

STATE OF FLORIDA

ORIGINAL

COMMISSIONERS:  
LILA A. JABER, CHAIRMAN  
J. TERRY DEASON  
BRAULIO L. BAEZ  
MICHAEL A. PALECKI  
RUDOLPH "RUDY" BRADLEY



OFFICE OF THE GENERAL COUNSEL  
HAROLD A. McLEAN  
GENERAL COUNSEL  
(850) 413-6199

Public Service Commission

October 22, 2002

Mr. Carroll Webb  
Joint Administrative Procedures  
Committee  
Room 120 Holland Building  
Tallahassee, Florida 32399-1300

Re: PSC Docket No. 021061-TP - Petition of CNM Networks, Inc. for declaratory statement that CNM's phone-to-phone Internet protocol (IP) telephony is not "telecommunications" and that CNM is not a "telecommunications company" subject to Florida Public Service Commission jurisdiction.

Dear Mr. Webb:

The Commission received a Petition for Declaratory Statement from CNM Networks, Inc. on October 18, 2002. A copy of the petition is enclosed. A notice will be published in the Florida Administrative Weekly on Friday, November 1, 2002.

Sincerely,

Samantha M. Cibula  
Senior Attorney

- AUS \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
- OPC \_\_\_\_\_
- MMS \_\_\_\_\_
- SEC   1
- OTH \_\_\_\_\_

cc: Division of the Commission Clerk  
and Administrative Services

Enclosure

dcstatjapc.smc

DOCUMENT NUMBER DATE  
11491 OCT 22 02  
COMMUNICATIONS CENTER

Before the Florida Public Service Commission

In Re Petition of CNM Network, Inc., for  
Declaratory Statement Regarding Florida  
Public Service Commission Jurisdiction

Docket No: 02-1061-TP

Filed: October 18, 2002

**PETITION OF CNM NETWORK, INC., FOR DECLARATORY STATEMENT  
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Petitioner CNM Network, Inc. ("CNM"), pursuant to Section 120.565 of the Florida Statutes and Rule 28-105.001, *et seq.*, of the Florida Administrative Code, hereby requests that the Florida Public Service Commission (the "Commission" or "PSC") issue a declaratory statement determining that phone-to-phone Internet protocol ("IP") telephony is not telecommunications under Florida law and, therefore, CNM is not a telecommunications company subject to the Commission's certification and tariffing requirements. In support of this Petition, CNM states as follows:

**I. PRELIMINARY INFORMATION**

1. The name, address, telephone number, and fax number of CNM is:

CNM Network, Inc.  
4100 Guardian Street  
Simi Valley, California 93063

Phone: (805) 520-7170  
Fax: (805) 520-7211

2. The name, address, telephone number and fax number of the attorneys authorized to represent CNM in this proceeding:

Floyd R. Self  
Messer, Caparello & Self, P.A.  
215 South Monroe Street, Suite 701  
P.O. Box 1876  
Tallahassee, Florida 32302-1876

Phone: (850) 222-0720  
Fax: (850) 224-4359

Robert S. Metzger  
Joseph F. Scavetta  
Gibson, Dunn & Crutcher, LLP  
333 South Grand Avenue  
Los Angeles, California 90071

Phone: (213) 229-7000  
Fax: (213) 229-7520

3. CNM seeks a declaratory statement regarding the applicability, if any, of the definition of "telecommunications company" under Section 364.02(12) of the Florida Statutes to CNM. Based on the statement of the information below, CNM understands that as a provider of phone-to-phone IP telephony, it does not offer telecommunications and, therefore, is not a telecommunications company under Section 364.02(12). As a result, CNM is not be required to obtain a certificate of public necessity and convenience under Sections 364.33 and 364.337 and is not subject to the jurisdiction of the Commission.

4. This Petition relies upon the following Florida statutes, PSC orders, federal statutes, Federal Communications Commission ("FCC") orders, and other authority:

- a. Fla. Stat. § 364.01(4)(b), (e).
- b. Fla. Stat. § 364.02(2), (11), (12).
- c. In Re Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996, Docket No. 000075-TP (Phases II and IIA), Order No. PSC-02-1248-FOF-TP, September 10, 2002.
- d. In Re Investigation into BellSouth Telecommunications, Inc.'s Tariff Filing (02-0057) on Installment Billing, Docket No. 020086-TL; Order No. PSC-02-0255-PAA-TL, February 27, 2002.

