
**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-8002

PAETEC COMMUNICATIONS, INC.,

Petitioner,

v.

COMMPARTNERS, LLC,

Respondent.

On Petition for Interlocutory Appeal from the U.S. District Court
for the District of Columbia, Civ. Action No. 1:08-CV-00397 (JR)

**JOINT BRIEF OF AT&T, CTIA, GRANITE, NECA, NEUTRAL TANDEM,
QWEST, SUREWEST, TDS TELECOM, USTELECOM, U.S. TELEPACIFIC,
VERIZON, VON COALITION, WCIA, AND WINDSTREAM AS *AMICI
CURIAE* IN SUPPORT OF PAETEC'S PETITION UNDER 28 U.S.C. § 1292(B)**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the *amici curiae* hereby certify as follows:

A. *Parties and Amici.* All parties appearing before the district court and before this Court are listed in the petition for permission to appeal of PAETEC Communications Inc. All *amici* appearing before this Court are listed below:

AT&T Inc.
CTIA—THE WIRELESS ASSOCIATION®
Granite Telecommunications, LLC
National Exchange Carrier Association, Inc.
Neutral Tandem, Inc.
Qwest Communications International Inc.
SureWest Communications
TDS Telecommunications Corp.
United States Telecom Association
U.S. TelePacific Corp.
The Voice on the Net Coalition, Inc.
Verizon
Windstream Corporation
Wireless Communications Association International

B. *Rulings Under Review.* Reference to the ruling under review appears in the petition for permission to appeal of PAETEC Communications Inc.

C. *Related Cases.* Reference to related cases appears in the petition for permission to appeal of PAETEC Communications Inc.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, the *amici curiae* respectfully submit the following corporate disclosure statements:

AT&T Inc. AT&T Inc. is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services and products to the general public. AT&T Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

CTIA—THE WIRELESS ASSOCIATION®. CTIA—THE WIRELESS ASSOCIATION® (“CTIA”) is an international non-profit membership organization representing all sectors of the wireless communications industry — cellular, personal communication services, and enhanced specialized mobile radio. CTIA certifies that it has no parent corporation and that no publicly-held company owns 10 percent or more of its stock.

Granite Telecommunications, LLC. Granite Telecommunications, LLC is a privately held limited liability company with no parent company. No publicly held company owns 10 percent or more of the membership interests in Granite Telecommunications, LLC. Insofar as relevant to this litigation, Granite

Telecommunications, LLC's general nature and purpose is to provide communications services.

National Exchange Carrier Association, Inc. The National Exchange Carrier Association, Inc. ("NECA") is a not-for-profit membership association created under subpart G of the Federal Communications Commission's rules. *See generally* 47 C.F.R. § 69.601 *et seq.* It is organized as a not-for-profit corporation under the laws of Delaware. Its members are local exchange carriers, including telephone companies that do not file separate interstate tariffs. NECA has no parent company, subsidiaries or affiliates for which disclosure is required by Rule 26.1.

Neutral Tandem, Inc. Neutral Tandem, Inc. provides tandem interconnection services throughout the United States. Neutral Tandem is a publicly traded company, has no parent company, and no publicly held company has a 10 percent or greater ownership interest.

Qwest Communications International Inc. Qwest Communications International Inc. is a publicly held corporation that has no parent company. Capital Research and Management Company owns approximately 12 percent of Qwest Communications International Inc. Qwest Communications International Inc., through its operating subsidiaries, provides a variety of

broadband Internet-based data, voice, and image communications for businesses and consumers.

On April 22, 2010, Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink, announced their intention to merge. CenturyLink provides voice, broadband and video services to consumers and businesses in 33 states. Capital Research and Management Company owns approximately 12 percent of CenturyLink. Although Qwest Communications International Inc. and CenturyLink are still in the process of seeking the requisite federal and state regulatory and other approvals for their transaction, Qwest Communications International Inc. provides this additional information under FRAP 26.1(b) and Circuit Rule 26.1(a).

Qwest Communications International Inc. owns Qwest Communications Company, LLC, which provides interstate interLATA services, both domestically and internationally, as well as Voice over Internet Protocol services. Qwest Communications International Inc. also owns Qwest Corporation, a local exchange carrier that provides local exchange telecommunications, exchange access, information access, data and intraLATA long distance services pursuant to tariff and contract within a 14-state incumbent local exchange region. Qwest Communications International Inc. also owns other subsidiaries that provide telecommunications services.

