

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of AT&T Ohio, )

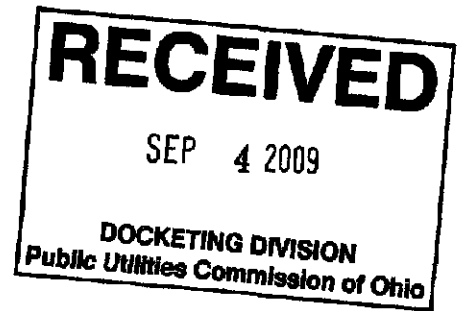
Complainant, )

**V.**

Global NAPs Ohio, Inc., )

**Respondent.**

Case No. 08-690-TP-CSS



### **AT&T Ohio's Initial Brief**

**PUBLIC VERSION**

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September 10, 2009

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## **Introduction**

In 2002, The Ohio Bell Telephone Company ("AT&T Ohio") and Global NAPs Ohio, Inc. ("Global") entered into an interconnection agreement ("ICA") in order to interconnect their networks in Ohio to exchange telecommunications traffic. Since that time, AT&T Ohio has provided a number of services to Global pursuant to the parties' ICA. These services were used by Global or its affiliates to provide service to the customers of Global's affiliates and earn substantial revenues for those affiliates, yet Global has refused to pay AT&T Ohio a penny. AT&T Ohio requests that the Commission find Global in breach of the parties' ICA and order Global to pay the charges AT&T Ohio has billed. AT&T Ohio also requests that the Commission revoke Global's certificates of service authority in Ohio, because Global is merely an empty shell, devoid of financial, managerial, or technical resources, designed to defraud AT&T Ohio and other creditors.

AT&T Ohio seeks to recover certain "usage" charges (*e.g.*, per-minute charges) for traffic that Global delivered to AT&T Ohio. Pursuant to the parties' ICA, Global requested the establishment of trunks to exchange local and intraLATA toll traffic, AT&T Ohio established those trunks between the parties, and Global then began delivering traffic to AT&T Ohio over those trunks. Some of the traffic that Global delivered to AT&T Ohio consisted of calls to end-user customers of AT&T Ohio, and some consisted of calls to end-users of other local telephone carriers in Ohio. When Global handed off calls destined for AT&T Ohio end-users, AT&T Ohio routed and transported those calls over its local network and "terminated" the calls to the appropriate end-users. When Global handed off calls that were supposed to go to end-users of third party carriers, AT&T Ohio routed and transported those calls over its local network to deliver them to the appropriate third party carrier (a service called "transiting"). In both cases,

AT&T Ohio then billed Global the charges specified by the parties' ICA for these services. In particular, the ICA specifies the charges for (1) local calls that Global hands off to AT&T Ohio that AT&T Ohio then terminates to one of its own end-users ("reciprocal compensation" charges); and (2) calls that AT&T Ohio transits for Global to a third party carrier ("transit" charges).

Like its affiliates have done with numerous other carriers throughout the country, Global has raised a litany of excuses for its failure to pay a single penny of these charges, but none of them hold water. At bottom, Global suggests that various orders and regulations of the Federal Communications Commission ("FCC") do not require it to pay any charges because the customers of Global's affiliates purportedly are involved in the transmission of (and possibly the conversion of the transport protocol of) Voice over Internet Protocol ("VoIP") or "enhanced" traffic. Global's suggestion that the FCC's orders somehow relieve Global of the contractual commitments it made in its ICA with AT&T Ohio is meritless.

Under federal law, ICAs are "binding" and must be given effect. Here, Global agreed in the ICA to use the trunks it ordered to deliver local and intraLATA toll traffic, as well as transit traffic; AT&T Ohio agreed to provide termination and transiting service for this traffic; and Global agreed to pay certain charges for these services. AT&T Ohio lived up to its end of the bargain, and after taking advantage of the ICA to obtain termination and transiting service from AT&T Ohio, Global cannot deny that it is subject to the charges specified by the ICA.

More generally, this case is not about the FCC's so-called "ESP exemption" for "enhanced" or "VoIP" service providers. Global is neither of those. The ESP "exemption" merely permits enhanced service providers ("ESPs") to establish connectivity with their customers by purchasing certain services from local carriers' tariffs for business customers,

exempting the ESPs from certain interstate access charges associated with the origination (not termination) of the ESP's enhanced services traffic. This exemption does not help Global here, because Global is not an ESP, the traffic at issue is not traffic between an ESP and that ESP's customers, and AT&T Ohio is not seeking to collect interstate access charges (or, for that matter, any other access charges) in this proceeding. Indeed, in a prior arbitration between AT&T Ohio and TelCove, the Commission rejected the contention that IP-based traffic is somehow exempt from the same intercarrier compensation that applies to other traffic.

In Section I below, AT&T Ohio demonstrates that Global is required by its ICA to pay for the transiting service provided by AT&T Ohio, and to pay reciprocal compensation charges for the traffic terminated by AT&T Ohio that Global represented was local and delivered over trunks reserved for local and intraLATA toll traffic. In Section II, AT&T Ohio demonstrates that federal law does not exempt Global from these charges, even if Global delivered VoIP or "enhanced" traffic to AT&T Ohio. In any event, as AT&T Ohio explains in Section III, Global has failed to satisfy its burden to demonstrate that its traffic is VoIP or "enhanced" traffic.

In Section IV, AT&T Ohio demonstrates that there can be no genuine dispute that AT&T Ohio's bills to Global appropriately (albeit conservatively) measure the charges that Global owes AT&T Ohio. In the alternative, as explained in Section V, the Commission should find that Global has breached the ICA by misrouting traffic over trunks reserved for local and intraLATA toll traffic. Finally, in Section VI, AT&T Ohio demonstrates that Global is being used as a shell corporation in a blatantly choreographed effort to obtain the benefits of certification and interconnection with AT&T Ohio while shielding itself and its corporate affiliates from any financial responsibility for the services provided by AT&T Ohio. The Commission should see right through this scheme and should put an end to it by revoking Global's certificate of service

authority, as the California and Illinois commissions have done with similar “shell company” affiliates of Global.

**I. Global Has Breached The Parties’ ICA By Failing To Pay Transiting Charges And Local Reciprocal Compensation Charges.**

**A. The ICA requires Global to pay for transiting service and to pay reciprocal compensation charges for AT&T Ohio’s termination of traffic that Global represented was local.**

The parties entered into the ICA in order to exchange traffic. To exchange calls, the parties must physically interconnect their networks and then establish “trunks” over those facilities. A trunk is a dedicated call path capable of carrying an individual call, and because a single trunk can carry only one call at a time, multiple trunks are established together in arrangements known as trunk groups. *See* AT&T Ex. 2 (Hamiter) at 6-7, 9-10.

In Appendix ITR (Interconnection Trunking Requirements), the parties specified the six different types of trunks that could be established between the parties to exchange traffic.<sup>1</sup> In particular, in section 5.1 of Appendix ITR, the parties agreed: “The following trunk groups *shall* be used to exchange various types of traffic between CLEC and SBC-13STATE”:<sup>2</sup> (1) “Local and IntraLATA Interconnection Trunk Group(s)” (§ 5.3); (2) “InterLATA (Meet Point) Trunk Group” (§ 5.4); (3) “800/(8YY) Traffic” trunk groups (§ 5.5); (4) “E911 Trunk Group” (§ 5.6); (5) “High Volume Call In (HVCI)/Mass Calling (Choke) Trunk Group” (§ 5.7); and (6) “Operator Services/Directory Assistance Trunk Group(s)” (§ 5.8). The parties further specified that local and intraLATA toll traffic may be combined on the “Local and IntraLATA Interconnection Trunk Groups” (§§ 5.3.1.1, 5.3.2.1), while “InterLATA traffic shall be

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<sup>1</sup> *See* Appendix ITR § 1.1 (“This Appendix sets forth terms and conditions for Interconnection . . .”); *id.* § 1.4 (“This Appendix provides descriptions of the trunking requirements between CLEC and SBC-13STATE.”); Appendix NIM (Network Interconnection Methods) § 1.9.1 (“Trunking requirements associated with Interconnection are contained in Appendix ITR.”).

