

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Global NAPs Petition for Declaratory Ruling)	WC Docket No. 10-60
and Alternative Petition for Preemption of the)	
Pennsylvania, Maryland, and New Hampshire)	
State Commissions)	

COMMENTS OF THE TDS TELECOM COMPANIES:

**Hollis Telephone Company, Inc.
Kearsarge Telephone Company
Merrimack County Telephone Company
Wilton Telephone Company, Inc.
Ludlow Telephone Company
Northfield Telephone Company
Perkinsville Telephone Company, Inc.
Blue Ridge Telephone Company**

Paul J. Phillips, Esq.
Primmer Piper Eggleston & Cramer PC
100 East State Street, P.O. Box 1309
Montpelier, VT 05602
(802) 223-2102

Attorneys for the TDS Telecom Companies

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COMMENTS OF THE TDS TELECOM COMPANIES

I. Introduction and Summary

The following local exchange companies, all operating subsidiaries of TDS Telecommunications Corporation (“the TDS Telecom Companies”), submit these comments pursuant to the Public Notice (DA 10-461) released in this proceeding on March 18, 2010, concerning the Petition for Declaratory Ruling and Alternative Petition for Preemption (“Petition”) filed by Global NAPs, Inc. (“GNAPs”) on March 5, 2010:

- Hollis Telephone Company, Inc., Hollis, New Hampshire;
- Kearsarge Telephone Company, Kearsarge, New Hampshire;
- Merrimack County Telephone Company, Contoocook, New Hampshire;
- Wilton Telephone Company, Inc., Wilton, New Hampshire (the four foregoing companies, together, the “TDS-NH Companies”);
- Ludlow Telephone Company, Ludlow, Vermont;
- Northfield Telephone Company, Northfield, Vermont;
- Perkinsville Telephone Company, Inc., Perkinsville, Vermont (the “TDS-VT Companies”); and
- Blue Ridge Telephone Company, Blue Ridge, Georgia (“TDS-Blue Ridge”).

The TDS Telecom Companies comprise ILECs in New Hampshire, Vermont and Georgia, all of which have commenced regulatory proceedings against GNAPs before their respective state commissions to enforce their respective intrastate access tariffs. In particular, the TDS-NH Companies are four New Hampshire operating companies that have petitioned the New Hampshire Public Utilities Commission (“NHPUC”) for relief in a longstanding access billing dispute with Global NAPs, Inc. (“GNAPs”),¹ a proceeding that GNAPs now seeks to pre-empt through the present Petition to this Commission. In addition, the TDS-VT Companies have a pending proceeding against GNAPs before the Vermont Public Service Board,² and TDS-Blue Ridge was one of several Georgia ILECs that obtained a favorable judgment against GNAPs in a recent proceeding before the Georgia Public Service Commission.³ In all cases, the TDS Telecom Companies are rural ILECs serving in high-cost areas of their respective states, and as such, depend on the timely flow of intercarrier payments to keep the public switched network running smoothly.

The TDS-NH Companies’ petition before the NHPUC, which GNAPs now seeks to pre-empt, has been pending for more than two years and has been marked by repeated procedural delays caused by GNAPs’ refusal to abide by NHPUC rules and orders.

¹ *Joint Petition of Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc.*, Docket No. DT 08-028, Final Order (N.H. Pub. Utils. Comm’n, Nov. 10, 2009) (the “NHPUC Final Order”); Order Denying Motion for Stay, Rehearing or Reconsideration (N.H. Pub. Utils. Comm’n, Apr. 2, 2010) (the “NHPUC Reconsideration Order”).

² *Joint Petition of Ludlow Telephone Company, Northfield Telephone Company, and Perkinsville Telephone Company, Inc.*, pursuant to 30 V.S.A. § 208, seeking (1) temporary restraining order against Global NAPs, Inc. (“GNAPs”), (2) payment of interexchange access charges by GNAPs, and (3) revocation of GNAPs’ Vermont certificate(s) of public good for violations of Vermont law, Docket No. 7493 (petition filed Dec. 5, 2008; decision of Vermont Public Service Board pending).

³ *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, Docket No. 21905, Order Adopting In Part and Modifying in Part the Hearing Officer’s Initial Decision (Order #121910) (Ga. Pub. Serv. Comm’n, July 31, 2009) (the “Georgia PSC Decision”); Docket No. 21905-U, Hearing Officer’s Initial Decision (Ga. Pub. Serv. Comm’n, Apr. 8, 2008) (the “Georgia PSC Initial Decision”).

As in the proceeding before the NHPUC, GNAPs in its Petition offers contorted and selective interpretations of applicable caselaw, both from the Commission and elsewhere, in an effort to concoct a regulatory exemption that has no basis in law. This strategy has been characteristic of GNAPs' approach in the other state regulatory proceedings brought by the TDS Telecom Companies, as well as in state and federal proceedings involving other ILECs. In the view of the TDS Telecom Companies, the GNAPs Petition represents merely the latest GNAPs procedural ploy to delay paying the lawful access charges that GNAPs has been billed for terminating telecommunications traffic to the networks of the TDS Telecom Companies.

The Commission should reject GNAPs' efforts and should deny the GNAPs Petition on the basis of the Commission's precedents. Furthermore, the Commission should confirm that access charges apply to the traffic in question and order GNAPs to pay all outstanding interstate access charges. If GNAPs fails to comply, the Commission's Enforcement Bureau should promptly investigate GNAPs' business practices.

