

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	

**COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION
(SECTION XV)**

The Pennsylvania Public Utility Commission (Pa. PUC) hereby submits these Comments to Section XV of the *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* (NPRM) that was released by the Federal Communications Commission (FCC or Commission) on February 9, 2011. These Comments are submitted in accordance with Public Notice DA 11-141 that was released on March 2, 2011. The FCC has established the deadlines of April 1, 2011 and April 18, 2011 for the respective submission of Comments and Reply Comments on Section XV of the NPRM.

The Pa. PUC appreciates the opportunity to submit these Comments. As a preliminary matter, these Comments should not be construed as binding on the Pa. PUC in any proceeding pending before the Pa. PUC. Moreover, these Comments could change in response to

subsequent events. This includes a later review of other filed comments and legal and/or regulatory developments at the federal or state level.

I. INTRODUCTION

The Pa. PUC welcomes the FCC's initiative in putting forward numerous reform proposals that address various and interlinked issues in the areas of the federal universal service fund (USF) and intercarrier compensation in its overall NPRM. The FCC's reform proposals that are intended to reduce inefficiencies and waste by curbing arbitrage opportunities in the existing intercarrier compensation system and contained in Section XV of the NPRM are particularly noteworthy.¹ However, the Pa. PUC continues to point out the fundamental principle that the area of intercarrier compensation is both legally and technically subject to the overall concept of federalism and the dual federal and state jurisdiction. Consequently, various legal and technical proposals that directly ignore or indirectly attempt to circumvent this principle are unlawful, technically inapplicable, and will not lead to the desirable intercarrier compensation reforms both at the federal and state levels.

II. INTERCARRIER COMPENSATION AND VOIP TRAFFIC

A. Classification of VoIP and Scope of VoIP Traffic

The FCC's classification of interconnected voice over the Internet Protocol (VoIP) as a Title II telecommunications service could have resolved many perceived issues in the area of intercarrier compensation a long time ago² where such issues involve the exchange, transport, and termination of interconnected VoIP and, potentially, other types of Internet Protocol (IP) based traffic as well. The FCC has consistently refrained from such a classification. For example, the FCC has avoided this issue in its December 23, 2010 *Net Neutrality* Order through the use of the term "specialized traffic" for VoIP calls,³ and its solicitation of comments in the instant proceeding is largely premised on the lack of such a classification.⁴ As the NPRM points

¹ NPRM, Section II, Executive Summary, Figure 3, at 16, and Section XV, at 191.

² NPRM, n. 924, at 194, referencing *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039 (2009).

³ *In re Preserving the Open Internet Broadband Industry Practices*, (FCC Rel. December 23, 2010), GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, FCC 10-201.

⁴ NPRM, ¶ 618, at 196-197.

out, a number of states have reached their own determinations on VoIP classification.⁵ Other states have reached their own individual statutory determinations on whether *retail* interconnected VoIP services should be subject to regulation.⁶ However, as the Pa. PUC explains below, the classification of interconnected VoIP is not absolutely crucial in dealing with relevant intercarrier compensation matters where VoIP and other IP-based traffic are involved.

In view of the FCC’s laudable goal to avoid arbitrage inefficiencies in the area of intercarrier compensation, it is intuitive that “fixed facilities” and “nomadic” interconnected VoIP traffic should not be distinguished for intercarrier compensation purposes. Such a potential distinction would be artificial and ill-advised, and holds the potential of achieving results that would be contrary to the goal of avoiding arbitrage inefficiencies. At the end of the day, “traffic is traffic” no matter in *what protocol* it is initiated, transmitted, and eventually terminated with or without necessary protocol conversions. Furthermore, telecommunications carriers are constantly called upon and are legally obliged to transport, switch and terminate traffic of *various* protocols – including time division multiplexing (TDM), VoIP, and other protocols – through the use of the *same* physical facilities while accruing relevant economic costs for the use of such facilities. Thus, the distinction between “fixed” and “nomadic” VoIP traffic should be immaterial for intercarrier compensation purposes.

