

FILE

28

RECEIVED-DOCKETING DIV

2010 FEB -3 AM 11: 26

February 3, 2010

PUCO

Jay Agranoff, Esq.
Attorney Examiner
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

RE: In the Matter of Complaint of AT&T Ohio v. Global NAPs Ohio, Inc.
PUCO Case No. 08-690-TP-CSS

Dear Examiner Agranoff:

Please find attached, as supplemental authority, a Proposed Order from the Maryland Public Service Commission filed *In the Matter of the Investigation, Examination and Resolution of Payment Obligation of Global NAPs – Maryland, Inc. for Intrastate Access Charges Assessed by Armstrong Telephone Company Maryland*, Case No. 9177; December 30, 2009 ("Maryland Proposed Order").¹ The Maryland Proposed Order was issued after the Initial and Reply Briefs were due in the above-referenced proceeding; therefore Global NAPs was unable to cite the Order in its Post Hearing Briefs.² However, Global NAPs believes the findings in the Maryland Proposed Order are substantially similar to the issues raised in the Public Utilities Commission of Ohio Case No. 08-690-TP-CSS and should be brought to the Commission's attention.

Specifically, Global NAPs notes that the Maryland Proposed Order found that, at the very least, a significant percentage of the traffic Global NAPs delivers is VoIP and that it is possible that all traffic Global NAPs delivers is VoIP. Maryland Proposed Order at 20. In addition, Global NAPs notes the determination that leveling intrastate access charges on Global NAPs traffic *clearly violates the federal prohibitions on subjecting nomadic VoIP to access charges*. Maryland Proposed Order at 22. Finally, the Proposed Order concludes that, on the basis of the FCC's *Phone-to-Phone IP Telephony Order*, Global NAPs is an intermediate carrier not subject to local access charges. Maryland Proposed Order at 24.

¹ The Maryland Proposed Order was drafted by the Attorney Examiner in that proceeding. The Maryland Proposed Order is still subject to final decision of the Maryland Public Service Commission ("PSC"). Global NAPs will file the final Order if and when it is finalized by the Maryland PSC. The Attorney Examiner's proposed decision is filed on the Maryland Public Service Commission website in Case No. 9177, Document 76 at: http://webapp.psc.state.md.us/Intranet/Casenum/CaseAction_New.cfm?CaseNumber=9177.

² The Maryland Proposed Order was published on the Maryland Commission website only this week.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.

Technician SM Date Processed FEB 03 2010

Global NAPs respectfully submits the attached supplemental authority for the Commission's consideration.

Very truly yours,

Harry Davidow *msu*

Harry Davidow, Esq.
685 West End Avenue
Apartment 4C
New York, NY 10025
hmdavidow@yahoo.com
(212) 865-7488

cc: All Parties of Record

ND: 4823-5587-8917, v. 2

IN THE MATTER OF THE INVESTIGATION,
EXAMINATION AND RESOLUTION OF PAY-
MENT OBLIGATION OF GLOBAL NAPS -
MARYLAND, INC. FOR INTRASTATE ACCESS
CHARGES ASSESSED BY ARMSTRONG
TELEPHONE COMPANY - MARYLAND.

On December 23, 2008, Armstrong Telephone Company - Maryland, Inc. ("Armstrong") filed with this Commission its Request for Investigation, Examination and Resolution of Payment Obligation of Global NAPs - Maryland, Inc. for Intrastate Access Charges Assessed by Armstrong Telephone Company - Maryland. ("Request for Investigation"). Armstrong requested that the Commission find and conclude that:

- (1) Armstrong's rates, terms and conditions contained in their intrastate access tariffs are to be applied to the GNAPs' traffic that the Company has identified as intrastate; (2) GNAPs has unreasonably refused to pay Armstrong's properly assessed intrastate access charges; (3) GNAPs must comply with the tariffs, including, without limitation, the payment and interest sections of such tariffs, for that traffic that Armstrong had identified as intrastate; and (4) GNAPs must pay immediately the intrastate charges that Armstrong has billed to GNAPs including applicable late payment penalties. Further, to the extent that state law provides, in the event that such payments are not made within 30 days of the Commission's findings and conclusions as are being requested, the Commission allow Armstrong to block the traffic identified as GNAPs' traffic either by Armstrong or through the direction and assistance of Verizon Maryland, Inc. (to which Armstrong connects as the tandem operator).

