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February 24, 2000

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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 99-354

Dear Secretary Salas:

On behalf of Global NAPs Inc., enclosed please find an original and four (4) copies of correspondence from Christopher W. Savage to Jake E. Jennings in the FCC's Common Carrier Bureau.

If you have any questions concerning the attached correspondence please contact the undersigned.

Sincerely,



Christopher W. Savage

cc: Attached Service List

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VIA HAND DELIVERY

Mr. Jake Jennings
Deputy Chief,
Policy & Program Planning Division, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Preemption of Massachusetts DTE in Global NAPs Matter — CC Docket No. 99-354

Dear Mr. Jennings:

About two weeks ago, at your request, we met in your offices to discuss some matters relating to Global NAPs' pending petition to preempt the Massachusetts DTE as a result of the DTE's failure to take any action whatsoever on Global NAPs' complaint against Bell Atlantic-Massachusetts ("Bell Atlantic") for interpretation and enforcement of the parties' interconnection agreement. At the meeting, we briefly reviewed the substantive issues in the underlying complaint, filed in April 1999, and the fact that the DTE had done nothing at all about it for the last (now) eleven months. Although the Commission obviously has to make its own decision, from our perspective it is quite clear that the DTE has "failed to act to fulfill its responsibility" with respect to this dispute.

The discussion, however, focused on a slightly different issue: whether this case — a

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complaint against an ILEC arising under an interconnection agreement — was the type of matter subject to preemption by the Commission under Section 252(e)(5) of the Communications Act and/or the Commission’s regulations interpreting that provision, 47 C.F.R. § 51.801.

The basic issue is this. Section 252(e)(5) states that the Commission “*shall*” preempt a state’s authority in “*any* proceeding or other matter under this section” if a state commission “fails to act to carry out its responsibility under” Section 252. If the dormant complaint before the DTE is a “proceeding or matter” under Section 252, the *statute* unambiguously commands the Commission to preempt the DTE. That said, the Commission’s *rule* on this point — 47 C.F.R. § 51.801(b) — states that “for purposes of this part, a state commission fails to act if” it ignores a request for mediation or arbitration. On the one hand, the rule does not say that those are the *only* things that constitute a failure to act for purposes of Section 252(e)(5). On the other hand, nothing else is specifically mentioned. There is apparently some concern that the Commission cannot preempt the DTE in our case due to the fact that the regulation only identifies two classes of situations where preemption will occur, and preempting here could, arguably, be inconsistent with the regulation.

There is no valid basis for this concern. At the outset, as explained in Global NAPs’ reply comments, there is no actual, literal conflict between the words of the regulation and the action that Global NAPs has asked the Commission to take. But we assume for purposes of this letter that some additional legal analysis is needed beyond that in those reply comments.

As we see it, there are three independent grounds on which the Commission could (and, arguably, must) grant Global NAPs’ petition, notwithstanding the language of the regulation, and notwithstanding the assumption (which we make for the remainder of this letter) that the proper interpretation of the regulation, as promulgated, is that only mediations and arbitrations are covered by its terms.

1. Rule 51.801(b) is an interpretive rule. First and foremost, the Commission may modify its list of situations where preemption is appropriate, without any additional rulemaking or other proceedings, because 47 C.F.R. § 51.801(b) is an interpretive rule, not a legislative rule. A legislative rule establishes an independent legal obligation on affected parties not specified in the underlying statute. An example would be an EPA regulation identifying a particular substance as toxic and setting specified permitted emissions levels for it. An example closer to home would be a prescription of a specific rate or rate of return under the Communications Act’s “just and reasonable” standard. In each case, the underlying statute grants the regulatory body discretion to, in effect, legislate interstitially within a zone identified by Congress.

An interpretive rule, however, does not create new legal obligations but, instead, defines the agency’s view of how it will interpret or apply an existing, clear statutory command. *See, e.g., General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (an interpretive rule “simply states what the administrative agency thinks the statute means ...”). Unlike “legislative” rules, which are “justified” on the basis of facts and record evidence,

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interpretive rules are “justified” by the agency by reference to “reasoned statutory interpretation, with reference to the language, purpose, and legislative history” of the affected statute. *See id.* Under Section 553(b) of the Administrative Procedure Act, interpretive rules are exempt from the notice-and-comment provisions of that Act. It follows that, even if the Commission in August 1996 interpreted Section 252(e)(5) to apply only to mediations and arbitrations, it is free to modify that interpretation now, in this proceeding, without any notice or comment procedures.

