

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

In the Matter of)	
)	
Petition of Northland Networks, Ltd. for)	WC Docket No. 03-242
Preemption of the Jurisdiction of the)	
New York Public Service Commission)	
Pursuant to Section 252(e)(5) of the)	
Communications Act of 1934, as Amended)	

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 2004

Released: February 11, 2004

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order addresses the petition of Northland Networks, Ltd. (Northland) for preemption of the jurisdiction of the New York State Public Service Commission (New York Commission) with respect to a dispute concerning the interpretation and enforcement of interconnection agreements between Northland and Verizon New York Inc. (Verizon).¹ Northland seeks preemption of the jurisdiction of the New York Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (the Act).²

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

¹ Petition of Northland Networks, Ltd. Pursuant to § 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the New York State Public Service Commission Regarding Interpretation and Enforcement of an Interconnection Agreement (filed Nov. 14, 2003) (Petition); *see Pleading Cycle Established for Comments on Petition of Northland Networks, Ltd. for Preemption of the Jurisdiction of the New York State Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act*, WC Docket No. 03-242, Public Notice, DA 03-3766 (rel. Nov. 24, 2003) (Public Notice).

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 (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).

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

3. Northland alleges that the New York Commission's failure to resolve the interconnection dispute arising out of Northland's interconnection agreement with Verizon constitutes a "failure to act" triggering this Commission's section 252(e)(5) duty to preempt the jurisdiction of the New York Commission. For the reasons set forth below, we grant the petition.

II. BACKGROUND

4. Northland, a competitive LEC in New York, is engaged in a contractual dispute with Verizon, an incumbent LEC in New York, over the treatment of reciprocal compensation for traffic bound for Internet service providers (ISPs) (ISP-bound traffic) under the terms of their interconnection agreement, and in light of this Commission's April 2001 *ISP Remand Order*.⁵ Specifically, Northland seeks resolution of the following four issues: (1) For the period beginning on June 14, 2001, did the interconnection agreement between Verizon and Northland automatically incorporate the intercarrier compensation regime of the *ISP Remand Order* as of the effective date of that order without requiring further action by the parties? (2) Did the *ISP Remand Order* constitute a change of law under paragraph 34.0 of the interconnection agreement that triggered an obligation to amend the agreement in order to incorporate the intercarrier compensation regime of the *ISP Remand Order*? (3) If it did, would that regime become effective as of June 14, 2001, on the date that the parties executed the amendment, or some other date? (4) Because the parties have not executed an amendment to their interconnection agreement and Verizon has not pursued its effort to require Northland to execute such an amendment, has Northland been entitled to receive the reciprocal compensation rate set forth in Verizon's PSC 914 Tariff (which is incorporated by reference into the interconnection agreement)?⁶

5. Northland is a corporation with principal offices in Utica, New York, and operates as a facilities-based common carrier providing residential and business local exchange service.⁷ On April 1, 1999, pursuant to section 252(i) of the Act, Northland opted into a pre-existing interconnection agreement between Verizon and ACC National Telecom Corp.⁸

6. On April 29, 2002, Verizon filed a petition with the New York Commission seeking resolution of a contractual dispute with Northland regarding reciprocal compensation for

⁴ See generally 47 U.S.C. § 252.

⁵ See Petition at 2-3; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded sub nom. WorldCom, Inc. v. F.C.C.*, 288 F.3d 429 (D.C. Cir. 2002) (*ISP Remand Order*).

⁶ Petition at 9.

⁷ *Id.* at 1-2.

⁸ *Id.* at 2 and Exhibit 1. See 47 U.S.C. § 252(i).

ISP-bound traffic.⁹ On July 10, 2002, however, Verizon withdrew its petition from the New York Commission based on representations by staff that the New York Commission no longer would resolve contractual disputes between carriers regarding reciprocal compensation for ISP-bound traffic.¹⁰ On August 7, 2002, the New York Department of Public Service, which functions as the New York Commission staff, issued a letter to Verizon stating that “because adequate, alternative forums exist, the Department will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic.”¹¹

7. On November 14, 2003, Northland filed a petition for preemption with this Commission alleging that the New York Commission “failed to act” to resolve the reciprocal compensation dispute between Northland and Verizon.¹² On November 24, 2003, the Commission issued a public notice requesting comments on the petition.¹³ In response, Verizon filed comments, and Northland filed reply comments.¹⁴ Verizon agrees with Northland that preemption is appropriate in this case, but it argues that the fourth issue Northland identifies for resolution by this Commission should not be included.¹⁵ Verizon argues that the fourth issue would be rendered moot upon resolving the first three issues, and furthermore, that Northland drafted the fourth issue in argumentative terms designed to favor Northland.¹⁶ Northland argues that the fourth issue importantly concerns Verizon’s failure to pursue remedies under the interconnection agreement to require an amendment.¹⁷ According to Northland, Verizon’s failure may be critical to this Commission’s determination on whether, and how much, reciprocal compensation is due to Northland.¹⁸

⁹ Specifically, Verizon alleged, among other things, that Northland was obligated to adopt contractual amendments to the interconnection agreements pursuant to the *ISP Remand Order* and that these amendments should be effective retroactive to June 14, 2001. *See* Petition at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.* at Exhibit 6 (Letter of Janet Hand Deixler, Secretary, New York DPS, to Gayton P. Gomez, Esq., Verizon New York, Inc., dated Aug. 7, 2002).