<sup>2</sup> “SBC-13STATE” is defined to mean AT&T Ohio, and “CLEC” (competitive local exchange carrier) is Global.

transported . . . over a 'meet point' trunk group separate from local and IntraLATA toll traffic" (§ 5.4.1).<sup>3</sup>

The ICA also permits Global to send AT&T Ohio "transit" traffic. Transiting is a service whereby a carrier, usually an incumbent LEC like AT&T Ohio, agrees to act as a middleman, accepting traffic from one carrier, transporting the traffic across its network, and delivering it to a third-party carrier. For example, if Global has traffic from one of its affiliates' customers that is supposed to be delivered to an end-user customer of Comcast in Ohio, but Global is not directly interconnected with Comcast, Global can deliver the traffic to AT&T Ohio instead, and AT&T Ohio will "transit" the traffic across its network and deliver it to Comcast on Global's behalf. *See* AT&T Ex. 4 (Cole) at 4-5; AT&T Ex. 1 (Pellerin) at 28. In the parties' ICA, AT&T Ohio agreed to provide transiting service to Global. In particular, section 4.3 of Appendix Interconnection Trunking Requirements provides that, at least until certain events occur, "SBC-13STATE will provide CLEC with transit service."<sup>4</sup>

The ICA also specified the charges Global agreed to pay AT&T Ohio for (1) transiting service and (2) the termination of traffic represented by Global to be local and delivered over trunk groups reserved for local traffic. With respect to transiting service, section 9.1 of Appendix Reciprocal Compensation states that "[a] Transiting rate element applies to all MOUs [minutes-of-use] between a Party and third party networks that transits an SBC-13STATE network," and "[t]he rates that SBC-13STATE shall charge for transiting CLEC traffic are

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<sup>3</sup> Local traffic is traffic that originates and terminates in the same local calling area; intraLATA toll traffic is traffic that originates and terminates in different local exchanges but within the same LATA; and interLATA traffic is traffic that originates and terminates in different local exchanges and in different LATAs. *See* AT&T Ex. 4 (Cole) at 3-4.

<sup>4</sup> As explained in Mr. Cole's testimony (at 3-4), Global delivers transit and non-transit traffic to AT&T Ohio over the same facilities and trunks established between the parties (in this instance, trunks ordered by Global under the parties' ICA that are reserved for the exchange of local and intraLATA toll traffic). To determine whether a call delivered by Global needs to be terminated to an AT&T Ohio end-user, or instead is directed to an end-user of a third-party carrier such that AT&T Ohio must transit the call to that third-party carrier, AT&T Ohio's switch performs a routing analysis based on the telephone number that was called.

outlined in Appendix Pricing.” Appendix Pricing of the ICA in turn sets forth three rate elements and rates for transiting service. For the termination of local traffic, section 5 of Appendix Reciprocal Compensation states: “The Parties agree to compensate each other for the termination of Local Calls . . . on a ‘bifurcated’ basis, meaning assessing an initial Call Set Up charge on a per Message basis, and then assessing a separate Call Duration charge on a per Minute of Use (MOU) basis.” ICA, App. Recip. Comp. § 5.2. Appendix Reciprocal Compensation describes the particular rate elements that apply, and incorporates the rates “shown in Appendix Pricing.” *Id.* §§ 5.2 – 5.4. *See also* Attachment A hereto (ICA excerpts); AT&T Ex. 1 (Pellerin) at 9-10, 29 (describing rate elements).

After agreeing to these provisions, Global proceeded to order combined local/intraLATA toll trunks from AT&T Ohio. Appendix ITR § 8.1 states that “[o]rders between the Parties to establish, add, change or disconnect trunks shall be processed by using an Access Service Request (ASR),” and “CLEC will have administrative control for the purpose of issuing ASR’s on two-way trunk groups” (*i.e.*, trunk groups, like those used by AT&T Ohio, that are capable of carrying traffic in both directions). As Mr. McNeil explained, Global submitted several ASRs to AT&T Ohio requesting the establishment of combined local/intraLATA toll trunks, representing to AT&T Ohio that it would be delivering local and intraLATA toll traffic over those trunks. AT&T Ex. 3 (McNeil) at 3-4.

It is not disputed that after the local/intraLATA toll trunks were established pursuant to the ICA, Global began delivering traffic over those trunks. It also is not disputed that AT&T Ohio terminated the traffic to its end-users or, where the traffic was destined to an end-user of a third-party carrier, AT&T Ohio transited the traffic. For transit traffic, AT&T Ohio billed Global the transiting rates specified by the ICA. For traffic that AT&T Ohio terminated to its



own end-users, AT&T Ohio used the Calling Party Number ("CPN") information (*i.e.*, the telephone number of the person placing the call) to determine the portion that was local, and billed Global the local reciprocal compensation rates specified by the ICA. *See* AT&T Ex. 4 (Cole) at 5-10; AT&T Ex. 5 (Williams) at 4-11.

As Mr. Hamiter explained, carriers traditionally use CPN to determine whether a call is local, intraLATA toll, or interLATA in nature. AT&T Ex. 2 (Hamiter) at 13. In accordance with this standard practice, the parties' ICA contemplated that the parties would use CPN to determine the appropriate compensation for terminating traffic. Among other things, in Appendix Reciprocal Compensation, the parties agreed to pass "the original and true Calling Party Number (CPN)" where available (§ 4.2), agreed that if less than 90% of a party's calls had CPN then "all calls passed without CPN will be billed as intraLATA switched access" (§ 4.4), and agreed that if more than 90% of the calls had CPN, then "all calls exchanged without CPN information will be billed as either Local Traffic or intraLATA Toll Traffic in direct proportion to the minutes of use (MOU) of calls exchanged with CPN information" (*id.*).

Mr. Cole explained how AT&T Ohio used the CPN of the traffic delivered by Global to identify which traffic was local, and to bill the traffic accordingly. AT&T Ohio's switches recorded information for every call delivered by Global, including the CPN. AT&T Ex. 4 (Cole) at 5-8. To determine which calls were local, AT&T Ohio's systems compared the telephone numbers of the calling and called parties. *Id.* This information was then used to automatically generate bills to Global for reciprocal compensation for the calls classified as local. *Id.*

The volume of traffic billed and terminated or transited is not in dispute. Nevertheless, Global has refused to pay AT&T Ohio's bills for transiting and for local reciprocal compensation. As explained above, under the ICA, Global is obligated to (i) pay AT&T Ohio

reciprocal compensation charges for the traffic that Global represented was local and delivered over the combined local/intraLATA toll trunks and that AT&T Ohio terminated for Global, and (ii) pay AT&T Ohio transiting charges for the traffic that AT&T Ohio transited on Global's behalf. As a result, AT&T Ohio requests that the Commission hold Global to its contractual commitment, find that Global has breached the ICA by failing to pay these charges, and order Global to pay AT&T Ohio all amounts owed for such services.<sup>5</sup>

**B. Under the ICA, Global is required to pay the transiting and reciprocal compensation charges at issue *even if* it delivered VoIP or “enhanced” traffic.**

Global suggests that it is not required to pay anything under the ICA for AT&T Ohio's transiting and termination of Global's traffic because that traffic is allegedly VoIP or “enhanced” traffic. Global's suggestion is refuted by the plain language of the ICA, which makes clear that Global is required to pay the charges at issue *even if* Global's traffic were VoIP or “enhanced” traffic.

Section 3 (“Classification of Traffic”) of Appendix Reciprocal Compensation begins by stating: “Telecommunications traffic exchanged between CLEC and ILEC will be classified as either Local Calls, Transit Traffic, Optional Calling Area Traffic, IntraLATA Toll Traffic, or InterLATA Toll Traffic.” App. Recip. Comp. § 3.1. There is no ‘other’ category for VoIP or “enhanced” traffic.

Even if Global's traffic were VoIP or “enhanced” traffic, that traffic plainly is still “[t]elecommunications traffic exchanged between CLEC and ILEC” within the meaning of section 3.1 of Appendix Reciprocal Compensation (and thus is to be classified as “either Local Calls, Transit Traffic, Optional Calling Area Traffic, IntraLATA Toll Traffic, or InterLATA Toll Traffic” pursuant to that section). In 2006, the FCC squarely held that “interconnected VoIP

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<sup>5</sup> AT&T Ohio addresses below in Section IV the calculation of the amounts due.

providers provide ‘telecommunications.’” *VoIP Universal Service Order*,<sup>6</sup> ¶ 41. “Specifically, using the Act’s definitions, we find that interconnected VoIP providers ‘provide’ ‘the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.’” *Id.* ¶ 39 (quoting 47 U.S.C. § 153(43), the Act’s definition of “telecommunications”). That is because the *transport* of the voice communications – including the service Global and its affiliates purport to provide to enhanced service provider customers – is “telecommunications.” On appeal, the D.C. Circuit upheld the FCC’s determination. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240-41 (D.C. Cir. 2007).

