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HELEIN & MARASHLIAN, LLC
THE COMMLAW GROUP

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February 10, 2011

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Federal Communications Commission
Office of the Secretary

Via Hand Delivery

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition for Declaratory Ruling Regarding Application of Sections 214 And 254 to International Providers of Peering and Distribution of Private Label Prepaid Calling Cards*

Dear Ms. Dortch:

Transmitted herewith, on behalf of Toronto Asia Tele Access Telecom, Inc., is its Petition for Declaratory Ruling that that its VoIP peering services and distribution of private label prepaid calling cards are lawful under the Communications Act. An original plus nine (9) copies are enclosed.

An additional copy of this filing is also enclosed. Please date-stamp the copy and return in the postage-prepaid envelope provided.

Should there be any questions regarding this matter, kindly contact the undersigned.

Respectfully submitted,

Charles H. Helein

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

In the Matter of	)
	)
Petition for Declaratory Ruling	)
Regarding Application of Sections 214	)
And 254 to International Providers of VoIP	)
Peering and Distribution of Private Label	)
Prepaid Calling Cards	)
	)

TORONTO ASIA TELE ACCESS TELECOM INC.'S PETITION FOR DECLARATORY RULING THAT ITS VOIP PEERING SERVICES AND DISTRIBUTION OF PRIVATE LABEL PREPAID CALLING CARDS ARE LAWFUL UNDER THE COMMUNICATIONS ACT

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February 10, 2011

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EXECUTIVE SUMMARY

By this Petition, Toronto Asia Tele Access Telecom, Inc. ("Petitioner"), seeks a declaratory ruling that Petitioner has been lawfully operating as an international service provider since 2006 and, as such, does not require authority to provide international services under Section 214 ("214 Certificate") of the Federal Communications Act ("FCA") and need not report or contribute to the Universal Service Fund ("USF") or related federal programs under Section 254.

Petitioner, a Canadian company, provides communications services in the U.S. under the name "TATA Telecom." Petitioner is involved in ongoing trademark litigation in which the opposing party has claimed that because Petitioner lacks a 214 Certificate, its operations that began in 2006 are unlawful and in consequence cannot claim priority of use in the name "TATA."[1] The central, if not dispositive issue, in the pending litigation is the lawfulness, under the Communications Act and Commission regulations and polices, of Petitioner's operations. Because the determination of "lawfulness" in this context is within the expertise of the Commission, in order to avoid a conflict in decisions, Petitioner has filed a Motion for Stay with the District Court on the grounds of primary jurisdiction. Likewise, Petitioner files this Petition in support of the Commission's primary jurisdiction and in the interest of harmonizing judicial and regulatory authority and obtaining the most efficient determination of the lawfulness issue raised. This Petition requests that the Commission, as the expert agency charged with

[1] This Petition seeks the exercise of the Commission's primary jurisdiction over the issues presented, issues that are currently before the United States District Court for the Western District of Washington in *Toronto Asia Tele Access Telecom Inc. and Manmohan Singh Thamber v. Tata Sons Limited*, No. CV 09-01356 RSM (W.D. Wash. filed Sep. 24, 2009). ("Washington Litigation").

administering and enforcing the provisions of the FCA, interpret its rules, policies and decisions and declare Petitioner's services lawful.

Petitioner has been lawfully operating as an international service provider since its entry into the U.S. market in 2006, first as a private label distributor and later as an unregulated provider of prepaid calling cards via VoIP peering (traffic exchange) arrangements. As a private label prepaid calling card distributor Petitioner exercised no control over the underlying services, did not provide any facilities and was not involved in the transmission of any end user's information of its choosing and therefore is not an entity requiring a 214 Certificate. Petitioner also operates lawfully via its VoIP peering services. Its intermediary role between the underlying carrier, retail outlets and customers requires no regulation. Being engaged in unregulated VoIP peering arrangements, Petitioner operates as an unregulated information services provider under current law. And because the only facilities operated by Petitioner include a platform located in Milan, Italy, it has no physical presence in the U.S. over which the Commission could exercise jurisdiction. Finally, the Commission must also give consideration to Congress' long-standing directive and forebear from enforcing provisions or regulations to the extent such forbearance will enhance competition and is in the public interest.[2]

This Petition is timely and appropriate as it will assist the Commission in the proper application of its rules, orders and policies, ensure the efficient administration of pending litigation and clarify the duties and responsibilities of international service providers, helping carriers avoid similar disputes in the future.