¹² *See* Petition, *supra* note 1. Northland also requests relief on an expedited basis. *See id.*

¹³ *See* Public Notice, *supra* note 1.

¹⁴ Comments of Verizon in WC Docket No. 03-242 (filed Dec. 12, 2003) (Verizon Comments); Reply Comments of Northland Networks, Ltd. in WC Docket No. 03-242 (filed Dec. 19, 2003) (Northland Reply Comments).

¹⁵ Verizon Comments at 1-2. Verizon also objects to Northland’s request for expedited preemption. *Id.* We note that under section 252(e)(5) of the Act, this Commission must act “within 90 days of being notified (or taking notice)” of a state commission’s failure to act. 47 U.S.C. § 252(e)(5). We find that the Act’s requirement for expedited action renders moot the arguments for and against a roughly equivalent treatment here.

¹⁶ Verizon Comments at 2-3.

¹⁷ Northland Reply Comments at 1-2.

¹⁸ *Id.* at 2.

III. DISCUSSION

8. We conclude that the circumstances presented by Northland require us to assume the jurisdiction of the New York Commission. Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state “fails to act to carry out its responsibility under [section 252].”¹⁹ The Commission’s rules address a state’s “failure to act” with respect to its mediation and arbitration responsibilities pursuant to section 252.²⁰ In the *Starpower Preemption Order*, the Commission held that if a carrier chooses to file a complaint with a state commission concerning interpretation and enforcement of an interconnection agreement, the state commission has authority to adjudicate it.²¹ Specifically, the Commission stated: “In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states’ responsibility under section 252. We conclude that it is.”²² In *Starpower*, the Commission granted a petition for section 252(e)(5) preemption because the Virginia Commission declined to assume jurisdiction over a contractual dispute involving reciprocal compensation for ISP-bound traffic.²³

¹⁹ 47 U.S.C. § 252(e)(5).

²⁰ Section 51.801(b) provides: “For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(c) of the Act.” 47 C.F.R. § 51.801(b).

²¹ *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, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11279 para. 6 (2000) (*Starpower Preemption Order*). The Commission has taken a clear position on this issue, and with the exception of the Fourth Circuit, federal courts of appeal that have addressed this issue also have recognized that states have authority pursuant to section 252 to resolve disputes arising out of interconnection agreements. See *BellSouth Telecommunications, Inc., et al. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1274-78 (11th Cir. 2003) (en banc); *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 838 (D.C. Cir. 2002); *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 511 (3rd Cir. 2001), cert. denied, 123 S. Ct. 340 (2002); *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 496-97 (10th Cir. 2000); *Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475, 480 (5th Cir. 2000); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999). But see *Bell Atlantic Maryland v. MCI WorldCom*, 240 F.3d 279 (4th Cir. 2001) (holding that states have authority under state law to address disputes arising from interconnection agreements), vacated on other grounds and remanded sub nom. *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002).

²² See *Starpower Preemption Order*, 15 FCC Rcd at 11279 para. 6; cf. *Core Communications, Inc. v. Verizon Maryland, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962, 7971 para. 22 (2003); *CoreComm Communications, Inc. v. SBC Communications Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7568, 7573-76 paras. 13-19 (2003) (holding that state commissions and this Commission have concurrent jurisdiction to resolve certain interconnection disputes under sections 251(c)(2) and 251(c)(3) of the Act).

²³ See *Starpower Preemption Order*, 15 FCC Rcd at 11280 para. 7; see also *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, Memorandum Opinion and Order, 15 FCC Rcd 17958 (2000).

