
Boston, MA 02202

By Messenger

RE: Petition of Global NAPs, Inc. for Arbitration with New England Telephone and Telegraph Company and Related Relief

Dear Secretary Cottrell:

Enclosed please find an original and ten copies of the petition of Global NAPs, Inc. ("Petitioner") for arbitration of one open issue relating to interconnection between Petitioner and New England Telephone and Telegraph Co. ("NYNEX"). This petition is being filed with the Commonwealth of Massachusetts Department of Public Utilities pursuant to section 252(b) of the Communications Act of 1954 as amended by the telecommunications Act of 1996. The requisite filing fee of $100.00 is also enclosed with the original petition.

As detailed in the enclosed petition, petitioner seeks interconnection on an interim basis while this arbitration is pending.

Please date stamp and return the enclosed additional copy of this petition and return it to the undersigned with our messenger. Please do not hesitate to call me if you have any questions regarding this petition.

Sincerely,

William J. Rooney, Jr.

Enclosures
cc: Patrick McLarney, Telecommunications Division
Michael Eisenberg, Esq., Telecommunications Division
Jaime d'Almeida, Analyst
Maureen Thompson, Esq.
Bruce Beaufejour, Esq.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

In the Matter of

Global NAPs, Inc.

Petition for Arbitration Pursuant to
47 U.S.C. Section 252(b) of Interconnection
Rates, Terms, and Conditions with

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY d/b/a NYNEX

Docket No.
D.P.U. 97-35

PETITION OF GLOBAL NAPS, INC. FOR
ARBITRATION OF INTERCONNECTION RATES, TERMS AND
CONDITIONS AND RELATED RELIEF

William J. Rooney, Jr., Esq.
Ten Winthrop Square
Boston, MA 02210
(617) 350-0100
Fax: (617) 426-5251
Counsel for Global Naps, Inc.

Dated: March 5, 1997

TABLE OF CONTENTS

I. INTRODUCTION AND OVERVIEW OF FACTS; INTERIM RELIEF 1

Background 1
Interim Relief 6
Arbitration Request 6

II. UNRESOLVED ISSUES (Section 252(b)(2)(A)(i-ii) of the 1996 Act) 7

A. Is GNAPS a common carrier? 8
B. "Section 28.0 Regulatory Approval" 9

III. OTHER ISSUES DISCUSSED AND RESOLVED BY THE PARTIES (Section 252(b)(2)(A)(iii) of the 1996 Act) 10

IV. RELIEF REQUESTED 11

APPENDIX

Correspondence Between GNAPS and NYNEX

December 19, 1996 Draft Agreement Sent by NYNEX to GNAPS

February 4, 1997 Letter from Thomas Dreyer

February 4, 1997 Interconnection Agreement Sent by NYNEX to GNAPS

February 11, 1997 Letter to Maureen Thompson, Esq.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

PETITION OF GLOBAL NAPS, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS AND RELATED RELIEF

Global NAPs, Inc. ("GNAPS"), by its undersigned attorney, hereby petitions the Massachusetts Department of Public Utilities (the "Department") for arbitration of rates, terms and conditions for interconnection and related arrangements, concerning a proposed interconnection agreement between GNAPS and New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX"), pursuant to §252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub.L.No. 104 §101(a), 110 Stat. 70, to be codified at 47 U.S.C. §252(b).[1] Relatedly, GNAPS respectfully requests that, while this arbitration is pending, NYNEX promptly provide GNAPS with interconnection on an interim basis on terms consistent with the terms already agreed upon by the parties.

I. INTRODUCTION AND OVERVIEW OF FACTS; INTERIM RELIEF

Background

1. GNAPS is a start-up telecommunications corporation formed in 1996 under the laws of the State of Delaware. GNAPS' offices are located at 89 Access Road, Norwood, MA 02062.

2. Pursuant to its effective tariffs on file with the Department, GNAPS proposes to provide intrastate telecommunications services within the Commonwealth of Massachusetts. GNAPS currently maintains the following tariff on file and effective with the Department:

---

[1]The Communications Act of 1934, as amended by the Telecommunications Act of 1996, is hereinafter cited as the "1996 Act".

Global NAPs, Inc. M.D.P.U. Tariff No. 1 for effect December 12, 1996. GNAPS is awaiting interconnection with NYNEX and does not yet provide services in the field to Massachusetts customers. GNAPS, however, does have customers subscribed to take service from it when interconnection arrangements are finalized.