On the same day the Commission requested that Global NAPs - Maryland, Inc. ("Global" or "GNAPs") respond to Armstrong's Request for Investigation. Global did so on January 20, 2009. On February 11, 2009, the Commission docketed Case No. 9177 and delegated it to the Hearing Examiner Division. A pre-hearing conference was held on March 17, 2009, at which a procedural schedule was established, including a schedule for filing of memoranda on the threshold issue of Commission jurisdiction over this dispute.

Accordingly, on March 31, 2009, at the Hearing Examiner's request, Armstrong filed a *Memorandum of Law* on

Jurisdiction. On April 1, 2009, Global NAPs filed a *Motion to Dismiss [Armstrong's] Complaint or, in the Alternative, Stay Proceedings ("Motion to Dismiss Complaint")*. Armstrong filed a letter in response to the *Motion to Dismiss Complaint* on April 10, 2009. On May 1, 2009 this Hearing Examiner issued a Jurisdictional Ruling, deciding that this Commission had jurisdiction to hear Armstrong's complaint. While GNAPs contended that its traffic was not subject to access charges, but instead the Federal Communications Commission ("FCC") had jurisdiction, Armstrong maintained that GNAPs' traffic was essentially local, and clearly under Commission jurisdiction. This Hearing Examiner found that a case intended to decide those issues had been pending before the Federal Communications Commission ("FCC") since 2001 and that it was not clear that the FCC had precluded state jurisdiction over the issues in Case No. 9177.

On May 19, 2009 the Commission's Staff filed the Direct Testimony of Juan Carlos Alvarado, a Regulatory Economist in the Commission's Telecommunications, Gas and Water Division. Armstrong filed the public as well as the confidential Direct Testimony of Thomas S. Wilson, its Director of Telecommunications Traffic Management; and the Direct Testimony of James D. Mitchell, President of Armstrong Telephone Company. On May 20, 2009 James R.J. Scheltema, an attorney for GNAPs, filed an affidavit pertaining to the type of traffic Global terminates to Armstrong. Although Mr. Scheltema appeared in this case as an attorney for

Global, other counsel for Global also entered their appearances, and thus Mr. Scheltema was permitted to testify.

On May 19, 2009 the Commission's Office of Staff Counsel filed a *Motion to Compel Discovery*, directed at Global. Armstrong Telephone Company filed a similar *Motion to Compel Discovery* on May 18, 2009. Global filed the proprietary and non-proprietary versions of its replies to Armstrong's and Staff's motions on May 29, 2009.

On May 20, 2009 Armstrong filed a Motion for Interim Emergency Order, requesting that the Hearing Examiner require Global to procure a surety bond in Armstrong's favor for the amount at issue in this case. On June 1, 2009 Global filed a *Reply Memorandum in Opposition to Plaintiff's [Armstrong's] Emergency Petition to Compel Posting of a Bond*. On July 31, 2009 this Hearing Examiner issued an Interlocutory Ruling granting Armstrong's Request for an interim emergency order that Global obtain a surety bond for the amount at issue in this case. On August 27, 2009, Global asked for an extension of time to obtain the required surety bond. On August 28, 2009 this Hearing Examiner temporarily suspended the 30-day deadline for Global to obtain the bond. Global and Armstrong agreed that Global would stop sending traffic to Armstrong as of May 31, 2009.

Hearings in this matter were held on June 26, 2009, July 7 and 8, 2009. The parties filed initial briefs on August 10, 2009, and reply briefs on September 14, 2009.

In this proceeding Armstrong bears the burden of proving the assertions in its Request for Investigation, including its central contention that Global's traffic is subject to Armstrong's intrastate access tariffs. Global bears the burden of its affirmative defenses, including its assertions that it carries enhanced Voice over Internet Protocol ("VoIP") traffic and that it is an "intermediate" carrier.

II. POSITIONS OF THE PARTIES

A. Armstrong Telephone - Maryland

Armstrong Telephone "is an independent rural incumbent local exchange carrier telephone company. Armstrong relies heavily on revenue generated by the provision of intrastate exchange access charges." Armstrong In. Br. at 2. In short, Armstrong is an incumbent local exchange carrier, or ILEC. Armstrong asserts that "GNAPs has refused to pay the lawfully assessed Armstrong intrastate access charges for the terminating functions that GNAPs utilizes to deliver its traffic." Armstrong seeks a total of \$273,982.91 from GNAPs, as a result of carrier access billings ending May 31, 2009.

Armstrong further claims that Global's calls come to Armstrong through Verizon's tandem switch, which is connected through Feature Group D exchange access to Armstrong's network, through which the call is passed to Armstrong customers in Rising

Sun, Maryland. Armstrong arrived at the \$273,982.81 amount by applying the rate elements of its intrastate access tariff to traffic sent by Global through Verizon to Armstrong.

