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March 5, 2010

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

Re: In the Matter of Petition for Declaratory Ruling and Alternative Petition for
Preemption to the Pennsylvania, New Hampshire and Maryland State
Commissions WC Docket No. 10-_____

Dear Ms. Dortch:

On behalf of Global NAPs, Inc. and affiliates, enclosed for filing please find an original and four copies of Global's Petition for Declaratory Ruling and Alternative Petition for Preemption to the Pennsylvania, New Hampshire and Maryland State Commissions.

A copy of this letter and the accompanying Petition is being served contemporaneously on the relevant state commissions.

Thank you for your attention.

Sincerely,



Matthew Thielemann

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Petition for Declaratory
Ruling and Alternative Petition for Preemption WC Docket No. 10-____
to the Pennsylvania, New Hampshire
and Maryland State Commissions

**PETITION FOR DECLARATORY RULING
AND
ALTERNATIVE PETITION FOR PREEMPTION
TO THE PENNSYLVANIA, NEW HAMPSHIRE AND MARYLAND
STATE COMMISSIONS**

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Dated March 5, 2010

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SUMMARY

Global NAPS, Inc., Global NAPs Pennsylvania, Inc., Global NAPs South, Inc. and other Global NAPs affiliates (collectively "Global") seek declaratory rulings pursuant to 47 C.F.R. § 1.2 to guide state commissions and federal courts in resolving actual controversies between Global and several local exchange carriers ("LECs") regarding the tariff treatment of Voice over Internet Protocol ("VoIP") traffic terminated to end users of interconnected LECs through Global.

Global asks the Commission to clarify its prior orders by declaring that: 1) because VoIP was declared jurisdictionally interstate in *Vonage*,¹ federal law prohibits state commissions from subjecting such traffic to intrastate tariffs; 2) once a carrier's traffic has been determined to be primarily nomadic VoIP, the remainder of its traffic must be treated as interstate absent clear proof of purely in-state calls; 3) because millions of telephone numbers are "sold" or ported by carriers to VoIP companies, Local Exchange Routing Guides ("LERGs") are not a reliable proxy for determining the true geographic point of origination of a call, and thus cannot be utilized to prove the applicability of intrastate tariffs to VoIP calls; 4) connecting carriers forwarding VoIP traffic are not subject to interstate switched access charges, and are also immune from intrastate access charges because forwarders of telecommunications traffic that do not sell toll services are not paid by the original caller and do not convey the call out of the originating caller's Local Access Transport Area ("LATA") are "intermediate carriers"

¹ *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 F.C.C.R. 22404, 2004 WL 2601194 (2004) ("*Vonage*"); see also *Minnesota P.U.C. v. FCC*, 483 F.3d 570 (8th Cir. 2007), *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009).

and not interexchange carriers (“IXCs”) as those terms are used in footnote 92 of the AT&T Declaratory (*IP-in-the-Middle*)² ruling, and thus are not subject to access charges.

In the alternative, as a remedy or contingency against recent and/or impending rulings from the state commissions in Pennsylvania, Maryland, and New Hampshire that do or will encroach upon the Commission’s jurisdiction while simultaneously hampering the provision of interstate services, Global respectfully requests an order preempting such actions under the standard for the federal preemption of state actions discussed in *Louisiana Public Service Commission v. F.C.C.*³

INTRODUCTION AND BACKGROUND

Global is a Massachusetts-based company with switching locations at Quincy, Massachusetts, New York City, New York and Reston, Virginia. In transmitting traffic, Global has only six customers: Transcom, CommPartners, Unipoint, BroadVoice, Reynwood and YMax/Magic Jack. Global delivers the traffic of several nomadic VoIP companies, including Vonage, BroadVoice and Magic Jack to about one dozen states. All of Global’s customers who are not themselves VoIP companies deliver VoIP and enhanced traffic through Global and similarly situated companies.

A licensed CLEC in the states where it operates, Global earns income by renting amounts of capacity or “sessions” on its delivery facilities. Global has no end user customers and never charges per call or per minute. In states such as Maryland and Pennsylvania, Global has an interconnection agreement with Verizon and sends traffic to

² *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, FCC WC Docket No. 02-361, FCC 04-97 (released April 21, 2004)(“*IP-in-the-Middle*”).

³ *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (“*Louisiana PSC*”).

the Verizon tandem, whereupon some traffic may then be transmitted by Verizon to ICOs on Verizon's tandem.⁴

Granting of this petition would not only ensure a viable and competitive marketplace for interconnecting VoIP carriers, but would also help achieve important goals of this Commission concerning the uniform application of rules and policies for VoIP traffic by: 1) reaffirming the Commission's exclusive power to set pricing and policy for Internet-related traffic; 2) remedying a lack of uniformity in outcomes of cases before state commissions and courts; and 3) preventing the imposition of exorbitant legacy rates on modern, low-cost and consumer-friendly VoIP services.

State commissions and their ALJs have varied widely in their interpretations of *Vonage* as it applies in intrastate tariff disputes. Correct readings of *Vonage* began to emerge in 2007 when the New York Public Service Commission ("NYPSC") interpreted this Commission's categorization of VoIP traffic as "jurisdictionally interstate" as precluding the application of intrastate access charges to the VoIP traffic transmitted by Global. An ALJ in Pennsylvania and a hearing examiner in Maryland adopted the same logic as the NYPSC. Over the past year, however, the state commissions in Pennsylvania and New Hampshire have expressly declined to follow the NYPSC's interpretation using various rationales.

These misinterpretations arise not only in cases involving Global or in disputes before state commissions. The chart below summarizes the proceedings and results in

⁴ This description of Global's service has been confirmed by findings of the New York Public Service Commission, an ALJ in Pennsylvania, and a hearing examiner in Maryland. To add detail, sworn testimony of Global's Vice President, Vonage, Broadvoice and Transcom taken at trial in the United States District Court for the Southern District of New York are appended hereto.

cases involving multiple VoIP carriers before state commissions and, occasionally, before federal courts:

Tribunal and Date	Plaintiff	Defendant	Result
New York PSC 2007	TVC	GNAPs	Commission finds that GNAPs transmits primarily nomadic VoIP and thus <i>Vonage</i> requires dismissal of intrastate tariff claims. GNAPs to pay special VoIP rate.
S.D.N.Y. 2009	MetTel	GNAPs	Judge Rakoff denies primary jurisdiction motion and SJ for either side; Vonage and Transcom testify for GNAPs. Ruling will issue.
Georgia PUC 2009	Georgia	GNAPs	GNAPs loses, but instate vs. interstate breakdown has not yet occurred.
D.D.C. 2009	Paetec	CommPartners	CommPartners granted summary judgment on all Paetec claims for tariff-based charges on its VoIP traffic
D.D.C. 2010	Paetec	GNAPs	Settlement discussions pending
PA PUC 2010	Palmerton	GNAPs	ALJ follows New York PSC, full Commission accepts finding that GNAPs transmits primarily nomadic VoIP, but reverses ALJ and orders payment at instate tariff rate (\$.04 per MOU)
PA PSC	Buffalo Valley	CommPartners	Probably subject to

2010			GNAPs' result with Palmerton
PA PSC 2010	Laurel Highland	ChoiceOne	Probably subject to GNAPs' result with Palmerton
New Hampshire PUC 2009	TDS	GNAPs	Commission orders full payment at intrastate rates, but suspends its order to consider new evidence from GNAPs
Vermont PSB 2009	Ludlow et al.	GNAPs	Agreed six month postponement
Maryland PUC 2010	Armstrong	GNAPs	ALJ follows NYPSC. Armstrong and staff ask Commission to follow Georgia, New Hampshire, and Pennsylvania rulings

As the chart makes clear, lawsuits and disparate results concerning the application of intrastate access charges to VoIP traffic have proliferated.⁵

Another reason for reaffirmation of the correct rule lies in the economics of the industry. All of these suits seek imposition of uneconomic rates on Internet-related traffic. For example, Palmerton's suit against Global in Pennsylvania requests \$.04 per minute of use ("MOU"), a rate more than one hundred times higher than the cost-based

⁵ The FCC has been made aware of aspects of this problem on several prior occasions. In 2005, Grande Communications, a CLEC providing terminating services for VoIP providers was involved in a similar form of dispute, and sought a declaration from this Commission allowing it to rely on customer certifications that all traffic received by Grande originated in IP format. *See Petition for Declaratory Ruling of Grande Communications, Inc.*, WC Docket 05-283 (filed, Oct. 3, 2005).

rates charged by AT&T, Verizon and Level 3.⁶ Not to be outdone, Armstrong seeks \$.06 per MOU in Maryland. These rates greatly exceed the costs of transmitting IP-enabled services, and their imposition on interconnecting VoIP carriers could prove catastrophic to such carriers' businesses as well as damaging to the consumer-friendly pricing of VoIP services. Because of the differences in these pricing regimes, an extreme two-tier system may emerge, with delivery of VoIP to small companies or cities costing significantly more than to larger companies and cities. This result would obviously impose a severe prejudice against the provision of competitive voice services to rural customers, and should be avoided at all costs.

Until the Commission acts to reaffirm and clarify its past positions regarding VoIP services and tariffs, other interconnecting VoIP companies will likely be forced into defending similar disputes and face similarly unpredictable or undesirable outcomes. Due to the conflicting applications of FCC precedent in these and other proceedings, prompt clarification is unquestionably necessary.

I. THE COMMISSION SHOULD ISSUE THE FOUR CLARIFICATIONS REQUESTED HERE.

All four clarifications Global seeks represent this Commission's unchanging intent. Thus, the standards for granting Global's petition with respect to all four points is unquestionably met in terms of correctness of the positions asserted, the need for clarification on those positions and the benefit to the national telecommunications marketplace achieved via such clarifications.

⁶ In New York, Pennsylvania and Maryland, Global, while contesting intrastate tariff claims, initiated requests for direct interconnection under 47 U.S.C. § 251, at the same unitary rate per MOU charged by Verizon and AT&T.