B. Existing Intercarrier Compensation Rates Should Apply to Interconnected VoIP Traffic

1. The FCC Cannot Directly or Indirectly Preempt the States

The dual federal and state jurisdiction in matters pertaining to intercarrier compensation is a fundamental premise that should remain unaltered when dealing with interconnected VoIP or other types of IP-based traffic.⁷ The FCC has already recognized the jurisdictional division of VoIP traffic and associated revenues for the purpose of federal and state universal service fund (USF) contribution assessments.⁸ The same logic of bi-jurisdictional regulatory responsibility

⁵ NPRM, n. 935, at 197.

⁶ See generally Pennsylvania “Voice-Over-Internet Protocol Freedom Act,” 73 P.S. § 2251.1 *et seq.*

⁷ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986) (state commission has jurisdiction over intrastate rates and intrastate depreciation rates).

⁸ NPRM n 937, at 197 referencing *Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, (FCC Rel.

should be applied to intercarrier compensation matters that involve intrastate and interstate VoIP traffic. Therefore, the FCC should “determine that interconnected VoIP traffic is subject to the same intercarrier compensation charges – intrastate access, interstate access, and reciprocal compensation – as other voice telephone service traffic both today, and during any intercarrier compensation reform transition.”⁹

Other proposed alternatives such as bill-and-keep for interconnected VoIP traffic or VoIP-specific intercarrier compensation rates can and do lead to the direct or indirect preemption of state jurisdiction over intrastate carrier access charges and reciprocal compensation rates and their appropriate application to intrastate interconnected VoIP traffic. Such a result would be unlawful and unwarranted. It is intuitive that irrespective of the VoIP classification issue, the states cannot have “split jurisdiction” when it comes to their respective abilities to assess interconnected VoIP providers state-specific USF contribution assessments (as the FCC has explicitly acknowledged) while being effectively prohibited from addressing intrastate intercarrier compensation matters that involve the wholesale transmission, switching and termination of interconnected VoIP traffic that accesses the physical facilities of telecommunications carriers at a non-zero economic cost.

Section 252(d) of the federal Telecommunications Act of 1996 (TA-96), 47 U.S.C. § 252(d), directs the FCC to preempt, to the extent necessary, the enforcement of any State or local statute, regulation, or legal requirement that is proscribed by Section 253(a), 47 U.S.C. § 253(a), and is outside the authority reserved for State and local governments under Section 253(b), 47 U.S.C. § 253(b). Section 253(a) provides:

[n]o State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Section 253(b) provides that nothing in Section 253:

November 5, 2010), WC Docket No. 06-122, Declaratory Ruling, FCC 10-185. *See also In re Universal Service Contribution Methodology, et al.*, (FCC June 27, 2006), WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, ¶¶ 53-58, at 27-30; *Vonage Holdings Corp. v. FCC*, Nos. 06-1276, 06-1317, (D.C. Cir. June 1, 2007) (upholding FCC’s authority to assess “interconnected” VoIP providers for federal USF purposes without classifying “interconnected” VoIP service as a “telecommunications service”).

⁹ NPRM ¶ 618, at 196.

Shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications, and safeguard the rights of consumers.

The FCC’s approach in making preemption determinations is very careful and mindful of the precarious balance between state and federal regulation. The FCC has long had a two-part test for determining whether to preempt a state.

The FCC first determines whether the legal requirements are proscribed by the terms of Section 253(a). If the FCC finds that the provisions are proscribed by Section 253(a), considered in isolation, the FCC next determines whether they fall within the exception to Section 253(a) set forth in Section 253(b). The FCC only preempts if the requirements are impermissible under Section 253(a) and do not satisfy the requirements of Section 253(b). Importantly, the FCC does not preempt if the requirement proscribes Section 253(a) but meets Section 253(b) considered in isolation.¹⁰ In addition, the FCC does not preempt if the requirement is competitively neutral and is necessary to advance certain specified public interest objectives.¹¹

The FCC previously rejected attempts to preempt Pennsylvania law based on claims that Pennsylvania law on the legal treatment of wholesale access service was inconsistent with federal law.¹² The FCC rejected that claim and found that Pennsylvania law was entirely consistent with federal law in holding that wholesale and retail service constituted “telecommunications” service, particularly in the *DQE* and *Fiber Optics* decisions.

