

# **EXHIBIT A**

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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
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10 GLOBAL NAPS CALIFORNIA INC., ) CASE NO. CV 07-04801 MMM (SSx)  
11 Plaintiff, )  
12 vs. ) ORDER DENYING MOTION FOR  
13 PUBLIC UTILITIES COMMISSION OF ) PRELIMINARY INJUNCTION  
14 THE STATE OF CALIFORNIA, )  
15 Defendant. )

16 On July 24, 2007, plaintiff Global NAPs California, Inc. filed an *ex parte* application  
17 seeking injunctive relief restraining enforcement by the Public Utilities Commission of California  
18 ("CPUC") of two CPUC orders: (1) Decision 07-01-004, issued January 11, 2007, which granted  
19 Cox California Telcom, LLC's motion for summary judgment against Global NAPs; and  
20 (2) Decision 07-06-044, issued June 21, 2007, which suspended Global NAPs' Certificate of  
21 Public Convenience and Necessity. On June 26, 2007, the CPUC instructed telecommunications  
22 carriers in California to cease exchanging telecommunications traffic with Global NAPs after July  
23 22, 2007. On July 17, 2007, the CPUC rescinded this instruction after the California Court of  
24 Appeal stayed enforcement of Decision 07-06-044, and directed carriers that they should continue  
25 to exchange telecommunications traffic with Global NAPs pending further notice.

26 The court held a telephonic hearing on Global NAPs' application on July 26, 2007. At the  
27 hearing, the CPUC agreed that it would not rescind the July 17, 2007 directive pending further  
28 hearing on the application. Global NAPs then agreed that its application could be heard as a

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1 motion for preliminary injunction on August 27, 2007. This order addresses that motion.

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3 **I. FACTUAL BACKGROUND**

4 **A. The Relevant Parties**

5 Global NAPs California, Inc. ("Global NAPs") is the California affiliate of Global NAPs,  
6 Inc., a Delaware corporation with its home office in Massachusetts. <sup>1</sup> In 2000, Global NAPs  
7 secured authority from the CPUC to operate as a Competitive Local Exchange Carrier (CLEC)  
8 and Interexchange Carrier (IXC) in California. <sup>2</sup> Also in 2000, Global NAPs obtained a  
9 Certificate of Public Convenience and Necessity (CPCN) from the CPUC, granting it authority  
10 to do business as a telecommunications company in California.<sup>3</sup>

11 Global NAPs contends that it provides only outbound transport of Voice Over Internet  
12 Protocol (VoIP) and Internet Protocol Enabled (IP-enabled) services to its California customers.<sup>4</sup>  
13 VoIP is an internet application that "allows a caller using a broadband Internet connection to place  
14 calls to and receive calls from other callers using VoIP or traditional telephone service." *Nuvio*  
15 *Corp. v. F.C.C.* 473 F.3d 302, 303 (D.C. Cir. 2006).<sup>5</sup> IP-enabled services is a broader category

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<sup>1</sup>Declaration of Bradford Masuret in Support of Ex Parte Application for Temporary  
18 Restraining Order and Order to Show Cause re Preliminary Injunction ("Masuret Decl."), ¶ 2.

19 <sup>2</sup>Declaration of Christopher Witteman in Opposition to Petitioner's Application for  
20 Preliminary Injunction ("Witteman Decl. II"), Exh. 5.

21 <sup>3</sup>*Id.*

22 <sup>4</sup>See Masuret Decl., ¶ 4.

23 <sup>5</sup>The Eighth Circuit has explained VoIP in this way:

24 "VoIP is an internet application utilizing 'packet-switching' to transmit a voice  
25 communication over a broadband internet connection. In that respect, it is different  
26 from the 'circuit-switching' application used to route traditional landline telephone  
27 calls. In circuit-switched communications, an electrical circuit must be kept clear  
of other signals for the duration of a telephone call. Packet-switched  
communications travel in small digital packets along with many other packets,  
allowing for more efficient utilization of circuits."

28 *Minnesota Public Utilities Comm'n. v. F.C.C.*, 483 F.3d 570, 574 (8th Cir. 2007) ("*Minnesota*

1 that includes VoIP. See *In the Matter of IP-Enabled Services*, 19 F.C.C.R. 4863, 4918 n. 1  
2 (F.C.C. 2004) (IP-enabled services “includes services and applications relying on the Internet  
3 Protocol family”). Global NAPs asserts that all of its customers in the state have confirmed their  
4 status as Enhanced Service Providers (“ESPs”),<sup>6</sup> and that none of the calls it handles originate  
5 from a local Global NAPs switch because Global NAPs does not offer origination dial tone  
6 service.<sup>7</sup>

7 The CPUC is the California regulatory body empowered under the Telecommunications  
8 Act (“TCA”) to arbitrate and enforce Interconnection Agreements (“ICAs”). Cox California  
9 Telcom is a CLEC that was granted permission to “provide local exchange telephone services in  
10 Southern California” in 1996.<sup>8</sup>

### 11 B. Regulatory Background

12 In *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006) (“*Global*  
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14 *PUC*”). “Interconnected VoIP service” is a service in which a call is transferred from VoIP to  
15 a landline telephone or from a landline to VoIP. *Id.*

16 <sup>6</sup>Masuret Decl., ¶ 3. “An ‘enhanced’ service contains a basic service component but also  
17 ‘employ[s] computer processing applications that act on the format, content, code, protocol or  
18 similar aspects of the subscriber’s transmitted information; provide the subscriber additional,  
19 different, or restructured information; or involve subscriber interaction with stored information.’”  
20 *IP-Enabled Services*, 19 F.C.C.R. at 4880; see also 47 C.F.R. § 64.702(a). “Enhanced services  
21 ‘include [ ] access to the Internet and other interactive computer networks.’” *Howard v. America*  
22 *Online Inc.*, 208 F.3d 741, 752 (9th Cir. 2000) (quoting *In re Access Charge Reform*, 12  
23 F.C.C.R. 15982, 16131 n. 498 (1997) (proposed rule)). Thus, ESPs offer “data processing  
24 services that use the telephone network to transmit information among customers and computers.”  
25 *MCI Telecommunications Corp. v. F.C.C.*, 57 F.3d 1136, 1138 (D.C. Cir. 1995) (citing  
26 *California v. F.C.C.*, 905 F.2d 1217, 1223 n. 3 (9th Cir. 1990)). The FCC has consistently  
27 stated that ESPs are not common carriers. See *id.* (citing *In re Federal-State Joint Board on*  
28 *Universal Service*, 12 F.C.C.R. 87, 479 (F.C.C. 1996) (recommended decision) (“[Enhanced  
Service Providers (‘ESPs’)] note that the Commission has traditionally defined on-line and  
Internet services as enhanced services and has not regulated [ESPs] as common carriers. . .”).