[2] 47 U.S.C. §10.

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Peering and Distribution of Private Label	)
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PETITON FOR DECLARATORY RULING

Pursuant to Sections 4(i) and (j) of the Federal Communications Act ("FCA"), 47 U.S.C. §§ 4(i) and 4 (j), as amended (1996), ("FCA"), Commission Rule 1.2, 47 C.F.R. §1.2 and the Administrative Procedure Act, 5 U.S.C. § 554(e), Toronto Asia Tele Access Telecom Inc. ("Petitioner"), hereby petitions the Commission for a declaratory ruling that:

(1) Petitioner has been lawfully operating as an international service provider since its entry into the U.S. market in 2006 as a private label prepaid calling card distributor;

(2) Petitioner has been lawfully providing its international services through its VoIP peering arrangements; and

(3) Petitioner is not engaged in provisioning a communications service that requires a certificate of public convenience and necessity granted by the Federal Communications Commission pursuant to Section 214 of the FCA;

(4) Petitioner is not required to report or contribute to the Universal Service Fund ("USF") under Section 254 of the FCA.

I. INTRODUCTION

This Petition for Declaratory Ruling ("Petition") is filed to terminate existing and on-going controversies at law, remove uncertainty as to the interpretation and scope of Sections 214 and 254 of the FCA directly relevant to the controversies at law, and to avoid creating inconsistent decisions between the courts and the Commission in the interpretation and application of the FCA in which the Commission is the expert agency, created by Congress, to properly enforce the FCA's provisions.

II. BACKGROUND FACTS

A. Petitioner's Business

Petitioner is a Canadian company founded in 2002. In early 2006, it operated as a private label distributor of prepaid calling cards. It contracted with retail outlets in the U.S. to distribute prepaid calling cards, the underlying service for which was provided by other carriers. In late 2006, Petitioner began providing VoIP peering services through international traffic exchange agreements with U.S. carriers. Through such arrangements, Petitioner diverts traffic through its Milan, Italy switch. Its U.S. carrier partners originate and terminate traffic in the U.S. Petitioner continues to provide international calling services through VoIP peering (traffic exchange) arrangements.

B. Trademark Litigation Pending in the District Court

Petitioner and its current Chief Executive Officer, Manmohan Singh Thamber ("Mr. Thamber") are currently embroiled in a trademark dispute with Tata Sons Limited ("TSL") pending before the District Court for the Western District of Washington at Seattle ("District Court"). *See Toronto Asia Tele Access Telecom Inc. and Manmohan Singh Thamber v. Tata Sons Limited*, No. CV 09-01356 RSM (W.D. Wash. Filed Sep. 24, 2009). ("Washington

Litigation"). In 2009, TSL filed a complaint against Petitioner with the World Intellectual Property Organization ("WIPO") with regard to Petitioner's use of the "TATA" name in its company's domain name.[3] The WIPO arbitration panel ultimately decided against Petitioner and ordered it to transfer the domain to TSL.[4] In accordance with its common law rights and those afforded under the Lanham Act, Petitioner initiated the Washington Litigation seeking to establish its rights in the *TATA-Telecom.com* domain.[5] In response, TSL lodged several counterclaims all hinging on Petitioner's use of the "TATA" name.[6]

At its core, the threshold issue underlying the Washington Litigation is which party has priority of use in the name, i.e., which party was first using the "TATA" name, in connection with communications in the U.S.[7] Petitioner first began selling its communications services in the U.S. in June 2006. TSL, on the other hand, did not begin selling communications in the U.S. until 2008.[8] Given these facts, the District Court could conclude that Petitioner has priority in

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[3] When Petitioner registered its *TATA-Telecom.com* domain name, it consented to have disputes relating to its domain name decided according to the URDP, and WIPO is an approved arbitration service provider under the UDRP.

[4] *Barcelona.com, Inc. v. Excelentisimo Avuntamiento De Barcelona*, 330 F.3d 617, 626 (4th Cir. 2003) (WIPO decisions receive no deference in later proceedings and a decision made by a panel under the UDRP to be nothing more "than an agreed-upon administration that is *not* given any deference.").

[5] *See* Washington Litigation Complaint attached at Exhibit A. Specifically, Petitioner seeks a ruling that its domain is not unlawful under the Lanham Act, and that Petitioner is not required to transfer the domain to TSL.

