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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
US LEC of Virginia LLC	)	
	)	CC Docket No. 01-268
Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 253(e)(5) of the Telecommunications Act of 1996	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 2002 **Released: January 22, 2002**

By the Common Carrier Bureau

I. INTRODUCTION AND BACKGROUND

1. This *Memorandum Opinion and Order* addresses the petition of US LEC of Virginia LLC (US LEC) 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 Verizon-Virginia Inc. (Verizon).[1] Specifically, US LEC 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).[2] For the reasons set forth below, we grant US LEC'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.[3] 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.[4]

3. US LEC filed a petition with the Virginia Commission on or around September 13, 2001, seeking a declaratory ruling directing Verizon to pay reciprocal compensation to US

[1] Petition of US LEC of Virginia LLC Pursuant to Section 252(e)(5) of the Communications Act, CC Docket No. 01-268, Supplemental Submission in Further Support of Petition of US LEC of Virginia LLC Pursuant to Section 252(e)(5) of the Communications Act, CC Docket No. 01-268 (filed Nov. 6, 2001) (collectively, Petition).

[2] 47 U.S.C. § 252(e)(5). Section 252 was added to the Communications Act of 1934 by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* Hereafter, all citations to the Telecommunications Act of 1996 will be in accordance with its codification in Title 47 of the United States Code.

[3] 47 U.S.C. § 252(e)(5).

[4] *See generally* 47 U.S.C. § 252.

LEC for transporting and terminating Verizon's traffic to ISPs served by US LEC.[5] On September 25, 2001, US LEC filed with the Commission a petition pursuant to Section 252(e)(5) of the Act.

4. On October 24, 2001, the Virginia Commission issued a final order declining jurisdiction over US LEC's petition.[6] The Virginia Commission dismissed the petition without prejudice and instead encouraged the parties to seek interpretation of their agreement from this Commission.[7] On November 6, 2001, US LEC filed with the Commission a supplemental submission in support of its petition, providing a copy of the Virginia Commission's decision. On November 8, 2001, the Commission issued a public notice requesting comment on US LEC's petition.[8] No parties filed comments.

II. DISCUSSION

5. We conclude that the circumstances presented by US LEC's petition require us to assume the jurisdiction of the Virginia Commission. The Commission has determined that a state's "failure to act" with respect to a dispute arising from an interconnection agreement may trigger the Commission's obligation to intervene under section 252(e)(5). The Commission's rules address the context of a state's "failure to act" with respect to a state's mediation and arbitration responsibilities pursuant to section 252.[9] In the *Starpower Preemption Order,*[10] the Commission further determined that a dispute arising from an interconnection agreement, seeking interpretation and enforcement of the agreement, also falls within a state's responsibilities under section 252.[11] As in the Starpower case, US LEC seeks resolution of a

[5] *Petition of US LEC of Virginia, LLC, For Declaratory Judgment Interpreting and Enforcing Interconnection Agreement with Verizon Virginia, Inc.*, Case No. PUC010194, Final Order (October 24, 2001) (*US LEC/Verizon Decision*) at 1.

[6] *US LEC/Verizon Decision* at 4.

[7] *US LEC/Verizon Decision* at 5. The Virginia Commission noted that this Commission "has still not reached determinations on the various outstanding issues concerning its treatment of ISP-bound traffic", and expressed concern "regarding the possibility of conflicting results by [the Virginia] Commission and the FCC." *US LEC/Verizon Decision* at 4.

[8] *See Pleading Cycle Established for Comments on US LEC Petition for Preemption Pursuant to 47 U.S.C. §252(e)(5),* Public Notice, CC Docket No. 01-268, DA 01-2514 (rel. Nov. 8, 2001).

[9] *See* 47 C.F.R. §51.801(b).