3. GNAPS is a locally formed and operated venture with several innovative approaches to the provision of telecommunications services in Massachusetts. In short, GNAPS is a prototype of the creative venture that the 1996 Act seeks to foster. Indeed, in promulgating its regulations under the 1996 Act, the Federal Communications Commission expressly found that:

> Competition [under the Act] is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets. The opening of all markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American customers.

Federal Communications Commission, First Report and Order, CC Docket 96-96/96-185 at §5 (August 8, 1996) (emphasis in original).

4. These policies supporting creative new telecommunications ventures are especially applicable to Massachusetts, where the fostering of an innovative telecommunications industry is viewed as vital for the Commonwealth's economy ("if there is one industry that is key to the future prosperity of this state, it is the telecommunications industry." Prof. C. Moore, University of Massachusetts, quotation from Boston Herald, September 18, 1996, at p. 29). See also Kates-Garnick and Tierney, Opening up the Local Exchange Market to Competition: Common Themes with Retail Competition in Electricity and Natural Gas Industries, August 30, 1996, p. 13 ("Opening up [the] local exchange market will pay off by enabling new entrants to compete fairly

and to provide consumers with the price, efficiency, choice, and service innovation benefits of competition.")

5. NYNEX is a monopoly provider of local exchange telecommunications within the State of Massachusetts. NYNEX is a corporation organized and formed under the laws of the State of New York, having a local office at 185 Franklin Street, Boston, MA. NYNEX provides local exchange and other services throughout Massachusetts.

6. For purposes of §§251 and 252 of the 1996 Act, NYNEX is and has been at all material times an "incumbent local exchange carrier" ("ILEC") in the Commonwealth of Massachusetts as defined by §251(h) of the 1996 Act.

7. On October 11, 1996, GNAPS requested interconnection services and network elements from NYNEX pursuant to Section 251 of the 1996 Act. Consistent with the requirements of §252(b)(1) of the 1996 Act, the filing of this petition for arbitration is therefore occurring between the 135th and 160th date following such request for interconnection. For the Department's information, copies of relevant written correspondence between GNAPS and NYNEX is attached.

8. As outlined in paragraph 10 below, GNAPS, as the requesting telecommunications carrier, has negotiated in good faith in accordance with §251(c)(1) of the 1996 Act to attempt to establish terms and conditions for a binding agreement with NYNEX for interconnection services and network elements. GNAPS asserts that NYNEX has not satisfied its duty to negotiate in good faith as required under §251(c)(1) of the 1996 Act and make this claim at such future time and forum as may be necessary or appropriate.

9. The negotiations between GNAPS and NYNEX, to date, have failed to yield a binding, executed interconnection agreement on all issues. Thus, NYNEX has not entered into an agreement with GNAPS covering the terms and conditions of interconnection and unbundling under the 1996 Act. Although NYNEX purported to make a firm offer for such services to GNAPS on February 4, 1997, NYNEX has refused to execute even its own proposed agreement notwithstanding the passage of essentially the entire negotiating period contemplated under §252(a)(1) of the 1996 Act.

10. By way of summary of the negotiations, on October 11, 1996, GNAPS began negotiating an Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("Interconnection Agreement") with NYNEX. NYNEX sent GNAPS a draft Interconnection Agreement on December 19, 1996. (A copy of which is attached.) Frank Gangi and Barton Bruce of GNAPS met with Robert Fox, Tom Dreyer, Amy Stearn and Ed Rauba of NYNEX on January 20, 1997 and agreed upon some changes to the draft agreement. At that time the parties acknowledged that they had a final agreement which would be reduced to writing and signed.

On February 4, 1997, Tom Dreyer sent a revised agreement with signature pages to GNAPS. (A copy of which is attached.) He wrote, "Please sign both signature pages and return to me as soon as possible. After Mr. Goldberg signs these pages, I will forward one of the signature pages back to you for your file." The cover letter is enclosed. The appended Interconnection Agreement generally comported with the agreement of January 20, 1997. It did, however, contain a revised section 28.0, "Regulatory Approval", which did not appear in the December 19, 1996 draft and which was not discussed on January 20, 1997. This revised

language was not part of the agreement the parties reached on January 20, 1997 and has never been accepted by GNAPS. GNAPS counsel called Mr. Dreyer and Mr. Fox for an explanation of the change. None has been forthcoming.