[6] Specifically, TSL's Counterclaims allege federal and common law trademark infringement, false designation and false description, federal cyberpiracy, violation of the Washington Consumer Protection Act and common law unfair competition. *See* TSL's Answer and Counterclaims attached at Exhibit B.

[7] "It is axiomatic in trademark law that the standard test of ownership is priority of use...the party claiming ownership must have been the first to actually use the mark in the sale of goods or services." *Sengoku Works v. RMC Int'l*, 96 F.3d 1217, 1219 (9th Cir. 1996).

[8] That TSL was awarded Section 214 authorization in 2004 to operate in the U.S. as an international telecommunications carrier does not equate to use in the United States. Indeed, many companies apply for and secure Section 214 authority prior to providing service. The

the name. TSL, however, argues that Petitioner's priority is irrelevant because its sale of communications in the U.S. has been unlawful. Specifically, TSL contends that Petitioner's operations are not lawful because it does not have a certificate of public convenience and necessity ("Certificate") granted by the Federal Communications Commission ("FCC" or "Commission"), pursuant to Section 214 of the FCA, 47 U.S.C. § 214 ("Section 214").

The "unlawful defense" relied on by TSL was recently established by the Ninth Circuit.[9] TSL argues that pursuant to the "lawfulness" principle, until Petitioner lawfully provides telecommunications services (beginning with its obtaining a Certificate)[10], Petitioner's use of the "TATA" name cannot support any claim to trademark rights.[11] When addressing unlawful use, the District Court must ask whether: (1) the issue of compliance has previously resulted in a finding of non-compliance by a court *or government agency* having competent jurisdiction pursuant to the applicable statute, or (2) there has been a *per se* violation of a statute regulating

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evidence shows that TSL, through its subsidiary, Tata Communications, did not begin providing service in the U.S. until 2008. This is further supported by the fact that Tata Communications filed its intent-to-use application with the USPTO on February 6, 2008. Therefore, the fact that TSL obtained Section 214 authority in 2004 is immaterial to the fact that it did not begin providing communications until at least 2008.

[9] *CreAgri Inc. v. USANA Health Sciences Inc.*, 474 F.3d 626 (9th Cir. 2007)("*CreAgri*"). In *CreAgri*, the Ninth Circuit addressed the lawfulness issue as one of first impression and ultimately expanded the USPTO's Trademark Trial and Appeal Board policy that use in commerce only creates trademark rights when the use is lawful. In short, the Ninth Circuit determined that CreAgri violated federal labeling requirements for dietary supplements. CreAgri's OLIVENOL mark had been used in commerce a year before the priority date to which USANA's registered OLIVENOL mark was entitled -- but since CreAgri's supplements were mislabeled, its use was unlawful and didn't count. *Id.* at 628.

[10] Section 214 of the Communications Act of 1934 required carriers to seek authority from the FCC prior to construction, acquisition, or operation of lines of communication (entry certification) and for the discontinuance of service to a community (exit certification). 47 U.S.C. § 214.

[11] TSL has indirectly, through discovery requests, suggested that Petitioner has failed to comply with FCC reporting and universal service contribution obligations under Section 254 of the FCA. Petitioner's compliance with Section 254 of the FCA is addressed below and further warrants a finding of lawfulness.

the sale of a party's goods or services.[12] Petitioner, despite lacking a Certificate, has not been determined by any court or the FCC to be non-compliant with Section 214. Nor is there any finding or any applicable authority that Petitioner's lack of a Certificate amounts to a *per se* violation of the Act. Indeed, Petitioner has maintained throughout the Washington Litigation that a correct understanding of Section 214 and FCC policies and decisions requires the conclusion that Petitioner is not provisioning a communications service that requires a Certificate nor is it required to report or contribute to the USF under Section 254.

Notwithstanding Petitioner's position that it required no Section 214 Certificate for its operations commenced in 2006, business plans to expand its services made it prudent to file an application with the FCC for a Section 214 Certificate.[13] In response, TSL filed a Petition to Deny Petitioner's application.[14] In its Petition to Deny, TSL directly presents the issue of the lawfulness of Petitioner's operations since 2006 without a Section 214 Certificate.[15] Recently, the FCC responded to TSL's Petition to Deny by serving Petitioner with an information request that expressly asks about the lawfulness of Petitioner's operations.[16] Consequently, the issue of Petitioner's lawfulness and need for a Section 214 Certificate is already before the FCC in response to TSL's own initiative.