26 <sup>7</sup>Masuret Decl. ¶ 4.

27 <sup>8</sup>Opposition of Respondent California Public Utilities Commission to Petitioner’s  
28 Application for Order to Show Cause Re Preliminary Injunction (“CPUC Opp.”) at 3.

1 *NAPs III*”), the First Circuit described the regulatory backdrop for this action as follows:

2 “The Telecommunications Act of 1996 (TCA), Pub.L. No. 104-104, 110 Stat. 56  
3 (codified as amended in scattered sections of 47 U.S.C.), was enacted ‘to end the  
4 local telephone monopolies and create a national telecommunications policy that  
5 strongly favored competition in local telephone markets.’ [*Global NAPs, Inc. v.*  
6 *Verizon New England, Inc.*] 396 F.3d [16,] 18 [(1st Cir. 2005) (*Global NAPs*  
7 *I*)]; *P.R. Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 7 (1st Cir. 1999);  
8 see also *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 638 . . . (2002);  
9 *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 . . . (1999). To achieve this  
10 goal, the TCA requires the former local phone monopolies, called incumbent local  
11 exchange carriers (ILECs), to allow competitive local exchange carriers (CLECs)  
12 to interconnect with their networks. See 47 U.S.C. § 251(c)(2). Interconnection  
13 permits customers of one local exchange carrier to make calls to, and receive calls  
14 from, customers of other local exchange carriers. [*Global Naps, Inc. v.*  
15 *Massachusetts Department of Telecommunications & Energy* (*Global Naps II*),  
16 427 F.3d 34, 36 (1st Cir. 2005).] The TCA also requires the ILECs to negotiate  
17 in good faith the terms of interconnection agreements with the CLECs. See 47  
18 U.S.C. § 251(c)(1). ‘These agreements provide the terms of interconnection and  
19 “fulfill the duties” enumerated in § 251.’ *Global Naps II*, 427 F.3d at 37 (quoting  
20 47 U.S.C. § 251(c)(1)).

21 Section 252 prescribes the process by which interconnection agreements are to be  
22 formed. 47 U.S.C. § 252. Under this provision, if negotiations between local  
23 exchange carriers do not result in a final agreement, either party can petition the  
24 relevant state commission to arbitrate unresolved issues. See *id.* § 252(b)(1). The  
25 state commission must limit its consideration of the agreement to the matters  
26 specifically presented in the petition for arbitration and in the response. See *id.*  
27 § 252(b)(4)(A). The state commission has ‘the authority to decide the open issues  
28 between the parties, and to impose conditions on the parties for the implementation

1 of the terms of arbitration into an agreement,’ *Global Naps I*, 396 F.3d at 19  
2 (citing 47 U.S.C. § 252(b)(4)(C)), so long as its resolutions are consistent with  
3 § 251 and any regulations promulgated by the FCC, see 47 U.S.C. §§ 252(c)(1),  
4 253(a). Once an agreement is concluded, it is submitted to the state commission  
5 for final approval. *Id.* § 252(e).

6 State commission decisions are subject to judicial review in federal court under 47  
7 U.S.C. § 252(e)(6):

8 In any case in which a State commission makes a determination  
9 under this section, any party aggrieved by such determination may  
10 bring an action in an appropriate Federal district court to determine  
11 whether the agreement or statement meets the requirements of  
12 section 251 of this title and this section.”

13 *Global NAPs III*, 444 F.3d at 61-62.

14 As noted, both Cox and Global NAPs are CLECs. Global NAPs is also an IXC, or  
15 interexchange carrier. This means that it functions as an intermediary long-distance carrier,  
16 transmitting calls from one local exchange carrier to another when those carriers are not directly  
17 interconnected. See *Alma Communications Co. v. Missouri Public Service Comm’n*, 490 F.3d  
18 619, 621 (8th Cir. 2007); see also *Qwest Communications v. AT & T Corp.*, 479 F.3d 1206, 1208  
19 (10th Cir. 2007) (“Long-distance providers, or interexchange carriers (‘IXCs’), enable customers  
20 in different local exchanges to call each other, generally by routing communications from one  
21 LEC network to the IXC network and from that IXC network to a different LEC network”). The  
22 fact that Cox and Global NAPs are both CLECs does not alter the regulatory framework, as all  
23 telecommunications carriers – whether they are ILECs or CLECs – have a duty under the TCA  
24 to interconnect. See 47 U.S.C. § 251(a).

25 **C. The Interconnection Agreement Between Global NAPs and Cox**

26 In October 2003, Global NAPs and Cox entered into an ICA that governed the exchange  
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1 of local traffic, ISP-bound traffic, and intraLATA toll traffic.<sup>9</sup> “For all Local Traffic and ISP-  
2 bound Traffic, the Parties agree[d] to mutual traffic exchange without explicit compensation  
3 (sometimes referred to as ‘bill and keep’).”<sup>10</sup> See *Verizon Maryland, Incorporated v. Global*  
4 *Naps, Inc.*, 377 F.3d 355, 361 (4th Cir. 2004) (describing “bill and keep” as a compensation  
5 system under which each carrier recovers its costs from its own customers). “The Parties  
6 [agreed, however, to] compensate each other for the transport and termination of all IntraLATA  
7 Toll Traffic<sup>11</sup> at the rates provided” in the agreement.<sup>12</sup> Pursuant to the agreement, “[t]he  
8 designation of traffic as Local Traffic (and ISP-Bound traffic) or IntraLATA Toll for purposes  
9 of compensation [was to] be based on the horizontal and vertical coordinates associated with the  
10 originating and terminating NPA-NXXs<sup>13</sup> of the call, regardless of the carrier(s) involved in  
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12 <sup>9</sup>Witteman Decl. II, Exh. 6 at 52; see also Declaration of Richard Davis in Support of Ex  
13 Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary  
14 Injunction (“Davis Decl.”), Exh. S.

15 <sup>10</sup>Witteman Decl. II, Exh. 6 at 61.

