BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of AT&T OHIO	:	
Complainant,	:	Case No. 08-690-TP-CSS
v.	:	
GLOBAL NAPs OHIO, Inc.,	:	
Respondent.	:	

GLOBAL NAPS OHIO, INC.'S REPLY BRIEF

I. Introduction

A basic premise of AT&T's Initial Brief, and the centerpiece of its defense of its claims in this proceeding, rests on a misconception. AT&T asserts:

> 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.

(AT&T Initial Br., 2).

Global NAPs Ohio, Inc. ("Global") has made no such assertion in this case. To the contrary, Global seeks to enforce the agreement as written, not to avoid it. Voice over Internet Protocol ("VoIP") and other Internet Telephony are categories of traffic that are part of, and are governed by, the terms of the Parties' Interconnection Agreement ("ICA" or "Agreement"). Global agrees with Ms. Pellerin that "the agreement clearly does contemplate that VoIP would exist; otherwise, there would be no reason for that Provision 16.9 in Reciprocal Compensation

Global agrees with Ms. Pellerin that "the agreement clearly does contemplate that VoIP would exist; otherwise, there would be no reason for that Provision 16.9 in Reciprocal Compensation that Mr. Davidow pointed me to." (Tr. vol. 1, 150. (Cross of Patricia Pellerin)). Global contends that AT&T was responsible for respecting the presence of VoIP and Internet Telephony as categories of traffic present in and governed by the Agreement, and that AT&T failed to do so.

II. AT&T Has Failed To Prove The Legal and Factual Validity of its Claims

One important consequence of AT&T's mischaracterization of the issues in dispute in this proceeding is that AT&T has miscalculated its own obligations to justify its claims and validate its bills. As the Hearing Examiner ruled in his March 16, 2009 Entry in this case, "AT&T will continue to have the burden of proof based on the record in this case . . . "*In the Matter of the Complaint of AT&T Ohio, v. Global NAPs Ohio, Inc.*, Case No.08-690-TPS-CSS, Entry, ¶ 14 (March 16, 2009) (hereinafter "March 16, 2009 Entry"). That ruling correctly reflects two established legal principles; that Complainant has the burden of proving each of the elements of its claim, and that it must do so on the basis of record evidence. *Marcus & Millichap Real Estate Inv. Svcs. v. Sekulovski*, 2009 U.S. Dist. LEXIS 46079 at *13 (N.D.Ill. 2009) (party setting forth breach of contract claim has burden of proof as to all elements); *Plastech Engineered Prods. v. Cooper-Standard Auto*, 2003 U.S. Dist. LEXIS 19155 (N.D.Ohio 2003).

AT&T attempts to reverse the burden of proof by claiming that Global offered an affirmative defense by assertion that the traffic Global sent to AT&T was VoIP traffic. (AT&T Initial Br., 22). AT&T's argument is without merit for at least three reasons.

First, AT&T is wrong as a matter of law. An "affirmative defense" is a new matter which, assuming a complaint to be true, constitutes a defense to it. An affirmative defense admits the plaintiff has a claim, but asserts some legal reason why the plaintiff cannot have any recovery

on that claim. *State ex rel. The Plain Dealer Publishing Co. v. Cleveland*, 75 Ohio St. 3d 31, 661 N.E.2d 187. An affirmative defense is a legal defense to a claim, as opposed to a factual dispute as to an essential element of the claim. *Matter of Coramn,* 909 P.2d 966 (Wyo. 1996). *See generally* 61A Am. Jur. 2d Pleading § 288.

Global is making no such argument. Global's argument is that the traffic that Global sent to AT&T was VoIP *within the definitions in, and subject to the terms of, the ICA.* AT&T's failure to identify the VoIP traffic that Global sent to it and to treat it as the ICA requires constitutes a failure to implement the ICA as written. The Agreement "clearly does contemplate that VoIP would exist" just as it contemplates the exchange of Local, intraLATA Toll and interLATA 800 traffic would exist. Global no more had the burden of proving how much of its traffic was VoIP than it had of proving how much of its traffic was "Local." Both are covered by the Agreement and separating them and treating them as required by the Agreement is AT&T's task. Second, even if Global had a burden of proof to show that some or all of its traffic was, in fact, VoIP, enhanced or Internet Telephony, once Global met that burden, it was AT&T's continuing burden to prove that AT&T had properly recognized, priced and billed all of its traffic correctly. Again Global stresses the point: VoIP and Internet Telephony traffic are part of the Agreement. Once Global put AT&T on notice that it was sending, or even claiming to send, VoIP traffic, it was AT&T's job to properly identify, track, price and bill that traffic, exactly as it was AT&T's job to identify, track, price and bill local or Information Services traffic. AT&T could demand that Global work with it in this effort (which it did not), but it could not simply ignore its obligations, as AT&T did.