Prompted by the FCC's action in response to TSL's Petition to Deny, in recognition that

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[12] *Dessert Beauty, Inc. v. Fox, et al.*, 617 F.Supp.2d 185, 190 (S.D.N.Y. 2007) (citing *Erva Pharm., Inc. v. American Cyanamid Co.*, 755 F.Supp. 36, 40 (D.P.R. 1991)).

[13] On September 18, 2010, Petitioner filed a Section 214 application with the FCC ("Application"), a copy of which is attached hereto as Exhibit C.

[14] On September 25, 2010, Tata Sons filed a Petition to deny TATA Telecom's Application. *See* Petition to Deny attached hereto as Exhibit D.

[15] Petition to Deny at 5-11.

[16] On January 28, 2011, the International Bureau sent a letter to Petitioner inquiring about the lawfulness of its operations, to which Petitioner will respond, a copy of which is attached hereto as Exhibit E.

the FCC is the proper authority to determine the issue of Petitioner's lawfulness and that Petitioner's response to the FCC's information request will require more thorough treatment, Petitioner now takes the prudent and necessary action to have the lawfulness issue decided by the FCC through this Petition for Declaratory Ruling.

C. FCC Must Decide Lawfulness as the Expert Agency with Jurisdiction

The Commission must decide the issue of lawfulness as the expert body with jurisdiction to do so. The issue of lawfulness raises "issues of fact not within the conventional experience of judges" but rather matters within the particular expertise of an expert agency created by Congress to address such issues, in this case, the FCC.[17] Petitioner's lawfulness involves complex questions of fact, regulatory policy involving definitional conundrums inherently "difficult and unique," each of which requires consideration by the FCC, as the expert agency.[18] There is the added consideration that without FCC review, a decision by the District Court, lacking the special expertise required, will create inconsistent and conflicting rulings. Therefore, Petitioner has contemporaneously filed with the District Court a Motion to Stay the Washington Litigation pending a decision by the FCC applying its expertise to the facts, policies and definitional conundrums to properly determine the lawfulness issue. As the expert agency with jurisdiction over issues related to the interpretation of the FCA and Commission rules, the FCC must take action on the Petition and declare Petitioner's operations lawful.

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[17] *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952).
[18] *Ellis v. Tribune Television Co.*, 443 F.3d 71, 83 (2d Cir. 2006).

III. THIS PETITION FOR DECLARATORY RULING IS PROPER AND A COMMISSION RULING WILL HELP RESOLVE A RIPE CONTROVERSY

A Commission ruling on this Petition is essential to the resolution of the application of Sections 214[19] and 254[20] to the practices of international service providers such as Petitioner, as described herein, which rulings may then be applied to Petitioner's services. Under sections 4(i) and 4(j) of the FCA, sections 1.1 and 1.2 of the Commission's Rules, and 5 U.S.C. Section 554(e), the Commission has wide authority to issue declaratory rulings to serve the public interest by resolving a controversy and eliminating uncertainty.[21] The Commission's discretion to issue declaratory rulings can particularly serve these purposes when parties are in the midst of an ongoing dispute in another forum that can be moved ahead by a clarification of Commission rules, regulations or orders that have become the subject of a controversy.

For example, in the *Hold Order*, Home Owners Long Distance ("HOLD") was involved in an ongoing court proceeding with WorldCom, Inc. ("WorldCom") concerning, among other things, liability limitations contained in WorldCom's tariff. HOLD filed a Petition for Declaratory Ruling with the Commission and at about the same time filed a motion to stay or abate the ongoing court proceeding until the Commission had an opportunity to resolve the questions concerning the lawfulness of tariff provisions raised by the petition. The court granted the stay and referred the issue of the lawfulness of liability limitations in WorldCom's tariff to

[19] Section 214 of the FCA requires carriers to seek authority from the FCC prior to construction, acquisition, or operation of lines of communication (entry certification) and for the discontinuance of service to a community (exit certification). 47 U.S.C. § 214.

[20] Section 254 of the FCA mandates equitable USF contributions from "telecommunications carriers" that provide "interstate telecommunications services." 47 U.S.C. §254(d).

