

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Global NAPs, Inc.)	WC Docket No. 10-60
Petition for Declaratory Ruling and Alternative)	
Petition for Preemption to the Pennsylvania,)	
Maryland and New Hampshire State Commissions)	

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (VON Coalition)¹ hereby submits these comments in support of Global NAPs’ request for a declaratory ruling (Petition) that federal law prohibits state public utility commissions from subjecting Voice over Internet Protocol (VoIP) traffic to intrastate access tariffs. As discussed below, such a ruling would be consistent with the Commission’s longstanding policy that enhanced services such as VoIP are exempt from the payment of access charges, a policy confirmed last month by a federal court in the District of Columbia. Such a ruling will also maintain the status quo while the Commission embarks on its much anticipated reform of intercarrier compensation system, with a goal of a complete transition to IP networks. The Commission should similarly confirm that access charges may not be assessed for the termination of calls to VoIP endpoints, or for the origination of 8YY calls from VoIP endpoints.

¹ The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of IP enabled communications. VON Coalition members are developing and delivering voice and other communications applications that may be used over the Internet. VON Coalition members include AT&T, Cisco, Google, iBasis, Microsoft, New Global Telecom, Skype, T-Mobile, Vonage and Yahoo.

DISCUSSION

I. VoIP SERVICES ARE NOT SUBJECT TO INTRASTATE ACCESS CHARGES

VoIP services are integrated, IP-enabled services providing multiple capabilities that combine information provision, computer interactivity, and voice-calling capabilities, which render such services as single “integrated offerings.” VoIP users can “utilize multiple service features that access different websites or IP addresses during the same communication session and perform different types of communications simultaneously.”² These features and functions are inseparable from the voice application that may appear to be most similar to a telephone service.

VoIP services are either unregulated or properly classified as information services under the Telecommunications Act of 1996 (“1996 Act”). The 1996 Act creates a distinction between “telecommunications services” and “information services.” The first consists of pure transmission services offered to end users without change in form or content, and subject to common-carrier regulation.³ The second, in contrast, offers the ability, for example, to store, retrieve, utilize and/or manipulate “information.”⁴ VoIP service takes full advantage of the flexibility and efficiency of IP-based transmissions by enabling the user to manipulate, generate, store, transform and make information services available to others.⁵

The Commission has further explained that the statutory definitions of telecommunications service and information service do not “rest[] on the particular types

² *Id.* at 22419, ¶ 25.

³ 47 U.S.C. § 153(43).

⁴ 47 U.S.C. § 153(20).

⁵ The 1996 Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” *See* 47 U.S.C. § 153(20).

of facilities used.”⁶ Each rests instead “on the function that is made available.”⁷ IP-enabled services that originate or terminate in IP are intrinsically information services when traffic is exchanged between an IP network and the PSTN because the traffic must, of necessity, undergo a net protocol conversion from circuit-switched format to IP (or vice versa). The FCC has held that “both protocol conversion and protocol processing services are information services under the 1996 Act.”⁸

In addition, the FCC has held that a service will be treated as a single, integrated information service, rather than as an information service with a separate telecommunications service component, when the telecommunications features are not “separated from the data-processing capabilities of the service” but are instead “part and parcel of [the overall information] service and . . . integral to its other capabilities.”⁹ Thus, interconnected VoIP falls squarely within the definition of an “information service” and is subject to exclusive federal jurisdiction unless otherwise specifically provided by Congress or the FCC.

Under federal law, “information services” are exempt from telecommunications regulation, which includes state regulation (including certification and tariff requirements). The FCC’s long standing policy of exempting information services from

⁶ Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4821 (¶ 35) (2002).

⁷ *Id.*

⁸ First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 (¶ 104) (1996) (“*Non-Accounting Safeguards Order*”).

⁹ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶¶ 36, 38.

state public utility regulation has proven to be one of the great successes in implementing the 1996 Act's pro-competitive objectives.

While the FCC has asserted limited jurisdiction over interconnected VoIP services, it has not treated interconnected VoIP as a traditional telecommunications service. Specifically, the FCC has imposed a number of public safety and consumer protection obligations, including, requirements to provide Enhanced 911 services, contribute to the Federal Universal Service and Telecommunications Relay Service Funds, protect customer proprietary network information and provide customers notice before discontinuing service.¹⁰ In none of these actions, however, has the FCC granted the states authority to require VoIP providers to pay intrastate access charges as the state would do here.

With respect to the access charges at issue, the FCC's regulations require the assessment of carrier's carrier switched access charges only upon "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."¹¹ The rules do not authorize the assessment of switched access charges on enhanced or information service providers, such as VoIP providers. In fact, in the *MTS and WATS Market Structure Order*, the Commission promulgated Rule 69.5, imposing end-user charges upon end users and carriers' carrier charges upon interexchange carriers but also created what became known as the Enhanced Service Provider exemption by describing the term "interexchange carriers" to exclude ESPs for

¹⁰ First Report and Order and Notice of Proposed rulemaking, WC Docket 04-36, FCC 05-116, released June 3, 2005 (imposing E911 requirements); Report and Order and Notice of Proposed Rulemaking, WC Docket 06-122, FCC 06-94, released June 27, 2006 (imposing USF requirements); Report and Order and Further Notice of Proposed Rulemaking, WC Docket 04-36, FCC 07-22, released April 2, 2007 (imposing CPNI requirements); Report and Order, WC Docket 04-36, FCC 09-40, released May 13, 2009 (imposing discontinuance requirements)

¹¹ 47 C.F.R. § 69.5(b).

purposes of assessing access charges.¹² The Commission explained that it considered (and rejected immediately) imposing access charges upon ESPs, and it enacted a new regulation explicitly reserving “carrier’s carrier charges” for “interexchange carriers.”¹³ Thus, it would be inappropriate for a state to assess access on services the FCC so carefully exempted.