In *DQE* and *Fiber Optics*, the FCC examined Pennsylvania law and concluded that Pennsylvania, like federal law, recognized that wholesale common carrier service constituted “telecommunications” under state and federal law. Incumbent carriers cannot refuse access to Section 251 pole attachment rights simply because the transmission path services provided by a common carrier wholesale provider may accommodate “information” services. The FCC made

¹⁰ *In re: Silver Star Telephone Company*, Docket No. CCB Pol 97-1 (FCC September 24, 1997), paragraph 38.

¹¹ *In re: American Communications Services, Inc.*, Docket No. 97-100 (FCC December 23, 1999), ¶ 9.

¹² *In the Matter of DQE Communications, Inc. v. North Pittsburgh Telephone Company*, File No. EB-05-MD-027 (FCC February 2, 2007) (*DQE*); *In re: Fiber Technologies Networks, Inc. v. North Pittsburgh Telephone Company*, File No. EB-05-MD-014 (FCC February 23, 2007) (*Fiber Optics*) (Pennsylvania law and federal law are consistent on wholesale and retail service under state and federal law).

that determination by reliance on the *Time Warner* approach.¹³ That same approach is appropriate here.

The FCC reasoned that wholesale service provided by a common carrier provider is “telecommunications” even if the services provided over that wholesale intercarrier connection may not be telecommunications. The FCC holdings in *Time Warner* and *DQE* or *Fiber Optics* do not stand for the proposition that a state-certificated common carrier provider of wholesale service is not responsible for remitting compensation to other carriers for access services rendered. This is particularly true when interconnected VoIP providers utilize the physical access facilities and services for the transmission, switching and termination of interstate and intrastate VoIP traffic at a non-zero economic cost. This alone invalidates the NPRM proposal that bill and keep arrangements somehow can be used in lieu of established interstate and intrastate intercarrier compensation mechanisms that can and do apply for jurisdictional VoIP traffic. Consequently, state jurisdiction over intrastate intercarrier compensation matters where VoIP traffic is implicated must be maintained.

2. The States Have Successfully Been Resolving Intrastate Intercarrier Compensation Disputes Involving VoIP Traffic Through the Use of Existing Mechanisms and Common Carrier Principles

The states have successfully been resolving intrastate intercarrier compensation disputes involving interconnected VoIP traffic through the use of existing mechanisms and common carrier principles. The resolution of such disputes is being carried out consistent with applicable federal guidelines (inclusive of FCC decisions) and individual state law. The resolution of these disputes has proceeded *independently* and does not *rely* on the non-existing FCC classification of interconnected VoIP traffic. Rather, the states have largely relied on the technical and legal fact that the common carrier wholesale transport and termination of traffic that also *includes* interconnected VoIP calls constitutes a *telecommunications* service that is properly subject to the bi-jurisdictional regulatory oversight of the states and the FCC. This approach is fully consistent with a number of prior FCC rulings including the *Time Warner*, *DQE* and *Fiber Optics* decisions. Furthermore, these state decisions are usually reached after lengthy, detailed, fact-

¹³ *In re 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 (FCC March 1, 2007), Memorandum Opinion and Order, DA-07-709, *slip op.* (*Time Warner* FCC decision).

sensitive, and live evidentiary adjudications that involve the cross-examination of expert witnesses before administrative law judges (ALJs) and not just the mere conduct of administrative “paper hearings.” The experience of the Pa. PUC is not unique in this regard.

A voluminous evidentiary record was developed before the Pa. PUC during the course of the formal complaint adjudication involving the refusal of Global NAPs (GNAPs) to pay intrastate intercarrier compensation for the indirect termination of interexchange traffic to the public switched telephone network (PSTN) facilities of Palmerton Telephone Company (Palmerton) a rural incumbent local exchange carrier (ILEC) operating in Pennsylvania. This evidentiary record conclusively established that contrary to the GNAPs practice of non-payment of *both* intrastate *and* interstate intercarrier compensation for the termination of interexchange traffic at Palmerton’s PSTN facilities, other entities that also directly or indirectly terminate the same types of traffic in the switched access network of the same ILEC — including calls that originally are initiated in a fixed VoIP protocol —do pay the jurisdictionally prescribed and appropriate amounts of intercarrier compensation in accordance with Palmerton’s switched carrier access tariffs. The Pa. PUC Order states in relevant part the following:

The majority of Pennsylvania and federal legal authority that has already been discussed points to the inescapable conclusion that the Commission has the appropriate subject matter jurisdiction over Palmerton’s Formal Complaint. The next issue is whether this Commission’s intrastate subject matter jurisdiction and the proper and lawful application of intrastate carrier access charges are somehow altered or nullified because of the presence of the allegedly “unique” VoIP or IP-enabled calls in the traffic that is transported by GNAPs and indirectly terminated at Palmerton’s PSTN facilities.

