PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Palmerton Telephone Company	**PUBLIC MEETING: February 11, 2010** **2093336 - OSA**
v.	
Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc., and Other affiliates	**Docket No. C-2009-2093336**

MOTION OF CHAIRMAN JAMES H. CAWLEY

Before us are the Exceptions and Reply Exceptions of Palmerton Telephone Company (Palmerton) and Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc., and other affiliates (collectively GNAPs) to the Initial Decision (ID) of presiding Administrative Law Judge (ALJ) Wayne L. Weismandel that was issued on August 11, 2009 in this proceeding. This Formal Complaint adjudication constitutes a case of first impression for this Commission. This motion disposes of certain substantive issues in the case.

The Formal Complaint concerns a dispute over intercarrier compensation involving the termination of certain calls by Palmerton where these calls have been indirectly transmitted to Palmerton by GNAPs. It is beyond doubt that a number of these calls are Voice over Internet Protocol (VoIP) calls. Because of certain actions or inaction of the Federal Communications Commission (FCC) and certain decisions of federal appellate courts that relate to VoIP and Internet Protocol (IP) enabled services, there exists a certain degree of confusion in this proceeding regarding whether this Commission possesses and can exercise the appropriate subject matter jurisdiction to resolve this intercarrier compensation dispute.

A. The Commission's Subject Matter Jurisdiction

1. Analytical Framework

ALJ Weismandel's analysis on whether this Commission possesses subject matter jurisdiction is predicated *on the type of traffic* delivered by GNAPs to Palmerton. ALJ Weismandel's ID states in relevant part:

> 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 a telecommunications service*, then Palmerton's claim for unpaid 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.

ID at 22-23 (emphasis added).

First, excluding any consideration of the interstate versus intrastate *jurisdictional* classification of the traffic at issue – a matter that is addressed below – *strict* reliance on the *traffic protocols* for the related calls that are being transmitted by GNAPs and eventually terminate in Palmerton's network is *not determinative* of the Commission's subject matter jurisdiction both in terms of applicable Pennsylvania and federal law and sound policy. Such strict reliance on these traffic protocols for these calls places the legal and technical analysis in this matter on a legally unsustainable course; it also has the capacity of creating undesirable regulatory policy results. To use a simple analogy to the situation that the Commission faces in this proceeding, consider the following simplified hypothetical situation:

- The Commission regulates both the equipment and the transportation *services* of a truck company that conveys *mixed* merchandise which ends up at a transshipment terminal.
- The Commission exercises a certain degree of regulation over the access and the access fees for the use of the transshipment terminal facilities by the trucking company.
- Different fee schedules apply for the transshipment terminal access and handling of the mixed merchandise items carried by the trucking firm. The merchandise items that carry a discernible label identifying their origin as being within the Commonwealth are charged access fees prescribed by the Commission. Certain origin classifications may have further effects on these fees that are under the Commission's jurisdiction.

In this hypothetical situation, the Commission, the trucking firm, and the transshipment terminal operator are or should be *totally indifferent* as to the *types of merchandise* carried by the transport vehicles of the trucking firm. The Commission focuses on the common carrier *transportation function and service* of the trucking company, the *access service* provided by the transshipment facility that is open to *all* trucking common carriers, and the transshipment

facility's access fees that involve merchandise items of intrastate origin. It goes without saying that the Commission would face an interesting situation – as it does in this proceeding – if the trucking firm asserts that it is able to access and drop off certain types of merchandise items at the transshipment facility (which is then obliged to appropriately handle them), but it is not obligated to pay any access or handling fees for certain "unique types" of merchandise items. The problem would become even more complex if the trucking firm were also to assert that the Commission cannot address this situation because of the "unique type" of these merchandise items. Assuming that the Commission was to somehow voluntarily abstain from addressing this situation, one would wonder what could be the incentive of the transshipment facility to *accept and handle any and all* of the merchandise items delivered to it by the trucking firm while potentially incurring a financial loss in the process. On the other hand, the Commission has the choice of more precisely focusing its analysis of the pertinent situation on the trucking firm's common carrier transportation service and the transshipment facility's access function. Under this analytical prism, the trucking firm still performs a common carrier transportation service no matter the type of merchandise that it conveys to the transshipment facility for final handling and, in the hypothetical situation, this activity is squarely within the Commission's subject matter jurisdiction.

2. GNAPs Provides Telecommunications Services and the Commission Has Subject Matter Jurisdiction

GNAPs' function of transmitting and then indirectly accessing and terminating traffic at Palmerton's network facilities is a common carrier telecommunications service and the Commission has subject matter jurisdiction. GNAPs' fundamental telecommunications service function is not *altered* by the fact that GNAPs transports a "mix" of traffic including the "unique type" of VoIP calls. A large part of the evidentiary record in this proceeding has been consumed in an attempt to ascertain whether the Commission's subject matter jurisdiction is dependent upon the *traffic protocols* of the calls transported by GNAPs and indirectly terminated at Palmerton's facilities rather than on the overall transportation function that in and of itself legally and technically constitutes a telecommunications service *irrespective* of the technical protocol classification of the traffic being carried. This telecommunications service is clearly provided by

a common carrier telecommunications utility that has been duly certified to operate as such by this Commission within specific areas of the Commonwealth.[1]

The overwhelming weight of both Pennsylvania and federal legal authority in this matter supports the legal conclusion that GNAPs is engaged in the provision of common carrier telecommunications service in transporting VoIP and other types of traffic calls that are not IP-based, e.g., conventional wireline voice call traffic transmitted under time division multiplexing or TDM, wireless calls, asynchronous transfer mode or ATM traffic, etc. The technical fact that GNAPs accepts, handles, and transports traffic of *various technical transmission protocols* is well established.[2] The fact that GNAPs handles and transports IP-based traffic does not detract from the overall common carrier telecommunications service which GNAPs performs. This Commission found in its landmark *Core* decision that the provision of access to information service providers (ISPs) constitutes "telephone exchange service" and, naturally, a telecommunications service. The Commission stated:

> We find the FCC's treatment of dial-up access to ISPs to be more consistent with the Core position. That is ISPs themselves, are treated as end users of telecommunications services, while the underlying service they provide to ISP subscribers, Internet access, is information.[10]
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> [10] This observation is not to suggest a particular position on the "one-call" versus "two calls" debate associated with ISP-bound compensation litigation.

Application of Core Communications, Inc. for Authority to amend its existing Certificate of Public Convenience and necessity and to expand Core's Pennsylvania operations to include the Provision of competitive residential and business Local exchange telecommunications services throughout the Commonwealth of Pennsylvania, et al., Docket Nos. A-310922F0002AmA, A-3100922F0002AmB, Order entered December 4, 2006, at 26, *aff'd Rural Tel. Co. Coalition v. Pa. Pub. Util. Comm'n*, 941 A.2d 751 (Pa. Cmwlth. 2008) (*Core Appeal Decision*).

[1] GNAPs is a competitive local exchange carrier (CLEC) authorized to operate in the service areas of various incumbent local exchange carrier (ILEC) telephone companies. ID at 12. Although GNAPs is not authorized to operate in Palmerton's service area and does not have a direct interconnection agreement with Palmerton, GNAPs' transported call traffic indirectly terminates at Palmerton's facilities by transiting the network of Verizon Pennsylvania Inc. (Verizon PA), another ILEC. Verizon PA and GNAPs have an interconnection agreement. *Petition of Global NAPs South, Inc. For Arbitration pursuant to 47 U.S.C. §252(b) of Interconnection Rates, Terms and Conditions with Verizon Pennsylcania Inc.*, Docket No. A-310771F7000, Order entered April 21, 2003.

[2] GNAPs Witness Mazuret, Tr. 850, 925. For a technical description of the ATM and TDM types of traffic, see Harry Newton, *Newton's Telecom Dictionary*, 20th ed. (CMP Books, San Francisco, CA 2004), at 78 and 834.