II. Background

For more than seven years, GNAPs has refused to pay the TDS-NH Companies access charges, billed at lawful tariffed rates, for the termination of GNAPs' toll traffic on the networks of the TDS-NH Companies in New Hampshire. On February 19, 2008, the TDS-NH Companies jointly petitioned the New Hampshire Public Utilities Commission ("NHPUC"), alleging numerous violations by GNAPs of the New Hampshire public utilities statutes and NHPUC rules and seeking payment of long-overdue terminating access charges by GNAPs and an order

authorizing the TDS-NH Companies to disconnect GNAPs from the further termination of traffic to its networks.⁴

GNAPs is authorized by the NHPUC to offer ompetitive local exchange carrier (“CLEC”) services in the areas of New Hampshire served by Verizon New England, Inc. d/b/a Verizon-New Hampshire (“Verizon”) (and now by its successor-in-interest, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”)).⁵ The traffic at issue in DT 08-028 bore a Carrier Identification Code (“CIC”) assigned to GNAPs and had been handed off, under the terms of a Section 251 interconnection agreement (“ICA”) between GNAPs and Verizon, at Verizon’s tandem switch in New Hampshire for termination on the networks of the TDS-NH Companies. At no time had GNAPs requested or established an interconnection agreement with any of the TDS-NH Companies, nor had GNAPs requested or obtained authority to offer telecommunications service in the service areas of the TDS-NH Companies.⁶ Under the provisions of the Verizon-GNAPs ICA, “[a]ny traffic not specifically addressed in this Agreement shall be treated as required by the applicable Tariff of the person transporting and/or terminating the traffic.”⁷

By agreement of the parties, the proceeding before the NHPUC was conducted as a paper proceeding, based on the pleadings, a technical conference, two rounds of discovery (later supplemented by two additional rounds of discovery), a settlement conference that produced a

⁴ NHPUC Docket No. DT 08-028, Joint Petition of Hollis Telephone Company, Inc., et al. (filed Feb. 19, 2008).

⁵ NHPUC Docket No. DE 98-024, Order No. 22,976 (July 8, 1998).

⁶ On November 17, 2009, one week after the issuance of the NHPUC’s Final Order, GNAPs requested interconnection with the TDS-NH Companies, who then provided GNAPs with a copy of their standard interconnection template but who have thus far not received a response.

⁷ *Agreement by and between Global NAPs, Inc. and Verizon New England, Inc. d/b/a Verizon-New Hampshire for the State of New Hampshire* (dated Jan. 17, 2003), § 8.4, at 64 (emphasis added) (submitted to the NHPUC as Exhibit-1 to GNAPs Responses to Data Requests (Set 1) of the New Hampshire Telephone Association and admitted into evidence by Joint Stipulation of Facts in Docket No. DT 08-028 (filed July 15, 2008)).

Joint Stipulation of Facts, and two rounds of briefs.⁸ On November 10, 2009, the New Hampshire Public Utilities Commission issued a Final Order in Docket No. DT 08-028.⁹

In its Final Order, the NHPUC found in favor of the TDS-NH Companies in all material respects and ordered GNAPs to pay the TDS-NH Companies all monies then due and owing to it or face disconnection of further services by the TDS-NH Companies in New Hampshire. The NHPUC rejected GNAPs' claims that the disputed traffic was "exempt from *any* charges, whether under TDS's intrastate tariff or Section 252 of the Telecom Act, because they are calls from IP-enabled ESP [Enhanced Service Provider] customers." Instead, the NHPUC found, based on monthly call detail records provided to the TDS-NH Companies by Verizon-New Hampshire, that GNAPs' traffic is, in fact, being transmitted through the TDS-NH Companies' local exchange network and that the call data "bear all the hallmarks of traditional voice traffic that is subject to access charges covered by access tariffs."¹⁰

The NHPUC's findings are consistent with the findings made by the Georgia Public Service Commission in a fully-litigated proceeding brought on identical grounds by TDS-Blue Ridge and others against GNAPs in Georgia. There, the Georgia PSC reviewed monthly call-detail records that the Petitioners received from BellSouth and found that "the traffic that GNAPs terminates to each Petitioner utilizing the jointly provided facilities between BellSouth and the [Petitioners] originates as voice traffic and, as explained by each of the [Petitioners], terminates as voice traffic."¹¹ As the Georgia PSC found:

The [Petitioners] have provided evidence from each of the company witnesses that the traffic being terminated is traditional voice traffic. In combination with these company witnesses' testimonies, the [Petitioners]

⁸ Following submission of the Joint Stipulation of Facts, GNAPs sought to repudiate the Stipulation, but the NHPUC denied the GNAPs request. *See* NHPUC Docket No. 08-028, Procedural Order (Sept. 17, 2008), at 7.

⁹ NHPUC DT 08-028, Final Order (Nov. 10, 2009).

¹⁰ NHPUC Final Order, at 22.

¹¹ *Georgia PSC Initial Decision*, at 8, affirmed on reconsideration by *Georgia PSC Decision*, at 4.

provided evidence regarding the sample SS7 records obtained from BellSouth during the discovery process in this case. These SS7 records demonstrate that purportedly ESP traffic is delivered to the PSTN by a traditional wireline or wireless carrier and is terminated over the PSTN as traditional wireline or wireless traffic. At best, therefore, the traffic is the same type of IP-in-the-Middle traffic that the FCC has decided is subject to access charges. See *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charge*, Order, WC Docket No. 02-361, FCC 04-97, released April 21, 2004 (the “AT&T Decision”), at 1 and n.61.

