

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

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

COMMENTS OF THE AD-HOC GROUP OF RURAL TELEPHONE COMPANIES

The Ad-Hoc Group of Rural Telephone Companies (the “RLEC Companies”),¹ hereby provide these comments in response to the Public Notice released March 18, 2010 by the Federal Communications Commission (“FCC” or the “Commission”),² requesting comment on a petition filed by Global NAPs, Inc. and its affiliates (collectively “GNAPs”).³ In its filing,⁴ GNAPs requests the Commission to declare that:

1) because VoIP was declared jurisdictionally interstate in *Vonage*, 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) . . . 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

¹ The companies comprising the group are noted in Attachment A. Each of the RLEC Companies either has had to or anticipates addressing efforts by entities to avoid the payment of properly assessed exchange access charges to carriers which claim that no access charges are due and owing. As such, each of the RLEC Companies is a party in interest in this proceeding.

² *Pleading Cycle Established for Comments on Global NAPs Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions*, WC Docket No. 10-60, Public Notice, DA 10-461 (Mar. 18, 2010).

³ Based on statements in the petition at issue such affiliates include Global NAPs Pennsylvania, Inc., Global NAPs South, Inc. and other Global NAPs affiliates.

⁴ See Petition of Global NAPs, Inc. for Declaratory Ruling and Alternative Petition for Preemption to the Pennsylvania, New Hampshire and Maryland State Commissions, WC Docket No. 10-60 (Mar. 5, 2010) (“*GNAPs Petition*”).

access charges, and are also immune from intrastate access charges⁵

In the alternative GNAPs seeks preemption of rulings by state commissions in Pennsylvania, Maryland, and New Hampshire.⁶

II. SUMMARY OF ARGUMENT

The relief GNAPs seeks should be denied as it is contrary to existing FCC precedent which acknowledges state commission authority over jurisdictionally identified intrastate traffic. FCC-established and existing law requires GNAPs, as a wholesale telecommunications carrier/common carrier,⁷ to be responsible for the intercarrier compensation associated with the traffic *it delivers* to the Public Switched Telephone Network (“PSTN”). Moreover, established and existing law recognizes and confirms the ability of local exchange carriers (like each of the RLEC Companies) to rely upon the originating and terminating NPA-NXXs of the calling and called parties as a surrogate for the geographic location of those parties for purposes of determining the jurisdictional nature (and thus the attendant intercarrier compensation regime applicable to) the call. And, while this law has been known to GNAPs for a considerable period of time,⁸ GNAPs’ refusal to recognize this law (and, in fact, its refusal to even acknowledge the

⁵ *Id.* at 1 (internal citations omitted).

⁶ *Id.* at 2.

⁷ The Communications Act of 1934, as amended (hereinafter, “the Act”) effectively equates the term “telecommunications carrier” with “common carrier.” See 47 U.S.C. § 153(44) and *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-927 (D.C. Cir. 1999).

⁸ Rather than burden the record, the RLEC Companies incorporate herein by reference the various submissions made before the Maryland Public Service Commission (“Maryland Commission”) by one of the RLEC Companies, Armstrong Telephone Company – Maryland. Those briefs can be found on the Maryland Commission website at <http://webapp.psc.state.md.us/Intranet/home.cfm> (Search for Case 9177). Since at least by August of last year, the referenced substantive law contained in these comments has been known to GNAPs based on the pending Maryland case, and the directive discussed *infra* from the Commission’s Wireline Competition Bureau was also known by GNAPs as a result of the

existing law within the *GNAPs Petition*) is telling. Existing law fatally undermines any claim made by GNAPs for relief. Accordingly, since GNAPs presents no “controversy” or “uncertainty”,⁹ other than of its own making, the *GNAPs Petition* should be dismissed.

II. EXISTING LAW REJECTS THE NOTIONS CONTAINED IN THE *GNAPS PETITION*

The declaratory or preemptive relief GNAPs seeks is inappropriate because existing law demonstrates that there is no legal basis for such relief. Each element of the requested relief should be rejected in its entirety, as should the general request for preemption of state commission actions.

A. Existing Law is the Governing Standard.

Conspicuously absent from the *GNAPs Petition* is any reference to the Wireline Competition Bureau’s recent pronouncement that decisions for which GNAPs’ relief is presumably based -- intercarrier compensation matters associated with Internet Protocol-enabled services -- should be based on existing law.

Under the facts before the Commission, the PUCT did act to complete its duties in a timely manner, but believed that it was unable to make a final determination with regard to UTEX’s arbitration request solely because the Commission has not resolved the regulatory classification of VoIP traffic, and the associated intercarrier compensation obligations. . . The PUCT perceived the absence of Commission resolution of these regulatory questions as an obstacle to its conclusion of the arbitration proceeding. . . [W]e . . . make clear . . . that the lack of regulatory direction from the Commission regarding these issues does not, in fact, stand as a legal obstacle to the PUCT’s resolution of the arbitration. . . . We emphasize that the PUCT should not wait for Commission action to move forward. Rather, the PUCT must proceed to arbitrate this interconnection

Maryland case shortly after that decision was released. Not surprisingly, GNAPs has yet to address this law because GNAPs cannot do so.