In affirming the Commission's *Core* decision, the Commonwealth Court relied on applicable federal law, stating:

> The FCC Pole Attachment Decisions hold that the offering of *transmission path service on a non-discriminatory basis to the public by a common carrier is telecommunications service*. The FCC Pole Attachment Decisions confirm that internet service is an information service, but that the *transmission path* needed to provide that internet service *is a telecommunications service if the transmission path service is offered to the public by a common carrier*. Thus, the Commission was correct in determining that transmission path service is a telecommunications service *under state and federal law*.

Core Appeal Decision, 941 A.2d at 758 (emphasis added).[3]

The Commission reached a similar conclusion when it certified Sprint Communications Company L.P. as a CLEC provider of wholesale telecommunications "platform" services. Our *Sprint* Order noted with approval Sprint's position that the "mere fact that Sprint uses Internet Protocol – a particular technology adopted by most of the cable industry for placing voice traffic onto a hybrid fiber coax network – does not render Sprint's service an internet service."[4] The Commission's *Core* and *Sprint* decisions were paralleled by the federal *Time Warner* declaratory ruling that was issued by the FCC in March 2007. The FCC stated:

> 9. Consistent with Commission precedent, we find that the Act [federal Communications Act of 1934, as amended] does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), and we confirm that providers of wholesale telecommunications services enjoy the same rights as any "telecommunications carrier" under these provisions of the Act.[19] We further conclude that the statutory classification of the end-user service, *and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251*.
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> 10. The Act defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and

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[3] The Commonwealth Court relied on the following FCC decisions: *In the matter of Fiber Technology Networks, L.L.C. v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-014, 22 FCC Rcd 3392, 2007 FCC LEXIS 1593 (February 23, 2007); *In the matter of DQE Communications Network Services, LLC v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-027, 22 FCC Rcd 2112, 2007 FCC LEXIS 1066 (February 2, 2007) (collectively, FCC Pole Attachment Decisions).

[4] *Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company*, Docket Nos. A-310183F0002AMA, A-310183F0002AMB, A-310183F0002AMC, Order entered December 1, 2006, at 36.

received."[20] The Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[21] Finally, any provider of telecommunications services is a "telecommunications carrier" by definition under the Act.[22]

[19] To resolve the confusion over the meaning of "wholesale," we affirm the longstanding Commission [FCC] usage of a wholesale transaction of a service or product as an input to a further sale to an end user, in contrast to a retail transaction for the customer's own personal use or consumption. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237, 19423, para. 13 (1999) ("Black's Law Dictionary defines retail as '[a] sale for final consumption in contrast to a sale for further sale or processing (*i.e.*, wholesale) … to the ultimate consumer") (quoting Black's Law Dictionary 1315 (6th ed. 1990)).

[20] 47 U.S.C. § 153(43).

[21] 47 U.S.C. § 153(46).

[22] 47 U.S.C. § 153 (44).

In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55 (FCC March 1, 2007), Memorandum Opinion and Order, DA-07-709, *slip op.*, ¶¶ 9-10, at 5 (emphasis added) (*Time Warner* FCC decision). *See also* Palmerton Exc. at 26.

The FCC went on to state the following on how its *Time Warner* ruling relates to inter-carrier compensation issues:

17. Certain commenters ask us to reach other issues, including the application of section 251(b)(5)[49] and the classification of VoIP services.[50] We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically that the Commission is currently addressing elsewhere on more comprehensive records.[51] For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket.[52] Moreover, in this declaratory ruling proceeding we do not find it appropriate to revisit any state commission's evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law. In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein.[53] We do not, however, prejudge the Commission's determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket.

[50] *See, e.g.,* Qwest Comments at 6 ("The Nebraska position is obviously dependent on how the Commission ultimately classifies VoIP service").

[51] *See, e.g., Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd 4685 (2005).

[52] *IP-Enabled Services*, 20 FCC Rcd at 10245. Similarly, we disagree with the assertions that it is necessary to complete the proceedings pending in the IP-enabled services, intercarrier compensation, and universal service dockets in order to take action on or instead of taking action on this Petition. *See, e.g.*, NTCA Reply Comments at 5-6.

[53] *See, e.g.*, Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is "administration, payment, and collection of intercarrier compensation, including exchange access and reciprocal compensation"); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers "intercarrier compensation, including exchange access and reciprocal compensation").

Time Warner FCC Decision, ¶ 17, at 11. *See also* Palmerton Exc. at 26.

The FCC Pole Attachment Decisions that were cited by the Commonwealth Court also confirm that there are not material differences between Pennsylvania and federal law in determining whether entities that have been certified by this Commission as competitive telecommunications carriers indeed provide *common carrier telecommunications services*.[5] In short, GNAPs is a telecommunications common carrier providing telecommunications services in Pennsylvania.

The next area of focus must be whether the Commission has subject matter jurisdiction over the present intercarrier compensation dispute.

The overwhelming majority of available legal authority clearly indicates that both state utility regulatory commissions and various courts have adjudicated intercarrier compensation disputes involving GNAPs in a number of jurisdictions. The related adjudications took place even though these intercarrier compensation disputes involved the common carrier exchange of VoIP traffic between GNAPs and other telecommunications service providers. These state utility regulatory commissions and courts conducted these adjudications by asserting the appropriate subject matter jurisdiction over these intercarrier compensation disputes. The fact that the underlying traffic exchanged between GNAPs and other telecommunications carriers was of the VoIP type did not prove to be determinative of subject matter jurisdiction for these regulatory bodies and courts, nor did it become an insurmountable legal barrier. Similarly, the fact that the FCC has not yet made definitive pronouncements in its long pending but still

[5] *In re Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Company*, File No. EB-05-MD-014 (FCC Rel. February 23, 2007), DA-07-486, *slip op.*, ¶¶ 11-16, at 5-7; *In re DQE Communications Network Services, LLC v. North Pittsburgh Telephone Company*, File No. EB-05-MD-027 (FCC Rel. February 2, 2007), DA-07-472, *slip op.*, ¶¶ 11-13, at 5-6.

unresolved proceedings relating to intercarrier compensation and the proper classification of IP-based services, including VoIP, did not detract from the adjudication of intercarrier compensation disputes involving GNAPs by the majority of the state utility regulatory commissions and courts of proper jurisdiction.

A relevant decision of the United States District Court for the Eastern District of New York observed the following while deciding opposing motions for partial summary judgment and dismissal:

> There are several fatal flaws in Global's [GNAPs'] argument. *First and foremost, it is not essential to determine what the entire regulatory regime for VoIP traffic should be in order to determine the dispute pending before the Court*. Critically, as is currently the case regarding traditional reciprocal compensation, even if the FCC had made such a determination, the parties would have been free to opt out of any such regulatory regime by a mutual nondiscriminatory, arms length agreement. *See Iowa Utilities Bd.*, 525 U.S. at 372-73, 119 S.Ct. 721; *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 638-39, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)
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> Shotgun wedding notwithstanding, the parties [Verizon New York Inc. and GNAPs] have developed a complex technical and contract-based infrastructure of long standing to *deliver* for their customers a variety of *telecommunications services. VoIP traffic delivery is certainly one of them; in fact Global acknowledges that the lion's share of the traffic covered by the* [interconnection] *agreements now before the Court was VoIP traffic* **when the agreements were executed**. *See* Masuret Aff. at ¶ 6. *Neither side was waiting for the FCC to decide VoIP's regulatory regime when they made their bargain.* And, what is in issue here is the bargain. Who pays for what **as agreed**.
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> Ultimately, Verizon is correct: at its essence the dispute is a billing dispute. There is no reason to wait for Godot or the adoption of a regulatory scheme for VoIP traffic by the FCC. The determination of disputed contractual obligations is well within the conventional experience of the district court.
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> This point dovetails well in applying the second and fourth prong of the test. Although the FCC is quite appropriately concerned with creating a uniform scheme to regulate VoIP traffic going forward, when the parties brought to the FCC their contractual dispute arising out of the VoIP traffic that they were actually handing off to each other every day, Cmplt. at ¶ 36, the FCC took a pass and sent them packing. *See* Ingram Aff. in Opposition to Motion to Dismiss at ¶¶ 4-5, 13. It was a response that is most instructive. Obviously the FCC had to be well aware of the existence of substantial VoIP traffic in the telecommunications marketplace otherwise it would not be pondering overall regulation. Equally obvious, the FCC had to be aware also that the existing VoIP traffic was *moving at someone's expense*. The fact that neither on the complaint of Global nor in any other proceeding referred to us by the parties has the FCC deemed it necessary to

> intervene to upset compensation schemes involving such traffic agreed to by the carriers, *see, e.g., In re Vonage Holding Corp.*, 19 F.C.C.R. at 22,404, leads to the inescapable conclusion that the FCC is in the interim deferring to the existing intercarrier agreements as controlling such billing issues and has left for courts or arbitration to resolve any contractual disputes about VoIP traffic arising out of them.