47 C.F.R. § 1.2 provides that the "Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." *Id.* Thus, a declaratory ruling is an appropriate vehicle to restate established law or clarify any perceived uncertainty under existing Commission regulations or precedent.⁷ Where, as here, the subject matter of the petition for declaratory ruling concerns issues over which the Commission has exclusive jurisdiction - *i.e.*, access charges for jurisdictionally interstate telecommunications traffic- "the need for agency expertise and for uniformity of decisions" demands that this Commission provide guidance to the courts and state commissions. *Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 310 (6th Cir. 1990). This is particularly the case where the "actions of the state [commission] are necessarily intertwined with federal actions" and the "ultimate issue" is whether a state commission has exceeded its jurisdictional authority. *Id.* at 309-310.

Petitioners file this request in response to or in advance of orders or positions adopted by the state commissions in New Hampshire, Maryland and Pennsylvania on the ground that they would be irreparably harmed, as described below, were any order issued that imposes non-cost based rates and can lead to blockage of their interstate access. This Petition is not premature or unripe. The relevant orders here are current and may lead to immediate blockages of interstate traffic. In any event, federal agencies are not constrained by Article III "case or controversy" limitations, but rather "may issue a declaratory order in mere anticipation of a controversy or simply to resolve an uncertainty." *Pfizer, Inc. v. Shalala*, 182 F.3d 975,980 (D.C. Cir. 1999).

⁷ See *Universal Service Contribution Methodology*, 23 FCC Rcd. 1411, para. 1 (2008).

A. **The Commission's Finding That VoIP is Jurisdictionally Interstate Renders Intrastate Tariffs Inapplicable to VoIP Traffic.**

Despite the FCC's emphasis on the need to protect the development of VoIP services by declaring them to be "jurisdictionally interstate" in *Vonage*, state commissions have been resistant and inconsistent in their interpretations of that order. In *Vonage*, this Commission ruled that because VoIP traffic can come from a local number transferred to an out-of-state person or from any place in the world to which such person carries their adaptor or router device, knowing whether such call is or is not intrastate is "impossible," thus triggering the FCC's right to deem such traffic "jurisdictionally interstate." Since the Eighth Circuit Court of Appeals' affirmation⁸, *Vonage* has been interpreted as allowing non-tariff regulation of VoIP providers (generally regarding issues such as E911/safety), but no federal court has held *Vonage* to be open to interpretations which would allow state commissions to enforce intrastate tariffs on VoIP traffic.

Explaining why it preempted tariff regulation of VoIP/ESP traffic based on separation of calls into intrastate and interstate segments, the Commission stated:

The significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information as a necessary aspect of the service would substantially reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers. *Vonage* at para. 23.

Commissioner Abernathy explained that:

This Order should make clear the Commission's view that all VoIP services that integrate voice communications capabilities with enhanced features and entail the interstate routing of packets-whether provided by

⁸ *Minnesota P.U.C. v. FCC*, 483 F.3d 570 (8th Cir. 2007).

application service providers, cable operators, LECs, or others – will not be subject to state regulation.

Further explaining the purpose of *Vonage*, Chairman Powell stated:

To subject a global network to disparate local regulatory treatment by 51 different jurisdictions would be to destroy the very qualities that embody the technological marvel that is the Internet. *Vonage*, at para. 45.

An additional statement of this exemption lies in *IP-in-the-Middle*,⁹ where the Commission stated that “IP telephony [is] generally exempt from access charges. . . .”¹⁰ Although, by its wording, this general exemption logically applies to *any* form of access charges and/or to the extent any state commission attempts to impose burdensome regulations on VoIP services as contravening the FCC’s overarching national policy goals, the exemption is most clear with respect to intrastate (local) access charges. As former Chairman Michael Powell stated with respect to the jurisdictional nature of VoIP services, “I don’t know whether it’s Internet or telephone, but I know it’s not local.”¹¹ He went on to emphasize that the Commission, not the states, is the “principal regulatory authority” for VoIP services and the “first in line to set the initial regulatory environment” for VoIP services.¹²

⁹ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, FCC WC Docket No. 02-361, FCC 04-97 (released April 21, 2004)(“*IP-in-the-Middle*”).

¹⁰ *Id.* at para. 9. (citing *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 F.C.C. Rcd 9610, 9657, para. 133 (2001)).

¹¹ Wireline, COMMUNICATIONS DAILY, Dec. 10, 2003 at 9.

¹² *Id.*

For all these reasons, Vonage and similar VoIP services were declared interstate and therefore subject to the Commission's exclusive jurisdiction.¹³ Thus, the preemptive intent of *Vonage* remains unquestionable: The classification of VoIP as "jurisdictionally interstate" renders interconnected VoIP services immune from attempts to subject VoIP to intrastate tariffs or to the enforcement by state commissions of those tariffs. Any contrary interpretation would endorse the very "disparate local regulatory treatment" *Vonage* specifically purports to avoid.

This clarity notwithstanding, state commissions have been anything but consistent in following the FCC's analysis. Three state commission orders (two of which are presently subject to appeals) explicitly find *Vonage* precludes application of intrastate tariffs to VoIP traffic. As noted above, the New York Public Service Commission ("NYPSC") correctly applied *Vonage* in a case involving Global,¹⁴ definitively ruling that nomadic VoIP traffic, such as that originating with Global's suppliers, must be treated as jurisdictionally interstate. Rejecting TVC's claim for intrastate access charges, the NYPSC stated:

Because nomadic VoIP is interstate in nature, and because its rates are exclusively under the FCC's jurisdiction, we are similarly precluded from imposing the TVC intrastate access tariff. Under the FCC's decisions, nomadic VoIP is treated as interstate subject to exclusive federal rate jurisdiction. *Applying the TVC intrastate access tariff to an interstate service would be inappropriate and conflict with valid federal laws and policies.*

TVC at 15 (emphasis added).

¹³ *Vonage* at para. 14.

¹⁴ PSC Case No. 07-C-0059, *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Order dated Mar. 20, 2008 ("TVC").

The *Vonage/TVC* analysis was recently adopted in a proposed order (presently subject to an appeal) in the Maryland Public Service Commission (“PSC”) in another case involving Global.¹⁵ There the hearing examiner concluded:

As it is impossible to separate intrastate from interstate nomadic VoIP calls, it is impossible for ILECs to determine which calls are subject to intrastate access charges. The “impossibility exception” therefore precludes levying intrastate access charges on VoIP traffic that contains unknown amounts of nomadic traffic, which may be interstate.¹⁶

Nevertheless, in its appeal brief the Maryland PSC staff argues simply that, notwithstanding the hearing examiner’s analysis and the admitted presence of VoIP (specifically nomadic VoIP), “[Global] is subject to the Armstrong intrastate access tariff for the traffic it is terminating on the Armstrong network.”¹⁷

Like the hearing examiner in Maryland, the ALJ in Global’s dispute with Palmerton in Pennsylvania also correctly interpreted *Vonage*, finding that “[t]here is, however, a clear determination regarding VoIP service that has been made: nomadic interconnected VoIP service has been preempted from state regulation by the FCC.”¹⁸ Against this legal backdrop, the ALJ concluded that “nomadic VoIP services . . . are not calls within the Commission’s jurisdiction and are not properly billed intrastate access charges.”¹⁹

¹⁵ *In the Matter of the Investigation Examination and Resolution of Payment Obligation of Global NAPs Maryland, Inc. for Intrastate Access Charges Assessed by Armstrong Telephone Company –Maryland*, Case No. 9177, Proposed Order of Hearing Examiner (issued Dec. 30, 2009)(“*Armstrong*”).

¹⁶ *Id.* at 22.

¹⁷ Staff Br. at 6.

¹⁸ *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc., and other affiliates*, C-2009-2093336, Initial Decision issued August 11, 2009 (*Palmerton*) at 29.

¹⁹ *Id.* at 34.

On appeal, however, the full Pennsylvania Public Utility Commission (“PPUC”) found intrastate tariffs applicable to the VoIP calls forwarded by Global, declaring that “[Global’s] reliance on the NY PSC *TVC v. GNAFs* decision is equally misplaced.”²⁰ In rejecting the NYPSC’s interpretation of *Vonage*, the PPUC stated:

... [Global’s] contention that the FCC somehow “has clearly and repeatedly stated its intention” to preempt state regulatory jurisdiction over intercarrier compensation matters for “all VoIP and enhanced traffic” is without basis in law or fact.²¹

* * * *

... the fact that [Global] transports and indirectly terminates traffic that may have initially originated in IP, inclusive of nomadic VoIP, is largely immaterial to this analysis on whether this Commission has subject matter jurisdiction and whether the appropriate jurisdictional intercarrier compensation should apply.²²

The Chairman’s Motion, adopted by the full state commission, categorizes the transport of VoIP calls as a telecommunications service in contrast to this Commission’s avoidance of that issue in *Vonage*: “[Global’s] wholesale *transport (inclusive of VoIP or IP-enabled calls)* ... are clearly telecommunications functions and services under the [this] Commission’s jurisdiction in accordance with applicable Pennsylvania and federal law.”²³

²⁰ *Palmerton*, Motion of Chairman James H. Cawley, at 17 (“*Chairman’s Motion*”).

²¹ *Chairman’s Motion* at 16.

²² *Id.* at 20.

²³ *Id.* at 16. (Emphasis in original).

In another Global case,²⁴ the New Hampshire PUC (“NHPUC”) also misinterpreted *Vonage* in applying intrastate tariffs to Global’s VoIP traffic, nomadic or otherwise. The NHPUC acknowledged Vonage’s prohibition against state imposition of certification, tariffing and related requirements, stating that “state regulation violates the Commerce Clause if the burdens imposed on interstate commerce by state regulation would be ‘clearly excessive in relation to the putative local benefits.’”²⁵ However, the NHPUC then determined that:

Payment for services rendered, however, cannot be construed as an excessive regulatory burden. Here, TDS is not proposing that this Commission impose new regulations on Global NAPs that could pose a potential barrier to market entry—it is seeking enforcement of its existing intrastate tariff.²⁶

Somehow, the New Hampshire PUC concluded the ICO’s intrastate tariffs were applicable “whether the traffic at issue is interstate or intrastate.”²⁷ Ultimately, and despite some discussion of the import of *Vonage* and acknowledgment that at least some of Global’s traffic was interstate, the PUC determined Global was obligated to pay the full amount of the ICO’s bills assessing intrastate access charges, or be blocked from delivering traffic to the state.²⁸

²⁴ *Hollis Telephone, Inc., Kearsage Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co. Petition for Authority to Block the Termination of Traffic from Global NAPs, Inc.*, DT 08-028, Order No. 25,043 (issued November 10, 2009) (“TDS”).