16 <sup>11</sup>The ICA defines intraLATA toll traffic as “those intraLATA calls that are not defined  
17 as ‘Local Traffic’ in this Agreement.” (Witteman Decl. II at 49.) Generally, intraLATA toll  
18 calls are “long-distance calls that do not travel beyond the borders of a single LATA,” or “local  
19 access and transport area.” *Global NAPs III*, 444 F.3d at 62-63 n. 1. They are distinct from  
20 intraLATA calls, which are “what consumers generally know as local service.” *Id.*

21 <sup>12</sup>Witteman Decl. II, Exh. 6 at 61.

22 <sup>13</sup>Telephone numbers consist of three components. The first three digits are the area code,  
23 or numbering plan area (NPA) in industry parlance. The next three digits are known as the NXX-  
24 code and identify the switch or central office to which the customer is connected. The final four  
25 digits distinguish each customer’s phone line and are known as “XXXX” in the industry. See  
26 *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1147-48 (9th Cir. 2006) (“Telephone numbers  
27 generally consist of ten digits in the form of NPA-NXX-XXXX. The first three digits indicate the  
28 Numbering Plan Area (or NPA), commonly known as the area code, and the next three digits  
refer to the exchange code. Under standard industry practice, area codes and exchange codes  
generally correspond to a particular geographic area served by an LEC. These codes serve two  
functions: the routing of calls to their intended destinations, and the rating of calls for purposes  
of charging consumers. Each NPA-NXX code is assigned to a rate center, and calls are rated as  
local or toll based on the rate center locations of the calling and called parties. When the NPA-  
NXX codes of each party are assigned to the same local calling area, the call is rated to the calling

1 carrying any segment of the call.”<sup>14</sup>

2 On April 28, 2006, Cox filed a complaint with the CPUC, alleging that Global NAPs had  
3 breached the ICA.<sup>15</sup> Cox asserted that Global NAPs had failed and refused to pay for the  
4 termination of intraLATA toll calls by Cox.<sup>16</sup> On June 9, 2006, Global NAPs filed a motion to  
5 dismiss the CPUC proceeding, asserting that the issue raised by Cox’s complaint fell within the  
6 exclusive jurisdiction of the Federal Communications Commission. An ALJ denied the motion.<sup>17</sup>  
7 On January 11, 2007, the CPUC granted Cox’s motion for summary judgment, and ordered  
8 Global NAPs to pay Cox approximately \$985,000, representing the outstanding balance due under  
9 its interpretation of the ICA.<sup>18</sup> On February 13, 2007, Global NAPs filed a timely application  
10 for rehearing, which the CPUC denied on August 23, 2007.<sup>19</sup>

11 On February 15, 2007, Cox filed a motion requesting that the CPUC order Global NAPs  
12 to pay the judgment and comply with the order; on March 22, the ALJ granted the motion and  
13 set a hearing on “possible sanctions” for April 9, 2007.<sup>20</sup> On June 21, 2007, the CPUC issued  
14 a decision suspending Global NAPs’ Certificate of Public Convenience and Necessity as a result  
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16 party as local; otherwise it is a toll call, for which the calling party must normally pay a  
17 premium”); see also *USA Choice Internet Service, LLC v. United States*, 73 Fed. Cl. 780, 782  
18 n. 6 (Fed. Cl. 2006).

19 <sup>14</sup>Witteman Decl. II, Exh. 6 at 61.

20 <sup>15</sup>*Id.*, Exh. 6 at 22-23.

21 <sup>16</sup>*Id.*, Exh. 6 at 25, 31-32. In its reply, Global NAPs contends that it is willing to pay Cox  
22 for such calls, but only at the federal rate for intercarrier compensation. (See Global NAPs’  
23 Reply Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction  
24 (“Global NAPs’ Reply”) at 4.)

25 <sup>17</sup>*Id.*, Exh. 10.

26 <sup>18</sup>Davis Decl., Exh. A.

27 <sup>19</sup>Witteman Decl. II, Exh. 12; August 23, 2007 letter from Christopher Witteman,  
28 attaching Order Modifying Decision 07-01-004 and Denying Rehearing of Decision as Modified.

<sup>20</sup>Davis Decl., Exh. J; *id.*, ¶ 9.

1 of its failure to satisfy the judgment.<sup>21</sup> Before this decision was mailed to the parties, the CPUC  
2 issued a press release in which one commissioner referred to Global NAPs as a “scofflaw[ ],”  
3 while another pledged to stop Global NAPs from doing business in California and prevent it  
4 from “engag[ing] in this type of shoddy business practice again.”<sup>22</sup> On June 26, 2007, Jack  
5 Leutza, the director of CPUC’s Communications Division, advised all facility-based carriers in  
6 California not to do business with Global NAPs after July 22, 2007 (the date on which its CPCN  
7 was to be revoked).<sup>23</sup>

8 On June 29, 2007, Global NAPs filed a petition for writ of review in the California Court  
9 of Appeal under California Public Utilities Code § 1756.<sup>24</sup> The court concluded that Global NAPs  
10 had failed to exhaust administrative remedies because it had not filed an application for rehearing  
11 of the order revoking the CPCN. Consequently, it dismissed the petition.<sup>25</sup>

12 On July 17, 2007, the CPUC retracted Leutza’s June 26, 2007 email and advised carriers  
13 to “continue to exchange telecommunications traffic in California with Global NAPs California  
14 beyond July 22, 2007.”<sup>26</sup> Global NAPs initiated this action on July 25, 2007, filing a petition  
15 seeking review of the CPUC’s decisions under 47 U.S.C. § 252. The court held a telephonic  
16 hearing on Global NAPs’ application for temporary restraining order on July 26, 2007. At the  
17 hearing, the CPUC agreed not to rescind its July 17, 2007 communication to carriers pending  
18 further proceedings in this court, and Global NAPs agreed that its application could be deemed  
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20 <sup>21</sup>*Id.*, Exh. B.

21 <sup>22</sup>*Id.*, Exh. T.

22 <sup>23</sup>*Id.*, Exh. U.

23 <sup>24</sup>*Id.*, ¶ 16.

24 <sup>25</sup>*Id.* Global NAPs contends that it timely filed a petition for rehearing on July 20, 2007,  
25 but that CPUC failed to advise the California court of its filing.

26 <sup>26</sup>Declaration of Christopher Witteman in Opposition to Ex Parte Application for  
27 Temporary Restraining Order and Order to Show Cause re Preliminary Injunction (“Witteman  
28 Decl. I”), Exh. 1.

1 a motion for preliminary injunction and heard on August 27, 2007.