[21] *See In the Matter of Petition of Home Owners Long Distance, Inc. for a Declaratory Ruling that WorldCom Cannot Limit Its Liability for Gross Negligence or Other Willful Misconduct Through its Interstate Tariffs*, Order, 14 FCC Rcd 17,139 (1999) ("*HOLD Order*") at ¶ 12 ("The Commission has broad discretion under the Administrative Procedure Act and Commission rules to determine whether deciding a petition for declaratory ruling on the merits is necessary to 'terminate a controversy or remove uncertainty.'").

the Commission under the doctrine of primary jurisdiction.[22] The Commission issued a Public Notice seeking comment on HOLD's petition, and specifically, among other issues, whether the tariff provision in question "constituted an unjust and unreasonable practice under section 201(b) of the Act."[23]

In deciding whether to exercise its discretion to rule on HOLD's petition, the Commission set forth two relevant questions: "whether reaching the merits of HOLD's petition is necessary to assist the Court in resolving the referred issue; and if not, whether reaching the merits of HOLD's petition nevertheless is appropriate to terminate a controversy or remove uncertainty."[24] A Commission decision on the questions presented by Petitioner herein satisfies both inquiries. First, it will assist in resolving the controversy between the parties as to whether Petitioner has been and is lawfully operating in the U.S. A ruling in Petitioner's favor will direct the proper application of Commission precedent and Communications laws to the facts developed and will further assist in the District Court's consideration of Petitioner's priority of use of the name at issue in the Washington Litigation. Once the FCC issues a declaration on the lawfulness of Petitioner's operations, the Washington Litigation will place the case in a posture for the most prompt and efficient disposition either by summary judgment or by substantial narrowing of issues to be tried. Second, as a more general matter, a Commission ruling on this Petition will clarify the duties and responsibilities of international service providers and will help

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[22] *Id.* at ¶ 6.

[23] *Id.* at ¶ 7. In the *HOLD* case, before the Commission ruled on the petition, WorldCom filed a "proposed settlement for dismissal" of HOLD's petition for declaratory ruling stating that WorldCom would not rely on the liability limitations in its tariff as a defense in that or future proceedings, *id.* at ¶ 10, and WorldCom amended the tariff provision in question. Because WorldCom's proposed settlement "provide[d] HOLD with virtually all of the relief it sought in its petition" (*id.* at ¶ 18) and to the extent that the issue referred by the court was no longer "live," (*id.* at ¶ 13), the Commission did not reach the merits of HOLD's petition.

[24] *Id.* at ¶ 12.

carriers avoid similar disputes in the future. This Petition is timely and procedurally appropriate given the circumstances described above. Wherefore, the Commission should exercise its discretion and, as requested, issue a ruling on this Petition.

IV. PETITIONER IS AND HAS BEEN LAWFULLY OPERATING IN THE U.S.

The Commission must find that Petitioner has been lawfully operating as an international service provider since its entry into the U.S. market in 2006, first as a private label distributor and then as an unregulated provider of prepaid calling cards via VoIP peering (traffic exchange) arrangements. Petitioner does not currently hold international Section 214 authority and has not registered with the FCC via Form 499A. However, because Petitioner does not operate as a regulated common carrier, it does not fall under the Commission's jurisdiction or require authority to operate. Petitioner's intermediary role between the underlying carrier, retail outlets and customers excludes it from the category of regulated carrier. Based upon the Commission's current rules, Petitioner does not provide "telecommunications," because it engages in unregulated VoIP peering arrangements. Instead, it operates as an unregulated information services provider under current law. Further, because it has no presence in the U.S. or direct nexus with end users, the Commission has no jurisdiction over Petitioner's services.

A. Description of Petitioner's Business Model

1. Phase I

Petitioner provides international long distance calling to customers in the U.S. and abroad. Upon its founding in Toronto in 2002, Petitioner distributed prepaid calling cards provided by Global Line Ltd. UK ("Global Line"). Global Line provided Petitioner with prepaid calling cards branded with its own name and logo, and provisioned the service to customers. Global Line also cared for customer service on the cards and set international calling rates.

Petitioner later began to provide prepaid calling cards branded with its own name and logo (TATA Telecom). Global Line continued to provide the underlying service and remained responsible for customer service and setting rates.

Thereafter, Petitioner terminated its relationship with Global Line and established a distributor relationship with World Telecom Network ("WTN"). WTN took over Global Line's role, providing Petitioner with calling cards that it branded with its own name and logo. WTN cared for setting final rates and addressing customer complaints and service issues. WTN's network functioned like Global Line's. In 2006, Petitioner entered the U.S. market. In early 2006, Petitioner continued to provide privately labeled calling cards, the service for which was provisioned by WTN.