AT&T's Initial Brief offers an unexplained and inexplicable theory to relieve it of its burden of proof. It points to its Three Minute Reports and asserts that this data "conclusively

prove[] that Global sent AT&T many thousands of calls that were not IP-originated at all." (AT&T Initial Br., 23).

AT&T has exaggerated and misrepresented this data. An examination of AT&T's data tells a very different story. Mr. Hamiter testified that AT&T captured "all" IP-originated 3 minute or longer calls that originated on the AT&T PSTN across its twelve state region, in 44 sample days. (Tr. vol. 1, 17, 25 (Cross of James Hamiter)). The "many thousands" of calls that AT&T found amounted to approximately 6,270 calls, spread across 44 days. That is an average of 142 calls per day. But those 142 calls per day originated across 12 AT&T states, which means that AT&T's study of "all" PSTN originated calls found an average of less than 12 such calls per day per state. In short, AT&T's Three Minute Reports ("TMRs") found that Global was receiving from the AT&T network only about one call per state every two hours.

Perhaps to counter this fact, AT&T's Initial Brief asserts that "at the same time, this data does not show that *any* calls were VoIP." (AT&T Initial Br., 23) (emphasis in original). This suggestion would be silly if AT&T was not so serious in its intent. Of course AT&T's study found no VoIP calls because: (A) AT&T defines VoIP as IP originated and (B) the TMRs deliberately excluded all IP originated calls. Mr. Hamiter testified:

> A. Their Internet stuff on the DSL line is handled a different way. That stuff is not switched by our local switches.
>
> Q. And as a consequence of that fact, if there is such traffic, your study didn't capture it?
>
> A. That's right.

(Tr. vol. 1, 28 (Cross of James Hamiter)). It is hard to trumpet the fact the TMRs do "not show that *any* calls were VoIP" when the TMRs were designed to exclude *all* calls that were VoIP.

While Mr. Hamiter's study excluded from its analysis all IP-originated calls, Mr. Masuret's study captured this traffic. Mr. Masuret demonstrated that for every call that AT&T found that originated on the PSTN, there were more than 100 calls that did not. In the Local market, which forms the basis of both of AT&T's monetary claims, Mr. Masuret found, and Mr. Hamiter confirmed, that there were no PSTN-originated calls.

Having found "many thousands" of PSTN-originated calls, AT&T essentially accuses Global of lying about its business on the trumped up charge that Global had insisted that all of its traffic was IP-originated VoIP. AT&Ts allegation is not only slander, it is also irrelevant.

AT&T's statements are slander because Mr. Scheltema[1] simply testified that Global "had substantial reason to believe" that the traffic it was forwarding to AT&T was VoIP and that a "typical arrangement" was a Vonage type arrangement; i.e., IP-PSTN. (Rooney/Scheltema, 3-4). The use of the word "typical" necessarily implies that non-typical arrangements also existed, and the testimony of Mr. Scheltema cited the *Transcom* decisions for proof that other forms of arrangements were VoIP or enhanced traffic as well. (Rooney/Scheltema, 3-5). Second, AT&T's arguments are slander because the data produced in this record fully validates Mr. Scheltema's summary testimony. As demonstrated in the testimony of Mr. Noack, Mr. Masuret and in the data and testimony provided by Mr. Hamiter, *all* of the Global Local traffic was IP-originated and between 98% and 99% of the traffic routed through an interexchange carrier was IP-originated. (Masuret Testimony, 5-6). Mr. Scheltema describing the Vonage arrangement as "typical," therefore, was an understatement. IP-PSTN traffic is nearly the only type of traffic that Global sends to AT&T.

[1]Adopted by Mr. Rooney in his testimony of July 24, 2009. For ease of citation this brief uses "Rooney/Scheltema" to refer to this testimony, and cites page numbers from Scheltema's testimony.

Moreover, AT&T seems to argue the strange legal theory that, if AT&T can identify even *one* Global call that was PSTN-originated,[2] the Commission should allow it to bill as if AT&T had proven that *all* of Global's traffic was PSTN-originated. Both logic and common sense suggest otherwise. If AT&T has proven that only 1% of Global's traffic was PSTN-originated, and if it has also demonstrated that this 1% was not enhanced, then it may have a claim with respect to that 1%, but it has no claim as to the remaining 99% of the calls were shown to be IP-originated VoIP.[3] The facts are what the record shows them to be, not a made up number based on a lawyer's "gotcha."