2 **D. The Issue in Dispute**

3 In its petition for review, Global NAPs seeks a determination that the CPUC exceeded its  
4 authority in issuing Decisions 07-01-004 and 07-06-044. It contends that the CPUC lacks  
5 jurisdiction to regulate VoIP and IP-enabled traffic because the Federal Communications  
6 Commission has preempted regulation of such traffic by state commissions. Global NAPs asserts  
7 that the calls for which it was ordered to pay Cox were IP-enabled traffic because they originated  
8 from ESPs. It further contends that the CPUC improperly characterized the calls as intraLATA  
9 toll calls because Global NAPs does not provide origination dial tone service to its customers, and  
10 the calls did not originate from its switch in Los Angeles.<sup>27</sup> The CPUC counters that it was merely  
11 exercising its authority under the TCA to interpret and enforce disputes regarding an ICA, and  
12 that Global NAPs' argument regarding origination of the calls obfuscates the central issue in  
13 interpreting its ICA with Cox, i.e., the fact that, wherever it may have originated, the traffic for  
14 which access charges were assessed was traffic that came into Global NAPs' facility in Los  
15 Angeles and was sent from there over the Publicly Switched Telephone Network (PSTN)<sup>28</sup> to  
16 Cox's facility Orange County.<sup>29</sup>

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18 **II. DISCUSSION**

19 **A. Standard Governing Motions for Preliminary Injunctions**

20 The "limited purpose" of a preliminary injunction is "to preserve the relative positions of  
21 the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S.

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<sup>27</sup>Global NAPs' Ex Parte Application for Temporary Restraining Order and Order to Show  
24 Cause re Preliminary Injunction ("Global NAP App.") at 11-12.

25 <sup>28</sup>The PSTN "is a vast network which today is understood to consist of not only the old  
26 Bell Operating Companies (now parts of Verizon and AT&T), but also competing local telephone  
27 companies, long distance telephone companies, cable telephone providers, and wireless telephone  
providers." (CPUC Opp. at 14.)

28 <sup>29</sup>CPUC Opp. at 10, 17.

1 390, 395 (1981). A court may issue a preliminary injunction if plaintiff demonstrates “either:  
 2 (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that  
 3 serious questions going to the merits were raised and the balance of hardships tips sharply in its  
 4 favor.” *Lands Counsel v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007) (quoting *Clear Channel*  
 5 *Outdoor Inc., a Delaware Corp. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)); see  
 6 also *Miller v. Cal. Pacific Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994).<sup>30</sup> “The two alternative  
 7 methods . . . represent extremes of a single continuum; ‘the less certain the district court is of the  
 8 likelihood of success on the merits, the more plaintiffs must convince [the court] that the public  
 9 interest and balance of hardships tip in their favor.’” *Lands Council*, 479 F.3d at 639 (quoting  
 10 *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)). “If  
 11 the plaintiff shows no chance of success on the merits, . . . the injunction should not issue,  
 12 because ‘[a]s an irreducible minimum, the moving party must demonstrate a fair chance of success  
 13 on the merits, or questions serious enough to require litigation.’” *Department of Parks and*  
 14 *Recreation v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1123-24 (9th Cir. 2006) (quoting  
 15 *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987)).

#### 16 **B. Global NAPs’ Likelihood of Success on the Merits**

17 Global NAPs’ primary contention is that the CPUC exceeded the scope of its authority  
 18 under the TCA to arbitrate, interpret and enforce ICAs by ordering Global NAPs to pay fees to  
 19 Cox for traffic terminated over its line. Global NAPs asserts (1) that the CPUC had no authority  
 20 to determine the compensation Global NAPs owed Cox because the FCC has preempted state  
 21 utility commissions from regulating and setting compensation rates for IP-enabled and VoIP  
 22 traffic; and (2) that it incorrectly determined that the traffic in question was intraLATA traffic.  
 23 To prevail on the merits of its claim, Global NAPs must show: (1) that the FCC’s order has the  
 24 preemptive effect Global NAPs contends; and (2) that the CPUC’s enforcement of the ICA  
 25 constituted regulation of VoIP traffic and was thus preempted. If the CPUC had authority to

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 27 <sup>30</sup>A “serious question” is one as to which the moving party has “a fair chance of success  
 28 on the merits.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir.  
 1984) (quotations omitted).

1 interpret and enforce the ICA, Global NAPs must show alternatively that the Commission  
2 incorrectly interpreted the agreement.

3 **1. Whether the CPUC Lacked Jurisdiction to Order Global NAPs to Pay**  
4 **Terminating Access Charges Under the ICA**

5 “The Supremacy Clause of Art. VI of the Constitution provides Congress with the power  
6 to pre-empt state law.” *Louisiana Public Service Comm’n v. F.C.C.*, 476 U.S. 355, 368 (1986).  
7 Preemption can result both from action taken by Congress and from action taken by a federal  
8 agency acting within the scope of its congressionally delegated authority. *Id.* at 369; see also *City*  
9 *of New York v. F.C.C.*, 486 U.S. 57, 64 (1988) (noting that a “narrow focus on congress’ intent  
10 to supercede state law [is] misdirected” because “in proper circumstances the agency may  
11 determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden  
12 area,” citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984)).

13 An agency that intends to preempt state regulation must do so clearly and explicitly. See  
14 *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987) (“it is appropriate  
15 to expect an administrative regulation to declare any intention to pre-empt state law with some  
16 specificity”); *Hillsborough County v. Automated Med. Labs. Inc.*, 471 U.S. 707, 718 (1985)  
17 (“because agencies normally address problems in a detailed manner . . . we can expect that they  
18 will make their intentions clear if they intend for their regulations to be exclusive”).