2. Phase II

Since late 2006, Petitioner has engaged in the exchange of traffic for delivery of end-user communications in the U.S. Petitioner currently maintains an international data center in Milan, Italy. It directs all customer traffic through its switch in Milan. It has no physical network presence in the U.S. U.S. originating and terminating traffic is delivered to Milan by Petitioner's third party carrier partners in the U.S. Petitioner maintains traffic exchange agreements with U.S. carrier partners for the delivery of traffic provided to customers of its prepaid calling cards. It signed contracts with several distributors in the U.S. for the distribution of its prepaid cards. Petitioner continues to provide cards pursuant to these contracts. Petitioner exchanges traffic via VoIP peering arrangements. VoIP peering allows VoIP providers to meet at the provider's peering point and exchange VoIP and data traffic.

3. Phase III

In 2009, Petitioner launched new services available in the U.S. and internationally. These services include IP-enabled international calling, SMS calling and web dialing, and are available on its www.tatavoip.com and www.tataring.com websites. Presently, Petitioner provides prepaid calling cards to its U.S. distributors and provides IP-enabled calling, SMS and web dialing through its websites to U.S. customers. Customer calls and messages travel via its switch in Milan. And, as with its prepaid calling card services, Petitioner provides its IP-enabled calling, SMS and web-dialing services via traffic exchange agreements with U.S. carriers.

B. The Lawfulness of Petitioner's Operations

1. Phase I: Petitioner Operated as Private Label Distributor, Not a Regulated Common Carrier

In early 2006, Petitioner operated as a private label distributor of Global Line calling cards. Thereafter, Petitioner continued to sell prepaid cards under its private label provided by WTN. Private label distribution involves a common carrier that provides the underlying service for a group of prepaid calling cards. It authorizes distributors to brand the cards with their own names. The carrier, however, retains customer service responsibilities as well as ultimate accountability on the quality of the service and compliance with regulations. While the service is not "new," the Commission has long neglected to clearly outline the proper regulatory treatment for such services. While the Commission has not provided clarity on the regulatory treatment of such services, it is clear that they do not qualify as regulated common carrier services.

a. Petitioner Did Not Qualify as a Common Carrier Because it Did Not Provide Telecommunications Services

Private label distributors, like Petitioner, retain responsibility solely for the packaging and distribution of prepaid calling cards. Private label distributors have no control over the

underlying services provided. Rather, they rely upon underlying carriers to provide transmission, set prices and address customer service and quality issues. But, because they add their own brand identities to the cards, they do not operate as mere sales agents of the underlying providers. Rather, they operate as independent distributors. But, as distributors, with no control over the underlying services provided, they do not provide "telecommunications services," but merely distribute cards that entitle end users to transmit traffic via the underlying service providers' networks.

b. Petitioner Did Not Qualify as a Common Carrier Because it Did Not Provide Transmission

A "common carrier" is defined as "any person engaged as a common carrier for hire." 47 U.S.C. § 153(10). Due to the obvious circularity of this definition, the Commission fashioned its own definition of the term in 1958. It held that the legislative history of the FCA made it clear that the regulatory provisions of Title II "should not apply to persons who are not common carriers in the *ordinary* sense of the term." *Frontier Broad. Co. v. Collier*, 24 F.C.C. 251, 254 (1958). The Commission set forth its sense of the term:

> Fundamental to the concept of a communications common carrier is that such a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who chose to employ such facilities and to compensate the carrier there-for may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and other carriers connecting with it. In other words, the carrier provides the means or ways of communication for the transmission of such intelligence as the subscriber may choose to have transmitted. *Frontier*, 24 F.C.C. at 254 (footnote omitted), *see Industrial Radiolocation Serv.*, 5 F.C.C. 2d 197, 202 (1958).

The Commission's definition of a communications common carrier was adopted by the D.C. Circuit in 1976.[25] The same year, the D.C. Circuit ratified the second prerequisite to common carrier status, one that "... is the requirement formulated by the FCC and with peculiar applicability to the communications field, that the system be such that customers 'transmit intelligence of their own design and choosing.'"[26] These two defining factors of communications common carriage were later upheld and applied by the Supreme Court.[27]

The second – "transmission" -- requirement for common carriage leads to the following analysis of the definitions in the FCA, 47 U.S.C. § 153. In particular, under Section 153,

> (43) "Telecommunications" means the transmission, between or among points specified by the user...
>
> (44) "Telecommunications carrier" means any provider of telecommunications services ... A telecommunications carrier will be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services ...
>
> (46) "Telecommunications service" means the offering of telecommunications [transmission] for a fee directly to the public, or such classes of users as to be effectively available directly to the public, regardless of the facilities used.[28]

Petitioner, when operating as a private label distributor, did not offer transmission, and could not, because it had no network to do so. It could not transmit communications of the user's choosing. Instead, it merely distributed cards that allowed end users to connect to the underlying carrier's network, over which Petitioner had no control. Under Section 153, because

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[25] *See National Ass'n of Regulatory Util Comm'rs v. FCC*, 525 F.2d 630, 641 & n.58 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*"NARUC I"*). In *NARUC I* the court succinctly stated that, "What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently.'" *NARUC I*, 525 F.2d at 641.

