

Exhibit A

GLOBAL NAPS
Legal Department

William J. Rooney, Jr.
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November 17, 2009

VIA OVERNIGHT DELIVERY

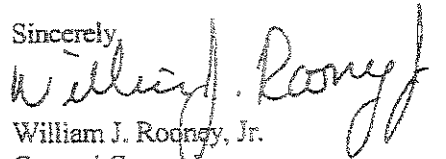
Paul J. Phillips
Primmer Piper Eggleston & Cramer, PC
421 Summer St.
PO Box 159
St. Johnsbury, VT 05819-0159

Re: Global NAPS, Inc. Request to Negotiate Interconnection Agreement

Dear Mr. Phillips,

Pursuant to 47 U.S.C. Sec. 252, Global NAPS, Inc. wishes to negotiate an Interconnection Agreement with Hollis Telephone Company, Inc. Kearsarge Telephone Company, Merrimack County Telephone Company, and Wilton Telephone Company, Inc. (collectively TDS Companies). Of particular import is the treatment of terminating Voice over Internet Protocol ("VoIP") calls and calls from Enhanced Service Providers ("ESPs"). As soon as you have designated a representative please contact the undersigned so that we may begin the negotiation. Thank you for your attention to this matter.

Sincerely,


William J. Rooney, Jr.
General Counsel

WJR: ljc

cc: Peter R. Healy, Esq.
Corporate and Regulatory Counsel
TDS Telecom
525 Junction Road, Suite 7000
Madison, WI 53717

Michael C. Reed
Manager, External Relations
TDS Telecom
24 Depot Square
Northfield, VT 05663

Debra A. Martone
TDS Telecom
PO Box 337
11 Kearsarge Av
Contoocook, NH 03229-0337

Exhibit B

998AMANips
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2
3 MANHATTAN TELECOMMUNICATIONS CORP.,

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4
4 Plaintiff,

5 v.

08 CV 3829 (JSR)

6 GLOBAL NAPS, INC.,

7 Defendant.

8 -----x

9
10 New York, N.Y.
10 September 8, 2009
11 9:30 a.m.

12 Before:

13 HON. JED S. RAKOFF

14 District Judge

15 APPEARANCES

16 KLEIN LAW GROUP PLLC
17 Attorneys for Plaintiff
17 BY: ANDREW M. KLEIN
18 ALLEN C. ZORACKI
18 BRADLY G. MARKS

19 KILE GOEKJIAN REED McMANUS PLLC
20 Attorneys for Defendant
20 BY: JOEL DAVIDOW
21 MATTHEW P. THIELEMANN

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25 SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

998AMAN2ps

Redden - cross

1 call access. It can be -- basic understanding of it is that
2 anybody can make a call over that network.
3 Q. So it's an opposite of a private line. It's a sort of art
4 of the public switch network as opposed to two carriers who
5 just bill by contract a private line.
6 A. Correct.
7 Q. Now, to start with a simple point, Feature Group D is part
8 of what's sometimes called a trunk, is it not?
9 A. Yes.
10 THE COURT: Called a?
11 MR. DAVIDOW: Trunk.
12 THE COURT: Trunk.
13 MR. DAVIDOW: Yes.
14 Q. And a trunk, rather than being a physical thing, is a
15 reserved channel in a wire. Isn't that correct?
16 A. Yes.
17 Q. But that goes back to another point, which is, if a call
18 didn't involve any public wires, then the call couldn't be a
19 Feature Group D call, could it?
20 MR. KLEIN: Objection, your Honor.
21 THE COURT: Ground?
22 MR. KLEIN: I think it's speculative and compound.
23 THE COURT: Overruled. You may answer if you know.
24 A. That is correct, but a lot of different things go into a
25 Feature Group D bill, because there are other bills. There

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Exhibit C

99ASMANI
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

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3 MANHATTAN TELECOMMUNICATIONS CORP.,
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4
4 Plaintiff,

5 v.

08 CV 3829 (JSR)

6 GLOBAL NAPS, INC.,
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7 Defendant.
7

8 -----x
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9 New York, N.Y.
10 September 10, 2009
10 9:30 a.m.
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12 Before:

13 HON. JED S. RAKOFF
13

14 District Judge
14

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16 Attorneys for Plaintiff
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19 Attorneys for Defendant
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99ASMAN5 Herron - direct

1 take it one question at a time but on that representation I
2 will allow the question to be put.

3 So what is the answer?

4 MR. KLEIN: Your Honor, but the 274 question relates
5 to the study.

6 THE COURT: But the point is that he could broaden it
7 to any and all calls that he has ever looked at. Maybe we
8 should do that.

9 Let me hear the question from our court reporter.

10 (Question read)

11 THE COURT: First of all, you can answer that
12 question.

13 Q. You are allowed to answer.

14 A. No.

15 THE COURT: Have you ever seen any calls from land
16 line businesses during your employment at Global, and I am
17 limiting it to MetTel calls.

18 THE WITNESS: Not that I recall, no.

19 THE COURT: Okay.

20 Q. Did you see any calls that were from numbers assigned to
21 Vonage?

22 A. Yes, I did.

23 Q. Did you see any calls from numbers assigned to Broad Voice?

24 A. Yes, I did.

25 Q. Did you see any calls from numbers assigned to --

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Exhibit D

9994MAN1
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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-----x
MANHATTAN TELECOMMUNICATIONS CORP.,

Plaintiff,

v.

08 CV 3829 (JSR)

GLOBAL NAPS, INC.,

Defendant.

-----x

New York, N.Y.
September 9, 2009
11:20 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

KLEIN LAW GROUP PLLC
Attorneys for Plaintiff
BY: ANDREW M. KLEIN
ALLEN C. ZORACKI
BRADLY G. MARKS

KILE GOEKJIAN REED McMANUS PLLC
Attorneys for Defendant
BY: JOEL DAVIDOW
MATTHEW P. THIELEMANN

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9994MAN3

Noack - direct

- 1 Q. What did you do in those years for Verizon?
2 A. Various engineering jobs, plus trunk servicing, trunk
3 forecasting, billing. I was involved in the IXCs, the breakup
4 of AT&T, when all the IXCs started coming in and ordering
5 facilities and trunks and ASRs. I had global engineering
6 responsibilities for Bell Atlantic when it moved to Maryland.
7 Then I was account manager for all the CLECs in Bell Atlantic.
8 Q. Explain what an ASR is?
9 A. Access service request, when interexchange carriers would
10 come to LEC and order feature group D trunking.
11 Q. You are in some sense in charge of the Global NAPs network,
12 is that correct?
13 A. Yes, sir, from our switch to in this case Verizon.
14 Q. Does the Global NAPs network include any feature group D
15 trunks?
16 A. No, sir.
17 Q. Does the Global NAPs network move any traffic across the
18 public switch network?
19 A. Yes.
20 Q. When does it do that?
21 A. Between our point of interface with Verizon to Verizon.
22 Q. In that particular piece, is that a feature group D trunk?
23 A. No, sir.
24 Q. What is it?
25 A. It's an interconnection trunk with Verizon.

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9994MAN3 Noack - direct

1 Q. Was it necessary for your work in these companies to know
2 the difference between a local call and an intrastate interLATA
3 call and an interstate call?

4 A. No, sir. No, it's the same trunk group; it was just
5 interconnection trunks that we would put the traffic on.

6 Q. In regard to a call that begins let's say in New York
7 within one LATA and goes to another spot in the same LATA, in
8 your experience could that call reach Global NAPs' network?

9 MR. KLEIN: Objection; relevance, speculation.

10 MR. DAVIDOW: Your Honor, we are being billed for
11 calls that are called intrastate intralATA. That presumes that
12 based on THE surrogate of knowing the phone number, that if you
13 have a phone number in Brooklyn and a phone number in New York,
14 the call really happened that way. We are now discussing
15 whether that is consistent with this witness' experience.

16 (Continued on next page)

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Exhibit E

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 08-028

HOLLIS TELEPHONE, INC., KEARSAGE TELEPHONE CO.,
MERRIMACK COUNTY TELEPHONE CO., AND WILTON TELEPHONE CO.

DECLARATION OF KEITH HERRON

1. My name is Keith Herron. I have been employed at Global NAPs since July, 1998 as their Senior Switch Engineer in the New York City office. My duties include maintaining the New York City office, as well as interfacing with various vendors, including the Number Portability Administration Center (NPAC), to coordinate and perform functions related to Local Number Portability (LNP). I have personal knowledge of the facts set forth, and if called upon to testify to them, could and would competently do so.

2. I was asked by counsel to perform a study of the traffic GNAPs sends to Fairpoint destined for the four TDS companies (Hollis Telephone, Kearsarge Telephone, Merrimack County Telephone, and Wilton Telephone) in New Hampshire. I was asked to limit the study to those calls that also originated in New Hampshire.

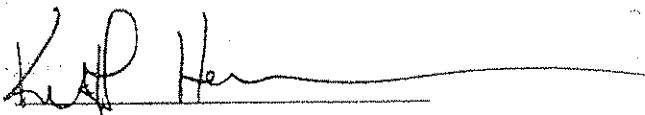
3. I requested a week's worth of data from our records personnel and after discussions with them settled on the calls from 10/19/09 thru 10/25/09. I restricted the study to calls of at least 3 minutes' duration – both to ensure the data excluded wrong numbers or other erroneous calls, and to limit the size of the data set.

4. I was provided Excel spreadsheets (one sheet for each day) containing the following information for each call: Calling Number, Called Number, Start Time, Duration, and the Date of the call.
5. After assembling all the data into one Excel spreadsheet (NH All 3-min IntraSTATE calls to TDS.xls), I used the LERG to identify the OCN (o-ocn), OCN Name (o-ocnName), Rate Center (o-rc), LATA (o-LATA), and State (o-State) of the originating part of the call (Calling Number); and used it to identify the OCN (t-ocn), OCN Name (t-ocnName), Rate Center (t-rc), and LATA (t-LATA) of the terminating part of the call (Called Number). I then eliminated all calls that did not terminate to one of the TDS companies (t-ocnName not equal to Hollis, Kearsarge, Merrimack, or Wilton). I further eliminated any call not originating in NH (o-State).
6. Because of Local Number Portability (LNP), the LERG is only a first approximation of the true owner of a phone number. Since most porting activity involves the ILEC in any given area, I then looked up every Calling Number (CALLING_NUM) which the LERG identified as belonging to OCN 9102, Verizon New England (now Fairpoint), to determine the true owner of the phone number. The LRN (tru-LRN), OCN (tru-OCN), and OCN Name (tru-ocnName) of the carrier who truly owned the number at the time of the call are recorded in columns A thru C of the spreadsheet.
7. I then pulled out subtotals of the number of calls and cumulative call duration for each of the true owners of the calls (tru-ocnName) and recorded them on the Summary tab of the spreadsheet.
8. I next flagged each company as to the type of phone company it is: VoIP, Cable, Cell, LEC, or predominantly Landline. My identification of company type is based on

my personal knowledge of the company or through a study of the company's web site and press releases. If I could not find compelling evidence of what type of company it was, I labeled it landline. I also assumed that the TDS companies are landline types.

9. I then computed the percentage of traffic, both call count and call duration, coming from each type of company. All of this information is on the Summary tab of the spreadsheet (Attachment 1).

10. I swear to the above upon penalty of perjury.



Keith Herron

Attachment 1

All 3 Minute Calls to TDS allegedly routed thru GNAPs
Originating in NH
10/19/09 thru 10/25/09

	Type	# of Calls	Duration (MOU)		% Tot Call
PAETEC COMMUNICATIONS, INC.	VoIP	1,022	710,521	11,842	23.25%
LEVEL 3/FOCAL/BROADWING/TELCOVE/ADELPHIA	VoIP	790	560,684	9,345	17.97%
COMCAST	Cable	789	1,385,268	23,088	17.95%
VERIZON NEW ENGLAND INC.	LEC	640	366,405	6,107	14.56%
IDT AMERICA CORP.	VoIP	283	208,005	3,467	6.44%
CTC COMMUNICATIONS	VoIP	140	66,802	1,113	3.19%
KEARSARGE TELEPHONE CO.	Landline	110	48,595	810	2.50%
MERRIMACK COUNTY TELEPHONE CO.	Landline	106	61,343	1,022	2.41%
GRANITE STATE TELEPHONE, INC.	Landline	84	49,304	822	1.91%
BELL ATLANTIC NYNEX MOBILE	Cell	68	36,375	606	1.55%
CHOICE ONE COMMUNICATIONS	VoIP	63	33,869	564	1.43%
METRO PCS, INC.	Cell	43	26,526	442	0.98%
UNITED STATES CELLULAR	Cell	39	22,408	373	0.89%
FREEDOM RING COMMUNICATIONS, LLC	Landline	33	11,830	197	0.75%
DUNBARTON TELEPHONE CO.	Landline	24	18,337	306	0.55%
LIGHTSHIP TELECOM, LLC	VoIP	19	10,017	167	0.43%
CONVERSENT COMMUNICATIONS	VoIP	12	5,254	88	0.27%
HOLLIS TELEPHONE COMPANY, INC.	Landline	10	4,414	74	0.23%
Broadview Networks	VoIP	9	6,135	102	0.20%
OMNIPOINT	Cell	9	4,330	72	0.20%
OTEL TELEKOM, INC. - NH	VoIP	9	2,837	47	0.20%
RNK, INC.	VoIP	9	6,545	109	0.20%
DSCI	VoIP	8	2,479	41	0.18%
Fairpoint	LEC	8	4,884	81	0.18%
NEW CINGULAR WIRELESS PCS, LLC	Cell	8	5,668	94	0.18%
BANDWIDTH.COM CLEC, LLC	VoIP	7	18,861	314	0.16%
UNION TELEPHONE CO. - NH	Landline	7	7,008	117	0.16%
NEXTEL COMMUNICATIONS, INC.	Cell	6	5,656	94	0.14%
SPRINT	Cell	6	5,400	90	0.14%
WILTON TELEPHONE CO.	Landline	6	3,682	61	0.14%
BROOKS FIBER COMMUNICATIONS	Landline	4	2,909	48	0.09%
CRC Communications	Landline	4	1,798	30	0.09%
GLOBAL NAPS	VoIP	4	5,109	85	0.09%
TCG	VoIP	3	1,034	17	0.07%
T-Mobile	Cell	3	2,139	36	0.07%
Verizon Wireless	Cell	3	1,383	23	0.07%
National Mobile Com	Cell	2	899	15	0.05%
New England Voice & Data	VoIP	2	925	15	0.05%
RURAL CELLULAR CORPORATION	Cell	2	786	13	0.05%
BRETTON WOODS TELEPHONE CO.	Landline	1	348	6	0.02%
Grand Total		4,395	3,716,773	61,946	

% Tot MOU		# of Calls	MOU	% Tot Call	% Tot MOU
19.12%	Nomadic VoIP	2,380	27,318	54.15%	44.10%
15.09%	Cable Companies	789	23,088	17.95%	37.27%
37.27%	LEC	648	6,188	14.74%	9.99%
9.86%	Landline	389	3,493	8.85%	5.64%
5.60%	Cell	189	1,860	4.30%	3.00%
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Exhibit F

9994MAN1
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

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3 MANHATTAN TELECOMMUNICATIONS CORP.,

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08 CV 3829 (JSR)

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9 New York, N.Y.
10 September 9, 2009
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12 Before:

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14 District Judge

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25 SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

9994MAN1 Munsell - cross

1 compensation and you mentioned access charges. Do you recall
2 that?

3 A. Yes.

4 Q. When there is an ICA, that ICA can set up any method of
5 billing at all, can't it; it doesn't have to be either
6 reciprocal comp or access charges?

7 A. I don't know the answer to that.

8 Q. I am saying that the contract rates in an ICA do not have
9 to be the rates that would result from either of the things you
10 mentioned, is that correct?

11 MR. KLEIN: Objection; speculation, ambiguous.

12 MR. DAVIDOW: The witness testified he is an expert in
13 negotiating ICAs?

14 THE COURT: I don't think he did but in any event I
15 think he has indicated previously he doesn't have knowledge to
16 answer this question. But I will allow the question just to
17 make sure that I have an understanding.

18 Do you have the question?

19 THE WITNESS: Yes.

20 THE COURT: What's your answer?

21 THE WITNESS: I don't know.

22 THE COURT: That's the answer: I don't know.

23 Put another question.

24 Q. In regard to carriers who send to traffic and who tell you
25 they are sending you VoIP traffic, have you developed a unitary

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9994MAN1 Munsell - cross

1 rate to charges those carriers?
2 A. In certain contracts, yes.
3 Q. What is that unitary rate?
4 A. I believe it's 00045; it might be 0045.
5 Q. So your first answer was 00045, four one-hundredths of a
6 cent?
7 A. Right.
8 MR. KLEIN: Objection to the characterization of the
9 testimony.
10 THE COURT: Sustained.
11 Q. Would your testimony in Pennsylvania refresh your
12 recollection on that point?
13 A. As to the rate?
14 Q. Yes.
15 A. Yes.
16 Q. When a carrier, would it be the case that --
17 THE COURT: I heard from your last question you were
18 going to show him the relevant portion.
19 MR. DAVIDOW: It will take a little while to get; I
20 have to see if there is and break and then come back to that.
21 THE COURT: Go ahead.
22 MR. DAVIDOW: I had not anticipated it would change.
23 THE COURT: Fine.
24 Q. If the carrier did not represent to you that they were
25 delivering VoIP, would the rate they would pay you be higher
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9994MAN1

Munsell - cross

- 1 THE WITNESS: That's correct.
2 THE COURT: As you understand it from Verizon's
3 standpoint what is the purpose of sending those?
4 THE WITNESS: There are a variety of EMI records sent,
5 so without the question being specific to a certain EMI record,
6 I can't answer it.
7 THE COURT: I understand. Go ahead.
8 Q. Would one item in the call detail records be the
9 identification number, sometimes called the OCN of the carrier
10 who was the last carrier to have the traffic before it got to
11 you?
12 A. In an 110120 EMI record, yes.
13 Q. So thus in calls involving, if Global NAPs in my example of
14 Reston, Virginia were to send it to Ray Street, eventually you
15 send one, Global NAPs' OCN would be in the data that you send
16 forward to MetTel?
17 MR. KLEIN: Objection; speculative, leading.
18 THE COURT: Sustained.
19 Q. Do the call data records include the OCN or carrier who
20 originated the call?
21 A. I don't know.
22 Q. Do the call data records indicate the city in which the
23 call originated?
24 A. Not by name like New York City.
25 Q. Do call data records indicate the name of the carrier who

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9994MAN1 Munsell - cross

- 1 began the call?
2 A. In an 110120 EMI record, no.
3 Q. Do call detail records indicate whether the call began with
4 1 plus dialing?
5 A. No.
6 Q. Do the call detail records indicate whether the call began
7 through the use of the feature group D trunk?
8 A. No.
9 Q. Do the call detail records indicate whether the call began
10 on a cellphone?
11 A. No.
12 Q. Do the call detail records indicate whether the call began
13 from a non-nomadic cable company such as Time Warner or
14 Comcast?
15 MR. KLEIN: Objection to the characterization of
16 companies; assumes facts not in evidence.
17 MR. DAVIDOW: I will rephrase the question.
18 (Continued on next page)
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999SMAN2

Munsell - cross

1 A. There are.

2 Q. Do you make any effort to quantify the frequency of those
3 occasions?

4 A. Not on a regular basis. We have seen a statement to the
5 SEC a couple of years back that the traffic that we received
6 from third-party carriers, about 20 percent of it is lacking
7 valid originating telephone number information.