19 “The requirement of a clear indication of the agency’s intent to preempt is especially  
20 important in the context of the TCA, which ‘divided authority among the FCC and the state  
21 commissions in an unusual regime of cooperative federalism.’” *Global NAPs III*, 444 F.3d at 72  
22 (quoting *Global NAPs II*, 427 F.3d at 46 (quotations omitted)). The TCA clearly envisioned that  
23 state commissions would have a role in the overall regulatory scheme. *Id.* (“The goal of  
24 preserving a role for the state regulatory commissions is reflected in a number of provisions of  
25 the TCA,” quoting *Global NAPs II*, 427 F.3d at 46-47). One area in which state commissions  
26 retain authority concerns ICAs; under section 252 of the TCA, the state commissions have power  
27 to arbitrate disputes regarding, to interpret and to enforce ICAs. See *Peevey*, 462 F.3d at 1153  
28 (affirming that the CPUC has power under § 252 to interpret and arbitrate ICAs); *Pacific Bell v.*

1 *Pac West Telecomm, Inc.*, 325 F.3d 1114, 1126-27 (9th Cir. 2003) (holding that the CPUC's  
2 power to regulate was limited to "arbitrating, approving and enforcing interconnection  
3 agreements," citing 47 U.S.C. § 252); see also *Global NAPs, Inc. v. Verizon New England, Inc.*,  
4 454 F.3d 91, 100 (2d Cir. 2006) ("*Global NAPs IV*") (noting that the FCC, in *In the Matter of*  
5 *the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,*  
6 *Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151 (2001) ("the *ISP Remand*  
7 *Order*"), remanded by *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429 (D.C. Cir. 2002),<sup>31</sup> "explicitly  
8 reserve[d] state commission authority in certain relevant matters. The *2001 Remand Order*  
9 acknowledges, for example, that state commissions have, and should continue to have, a role in  
10 arbitrating, reviewing and enforcing interconnection agreements relating to ISP-bound traffic").

11 Global NAPs contends that the FCC clearly preempted all regulation of VoIP traffic in *In*  
12 *the Matter of Vonage Holdings Corp.*, 19 F.C.C.R. 22404 (2004), aff'd., *Minnesota PUC*, 483  
13 F.3d 570. The FCC is currently in the process of deciding what, if any, regulatory framework  
14 it should apply to emerging IP-enabled communications technologies. See *IP-Enabled Services*,  
15 19 F.C.C.R. at 4864-68. In its Notice of Proposed Rulemaking, the FCC invited comment as to  
16 whether it should classify VoIP as a telecommunications service or an information service. See  
17 *id.* at 4880-81 (distinguishing between the two types of service). If classified as a  
18 telecommunications service, VoIP will be subject to mandatory common carrier regulations that  
19 would not apply if it were characterized as an information service. See *Vonage Holdings Corp.*  
20 *v. F.C.C.*, 489 F.3d 1232, 1235 (D.C. Cir. 2007) (citations omitted). During the pendency of  
21 this rulemaking process, the FCC has preempted state regulation of VoIP providers, finding that  
22 it is impossible to separate VoIP service into interstate and intrastate components, and that  
23 permitting individual states to regulate a global, interconnected technology would contravene  
24 federal rules and policies. See *Vonage Holdings Corp.*, 19 F.C.C.R. at 22412-27.

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26 <sup>31</sup>Although the District of Columbia Circuit held that the FCC's rationale for preempting  
27 state commission regulation of intercarrier compensation for local ISP-bound calls was inadequate,  
28 it chose not to vacate the order, so that it remains in force. See *WorldCom, Inc.*, 288 F.3d at  
433-34; see also *Global NAPs III*, 444 F.3d at 65.

1 In *Vonage*, the FCC preempted a regulation promulgated by the Minnesota Public Utilities  
2 Commission that required Vonage (a VoIP provider) to comply with state regulations governing  
3 telephone services, and cease and desist from offering VoIP services until it did. See *Minnesota*  
4 *PUC*, 483 F.3d at 576. The Eighth Circuit upheld the FCC's ruling, holding that it was  
5 reasonable based on the record before the agency. See *id.* at 579-80 (noting the FCC's  
6 determination that it was impractical or impossible to separate VoIP service into interstate and  
7 intrastate components, and deferring to the FCC's factual findings); see also *id.* at 581  
8 (concluding that the FCC's finding that state regulation of VoIP services would interfere with  
9 valid federal rules or policies was not arbitrary or capricious).<sup>32</sup>

10 Global NAPs contends that the FCC's order in *Vonage*, which the Eighth Circuit upheld,  
11 preempts the CPUC's alleged "regulation" of VoIP services through enforcement of the ICA.  
12 While the FCC in *Vonage* clearly stated that state commissions cannot require VoIP providers to  
13 comply with state statutes and regulations that govern the offering of telephone service within  
14 their jurisdiction, see *id.* at 22409, 22412-27, it in no way communicated an intent to preclude  
15 state commissions from enforcing ICAs that require the payment of interconnection charges on  
16 VoIP calls that terminate on the PSTN. See *id.* at 22432 (noting that the ruling preempted "state  
17 regulation to an extent comparable to what [the FCC] ha[s] done in this order"). Because such  
18 an intent is neither clear nor explicit on the face of the ruling, the court will not infer it here,  
19 particularly in light of the TCA's reservation to state commissions of the authority to interpret and  
20 enforce ICAs, and other FCC pronouncements, such as the *ISP Remand Order*, that recognize  
21 such authority.

22 Global NAPs argues that the intent to preempt is clear because the FCC in *Vonage* found  
23 that VoIP traffic was "jurisdictionally interstate." In its ruling, the FCC concluded that VoIP  
24 traffic could not practically be separated into intrastate and interstate components. See *Vonage*,  
25 19 F.C.C.R. at 22419-20 (noting that it is impossible to place the origin and endpoint of a VoIP

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27 <sup>32</sup>The Eight Circuit emphasized the "limited scope" of its review, stating: "[O]ur review  
28 is limited to the issue whether the FCC's determination was reasonable based on the record  
existing before it at the time." *Minnesota PUC*, 483 F.3d at 580.

1 call geographically). As a result, it determined that VoIP traffic was “jurisdictionally interstate”  
2 and that it could “preempt[ ] state regulation [of such traffic] where necessary.” *Id.* at 22423.

3 Global NAPs asserts that, simply because traffic is “jurisdictionally interstate,” the CPUC  
4 is preempted from imposing access charges on it. Several courts have rejected this proposition  
5 in the context of ISP-bound traffic, which is deemed to be interstate traffic. See *Global NAPs IV*,  
6 454 F.3d at 100 (noting that the *ISP Remand Order* “reserve[d] state commission authority in  
7 certain relevant matters,” including the arbitration, review and enforcement of ICAs, even where  
8 they dealt with ISP-bound, i.e., interstate, traffic); see also *Global NAPs III*, 444 F.3d at 71  
9 (rejecting Global NAPs’ argument that the statement in the *ISP Remand Order* that ISP-bound  
10 traffic is “properly characterized as interstate access” subject to FCC regulation indicates that  
11 state commission regulation is preempted because “[a] matter may be *subject* to FCC jurisdiction,  
12 without the FCC having exercised that jurisdiction and preempted state regulation”). As these  
13 cases demonstrate, the mere fact that VoIP traffic is “interstate” does not preclude the state  
14 commissions from exercising limited authority over it.<sup>33</sup>