Verizon New York Inc. v. Global NAPS, Inc., 463 F.Supp.2d 330, 342 (E.D.N.Y. 2006), 2006 U.S. Dist. LEXIS 87085 (emphasis added; bold emphasis in original).[6] *See also* Palmerton MB at 39, Palmerton Exc. at 28.

In an interconnection agreement dispute involving GNAPs and Verizon New England, the U.S. Court of Appeals for the First Circuit sustained the initial findings *and jurisdiction* of the Massachusetts Department of Telecommunications and Energy (Mass. DTE). The First Circuit Court established that the Mass. DTE was not preempted by the FCC's *ISP Remand Order*[7] on deciding an interconnection agreement dispute even when it related to information or ISP bound traffic between GNAPs and Verizon New England.[8] The First Circuit Court stated:

> Global NAPs' argument ignores an important distinction. The FCC has consistently maintained a distinction between local and "interexchange" calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC's policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic.

Global NAPs Inc. v. Verizon New England, Inc., 444 F.3d 59, 73 (1st Cir. 2006). *See also* Palmerton MB at 41, Palmerton Exc. at 24.

An intercarrier compensation dispute between GNAPs and certain rural ILECs that are subsidiaries of the Telephone and Data Systems Inc. (TDS) holding company in the State of New Hampshire presents strong parallels with the case before us. The November 10, 2009 ruling of

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[6] The same court correctly observed that: "To state the obvious, cost does attach to the provision of these [access] services" for the completion of interexchange calls. 463 F.Supp.2d at 334.

[7] *Local Competition Provisions In the Telecommunications Act of 1996 (ISP Remand Order)*, 16 FCC Rcd. 9151 (2001), 2001 WL 455869.

[8] *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006). The present reference to this court case that affirmed the Mass. DTE intercarrier compensation treatment for VNXX ISP-bound calls is not dispositive of the same issue in other proceedings that are still pending before this Commission. Palmerton MB at 41-42 n.99.

the New Hampshire Public Utilities Commission (NH PUC) is relevant here. That commission observed the following in its decision:

> TDS [four TDS ILECs] complains that Global NAPs is accessing TDS' local exchange network to terminate long distance toll calls to end-user customers located in TDS service areas without paying applicable charges. Nine other carriers [ILECs] intervened in this proceeding with similar concerns. Global NAPs argues that the calls it transmits via TDS's network are not subject to charges of any kind because they are Enhanced Service Provider (ESP) calls exempted by the FCC from access charges. Global NAPs is not itself an ESP, however, rather, it provides *call transport services* to ESPs, who, in turn, provide call initiation and reception services to end users. To resolve this dispute, we must consider the legal framework pertaining to network access, the nature of Global NAPs traffic, and the applicable burden of proof.

Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co., DT 08-28, Order No. 25,043 (NH PUC November 10, 2009), at 14 (NH PUC Order, footnotes omitted, emphasis added).

In that case, the NH PUC established the following points regarding the applicable legal framework and its jurisdiction:

- ILECs *must interconnect directly or indirectly* with the facilities and equipment of other telecommunications providers per Section 251(a) of TA-96, 47 U.S.C. § 251(a), and the U.S. Congress was clear in its expectation that local exchange carriers (LECs) would be compensated for *access to* and *use of their network facilities by other carriers*. NH PUC Order at 15 (citing 47 U.S.C. § 252(d) (establishing pricing standards for the provision of interconnection and network element charges)).

- The FCC has confirmed that any carrier that wishes to avail itself of an ILEC's network must pay for that privilege. Without such payment, the added cost to the ILEC of transporting and terminating the traffic is borne fully by the incumbent. NH PUC Order at 15.

- Rates, terms and conditions of access are generally established through interconnection agreements or interstate and intrastate access tariffs which govern interstate and intrastate traffic originating or terminating on a carrier's local exchange network. NH PUC Order at 15 (citing 47 U.S.C. § 251(c) (interconnection agreements); 47 U.S.C. § 252(f) (statements of generally available terms)).

- Interstate telecommunications traffic falls under the jurisdiction of the FCC. ILECs generally provide exchange access to their networks through interconnection agreements negotiated under Section 251 of TA-96. Such agreements often specify that interstate and intrastate exchange access shall be governed by applicable tariffs. The applicable interstate exchange access tariff for the TDS ILECs is filed by the National Exchange Carrier Association (NECA) with the FCC, and such tariffs establish the applicable rates for terminating interstate switched access services to exchanges served by the TDS ILECs in New Hampshire. NH PUC Order at 15-16.

- The FCC has reaffirmed that states have authority over intrastate access charge regimes, and that intrastate telecommunications traffic in New Hampshire is governed by intrastate access tariffs and subject to the jurisdiction of the NH PUC. *Id.* at 16 (citing *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 63, 73 (1st Cir. 2006)). It is well settled that tariffs filed with the NH PUC have the force and effect of law, and each of the TDS ILECs has filed an intrastate exchange access tariff with the NH PUC. These intrastate access tariffs establish the applicable rates for terminating intrastate switched access services to exchanges served by these companies. NH PUC Order at 17.

- The NH PUC was not persuaded by GNAPs' reliance on the FCC's *Vonage* decision and argument that all of the traffic at issue is interstate and therefore not subject to the NH PUC's intrastate jurisdiction.[9] The NH PUC decided otherwise:

> Global NAPs argues that the traffic at issue in this proceeding is inter-state and, therefore, not subject to the jurisdiction of this Commission. To reach that conclusion, Global NAPs argues that the calls are Internet Protocol (IP)-enabled and cannot be distinguished as intrastate versus interstate traffic; as a result, they must all be considered interstate. Global NAPs cites certain decisions of the FCC and other state commissions to support its argument. We have reviewed the cited cases and find none to be dispositive with respect to the traffic at issue here.

NH PUC Order at 17.

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> In the *Vonage* decision, the FCC preempts states from imposing market entry requirements such as certification, tariffing and related requirements on Vonage's interstate IP-enabled services as conditions to offering such services within a state. *Vonage* at ¶ 46… Underlying the FCC's decision is the recognition of the impracticability of separating intrastate from interstate calls in an IP-enabled system, such as that used by Vonage. *Id.* at ¶¶ 31-31 [*sic*]. The FCC noted that "state regulation violates the Commerce Clause if the burden imposed on interstate commerce by state regulation would be 'clearly excessive in relation to the putative local benefits.'" *Vonage* at 38.

NH PUC Order at 18.

> *Payment for services rendered, however, cannot be construed as an excessive regulatory burden*. Here TDS is not proposing that this Commission impose new regulations on Global NAPs that could pose a potential barrier to market entry – it *is seeking enforcement of its existing intrastate tariff*. Timely payment for services rendered under valid tariffs should be a uniform policy across all states. Non-payment *is an unjust*

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

> *burden for New Hampshire's local exchange carriers, and can create unfair market competition where other carriers are paying for those same services.*

NH PUC Order at 18-19 (emphasis added).