Equally fundamental, if some of the Global traffic was IP originated VoIP, some of it PSTN-originated and enhanced, and some of it neither, it was AT&T's burden *under the* ICA to make a *bonafide* effort to determine which calls and how many minutes fell into each basket. VoIP traffic is covered by the Agreement and AT&T had the obligation to correctly bill it under the Agreement. AT&T did not meet that burden in its billing. In breach of the Agreement, AT&T did not even try.

As Global explained in its Initial Brief, VoIP traffic is not merely a different contractual term, it is a different technology. As Mr. Cole testified, in all of AT&T's other VoIP contracts, AT&T works with the CLECs to negotiate an agreement on what is VoIP, what rate should apply and how to terminate VoIP traffic. In general, VoIP traffic is billed at a Unitary rate without regard to geographic distinctions and is carried over local interconnection trunks. (Tr.

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[2]And ignoring for the moment that these calls could be and, on the record evidence were, enhanced.

[3] Mr. Masuret's analysis demonstrates that, contrary to AT&T's claims of helplessness, AT&T was in an excellent position to estimate the percentage of Global's traffic that was IP-initiated since it had both total call volumes and originating phone numbers preserved in its records. It elected to exclude data that would have produced a denominator to attach to its numerator of "many thousands." That was a tactical decision to avoid disclosing what Mr. Masuret demonstrated: that "many thousands" of calls spread over 44 days and 12 states is a very small percentage of all three minute calls that Global terminates to AT&T. And, of course, AT&T's decision to study only the interexchange market when its claims address only the local market was another tactical decision – to avoid the inevitable showing that none of Global's "local" traffic to AT&T was PSTN-originated.

vol. 1, 111, 116-117 (Cross of William Cole)). In this case, however, AT&T made no effort whatsoever to determine which, and how much of the traffic that Global sent was VoIP and made no effort to determine what rate to bill such VoIP traiffic. It now turns out to be the case that nearly all of Global's traffic to AT&T is, in fact, IP-originated VoIP. Because AT&T refused to anticipate that possibility, it guaranteed that its bills are worthless, even under its own theory of the ICA.

Just as AT&T failed to meet its burden of proof with respect to billing, AT&T has similarly failed to meet the burden of supporting its claims in this complaint proceeding. AT&T completely failed to provide any evidence regarding Global's "local" traffic,[4] when even the most novice telecommunications engineer would have recognized that no PSTN to PSTN local calls could route through an ESP and then through Global . Instead, as Global predicted from the beginning of this case, AT&T has attempted to misuse its TMRs to imply in that the calls in the TMRs were proof of the presence of PSTN-originated traffic in the *local* market, even after its witness had testified under oath that they were not. (Tr. vol. 1, 38-39).

In the interexchange market, AT&T concealed the *total* number of three minute calls that Global terminates, which not coincidentally is the same data that AT&T had in its records and used to generate its bills, in order to avoid any comparison with the "many thousands" of PSTN-originated calls that the TMRs identified. What AT&T did not want on the record was a percentage of total calls studied in the TMRs. It took Global's own efforts to show that these "many thousands" of PSTN-originated calls amounted to less than one percent of the total number of three minute calls that Global terminated through AT&T in Ohio. With due respect to Mr. Hamiter and Ms. Pellerin, many thousands of calls spread over 44 days and divided among

[4] As Mr. Hamiter answered in response to the Hearing Examiner's question, AT&T could have done a study of the local market but elected not to do so. Mr. Hamiter later explains that no such study was needed since it was obvious that it would find no PSTN-originated traffic. See, Vol. 1, tr. 35-36 and 38-39.

12 states is a "trivial" number of calls. It is one call per state every two hours. It is not "much (if not all)" of Global's traffic, as Ms Pellerin represents in her testimony.

AT&T tries to beef up its claim by arguing that it only captured calls of three minutes or more and "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." (AT&T Initial Br., 24). However, it equally 'stands to reason" that Global delivered many more IP-originated calls of less than three minutes as well. Since neither evidence nor logic suggests that there should be a higher percentage of PSTN-originated short calls than PSTN-originated long calls, adding estimates of calls less than three minutes does not change the overall percentages. It should still be the case that more than 99% of all Global's calls to AT&T were IP-originated and less than 1% were PSTN-originated.