15 It is well settled, for example, that state public utility commissions have power to arbitrate,  
16 approve, interpret and enforce ICAs under the TCA. See *Peevey*, 462 F.3d at 1153; *Pacific Bell*,  
17 325 F.3d at 1126-27; see also, *BellSouth Telecom, Inc. v. MCImetro Access Transmission Servs.*  
18 317 F.3d 1270, 1274 (11th Cir. 2003) (“[A] common sense reading of the statute leads to the  
19 conclusion that the authority to approve or reject agreements carries with it the authority to  
20 interpret agreements”); *Global NAPs II*, 427 F.3d at 46-47 (noting that “[t]he model under the  
21 TCA is to divide authority among the FCC and the state commissions in an unusual regime of  
22 ‘cooperative federalism,’” and that “[t]he role played by state commissions is especially important  
23 with respect to interconnection agreements”); *E.SPIRE Communications, Inc. v. New Mexico*

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26 <sup>33</sup>In its reply, Global NAPs asserts in conclusory fashion that the fact that VoIP traffic is  
27 “jurisdictionally interstate” *per se* preempts state regulation of it. Global NAPs does not address  
28 or attempt to distinguish the cases cited in this order, however, which establish that the  
“interstate” nature of VoIP traffic does not automatically exempt it from all forms of state  
regulation.

1 *Public Regulation Com'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) (noting that the “grant to the  
 2 state commissions [of power] to approve or reject and mediate or arbitrate interconnection  
 3 agreements necessarily implies the authority to interpret and enforce specific provisions contained  
 4 in those agreements,” citing *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of*  
 5 *Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000) (section 252 “necessarily implies the authority  
 6 to interpret and enforce specific provisions contained in [ICAs]”)); *Southwestern Bell Tel. Co.*  
 7 *V. Public Utilities Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000) (“[T]he Act’s grant to state  
 8 commissions of plenary authority to approve or disapprove these interconnection agreements  
 9 necessarily carries with it the authority to interpret and enforce the provisions of agreements that  
 10 state commissions have approved”). Consequently, the CPUC had authority to interpret and  
 11 enforce the ICA between Global NAPs and Cox.<sup>34</sup>

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13 <sup>34</sup>Global NAPs argues that by ordering it to pay Cox, the CPUC has impermissibly set  
 14 rates for VoIP traffic. The parties to an ICA, however, have the power to opt out of any existing  
 15 regulatory regime by agreement. See *Peevey*, 362 F.3d at 1151 (“Parties who enter into a  
 16 voluntary interconnection agreement need not conform to the requirements of the Act, 47 U.S.C.  
 17 § 252(a)(1), and a state commission need not review such agreements for compliance with § 251,  
 18 47 U.S.C. § 252(e)(2). . . . Only if the parties sought mandatory arbitration from the  
 19 commission under § 252(b)(1) would the restrictions of the Act, and thus the *ISP Remand Order’s*  
 20 interpretation of § 251(b)(5), apply to the interconnection agreement. 47 U.S.C. § 252(c)”);  
 21 *Verizon New York, Inc. v. Global NAPs, Inc.*, 463 F.Supp.2d 330, 342 (E.D.N.Y. 2006) (noting,  
 22 with regard to an ICA between Global NAPs and Verizon, that “the parties would have been free  
 23 to opt out of any . . . regulatory regime by a mutual nondiscriminatory, arms length agreement”);  
 24 see also *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 372-73 (1999) (“the [ILEC] can negotiate an  
 25 agreement without regard to the duties it would otherwise have under § 251(b) or § 251(c)”; *In*  
 26 *the Matter of Implementation of the Local Competition Provision in the Telecommunications Act*  
 27 *of 1996*, 14 F.C.C.R. 3689, 3703 (1999) (“In the absence of [a rule governing inter-carrier  
 28 compensation for ISP-bound traffic], parties may voluntarily include this traffic within the scope  
 of their interconnection agreements. . . . Where parties have agreed to include this traffic . . .  
 they are bound by those agreements, as interpreted and enforced by the state commissions”),  
 vacated by *Bell Atlantic Tel. Co. v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000)). A state commission  
 can enforce the terms of an ICA even if the agreement is not consistent with the federal baseline.  
 The only limit on its enforcement power is that it must review the ICA to ensure that (1) the  
 agreement does not discriminate against a telecommunications carrier that is not a party to the  
 agreement; (2) that it is consistent with the public interest, convenience, and necessity; and  
 (3) that it meets the requirements of § 251. See 47 U.S.C. § 252(e)(2).

Although Global NAPs asserts that the CPUC’s enforcement of its contractual obligations  
 under the agreement with Cox was equivalent to state regulation of interconnection rates for VoIP

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1 This is particularly true since the traffic that was the subject of the CPUC's order was not  
2 ISP-bound, but PSTN-bound, traffic.<sup>35</sup> In *IP-Enabled Services*, the FCC noted:

3 "As a policy matter, we believe that any service provider that sends traffic to the  
4 PSTN should be subject to similar compensation obligations, irrespective of  
5 whether the traffic originates on the PSTN, *on an IP network* , or on a cable  
6 network. We maintain that the cost of the PSTN should be borne equitably among  
7 those that use it in similar ways." *IP-Enabled Services*, 19 F.C.C.R. at 4885  
8 (emphasis added).

9 The fact that the traffic that came into Global NAPs' facility in Los Angeles was IP-originated  
10 does not necessitate a finding that it is exempt from regulation by the CPUC because that traffic  
11 was bound for, and terminated on, the PSTN.

12 In sum, Global NAPs has not shown that the CPUC's action in enforcing the  
13 interconnection agreement between it and Cox is analogous to the direct regulation preempted in  
14 *Vonage*. Nor has it shown that the "jurisdictionally interstate" nature of VoIP traffic precluded  
15 the CPUC from enforcing the private interconnection agreement into which it entered with Cox.  
16 In the absence of either showing, Global NAPs has failed to demonstrate that it is likely to prevail

17 \_\_\_\_\_  
18 traffic, this is simply not the case. There is a difference between a general order that sets rates  
19 all carriers must pay and an order that enforces the terms of a specific ICA. See *Pacific Bell*, 325  
20 F.3d at 1125-26 (differentiating between the CPUC's power to interpret a specific interconnection  
21 agreement and its authority to promulgate regulations governing certain types of  
22 telecommunications traffic). The CPUC's decision was specific to Cox and Global NAPs, and  
23 was binding only on them.