SureWest Communications. SureWest Communications is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services. SureWest Communications has no parent company, and no publicly held company owns 10 percent or more of its stock.

TDS Telecommunications Corporation. TDS Telecommunications Corporation (“TDS Telecom”) is a direct, wholly owned subsidiary of Telephone and Data Systems, Inc. (“TDS”). TDS has no parent company. Insofar as it is relevant to this litigation, TDS Telecom’s general nature and purpose is to provide communications services.

United States Telecom Association. The United States Telecom Association (“USTelecom”) is a trade association representing companies offering a wide range of services across communications platforms, including voice, video and data over local exchange, long distance, wireless, Internet, and cable services. USTelecom’s members include many of the smallest providers in the industry as well as many of the largest.

U.S. TelePacific Corp. U.S. TelePacific Corp. d/b/a TelePacific Communications provides local and long distance telephone service and Internet access service to business customers in California and Nevada. U.S. TelePacific Corp. d/b/a TelePacific Communications is a wholly-owned subsidiary of U.S.

TelePacific Holdings Corp. No publicly-held company owns 10 percent or more of U.S. TelePacific Holdings Corp.

Verizon. The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. has no parent company. No publicly held company owns 10 percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon's general nature and purpose is to provide communications services.

The Voice on the Net Coalition, Inc. The Voice on the Net Coalition, Inc. ("VON Coalition") is a corporation organized in 1998 under the Nonprofit Corporation Act of the District of Columbia. The VON Coalition does not own or maintain a controlling interest in any public company, nor is it owned or controlled by any public company.

Windstream Corporation. Windstream Corporation is a publicly traded telecommunications company that, through its subsidiaries, provides voice, data, and video services. Windstream Corporation does not have a parent company, and no publicly held company holds 10 percent or more of its stock.

Wireless Communications Association International (WCAI). The Wireless Communications Association International is a non-profit trade association for companies that provide broadband telecommunications services

using wireless technology. Its members include the world's leading wireless licensees and manufacturers.

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GLOSSARY

FCC	Federal Communications Commission
IP	Internet Protocol
PSTN	Public Switched Telephone Network
VoIP	Voice over Internet Protocol

**STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF
AUTHORITY TO FILE OF *AMICI CURIAE***

The *amici* filing this brief, and their members, provide a variety of voice and data services — including Voice over Internet Protocol (“VoIP”) services — throughout the nation. *Amici* are involved in numerous lawsuits, and other disputes, regarding whether and what tariffed access charges apply to the VoIP traffic they exchange with other companies. *Amici* have also participated actively in proceedings before the Federal Communications Commission (“FCC”) in which that agency continues to consider issues of federal law and policy related to VoIP traffic, including the regulatory classification of VoIP traffic and the intercarrier compensation obligations associated with such traffic. Although *amici* have differing views on the merits of the question certified for appeal by the district court, all *amici* have a strong interest in the establishment of a clear legal framework for VoIP traffic.

Amici are authorized to state that PAETEC Communications, Inc. (“PAETEC”) has consented to, and CommPartners, LLC (“CommPartners”) does not oppose, the filing of this brief. *See* Fed. R. App. P. 29(a); D.C. Cir. Rule 29(b).

BACKGROUND

PAETEC filed this suit to collect amounts that it claimed were due under its federal and state switched access tariffs for traffic that CommPartners sent to PAETEC for delivery to PAETEC’s local telephone customers. CommPartners

claimed — and PAETEC did not dispute — that some of the traffic CommPartners delivered to PAETEC was originated by callers using a VoIP service.¹

CommPartners argued that federal law prevented PAETEC from assessing its tariffed access charges on such VoIP traffic, even if the terms of those tariffs extended to that traffic.

On February 18, 2010, the district court entered partial summary judgment for CommPartners, holding that “the access charge regime is inapplicable to VoIP-originated traffic.” Memorandum Order at 11, *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-cv-397 (D.D.C. Feb. 18, 2010) (“Feb. 18 Order”). Therefore, the court held, PAETEC’s tariffed access charges did not apply to this traffic. *See id.* The court also concluded that, “[b]ecause the Communications Act establishes the exclusive methods of intercarrier compensation for the calls at issue, PAETEC’s unjust enrichment and *quantum meruit* claims are statutorily barred.” *Id.* at 12.