Global points to section 16.9 of Appendix Reciprocal Compensation, but that provision merely reserves the parties’ rights to dispute whether VoIP traffic is subject to access charges, or should be treated as local traffic. It states that “[t]he Parties reserve the right to raise the appropriate treatment of Voice Over Internet Protocol (VOIP) or other Internet Telephony traffic under the Dispute Resolution provisions of this Interconnection Agreement,” and “[t]he Parties further agree that this Appendix shall not be construed against either Party as a ‘meeting of the minds’ that VOIP or Internet Telephony traffic is or is not local traffic subject to reciprocal compensation.”<sup>7</sup> But if VoIP is not “local traffic” under the ICA, then it must be treated as “Transit Traffic, Optional Calling Area Traffic, IntraLATA Toll Traffic, or InterLATA Toll Traffic.” Appendix Recip. Comp. § 3.1. Here, consistent with the ICA, AT&T Ohio treated as

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<sup>6</sup> *In re Universal Service Contribution Methodology*, 21 FCC Rcd. 7518, 2006 WL 1765838 (2006) (“*VoIP Universal Service Order*”).

<sup>7</sup> Many competitive carriers have argued that all VoIP traffic should be treated like local traffic, subject to the same reciprocal compensation rate (which is generally \$0.0007 where carriers have amended their ICAs to incorporate the *ISP Remand Order*’s declining rate cap plan for the exchange of local and ISP-bound traffic). AT&T Ohio, on the other hand, contends that carriers should treat VoIP traffic like other traffic, and rate it as local, intraLATA toll, or interLATA traffic depending upon the CPN. In any event, Global never noticed its agreement for termination and did not attempt to negotiate or amend its ICA to take advantage of more favorable terms until after this complaint was filed.

"Transit Traffic" the traffic that it transited, and treated as "Local Traffic" the traffic that it terminated that Global represented was local.

Other provisions of the ICA also make clear there is no free ride for Global, even if its traffic were VoIP or "enhanced." Global suggested at the hearing that there is no rate in the ICA that is specific to "VoIP" traffic, and that means AT&T must provide service to Global but Global is not required to pay anything. *See* Hearing Tr. at 373 (Rooney). The ICA, however, states that AT&T Ohio "shall not be required to provide CLEC a product or service under this Agreement unless and until the Parties have agreed upon a rate element or charge . . . applicable to the requested product and/or service." Appendix Pricing § 1.5.

**C. Global is estopped from denying that its traffic is subject to transiting and local reciprocal compensation charges.**

In any event, Global is estopped from denying that its traffic is subject to local reciprocal compensation and transiting charges. Under the doctrine of estoppel, "[c]ourts have recognized that a party who accepts the benefits of a contract or transaction will be estopped to deny the obligations imposed on it by that same contract or transaction." *Dayton Securities Assocs., et al. v. Avutu, et al.*, 105 Ohio App.3d 559, 664 N.E.2d 954, 957 (Ohio App. 2 Dist. 1995). *See also Rayl et al. v. East Ohio Gas Co., et al.*, 46 Ohio.App.2d 175, 348 N.E.2d 390, 393 (Ohio. App. 9 Dist. 1975) (plaintiffs estopped from denying the operation of an agreement when they accepted benefits under it).

Here, Global plainly accepted the benefits of the ICA. Global interconnected pursuant to the ICA, used the ICA to establish local and intraLATA toll trunks with AT&T Ohio (trunks that were reserved for local and intraLATA toll traffic), and delivered traffic to AT&T Ohio over those trunks, expecting AT&T Ohio to either transit or terminate that traffic for Global. *See* Hearing Tr. at 378 (Rooney) (admitting Global uses local trunk groups to terminate its purported

VoIP traffic); AT&T Ex. 1 (Pellerin) at 15 (quoting and attaching another Global admission that the trunks over which Global delivered traffic to AT&T Ohio were established pursuant to the ICA). AT&T Ohio treated the traffic as it would any other local or intraLATA toll traffic, and transited or terminated the traffic as appropriate.

After taking advantage of the interconnection, call termination, and transiting services offered under the ICA, including use of the local/intraLATA toll trunks to deliver traffic for transiting and termination, Global is estopped to deny the obligations imposed upon it by the ICA. These include the obligation to use the trunks to deliver local and intraLATA toll traffic, the obligation to pay transiting charges for traffic delivered over those trunks that AT&T Ohio transited, and the obligation to pay reciprocal compensation charges for traffic Global represented was local and delivered over those trunks that AT&T Ohio terminated to its end-users.

**II. Federal Law Does Not Exempt Global From The Charges At Issue Even If It Delivered VoIP Or “Enhanced” Traffic To AT&T Ohio.**

**A. As a matter of federal law, Global is bound by its ICA irrespective of the FCC’s rules.**

As demonstrated above, Global is required under the parties’ ICA to pay the transiting and local reciprocal compensation charges at issue here, and nothing in the ICA exempts Global from these charges even if its traffic were VoIP or “enhanced” traffic. As a result, Global’s suggestion that federal law or the FCC’s rules somehow exempt Global from charges is baseless. That is because Global is bound by its ICA irrespective of the FCC’s rules.

Under the 1996 Act, and as a matter of federal law, parties can negotiate ICA terms without regard to the FCC’s rules, and their ICAs are “binding.” In the 1996 Act, Congress mandated that carriers implement the duties imposed by the Act through interconnection agreements. *See* 47 U.S.C. § 251(b)-(c); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 372

(1999). The Act requires carriers to negotiate their agreements in the first instance, and permits carriers to enter into a “binding agreement . . . without regard to the standards” set forth in § 251. 47 U.S.C. § 251(c)(1), § 252(a)(1). As the Ninth Circuit has held, the 1996 Act “mandate[s] that interconnection agreements have the binding force of law.” *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) (citing 47 U.S.C. § 252(a)(1)). Thus, an ICA departing from the FCC’s rules “would be binding on the parties regardless of” the FCC’s orders, because “[p]arties who enter into a voluntary interconnection agreement need not conform to the requirements of the Act.” *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1151 (9th Cir. 2006). In short, under the 1996 Act, the state commission’s approval of Global’s ICA with AT&T Ohio “made it finally binding on the private parties involved,” and “[f]ederal law thus gives [AT&T Ohio] the right to insist that it be held only to the terms of the interconnection agreement to which it actually agreed.” *Verizon Maryland, Inc. v. RCN Telecom Servs.*, 232 F. Supp. 2d 539, 551, 555 (D. Md. 2002).

A California district court recently reiterated the same principle in *Global NAPs California, Inc. v. Public Utilities Commission of California*, No. 07-04801 (C.D. Cal. Dec. 23, 2008) (attached as Exhibit B hereto). In that case, Global’s affiliate challenged decisions of the California commission holding that Global’s affiliate was obligated to pay Cox California Telecom charges for the termination of traffic pursuant to an interconnection agreement. The court rejected the assertions of Global’s affiliate that because its traffic was VoIP, the California commission had violated federal law. Among other things, the court concluded, “[e]ven if Global NAPs is or was a VoIP provider, it was also, by its own admission, a signatory to the ICA with Cox,” and “[t]he relevant question, therefore, is whether the CPUC correctly interpreted that contract.” Ex. B at 24. The court rejected the contention that the state commission “has

impermissibly set rates for VoIP traffic” in violation of federal law because, the court correctly concluded, “[t]he parties to an ICA . . . have the power to opt out of any existing regulatory regime by agreement” and thus “[a] state commission can enforce the terms of an ICA even if the agreement is not consistent with the federal baseline.” *Id.* at 16 n.27. *See also Verizon New York, Inc. v. Global NAPs, Inc.*, 463 F. Supp. 2d 330, 342 (E.D.N.Y. 2006) (noting, with regard to an ICA between Global NAPs and Verizon, that “the parties would have been free to opt out of any . . . regulatory regime by a mutual nondiscriminatory, arms length agreement”).

In short, because Global is required by the parties’ ICA to pay the charges at issue, the FCC’s rules regarding VoIP or “enhanced” traffic are simply beside the point.

**B. The FCC’s “ESP exemption” does not exempt CLECs like Global from transiting or local reciprocal compensation charges.**

In any event, even if the FCC’s rules somehow trumped Global’s binding ICA, Global’s position is without merit because the FCC’s rules do not exempt Global from the charges at issue. The FCC’s “ESP exemption” only exempts *enhanced service providers* (“ESPs”) from *originating interstate access charges* for traffic between the ESP and its customers. It does not exempt telecommunications carriers (like Global) that purport to serve ESPs from any charges. Nor does it exempt carriers from transiting or local reciprocal compensation charges. As a result, the “ESP exemption” does not help Global here even if its traffic were “VoIP” or “enhanced” traffic.