9. We find that Northland's request for preemption falls squarely within Commission precedent, presents no novel questions of fact, law or policy, and therefore we resolve this joint petition pursuant to our delegated authority.²⁴ Following the Commission's guidance in the *Starpower Preemption Order*, we find that the New York Commission has "failed to act" with regard to the interconnection dispute between Verizon and Northland. As in *Starpower*, the state commission in this case has expressly declined to interpret or enforce the terms of the identical interconnection agreements at issue. Specifically, the August 7, 2002 letter to Verizon unequivocally expresses the New York Commission's intent not to act to resolve interconnection disputes regarding reciprocal compensation for ISP-bound traffic.²⁵ In that letter, the New York Commission states that "because adequate, alternative forums exist, the Department will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic."²⁶

10. We have recently granted preemption pursuant to section 252(e)(5) based on very similar circumstances. On November 26, 2002, the Wireline Competition Bureau, acting on delegated authority, granted a section 252(e)(5) preemption petition filed by MCImetro Access Transmission Services, LLC (MCImetro), finding that the New York Commission had "failed to act" to resolve an interconnection dispute between MCImetro and Verizon regarding the treatment of reciprocal compensation for ISP-bound traffic.²⁷ Similarly, on May 7, 2003, the Wireline Competition Bureau granted another section 252(e)(5) preemption petition jointly filed by MCI WorldCom Communications, Inc. f/k/a MFS Intelenet of New York (MFS), Brooks Fiber Communications of New York, Inc. (Brooks Fiber) and Verizon, finding again that the New York Commission had "failed to act."²⁸ When granting preemption in both proceedings, we relied on the same August 7, 2002 letter cited by Northland here as evidence of the New York Commission's failure to act.²⁹

²⁴ See 47 C.F.R. §§ 0.91, 0.291

²⁵ Petition at 5.

²⁶ *Id.*

²⁷ See *Petition of MCImetro Access Transmission Services LLC Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the New York Public Service Commission Regarding Interpretation and Enforcement of Interconnection Agreement*, CC Docket No. 02-283, Order, 17 FCC Rcd 23953 (2002) (*MCImetro Preemption Order*).

²⁸ See *Joint Petition of MCI WorldCom Communications, Inc., Brooks Fiber Communications of New York, Inc. and Verizon New York Inc. for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, CC Docket No. 03-81, Order, 18 FCC Rcd 9473 (2003) (*MFS/Brooks Fiber/Verizon Preemption Order*).

²⁹ See *MCImetro Preemption Order*, 17 FCC Rcd at 23956-57 para. 9; *MFS/Brooks Fiber/Verizon Preemption Order*, 18 FCC Rcd at 9476-77 para. 9. Although the New York Commission has not filed comments in this proceeding, it is worth noting that in the MCImetro proceeding, the New York DPS explained that MCImetro's petition "arises from New York's decision to refrain from immersing itself in an MCI and Verizon dispute over the reciprocal compensation provisions of their interconnection agreement." *MCImetro Order*, 17 FCC Rcd at 23955 para. 7. The New York DPS also explained that the "NYPSC chose not to review the interconnection dispute because it (continued....)

11. Consistent with Commission and Bureau precedent, we conclude, based on the New York Commission's express intent not to resolve this dispute, that the New York Commission has "failed to act to carry out its responsibility" under section 252. Accordingly, the Act compels us to assume the jurisdiction of the New York Commission and resolve the outstanding interconnection dispute.

12. Verizon and Northland may now file with the Commission for resolution of the interconnection dispute identified in Northland's petition.³⁰ Upon receiving the appropriate filings from Verizon and Northland, the Commission will proceed to resolve the question that the New York Commission would have resolved had it chosen to act.³¹ Specifically, the Commission will resolve the following issue: Under the parties' interconnection agreement, what effect, if any, did the *ISP Remand Order* have on the parties' obligations to pay reciprocal compensation for the delivery of ISP-bound traffic? We leave it to the formal complaint process to determine what sub-issues should be addressed within this framework. We thus decline, at this time, to address Verizon's request that we exclude from consideration the fourth issue identified by Northland.

13. We strongly encourage the parties to contact the Market Disputes Resolution Division of the Enforcement Bureau before filing to discuss how the proceedings before the Commission 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).³² Similarly, these proceedings before the Commission and any judicial review thereof shall be the exclusive remedies available to the parties.³³

IV. CONCLUSION

14. For the foregoing reasons, to the extent described herein we grant Northland's petition for preemption of the New York Commission over the dispute between Verizon and Northland, and invite Verizon and Northland to file for resolution of this dispute under 47 C.F.R. § 1.720 *et seq.*

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involved contract interpretation questions turning on the FCC's use of the term 'reciprocal compensation.'" *Id.* at 23956-57 para. 9.

³⁰ Any filing that Verizon and Northland 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.*

³¹ *See* 47 C.F.R. § 51.801 (providing that the Commission "assume[s] the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter"). *See also* *Starpower Preemption Order*, 15 FCC Rcd at 11281 para. 9.

³² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 16129 para. 1289 (1996) (*Local Competition Order*).

³³ 47 U.S.C. § 252(e)(6).

V. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, 47 U.S.C. § 252, and sections 0.91, 0.291 and 51.801(b) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 51.801(b), the petition for preemption filed by Northland Networks, Ltd. on November 14, 2003 IS GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Maher, Jr.
Chief, Wireline Competition Bureau