Armstrong receives from Verizon Exchange Message Interface ("EMI") records which identify Global as the carrier delivering calls to Armstrong via Verizon's tandem switch. *Id.* at 5-6. Under this system, which Armstrong claims is appropriate and consistent with FCC decisions, a call originating in Maryland, routed to other states and ending in Maryland is treated by Armstrong as an intrastate call, subject to intrastate access charges. Thus Armstrong argues that although a call may traverse several states, Armstrong should be able to bill the call forwarder [here Global] under the intrastate access charge regime. July 7, 2009 Tr. at 200. Armstrong has relied on number identification to determine intrastate charges owed by GNAPS because GNAPS has not filed a Percentage of Interstate Use ("PIU") with Armstrong, as Armstrong claims other wireline carriers terminating calls to Armstrong have done. Armstrong In. Br. at 6-8.

Armstrong also challenges GNAPS' various "affirmative defenses," including GNAPS' argument that it carries a substantial amount of VoIP traffic that is exempt from standard intrastate access charges. Also, GNAPS claims to be an "intermediate carrier" that federal law exempts from state regulation, and thus is exempt from access charges payable to Armstrong. These arguments, includ-

ing Armstrong's objections to GNAPS' arguments, are further discussed below.

B. GNAPS' Position

GNAPS asserts that as a carrier of enhanced VoIP traffic and as an intermediate carrier that the calls it terminates on Armstrong's network should not be subject to intrastate access charges. First, GNAPS maintains that much of the traffic it terminates on Armstrong's network is VoIP traffic, and as such is subject to Federal rather than State regulation. GNAPS therefore relies on the case of *Vonage Holdings Corp.*¹ Therein "the FCC ruled that "VoIP traffic ... can come from a local number transferred to an out of state person or from any place in the world to which that person carries their adaptor or router device." GNAPS In. Br. at 6. GNAPS claims that as a result of this ruling the FCC has deemed VoIP calls to be jurisdictionally interstate, preventing states from imposing their own tariffed intrastate rates on those calls, as Armstrong seeks to do here.

GNAPS further contends that the New York Public Service Commission ("NY PSC") has also ruled that nomadic² VoIP traffic is interstate, and therefore not subject to intrastate access charges.

¹ *Petition for Declaratory Ruling concerning an Order of the Milwaukee Public Utilities Commission*, WC Docket No. 03-211, 19 F.C.C.R. 22404 (2004); *aff'd*, *Mn. Public Utilities Commission*, 483 F.3d 570 (8th Cir. 2007).

² VoIP traffic may be either nomadic or fixed. If nomadic, it may originate from any location. Thus a call originating from a (410) number may actually come from California.

In NY PSC Case No. 07-C -0059 ("TVC Albany")³ a small ILEC (Tech Valley Communication) sued to recover from GNAPs the access charges that GNAPs supposedly incurred by terminating its traffic on Tech Valley's system. The NY PSC determined that GNAPs was transporting VoIP traffic to Tech Valley, and that VoIP traffic was jurisdictionally interstate and thus exempt from Tech Valley's tariffs.

GNAPs claims that the present case in Maryland and the TVC Albany case are on all fours, and the decision in Maryland must be consistent with New York and other decisions that have found that GNAPs' traffic was not subject to state access charges. GNAPs claims that it receives VoIP traffic in Maryland as it does in other states, and that "[n]o special processing is made for any state, i.e., the way in which New York-bound traffic is received or forwarded does not vary from the way Maryland traffic is handled and forwarded." Noack T. at 14. As GNAPs claims that its Maryland and New York traffic have the same characteristics, it argues that the result of this case should be the same as in New York.

GNAPs also responded to an Armstrong study, based on three calls apparently terminated by GNAPs on Armstrong's network, in which Armstrong claims one call was an ordinary time division multiplexing ("TDM") call rather than an Internet or enhanced call. Armstrong argues, based on that call, that a significant portion of GNAPs' traffic to Armstrong consisted of ordinary intrastate calls,

³ *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Interstate Access Charges*, Order dated March 30, 2008.

subject to access charges. GNAPs challenges Armstrong's contention and maintains that it carries primarily VoIP traffic that is not subject to intrastate access charges. To support its claim, GNAPs submitted to the record letters from three of its customers, Transcom, CommPartners, and PointOne, who pass traffic through Global and Verizon to Armstrong. The customers state as follows as to the nature of their traffic:

Transcom: Transcom is an enhanced service provider serving the VoIP communications industry with call enhancement and termination. On four separate occasions, courts have ruled that Transcom's system qualifies under the definitions of "enhanced service" and "information service" ... and therefore Transcom's system is not a "telecommunications service" and Transcom is not obligated to pay access charges.