These same conclusions are reached regarding the [Georgia] Commission jurisdiction even if GNAPs had demonstrated that the traffic it delivered to the [Petitioners] for termination was ESP or ISP traffic. The *AT&T Decision* resolves the fact that [the Georgia] Commission has jurisdiction over the traffic in the event that GNAPs’ traffic is IP-in-the-Middle traffic. Moreover, even if the traffic was Voice over Internet Protocol (“VoIP”), the FCC has also already determined that *the carrier (which in this case would be GNAPs) that delivers traffic for termination to the PSTN is the party with the financial responsibility for the intercarrier compensation (in this case intrastate access charges).* See *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*, Memorandum Opinion and Order, WC Docket No. 06-55, DA 07-709, released March 1, 2007 (“TWC Order”), at para. 17.¹²

In the both the New Hampshire and Georgia proceedings, moreover, GNAPs had completely failed to substantiate its “ESP exemption” claims. As the NHPUC found:

Global NAPs admits, however, that it does not know the original format of the calls it receives from its ESP customers for transport. *Global NAPs Objection to Stipulation of Facts* at 5, #13. Nor does Global NAPs distinguish the format of the traffic it receives, whether time division multiplexing (TDM), asynchronous transfer mode (ATM), or IP [Internet Protocol]. *Id.* at 5, #14; see also #12 (Global NAPs is capable of accepting traffic in all three media types or transmission methods). Further, Global NAPs converts all traffic to ATM for transport on its own network and then converts the traffic to TDM for termination on the public switched network. *Id.* at 6, #15 and #16.

The only “evidence” Global NAPs has provided to support its claim that the calls are ESP calls and, therefore, according to Global NAPs, exempt from charges, is in the form of boilerplate customer contract

¹² *Georgia PSC Initial Decision*, at 9, affirmed on reconsideration by *Georgia PSC Decision*, at 4.

language which states that any calls made under that contract are ESP calls. See *Joint Petitioners Reply Brief* at 4-5 and Exh. TDS-5/Part A and TDS-6/Part A. Global NAPs does not provide any data or explanations to refute TDS's argument that the call data records confirm that some of the traffic is intrastate. Rather, *Global NAPs misconstrues the case law to create blanket assertions that its traffic is IP-enabled and therefore interstate and exempt from charges.* . . .

Despite multiple opportunities to support its arguments with data and information through discovery, technical sessions, and two rounds of briefing, as well as mandated compliance with a Commission order requesting further information, Global NAPs failed to produce any evidence to substantiate its claims that the calls carried over TDS' network are ESP traffic and exempt from access charges. Global NAPs offers nothing beyond the generic, boilerplate language its customers adopt by signing service contracts with Global NAPs. Indeed, in each of its filings, Global NAPs appears to rely on its general jurisdictional argument to avoid providing further data for this record. . . .

Global NAPs has failed in its burden of proving its arguments against TDS's claims. TDS has demonstrated through record evidence that Global NAPs' traffic is traveling across TDS facilities to TDS end-users. Global NAPs has offered no evidence to refute TDS's argument that the intrastate traffic in question is identified and treated as exchange access traffic subject to intrastate tariffed access charges.¹³

The NHPUC nonetheless considered the application of this Commission *Vonage Decision*,¹⁴ which GNAPs relied on as the basis for its claim to a jurisdictional "exemption." Rejecting GNAPs' "blanket assertions" of an exemption from intrastate access charges, the NHPUC said:

In the *Vonage* decision, the FCC preempts states from imposing market entry requirements such as certification, tariffing and related requirements on Vonage's interstate IP-enabled services as conditions to offering such services within a state. *Vonage* at ¶ 46. In its decision, the FCC preempted Minnesota's efforts to impose regulatory entry requirements on Vonage's IP-enabled services because it foresaw the possibility of "similar imposition of 50 or more additional sets of different economic regulations" on Vonage's services. *Vonage* at ¶ 37. Underlying the FCC's decision is the recognition of the impracticability of separating

¹³ NHPUC Docket No. DT 08-028 (Nov. 10, 2009), at 23-24 (emphasis added); see also *Georgia PSC Initial Decision*, at 8-9, affirmed on reconsideration by *Georgia PSC Decision*, at 7.

¹⁴ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Mem. Opinion and Order (FCC 04-267) (released Nov. 12, 2004) (the "*Vonage Decision*").

intrastate from interstate calls in an IP-enabled system, such as that used by Vonage. *Id.* at ¶¶ 31-31 [*sic*]. The FCC noted that “state regulation violates the Commerce Clause if the burden imposed on interstate commerce by state regulation would be ‘clearly excessive in relation to the putative local benefits.’” *Vonage* at ¶ 38. *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. Timely payment for services rendered under valid tariffs should be a uniform policy across all states. Non-payment is an unjust burden for New Hampshire’s local exchange carriers, and can create unfair market competition where other carriers are paying for those same services.*¹⁵

Following the Final Order, GNAPs timely requested rehearing and the NHPUC suspended the Final Order pending further consideration of the GNAPs rehearing request.¹⁶ On April 2, 2010, the same date as the present Comments are filed, the NHPUC denied the GNAPs request for rehearing and reaffirmed GNAPs’ obligation to pay the TDS-NH Companies for the use of their networks or else face disconnection from further network services in New Hampshire.¹⁷

III. Argument

A. **Tariffed charges should remain the method for compensating ILECs for the use of their networks, regardless of how traffic originates.**

GNAPs asks the Commission to determine that “[c]onnecting carriers are immune from access charge liability,” both at the interstate and intrastate levels.¹⁸ To advance this claim, GNAPs asks that the Commission “[f]ocus on the *traffic* being transmitted by Global instead of provider/carrier status.”¹⁹ Such a “focus” would require the Commission to recognize a new category of carriers – which GNPS calls “interconnection VoIP carriers”²⁰ – that would be

¹⁵ NHPUC Final Order, at 18-19 (emphasis added).