- The NH PUC was not persuaded by the decision of the New York Public Service Commission (NY PSC) in an intercarrier compensation dispute involving GNAPs and TVC Albany d/b/a Tech Valley Communications, an ILEC,[10] where the NY PSC directed the adversary parties to enter into private contract negotiations on the rates, charges, terms and conditions for the exchange of nomadic VoIP traffic. NH PUC Order at 19 (citing NY PSC *TVC* decision at 16-17). The NH PUC points out, however, that the NY PSC *TVC* decision acknowledged that "[a]ny telecommunications carrier that delivers traffic over the public switched telephone network for another carrier can reasonably expect to be compensated irrespective of whether the traffic originates on the PSTN [public switched telephone network], on an IP network, or on a cable network." NH PUC Order at 19 (citing NY PSC *TVC v. GNAPs* decision at 15).

- The NH PUC noted with approval that a California Public Utilities Commission decision requiring GNAPs to pay access charges "took into account the fact that the FCC expressed a general policy view that services that terminate on the PSTN, such as those offered by GNAPs, should not be exempt from access or similar charges." NH PUC Order at 19 [citing *California PUC GNAPs Decision Denying Rehearing,* slip op. 2009 WL 254838 (Cal. P.U.C.) at 10 (citing FCC Order *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges* (2004) 19 F.C.C.R. 7457, 7464-65, ¶ 15)].

- The NH PUC found that:

> Global NAPs focuses on the interstate versus the intrastate issue underlying each decision to conclude more broadly that because some of its calls are an IP-enabled service, it is impossible to distinguish intrastate from interstate and, therefore, jurisdiction over all its traffic defaults to the FCC. In so doing, Global NAPs evades the more fundamental concern that it has failed to pay anything for access to TDS facilities and services, whether the traffic at issue is interstate or intrastate.

Id. at 19-20.

The NH PUC concluded the following when dealing with the nature of the traffic at issue:

- The TDS ILECs pointed out that there is nothing in the call detail records to distinguish "regular" voice traffic from ESP or any other IP-enabled traffic. The TDS companies

[10] *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 (NY PSC March 20, 2008) (NY PSC *TVC v. GNAPs* decision). *See also* GNAPs MB Appendix and GNAPs Reply Exc. at 4.

further argued that the data collected for the calls transmitted by Global NAPs and carried over the TDS's network bear all the hallmarks of traditional voice traffic that is subject to access charges covered by access tariffs. NH PUC Order at 21-22.

- GNAPs admitted that it does not know the original format of the calls it receives from its ESP customers for transport, nor does GNAPs distinguish the format of the traffic it receives, whether time division multiplexing (TDM), asynchronous transfer mode (ATM), or IP. Further, Global NAPs converts all traffic to ATM for transport on its network and then converts the traffic to TDM for termination on the public switched network. NH PUC Order at 22 (citations omitted). GNAPs also conceded that at least some, if not most or all, of its traffic is likely intrastate. NH PUC Order at 22 [citing *Global NAPs Brief* at 4 ("This classification of traffic as 'nomadic' is important because it indicates the extremely high probability that *not all* of the traffic terminated by Global to FairPoint is sent and received entirely within New Hampshire." (emphasis added by NH PUC))]. Despite this acknowledgment that some, if not all, traffic delivered by Global NAPs to FairPoint for termination to a TDS end-user is sent and received entirely within New Hampshire, Global NAPs has not paid any access charges, whether intrastate or interstate, to TDS. NH PUC Order at 23.

- GNAPs failed to produce any evidence to substantiate its claims that the calls carried over the TDS ILECs' networks are ESP traffic and exempt from access charges. GNAPs offered nothing beyond the generic, boilerplate language its customers adopt by signing service contracts with GNAPs. Even if, *arguendo*, all GNAPs traffic delivered to TDS facilities were determined to be interstate, GNAPs remains obligated to pay for its access to TDS's network under TDS's interstate tariff. However, GNAPs has paid nothing for the use of TDS's network. NH PUC Order at 23.

The NH PUC reached the following decision in the GNAPs intercarrier compensation dispute with the TDS ILECs:

> Based on our review of the record and the arguments presented by the parties, we conclude that Global NAPs has failed to prove its assertion that its traffic is exempt from access charges. In the meantime, unpaid charges for access to TDS facilities continue to accrue at the rate of nearly $25,000 per month, totaling $410,613.12 as of January 1, 2009. *TDS Letter* dated January 20, 2009. If Global NAPs does not pay for access to TDS's network – access that is essential for the provision of service to its customers communicating with customers located in TDS's service territory, those costs must be absorbed by TDS. *Such a result is untenable where the law is clear that carriers must compensate for such access*. Therefore, we find that, absent payment in full of outstanding invoices or a mutually acceptable payment arrangement between Global NAPs and TDS, TDS *is entitled to disconnect service* to Global NAPs, in accordance with the conditions set forth below.

NH PUC Order at 24-25 (emphasis added).

The Georgia Public Service Commission (GA PSC) reached a generally similar conclusion in an intercarrier compensation dispute between GNAPs and a number of ILECs in the State of Georgia:

> In concluding that the Commission would not be preempted *even if the subject traffic was ESP or ISP traffic*, the Hearing Officer relied upon the FCC's Time Warner Decision. In that case, the FCC found that the wholesale telecommunications carriers assumed the responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between the parties. (Time Warner Decision, ¶ 17). GNAPs argued that the Commission should not rely on the Time Warner Decision because it involved a section 251 agreement as opposed to the tariff arrangement in this case. (Memorandum, p. 14). However, GNAPs did not explain why this distinction *alters the principle that it should not have a "free ride" on the system*. The Commission concludes that, under the terms of the applicable tariff, access charges are due for termination of the subject traffic to the PSTN.
>
> * * *
>
> GNAPs relied on the [FCC] Vonage Decision in support of its position that the Commission is preempted from assessing access charges. However, GNAPs has not established that the service it offers is the same as the service at issue in the Vonage Decision. In addition, in the Vonage Decision, the FCC preempted state regulations that pertained to operating authority, the filing of tariffs and the provisioning and funding of 911 services. (Vonage Decision, ¶ 10). At issue in this case are regulations regarding the payment of intrastate access charges for calls that terminate on the PSTN. The FCC has not preempted states regarding this issue. Should Congress or the FCC take additional action on the extent to which states are preempted in this area, the Commission may re-examine the preemption issue at that time. The Commission's decision is based on the specific facts of this case.

Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc., Docket No. 21905 (GA PSC July 29, 2009), Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision, Document No. 121910, at 8-9 (GA PSC Order, emphasis added). *See also* Palmerton Exc. at 29-30.

3. Commission Jurisdiction and the Interaction of Pennsylvania and Federal Law

The overwhelming weight of legal authority of Pennsylvania and federal law, as well as the relevant decisions of other state utility regulatory commissions and courts of appropriate jurisdictions that have dealt with a large number of intercarrier compensation disputes involving GNAPs, leads to the inescapable conclusion that the FCC *Vonage* decision is not relevant or material on matters pertaining to intercarrier compensation. The NH PUC Order – and other

similar decisions – that the FCC *Vonage* decision primarily affects the potential state role on market entry and regulation of nomadic VoIP service providers – is correct. NH PUC Order at 17-19. Here, as in many other jurisdictions, we are not dealing with the issue of market entry and regulation of nomadic VoIP service providers. Instead, we are dealing with the issue of GNAPs, a telecommunications utility carrier, which transports and terminates traffic at Palmerton's PSTN facilities. As in the case of the TDS ILECs in New Hampshire, Palmerton indirectly receives and terminates traffic that has been transported by GNAPs via the Verizon PA tandem switch on Market Street, Philadelphia, Pa. Tr. 667-668, GNAPs Exh. 6. The FCC *Vonage* decision plainly does not, nor was it intended to, address the issue of whether intercarrier compensation applies for the use of Palmerton's PSTN facilities when terminating VoIP calls. Costs indeed attach to the termination of *any type of traffic* that Palmerton receives, and such costs do not "magically disappear" when the traffic includes VoIP calls whether those are of the nomadic or fixed type. Under the existing and so far unaltered premises of both Pennsylvania and federal law, Palmerton deserves compensation for the traffic that it terminates at its facilities. Furthermore, indirect transmission of such traffic by GNAPs to Palmerton constitutes a telecommunications service that falls squarely within this Commission's jurisdiction under applicable Pennsylvania and federal law.