In 1983, in connection with the break-up of “Ma Bell,” the FCC created the “access charge” regime to govern payments from long distance (or “interexchange”) carriers to local telephone companies (local exchange carriers, or LECs), for access to and use of the latter’s networks. For example, when an end-user places a long distance call from New York to Ohio, the call would originate on the network of the end-user’s local carrier in New York, would be

handed-off to the end-user's long distance carrier for transport across the country, and would then be handed-off to the appropriate local carrier in Ohio for delivery to the Ohio end-user being called. Under the access charge regime, the long distance carrier pays the New York LEC "originating access" charges for originating the call on its network, and pays the Ohio LEC "terminating access" charges for terminating the call on its network.<sup>8</sup>

At the same time, the FCC considered whether ESPs should be required to pay originating interstate access charges. An ESP, just like a long distance carrier, may access its customer by using the local network of the customer's local carrier (LEC), and, like a long distance carrier, after receiving the call from the LEC, the ESP may then transport that traffic outside of the local exchange. For example, an Internet service provider providing dial-up Internet access (which is one species of an ESP) uses the local networks of LECs to connect to its customers; that is, customers place calls to the ISP from their computer modems, and those calls originate on and travel over the local network of the customer's local exchange carrier. After receiving the calls, the ISP may transport the calls to distant points just like a long distance carrier; in particular, the ISP transports the calls to servers located around the country or the world, allowing customers to surf the Internet.

As a policy matter, the FCC concluded in 1983 that ESPs should not have to pay access charges for using LEC networks in this manner, but instead should be treated by the LEC like business customer end-users (not like residential customer end-users or like long distance carriers). That is, just as an auto mechanic or dentist's office purchases local business service in

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<sup>8</sup> In the words of the FCC: "Each long distance telephone call you make includes per-minute fees that your long distance carrier pays to the originating and terminating local telephone companies over whose facilities that call also traveled. Those fees, which are designed to recover the costs to local telephone companies for use of their facilities, are referred to as 'access charges.'" Fact Sheet on The FCC, Internet Service Providers, and Access Charges, available at [www.fcc.gov/Bureaus/Common\\_Carrier/Factsheets/ispfact.html](http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/ispfact.html) (last updated 4/3/02) (hereinafter "FCC Fact Sheet").



order to receive calls from customers, and are not required to pay additional access charges on every call received, so too the FCC concluded that ESPs should be permitted to purchase local business service in order to receive calls from their customers, without paying additional access charges even though the ESP may engage in additional transport of the call. As the FCC explained in the *ISP Remand Order*:

In the [1983] *MTS/WATS Market Structure Order*, the Commission acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, however, the Commission has exempted ESPs from the payment of certain interstate access charges. Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN).<sup>9</sup>

“This policy is known as the ‘ESP exemption.’”<sup>10</sup>

This “ESP exemption” plainly has no application here, for a number of reasons.

First, Global is not an ESP, but is a telecommunications carrier that purports to provide service to ESPs. The “ESP exemption,” however, applies only to ESPs themselves, treating them as end-users.

In the *MTS/WATS Order* (¶ 83), the FCC explained that it was exempting “enhanced service providers” (not all carriers that purport to transport enhanced services traffic, like Global) from access charges: “[E]nhanced service providers, . . . , who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. . . . Were we at the outset to impose full carrier usage

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<sup>9</sup> *ISP Remand Order*, ¶ 11.

<sup>10</sup> *Id.* n.18. See also FCC Fact Sheet (“Since the access charge system was established in 1983, enhanced service providers have been classified as ‘end users’ rather than ‘carriers’ for purposes of the access charge rules, and therefore they do not pay the per-minute access charges that long-distance companies pay to local telephone companies.”).

charges on enhanced service providers . . . , these entities would experience huge increases in their costs of operation which could affect their viability.”

The FCC reiterated the same limitation in its subsequent access charge orders. *See 1988 Access Charge Order*<sup>11</sup> (noting that in 1983, “we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers,” and “decid[ing] not to eliminate the exemption from interstate access charges currently permitted *enhanced service providers*”); *1997 Access Charge Reform Order*,<sup>12</sup> (explaining that in 1983, the FCC “decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls, *ISPs* should not be required to pay interstate access charges,” “conclud[ing] that the existing pricing structure *for ISPs* should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges *on ISPs*,” and “*ISPs* should remain classified as end users for purposes of the access charge system”).

More to the point, in a 1992 order, the FCC explained that under its ESP exemption “enhanced service providers are treated as end users for purposes of [the FCC’s interstate] access charge rules” (and thus pay end user charges rather than access charges), but “[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers.”<sup>13</sup> In other words, ESPs may be exempt from interstate access charges because they are treated as end-users, but that does not create an access charge exemption for the carriers from whom the ESP/end-user purchases service. This result naturally

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<sup>11</sup> Order, *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631 (1988) (“*1988 Access Charge Order*”), available at 1988 WL 488404, ¶¶ 1, 2 (emphasis added).

<sup>12</sup> First Report and Order, *In re Access Charge Reform*, 12 FCC Rcd. 15982 (1997) (“*1997 Access Charge Reform Order*”), available at 1997 WL 268841, ¶¶ 341, 344, 348 (emphases added).

<sup>13</sup> *In re Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987), available at 1987 WL 344405, vacated on other grounds, 7 FCC Rcd 5644 (1992). While the FCC ultimately vacated the *Northwestern Bell* decision for mootness, that decision still carries informational and persuasive value as the FCC’s own explanation of its ESP exemption (and, more importantly, the limits of that exemption).

flows from the FCC's determination that ESPs are to be treated as end-users for purposes of the FCC's access charge rules. When the dentist's office purchases interexchange service, it is treated as a business end-user, and is not subject to access charges for originating calls. But the end-user's carrier, the carrier that provides the interexchange service, obviously must pay these charges for the origination and termination of interexchange calls. The same holds true for ESPs, since they are to be treated as end-users.

Second, the "ESP exemption" has nothing to do with transiting charges. As the FCC explained in the *ISP Remand Order*, the "ESP exemption" is "a long-standing Commission policy that affords one class of entities using interstate access – information service providers – *the option* of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXC's," such that ESPs may "choos[e] . . . to pay local business rates, rather than the tariffed interstate access charges that other users of interstate access are required to pay." *ISP Remand Order*, ¶ 27 (emphasis in original).<sup>14</sup> Access charges are payments "ma[d]e to local exchange carriers (LECs) to originate and terminate long-distance calls" on the LEC's local network. *Intercarrier Compensation NPRM*, ¶ 1 n.2.<sup>15</sup>

The transiting charges AT&T Ohio seeks to collect are not access charges, because they are not charges for originating or terminating long-distance calls on AT&T Ohio's network. Rather, the transiting charges are for traffic that AT&T Ohio agreed to transport across its network and hand-off to third party carriers on Global's behalf. Nothing in the FCC's rules

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<sup>14</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd. 9151 (2001) ("*ISP Remand Order*") (subsequent history omitted), available at 2001 WL 455869.

<sup>15</sup> Further Notice of Proposed Rulemaking, *In re Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 (2005) ("*Intercarrier Compensation NPRM*"), available at 2005 WL 495087.

exempts VoIP or enhanced services traffic from such charges, even if some “access charge” exemption applied here.

Third, and similarly, the “ESP exemption” has nothing to do with reciprocal compensation charges. The FCC orders discussed above all confirm that the exemption is only an exemption from *interstate access* charges. *See, e.g., 1997 Access Charge Reform Order*, ¶ 341 (explaining that in 1983, the FCC “decided that . . . ISPs should not be required to pay *interstate access charges*” (emphasis added)); *1988 Access Charge Order*, ¶ 1 (deciding to retain “the exemption from *interstate access charges* currently permitted enhanced service providers” (emphasis added)); *ISP Remand Order* ¶ 27 (the exemption allows ESPs to “pay local business rates, rather than the tariffed interstate access charges that other users of interstate access are required to pay”).

Fourth, as the FCC explained in the *ISP Remand Order* (¶ 11), under the exemption ESPs are “entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network.” But the charges at issue here have nothing to do with the ESPs’ connections to their customers, which occur before Global even receives the traffic from its alleged “ESP” customers. Rather, the local reciprocal compensation charges AT&T Ohio seeks to collect are for terminating traffic on the PSTN to *AT&T Ohio*’s end users.