The answer can be readily found in the evidentiary record that amply and credibly documents the routine application of Palmerton’s intrastate carrier access tariff to intrastate interexchange traffic containing VoIP or IP-enabled calls *irrespective* of their final communication protocol conversion in their transport and final termination by Palmerton. This routine application of Palmerton’s intrastate carrier access tariffs on the appropriate traffic has resulted in a corresponding absence of intercarrier compensation disputes in the ordinary and established course of intercarrier compensation business dealings.

For example, cable companies such as Adelphia, Comcast, and RCN *originate* fixed VoIP or IP-enabled wireline interexchange calls that terminate at Palmerton’s PSTN’s facilities. When Palmerton directly bills these companies under its intrastate carrier access tariff for the termination of these intrastate

interexchange calls to its facilities, Palmerton receives the appropriate amount of intercarrier compensation irrespective of whether these fixed VoIP or IP-enabled originated wireline calls have been converted to a TDM protocol prior to their final termination at Palmerton's PSTN facilities. Tr. 519-520. *See also* Palmerton Exh. 12 at 27-28 (Comcast Deposition), and Palmerton Exc. at 30-31.

The same also happens with the fixed VoIP or IP-enabled intrastate interexchange wireline calls that Palmerton terminates from its own affiliate Blue Ridge Digital Phone, a cable company, where such calls first transit through Sprint's common carrier telecommunications network prior to reaching Palmerton's PSTN. Sprint pays Palmerton the appropriate intrastate intercarrier compensation. Tr. 518-519, 536. Further, other companies, such as Service Electric, that also engage in the common carrier telecommunications transit transport of intrastate interexchange VoIP or IP-enabled originating wireline traffic behave in a similar and ordinary fashion. Tr. 631-633, 636. (The more unique aspects of intercarrier compensation that apply on intrastate interexchange wireless calls terminating at the PSTN facilities of an ILEC such as Palmerton are addressed below.)

Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates, Pa. PUC Docket No. C-2009-2093336, Order entered March 16, 2010, at 29-31 (Pa. PUC Order, footnotes omitted).¹⁴

The Pa. PUC also reached the following conclusions that address the applicability of the FCC's *Vonage* holding¹⁵ in intrastate intercarrier compensation disputes where interexchange VoIP calls are implicated. These Pa. PUC conclusions are in line with other state utility commission and court decisions on intrastate intercarrier compensation disputes that involve the wholesale common carrier transport and termination of interexchange VoIP calls:¹⁶

¹⁴ The Pa. PUC also observed that the "evidentiary record indicates that at least four more companies, other than GNAPs, have refused to pay terminating access charges to Palmerton and other ILECs, with at least one more intercarrier compensation dispute between one or more ILECs and one of those four companies currently pending before" the Pa. PUC. Pa. PUC Order n. 20 at 31 citing Tr. 532.

¹⁵ *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (FCC Rel. November 12, 2004), Memorandum Opinion and Order, FCC 04-267, 19 FCC Rcd. 22,404 (2004) (FCC *Vonage* decision), *aff'd*, *Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

¹⁶ Some of the relevant cases include: *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006); *Verizon New York Inc. v. Global NAPS, Inc.*, 463 F.Supp.2d 330, 342 (E.D.N.Y. 2006), 2006 U.S. Dist. LEXIS 87085; *In re Sprint Communications Company L.P. v. Iowa Telecommunications Services Inc. d/b/a Iowa Telecom*, (Iowa Util. Bd. February 4, 2011), Iowa Util. Bd. Docket No. FCU-2010-0001; *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC November 10, 2009) (NH PUC Order); *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.