8 Q. In looking at an originating number and a final number,
9 such as in these situations we have been discussing, you would
10 sometimes find originating numbers that were obtained from
11 NANPA from Verizon, would you ever find that?

12 MR. KLEIN: Objection, ambiguous. There has been a
13 number of things the witness testified to.

14 THE COURT: Sustained.

15 Q. Have you had occasion in previous testimony to discuss
16 phone calls involving Global in which the phone number that
17 began the call was a phone number assigned to Verizon?

18 A. Yes.

19 Q. And does Verizon send traffic to local intentionally?

20 A. I don't know the answer to that in New York or any of the
21 other states frankly.

22 Q. In the Verizon system if a call originated from a household
23 that had selected Verizon as their customer and it was to go to
24 another phone within New York State, would Verizon make any
25 difference in choice between sending that call solely in-state

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999SMAN2 Munsell - cross

1 as opposed to sending it out of state and back to the state?

2 A. I didn't understand that question.

3 (Question read)

4 THE COURT: Again, even if the witness understands the
5 question, I don't understand it so his answer won't be of any
6 help. So rephrase the question.

7 Q. Did you testify or have you testified previously that
8 Verizon normally keeps calls from one point in the state,
9 another point in the state within the state rather than sending
10 it out?

11 A. To the extent that the call is not presubscribed to a
12 third-party carrier and we have control over that call end to
13 end we do not tend to send the call out of state.

14 MR. DAVIDOW: I have no further questions.

15 THE COURT: Alright. Redirect.

16 REDIRECT EXAMINATION

17 BY MR. KLEIN:

18 Q. Mr. Munsell, does the CDR, or call detail record, indicate
19 in any way the point-of-call origination?

20 A. It indicates to the extent populated the originating area
21 code and first 3 digits of the telephone number, normally
22 called NSX, and those 6 numbers can be referenced in industry
23 standard guides to a particular city name state.

24 Q. In determining the jurisdiction of a call as between
25 interstate or intrastate, is it relevant to consider whether

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Exhibit G



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

ISSUED: August 11, 2009

C-2009-2093336

DANIEL P DELANEY ESQUIRE
K&L GATES
17 NORTH SECOND ST
18TH FLOOR
HARRISBURG PA 17101

Palmerton Telephone Company

v.

Global NAPs South, Inc., Global NAPs Pennsylvania, Inc.,
Global NAPs, Inc. and other affiliates

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Wayne L. Weismandel. This decision is being issued and mailed to all parties on the above specified date.

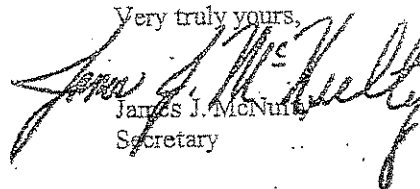
If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions **MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2ND FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265**, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,


James J. McNulty
Secretary

Encls.
Certified Mail
Receipt Requested
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**THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Palmerton Telephone Company	:	
	:	
v.	:	C-2009-2093336
	:	
Global NAPs South, Inc., Global NAPs	:	
Pennsylvania, Inc., Global NAPs, Inc. and	:	
other affiliates	:	

INITIAL DECISION

Before
Wayne L. Weismandel
Administrative Law Judge

HISTORY OF THE PROCEEDINGS

On March 4, 2009, Palmerton Telephone Company (Palmerton) filed a formal Complaint (Complaint) and A Petition for Interim Emergency Order (Emergency Petition) with the Pennsylvania Public Utility Commission (Commission) against Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and other affiliates (collectively, Global NAPs), Docket Number C-2009-2093336. The Complaint alleged the following violations of the Public Utility Code (Code), 66 Pa.C.S.A. § 101 et seq., Commission regulations, or Commission orders: refusal to pay access charges in violation of the provisions of the Code [66 Pa.C.S.A. § 3017(b)] (Count I), obtaining access service without submitting an access service request in violation of the provisions of the Commission approved Pennsylvania Telephone Association (PTA) tariff PA P.U.C. Tariff No. 11¹ (Count II), disputing intrastate access charges in bad faith in violation of the provisions of the PTA tariff PA P.U.C. Tariff No. 11 (Count III), refusal to pay

¹ Palmerton is a member of PTA and jointly files the Access Service Tariff with other members.

intrastate access charges in violation of the provisions of the PTA tariff PA P.U.C. Tariff No. 11 (Count IV), operating as an access provider and/or an interexchange carrier without a Commission granted certificate of public convenience in violation of the provisions of the Code [66 Pa.C.S.A. § 1102(a)] (Count V), and failing to maintain legal and financial fitness to hold a Commission granted certificate of public convenience and failing to file annual financial reports in violation of the provisions of the Commission's regulations (52 Pa. Code § 63.36) and failing to file annual assessment reports in violation of the provisions of the Code (66 Pa.C.S.A. § 510) (Count VI).

By Hearing Notice dated March 5, 2009, an Initial Hearing on the Emergency Petition was scheduled for March 12, 2009, and the case was assigned to Administrative Law Judge (ALJ) Kandace F. Melillo.

On March 11, 2009, Michael A. Gruin, Esquire, a member of the Bar of the Commonwealth of Pennsylvania, moved the admission pro hac vice of William Rooney, Esquire, on behalf of Global NAPs.

On March 12, 2009, Palmerton filed a Petition for Protective Order (Protective Order Petition).

The Initial Hearing on the Emergency Petition occurred as scheduled on March 12, 2009. Global NAPs and Palmerton each appeared and presented evidence. Global NAPs presented the testimony of two witnesses. Palmerton presented the testimony of one witness and sponsored five exhibits (Palmerton Exhibits 1, 2, 3, 4 and 5) that were admitted into evidence. A transcript of the proceeding containing 247 pages was produced.

On March 12, 2009, ALJ Melillo issued a Protective Order (Protective Order) in response to Palmerton's Protective Order Petition as supplemented on the record at the March 12, 2009 hearing.

By Order Granting Admission Pro Hac Vice dated March 13, 2009, ALJ Melillo admitted William Rooney, Esquire, pro hac vice on behalf of Global NAPs.

By Notification To The Parties Of The Taking Of Official Notice (Notification) dated March 16, 2009, ALJ Melillo notified the parties that official notice of the competitive local exchange carrier (CLEC) status and of interconnection agreements identified in a proprietary letter from Palmerton dated March 14, 2009, would be taken.

By Order Granting Continuing Admission Pro Hac Vice dated March 18, 2009, ALJ Melillo granted continuing pro hac vice admission to William Rooney, Esquire, on behalf of Global NAPs, and substituted Daniel P. Delaney, Esquire, for Michael A. Gruin, Esquire, as attorney of record for Global NAPs.

By order Denying Interim Emergency Relief And Certifying Material Question (Material Question Order) dated March 19, 2009, ALJ Melillo denied Palmerton's Emergency Petition.

On March 20, 2009, Global NAPs filed a Motion for an extension of time to file a responsive pleading to the Complaint. This request was granted by ALJ Melillo's Order Granting An Extension Of Time dated March 20, 2009.

On April 3, 2009, Global NAPs filed both an Answer (Answer) and Preliminary Objection (P.O.) to the Complaint.

On April 13, 2009, Palmerton filed an Answer (P.O. Answer) to Global NAPs' P.O.

On April 20, 2009, the presiding officer in this case was changed from ALJ Melillo to me.

By Order Joining Indispensable Party dated April 22, 2009, I joined Verizon Pennsylvania Inc. (Verizon) as an indispensable party in this case.

Also on April 22, 2009, the Commission's Secretary's Bureau served my Order Joining Indispensable Party dated April 22, 2009, the Complaint and the Answer on Verizon.

By Order Denying Preliminary Objection dated April 23, 2009, I denied Global NAPs' P.O.

By Opinion and Order (Order) adopted April 16, 2009, entered May 5, 2009, in the above-captioned case, the Commission reversed ALJ Melillo's Material Question Order, remanded the case to the Office of Administrative Law Judge (OALJ), ordered that "the presiding Administrative Law Judge . . . establish an escrow amount or the amount for a surety bond within thirty (30) days of the entry date of this Opinion and Order", and ordered that "the presiding ALJ shall schedule this matter for expedited consideration with the goal of completing the proceeding on the Formal Complaint of Palmerton Telephone Company within 120 days of the entry date of this Opinion and Order."

By Hearing Notice dated May 6, 2009, a Further Hearing on financial security was scheduled for May 15, 2009.

On May 12, 2009, Verizon filed its Answer and New Matter (Verizon Answer) and its Preliminary Objections (Verizon P.O.).

On May 14, 2009, Daniel P. Delaney, Esquire, moved the admission pro hac vice of Joel Davidow, Esquire, on behalf of Global NAPs. The motion was granted by Order Granting Admission Pro Hac Vice dated May 18, 2009.

The Hearing on financial security occurred as scheduled on May 15, 2009. Global NAPs, Palmerton, and Verizon participated in the hearing. Global NAPs and Palmerton each

presented the testimony of one witness. Palmerton offered three exhibits into evidence (Palmerton Exhibit 3-Revised, 6, and 7) and all three were admitted. Verizon presented no witnesses and offered no exhibits. A transcript of the proceeding containing 169 pages (numbered 248 through 416) was produced.

By Order Establishing Financial Security (Financial Security Order) dated May 18, 2009, Global NAPs was ordered to provide appropriate documentation not later than May 28, 2009, to the Commission and to Palmerton demonstrating that it had obtained a surety bond in favor of Palmerton in the amount of at least, \$246,108.20, pending a final order by the Commission in the above-captioned case. The surety bond was to be obtained from a company engaged in the business of providing such bonds and authorized to conduct business in the Commonwealth of Pennsylvania, having an A. M. Best rating of "A" or higher.

By Scheduling and Briefing Order (Scheduling Order) dated May 18, 2009, an expedited litigation schedule to meet the Commission's directive was established for this case, with hearings scheduled for July 9 and 10, 2009.

By Hearing Notice dated May 19, 2009, Further Hearings on Palmerton's Complaint were scheduled for July 9 and 10, 2009.

On May 22, 2009, Global NAPs filed and served a Motion For Reconsideration Or Recalculation Of The Financial Security Bond (Reconsideration Motion). Attached to the Reconsideration Motion was an affidavit of Global NAPs' Vice President of Sales stating that "Global Naps, Inc. is no longer sending traffic to Palmerton Telephone."

In response to Global NAPs' Reconsideration Motion, by Order dated May 26, 2009, I reduced the required amount of the surety bond to \$205,972.79. My May 26, 2009 Order did not change the date for providing proof of having obtained the required surety bond, i.e., May 28, 2009, nor did it remove the requirements regarding the company providing the surety bond. In addition, my May 26, 2009 Order provided that Global NAPs "shall not send any traffic to

Palmerton Telephone Company pending a final order of the Pennsylvania Public Utility Commission in the above-captioned case."²

By Order Denying Preliminary Objections dated May 26, 2009, I denied the Verizon P.O.

On May 27, 2009, Global NAPs filed and served a Motion For Summary Judgment (Summary Judgment Motion), endorsed with a Notice To Plead. The Summary Judgment Motion requested, among other things, that responses be due within 10 days of service.³

By letter dated May 29, 2009,⁴ Palmerton stated that the Order Establishing Financial Security dated May 18, 2009, had not been complied with⁵ and requested that sanctions be imposed upon Global NAPs in the form of a civil penalty at the rate of \$1,000 per day for each day until Global NAPs complies.⁶

By letter also dated May 29, 2009,⁷ Global NAPs responded to Palmerton's request for sanctions. For the first time, Global NAPs contended that it was under "a Federal District Court order limiting its ability to spend money" and therefore, should not be sanctioned for its failure to obtain the required surety bond.

By Hearing Notice dated June 1, 2009, a Hearing on Sanctions was scheduled for June 4, 2009, at 1:00 p.m.

² The reduction in the amount of the required surety bond was premised on Global NAPs not sending traffic to Palmerton during June, July and August, 2009.

³ Commission Regulations require that an answer to a motion for summary judgment is due within 20 days of service. 52 Pa.Code § 5.102(b).

⁴ The correct filing would have been in the form of a motion. However, because of the serious nature of the situation Palmerton's letter was deemed to be a Motion For Sanctions.

⁵ Neither the Commission nor Palmerton had been provided with the required documentation regarding Global NAPs obtaining of the required surety bond.

⁶ Both the proposed amount of the civil penalty and the continuing nature of its imposition are authorized by the provisions of 66 Pa.C.S.A. § 3301.

⁷ Again, the correct filing would have been an answer to a motion. As with Palmerton's letter, Global NAPs' May 29, 2009 letter was deemed to be such an answer.

By Order dated June 1, 2009, I denied that part of Global NAPs' Summary Judgment Motion that requested that responses to it be due within 10 days.

Also on June 1, 2009, Palmerton filed and served its Motion to Compel Responses to Set II Interrogatories (Palmerton Motion to Compel). The Palmerton Motion to Compel sought an order requiring Global NAPs to respond to Palmerton Set II Interrogatories Nos. 3, 11e and 15.

On June 3, 2009, Global NAPs filed and served a Motion For Modification Of The Timing Requirement For the Board (sic) [Modification Motion]. Global NAPs' Modification Motion requested that it be allowed to provide the required financial security in four payments (\$52,000 in June and \$51,000 in each of July, August and September, 2009).

The Hearing on Sanctions occurred as scheduled on June 4, 2009. Representatives of Palmerton, Global NAPs, and Verizon participated. All Parties agreed to my taking official notice of the Civil Docket For Case #: 1:08-mc-10298-NG (United States District Court for the District of Massachusetts), the Orders of the United States District Court for the District of Massachusetts dated December 9, 2008; December 18, 2008; March 10, 2009; and May 22, 2009; the Judgment entered January 29, 2009 by the United States District Court for the District of Massachusetts; and the transcript of the Motion Hearing held May 27, 2009, before the United States District Court for the District of Massachusetts in *Global NAPs, Inc. v. Verizon New England, Inc., d/b/a Verizon Massachusetts*, Civil Action Nos. 02-12489-RWZ, 05-10079-RWZ, copies of which were provided by the parties. A transcript of the proceeding containing 74 pages (numbered 417 through 490) was produced.

By Initial Decision Imposing Sanctions dated June 5, 2009, I imposed a civil penalty in the amount of \$1,000 per day commencing May 29, 2009, and accruing until such time as Global NAPs provide appropriate documentation to the Commission and to Palmerton demonstrating that it has obtained a surety bond in favor of Palmerton in the amount of, at least, \$205,972.79, and that the surety bond has been obtained from a company engaged in the business

of providing such bonds and authorized to conduct business in the Commonwealth of Pennsylvania, having an A. M. Best rating of "A" or higher.

On June 9, 2009, Global NAPs filed and served a Motion to Compel (Global NAPs Compel Motion) requesting that Palmerton be ordered to answer Global NAPs Interrogatories Set II, Numbers 5 and 6.

On June 10, 2009, Global NAPs filed and served Exceptions to my Initial Decision Imposing Sanctions.

By Order Compelling Answers To Interrogatories dated June 10, 2009, Global NAPs was ordered to serve full and complete answers to Palmerton's Interrogatories Set II, Nos. 3, 11e and 15 not later than June 22, 2009.

On June 11, 2009, Global NAPs filed applications for the issuance of subpoenas duces tecum and ad testificandum to Comcast Business Communications, Inc. (Comcast), Paetec Communications, Inc. (Paetec) and XO Pennsylvania, Inc. (XO) for the taking of depositions by oral examination on June 29, 2009.

On June 12, 2009, Palmerton filed and served its Answer to the Global NAPs Compel Motion (Palmerton Compel Answer).

On June 15, 2009, Palmerton filed and served its Reply to Exceptions responding to Global NAPs' Exceptions to my Initial Decision Imposing Sanctions.

By Order Denying Motion To Compel dated June 15, 2009, I denied Global NAPs Compel Motion requesting that Palmerton be ordered to answer Global NAPs Interrogatories Set II, Numbers 5 and 6.

On June 16, 2009, Global NAPs filed an application for the issuance of a subpoena duces tecum and ad testificandum to CommPartners LLC (CommPartners) for the taking of a deposition by oral examination on June 30, 2009.

Also on June 16, 2009, Palmerton filed and served its Answer (Summary Judgment Answer) to Global NAPs' Summary Judgment Motion.

By Order Denying Motion For Summary Judgment dated June 18, 2009, I denied Global NAPs' Summary Judgment Motion.

On June 23, 2009, there having been no objections to the applications, I issued subpoenas duces tecum and ad testificandum to Comcast, Paetec and XO for the taking of depositions by oral examination on June 29, 2009.