Counsel for Transcom further states that the vast majority of calls passing through Transcom's system do not originate on the public switched telephone network. Counsel further states that a "significant portion" of calls passing through Transcom's system originate from "nomadic" VoIP services and could be "from anywhere in the world."

CommPartners: In states where CommPartners have not yet built network, or needs additional termination capacity, CommPartners acts as an intermediate carrier sending traffic to Global NAPs and other CLECs for termination. CommPartners' contracts with its carrier customers specify that only true IP-originated traffic be sent to CommPartners for termination. CommPartners' largest wholesale termination customer is Vonage. CommPartners has reason to believe that its other wholesale carrier customers offer service similar to Vonage, i.e., enhanced

service provider traffic generated by end-users without fixed origination points.

PointOne: PointOne is an enhanced service provider serving the VoIP Communications Industry. [CommPartner's] operates a significant North American IP network that is 100% VoIP. Point One purchases communications services from GNAPs in all of their operation areas to process these enhanced voice calls.

A portion of [PointOne's] traffic is Nomadic VoIP traffic.

The letters are signed by company officers and attorneys for the various companies.

Global also relies on the testimony of its witness Jeffrey Noack, its Director of Network Operations. Witness Noack testified that none of the traffic Global delivers to Armstrong is traditional long distance traffic. Instead, all of the traffic from GNAPs that Armstrong characterizes as local "originates on broadband facilities and is ... VoIP traffic." GNAPs In. Br. at 14. Based on the statements by Transcom, CommPartners and PointOne, plus the testimony of Mr. Noack, Global claims that the factual record here, even more than the record in New York, requires a finding that Global primarily delivers nomadic VoIP traffic in Maryland. As it asserts that such traffic is not subject to access charges, GNAPs concludes that Armstrong's attempt to recover access charges for GNAPs' traffic should be denied.

Global also argues that it is an intermediate carrier rather than a traditional long distance company. In support, GNAPs

cites FCC language interpreting 47 C.F.R. § 69.5(b) and stating that access charges should not be assessed against "intermediate LECs⁴ that may hand off traffic to terminating LECs." GNAPs cites the FCC's language of the so-called "IP in the middle" case.⁵ Further, GNAPs notes that the witness for the Commission Staff in this case stated that, based on the parties' testimony, he believed GNAPs was an intermediate carrier. Tr. at 561; GNAPs In. Br. at 21.

GNAPs puts special emphasis on precedent set in two cases: *TVC Albany* and *Palmerton Telephone Company v. Global NAPs South, Etc.*, C-2009-2093336 (September 14, 2009) ("*Palmerton*").⁶ In *TVC Albany*, the NY PSC relied, in part, on two letters from GNAPs' customers and on GNAPs' witness testimony. The NY PSC found that Global's traffic was primarily nomadic VoIP, and therefore, based on the *Vonage Holdings Corp.* ruling prohibiting "separate local regulation" of mixed VoIP traffic, was not subject to intrastate access charges. Global maintains that it presented more evidence in the current Maryland case than was presented in New York, and therefore a decision in its favor should be even more certain here.

Global relies even more strongly on *Palmerton* than on the *TVC Albany* case. In *Palmerton*, the Pennsylvania Administrative

⁴ Local exchange carriers.

⁵ In the Matter of the Petition for Declaratory Ruling that AT&T's Phone to Phone IP telephone Services are Exempt from Access Charges, ("AT&T Order") FCC Docket No. 02-361, FCC 04-97 (April 21, 2004).

⁶ *Palmerton* is an Initial Decision. The Initial Decision of the Administrative Law Judge is not binding on the Pennsylvania Commission. The Commission will adopt or modify the Initial Decision at an upcoming Public Meeting.