²⁵ *Id.* at 18, citing *Vonage*, para. 38.

²⁶ *Id.*

²⁷ *Id.* at 20.

²⁸ *Id.* at 24. As previously noted, disputes over application of intrastate tariffs to VoIP traffic are not unique to Global or the state commissions. A fourth interpretation of the law surrounding intrastate access charges and VoIP recently occurred in a federal

Notably, none of the *final* orders above utilize the identical interpretation and application of *Vonage*. Again, this lack of uniformity is the very result sought to be avoided by this Commission's order in *Vonage*, and can only be remedied by a clear and emphatic declaration that intrastate access charges are inapplicable to VoIP services.

B. Imposing Intrastate Tariff Charges on any Percentage of Jurisdictionally Mixed VoIP Services Necessarily Impinges Upon the FCC's Exclusive Regulatory Authority.

The only proper interpretation of *Vonage* is that this Commission retained jurisdiction to set pricing for all aspects of VoIP services. In *TVC*, the NYPSC partially based its decision to preclude application of intrastate tariffs to Global's traffic on the fact that ". . . *most*, if not all, the traffic [Global] sends to the TVC network for termination is nomadic VoIP."²⁹ This order acknowledges states' lack of authority to impose intrastate tariff rates upon interstate services, especially where the exact percentage of interstate traffic being transmitted is unknown or unknowable. In other words, it is inappropriate for a state commission to order a blanket application of an intrastate tariff to traffic

court, where summary judgment was granted on behalf of a carrier similarly situated to Global. In *Paetec Communications, Inc. v. CommPartners, LLC*, 08-cv-0397-JR (D.D.C. Feb. 18, 2010) ("*Paetec*"), Paetec sought application of an intrastate tariff with exceptionally broad terminology to VoIP-to-TDM calls originated by CommPartners. CommPartners opposed on two grounds: 1) that its termination of VoIP-originated calls in an information service exempt from access charges; and 2) that access charges cannot apply to VoIP-originated calls because reciprocal compensation applies instead. Without any discussion of this Commission's order in *Vonage*, the court held "CommPartners' transmission and net conversion of the calls is properly labeled an information service." *Id.* at 7. The court went on to conclude access charges were inapplicable to VoIP services, stating: ". . . access charges apply only where there was a 'pre-Act obligation relating to inter-carrier compensation.' There cannot be a pre-act obligation relating to intercarrier compensation for VoIP, because VoIP was not developed until [after] the 1996 Act was passed." *Id.* at 7-8.

²⁹ *TVC* at 14 (emphasis added).

known to be at least partially interstate because doing so would exceed states' authority and subvert this Commission's exclusive jurisdictional powers. This is, of course, simply a restatement of the "impossibility" doctrine that this Commission adopted in *Vonage* to assert exclusive jurisdiction over all nomadic VoIP and that the courts accepted in affirming that decision.

Echoing these general principles, the hearing examiner in *Armstrong* reached the same conclusion as the NYPSC, holding that:

While the exact proportions of fixed and nomadic VoIP in Global's traffic are not available, it is not realistic to assume that all of Global's traffic is fixed, as Staff concludes. (internal citation omitted) For Armstrong to charge Global intrastate access charges for its traffic would therefore clearly violate federal prohibitions on subjecting nomadic VoIP to access charges.³⁰

Importantly, neither the *TVC* nor *Armstrong* opinions indicated any qualifying percentage of federally regulated traffic. Rather, both orders held that even the slightest impingement upon federal authority was inappropriate.

Federal courts have followed similar rationales. The Court of Appeals for the Eighth Circuit recently ruled this Commission's authority was trespassed upon by Nebraska's attempt to adopt 35.1 percent as a number necessarily reflecting the amount of intrastate nomadic interconnected VoIP usage for the purposes of NUSF application.³¹

Citing *Vonage*, the Court of Appeals held:

A reasonable interpretation of this language is the FCC has determined, given the impossibility of distinguishing between interstate and intrastate nomadic interconnected VoIP usage, it must have sole regulatory control.

³⁰ *Armstrong* at 22.

³¹ *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009).

Thus, while a universal service fund surcharge could be assessed for intrastate VoIP services, the FCC has made clear it, and not state commissions, has the responsibility to decide if such regulations will be applied.³²

Certain state commissions have not followed this rationale. For example, the full Pennsylvania commission found the

traffic protocols for the related calls that are being transmitted by GNAPs and eventually terminate in Palmerton's network is *not determinative* of the Commission's subject matter jurisdiction both in terms of applicable Pennsylvania and federal law and sound policy.³³

Thus, the PPUC determined that it could, in fact, regulate pricing and policy for VoIP traffic by forcing Global to pay Palmerton's intrastate charges in direct contradiction of federal precedent. Distorted interpretations such as this can be avoided, however, by this Commission's clarification that it, not the states, will set pricing for *all* segments and *all* aspects of VoIP services.

C. Utilization of LERGs and NANP Numbers Is Inadequate for Determining the True Geographic End Points of Calls, and Thus, if Challenged Factually, Cannot Demonstrate the Applicability of Intrastate Tariffs.

Other examples supporting (and explicitly or implicitly recognizing the need) for a uniform broadband policy limiting the role of the states are found in the Commission's rulings in *pulver.com*³⁴ and *Vonage*. In both cases, the Commission rejected use of the so-called "functional equivalence" test (use of LERGs and NANP numbers) to determine the true geographic end points of IP-enabled calls.

³² *Id.* at 905.

³³ *Chairman's Motion* at 2. (Emphasis in original).

³⁴ *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, para. 16 (2004) ("*pulver.com*").

In *pulver.com*, the Commission stated plainly that the end-to-end analysis is either inappropriate or “unhelpful” with respect to services involving the internet. In *Vonage*, the Commission determined that the Minnesota PUC’s holding should be preempted due to the impossibility of separating Vonage’s service into interstate and intrastate communications for compliance with Minnesota’s requirements without negating valid federal policies and rules.³⁵ In so doing, the Commission reiterated its previous findings in *pulver.com* that applying the end-to-end analysis to Internet-based services is difficult, if not impossible due to the “total lack of dependence on *any* geographically defined location” associated with such services.³⁶ While there may be some indirect proxies for determining jurisdiction (i.e., billing address), the Commission found these proxies have no place in the world of IP-related services and would impose significant costs on IP-transmitting companies by requiring them to essentially retrofit their networks into the traditional service model.³⁷

The Commission’s order in *Thrifty Call*,³⁸ a decision which holds the use of an out-of-state relay station will not justify altering the intrastate classification of a call indisputably originating with “1 plus” dialing in the state of the party being called, contains a footnote to the same effect as the *Vonage* order:

Although the Commission has applied this type of end-to-end analysis to traditional telephone services, such as those provided by Thrifty Call, it

³⁵ *Vonage* at para. 31.

³⁶ *Id.* at paras. 24-25 (emphasis in original). Also, *pulver.com*.

³⁷ *Vonage* at para. 26-29.

³⁸ *In the Matter of Thrifty Call, Inc.*, 19 FCC Rcd. 22240 at para. 7 (2004) (“*Thrifty Call*”).

has acknowledged that an approach based on the geographic end points of a call may be a poor fit as applied to services that involve the Internet. Thrifty Call, para. 15, n. 49. (Emphasis added).

In these orders, the Commission emphasized the factual and policy problems associated with applying traditional analysis to non-traditional services. Some state commissions, acknowledging these difficulties, have adopted the FCC's position in disallowing NANP/LENG analysis with respect to IP-enabled services while others have defiantly continued to ignore this Commission's precedent.

One example of the correct application of the *pulver/Vonage/Thrifty Call* rationale is an order resulting from a proceeding in the Wisconsin PUC, where AT&T sought to use an end-to-end analysis, even including some samples, to impose access charges on MCI traffic asserted to be VoIP.³⁹ MCI argued that its entitlement to a VoIP or enhanced service provider (ESP) exemption for its traffic had not been disproved, and that no charge above \$.0007 (a charge MCI agreed to pay) could legally be imposed. The Wisconsin commission accepted all of the MCI arguments, holding that: "*The use of an end-to-end analysis to rate an IP-PSTN call is unreliable, unreasonable and would frustrate a valid federal interest in promoting competitive advanced service offerings.*" *Id.* at 32. (Emphasis added).