For these reasons, the Commission should reject Global’s suggestion that its alleged VoIP or “enhanced” traffic is exempt from the charges at issue here. Indeed, the Commission reached a similar conclusion in the *TelCove Arbitration Decision*.<sup>16</sup> The issue there was whether VoIP traffic should be treated like local (or Section 251(b)(5)) traffic for intercarrier compensation purposes, as TelCove argued, or should be treated like local, intraLATA toll, or

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<sup>16</sup> Arbitration Award, *In re TelCove Operations, Inc.’s Petition for Arbitration*, Case No. 04-1822-TP-ARB (Jan. 25, 2006) (“*TelCove Arbitration Decision*”).

interLATA traffic depending upon the CPN of a call, as AT&T Ohio argued. The Commission agreed with AT&T Ohio, and rejected the notion that IP-PSTN traffic (*i.e.*, VoIP traffic that originates in IP format and is terminated on the public switched telephone network (PSTN)) is somehow exempt from access charges. The Commission explained that at the present time,

[C]arriers are required to follow the existing rules and apply different rates based on traffic jurisdiction. As to the technologically neutral intercarrier compensation and trunking guiding principles, it has been clearly articulated by the FCC, in paragraph 61 of its *IP-Enabled Services NPRM*, that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network, and that the cost of the PSTN should be borne equitably among those that use it in similar ways. We also find it necessary to use the current industry practices, to the extent possible, to resolve these issues until the FCC resolves these issues generically and sets the necessary industry requirements for interconnection and trunking arrangements.

Accordingly, we find that . . . for all types of traffic (PSTN-PSTN, PSTN-IP-PSTN or IP-PSTN), the physical location of the calling and called party, to the extent it is known, is the deciding factor in the jurisdiction of the call for traffic routing and intercarrier compensation purposes. If the physical location of the calling and called party is not known, but the CPN of the called party is available, the CPN should be used for the jurisdictional identification of the call for traffic routing and intercarrier compensation purposes.

*TelCove Arbitration Decision* at 16.

Other state commissions have similarly rejected attempts (including by Global's affiliates) to avoid charges under the "ESP exemption." For example, the California Public Utilities Commission ("CPUC") has recognized that the "ESP exemption" has no application to traffic *from* an ESP that is terminated on the PSTN. In the Pacific Bell/MCI arbitration, the parties asked the CPUC to arbitrate appropriate ICA language governing the exchange of and compensation for such traffic. The CPUC concluded that "not all information or enhanced

services qualify for the ESP exemption.” *Pacific Bell/MCI Decision* at 127-29.<sup>17</sup> Rather, the CPUC agreed with AT&T California that the exemption “applies only to an ESP’s use of the PSTN as a link between the ESP and its subscribers,” and thus concluded that the exemption does not apply to “IP-PSTN” traffic, or traffic *from* an ESP in the Internet protocol (IP) format that is then terminated on the PSTN like any other call. *Id.* at 127.

The CPUC recently reached a similar conclusion in the *Cox v. Global NAPs California* and *Pacific Bell v. Global NAPs California* cases, ruling that Global NAPs California was obligated pursuant to its ICA to pay Cox and Pacific Bell charges for the termination of Global NAPs California’s traffic, irrespective of the fact that Global NAPs California claimed that its traffic was VoIP or “enhanced.” See *Cox/Global California Decision* at 5<sup>18</sup>; *Pacific Bell/Global California Order* at 1.<sup>19</sup> Among other things, the CPUC found that the “ESP exemption” does not apply to Global. See *Pacific Bell/Global California Order* at 12.

Most recently, the Illinois Commerce Commission (“ICC”) rejected the contention of Global’s affiliate, Global NAPS Illinois, that its traffic was somehow exempt from charges if it was VoIP or “enhanced” traffic. The ICC correctly concluded:

Global claims that it has an exemption and does not need to pay AT&T Illinois anything for transiting. The Commission is not convinced in these premises. The “exemption” on which Global would rely, is the FCC’s “enhanced service provider” exemption, which exempts ESPs, and *only* ESPs, from certain access charges.

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<sup>17</sup> Final Arbitrator’s Report, Application by Pacific Bell Tel. Co. d/b/a SBC California (U 1001 C) for Arbitration of an Interconnection Agreement with MCI Metro Access Transmission Services LLC (U 5253 C), App. 05-05-027, at 127-129 (dated April 19, 2006), adopted by the Commission in D.06-08-029 (Aug. 24, 2006), available at 2006 Cal. PUC LEXIS 371.

<sup>18</sup> *Cox California Telecom LLC (U-5684-C) v. Global California, Inc. (U-6449-C)*, Case No. 06-04-026, *Opinion Granting Complainant’s Motion for Summary Judgment*, D. 07-01-004, at 5 (January 11, 2007) (quoting *In the Matter of IP-Enabled Services Notice of Proposed Rulemaking*, WC Docket 04-36 (March 10, 2004)), available at 2007 Cal. PUC LEXIS 8.

<sup>19</sup> D. 08-09-027, Modified Presiding Officer’s Decision Finding Global NAPs California in Breach of Interconnection Agreement, Case 07-11-018 (issued by the CPUC on 9/22/2008) (“*Pacific Bell/Global California Order*”) (attached hereto as Exhibit A).

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Once again, Global causes a mismatch of fact to law by asserting that, since 1983, the FCC has held that interstate access charges may not be applied to traffic that is delivered from ESPs. To be sure, there is no relevancy to that assertion where, as here, AT&T Illinois is not seeking recovery of any interstate access charges. In any event, it is well established on record, and to more than a reasonable degree of certainty, that the FCC's ESP exemption applies only to ESPs themselves, and is only an exemption from certain (*i.e.*, originating) "interstate access charges." As such, the ESP exemption has no application to the charges at issue here, which are all *intrastate* charges (*i.e.*, local reciprocal compensation and intrastate access charges, as well as the transiting charges that we addressed above), not interstate access charges. Even more to the point, the FCC's exemption does not apply "to traffic that is delivered from ESPs." Rather, it applies *to ESPs themselves*, exempting *ESPs* from certain interstate access charges. Global is a carrier, not an ESP, and hence the ESP exemption does not apply to Global, even if the customers of Global's affiliates (and Global itself has no customers) were in fact ESPs. Thus, the ESP exemption offers Global no relief.

*Illinois Bell/Global NAPs Illinois Decision*<sup>20</sup> at 24, 44.

In short, even if Global delivered VoIP or "enhanced" traffic to AT&T Ohio, nothing in federal law exempts Global from the transiting or local reciprocal compensation charges imposed under the parties' ICA. Global's protestations to the contrary are baseless, wrong, and an irrelevant red herring.

### **III. Global Has Not Satisfied Its Burden To Prove That The Traffic It Delivered AT&T Ohio Was VoIP Or "Enhanced" Traffic.**

As demonstrated above, the Commission need not determine whether or not Global's traffic is VoIP or "enhanced." Even if it is, Global is required to pay the transiting and local reciprocal compensation charges billed by AT&T Ohio. If the Commission nevertheless reaches

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<sup>20</sup> Order, *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105 (ICC Feb. 11, 2009) (attached as Ex. C hereto) ("*Illinois Bell/Global NAPs Illinois Decision*").

this issue, however, it should find that Global has failed to prove that the traffic it sent AT&T Ohio was VoIP or enhanced traffic.

Global bears the burden to prove its assertion that its traffic is VoIP or “enhanced” traffic. AT&T Ohio alleges that Global established trunks to deliver local and intraLATA toll traffic, as well as transit traffic; that Global used those trunks to deliver traffic for transiting and termination; that AT&T Ohio transited and terminated the traffic delivered by Global; and that pursuant to the ICA Global thus must pay the charges specified for the transit and termination of traffic, in the manner contemplated by the ICA (*i.e.*, using the CPN to classify the traffic). In defense, Global raised an affirmative matter – *i.e.*, that even though Global used the trunks established under the ICA to deliver traffic, its traffic is actually VoIP or “enhanced” traffic, and as a result is exempt from charges. Global bears the burden to establish its defense. *See In the Matter of the Complaint of Julie Smith v. Pike Natural Gas Co.*, Case No. 01-799-1GA-CSS, 2001 WL 1744320 at \*1 (Ohio P.U.C. 2001) (holding that the defendant was arguing that it had properly applied certain rates to its customers, and that this “appears to have set forth a defense in this matter and [defendant] carries the burden of proof with respect to any defenses”).

