

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

DOCKET FILE COPY ORIGINAL

RECEIVED

JAN 13 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 99-354

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.)
_____)

RELY COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

James Bradford Ramsay
GENERAL COUNSEL

National Association of Regulatory
Utility Commissioners
1101 Vermont Avenue, Suite 200
Washington, DC 20005

Phone: 202.898.2200
Facsimile: 202.898.2213

Date: January 13, 2000

No. of Copies rec'd 0711
List ABCDE

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

RECEIVED
JAN 13 2000
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

**RELY COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners respectfully submits these reply comments generally supporting the January 6, 1999 Commonwealth of Massachusetts Department of Telecommunications and Energy ("DTE") comments in responding 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").

As a preliminary matter, the GNAPs petition makes a wholly inappropriate request that the FCC condition the DTE's exercise of its authority under the Act on a waiver of its sovereign 11th amendment constitutional right to avoid suit in federal court. NARUC respectfully suggests that taking such action is wholly inconsistent with the coordinated approach to implementation we believe is inherent in the 1996 legislation, as well as the FCC's welcome efforts to increase comity, contact, and coordination of policies with their State colleagues.

In any case, GNAPs' concerns regarding the 11th Amendment are speculative at best and should have no bearing on the Commission's decision whether to preempt the DTE or not. No definitive ruling from a court with substantive jurisdiction over the DTE has been rendered. Even if a federal court does hold that the Department is immune from suits consistent with the Supreme Court's recent ruling, such a determination would not eliminate all opportunities for appellate review of the DTE's ultimate decision in accordance with applicable state law. Moreover, should a court ultimately determine that certain aspects of the 1996 legislation are constitutionally infirm, it seems unlikely Courts would view favorably an agency reference to such unconstitutionality as a basis to alter the scope of agency authority under the Act. In other words, if the Courts determine Congress cannot constitutionally require review in a federal court within the context of the Telecommunications Act, it is unlikely that those same Courts will find an entity created by Congress, the FCC, can effectively require what Congress cannot, i.e., review in federal court.

We agree with the DTE that this novel 11th amendment argument, as well as the entire GNAPs petition, should be dismissed. As the DTE noted in its initial comments, the preemption provisions of 47 U.S.C. § 252(e)(5) are simply not applicable in this situation.

In the Local Competition Order, the FCC adopted "interim procedures" to exercise preemption authority under § 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. . . ."

Significantly, the FCC concluded it would not take an "expansive view" of what constitutes a state commission's "failure to act" under § 252(e)(5), and limited the instances under which FCC 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 § 252(b)(4)(C)." Under the Commission's rules, "[t]he party seeking preemption must prove that the state [commission] has failed to carry out its responsibilities under § 252 of the Act."

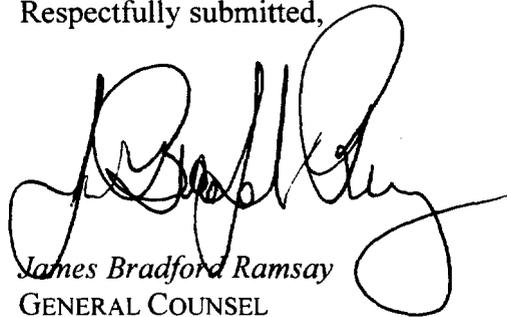
The adjudication of the instant reciprocal compensation dispute between GNAPs and Bell Atlantic is not subject to preemption because the instant dispute concerns the proper interpretation of terms contained in an existing and approved interconnection agreement. The DTE is in the midst of an ongoing proceeding 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 any case, as the DTE points out, GNAPs has not yet taken the steps required under the statute to initiate an arbitration and the associated deadline for specific DTE action. 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 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. 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.

CONCLUSION

For the foregoing reasons, NARUC 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 § 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,



James Bradford Ramsay
GENERAL COUNSEL

National Association of Regulatory
Utility Commissioners
1101 Vermont Avenue, Suite 200
Washington, DC 20005

Phone: 202.898.2200
Facsimile: 202.898.2213

Date: January 13, 2000

CERTIFICATE OF SERVICE

I, James Bradford Ramsay, hereby certify that on this 13th 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 either hand-delivered (*) or sent 1st Class Mail Postage Prepaid, 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 Matthey, 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

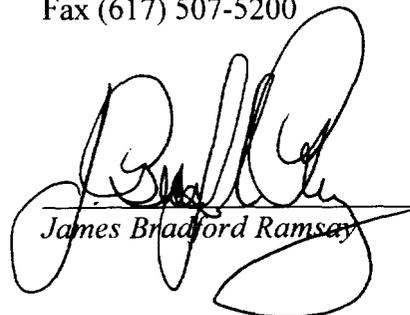
Dana Bradford, Esq.
Formal Complaints and Investigations Branch
Enforcement Division
Federal Communications Commission
445 12th Street, S.W., Room 5-A314
Washington, D.C. 20554

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

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

James Connelly, Commissioner
W. Robert Keating, Commissioner
Paul B. Vasington, Commissioner
Eugene J. Sullivan, Commissioner
Commonwealth of Massachusetts
Department of Telecommunications and Energy
One South Station
Boston, Massachusetts 02110



James Bradford Ramsay