Pennsylvania's Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, codified at 73 P.S. § 2251.1 *et seq.*, established the Commission's jurisdictional boundaries over VoIP or IP-enabled services. 73 P.S. § 2251.4. The Act clearly provides that the Commission retains jurisdiction over "[s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company." 73 P.S. § 2251.6(1)(iv). And it is the question of "switched network access" that is at issue here for the Palmerton PSTN facilities and the GNAPs traffic that these facilities terminate. *See also* 66 Pa. C.S. § 3017 ("Refusal to pay access charges prohibited. — No person or entity may refuse to pay tariffed access charges for interexchange services provided by a local exchange telecommunications company."). This Commission has also adjudicated a number of intercarrier compensation disputes under the premises of applicable Pennsylvania and federal law whether such cases involved the interpretation and enforcement of intrastate carrier access tariffs and/or interconnection agreements. In a similar vein, we do not need and cannot afford to wait and speculate whether the FCC will reach some sort of coherent and sustainable conclusion to its IP-enabled services and intercarrier compensation reform proceedings, when this might happen, and what the FCC's conclusions might be.

This Commission is not preempted by the FCC in addressing the intercarrier compensation issues at hand. Furthermore, GNAPs' contention that the FCC somehow "has clearly and repeatedly stated its intention" to preempt state regulatory jurisdiction over intercarrier compensation matters for "all VoIP and enhanced traffic"[11] is without basis in law or fact. That assertion flies in the face of federal appellate and district court decisions that have addressed intercarrier compensation disputes involving GNAPs itself.

Both ALJ Weismandel's ID and GNAPs refer to the refusal of the federal courts to permit the collection of state universal service fund (USF) intrastate assessment surcharges by a nomadic VoIP provider in accordance with pertinent directives of the Nebraska Public Service Commission (NE PSC) for the broad proposition that "nomadic interconnected VoIP service has been preempted from state regulation by the FCC."[12] The "jurisdictional mix" issue of the telecommunications traffic that is carried by GNAPs and terminated at the Palmerton PSTN facilities is addressed below.

The federal court decisions are not applicable on the issue of subject matter jurisdiction in the case before us. First, we are not dealing here with the *retail services* of an interconnected albeit nomadic VoIP service provider. Neither are we trying to apply regulation that would have had the potential of *touching* the *intrastate* retail operations of an interconnected nomadic VoIP provider such as Vonage, e.g., through (hypothetically) Pennsylvania USF contribution assessments on Vonage's intrastate *retail* operations under our Pa. USF regulations at 52 Pa. Code § 63.161 *et seq.* Instead, we are dealing with GNAPs' *wholesale transport (inclusive of VoIP or IP-enabled calls), access to and termination of traffic in* Palmerton's PSTN network facilities, and these are clearly telecommunications functions and services under the Commission's jurisdiction in accordance with applicable Pennsylvania and federal law.

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[11] GNAPs Reply Exc. at 14 ("While the FCC has not yet specified the compensation rates for terminating VoIP traffic, it has clearly and repeatedly stated both its intention to do so and its preemption of state traffic regulation of all VoIP and enhanced traffic so that piecemeal resolution of this issue at the state level is prevented." (citing FCC *Vonage* decision)).

[12] ID at 29 (citing *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009)). *See also* GNAPs MB at 9, GNAPs Reply Exc. at 13 (citing the underlying case, *Vonage Holdings v. Nebraska PUC [sic]*, 4:07 CV 3277 (D. Neb. 2008) at 9 ("there is no way to distinguish between interstate and intrastate Digital/Voice service; nor does the adoption of [FCC] safe-harbor rules affect the characterization of VoIP service as an information service") (*Vonage v. NE PSC* decisions)).

Second, the practical effects of the *Vonage v. NE PSC* federal court decisions still remain unsettled and are currently pending before the FCC.[13] Finally, this Commission is technically well equipped and legally entitled to address the issues of *jurisdictional traffic allocation* in disputes involving intercarrier compensation for the provision of *wholesale telecommunications carrier access services*. Such a determination is essential in determining the type and appropriate level of intercarrier compensation for the various jurisdictional classifications of traffic that terminates at Palmerton's PSTN facilities. Again, in contrast to the *Vonage v. NE PSC* federal court decisions, this Commission is not dealing here with jurisdictional traffic allocations that relate to the *retail* operations, services, and revenues of a nomadic VoIP provider.

GNAPs' reliance on the NY PSC *TVC v. GNAPs* decision is equally misplaced and unpersuasive for both legal and operative reasons.[14] The NY PSC *TVC v. GNAPs* decision revolves around the unfounded legal theory that the FCC's *Vonage* decision has preemptive effects over the jurisdiction of a state utility regulatory commission to reach the actual merits of an intercarrier compensation dispute between two telecommunications carriers that involves the transport and termination of traffic that includes VoIP or IP-enabled calls "irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network." NY PSC *TVC v. GNAPs* decision at 15. Not surprisingly, the NH PUC considered but declined to utilize both the rationale and the end result of the NY PSC *TVC v. GNAPs* decision. From an operative perspective, if this Commission were to follow the ruling of the NY PSC, it could not timely and conclusively resolve the present intercarrier compensation dispute in violation of applicable Pennsylvania and federal law; and such reliance would most likely prolong totally unnecessary and wasteful litigation by replacing the present Formal Complaint case with an equally contentious interconnection arbitration on exactly the same material intercarrier compensation issues.[15] The course of action taken by the NH PUC and the clear majority of state utility regulatory commissions and courts of competent jurisdiction in intercarrier compensation

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[13] *See generally Petition of the Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues,* FCC WC Docket No. 06-122, filed July 16, 2009; NE PSC and Kansas Corp. Comm'n *Ex Parte*, FCC WC Docket No. 06-122, filed December 30, 2009. *See also* Palmerton Exc. at 27 & n. 98.

[14] GNAPs MB Appendix, GNAPs Reply Exc. at 4.

[15] Although reportedly TVC Albany and GNAPs appear to have agreed to the NY PSC directives, it is unclear whether the case has reached administrative finality before the NY PSC where it has been in adjudication since January 12, 2007. NY PSC *TVC v. GNAPs* decision at 1.

disputes involving GNAPs is the only clear, lawful, and operatively preferred choice for this Commission.