⁹ 47 C.F.R. § 1.2. (The FCC “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.”).

agreement in a timely manner, relying on existing law.¹⁰

Thus, any analysis of GNAPs' requests must, under *UTEX*, be based on existing law. As demonstrated in Section II.B.2, *infra*, and notwithstanding GNAPs "spin" on the Time Warner Cable declaratory order,¹¹ both that decision and the Commission's pronouncement in the 2006 Calling Card Order¹² ultimately represent the existing law that governs this matter.

B. GNAPs' Request for Relief is Contrary to Existing Law.

1. Vonage is not applicable.

GNAPs' reliance on the Commission's *Vonage Order*¹³ is misplaced. The *Vonage Order* preempted state entry and economic regulation of the actual provider of Voice over Internet Protocol ("VoIP") service.¹⁴ At least in the Maryland proceeding (and it appears to be true in Pennsylvania and New Hampshire as well), regulation of VoIP providers is not at issue. That the *GNAPs Petition* seeks "to either clarify the scope of its preemption in *Vonage*, or *expand* its

¹⁰ *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, Memorandum Opinion and Order*, WC Docket No. 09-134, DA 09-2205 (rel. Oct. 9, 2009) ("*UTEX*") at paras. 9-10. Thus, state commissions are not preempted under existing law. See n. 21, *infra*, and accompanying text.

¹¹ 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, 22 F.C.C.R. 3513 (2007) ("*Time Warner Order*") at para. 17 & n.53.

¹² See *In the Matter of Regulation of Prepaid Calling Card Services, Declaratory Ruling and Report and Order*, WC Docket No. 05-68, 21 F.C.C.R. 7290 (2006) ("*Calling Card Order*") at para. 32 & n.89.

¹³ *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Comm'n, Memorandum Opinion and Order*, WC Docket No. 03-211, 19 F.C.C.R. 22404 (2004) ("*Vonage Order*").

¹⁴ See *id.* at paras. 3-9, 46.

preemption in *Vonage*”¹⁵ illustrates that the law does not support the relief that GNAPs seeks.

Thus, GNAPs’ expansive reading of *Vonage* should be rejected.

2. It is the GNAPs’ status as a common carrier that governs the applicable intercarrier compensation requirements.

The Commission has already stated that, as a matter of law, wholesale telecommunications carriers such as GNAPs are responsible for the intercarrier compensation associated with the intrastate access traffic that they deliver to the PSTN for termination.

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.⁵³

⁵³ See, e.g., Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is “administration, payment, and collection of intercarrier compensation”); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers “intercarrier compensation, *including exchange access and reciprocal compensation*”).¹⁶

In doing so, the Commission did not limit compensation to negotiated rates as GNAPs contends.¹⁷ Rather, the appropriate intercarrier compensation includes *both* reciprocal compensation and exchange access charges as reflected in footnote 53 quoted above, since each of them is part of a “Section 251 arrangement.”¹⁸ And, “exchange access” is a section 251 arrangement as reflected in section 251(g) of the Act.¹⁹

¹⁵ *GNAPs Petition* at 28 (emphasis added).

¹⁶ *Time Warner Order* at para. 17 & n.53 (emphasis added).

¹⁷ *GNAPs Petition* at 21.

¹⁸ *Time Warner Order* at para. 17.

¹⁹ Section 251(g) of the Communications Act of 1934, as amended (the “Act”) states:

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide *exchange access*, information access, and

As the same time, the Commission explicitly acknowledged that its *Time Warner Order* was addressing VoIP service,²⁰ the very type of customer traffic GNAPs claims to transport. Yet, since VoIP traffic is originated in Internet Protocol (“IP”) and terminated to the PSTN in Time-Division Multiplexing (“TDM”), following GNAPs’ logic, one would have expected the Commission to find that once the IP protocol was changed to TDM protocol, a protocol conversion occurred and thus an information service was created. But that is not what the Commission concluded. Rather, as noted above, the Commission ruled in the *Time Warner Order* that wholesale telecommunications carriers like GNAPs are responsible for the intercarrier

exchange services *for such access to interexchange carriers* and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (*including receipt of compensation*) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission. (emphasis added)