- e. In Re Petition of BellSouth Telecommunications, Inc., for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc., Docket No. 991854-TP; Order No. PSC-01-1015-FOF-TP, April 24, 2001.
- f. In Re Petition by MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Docket No. 000649-TP; Order No. PSC-01-0824-FOF-TP, March 30, 2001.
- g. In Re Petition by MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with Bellsouth Telecommunications, Inc., Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Docket No. 000649-TP; Order No. PSC-00-1803-PHO-TP, October 2, 2000.
- h. Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").
- i. 47 U.S.C. § 151.
- j. 47 U.S.C. § 153(20), (43), (44), (46).
- k. 47 U.S.C. § 230(b).
- l. 47 U.S.C. § 251.
- m. In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272, 11 FCC Rcd 21905.
- n. In the Matter of Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd 11501.

## II. BACKGROUND

5. CNM offers phone-to-phone IP telephony, not telecommunications, that the Commission has not regulated, and that the Federal Communications Commission ("FCC") has determined to be outside the scope of telecommunications regulation under federal law. Indeed, CNM is not presently aware of any state that currently regulates providers of IP telephony, including phone-to-phone IP telephony, as ordinary telecommunications carriers. As a result,

CNM has in good faith conducted operations in Florida without a certificate and should be allowed to continue to do so.

6. CNM has offered a low-cost, high quality service that is a competitive choice using new and emerging technologies. If the Commission, nonetheless, is inclined to change the regulatory treatment of phone-to-phone IP telephony by determining that such services constitute "telecommunications" and that a company providing such services is a "telecommunications company," then CNM respectfully requests that the Commission commence a generic investigation or a rulemaking proceeding to better understand the technical and operational issues and to establish a uniform definition of IP telephony. Such a proceeding would afford all interested parties a meaningful opportunity to participate and prevent CNM, a small company, from bearing the burden of representing the entire industry on this complicated issue. It also would afford the PSC an opportunity to hear from a broader spectrum of the potentially affected parties, and the public, before making a decision that could have important precedent-setting effects.

7. CNM was founded in January 1996, in a suburb of Los Angeles, California. It is a small business, privately held, with about 180 employees and sales of approximately \$30 million annually. After a formation period in which CNM acquired experience as an Internet Service Provider ("ISP"), the company began to develop Voice over Internet Protocol ("VoIP") technology. CNM now offers a form of VoIP, phone-to-phone IP telephony, in the state of Florida, and throughout the United States. CNM operates a private, national IP network over Asynchronous Transfer Mode ("ATM"). Its "convergent" network is capable of carrying a variety of information, over IP, including data, video, facsimile transmissions, and voice. The information is encoded by converting it into digital data packets that are transferred efficiently

across the network. The encoding and decoding process works the same regardless of which type information (voice, facsimile, video, or data) is put into the network or from what device that information is received. However for VoIP communications, an additional computer processing algorithm is used to sample and compress voice packets, at entry into the network, and then reconstruct voice transmissions at point of exit from the network.

8. In Florida, CNM has contracted with various competitive local exchange carriers (“CLECs”) to give CNM end users access to CNM’s private IP network. Florida customers seeking to use CNM’s IP network for voice traffic dial a local phone number to access the network through a local gateway, similar to the manner in which end users access their local ISP. Once connected to the local gateway, a customer then separately enters the telephone number they are trying to reach. At the local gateway, the call is converted to data and sent along CNM’s network to the CNM gateway closest to the termination point of the call. This gateway then converts the data back into voice and the call is handed off to a CLEC at the destination who delivers the call to its final destination. This technology differentiates CNM’s service from both traditional telecommunications and from packet switching. Through its phone-to-phone IP telephony service, CNM offers consumers a low-cost alternative to traditional voice service provided primarily by large monopoly-type companies, precisely the type of new and experimental service that the Florida Legislature directed the Commission to encourage by refraining from imposing “unnecessary regulatory restraints.”<sup>1</sup>

---

<sup>1</sup> Fla. Stat. § 364.01(4)(b), (e).

### III. DISCUSSION

#### A. Florida Law

9. In 2001, counsel for CNM conducted a national survey of state public utilities commissions. At that time, our survey indicated no state had extended telecommunications regulation to phone-to-phone IP telephony providers. Before filing this Petition, counsel for CNM has updated this research with the same result.<sup>2</sup> In Florida in particular, we are aware of no statutes or Commission orders that contradict the fundamental federal regulatory scheme regarding phone-to-phone IP telephony.