Law Judge found, among many other things, that Global NAPs was a CLEC, that the FCC had determined that nomadic VoIP was not subject to state regulation if interstate and intrastate calls could not be separated, and that the FCC has "repeatedly refused to classify interconnected VoIP service as either telecommunications service or information service." *Palmerton Initial Decision* at 12-15. *Palmerton* rejected the complainant's, *Palmerton Telephone Company*, assertion that its one percent sample of calls received from GNAPs showed that the calls were local, and therefore subject to access charges. *Palmerton* therefore found that the telephone company had not carried its burden of proof as to its claim that it was owed intrastate access charges by Global NAPs. The Pennsylvania Administrative Law Judge further found that Global "had produced sufficient credible evidence to bear its burden of proof that calls it forwarded to *Palmerton* were enhanced by Global NAPs' customers, and consequently [were] information services not telecommunication services." *Palmerton Initial Decision* at 50. Based on those and other findings, *Palmerton* found that the Pennsylvania Commission did not have jurisdiction over calls Global forwarded to *Palmerton Telephone Company*. *Id.*

Global argues that the decisions in New York and Pennsylvania require a similar result in Maryland: dismissal of Armstrong's Request and a determination that Global is not required to pay intrastate access charges to Armstrong. Global reasons that

it provides the same service to Armstrong as it provides to Palmerton in Pennsylvania. Global argues that:

Decisions in New York, Pennsylvania, and elsewhere, recognize that once traffic is transformed in character by protocol shift, removal of background noise, etc., it becomes an information service not subject to access charges.

Global Rep. Br. at 11.

Global states that to move a call from a VoIP or cable company to Armstrong's TDM system for completion requires a "net protocol conversion," and telecommunications traffic that undergoes protocol conversions is enhanced traffic. As enhanced traffic, it is an information service, according to Global, and not subject to intrastate access charges, either in Pennsylvania or Maryland.

Global also notes *Palmerton's* emphasis on the inadequacy of Palmerton Telephone Company's study of one percent of the nearly 200,000 calls at issue. The *Palmerton* Initial Decision found that Palmerton's one percent sample "was not proven to be statistically valid," did not differentiate between regular telecommunication services and information services, and could not be considered credible evidence to support Palmerton's claim that all GNAPS calls to Palmerton are subject to intrastate access charges. *Palmerton* at 31. Global points out that, in the present case, Armstrong offered only three calls as a sample. Global finds Armstrong's sample too small to be useful and therefore essentially irrelevant to this case.

GNAPs lastly points out that Armstrong has no precise data to show that it has charged GNAPs only for intrastate calls "because any such data must come from a customer of one of Global's customers." Tr. at 299, GNAPs In. Br. at 22. Given that Armstrong did not have proof of what proportion of GNAPs' Armstrong-bound traffic was interstate and what was intrastate, GNAPs claims that it was unfair to place the burden of proving those percentages on it, because GNAPs "has no contract with Armstrong and no immediate access to call origination data." *Id.* at 22.

Global does not maintain that Armstrong should never recover any of its charges to Global. Global instead posits that payment could occur at FCC-mandated rates, or market-based (as opposed to tariffed rates), or at interstate (as opposed to intrastate) rates.

C. Armstrong's Response to GNAPs' Case

Armstrong challenges each of GNAPs' assertions. Armstrong seeks to undermine several of GNAPs' arguments that GNAPs carries largely VoIP traffic, that GNAPs transports "enhanced" traffic, and that the New York TVC Albany and Palmerton decisions apply to the issues in the present Maryland case. Armstrong's fundamental claim is that GNAPs' evidence is simply not substantial enough to prove those assertions. Armstrong contends that the letters from Transcom, CommPartners, and PointOne upon which GNAPs relies are hearsay, and do not prove that GNAPs carries VoIP

traffic. Armstrong instead argues that this case is not about VoIP at all, because GNAPS is not itself a VoIP carrier, nor has GNAPS proven that it primarily carries VoIP traffic for other providers. Therefore, Armstrong argues that the *Vonage Holdings Corp.* decision, prohibiting local regulation of interstate VoIP calls, does not apply to GNAPS' situation at all. Further, even if GNAPS does transport a significant amount of VoIP traffic, Armstrong argues that language in one federal court case suggests the "FCC [may be] deferring to the existing intercarrier agreements as controlling ... billing issues." Armstrong Rep. Br. at 15, citing *Verizon New York Inc. v. Global NAPS, Inc.*, 463 F. Supp. 2d 330, 342 (E.D.N.Y. 2006).

Armstrong denies GNAPS' assertion that GNAPS is exempt from intrastate access charges because it is an intermediate carrier. To support its position, Armstrong points to footnote 92 by the FCC in the *AT&T Order* "regarding the application of access charges to Interexchange carriers under 47 C.F.R § 69.5(b) [stating] that charges should not be assessed to "intermediary carriers." Arm. Rep. Br. at 30. Armstrong contends that GNAPS does not fall into the category of "intermediary carrier" or "intermediate carrier" and thus is not exempted from access charges under footnote 92 of the *AT&T Order*. Armstrong specifically attacks GNAPS' witness Scheltema's characterization of GNAPS as "an intermediate or wholesale carrier ... neither the originating carrier ... nor the terminating carrier. [GNAPS is] a carrier in between."