In *Palmerton*, the ALJ employed virtually identical reasoning to the Wisconsin panel in rejecting an attempt to impose access charges via a non-segregated end-to-end analysis:

³⁹ *Petition of MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Interconnection Terms and Conditions and Related Arrangements with Wisconsin Bell, Inc. d/b/a Wisconsin Pursuant to 47 U.S.C. §252(b), PSC Ref. No. 54417, Arbitration Award of May 15, 2006.*

While Palmerton contends this is “standard industry practice” (and it may well be), this only highlights the fact that we are attempting to fit the square pegs of advanced technology into the round holes of outmoded regulation. Palmerton made no attempt to determine the nature of the calls but relied only upon the apparent beginning and end points to determine that this was traffic subject to intrastate access charges. Palmerton ignored any possibility that the calls were nomadic VoIP (over which the FCC has removed state jurisdiction) or that they were not telecommunications services but rather information services (over which the FCC has also removed state jurisdiction). The fact that nomadic VoIP originated calls are not geographically limited, along with the availability of non-native area codes, prevents the simple comparison of LERG and TPM supposed geographic locations from being conclusive as to the intrastate nature of a call. Likewise, the enhancement of traffic provided by carriers such as Transcom, PointOne, and CommPartners that are included in the delivery of the traffic but basically transparent to Palmerton makes such simple determinations insufficient for concluding whether the traffic is telecommunications services or information services. (internal citations omitted).⁴⁰

A recurrent feature of recent state commission cases with contrary holdings has been the ability of ICOs to persuade commission staff or commissioners that a mere showing that a billed call originated from an in-state area code should be treated as conclusive proof that it can be billed as an intrastate call. This presumption has even led to rulings that fact hearings on the actual origin or nature of calls are unnecessary. The most extreme conclusions have been that proof that a billed call was from a cable or cell phone company, that the originating phone number had been sold to Vonage or another VoIP provider, or that the call originated in IP and was transmitted to an enhanced service provider, have no relevance to the propriety and legality of imposing intrastate tariff rates on calls. The PPUC, for instance, ordered Global to pay full intrastate rates on every call at issue, despite proof accepted by the ALJ as clearly demonstrating all the above facts. In fact, the Pennsylvania commission admitted that “[a]lthough Palmerton

⁴⁰ *Palmerton* at 31-32.

follows standard industry practices for the jurisdictional classification, access rating, and billing of interexchange calls, it cannot identify the actual physical location of the calling party.”⁴¹ This uncertainty and technological inability notwithstanding, the commission held that

Based on the case-specific evidentiary record, Palmerton adequately relied on the NPA/NXX origination and termination of the intrastate interexchange call traffic at issue for the jurisdictional classification and billing of such traffic.⁴²

Where state commissions issue orders (such as this) allowing the utilization of LERGs and NANP numbers to impose intrastate access charges even where the calls are admittedly interstate and/or VoIP, two results occur: First, as stated in section I.B., *supra*, these orders inappropriately infringe upon this Commission’s exclusive interstate jurisdiction. Second, these orders create a lack of uniformity by directly contradicting FCC precedent and other state commission orders. In order to resolve both problems, the FCC should re-emphasize its regulatory jurisdiction over VoIP services and clarify the inapplicability of “functional equivalence” studies in billing disputes concerning VoIP traffic.

D. Connecting Carriers of VoIP Traffic Share the Exemption From Access Charges and are Also Immune Because the Commission’s Holdings Prohibit Application of Access Charges to Intermediate Carriers Such as Global.

Connecting carriers of VoIP traffic are immune from access charge liability. The commission in *TVC*, the hearing examiner in *Armstrong* and the ALJ in *Palmerton* all implicitly recognized this general rule by focusing on the *traffic* being transmitted by

⁴¹ *Chairman’s Motion* at 24.

⁴² *Id.* at 27.

Global instead of provider/carrier status. Once those commissions found the presence of nomadic VoIP, their inquiries ceased. No “VoIP provider” status requirement was deemed necessary.

The exemption is particularly clear with respect to tariff application. The Wireline Competition Bureau in *Time Warner* held interconnection VoIP carriers were entitled to the same 47 U.S.C. § 251 privileges as any traditional carrier.⁴³ Thus, *Time Warner* explains arms-length negotiations, not tariffs, must apply to traffic like Global’s. *Time Warner*’s holding only reinforces the inapplicability of tariffs to services developing post-enactment of the Act. Under the 1996 Act, reciprocal compensation is the norm; access charges apply only where there is a “pre-Act obligation relating to intercarrier compensation.”⁴⁴ Obviously, no pre-Act obligation can exist for VoIP because VoIP was not developed at the time until after the Act was implemented.⁴⁵

Contrary to these clear holdings, some state commissions have adopted much more narrow interpretations, holding the exemption applies only to VoIP providers and not their interconnecting carriers. PPUC issued just such an order, stating that:

The NH PUC Order – and other similar decisions – that the FCC *Vonage* decision primarily affects the potential state role on market entry and regulation of nomadic VoIP service providers – is correct. NH PUC Order at 17-19. Here, as in many other jurisdictions, we are not dealing with the issue of market entry and regulation of nomadic VoIP service providers.

⁴³ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, DA 07-709, Memorandum Opinion and Order, para. 17 (March 1, 2007) (“*Time Warner*”).

⁴⁴ *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 433 (D.C. Cir. 2002).

⁴⁵ *Paetec Communications, Inc. v. CommPartners, LLC*, No. 08-0397-JR, Summary Judgment Order (Feb. 18, 2010) at 7-8.

Instead, we are dealing with the issue of GNAPs, a telecommunications utility carrier, which transports and terminates traffic at Palmerton's PSTN facilities.⁴⁶

Global is unquestionably an intermediate CLEC, not an IXC. Such intermediaries normally may not be billed switched access fees in any form. The applicable federal rule on the application of access charges states that:

(b) Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.

47 C.F.R. § 69.5(b). The Commission explained the negative implications of this rule in 2004:

We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers *and not against any intermediate LECs that may hand off the traffic to the terminating LECs*, unless the terms of any relevant contracts or tariffs provide otherwise.⁴⁷

The rationale underlying this exemption is that companies who serve only as intermediaries are not well-positioned to determine the actual origination points of the traffic they transmit. Thus, intermediate companies remain ill-suited to correctly apply or defend against fees sought to be applied to their traffic.

Although the Commission has clearly delineated an intermediate carrier exemption from access charges, state commissions and federal courts have not uniformly applied it. In *Armstrong*, the hearing examiner correctly applied the intermediate carrier

⁴⁶ *Chairman's Motion* at 15.

⁴⁷ *See IP-in-the-Middle, supra* at n. 92 (Emphasis added).

exemption to Global after specifically contrasting Global's forwarding service to AT&T's role as an IXC in *IP-in-the-Middle*, stating that:

Global is . . . clearly "in the middle" in a structural sense . . . Global, as a transporter of VoIP telephone traffic, does not directly connect with ordinary customer premise equipment, does not originate (but does terminate) calls on the public switched telephone network, and effects a protocol conversion of its traffic to TDM at Verizon's switch. These characteristics and actions are the opposite of those that the FCC determined, in its *IP in the Middle*⁴⁸ order, defined carriers subject to local access charges. Therefore, I conclude that on the basis of the FCC's *Phone-to-Phone IP Telephony* order Global is an intermediate carrier not subject to local access charges.⁴⁹

Most courts and administrative bodies have not reached the intermediate carrier issue, instead focusing their orders on the impact of the presence of VoIP traffic to their jurisdiction or on various other exemptions from intrastate tariffs.⁵⁰ Even the broad reaches of the full commission order rendered by the Pennsylvania PUC do not include the slightest reference to the intermediate carrier issue.⁵¹ In any event, sufficient confusion about the applicability of access charges to either intermediate carriers of VoIP traffic or to intermediate carriers in general militates in favor of clarification by this Commission of its 2004 statements.

⁴⁸ *IP-in-the-Middle*, at para. 1.

⁴⁹ *Armstrong* at 23-24. (Emphasis in original).

⁵⁰ See *TVC* at 16-17 ("Finally, while [Global] claims that it is not subject to access charges because it is an intermediate carrier, this claim is moot. We have already decided that we cannot impose intrastate charges on nomadic VoIP because it is an interstate service. We need not determine the merits of [Global's] claimed exemption under its intermediate carrier status.").

⁵¹ However, Global's motion for summary dismissal due to its status as an intermediate carrier was denied.

II. ACTIONS OR THREATS BY THE NEW HAMPSHIRE, PENNSYLVANIA AND MARYLAND STATE COMMISSIONS TO ENFORCE INTRASTATE ACCESS CHARGES ON NOMADIC VOIP TRAFFIC MERIT PREEMPTION UNDER THE *LOUISIANA PSC* TEST.

The jurisprudence on the Commission's interstate jurisdiction being so clear, Global respectfully requests a ruling that any action by the state commissions imposing rates on jurisdictionally interstate services is preempted. The use of federal jurisdiction to supplant state law was delineated by the Supreme Court in the *Louisiana PSC* case:

The Supremacy Clause of Article VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), when there is outright or actual conflict between federal and state law, e.g., *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).⁵²

⁵² *Louisiana PSC*, 476 U.S. 355 at 368-69.

The Commission itself has noted that: "It is well-established that . . . 'a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations.'"⁵³

The Commission has regularly used this authority to prevent the erosion of its jurisdiction, to implement its rules and policies on a nationwide basis, and to implement the mandates of the Communications Act.⁵⁴ Section 253 of the Communications Act, as amended by the Telecommunications Act of 1996, provides the Commission with express authority to preempt state regulations that "prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253. In addition, the Commission has found implied preemption authority in other sections of the Act, including Sections 154(i) and 251.⁵⁵

As Global demonstrates below, any order by the state commissions mentioned above granting any of the relief sought by the relevant ICOs would merit preemption under several of the provisions of the *Louisiana PSC* test. Such orders: 1) directly contradict statements of law and policy established by this Commission in the *Vonage*

⁵³ *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition/or Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Red. 15168, 15172, para. 8 (2000) (citing *Fidelity Federal Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982)).

⁵⁴ *E.g., Vonage Holdings Corp.*, 19 FCC Red. 22404 (2004); *Petition for a Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc. and Ryder Communications, Inc.*, 8 FCC Red. 698 (1993), *aff'd* 10 FCC Red. 4153 (1995).

⁵⁵ *See BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, 20 FCC Red. 6830, 6839, para. 19 (2005).

preemption order; 2) effectively ignore the Commission's desire for uniformity, instead imposing multiple disparate interpretations of intrastate tariff application; and 3) would constitute a barrier to the competitive provision of both interstate and intrastate services in contravention of 47 U.S.C. § 253.