A telephone conference to discuss the application for the issuance of a subpoena duces tecum and ad testificandum to CommPartners was held on June 24, 2009. Counsel for Palmerton and Global NAPs participated, as did Michael A. Gruin, Esquire, on behalf of CommPartners. An agreement was reached for the taking of the deposition of CommPartners by written questions pursuant to the provisions of 52 Pa.Code § 5.345.

On June 24, 2009, I issued a subpoena duces tecum and ad testificandum to CommPartners for the taking of a deposition by written questions.

By Opinion and Order adopted and entered June 25, 2009, the Commission denied Global NAPs' Exceptions and adopted my Initial Decision Imposing Sanctions.

Also on June 25, 2009, Palmerton filed an application for the issuance of a subpoena duces tecum and ad testificandum to CommPartners for the taking of the deposition of CommPartners by written questions pursuant to the provisions of 52 Pa.Code § 5.345.

As a part of the agreements reached during the telephone conference held on June 24, 2009, on June 26, 2009, I issued a second subpoena duces tecum and ad testificandum to CommPartners for the taking of a deposition by written questions.

Also on June 26, 2009, Global NAPs filed notices of taking depositions by written questions addressed to Transcom (Transcom) and to PointOne (PointOne).

By letter dated June 30, 2009, Global NAPs withdrew the notice of taking deposition by written questions addressed to Transcom.

At the request of the parties (resulting from agreements reached with counsel for some of the deponents), on July 1, 2009, I issued an Amended Protective Order (Amended Protective Order) to specifically include items produced by deponents during the litigation of this case.

A Further Hearing (actually an initial hearing with respect to the substantive claims of the Complaint) was held on July 9 and 10, 2009. Palmerton, Global NAPs and Verizon each participated. Palmerton presented evidence in the form of testimony by seven⁸ witnesses and the introduction of nine additional exhibits, Palmerton Exhibits 6-Revised, 8, 9, 10, 11, 12, 13, 14 and 15. Global NAPs presented evidence in the form of testimony by four⁹ witnesses and the introduction of nine exhibits, Global NAPs Exhibits 1, 2, 3, 4, 5, 6, 7, 9 and 10. Palmerton and Global NAPs jointly introduced into evidence one exhibit, Verizon Exhibit 1. A transcript of the proceeding containing 574 pages (numbered 491 through 1064) was prepared.

By letter dated July 14, 2009, Palmerton requested that two late-filed exhibits be admitted into the record and that "administrative notice" be taken of the Commission approved

⁸ William E. Munsell, an employee of Verizon appeared on the witness list of both Palmerton and Global NAPs. As a courtesy, Verizon made Mr. Munsell available as a witness for both Palmerton and Global NAPs but did not conduct any examination of him himself. In counting witnesses presented by the parties, Mr. Munsell is included in the count for both Palmerton and Global NAPs.

⁹ See footnote 8, above.

Paetec tariffs. Counsel for Global NAPs and counsel for Verizon each subsequently notified me that they did not object.

Under cover letter dated July 17, 2009, Global NAPs provided copies of its late-filed Exhibit 8 to the court reporter, the other parties and me.

Under cover letter dated July 17, 2009, Palmerton provided copies of late-filed Exhibits 16 and 17 to the court reporter, the other parties and me.

By Order Admitting Materials Into The Evidentiary Record dated July 17, 2009, Global NAPs Exhibit 8 and Palmerton Exhibits 16 and 17 were each admitted into evidence and, pursuant to the provisions of 52 Pa.Code § 5.406, the Pennsylvania tariffs of Paetec Communications were admitted into evidence.

On July 20, 2009, Palmerton and Global NAPs each filed and served their Main Brief. Also on July 20, 2009, Verizon filed and served a letter stating that it would not be filing a Main Brief.

On July 22, 2009, Global NAPs filed and served an Errata Sheet to its Main Brief, correcting an error in proposed conclusion of law number 8 appearing on page 44.

On July 27, 2009, Palmerton, Global NAPs and Verizon each filed and served their Reply Brief. Palmerton and Global NAPs each filed additional proposed Findings of Fact and Global NAPs also filed an additional proposed Conclusion of Law. Inclusion of additional proposed Findings of Fact and of proposed Conclusions of Law in Reply Briefs is procedurally improper and none of Palmerton's nor of Global NAPs' will be considered in this decision.

FINDINGS OF FACT

1. Palmerton is a rural local exchange carrier (LEC), providing local exchange services in portions of Northampton, Carbon and Monroe Counties, Pennsylvania.
2. Global NAPs South, Inc. is a competitive local exchange carrier (CLEC), authorized to operate in the service territories of Bell Atlantic-Pennsylvania, Inc. [now Verizon, Inc.], Commonwealth Telephone Company, GTE North, Inc. [now Verizon North Inc.], and The United Telephone Company of Pennsylvania [now The United Telephone Company of Pennsylvania d/b/a Embarq].
3. On March 4, 2009, Palmerton filed a Complaint with the Commission against Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and other affiliates, alleging various violations set forth in six Counts.
4. Global NAPs South, Inc. is the only Global NAPs entity holding a certificate of public convenience issued by the Commission.
5. By Opinion and Order adopted and entered June 25, 2009, the Commission adopted my Initial Decision Imposing Sanctions on Global NAPs dated June 5, 2009.
6. Pursuant to the Commission Opinion and Order adopted and entered June 25, 2009 in this case, Global NAPs South, Inc. and its affiliates are incurring a civil penalty in the amount of \$1,000 per day commencing May 29, 2009, and continuing until Global NAPs South, Inc. and its affiliates either comply with Ordering Paragraph 1 of my Initial Decision Imposing Sanctions on Global NAPs dated June 5, 2009, or the date of a final order by the Commission in this case, whichever occurs first.

7. An Initial and further Hearing on the six Counts of Palmerton's Complaint was held on July 9 and 10, 2009.

8. Enhanced services are services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

9. All enhanced services are information services as the term "information services" is used by the Federal Communications Commission (FCC).

10. The terms telecommunications service and information service used in the Telecommunications Act of 1996 (1996 Act) are similar to the terms basic service and enhanced service that were used by the FCC prior to 1996.

11. Enhanced service providers provide information services rather than telecommunications services.

12. The FCC has determined that the provision of enhanced services is not a common carrier public utility offering and that they should be free from public utility-type regulation.

13. Voice over Internet Protocol (VoIP) is an internet application that uses packet switching to transmit a voice communication over a broadband internet connection data network.

14. VoIP is significantly different from the traditional circuit switched Public Switched Telephone Network (PSTN).

15. VoIP communications use digital packets carrying the voice communication interspersed with data packets to complete the communication over a possible multiplicity of circuits.

16. The traditional circuit switched PSTN uses analog signals over an electrical circuit that must be kept clear of other signals for the entire time the telephonic communication is occurring.

17. VoIP is a more cost effective method of communication than the PSTN.

18. VoIP -to-VoIP communications both originate and terminate at internet protocol (IP) addresses which are tied to no identifiable geographic location.

19. Unlike a traditional PSTN call where both the point of origin and the point of termination can be identified by use of the North American Numbering Plan (NANP) telephone number, VoIP -to-VoIP communications can begin or end at any geographic location where the user can access a broadband connection to the Internet.

20. A VoIP end user may choose to have a NANP telephone number that does not correspond to his residence or place of business. This ability to choose a "non-native" area code is a significant difference between VoIP service and "plain old telephone service" (POTS) offered by the PSTN.

21. If the VoIP service is able to originate calls to or terminate calls from the PSTN it is referred to as interconnected VoIP service.

22. Interconnected VoIP service (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users

generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

23. Because interconnected VoIP providers are not state certificated they cannot directly obtain NANP telephone numbers.

24. Interconnected VoIP providers generally obtain NANP telephone numbers for customers by partnering with a LEC through a commercial arrangement rather than obtaining them directly from the numbering administrator, which provides numbers only to entities that are licensed or certificated as carriers under the 1996 Act.

25. Interconnected VoIP service may be "nomadic" or "fixed."

26. Nomadic service allows a customer to use the service by connecting to the Internet wherever a broadband connection is available, making the geographic originating point difficult or impossible to determine.

27. Fixed VoIP service originates from a fixed geographic location.

28. Cable television companies offer fixed interconnected VoIP service, and the transmissions use the cable running to and from the customer's residence. As a result, the geographic originating point of the communications can be determined.

29. The FCC has repeatedly refused to classify interconnected VoIP service as either telecommunications service or information service under the 1996 Act.

30. The FCC has concluded with respect to nomadic interconnected VoIP service that the "impossibility exception" of section 152(b) of the 1996 Act allows it to preempt state regulation where it is impossible or impractical to separate the service's intrastate and interstate components and that state regulation interferes with valid Federal rules or policies.

31. The FCC has determined that it is, in fact, impossible or impractical to separate nomadic interconnected VoIP service's intrastate and interstate components and that state regulation would interfere with the Federal policy of refraining from regulation of the Internet.

32. The FCC has determined that if there is no net protocol conversion involved in a call, and no other enhancements beyond the intermediate use of IP is being provided, no enhanced service is being provided.

33. Palmerton conducted a "study" of approximately 2,100 calls received from Global NAPs during a one-month period that Palmerton claimed were "intrastate" calls subject to intrastate access charges.

34. Palmerton estimated that the 2,100 calls constituted about 10% of the alleged "intrastate" calls received from Global NAPs during that month.

35. Global NAPs' traffic to Palmerton began in 2005 but increased significantly in volume from August, 2008 to May, 2009.

36. Based upon Palmerton's own figures, from August, 2008 to May, 2009 Palmerton received at least 189,000 supposed "intrastate" calls from Global NAPs.

37. The number of calls included in Palmerton's one-month "study" amounts to slightly more than one per cent of the 189,000 supposed "intrastate" calls from Global NAPs.

38. Palmerton presented no evidence that a "study" of slightly more than one per cent of the calls in issue has any statistical validity.¹⁰

¹⁰ "There are three kinds of lies - lies, damn lies, and statistics." Attributed to Mark Twain and others.

39. Nineteen out of 26 calls included in the Palmerton "study" as originating from Paetec Communications, Inc. (Paetec) were from numbers that Paetec had assigned to Vonage Holdings Corporation (Vonage), a VoIP provider, especially nomadic VoIP.

40. All of the calls included in the Palmerton "study" listed as originating from Comcast originate in IP format and terminate at Palmerton in Time Division Multiplex (TDM) format. That is, the calls have all undergone a net protocol conversion.

41. Palmerton determined that the 2,100 calls in its "study" were subject to intrastate access charges merely by comparing the information it received from Verizon to the information contained in the Local Exchange Routing Guide (LERG) and the Terminating Point Masterfile (TPM) to determine the ostensible originating and terminating points of the call.

42. Palmerton made no attempt to determine if any of the calls were VoIP or if any of the calls were information services rather than telecommunications services.

43. Because nomadic VoIP originated calls are not geographically limited, and can use non-native area codes, the simple comparison of LERG and TPM geographic locations are not determinative of the intrastate nature of the calls.

44. The enhancement of traffic provided by carriers such as Transcom, PointOne, and CommPartners that are included in the delivery of the traffic but basically transparent to Palmerton makes mere comparisons of LERG and TPM geographic locations insufficient for concluding whether the traffic is telecommunications services or information services.

45. Global NAPs witness Dr. John L. Fike was accepted as an expert witness in the field of telecommunications technology.

46. Dr. Fike formed his expert opinions based upon Global NAPs Exhibits 4, 7 and 10, interviews with representatives of Transcom and PointOne, and review of Transcom's, CommPartners' and PointOne's web sites.

47. Global NAPs presented credible evidence that more than 85% of its traffic comes to it from CommPartners, Transcom and PointOne, with additional traffic, claimed to be either enhanced traffic or nomadic VoIP, from NTERA, IDT, Ymax/Magic Jack and Raywood Communications.

48. All traffic from both Transcom and PointOne to Global NAPs is enhanced traffic (information services).

49. Examples of what Transcom and PointOne do to "enhance" their traffic include: (1) fixing dropped packets through use of a sophisticated linear predictive code that does not merely repeat the previous (undropped) packet but actually makes a "guess" at what the dropped packet actually was, (2) removing background noise, such as a crying baby, through signal processing, (3) injecting "comfort" noise so that the parties do not mistakenly believe that the call has been disconnected, and (4) inserting "short codes" that allow the customer to key in on their computer or handset a code that initiates another process such as an e-mail account or conference calling.

50. 50% to 75% of the Transcom traffic that passes on to Global NAPs is nomadic VoIP traffic. It is more likely than not that the same applies to the PointOne traffic passed on to Global NAPs.

51. None of the witnesses presented by Palmerton could explain how the traffic originated by their customers got on to Global NAPs' facilities.

52. When asked if Global NAPs had ever submitted an access service request Palmerton's witness' answer was not an unequivocal no, but rather, "To my knowledge, they have not."

53. After explaining that "[i]f a company wishes to establish a direct trunk group with us, it will send an access service request requesting a certain number of trunks, telling us where they're supposed to direct them, what facilities they're supposed to be put on, yes[]", Palmerton's witness admitted that Global NAPs had never requested direct access to Palmerton.

54. Global NAPs' service is not dedicated line service, reserved for the use of a single entity.

55. Global NAPs' service does not connect point-to-point or multi-point locations with its own distinctly independent network.

56. Global NAPs' service does go through the PSTN in the manner that local and toll calls do.

57. Global NAPs did carry all of the calls at issue "outside the local calling area".

58. While it is true that Global NAPs was not the first entity to transmit the call outside of the local calling area of the originating party (that function was performed by the customers' primary interexchange carrier (PIC), it is equally true that Global NAPs transmitted the call not only "outside the local calling area" but outside of Pennsylvania.

59. Global NAPs' carrying of the call occurs "outside the local calling area" of the party originating the call (and "outside the local calling area" of Palmerton).

60. 52 Pa.Code § 63.36(1) requires that Global NAPs South, Inc. file an annual financial report by April 30 each year covering the preceding calendar year.

61. Global NAPs South, Inc. filed its report for the calendar year ending December 31, 2005, on August 25, 2006.

62. Global NAPs South, Inc. filed its reports for the calendar years ending December 31, 2006, December 31, 2007, and December 31, 2008, on March 27, 2009.

63. The filings for the calendar years ending December 31, 2005, December 31, 2006, and December 31, 2007, were untimely.

64. No evidence was introduced at the Hearing in this case pertaining to Global NAPs South, Inc.'s filing or not filing of assessment reports in accordance with the provisions of section 510 of the Code.

DISCUSSION

This case illustrates the impact of emerging technologies evolving ahead of the regulatory scheme intended to address them.

Vonage Holdings Corp. v. Mn. Public Utilities Comm'n, 290 F.Supp. 2d. 993 (D. Mn. 2003)

As the proponent of a Commission order, Palmerton has the burden of proof in this case. 66 Pa.C.S.A. § 332(a).

To establish a sufficient case and satisfy the burden of proof, Palmerton must show that Global NAPs is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). Such a showing must be by a

preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Public Utility Comm'n*, 134 Pa.Cmwlth. 218; 221-222, 578 A.2d 600; 602 (1990), app. denied, 529 Pa. 654, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Palmerton must initially produce sufficient credible evidence to establish a prima facie case in order that it not lose summarily. *Morrissey v. Dep't of Highways*, 424 Pa. 87, 225 A.2d 895 (1967). If it does so, the burden of going forward with evidence shifts to Global NAPs to produce credible evidence of at least co-equal weight. This burden of going forward with evidence may shift back and forth between the parties, but the ultimate burden of persuasion remains with Palmerton. *Milkie v. Pa. Public Utility Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Public Utility Comm'n*, 67 Pa.Cmwlth. 597, 447 A.2d 1100 (1982), *Edan Transportation Corp. v. Pa. Public Utility Comm'n*, 154 Pa.Cmwlth. 21, 623 A.2d 6 (1993), 2 Pa.C.S. § 704. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Bd. (Skirpan)*, 531 Pa. 287, 612 A.2d 434 (1992). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Public Utility Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Dep't of Public Welfare*, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

Palmerton, in its Main Brief, argues that Global NAPs litigated the case on the basis of affirmative defenses, upon which Global NAPs should have the burden of proof. Affirmative defenses are distinguished from the mere denial of facts which make up the complainant's cause of action in that affirmative defenses require the averments of facts extrinsic to the complainant's claim. *Coldren v. Peterman*, 2000 Pa.Super. 364, 763 A.2d 905 (2000), app. denied, 566 Pa. 633, 781 A.2d 137 (2001). The party asserting an affirmative defense bears the burden of proof as to that affirmative defense. *Id.* See, also, *Commonwealth ex rel. Corbett v. Griffin*, 596 Pa. 549, 946 A.2d 668 (2008). Affirmative defenses are properly raised under the heading of "New Matter" in the pleadings. 52 Pa.Code § 5.62(b). Global NAPs did not include a section headed "New Matter"

in its Answer, but clearly delineated that its position was that it did not owe Palmerton intrastate access charges due to the nature of the traffic it delivered to Verizon's Philadelphia tandem switch. As Palmerton itself avers, a primary issue litigated in this case is the nature of the calls. Palmerton acquiesced by raising no objection to any of Global NAPs' evidence on the basis that it was beyond the scope of the pleadings. Indeed, Palmerton itself introduced evidence to establish the nature of the calls. Pursuant to the provisions of 52 Pa.Code § 5.92(a) the pleadings are amended to properly raise Global NAPs' affirmative defenses.

In addition to the question of which party bears the burden of proof, this case also raises a question of subject matter jurisdiction. The Commission is a creature of the legislative body which created it. As such, it has only the powers, duties, responsibilities and jurisdiction given to it by the Legislature. *Western Pennsylvania Water Co. v. Pa. Public Utility Comm'n*, 10 Pa.Cmwlth. 533, 311 A.2d 370 (1973). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Public Utility Comm'n*, 157 Pa.Super. 595, 43 A.2d 348 (1945). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Cf., *Hughes v. Pa. State Police*, 152 Pa.Cmwlth. 409, 619 A.2d 390 (1992), app. denied, 536 Pa. 633, 637 A.2d 293 (1993). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. VanBuskirk*, 303 Pa.Super. 148, 449 A.2d 621 (1982), nor can jurisdiction be obtained by waiver or estoppel, *Scott v. Bristol Twp. Police Dep't*, 669 A.2d 457 (Pa.Cmwlth. 1995). Since the issue of subject matter jurisdiction may not be waived, it may be raised at any stage of a proceeding by a party, or sua sponte by the court or agency in which the case exists. *Blackwell v. State Ethics Comm'n*, 523 Pa. 347, 567 A.2d 630 (1989).