Multiple federal courts have enjoined state commissions from regulating interconnected VoIP services on the grounds that they were information services, exempt from state utility regulation.¹⁴ For instance, a Minnesota federal district court has even held that “[state] regulations that have the *effect* of regulating information services are in conflict with federal law and must be pre-empted.¹⁵ Additionally, a federal district court in Missouri held that existing laws mandate that states classify VoIP services that perform IP to TDM conversions as an information service because IP-PSTN traffic offers the “capability for generating, acquiring, storing transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁶ The court also noted that IP-PSTN traffic “alters the form and content of the information sent and received because it involves a net protocol conversion from the digitized packets of the IP

¹² See *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) (“MTS and WATS Market Structure Order”). Before the phrase “information service” was introduced in 1996, the Commission used the term “enhanced services.” The Commission has found that these two terms substantially overlap. See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. at 15982, 16132 (¶ 341 n.498).

¹³ *Id.* at Appendix A.

¹⁴ See e.g., *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (summarizing federal policy of preempting state attempts to regulate information services); *Southwestern Bell Telephone L.P. v. Missouri Public Service Board*, 461 F. Supp. 2d 1055, 1082-1083 (E.D. Mo. 2006) (classifying services as information services when it transforms or processes “information,” even if the content is the same).

¹⁵ See *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003).

¹⁶ See *Southwestern Bell Telephone L.P. v. Missouri Public Service Board*, 461 F. Supp. 2d 1055, 1082-1083, citing 47 U.S.C. ¶ 153(20).

protocol to the TDM technology used on the PSTN.”¹⁷ While the court recognized that the FCC may be willing to revisit the classification and regulatory status of interconnected VoIP at some point, “existing rules and orders establish how VoIP and other IP services should be treated in the interim.”¹⁸

More recently, another federal court re-affirmed that IP-originated calls are information services and not subject to access charges.¹⁹ In a dispute concerning whether a VoIP provider owed interstate access charges to a CLEC, the court was persuaded by two prior federal court decisions that found that “transmissions which include net format conversion from VoIP to TDM are information services exempt from access charges.”²⁰

Global NAPs’ petition does not expressly address two calling scenarios in which carriers routinely try to assess access charges on traffic exchanged between VoIP and PSTN endpoints.²¹ The first is when a PSTN user calls a VoIP user whose NPA-NXX is not within the PSTN customer’s local calling area. The second is when a VoIP user places a call to an 8YY (toll free) telephone number. For all the reasons set out above, the Commission should clarify that access charges do not apply to such calls.

II. REQUIRING VOIP PROVIDERS TO PAY INTRASTATE ACCESS CHARGES WOULD BE INCONSISTENT WITH THE GOALS OF THE NATIONAL BROADBAND PLAN

As described in the Global NAPs petition, ambiguity and uncertainty around the classification of interconnected VoIP have led to numerous disputes concerning the

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *PAETEC COMMUNICATIONS, INC. V. COMMPARTNERS, LLC.*, (“*PAETEC*”) US District Court for the District of Columbia, CA No. 08-0397 (February 18, 2010).

²⁰ *Id.* at 6.

²¹ Indeed, some of the entities identified in the petition as customers of Global NAPs engage in these practices. *See, e.g.*, http://tariffs.net/select_client_docs.asp?comp=152 for documentation of intrastate and interstate switched access tariffs of YMAX Communications Corporation.

requirements to pay access charges.²² A finding that interconnected VoIP is an interstate, information service will eliminate many of these disputes and will encourage incumbent and competitive local exchange carriers to work towards the necessary reforms described in the National Broadband Plan that are needed to move them to all IP networks.

On March 16, 2010, Commission released *Connecting America: The National Broadband Plan*, which outlines a roadmap for achieving the goals of universal broadband access and adoption. While there are of course many factors necessary to achieve these goals, reform of intercarrier compensation, including the elimination of per minute access charges during the next 10 years, is a key component in helping the nation move from circuit switched to IP-based, next generation networks. Specifically, in Chapter 8 of the Plan, the Commission details steps that should be taken to “close the broadband availability gap,” including the adoption of a framework for long-term intercarrier compensation reform that “creates a glide path to eliminate per-minute charges.”²³ As noted in the plan, the current intercarrier compensation system “is not sustainable in an all-broadband Internet Protocol (IP) world where payments for the exchange of IP traffic are not based on per-minute charges, but instead are typically based on charges for the amount of bandwidth consumer per month.”²⁴

In the current system, access rates vary from 0 to 35.9 cents, creating disincentives for carriers in high rate areas to transition to IP networks – requiring VoIP providers to inefficiently convert IP traffic to TDM.²⁵ As a first step to reform, the Plan recommends that carriers’ intrastate terminating access rates be reduced to match

²² Petition at 4-5.

²³ National Broadband Plan, at 135-136.

²⁴ *Id.* at 142.

²⁵ *Id.*

interstate rates; followed by reduction of the interstate rates to reciprocal compensation rate levels and finally a path to phase out per minute charges by 2020.²⁶

Shortly, the Commission is expected to release Notice of Proposed Rulemakings that will seek comments on the recommendations in the National Broadband Plan, including the proposed changes to intercarrier compensation. In light of the pending changes to intercarrier compensation practices, the Commission should wait for more specific direction flowing from the National Broadband Plan before taking action counter to the proposals therein, including allowing states to assess intrastate access charges on interconnected VoIP providers.

²⁶ *Id.* at 148, 149.