A. **This Commission has Either Preempted or Expressed a Clear Intent to Preempt State Actions Impeding the Development and Utilization of VoIP Services.**

The Court of Appeals for the Eighth Circuit affirmed this Commission's retention of jurisdiction over nomadic VoIP services, stating that "[t]he impossibility exception . . . is dispositive of the issue whether the FCC has authority to preempt state regulation of VoIP services."⁵⁶ Because of the nature of Internet-related services, it is technically impossible to apply the state regulations imposed by orders in New Hampshire and Pennsylvania to traffic which is admittedly at least partially interstate in nature. Indeed, because the Internet-based nature of Global's services makes it impossible or impractical to distinguish intrastate from interstate communications and nomadic from fixed VoIP,⁵⁷ the New Hampshire and Pennsylvania commissions cannot enforce their respective orders without imposing state tariffs on services the Commission expressed its desire to regulate and without also interfering with Global's ability to provide interstate services. Clearly, this Commission possesses the power to preempt state actions affecting interstate communications: "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be

⁵⁶ *The Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d at 578 (8th Cir. 2007).

⁵⁷ *Chairman's Motion* at 24 (noting how Palmerton ". . . cannot identify the actual physical location of the calling party.>").

governed solely by federal law and . . . the states are precluded from acting in this area.”⁵⁸

Moreover, when this Commission issued its impossibility-based preemption order in *Vonage*, it stated that:

[T]he practical inserverability of other types of IP-enabled services having basic characteristics similar to DigitalVoice *would* likewise preclude state regulation. . . . Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we *would* preempt state regulation to an extent comparable to what we have done in this Order.⁵⁹

Thus, this Commission has already concluded that preemption is warranted with respect to services sharing similar basic characteristics to that of Vonage, including a requirement for broadband connection from the customer’s location, utilization of broadband compatible customer premises equipment, and a service offering allowing for interaction with traditional network infrastructure. The Federal Regulations incorporate this description as the definition for “interconnected VoIP”⁶⁰ services—the very services Global provides.

Global only asks this Commission to follow through on its previously expressed intent to preempt state commissions consistently with *Vonage*. Global has been found to provide a form of interconnecting VoIP service—a service integral to the interaction of VoIP with traditional network infrastructure. There can be no doubt that state commissions are either directly or indirectly regulating and hindering the provision of

⁵⁸ *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 S.2d 486, 491 (2d Cir. 1968) (emphasis added).

⁵⁹ *Vonage* at para. 32. (Emphasis added).

⁶⁰ *The Minnesota Public Utilities Comm’n v. FCC*, 483 F.3d at 574-75 (8th Cir. 2007) (citing 47 C.F.R. § 9.3).

this service by levying intrastate access charges and/or blocking or threatening to block the transmission of Global's VoIP traffic to various states. Federal courts have also already recognized a total preemption of *any* state court action impacting VoIP services by this Commission.⁶¹ Thus, all that remains is for the Commission to either clarify the scope of its preemption in *Vonage*, or expand its preemption in *Vonage* to prevent imposition of intrastate tariffs on interconnected VoIP traffic.

B. This Commission has Clearly Expressed its Desire to Implement a Uniform System of Regulation for VoIP Services.

One import of *Vonage* and its prodigy is that there should be a single national policy to ensure the continued development of advanced and Internet-related services. As noted in Section I.A., *supra*, none of the final orders in these cases employs the same rationale or reaches the same conclusion with respect to applying *Vonage* to VoIP-based intrastate tariff disputes. If the local ILECs ultimately prove successful in seeking to impose their extremely high-priced intrastate tariffs, the end-result will be a dual system of pricing: one low rate for major carriers/localities and a second high rate for the smaller, more rural carriers/localities. Thus, in the absence of preemption by this Commission, VoIP services will not only be subject to multiple disparate interpretations of *Vonage*, but also to multiple pricing regimes imposed under those varying interpretations.

Moreover, due to the conflict between these higher prices and the consumer-friendly pricing of VoIP services, carriers of VoIP traffic may ultimately be forced into denying traffic transmission in rural areas. This Commission's emphasis on the

⁶¹ See, e.g., *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900, 905 (8th Cir. 2009).

competitive provision of all rural services (including broadband services) over the past two years strongly militates against this result.⁶²

As of the time of this petition's filing, each of the state proceedings in question remains in flux. In New Hampshire, the order to pay all ICO bills or have traffic blocked was suspended in December due to Global's motion for reconsideration.⁶³ In Pennsylvania, an opinion has been published,⁶⁴ but no final order has issued. In Maryland, the ALJ's decision was favorable to Global, but the staff supported the ICO's appeal, urging Global should pay all intrastate tariff bills regardless of the presence of nomadic VoIP. Briefing has just been completed, so the matter is now before the full commission.

C. This Commission Clearly Expressed its Desire to Protect Both Providers and "Connecting Carriers" of VoIP Traffic from Tariff Charges.

This Commission has declared on three occasions that intermediate carriers of VoIP traffic are not subject to access tariffs, but only to negotiated charges under 47 U.S.C. § 251.⁶⁵

In 2004, the Commission opened a proceeding to determine whether and to what extent IP telephony services should pay access charges. However, events quickly

⁶² See generally <http://www.fcc.gov/cgb/rural/>

⁶³ DT 08-028. *Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc. Joint Petition for Authority to Block the Termination or Traffic from Global NAPs, Inc., Suspension or Order*, issued December 15, 2009.

⁶⁴ *Chairman's Motion*.

⁶⁵ See Section I.D., *supra*; FCC Press Release, November 26, 2004; *Time Warner, supra* at para. 17 (March 1, 2007); *IP-in-the-Middle, supra* at n. 92.

outpaced that project. That year, SBC (now AT&T) sought FCC approval of a tariff that would explicitly and automatically subject VoIP traffic to switched access charges (at a somewhat reduced rate). The Commission withheld approval. Only when SBC confirmed that its tariff was purely optional did the Commission finally approve the optional tariff (though it does not appear that SBC ever actually used it).

In connection with the approval, the chairman of the FCC issued a press release to clarify the understanding and ensure the industry was aware of the agency's view that switched access tariffs should not apply to VoIP traffic unless and until the FCC said so.

The Press Release states:

Should we conclude that this [optional] tariff is being used to justify the imposition of traditional tariffed access charges on VoIP providers or to discriminate against SBC's competitors, the Commission will take appropriate action including, but not limited to, initiating an investigation of SBC's interstate tariff and any other tariff that proposes similar terms. Nothing in this tariff should be interpreted to force a set of compensation relationships on VoIP providers and their connecting carriers at this commission or in other venues. FCC Press Release, November 26, 2004. (Emphasis supplied).

This press release is especially significant because the Commission expressly exempted both VoIP providers "and their connecting carriers" (like Global) from traditional access charges, and warned against contrary policies "in other venues," which can only be interpreted as involving state commissions. Thus, the only rational conclusion to be drawn from this statement is that interconnecting carriers are entitled to the access charge immunity extended to VoIP providers.

This result is both fair and logical due to the fact that intermediaries are unable to provide estimates of interstate use or origination data on calls. The inability to generate

this information renders intermediaries particularly susceptible to victimization by intrastate tariff-hungry ICOs.

Moreover, the conclusions of the state commissions that VoIP providers may be exempt from access charges but that the interconnecting carriers that carry their traffic towards termination are not, directly contradicts the FCC's decision in *Time Warner*. There, this Commission correctly recognized that a demand by ICOs that interconnecting carriers of VoIP traffic interconnect only by purchasing access facilities would violate federal law and public policy. The Order discusses the critical importance to competition and to the deployment of new technology of "ensuring the protections of section 251 interconnection" are available to wholesale LECs serving VoIP providers:

We further find that our decision today is consistent with and will advance the Commission's goals in promoting facilities-based competition as well as broadband deployment. Apart from encouraging competition for wholesale services in their own right, ensuring the protections of section 251 interconnection is a critical component for the growth of facilities-based local competition. Moreover, as the Commission has recognized most recently in the VoIP 911 Order, VoIP is often accessed over broadband facilities, and there is a nexus between the availability of VoIP services and the goals of section 706 of the Act. *Id.*, para. 13.

This general rule and underlying rationale has been recognized by the Maryland ALJ, but rejected in New Hampshire and Pennsylvania.⁶⁶ Thus, there is both prior justification and a clear and present need for a preemption order against imposition of intrastate access charges on VoIP forwarders.

D. The Commission has the Right to Preempt State Actions that Impose Barriers to Competition.

Section 253 of the federal Communications Act provides for the "Removal of Barriers to Entry." This section of the Act states:

⁶⁶ See discussion in Section I.C., *supra*.

[253](a) IN GENERAL. - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,

(b) STATE REGULATORY AUTHORITY, - Nothing in this section shall affect the ability of a State to impose, on a competitive neutral basis. . . requirements necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers,

(d) PREEMPTION, - If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such a violation or inconsistency,

The relief sought by the ILECs involved in state actions with Global and the resulting state commission orders would restrict both intrastate and interstate competition in multiple respects, and so fall within the express Congressional preemption mandate. Although 47 U.S.C. § 253, by its very terms, only applies to “telecommunications services,” this Commission may nonetheless preempt state commissions under similar logic to that employed in *Time Warner Cable* because parallel rationales underlie the application of 47 U.S.C. §§ 251 and 253 to interconnected VoIP companies. Thus, the Commission need not classify interconnected VoIP as either a “telecommunications” or “information service” for the purposes of applying its preemptive powers under this section.

The order of the New Hampshire PUC and the proposal of the plaintiff in Pennsylvania have been that if Global fails to pay every penny of the in-state tariff

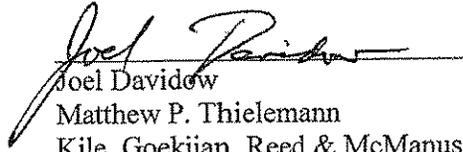
charges for which it has been billed, it should be expelled from the state.⁶⁷ Allowing or endorsing this expulsion produces the anomalous result that a dispute with a recipient of 1% of a carrier's traffic could lead to a ban on transmitting any interstate calls to the other 99% of the carrier's traffic recipients. That ruling turns this Commission's ruling in *Vonage* on its head. There, this Commission found under the impossibility doctrine that VoIP traffic must be presumed to be entirely interstate. 47 U.S.C. § 253 was drafted to prevent exactly this form of state action. Thus, this Commission should preempt the state commissions from blocking the transmission of Global's traffic, including interconnected VoIP.