Finding that the question whether tariffed access charges may be assessed on VoIP traffic is “a controlling question of law as to which there is substantial ground for difference of opinion,” the district court, on May 3, 2010, granted

¹ After originating with the calling party in Internet Protocol (“IP”) transport format, the traffic was delivered to the called party (a PAETEC customer) in a circuit-switched transport format on the Public Switched Telephone Network (“PSTN”); such traffic is often referred to as “IP-PSTN” or “VoIP-originated” traffic. *Amici* refer to such traffic here as “VoIP traffic.”

PAETEC's request that it certify its February 18, 2010 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Order, *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-cv-397 (D.D.C. May 3, 2010). PAETEC timely filed its petition for permission to appeal.

SUMMARY OF ARGUMENT

In its petition for permission to appeal, PAETEC ably defends the district court's conclusion that its February 18, 2010 decision satisfies the criteria for interlocutory review set forth in § 1292(b), and explains why this Court should exercise its discretion to take jurisdiction over the appeal. *Amici* submit this brief to emphasize the industry-wide significance of the question certified for appeal.² Although some *amici* contend that existing law is clear that access charges apply to VoIP traffic, other *amici* argue to the contrary just as adamantly. This disagreement, combined with inconsistent decisions from courts and state regulators, and inaction by the FCC, has resulted in numerous disputes within the industry, leading to extensive litigation before courts and state public utility commissions. No federal court of appeals has addressed the question presented in

² From an industry-wide perspective, the most significant of the issues presented in PAETEC's petition is the question whether the district court correctly held that the access charge regime is inapplicable to VoIP traffic. *See* PAETEC Pet. 13-20. *Amici* agree that the Court will need to reach that issue, which is of fundamental importance to the industry, regardless of the Court's resolution of the tariff issues that PAETEC also addresses in its petition, *see id.* at 7-13, about which *amici* have differing views.

this case, and the potential for a decision of this Court to minimize, if not resolve, the widespread disputes strongly favors granting PAETEC's petition.

ARGUMENT

In deciding whether to take jurisdiction over an interlocutory appeal under § 1292(b), a court of appeals “may properly consider the system-wide costs and benefits of allowing the appeal” — that is, “the impact that an appeal will have on other cases.” *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990); *see McFarlin v. Conseco Svcs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (questions certified under § 1292(b) must be “stated at a high enough level of abstraction” to have “general relevance to other cases in the same area of law”); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3930, at 425 n.24 (2d ed. 2010) (“The fact that a question of law that is controlling in the present case also may be important to other cases is one factor to be considered in exercising the discretionary power to permit a § 1292(b) appeal.”).

As Judge Robertson found, disputes about what amounts federal law requires communications companies to pay each other for VoIP traffic have been ““raging for years’” within the industry, and “[t]he FCC, which has had the controversy on its docket for a decade, has been unable to decide it.” Feb. 18 Order at 6. In a similar case, Judge Rakoff recently noted that the parties’ dispute

about whether the plaintiff could recover its tariffed access charges for VoIP traffic was “exacerbated by the years-long failure of the [FCC] to act in this area.”

Manhattan Telecomms. Corp. v. Global NAPs, Inc., No. 08-cv-3829, 2010 WL 1326095, at *1 (S.D.N.Y. Mar. 31, 2010).³

The widespread disputes regarding intercarrier compensation for VoIP traffic have also been noted across the industry. As the U.S. Telecom Association recently explained, “[i]ntercarrier compensation issues, particularly the treatment of VoIP traffic terminating on the public switched network, [have] become increasingly contentious, with companies on both sides unsure of the rules of the road.”⁴ The Open Internet Coalition has similarly noted that “confusion over the rules governing the interconnection of broadband Internet communications to the narrowband [public switched telephone network]” threatens to “stall the development, evolution, and ubiquity of Internet communications.”⁵ The FCC has acknowledged that, despite having considered the question for nine years, it “has not addressed whether VoIP traffic is subject to [intercarrier compensation]

³ Contrary to the district court’s holding in this case, however, Judge Rakoff held that “the inability to apply the tariff regime as it stands does not preclude [the plaintiff’s] entitlement to recover in equity,” 2010 WL 1326095, at *3, and ordered the defendant to pay the plaintiff’s tariffed interstate access rate for the traffic at issue, *see id.* at *4.