The next information GNAPS received was that NYNEX did not intend to go forward with the Interconnection Agreement. GNAPS counsel called NYNEX's counsel, Maureen Thompson, on February 10, 1997. Ms. Thompson stated that GNAPS was not a common carrier and NYNEX had only sent GNAPS a copy of their Interconnection Agreement. She also stated that NYNEX's position would be set out in a letter to counsel for GNAPS. The next day, GNAPS counsel wrote to Ms. Thompson. A copy of said letter is enclosed. The letter explained that negotiations had proceeded to the point of signing the agreement. Included with the letter was a stamped cover letter to the Department of Public Utilities which discloses when GNAPS' tariffs come into effect to show that GNAPS was a common carrier. Two signed copies of the February 4, 1997 Interconnection Agreement, amended to include the original section 28.0 for signature were enclosed with the letter. On February 14, 1997, GNAPS requested mediation by the Department of Public Utilities. To date, GNAPS has had no further response from NYNEX.

11. This Petition seeks to set forth all matters that remain open (see Section II below) and all interconnection matters agreed to (see Section III below).

12. As indicated above, the parties, to date, have been unable to reach a binding agreement on all issues through negotiations under Sec. 2352(a)(1) of the 1996 Act. Under §252(b)(1) of the 1996 Act, Congress created a specific arbitration process for ILECs and requesting telecommunication carriers (also called competing local exchange carriers or "CLECs") to arrive at an interconnection agreement through "compulsory arbitration" by

"petition [to] a State commission to arbitrate any open issues" unresolved by negotiation under §252(a). The provision states that either party to the interconnection negotiation may petition the State commission for arbitration "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section . . . ." See 1996 Act at §252(b)(1). In accordance with the scheduling requirements of the 1996 Act, this petition is being timely filed with the Department.

Interim Relief

13. While the parties have reached an agreement on substantially all issues, NYNEX has refused to execute the interconnect agreement, necessitating arbitration before the Department as prescribed by §252(b) of the 1996 Act. While the arbitration is pending, GNAPS[2] respectfully requests that the Department order NYNEX promptly to provide GNAPS with interconnection on an interim basis on terms consistent with those agreed upon by the parties, i.e., the Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 dated as of February 4, 1997. Such interim relief will enable GNAPS to begin to provide services to Massachusetts customers as soon as possible consistent with the goal of increasing competition established in the 1996 Act.

Arbitration Request

14. In accordance with the requirements of §252(b)(2) of the 1996 Act and based upon its current understanding, GNAPS, the Petitioner, states below: (1) those issues that remain

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[2]GNAPS notes that, as a start-up venture, it is not similarly situated to most other parties requesting interconnection from NYNEX; these established entities generally already provide services in the field through existing arrangements. Accordingly, the execution of an intercommunication agreement, on an interim basis, would allow GNAPS to compete on a more level planning field in the near term.

unresolved between the parties (see Section II); (2) the position of each of the parties with respect to those issues (see Section III). GNAPS reserves its right to arbitrate any issues NYNEX may assert are unresolved and to seek the inclusion in its agreement with NYNEX of those provisions incorporated in the connection agreements of other requesting telecommunications carriers as expressly allowed under §252(i) of the 1996 Act. GNAPS also reserves its right to submit additional evidence in support of this petition as may be necessary or appropriate in light of the conduct of such arbitration.

II. UNRESOLVED ISSUES (§252(b)(2)(A)(i-ii) of the 1996 Act)

GNAPS requests that the Department arbitrate the issues discussed below which remain open despite GNAPS' good faith efforts. GNAPS would emphasize that it seeks to have the scope of this arbitration remain limited and focused on these issues. As noted above, GNAPS is a start-up venture, not currently serving customers in Massachusets. As a start-up venture, GNAPS does not seek to allocate its finite resources to protracted or broad arbitration proceedings. Indeed, the burden of such a process on a start-up venture such as GNAPS could produce results contrary to the goals of the 1996 Act. GNAPS stands ready to abide by reasonable expenditure and timing limitations regarding this arbitration which may be established either with the consent of NYNEX or pursuant to the Department's order. Additionally, as indicated above, GNAPS believes that use of the mediation process -- especially before commencement of arbitration hearings -- could serve to reduce the scope of the arbitration to the benefit of all concerned parties.

