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May 7, 2004

## VIA HAND DELIVERY

Ms. Blanca S. Bayo, Director  
Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0870

Re: Docket No. 040343-TP

Dear Ms. Bayo:

Enclosed for filing in the above dockets are the original and fifteen (15) copies of ALLTEL Communications, Inc.'s Motion to Dismiss.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Sincerely,

  
J. Jeffrey Wahlen

JJW/jh  
Enclosure  
cc: All Parties of Record (w/encls.)

DOCUMENT NUMBER-DATE

05394 MAY-7 3

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Adopt the ALLTEL  
Interconnection Agreement Pursuant  
to Section 252(j) of the Telecommuni-  
cations Act of 1996

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DOCKET NO. 040343-TP  
FILED: May 7, 2004

**ALLTEL FLORIDA, INC.'S**  
**MOTION TO DISMISS**

Pursuant to Rule 28-106.204(2), Florida Administrative Code, ALLTEL Florida, Inc. ("ALLTEL" or the "Company") moves to dismiss the Petition filed by Volo Communications of Florida, Inc., d/b/a/ Volo Communications Group of Florida, Inc. ("Volo"), and states:

1. ALLTEL is an incumbent local exchange company doing business in Florida subject to the jurisdiction of the Florida Public Service Commission. ALLTEL's principal place of business in Florida is Live Oak, Florida. Pleadings, orders, notices and other papers filed or served in this matter should be served upon:

Steve Rowell  
ALLTEL Corporate Services, Inc  
One Allied Drive  
Little Rock, AR 72203-2177

J. Jeffry Wahlen  
Ausley & McMullen  
P. O. Box 391  
Tallahassee, FL 32302

Bettye Willis  
ALLTEL Corporate Services, Inc.  
One Allied Drive  
Little Rock, AR 72203-2177

2. On April 19, 2004, Volo filed a Petition to Adopt the ALLTEL Florida, Inc. and Level 3 Communications, LLC Interconnection Agreement ("Petition"). The Petition was served via mail on ALLTEL and its counsel by Volo on that same day.

3. Therein, Volo petitioned the Commission "to adopt the rules, terms and conditions" of the Interconnection Agreement between ALLTEL and Level 3 Communications

("Level 3 Agreement"). The Level 3 Agreement was filed with the FPSC for approval on June 13, 2002 in Docket No. 02-0517-TP. (See Exhibit A to Petition.) The Level 3 Agreement was approved by the FPSC in September 2002. The Petition affects ALLTEL's substantial interests, because it seeks to require ALLTEL to perform for Volo an agreement that ALLTEL has with Level 3, which is set to expire in a short period of time.

4. Specifically, by its terms, the Level 3 Agreement is effective through "June 30, 2004 and thereafter, unless terminated or modified." Thus, Volo filed its Petition to Adopt the ALLTEL Level 3 Agreement 72 days or about 10 weeks before that Agreement is set to expire.<sup>1</sup>

5. Volo's Petition fails to state a cause of action as a matter of law and should be dismissed for the reasons explained in the memorandum of law below.

#### **Memorandum of Law**

1. Rule 28-106.204(2), Florida Administrative Code, provides that a motion to dismiss shall be filed no later than 20 days after service of a petition on a party. One of the basic purposes of a motion to dismiss is to test the overall sufficiency of the complaint (or petition) to state a claim upon which relief can be granted. Augustine v. Southern Bell Tel. & tel. Co., 91 So. 2d 320 (Fla. 1957). In ruling on a motion to dismiss, a court must treat the factual allegations of the complaint (petition) as true and determine if it states a valid claim for relief. Russell v. Sherwin-Williams Co., 767 So. 2d 592 (Fla. 4<sup>th</sup> DCA 2000).

2. Volo seeks the Commission's approval of adoption of the Level 3 Agreement pursuant to Section 252(i) of the Telecommunications Act of 1996 ("Act"), which states:

A local exchange carrier shall make available any interconnection, service, or network element provided under an

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<sup>1</sup> ALLTEL is currently renegotiating its agreement with Level 3.

agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

3. This section is sometimes called the "opt-in" provision of the Act. The Federal Communications Commission has adopted a regulation implementing Section 252(i) of the Act. 47 C.F.R. § 51.809(c) requires "that an ILEC only make available an interconnection for "opt-in" for a reasonable period of time after the approved agreement is available for inspection."

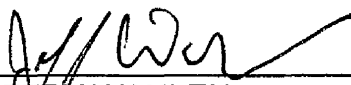
4. In this instance, the Level 3 Agreement was filed with the Commission in June 2002 and according to the Commission's website was administratively approved in September 2002. By its terms, it is only effective through June 30, 2004, with no guarantee that it will survive a single day later. Volo's petition, dated 71 days before the last certain day of the Agreement, was not filed within a reasonable time as a matter of law, does not state a cause of action under the Act and FCC regulations and should be dismissed.

