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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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DISTRICT

In the Matter of )

Global NAPs, Inc. Petition for )  
Preemption of 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

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 3, 2000**

**Released: March 7, 2000**

By the Chief, Common Carrier Bureau:

**I. INTRODUCTION & BACKGROUND**

1. This *Memorandum Opinion and Order* addresses the petition of Global NAPs, Inc. (GNAPs) for preemption of the jurisdiction of the Massachusetts Department of Telecommunications and Energy (Massachusetts DTE or DTE) with respect to a dispute over interpretation of an interconnection agreement between GNAPs and Bell Atlantic-Massachusetts (Bell Atlantic).<sup>1</sup> The Commission placed GNAPs' Petition on public notice on December 14, 1999,<sup>2</sup> with a correction to the comment and reply dates released on December 23, 1999.<sup>3</sup> RNK Telecom and the Massachusetts DTE filed comments, and GNAPs and the National Association of Regulatory Utility Commissioners (NARUC) filed replies.

<sup>1</sup> Global NAPs, Inc. Petition for Preemption of the Jurisdiction of the Massachusetts Department of Telecommunications and Energy, CC Docket No. 99-354 (filed Dec. 9, 1999) (Petition).

<sup>2</sup> *Pleading Cycle Established for Comments on Global Naps, Inc. Petition for Preemption of Jurisdiction of Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5)*, CC Docket No. 99-354, Public Notice, DA 99-2808 (rel. Dec. 14, 1999) (Dec. 14<sup>th</sup> Public Notice).

<sup>3</sup> *Correction, Pleading Cycle Established for Comments on Global Naps, Inc. Petition for Preemption of Jurisdiction of Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) Request for Extension of the Comments and Reply Comments*, CC Docket No. 99-354, Public Notice, DA 99-3005 (rel. Dec. 23, 1999) (Dec. 23<sup>rd</sup> Public Notice).

2. GNAPs seeks preemption of the jurisdiction of the Massachusetts DTE pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (the Act),<sup>4</sup> which authorizes the Commission to preempt a state commission in any proceeding or matter in which the state commission “fails to act or carry out its responsibility” under section 252.<sup>5</sup> Section 252 of the Act sets forth the procedures by which telecommunications carriers may request and obtain interconnection, services, or unbundled network elements from an incumbent local exchange carrier (LEC).<sup>6</sup>

3. GNAPs filed a complaint with the Massachusetts DTE against Bell Atlantic in April 1999, alleging that its existing interconnection agreement with Bell Atlantic calls for the payment of reciprocal compensation on ISP-bound calls.<sup>7</sup> The complaint sought adjudication of GNAPs’ claimed right to receive reciprocal compensation payments for calls that Bell Atlantic customers make to ISPs. GNAPs filed the present Petition in December 1999, requesting that the Commission “preempt the jurisdiction” of the Massachusetts DTE over the GNAPs/Bell Atlantic contract dispute. GNAPs argues that because, as of the date of its December filing, there has been no ruling on its complaint, the DTE has not fulfilled its responsibility to adjudicate or mediate its dispute with Bell Atlantic. Accordingly, GNAPs urges this Commission to exercise its authority under section 252(e)(5) of the Act to preempt the jurisdiction of the Massachusetts DTE over the GNAPs/Bell Atlantic contract dispute.

4. GNAPs’ Petition also argues that, should the Massachusetts DTE act on its complaint before expiration of the 90-day time limit for resolution of its preemption Petition, the Commission should direct the DTE to execute a “specific and unequivocal waiver” of its Eleventh Amendment sovereign immunity with respect to federal court review of the DTE order.<sup>8</sup> GNAPs alleges that, in some cases, state regulators have rendered decisions under section 252 of the Act and then asserted Eleventh Amendment sovereign immunity to obtain dismissals from Federal district courts when those state decisions are challenged.<sup>9</sup> To avoid this situation and ensure that both GNAPs and Bell Atlantic may obtain the federal district court review to which they are entitled,<sup>10</sup> GNAPs argues, the Commission should direct that any order

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<sup>4</sup> 47 U.S.C. § 252 (e)(5). Section 252 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), 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 in accordance with its codification in Title 47 of the United States Code.

<sup>5</sup> 47 U.S.C. § 252(e)(5).