Complicating the question of subject matter jurisdiction in this case is the fact that the key issue of dispute between the parties, the very nature of the telephone traffic delivered by Global NAPs to Palmerton, is determinative of the Commission's jurisdiction. Palmerton's Complaint alleges that Global NAPs owes intrastate access charges pursuant to the Pennsylvania Telephone Association Access Service Tariff, PA P.U.C. Tariff No. 11. To state the obvious, if the

telephone traffic is truly intrastate, and not otherwise excluded from the imposition of access charges or from Commission jurisdiction, then Palmerton has a meritorious claim. However, if the traffic is of a type over which the Commission's jurisdiction has been preempted or is not telecommunications service, then Palmerton's claim for intrastate access charges must fail. Palmerton's claim for unpaid intrastate access charges is dependent upon Palmerton's ability to establish that the telephone traffic for which it billed Global NAPs is, in fact, intrastate telecommunications service not otherwise removed from the Commission's jurisdiction.

Global NAPs contends that all traffic it delivers to Palmerton are "enhanced services" and that at least some of the traffic is VoIP.

The term "enhanced service" means:

[S]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

47 C.F.R. § 64.702(a)

All enhanced services are "information services" as that term is defined in 47 U.S.C. § 153(20)¹¹. "[W]hile all enhanced services are information services, not all information services are enhanced services." *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended* (First Report And Order And Further Notice Of Proposed Rulemaking), 11 FCC Rod 21905, ¶ 103 (1996). Information services are subject to the jurisdiction of the FCC and not to the jurisdiction of the individual states. Cf., *In the Matter of Petition for Declaratory Ruling that pulver.com's*

¹¹ Information service. -- The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. 47 U.S.C. § 153(20).

Free World dialup is Neither Telecommunications Nor a Telecommunications Service, 19 FCC Rcd 3307 (2004). The FCC has found that the terms telecommunications service and information service used in the 1996 Act are similar to the terms basic service and enhanced service that were used by the FCC prior to 1996. *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, 20 FCC Rcd 4826 (2005). As long ago as 1980 the FCC described the difference between basic service, the providers of which are regulated by the FCC under Title II of the Communications Act of 1934 as amended by the 1996 Act, and enhanced service, the providers of which may, but do not have to, be regulated by the FCC under its Title I ancillary jurisdiction. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

[A] basic transmission service should be limited to the offering of transmission capacity between two or more points suitable for a user's transmission needs and subject only to the technical parameters of fidelity or distortion criteria, or other conditioning. . . . In offering a basic transmission service, therefore, a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information. . . . An enhanced service is any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information. In these services additional, different, or restructured information may be provided the subscriber through various processing applications performed on the transmitted information, or other actions can be taken by either the vendor or the subscriber based on the content of the information transmitted through editing, formatting, etc.

In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, ¶¶ 95-97 (1980) (footnotes omitted).

The FCC also defined the terms "code" and "protocols":

“[C]ode means the binary representation of alphanumeric and control characters. Thus an enhanced service may modify the transmitted bit stream to change it from the ASCII code to the EBCDIC code, which a basic service may not. “Protocols” govern the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and separate control messages.
Id. at ¶ 97, n. 33.

Both protocol conversion and protocol processing services are information services under the 1996 Act. *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended* (First Report And Order And Further Notice Of Proposed Rulemaking), 11 FCC Rcd 21905 (1996). See, also, *In the Matters of Amendment to Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*; and *Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Thereof; Communications Protocols under Sections 64.702 of the Commission’s Rules and Regulations*, 3 FCC Rcd 1150 (1988).

Under the FCC’s “contamination theory” entities that offer enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers. The FCC’s position is that the enhanced element of the combined offering contaminates the basic portion and, therefore, the entire offering is considered to be enhanced. *In the Matters of Amendment to Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*; and *Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Thereof; Communications Protocols under Sections 64.702 of the Commission’s Rules and Regulations*, 3 FCC Rcd 1150, ¶ 14, n.23 (1988). See, also, *Vonage Holdings Corp. v. Mn. Public Utilities Comm’n*, 290 F.Supp. 2d. 993, 998 n. 3 (D. Mn. 2003).

Enhanced service providers are exempt from the payment of interstate access charges (the ESP exemption). *In the Matter of Amendments of Part 69 of the Commission’s*

Rules Relating to Enhanced Service Providers, 3 FCC Rod 2631 (1988). See, also, 47 C.F.R. § 69.5(b) [access charges are assessed on all interexchange carriers that use local switching facilities for the provision of interstate or foreign telecommunications services. (emphasis added)]. Because enhanced service providers provide information services rather than telecommunications services the terms of 47 C.F.R. § 69.5(b) do not include them. Enhanced services are not regulated under Title II of the 1996 Act. 47 C.F.R. § 64.702(a). In order for the Federal program of deregulation of enhanced services to work, inconsistent state regulation is preempted by the FCC. *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.D.C. 1982), cert. den. sub nom. *La. Public Service Comm'n v. FCC*, 461 U.S. 938 (1983). The FCC has determined that the provision of enhanced services is not a common carrier public utility offering and that they should be free from public utility-type regulation. *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 83, n. 34 (1980). See, also, *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rod 3307 (2004).

In addition to contending that all its traffic is comprised of enhanced services, Global NAPs further contends that at least some part (perhaps the majority) of its traffic is VoIP.

VoIP is an internet application that uses packet switching to transmit a voice communication over a broadband internet connection data network. VoIP is significantly different from the traditional circuit switched PSTN. VoIP communications use digital packets carrying the voice communication interspersed with data packets to complete the communication over a possible multiplicity of circuits. The traditional circuit switched PSTN uses analog signals over an electrical circuit that must be kept clear of other signals for the entire time the telephonic communication is occurring. VoIP is a more cost effective method of communication than the PSTN. *Mn. Public Utilities Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

VoIP-to-VoIP communications both originate and terminate at IP addresses which are tied to no identifiable geographic location. Unlike a traditional PSTN call where both

the point of origin and the point of termination can be identified by use of the NANP telephone number¹², VoIP-to-VoIP communications can begin or end at any geographic location where the user can access a broadband connection to the Internet.

Further complicating the determination of the point of origin of all VoIP-initiated communication is the fact that the end user may choose to have a NANP telephone number that does not correspond to his residence or place of business (a Minnesota resident or located business can obtain a NANP telephone number with an Arizona area code). See, *Mn. Public Utilities Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). This ability to choose a "non-native" area code is a significant difference between VoIP service and POTS offered by the PSTN. *Navio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. (2006).

If the VoIP service is able to originate calls to or terminate calls from the PSTN it is referred to as interconnected VoIP service. See, 47 C.F.R. § 9.3 [interconnected VoIP service (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network]. Because interconnected VoIP providers are not state certificated they cannot directly obtain NANP telephone numbers. *In the Matter of Numbering Resource Optimization*, 15 FCC Red 7574, ¶ 97 (2000).

Interconnected VoIP providers generally obtain NANP telephone numbers for customers by partnering with a local exchange carrier (LEC) through a commercial arrangement rather than obtaining them directly from the numbering administrator, which provides numbers only to entities that are licensed or certificated as carriers under the [1996] Act.

¹² NANP numbers are 10 digits in length, in the format NXX-NXX-XXXX. The first three digits are the NPA code (i.e., area code). The second three are the central office code or central office prefix, and the last four are the line number. Newton's Telecom Dictionary 553 (20th ed. 2004).

In the Matter of Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization (Report And Order, Declaratory Ruling, Order On Remand, And Notice Of Proposed Rulemaking), 22 F.C.C.R. 19531, ¶ 12 (2007) [footnote omitted].

Finally, interconnected VoIP service may be “nomadic” or “fixed.” Nomadic service allows a customer to use the service by connecting to the Internet wherever a broadband connection is available, making the geographic originating point difficult or impossible to determine. Fixed VoIP service, however, originates from a fixed geographic location. For example, cable television companies offer interconnected VoIP service, and the transmissions use the cable running to and from the customer’s residence. As a result, the geographic originating point of the communications can be determined and the interstate and intrastate portions of the service are more easily distinguished.

Vonage Holdings Corp. v. Ne. Public Service Comm’n, 564 F.3d 900, 902-903 (8th Cir. 2009)

The FCC has repeatedly refused to classify interconnected VoIP service as either telecommunications service or information service under the 1996 Act¹³. See, *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd. 22404, ¶ 14 (2004), *affm’d*, *Mn. Public Utilities Comm’n*, 483 F.3d 570 (8th Cir. 2007); *In the Matters of IP-Enabled Services; E911 Requirements For IP-Enabled Service Providers*, 20 FCC Rcd. 10245, ¶ 22 (2005), *affm’d*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); *In the Matter of Universal Service Contribution Methodology*;

¹³ Based upon the different, and broader, definition of “telecommunications carrier” contained in the Communications Assistance for Law Enforcement Act (CALEA) from that of “telecommunications carrier” contained in the 1996 Act, the FCC found that the classification of a service as an information service under the 1996 Act did not compel a finding that the service falls within CALEA’s Information Service Exclusion and that broadband Internet access service providers are “telecommunications carriers” under the CALEA definition and not entitled to CALEA’s Information Service Exclusion. The FCC then concluded that CALEA applies to providers of “interconnected VoIP services”. *In the Matter of Communications Assistance For Law Enforcement Act And Broadband Access And Services*, 20 FCC Rcd. 14989 (2005), *affm’d*, *American Council On Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

Federal-State Joint Board On Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated With Administration Of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, And Universal Service Support Mechanisms; Telecommunications Services For Individuals With Hearing And Speech Disabilities, And The Americans With Disabilities Act Of 1990; Administration Of The North American Numbering Plan And North American Numbering Plan Cost Recovery Contribution Factor And Fund Size; Number Resource Optimization; telephone Number Portability; Truth-In-Billing and Billing Format; IP-Enabled Services, 21 FCC Rcd. 7518, ¶ 35 (2006), *affm'd in part and vacated in part, Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007); *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Service to VoIP Providers*, 22 FCC Rcd 3513, ¶¶ 15, 17 (2007).

There is, however, a clear determination regarding VoIP service that has been made: nomadic interconnected VoIP service has been preempted from state regulation by the FCC. *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd. 22404 (2004), *affm'd, Mn. Public Utilities Comm'n*, 483 F.3d 570 (8th Cir. 2007), See, also, *Vonage Holdings Corp. v. Ne. Public Service Comm'n*, 564 F.3d 900, (8th Cir. 2009).¹⁴ The FCC has concluded with respect to nomadic interconnected VoIP service that the “impossibility exception” of section 152(b) of the 1996 Act allows it to preempt state regulation where it is impossible or impractical to separate the service’s intrastate and interstate components and that state regulation interferes with valid Federal rules or policies. *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd. 22404 (2004), *affm'd, Mn. Public Utilities Comm'n*, 483 F.3d 570 (8th Cir. 2007). Because nomadic interconnected VoIP service can originate calls from any geographic location where broadband internet access is available while using a non-native area code, the FCC determined that it is, in fact, impossible or impractical to separate the service’s intrastate and interstate components and

¹⁴ It is also noted that the FCC, in the context of contributing to the Federal Universal Service Fund, has said, “We find that interconnected VoIP providers are ‘providers of interstate telecommunications’ . . .”. *FCC Universal Service Order*, ¶ 39.

that state regulation would interfere with the Federal policy of refraining from regulation of the Internet.

In contrast to the determination regarding nomadic interconnected VoIP service, the FCC determined that a service involved in an interexchange call that originated from a regular telephone by dialing 1 + the called number, was converted by AT&T from its existing format to IP format and transported over AT&T's Internet backbone, converted back from the IP format by AT&T and then delivered to the called party through LEC local business lines was a telecommunications service upon which interstate access charges could be assessed. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457 (2004) (IP in-the-middle Case). The FCC pointed out that there was "no net protocol conversion" involved in AT&T's service and that in all respects other than the intermediate use of its own Internet backbone, the call was indistinguishable from a traditional circuit-switched long distance call, i.e., no enhanced service was being provided. No discussion of the ability to locate the geographic origin point of the call was made, nor was it necessary, in the IP in-the-middle decision. The instant case is distinguishable from the IP in-the-middle Case because enhanced services are being applied to the calls that Global NAPs forwards to Palmerton.

It is against this legal backdrop that Palmerton's claims for intrastate access charges from Global NAPs must be decided.

Palmerton bases its claim on a "study" (Palmerton Exhibits 6 and 6[Revised]) performed of approximately 2,100 "intrastate" calls during one-month that it received from Global NAPs. Palmerton estimates that the 2,100 figure comprises about 10% of the "intrastate" traffic delivered by Global NAPs during that month. Tr. 296. In other words, Palmerton presented evidence that Global NAPs delivered about 21,000 "intrastate" calls to Palmerton in the month used for the study. Palmerton also presented evidence that although it was receiving traffic from Global NAPs since 2005, the volume increased considerably from August, 2008 until May, 2009. Tr. 297. Using the monthly call volume established by Palmerton for the nine

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month period equates to a minimum of 189,000 "intrastate" calls delivered by Global NAPs to Palmerton. Palmerton's "study", therefore, amounts to, at best, slightly more than one per cent of the supposed "intrastate" traffic delivered by Global NAPs to Palmerton. Palmerton presented no evidence that such a small sample has any statistical validity.

Any possible usefulness of the Palmerton "study" is further undermined by credible evidence that a number of the included calls are either nomadic VoIP or constitute information service rather than telecommunications service. For instance, 19 out of 26 calls listed as originating from Paetec Communications, Inc. (Paetec) were numbers that Paetec had assigned to Vonage Holdings Corporation (Vonage), a VoIP provider – especially nomadic VoIP. Global NAPs Exhibit 1. Additionally, all of the included calls that are listed as originating from Comcast¹⁵ originate in IP format and terminate at Palmerton in TDM format. That is, the calls undergo a net protocol conversion which the FCC has held makes them information services rather than telecommunications services. *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended* (First Report And Order And Further Notice Of Proposed Rulemaking), 11 FCC Rcd 21905 (1996).

Because Palmerton's "study" was not proven to be statistically valid, and because the "study" did not attempt to determine if any of the included calls were actually information services rather than telecommunications services, any finding of fact based upon the "study" would be mere speculation and conjecture. Palmerton's "study" cannot be considered credible evidence to support the claim that all Global NAPs calls to Palmerton are legitimately subject to intrastate access charges.

Palmerton merely relied upon information received from the Verizon tandem, located in Philadelphia, which it then checked against the LERG and the TPM to determine the ostensible originating and terminating locations of the calls. If the locations both appeared to be in Pennsylvania, and the originating point appeared to be outside of Palmerton's local calling area, Palmerton decided that the call was subject to intrastate access charges. While Palmerton

contends that this is "standard industry practice" (and it may well be), this only highlights the fact that we are attempting to fit the square pegs of advanced technology into the round holes of outmoded regulation. Palmerton made no attempt to determine the nature of the calls but relied only upon the apparent beginning and end points to determine that this was traffic subject to intrastate access charges. Palmerton ignored any possibility that the calls were nomadic VoIP (over which the FCC has removed state jurisdiction) or that they were not telecommunications services but rather information services (over which the FCC has also removed state jurisdiction). The fact that nomadic VoIP originated calls are not geographically limited, along with the availability of non-native area codes, prevents the simple comparison of LERG and TPM supposed geographic locations from being conclusive as to the intrastate nature of a call. See, *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd. 22404 (2004), *affm'd*, *Mn. Public Utilities Comm'n*, 483 F.3d 570 (8th Cir. 2007). Likewise, the enhancement of traffic provided by carriers such as Transcom, PointOne, and CommPartners that are included in the delivery of the traffic but basically transparent to Palmerton makes such simple determinations insufficient for concluding whether the traffic is telecommunications services or information services.

Global NAPs presented credible expert testimony by Dr. John L. Fike regarding the nature of the traffic it delivered to Palmerton. Dr. Fike was accepted as an expert witness in the field of telecommunications technology. Tr. 957. As such, Dr. Fike was qualified to render an opinion on an ultimate issue in the case. *Commonwealth v. Daniels*, 480 Pa. 340, 390 A.2d 172 (1978). Further, Dr. Fike's expert opinion need not be based on facts or data that would be admissible in evidence themselves, so long as the facts or data upon which his opinion is based are of a type reasonably relied upon by experts in the field. *Pinnacle Health Sys. v. Dep't of Public Welfare*, 942 A.2d 189 (Pa. Cmwlth. 2008); Cf., *Pa. Public Utility Comm'n v. Pa. Gas and Water Co.*, 68 Pa. PUC 191, 197-198 (1988). Global NAPs presented credible evidence that more than 85% of its traffic comes to it from CommPartners, Transcom and PointOne, with additional traffic, claimed to be either enhanced traffic or nomadic VoIP, from NTERA, IDT, Ymax/Magic Jack and Raynwood Communications. Tr. 809-811. Dr. Fike testified that the matters he relied upon in forming his opinions (including Global NAPs Exhibits 4, 7 and 10,

¹⁵ A number of the calls listed as originating from Comcast were found to have actually originated from

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interviews with representatives of Transcom and PointOne, and review of Transcom's, CommPartners' and PointOne's web sites) are of a type reasonably relied upon by experts in the field. Tr. 969. This testimony was uncontroverted and I accepted it as adequate for Dr. Fike to state his expert opinions. Dr. Fike opined that all traffic from both Transcom and PointOne to Global NAPs is enhanced traffic. Tr. 974, 976. Dr. Fike gave as examples of what Transcom and PointOne do to "enhance" their traffic: (1) fixing dropped packets through use of a sophisticated linear predictive code that does not merely repeat the previous (undropped) packet but actually makes a "guess" at what the dropped packet actually was and inserting it, (2) removing background noise, such as a crying baby, through signal processing, (3) injecting "comfort" noise so that the parties do not mistakenly believe that the call has been disconnected, and (4) inserting "short codes" that allow the customer to key in on their computer or handset a code that initiates another process such as an e-mail account or conference calling. Tr. 960-962, 974, 976. Dr. Fike also testified that at least the first three enhancements constitute a "beneficial change from the input to the output of the signal in form, content or storage." Tr. 990. In other words, Dr. Fike concluded that Transcom and PointOne use computer processing applications to act on the content, code, protocol, and other aspects of the subscriber's information, meeting the FCC definition of enhanced services.