5. Two cases from other states support this conclusion. The first is In re: Global NAPs South, Inc., 15 FCC Rcd 23318 (Aug. 5, 1999) [Attachment One], which involved a CLEC's request to adopt an interconnection agreement approved in 1996. The CLEC requested to adopt the agreement in August 1998, when the agreement was set to expire on July 1, 1999. The Commission denied the CLEC's request given the limited amount of time remaining under the 1996 agreement (which the Virginia Commission concluded would be about 30 days by the time an adopted agreement would be approved and when the ILEC could exercise its termination rights). The CLEC petitioned the FCC for an order preempting the Virginia Commission's decision, which the FCC denied.

6. The second case is In re: Petition of Global NAPs South, Inc., Case No. 8731 (Md. PSC July 15, 1999) [Attachment Two], in which the Maryland Public Service Commission held that it was unreasonable to allow a CLEC to opt into a three-year interconnection agreement approximately two and a half years after the agreement had been approved.

7. By the time the FPSC could approve Volo's Petition, it will be time for ALLTEL to exercise its termination rights under the Agreement, which ALLTEL intends to do. Consistent with the two GNAPs cases, the FPSC should determine as a matter of law that Volo did not file its opt in petition within a reasonable time as prescribed in 47 C.F.R. § 51.809(c) and enter an order dismissing the Petition for failure to state a cause of action. Alternatively, if the Commission concludes that it cannot grant this motion and dismiss the Petition as a matter of law, ALLTEL requests that the Commission set this matter for a hearing under Section 120.57(1), Florida Statutes, so that the Commission can evaluate material facts that may be in dispute such as the length of time it would take for ALLTEL and Volo to begin operating under the Level 3 Agreement and the opportunities Volo has to execute and adopt other interconnection and/or traffic termination agreements to which ALLTEL is a party.

DATED this 7<sup>th</sup> day of May, 2004.

  
\_\_\_\_\_  
J. JEFFERY WAHLEN  
Ausley & McMullen  
Post Office Box 391  
Tallahassee, Florida 32302  
850/425-5471

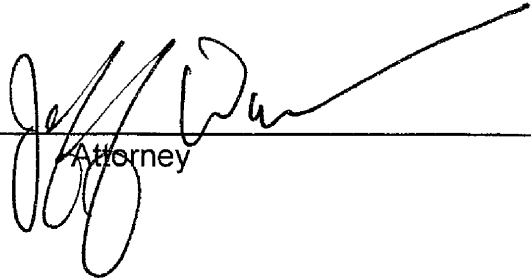
ATTORNEYS FOR ALLTEL FLORIDA, INC.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail or hand delivery (\*) this 7<sup>th</sup> day of May, 2004, to the following:

Mary Beth Keating \*  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Floyd Self \*  
Messer Caparello & Self P.A.  
215 South Monroe street  
Tallahassee, FL 32301



\_\_\_\_\_  
Attorney

1999 WL 587307 (F.C.C.), 15 F.C.C.R. 23,318, 15 FCC Rcd. 23,318  
(Cite as: 15 F.C.C.R. 23318)

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF GLOBAL NAPS SOUTH, INC. PETITION FOR PREEMPTION OF  
JURISDICTION OF THE VIRGINIA STATE CORPORATION COMMISSION REGARDING  
INTERCONNECTION DISPUTE WITH BELL ATLANTIC-VIRGINIA, INC.  
CC Docket No. 99-198

DA 99-1552

Adopted: August 5, 1999

Released: August 5, 1999

\*23318 By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order addresses the petition of Global NAPS South, Inc. (GNAPS) for preemption of jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to an arbitration proceeding involving GNAPS and Bell Atlantic-Virginia, Inc. (Bell Atlantic). [FN1] The Commission placed GNAPS' preemption petition on public notice on May 24, 1999. [FN2] Ameritech, Bell Atlantic, Connect!, Cox Communications, Inc., and the Virginia Commission filed comments, and GNAPS filed a reply.

2. GNAPS seeks preemption of the Virginia Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended. [FN3] Section 252(e)(5) authorizes the \*23319 Commission to preempt a state commission in any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252. [FN4] Section 252 sets out the procedures by which telecommunications carriers may request and obtain interconnection, resale services or unbundled network elements from an incumbent local exchange carrier (LEC). [FN5] For the reasons discussed below, we find that the Virginia Commission has not "failed to act" within the meaning of our rules implementing section 252(e)(5). [FN6] We therefore deny GNAPS' petition and do not preempt the Virginia Commission.

