

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

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

**OPPOSITION OF THE PUBLIC
SERVICE COMMISSION OF MARYLAND**

The Maryland Public Service Commission (“Maryland PSC”) respectfully opposes Global NAPs, Inc.’s (“GNAPs” or “Global”) Petition for Declaratory Ruling and Alternative Petition for Preemption of the Maryland PSC (“Petition”). The Petition seeks improperly to end-run a case currently pending before the Maryland PSC, a case involving factual disputes about the exact nature of GNAPs’s traffic properly resolved by the Maryland PSC in the first instance, not the Federal Communications Commission (“FCC” or “the Commission”). The Commission should deny this Petition and allow the pending case to proceed.

In Maryland PSC Case No. 9177, Maryland-jurisdictional local exchange carrier Armstrong Telephone Company of Maryland (“Armstrong”) filed a Request for Investigation seeking an order permitting it to collect local switched access charges from Global related to terminating GNAPs’s Voice over Internet Protocol (“VoIP”)-related calls on Armstrong’s network, pursuant to Armstrong’s intrastate tariff. The Maryland PSC delegated the case to a Hearing Examiner, who has rendered two decisions: (1) a Jurisdictional Ruling, issued on April 30, 2009, concluding that – at that time – GNAPs had not referenced any FCC regulations or comprehensive FCC actions that have preempted the Maryland PSC’s jurisdiction in this matter; and (2) the substantive Proposed Order of Hearing Examiner on the merits, issued on December 30, 2009, finding that on the basis of the “impossibility

exception” of section 152(b) of the Communications Act of 1934 (47 U.S.C. § 152(b)) -- which allows the FCC to preempt state regulation of a service which would otherwise be subject to dual federal and state regulation “where it is impossible or impractical to separate the service’s intrastate and interstate components, and state regulation interferes with valid federal rules or policies.”¹ -- GNAPs does not owe local access charges to Armstrong. Armstrong filed a timely appeal of the Proposed Order of Hearing Examiner to the Maryland PSC, and that appeal remains pending.

The Maryland PSC cannot discuss the merits of Armstrong’s appeal here. The Maryland PSC recognizes that, under Maryland law, it does not have jurisdiction over the regulation of VoIP services.² At the same time, the Maryland PSC does have a direct and immediate interest in ensuring that Maryland-jurisdictional local exchange carriers are adequately compensated for the costs they incur in originating and terminating intrastate traffic on the public switch telephone network. The record in Case No. 9177 reveals disputes regarding GNAPs’s status as a true provider of VoIP services that are the Maryland PSC’s to resolve. Among other things, the appeal presents a variety of factual questions about the nature of GNAPs’s traffic over Armstrong’s network, not purely legal or jurisdictional questions. For example, the parties dispute whether GNAPs transports exclusively VoIP traffic, whether its VoIP traffic is entirely nomadic, whether or not the “impossibility exception” properly applies, and whether GNAPs could owe access charges to Armstrong

¹ *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 576 (8th Cir. 2007) (interpreting and applying the FCC’s decision in *Vonage Holdings Corp.*, 19 FCCR 22404 (2004)).

² While Maryland law expressly provides that the Maryland PSC does not have jurisdiction over the regulation of VoIP service, including the imposition of regulatory fees, certification requirements, and the filing or approval of tariffs (Md. Code Ann., Public Utility Companies Article, § 8-602(a)), § 8-602(b) [relating to construction] provides that nothing in the subtitle may be construed to ... (3) require or prohibit the payment of any switched access rates or other intercarrier compensation rates that may be determined to apply.

under Armstrong’s intrastate tariff. Indeed, GNAPs’s status as a true VoIP provider is no more clearly defined in its Petition than it is in the Maryland PSC Case No. 9177 record. But the fact that GNAPs’s status as a true VoIP provider is unclear does not mean that it is “impossible” to separate the intrastate and interstate components of GNAPs’s services.

The appeal also requires the Maryland PSC to determine whether the lack of clarity is implicit, based on the configuration of GNAPs’s VoIP-related service offerings, or whether the lack of clarity lies in the distinction between VoIP services (as services) and complications in assessing whether GNAPs and others can track the geographic end-points of Global’s VoIP-related calls terminating on Armstrong’s network. Although the Maryland PSC recognizes the nuance involved in navigating what might appear to be a subtle distinction, these are distinctions the Maryland PSC is obliged to consider under Maryland law. And they matter: as the United States Court of Appeals for the Eighth Circuit observed in *Minnesota Public Service Commission v. FCC*, *supra*, “VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effects of the [FCC’s 2004] *Vonage* order.”³

Unlike state commission regulations that attempt to regulate VoIP services (as services), also distinguished in *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F. 3d 900 (8th Cir. 2009), the Maryland PSC proceeding does not involve regulation of VoIP services as services. Instead, the sole purpose of the proceeding is to determine whether GNAPs’s termination of VoIP-related calls on the Armstrong public service telephone network can be tracked on a geographic end-point basis in order to determine whether Armstrong’s *intrastate* switch access charges should apply.

³ 483 F. 3d at 582.

Under current federal case law, if the record reveals that GNAPs's VoIP-related traffic in fact can be tracked from geographic end-point to geographic end-point, intrastate switched access charges might apply. If not, the "impossibility exception" might indeed preclude the applicability of Armstrong's tariff to GNAPs's VoIP-related traffic. In either case, existing FCC and federal case law provide sufficient guidance to allow the Maryland PSC to determine whether the local carrier's intrastate switched access tariff is – or is not – applicable, without the need for a declaratory ruling from the Commission on this issue. This Commission should not preempt the Maryland PSC's consideration of these issues, but instead should deny the Petition.

THEREFORE, for the foregoing reasons, the Maryland Public Service Commission respectfully request that the Petition for Declaratory Ruling and Alternative Preemption filed by Global NAPs, Inc., as to the Maryland Public Service Commission, be denied.

Respectfully submitted,

PUBLIC SERVICE COMMISSION OF
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