47 U.S.C. § 254(g). While a recent federal court decision indicated that Section 254(g) did not apply to the exchange of VoIP traffic because such traffic was not in existence as of 1996, *Paetec Commc’ns, Inc. v. CommPartners, LLC*, Case No. 1:08-cv-00397-JR, slip op. at 7-8 (D.D.C. Feb. 18, 2010), the court’s construction of Section 254(g) is questionable not only based on the FCC’s pronouncements in the *Time Warner Order* and *Calling Card Order* but also the language of the statute and the fact that no rule changes from the Commission with respect to intercarrier compensation regimes associated with VoIP traffic have been made. Further, the federal cases relied upon by the court in *Paetec, Vonage Holdings Corp. v. Minn Pub. Utils. Comm’n*, 290 F. Supp. 2d 993 (D. Minn. 2003) and *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), were both decided prior to the Commission’s *Time Warner Order* where the occurrence of a net protocol conversion at some place prior to the delivery of the traffic for termination on the PSTN *was not deemed* to be dispositive of the wholesale provider’s intercarrier compensation obligations. *See infra*, note 20.

²⁰ *Time Warner Order* at para. 13, 15 (Recognizing that “affirming the rights of wholesale carriers to interconnect for the purpose of exchanging traffic with VoIP providers will spur the development of broadband infrastructure” and further clarifying that “the statutory classification of a third-party provider’s VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b).”)

compensation associated with the use of another carrier's network even though a protocol conversion may have occurred.

Accordingly, it is GNAPs' status as a common carrier and not the alleged status of its customers that governs the proper treatment of GNAPs' interconnection to the PSTN and the intercarrier compensation ramifications that arise from that status.

3. Existing law allows for the utilization of NPA-NXXs as a proxy for determining geographic location of traffic.

Even if the traffic that GNAPs terminates to an ILEC is some form of IP-enabled service like nomadic VoIP, that fact does not alter the application of the traditional intercarrier compensation. Rather, the use by the ILEC of the originating and terminating NPA-NXXs to determine that its intrastate access tariff applies, has been acknowledged and affirmed as proper by the FCC.

In a standard interexchange call, the CPN [calling party number] will be passed as part of the SS7 signaling message, and the carriers involved in the call should be able to determine the jurisdiction based on a comparison of the calling and called party telephone numbers.⁸⁹

⁸⁹ 47 C.F.R. § 64.1601. As noted in the *Inter-carrier Compensation FNPRM*, the emergence of wireless and IP-based calling options makes it less likely that a comparison of telephone numbers will provide meaningful information on the geographic end points of call. Nevertheless, *for now carriers* continue to rely on telephone numbers as a proxy for geographic locations. See *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4696-97, paras. 20-22.²¹

Where both the originating and terminating numbers are not available, the Commission has also

²¹ *Calling Card Order* at para. 32 & n.89 (emphasis added) citing *In the Matter of Developing a Unified Inter-carrier Compensation Regime, Further Notice of Proposed Rulemaking*, CC Docket No. 01-92, 20 F.C.C.R. 4685 (2005) (the "*Inter-carrier Compensation FNPRM*"); see also *Inter-carrier Compensation FNPRM* at para. 22 & n.59. ("Telecommunications carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call, which may be relevant for jurisdiction and compensation purposes.") (citing *Starpower Communications, LLC v. Verizon South Inc.*, EB-00-MD-19, *Memorandum Opinion and Order*, 18 F.C.C.R. 23625, 23633, para. 17 (2003)).

made clear that it “has long endorsed the use of [percentage of interstate usage factors] to determine the jurisdictional nature of traffic for access charge purposes.”²² Thus, under existing law, GNAPs’ claim with respect to the use of telephone numbers in the LERG has already been resolved.

4. GNAPs’ efforts to avoid both interstate and intrastate access charges fly in the face of existing law.

GNAPs’ position flies in the face of the *Time Warner Order* and the *Calling Card Order* in the *GNAPs Petition*. GNAPs cannot be permitted to ignore this governing law. Yet, the analysis outlined above was provided to the Maryland Commission in a proceeding that is currently pending,²³ and no substantive response to it has been provided. Also conspicuously absent in the *GNAPs Petition* is a recognition by GNAPs that it is in fact a telecommunications carrier/common carrier as properly noted by the Pennsylvania Public Utilities Commission (“PA PUC”). GNAPs’ efforts to avoid the law and its status cannot be countenanced by the FCC.

The status of GNAPs as a telecommunications carrier represents the very foundation upon which any analysis associated with intercarrier compensation must proceed.²⁴ The *Time Warner Order* confirms the fact that it is the telecommunications carrier status of the wholesale provider that is the lynchpin of that carrier’s intercarrier compensation obligations.

Accordingly there is absolutely no basis for the proposition that a common carrier who sells a terminating-to-the-PSTN service (*i.e.*, GNAPs) should obtain the free use of the service that carrier needs from other entities. Even GNAPs muddies the record by first stating that it

²² *Calling Card Order* at para. 32 & n.90.

²³ *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 (Md. P.S.C.).