II. BACKGROUND

A. Statutory Provisions

3. Congress adopted sections 251 and 252 of the 1996 Act to foster local exchange competition by imposing certain requirements on incumbent LECs that are designed to facilitate the entry of competing telecommunications carriers. Section 251 describes the various requirements designed to promote market entry, including incumbent LECs' obligations to provide requesting telecommunications

**ATTACHMENT ONE**

(Cite as: 15 F.C.C.R. 23318, \*23319)

carriers interconnection, unbundled network elements, and services for resale. [FN7] Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, unbundled network elements, and services for resale from an incumbent LEC pursuant to section 251. [FN8] Specifically, sections 252(a) and (b) establish a scheme whereby telecommunications carriers may obtain interconnection with the incumbent according to agreements fashioned through (1) voluntary negotiations between the \*23320 carriers, (2) mediation by state commissions, or (3) arbitration by state commissions. [FN9] These interconnection agreements must then be submitted for approval to the appropriate state commission. [FN10]

4. In addition, section 252(i) provides another means for establishing interconnection. Pursuant to section 252(i), local exchange carriers must "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." [FN11] Negotiation is not required to implement a section 252(i) opt-in arrangement; indeed, neither party may alter the terms of the underlying agreement. Although there is no arbitration or negotiation as identified in section 252(e)(1) for the state to approve, [FN12] states may adopt "procedures for making agreements available to requesting carriers on an expedited basis." [FN13] As the Commission observed three years ago, a party seeking interconnection pursuant to section 252(i) "need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis." [FN14] Otherwise, the "non-discriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251." [FN15]

5. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding in which the state commission "fails to act to carry out its responsibility" under section 252:

(5) COMMISSION TO ACT IF STATE WILL NOT ACT.-If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an \*23321 order within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission. [FN16]

## B. Commission's Rules

6. The Local Competition Order adopted "interim procedures" to exercise preemption authority under section 252(e)(5) in order to "provide for an efficient and fair transition from state jurisdiction should [the Commission] have to assume the responsibility of the state commission..." [FN17] The Local Competition Order concluded that the Commission would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5). [FN18] Rather, the Local Competition Order interpreted "failure to act" to mean a state's failure to complete its duties in a timely manner. The Local Competition Order limited the instances under which Commission preemption pursuant to section 252(e)(5) is appropriate to "when a state



(Cite as: 15 F.C.C.R. 23318, \*23321)

commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(c)." [FN19] Under the Commission's rules, "[t]he party seeking preemption [pursuant to section 252(e)(5)] must prove that the state [commission] has failed to act to carry out its responsibilities under section 252 of the Act." [FN20]

### C. Procedural History

7. On July 2, 1998, GNAPs asked Bell Atlantic to commence negotiations for interconnection. [FN21] The parties subsequently attempted to negotiate the terms of an interconnection agreement. [FN22] In August 1998, GNAPs concluded that it could meet its \*23322 interconnection needs by opting-into a 1996 agreement between Bell Atlantic and MFS Intelenet (MFS) pursuant to section 252(i). [FN23] As a result, GNAPs advised Bell Atlantic that GNAPs wanted to interconnect with Bell Atlantic on the same terms as contained in Bell Atlantic's 1996 agreement with MFS (1996 MFS Agreement). [FN24] According to GNAPs, Bell Atlantic refused to honor GNAPs' right to opt-into the 1996 MFS Agreement without modifications. [FN25]

8. On November 16, 1998, GNAPs filed a petition for arbitration with the Virginia Commission, [FN26] pursuant to section 252(b) of the Act. [FN27] On November 25, 1998, GNAPs filed a motion requesting expedited treatment of its petition and further requesting that Bell Atlantic \*23323 provide GNAPs interconnection on an interim basis. [FN28] On December 11, 1998, Bell Atlantic filed its response to the GNAPs arbitration petition and motion. [FN29]

9. In a January 29, 1999 order, the Virginia Commission determined that there was no need to hold an evidentiary hearing in the GNAPs/Bell Atlantic arbitration proceeding, having found that the issues raised by the parties presented only legal questions. [FN30] In the same order, however, the Virginia Commission encouraged the parties to supplement their pleadings in order to further clarify their positions on the issues, and to address how the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board might impact the arbitration of unresolved issues between GNAPs and Bell Atlantic. [FN31]

10. On February 10, 1999, Bell Atlantic filed a supplemental brief in response to the January 29, 1999 order. [FN32] According to the Virginia Commission's April 2, 1999 final order, Bell Atlantic argued in its supplemental brief that the Supreme Court's reinstatement of section 51.809 of the Commission's rules did not entitle GNAPs to adopt Bell Atlantic's 1996 MFS Agreement. [FN33] On February 10, 1999, GNAPs also filed a supplemental brief in response to the January 29, 1999 order. [FN34] According to the Virginia Commission's April 2, 1999 final order, GNAPs argued in its supplemental brief that it was entitled to reciprocal compensation for terminating Internet Service Provider (ISP) traffic; that it should be able to opt-into the 1996 MFS Agreement for a full three-year term; and that section 51.809 of the Commission's rules did not prevent GNAPs from adopting Bell Atlantic's 1996 MFS Agreement. [FN35] GNAPs further asserted that Bell Atlantic acted in bad faith by not permitting it to opt-into the 1996 MFS Agreement in August 1998. [FN36]

\*23324 11. On February 26, 1999, the Commission released its ISP Compensation Ruling and NPRM. [FN37] On March 11, 1999, the Virginia Commission released an