4. The Commission's Intrastate Jurisdiction, Access Charges, and the Presence of IP-Enabled Traffic

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

The answer can be readily found in the parts of the evidentiary record that amply and credibly document the *routine application* of Palmerton's intrastate carrier access tariff to *intrastate* interexchange traffic *containing* VoIP or IP-enabled calls *irrespective* of their final communication protocol conversion in their transport and final termination by Palmerton. This *routine application* of Palmerton's intrastate carrier access tariffs on the appropriate traffic has resulted in the corresponding routine absence of intercarrier compensation disputes in the ordinary and rather established course of intercarrier compensation business dealings. For example, cable companies such as Adelphia, Comcast, and RCN *originate* fixed VoIP or IP-enabled wireline interexchange calls that terminate at Palmerton's PSTN's facilities. When Palmerton directly bills these companies under its intrastate carrier access tariff for the termination of these intrastate interexchange calls to its facilities, Palmerton receives the appropriate amount of intercarrier compensation irrespective of whether these fixed VoIP or IP-enabled originated wireline calls have been converted to a TDM protocol prior to their final termination at Palmerton's PSTN facilities. Tr. 519-520. *See also* Palmerton Exh. 12 at 27-28 (Comcast Deposition), and Palmerton Exc. at 30-31.[16] The same happens with the fixed VoIP or IP-enabled intrastate interexchange wireline calls that Palmerton terminates from its own affiliate Blue Ridge Digital Phone, a cable company, where such calls first transit through Sprint's common carrier telecommunications network prior to reaching Palmerton's PSTN. Sprint pays Palmerton the appropriate intrastate intercarrier compensation. Tr. 518-519, 536. Other

[16] Certain of these cable companies also have telecommunications service operations that have been certified as competitive local exchange carriers (CLECs) by the Commission. *See* Palmerton Exh. 7.

companies, such as Service Electric, that also engage in the common carrier telecommunications transit transport of intrastate interexchange VoIP or IP-enabled originating wireline traffic behave in a similar and rather ordinary fashion. Tr. 631-633, 636.[17] (The more unique aspects of intercarrier compensation that apply on intrastate interexchange wireless calls terminating at the PSTN facilities of an ILEC such as Palmerton are addressed below.)

At first glance, this ordinary application of Palmerton's intrastate access tariffs could also have taken place with respect to the intrastate interexchange call traffic that is transported by GNAPs — VoIP or IP-enabled calls included — and indirectly terminated at Palmerton's PSTN facilities. Palmerton's special traffic study, the statistical validity of which is further discussed below, has indicated that GNAPs indirectly transports and terminates at Palmerton's PSTN facilities calls of various categories and originating protocols including ILEC, CLEC, cable company (i.e., fixed interconnected VoIP or IP-enabled), wireless, and nomadic VoIP. Palmerton Exc. at 31, *see also* Palmerton Exh. 6. And GNAPs acknowledges that it *accepts* traffic in a variety of communication protocols, including IP, ATM and the more conventional TDM. Tr. 849-850.

GNAPs argued and the ID found — largely on the basis of the FCC's *Vonage* decision — "that the majority of its [GNAPs'] 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." ID at 33-34; GNAPs Reply Exc. at 2. On the basis that GNAPs handles "enhanced" or "information services" and nomadic VoIP traffic, GNAPs alleges — again largely on the basis of the FCC's *Vonage* decision — that such traffic is exempt from the application of intrastate access charges because such traffic is "jurisdictionally inter-state." GNAPs MB at 8-9 (citing FCC *Vonage* decision and the initial *Vonage v. NE PSC* federal court decision).

This GNAPs argument and the associated findings in the ID are not persuasive. The NH PUC was faced with a similar GNAPs argument and rejected it for the very simple reason that GNAPs had *not paid any carrier access charges* to the TDS ILECs in New Hampshire *"whether intrastate or interstate…"* for the indirect termination of GNAPs transported traffic. NH PUC

[17] The evidentiary record indicates that at least four more companies, other than GNAPs, have refused to pay terminating access charges to Palmerton and other ILECs, with at least one more intercarrier compensation dispute between one or more ILECs and one of those four companies currently pending before the Commission. Tr. 532. Some of Service Electric's services operate on the basis of the session initiated protocol or SIP, an advanced form of IP. Tr. 632.

Order at 23 (emphasis added). The situation is not different in the case before us. The preceding discussion has established and GNAPs acknowledges that it is not an "enhanced service" or "information service provider" (ISP), and that it does not itself engage in any alleged "enhancement" of the traffic that it transports. Tr. 876-877. However, the evidentiary record is clear that GNAPs has not paid *any* access charges to Palmerton, whether interstate or intrastate, and that Palmerton's monetary claim is concentrated on the intrastate portion of the intercarrier compensation dispute at issue that is clearly within this Commission's jurisdiction. Tr. 284, 287.

As previously discussed, the fact that GNAPs transports and indirectly terminates traffic that may have initially originated in IP, inclusive of nomadic VoIP, is largely immaterial to this analysis on whether this Commission has subject matter jurisdiction and whether the appropriate jurisdictional intercarrier compensation should apply. GNAPs is unable to explain the presence of more conventional intrastate interexchange ILEC, CLEC, and wireless calls in the stream of traffic that it transports and indirectly terminates at Palmerton's PSTN facilities — where such calls have been detected in Palmerton's special traffic study — and GNAPs' own testimony does not totally exclude their presence. Tr. 925-928.

In a similar fashion, GNAPs propounds the argument that the traffic it transports does not leave its local calling area "as its service never touches the local calling area," and that as an "intermediary carrier" carrying IP-enabled transit traffic it should be subjected at most to cost-based reciprocal compensation rates under Section 251 of TA-96, 47 U.S.C. § 251, for terminating such traffic at Palmerton's facilities.[18] GNAPs MB at 21-22. This argument lacks substantive and legal merit and is merely designed to advocate the solution that GNAPs achieved through the NY PSC *TVC v. GNAPs* decision directing TVC Albany and GNAPs to "work out a traffic exchange agreement establishing rates, charges, terms and conditions for nomadic VoIP traffic." NY PSC *TVC v. GNAPs* decision at 17. GNAPs also pointed out the lower reciprocal compensation rate that exists in Commission approved *interconnection agreements* between Verizon PA and various CLECs for the exchange of VoIP traffic. Tr. 692,

[18] The clear inference here is that the GNAPs intercarrier compensation with Palmerton for IP-enabled traffic should be based on the total element long-range incremental cost (TELRIC) standard that this Commission has utilized for deriving reciprocal compensation rates for the exchange of local exchange traffic between interconnected ILECs such as Verizon PA and CLECs. The same TELRIC-based rates are also generally applicable in the intercarrier compensation arrangements between local wireline telecommunications carriers, e.g., ILECs, and wireless carriers for the exchange of intra-MTA (within the major trading area) traffic in accordance with applicable FCC rules. In terms of numerical values, reciprocal compensation rates are lower than intrastate and interstate carrier access rates.

700-704, and Verizon PA Exh. 1.[19] This argument must fail for multiple reasons. First, GNAPs traffic termination at Palmerton's facilities is indirect under Section 251(a)(1) of TA-96, 47 U.S.C. § 251(a)(1), and Palmerton was clearly obliged to terminate the traffic and did so until on or about May 19, 2009 when GNAPs ceased sending traffic to Palmerton. Tr. 514, 904. Second, GNAPs does not have a local calling area presence in Palmerton's service area, nor does it have a direct interconnection agreement. Third, assuming *arguendo* that GNAPs would seek interconnection with Palmerton and cost-based TELRIC rates for the indirect termination of its IP-enabled traffic at Palmerton's facilities — and nothing of this sort has happened here — it would have to initiate the appropriate interconnection request and Palmerton, as a rural ILEC, could invoke the relevant provisions of Section 251(f) of TA-96, 47 U.S.C. 251(f). Finally, following the receipt of Palmerton's billing invoices, GNAPs could have approached Palmerton in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic. This has not happened. In summary, we are faced with the same situation as in New Hampshire where the NH PUC found that GNAPs, despite its assertions to the contrary, was indirectly delivering intrastate interexchange traffic to the PSTN facilities of the New Hampshire TDS ILECs. NH PUC Order at 22-23.