Tr. at 448-49. Armstrong counters that GNAPs' witness Shaw testified that "GNAPs provides terminating services to the Public Switched Telephone Network." Thus, Armstrong argues, GNAPs must be a terminating and not an intermediate carrier. Armstrong quotes from the *AT&T Order* to show that GNAPs and carriers like GNAPs are subject to access charges:

When a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.

Armstrong In. Br. at 32, quoting *AT&T Order* at ¶ 19.

Armstrong contends that there are a number of other decisions at the federal level that permit Armstrong to charge GNAPs intrastate access charges. For example, Armstrong states that "the FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional 'economic regulation.'" Armstrong In. Br. at 14, citing *Embarq Broadband Forbearance Order*, 22 FCC Rcd 19478, 19481 ¶ 5 (2007). Armstrong also looks to a 2004 Georgia Public Service Commission decision involving GNAPs and several small local telephone companies. The

Georgia Commission found against GNAPs, noting that GNAPs had not shown that its traffic was ESP, and record evidence existed that its traffic was in fact traditional voice traffic. In finding that GNAPs was liable for access charges for intrastate calls terminated on the public switched telephone network, the Georgia Commission relied on several federal cases that it claimed would permit such charging (even if the traffic were ESP).⁷

Therefore, Armstrong contends the *TVC Albany* case is an outlier, going against the majority of precedents. Further, Armstrong suggested that Global had not proven that the traffic it delivered to Armstrong in Maryland was the same type of traffic it delivered to TVC Albany or to Palmerton in Pennsylvania.

D. Staff's Position

Staff witness Alvarado testified that GNAPs' data responses "had made a compelling case in favor of [GNAPs'] traffic being exclusively VoIP traffic." Alvarado Reb. T. at 3. Staff also admits that, based on letters from GNAPs' customers "it can be logically construed that in New York at least a portion of the traffic is nomadic VoIP." Staff also finds, however, that letters

⁷ 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 194, as Amended to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order ("*Time Warner Decision*") ; *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-To Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-36, FCC 04-97, released April 21, 2004 ("*IP in the Middle*" decision); *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, released March 10, 2004 ("*IP-Enabled Services*").

from Transcom, CommPartners, and PointOne "do not present any conclusive information to show that the [GNAPs] traffic in Maryland is nomadic." *Id.* Therefore, based on its review of the evidence, Staff concludes that it cannot "determine whether the proportion of nomadic traffic is significant or close to zero." Further, because each of the calls in question carries an NXX code (such as 410) Staff agrees with Armstrong that the traffic is fixed and subject to access charges, as Armstrong claims.

Staff also argues that GNAPs is not an intermediate carrier. Staff claims GNAPs cannot be an intermediate carrier because GNAPs actually terminates calls on Armstrong's network. While Staff agrees that GNAPs does not originate the traffic it carries, Staff maintains that GNAPs has not refuted Armstrong's claim that GNAPs is a terminating carrier. Staff thus concludes that GNAPs does not meet the FCC's definition of "intermediate carrier" as spelled out in its *IP in the Middle* decision.

Staff therefore concludes that GNAPs has not met its burden of proving its affirmative defenses that its traffic is nomadic VoIP and it is an intermediate carrier. Therefore Staff maintains that GNAPs owes Armstrong for calls transferred to Armstrong's network. Should GNAPs not reimburse Armstrong, Staff urges that GNAPs be directed not to transmit traffic to Armstrong until a final order resolving this proceeding is issued.

III. DISCUSSION AND FINDINGS

A. The VoIP Issue

The question whether or not to impose access charges on ESP or VoIP traffic has been before the FCC since 2001. Central to the several state cases that have addressed much the same issues presented here has been the degree to which Global's traffic is VoIP, and whether it is intrastate or interstate.⁸ While the Federal law is somewhat unsettled, it is likely that, if Global's traffic is largely VoIP, it is exempt from intrastate access charges at this time.

⁸ The state decisions have been mixed. In an Order Denying Preliminary Injunction in Docket No. 7493, the *Amended Joint Petition of Ludlow Telephone Company, et al.* (December 7, 2009), the Vermont Hearing Officer cited several cases with differing outcomes (some of which have also been discussed here), as follows:

See, e.g., *Hollis Telephone, Inc., et al.*, DT 08-028, Order dated November 10, 2009 (New Hampshire) (granting permission to disconnect service to GNAPs due to non-payment for access to local networks of incumbent and competitive carriers); *Palmerton Tel. Co. v. Global NAPs South, Inc., et al.*, Case C-2009-2093336, Order dated August 7, 2009 (Pennsylvania) (claim of wrongful refusal to pay intrastate access charges dismissed for lack of subject-matter jurisdiction); Docket 21905, *Request for Expedited Declaratory ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*; Order dated July 31, 2009 (Georgia) (reversing hearing officer order granting contingent permission to disconnect GNAPs, but otherwise upholding conclusion that access charges were due for intrastate traffic); *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Case No. 07-C-0059, Order dated March 20, 2008 (New York) (directing parties to negotiate appropriate compensation.