(Cite as: 15 F.C.C.R. 23318, \*23324)

order scheduling oral argument so that the parties could address what effect, if any, the Commission's ISP Compensation Ruling and NPRM and the Supreme Court's decision might have on the resolution of the GNAPs/Bell Atlantic arbitration proceeding. [FN38] Oral argument was held on March 25, 1999. [FN39]

12. On April 2, 1999, the Virginia Commission issued its final order in the GNAPs/Bell Atlantic arbitration proceeding. In its final order, the Virginia Commission acknowledged that the 1996 MFS Agreement would terminate on July 1, 1999 and that any carrier opting-into this agreement would necessarily find themselves bound by this termination date, unless otherwise negotiated. [FN40] The Virginia Commission noted that in light of the very limited time remaining under the 1996 MFS Agreement, there would likely be only thirty days, at most, from the time an adopted GNAPs/Bell Atlantic agreement based on the 1996 MFS Agreement would be approved until Bell Atlantic could terminate the agreement pursuant to the contract terms. [FN41] Thus, citing both the maxim "equity will not do a vain or useless thing," and the "reasonable time" language in section 51.809(c) of the Commission's rules, the Virginia Commission denied GNAPs' petition to adopt the 1996 MFS Agreement and dismissed the GNAPs/Bell Atlantic arbitration proceeding. [FN42]

13. On April 21, 1999, GNAPs filed a petition for reconsideration of the April 2, 1999 final order with the Virginia Commission. [FN43] Under the Virginia Commission's rules, an order becomes final within 21 days after entry, unless modified or vacated in a response to a petition for reconsideration or on the Virginia Commission's own motion. [FN44] The Virginia Commission \*23325 elected not to act in response to GNAPs' petition for reconsideration and therefore allowed its April 2, 1999 order to become final. [FN45]

#### D. GNAPs' Petition for Preemption of Jurisdiction

14. GNAPs requests in its petition that the Commission "preempt the jurisdiction" of the arbitration proceeding it requested before the Virginia Commission, pursuant to section 252(e)(5). [FN46] GNAPs alleges that the April 2, 1999 final order is a "plain failure of the [Virginia Commission] to fulfill its responsibilities under the Act." [FN47] GNAPs does not allege, however, that the Virginia Commission "failed to act" upon its arbitration request in a timely manner, nor that the April 2, 1999 final order was untimely rendered. [FN48]

15. GNAPs alleges that, without identifying any provision of the 1996 MFS Agreement that was technically infeasible or impractical, or any rate in that agreement that was based on outdated cost analyses, the Virginia Commission found that the 1996 MFS Agreement was too old to be opted-into and denied and dismissed GNAPs' arbitration petition. [FN49] GNAPs maintains that it does not know whether the Virginia Commission's April 2, 1999 final order is the product of confusion regarding whether or not its efforts to opt-into the 1996 MFS Agreement were subject to arbitration; confusion regarding the jurisdictional status of ISP-bound calls; uncertainty following the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board; or some other misunderstanding. [FN50] GNAPs argues, however, that the effect of the April 2, 1999 final order is to put them "back at ground zero" and leave them without an interconnection agreement nearly a year after their negotiations with Bell Atlantic began. [FN51] In light of this outcome, GNAPs alleges that the Virginia Commission has "failed to act to carry

(Cite as: 15 F.C.C.R. 23318, \*23325)

out its responsibilities under section 252 of the Act." [FN52]

### \*23326 III. DISCUSSION

16. 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]." [FN53] Here, the Virginia Commission has not "failed to act" under Commission rules implementing section 252(e)(5) solely because it has issued a decision denying GNAPs the terms and conditions on which it sought to interconnect with Bell Atlantic. [FN54] As noted above, in the Local Competition Order, the Commission concluded that it would not take an "expansive view" of what constitutes a state commission's failure to act, noting its belief that "states [would] meet their responsibilities and obligations under the 1996 Act." [FN55] Therefore, the Commission determined that it would preempt a state commission's jurisdiction for "failure to act" under section 252(e)(5) only in those "instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)." [FN56] Thus, under the Commission's current rules, a state commission does not "fail to act" when it responds to a request for arbitration but subsequently dismisses or denies an arbitration within the nine month time limit in section 252(b)(4)(C).

17. Applying the Commission's rules in this instance, we find that the Virginia Commission responded to GNAPs' request for arbitration by quickly initiating proceedings. The Virginia Commission established a series of pleading cycles and afforded the parties opportunities to address the impact of the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board and the Commission's ISP Compensation Ruling and NPRM. In addition, an oral argument was held on March 25, 1999.

