

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

In the Matter of
Cox Virginia Telecom, Inc.
Petition for Preemption of Jurisdiction of the
Virginia State Corporation Commission
Pursuant to Section 252(e)(5) of the
Telecommunications Act of 1996
CC Docket No. 00-126

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MEMORANDUM OPINION AND ORDER

Adopted: September 14, 2000

Released: September 18, 2000

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. This Memorandum Opinion and Order addresses the petition of Cox Virginia Telecom, Inc. (Cox) for preemption of the jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to a dispute concerning the interpretation and enforcement of its interconnection agreement with GTE South, Incorporated (GTE). Specifically, Cox seeks preemption of the jurisdiction of the Virginia Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (the Act). For the reasons set forth below, we grant Cox's petition.

2. Section 252(e)(5) requires the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252. Section 252 of the Act sets forth the procedures by which

1 Petition of Cox Virginia Telecom, Inc. Pursuant to Section 252(e)(5) of the Communications Act, CC Docket No. 00-126 (filed June 30, 2000) (Petition); see Pleading Cycle Established for Comments on Cox Virginia Telecom, Inc.'s Petition for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with GTE South Incorporated, CC Docket No. 00-126, Public Notice, DA 00-1552 (rel. July, 12 2000) (July 12th Public Notice). The Verizon Companies (GTE and Bell Atlantic) filed comments. Although we recognize that GTE has merged with Bell Atlantic and is now operating as "Verizon," see order, we will continue to refer to the parties to the interconnection dispute as Cox and GTE as they were the original parties to the agreement. Cox filed a reply.

2 47 U.S.C. § 252(e)(5). Section 252 was added to the Communications Act of 1934 by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Sta. 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.

3 47 U.S.C. § 252(e)(5).

telecommunications carriers may request and obtain interconnection, services, or unbundled network elements from an incumbent local exchange carrier (LEC).<sup>4</sup>

3. Cox filed a petition with the Virginia Commission on March 19, 1999, seeking enforcement of its interconnection agreement with GTE and requesting that GTE be required to pay reciprocal compensation to Cox for delivering GTE's local traffic to Internet Service Providers (ISPs) served by Cox.<sup>5</sup> On January 24, 2000, the Virginia Commission issued a final order declining jurisdiction over Cox's petition with respect to GTE by stating, "we find we should take no action."<sup>6</sup> In its decision, the Virginia Commission encouraged the parties to seek relief from this Commission.<sup>7</sup> Cox filed the present petition in June 2000, requesting that the Commission preempt the jurisdiction of the Virginia Commission over the Cox/GTE contract dispute.

## II. DISCUSSION

4. We grant Cox's petition to assume the jurisdiction of the Virginia Commission under section 252(e)(5). Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission "fails to act to carry out its responsibility under [section 252]."<sup>8</sup> The facts presented by this case are identical to those in the Starpower case.<sup>9</sup> Indeed, the Virginia Commission issued one decision addressing both the Starpower and Cox disputes with GTE, and that decision declining jurisdiction applied equally to

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<sup>4</sup> See generally 47 U.S.C. § 252.

<sup>5</sup> *Petition of Cox Virginia Telecom, Inc. V. GTE South, Inc., For Enforcement of Interconnection Agreement For Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers*, Case No. PUC99-0046, at 1.

<sup>6</sup> The Virginia Commission stated that this Commission's "failure to act on either inter-carrier compensation or separations reform for ISP-traffic . . . has created great regulatory uncertainty" and that, in the absence of any Commission rules on inter-carrier compensation, "any interpretation of the instant agreements we might reach may well be inconsistent with the FCC's final order in its rulemaking." *Petition of Starpower Communications, LLC For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc.*, Case No. PUC990023, and *Petition of Cox Virginia Telecom, Incorporated*, Case No. PUC990046, Final Order (Jan. 24, 2000) (*Cox/GTE Decision*) at 7. The Virginia Commission was referring to the Commission's outstanding Notice of Proposed Rulemaking examining inter-carrier compensation for ISP-bound traffic. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (*Reciprocal Compensation Order*), vacated and remanded, *Bell Atlantic Telephone Co. v. Federal Communications Comm'n*, 206 F.3d 1 (D.C. Cir. 2000).

