

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

MAR 21 2002  
FCC-MAR 2002

In the Matter of )  
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Petition of KMC Telecom of Virginia, Inc. )  
KMC Telecom IV of Virginia, Inc. )  
KMC Telecom V of Virginia, Inc. )  
 )  
Pursuant to Section 252(e)(5) of the )  
Communications Act for Preemption of the )  
Jurisdiction of the Virginia State Corporation )  
Commission Regarding Interconnection )  
Disputes with Bell Atlantic-Virginia, Inc. )

CC Docket No. 02-5

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 18, 2002**

**Released: March 19, 2002**

By the Chief, Common Carrier Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. This *Memorandum Opinion and Order* addresses the petition of KMC Telecom of Virginia, Inc., KMC Telecom IV of Virginia, Inc., and KMC Telecom V of Virginia, Inc. (collectively KMC) 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 agreements with Verizon-Virginia Inc. (f/k/a Bell Atlantic-Virginia, Inc.) (Verizon).<sup>1</sup> Specifically, KMC 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).<sup>2</sup> For the reasons set forth below, we grant KMC'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.<sup>3</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.<sup>4</sup>

<sup>1</sup> Petition of KMC Telecom of Virginia, Inc., KMC Telecom IV of Virginia, Inc., and KMC Telecom V of Virginia, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Bell Atlantic-Virginia, Inc., CC Docket No. 02-5, (filed Jan. 10, 2002) (Petition).

<sup>2</sup> 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.

<sup>3</sup> 47 U.S.C. § 252(e)(5).

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

3. KMC filed a petition with the Virginia Commission on November 9, 2001, seeking declaratory judgment directing Verizon to pay reciprocal compensation to KMC for transporting and terminating Verizon-originated traffic, including traffic to ISPs served by KMC.<sup>5</sup> On December 20, 2001, the Virginia Commission issued a final order declining jurisdiction over KMC's petition.<sup>6</sup> The Virginia Commission dismissed the petition without prejudice and instead encouraged the parties to seek interpretation of their agreement from this Commission.<sup>7</sup>

4. On January 10, 2002, KMC filed with the Commission a petition pursuant to Section 252(e)(5) of the Act. On January 18, 2002, the Commission issued a public notice requesting comment on KMC's petition.<sup>8</sup> No parties filed comments.

## II. DISCUSSION

5. We conclude that the circumstances presented by KMC's petition require us to assume the jurisdiction of the Virginia Commission.<sup>9</sup> 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.<sup>10</sup> In the *Starpower Preemption Order*,<sup>11</sup> 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.<sup>12</sup> As in the *Starpower* case, KMC seeks resolution of a

<sup>5</sup> *Petition of KMC Telecom of Virginia, Inc., KMC Telecom IV of Virginia, Inc., and KMC Telecom V of Virginia, Inc. For Declaratory Judgment Interpreting and Enforcing Interconnection Agreements with Verizon Virginia, Inc.*, Case No. PUC010239, Final Order (December 20, 2001) (*KMC/Verizon Decision*) at 1.

<sup>6</sup> *KMC/Verizon Decision* at 4.

<sup>7</sup> *KMC/Verizon Decision* at 4-5. 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." *KMC/Verizon Decision* at 3-4.

<sup>8</sup> *See Pleading Cycle Established for Comments on KMC Telecom Petition for Preemption Pursuant to Section §252(E)(5)*, Public Notice, CC Docket No. 02-5, DA 02-165 (rel. Jan. 18, 2002).

<sup>9</sup> The circumstances of this case are virtually identical to those presented in another recent case, in which we preempted the Virginia Commission's authority. *See US LEC of Virginia, 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. 01-268, DA 02-97 (rel. Jan. 22, 2002.)

<sup>10</sup> *See* 47 C.F.R. §51.801(b).

<sup>11</sup> *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*).

<sup>12</sup> *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 (3<sup>rd</sup> Cir. 2001); *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475 (5<sup>th</sup> Cir. 2000); *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493 (10<sup>th</sup> Cir.

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dispute arising from interconnection agreements 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 KMC's petition. The Virginia Commission expressly declined to resolve KMC's petition. The Virginia Commission did not interpret or enforce KMC's interconnection agreements with Verizon, nor did it dismiss KMC's petition because of any procedural or jurisdictional defect. Rather, 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."<sup>13</sup> 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. KMC may now file a complaint with the Commission for resolution of the interconnection dispute that was the subject of the Virginia Commission proceedings addressed herein. In preparing its complaint, KMC must support any factual assertions with relevant documentation, and any legal arguments with appropriate judicial, Commission, or statutory authority. KMC should consult the Commission's rules governing the filing of formal complaints, which enumerate specific requirements that complaints must fulfill.<sup>14</sup> Moreover, we strongly encourage the parties to contact the Market Disputes Resolution Division of the Enforcement Bureau before filing to discuss conduct of the complaint process. Upon receiving the appropriate filings from KMC, the Commission will proceed to resolve only the question that the Virginia Commission would have resolved had it chosen to act: "Specifically, KMC seeks interpretation and enforcement of the Agreements and their terms relating to the payment of reciprocal compensation for their transport and termination of Verizon Virginia's traffic to Internet Service Providers ("ISPs")."<sup>15</sup> We 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).<sup>16</sup> 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.<sup>17</sup>

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2000); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7<sup>th</sup> Cir. 1999), cert. granted, 121 S.Ct. 1224 (U.S. March 5, 2001). But see *BellSouth Telecommunications, Inc., et al. v. MCI MetroAccess Transmission Services, Inc. et al.*, Nos. 00-12809, 00-12810, 2002 WL 27099 (11<sup>th</sup> 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 (4<sup>th</sup> Cir. 2001), cert. granted sub nom. *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 7<sup>th</sup> and 4<sup>th</sup> Circuit cases.

<sup>13</sup> *KMC/Verizon Decision* at 4.

<sup>14</sup> See 47 C.F.R. §§ 1.720-1.736.

<sup>15</sup> *KMC/Verizon Decision* at 1.

<sup>16</sup> *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, 15129, para. 1289 (1996) (*Local Competition Order*).

<sup>17</sup> 47 U.S.C. § 252(e)(6).

**III. CONCLUSION**

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

**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 KMC Telecom of Virginia, Inc., KMC Telecom IV of Virginia, Inc., and KMC Telecom V of Virginia, Inc., on January 10, 2002, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION



Dorothy T. Attwood  
Chief, Common Carrier Bureau