Even though the uncontested record evidence demonstrated that nearly none of Global's traffic was PSTN originated, Global produced record evidence showing that the small percent of its traffic that was PSTN-originated traffic was, in fact, enhanced. In lieu of contesting evidence, AT&T concedes the point but asserts that "whatever 'enhancements' these purported ESPs provide are not provided to end users." (AT&T Initial Br., 26). This assertion is wrong both as a matter of law and as a matter of fact. First, nothing in the statutory definitions of enhanced services requires that these services be sold directly to end users. If the call involves a change in code or protocol or the call is altered in form or content, it is enhanced. AT&T has made no effort to explain why these statutory definitions do not apply in this case.

Moreover, AT&T ignores the sworn testimony of Mr. Masuret, explaining that the services that Global participates in involve *bona fide*, consumer benefiting enhancements, as opposed to the AT&T IP in the Middle arrangement, where there was no claim of enhancement.

(Tr. vol. 2, 309-311 (Cross of Bradford Masuret)). This was, of course, also the express finding in the *Global Crossing* case, where the federal court expressly held as a matter of fact that Transcom's system was distinguishable from the AT&T IP in the Middle system because it produced bona fide enhancements that benefited consumers.

> That record establishes by a preponderance of the evidence that the service provided by Transcom is distinguishable from AT&T's specific service (as described in the AT&T Order) in a number of material ways, including, but not limited to, the following:
>
> (a) Transcom is not an interexchange (long distance) carrier;
>
> (b) Transcom does not hold itself out as a long distance carrier;
>
> (c) Transcom has no retail long distance customers;
>
> (d) The efficiencies of Transcom's network result in reduced rates for its customers;
>
> (e) Transcom's system provides its customers with enhanced capabilities; and
>
> (f) Transcom's system changes the content of every call that passes through it.

Transcom Enhanced Services, Inc. v. Global Crossing Bandwidth, No. 05-31929-HDH-11, 5 (Bankr. N.D. Tex. Sept. 20, 2007)

It is notable that the court found that the Transcom system reduces rates for consumers and provides customers with enhanced capabilities.

It is immaterial to the benefit the customer receives whether Transcom charged the consumer for the enhancement or charged it's IXC, or built the benefit into its base service charge. It is equally irrelevant whether the IXC charged its customer directly or simply provided the consumer with a superior product without charge in order to compete with "traditional" long distance. The federal court decisions involving Transcom confirm that the key inquiry into what is enhanced traffic is whether the traffic is being altered in form or content to the benefit of the

consumer, not whether the consumer was billed for the benefit. AT&T has also ignored the communication from UniPoint, cited in Mr. Masuret's Testimony, confirming that everything UniPoint sends to Global is "enhanced" VoIP.

In sum, even if Global had a burden to prove that its traffic was, in fact, VoIP or other Internet Telephony, Global has easily met that burden. The uncontroverted evidence of record shows that: (1) all of the traffic that AT&T billed as "Local" was, in fact, IP-originated VoIP; (2) between 98 and 99 percent of the traffic that AT&T labels "interLATA" was IP originated VoIP; and (3) the remaining 1 to 2 percent of the "interLATA" traffic that was PSTN-originated, left the PSTN, went to an Enhanced Service Provider, was converted to IP and was enhanced before it was returned to the PSTN. As each of these issues, Global has offered record evidence proving each of these facts and AT&T has offered nothing to prove otherwise.

For each issue in this case, AT&T bears the burden of proof. If it chooses to pursue the claim that VoIP and Internet Telephony traffic are subject to the same pricing rules governing "Local," "intraLATA," and" interLATA" traffic, AT&T has the burden of showing how VoIP and Internet Telephony traffic fit within the applicable definitions of the ICA. Further, AT&T must show that its bills were correct, first by showing that AT&T properly divided the traffic that it claims was "Local" "intraLATA" and "interLATA" into VoIP and "traditional" categories and second, as to VoIP traffic, that AT&T correctly determined how many VoIP minutes of use were geographically "Local", how many were geographically "intraLATA" and how many were geographically "interLATA." Global reiterates: VoIP is an express term of the ICA and both Global and AT&T agree that "the agreement clearly does contemplate that VoIP would exist." As Complainant, it was AT&T's obligation to show that it recognized and accommodated this

fact and satisfied its contractual obligations with respect to it. Any reading of AT&T's Initial Brief demonstrates that AT&T does not even attempt to satisfy its burden of proof.