[26] *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976)(*NARUC II*) (emphasis added).

[27] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 & n. 10 (1979).

[28] 47 U.S.C. § 153 (emphasis added).

Petitioner employed no facilities capable of providing transmissions, it did not offer telecommunications. Because it did not offer "telecommunications," it could not offer "telecommunications services" to the public, and therefore did not qualify as a common carrier.

c. The FCC's Longstanding Public Policy Mandates that Private Label Distributors not be Regulated as Common Carriers

Private label distribution continues as an accepted, and in fact, common form of selling services in the U.S. In fact, private label distribution arose directly from the FCC's own policies promoting competition, as an effective means to deliver services to customers at competitive rates. And, while private label distribution promotes the Commission's pro-competitive agenda, regulation of such services would prove unwieldy. Although competition involves creativity, ingenuity and organic growth, regulations require definition, bright-line rules and categorization. When the Commission began its pro-competitive agenda in 1996, it established categories applicable to the then-existing communications market. These categories remain the same, while the market and industry players continue to evolve.

Today, the industry promotes a wide variety of unique methods of delivering service, particularly apparent in the international prepaid business. These new business models do not fit cleanly within the categories of regulated services adopted before the appearance of these businesses. Further, regulating such services would, as discussed more fully below, subject services long free from inhibiting regulations to substantial cost burdens. Such costs would be transferred to consumers who would experience substantial increases in the price of their long-distance services. Furthermore, such a course would substantially harm competition in the international marketplace, contrary to the Commission's longstanding goals.

2. Phases 2 - 3: Petitioner Continues To Operate Lawfully Via VoIP Peering Arrangements

Petitioner maintains a data center in Milan to exchange traffic to provide service to its calling card customers. In addition, Petitioner provides its VoIP calling, SMS and web dialing services through VoIP peering arrangements.[29] Petitioner continues to exchange traffic with third party carriers, who deliver traffic to its customers in the U.S. In short, Petitioner engages in peering of IP-based traffic with U.S. carriers. The Commission has yet to classify the regulatory status of such providers. The only existing precedent applicable to carriers providing intermediate IP transmission is the Commission's IP-in-the-Middle Order.[30] That order, however, only classified services with the particular characteristics of AT&T's service at issue. It did not cast a wide net in seeking to apply traditional telecommunications regulations to all providers of services using IP "in the middle" transmission.[31]

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[29] This Petition focuses on Petitioner's prepaid calling card services. However, its web-dialing, SMS and VoIP calling services likewise are lawful based upon the same analysis- use of VoIP peering arrangements to deliver services. Furthermore SMS and web-dialing independently escape the Commission's jurisdiction as unregulated information services. *See, e.g.*, *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307 (Feb 19, 2004) (*pulver.com FWD Order*").

[30] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*. Order, 19 FCC Rcd. 7457, WC Docket No. 02-361 (2004) (*"IP in the Middle Order"*).

[31] *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-38, Declaratory Ruling and Report and Order, 21 FCC Rcd. 7290, ¶ 18 (2006)("*Calling Card Order*") ("In the *IP-in-the-Middle Order*, the Commission addressed AT&T's use of IP technology to transport interexchange telephone calls dialed on a 1+ basis.48 The Commission found that "an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology" is a telecommunications service. The Commission limited its ruling in the *IP-in-the-Middle Order* to calls that meet all of the above criteria and are placed using 1+ dialing.").