The available evidence fails to establish that the nomadic VoIP traffic that GNAPs receives from other entities is somehow already or becomes " 'enhanced' (significantly changed in form and/or contents)." GNAPs Reply Exc. at 5-6. The ID provides the following federal definitions for the "enhanced" and "information" services:

> 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

[19] The relevant reciprocal compensation rate mentioned in the record for the exchange of VoIP traffic was $0.00045 per minute. It should be pointed out that various *voluntary* interconnection agreement arrangements have been approved by the Commission that address the exchange of VoIP traffic. *See generally Joint Petition of Verizon Pennsylvania Inc. and XO Communications Services, Inc. for Approval of Amendment No. 8 to an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-2009-2085611, Order entered March 27, 2009 (use of interstate and intrastate terminating switched access rates under certain conditions for "Interexchange VOIP Traffic"); *Joint Petition of Windstream Pennsylvania, LLC and Service Electric Telephone Company, LLC for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-2009-2145812, Order to be adopted concurrently on February 11, 2010 ("all traffic, other than Local Traffic, that is terminated on the public switched network, regardless of the technology used to originate or transport such traffic, including but not limited to Voice Over Internet Protocol (VOIP) will be assessed either interstate or intrastate (depending on the end points of the call) terminating charges at the rates provided in the terminating Party's access tariff").

> 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) [*sic*].
>
> 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).

ID at 23 and n. 11 (emphasis added).

GNAPs argues that Transcom's removal of background noise, the insertion of white noise, the insertion of computer developed substitutes for missing content, and the added capacity for the use of short codes to retrieve data during a call all constitute "enhancements" to the traffic that Transcom passes on to GNAPs. GNAPs MB at 18-19, Tr. 960-962. Palmerton responds that the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony. *See generally* Palmerton Exc. 35-38, Tr. 1046-1047, ID at 24. The FCC has ruled that:

> Adjunct-to-basic services are services that are "incidental" to an underlying telecommunications service and do not "alter [] their fundamental character" even if they may meet the literal definition of an information service or enhanced service… We find that the advertising message provided to the calling party in this case is incidental to the underlying [AT&T calling card] service offered to the cardholder and does not in any way alter the fundamental character of that telecommunications service. From the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call and therefore the service should be classified as a telecommunications service.

In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services et al., WC Docket Nos. 03-133 and 05-68 (FCC Rel. February 23, 2005), Order and Notice of Proposed Rulemaking, FCC 05-41, *slip op.* ¶ 16 at 6 (citations omitted) (FCC AT&T Prepaid Calling Card Order rejecting AT&T declaratory ruling petition that access charges do not apply to "enhanced" calling card service with advertising message to the end-user consumer).

In the case involving AT&T's use of IP "in the middle" and its request that "its 'phone-to-phone Internet protocol (IP) telephony services are exempt from the access charges applicable to circuit-switched interexchange calls," the FCC stated the following in denying AT&T's request:

> More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under section 153(20) of the Act. End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions which the Commission has found to be telecommunications services. We clarify, therefore, that AT&T's specific service constitutes a telecommunications service.

In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361 (FCC Rel. April 21, 2004), Order, FCC 04-97, *slip op.* ¶¶ 1 and 12, at 1, 9 (citations omitted) (FCC AT&T IP in the Middle Order).

In view of the evidence presented and the FCC's rulings in the two AT&T cases just referenced, Transcom does not supply GNAPs with "enhanced" traffic under applicable federal rules. Consequently, such traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges. Also unpersuasive is the decision of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, finding Transcom to be an "enhanced services provider" on the basis that Transcom indicated in that proceeding that it provided "data communications services over *private* IP networks (VoIP)." *In re Transcom Enhanced Services, LLC,* No. 05-31929-HDH-11 (Bkrptcy. N.D.Tex., April 28, 2005) at 2.

B. Determination of Intercarrier Compensation

Under currently established practices and available technologies dealing with the rating and billing of interexchange calls, Palmerton largely relies on the originating number of the call and other billing and data base information (e.g., rate centers, Telcordia terminal point master data base, local exchange routing guide or LERG, billing information received from the Verizon PA tandem switch, Signaling System 7 or SS7) to determine whether the call is intrastate or interstate. Tr. 512-513, 739. The following exchange during the evidentiary hearing of July 9,

2009 provides a pertinent general summary of the process that Palmerton uses to jurisdictionally classify and bill calls:

> ALJ WEISMANDEL: Yes, okay. And can you tell me then, with respect to the calls that are described on Palmerton's Exhibit 6 (Revised), what is your position as to where those calls, quote, entered a customer network?
>
> WITNESS LAGER (Palmerton): They entered the customer network at the point indicated by the originating telephone number, as the tariff [PA P.U.C. Tariff No. 11, Original Page 2-21, General Regulations] states.
>
> ALJ WESMANDEL: Would that be the Verizon tandem in Philadelphia?
>
> WITNESS LAGER (Palmerton): That would be the end office switch where that number resides. On the originating end, if that telephone number is indicated as having been residing in Pennsylvania, the telephone number, the NPA/NXX telephone number, are listed as being a Pennsylvania location, and it's on a telephone switch that's located in that same place, then it is considered as originating in Pennsylvania.
>
> ALJ WEISMANDEL: All right. And you're saying that that's where the call entered the customer network?
>
> WITNESS LAGER (Palmerton): Yes.
>
> ALJ WEISMANDEL: Now let's go back to my hypothetical resident of the suburbs of Denver, Colorado [with a Vonage 717 area code number, Lancaster County, Pa.]. Where did that call enter the network?
>
> WITNESS LAGER (Palmerton): If it has a telephone number assigned to a switch in Pennsylvania, then it entered where the telephone number is assigned.
>
> ALJ WEISMANDEL: So it's your position, Palmerton's position, that regardless of the physical location of the person initiating the call, it's merely a matter of the physical location of the switch?
>
> WITNESS LAGER (Palmerton): That's correct.

Tr. 563-564. *See also* Tr. 569, Palmerton Exc. at 30.

Palmerton's witness further testified that, when the indicator information on a terminated interexchange call is ambiguous or incomplete in its carrier access billing system (CABS), or the call has incomplete originating NPA/NXX telephone number information, the call is defaulted to a lower interstate carrier access rate rather than the highest intrastate one. Tr. 549. Although Palmerton follows standard industry practices for the jurisdictional classification, access rating, and billing of interexchange calls, it cannot identify the actual physical location of the calling party. For example, if a caller using a wireless phone with an assigned "610" area code number (Southeastern Pennsylvania) calls a Palmerton end-user customer from Manhattan, City of New York, NY, Palmerton will identify and rate this interexchange wireless call as if it originated

somewhere in Southeastern Pennsylvania. Tr. 570-571.[20] The existing state of carrier access billing system technologies and industry practices do not yet permit such a precise location identification of a calling party; neither was Palmerton aware of any network signaling system that would permit such a precise identification. Tr. 579. Furthermore, the available evidentiary record indicates that since VoIP or IP-enabled calls are transformed into the TDM protocol prior to their final termination in Palmerton's PSTN facilities (Verizon PA's tandem switch on Market St., Philadelphia, Pa., will forward the traffic to Palmerton in TDM protocol), Palmerton cannot technologically determine whether such calls originated in IP format in the first place. Tr. 382, 849-850, GNAPs Exh. 6 (routing of Vonage nomadic VoIP traffic). Palmerton also testified that it relies on billing records that are generated at and received from the Verizon PA Market Street, Philadelphia, Pa., tandem switch, and that GNAPs "has not sent traffic to Palmerton with information identifying underlying carriers, so, as some other carriers do." Tr. 267.

Palmerton's use of the billing information generated and received from Verizon PA's tandem switch for the jurisdictional classification and rating of calls that terminate at Palmerton's facilities, and the relative reliability and precision of such information or associated lack thereof (treatment of calls with missing billing information), was independently corroborated through the testimony of Verizon PA. The same testimony established that the Verizon PA tandem switch also is capable and does identify the traffic that it receives from GNAPs which is then passed on and terminated in Palmerton's PSTN facilities. However, the Verizon PA tandem switch does not identify whether particular GNAPs calls that eventually terminate at Palmerton's network have originally been IP-enabled. *See generally* Tr. 667-681, 685-691.