While Global NAPs cannot see into the mind of the Commission, there is a fairly reasonable chain of events that leads to the need to revise any such interpretation that the Commission may have made. Back in August 1996, it was not clear how much state commissions would do under Section 252 *other than* the mediation and arbitration functions addressed in Rule 51.801(b). On the particular issue of complaints regarding the interpretation and enforcement of already-effective interconnection agreements, it seems evident that the Commission thought that *it*, not the states, would handle such matters under Section 208 of the Act. *See Local Competition Order*, ¶¶ 127-28.¹ So concerns about whether the Commission would have to preempt a state commission’s failure to handle such a matter was probably not on the Commission’s radar screen at that time.

In this regard, the notion that state commissions would be directly involved in handling disputes about already-effective interconnection agreements was invented by the 8th Circuit in its opinion rejecting many aspects of the *Local Competition Order* — including, specifically, the Commission’s discussion of its own authority to handle such matters. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 803-04 (8th Cir. 1997), *vacated sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. ___, 142 L. Ed. 2d 834, 853 (1999).² Although the court of appeals’ ruling on this point was vacated, it appears that in the intervening years the Commission has embraced the notion that state commissions may and should undertake more functions under Section 252 than merely dealing with mediations and arbitrations.

Indeed, on the topic of compensation for ISP-bound calls — the subject matter of the underlying dispute between Bell Atlantic and Global NAPs that the DTE is ignoring — the Commission noted with understanding and approval that states are responsible under Section 252 for deciding complaints to enforce and/or interpret interconnection agreements. Specifically, in the *Reciprocal Compensation Order*, the Commission stated:

In the absence of a federal rule, state commissions that have *had to fulfill their statutory obligation under section 252* to resolve interconnection disputes

¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”).

² The 8th Circuit stated that “Section 252(e)(1) of the Act explicitly requires all agreements ... to be submitted for state commission approval. ... We believe that the state commissions’ plenary authority to accept or reject these agreements *necessarily carries with it* the authority to enforce the provisions of agreements *that the state commissions have approved.*” 120 F.3d at 804 (emphasis added).

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between incumbent LECs and CLECs *have had no choice* but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation.

Reciprocal Compensation Order at ¶26.³ Whatever the Commission may have thought in August 1996 about the scope of state commission authority and responsibility under Section 252, by February 1999 the Commission's understanding had clearly evolved to the point that it affirmatively relied on that authority and responsibility in the area of deciding whether existing interconnection agreements contemplate compensation for ISP-bound calls.

There is nothing objectionable about the Commission's understanding of the states' role evolving in this way. That evolution will no doubt continue as additional controversies arise under the 1996 Act and parties seek various avenues of legal and regulatory redress for their perceived grievances. What would be objectionable, however (and, indeed, legally unsustainable), would be for the Commission to fail to recognize that the more matters states handle under Section 252, the more matters that the Commission has an unequivocal *duty* to take over under Section 252(e)(5) if, as here, a state falls down on the job.

2. *A rule cannot supercede a statute.* Even if the existing rule is not an interpretive rule, the Commission still may preempt in this case. The reason is that in a conflict between a rule and a statute, the statute wins. If: (a) conducting the complaint proceeding involving the meaning of the Bell Atlantic/Global NAPs agreement is part of the DTE's "statutory obligation under section 252," as the Commission found in the *Reciprocal Compensation Order*; and (b) the DTE is not fulfilling that obligation (which it plainly is not, having let the matter lie for nearly eleven months now), Section 252(e) flatly commands the Commission to preempt the DTE. A Commission rule cannot act as a bar to that statutory command. It has long been settled law that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 & n.12 (1977). *See also Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) ("A regulation which

³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (Feb. 26, 1999) ("*Reciprocal Compensation Order*"). *See id.* at ¶ 9 ("parties negotiating interconnection agreements and the state commissions *charged with interpreting them* were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs"); *id.* at ¶ 22 ("Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as *interpreted and enforced by the state commissions*"); *id.* at ¶ 24 ("These factors are illustrative only; *state commissions*, not this Commission, *are the arbiters* of what factors are relevant in ascertaining the parties' intentions"); *id.* at ¶ 26, n.87 ("in the absence a federal rule, *state commissions have the authority under section 252 of the Act to determine* inter-carrier compensation for ISP-bound traffic"); *id.* at ¶ 28 ("Until adoption of a final rule, *state commissions will continue to determine* whether reciprocal compensation is due for this traffic").