Global has failed to satisfy its burden. In its direct testimony, Global asserted that it “focuses on one type of traffic for termination to AT&T Ohio’s customers,” and “[t]his is Voice over Internet Protocol (‘VoIP’) traffic.” Global Ex. 3 (Rooney) at 3. Global further asserted that “[i]n a typical arrangement, a VoIP provider, such as Vonage, routes its subscriber’s calls to a network aggregator, such as CommPartners or Transcom Enhanced Services,” and “CommPartners, Transcom, or another aggregator, contracts with Global NAPs to receive calls from them and to terminate those calls in a location that Global NAPs serves.” *Id.* Global also asserted that “Global does not receive traffic from any customer using a 1+ dialing protocol”



(*id.*), and “Global has substantial reason to believe that the traffic that all Global customers send to Global to transport for termination to AT&T is VoIP and, moreover, is ‘nomadic’ VoIP” (*id.* at 4).

AT&T Ohio’s testimony – in particular its “three minute reports” – demonstrates that these assertions are baseless, because the traffic Global delivered to AT&T Ohio included traffic that was *not* nomadic VoIP, that did *not* originate with a VoIP provider like Vonage (*i.e.*, is not IP-originated traffic), and that *did* originate using a 1+ dialing protocol. As AT&T Ohio’s witness James Hamiter explained, for one day each month between January 2005 and October 2008 (with the exception of two months), AT&T Ohio and its affiliated incumbent LECs in eleven other states recorded all the phone calls originating and terminating in their switches that were three minutes or greater in call duration. AT&T Ohio took that data and tested certain of the traffic that Global delivered to AT&T Ohio, by matching the terminating records of Global’s traffic to the originating records for regular “1+” long distance calls (of at least 3 minutes in duration) that originated from end users on the public switched telephone network (“PSTN”) of the AT&T incumbent LECs in the twelve states. AT&T Ex. 2 (Hamiter) at 14-18. AT&T Ohio found that on each of the tested days, Global sent AT&T Ohio numerous such calls – *i.e.*, calls that were not IP-originated VoIP at all, but were ordinary “1+” long distance calls that originated on the network of one of the AT&T ILECs that collectively operate in twelve states. *See id.* at Sch. JWH-1.

This data conclusively proves that Global sent AT&T Ohio many thousands of calls that were not IP-originated calls at all, but instead originated as ordinary long distance calls on the PSTN of the twelve AT&T incumbent LECs. At the same time, this data does not show that *any* calls were VoIP. AT&T Ohio’s test was limited to records readily available to AT&T Ohio – the

originating records of AT&T Ohio and its eleven incumbent LEC affiliates in the twelve state geographic area where those incumbent LECs operate. AT&T Ohio could not test calls coming from other geographic areas or even from other ILECs or CLECs that do not utilize AT&T incumbent LEC switching within those twelve states, and it further limited its population of tested calls to calls that were three minutes or more in length. *See id.* at 17. But given the fact that, within this limited sampling, on each day that was tested Global delivered numerous ordinary long distance calls that were longer than three minutes and originated from the PSTN of the AT&T ILECs in these twelve states, then it stands to reason that Global delivered many more calls of *less* than three minutes in length that originated on those ILECs' PSTNs in the twelve states. It also stands to reason that Global also delivered many more calls that originated on the PSTNs of *other* traditional telecommunications carriers, *i.e.*, ILECs or CLECs, both in the areas of the twelve states that AT&T Ohio examined that are served by other incumbents and in the other 38 states.

In response to AT&T Ohio's three minute reports, Global again changed its story.<sup>21</sup> In its supplemental testimony, Global asserted, not that these calls are IP-originated or "nomadic" VoIP calls, but that they are PSTN-to-PSTN calls that were converted to IP and "enhanced" in the middle by the customers of Global's affiliates. But even if these calls use IP format in the middle, there is no evidence that these calls are anything except the same type of "IP in the middle" calls that the FCC has already ruled are telecommunications services subject to access charges.

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<sup>21</sup> When it disputed AT&T Ohio's bills, Global asserted that the charges were improper because "Global NAPs has made clear that the traffic carried by the facilities upon which these charges are levied is ISP-bound traffic." AT&T Ex. 5 (Williams) at 11. Of course, this traffic is not ISP-bound, but is voice traffic destined to end-users in Ohio. Global later changed its story to assert that the traffic is VoIP.

In the *IP Access Charge Order*,<sup>22</sup> the FCC held that PSTN-IP-PSTN services are “telecommunications services,” not “enhanced” services, and that interexchange carriers who carry such traffic must pay applicable access charges. In that proceeding, AT&T Corp., an IXC, had petitioned the FCC for a declaration that its “phone-to-phone IP telephony services” were exempt from access charges. *IP Access Charge Order*, ¶ 1. The services at issue used IP only in the middle: an interexchange call was “initiated in the same manner as traditional interexchange calls,” once the call “reaches AT&T’s network, AT&T converts it from its existing format into an IP format and transports it over AT&T’s Internet backbone,” and “AT&T then converts the call back from the IP format and delivers it to the called party through [the LEC’s PSTN].” *Id.* “[U]nder the current rules,” the FCC squarely held, such a service “is a telecommunications service upon which interstate access charges may be assessed.” *Id.*<sup>23</sup>

Among other things, the FCC concluded that if interexchange PSTN-IP-PSTN traffic were not subject to access charges, “carriers would convert to IP networks merely to take advantage of the cost advantage afforded to voice traffic that is converted, no matter how briefly, to IP and exempted from access charges.” *Id.* ¶ 18. That would inappropriately “create artificial incentives for carriers to convert to IP networks,” when “IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges.” *Id.*

The FCC also held that its ruling applies to interexchange service that “(1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and

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<sup>22</sup> Order, *In re Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (FCC rel. April 21, 2004) (“*IP Access Charge Order*”), available at 2004 WL 856557.

<sup>23</sup> The FCC clarified that its conclusion applies “regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.” *IP Access Charge Order*, ¶ 19.

terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." *Id.* ¶ 1. Here, while Global claims that its affiliates' customers, like Transcom, "enhance" ordinary PSTN-to-PSTN calls in the middle, that proves nothing. Under the FCC's *IP Access Charge Order*, the issue is whether the service provides "enhanced functionality to end users." There is no evidence that Transcom or any of the other purported "ESPs" that are customers of Global's affiliates provide any enhanced functionality to end users.

To the contrary, the evidence indicates that whatever "enhancements" these purported ESPs provide are *not* provided to end users. A significant portion of the traffic identified in AT&T Ohio's three minute reports was handed off from the originating AT&T incumbent LEC to \*\*\*REDACTED\*\*\*. Global undertook discovery to determine how these calls reached Global from \*\*\*REDACTED\*\*\*, and Global introduced an affidavit from \*\*\*REDACTED\*\*\*. \*\*\*REDACTED\*\*\* explained that it provides intrastate and interstate interexchange services to end user customers (*id.* ¶ 7); that each of the calls in question "was dialed as a 1+ toll call for which \*\*\*REDACTED\*\*\* was identified by AT&T as the customer's interexchange carrier ("IXC") (*id.* ¶ 8); that these calls were carried to Level 3, and then aggregated and sent to Transcom, the customer of Global's affiliates, "for call switching and routing" (*id.* ¶¶ 8-10); and that Transcom would convert the calls to IP format (*id.* ¶ 10). \*\*\*REDACTED\*\*\* further explained that "[u]nder this arrangement, Transcom is responsible for two separate functions: (a) Switching, which consists of converting the TDM signal to IP-call routing; and (b) Call Termination, as a terminating carrier." *Id.* ¶ 11.

\*\*\*REDACTED\*\*\* affidavit makes clear that Transcom is not providing enhanced functionality to end users. Indeed, Transcom is not providing *any* service to end users. Rather,

Transcom merely provides switching and call termination services to an IXC, \*\*\*REDACTED\*\*\*, while end users receive ordinary long distance service (provided by \*\*\*REDACTED\*\*\*).

In short, this is precisely the sort of "IP in the middle" traffic that the FCC has already ruled is not entitled to any access charge exemption as "enhanced" traffic.

#### **IV. AT&T Ohio's Bills To Global Accurately Measure The Amounts Due.**

There is no dispute that if the ICA's transiting and local reciprocal compensation charges apply to the traffic Global delivered to AT&T Ohio, then AT&T Ohio's bills to Global accurately measure the amounts due. As a result, the Commission should order Global to pay the amounts billed by AT&T Ohio, plus all additional amounts accrued up to the time of the Commission's decision in this proceeding.

AT&T Ohio's bills to Global accurately measure the amount of charges due. Every month, AT&T Ohio sent Global timely, detailed bills showing the charges due for local reciprocal compensation and transiting, generated automatically from AT&T Ohio's billing systems. *See* AT&T Ex. 5 (Williams) at 4-5. All of the traffic that Global delivered AT&T Ohio passed through one of AT&T Ohio's switches, which recorded information for every call, such as the date and time of connection and the length of the call. *See* AT&T Ex. 4 (Cole) at 5-8. Periodically, AT&T Ohio's computer systems retrieve this information and transmit detailed call information for each interconnecting carrier to AT&T Ohio's billing systems. *See id.* at 6-7.<sup>24</sup> The billing systems in turn summarize the usage and other information and apply the appropriate rate elements to generate bills. *See id.* at 6-8; AT&T Ex. 5 (Williams) at 4-5.