In short, Palmerton finds itself in the same situation as the TDS ILECs in New Hampshire where all interexchange IP-enabled originating traffic that came from GNAPs and terminated at their PSTN facilities appeared to be traditional voice traffic that was subject to the appropriate jurisdictional carrier access charges in accordance with their applicable intrastate and interstate carrier access tariffs. NH PUC Order at 21-22.

GNAPs focuses on the various movements of nomadic VoIP calls prior to their eventual termination at Palmerton's facilities for the proposition that all such calls should be classified as interstate and, thus, potentially accrue lower interstate access charges. Palmerton MB at 23-24.

[20] The reference to the "610" area code may have conveyed the erroneous impression that this NPA was assigned to the City of Philadelphia, Pa.

This argument must fail for the following reasons. First, as it has been stated before, GNAPs has *not paid any* access charges either interstate or intrastate. Second, here we are not dealing with individual end-user *retail calls* to ISPs. Instead, we are dealing with the *wholesale* telecommunications transport movement and termination of interexchange traffic that includes VoIP or IP-enabled calls. In these circumstances, the FCC has opined as follows:

> We agree with Bell South that AT&T's service is not analogous to ISP-bound traffic. Although a call to an ISP may include multiple communications, the only relevant communication in the case presented by AT&T is from the calling card caller to the called party. Moreover, even if there are multiple communications, the Commission [FCC] has found that neither the path of the communication nor the location of any intermediate switching point is relevant to the jurisdictional analysis.

FCC AT&T Prepaid Calling Card Order, ¶ 26 at 10.

Prior management or movement of a call communication is not dispositive of its jurisdictional classification when, as here, the NPA/NXX origin and termination of the call are clearly intrastate on the basis of available billing information, associated technologies, and established industry practices for the purposes of establishing the appropriate level of intercarrier compensation. In the present factual situation, in the absence of any other discernible, substantive, and reliable information, we cannot classify a call – even an interconnected nomadic VoIP call – as interstate simply because it may have moved across the Commonwealth's boundaries while the relevant call origination and termination information clearly indicate an intrastate interexchange classification. It is sufficient to point out that even conventional circuit-switched non-VoIP interexchange calls that originate in Pennsylvania are often transported out-of-state before their subsequent in-state termination within the Commonwealth. However, such intermediate transport does not transform the jurisdictional classification of such calls to "interstate." Furthermore, the accompanying SS7 signaling for such calls can and does cross state boundaries (depending on the physical location of the utilized SS7 nodes) in order to independently establish the most optimal path for the transmission and termination of these circuit-switched interexchange calls.

Although the FCC has not yet formally proceeded with any jurisdictional classification of interconnected VoIP calls, it still expects state utility regulatory commissions to deal with and resolve intercarrier compensation disputes that may implicate interconnected VoIP. *See generally In re Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of*

the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, WC Docket No. 09-134 (FCC Rel. October 9, 2009), Memorandum Opinion and Order, DA 09-2205. Finally, the FCC fully expects state utility regulatory commissions to address intercarrier compensation issues that involve intrastate traffic and access matters. *See generally North County Communications Corp. v. MetroPCS California, LLC*, File No. EB-06-MD-007 (FCC March 30, 2009), Memorandum Opinion and Order, DA 09-719.

Based on the case-specific evidentiary record, Palmerton adequately relied on the NPA/NXX origination and termination of the intrastate interexchange call traffic at issue for the jurisdictional classification and billing of such traffic. Such reliance is generally consistent and does not undermine the *Core Appeal Decision* in some other but still rather important respects. *Core Appeal Decision*, 941 A.2d 758 and n.10 (classification of NXX codes and local calling areas).

Although the special traffic study that was carried out by Palmerton may lack the appropriate degree of statistical validity to be fully representative of terminating traffic patterns at Palmerton's facilities for the full time horizon of the intercarrier compensation dispute at issue, that traffic study should significantly and materially affect the outcome of this proceeding. Palmerton Revised Exh. 6 (Revised Traffic Study), ID at 31, Tr. 1035-1044. As Palmerton explained in its Exceptions:

> The study was not presented to undertake complicated statistical studies or to derive traffic billing factors. It was designed simply to determine whether the traffic delivered was exclusively nomadic VoIP, as Global NAPs claimed. Exhibit 6 focuses exclusively on long distance voice calls that originated from other Pennsylvania numbers. Both Palmerton and Global NAPs used the traffic study as a base document to undertake extensive discovery (interrogatories and depositions) and present witnesses.

Palmerton Exc. at 14 (citations omitted).

Palmerton's special study provided specific information on the various types of entities, e.g., ILEC, CLEC, wireless telecommunications carriers, and cable companies that had their intrastate interexchange calls transported by GNAPs and indirectly terminated at Palmerton's PSTN facilities. Consequently, this special traffic study is of adequate probative value to draw the appropriate inferences regarding the indirect termination of traffic by GNAPs at Palmerton's facilities and the intercarrier compensation regime that should apply.

Palmerton's special traffic study was utilized in an attempt to reconcile Palmerton's billing of interexchange intra-MTA wireless calls consistent with the directives of our May 5, 2009 Order in this proceeding.[21] It appears that Palmerton made an effort to reduce the overall intercarrier compensation amount in dispute in order to account for the reciprocal compensation rate that is commonly applied for the termination of interexchange intra-MTA wireless calls. Tr. 280. This rate is usually lower than intrastate and interstate carrier access charges in accordance with applicable federal law and past Commission decisions.[22] Although Palmerton's special traffic study played a role in producing the relevant monetary adjustment, this adjustment does not materially impact the intrastate intercarrier compensation amount that is at issue. Palmerton Revised Exh. 3.

C. Intercarrier Compensation and Regulatory Policy

Now that the legal and technical reasons for exercising subject matter jurisdictions in this intercarrier compensation dispute have been discussed and the fundamental merits of the Palmerton Complaint have been sustained, broader regulatory policy issues must also be covered. In our May 5, 2009 Order, we noted that, if "certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services." Docket No. C-2009-2093336, Order entered May 5, 2009, at 8-9. One of the statutory policy directives in Chapter 30 of the Public Utility Code mandates this Commission to:

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

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

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[21] Docket No. C-2009-2093336, Order entered May 5, 2009, at 9.

[22] *See generally Petition of Cellco Partnership d/b/a Verizon Wireless, et al.*, Docket No. P-00021995 *et al.*, Order entered January 18, 2005; *ALLTEL Pennsylvania, Inc. v. Verizon Pennsylvania Inc., et al.*, Docket No. C-20039321, Order entered January 18, 2005.

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

The FCC has expressed similar concerns:

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

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

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

THEREFORE, I move that:

1. The Exceptions of Palmerton Telephone Company are hereby granted consistent with this Motion.

2. Within thirty (30) days of entry of the Commission's Order in this proceeding, Palmerton Telephone Company shall issue a final bill to Global NAPs consisting of all amounts owed for intrastate interexchange call traffic transported by Global NAPs and terminated at the facilities of Palmerton Telephone Company.

3. Within thirty (30) days of the bill issuance by Palmerton Telephone Company in accordance with Moving Paragraph No. 2 above, Global NAPs shall make full payment to Palmerton Telephone Company with appropriate notification to this Commission and the participating parties in this proceeding.

4. If Global NAPs shall not make the payment to Palmerton Telephone Company in accordance with Moving Paragraph No. 3 above, this matter shall be referred to the Law Bureau of the Commission for investigation and further action as deemed necessary.

5. Ordering Paragraph No. 7 of the Initial Decision, recommending the imposition of a $750 fine against Global NAPs for three violations of the Public Utility Code be adopted.

6. A civil penalty of $50,000 be imposed upon Global NAPs for failure to comply with the Commission's June 25, 2009 Order Imposing Sanctions.

7. The Office of Special Assistants prepare the appropriate Order consistent with this Motion.

DATED: February 11, 2010

James H. Cawley
Chairman