18. Moreover, GNAPs does not claim that the Virginia Commission acted outside of any statutory time frame. [FN57] Although GNAPs contends that the Commission "failed to act to carry out its responsibilities under section 252 of the Act," we note that the Virginia Commission issued its April 2, 1999 final order within nine months after Bell Atlantic received GNAPs' request for interconnection, consistent with the requirements of section 252(b)(4)(C). According to the Virginia Commission, GNAPs presented no evidence regarding terms for an \*23327 interconnection agreement with Bell Atlantic in the event the Virginia Commission determined it was not reasonable to require Bell Atlantic to offer the soon to expire 1996 MFS Agreement to GNAPs. [FN58] Because section 51.801 of the Commission's rules does not focus on the validity of state commission decisions, we do not see a basis for examining the underlying reasoning of the Virginia Commission. While we recognize the frustration GNAPs has experienced in its efforts to obtain interconnection with Bell Atlantic, we cannot conclude that the Virginia Commission has "failed to act" under the Commission's rules implementing section 252(e)(5).

19. Commission precedent supports our conclusion that there is no basis for preemption here. In the Low Tech Order, the Commission denied three preemption petitions filed by Low Tech Designs, Inc. (Low Tech), pursuant to section 252(e)(5). [FN59] The three state commission arbitration proceedings at issue

(Cite as: 15 F.C.C.R. 23318, \*23327)

dismissed or denied Low Tech's arbitration petition on the basis that Low Tech was not yet a certified carrier in the relevant state. [FN60] The Commission held that a state commission has not "failed to act" when it issues a decision that dismisses or denies an arbitration petition on grounds that prevent it from resolving the substantive issues in the arbitration petition. [FN61] There, as here, the petitioner essentially argued that there was a failure to act because the state commission had erroneously applied the law and our rules in rendering its decision. The Commission concluded that there was no basis to examine the substantive validity of the state commission's decision under section 51.801 of its rules. Accordingly, we do not preempt the Virginia Commission's jurisdiction and do not assume responsibility for this arbitration.

20. Finally, we note that the Commission's decision not to preempt the jurisdiction of the Virginia Commission does not leave GNAPs without a remedy. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court. [FN62] Thus, GNAPs may still challenge the Virginia Commission determination in federal district court pursuant to section 252(e)(6).

21. In sum, we conclude that GNAPs has not met its burden of demonstrating that the Virginia Commission has "failed to act" within the meaning of the Commission's rules implementing section 252(e)(5). Rather, the Virginia Commission has met the requirements of \*23328 the statute and our rules by responding to GNAPs' request for arbitration and rendering a final decision in the arbitration within nine months after Bell Atlantic received GNAPs' request for interconnection. We therefore do not preempt the jurisdiction of the Virginia Commission pursuant to the authority granted the Commission in section 252(e)(5).

#### IV. CONCLUSION

22. For the foregoing reasons, we deny GNAPs' petition for Commission preemption of jurisdiction of GNAPs' arbitration proceeding with Bell Atlantic in Virginia.

#### VI. ORDERING CLAUSES

23. 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 Global NAPs South, Inc. on May 19, 1999 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert C. Atkinson  
Deputy Chief  
Common Carrier Bureau

FN1. Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission, CC Docket No. 99-198, filed with the Commission on May 19, 1999 (Virginia Petition).

(Cite as: 15 F.C.C.R. 23318, \*23328)

FN2. Pleading Cycle Established for Comments on Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic - Virginia, Public Notice, CC Docket No. 99-198, DA 99-984 (rel. May 24, 1999) (Public Notice). The Public Notice established a deadline for comment of June 8, 1999, and a deadline for reply comments of June 17, 1999. On May 26, 1999, GNAPs requested that the Commission extend the comment and reply dates by one week because the Virginia Commission was not served with the Virginia Petition until May 26, 1999. On June 3, 1999, the Common Carrier Bureau released an order extending the deadline for comment to June 15, 1999, and the deadline for reply comments to June 24, 1999. In the Matter of Global NAPs South, Inc. Petition for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Order, CC Docket No. 99-198, DA 99-1090 (rel. Jun. 3, 1999).

FN3. 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 to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

FN4. 47 U.S.C. § 252(e)(5).

FN5. See generally 47 U.S.C. § 252.

FN6. 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, 16122-16132 (1996) (Local Competition Order), aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997) and Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), petition for cert. granted, Nos. 97-829, 97-830, 97-831, 97-1097, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively Iowa Utils. Bd. v. FCC), aff'd in part and remanded, AT&T Corp., et al. v. Iowa Utils. Bd. et al., 119 S.Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), further recons. pending; see also 47 C.F.R. §§ 51.801(b), 51.803(b).

FN7. See generally 47 U.S.C. § 251(c). For purposes of this order, the interconnection, access to unbundled elements, services for resale and other items for which incumbent LECs have a duty to negotiate pursuant to section 251(c)(1) are sometimes referred to collectively as "interconnection."

FN8. See generally 47 U.S.C. § 252.

FN9. See 47 U.S.C. § 252(a), (b).

FN10. 47 U.S.C. § 252(e)(1).

(Cite as: 15 F.C.C.R. 23318, \*23328)

FN11. 47 U.S.C. § 251(i).