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<sup>24</sup> More particularly, information for calls terminated to AT&T end-users is passed on to the Carrier Access Billing System ("CABS"), while information for calls transited to third-party carriers is passed on to the LEC Services Billing group ("LSB"). *See id.* at 6-7

AT&T Ohio uses a variety of methods to ensure that the call data recorded by its systems is accurately measured and accurately translated into bills. AT&T Ex. 4 (Cole) at 7, 9-10. AT&T Ohio's automatic billing processes are tested by a variety of sources before being deployed, and are periodically tested by AT&T Ohio to ensure accurate and reliable operation. *Id.* at 9-10. AT&T Ohio has numerous safeguards and controls in place to ensure its billing is accurate, and has used the same systems and operating procedures to bill carriers throughout Ohio for many years. *Id.* In addition, with respect to Global's bills in particular, AT&T Ohio (a) verified there were no network recording problems on Global's trunks, (b) verified there were no message processing errors or data record fallout for Global's calls, and (c) manually reviewed the bills to verify their accuracy. *Id.*; AT&T Ex. 5 (Williams) at 5-6.<sup>25</sup>

Moreover, when it disputed AT&T Ohio's bills, Global never once claimed that AT&T Ohio's calculations were inaccurate. AT&T Ex. 5 (Williams) at 11. Global's failure to contest the accuracy of AT&T Ohio's billing means Global cannot now challenge the accuracy of those bills. The ICA requires Global to identify the basis on which it disputes AT&T Ohio's bills. *See* ICA General Terms & Conditions § 10.4. The requirement to timely inform AT&T Ohio of the reasons for disputing a bill is especially important in the context of "factual" disputes regarding application of rate elements and rates, because timely notice of such a dispute is necessary to permit AT&T Ohio to properly investigate the issue when the underlying facts and data are fresh, and to adjust its billing if necessary. But Global never disputed the accuracy of the amounts billed by AT&T Ohio.

Finally, and in any event, there is no genuine dispute that AT&T Ohio's bills accurately measure the amounts due. Global has been receiving AT&T Ohio's bills since at least 2004, and

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<sup>25</sup> AT&T Ohio's manual review revealed that AT&T Ohio has been underbilling Global for reciprocal compensation, by failing to bill the ICA's "set up" charges. AT&T Ohio is not seeking to recover this underbilling. *See* AT&T Ex. 5 (Williams) at 6 n.1; AT&T Ex. 1 (Pellerin) at 9 n.9.

Global has never challenged the accuracy of the measurements on those bills. AT&T Ex. 5 (Williams) at 5. That is, while Global claimed that it was not obligated to pay *any* of the charges billed by AT&T Ohio, Global never claimed that, if those charges applied, AT&T Ohio had miscalculated the amounts due. And even now, Global points to no specific factual disputes that cast any doubt on the accuracy of AT&T Ohio's bills. The call volumes are not in dispute.

The Commission thus should order Global to pay the amounts billed by AT&T Ohio for transiting and local reciprocal compensation, plus late payment fees.<sup>26</sup> As AT&T Ohio's witnesses demonstrates, the unpaid amounts include \$40,339.37 in local reciprocal compensation charges and \$32,728.66 in transiting charges, both excluding late payment charges, through the December 2008 bill date. AT&T Ex. 5 (Williams) at 6. The Commission also should order Global to pay the local reciprocal compensation and transiting amounts that have accrued since the December 2008 bill. These amounts appear on the bills AT&T Ohio has continued to send Global. AT&T Ohio further notes that in the *Illinois Bell v. Global NAPs Illinois* proceeding, the ICC ordered Illinois Bell to submit an updated bill or invoice to Global Illinois, and ordered Global Illinois to pay that updated amount within five days. *See Illinois Bell/Global NAPs Illinois Decision* at 62-63. AT&T Ohio suggests that this Commission adopt a similar requirement in this proceeding.

**V. In The Alternative, Global Has Violated The Parties' ICA By Delivering InterLATA Interexchange Traffic Over Trunks Reserved For The Exchange Of Local And IntraLATA Toll Traffic.**

As demonstrated above, AT&T Ohio appropriately classified as local traffic, and billed local reciprocal compensation charges for, the traffic it terminated that Global represented was local and delivered over trunk groups reserved for local and intraLATA toll traffic. Moreover, Global is estopped from contesting the proper classification of this traffic. But in the alternative,

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<sup>26</sup> The ICA specifies the late payment fees that apply to bills that are not timely paid.

if the Commission disagrees with AT&T Ohio, and agrees with Global that this traffic cannot be classified as local traffic, then the Commission should declare Global in breach of the ICA, and further declare that the damages Global owes to AT&T Ohio are at least equal to the reciprocal compensation amounts that AT&T Ohio billed Global for AT&T Ohio's termination of that traffic.

Pursuant to section 5 of Appendix ITR, the parties established "Local and IntraLATA Interconnection Trunk Group(s)," which permit "IntraLATA Toll and Local traffic" to be "combined on a single Local Interconnection Trunk Group." Appendix ITR § 5.3.1, 5.3.2. The parties also agreed that "InterLATA traffic shall be transported . . . over a . . . trunk group . . . separate from local and IntraLATA toll traffic." *Id.* § 5.4.1. Global now suggests that its traffic cannot be classified as local or intraLATA toll traffic under the ICA, but instead must be classified as some other kind of traffic, *i.e.*, interstate VoIP or "enhanced" traffic. If the Commission agrees with Global, then Global plainly is in breach of the ICA for delivering this traffic over the local/intraLATA toll trunks. *See* Hearing Tr. at 378 (Rooney) (admitting Global used local trunk groups to terminate its purported VoIP traffic). Similarly, if the traffic is not classified as local or intraLATA toll traffic under the ICA, then it must be interLATA traffic (*i.e.*, traffic that begins and ends in different LATAs), and Global is in breach of Section 5.4.1, which makes clear that interLATA traffic must be transported over separate trunk groups.

As a result, in the event the Commission agrees with Global that its traffic cannot be classified as local or intraLATA toll traffic under the ICA (an assertion that, as explained above, is wrong and Global is estopped from making), the Commission should declare Global in violation of the ICA for misrouting this traffic over the local/intraLATA toll trunks groups, should further declare that AT&T Ohio's damages from this breach are at least equal to the



reciprocal compensation amounts that AT&T Ohio billed Global for AT&T Ohio's termination of this traffic, and should order Global to immediately cease this misrouting.

**VI. The Commission Should Revoke Global's Certificate Of Public Convenience And Necessity.**

In July 2001, the Commission granted Global's application for certification to provide local exchange service in Ohio. Certificate No. 90-9199, issued pursuant to Case No. 01-1122-TP-ACE (July 10, 2001) (attached to AT&T Ohio Ex. 1 as Att. PHP-12). The Commission should revisit this decision, because it is apparent that Global no longer satisfies (if it ever did satisfy) the requirements for certification under Ohio law – namely, that it “maintain accounting records pursuant to generally accepted accounting practices,” possess “satisfactory technical expertise,” possess “satisfactory corporate structure, managerial expertise, and ownership,” and have “financial viability.” Ohio Administrative Code Chapter 4901:1-6-10(D).

In granting Global's application, the Commission noted that the certificate “is revocable if all the conditions set forth in the aforementioned case(s) [Case No. 01-1122-TP-ACE] are not met.” In addition, OAC Chapter 4901:1-6-10(K) expressly provides that the Commission may revoke a CLEC's certification “upon a demonstration that the company has engaged in a pattern of conduct in violation of Ohio law,” “includ[ing] the failure to comply with the rules and regulations of the commission, including the failure to file the requisite annual reports and the failure to pay all corresponding assessments.”

Global lacks the financial and technical resources necessary to provide services in Ohio. There is no dispute that Global has no assets. *See* AT&T Ex. 1 (Pellerin) at 39. There is no dispute that Global has no employees. *See id.* at 38. There is no dispute that Global has no network or other equipment to provide communications services. *See id.* at 39. And there is no dispute that Global has no revenues or customers. *See id.* at 37-38, 40-41.