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 dispute 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. NH PUC Order at 17-19. Here, as in many other jurisdictions, we are not dealing with the issue of market entry and regulation of nomadic VoIP service providers. Instead, we are dealing with the issue of GNAPs, a telecommunications utility carrier, which transports and terminates traffic at Palmerton's PSTN facilities. As in the case of the TDS ILECs [incumbent local exchange carriers] in New Hampshire, Palmerton indirectly receives and terminates traffic that has been transported by GNAPs via the Verizon PA [Verizon Pennsylvania Inc.] tandem switch on Market Street, Philadelphia, Pa. Tr. 667-668, GNAPs Exh. 6.

The FCC *Vonage* decision plainly does not, nor was it intended to, address the issue of whether intercarrier compensation applies for the use of Palmerton's PSTN [public switched telephone network] facilities when terminating VoIP calls. Costs indeed attach to the termination of *any type of traffic* that Palmerton receives, and such costs do not “magically disappear” when the traffic includes VoIP calls whether those are of the nomadic or fixed type. Under the existing and so far unaltered premises of both Pennsylvania and federal law, the Commission determines that Palmerton is entitled to compensation for the traffic that it terminates at its facilities.

Furthermore, indirect transmission of such traffic by GNAPs to Palmerton constitutes a common carrier telecommunications service that falls squarely within this Commission's jurisdiction under applicable Pennsylvania and federal law. Pennsylvania's Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, codified at 73 P.S. § 2251.1 *et seq.*, established the Commission's jurisdictional boundaries over VoIP or IP-enabled services. 73 P.S. § 2251.4. The Act clearly provides that the Commission retains jurisdiction over “[s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company.” 73 P.S. § 2251.6(1)(iv). And it is the question of “switched network access” that is at issue here for the Palmerton PSTN facilities and the GNAPs traffic that these facilities terminate. *See also* 66 Pa. C.S. § 3017 (“Refusal to pay access charges prohibited. — No person or entity may refuse to pay tariffed access charges for

21905 (GA PSC July 29, 2009), Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision, Document No. 121910 (GA PSC Order).

interexchange services provided by a local exchange telecommunications company.”).

Pa. PUC Order at 24-25 (emphasis in the original).

The Pa. PUC also ascertained that its decision to apply conventional intrastate carrier access charges to the wholesale common carrier interexchange traffic that terminated at Palmerton’s PSTN access facilities was fully consistent with the FCC’s *Time Warner* decision. The Pa. PUC quoted the following relevant part of the FCC’s *Time Warner* decision:

17. Certain commenters ask us to reach other issues, including the application of section 251(b)(5) and the classification of VoIP services. [*See, e.g.*, Qwest Comments at 6 (“The Nebraska position is obviously dependent on how the Commission ultimately classifies VoIP service”).] 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. [*See, e.g., Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd 4685 (2005).] For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket. [*IP-Enabled Services*, 20 FCC Rcd at 10245. Similarly, we disagree with the assertions that it is necessary to complete the proceedings pending in the IP-enabled services, intercarrier compensation, and universal service dockets in order to take action on or instead of taking action on this Petition. *See, e.g.*, NTCA Reply Comments at 5-6.] 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. [*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, including exchange access and reciprocal compensation”); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers “intercarrier compensation, including exchange access and reciprocal compensation”).] We do not, however, prejudice the Commission’s determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket.

Pa. PUC Order at 12-13, quoting *Time Warner* FCC Decision, ¶ 17, at 10-11 (original FCC footnotes in brackets).

It is rather obvious that the Section 251, 47 U.S.C. § 251, interconnection arrangements that are addressed in the FCC *Time Warner* decision do not preclude the application of interstate and intrastate carrier access charges for the termination of interexchange traffic, and also apply the usual reciprocal compensation arrangements for the mutual movement and termination of *local* exchange traffic between interconnected wholesale CLEC and ILEC telecommunications carriers.