24 <sup>35</sup>ISP-originated traffic is traffic that originates with an Internet Service Provider (ISP) or  
25 on the internet. ISP-bound traffic, on the other hand, is traffic that terminates at an ISP or that  
26 is routed to an internet user rather than a conventional telephone user. VoIP traffic, if delivered  
27 between ISPs, is both ISP-originated and ISP-bound. Here, the calls that were the subject of the  
28 CPUC's order were, if anything, "interconnected VoIP" calls, i.e., VoIP-to-landline calls. See  
*Vonage Holdings Corp.*, 489 F.3d at 1236 ("Interconnected VoIP services '(1) enable real-time,  
two-way voice communications; (2) require a broadband connection from the user's location; (3)  
require IP-compatible customer premises equipment; and (4) permit users to receive calls from  
and terminate calls to the PSTN [public switched telephone network],'" quoting *In re Universal  
Service Contribution Methodology*, 21 F.C.C.R. 7518, 7526 (2006)).

1 on its preemption claim, or that there are serious questions going to the merits of the claim.<sup>36</sup>

2 **2. Whether Global Naps Has Demonstrated That It Will Likely Prove It**  
3 **Is A VoIP Provider**

4 The factual predicate for Global NAPs' preemption argument is that it is a VoIP provider  
5 and thus exempt from regulation by the CPUC.<sup>37</sup> While the court has concluded, *supra*, that  
6 Global NAPs is not likely to prevail on the merits of its preemption claim, it notes additionally  
7 that the present record does not support Global NAPs' characterization of the service it provides.  
8 In the proceedings before the CPUC, Global NAPs described the service it provides to customers  
9 differently - it asserted that the calls in dispute "ar[o]se from an enhanced service provider and  
10  
11  
12

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13 <sup>36</sup>At oral argument, Global NAPs argued that there was at least a "substantial question"  
14 as to whether the CPUC's action in this case was preempted. As support, it cited *Southern New*  
15 *England Telephone Company v. MCI WorldCom Communications*, 539 F.Supp.2d 229 (D.Conn.  
16 2005) ("*SNET II*"), as evidence that there is a split of authority regarding the extent of the FCC's  
17 preemption of state commission regulation of ISP traffic. There, the district court approved its  
18 prior holding that the *ISP Remand Order* "applies to all ISP bound traffic." *Id.* at 230 (refusing  
19 to amend or alter *SNET v. MCI WorldCom*, 353 F.Supp.2d 287 (D. Conn. 2005) ("*SNET I*").  
20 *SNET II* does not raise a "substantial question" (or indeed any question at all) as to preemption  
21 of the CPUC's action here, or show that there is any disagreement among courts regarding the  
22 issue Global NAPs' petition presents. First, *SNET II* holds only that both local and non-local ISP-  
23 bound traffic is governed by the *ISP Remand Order*. *See id.* at 231-32. Global NAPs has, as  
24 noted, not argued or adduced evidence that the traffic at issue here is ISP-bound. Second, the  
25 court in *SNET I* held that the Connecticut Department of Public Utility Control acted arbitrarily  
26 and capriciously when it set reciprocal compensation rates for ISP-bound traffic in arbitrating a  
27 dispute concerning the formation of an ICA. *See SNET I*, 353 F.Supp.2d at 294-95. Here,  
28 however, the CPUC was merely interpreting an ICA into which the parties had voluntarily entered  
and enforcing the compensation rate to which they had agreed. *See Peevey*, 362 F.3d at 1151  
("Parties who enter into a voluntary interconnection agreement need not conform to the  
requirements of the Act"); see also *SNET II*, 353 F.Supp.2d at 294 (stating that the *ISP Remand*  
*Order* "simply prohibits states from addressing the issue of how to categorize ISP traffic *when*  
*arbitrating or approving* interconnection agreements or issuing regulations at any time after June  
14, 2001" (emphasis added)).

<sup>37</sup>Global NAPs App. at 4 ("Global NAPs provides exclusively VoIP and IP-enabled services to its customers in California. . .").

1 [were] terminated on Cox’s network,”<sup>38</sup> and that its role in completing the calls was the provision  
 2 of “outbound transport services” for traffic “delivered to” it by its ESP customers for termination  
 3 to LEC networks.”<sup>39</sup> The fact that Global NAPs may use Internet protocols to receive traffic  
 4 from its ESP customers before transmitting that traffic to an end point on the PSTN through  
 5 Cox’s facility does not make it a VoIP provider. Cf. *In the Matter of Petition for Declaratory*  
 6 *Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19  
 7 F.C.C.R. 7457, 7464-65 (2004) (concluding that AT & T offered a telecommunications service  
 8 despite the fact that it “routed calls over its Internet backbone” because end-users “obtain[ed] only  
 9 voice transmission with no net protocol conversion”); *ACS of Anchorage, Inc. v. F.C.C.*, 290  
 10 F.3d 403, 409 (D.C. Cir. 2002) (discussing the ESP exemption, and stating that “[r]ather than  
 11 directly exempting ESPs from interstate access charges, the Commission defined them as ‘end  
 12 users’ – no different from a local pizzeria or barber shop”). Consequently, Global NAPs has not  
 13 demonstrated that it is likely to succeed on its preemption claim, and has not raised serious  
 14 questions regarding the merits of that claim, as a factual matter as well.<sup>40</sup>

15 **3. Whether The CPUC Correctly Interpreted The ICA**

16 Even though Global NAPs has failed to establish that it will likely succeed on its

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18 <sup>38</sup>Witteman Decl. II, Exh. 7, ¶¶ 10, 11. See also CPUC Opp. at 20 (“Only now, after the  
 19 CPUC issued its [d]ecision . . . , does GNAPs represent that it ‘provides [IP]-enabled and [VoIP]  
 20 services to its customers.’ Throughout the proceeding below GNAPs made a very different  
 representation, i.e., that it is transporting traffic *from “ESPs” to Cox’s customers*”).

21 <sup>39</sup>See Davis Decl., Exh. E at 3, ¶¶ 6, 7.