Dr. Fike also buttressed testimony of Global NAPs' witness Masuret (Tr. 934-936) by concluding that 50 to 75 percent of the Transcom traffic that passes on to Global NAPs is nomadic VoIP traffic. Tr. 979. Dr. Fike also concluded that the same could apply to PointOne's traffic passed to Global NAPs, though PointOne representatives he spoke with would not agree to provide percentage information. Tr. 980.

In summary, Global NAPs presented credible evidence that the majority of its traffic is received from three other carriers, Transcom, CommPartners and PointOne; that the vast majority of its traffic is enhanced and hence, information services rather than telecommunications services; and that a very significant amount (at least half) of its traffic is nomadic VoIP. Palmerton, on the other hand, presented witnesses from carriers that it claimed

AT&T, "Team" (T?) Mobile, or Embarq. Palmerton Exhibit 12, 11-12.

were the source of the calls that Palmerton contended were subject to intrastate access charges (Frontier Communications, Windstream Communications, D&E Communications and Ironton Telephone Company) and yet none of these witnesses could explain how Global NAPs got involved with the calls at issue. Tr. 612-613 (Frontier Communications), Tr. 589 (Windstream Communications), Tr. 619-622 (D&E Communications), Tr. 643, 648-651 (Ironton Telephone Company). Even the Verizon witness, whose company's Philadelphia tandem passes the calls from Global NAPs to Palmerton, had no explanation as to how Verizon calls to Palmerton got involved with Global NAPs. Consequently, Global NAPs' evidence is worthier of credence because it could explain how the calls were transported, and by whom, and what types of traffic they were.

Palmerton, who has the burden of proof as to its claim that it is owed intrastate access charges by Global NAPs, failed to bear its burden. Global NAPs produced sufficient credible evidence to bear its burden of proof that the calls it forwarded to Palmerton were enhanced by Global NAPs' customers, and consequently information services not telecommunications services, or nomadic VoIP services. In either event, they are not calls within the Commission's jurisdiction and are not properly billed intrastate access charges. Counts I, III and IV of the Palmerton Complaint are dismissed as being beyond the jurisdiction of the Commission.¹⁶

Count II of Palmerton's Complaint avers a violation of Palmerton's tariff PA P.U.C. Tariff No. 11 because Global NAPs never submitted an access service request. Very little evidence on this issue was adduced by either party. When asked if Global NAPs had ever submitted an access service request Palmerton's witness' answer was not an unequivocal no, but rather, "To my knowledge, they have not." Upon cross-examination Palmerton's witness testified that, "[i]f a company wishes to establish a direct trunk group with us, it will send an access service request requesting a certain number of trunks, telling us where they're supposed to direct them,

¹⁶ If, upon review, the Commission determines that it does have jurisdiction, Palmerton's Counts I, III and IV should be dismissed for failure to bear the burden of proof. Palmerton did not adduce a preponderance of the credible evidence to establish that the calls for which it has billed Global NAPs intrastate access charges are, in fact, intrastate telecommunications service.

what facilities they're supposed to be put on, yes." Tr. 551. The very next question and answer were:

Q. Now, Global never requested to set up a direct access to you, did it?

A. No, they haven't.

Tr. 551-552.

The only other discussions regarding access requests consisted of Palmerton's witness being asked, and agreeing, that if Global NAPs (who has an interconnection agreement with Verizon) needed more trunks it would request them from Verizon, not Palmerton. Tr. 552-553. This hardly amounts to sufficient evidence on Palmerton's part to prove that (a) Global NAPs was under some obligation to submit an access service request to Palmerton, or (b) that it has not done so. See, *In the Matter of Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513 (2007). Global NAPs South, Inc., as a certificated CLEC¹⁷ in Pennsylvania, has the right to indirectly interconnect with Palmerton under section 251(a)(1) of the 1996 Act. That is what it has done. Palmerton has not borne its burden of proof with respect to Count II of its Complaint and Count II will be dismissed on that basis.

Count V of Palmerton's Complaint avers that Global NAPs is operating as "a [sic] access provider and/or an interexchange carrier" in Pennsylvania without the requisite Commission certification.

Global NAPs is not a competitive access provider (CAP) as that term is defined in Pennsylvania.

¹⁷ Global NAPs South, Inc. was certificated by the Commission in 1999 as a CLEC in the service territories of Bell Atlantic-Pennsylvania, Inc. (now Verizon, Inc.), Commonwealth Telephone Company, GTE North, Inc. (now Verizon North Inc.), and The United Telephone Company of Pennsylvania (now The United Telephone Company of Pennsylvania d/b/a Embarq), Docket Number A-310771.

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"CAP" stands for "competitive access provider." An equivalent term within the Commonwealth is "special access service." CAP has variously been applied to the following types of non-switched service: Leased lines, circuits, or private lines or channels (but not typically a "channel" as in "unbundled network elements (UNEs)"). CAP service is non-switched (i.e., dedicated line) service and may be either within an exchange or between exchanges. It may be intraLATA (local access transport area) or interLATA. CAP service connects point-to-point or multi-point locations with the CAP's distinctly independent network.

CAP service does not go through the public switched network (i.e., a circuit switched network such as the telephone or telex network) in the manner that local and toll calls do. CAP service does not access dial tone. Stations connected to CAP service generally do not have seven-digit telephone numbers associated with them but may be accessed by dialing "codes" (like an intercom that can access any station on the intercom system, but which cannot access, or be accessed by, any party not on the intercom). CAP service is typically paid for on a \$/mile/month basis rather than \$/minute or \$.call or \$/month basis. Examples of CAP services are tie lines, private lines, data circuits, "junk yard circuits," "ring down circuits," etc. CAP lines typically carry data but can carry voice. CAP service is typically used by business rather than residential customers.

CAP authority may not be used to access the public switched network or toll calling.

Amended Application of Vanguard Telecom Corp., d/b/a CellularOne, for approval to offer, render, furnish, or supply Facilities-based Competitive Local Exchange Telecommunications Services, Amended Application of Vanguard Telecom Corp., d/b/a CellularOne, for approval to offer, render, furnish, or supply Facilities-based Competitive Access Provider Services, Docket Numbers A-310621F0002 and A-310621F0003, Tentative

Opinion and Order adopted March 31, 1999, entered April 2, 1999, p.16, Final Opinion and Order adopted and entered April 8, 1999.

Global NAPs' service is not dedicated line service, reserved for the use of a single entity. Global NAPs' service does not connect point-to-point or multi-point locations with its own distinctly independent network. Global NAPs' service does go through the PSTN in the manner that local and toll calls do. Global NAPs is not a CAP.

Chapter 30 of the Code defines an "interexchange telecommunications carrier" as "[a] carrier other than a local exchange telecommunications carrier authorized by the commission to provide interexchange services." 66 Pa.C.S.A. § 3012. The Code also defines "interexchange services" as "[t]he transmission of interLATA or intraLATA toll messages or data outside the local calling area." 66 Pa.C.S.A. § 3012. The undisputed evidence is that Global NAPs did carry all of the calls at issue "outside the local calling area". While it is true that Global NAPs was not the first entity to transmit the call outside of the local calling area of the originating party (that function was performed by the customers' primary interexchange carrier (PIC)¹⁸), it is equally true that Global NAPs transmitted the call not only "outside the local calling area" but outside of Pennsylvania. Global NAPs itself argues that its position in the call lies between one of its enhanced service provider customers and the Verizon tandem in Philadelphia. Global NAPs Exhibits 5 and 6. It is clear that Global NAPs' carrying of the call occurs "outside the local calling area" of the party originating the call (and "outside the local calling area" of Palmerton). Consequently, Global NAPs meets the Pennsylvania definition of a provider of interexchange services. However, while Global NAPs may meet the literal definition of a provider of interexchange services under Pennsylvania law, I have also found that all of its traffic is enhanced services, that is, information services rather than telecommunications services. The FCC has determined that the provision of enhanced services is not a common carrier public utility offering and that they should be free from public utility-type regulation. *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 83, n. 34 (1980). See, also, *In the Matter of Petition for*

¹⁸ Pennsylvania customers may have two different PICs, one for interLATA and another for intraLATA calls.

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Declaratory Ruling that pulver.com's Free World dialup is Neither Telecommunications Nor a Telecommunications Service, 19 FCC Rcd 3307 (2004). In order for the Federal program of deregulation of enhanced services to work, inconsistent state regulation is preempted by the FCC. *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.D.C. 1982), cert. den. sub nom. *La. Public Service Comm'n v. FCC*, 461 U.S. 938 (1983). If Global NAPs were providing telecommunications services it would have to be certificated by the Commission as an interexchange carrier. Because it is providing information services rather than telecommunications services it need not be certificated by the Commission as an interexchange carrier.

Count V of Palmerton's Complaint must be dismissed because Palmerton failed to prove by a preponderance of the credible evidence adduced that Global NAPs is operating as either a competitive access provider or as an interexchange carrier of telecommunications over which the Commission has jurisdiction.

The last Count of Palmerton's Complaint, Count VI, avers that Global NAPs¹⁹ fails to maintain legal and financial fitness to hold a Commission granted certificate of public convenience and failed to file annual financial reports in violation of the provisions of the Commission's regulations (52 Pa.Code § 63.36) and failed to file annual assessment reports in violation of the provisions of the Code (66 Pa.C.S.A. § 510).

It is incontrovertible that Global NAPs entities (but not Global NAPs South, Inc.) have been involved in litigation over its business activities in numerous State and Federal jurisdictions. In some of that litigation it was successful and in some it was not. The mere fact that it has prevailed in some jurisdictions is evidence that its legal position is defensible and establishes good faith on its part in maintaining its legal position. Litigiousness, in and of itself, is not evidence of a lack of legal fitness. Lack of compliance with Commission regulations, on the other hand, as discussed below, does go to Global NAPs South, Inc.'s legal fitness to remain certificated.

The question of Global NAPs South, Inc.'s continued financial fitness is more difficult to decide. Global NAPs South, Inc. was ordered to post a surety bond in this case and failed to do so. It did, however, represent that it could post the bond if the entire amount was not required at one time. Further, Global NAPs presented uncontradicted evidence that it was able to pay its normal business expenses (not including expenses it disputed as legally improper) in the normal course of business. Tr. 812-814. Palmerton did not bear its burden of proof to establish that Global NAPs South, Inc. lacks financial fitness to retain its Pennsylvania certificate of public convenience.

Global NAPs South, Inc.'s violation of the Commission's regulation at 52 Pa. Code § 63.36 is clearly established. Section 63.36(1) requires that Global NAPs South, Inc. file an annual financial report by April 30 each year covering the preceding calendar year. Global NAPs South, Inc. filed its report for the calendar year ending December 31, 2005, on August 25, 2006, nearly four months after it was due. Palmerton Exhibit 5. Global NAPs South, Inc. filed its reports for the calendar years ending December 31, 2006, December 31, 2007, and December 31, 2008, on March 27, 2009.²⁰ Obviously, the filings for the calendar years ending December 31, 2006, and December 31, 2007, were untimely. In accordance with the provisions of 52 Pa. Code § 63.36(2), a civil penalty will be imposed for these three violations (late-filing of the annual reports for the calendar years ending December 31, 2005, December 31, 2006, and December 31, 2007). I cannot say that these late-filings, by themselves, demonstrate a propensity of Global NAPs South, Inc. to violate the Code or Commission orders or regulations. Without condoning late-filings, Global NAPs South, Inc. has not otherwise been the subject of complaints (with the exception of the instant case) nor of Commission investigations. Imposition of a civil penalty pursuant to the provisions of 66 Pa.C.S.A. § 3301 rather than revocation of the certificate of public convenience is an appropriate penalty here.

¹⁹ Count VI of Palmerton's Complaint must be specifically addressed to Global NAPs South, Inc., the only Global NAPs entity certificated in Pennsylvania.

²⁰ Palmerton Exhibit 11 includes copies of the three Global NAPs South, Inc. annual reports, but without any indication of the date they were filed other than the cover letter date of March 25, 2009. Review of the copies actually filed with the Commission shows that the filing date for all three annual reports was March 27, 2009.

No evidence was introduced at the Hearing in this case pertaining to Global NAPs South, Inc.'s filing or not filing of assessment reports in accordance with the provisions of section 510 of the Code. This allegation must be dismissed, therefore, Palmerton having failed to bear its burden of proof.

Count VI of Palmerton's Complaint will be sustained in part and dismissed in part in accordance with the discussion above.

Having determined that Palmerton has not borne its burden of proof on the main issue in this case, the nature of the traffic forwarded by Global NAPs to Palmerton and the jurisdictional consequence that flows from that determination, and that Global NAPs has sustained its burden of proof as to its affirmative defense on the same issue, a few additional observations are in order.

First, this case was a formal complaint case, not a Commission initiated investigation. There were some serious repercussions from this distinction. Perhaps of most significance was the ability, or lack thereof, of the parties to obtain evidence. The Commission's power to subpoena witnesses to appear and testify at a hearing does not extend beyond the boundaries of Pennsylvania. Discovery is also made much more difficult when out-of-state witnesses must be deposed by use of written questions rather than upon oral examination. A generic Commission investigation proceeding could compel representatives of certificated public utilities to appear for examination at a hearing, even if the representative had to attend from out-of-state.

Another problem was the extremely short time period in which it was ordered that this case be litigated. While the need for expeditious treatment was clear, 120 days to fully litigate and decide a case with the complicated factual and legal issues such as this one contains is bound to result in a less than fully-developed evidentiary record. All of the normally available discovery tools were not able to be used by the parties or were used in such a truncated fashion as to be practically unusable.

For these reasons I strongly endorse Verizon's position, contained in its Reply Brief, that "this Commission's decision with regard to the private billing dispute between Palmerton and Global NAPs should be confined to the specific parties before it and the particular facts of this case." Verizon Reply Brief, p. 2.

This case is not an appropriate vehicle for sweeping rulings on the treatment of VoIP traffic, for instance. The Commission has previously concluded that it would be premature to make conclusive jurisdictional or policy determinations or to take action with respect to VoIP traffic until the FCC provides guidance. See, *Investigation into Voice over Internet Protocol as a Jurisdictional Service*, Docket Number M-00031707, Order adopted April 15, 2004, entered May 24, 2004. This Commission conclusion should not be altered based upon the record in this private complaint case, especially given the procedural and time constraints under which it was litigated.

The FCC has two on-going proceedings that address the complicated issues of national significance that appear in this case. While both *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) and *In the Matter of IP-Enabled Services*, 19 FCC Rcd 4863 (2004) have been pending for a long time, they are proceedings designed to provide nationwide uniformity in the areas of jurisdiction over advanced technology services, the proper method (and, perhaps, amount) of all forms of intercarrier compensation, and other issues that appear in the instant case. The Commission should continue to participate in, and monitor, these FCC proceedings and defer action pending resolution of them.

Finally, if the Commission determines that something must be done to stop Global NAPs from its "free ride" on the PSTN, perhaps an order under the authority of 66 Pa.C.S.A. § 2904(b) directed to Global NAPs South, Inc. and Palmerton would be appropriate. This would appear to parallel the result reached by the New York Public Service Commission in *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Case 07-C-0059, Order Directing Negotiation, issued and effective March 20, 2008.

CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction over some, but not all, of the claims contained in Palmerton's Complaint.
2. The Commission has personal jurisdiction over Palmerton.
3. The only Global NAPs entity over which the Commission has personal jurisdiction is Global NAPs South, Inc.
4. As the proponent of a Commission order, Palmerton has the burden of proof in this case.
5. To establish a sufficient case and satisfy the burden of proof, Palmerton must show that Global NAPs is responsible or accountable for the problem described in the Complaint.
6. A showing that Global NAPs is responsible or accountable for the problem described in the Complaint must be by a preponderance of the evidence.
7. A preponderance of the evidence is achieved by presenting evidence more convincing, by even the smallest amount, than that presented by the other party.
8. Palmerton must initially produce sufficient credible evidence to establish a prima facie case in order that it not lose summarily.
9. If Palmerton does so, the burden of going forward with evidence shifts to Global NAPs to produce credible evidence of at least co-equal weight.

10. The burden of going forward with evidence may shift back and forth between the parties, but the ultimate burden of persuasion remains with Palmerton.

11. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence.

12. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

13. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.

14. Affirmative defenses are distinguished from the mere denial of facts which make up the complainant's cause of action in that affirmative defenses require the averments of facts extrinsic to the complainant's claim.

15. The party asserting an affirmative defense bears the burden of proof as to that affirmative defense.

16. Affirmative defenses are properly raised under the heading of "New Matter" in the pleadings.

17. Global NAPs did not include a section headed "New Matter" in its Answer, but clearly delineated that its position was that it did not owe Palmerton intrastate access charges due to the nature of the traffic it delivered to Verizon's Philadelphia tandem switch.

18. Palmerton acquiesced by raising no objection to any of Global NAPs' evidence on the basis that it was beyond the scope of the pleadings.

19. Pursuant to the provisions of 52 Pa.Code § 5.92(a) the pleadings are amended to properly raise Global NAPs' affirmative defenses.

20. This case raises a question of subject matter jurisdiction.

21. The Commission is a creature of the legislative body which created it. As such, it has only the powers, duties, responsibilities and jurisdiction given to it by the Legislature.

22. The Commission must act within, and cannot exceed, its jurisdiction.

23. Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy.