10. A company that offers a telecommunications service is regulated as a “telecommunications company” under Florida law.<sup>3</sup> While Florida law defines “Basic Local Telecommunications Service” for local exchange traffic, it does not, however, define

---

<sup>2</sup> On May 31, 2002, the New York Public Service Commission (“NY PSC”) released an order that required US DataNet Corporation (“DataNet”) to meet and discuss with Frontier Telephone of Rochester, Inc. (“Frontier”), the Feature Group A intrastate access charges that DataNet accrued pursuant to Frontier’s tariff on file with the NY PSC. Although DataNet claimed to provide IP telephony, the NY PSC found that a substantial portion of DataNet’s “traffic uses no IP conversion at all and is handled by interexchange carriers.” See *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, 2002 N.Y. PUC LEXIS 241, \*16 (May 31, 2002). Furthermore, the NY PSC specifically stated “the issue here is a specific complaint concerning DataNet’s service, and not a general policy discussion.” See *id.* at \*17.

Thus, by its terms, *Frontier* decision applies only to DataNet. Indeed, in the months that have followed the *Frontier* decision, counsel for CNM is not aware of any decision in New York or elsewhere that has relied upon *Frontier* in imposing access charges or any other regulatory burdens on an IP telephony provider. Furthermore, CNM’s enhanced services are readily distinguishable from DataNet’s services. First, while the NY PSC found that a substantial portion of DataNet’s traffic was carried by traditional interexchange carriers without IP conversion, all of CNM traffic is routed over its private IP network via ATM. Second, unlike DataNet, CNM’s network does not simply duplicate the functionality of long distance service provider; it also provides enhanced computer-based services such as its web-enabled application, Xpress Conferencer™, which permits personal computer users to set up voice conferencing using their PC software applications. The *Frontier* decision therefore does not suggest that CNM’s services would be subject to common carrier regulation in any jurisdiction.

<sup>3</sup> Fla. Stat. § 364.02(12).

“telecommunications service.”<sup>4</sup> Instead, the Commission often refers to the *federal* definition of a “telecommunications service” under Section 153(46) of the 1996 Act to clarify that term as it is applied in Florida. For example, when the Commission needed to determine if installment billing should be construed as a telecommunications service, the Commission examined the federal definition.<sup>5</sup>

11. Although the term “service” is construed broadly under Florida law, there is no similar requirement to expand the definition of “telecommunications.”<sup>6</sup> With respect to CNM, its offering of phone-to-phone IP telephony should not be considered a “telecommunications” merely because of this broad definition of “service.” CNM does not deny that its phone-to-phone IP telephony offering in Florida is a “service.” Rather, CNM contends that its service is not properly classified as “telecommunications.” Instead, as previously discussed, the Commission often refers to the federal definition of “telecommunications service.” That federal definition currently *excludes* phone-to-phone telephony from the scope of regulated telecommunications offerings.

12. Furthermore, the Commission has repeatedly declined to clarify the role that IP telephony might play in Florida’s telecommunications regulatory regime. Nothing in CNM’s services in Florida (including consumer experience) warrants changing this practice with respect to CNM. In recent arbitration proceedings, the Commission declined to clarify the definition of

---

<sup>4</sup> Fla. Stat. § 364.02(2).

<sup>5</sup> See In Re Investigation into BellSouth Telecommunications, Inc.’s Tariff Filing (02-0057) on Installment Billing, Docket No. 020086-TL; Order No. PSC-02-0255-PAA-TL, February 27, 2002.

<sup>6</sup> Fla. Stat. § 364.02(11).



IP telephony or give guidance on the issue of whether IP telephony constituted switched traffic subject to the intrastate reciprocal compensation scheme.<sup>7</sup> Months later, in the same arbitration, the Commission again declined to address the regulatory treatment of IP telephony for the purposes of reciprocal compensation.<sup>8</sup> In these arbitrations, the Commission noted that it would be examining the IP telephony issue in a pending docket regarding intercarrier compensation.