<sup>6</sup> *See generally id.*

<sup>7</sup> Petition at 3.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.*

<sup>10</sup> Section 252(e)(6) provides that parties may seek review of a state commission determination under section 252 in Federal district court. 47 U.S.C. § 252(e)(6).

issued by the Massachusetts DTE be accompanied by a clear waiver of the state's sovereign immunity.

## II. DISCUSSION

5. We observe at the outset that the proceeding over which GNAPs urges us to assert federal jurisdiction is not one encompassed within the Commission's existing rules under section 252(e)(5). In the *Local Competition First Report and Order*, the Commission interpreted section 252(e)(5) to authorize preemption of the jurisdiction of a state commission only in the context of requests for mediation pursuant to section 252(a)(2) and requests for arbitration pursuant to section 252(b)(1).<sup>11</sup> As GNAPs itself acknowledges through its characterization of its dispute with Bell Atlantic, however, those circumstances are not present here. Rather, as GNAPs states in its Petition, the Massachusetts complaint proceeding involves the proper interpretation of the parties' existing interconnection agreement.<sup>12</sup>

6. GNAPs argues, however, that the absence of any limiting language in the Commission's rule 51.801(b) indicates that circumstances other than those delineated in the rule are subject to Commission preemption under section 252(e)(5).<sup>13</sup> Additionally, GNAPs argues that the language of section 252(e)(5) itself indicates that proceedings other than those set forth in rule 51.801(b) may be preempted by the Commission should the particular state commission fail to carry out its responsibilities in a timely manner.<sup>14</sup>

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<sup>11</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16141, ¶ 1321 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom.*, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1998), *aff'd in part and remanded*, *AT&T Corp., et al. v. Iowa Utils. Bd., et al.*, 119 S.Ct. 721 (1999); Second Further Notice of Proposed Rulemaking, 14 FCC Rcd 8694 (1999); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999); Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999).

Specifically, Commission rule 51.801(b) limits the instances under which Commission preemption pursuant to section 252(e)(5) is appropriate to three specific circumstances. First, a state commission "fails to act" if it fails to respond, within a reasonable time, to a request for mediation pursuant to section 252(a)(2) of the Act, which permits any party to request mediation of differences that arise when voluntarily negotiating an interconnection agreement. 47 C.F.R. § 51.801(b); 47 U.S.C. § 252(a)(2). Second, a state commission's failure to respond within a reasonable time to a request for arbitration pursuant to section 252(b)(1) would similarly constitute a "failure to act." 47 C.F.R. § 51.801(b). Finally, a state commission "fails to act" if it fails to complete arbitration of an interconnection agreement within nine months as set forth in section 252(b)(4)(C). *Id.*; *In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Order, 13 FCC Rcd 1755, 1758-59, ¶ 5 (1997), *recons. denied*, 14 FCC Rcd 7024 (1999).

<sup>12</sup> Petition at 2.

<sup>13</sup> GNAPs Reply Comments at 5-7.

<sup>14</sup> *Id.* at 5.

7. We conclude that we need not resolve that question in the context of the present Petition. Rather, we deny GNAPs' Petition based upon the final action taken by the Massachusetts DTE on February 25, 2000 addressing the interconnection dispute between GNAPs and Bell Atlantic.<sup>15</sup> Specifically, the DTE affirmed a prior order that had vacated its requirement that Bell Atlantic make reciprocal compensation payments for traffic that competitive LECs terminate to ISPs. Because the interconnection agreement at issue in the DTE's prior order was identical in all material respects to GNAPs' agreement with Bell Atlantic, the DTE also dismissed GNAPs' complaint and demand for reciprocal compensation from Bell Atlantic as moot.<sup>16</sup> Thus, regardless of whether we conclude that the GNAPs/Bell Atlantic Massachusetts interconnection dispute could be a preemptable proceeding within the meaning of section 252(e)(5), we are confronted with a situation in which GNAPs has requested that this Commission assume jurisdiction over an already-completed state proceeding. The Massachusetts DTE's recent action has rendered moot the need for Commission preemption of the GNAPs/Bell Atlantic dispute.<sup>17</sup> Since the release of the Massachusetts DTE's February 25, 2000 order, there is no longer a pending GNAPs/Bell Atlantic complaint proceeding before the DTE and no "responsibility" left for the Commission to assume, and, therefore, we need not determine whether the Commission could have a duty to assume jurisdiction over this type of proceeding if it determined that the state commission had "failed to act."