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... operates to create a rule out of harmony with the statute, is a mere nullity”); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 508 (9th Cir. 1988) (citing *Larionoff*); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 789 F.2d 26, 36 (D.C. Cir. 1996) (same). In the face of the Commission’s statement of the DTE’s statutory obligation in the *Reciprocal Compensation Order* and the plain language of Section 252(e)(5), an order that relies on the rule to justify a failure to preempt the DTE could only be interpreted as an agency decision to ignore Congress’s plain statutory command. Global NAPs cannot imagine that the Commission would want to issue such an order.

3. ***There has been sufficient process in this case to warrant a rule change under Chenery.*** Under the long-standing doctrine of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), agencies such as the Commission are free to develop their policies either through formal rulemaking proceedings or through individual adjudications. The instant proceeding is not, technically, even an “adjudication” — it is a notice-and-comment proceeding in its own right. The petition, comments, and reply comments have clearly framed for decision the question whether ***this particular DTE matter*** is subject to preemption under Section 252(e)(5), in the face of objections by the DTE that this type of matter is exempted from the statute by virtue of the Commission’s rule. As noted above, the DTE’s basic argument has the cart before the horse — the statute trumps the rule, not vice-versa — but the point here is that the public has now had full notice and opportunity to be heard on the question whether this type of matter is subject to preemption, even though the actual comments have been mainly limited to the immediately affected parties (Global NAPs, the DTE, and Bell Atlantic). Under the logic of *Chenery*, the Commission is free to use ***this proceeding*** as the basis for announcing any necessary changes in Rule 51.801 that may be necessary to accommodate the expanded role for state commission action under Section 252 that has evolved since the rule was originally promulgated.

* * * * *

This Commission has directly held that deciding precisely the kind of matter at issue here — a dispute between an ILEC and a CLEC over whether an interconnection agreement contemplates compensation for ISP-bound calls — is part of the “statutory obligation under section 252” that state commissions are called upon to “fulfill.” Section 252(e)(5) directly and unambiguously commands the Commission to preempt a state commission when it fails to fulfill its responsibility in “any proceeding or other matter” under Section 252. As long as the DTE has, in fact, failed to take action in this matter, therefore, the Commission’s duty under the statute is completely unequivocal and clear: preempt the DTE.

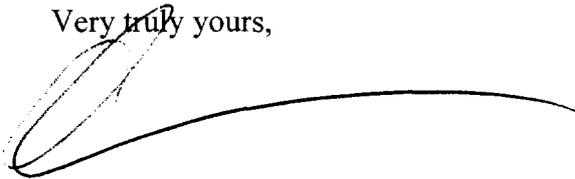
Rule 51.801 cannot stand as a bar to this statutory obligation on the Commission — but it does not have to even try. Because it is an interpretive rule, the Commission may change it at any time, as long as the grounds for doing so are reasonable. Here, the expansion in the scope of state commission responsibilities under Section 252 in the years since the rule was promulgated not only justifies such a change, it compels it. Moreover, even if some form of formal process is

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required prior to a change in the rule, Global NAPS submits that under the logic of *Chenery*, the very process that has occurred in this case is a sufficient basis for announcing any necessary rule changes in the Commission's order disposing of this case.

Please feel free to contact me if you have any questions. My direct dial is 202-828-9811, and my email is chris.savage@crblaw.com

Very truly yours,

A handwritten signature in black ink, appearing to read "Chris Savage", with a long, sweeping horizontal flourish extending to the right.

Christopher W. Savage
Counsel for
GLOBAL NAPS, INC.

cc: William J. Rooney, Jr.
Magalie Roman Salas
Julie Patterson

CERTIFICATE OF SERVICE

I, Kathleen G. Maynard, hereby certify that on this 24th day of February 2000, I caused a copy of the foregoing documents in CC Docket No. 99-354, to be sent via Hand Delivery (*) or Federal Express, to the following:

(*)Ms. Magalie Roman Salas

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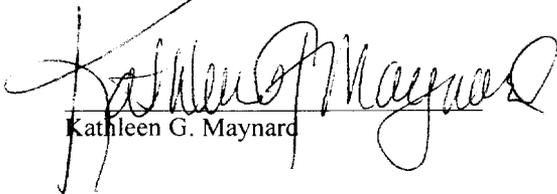
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