13. On January 21, 2000, the Commission opened Docket No. 000075-TP "to investigate the appropriate methods to compensate carriers for the exchange of traffic subject to Section 251 of the 1996 Telecommunications Act."<sup>9</sup> This investigation included an examination of the definition of IP telephony and whether intercarrier compensation should apply to IP telephony.<sup>10</sup> On September 10, 2002, just a few weeks ago, the Commission issued the *Reciprocal Compensation Order* and made the following statement regarding IP telephony:

[W]e believe that a broad sweeping decision on this particular issue would be premature at this time. We agree with the majority of witnesses who argue that IP telephony is a relatively nascent technology with limited market application at

---

<sup>7</sup> See *In Re Petition of BellSouth Telecommunications, Inc., for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc.*, Docket No. 991854-TP; Order No. PSC-01-1015-FOF-TP, April 24, 2001; see also *In Re Petition by MCI Metro Access Transmission Services LLC and MCI WorldCom Communications, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 000649-TP; Order No. PSC-01-0824-FOF-TP, March 30, 2001.

<sup>8</sup> *In Re Petition by MCI Metro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for Arbitration Of Certain Terms and Conditions of a Proposed Agreement with Bellsouth Telecommunications, Inc., Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 000649-TP; Order No. PSC-00-1803-PHO-TP, October 2, 2000.

<sup>9</sup> See *In Re Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP (Phases II and IIA), Order No. PSC-02-1248-FOF-TP, at 5, September 10, 2002 ("Reciprocal Compensation Order").

<sup>10</sup> See *Reciprocal Compensation Order* at 34.

this time. That being the case, we are hesitant to make a specific decision in this proceeding that could possibly serve to constrain an emerging technology.

\* \* \* \*

As such, we reserve any generic judgment on this issue until the market for IP telephony develops further. However, we find this shall not preclude carriers from petitioning us for decisions regarding specific IP telephony services . . . .<sup>11</sup>

CNM has followed the advice of the Commission by filing this Petition because if the CNM must obtain a certificate to operate its IP telephony network, then the Commission will also be deciding that IP telephony traffic is subject to reciprocal compensation, even though the *Reciprocal Compensation Order* establishes otherwise.

14. CNM believes that the *Reciprocal Compensation Order* plays a significant role in deciding whether CNM should be classified as a “telecommunications company” that needs a certificate to operate its IP telephony service in Florida. If CNM needs a certificate to conduct its IP telephony service, then the Commission must base that conclusion on IP telephony being a telecommunications service. Such a determination would make CNM a telecommunications company under Florida law.<sup>12</sup> Once the Commission decides that IP telephony is a telecommunications service, reciprocal compensation must apply to IP telephony, as required under federal law.<sup>13</sup>

15. Of course, the Commission just decided that the reciprocal compensation scheme does not apply to IP telephony. Thus, a decision to regulate CNM as a telecommunications company merely because it offers IP telephony service would effectively reverse the the

---

<sup>11</sup> *Reciprocal Compensation Order* at 36–37.

<sup>12</sup> See Fla. Stat. § 364.02.

<sup>13</sup> See 47 U.S.C. § 251.

*Reciprocal Compensation Order* and risks inadvertently and inexplicably reopening the very issue that the Commission deferred just a few weeks ago. Such a sudden change in the regulatory scheme could make it difficult for a small company such as CNM to do business in Florida and likewise might discourage other emerging companies from employing new technologies that similarly offer price competition and superior value. However, because the Commission has already decided that IP telephony is not subject to reciprocal compensation, the effect of this order is that CNM is not a telecommunications company under Florida law.

**B. Federal Law**

16. Federal law prohibits state regulation of internet-based technologies. Congress declared in the 1996 Act that:

It is the policy of the United States to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*<sup>14</sup>

Under the 1996 Act, communications services are divided into “telecommunications” and “information” services. The 1996 Act defines “telecommunications” as “[t]he transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”<sup>15</sup> “Telecommunications service” is the offering of telecommunications for a fee directly to the public or to such classes of

---

<sup>14</sup> 47 U.S.C. § 230(b) (*emphasis added*).

<sup>15</sup> 47 U.S.C. § 153(43).

users as to be effectively available directly to the public, regardless of the facilities used.”<sup>16</sup> A “telecommunications carrier” includes “Any provider of telecommunications services” (with enumerated exceptions not relevant here) and is a common carrier “to the extent that it is engaged in providing telecommunications service.”<sup>17</sup> The 1996 Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, and includes electronic publishing, but does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”<sup>18</sup>

17. In the *Universal Service Report to Congress*, the FCC held that “hybrid services” that contain elements of both “information services” and “telecommunications services” generally are *not* telecommunications services, even where telecommunications are an inseparable part of the related information service.<sup>19</sup> In particular, the FCC declined to regulate phone-to-phone IP telephony as a “telecommunications service” under the 1996 Act. For purposes of its discussion, the FCC defined phone-to-phone IP telephony as any service that:

- (1) holds itself out as providing voice telephony or facsimile transmission service,
- (2) does not require the customer to use customer premises equipment different from that necessary to place an ordinary touch-tone call (or facsimile transmission),
- (3) allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan and associated international

---

<sup>16</sup> 47 U.S.C. § 153(46).