<sup>7</sup> *Cox/GTE Decision* at 7.

<sup>8</sup> 47 U.S.C. § 252(e)(5).

<sup>9</sup> *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, FCC 00-216 (rel. June 14, 2000).

both cases.<sup>10</sup> Accordingly, based upon the same reasoning that the Commission applied in the Starpower Order, we will preempt the Virginia Commission in the Cox matter.

5. We reject the arguments of Verizon that the mere issuance of the Virginia Commission's final order in the Cox and Starpower proceedings was sufficient to fulfill its responsibility under section 252(e)(5).<sup>11</sup> Rather, as the Commission has found in other orders interpreting section 252(e)(5), we must evaluate whether a state commission has fulfilled its responsibility under section 252 based on the particulars of each case. For example, the Commission has found that a state commission has carried out "its responsibility [under section 252]" when it resolves the merits of a section 252 proceeding or dismisses such a proceeding on jurisdictional or procedural grounds.<sup>12</sup> The Virginia Commission did not dismiss Cox's petition because of a jurisdictional or procedural defect, but rather expressly declined to resolve the merits of the case. Furthermore, we disagree with Verizon that Cox's proper remedy was to file an appeal of the Virginia Commission's order in federal district court. Rather, Cox properly filed the present petition with this Commission under section 252(e)(5).

6. Cox may now file with the Commission for resolution of the interconnection disputes that were the subject of the Virginia Commission proceedings addressed herein.<sup>13</sup> Upon receiving the appropriate filings from Cox, the Commission will proceed to resolve only the question that the Virginia Commission would have resolved had it chosen to act: whether the existing interconnection agreement between Cox and GTE requires GTE to pay compensation to Cox for the delivery of ISP-bound traffic. In resolving that question, the Commission will apply, *inter alia*, the principles that the Commission suggested state commissions apply to such disputes in the *Inter-Carrier Compensation Declaratory Ruling*.<sup>14</sup> In addition, to expedite resolution of this case, we strongly encourage the parties to contact the Market Disputes Resolution Division of the Enforcement Bureau before filing to discuss how the issue might best be handled.

### III. CONCLUSION

7. For the foregoing reasons, we grant Cox's Petition for Commission preemption of

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<sup>10</sup> As the Commission concluded in the Starpower case, the Virginia Commission's failure to address the Cox and Starpower petitions constitutes "failure to act" under section 252(e)(5). Petition of Starpower Communications, LLC Pursuant to Section 252(e)(5) of the Communications Act, CC Docket No. 00-52 (filed Mar. 16, 2000).

<sup>11</sup> Comments of Bell Atlantic and GTE at 2, attachment to Verizon comments.

<sup>12</sup> See *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, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1758-59, paras. 5, 33 (1997), *recons. denied*, 14 FCC Rcd 7024 (1999).

<sup>13</sup> Any filings made by Cox must meet the requirements of the Commission's rules governing the filing of formal complaints. See 47 CFR § 1.720 *et seq.*

<sup>14</sup> *Reciprocal Compensation Order*, 14 FCC Rcd at 3703-6, paras. 24 and 27.

jurisdiction over its complaint against GTE and invite Cox to file for resolution of its dispute with GTE under 47 C.F.R. § 1.720 *et seq.*

#### IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and sections 0.291 and 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. § 0.291 and § 51.801(b), the Petition for Commission preemption of jurisdiction filed by Starpower Communications, LLC on March 16, 2000, IS GRANTED.

Dorothy Attwood  
Chief, Common Carrier Bureau

#### I. COMMENTS OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

*Re: Cox Virginia Telecom, Inc., Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-126*

I did not agree with the Commission's resolution of the precedent on which the Bureau relies here.<sup>15</sup> In my view, and as I explained in more detail in my dissent from the Commission's *Starpower Order*, it is not clear that the Virginia State Corporation Commission has failed to carry out its responsibilities within the meaning of 47 U.S.C. § 252(e)(5). I therefore disagree with the way in which the Bureau has resolved this matter.

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<sup>15</sup> See Dissenting Statement of Commissioner Harold Furchtgott-Roth, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, CC Docket No. 00-52 (SUPPLY DATE).