¹⁶ NHPUC DT 08-028, Secretarial Letter Suspending Final Order (Dec. 15, 2009), at 1.

¹⁷ NHPUC Reconsideration Order (Apr. 2, 2010), at 23-24.

¹⁸ GNAPs Petition, at 1 & 20.

¹⁹ *Id.*, at 20-21 (emphasis in original).

²⁰ *Id.*, at 21.

entirely exempt from access charges. The GNAPs position, however, flies in the face of longstanding Commission precedent and misreads the caselaw on which GNAPs purports to rely.

The Commission has firmly stated that any carrier that wishes to use an incumbent carrier's network must pay for that privilege:

As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.²¹

The Commission's mandate applies to "any service provider" and to all traffic delivered to the PSTN, irrespective of how the traffic originates. Similarly, the Commission also made clear, in the *Time Warner* decision, that

the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), and we confirm that providers of wholesale telecommunications services enjoy the same rights as any "telecommunications carrier" under those provisions of the Act. We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251.²²

These decisions reflect the Commission's determination that all telecommunications carriers bear the same rights and obligations even if they terminate VoIP service to the PSTN.

GNAPs' suggestion of a new and different status for itself, or for a new "focus" on traffic type rather than carrier type, is thus entirely unavailing. As a carrier delivering traffic to the public-switched network, GNAPs cannot escape its obligation to pay for its network usage.

²¹ *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, NPRM (FCC 04-28) (released Mar. 10, 2004) ("IP-Enabled Services Proceeding"), at ¶ 33 (emphasis added).

²² *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, Mem. Opinion and Order (DA 07-709) (released Mar. 1, 2007) (the "*Time Warner Decision*"), at ¶ 8 (footnote omitted).

Under the Commission's rules, access 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."²³ In the face of this obligation, GNAPs contends that it is "unquestionably an intermediate CLEC," and not an interexchange carrier, and that the Commission held, in its *IP-in-the-Middle* Order, that "access 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."²⁴

The GNAPs contention is entirely meritless. In the New Hampshire proceeding, the record evidence, in the form of call detail records, showed that GNAPs is delivering interexchange, not local, traffic to the Verizon-New Hampshire (now FairPoint) tandem switch for termination on the TDS-NH Companies' networks.²⁵ Under a fair reading of the *IP-in-the-Middle* Order, FairPoint (and not GNAPs) would be the "intermediate LEC" that hands off the GNAPs interexchange traffic to the terminating RLECs. That is precisely the reason that the TDS-NH Companies send monthly bills for such traffic to GNAPs (identified through its CIC code), rather than to FairPoint.

But even if GNAPs were entitled to claim status as an "intermediate LEC" in such cases, the Commission's language makes clear that GNAPs should still be assessed access charges because "the terms of any relevant contracts or tariffs" impose such charges.²⁶ Under the provisions of the interconnection agreement between GNAPs and Verizon (now FairPoint),

²³ 47 C.F.R. § 69.5(b).

²⁴ GNAPs Petition, at 22 (emphasis in original) (quoting *In the matter of Petition for Declaratory Ruling that AT&T's Phone-toPhone IP Telephone Services Are Exempt from Access Charges*, FCC WC Docket No. 02-361, Order (FCC 04-97) ("IP-in-the-Middle") (released Apr. 21, 2004), at ¶ 23, f.n. 92).

²⁵ The Georgia Public Service Commission relied on similar evidence to reach the same conclusion in the analogous GNAPs proceeding in Georgia. *See* discussion at pages 4-5, *supra*.

²⁶ *IP-in-the-Middle Order*, at ¶ 23 f.n. 92.

“[a]ny traffic not specifically addressed in this Agreement shall be treated as required by the applicable Tariff of the person transporting and/or terminating the traffic.”²⁷ GNAPs is obligated under its 2003 ICA with Verizon-New Hampshire to treat the subject traffic in accordance with the applicable tariffs of the terminating LECs, which, in the case of the TDS-NH Companies, requires payment of terminating access charges.

In its Petition, GNAPs acknowledges that “intermediate carriers of VoIP traffic” are subject to “negotiated charges under 47 U.S.C. § 251,” but denies that such carriers are subject to “access tariffs.”²⁸ GNAPs simply wishes to ignore the fact that the interconnection agreement it negotiated with Verizon-New Hampshire under Section 251 requires GNAPs to pay access charges under applicable tariffs when GNAPs terminates the subject traffic to the TDS-NH Companies.

GNAPs’ contention that this Commission has already resolved the issue of intercarrier compensation for nomadic VoIP traffic, and that all that is left for the Commission to do is to “clarify” the inconsistent decisions of state commissions, is a misreading of the applicable precedents. GNAPs purports to rely on the *Vonage* decision for the proposition that states are (or should be) prohibited from “levying intrastate access charges and/or blocking or threatening to block the transmission of Global’s VoIP traffic to various states.”²⁹ However, the Commission made clear in the *Vonage* decision, that, while states are pre-empted from regulating nomadic VoIP services, the Commission would defer consideration of a “variety of issues” to the IP-Enabled Services Proceeding:

We emphasize that while we have decided the jurisdictional question for Vonage’s DigitalVoice here, we have yet to determine final rules for the

²⁷ See f.n. 7, *supra*.

²⁸ GNAPs Petition, at 29.