<sup>17</sup> 47 U.S.C. § 153(44).

<sup>18</sup> 47 U.S.C. § 153(20).

<sup>19</sup> See *In the Matter of Federal-State Joint Board on Universal Service (Report to Congress)*, 13 FCC Rcd 11501, 11528–29, ¶ 55–57 (“Universal Service Report to Congress”).

agreements; and (4) transmits customer information without net change in form or content.<sup>20</sup>

While the FCC acknowledged that phone-to-phone IP telephony is more akin to traditional telephony than it is to interactive computer applications, it found that *regulation of phone-to-phone IP telephony would be inappropriate* “in the absence of a more complete record focused on individual service offerings at that time.”<sup>21</sup> The FCC explained:

Because of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology.<sup>22</sup>

Since the *Universal Service Report to Congress*, the FCC has not altered its position, has not declared phone-to-phone IP telephony a “telecommunications service,” and still declines to regulate it. Accordingly, the FCC continues to treat phone-to-phone IP telephony as an internet-based service, and does not regulate it as “telecommunications” under the 1996 Act.

### C. Policy Concerns

18. Florida law does not support the regulation of phone-to-phone IP telephony. The Florida Legislature requires the Commission to encourage competition through flexible regulatory treatment of services to provide “the widest possible range of consumer choice” and “to introduce new or experimental” services that are “free of unnecessary regulatory

---

<sup>20</sup> *Id.* at 11543–44, ¶ 88.

<sup>21</sup> *Id.* at 11543–44, ¶¶ 89–90.

<sup>22</sup> *Id.*

restraints.”<sup>23</sup> Because phone-to-phone IP telephony is a new, low-cost alternative to traditional long distance telephony, encouraging investment and innovation in phone-to-phone IP telephony technologies by maintaining the current regulatory exemption will promote competition and stimulate downward pressure on long distance rates, thereby enhancing consumer choice.

19. Conversely, the premature regulation of emerging technologies, such as phone-to-phone IP telephony, could stifle innovation and much-needed capital investment, thereby limiting or delaying consumer choice, contrary to the express intent of the Florida Legislature, as discussed above, and Congress. Indeed, in the *Universal Service Report to Congress*, then-Commissioner (now-Chairman) Powell commented in a separate statement that “If innovative new IP services were all thrown into the bucket of telecommunications carriers, we would drop a mountain of regulations and their attendant costs, on these services and perhaps stifle innovation and competition.”<sup>24</sup> Because of these powerful public policy considerations, the federal government, as well as the states, including Florida, has thus far not regulated phone-to-phone IP telephony services.

20. Furthermore, phone-to-phone IP telephony remains exempt from telecommunication regulation under federal law. Congress captioned the 1996 Act as “An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of

---

<sup>23</sup> Fla. Stat. § 364.01 (4)(b), (e).

<sup>24</sup> *Universal Service Report to Congress*, 13 FCC Rcd at 11623.

new telecommunications.”<sup>25</sup> Specific provisions of the 1996 Act bear out Congress’ intent to encourage deregulation of communications services, particularly internet-based services. For example, Section 151 of the 1996 Act declares that the FCC’s purpose is “to make available . . . to people of the United States a rapid, efficient . . . communication service with adequate facilities at reasonable charges.”<sup>26</sup> Section 230(b) of the 1996 Act, discussed above, demonstrates Congress’ intention that this efficiency should result from competition rather than regulation of computer-based services, so that “the Internet and other interactive computer services and other interactive media” could thrive in the “vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”<sup>27</sup>

21. The FCC’s decision to forebear from regulating phone-to-phone IP telephony notwithstanding its similarities to regulated telecommunications offering reflects its recognition that the Congressional mandate to allow internet-based services to develop unfettered by federal or state regulation should be given a wide berth to protect providers of emerging communications services that include attributes of both information services and telecommunications services. The FCC also noted that while it would be possible to treat protocol processing services as telecommunications services, protocol services are effectively provided on a competitive, unregulated basis, and regulating them would undermine the purposes

---

<sup>25</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>26</sup> 47 U.S.C. § 151

<sup>27</sup> 47 U.S.C. § 230(b) (emphasis added).

of the 1996 Act.<sup>28</sup> Similarly, action by a state that regulates IP telephony, where the federal outcome is the opposite, would be inconsistent with the purposes of the federal statute.