The Vermont Order itself found that the complainant local telephone companies had not carried their burden of proving that Global was terminating intrastate traffic on their networks.

Based on the record, I find that Global NAPs, Inc. is a competitive local exchange carrier in Maryland.⁹ I also conclude that Global transports traffic on behalf of customers such as Transcom, CommPartners and PointOne, which I find are enhanced service providers. More specifically, I find that Transcom, CommPartners, and PointOne all serve VoIP communications providers, including Vonage, and that CommPartners "operates a significant North American IP network that is 100% VoIP, and transmits nomadic VoIP calls as well." I do not find that Global transports only VoIP traffic, although that is possible based on the record, especially Staff witness Alvarado's conclusion that GNAPs has shown that its traffic may be exclusively VoIP. Alvarado Rebr. T. at 3. I do find that, based on its customers' business, a significant percentage of Global's traffic is VoIP. I conclude there are no reasonable grounds to doubt that letters from Transcom, CommPartners, and PointOne, signed by company attorneys and corporate officers, are in any way fabricated or unworthy of receipt into evidence, given the latitude to admit hearsay in administrative adjudication. This finding is also supported by Staff witness Alvarado's conclusion in his Rebuttal Testimony.

I accept GNAPs' assertions, as set forth in Mr. Scheltema's testimony, that VoIP providers, such as Vonage, route VoIP calls to a VoIP aggregator, such as one of Global's customers, "who in turn enhance the signals and route the calls

⁹ The Global NAPs tariff, enabling it to operate as a competitive local exchange carrier, was accepted by the Commission on December 16, 1998.

through Global's facilities." Scheltema affidavit at 4. In short, Global's customers, such as Transcom, CommPartners and PointOne, enhance VoIP by protocol conversion. Global transports the enhanced traffic to Verizon's tandem switch, where it is transformed again into time division multiplex (TDM) format and sent on Verizon's network to Armstrong's network.

As the VoIP calls that Global transports ultimately connect with a landline carrier, they are rightly classified as interconnected VoIP. 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." *Vonage Holdings Corp. v. Ne. Public Service Comm'n*, 564 F. 3rd 900, 902-903 (18th Cir. 2009). "The FCC has repeatedly refused to classify interconnected VoIP as either telecommunications service or information service under the 1996 Act." *Palmerton* Initial Decision at 28 (cases omitted). It is puzzling how Armstrong can attempt to show, on the basis of only a three call sample, that traffic that is not even clearly telecommunications traffic is in fact intrastate telecommunications traffic. Further, that part of Global's VoIP traffic that is nomadic VoIP is preempted from state regulation by the FCC:

The FCC has concluded with respect to nomadic interconnected VoIP service that the "impossibility exception of Section [2] 52(b) of the Act allows it to preempt state regulation when it is impossible or impractical to sepa-

rate the service's intrastate and interstate components.

Pennsylvania Initial Decision at 29, citing *Vonage, supra*, ft. nt. 1, p. 7.

As it is impossible to separate intrastate from interstate nomadic VoIP calls, it is impossible for ILECs to determine which calls are subject to intrastate access charges. The "impossibility exception" therefore precludes levying intrastate access charges on VoIP traffic that contains unknown amounts of nomadic traffic, which may be interstate.

Although Armstrong contends that this case is not about VoIP, because Global is not a VoIP provider, Global is, as Staff admits, a carrier of traffic that may be almost exclusively VoIP. VoIP traffic is almost certainly a mixture of fixed and nomadic VoIP. While the exact proportions of fixed and nomadic VoIP in Global's traffic are not available, it is not realistic to assume that all of Global's traffic is fixed, as Staff concludes. Alvarado Reb. T. at 4. For Armstrong to charge Global intrastate access charges for its traffic would therefore clearly violate federal prohibitions on subjecting nomadic VoIP to access charges.