22 <sup>40</sup>The CPUC contends that in California, VoIP providers are classified as neither CLECs  
 23 or IXC. (CPUC Opp. at 20.) Thus, if Global NAPs were a VoIP provider, it should not, under  
 24 the logic of *Vonage*, have obtained a license from the CPUC to operate as a telecommunications  
 25 carrier. Cf. *Vonage*, 19 F.C.C.R. at 22408 (“If the destination is another Vonage customer or  
 26 a user on a peered service, the server routes the packets to the called party over the Internet and  
 27 the communication also terminates via the Internet. If the destination is a telephone attached to  
 28 the PSTN, the server converts the IP packets into appropriate digital audio signals and connects  
 them to the PSTN using the services of telecommunications carriers interconnected to the PSTN.  
 If a PSTN user originates a call to a Vonage customer, the call is connected, using the services  
 of telecommunications carriers interconnected to the PSTN, to the Vonage server, which then  
 converts the audio signals into IP packets and routes them to the Vonage user over the Internet”).

1 preemption argument, it can nonetheless obtain a preliminary injunction if it demonstrates that  
2 it will likely prove that the CPUC incorrectly interpreted the ICA. The TCA gives the district  
3 courts the responsibility of reviewing a state commission's interpretation of an ICA to ensure that  
4 it is consistent with section 251 of the TCA. See *Global NAPs III*, 444 F.3d at 61-62 (citing 47  
5 U.S.C. § 252(e)(6) giving the district court authority to decide whether a state commission's  
6 determination satisfied the requirements of section 251). The scope of judicial review is limited.  
7 While the court reviews the CPUC's interpretation of federal law *de novo*, it must uphold the state  
8 commission's factual findings unless they are arbitrary and capricious. See *U.S. West*  
9 *Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999); see also *Alma*  
10 *Communications v. Missouri Public Service Com'n*, 490 F.3d 619, 624 (8th Cir. 2007); *Islander*  
11 *East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 482 F.3d 79,  
12 94 (2d Cir. 2006) (noting a two step approach treating issues of federal law first and then turning  
13 to factual determinations, citing *Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d  
14 428, 433 (6th Cir. 2003)).

15 Applying this standard, the court has found, reviewing the matter *de novo*, that Global  
16 NAPs is not likely to show that the CPUC's interpretation of preemption under federal law was  
17 erroneous. Turning to the CPUC's interpretation of the ICA, the court reviews its definition of  
18 intraLATA traffic and its categorization of the traffic between Global NAPs and Cox with  
19 deference. See *Peevey*, 462 F.3d at 1150; *Michigan Bell*, 339 F.3d at 433 ("whether the state  
20 commission correctly interpreted the challenged interconnection agreement must then be analyzed  
21 . . . under the more deferential arbitrary-and-capricious standard of review usually accorded to  
22 state administrative bodies' assessments of state law principles," citing *U.S. West*  
23 *Communications*, 193 F.3d at 1117 (applying the arbitrary and capricious standard to all issues  
24 not related to the commission's compliance with the TCA)). "A state commission's decision is  
25 arbitrary and capricious if the decision 'was not supported by substantial evidence,' or the  
26 commission made a 'clear error of judgment.'" *Peevey*, 462 F.3d at 1150 (quoting, *Pacific Bell*,  
27 325 F.3d at 1131).

28 Global NAPs contends that the CPUC erred in determining that the traffic it transferred

1 to Cox constituted intraLATA traffic.<sup>41</sup> This argument appears to turn on Global NAPs'  
2 contention that it is a VoIP provider and that none of the traffic for which it was ordered to pay  
3 Cox originated in California. Given the uncontradicted evidence in the record that Global NAPs  
4 received traffic from ESP customers at its facility in Los Angeles, and transferred that traffic to  
5 Cox's facility in Orange County, and in the absence of further argument by Global NAPs as to  
6 why the calls should not be deemed intraLATA traffic, the court concludes it is not likely that  
7 Global NAPs will be able to show that the CPUC's determination was arbitrary and capricious,  
8 i.e., "not supported by substantial evidence" or the product of "a clear error in judgment." *Id.*<sup>42</sup>

9 **B. Irreparable Harm and the Balance of Hardships**

10 Because the court concludes that Global NAPs has failed to show either that it is likely to  
11 prevail on its preemption claim or that there are serious questions going to the merits of that claim  
12 or its contention that the CPUC acted arbitrarily and capriciously in interpreting its ICA with

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13  
14 <sup>41</sup> Global NAPs App. at 12 (asserting that this determination by the CPUC was "plainly  
15 wrong as a matter of fact").

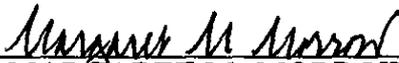
16 <sup>42</sup>Beyond the conclusory assertion in its opening memorandum that the CPUC was "plainly  
17 wrong" to conclude that the calls at issue were intraLATA traffic, Global NAPs offers in support  
18 of its argument that commission's decision was factually erroneous a single citation that first  
19 appears in a footnote in its reply brief. There, Global NAPs contends that, in *In the Matter of*  
20 *Time Warner Cable Request for Declaratory Relief That Competitive Local Exchange Carriers*  
21 *May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended,*  
22 *to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 F.C.C.R. 3513 (F.C.C.  
23 2007), "[t]he FCC . . . confirmed the inapplicability of switched access charges to VoIP. . . ." (Global NAPs Reply at 4 n. 2.) The FCC's decision nowhere mentions access charges, however.  
24 Rather the FCC decided only that telecommunications carriers are entitled to interconnect with  
25 ILECs in order to provide wholesale telecommunications services to other service providers,  
26 including VoIP providers. See *id.* at 3517 ("Because the Act does not differentiate between retail  
27 and wholesale services when defining 'telecommunications carrier' or 'telecommunications  
28 service,' we clarify that telecommunications carriers are entitled to interconnect and exchange  
traffic with incumbent LECs pursuant to section 251(a) and (b) of the Act for the purpose of  
providing wholesale telecommunications services"). The fact that Time Warner sought to  
interconnect for the purpose of providing wholesale telecommunications services to VoIP service  
customers did not alter the FCC's view that it was in fact a telecommunications carrier entitled  
to interconnect under the TCA. *Id.* ("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").

1 Cox, the court need not address its showing of irreparable harm or the balance of the hardships.  
2 *Department of Parks and Recreation*, 448 F.3d at 1123-24 (“If the plaintiff shows no chance of  
3 success on the merits, . . . the injunction should not issue,’ because ‘[a]s an irreducible minimum,  
4 the moving party must demonstrate a fair chance of success on the merits, or questions serious  
5 enough to require litigation,” quoting *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937  
6 (9th Cir. 1987)).

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8 **III. CONCLUSION**

9 For the reasons stated, the court denies Global NAPs’ application for preliminary  
10 injunction.

11  
12 DATED: August 27, 2007

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15 MARGARET M. MORROW  
16 UNITED STATES DISTRICT JUDGE  
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