²⁹ *Id.*, at 27-28.

variety of issues discussed in the *IP-Enabled Services Proceeding*. While we intend to address the 911 issue as soon as possible, perhaps even separately, we anticipate addressing other critical issues such as universal service, intercarrier compensation, section 251 rights and obligations, numbering, disability access, and consumer protection in that proceeding.³⁰

Similarly, GNAPs purports to rely on the *Time Warner* decision for the proposition that “arms-length negotiations, not tariffs, must apply to traffic like Global’s” and that “*Time Warner*’s holding only reinforces the inapplicability of tariffs to services developing post-enactment of the Act.”³¹ In the *Time Warner* decision, however, the Commission said nothing of the sort. Instead, the Commission expressly stated:

Certain commenters ask us to reach other issues, including the application of section 251(b)(5)49 and the classification of VoIP services. We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically that the Commission is currently addressing elsewhere on more comprehensive records. For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket. Moreover, in this declaratory ruling proceeding we do not find it appropriate to revisit any state commission’s evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well established case law. In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein. We do not, however, prejudge the Commission’s determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket.³²

The Commission thus makes clear that it will defer “the determination of what compensation is appropriate” for VoIP traffic, but that wholesale telecommunications carriers bear the

³⁰ *Vonage Decision*, at ¶ 44 (emphasis added and footnote omitted).

³¹ GNAPs Petition, at 21.

³² *Time Warner Decision*, at ¶ 17 (footnotes omitted).

responsibility for compensating incumbent LECs for the termination of such traffic. GNAPs insists that this responsibility can only be established by means of a Section 251 arrangement, rather than through a tariff. But as has been shown in relation to the New Hampshire proceeding, GNAPs in New Hampshire is subject to a Section 251 interconnection agreement that requires GNAPs to compensate ILECs in accordance with the requirements of their tariffs.

In summary, the GNAPs Petition uses selective statements and erroneous readings of various Commission decisions as the basis for proposing a new status for itself that would entirely exempt GNAPs from paying terminating ILECs for the use of their networks. The GNAPs position conflicts with the clear mandate of the Commission that any service provider sending traffic to the PSTN must compensate carriers for using their facilities, irrespective of the technology in which the traffic is originated. GNAPs insists that such compensation can only be established in a Section 251 interconnection agreement, rather than by an access tariff, but the Commission has continued to require adherence to access tariffs in its rules.

The Commission should deny the GNAPs Petition as contrary to the rules and orders of the Commission.

B. The GNAPs Petition represents the latest in a long series of procedural tactics that GNAPs and its affiliates around the country have used to delay and evade their lawful obligations to pay for their use of the public switched network.

As GNAPs acknowledges in its Petition, GNAPs has failed to convince most of the state commissions of the soundness of its position. State commissions and state and federal courts around the country have reached near-unanimous consensus that GNAPs advances a distorted reading of this Commission's decisions in order to avoid lawful access charges that other similarly-situated interexchange carriers pay. In the New Hampshire proceeding that GNAPs

seeks to pre-empt, the NHPUC openly questioned how GNAPs could expect to deliver traffic to the public switched network and pay absolutely nothing for the services it uses:

Global NAPs focuses on the interstate versus intrastate issue underlying its decision to conclude more broadly that because some of its calls are an IP-enabled service, it is impossible to distinguish intrastate from interstate and, therefore, jurisdiction over all its traffic defaults to the FCC. In so doing, Global NAPs evades the more fundamental concern that it has failed to pay anything for access to TDS facilities and services, whether the traffic at issue is interstate or intrastate. . . . Global NAPs does not provide any data or explanation to refute TDS's argument that the call detail records confirm that some of the traffic is intrastate. Rather, Global NAPs misconstrues the case law to create blanket assertions that its traffic is IP-enabled and therefore interstate and exempt from charges.³³

GNAPs' legal machinations are part of a larger pattern by GNAPs to evade financial responsibility for its business operations. In several state regulatory proceedings, GNAPs has claimed its certificated operating companies are not the entities responsible for providing service and thus are not ultimately responsible for the payment of intercarrier invoices and other regulatory obligations. For example, in the Georgia PSC proceeding brought against GNAPs by TDS-Blue Ridge and others, GNAPs attempted to shirk its duties by claiming that the decision applied to "Global NAPs, Inc." while the services were actually provided by "Global NAPs Georgia, Inc.", a concern that the Georgia PSC addressed with a simple correction in its Final Decision.³⁴

In 2007, however, the California Public Utilities Commission ("California PUC") suspended the certificate of Global NAPs California Inc. ("GNAPs CA") until GNAPs CA paid Cox California Telecom, LLC ("Cox") nearly a million dollars plus interest on past-due access

³³ NHPUC Final Order, at 19-20, 22-23 (emphasis added).

³⁴ *Georgia PSC Decision*, at 3, 5.

charges invoiced by Cox.³⁵ GNAPs CA claimed that it could not be found in contempt because GNAPs CA had no resources with which to pay Cox. GNAPs CA filed two separate affidavits in that proceeding in which its Corporate Treasurer attested that GNAPs CA had no liquid assets and owns no real estate, offices or banks in the state of California. The California PUC suspended GNAPs CA's certificate, finding that there was no doubt that GNAPs CA violated California's utility laws, and that "a fine is ineffectual as a response to this violation because [GNAPs CA] has admitted that it has no money and its debts are not guaranteed by its parent or any other solvent entity."³⁶