[10] *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, 15 FCC Rcd 11277 (2000), *(Starpower Preemption Order).*

[11] *Starpower Preemption Order,* 15 FCC Rcd at 11278-80, paras. 5-6. Federal appeals courts have divided on the issue of whether sovereign immunity precludes federal court review of state commission decisions interpreting and enforcing previously-approved interconnection agreements; in examining this question, a majority of circuits has recognized that states have authority pursuant to section 252 to resolve disputes arising out of interconnection agreements. *See MCI Telecommunication Corporation. v. Bell Atlantic – Pennsylvania et al.,* 271 F.3d 491 (3rd Cir. 2001); *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas,* 208 F.3d 475 (5th Cir. 2000); *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.,* 235 F.3d 493 (10th Cir. 2000); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.,* 179 F.3d 566 (7th Cir. 1999), *cert. granted,* 121 S.Ct. 1224 (U.S. March 5, 2001). *But see BellSouth Telecommunications, Inc., et al. v. MCIMetroAccess Transmission Services, Inc. et al.,* Nos. 00-12809, 00-12810, 2002 WL 27099 (11th Cir. January 10, 2002) (holding that states lack authority under federal statute to resolve disputes arising from interconnection agreements); *Bell Atlantic Maryland v. MCI WorldCom,* 240 F.3d 279 (4th Cir. 2001), *cert. granted sub nom.*

(continued....)

dispute arising from an interconnection agreement approved by the state commission.

6. The second step in the Commission's analysis in the *Starpower Preemption Order* was to determine whether the state commission had "failed to act" within the meaning of section 252(e)(5). Following the Commission's guidance in the present matter, we find that the Virginia Commission "failed to act" with regard to US LEC's petition. The Virginia Commission expressly declined to resolve the petition before it and interpret and enforce US LEC's interconnection agreement with Verizon, nor did it dismiss US LEC's petition because of any procedural or jurisdictional defect. Instead, the Virginia Commission stated, "the most practical action is for this Commission to decline jurisdiction and allow the parties to present their case to the FCC."[12] Therefore, we conclude that the Virginia Commission "failed to act to carry out its responsibility" under section 252. Accordingly, the Act compels us to assume the jurisdiction of the Virginia Commission and resolve the outstanding interconnection dispute.

7. US LEC may now file with the Commission for resolution of the interconnection dispute that was the subject of the Virginia Commission proceedings addressed herein.[13] Upon receiving the appropriate filings from US LEC, the Commission will proceed to resolve only the question that the Virginia Commission would have resolved had it chosen to act: "Specifically, US LEC seeks interpretation and enforcement of the Agreement and its terms relating to the payment of reciprocal compensation for their transport and termination of Verizon Virginia's traffic to Internet Service Providers ("ISPs")."[14] 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. We also reiterate the finding in the *Local Competition Order* that the Commission retains exclusive jurisdiction over any proceeding or matter over which it assumes responsibility under section 252(e)(5).[15] Similarly, any findings made by the Commission after it assumes responsibility over a proceeding and any judicial review of such findings shall be the exclusive remedies available to the parties.[16]

III. CONCLUSION

8. For the foregoing reasons, we grant US LEC's Petition for Commission preemption of jurisdiction over its complaint against Verizon and invite US LEC to file for resolution of its dispute with Verizon under 47 C.F.R. § 1.720 *et seq.*

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Verizon Maryland Inc. v. Public Service Commission of Maryland et al. and United States v. Public Service Commission of Maryland et al., 121 S.Ct. 2548 (U.S. June 25, 2001) (holding that states have authority under state law to address disputes arising from interconnection agreements). The Supreme Court is currently considering the sovereign immunity questions presented by the 7th and 4th Circuit cases.

[12] *US LEC/Verizon Decision* at 4.

[13] Any filing US LEC makes must meet the requirements of the Commission's rules governing the filing of formal complaints. *See* 47 C.F.R. § 1.720 *et seq.*

[14] *US LEC/Verizon Decision* at 1-2.

[15] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16129, para. 1289 (1996) *(Local Competition Order).*

[16] 47 U.S.C. § 252(e)(6).

IV. ORDERING CLAUSE

9. 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 US LEC of Virginia on November 6, 2001, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Dorothy T. Attwood

Dorothy T. Attwood,
Chief, Common Carrier Bureau