In the 2004 order, the FCC clarified that calls originating and terminating to the PSTN that travel via an Internet medium may still qualify as telecommunications services.[32] The FCC's clarifying "IP in the Middle" Order responded to AT&T's petition for a declaratory ruling that interstate access charges, applicable only to telecommunications and not information services, did not apply to its phone-to-phone IP telephony.[33] The Commission determined that AT&T's service properly qualified as a telecommunications service.[34] The FCC limited its decision to the specific service offered by AT&T.[35] AT&T's service allowed customers to place calls by dialing "1" plus the called party's number, as with traditional circuit-switched calls.[36] The calls were routed over AT&T's Feature Group D trunks, handing the call off to the calling party's LEC.[37] The LEC then connected the call to AT&T's network after which AT&T routed the call through a gateway where it was converted to IP format, and transported over AT&T's Internet backbone.[38] Thereafter, AT&T would convert the call back into a telecommunications format and terminate the call to the terminating LEC's switch.[39] The Commission determined that AT&T's service qualified as a telecommunications service because users obtained only

[32] *See IP in the Middle Order.*
[33] *IP in the Middle Order* at ¶¶ 1, 9.
[34] *Id.* at ¶ 12.
[35] *Id.* at ¶ 10.
[36] *Id.* at ¶ 11.
[37] *Id.* at ¶ 11, n. 46 ("Feature Group D trunks allow end users to use 1+ dialing for long-distance calls, with the call being handled by the caller's preselected interexchange carrier. Without use of Feature Group D, the user must first dial a 7- or 10-digit number, a calling card number and PIN number, and then the desired telephone number. Harry Newton, *Newton's Telecom Dictionary* 318 (19th ed. 2003).")
[38] *IP in the Middle Order* at ¶ 11.
[39] *Id.* at ¶ 11.

voice transmission with no net protocol conversion.[40] The lack of conversion rendered the service a basic telecommunications service rather than an enhanced information service.[41]

In short, the FCC determined that AT&T's phone-to-phone "IP-in-the-middle" service constituted telecommunications.[42] The Commission limited this decision to any similar service with the following features: (1) use of ordinary CPE with no enhanced functionality; (2) origination and termination on the PSTN; (3) absence of net protocol conversion; and (4) lack of enhanced functionality to end users due to the provider's use of IP technology.[43] Petitioner's services do not meet these four prongs. Unlike the services analyzed in the AT&T IP-in-the-middle Order, end-users accessing Petitioner's VoIP peering do not necessarily use ordinary CPE and originate the calls on and terminate calls to the PSTN.

Instead, Petitioner's VoIP peering arrangements should more appropriately be classified as unregulated information services. In addition to the rationale outlined below, once again, regulation of these services would directly conflict the FCC's public policy goals by diminishing competition in the industry and raising rates applicable to international services. As more providers shift to IP-enabled services, and customers rely on such providers to offer low-cost quality international services, regulating all entities in the distribution chain will stall innovation and development and burden consumers with unnecessary expenses.

a. Petitioner Does Not Offer Regulated "Telecommunications"

First, Petitioner's services are distinct from the types of prepaid calling card arrangements previously defined by the Commission as regulated "telecommunications." The

[40] *Id.* at ¶ 12.
[41] *Id.*
[42] *Id.*
[43] *Id.* at ¶ 1.

FCC has specifically declined to address the classification of VoIP peering services when offered via prepaid calling cards. The most recent order addressing the status of prepaid calling cards dates to 2006. However, that order only addressed services with a particular set of defines characteristics.

In reviewing an AT&T prepaid calling card service that allowed users to access a menu of options, the Commission outlined the relevant inquiry as whether an entity provides a "single information service with communications and computing components" or "two distinct services, one of which is a telecommunications service."[44] The FCC found no functional integration between the information service features and telephone calling capability. The menu merely allowed customers to access separate capabilities that happened to be packaged with telecommunications transmission capacity in a single prepaid calling card.[45] Because the customer could only use either an enhanced menu-driven feature or calling capacity at one time, the FCC found the two capabilities completely independent of one another.[46] The Commission concluded that even if the additional menu-driven capabilities were classified as an information service, the packaging of the multiple services together did not by itself transform the telecommunications component of the cards into an information service. [47]

Second, the Commission analyzed prepaid calling cards using IP transport to deliver all or a portion of a call. The FCC concluded that:

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[44] *Calling Card Order* at ¶ 14 (2006)(citing *Universal Service Report to Congress*, 13 FCC Rcd. 11501). For example, the FCC has noted that a packaged offering of local telephone service and voicemail should clearly be treated as separate services for regulatory purposes. *Universal Service Report to Congress*. 13 FCC Rcd. at 11530, ¶ 60 ("It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail.").
[45] *Calling Card Order* at ¶ 14.
[46] *Id.*
[47] *Id.*