Devoid of assets, equipment, employees, or revenues, Global plainly has no ability to provide the services for which it obtained certification. Nor does it have the financial and technical resources necessary to satisfy any of its obligations as a certificated carrier in Ohio, including obligations it incurs to other Ohio carriers with whom it exchanges traffic.

Further, the manner in which Global is operated – *i.e.*, as a mere “paper company” – demonstrates that Global lacks the appropriate managerial resources to provide service in Ohio. It is apparent that Global’s managers never intended for Global to have actual operations in Ohio or to stand on its own feet as a viable carrier in Ohio. Rather, the sole purpose of the creation and certification of “Global NAPs Ohio” appears to have been to defraud creditors and the Commission, and shield any revenues and assets associated with providing service in Ohio from legitimate creditors like AT&T Ohio. Global was created to obtain from this Commission a certificate to provide telecommunications services in Ohio, and thereafter enter into the arrangements with other telecommunications carriers, including the ICA with AT&T Ohio, necessary to provide service in Ohio. The customers and revenues associated with these operations, however, were assigned to different Global NAPs entities, such that Global has always remained an assetless shell, just as it was designed to be.

In addition, by participating in this scheme, Global has conspired to allow its affiliates to provide service in Ohio without obtaining certificates from the Commission, and hence to avoid the Commission’s regulatory oversight and authority. Global’s affiliate Global NAPs, Inc. (“Global NAPs”) entered into contracts with customers to terminate traffic in Ohio (and other states), and later purportedly assigned those contracts to yet another affiliate, Global NAPs Networks, Inc. Further, Global NAPs purportedly owned much of the Global NAPs organization’s network, but that network is now purportedly owned and operated by Global

NAPs Networks. Neither Global NAPs nor Global NAPs Networks are certificated in Ohio. *See* AT&T Ex. 1 (Pellerin) at 42-43. This misuse of Global's certification by other, noncertificated entities to offer and provide service in Ohio further confirms Global's lack of appropriate managerial resources and abilities.

If that were not enough, Global also has violated other requirements to maintain its certification. Global is required to maintain accounting records according to generally accepted accounting practices, and it assured the Commission in its application that "[t]he Commission will have a reliable means by which to evaluate [Global's] operations and assess its financial fitness." *See* AT&T Ex. 1 (Pellerin) at 37. But Global has never kept such records. Its representations to the Commission were false, and it has violated the express conditions of its certification.

Global's testimony at the hearing confirmed that Global does not maintain appropriate accounting records, has no real financial viability, has flouted its annual reporting and assessment obligations, and is just part of a shell game operated by the Global NAPs enterprise. Global's annual reports to the Commission report no intrastate revenues. *See* AT&T Ex. 1 (Pellerin) at 44. At the hearing, Global witness Rooney testified that Global would bill for its services, and report revenues, only if it paid AT&T Ohio or other entities. Hearing Tr. at 380-381. That simply makes no sense. Revenues are not the same thing as expenses, and Global either has revenues or it doesn't. Global's suggestion that its accounting for revenues is entirely dependent upon its expenses, and its suggestion that it will recognize revenues only if it agrees to pay AT&T Ohio (or is ordered to pay AT&T Ohio) proves that Global's managers operate Global – and intend to continue to operate Global – as a paper company with no real economic substance.

The activities of Global's affiliates in other states, who also are owned by Ferrous Miner and operated under the direction of Ferrous Miner's sole owner, Frank Gangi, also reveal a lack of appropriate managerial resources and abilities. For example, Global's California affiliate (Global NAPs California, Inc., or "Global California") recently lost its certification to provide service in California, and the California commission ordered other local carriers in California to cease exchanging traffic with it. Global California, like Global here, had refused to pay other carriers for terminating traffic in California, while its affiliates reaped revenues.<sup>27</sup> The California commission found Global California liable to Cox Communications for about \$1 million in intrastate access charges for terminating intraLATA toll traffic, and revoked Global California's certification when Global California violated the commission's order to pay Cox. *See* AT&T Ex. 1 (Pellerin) at 51-53. Even more recently, the California commission found Global California liable to AT&T California for nearly \$19 million in unpaid local reciprocal compensation, transiting, and intraLATA toll charges, not including any late payment or interest charges. *See Pacific Bell/Global California Order* at 1. Yet Global California purported to have about \$100 to its name, with no liquid assets, offices, or real or personal property in California. AT&T Ex. 1 (Pellerin) at 52. That is, Global California was structured by its managers just like Global here – as an empty shell without any assets to pay any creditors in connection with the provision of certificated services.

A similar story recently played out in Connecticut. There, Southern New England Telephone ("SNET") sued the certificated Global affiliate in Connecticut, Global NAPs, Inc. ("Global NAPS") to recover more than \$5 million in unpaid tariff charges. After the federal court awarded SNET a prejudgment remedy of \$5.25 million, Global NAPs revealed that it

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<sup>27</sup> Other Global affiliates in other states exhibit the same behavior, and are being sued by other carriers for unpaid charges in California, Illinois, Massachusetts, New York, Connecticut, Georgia, Florida, and North Carolina. *See* AT&T Ex. 1 (Pellerin) at 53-55.

purported to have virtually no assets, virtually no network equipment, and no customers, because it had transferred its equipment and customer contracts – without compensation – to Global NAPs Networks. When SNET attempted to pursue discovery of the financial and accounting records of Global NAPs and its affiliated co-defendants, including the parent company Ferrous Miner, they concealed and destroyed records and lied to SNET and the federal court – leading the court to impose the ultimate sanction of a default judgment against Global NAPs and its affiliated co-defendants. *See* AT&T Ex. 1 (Pellerin) at 46-50. The conduct of Global NAPs, Ferrous Miner, and their affiliated co-defendants in the Connecticut case is a clear evidence of lack of appropriate managerial resources and abilities.

Most recently, the Illinois Commerce Commission (“ICC”) issued a show cause order after concluding that the Global NAPs entity certificated in Illinois, Global NAPs Illinois, Inc. (“Global Illinois”) “no longer possesses the technical, managerial and financial qualifications” required for certification to provide service in Illinois. *Illinois Bell/Global NAPs Illinois Decision* at 63. Like Global, Global Illinois obtained certification and entered into an ICA with the incumbent LEC (Illinois Bell) to terminate traffic in Illinois and incur the liabilities associated with that service, but Global Illinois was operated as an assetless shell, while its affiliates (Global NAPs, Inc. and Global NAPs Networks) entered into customer contracts, held network equipment, and enjoyed the revenues associated with providing service in Illinois. The ICC found, among other things:

Staff expresses deep concern in that Global Illinois only possesses a certificate and relies on Global Networks, an un-certificated entity, to provide all actual services. This brings up AT&T Illinois’ concern of having to do business with an empty shell. The Commission can draw nothing good from such a situation that is unlike anything we, or our Staff, have ever seen. Indeed, it has become obvious to the Commission that Global has structured itself and operated in this manner in order to defraud its creditors

in Illinois, and to make Global 'judgment-proof' with respect to the operations of Global and its affiliates in Illinois. The Commission cannot condone nor need it ignore such a ploy.

*Illinois Bell/Global NAPs Illinois Decision* at 61.<sup>28</sup>

Finally, Global's lack of appropriate financial, technical, and managerial resources and abilities harms Ohio carriers and consumers. By operating Global as a shell company, Global's managers are attempting to enjoy a free ride on AT&T Ohio's public switched network, and that of other Ohio carriers that terminate Global's transit traffic, while shielding their revenues from creditors. While AT&T Ohio (and ultimately its customers) is thus forced to subsidize Global's "business" in Ohio, other CLECs and carriers pay for the services they receive from AT&T Ohio. As a result, Global's managers obtain an unfair and inappropriate competitive advantage over other carriers, distorting the market and harming competition. *See* AT&T Ex. 1 (Pellerin) at 58-59.

For these reasons, the Commission should conclude that Global does not possess "satisfactory technical expertise," possess "satisfactory corporate structure, managerial expertise, and ownership," and have "financial viability" (OAC Chapter 4901:1-6-10(D)), and should revoke Global's certificate.

### **Conclusion**

For the foregoing reasons, AT&T Ohio respectfully requests that the Commission enter an order finding that Global has breached the parties' ICA, finding that Global owes AT&T Ohio the amounts of \$40,339.37 in local reciprocal compensation charges and \$32,728.66 in transiting charges, plus late payment charges and any amounts that have accrued since December 2008, and revoking Global's certificates of service authority.

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<sup>28</sup> Rather than proceed on the merits of the show cause proceeding, Global Illinois surrendered its certificates of service, and on August 4, 2009, the ICC entered an order withdrawing Global Illinois' certificates of service authority.

Respectfully submitted,

AT&T OHIO

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