CONCLUSION

Global appreciates the Commission's reluctance to engage in piecemeal pronouncements setting compensation rules for Internet-related traffic, but believes this petition should not be regarded as such a request. Global seeks only to have the Commission reaffirm and enforce rulings it made in 2004 that have been well understood and correctly followed by some state commissions and administrative law judges but distorted or disregarded by other state commissions and/or their staffs. Further, foreclosing the states once and for all from seeking to impose access charges on nomadic VoIP and its interconnecting carriers will better clear the way for a unitary intercarrier compensation solution orchestrated by this Commission.

⁶⁷ See, e.g., DT 08-028. *Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc. Joint Petition for Authority to Block the Termination or Traffic from Global NAPs, Inc.*, Order No. 25,043 issued November 10, 2009.

Respectfully submitted by

A handwritten signature in cursive script, appearing to read "Joel Davidow", is written over a horizontal line.

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Dated March 5, 2010

CERTIFICATE OF SERVICE

I, Matthew Thielemann, do hereby certify that the foregoing **PETITION FOR DECLARATORY RULING AND ALTERNATIVE PETITION FOR PREEMPTION TO THE PENNSYLVANIA, NEW HAMPSHIRE AND MARYLAND STATE COMMISSIONS** was hand delivered on this the 5th day of March 2010 to the following:

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554


Matthew P. Thielemann

EXHIBIT A

9994MAN1
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2
3 MANHATTAN TELECOMMUNICATIONS CORP.,

3
4
4 Plaintiff,

5 v.

08 CV 3829 (JSR)

6 GLOBAL NAPS, INC.,

7 Defendant.

8 -----x

9
9 New York, N.Y.
10 September 9, 2009
10 11:20 a.m.

11
12 Before:

12
13 HON. JED S. RAKOFF

14 District Judge

15 APPEARANCES

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21 MATTHEW P. THIELEMANN

999SMAN2

Masuret - direct

- 1 A. Yes. I graduated from Boston College High School and then
2 on to Boston College where I received a BS in business.
3 Q. And how long have you been in the telecommunications
4 business?
5 A. I have been in the telecom since 1990.
6 Q. Approximately 19 years?
7 A. Yes.
8 Q. Were they all with Global Naps?
9 A. No, they were not.
10 Q. Who else did you work for in telecom?
11 A. I worked for U.S. Telecenters for approximately 2 years. I
12 went on to work for Ray Calvin Datacom for approximately 3
13 years. I went on to U.S. Robotics for approximately 2 years,
14 and that should bring us up to May '98 where I went to work for
15 Global Naps.
16 Q. What are your duties at Global Naps?
17 A. I do the selling of the Global Nap products to the customer
18 base.
19 Q. What kind of telecommunications business is Global Naps in?
20 A. Currently I would say that we have two product lines. The
21 first would be an inbound application where we provide
22 telephone service or DID service, which stands for direct
23 inward dialing service, to Internet service providers seem to
24 be the company that is most attracted to that product. And the
25 second product line could be described as a forwarding of

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999SMAN2

Masuret - direct

- 1 voiceover IP traffic.
2 Q. Is the first business sometimes called dial-up Internet?
3 A. Yes, the application is dial-up Internet that would go over
4 that product, yes.
5 Q. And in regard to your voiceover Internet protocol business,
6 your VoIP business, who are your customers? Who pays you for
7 that forwarding?
8 A. The customer base I would refer to as enhanced service
9 providers.
10 Q. And how many customers do you have for your whole income as
11 a VoIP program?
12 A. It has ranged over the course of the past many years but
13 it's always been a relatively small number. So I would say
14 approximately 85 to 95 -- 85 to 90 percent of our business
15 comes from three of the enhanced service providers and there
16 are approximately two or three additional enhanced service
17 providers or VoIP carriers, pure VoIP carriers that account for
18 the rest.
19 Q. And let's start with your top three. Who are they?
20 A. The top three would be Transcom, COMM Partners --
21 Q. Would you spell that?
22 A. COMM Partners. I believe they are referred to in this case
23 as TPC, the letters TPC, and the last company of the big three
24 would be Point One, also known as UNE-Point.
25 Q. What is the central location of Transcom?

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999SMAN2

Masuret - direct

- 1 A. Texas.
- 2 Q. What is the central location of COMM Partners?
- 3 A. Las Vegas.
- 4 Q. What is the central location of Point One?
- 5 A. Texas.
- 6 Q. Could you describe the remainder of your customers, the
7 smaller ones, in terms of name and location?
- 8 A. Sure.
- 9 NTERA is no longer a customer now. They went bankrupt
10 I would like to approximate maybe 3 or 4 years ago. I can't be
11 exactly sure of that date. We also terminate traffic for Magic
12 Jack, also known as YMAX, and we also terminate traffic for
13 Broad Voice. There is one more account that has turned up a
14 couple of months ago and their name is Raynwood Communications.
- 15 Q. Do you have any end-user customers, that is, businesses or
16 people who want to make telephone calls for purposes of your
17 VoIP business?
- 18 A. No, we do not have any direct end users if that is what you
19 are asking.
- 20 Q. Do you deliver any calls in which you were paid by minute
21 of use as you met with them?
- 22 A. We offer a flat rate product.
- 23 Q. And what do you mean by a flat rate product?
- 24 A. Similar to, say, a residential product that you may have at
25 home where you pay a flat monthly price and you can terminate

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1 or make as many phone calls as you would like for that dollar
2 amount. We provide a product to the enhanced service provider
3 where they sign up for a specific amount of simultaneous
4 sessions, which is the ability to make a single phone call, and
5 they would buy them typically in increments of 672, which is
6 the number of channels or DS3 circuit, and they would pay a set
7 price for that, ability to make that many simultaneous calls,
8 and they could either make one call or 10 million calls.

9 Q. Are the calls made in large numbers in more than 1 million
10 calls?

11 A. Yes, they are typically made in large numbers.

12 Q. What parts of the country do you serve once you are doing
13 this service?

14 A. We currently provide this outbound service to I guess a
15 good way to describe it would be the New England territories,
16 so from Maine, New Hampshire and Vermont, down south until
17 Pennsylvania, Virginia. We also provide service in Cleveland
18 as well.

19 I can list the territories if that is what you would
20 like.

21 Q. In about how many states is that?

22 A. Approximately ten right now.

23 Q. Do you have facilities for switching this traffic?

24 A. Yes, Global Naps has a large network that consists of
25 telephone switches and fiber optic equipment.

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1 Q. Where are your major switching locations?

2 A. The major facilities that we bring traffic back into where
3 our switches are located, there are three main areas currently.
4 They are Quincy, Massachusetts, New York, New York, and Reston,
5 Virginia.

6 Q. When you speak of carrying voiceover Internet traffic, do
7 you carry, for want of a better word, more than one kind of
8 VoIP?

9 A. I would say that voiceover IP traffic can come in different
10 flavors, so I would describe the first type of voiceover IP as
11 a nomadic VoIP application where the user -- the most common
12 name that you might hear would be a Vonage application where
13 the user can get a phone number that is a virtual phone number.
14 It does not have to be affiliated with any specific location
15 where they would be making a phone call from. So that is why
16 we call it nomadic in nature.

17 The second type of voiceover IP application I would
18 refer to as more of a static application and a cable company
19 would probably fall into that sort of a category where the
20 physical location making the call is more stationery.

21 And the third type of voiceover IP would be more of
22 the conversion to IP takes place in the middle of a call and at
23 the same time because all the traffic that is associated with
24 Global Naps comes to us from an enhanced service provider, it's
25 that core or that middle piece, this IP, which is where the

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1 enhancement of a call takes place. So I would refer to that as
2 voiceover IP, IP in the middle where the call is enhanced.

3 Q. Going back to nomadic VoIP, other than the fact that you
4 can have phone numbers in more than one place, what is the
5 relevance of things called adapters?

6 MR. KLEIN: Objection, your Honor, foundation.

7 Q. Is it part of your business to know what an adapter is?

8 A. I mean, I come across it, yes.

9 Q. What is the relevance --

10 THE COURT: What is it? Let's start with that.

11 Q. What is an adapter?

12 A. An adapter can come in the form of a physical
13 square-looking device or an adapter can really be nowadays an
14 IP enabled device. It looks just like a cell phone but it's a
15 SIP phone, session Internet protocol -- session initiation
16 protocol I believe it is. And the use of this device allows a
17 user to make phone calls anywhere in the world as long as they
18 have access to Internet protocol or IP, so they could be in
19 Europe and as long as they have access to Internet band width,
20 whether they are at a hotel or a cafe, or where ever they may
21 be, as long as they have the adapter, whether it's the physical
22 square device or a SIP enabled device such as a phone, they can
23 make a phone call and they can call wherever their provider
24 will allow them to.

25 THE COURT: I understand.

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Go ahead.

Q. What nomadic VoIP companies have you personally worked with or become personally aware of in the conduct of your business that you are carrying the traffic?

A. I am aware that we carry the traffic of Vonage, Magic Jack and Broad Voice.

(Continued on next page)

9994MAN3

Masuret - direct

1 BY MR. DAVIDOW:

2 Q. How did you become aware, can you name at least one way in
3 which you became aware that you were carrying the traffic of
4 Vonage?5 A. Sure. There are several ways. One way where I became
6 aware that Vonage was the traffic that we were carrying on the
7 network being handed to us from a hand service provider is over
8 the course of account management, so as part of selling, I
9 manage the accounts, and when a customer has a problem, a
10 problem with the product that we are delivering to them,
11 meaning calls are not successfully completing for one reason or
12 another, it occasionally gets escalated up.13 In the case of Vonage I have been on phone calls with
14 Vonage, our ESP customer, our network operations center and
15 myself as well as the actual sales rep that handles it. His
16 name is David Shaw. So I am aware that Vonage's calls were on
17 our network. That's one way.18 Q. Can you recall any particular one of your ESP customers who
19 was on the same call concerning trouble shooting for Vonage
20 calls?