The issues for which GNAPS seeks arbitration, including summaries of the parties' position of these issues, are set forth as follows:

A. **Is GNAPS a common carrier?**

The reason given by Maureen Thompson, Esq. of NYNEX for refusal to enter into an interconnection with GNAPS was that GNAPS was not a common carrier. Ms. Thompson did not elaborate on why NYNEX did not believe that GNAPS was a common carrier. Ms. Thompson promised to send a letter setting out NYNEX's position but that has not yet come.

Under the Communications Act of 1934, "Common carrier" or "Carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to the act; but a person engaged in radio broadcasting shall not, insofar as such person is so indeed, be deemed a common carrier. 47 U.S.C. §153(h). To be a "Common carrier" under the Communications Act, an entity must either be under legal compulsion to hold itself out indiscriminately to clientele as one suited to serve or, if not under legal compulsion, must in fact do so. Re Cox Cable Communications, Inc. FCC 85-455 (adopted August 7, 1985). The Code of Massachusetts Regulations defines "common carrier" as any corporation, person, partnership or any other organization subject to the Department's jurisdiction pursuant to M.G.L.c. 159 providing local exchange service for sale to subscribers, and resellers of such service for public use. 220 C.M.R. §37.02. GNAPS meets these definitions. To be in the business of providing local telephone service, petitioner is required to post a tariff of rates and provide service pursuant to those posted rates under 220 C.M.R. §5.04. As stated above, GNAPS has filed a tariff schedule with the Department of Public Utilities. Consequently, petitioner is required by law to provide non-discriminatory service and is under the jurisdiction of the Department of Public Utilities. Consequently, as soon as GNAPS interconnects with NYNEX,

GNAPS shall be a common carrier.

B. **"§28.0 Regulatory Approval"**

The only portion of the February 4, 1997 agreement sent by NYNEX to GNAPS on which the parties did not agree was Section 28.0, entitled "Regulatory Approval." The parties had previously met on January 20, 1997 and agreed upon the provisions of the interconnection agreement. The version of Section 28.0 which appeared in the February 4, 1997 agreement was different from the provision that the parties had agreed upon on January 20, 1997.

Section 28.0 begins:

> The Parties understand and agree that this Agreement will be filed with the Commission and may hereafter be filed with the FCC. The Parties covenant and agree that this Agreement is satisfactory to them as an agreement under section 251 of the Act. Each party covenants and agrees to fully support approval of this Agreement by the Commission or the FCC under section 252 of the act without modification. The Parties, however, reserve the right to seek regulatory relief and otherwise seek redress from each other regarding performance and employment implementation of this agreement. In the event the Commission or SEC rejects this Agreement in whole or in part, the parties agree to meet and negotiate in good faith to arrive at a mutually acceptable modification of the rejected portion(s); provided that such rejected portion(s) shall not affect the validity of the Remainder of this Agreement.

Section 28.0 in the December 19, 1996 agreement concluded:

> This agreement is subject to change, modification, or cancellation as may be required by a either party based for on any significant change in FCC or Department rules which may impact the provision of services under this Agreement or the rights and obligations of the Parties under the Act.

The February 4, 1997 Agreement which NYNEX sent GNAPS omitted this language and in its place stated:

> This agreement shall be subject to change, modification or cancellation based on any significant changes in FCC or state regulatory commission rules which may impact the provision of service under this agreement, or the rights and obligations of the Parties under the Act. In the event such a modification or cancellation is required or desired by a Party, the Parties agree to meet and negotiate in good faith to arrive at mutually acceptable modifications or cancellation of the agreement; provided that such modified or canceled portions shall not affect the validity of the remainder of this agreement, if any.

This change was never discussed on January 20, 1997 and to date NYNEX has failed to articulate a reason for the change.

GNAPs objects to this change because this revised language is too broad. In the original version, the parties would negotiate a change when either party was "required" to make a change due to a significant change in FCC or Department rules. The revised language allows either party to require negotiation to reach a modification or cancellation of the agreement if their rights or obligations are "impacted" by a change in FCC or state regulatory commission rules. The original version allows for more certainty. If NYNEX were no longer required to enter into interconnection agreements, it would still have to perform under its interconnection agreement with GNAPS until the agreement reached the end of its term. Under the revised version, NYNEX could demand negotiation to cancel the GNAPS interconnection agreement before its term expires. The language in the modified version is softened by the requirement that the parties negotiate in good faith to arrive at mutually acceptable modifications, however this limitation still would permit NYNEX to initiate litigation or arbitration which could be ruinous to GNAPS.

