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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 to the Pennsylvania, New Hampshire and Maryland State Commissions	WC Docket No. 10-___

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"

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[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

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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

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[4] This description of Global's service has been confirmed by findings of the New York Public Service Commission, an AJL 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 *Vonage* 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.

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[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).

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[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' affirmation[8], *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

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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]

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[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).

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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]

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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. GNAPs* 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]

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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]

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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

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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.

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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.

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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

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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/LERG 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:

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[39] *Petition of MCImetro 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

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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

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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.

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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

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46 *Chairman's Motion* at 15.

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