⁴ Comments of U.S. Telecom Association at 4-5, *FCC Report on Rural Broadband Strategy*, GN Docket No. 09-29 (filed Mar. 25, 2009).

⁵ Comments of the Open Internet Coalition at 3-4, *Feature Group IP Petition for Forbearance*, WC Docket No. 07-256 (filed Feb. 19, 2008).

charges,” even though it recognized that many in the industry had pointed out the “significant disputes and costly litigation” resulting from the FCC’s inaction in this area. *Connecting America: The National Broadband Plan* at 159 n.53 (Mar. 16, 2010) (“*National Broadband Plan*”). Prompt resolution of this issue is particularly important given that, as the FCC has acknowledged, unclear intercarrier compensation rules can lead to arbitrage, inefficiencies, and outright fraud, as companies attempt to exploit loopholes and ambiguities. *See id.* at 142.

Indeed, this well-documented disagreement has manifested itself in countless disputes within the industry about who owes what to whom among the companies involved in exchanging VoIP traffic. In the absence of FCC action in its pending dockets, providers have decided to pay — or, in some instances, to refuse to pay — access charges for such traffic based on their own view of the law.

As a result, litigation over intercarrier compensation for VoIP traffic has increased in recent years. Two other cases raising the same dispute as this case are pending before Judge Robertson,⁶ and many similar cases are pending in other districts across the country.⁷ Such disputes have been presented to multiple state

⁶ *See PAETEC Communications, Inc. v. One Communications Corp.*, No. 09-cv-1505 (D.D.C. filed Aug. 10, 2009); *PAETEC Communications, Inc. v. Global NAPs, Inc.*, No. 09-cv-1504 (D.D.C. filed Aug. 10, 2009).

⁷ *See, e.g., Choice One of Pa., Inc. v. Verizon Pa. Inc.*, No. 10-cv-670 (E.D. Pa. filed Feb. 10, 2010); *Choice One of NY, Inc. v. Verizon NY Inc.*, No. 10-cv-1108 (S.D.N.Y. filed Feb. 10, 2010); *One Communications Corp. v. MCI*

public utility commissions,⁸ and in petitions for declaratory ruling or forbearance filed with the FCC.⁹ To date, no federal court of appeals has ruled on the question that Judge Robertson decided in this case and certified for interlocutory appeal.¹⁰

When disputes over intercarrier compensation for VoIP traffic were first filed in federal court, the district courts routinely invoked the doctrine of primary jurisdiction to stay those cases (or to dismiss them without prejudice) pending the FCC's resolution of the relevant issues. For example, in *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, 386 F. Supp. 2d 144 (W.D.N.Y. 2005), the district court noted that "the FCC has been seeking comments on these very issues

Communications Svcs., Inc. d/b/a Verizon Business, No. 09-cv-89 (D. Del. filed Feb. 9, 2009); *Central Tel. Co. of Va. v. Sprint Communications Co. of Va., Inc.*, No. 3:09-cv-720 (E.D. Va. filed Nov. 16, 2009); *Teleport Communications Wash. D.C., Inc. v. Global NAPs, Inc.*, No. 1:09-cv-11062-EFH (D. Mass. filed June 19, 2009).

⁸ See, e.g., Opinion and Order, *Palmerton Tel. Co. v. Global NAPs South, Inc.*, No. C-2009-2093336 (Pa. Pub. Util. Comm'n Feb. 11, 2010); Order No. 25,043, *Hollis Telephone, Inc. et al.*, DT 08-028 (N.H. Pub. Utils. Comm'n Nov. 10, 2009); Procedural Order re: Scheduling, *Amended Joint Petition of Ludlow Tel. Co. et al.*, Docket No. 7493 (Vt. Pub. Serv. Bd. Dec. 7, 2009).

⁹ See, e.g., Global NAPs Petition, *Global NAPs Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions*, WC Docket No. 10-60 (filed Mar. 5, 2010); Memorandum Opinion and Order, *FeatureGroup IP Petition for Forbearance*, 24 FCC Rcd 1571 (2009).