8. Moreover, as the Commission found when resolving a prior GNAPs petition for preemption pursuant to section 252(e)(5), "[p]rinciples of federal-state comity and efficiency lead us to question the merit of assuming jurisdiction over the completed state proceeding under the circumstances presented in this instance."<sup>18</sup> As in that case, the circumstances presented by GNAPs' present Petition do not warrant preemption of the state's jurisdiction. Rather, we heed the Commission's recognition of "the practical efficiency of acknowledging the [Massachusetts DTE's] recent resolution of this proceeding."<sup>19</sup> We therefore conclude that Commission assumption of jurisdiction over the already-completed Massachusetts GNAPs/Bell Atlantic interconnection dispute is unwarranted in these circumstances and, accordingly, deny GNAPs' Petition.

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<sup>15</sup> *In re MCI WorldCom Technologies, Inc. and New England Telephone and Telegraph Company d/b/a/ Bell Atlantic-Massachusetts*, DTE 97-116-D (Mass. DTE Feb. 25, 2000).

<sup>16</sup> *Id.* at 20-21.

<sup>17</sup> See *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, Memorandum Opinion and Order, 14 FCC Rcd 12530, ¶ 17 (1999).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Furthermore, as the Commission found in the August 1999 GNAPs' Order, section 252(e)(5) also suggests that Commission preemption should be avoided in the case of a completed state proceeding. *Id.* at ¶ 18. The Commission concluded that the provision of the statute directing the Commission to assume jurisdiction within 90 days after being notified of the state's failure to act could be interpreted to place the state on notice that unless it completes the proceeding within those 90 days, the Commission would preempt the state's authority. *Id.*

9. We also reject GNAPs' recent arguments that the DTE, by dismissing GNAPs' complaint as moot, did not fulfill its responsibilities under section 252(e)(5) because it did not decide whether compensation for ISP-bound calls is due under the specific interconnection agreements at issue, include that of GNAPs.<sup>20</sup> As we concluded in a prior order under section 252(e)(5), however, "section 51.801 of the Commission's rules does not focus on the validity of state commission decisions."<sup>21</sup> We therefore do not see a basis for examining the underlying reasoning of the Massachusetts DTE in determining that GNAPs' complaint is moot.<sup>22</sup> In the circumstances presented by this Petition, we cannot conclude that the DTE has "failed to act" under the Commission's rules implementing section 252(e)(5).

10. Finally, in denying the present Petition, we do not reach GNAPs' request that we direct the Massachusetts DTE to waive its Eleventh Amendment rights. It is the federal court that would be required to determine its jurisdiction if and when it were faced with a state's assertion of Eleventh Amendment immunity during review of a state commission determination under section 252.

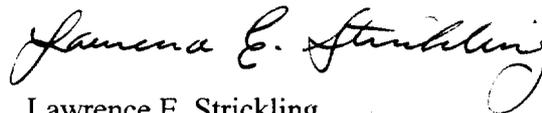
### III. CONCLUSION

11. For the foregoing reasons, we deny GNAPs' Petition for Commission preemption of jurisdiction of GNAPs' complaint against Bell Atlantic in Massachusetts.

### IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and section 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. § 51.801(b), the Petition for Commission preemption of jurisdiction filed by Global NAPs, Inc. on December 9, 1999 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Lawrence E. Strickling  
Chief  
Common Carrier Bureau

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<sup>20</sup> See Letter from Christopher Savage, Esq., counsel for Global NAPs, Inc. to Magalie Roman Salas, Secretary, FCC, E-99-22 and CC 99-354 (filed Feb. 29, 2000) at 2.

<sup>21</sup> *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, Memorandum Opinion and Order, ¶ 18 (rel. Aug. 5, 1999).

<sup>22</sup> Indeed, GNAPs may appeal the DTE's ruling. MCI WorldCom, Inc., the named party in the underlying proceeding, in fact, filed a Petition for Appeal with the Massachusetts Supreme Judicial Court on March 2, 2000. See *MCI WorldCom, Inc. v. Commonwealth of Massachusetts Department of Telecommunications and Energy*, Petition for Appeal Pursuant to G.L. c. 25 § 5 (filed Mar. 2, 2000).