In 2008, The United States District Court in Connecticut ordered Global NAPs, Inc. to pay Southern New England Telephone Company ("SNET") \$5.25 million for failure to pay access charges, and approximately \$625,000 in attorneys' fees and costs. After SNET alleged that the corporate structure of Global NAPs, Inc. was a "sham" and amended its complaint to add defendants Global NAPs New Hampshire, Inc., Global NAPs Networks, Inc., Global NAPs Realty, Inc., and Ferrous Miner Holdings, Ltd., the Court ordered Global NAPs to produce financial and corporate information. Global NAPs, Inc. did not produce the documents. The Court issued a more detailed order of disclosure and granted SNET's motion for an order to attach personal property. In granting SNET a default judgment, the Court found that GNAPs willfully violated the court's discovery order to produce financial and corporate information, withheld and destroyed evidence in bad faith, gave misleading and nonresponsive answers to discovery requests, prejudiced the plaintiffs, squandered judicial resources, and committed a

³⁵ *Cox California Telecom, LLC v. Global NAPs California, Inc.*, Docket No. 06-04-026, Opinion Suspending Registrant's Certificate of Public Convenience and Necessity, Decision 07-06-44, (Calif. PUC June 21, 2007), available at http://docs.cpuc.ca.gov/published/AGENDA_DECISION/69197.htm.

³⁶ *Id.*

“fraud upon this court.”³⁷ Parties to the Connecticut action later alleged that GNAPs, Inc. transferred millions of dollars to a Virgin Islands bank account belonging to a Virgin Islands limited liability company owned by Frank Gangi, who was and still may be the President and Director of Global NAPs, Inc. A Virgin Islands Court issued, and refused to quash, a subpoena for the bank records of the Gangi-owned company, stating that the bank records were relevant to SNET’s veil-piercing theory in the Connecticut case.³⁸

In Massachusetts in 2006, Verizon New England, Inc. was granted an expedited prejudgment attachment and attachment by trustee process against GNAPs in the amount of \$70 million. The U.S. District Court of Massachusetts found that Verizon had established a reasonable likelihood that it was entitled to damages in the amount of \$70 million, and the Court noted that “prejudgment remedies may be particularly appropriate in this case, since the record indicates that Global, its principals, and affiliated entities may have attempted to transfer or otherwise conceal Global’s assets to avoid execution of any future judgments against it.”³⁹

In Illinois, a company called MyBell, Inc. (“MyBell”) applied for a certificate to provide facilities-based local telecommunications in Chicago. Shortly after the certificate was granted by the Illinois Commerce Commission (“ICC”), Illinois Bell Telephone Company (“AT&T Illinois”) moved for leave to intervene and reopen the record stating that it had evidence to prove that MyBell was yet another of the “shifting set of interlocking corporations created and owned by . . . the sole shareholder of the so-called parent company of the Global NAPs organization” and that MyBell’s officers, directors, and management personnel were all employees of Global

³⁷ *Southern New England Telephone Company v. Global NAPs, Inc.*, Civ. A. No. 3:04-cv-20785, 2008 WL 2704495 (D. Conn. July 1, 2008) (“SNET Connecticut”).

³⁸ *Southern New England Telephone Company v. Global NAPs, Inc.*, slip op., 2007 WL 3171949 (D. Virgin Islands, Oct. 6, 2007).

³⁹ *Global NAPs, Inc. v. Verizon New England*, 2006 WL 2632804 (D.Mass. Sept. 11, 2006), at *6, f.n.6.

NAPs.⁴⁰ AT&T Illinois alleged that the Global NAPs corporations that are certificated in various states lack the financial resources to provide the services for which they are certificated, and that Global NAPs' treasurer had admitted that the Global NAPs organization includes companies with no assets or customers, which exist solely to hold a certificate to provide service and to enter into interconnection agreements.⁴¹ Finally, AT&T Illinois stated that "the Global NAPs organization has been purposefully structured so as to intentionally deprive certificated entities like Global NAPs of Illinois of sufficient financial resources to provide service on a legitimate basis and to provide a source of financial recourse for creditors."⁴² The ICC reopened the docket, and MyBell withdrew its application, depriving the ICC of the opportunity to investigate AT&T Illinois' claims.

Most recently, the United States District Court for the Southern District of Ohio (Eastern Division), denied a motion filed by AT&T Ohio seeking summary judgment against Global NAPs Ohio, Inc., for unpaid terminating access charges due under an interconnection agreement.⁴³ The court concluded that "there remains a material question whether the traffic at the center of the case is VoIP traffic, which makes a summary judgment in the case inappropriate." Nonetheless, the court granted AT&T Ohio's motion to "pierce the corporate veil" between Global NAPs Ohio, Inc. and its ultimate parent company, Ferrous Miner Holdings, Ltd. The court found that the GNAPs affiliate "was indeed merely a façade for Ferrous" and that

⁴⁰ *Application for a Certificate of Local Authority to Operate as a Facilities-Based Carrier of Telecommunications Services in Chicago in the State of Illinois*, Request for Reconsideration of Ruling on Petition for Leave to Intervene and Motion to Reopen Record to Hear Additional Evidence, Docket 07-0063 (Mar. 7, 2007), at 3 (available at <http://www.icc.illinois.gov/downloads/public/edocket/192527.pdf>).

⁴¹ *Id.*, at 4.

⁴² *Id.*, at 5.

⁴³ *Ohio Bell Tel. Co. v. Global NAPs Ohio, Inc.*, Case No. C2-06-CV-549, Opinion and Order (S.D. Ohio, Mar. 15, 2010) (the "GNAPs Ohio Decision").