3. The Current System of Jurisdictional Intercarrier Compensation Treats VoIP Traffic in A Lawful, Technically Valid, and Technology Neutral Manner

The current system of jurisdictional intercarrier compensation treats interconnected VoIP traffic in a lawful, technically valid, and technology neutral manner. The FCC should explicitly adopt the use of the existing intercarrier compensation mechanism – intrastate access, interstate access, and reciprocal compensation – for *all* traffic inclusive of VoIP calls. To do otherwise, it will simply invite an unnecessary but unending cycle of jurisdictional intercarrier compensation disputes that would center on the handling and termination of traffic that includes VoIP calls, and where such disputes will have to be extensively litigated both before the state utility regulatory commissions such as the Pa. PUC and the FCC. If the FCC were to discontinue the use of the present intercarrier compensation system for just VoIP calls while retaining it for other types of traffic that traverse and terminate at the same physical facilities of telecommunications carriers, this approach would create unwarranted anti-competitive results that are not sustainable on the basis of applicable federal and state law. The Pa. PUC addressed this issue in detail:

Now that the legal and technical reasons for exercising subject matter jurisdiction in this intercarrier compensation dispute have been discussed and the fundamental merits of the Palmerton Complaint have been sustained, broader regulatory policy issues must also be covered. In our May 5, 2009 Order, we noted that, if “certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services.” Docket No. C-2009-2093336, Order entered May 5, 2009, at 8-9. One

of the statutory policy directives in Chapter 30 of the Public Utility Code mandates this Commission to:

Promote and encourage the provision of competitive services by a variety of service providers *on equal terms* throughout all geographic areas of this Commonwealth without jeopardizing the provision of universal telecommunications service at affordable rates.

66 Pa. C.S. § 3011(8) (emphasis added).

It is obvious that a telecommunications carrier that needs and obtains Palmerton's intrastate carrier access services at the prescribed jurisdictional rates that the carrier then pays to Palmerton will be competitively but artificially disadvantaged if another carrier obtains the same Palmerton carrier access services and pays no intercarrier compensation.

The FCC has expressed similar concerns:

The Commission [FCC] is sensitive to the concern that *disparate treatment* of voice services that both use IP technology and interconnect with the PSTN could have *competitive implications*. We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport. Thus our ruling here should not place AT&T at a competitive disadvantage. We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers *may be paying access charges for these services while others are not*.

FCC AT&T IP in the Middle Order, ¶ 19 at 13-14 (emphasis added, citations omitted).

In view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes.

Pa. PUC Order at 45-46.

The potential discontinuance of the existing intercarrier compensation mechanism for just VoIP calls will also create arbitrage inefficiencies and perverse disincentives for the necessary and *continuous* capital investments in access facilities inclusive of broadband by telecommunications common carriers. If such facilities can be utilized by other entities transmitting VoIP calls at zero cost or at a differential compensatory rate that is substantially lower than the economic cost of access and termination, then these telecommunications carriers will have no incentive to continue investing. The end result may be the unwarranted and the undesirable effects of “traffic jams” on the “information highway,” especially in areas where smaller and rural telecommunications carriers are the providers of last resort (POLR) for both PSTN voice and broadband access services.

Because the states have been successful in coherently and consistently managing intrastate intercarrier compensation disputes where VoIP traffic is implicated through the *existing* mechanisms and under applicable federal and state laws, certain entities have sought the FCC’s preemption of the state role in this area. A related petition has been pending before the FCC for more than a year.¹⁷ The FCC should decline such misplaced invitations to preempt the states and should affirm the continuous application of existing intercarrier compensation mechanisms for interconnected VoIP traffic.

C. Conclusion

The Pa. PUC continues to point out the fundamental principle that the area of intercarrier compensation is both legally and technically subject to the overall concept of federalism and the dual federal and state jurisdiction. Therefore, the FCC should not, either directly or indirectly, preempt the state when it comes to regulating intercarrier compensation charges for intrastate VOIP traffic.

States such as Pennsylvania have been successfully resolving intercarrier compensation disputes involving VOIP traffic through the use of existing mechanisms and common carrier principles. The resolution of these disputes has proceeded independently and does not rely on

¹⁷ NPRM n. 913, at 192 referencing *In re Global NAPs Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions*, WC Docket No. 10-60. See also Initial Comments of the Pa. PUC, April 2, 2010, and Reply Comments of the Pa. PUC, April 12, 2010, at WC Docket No. 10-60.

