

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

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

**REPLY COMMENTS OF THE
ARIZONA CORPORATION COMMISSION**

On March 12, 2010, Global NAPS, Inc. (“Global NAPS”) filed a Petition for Declaratory Ruling and Alternative Petition for Preemption (“Petition”) of the Pennsylvania, New Hampshire and Maryland State Commissions (collectively the “State Commissions”). The Federal Communications Commission (“FCC”) set April 2, 2010 as the deadline for initial comments on the Petition and April 12, 2010 as the deadline for reply comments. The Arizona Corporation Commission (“Arizona Commission”) files these brief Reply Comments.

Global NAPS requests the following declarations of preemption in its Petition: (1) federal law prohibits state commissions from subjecting VoIP 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 instate 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; and (4) connecting carriers forwarding VoIP traffic are not subject to interstate switched access charges, and are also immune from intrastate access charges.”

For the reasons discussed below, the FCC should deny the Global NAPS' Petition. It is overly broad and is based upon an incorrect interpretation of the law in certain cases. Further, to the extent it seeks broad-based industry-wide policy pronouncements that are prospective in nature, this should be done in the *IP Enabled Services Proceeding*.

First, Global NAPS relies primarily upon the *Vonage* decisions¹ in seeking preemption of the State Commissions with respect to VoIP intercarrier compensation issues. However the applicability of the *Vonage* decisions to the underlying State Commission proceedings appears to be tenuous at best. First, it seems clear that the State Commissions are not attempting to impose entry or economic regulation upon any nomadic VoIP services offered by Global NAPS. Instead, the State Commissions are trying to address intercarrier compensation issues arising between carriers operating within their respective jurisdictions.² The FCC did not expressly address intercarrier compensation issues involving VoIP traffic in the *Vonage* Order.³

Second, Global NAPS' makes it appear as though it is simply requesting that the FCC restate existing law. To the extent this is the case, restatements by the FCC of existing law would be duplicative and unnecessary. But, as noted by many commenters, Global NAPS' requests do not reflect existing law.

For instance, Qwest correctly notes in its Comments at p. 12 that:

¹ See *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, *Memorandum Opinion and Order* (Rel. November 12, 2004) *affirmed Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Circuit 2007).

² See PaPUC Comments at p. 4-5 (*citing Palmerton Telephone Company v. Global NAPs South, Inc., et al.*, Pa.PUC Docket No. C-2009-2093335, Order entered March 16 2010)(“The overwhelming weight of legal authority of Pennsylvania and federal law, as well as the relevant decisions of other state utility regulatory commissions and courts of appropriate jurisdictions that have dealt with a large number of intercarrier compensation disputes involving GNAPs, leads to the inescapable conclusion that the FCC *Vonage* decision is not relevant or material on matters pertaining to the intercarrier compensation disputes before us. We believe that the NH PUC [New Hampshire Public Utilities Commission] 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.”)

³ See Comments of TDS at p. 21; See also National Broadband Plan which targets addressing the treatment of VoIP traffic for purposes of intercarrier compensation in Stage One. Recommendation 8.7.

“The Commission’s rulings to-date simply do not establish, as Global NAPS would suggest, that the Commission has already completely preempted any state action impacting VoIP services and Global NAPS cites no authority for this proposition. In point of fact, the Commission has not declared all VoIP traffic, or even all nomadic VoIP traffic, to be interstate in nature. Rather, the Commission has found that there was no way to distinguish between interstate and intrastate nomadic VoIP service, and has taken several actions to preempt state regulation where state regulation would impede the Commission’s own regulation of interstate VoIP.”

The FCC’s Orders⁴ (and the Eighth Circuit of Appeals *Vonage* Decision⁵ as well) acknowledge that where the endpoints of a call can be identified (and it is possible to distinguish between interstate and intrastate nomadic VoIP service), the impossibility exception does not apply and any preemption based thereon would also no longer apply.

Further, while the FCC preempted state jurisdiction over pure “nomadic” VoIP traffic in the *Vonage* order because it was not possible to distinguish between interstate and intrastate nomadic VoIP calls, the *Vonage* decision and subsequent FCC decisions never preempted state regulation of non-nomadic VoIP traffic, which constitutes the vast majority of VoIP traffic nationwide.⁶ This includes the VoIP offerings of cable companies and other providers who own their own networks and who offer VoIP over those networks. The telecommunications network is evolving into an IP based network nationwide that will inevitably displace the existing circuit-switched based network.

⁴ See, *Universal Service Contribution Methodology*, WC Docket No. 06-122, 21 FCC Rcd 7518 para. 56 (2006)(“...an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider.”).

⁵ *Minnesota Public Utilities Commission v. FCC*, 483 F3d. 570, 580 (March 21, 2007)(“Similarly, we emphasize the limited scope of our review of the FCC’s decision. Our review is limited to the issue whether the FCC’s determination was reasonable based on the record existing before it at the time. If, in the future, advances in technology undermine the central rationale of the FCC’s decision, its preemptive effect may be reexamined.”).