24. Jurisdiction may not be conferred by the parties where none exists.

25. Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, nor can jurisdiction be obtained by waiver or estoppel.

26. Since the issue of subject matter jurisdiction may not be waived, it may be raised at any stage of a proceeding by a party, or sua sponte by the court or agency in which the case exists.

27. The nature of the telephone traffic delivered by Global NAPs to Palmerton is determinative of the Commission's jurisdiction.

28. If the telephone traffic is truly intrastate, and not otherwise excluded from the imposition of access charges or from Commission jurisdiction, then Palmerton has a meritorious claim. However, if the traffic is of a type over which the Commission's jurisdiction has been preempted or is not telecommunications service, then Palmerton's claim for intrastate access charges must fail.

29. Palmerton's claim for unpaid intrastate access charges is dependent upon Palmerton's ability to establish that the telephone traffic for which it billed Global NAPs is, in fact, intrastate telecommunications service not otherwise removed from the Commission's jurisdiction.

30. The term "enhanced service" means: Services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

31. All enhanced services are "information services" as that term is defined in 47 U.S.C. § 153(20).

32. The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

33. All enhanced services are information services, but not all information services are enhanced services.

34. Information services are subject to the jurisdiction of the FCC and not to the jurisdiction of the individual states.

35. The terms telecommunications service and information service used in the 1996 Act are similar to the terms basic service and enhanced service that were used by the FCC prior to 1996.

36. The providers of basic service are regulated by the FCC under Title II of the Communications Act of 1934 as amended by the 1996 Act.

37. The providers of enhanced service may, but do not have to, be regulated by the FCC under its Title I ancillary jurisdiction.

38. Both protocol conversion and protocol processing services are information services under the 1996 Act.

39. Entities that offer enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers.

40. Enhanced service providers are exempt from the payment of interstate access charges.

41. Enhanced services are not regulated under Title II of the 1996 Act.

42. In order for the Federal program of deregulation of enhanced services to work, inconsistent state regulation is preempted by the FCC.

43. The provision of enhanced services is not a common carrier public utility offering and providers of enhanced services should be free from public utility-type regulation.

44. The end user of VoIP service may choose to have a NANP telephone number that does not correspond to his residence or place of business, i.e., a non-native area code.

45. VoIP service that is able to originate calls to or terminate calls from the PSTN is referred to as interconnected VoIP service.

46. Interconnected VoIP service (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

47. Because interconnected VoIP providers are not state certificated they cannot directly obtain NANP telephone numbers.

48. The FCC has repeatedly refused to classify interconnected VoIP service as either telecommunications service or information service under the 1996 Act.

49. Nomadic interconnected VoIP service has been preempted from state regulation by the FCC.

50. With respect to nomadic interconnected VoIP service, the FCC has concluded that the "impossibility exception" of section 152(b) of the 1996 Act allows it to preempt state regulation where it is impossible or impractical to separate the service's intrastate and interstate components and that state regulation interferes with valid Federal rules or policies.

51. Because nomadic interconnected VoIP service can originate calls from any geographic location where broadband internet access is available while using a non-native area code, the FCC determined that it is, in fact, impossible or impractical to separate the service's intrastate and interstate components and that state regulation would interfere with the Federal policy of refraining from regulation of the Internet.

52. In *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457 (2004) the FCC pointed out that there was "no net protocol conversion" involved in AT&T's service and that in all respects other than the intermediate use of its own Internet backbone, the call was

indistinguishable from a traditional circuit-switched long distance call, i.e., no enhanced service was being provided.

53. The instant case is distinguishable from *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457 (2004) because enhanced services are being applied to the calls that Global NAPs forwards to Palmerton.

54. Palmerton's "study" of approximately 2,100 calls out of a minimum of 189,000 calls forwarded to Palmerton by Global NAPs, representing slightly more than 1% of the calls, was not proven to be statistically valid.

55. Palmerton's "study" included calls listed as originating from Paetec but were actually from numbers that Paetec had assigned to Vonage, a VoIP provider – especially of nomadic VoIP, a category of calls over which the FCC has assumed jurisdiction.

56. Palmerton's "study" included calls that are listed as originating from Comcast that originate in IP format and terminate at Palmerton in TDM format. That is, the calls undergo a net protocol conversion which the FCC has held makes them information services rather than telecommunications services.

57. Because Palmerton's "study" did not attempt to determine if any of the included calls were actually information services rather than telecommunications services, any finding of fact that the calls were subject to intrastate access charges based upon the "study" would be mere speculation and conjecture.

58. Palmerton's "study" ignored any possibility that the calls were nomadic VoIP (over which the FCC has removed state jurisdiction) or that they were not telecommunications services but rather information services (over which the FCC has also removed state jurisdiction).

59. The fact that nomadic VoIP originated calls are not geographically limited, along with the availability of non-native area codes, prevents the simple comparison of LERG and TPM supposed geographic locations from being conclusive as to the intrastate nature of a call.

25.

60. The enhancement of traffic provided by carriers such as Transcom, PointOne, and CommPartners that are included in the delivery of the traffic but basically transparent to Palmerton makes the mere comparison of LERG and TPM supposed geographic locations insufficient for concluding whether the traffic is telecommunications services or information services.

61. Global NAPs presented credible expert testimony by Dr. John L. Fike regarding the nature of the traffic it delivered to Palmerton.

62. Dr. Fike was accepted as an expert witness in the field of telecommunications technology.

63. Dr. Fike was qualified to render an opinion on an ultimate issue in the case.

64. Dr. Fike's expert opinion need not be based on facts or data that would be admissible in evidence themselves, so long as the facts or data upon which his opinion is based are of a type reasonably relied upon by experts in the field.

65. Dr. Fike testified that the matters he relied upon in forming his opinions (including Global NAPs Exhibits 4, 7 and 10, interviews with representatives of Transcom and PointOne, and review of Transcom's, CommPartners' and PointOne's web sites) are of a type reasonably relied upon by experts in the field.

66. All traffic from both Transcom and PointOne to Global NAPs is enhanced traffic.

67. Fixing dropped packets through use of a sophisticated linear predictive code that does not merely repeat the previous (undropped) packet but actually makes a "guess" at what the dropped packet actually was and inserting it, removing background noise, such as a crying baby, through signal processing, and injecting "comfort" noise so that the parties do not mistakenly believe that the call has been disconnected, constitute a beneficial change from the input to the output of the signal in form, content or storage.

68. Transcom and PointOne use computer processing applications to act on the content, code, protocol, and other aspects of the subscriber's information, meeting the FCC definition of enhanced services.

69. Global NAPs presented credible evidence that the majority of its traffic is received from three other carriers, Transcom, CommPartners and PointOne; that the vast majority of its traffic is enhanced and hence, information services rather than telecommunications services; and that a very significant amount (at least half) of its traffic is nomadic VoIP.

70. Global NAPs' evidence is worthier of credence because it could explain how the calls were transported, and by whom, and what types of traffic they were, while Palmerton's evidence could not.

71. Palmerton, who has the burden of proof as to its claim that it is owed intrastate access charges by Global NAPs, failed to bear its burden.

72. Global NAPs produced sufficient credible evidence to bear its burden of proof that the calls it forwarded to Palmerton were enhanced by Global NAPs' customers, and consequently information services not telecommunications services, or nomadic VoIP services.

73. The calls forwarded by Global NAPs to Palmerton are not calls within the Commission's jurisdiction and are not properly billed intrastate access charges.

74. Counts I, III and IV of the Palmerton Complaint are dismissed as being beyond the jurisdiction of the Commission.

75. Palmerton did not adduce sufficient evidence to prove that (a) Global NAPs was under some obligation to submit an access service request to Palmerton, or (b) that it has not done so.

76. Palmerton has not borne its burden of proof with respect to Count II of its Complaint and Count II will be dismissed on that basis.

77. Global NAPs is not a CAP as that term is defined in Pennsylvania.

78. Chapter 30 of the Code defines an "interexchange telecommunications carrier" as "[a] carrier other than a local exchange telecommunications carrier authorized by the commission to provide interexchange services."

79. The Code defines "interexchange services" as "[t]he transmission of interLATA or intraLATA toll messages or data outside the local calling area."

80. Global NAPs meets the Pennsylvania definition of a provider of interexchange services.

81. Because Global NAPs is providing information services rather than telecommunications services it need not be certificated by the Commission as an interexchange carrier.

82. Count V of Palmerton's Complaint must be dismissed because Palmerton failed to prove by a preponderance of the credible evidence adduced that Global NAPs is operating as either a competitive access provider or as an interexchange carrier of telecommunications over which the Commission has jurisdiction.

83. Count VI of Palmerton's Complaint must be specifically addressed to Global NAPs South, Inc., the only Global NAPs entity certificated in Pennsylvania.

84. Global NAPs South, Inc. presented uncontradicted evidence that it was able to pay its normal business expenses (not including expenses it disputed as legally improper) in the normal course of business.

85. Global NAPs South, Inc. did not timely file its annual financial reports for the calendar years ending December 31, 2005, December 31, 2006, and December 31, 2007, in violation of the provisions of the Commission's regulation at 52 Pa. Code § 63.36.

86. In accordance with the provisions of 52 Pa. Code § 63.36(2), a civil penalty may be imposed for the three violations of the Commission's regulation at 52 Pa. Code § 63.36.

87. Global NAPs South, Inc. has not otherwise been the subject of complaints (with the exception of the instant case) nor of Commission investigations.

88. Palmerton did not bear its burden of proof to establish that Global NAPs South, Inc. is not legally nor financially fit to remain certificated by the Commission.

89. No evidence was introduced at the Hearing in this case pertaining to Global NAPs South, Inc.'s filing or not filing of assessment reports in accordance with the provisions of section 510 of the Code. This allegation must be dismissed, therefore, Palmerton having failed to bear its burden of proof.

90. Count VI of Palmerton's Complaint will be sustained in part and dismissed in part.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal Complaint filed March 4, 2009, by Palmerton Telephone Company with the Pennsylvania Public Utility Commission, Docket Number C-2009-2093336, is dismissed as to Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and other affiliates, except for Global NAPs South, Inc.

2. That the formal Complaint filed March 4, 2009, by Palmerton Telephone Company with the Pennsylvania Public Utility Commission, Docket Number C-2009-2093336, is sustained in part and denied in part as to Global NAPs South, Inc.

3. That Counts I, III and IV of the formal Complaint filed March 4, 2009, by Palmerton Telephone Company with the Pennsylvania Public Utility Commission, Docket Number C-2009-2093336, are dismissed for lack of subject matter jurisdiction.

4. That Count II of the formal Complaint filed March 4, 2009, by Palmerton Telephone Company with the Pennsylvania Public Utility Commission, Docket Number C-2009-2093336, is denied for failure of Palmerton Telephone Company to bear its burden of proof.

5. That Count V of the formal Complaint filed March 4, 2009, by Palmerton Telephone Company with the Pennsylvania Public Utility Commission, Docket Number C-2009-2093336, is denied in part for failure of Palmerton Telephone Company to bear its burden of proof as to the allegation that Global NAPs South, Inc. is operating as a competitive access provider (CAP) without having a certificate of public convenience issued by the Pennsylvania Public Utility Commission, and dismissed in part for lack of subject matter jurisdiction as to the allegation that Global NAPs South, Inc. is operating as an interexchange carrier without having a required certificate of public convenience issued by the Pennsylvania Public Utility Commission.

6. That Count VI of the formal Complaint filed March 4, 2009, by Palmerton Telephone Company with the Pennsylvania Public Utility Commission, Docket Number C-2009-2093336, is sustained as to the allegation that Global NAPs South, Inc. has violated the provisions of 52 Pa.Code § 63.36 by not timely filing its annual financial reports for the calendar years ending December 31, 2005, December 31, 2006, and December 31, 2007, and denied for failure of Palmerton Telephone Company to bear its burden of proof as to the allegation that Global NAPs South, Inc. has violated the provisions of 66 Pa.C.S.A. § 510 by failing to file annual assessment reports.

7. That Global NAPs South, Inc. shall, for three violations of the provisions of 52 Pa.Code § 63.36, pay a civil penalty of \$750 as provided for in the Public Utility Code, 66 Pa.C.S.A. § 3301, by certified check or money order, within twenty (20) days after service of the Commission's Order and forwarded to:

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

8. That, in accordance with the provisions of the Pennsylvania Public Utility Commission's Opinion and Order adopted and entered June 25, 2009, at Docket Number C-2009-2093336, Global NAPs South, Inc. shall pay a civil penalty, calculated at the rate of \$1,000 per day commencing May 29, 2009, through and including the date of a final Pennsylvania

Public Utility Commission Order in the above-captioned case, by certified check or money order, within twenty (20) days after service of the Commission's Order and forwarded to:

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

9. That Global NAPs South, Inc. cease and desist from further violations of the Pennsylvania Public Utility Code and of the Pennsylvania Public Utility Commission's regulations and orders.

10. That the record at Docket Number C-2009-2093336 be marked closed.

Date: August 7, 2009

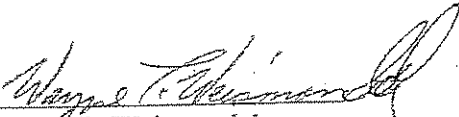

Wayne L. Weismandel
Administrative Law Judge

Exhibit H

99ASMAN1
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x
2
3 MANHATTAN TELECOMMUNICATIONS CORP.,

4 Plaintiff,

5 v.

08 CV 3829 (JSR)

6 GLOBAL NAPS, INC.,

7 Defendant.
8 -----x

9
10 New York, N.Y.
10 September 10, 2009
11 9:30 a.m.

12 Before:

13 HON. JED S. RAKOFF

14 District Judge

15 APPEARANCES

16 KLEIN LAW GROUP PLLC
17 Attorneys for Plaintiff
17 BY: ANDREW M. KLEIN
18 ALLEN C. ZORACKI
18 BRADLY G. MARKS

19 KILE GOEKJIAN REED McMANUS PLLC
20 Attorneys for Defendant
20 BY: JOEL DAVIDOW
21 MATTHEW P. THIELEMANN

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23
24
25 SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

99A4MAN6 Mulligan - direct

- 1 Q. How long with Vonage?
2 A. Four and a half years.
3 Q. What was your previous job just prior to that?
4 A. I was with Time Warner Telecom.
5 Q. What does Time Warner do?
6 A. They were a business services providing Internet voice
7 services and other business operations for telecommunications.
8 Q. What is the business of Vonage?
9 A. Provide voice telephony.
10 Q. How does one become a customer of Vonage?
11 A. They subscribe.
12 Q. Is that over the Internet?
13 A. They can either do that over the Internet or they can do
14 that through calling in via a phone call to a sales agent.
15 Q. How many subscribers do you have?
16 A. Approximately 2.4 million subscribers.
17 Q. In how many states?
18 A. Approximately 48 states, maybe larger.
19 Q. Do you have subscribers for instance in New York State?
20 A. Yes, we do.
21 Q. How many about?
22 A. I don't know the exact number today.
23 Q. Bigger than what number, 100,000?
24 A. Bigger than I would say 250,000 in New York State.
25 Q. When someone becomes a subscriber is there some process in

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1 though TransCom might not be the company that itself takes the
2 call to the ultimate person being called?

3 A. I don't know that for a fact.

4 Q. Either way?

5 A. Either way.

6 Q. I was putting it the other way.

7 A. Restate the question.

8 Q. If TransCom received a call, sent it to Global NAPs who
9 sends it to somebody then to the ultimate purchaser and you
10 found out about it, would you tell TransCom that they can't
11 keep the money because they didn't do it all themselves?

12 MR. KLEIN: Objection.

13 THE COURT: Sustained.

14 Q. My point is simply to ask when you pay them a termination
15 fee, do you understand that they are bound to you to personally
16 end that call as opposed to sending it on?

17 MR. KLEIN: Objection; argumentative and I think asked
18 and answered as well.

19 THE COURT: I don't think it was asked and answered.
20 I don't agree it's argumentative. I don't think the foundation
21 has been laid for this witness being the person who can speak
22 for Vonage on that issue. Sustained.

23 Q. Where does TransCom rank among the people to whom you pay
24 termination fees in terms of whether it's in the top two, the
25 top five, the top ten?

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1 MR. KLEIN: Objection; relevance, foundation.
2 MR. DAVIDOW: The subject is how much VoIP is going
3 on. TransCom is a customer of VoIP.
4 THE COURT: Let me hear the question read back.
5 (Record read)
6 THE COURT: Do you know the answer to that?
7 THE WITNESS: It's in our top 6 or 7 carriers.
8 THE COURT: This is top 6 or 7 in terms of what.
9 THE WITNESS: Across the United States.
10 THE COURT: No. In terms of money, in terms of
11 minutes, in terms of what?
12 THE WITNESS: In terms of minutes.
13 THE COURT: OK.
14 Q. You terminate traffic to CommPartners?
15 A. Yes, we do.
16 Q. Where would they rank in terms of minutes?
17 A. They are also within the top 6 or 7.
18 Q. Were you asked to provide a list of phone numbers that you
19 now have managed to obtain that relate to New York exchanges?
20 A. Yes, we were.
21 Q. Did you so provide?
22 A. Yes, we did.
23 Q. I show you what has been tentatively marked Defendant
24 Exhibit 8. Is this the list of New York phone numbers you have
25 obtained that you sent in connection with the subpoena?

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Exhibit I

99ASMAN1
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x
2
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99ASMAN7 Johnson - direct

1 vendors, things of that nature.

2 THE COURT: What does it mean to pass something
3 through your enhancement platform?

4 THE WITNESS: Our enhanced services platform applies
5 algorithms to the content of the session or call.

6 THE COURT: In order to do what?

7 THE WITNESS: To improve the intelligibility or
8 audibility of the session.

9 THE COURT: Okay. Now we are getting somewhere.

10 So this is a way to improve audibility or
11 intelligibility?

12 THE WITNESS: Predominantly for audio sessions, that
13 is correct.

14 THE COURT: What other enhancements do you offer?

15 THE WITNESS: We do offer enhancements for
16 computer-to-computer communications for modem and fax pass
17 through.

18 THE COURT: What is the nature of the enhancement that
19 you are offering there?

20 THE WITNESS: We terminate and detect the fax or modem
21 transmission and we generate a signal of the highest quality
22 that we can deliver from the terminating site.

