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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

CC Docket No. 99-354

**OPPOSITION OF BELL ATLANTIC TO APPLICATION FOR REVIEW<sup>1</sup>**

Global NAPs, Inc.'s ("GNAPs'") application for review should be denied, because there is no valid reason to reverse the Common Carrier Bureau's order declining to preempt the Massachusetts Department of Telecommunications and Energy ("DTE"). Contrary to GNAPs' claim, the DTE has issued a final *substantive* ruling on its complaint. Under the Act, review of that state commission order lies only with a federal district court, not this Commission. In addition, despite GNAPs' inflated view of the importance of its petition, its request does not present novel issues of law or policy and is well within the Bureau's delegated authority.

**ARGUMENT**

The Bureau Order properly found that the DTE issued a final ruling on the complaint that GNAPs filed (in April of 1999) against Bell Atlantic by dismissing it as moot in light of its substantive finding on identical issues in a related case. In fact, in that related case, the DTE addressed on two separate occasions the substantive issues raised by GNAPs. The first was in

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<sup>1</sup> This filing is being made on behalf of Bell Atlantic-Massachusetts, Inc. ("Bell Atlantic").

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May of 1999, just a month after GNAPs filed its complaint, when it found that “[r]eciprocal compensation need not be paid for terminating ISP-bound traffic.”<sup>2</sup> And in the second order, when it reaffirmed the earlier ruling, it also expressly rejected GNAPs’ complaint.<sup>3</sup> In short, the substantive issue underlying GNAPs’ complaint was decided shortly after GNAPs filed that complaint and was confirmed in the later order denying reconsideration.

GNAPs participated actively in the underlying DTE proceedings and its comments are cited frequently in both of the DTE orders. Therefore, GNAPs had a full opportunity to address the very issues that it raised separately in its complaint. Instead of going through the wasted effort of repeating the same analysis in denying on GNAPs’ separate complaint, the DTE simply recognized that the issues were identical. Therefore, the DTE has issued a final substantive ruling on GNAPs’ complaint and has not “failed to act,” as GNAPs claims.

Section 252 of the Act provides that review of state orders issued under that section lies with the federal district courts, not this Commission. *See* 47 U.S.C. § 252(e)(6) (“In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court”). And here GNAPs’ complaint was brought under section 252, seeking an interpretation of a provision of GNAPs’ interconnection agreement with Bell Atlantic. Therefore, the dismissal of that complaint is a state order issued under section 252 and, as a result, GNAPs’ remedy, if it wants review of the

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

<sup>3</sup> *MCI WorldCom Technologies, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts*, D.T.E. 97-116-D (Mass. D.T.E., rel. Feb. 25, 2000).

DTE's orders, is with the courts, not this Commission.<sup>4</sup> See *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n Texas*, 2000 U.S. App. LEXIS 5642 at \*10 (5<sup>th</sup> Cir. rel. March 30, 2000) (“[W]e are satisfied that the Act’s grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved”).

GNAPs’ claim that the Commission should have reviewed the merits of the DTE’s decision when deciding not to preempt is simply wrong. As pointed out above, under the Act review of state section 252 decisions is before federal district court, not the Commission. Merits review of a final state section 252 order by the Commission would therefore be inconsistent with the statute.

GNAPs cites only a single case to support its claim that the Commission has previously examined the merits of a state section 252 determination. But that case has no bearing here. See GNAPs at 8-10, citing *Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 FCC Rcd 15594 (1997) (“*MCI Order*”). There, the Commission limited its substantive examination to the narrow question of whether the state commission had actually “failed to act” on certain of the issues and whether those issues were, therefore, ripe for preemption. See *MCI Order* at ¶32. Upon reviewing the record, it found that the state commission had not “failed to act” on those issues within the meaning of section 252(e)(5), because, as the state commission had found, MCI had not fully presented the issues below. *Id.* at ¶ 36. The Commission did not examine whether the state commission’s substantive ruling was proper.

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<sup>4</sup> In fact, based on its own conduct, it appears that GNAPs agrees. It has appealed the DTE’s order to federal district court (as well as to state court).

Nor is there any basis in the statute or the Commission's rules that justifies GNAPs' call for a *de novo* Commission investigation into its complaint. Instead, under the Act, authority to adjudicate section 252 disputes lies with the states (a fact that GNAPs does not deny). And where, as here, the state commission has ruled on the merits, the federal district court, not this Commission, has review authority. As the Commission found in denying another preemption request, "we do not see a basis under our rules for examining the underlying reasoning of these state commissions' decisions." *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission*, 13 FCC Rcd 1755, ¶ 36 (1997) ("*Low Tech Order*").

To the contrary, where a party has litigated and lost an issue before the appropriate state commission, as GNAPs has here, it is affirmatively barred from relitigating that issue under the doctrine of claim preclusion. Indeed, the Commission itself has recently had occasion to address the circumstances under which a party is precluded from relitigating issues, all of which are abundantly satisfied here, when it applied the doctrine of claim preclusion in dismissing with prejudice a complaint that had already been fully adjudicated elsewhere. *Comsat Corporation v. IDB Mobile Communications, Inc.*, File No. E-99-08, DA 00-1005, ¶¶ 13-14 (rel. May 8, 2000). The simple fact is that GNAPs litigated its spurious claims in the appropriate forum and lost. It cannot now start over here.

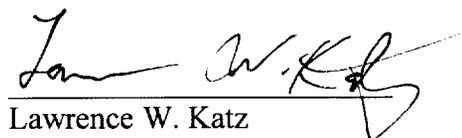
There is also no support for GNAPs' claim that the order exceeded the scope of the Bureau's delegated authority because its petition presented "novel questions of fact, law or policy." GNAPs at 15, quoting 47 C.F.R. § 0.291. Even if GNAPs would like the Commission to believe that its petition is somehow special, the issues are not new, as the *MCI* and *Low Tech Orders* (both of which GNAPs cites) demonstrate. Even GNAPs' own actions belie its claim

that this petition is novel – this was GNAPs’ fifth preemption petition to this Commission claiming that state commissions had failed to act on reciprocal compensation issues, and the Commission has denied all of them (except for one that GNAPs withdrew).

Nor is there any basis for GNAPs’ claim that the Commission cannot lawfully delegate to the Bureau authority to rule on preemption petitions. GNAPs at 15. The Act gives the Commission specific authority to “delegate *any of its functions* ... to ... an individual employee.” 47 U.S.C. 155(c)(1) (emphasis added). Section 252 matters are not among the limited number of listed exceptions to that delegation authority. Here, the Chief, Common Carrier Bureau lawfully acted on the authority that the Commission had delegated to him under section 0.291 of the rules and ruled within the 90-day window specified in the Act.

Accordingly, GNAPs’ Application for Review should be denied.

Respectfully submitted,

  
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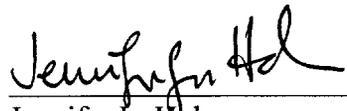
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May 10, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2000, copies of the foregoing "Opposition to Application for Review" were sent by first class mail, postage prepaid, to the parties on the attached list.

  
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Jennifer L. Hoh

\* Via hand delivery.

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