FN12. 47 U.S.C. § 252(e)(1) ("Any interconnection agreement adopted by negotiation or arbitration shall be submitted to the State commission"); see also Local Competition Order, 11 FCC Rcd at 16141, ¶ 1321 (indicating that carriers "seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 252 requests").

FN13. Local Competition Order, 11 FCC Rcd at 16141, ¶ 1321.

FN14. Id. An expedited process for section 252(i) opt-ins would necessarily be substantially quicker than the time frame for negotiation, and approval, of a new interconnection agreement since the underlying agreement has already been subject to state review under section 252(e).

FN15. Id.

FN16. 47 U.S.C. § 252(e)(5).

FN17. Local Competition Order, 11 FCC Rcd at 16127, ¶ 1283.

FN18. Id. at 16128, ¶ 1285.

FN19. Id. at 16128, ¶ 1285. See also 47 C.F.R. § 51.801(b); 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, Order, 13 FCC Rcd 1755, 1758-1759, ¶ 5 (1997) (Low Tech Order), recon. denied, CC Docket Nos. 97-163, 97-164, 97-165, FCC 99-71 (rel. Apr. 13, 1999). The Commission has indicated that there is no "failure to act" when an interconnection agreement is "deemed approved" under section 252(e)(4) as a result of state commission inaction. Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285; 47 U.S.C. § 252(e)(4).

FN20. 47 C.F.R. § 51.803(b); see also Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285.

FN21. Virginia Petition at 1.

FN22. Id.

FN23. Id. Section 252(i) provides that: "[a] local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). At the time GNAPs first sought to interconnect with Bell Atlantic, carriers were subject to the Eighth Circuit's

(Cite as: 15 F.C.C.R. 23318, \*23328)

interpretation of section 252(i). As a result, requesting carriers such as GNAPs were required to opt-into an existing contract as a whole rather than "pick and choose" different elements from different existing contracts. Iowa Utils. Bd., 120 F.3d at 800-801. The Supreme Court since overturned the Eighth Circuit's interpretation of section 252(i) and reinstated the Commission's "pick and choose" approach. AT&T Corp., 119 S.Ct. at 738; see generally 47 C.F.R. § 51.809.

FN24. Virginia Petition at 1.

FN25. Id. at 2. If a local exchange carrier fails to recognize the rights of an opt-in carrier, that carrier may seek expedited relief from this Commission pursuant to section 208. Local Competition Order, 11 FCC Rcd at 16141, ¶ 1321; 47 U.S.C. § 208. In this case, GNAPs decided to pursue arbitration pursuant to section 252(b) and during the arbitration proceeding that followed, sought to enter into an interconnection agreement with Bell Atlantic identical to the 1996 MFS Agreement. Bell Atlantic asserts in this proceeding that GNAPs has no right to opt-into provisions relating to reciprocal compensation, arguing that section 252(i) only permits carriers to opt-into provisions of interconnection agreements that are based on the requirements of section 251. Bell Atlantic Comments at 4. We reject Bell Atlantic's argument, as our rules establish only two limited exceptions to the right of carriers to opt-into an interconnection agreement. See 47 C.F.R. § 51.809(b).

FN26. Petition of Global NAPs South, Inc. for Arbitration of Unresolved Issues from Interconnection Negotiations with Bell Atlantic-Virginia, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996, Final Order, No. PUC980173 (Virginia Commission Apr. 2, 1999) at 1 (Virginia Final Order) (filed as an attachment to Virginia Petition).

FN27. The procedural history of this proceeding is complex because it involves both opt-in and arbitration attempts by GNAPs. GNAPs should have been able to exercise its opt-in right under section 252(i) on an expedited basis. Local Competition Order, 11 FCC Rcd at 16141, ¶ 1321. Thus, for example, a carrier should be able to notify the local exchange carrier that it is exercising this right by submitting a letter to the local exchange carrier identifying the agreement (or the portions of an agreement) it will be using and to whom invoices, notices regarding the agreement, and other communication should be sent. In such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date.

FN28. Virginia Final Order at 2.

FN29. Id. at 1.

FN30. Id. at 2.

FN31. Id. See generally AT&T Corp., 119 S.Ct. at 738.

(Cite as: 15 F.C.C.R. 23318, \*23328)

FN32. Virginia Final Order at 2.

FN33. Id. at 2-3. See also 119 S.Ct. at 738. Section 51.809 of the Commission's rules describes the availability of provisions of existing interconnection agreements to other telecommunications carriers under section 252(i) of the Act. 47 C.F.R. § 51.809.

FN34. Virginia Final Order at 2.

FN35. Id. at 3-4.

FN36. Id. at 3.

FN37. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68 (rel. Feb. 26, 1999) (ISP Compensation Ruling and NPRM).

FN38. Virginia Final Order at 4-5.

FN39. Id. at 5.

FN40. Id.

FN41. Id. at 5-6.