**D. Investigation or Rulemaking Proceeding**

22. Even if the Commission believed it were appropriate to regulate IP telephony, it should not do so in a proceeding involving an isolated provider, such as CNM. Instead, the Commission should address the regulation of IP telephony, including phone-to-phone IP telephony, if at all, in the context of a generic investigation or a rulemaking proceeding that would afford a meaningful opportunity for participation by telecommunications, cable and Internet Service Providers, the Office of the Public Counsel, and other interested parties. Any decision to regulate IP telephony may have sweeping ramifications for many facets of the communications industry and could dramatically change the course of investment, development, and deployment of emerging IP services in the state of Florida, and elsewhere. Undoubtedly, other IP-based providers, including those who carry voice only and those who carry “convergent” services with video and data, will have a direct interest in participating.

23. Only in such proceedings will the Commission be able to fully consider the essential public policy concerns related to the regulation of phone-to-phone IP telephony and other internet-based services, including: (i) the federal interest in promoting investment in emerging IP-based services by prohibiting federal and state regulation of such services; (ii) the Florida legislature’s interest in promoting consumer choice by implementing flexible,

---

<sup>28</sup> See *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 11 FCC Rcd 21905, 21957, ¶ 105, n.239.



deregulatory policies with respect to new or experimental services; (iii) the public interest in maintaining access to competitive, low cost telephony services, regardless of technology; and (iv) the public interest in encouraging investment and innovation in the emerging IP service technologies and markets, particularly in light of the recent collapse of telecommunications capital markets.

24. It would be unfair to impose regulatory requirements on CNM that are not currently applicable to other phone-to-phone IP telephony providers. Moreover, imposing telecommunications regulations on CNM would represent a fundamental departure from uniform federal and state precedent, which would create substantial regulatory uncertainty for other IP-based providers. Such doubt will undermine the ability of phone-to-phone IP telephony providers and other IP-based service providers to obtain essential operating and investment capital in an already difficult telecommunications market. Embarking upon such regulatory restructuring with its attendant economic fall-out and unpredictable policy implications is unwarranted where, as here, a change is not required to protect consumer interests.

#### IV. CONCLUSION

25. CNM is not a telecommunications company under Florida law and does not offer a telecommunications service under federal law. At this time, nothing has changed regarding the “nascent state of the phone-to-phone IP telephony industry” since the Commission’s *Reciprocal Compensation Order* that would merit now requiring CNM to obtain a certificate – forbearance by the state of Florida is the proper and prudent course. While we recognize and respect the Commission’s interest in the oversight of telecommunications services and the providers of those services, it is not necessary or appropriate to characterize IP telephony as “telecommunications” or CNM as a “telecommunications company” under the state’s legal scheme. It is appropriate to

let the federal government lead in this area, and for Florida to await developments that present a more compelling circumstance to justify a regulatory initiative.

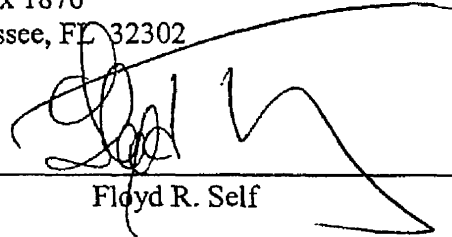
WHEREFORE, CNM respectfully requests a declaratory statement from the Commission that CNM's provision of phone-to-phone IP telephony is not "telecommunications" and that CNM is not a "telecommunications company" subject to the jurisdiction of the Commission. In the alternative, if the Commission believes that it could or should regulate phone-to-phone IP telephony or the companies that provide it, then CNM respectfully requests that the Commission first conduct a generic investigation or a rulemaking proceeding to address the issues raised in this Petition.

Respectfully submitted,

Gibson, Dunn & Crutcher, LLP  
Robert S. Metzger  
Joseph F. Scavetta  
333 South Grand Avenue  
Los Angeles, CA 90071-3197

Messer, Caparello & Self, P.A.  
Floyd R. Self  
P.O. Box 1876  
Tallahassee, FL 32302

By: \_\_\_\_\_

  
Floyd R. Self

Attorneys for Petitioner  
CNM Networks, Inc.