While Armstrong has attempted to justify its \$273,982.81 claim by reference to a sample of three calls coming from Global, such a miniscule sample can be given very little weight. In *Palmerton*, the ILEC submitted a sample study of one percent of the calls it received from Global, a study that was roundly rejected by the Pennsylvania Administrative Law Judge as too unrepresentative

to be useful. The present decision cannot be based on a call sample that is clearly less representative than Palmerton's.

In sum, I find that Global's services are integral to the transmission of VoIP communications from its originators to its end users. Levying a local access charge on Global would levy a local access charge on Global's traffic, which is, as Staff admits, essentially VoIP traffic. According to the Pennsylvania Initial Decision, both nomadic and interconnected VoIP traffic are exempt from local access charges. Yet even assuming a more conservative position (as this Hearing Examiner does), that only nomadic VoIP is exempt from access charges, neither Armstrong nor any other ILEC has been able to separate nomadic from non-nomadic VoIP. Certainly Armstrong's sample of three calls is not able to reliably indicate which Global calls are local and which are interstate. Therefore, I find on the basis of the Impossibility Exception that Global does not owe local access charges to Armstrong.

B. The Intermediate Carrier Issue

Global is by its own definition "a second (or third) tier intermediate carrier of VoIP traffic handled by Global." VoIP calls pass from an originating carrier, such as Vonage, to an aggregator, such as Transcom, to Global, to Verizon, to Armstrong. Global is therefore clearly "in the middle" in a structural sense. As a carrier, Global also appears to meet the FCC's definition of an interexchange carrier that is exempt from local access charges.

Global, as a transporter of VoIP telephone traffic, does not directly connect with ordinary customer premise equipment, does not originate (but does terminate) calls on the public switched telephone network, and effects a protocol conversion of its traffic to TDM at Verizon's switch. These characteristics and actions are the opposite of those that the FCC determined, in its *IP in the Middle*¹⁰ order, defined carriers subject to local access charges. Therefore, I conclude that on the basis of the FCC's *Phone-to-Phone IP Telephony* order Global is an intermediate carrier not subject to local access charges.

I therefore conclude that Armstrong has failed to show by a preponderance of the evidence that the traffic it received from Global was local telecommunications traffic, or traffic subject to access charges. I conclude instead that Global is an intermediate carrier of VoIP traffic, and for both of those reasons its traffic is not subject to Armstrong's intrastate access charges. Therefore, Armstrong's Request is dismissed, including its petition for payment of specific amounts based on intrastate access charges is denied.

Armstrong's inability to meet its burden of proof on those issues does not, however, mean that Armstrong must provide free termination for Global's calls. The FCC has issued general guidance that the cost of the Public Switched Telephone Network

¹⁰ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are Exempt from Access Charges*, WC Docket No. 02-361, at 1 (2004).

should be equitably borne by those who use it in similar ways."¹¹ Thus, transporting VoIP traffic does not absolve carriers from paying for the termination of such traffic: it merely absolves them, at least until a clear Federal ruling to the contrary, from paying access charges on that traffic. Even if all or nearly all of Global's traffic is VoIP, reliance on interstate rates, a specific contract, or on agreed-upon "percentage of interstate use" by Global, are all available, singularly or in combination, to provide an appropriate payment mechanism. This Proposed Order will therefore follow the ruling of the NY PSC in *TVC Albany* and direct Armstrong and Global to negotiate an appropriate compensation agreement. The parties shall report to this Commission on the progress of their talks 30 days after this Proposed Order becomes final.

IT IS, THEREFORE, this 30th day of December, in the year Two Thousand Nine,

ORDERED: (1) That Armstrong Telephone Company - Maryland's Request that the Commission find and conclude that Armstrong's intrastate tariffs apply to Global NAPs - Maryland, Inc.'s past and future traffic delivered to Armstrong, and that Global must pay local access charges to Armstrong based on that traffic is hereby denied.

¹¹ *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 (2004) ¶ 33.

(2) That Global NAPs - Maryland, Inc. is not entitled to terminate its traffic on Armstrong's network free of charge.

(3) That the parties shall negotiate an appropriate payment amount and schedule to compensate Armstrong for Global NAPs' traffic received by and to be received by Armstrong and report on the progress of such negotiations 30 days after this Proposed Order becomes a final order.

(4) That this Proposed Order will become a final Order of the Commission on January 30, 2010, unless before that date an appeal is noted with the Commission by any party to this proceeding as provided in Section 3-113(d)(2) of the Public Utility Companies Article, or the Commission modifies or reverses the Proposed Order or initiates further proceedings in this matter as provided in Section 3-114(c)(2) of the Public Utility Companies Article.

Robert H. McGowan
Hearing Examiner
Public Service Commission of Maryland