AT&T Ohio was entitled to enforce any judgment in the case against Ferrous Miner Holdings, Ltd. According to the court:

Global Ohio has admitted that it has no employees, equipment, assets, customers, or revenues. In addition, Global Ohio has admitted that it does not maintain any financial statements, and Richard Gangi, the Treasurer of Global Ohio and other Ferrous subsidiaries, stated during his deposition that while he was unsure whether Global Ohio maintained any financial statements and had never seen any such documents, he knew that Ferrous maintained those records. In addition, Mr. Gangi referred to Global Ohio and other subsidiaries as “file companies,” admitting that those companies “don’t actually do anything,” but “are filed just for regulatory reasons.” Frank Gangi, the President of Global Ohio and other subsidiaries and the sole shareholder, officer, and director of Ferrous, admitted that he is “the President of probably two hundred corporations set up by [Ferros’] counsel,” and that some of those corporations “may be just what we call a file drawer company.” As the Seventh Circuit observed with respect to Global Illinois’s relationship to Ferrous, “[t]he corporate structure that the Gangi brothers have created appears to be designed to keep all its assets in corporations that have no liabilities and all its liabilities in corporations that have no assets.”⁴⁴

The many state and federal cases involving GNAPs and its corporate affiliates underscore the obfuscatory nature of the GNAPs Petition. GNAPs has relied on the unsettled nature of the Commission’s caselaw concerning the treatment of VoIP traffic to delay and confuse regulatory enforcement proceedings in several states. The Commission should deny the Petition and reaffirm that Interconnected VoIP traffic may be subject to intrastate access charges. Indeed, the Commission should order GNAPs to pay the interstate access charges now due and owing to affected carriers and, if GNAPs fails to comply, should instruct its Enforcement Bureau to investigate GNAPs’ business practices around the country.

⁴⁴ *GNAPs Ohio Decision*, slip op., at 16-17 (quoting *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, 551 F.3d 587, 591 (7th Cir. 2008)).

C. A failure to confirm the continued application of intrastate access charges to Interconnected VoIP Traffic will foster rate arbitrage and undermine the success of the National Broadband Plan.

The TDS Telecom Companies support the position advanced by the National Exchange Carrier Association (“NECA”) and others concerning the pressing need for the Commission to reaffirm that intrastate access charges apply to Interconnected VoIP traffic. As its experience in several state commission proceedings have demonstrated, rural carriers have had to expend significant resources pursuing lawful intercarrier access payments against arbitrageurs who exploit the regulatory uncertainty at the federal level.

The Commission’s National Broadband Plan (the “Plan”) recognizes the present risk of arbitrage in intercarrier compensation and expressly urges the Commission to “adopt interim rules to reduce ICC arbitrage” and specifically to “address the treatment of VoIP for purposes of ICC.”⁴⁵ As it begins its efforts to implement the Plan, the Commission should reaffirm that intrastate access charges remain an important component of intercarrier compensation while the Commission considers reform proposals in line with the timetables of the Plan.

D. The NHPUC’s authority to require GNAPs to pay tariffed access charges has not been pre-empted by the Commission.

GNAPs has asked the Commission to clarify whether federal law preempts state commissions, such as the NHPUC, from subjecting “primarily nomadic VoIP” traffic to intrastate access tariffs, and to pre-empt the NHPUC from taking further action to finalize and enforce its Final Order in NHPUC Docket No. DT 08-028. The TDS Telecom Companies urge the Commission to deny GNAPs’ Petition.

⁴⁵ *Connecting America: The National Broadband Plan* (Fed. Commun. Comm’n.), Chapter 8 (Availability), Recommendation 8.7, at 148.

In the first instance, the NHPUC did not assert jurisdiction over “primarily nomadic VoIP” in Docket No. DT 08-028 and made clear that GNAPs had offered no evidence to support its claim to a purported “ESP” exemption from access charges under federal law. Instead, the NHPUC resolved the New Hampshire proceeding under its own procedural rules, as a billing dispute among carriers within the NHPUC’s state jurisdiction, and ruled in favor of the TDS-NH Companies on that basis. Nonetheless, it is inaccurate to characterize the NHPUC’s proceeding as asserting state jurisdiction over any VoIP service, whether fixed or nomadic, since GNAPs simply failed to substantiate its claims with any evidence. Nor do the TDS Telecom Companies believe that GNAPs has established a sufficient factual basis, in its present pleadings, to substantiate its claim to any “exemption” from its obligations to pay lawful access charges.

The TDS Telecom Companies assert that the NHPUC would still not be preempted under federal law from requiring GNAPs to pay intrastate access charges for terminating such traffic in New Hampshire, and so the GNAPs Petition must be denied.

As the GNAPs Petition states, federal pre-emption of state action occurs: (1) when Congress express a clear statutory intent to pre-empt a state law; (2) when there is outright or actual conflict between federal and state law; (3) where compliance with both federal and state law is in effect physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.⁴⁶ “Pre-emption may result not only from action taken by Congress itself; a federal

⁴⁶ GNAPs Petition, at 24 (citing *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-369 (1986) (collecting cases)).

agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”⁴⁷

GNAPs looks to this Commission’s *Vonage* decision, to the Commission’s desire to avoid disparate interpretation of intrastate tariff requirements, and to Section 253’s prohibition on state barriers to competitive entry as the supposed bases for its pre-emption request. However, there is nothing in federal law or policy that satisfies any of the elements for federal pre-emption of the NHPUC’s decision to require GNAPs to pay terminating access charges to the TDS-NH Companies.

As discussed in the previous section, the Commission’s existing rules require that access 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.”⁴⁸ Existing law does not recognize the exempt status that GNAPs now proposes for itself as an “interconnection VoIP carrier”.⁴⁹ Rather, such recognition would require the Commission to expand the scope of its *Vonage* decision, in which the Commission pre-empted state regulation of nomadic VoIP providers.