FN42. Id. Section 51.809(c) of the Commission's rules provides that "[I]ndividual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers ... for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act." 47 C.F.R. § 51.809(c).

FN43. Virginia Petition at 6.

FN44. Id.

FN45. Id.

FN46. Id. at 1.

FN47. Id. at 6.

FN48. State commissions are required to respond to a request for arbitration within a "reasonable time," Local Competition Order, 11 FCC Rcd 16128, ¶ 1285; 47 C.F.R. § 51.801(b), and to conclude an arbitration no later than nine months after the date on which the incumbent LEC receives a request for negotiation under section 252. 47 U.S.C. § 252(b)(4)(C).

FN49. Virginia Petition at 5.



(Cite as: 15 F.C.C.R. 23318, \*23328)

FN50. Id. at 6.

FN51. Id.

FN52. Id. at 7. See also 47 C.F.R. § 51.803(b).

FN53. 47 U.S.C. § 252(e)(5).

FN54. See Virginia Commission Comments at 1.

FN55. Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285.

FN56. 47 C.F.R. § 51.801(b). See also Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285; Bell Atlantic Comments at 3.

FN57. See Bell Atlantic Comments at 3.

FN58. Virginia Commission Comments at 1-3.

FN59. Low Tech Order, 13 FCC Rcd at 1759-1768.

FN60. Id.

FN61. Low Tech argued that a state commission has not acted until it has ruled on the merits of the issues raised in the arbitration petition. Id. at 1733-1774, ¶ 33 n.122. The Commission rejected Low Tech's argument and held that under its current rules, a state commission does not "fail to act" when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner slacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding. Id. at 1774, ¶ 33.

FN62. 47 U.S.C. § 252(e)(6); Local Competition Order, 11 FCC Rcd 15563, ¶ 124; Bell Atlantic Comments at 2.

1999 WL 587307 (F.C.C.), 15 F.C.C.R. 23,318, 15 FCC Rcd. 23,318

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**ORDER NO. 75360**

IN THE MATTER OF THE PETITIONS \*  
FOR APPROVAL OF AGREEMENTS \*  
AND ARBITRATION OF UNRESOLVED \*  
ISSUES ARISING UNDER SECTION \*  
252 OF THE TELECOMMUNICATIONS \*  
ACT OF 1996. \*

BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND

PETITION OF GLOBAL NAPS SOUTH, \*  
INC. FOR ARBITRATION OF \*  
INTERCONNECTION RATES, TERMS \*  
AND CONDITIONS AND RELATED \*  
RELIEF. \*

\_\_\_\_\_  
CASE NO. 8731  
\_\_\_\_\_

**I. Procedural History**

On December 7, 1998, Global Naps South, Inc. (“GNAPS”) filed its Petition for Arbitration with the Commission.<sup>1</sup> GNAPS requested arbitration of rates, terms and conditions and related arrangements for interconnection concerning a proposed interconnection agreement between GNAPS and Bell Atlantic – Maryland, Inc. (“BA-MD”) pursuant to §§252(b) and 252(i) of the Telecommunications Act of 1996 (“1996 Act”). BA-MD filed a response to the Petition on February 9, 1999. The Commission Staff filed comments on March 9, 1999.

**II. Discussion**

In 1996, Congress amended the Communications Act of 1934 with the purpose of fostering competition in both the interexchange and local exchange markets. The Telecommunications Act of 1996 (“1996 Act”) was designed, in part, to facilitate the entry of competing companies into local telephone service markets. The 1996 Act

requires incumbent local exchange carriers (“ILECs”) to allow new entrants access to their networks in three different ways. Specifically, an ILEC must: (1) permit requesting competitors to interconnect with the ILECs local network; (2) provide competitors with access to individual elements of its network on an unbundled basis; and (3) allow competitors to purchase its telecommunications services for resale. 47 USCA §251(c)(2)-(4) (West Supp. 1997). Together these duties regarding interconnection, unbundled network elements, and resale are intended to provide would-be competitors with realistic opportunities to enter the market for local exchange service. Through these three duties, and the 1996 Act in general, Congress sought “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>2</sup>

The 1996 Act also establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between ILECs and competing carriers to implement the 1996 Act’s substantive requirements. When a competing carrier asks an ILEC to provide interconnection, unbundled network elements, or resale, both the ILEC and the competing carrier have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the 1996 Act’s goals. 47 USCA §§251(c)(1), 252(a)(1). If the parties fail to reach an agreement through voluntary negotiation, either party may petition the respective state utility commission to arbitrate and resolve any open issues. 47 USCA

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<sup>1</sup> Due to some confusion regarding the service of process, the parties agreed that Bell Atlantic – Maryland, Inc. would respond to the Petition within twenty-five days after January 15, 1999.

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat 56, 56 (1996).

§252(b). The final agreement, whether accomplished through negotiation or arbitration, must be approved by the state commission. 47 USCA §252(e)(1).