⁶ See Comments of CenturyLink, Frontier, and Windstream at p. iii. While it is true as Verizon notes, that the FCC indicated in the *Vonage Order* an intent to preempt state regulation of fixed VoIP as well if necessary, it has not done so and this would appear to be no longer appropriate given subsequent FCC and court decisions.

Third, the records before the State Commissions appear to be very fact intensive and do not lend themselves to the sort of broad declarations of preemption which Global NAPS seeks.⁷ Many of the parties filing comments in this proceeding agree that it is important that state utility commissions have the authority to rule on issues such as those raised before the State Commissions involving Global NAPS' associated with intrastate traffic. If the FCC takes any action in this proceeding, it should be to clarify that the State Commissions are not precluded from addressing issues such as those raised by Global NAPS based upon existing law.

Fourth, AT&T makes an important point. Global NAPS itself is not providing a retail VoIP service; it is providing a wholesale telecommunications service.⁸ AT&T correctly notes that nothing in the *Vonage* Order suggests that state regulation of such wholesale telecommunications services are preempted by federal law merely because the wholesale carrier's customer is providing retail VoIP service.

Indeed, the FCC recently addressed a state's ability to resolve wholesale service issues involving a VoIP provider in an arbitration proceeding under Section 252 of the Telecommunications Act of 1996 ("1996 Act"). The Public Utilities Commission of Texas ("PUC") had initially declined to resolve issues related to VoIP in an arbitration proceeding pending before the PUC finding that it was preempted and that the FCC had stated an intent to address those issues. The FCC found:

"The PUC has affirmatively indicated its desire to retain jurisdiction over the arbitration, and we believe that it is best-suited to resolve such matters. We emphasize that the PUC should not wait for Commission action to move forward. Rather, the PUC must proceed to arbitrate the interconnection agreement in a timely manner, relying on existing law."⁹

⁷ MPSC Opposition at p. 2; PaPUC Comments; and NHPSC Comments. See also Qwest's Comments at p. 5. ("It has been Qwest's experience that what Global NAPS and other similarly situated carriers have called VoIP traffic is, in fact, not true VoIP traffic. Rather, it often includes IP-in-the-middle traffic and traditional TDM traffic disguised as VoIP."). See also, Comments of the CPUC at p. 3-4.

⁸ See Comments of AT&T at p. 10.

⁹ *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 (Rel. October 9, 2009).

Finally, to the extent Global NAPS is seeking industry-wide declarations that go beyond existing law, the FCC has already committed to addressing those issues in the generic *IP Enabled Services Proceeding*. The FCC should, as discussed later in these Reply Comments, act quickly to clarify any ambiguities that exist in existing law concerning VoIP, most importantly the appropriate regulatory classification for VoIP.

In the end, this proceeding and similar proceedings, all underscore the critical need for the FCC to finally address the regulatory classification of VoIP service and related issues to eliminate the uncertainty and ambiguity that exists relative to this service. The FCC initially sought comment on the treatment of VoIP services in the *IP-Enabled Services Proceeding* in 2004. Since that time, the FCC has reaffirmed its intent to address the issue in that Docket. One party's observations are particularly noteworthy:

“Lack of clarity on the classification issue has persisted for many years and has resulted in costly disputes (in court and elsewhere) between providers and state and local regulators about which regulatory system applies to IP-based services. This significant open question has deterred competition and market entry, and discouraged investment in and deployment of broadband and IP networks and services.”¹⁰

The Arizona Commission urges the FCC to act quickly in its *IP-Enabled Services Proceeding* to classify VoIP as a telecommunications service.¹¹ Under the “integrated services approach”, there is no question that VoIP (particularly non-nomadic VoIP) is a telecommunications service. The industry and state regulators need certainty with respect to this important issue.

In addition, at least one commenter points out that the FCC also stated an intent to address intercarrier compensation for VoIP traffic in its *IP-Enabled Services*

¹⁰ Comments of Verizon at 5. (“In the absence of industry-wide Commission rulings...resolving the regulatory classification of these services, the industry and regulators will continue to face an uncertain landscape that will hinder the roll-out of next generation communications services that consumers expect and demand.”).

¹¹ Accord NYPSC at 1 (The NYPSC supports classification of VoIP as a telecommunications service”).

Proceeding.¹² The FCC has also targeted the VoIP intercarrier compensation issue as one of the first issues it will address on an interim basis in its Broadband Plan.¹³ The Arizona

Commission supports this goal and asks the FCC to take that opportunity to address the regulatory classification of VoIP as well.

RESPECTFULLY submitted this 12th day of April, 2010.

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¹² See Comments of TDS at p. 21 (“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*.”)

¹³ See National Broadband Plan, Connecting America, Chapter 8 – Availability, Intercarrier Compensation, Recommendation 8.7 (As part of Stage One, the Plan suggests that interim rules should be adopted for among other things, the treatment of VoIP traffic for purposes of Intercarrier Compensation).