the non-existing FCC classification of interconnected VoIP traffic. Rather, the states have largely relied on the technical and legal fact that the common carrier wholesale transport and termination of traffic that also includes interconnected VoIP calls constitutes a telecommunications service that is properly subject to the bi-jurisdictional regulatory oversight of the states and the FCC. This approach is fully consistent with a number of prior FCC rulings including the *Time Warner*, *DQE* and *Fiber Optics* decisions. Furthermore, these state decisions are usually reached after lengthy, detailed, fact-sensitive, and live evidentiary adjudications that involve the cross-examination of expert witnesses before ALJs and not just the mere conduct of administrative “paper hearings.” The experience of the Pa. PUC is not unique in this regard, as a voluminous evidentiary record was developed before the Pa. PUC during the course of the formal complaint adjudication involving the refusal of Global NAPs to pay intrastate intercarrier compensation for the indirect termination of interexchange traffic to the PSTN facilities of Palmerton, a rural ILEC operating in Pennsylvania.

The current system of jurisdictional intercarrier compensation treats interconnected VoIP traffic in a lawful, technically valid, and technology neutral manner. The FCC should explicitly adopt the use of the existing intercarrier compensation mechanism – intrastate access, interstate access, and reciprocal compensation – for all traffic inclusive of VoIP calls. To do otherwise will simply invite an unnecessary but unending cycle of jurisdictional intercarrier compensation disputes that would center on the handling and termination of traffic that includes VoIP calls and will also create arbitrage inefficiencies and perverse disincentives for the necessary and continuous capital investments in access facilities inclusive of broadband by telecommunications common carriers.

III. PHANTOM TRAFFIC AND TRAFFIC STIMULATION

A. Phantom Traffic

The Pa. PUC welcomes the proposed initiatives of the FCC that will address the issue of phantom traffic.¹⁸ The Pa. PUC agrees that there is a need for additional rules that will address the need for sufficient identifying information for each call that transits through and terminates in a telecommunications or communications network. The Pa. PUC also shares the FCC’s concerns

¹⁸ NPRM ¶ 620, at 198.

that any adopted rules that will address the issue of phantom traffic should be of equal and more general applicability irrespectively of whether the transmitted call is utilizing the conventional TDM protocol and signaling system seven (SS7) or whether the call is originated and transmitted in IP.¹⁹ The Pa. PUC as well as other states is willing to constructively cooperate with the FCC on this issue.

B. Traffic Stimulation

The Pa. PUC also appreciates the FCC initiatives and proposals in addressing issues related to traffic stimulation or, alternatively, traffic pumping. The NPRM identifies access stimulation as “an arbitrage scheme employed to take advantage of intercarrier compensation rates by generating elevated traffic volumes to maximize revenues.”²⁰ In response to the NPRM’s invitation for comments the Pa. PUC states that it has not adjudicated formal complaint cases where traffic stimulation was the sole or primary issue.²¹ The Pa. PUC urges the FCC to address this issue in cooperation with the states under the bi-jurisdictional framework that governs intercarrier compensation. Furthermore, the Pa. PUC expresses its concern and reserves its comments on whether issues of reciprocal compensation between competitive local exchange carriers (CLECs or competitive LECs) and wireless CMRS carriers properly belong in the area of traffic stimulation. The Pa. PUC believes that more generic issues of intercarrier compensation that involve *any* type of telecommunications carrier, should be addressed within the corresponding generic context of the NPRM itself and not in an isolated and piecemeal fashion as the NPRM proposes to do here.²² To do otherwise invites unwarranted arbitrage inefficiencies and potentially raises unwelcome anti-competitive impacts. Finally, such proposals appear to unlawfully intrude into the state jurisdictional sphere of intrastate carrier access services and rates.

¹⁹ NPRM ¶¶ 627-628, at 202.

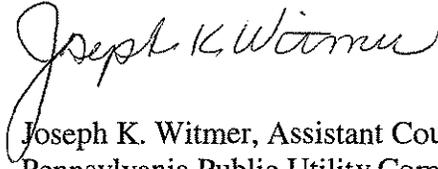
²⁰ NPRM, ¶ 636, at 205 (footnotes omitted).

²¹ NPRM ¶ 675, at 219.

²² NPRM ¶¶ 671-673, at 217-218.

The Pa. PUC thanks the FCC for providing an opportunity to file these Comments.

Respectfully Submitted,
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