The key provision of the 1996 Act at issue here is §252(i). Under this subsection, a competitive local exchange carrier (“CLEC”) may “opt in” to the terms of any other existing interconnection agreement between the incumbent local exchange carrier (“ILEC”) and another CLEC. Specifically, §252(i) states:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved [by a state commission] under this section to which it is a party to any other requesting telecommunication carrier upon the same terms and conditions as those provided in the agreement.

GNAPS has sought to “opt in” to the terms of BA-MD’s approved interconnection agreement with MFS Intelenet of Maryland, Inc. (“MFS”). GNAPS claims, however, that BA-MD seeks to impose conditions on GNAPS to which MFS is not subject, in violation of §252(i). Specifically, GNAPS requested to “opt in” to the MFS interconnection agreement but requested a three-year contract term, rather than the date certain which actually appears in the MFS agreement.<sup>3</sup> In contrast, BA-MD argued that GNAPS can only “opt in”, if at all, under the exact terms of the MFS agreement. We find that under the Federal Communications Commission’s (“FCC”) interconnection rules, GNAPS is not entitled to the relief it seeks.

In its First Report and Order implementing the local competition provisions of the 1996 Act, the FCC interpreted §252(i) as permitting CLECs to “pick and choose” among

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<sup>3</sup> GNAPS also requested that we order BA-MD to provide interconnection on an interim basis on terms consistent with the MFS agreement. We rejected this request on June 14, 1999.

the provisions of existing interconnection agreements.<sup>4</sup> This interpretation is reflected in the FCC's rule at 47 CFR §51.809 which provides:

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) the provision of a particular interconnection, service or element to the requesting carrier is not technically feasible.

(c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(f) of the Act.

Although Rule 51.809 generally requires ILECs to make individual interconnection arrangements from existing contracts available to requesting carriers,

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<sup>4</sup> *In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("First Report & Order").

contrary to GNAPS interpretation, this requirement is not without limitations. The rule limits the amount of time during which ILECs must make the terms of existing agreements available to a “reasonable period of time.” Thus, under the FCC’s reinstated interpretation of §252(i),<sup>5</sup> BA-MD is not required to make the terms and conditions of an existing agreement available to requesting carriers indefinitely, but only for a “reasonable period.”

While we decline to set forth the full parameters of a “reasonable period of time” in this proceeding, we do find that GNAPS request, occurring approximately two and a half years after the MFS agreement was available for public inspection, exceeded the bounds of “reasonable period of time.” MFS requested interconnection with BA-MD on February 8, 1996. The parties signed the agreement at issue here on July 16, 1996 and filed a joint petition for approval of the agreement on the following day, July 17, 1996. We approved the agreement on October 9, 1996. Unlike most interconnection agreements, the MFS agreement contains a specific termination date. Thus, the MFS agreement ends on July 1, 1999.

According to GNAPS, it first requested terms contained in the MFS agreement in September, 1998. This request occurred nearly two years after the MFS agreement had been approved by this Commission and only ten months before the agreement was to expire. More importantly, GNAPS did not request arbitration of the “opt in” issue until December, 1998. At this point, the MFS agreement was scheduled to expire in

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<sup>5</sup> The Eighth Circuit vacated Rule 51.809 on the ground that it would deter the “voluntarily negotiated agreements” favored by the 1996 Act. *Iowa Utilities Board v. FCC*, 120F.3d 753, 801 (8<sup>th</sup> Cir. 1998). The Supreme Court subsequently disagreed and reinstated the rule. *AT&T v. Iowa Utilities Board*, \_\_\_ U.S. \_\_\_ (Jan. 25, 1999).

approximately six months. We find that GNAPS request for arbitration did not occur within the reasonable period of time called for by the FCC rules.

Furthermore, we find that even if it were reasonable to permit GNAPS to “opt in” to the MFS agreement at this late date, GNAPS would be entitled to the terms of the MFS agreement only until the termination date of July 1, 1999. GNAPS cannot avoid the fact that the language of the agreement says that its term ends on a stated date, not “three years from the date hereof.” This term was negotiated and agreed upon by both MFS and BA-MD and there is no support for the argument that the length of the contract is not an integral part of the agreement. GNAPS seeks not only to “opt in” to the MFS agreement, but also to change one of its terms. There is nothing in the 1996 Act nor the FCC rules which would permit a CLEC to choose to opt in to an agreement while at the same time changing the terms of that agreement. Opting into contracts must occur upon the same terms and conditions as those which appear in the original agreement.<sup>6</sup>

IT IS THEREFORE, this 15th day of July in the year Nineteen Hundred and Ninety-Nine, by the Public Service Commission of Maryland,

ORDERED: 1) That the request of Global NAPS South, Inc. to opt in to the MFS agreement pursuant to §252(i) of the Telecommunications Act of 1996 is hereby denied.

2) That motions not granted by the actions taken herein are denied.

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<sup>6</sup> Given our resolution of this matter, we find that it is unnecessary for us to address the other issues raised in the Petition.

SIGNATURE PAGE

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Commissioners