III. OTHER ISSUES DISCUSSED AND RESOLVED BY THE PARTIES (§252(b)(2)(A)(iii) of the 1996 Act)

With the sole exception of the changes made in §28.0 "Regulatory Approval", all of the

provisions in the February 4, 1997 agreement sent by NYNEX to GNAPS for signature were acceptable, and thus were discussed and resolved by the parties.

IV. RELIEF REQUESTED

For all the foregoing reasons, GNAPS respectfully requests:

1. That the Department arbitrate the unresolved interconnection issues between GNAPS and NYNEX described in section II above and that such arbitration be conducted on an expedited bases with reasonable limitations on procedures (e.g., discovery), timing, hearing dates and arbitration expense to be incurred by the parties;

2. That in rendering its decision regarding such arbitration, the department accept the positions of GNAPS reflected in sections II and III;

3. That the department direct NYNEX to articulate clearly an interconnection offering to GNAPS and compel NYNEX pursuant to §252(b)(4)(B) of the 1996 Act to provide to GNAPS any and all relevant information regarding the unresolved interconnection issues;

4. That, in order to effectuate the competition sought under the 1996 Act, the Department direct NYNEX to enter into an interconnection agreement with GNAPS immediately upon the conclusion of such arbitration and that, while such arbitration is pending, the Department direct NYNEX promptly to provide GNAPS with interconnection on an interim basis on terms consistent with those agreed upon by the parties, i.e., the Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 dated as of February 4, 1997.

5. That the department accord GNAPS such other relief as it deems if necessary or appropriate.

Respectfully submitted,

6
3/5/97
Date

William J. Rooney, Jr., Esq.
Ten Winthrop Square
Boston, MA 02110
(617) 350-0100
Fax: (617) 426-5251

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition of Global Naps, Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief in accordance with the requirements of 220 CMR 1.05(1) (Department's Rules of Practice and Procedure) to the following:

Delivery by hand with enclosures

Patrick McLarney, Telecommunications Division
Department of Public Utilities
100 Cambridge St., 12th Floor
Boston, MA 02202

Michael Eisenberg, Esq., Telecommunications Division
Department of Public Utilities
100 Cambridge St., 12th Floor
Boston, MA 02202

Jaime d'Almeida, Analyst
Department of Public Utilities
100 Cambridge St., 12th Floor
Boston, MA 02202

Bruce P. Beausejour, Esq.
NYNEX
185 Franklin Street, Room 1403
Boston, MA 02110-1585

Delivery by first class mail with enclosures

Maureen Thompson, Esq.
1095 Avenue of the Americas, Room 3735
New York, NY 10036

3-6-97
Date

William J. Rooney, Jr.
Counsel for Global Naps, Inc.

CERTIFICATE OF SERVICE

I, A. Quincy Vale, hereby certify that on this 6 day of January, 2000, I caused a copy of the foregoing, attached document, submitted in Petition of Global NAPs, CC Docket No. 99-354, to be sent via overnight delivery, to the following:

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Mary L. Cottrell
Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Carol Mattey, Esq.
Common Carrier Bureau
Policy Division
Federal Communications Commission
445 12th Street, S.W., Room 5-B125
Washington, D.C. 20554

Alexander P. Starr, Chief
Formal Complaints and Investigations Branch
Enforcement Division
Federal Communications Commission
445 12th Street, S.W., Room 5-C812
Washington, D.C. 20554

Dana Bradford, Esq.
Formal Complaints and Investigations Branch
Enforcement Division
Federal Communications Commission
445 12th Street, S.W., Room 5-A314
Washington, D.C. 20554

Tracy Bridgham, Esq.
Formal Complaints and Investigations Branch
Enforcement Division
Federal Communications Commission
445 12th Street, S.W., Room 5-A664
Washington, D.C. 20554

and via Facsimile and First Class Mail to the following:

Christopher W. Savage, Esq.
Karlyn D. Stanley, Esq.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
(202) 659-9750
fax (202) 452-0067

William J. Rooney, Jr., Esq.
General Counsel
Global NAPs, Inc.
Ten Merrymount Road
Quincy, MA 02169
(617) 507-5111
Fax (617) 507-5200

Anthony Quincy Vale

A. Quincy Vale, Esq.