¹⁰ Recently, the Ninth Circuit heard oral argument in a dispute over whether a voluntary contract between two providers obligated one to pay access charges to the other for alleged VoIP calls. See *Global NAPs Cal., Inc. v. Public Utils. Comm'n of Cal.*, No. 09-55600 (9th Cir. arg. May 3, 2010). There is no such contract in the instant case.

since March 2004, and intends to issue a comprehensive set of rules concerning VoIP, including ones pertaining to intercarrier compensation,” *id.* at 150-51.

Given that “it appear[ed] that a decision [from the FCC] will be forthcoming in a matter of months, as opposed to years,” the court found it appropriate to stay the case pending FCC action. *Id.* at 151; *see also Southwestern Bell Tel., L.P. v.*

VarTec Telecom, Inc., No. 4:04 CV 1303 (CEJ), 2005 WL 2033416, at *4 (E.D. Mo. Aug. 23, 2005) (“The FCC’s ongoing [r]ulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance”).¹¹

Unlike the district courts that first considered this question, Judge Robertson (correctly) denied CommPartners’ motion seeking a primary jurisdiction stay.

Judge Robertson reasoned that, “[a]lthough some risk of inconsistent rulings is present, that risk is outweighed by the need for a decision: continued uncertainty about whether and when the FCC will ultimately address and decide the issue is unacceptable.” Memorandum Order at 8, *PAETEC Communications, Inc. v.*

CommPartners, LLC, No. 08-cv-397 (D.D.C. Feb. 10, 2009). At least one other

¹¹ *See also, e.g.*, Memorandum & Order at 8-11, *Southwestern Bell Tel., L.P. v. Global Crossing Ltd.*, No. 04-cv-1573 (E.D. Mo. Feb. 7, 2006); *Southern New England Tel. Co. v. Global NAPs, Inc.*, No. Civ. A. 304cv2075JCH, 2005 WL 2789323, at *3-*6 (D. Conn. Oct. 26, 2005).

district court had previously come to the same conclusion. *See Verizon NY Inc. v. Global NAPS, Inc.*, 463 F. Supp. 2d 330, 339-44 (E.D.N.Y. 2006).

In its recently issued *National Broadband Plan*, the FCC acknowledged the “regulatory uncertainty about whether or what intercarrier compensation payments are required for VoIP traffic,” and recognized the agency’s need to “address the treatment of VoIP for purposes of [intercarrier compensation].” *National Broadband Plan* at 142, 148. But the *National Broadband Plan* does not resolve that question. The FCC has since stated that it intends to start a rulemaking on intercarrier compensation in the fourth quarter of 2010. But it is unclear at this time whether — and when — the FCC will adopt the intercarrier compensation proposals in the *Plan*. *See id.* at 144 (proposing a ten-year “roadmap” for intercarrier compensation reform).

By granting PAETEC’s petition for permission to appeal and ruling on the dispute presented in this case, this Court can provide the industry with much-needed guidance on whether tariffed access charges apply to VoIP traffic. The *amici* signing this brief have differing views about the merits of the district court’s decision in this case, but all agree that a decision from this Court — whatever the ultimate result — would significantly reduce, if not eliminate, the disputes that have plagued the industry for years with respect to this question.

In addition, a decision from this Court in this case would likely have important ramifications beyond the specific question whether switched access tariffs apply to VoIP traffic of their own force. In many cases, the compensation due when two companies exchange VoIP traffic is determined by a contract (often an “interconnection agreement”) between those companies. Such agreements are inevitably negotiated against the backdrop of the legal regime that would apply in the absence of such a voluntary contract. A decision from this Court clarifying providers’ intercarrier compensation obligations for VoIP traffic would materially assist industry participants in such negotiations, dramatically reducing transaction costs and preventing future disputes and litigation.

CONCLUSION

In light of the importance of the question the district court decided — both to many other pending cases and to the communications industry more generally — the Court should grant PAETEC’s petition for permission to appeal.

Respectfully submitted,

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STATEMENT PURSUANT TO D.C. CIRCUIT RULE ECF-3

Pursuant to D.C. Circuit Rule ECF-3(B), the undersigned certifies that counsel for parties other than *amicus curiae* Verizon consent to the filing of this brief.

/s/ Scott H. Angstreich
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), D.C. Circuit Rule 32(a) and the Court's order of December 12, 2007, the undersigned certifies that this brief complies with the applicable type-volume limitations of Federal Rule of Appellate Procedure 32, D.C. Circuit Rule 32 and the Court's order. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 10 pages.

/s/ Scott H. Angstreich
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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of May, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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