23 THE COURT: What is the benefit to the customer for
24 that?

25 THE WITNESS: Generally speaking when sessions or
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Johnson - direct

1 calls are passed to us, especially in the case of calls
2 originated on the PSTM, they have a tendency to have been
3 degraded before we receive them and so by terminating and
4 attempting to interpret what we are receiving from the customer
5 and then generating it from the terminating side, we are
6 sending as good or better a signal as what we receive from the
7 customer and generally it is better.

8 THE COURT: So is the net effect of this to mean that
9 the person who is listening to the call will receive a better
10 call than they otherwise would?

11 THE WITNESS: Yes, sir, that is correct.

12 THE COURT: And the object here is to make it at least
13 as good if not better than what they would get in like a
14 traditional land line call?

15 THE WITNESS: That is correct.

16 THE COURT: Because of the nature of computerization,
17 that otherwise would not necessarily occur without the benefit
18 of these enhancements because of the nature of the process
19 degrades the signal to some degree.

20 THE WITNESS: The nature of the original process, yes,
21 that is correct.

22 THE COURT: Now I understand.

23 Q. If a call began and had background noise in the call, do
24 you have anything that deals with that subject?

25 MR. KLEIN: Objection, vague.

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1 Q. Any of the processes you are applying, do they deal with
2 background noise?

3 A. Yes, the algorithms that I have described on the ingress
4 for calls that have background noise, the algorithms attempt to
5 detect structured sound, like speech, and filter out to some
6 extent but not to a cleat extent background noise that would
7 appear in the original signal.

8 Q. Can you give an example?

9 A. White noise, a fan perhaps, something in the background
10 like that, that would be diminished on the transmission side
11 because it's not identified as speech or structured sound.

12 Q. So if somebody --

13 THE COURT: If you are at a ballgame, which I wish I
14 were, and there is a lot of kind of background noise and you
15 are on your cell phone and the person might otherwise have
16 trouble distinguishing or hearing what you are saying because
17 of all the background noise, this would help filter out the
18 background noise?

19 THE WITNESS: That is correct.

20 THE COURT: Okay.

21 Q. Is such filtering out of background noise available on a
22 regular telephone call, a TDM call?

23 A. No, sir.

24 Q. Are there any economies achieved in your process, what you
25 do with the calls?

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99ASMAN7

Johnson - direct

- 1 A. I am not sure I understand what you mean by economies.
2 Q. Are you able to compress any of the traffic to useless band
3 width?
4 A. We use the appropriate amount of band width depending on
5 the session or call and the policy applied. We do as part of
6 that identification algorithm, we do something called silence
7 suppression where we suppress empty periods from the
8 transmitting side and the purpose of silence suppression is
9 partly to make band width useage for efficient, but it's also
10 an offshoot of this algorithm used to detect speech and on the
11 far side we generate what is called comfort noise which is a
12 replacement for silent periods. This is something that has
13 become a big issue with mobile phones and the oftentimes sound
14 of the call has dropped but it's suppressing the silence. On
15 our system you hear comfort noise instead and that would make
16 the receiver feel like the session was still up when in fact it
17 is.
18 Q. Do you know what a nomadic VoIP company is?
19 A. Yes, sir.
20 Q. Would you define it?
21 A. Not giving a legal interpretation but just my
22 understanding, nomadic is when a device can be moved from one
23 location to another. It is generally connected via a broadband
24 or IP connection of some kind and that device when it moves
25 carries its PSTM phone number with it but it's moved from place

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99ASMAN7 Johnson - direct

1 to place geographically and therefore the phone number is no
2 longer anchored to a geographical location.

3 Q. Does TransComm have customers who are nomadic VoIP
4 companies?

5 A. Yes, sir.

6 MR. KLEIN: Objection, foundation. He doesn't work
7 for TransComm.

8 THE COURT: I know, but he has a good working
9 knowledge of it based on what he said before.

10 Overruled.

11 A. Yes, sir, we do.

12 Q. Can you approximate how many such companies are customers
13 of TransComm?

14 A. Yes.

15 MR. KLEIN: Objection.

16 THE COURT: That is a little -- well, that might need
17 more of a foundation.

18 Q. In preparing to represent the company at this hearing, did
19 you familiarize yourself with the answer to this question?

20 A. I did do some investigation prior to preparing this
21 testimony and I did in fact check to see how many of our
22 customers had been IP certified and how many of those customers
23 that were IP certified were also identified as nomadic.

24 THE COURT: What is the answer? What did you find?

25 THE WITNESS: I found 6.

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Johnson - direct

- 1 THE COURT: 6 out of --
2 THE WITNESS: 6 out of 35 that is certified IP.
3 Q. Are you saying that you have 35 different customers that
4 are "certified IP"?
5 A. That is correct.
6 Q. And 6 of those you know to be nomadic?
7 A. That is also correct.
8 Q. What other kind of company besides a nomadic VoIP company
9 could be certified for IP?
10 A. We did not include in that nomadic classification any
11 customers that might have some association with a geographical
12 location. For example, a company that does IP originated
13 traffic from a broadband connection provided by the same
14 company, so the customer has both a broadband service and a
15 voiceover IP service where the voiceover IP service is somehow
16 associated with the broadband, for example, it can be picked up
17 and moved to another location.
18 Q. Is Vonage one of the companies you identified?
19 A. Yes, it is.
20 Q. Did you understand a ranking of Vonage as a customer of
21 TransComm?
22 MR. KLEIN: Objection.
23 Q. Sending the most minutes, the next most minutes, the least
24 minutes?
25 A. I do not have a specific ranking, no.

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Johnson - direct

- 1 Q. Would you consider it from what you understand a major
2 customer?
3 A. Yes, sir, it is.
4 Q. Can you name any other nomadic VoIP customers that are
5 major customers?
6 A. No, that is the only one I know of for sure as a customer.
7 Q. You said there were 6?
8 A. Yes, sir.
9 Q. But you didn't find the names?
10 A. No, sir, I just asked how many.
11 Q. I see.
12 Did you ascertain a percentage of all minutes that
13 passed through your company that came to you in Internet
14 protocol as opposed to TDM?
15 A. No, sir.
16 Q. Does TransComm send traffic to Global Naps?
17 A. Yes, sir.
18 Q. Does TransComm regard itself as a customer of Global Naps?
19 A. Yes, sir.
20 Q. What is the purpose of TransComm in retaining Global Naps
21 and paying them?
22 A. Global Naps is one of several vendors that TransComm uses
23 to terminate sessions as calls to PSTM points if the session is
24 destined for a PSTM end point.
25 Q. Is there anything different about the traffic that comes to

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1 you and goes out generally and that comes to you and goes out
2 to Global Naps?

3 MR. KLEIN: Objection, vague.

4 THE COURT: Sustained.

5 Q. Is there a particular type of traffic that you send to
6 Global Naps more than some other type of traffic you send?

7 A. Global Naps is in our IP footprint which means that IP
8 certified origination is routed as well as standard
9 origination.

10 Q. Did you study how many minutes of traffic in a given month
11 you send Global Naps?

12 A. I don't have an exact count of that, no.

13 Q. Was TransComm involved in litigation in Dallas 2 years ago
14 with SBC concerning enhanced traffic and access charges?

15 MR. KLEIN: Objection, relevance, foundation.

16 MR. DAVIDOW: The case is about access charges.

17 THE COURT: Let me hear the last question reread.

18 (Question read)

19 THE COURT: Sustained.

20 Q. Does TransComm use a device called a Veraz converter?

21 A. We use equipment from Veraz. I don't believe any
22 particular device is referred to as a converter.

23 Q. Could you spell Veraz?

24 A. V-E-R-A-Z.

25 Q. And what does the Veraz equipment you use do?

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Johnson - direct

1 A. We have several components from Veraz. We have their media
2 gateways, which are the devices that convert from TDM to IP or
3 IP to TDM. And that is where we implement our proprietary
4 algorithms for audio enhancement. We also have their control
5 software for controlling those gateways and providing our
6 policy engine and policy routing and we have their software for
7 integrating into Internet and Internet protocol.

8 MR. DAVIDOW: I have no further questions.

9 THE COURT: Cross examination.

10 MR. KLEIN: May I have a moment, your Honor?

11 THE COURT: Yes.

12 (Pause)

13 CROSS EXAMINATION

14 BY MR. KLEIN:

15 Q. Mr. Johnson, would you describe cell phone service as being
16 nomadic?

17 A. No, sir.

18 Q. How would that differ from what you would term nomadic
19 VoIP?

20 A. Generally cell phone service is referred to as mobile
21 because the device is inherently mobile. It carries its own
22 power source and it doesn't require any wires to connect to
23 generate or terminate a telephone call. Nomadic services
24 generally do not have battery back-up or batteries that allow
25 you to move them around and they generally require wires.

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Exhibit J

9994MAN1

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

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999SMAN2

Masuret - direct

- 1 A. Yes. I graduated from Boston College High School and then
2 on to Boston College where I received a BS in business.
- 3 Q. And how long have you been in the telecommunications
4 business?
- 5 A. I have been in the telecom since 1990.
- 6 Q. Approximately 19 years?
- 7 A. Yes.
- 8 Q. Were they all with Global Naps?
- 9 A. No, they were not.
- 10 Q. Who else did you work for in telecom?
- 11 A. I worked for U.S. Telecenters for approximately 2 years. I
12 went on to work for Ray Calvin Datacom for approximately 3
13 years. I went on to U.S. Robotics for approximately 2 years,
14 and that should bring us up to May '98 where I went to work for
15 Global Naps.
- 16 Q. What are your duties at Global Naps?
- 17 A. I do the selling of the Global Nap products to the customer
18 base.
- 19 Q. What kind of telecommunications business is Global Naps in?
- 20 A. Currently I would say that we have two product lines. The
21 first would be an inbound application where we provide
22 telephone service or DID service, which stands for direct
23 inward dialing service, to Internet service providers seem to
24 be the company that is most attracted to that product. And the
25 second product line could be described as a forwarding of

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999SMAN2

Masuret - direct

- 1 voiceover IP traffic.
- 2 Q. Is the first business sometimes called dial-up Internet?
- 3 A. Yes, the application is dial-up Internet that would go over
- 4 that product, yes.
- 5 Q. And in regard to your voiceover Internet protocol business,
- 6 your VoIP business, who are your customers? Who pays you for
- 7 that forwarding?
- 8 A. The customer base I would refer to as enhanced service
- 9 providers.
- 10 Q. And how many customers do you have for your whole income as
- 11 a VoIP program?
- 12 A. It has ranged over the course of the past many years but
- 13 it's always been a relatively small number. So I would say
- 14 approximately 85 to 95 -- 85 to 90 percent of our business
- 15 comes from three of the enhanced service providers and there
- 16 are approximately two or three additional enhanced service
- 17 providers or VoIP carriers, pure VoIP carriers that account for
- 18 the rest.
- 19 Q. And let's start with your top three. Who are they?
- 20 A. The top three would be Transcom, COMM Partners --
- 21 Q. Would you spell that?
- 22 A. COMM Partners. I believe they are referred to in this case
- 23 as TPC, the letters TPC, and the last company of the big three
- 24 would be Point One, also known as UNE-Point.
- 25 Q. What is the central location of Transcom?

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999SMAN2

Masuret - direct

1 A. Texas.

2 Q. What is the central location of COMM Partners?

3 A. Las Vegas.

4 Q. What is the central location of Point One?

5 A. Texas.

6 Q. Could you describe the remainder of your customers, the
7 smaller ones, in terms of name and location?

8 A. Sure.

9 NTERA is no longer a customer now. They went bankrupt
10 I would like to approximate maybe 3 or 4 years ago. I can't be
11 exactly sure of that date. We also terminate traffic for Magic
12 Jack, also known as YMAX, and we also terminate traffic for
13 Broad Voice. There is one more account that has turned up a
14 couple of months ago and their name is Raywood Communications.

15 Q. Do you have any end-user customers, that is, businesses or
16 people who want to make telephone calls for purposes of your
17 VoIP business?

18 A. No, we do not have any direct end users if that is what you
19 are asking.

20 Q. Do you deliver any calls in which you were paid by minute
21 of use as you met with them?

22 A. We offer a flat rate product.

23 Q. And what do you mean by a flat rate product?

24 A. Similar to, say, a residential product that you may have at
25 home where you pay a flat monthly price and you can terminate

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999SMAN2

Masuret - direct

1 Q. Where are your major switching locations?
2 A. The major facilities that we bring traffic back into where
3 our switches are located, there are three main areas currently.
4 They are Quincy, Massachusetts, New York, New York, and Reston,
5 Virginia.

6 Q. When you speak of carrying voiceover Internet traffic, do
7 you carry, for want of a better word, more than one kind of
8 VoIP?

9 A. I would say that voiceover IP traffic can come in different
10 flavors, so I would describe the first type of voiceover IP as
11 a nomadic VoIP application where the user -- the most common
12 name that you might hear would be a Vonage application where
13 the user can get a phone number that is a virtual phone number.
14 It does not have to be affiliated with any specific location
15 where they would be making a phone call from. So that is why
16 we call it nomadic in nature.

17 The second type of voiceover IP application I would
18 refer to as more of a static application and a cable company
19 would probably fall into that sort of a category where the
20 physical location making the call is more stationery.

21 And the third type of voiceover IP would be more of
22 the conversion to IP takes place in the middle of a call and at
23 the same time because all the traffic that is associated with
24 Global Naps comes to us from an enhanced service provider, it's
25 that core or that middle piece, this IP, which is where the

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Exhibit K

99ASMANI
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

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99ASMAN1

1 enriched feature case, i.e., caller forwarding, at an economic
2 price. Our plans cover unlimited calling within the U.S.,
3 Canada, Puerto Rico, at a very reasonable price. We have, you
4 know, international plans that cover unlimited calls to Brazil,
5 to different countries at a very reasonable price. So it's
6 economics and features.

7 THE COURT: I understand the economics of it.
8 What are the features for the ones you just described?

9 THE WITNESS: Yes, sir. There are 23 basic features
10 that come with with our service and four advanced features that
11 can be purchased for additional money each month.

12 THE COURT: What is the difference technologically
13 between your service and a more traditional telephone service,
14 if any?

15 THE WITNESS: We are completely different. Our
16 service operates over the Internet only. We don't hook up to
17 any other source other than IP only. And we use set protocol,
18 which is the protocol that some VoIP providers use to initiate
19 the call, complete the call and carry the actual signal, not
20 signalling but the RTP to voice.

21 THE COURT: Tell me to how that actually works?

22 THE WITNESS: From a high level I will be able to.
23 Basically when a person hooks up their device to our service
24 they come and register with Broad Voice. That registration is
25 a user name and a password and that gives us -- and it's all

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1 dial tone, what happens next?

2 THE WITNESS: You get the dial tone, you pick up the
3 phone and you dial the number that you want to dial. So if, as
4 an example, I live in New Hampshire, I have a 212 number on my
5 laptop, I pick it up and I call Boston, 617-507-0000. The
6 signalling comes to Broad Voice, and that is the number and the
7 destination. Through our routing engine we actually route that
8 into whomever. If Global Naps provided us the number we would
9 route to Global Naps and from that point on I don't really know
10 what happens. But all I care about is that the number gets to
11 the final destination.

12 THE COURT: Alright.

13 THE WITNESS: Because my phone is going to ring if it
14 doesn't.

15 THE COURT: Okay.

16 That is all I need to know for now. Go ahead,
17 counsel.

18 MR. DAVIDOW: I am almost done, your Honor.

19 Q. Can you your users also be international?

20 A. Be international?

21 Q. Be foreigners?

22 A. In fact, one of our major population of customers are
23 Brazilians. Yes, they can be.

24 Q. But for a Brazilian to be your customer, the Brazilian
25 would have to be given a U.S. phone number, is that correct?

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99ASMAN1

1 servers like the ASTRICK server. It's an actual server
2 normally in a small business and/or your devices that are built
3 for 7, 8 lines at one time. Mainly they are in a small shop,
4 like a print shop. But 95 percent of the devices that register
5 on our network can be moved around, i.e., a laptop, and the
6 device is 2 inches by an inch and a half, weighs 11.6 ounces.
7 You can put it in your briefcase, take it to a hotel and hook
8 it up if you want to.

9 THE COURT: Anything else?

10 MR. DAVIDOW: No, nothing else.

11 THE COURT: Cross examination.

12 CROSS EXAMINATION

13 BY MR. KLEIN:

14 Q. Mr. Berry, good morning.

15 A. Good morning.

16 Q. Are your customers billed for the services your company
17 provides?

18 A. Yes.

19 Q. How much do your customers pay to provide voiceover
20 services?

21 A. It ranges -- we have 7 plans. It ranges from 5.95 all the
22 the way up to 34.95, and those are based on the different plans
23 they can select.