21 A. Yes.

22 Q. Who was that?

23 A. CommPartners.

24 Q. How were you aware that you carry the VoIP calls of
25 BroadVoice?

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9994MAN3

Masuret - direct

- 1 A. In the case of BroadVoice that traffic is sent directly to
2 us.
3 Q. You have a direct business relationship with BroadVoice?
4 A. That's correct.
5 Q. Do you terminate BroadVoice traffic to, for instance, New
6 York?
7 A. Yes.
8 Q. And New Jersey?
9 A. Yes.
10 Q. Essentially to all ten states?
11 A. We terminate BroadVoice traffic to all of the areas LATAs
12 states that we provide coverage in.
13 Q. How do you become aware that you are transmitting the VoIP
14 traffic of Magic Jack?
15 A. We have a direct relationship with Magic Jack also known as
16 YMAX.
17 Q. Can you describe that relationship other than the word
18 direct?
19 A. Yes. So, they contract for services. It's not a written
20 contract currently; it's an oral contract. It's been going on
21 I believe since I would like to say the March timeframe of
22 2009, so it's a fairly recent relationship. So they purchase
23 these outbound services from us and they pay us on a monthly
24 basis. In the process of that you have to turn up and
25 establish interconnections with your customers.

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EXHIBIT B

99ASMAN1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

MANHATTAN TELECOMMUNICATIONS CORP.,

Plaintiff,

v.

08 CV 3829 (JSR)

GLOBAL NAPS, INC.,

Defendant.

-----x

New York, N.Y.
September 10, 2009
9:30 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

KLEIN LAW GROUP PLLC
Attorneys for Plaintiff
BY: ANDREW M. KLEIN
ALLEN C. ZORACKI
BRADLY G. MARKS

KILE GOEKJIAN REED McMANUS PLLC
Attorneys for Defendant
BY: JOEL DAVIDOW
MATTHEW P. THIELEMANN

99A4MAN6 Mulligan - direct

- 1 Q. How long with Vonage?
2 A. Four and a half years.
3 Q. What was your previous job just prior to that?
4 A. I was with Time Warner Telecom.
5 Q. What does Time Warner do?
6 A. They were a business services providing Internet voice
7 services and other business operations for telecommunications.
8 Q. What is the business of Vonage?
9 A. Provide voice telephony.
10 Q. How does one become a customer of Vonage?
11 A. They subscribe.
12 Q. Is that over the Internet?
13 A. They can either do that over the Internet or they can do
14 that through calling in via a phone call to a sales agent.
15 Q. How many subscribers do you have?
16 A. Approximately 2.4 million subscribers.
17 Q. In how many states?
18 A. Approximately 48 states, maybe larger.
19 Q. Do you have subscribers for instance in New York State?
20 A. Yes, we do.
21 Q. How many about?
22 A. I don't know the exact number today.
23 Q. Bigger than what number, 100,000?
24 A. Bigger than I would say 250,000 in New York State.
25 Q. When someone becomes a subscriber is there some process in

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99A4MAN6 Mulligan - direct

1 though TransCom might not be the company that itself takes the
2 call to the ultimate person being called?

3 A. I don't know that for a fact.

4 Q. Either way?

5 A. Either way.

6 Q. I was putting it the other way.

7 A. Restate the question.

8 Q. If TransCom received a call, sent it to Global NAPs who
9 sends it to somebody then to the ultimate purchaser and you
10 found out about it, would you tell TransCom that they can't
11 keep the money because they didn't do it all themselves?

12 MR. KLEIN: Objection.

13 THE COURT: Sustained.

14 Q. My point is simply to ask when you pay them a termination
15 fee, do you understand that they are bound to you to personally
16 end that call as opposed to sending it on?

17 MR. KLEIN: Objection; argumentative and I think asked
18 and answered as well.

19 THE COURT: I don't think it was asked and answered.
20 I don't agree it's argumentative. I don't think the foundation
21 has been laid for this witness being the person who can speak
22 for Vonage on that issue. Sustained.

23 Q. Where does TransCom rank among the people to whom you pay
24 termination fees in terms of whether it's in the top two, the
25 top five, the top ten?

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99A4MAN6

Mulligan - direct

1 MR. KLEIN: Objection; relevance, foundation.
2 MR. DAVIDOW: The subject is how much VoIP is going
3 on. TransCom is a customer of VoIP.
4 THE COURT: Let me hear the question read back.
5 (Record read)
6 THE COURT: Do you know the answer to that?
7 THE WITNESS: It's in our top 6 or 7 carriers.
8 THE COURT: This is top 6 or 7 in terms of what.
9 THE WITNESS: Across the United States.
10 THE COURT: No. In terms of money, in terms of
11 minutes, in terms of what?
12 THE WITNESS: In terms of minutes.
13 THE COURT: OK.
14 Q. You terminate traffic to CommPartners?
15 A. Yes, we do.
16 Q. Where would they rank in terms of minutes?
17 A. They are also within the top 6 or 7.
18 Q. Were you asked to provide a list of phone numbers that you
19 now have managed to obtain that relate to New York exchanges?
20 A. Yes, we were.
21 Q. Did you so provide?
22 A. Yes, we did.
23 Q. I show you what has been tentatively marked Defendant
24 Exhibit 8. Is this the list of New York phone numbers you have
25 obtained that you sent in connection with the subpoena?

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EXHIBIT C

99ASMAN1
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x
2
3 MANHATTAN TELECOMMUNICATIONS CORP.,

4
4 Plaintiff,

5 v.

08 CV 3829 (JSR)

6 GLOBAL NAPS, INC.,

7 Defendant.
8
8 -----x

9
9 New York, N.Y.
10 September 10, 2009
10 9:30 a.m.
11
11

12 Before:

13 HON. JED S. RAKOFF

14 District Judge

15 APPEARANCES

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18 ALLEN C. ZORACKI
18 BRADLY G. MARKS

19 KILE GOEKJIAN REED McMANUS PLLC
19 Attorneys for Defendant
20 BY: JOEL DAVIDOW
21 MATTHEW P. THIELEMANN

99ASMAN1

1 Q. What is your present company?

2 A. I am presently the president of Broad Voice.

3 Q. How long have you been with Broad Voice?

4 A. I have been with Broad Voice since March 2004.

5 Q. How old is Broad Voice?

6 A. Broad Voice was incorporated December 2003.

7 Q. What does Broad Voice do?

8 A. Broad Voice is a voiceover IP provider.

9 THE COURT: What does that mean, although we have had
10 some testimony about it, but I would like to get your meaning.

11 What does that mean?

12 THE WITNESS: Broad Voice provides service to
13 residential and small businesses. We provide an adapter and/or
14 we let them come with their own device and we set it up to talk
15 to our voiceover IP servers so they get a device, they plug a
16 phone into it and the device converts the analogue phone into a
17 digital signal. They then connect it to a high speed Internet
18 service, i.e., your cable modem, DSL, a T-1, whatever
19 transport, and it goes over the Internet and hits our servers.
20 From that point on the call is routed through the routing
21 engine out to the world depending on where the destination of
22 the call is.

23 THE COURT: What are the benefits you are offering
24 that are different from an ordinary telephone service?

25 THE WITNESS: Well, it's a feature set. We offer an
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1 enriched feature case, i.e., caller forwarding, at an economic
2 price. Our plans cover unlimited calling within the U.S.,
3 Canada, Puerto Rico, at a very reasonable price. We have, you
4 know, international plans that cover unlimited calls to Brazil,
5 to different countries at a very reasonable price. So it's
6 economics and features.

7 THE COURT: I understand the economics of it.

8 What are the features for the ones you just described?

9 THE WITNESS: Yes, sir. There are 23 basic features
10 that come with with our service and four advanced features that
11 can be purchased for additional money each month.

12 THE COURT: What is the difference technologically
13 between your service and a more traditional telephone service,
14 if any?

15 THE WITNESS: We are completely different. Our
16 service operates over the Internet only. We don't hook up to
17 any other source other than IP only. And we use set protocol,
18 which is the protocol that some VoIP providers use to initiate
19 the call, complete the call and carry the actual signal, not
20 signalling but the RTP to voice.

21 THE COURT: Tell me to how that actually works?

22 THE WITNESS: From a high level I will be able to.
23 Basically when a person hooks up their device to our service
24 they come and register with Broad Voice. That registration is
25 a user name and a password and that gives us -- and it's all

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1 encrypted -- gives us authorization that they are a valid Broad
2 Voice user. From that point they register to our servers from
3 a set protocol standpoint. They send across a signal that says
4 this is who I am. We challenge it, they come back with the
5 proper credentials, we say you are accepted. At that point
6 they can pick up their phone that is hooked to their device
7 over the Internet and they get dial time. Either the device
8 creates the dial tone or we create the dial tone based on what
9 type of device it is.

10 THE COURT: Okay. Just pause on that for a moment.
11 What would determine -- well, when you say based open
12 the kind of device it is, what would be the distinction?

13 THE WITNESS: Specific vendors provide that as part of
14 the device itself. The vendor that we use that we send out all
15 our devices is Grand Stream. They actually create the dial
16 tone within the device. So once it's authenticated and passes
17 all the credentials we challenge it with, at that point when
18 they pick up the phone we challenge it again to make sure that
19 it's still the same person.

20 THE COURT: One other question before you go on.
21 Do you deal only with people who already have existing
22 phone numbers or do you in some cases provide phone numbers?

23 THE WITNESS: No, sir. In every case we provide a
24 U.S. phone number to every one of our customers.

25 THE COURT: And how do you obtain those numbers?

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99ASMAN1

1 THE WITNESS: Broad Voice is not a CLEC. We have to
2 go out and lease numbers from companies like EXO, Global Naps,
3 Level 3, numerous vendors.

4 THE COURT: Do the numbers you provide correspond to
5 some geographical address given to you by the customer or not?

6 THE WITNESS: Absolutely not.

7 THE COURT: So it's just a random kind of thing?

8 THE WITNESS: During the sign-up process we have a tab
9 on our website. All of our sign-ups are via Internet. We have
10 a tab on the website that says availability. That is our
11 number inventory pool. If I lived in Los Angeles but yet I
12 wanted a New York City number I would select New York. If I
13 wanted a 212 extension select 212, then I would go on and
14 complete the number selection based on my needs.

