

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

In the Matter of)	
)	
Petition of KMC Telecom of Virginia, Inc.,)	
KMC Telecom V of Virginia, Inc., and)	WC Docket No. 05-39
KMC Data LLC 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 Sprint)	

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 2005

Released: April 4, 2005

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION AND BACKGROUND

1. This *Memorandum Opinion and Order* addresses the petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC (collectively, KMC or Petitioners) for preemption of the jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to the arbitration of an interconnection agreement with United Telephone-Southeast, Inc. and Central Telephone Company of Virginia (collectively, Sprint).¹ 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).² For the reasons set forth below, we grant KMC's petition.

2. 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

¹ Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC 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 Sprint, WC Docket No. 05-39 (filed Jan. 4, 2005) (KMC Preemption Petition); *see Pleading Cycle Established for Comments on Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC for Preemption Pursuant to Section 252(e)(5)*, WC Docket No. 05-39, Public Notice, DA 05-278 (rel. Feb. 1, 2005).

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.*

local exchange carrier (LEC).³ Section 252(b) permits a party negotiating an interconnection agreement to petition the relevant state commission to arbitrate any open issues.⁴ 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 252.⁵

3. On June 22, 2004, KMC filed a petition with the Virginia Commission seeking arbitration under the Act and the Virginia Commission’s rules concerning unresolved issues in KMC’s interconnection agreement negotiations with Sprint.⁶ On September 16, 2004, the Virginia Commission issued an Order of Dismissal, declining to arbitrate the issues under the Act so that KMC and Sprint may proceed before this Commission.⁷

4. KMC filed the present Preemption Petition on January 4, 2005, requesting that this Commission preempt the jurisdiction of the Virginia Commission over the arbitration of unresolved issues in KMC’s interconnection agreement negotiations with Sprint.⁸ In comments filed in this proceeding on February 14, 2005, Sprint did not oppose KMC’s petition expressly but suggested that the Commission should hold the matter in abeyance, citing press releases which indicate that KMC intended to exit the competitive local exchange services market.⁹ Sprint argued that absent additional information, this proceeding might be moot because of KMC’s withdrawal from the market. KMC responded that the press release about a pending transaction will only impact the operations of one affiliate and that the other entities that are participating in this proceeding intend to continue acting as competitive LECs in Virginia.¹⁰

³ See generally 47 U.S.C. § 252.

⁴ 47 U.S.C. § 252(b).

⁵ 47 U.S.C. § 252(e)(5). See, e.g., *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 (2000) (*Starpower Preemption Order*).

⁶ *Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC, for Arbitration Pursuant to 47 U.S.C. § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, Case No. PUC-2004-000781 (filed June 22, 2004) (*Virginia Petition*).

⁷ Virginia Commission, *Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC, for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 and 20 VAC 5-41930 of the Commission’s Rules Implementing §§ 251 and 252 of the Telecommunications Act of 1996*, Case No. PUC-2004-00081, Order of Dismissal at 2, 5 (rel. Sept. 16, 2004) (*Order of Dismissal*) (stating that the arbitration proceeding should be deferred to the Federal Communications Commission).

⁸ KMC Preemption Petition at 1.

⁹ Sprint Comments at 1.

¹⁰ KMC Reply Comments at 2.

II. DISCUSSION

5. This petition involves virtually identical issues to those addressed by the Commission in the *WorldCom Preemption Order*,¹¹ and more recently, by the Bureau in the *Cavalier Preemption Order*.¹² 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].”¹³ In this case, the Virginia Commission dismissed KMC’s Virginia Petition outright for the express purpose of enabling the parties to proceed before this Commission. Furthermore, Sprint does not dispute that the Virginia Commission did not carry out its section 252 responsibilities. Accordingly, we grant KMC’s petition on the question of preemption and, pursuant to section 252(e)(5), assume the jurisdiction of the Virginia Commission over the interconnection arbitration proceeding between KMC and Sprint in Virginia.

6. Based upon the same reasoning that the Commission applied in the *WorldCom Preemption Order*, we find that the Virginia Commission failed to carry out its section 252 responsibilities in this case. We therefore preempt the jurisdiction of the Virginia Commission with respect to the interconnection arbitration proceeding between KMC and Sprint in Virginia pursuant to section 252(e)(5). Furthermore, we conclude that the planned departure one of the KMC operating companies does not moot this proceeding. KMC has amply demonstrated that it intends to continue providing such service through at least two other petitioning affiliates and that there is a continued need for arbitration of the interconnection agreement.¹⁴

7. KMC may now petition the Commission for arbitration of the interconnection disputes that were the subject of the Virginia Commission proceeding addressed herein. Prior to filing its Petition for Arbitration, KMC shall contact the Bureau to schedule a joint pre-filing conference.¹⁵ Parties should refer to the procedures established for the Commission’s previous arbitration to determine what they

¹¹ See *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, 16 FCC Rcd 6224 (2001) (*WorldCom Preemption Order*).

¹² *Petition of Cavalier Telephone, LLC 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 Verizon Virginia, Inc. and for Arbitration*, WC Docket No. 02-359, Memorandum Opinion and Order, 18 FCC Rcd 1558 (WCB 2003) (*Cavalier Preemption Order*).

¹³ 47 U.S.C. § 252(e)(5). See also 47 C.F.R. § 51.801(b). The Commission has previously indicated that it will evaluate whether a state commission has fulfilled its responsibility under section 252 based on the particulars of each case. See, e.g., *Starpower Preemption Order*, 15 FCC Rcd at 11280, para. 8; *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).

¹⁴ To the extent that one of the petitioners no longer seeks arbitration, it should appropriately amend its pleadings.

¹⁵ For purposes of the initial contact, the parties shall contact Jeremy Miller, Wireline Competition Bureau, at 202-418-1580.

should be prepared to discuss at the pre-filing conference.¹⁶ Once the pre-filing conference has been held, the Chief, Wireline Competition Bureau, will issue a public notice establishing procedures and a pleading schedule specific to the upcoming KMC/Sprint arbitration proceeding.¹⁷ Parties shall also be prepared to file the Petition for Arbitration no more than 30 days after the pre-filing conference.

8. Finally, we reiterate the Commission's 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).¹⁸ 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.¹⁹

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and sections 0.91, 0.291 and 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. §§ 0.91, 0.291 and 51.801(b), the Petition for Commission preemption of jurisdiction filed by KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC, on January 4, 2005, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Michelle Carey
Deputy Chief, Wireline Competition Bureau

¹⁶ See *Procedures Established For Arbitration Of Interconnection Agreements Between Verizon and AT&T, Cox, and WorldCom*, CC Docket Nos. 00-218, 00-249, 00-251, Public Notice, 16 FCC Rcd. 3957 at para. A.1 (discussing the pre-filing conference) (*AT&T/Cox/WorldCom Procedural Public Notice*).

¹⁷ We anticipate that the procedures and pleading schedule, including the contents of the Petition for Arbitration, will be similar to those set forth in the *AT&T/Cox/WorldCom Procedural Public Notice*. We may, however, modify these requirements or other aspects of the procedures based on discussions at the pre-filing conference.

¹⁸ See *Implementation of the Local Competition Provisions of 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*) (subsequent history omitted).

¹⁹ See 47 U.S.C. § 252(e)(6).