The Commission made clear, however, that the issue of intercarrier compensation for VoIP traffic was not decided in the *Vonage* decision but instead has been deferred for adjudication in the IP-Enabled Services Proceeding.⁵⁰ The fact that the Commission has left that question open, and has not resolved it for the carriers or for the states, means that GNAPs cannot meet its burden to show clear pre-emptive intent, outright or actual conflict between state and federal law, the impossibility of compliance with state and federal requirements, an implicit federal barrier to

⁴⁷ *Louisiana Public Service Commission*, 355 U.S. at 369; *see also* 47 U.S.C. § 253.

⁴⁸ 47 C.F.R. § 69.5(b).

⁴⁹ GNAPs Petition, at 21.

⁵⁰ *Vonage* Decision, *supra*, at ¶ 44.

state action, comprehensive legislative effect without any room for the states to supplement federal law, or a state obstacle to the accomplishment and execution of federal power, as required to invoke federal pre-emption.

Indeed, as recently as last October, the Commission expressly instructed a state commission that “the lack of regulatory direction from the Commission regarding [VoIP] issues does not, in fact, stand as a legal obstacle” to a state commission hearing and resolving VoIP issues.⁵¹ The *UTEX* decision involved an interconnection dispute between UTEX and AT&T Texas that UTEX had asked the Public Utilities Commission of Texas (“PUCT”) to arbitrate. The PUCT initiated an arbitration proceeding but then “abated” the proceeding when it learned that “all parts of the interconnection agreement were related to VoIP because [UTEX’s] principal business plan was to support IP-enabled services, including VoIP.”⁵² The PUCT had earlier determined that it would decline to consider issues implicating VoIP because it believed the Commission intended to address such issues. UTEX challenged the “abatement” decision, ultimately bringing a petition for pre-emption to the Commission on the ground that the PUCT had failed to act under Section 252(e)(5). The Commission denied the pre-emption request, however, holding that the PUCT had not failed to act and in fact stood ready to resolve the arbitration in the event the pre-emption request was denied.

The significance of the *UTEX* decision is clear: first, that the Commission has not manifested a clear intent with respect to pre-emption of state jurisdiction over VoIP issues; and second, that the Commission’s lack of regulatory direction with respect to VoIP issues does not preclude a state commission from hearing and resolving issues as they may arise.

⁵¹ *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134, Mem. Opinion and Order (DA 09-2205) (released Oct. 9, 2009), at ¶ 9.

⁵² *Id.*, at ¶ 4.

Given the state of the Commission's caselaw, the Commission should deny GNAPs' Petition to pre-empt the NHPUC proceeding, even assuming that the New Hampshire case implicates VoIP issues (notwithstanding the NHPUC's findings to the contrary). The NHPUC proceeding does not involve a VoIP provider, nor does it involve an assertion of state regulatory authority over a VoIP provider. At best, and giving GNAPs the benefit of every doubt, the NHPUC proceeding involves a consideration of the appropriate compensation scheme for a telecommunications carrier that delivers VoIP traffic for termination on the public switched telephone network. As this question is among the questions that the Commission has specifically reserved for resolution in a later proceeding, GNAPs cannot meet its burden of proving clear pre-emptive effect, and its Petition should be denied.

III. CONCLUSION

The Commission should deny the GNAPs Petition. GNAPs seeks to avoid application of access charges that are required by law for the services it uses. The Commission has made clear that every service provider must pay for its use of the public switched network, without regard to the technology or platform in which the traffic originates. The new "focus" or status that GNAPs proposes for itself is unfounded in the law and is contrary to the rules and orders of the Commission.

The Commission should not pre-empt the New Hampshire Public Utilities Commission proceeding in its Docket No. DT 08-028. There is nothing in the NHPUC actions that implicates any concerns about the jurisdiction of VoIP services. But even assuming the Commission sees a jurisdictional issue arising from the NHPUC proceeding, there is nothing in federal statutory or regulatory law that bars a state commission from imposing intrastate access charges on a telecommunications carrier that terminates IP-enabled traffic to the public switched telephone

network. The Commission has expressly reserved consideration of such issues to separate proceedings and has not resolved such issues in any way that can be construed to signal a clear intent to pre-empt states from acting as the NHPUC has done.

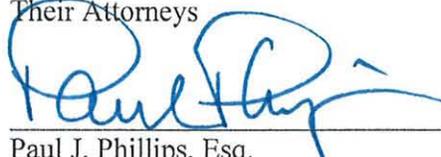
The Commission should deny the GNAPs Petition and should reaffirm that access charges apply to the traffic in question. Further, the Commission should order GNAPs to pay all outstanding interstate access charges. If GNAPs fails to comply, the Commission should refer the matter to its Enforcement Bureau for an investigation of GNAPs' business practices.

The TDS Telecom Companies express their appreciation for the opportunity to provide the foregoing Comments.

DATED at Plymouth, New Hampshire, this 2nd day of April, 2010.

HOLLIS TELEPHONE COMPANY, INC., KEARSARGE
TELEPHONE COMPANY, MERRIMACK COUNTY TELEPHONE
COMPANY, WILTON TELEPHONE COMPANY, INC., LUDLOW
TELEPHONE COMPANY, NORTHFIELD TELEPHONE
COMPANY, PERKINSVILLE TELEPHONE COMPANY, and
BLUE RIDGE TELEPHONE COMPANY

By: Primmer Piper Eggleston & Cramer PC,
Their Attorneys

By: 

Paul J. Phillips, Esq.
Primmer Piper Eggleston & Cramer PC
100 East State Street, P.O. Box 1309
Montpelier, VT 05601-1309
Tel: (802) 223-2102
Fax: (802) 223-2628
pPhillips@ppeclaw.com