²⁴ *Palmerton Tel. Co. v. Global NAPs South, Inc. et al*, Docket No. C-2009-20093336, *Opinion and Order*, (Pa.P.U.C. Mar. 16, 2010) at 8-9.

“delivers the traffic of several nomadic VoIP companies”²⁵ but later states that “interconnected VoIP” services are “the very services Global provides.”²⁶ Regardless, the fact remains that GNAPs is a common carrier and existing law provides that the common carrier must abide by the same intercarrier compensation rules that are in existence today as confirmed by the Commission’s *Time Warner Order*.²⁷

Nothing has changed with respect to the existing rules and law.²⁸ The rules that apply to all common carriers terminating traffic over the PSTN apply. The PA PUC reached this proper conclusion; the Maryland Commission, it is hoped, will do the same, as other states have already done.²⁹ Thus, states are not preempted from taking the actions they have under existing law.

²⁵ *GNAPs Petition* at 2.

²⁶ *Id.* at 27.

²⁷ From a public policy standpoint, the same conclusion has already been supported by the FCC.

[A]s 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 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.

In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 F.C.C.R. 4863 (2004) (“*IP-Enabled Proceeding*”) at para. 33.

²⁸ As one court has observed:

Obviously, the FCC had to be well aware of the existence of substantial VoIP traffic in the telecommunications marketplace otherwise it would not be pondering overall regulation. Equally obvious, the FCC had to be aware also that the existing VoIP traffic was moving at someone’s expense. The fact that neither on the complaint of Global nor in any other proceeding referred to us by the parties has the FCC deemed it necessary to intervene to upset compensation schemes involving such traffic agreed to by the carriers...leads to the inescapable conclusion that the FCC is in the interim deferring to the existing intercarrier agreements as controlling such billing issues and has left for courts or arbitration to resolve any contractual disputes about VoIP traffic arising out of them.

Verizon New York Inc. v. Global NAPS, Inc., 463 F. Supp. 2d 330, 342 (E.D.N.Y. 2006).

²⁹ The Georgia Public Service Commission concluded that it is not preempted from ordering access charges and that “under the terms of the applicable tariff, access charges are due for

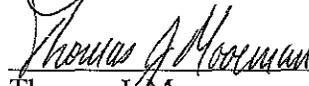
III. CONCLUSION

As set forth herein, FCC pronouncements (*i.e.*, existing law) require that, even if the GNAPs traffic is VoIP traffic, GNAPs traffic should be treated *no* differently than other traffic that is delivered for termination on the PSTN. GNAPs is responsible for the intercarrier compensation associated with the PSTN functionalities it needs to sell its “terminating-to-the-PSTN” service to its customers. When GNAPs sells its service, GNAPs is acting in its role as a common carrier, and it is that status as a common carrier that governs GNAPs’ intercarrier compensation obligations. Accordingly, for the reasons stated herein, the RLEC Companies respectfully request that the *GNAPs Petition* be denied in its entirety.

Respectfully submitted,

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termination of the subject traffic to the PSTN.” *See 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 (Ga. P.S.C. July 31, 2009) at 8. Likewise, the Indiana Utility Regulatory Commission disagreed with the proposition that “the absence of FCC action specifically requires [state commissions] to default to the application of reciprocal compensation.” *In the Matter of Spring Communications Company L.P.’s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions of Interconnection with Ligonier Telephone Company, Inc.*, Order, Cause No. 43052-INT-01, at 45-47 (Sept. 6, 2006); *see also Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana Petition for Arbitration of Interconnection Rates Terms and Conditions and Related Arrangements with MCIMetro Access Transmission Services, LLC, Intermedia Communications LLC, and MCI WorldCom Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Arbitration Order*, Cause No. 42893-INT-01, at 59 (Jan. 11, 2006).

Attachment A

Armstrong Telephone Company – Maryland
Armstrong Telephone Company – New York
Armstrong Telephone Company -- North
Armstrong Telephone Company – Northern Division
Armstrong Telephone Company – Pennsylvania
Armstrong Telephone Company – West Virginia
Bay Springs Telephone Company, Inc.
Chazy and Westport Telephone Corporation
Consolidated Telephone Company
Consolidated Telco, Inc.
Consolidated Telecom, Inc.
Crockett Telephone Company, Inc.
The Curtis Telephone Company
Germantown Telephone Company, Inc.
Great Plains Communications, Inc.
Ligonier Telephone Company, Inc.
The Middleburgh Telephone Company
National Telephone of Alabama, Inc.
Newport Telephone Company, Inc.
Nicholville Telephone Company, Inc.
Ontario Telephone Company
Peoples Telephone Company, Inc.
Plant Telephone Company, Inc.
Roanoke Telephone Company, Inc.
Trumansburg Telephone Company
West Tennessee Telephone Company, Inc.