24 Q. As part of your service offering, do you terminate calls to
25 any end user in the United States?

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(212) 805-0300

99ASMAN1 Berry - cross

- 1 A. Broad Voice does not terminate calls.
2 Q. Do your customers anticipate that you will be able to send
3 the calls that they originate through Broad Voice through to
4 any end user in the United States?
5 A. Yes.
6 Q. Do all of those calls terminate on the Internet at work?
7 A. No.
8 Q. Some of those calls do end up on the public switch
9 telephone network?
10 A. The majority, yes.
11 Q. Do you know what percentage that would be?
12 A. Based on 2008, we terminated 528 million minutes across the
13 public network. We terminated probably close to 1.2 million
14 Internet; in other words, Broad Voice to Broad Voice customers
15 which are considered all net customers to us. So a very small
16 percentage is terminated point to point.
17 Q. Does your contract with Global Naps differentiate between
18 calls terminated on net versus off net?
19 A. No.
20 Q. You --
21 A. We only send off-net calls to Global Naps or any other
22 vendor. The Internet handles the point-to-point calls only.
23 Q. What other vendors that Broad Voice utilize that are of a
24 similar nature to Global Naps?
25 A. EXO. We use COMM Partners, Global Naps, COMM Partners. We

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99ASMAN1 Berry - cross

1 MR. DAVIDOW: Objection.
2 THE COURT: Sustained.
3 Q. Mr. Berry, you indicated that 95 percent of your adapters
4 can be moved by the customer, is that correct?
5 A. That is correct.
6 Q. What percentage of the customers with those adapters
7 actually move those from one physical location to another?
8 A. As I stated in the beginning, there is no geographical
9 boundaries. You cannot tell other than from an IP address as
10 to where these boundaries are. Just from my experience in
11 talking with customers and going through the process, you know,
12 one big feature is the ability to have a presence someplace
13 else.
14 Q. You don't know what percentage of your customers actually
15 move their physical location from one place to another in using
16 your service?
17 A. No.
18 Q. Does Broad Voice pay universal service fund charges?
19 MR. DAVIDOW: Objection, relevance.
20 THE COURT: Well, I don't know what they are so let's
21 start there.
22 Give me that name again.
23 MR. KLEIN: Universal service charges are paid to the
24 FCC and the commission by telephone providers.
25 THE COURT: Okay. I will allow it for the moment at
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(212) 805-0300

Exhibit L

99ASMAN1
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MANHATTAN TELECOMMUNICATIONS CORP.,

Plaintiff,

v.

08 CV 3829 (JSR)

GLOBAL NAPS, INC.,

Defendant.

-----x

New York, N.Y.
September 10, 2009
9:30 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

KLEIN LAW GROUP PLLC
Attorneys for Plaintiff
BY: ANDREW M. KLEIN
ALLEN C. ZORACKI
BRADLY G. MARKS

KILE GOEKJIAN REED McMANUS PLLC
Attorneys for Defendant
BY: JOEL DAVIDOW
MATTHEW P. THIELEMANN

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

116

99ASMAN1 Eccles - direct

1 you have to be in to want this equipment?

2 A. Yes, you are a telecommunications provider or a voiceover
3 IP provider would want this equipment.

4 Q. What would be the advantages to a voiceover IP provider of
5 having this equipment?

6 MR. KLEIN: Objection, foundation, vague.

7 THE COURT: Overruled.

8 You may answer it.

9 A. The equipment essentially what it does is it allows -- it
10 enables in a phone call coming in over the Internet to be
11 switched either to another carrier through IP or to another
12 carrier, as I said, through ATM or to another carrier through
13 TDM. So that is the main purpose of it, is to enable this
14 switching of packetized voice network to another type of
15 network, either another packet network or a TDM network. In
16 the process of doing that what it does is it corrects for a lot
17 of problems which can occur in a packetized network.

18 Q. What are the advantages of a packetized network?

19 A. A packetized network can give you -- it gives you a number
20 of advantages over a TDM network. In a TDM network you have
21 fixed connections between point A and point B. In a packetized
22 network you have diverse paths which go between, so if I need
23 to get from point A to point B I can take different paths to
24 get there and I don't have to buy these dedicated pipes between
25 carriers. It also has the advantage of compressing the voice

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(212) 805-0300

99ASMAN1 Eccles - direct

1 so you can change -- basically you can take if a call, if the
2 data for a call is a certain size, in a normal phone call it's
3 56, 56K bits per second, you can shrink that. You can take the
4 voice and compress it down than an actually useless band width
5 than you would in a TDM network.

6 Q. Does the actual sound or is the actual sound of the call
7 coming across this divide changed?

8 THE COURT: I am not sure what that question means.
9 You mean to the listener?

10 MR. DAVIDOW: Yes.

11 A. Every piece of equipment changes the data that it touches.
12 It either helps things to improve it or it can also introduce
13 errors into it. In this case essentially what it does is it
14 takes the packetized voice and brings it in. It corrects for
15 if packets are lost in transmission there is something called
16 packet lost concealment, which will make an effort to introduce
17 to fill that Void where the missing data was in. So
18 approximate the voice on each side and it's a very small piece
19 of data which is put in there but in that case the voice is
20 improved over what was delivered across the packetized network.
21 There is also, you know, accounting for different delays in a
22 packetized network which the switch will essentially collect
23 data and then play it out at a later time. It's a very small
24 delay but this is called network jitter and what happens is if
25 packets are delayed getting from point A to point B, the switch

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99A4MAN2

Eccles - direct

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money?

MR. KLEIN: Objection; leading.

THE COURT: Overruled. I think it's self-evident.

You may answer.

A. Yes. There is different reasons for compression and it does use less band width than uncompressed data. So there is a cost savings associated with that when you are trying to -- every bit that goes across from between you and your in this case Internet service provider is, you pay by the bit, and in a compressed voice path, you send less bits and less money.

THE COURT: To return for one/half second, again this is just off the top of my head, I am not making any rulings, on the point you have of course repeatedly raised, I am sure the Texas judge was reluctant and I am certainly reluctant to enter into areas that the FCC could and should have addressed and that were before the FCC, but if someone is owed some money and they are not paid their money and they sue and someone says we don't owe them the money, that's essentially what this lawsuit is about, they can't be asked to stay on hold forever awaiting an FCC ruling. There comes a point where under the most elementary principles of law, a court has to rule on their request.

I take your point about if a court in so ruling can avoid issues where there is an administrative agency that might have addressed the issue, that may be prudent, but it cannot be

SOUTHERN DISTRICT REPORTERS, P.C.

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Exhibit M

1 COMMONWEALTH OF PENNSYLVANIA

2 PUBLIC UTILITY COMMISSION

3 -----

In the Matter of: :

4

Palmerton Telephone Company v Global NAPs : Docket No.

5 South, Inc. et al. Billing Dispute. C-2009-2093336

Further Hearing. :

6 -----

7 Pages 792 through 1064 Hearing Room 4

Commonwealth Keystone Building

8

Forster Street

Harrisburg, Pennsylvania

9

Thursday, July 10, 2009

10

Met, pursuant to notice at 9:05 a.m.

11 BEFORE: WAYNE L. WEISMANDEL,

Administrative Law Judge

12

13 APPEARANCES:

14 JOEL DAVIDOW, ESQUIRE

Kile, Goekjian, reed & McManus, PLLC

15 Suite 570

2100 New Hampshire Avenue, NW

16 Washington, DC 20036

(For Global NAPs South, Inc.)

17

DANIEL DELANEY, ESQUIRE

18 17 North Second Street, 18th Floor

Harrisburg, Pennsylvania 17101-1507

19 (For Global NAPs)

20

21

22

23

24

25

Commonwealth Reporting Company, Inc.
1-800-334-1063

974

1 Dr. Fike conduct the study?

2 MR. DAVIDOW: Yes. And the -- and -- all
3 right.

4 BY MR. DAVIDOW:

5 Q. So, question for the moment is, did your
6 interview with Transcom lead you to any conclusion
7 about the correctness of their other representations
8 such as, in their letters, that they received their
9 traffic in internet protocol?

10 A. The interview was consistent with the
11 information contained in the letters and the general
12 information on the website.

13 Q. Was the information consistent with the
14 information regarding how regularly they enhance the
15 traffic?

122

16 A. How what, sir?

17 Q. Regularly.

18 A. How regularly? It appears that they enhance a

19 hundred percent of the traffic passes through their

20 switch. That's my conclusion.

21 Q. I see. And what did you conclude they do to

22 that traffic?

23 A. They enhance it had one or more ways that I

24 described earlier. In fact, they're very proud of

25 that.

Commonwealth Reporting Company, Inc.
1-800-334-1063

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1 Q. From what you know of it, do you consider the
2 ESP industry to be competitive?

3 A. Certainly, it is the future.

4 Q. In your judgment, would one ESP company have to
5 offer as much enhancements as another in order to
6 remain competitive?

7 A. Well, certainly, it's a highly competitive
8 industry. And, so, they have to offer some combination
9 of service and price features to attract business from

123

10 an intensely competitive market.

11 Q. Did you make any investigation concerning
12 whether the use of contracts or warranties was an
13 important feature of this industry?

14 A. I inquired in my interviews, and I believe
15 there was some statements also made here in these
16 hearings in that regard.

17 Q. And what conclusions did you come to based on
18 that entire process?

19 A. The companies trust one another. If they say
20 that they're traffic is of a certain nature, that is a
21 fact.

22 Q. With the recognition of consequences if it's
23 not a fact?

24 A. I don't know that consequences came up one way
25 or another.

Commonwealth Reporting Company, Inc.
1-800-334-1063

976

1 Q. All right. Did you also investigate
2 comparison between the letter done by PointOne, their
3 website, and what they told you in the interview for?

124

4 A. In general, yes.

5 Q. And what conclusions were reinforced by the
6 interview?

7 A. I concluded that PointOne traffic that is --
8 comes to GNAPs from PointOne is 100 percent enhanced.
9 That's consistent with the claims on their website,
10 which is essentially a marketing website.

11 Q. In light of your entire investigation,
12 everything from -- everything you learned since you
13 were hired through your attendance at this trial, could
14 you tell me whether you concur or do not concur with
15 Mr. Masuret's contention that at least 75 percent of
16 the traffic being supplied to Global NAPS is from
17 nomadic VOIP sources?

18 MR. KENNARD: I'm going to object. How
19 could he conclude? He's been qualified as a technology
20 expert, not as an expert on traffic generated by
21 Transcom.

22 This now goes beyond his expertise. He's
23 been allowed to talk on enhanced services, whether it
24 includes enhanced services.

25 Now we're asking about market share. If

Commonwealth Reporting Company, Inc.

1 he wants to ask, do they have some that also make it
2 enhanced, that's fine. I think that would be
3 consistent with Your Honor's rule.

4 But now the information being sought is
5 hearsay. And I don't see how it is necessary to -- the
6 information is not necessary to the formation as to the
7 conclusion. If they have some, provide an opinion.
8 But he does not. He should specify how much.

9 JUDGE WEISMANDEL: I think, Mr. Davidow,
10 before you could ask a question and I could allow the
11 witness to answer that you just asked, there needs to
12 be some more foundation laid as to -- I mean,
13 everything he testified so far about has been what he's
14 done in looking into enhanced service.

15 I presume that you are differentiating
16 between enhanced services and VOIP and nomadic VOIP,
17 are you not?

18 MR. DAVIDOW: Yeah. Did your
19 investigations include --

20 JUDGE WEISMANDEL: Is that a yes?

21 MR. DAVIDOW: -- importance of nomadic

22 VOIP to the business model of these firms?

23 THE WITNESS: Appears to be a substantial

24 portion of their customer base, yes.

25 MR. KENNARD: Your Honor, that's the

Commonwealth Reporting Company, Inc.
1-800-334-1063

Exhibit N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
 MANHATTAN TELECOMMUNICATIONS CORP., :
 a/b/a METROPOLITAN :
 TELECOMMUNICATIONS, a/k/a METTEL, :
 :
 Plaintiff, :
 :
 -v- :
 :
 GLOBAL NAPS, INC., :
 :
 Defendant. :
 -----X

08 Civ. 3629 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

By Order dated November 4, 2008, the Court denied the parties' respective motions for summary judgment. This Memorandum Order sets forth the reasons for that ruling and, in one minor respect, modifies it by granting summary judgment dismissing plaintiff's fourth cause of action for "account stated."

At heart, this case involves a simple billing dispute. Plaintiff Manhattan Telecommunications Corp. ("MetTel") says defendant Global Naps, Inc. ("Global") has not paid it for services rendered pursuant to federal and state tariffs, whereas defendant says it does not fall within the purview of these tariffs. The Court therefore declines defendant's invitation to refer this matter to the Federal Communications Commission ("FCC") under the doctrine of primary jurisdiction. See FTC v. Verity Int'l, Ltd., 443 F.3d 48, 60 (2d Cir. 2006); Tassy v. Brunswick Hosp. Ctr., Inc., 296 F.3d 65, 72 (2d Cir. 2002). Although the issues in this case might conceivably be affected by the FCC's resolution of broader issues of telecom regulation, the FCC appears in no hurry to resolve those broader

questions and the payment issue in this case is sufficiently narrow and self-contained as to be capable of prompt resolution in this Court. See Verizon v. Global Naps, Inc., 463 F. Supp. 2d 330, 342 (E.D.N.Y. 2007).

Turning to the individual causes of action, the Court has determined that there remain triable issues of fact with respect to the first three counts under which plaintiff seeks payment for breach of the federal tariffs (Count One), breach of the state tariffs (Count Two), and unjust enrichment (Count Three).

Two disputed factual issues appear particularly significant. First, there remain material factual disputes regarding the nature of Global's traffic, particularly with respect to whether it originates in voice over internet protocol ("VoIP"). Compare, e.g., Affidavit of David Aronow in Support of Summary Judgment, sworn to August 6, 2008, submitted with Plaintiff's Motion for Summary Judgment ¶ 5, with Declaration of James R. J. Scheltema, signed August 6, 2008, submitted with Defendant's Memorandum in Support of its Motion for Summary Judgment ("Scheltema Decl.") ¶¶ 10-11. Second, there remain material factual disputes over whether Global is "interconnected" with MetTel, which would, in turn, determine whether the doctrine of constructive ordering is applicable. Compare, e.g., Ex. A to Plaintiff's Reply Memorandum (Global Naps-Verizon interconnection agreement), with Scheltema Decl. ¶ 5.

However, as to the fourth count, for "accounts stated," the Court now recognizes that it must grant summary judgment in favor of

the defendant. Under New York law, a claim for "account stated" will lie "if a party receiving a statement of account keeps it without objecting to it within a reasonable time." LeBeouf, Lamb, Greene & MacRae, LLP v. Worsham, 185 F.3d 61, 64 (2d Cir. 1999) (internal quotations and citation omitted). Here, however, Global has introduced undisputed evidence of its having made multiple timely objections to MetTel's invoices. See, e.g., Ex. 12 to Defendant Global Naps' Reply Memorandum in Support of Its Motion for Summary Judgment (copies of objection letters from Global to MetTel). Given these objections, no claim for account stated can survive. See Reade v. Cardinal Health, Inc., 12 A.D.3d 224, 225 (1st Dep't 2004).¹

Therefore, the Order of this Court denying the parties' respective motions for summary judgment is hereby reconfirmed except that Count Four is hereby dismissed with prejudice, and the Clerk of the Court is directed to close document numbers 12 and 31 in the docket of this case. Although the trial of this case was previously scheduled for March 2, 2008, in the last few days the Court has been obliged unexpectedly to reschedule a criminal case for that date, and, under federal law, criminal cases must ordinarily take precedence over civil cases because of the Speedy Trial Act. Accordingly, counsel for the parties are hereby directed to jointly telephone Chambers by no later than February 16, 2009 to schedule a new trial date.

SO ORDERED.

¹The Fifth Count, which seeks to preserve a potential cause of action against unnamed parties, is at this point moot.



JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
February 13, 2009

Exhibit O

Summary of Most Recent Bills from the TDS Companies

Wilton

Interstate = \$1,427.54

Intrastate = \$2,752.02

Merrimack

Interstate = \$4,325.08

Intrastate = \$2,049.71

Kearsage

Interstate = \$3,549.94

Intrastate = \$2,833.94

Hollis

Interstate = \$2,829.65

Intrastate = \$1,814.85

Total Interstate = \$12,132.21 (56.21% of total owed)

Total Intrastate = \$9,450.52 (43.79% of total owed)

Exhibit P

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 08-028

HOLLIS TELEPHONE, INC., KEARSAGE TELEPHONE CO.,
MERRIMACK COUNTY TELEPHONE CO., AND WILTON TELEPHONE CO.

AFFIDAVIT OF MATTHEW THIELEMANN

I, Matthew Thielemann, if called to provide sworn testimony, could and would testify competently as follows:

1. I reside at 590 15th St. S., Apt. 126, Arlington, VA 22202, and am employed as an associate at Kile, Goekjian, Reed & McManus PLLC where I have acted as legal counsel for Global NAPs in a number of proceedings. I am also a member in good standing of the Virginia Bar.
2. I was admitted *pro hac vice* as counsel for Global NAPs, Inc. in *Manhattan Telecommunications Corp., d/b/a Metropolitan Telecommunications, a/k/a MetTel v. Global NAPs, Inc.*, 08-CV-3829 (S.D.N.Y.) (*Met Tel*), assisted in the administrative proceedings in *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc., and other affiliates*, C-2009-2093336 (*Palmerton*), and selected the various transcript excerpts for use as exhibits in Global's Motion to Stay Disconnection and for Reconsideration in this dispute so as to remove only extraneous materials.
3. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit B is a true and correct copy of a transcript excerpt containing the testimony of Stanley Redden in *Met Tel*.

4. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit C is a true and correct copy of a transcript excerpt containing the testimony of Keith Herron in *Met Tel*.
5. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit D is a true and correct copy of a transcript excerpt containing the testimony of Jeffrey Noack in *Met Tel*.
6. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit F is a true and correct copy of a transcript excerpt containing the testimony of William E. Munsell in *Met Tel*.
7. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit H is a true and correct copy of a transcript excerpt containing the testimony of Edward Mulligan in *Met Tel*.
8. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit I is a true and correct copy of a transcript excerpt containing the testimony of Robert Edward Lee Johnson in *Met Tel*.
9. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit J is a true and correct copy of a transcript excerpt containing the testimony of Bradford Masuret in *Met Tel*.
10. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit K is a true and correct copy of a transcript excerpt containing the testimony of Leslie Berry in *Met Tel*.

11. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit L is a true and correct copy of a transcript excerpt containing the testimony of Gregory Eccles in *Met Tel.*

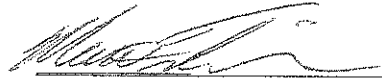
12. The document attached to the Motion to Stay Disconnection and for Reconsideration as Exhibit M is a true and correct copy of a transcript excerpt containing the testimony of John Fike in *Palmerton.*

I declare to the above upon penalty of perjury under the laws of the State of New Hampshire that the foregoing is true and correct.

Executed this 1st day of December, 2009 at Washington, D.C.



Irma B. Gamboa
Notary Public, District of Columbia
My Commission Expires 10/14/2011



Matthew Thielemann