15 THE COURT: Do you have any idea how many people
16 select numbers that are not where they are actually located?

17 THE WITNESS: There is no geographical boundaries.
18 No, sir. There are no geographical boundaries.

19 THE COURT: I understand no boundaries but you don't
20 know offhand.

21 THE WITNESS: No, sir. The only way you can really
22 pinpoint that which would be not a kind of scientific, which is
23 via the IP address. You could be in New Jersey and in New York
24 and share the same IP pool.

25 THE COURT: Okay. So now let's go back to get your

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1 dial tone, what happens next?

2 THE WITNESS: You get the dial tone, you pick up the
3 phone and you dial the number that you want to dial. So if, as
4 an example, I live in New Hampshire, I have a 212 number on my
5 laptop, I pick it up and I call Boston, 617-507-0000. The
6 signalling comes to Broad Voice, and that is the number and the
7 destination. Through our routing engine we actually route that
8 into whomever. If Global Naps provided us the number we would
9 route to Global Naps and from that point on I don't really know
10 what happens. But all I care about is that the number gets to
11 the final destination.

12 THE COURT: Alright.

13 THE WITNESS: Because my phone is going to ring if it
14 doesn't.

15 THE COURT: Okay.

16 That is all I need to know for now. Go ahead,
17 counsel.

18 MR. DAVIDOW: I am almost done, your Honor.

19 Q. Can you your users also be international?

20 A. Be international?

21 Q. Be foreigners?

22 A. In fact, one of our major population of customers are
23 Brazilians. Yes, they can be.

24 Q. But for a Brazilian to be your customer, the Brazilian
25 would have to be given a U.S. phone number, is that correct?

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1 A. Yes, every one of our customers is provided a U.S. DID. We
2 do not offer international numbers. If he lived in Brazil --
3 and a scenario I run into quite frequently is if he lives in
4 Brazil and he would like to call, let's say he is a partner
5 with some trading company in New York City as a 212 number and
6 there it has been a Verizon number for years, they don't want
7 to change the number because they advertised it over everywhere
8 but the person in Brazil wants to eliminate or cut down on his
9 international calling, he would get a 212 number from Broad
10 Voice, hook it up in Brazil to his high speed connectivity and
11 he could dial the Verizon as an example 212 number from Brazil
12 and it completes in New York City.

13 Q. And would that show up as a local call?

14 A. Yes, yes.

15 Q. About how many phone numbers do you have in your inventory
16 let's say for New York State?

17 A. New York State, if I recall -- and this changes on a daily
18 basis because of people signing up. It was around 16,500 at
19 our last status inventory meeting.

20 Q. And does that include both ones you have already given out
21 and ones that are in inventory?

22 A. Yes, we have two statuses. The first status is active,
23 those assigned to a customer, and the second status is
24 inactive, those available for new customers coming in.

25 Q. You briefly mentioned sending your calls to Global Naps,

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1 did you not?

2 A. Yes.

3 Q. Does that happen just once in a while or quite a lot?

4 A. It's quite frequently. We send numbers. We send calls to
5 Global Naps. We send calls to the routing engine of the
6 destination that we can complete the call. Global Naps is one
7 of our major vendors.

8 THE COURT: When you select a vendor, is that mostly
9 on a price basis or are there other distinctions?

10 THE WITNESS: Certainly price has something to do with
11 with it. The selection of the vendor, because SIP is so new,
12 we go through a compatibility test with all our vendors. That
13 compatibility test tests the signalling and the RTP or the
14 voice. So they not only have to meet the cost -- it has to be
15 affordable to fit into our plans. It also has to work. More
16 importantly, it has to be the actual, you know, RFC or the
17 requirements that have been put forward by the industry for SIP
18 signalling and voice. It has to meet that. We go through
19 weeks of testing. Once it meets that any time we change or
20 they change we go through that same process again to make sure
21 everything is working.

22 THE COURT: How are the requirements set by the
23 industry?

24 THE WITNESS: The requirements are basically set based
25 on the RFC. In other words, the RFC or the standard, they pull

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1 them out and vendors bill to these standards.

2 THE COURT: I guess maybe I wasn't clear. Who sets
3 the standard?

4 THE WITNESS: We set the standards for Broad Voice.

5 THE COURT: Well, I thought you indicated that there
6 is sort of industry-wide standards.

7 THE WITNESS: There are industry-wide guidelines based
8 on the RFC that came out.

9 THE COURT: Okay. And who issued the RFC and who
10 issued the guidelines?

11 THE WITNESS: Whatever board does it. I don't know
12 that far into it.

13 THE COURT: Is it a government board or a private
14 board?

15 THE WITNESS: It's an industry board I believe.

16 THE COURT: Okay.

17 Q. You spoke of adapters. What percentage of all your users
18 can move around -- that is, the use of your services is
19 portable to them?

20 MR. KLEIN: Objection, foundation.

21 THE COURT: I will allow it.

22 Go ahead. You may answer.

23 A. We have based on -- all adapters give you a signal as to
24 what they are. We have 95 percent of our adapters that can be
25 moved around. The other 5 percent of those are adapters and/or

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1 servers like the ASTRICK server. It's an actual server
2 normally in a small business and/or your devices that are built
3 for 7, 8 lines at one time. Mainly they are in a small shop,
4 like a print shop. But 95 percent of the devices that register
5 on our network can be moved around, i.e., a laptop, and the
6 device is 2 inches by an inch and a half, weighs 11.6 ounces.
7 You can put it in your briefcase, take it to a hotel and hook
8 it up if you want to.

9 THE COURT: Anything else?

10 MR. DAVIDOW: No, nothing else.

11 THE COURT: Cross examination.

12 CROSS EXAMINATION

13 BY MR. KLEIN:

14 Q. Mr. Berry, good morning.

15 A. Good morning.

16 Q. Are your customers billed for the services your company
17 provides?

18 A. Yes.

19 Q. How much do your customers pay to provide voiceover
20 services?

21 A. It ranges -- we have 7 plans. It ranges from 5.95 all the
22 the way up to 34.95, and those are based on the different plans
23 they can select.

24 Q. As part of your service offering, do you terminate calls to
25 any end user in the United States?

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EXHIBIT D

99ASMAN1
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x
2
3 MANHATTAN TELECOMMUNICATIONS CORP.,
3

4 Plaintiff,
5

5 v.

08 CV 3829 (JSR)

6 GLOBAL NAPS, INC.,
7

7 Defendant.
8

8 -----x
9
9 New York, N.Y.
10 September 10, 2009
10 9:30 a.m.
11

11
12 Before:

12
13 HON. JED S. RAKOFF
13

14 District Judge
14

15 APPEARANCES
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21 MATTHEW P. THIELEMANN
21
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23
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99ASMAN7 Johnson - direct

1 to place geographically and therefore the phone number is no
2 longer anchored to a geographical location.

3 Q. Does TransComm have customers who are nomadic VoIP
4 companies?

5 A. Yes, sir.

6 MR. KLEIN: Objection, foundation. He doesn't work
7 for TransComm.

8 THE COURT: I know, but he has a good working
9 knowledge of it based on what he said before.

10 Overruled.

11 A. Yes, sir, we do.

12 Q. Can you approximate how many such companies are customers
13 of TransComm?

14 A. Yes.

15 MR. KLEIN: Objection.

16 THE COURT: That is a little -- well, that might need
17 more of a foundation.

18 Q. In preparing to represent the company at this hearing, did
19 you familiarize yourself with the answer to this question?

20 A. I did do some investigation prior to preparing this
21 testimony and I did in fact check to see how many of our
22 customers had been IP certified and how many of those customers
23 that were IP certified were also identified as nomadic.

24 THE COURT: What is the answer? What did you find?

25 THE WITNESS: I found 6.

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Johnson - direct

- 1 THE COURT: 6 out of --
2 THE WITNESS: 6 out of 35 that is certified IP.
3 Q. Are you saying that you have 35 different customers that
4 are "certified IP"?
5 A. That is correct.
6 Q. And 6 of those you know to be nomadic?
7 A. That is also correct.
8 Q. What other kind of company besides a nomadic VoIP company
9 could be certified for IP?
10 A. We did not include in that nomadic classification any
11 customers that might have some association with a geographical
12 location. For example, a company that does IP originated
13 traffic from a broadband connection provided by the same
14 company, so the customer has both a broadband service and a
15 voiceover IP service where the voiceover IP service is somehow
16 associated with the broadband, for example, it can be picked up
17 and moved to another location.
18 Q. Is Vonage one of the companies you identified?
19 A. Yes, it is.
20 Q. Did you understand a ranking of Vonage as a customer of
21 TransComm?
22 MR. KLEIN: Objection.
23 Q. Sending the most minutes, the next most minutes, the least
24 minutes?
25 A. I do not have a specific ranking, no.

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99ASMAN7 Johnson - direct

- 1 Q. Would you consider it from what you understand a major
2 customer?
3 A. Yes, sir, it is.
4 Q. Can you name any other nomadic VoIP customers that are
5 major customers?
6 A. No, that is the only one I know of for sure as a customer.
7 Q. You said there were 6?
8 A. Yes, sir.
9 Q. But you didn't find the names?
10 A. No, sir, I just asked how many.
11 Q. I see.
12 Did you ascertain a percentage of all minutes that
13 passed through your company that came to you in Internet
14 protocol as opposed to TDM?
15 A. No, sir.
16 Q. Does TransComm send traffic to Global Naps?
17 A. Yes, sir.
18 Q. Does TransComm regard itself as a customer of Global Naps?
19 A. Yes, sir.
20 Q. What is the purpose of TransComm in retaining Global Naps
21 and paying them?
22 A. Global Naps is one of several vendors that TransComm uses
23 to terminate sessions as calls to PSTM points if the session is
24 destined for a PSTM end point.
25 Q. Is there anything different about the traffic that comes to

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