III. AT&T Has Not Justified Its Reciprocal Compensation or Tandem Transit Claims

AT&T has elected to address its Reciprocal Compensation and Tandem Transit claims together, making the same arguments in defense of each. As this is a reply brief, Global will answer in the same arrangement.

It is no longer disputable that all of the traffic that Global sent to AT&T and that AT&T billed as "Local" traffic was IP-originated VoIP. This is as true for AT&T's Transit Traffic claim as it is for its Reciprocal Compensation claim. Mr. Noack demonstrated this in his Testimony. (Noack Supplemental Testimony, 5-9). AT&T confirmed this in its answer to Information Request 1-15. Mr. Hamiter acknowledged this on cross examination. (Tr. vol. 1, 38 (Cross of James Hamiter)). Mr. Masuret also proved this in his Testimony. (Masuret Testimony, 6-7). There is no evidence to the contrary.

AT&T's answer to this in its Initial Brief is both *pro forma* and unprincipled. AT&T asserts, wrongly, that Global has the burden "to prove its assertion that its traffic is VoIP . . ." AT&T then states:

> 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, did *not* originate with a VoIP provider like Vonage (i.e., is not IP-originated traffic), and *did* originate using a 1+ dial protocol.

(AT&T Initial Br., 22-23).

As Global anticipated in its original brief and throughout this litigation, AT&T is attempting to falsely assert that its TMRs apply to Local traffic and, therefore, to AT&T's

Claims One and Three. However, as early as the March 16, 2009 Entry in this proceeding, the Hearing Examiner correctly noted:

> AT&T's three-minute studies are limited in scope to traffic handed off to an interexchange carrier. . . . [L] ocal traffic is not included within Mr. Hamiter's analysis. . .

(March 16, 2009 Entry, ¶ 26).

AT&T's witnesses were also more forthright than their lawyers. Mr. Hamiter testified that the TMRs show nothing about the traffic that AT&T labels as "Local," either directly or by implication. (Tr. vol. 1, 39-40 (Cross of James Hamiter)). Indeed, and contrary to AT&T counsel's representation above, Mr. Hamiter testified that none of Global's "Local" traffic could have originated in PSTN format.

> Q. So if there were a study done of purely local calls jurisdictionally, you would expect to find no PSTN-to-PSTN calls in such a survey; is that correct?
>
> A. In -- in regard to calls that would be delivered to AT&T Ohio by Global Ohio, yes.
>
> Q. None of those should have originated on the PSTN –
>
> A. Right.

(Tr. vol. 1, 38 (Cross of James Hamiter)).

The Hearing Examiner's March 16, 2009 Entry was precise in holding that AT&T's burden of proof must be satisfied "based on the record in this case." (March 16, 2009 Entry, ¶ 14). Here, all the record evidence is that all Global traffic that AT&T billed as Local was IP-originated. Hence, AT&T's Claim One is sustainable only if (1) AT&T has proven that it had the right to bill IP-originated VoIP traffic at the Reciprocal Compensation rates that apply to "Local" traffic, and (2) that it correctly determined that the VoIP traffic AT&T billed as Local was Local in fact, within the contract's definitions. Again, AT&T makes no effort to prove either point.

Instead, AT&T has shifted gears completely. AT&T's Complaint asserted that AT&T's rights to bill Global for Reciprocal Compensation arose out of Sections 3 and 5 of the Reciprocal Compensation Appendix ("RC Appendix"). (Compl., ¶ 30). AT&T's claim for Tandem Transit charges arises out of Section 9.1 of the RC Appendix, and cross references to the definitions of Local and intraLATA Toll in the ICA. (Compl., ¶ 38). Now, however, AT&T asserts that Global is liable for Reciprocal Compensation and Tandem Transit payments because Global routed its VoIP traffic over "Local and intraLATA trunks" and, thereby "represented"[5] that this traffic was "Local." (AT&T Initial Br., 3). AT&T's argument is specious. As with its factual assertions, there is no support for it either in the ICA or in the testimony of AT&T's own witnesses.

First, the classification of traffic *for billing purposes* is accomplished in the RC Appendix, not in the Interconnection Trunking Requirement Appendix ("ITR Appendix"). Section 1.1 of the RC Appendix states that it 'sets forth the terms and conditions for Reciprocal Compensation of intercarrier telecommunications traffic between ILEC and CLEC." Then, to avoid precisely the kind of spurious argument AT&T is now making, Section 1.5 states:

> Any inconsistencies between the provisions of this Appendix and other provisions of the underlying Interconnection Agreement shall be governed by the provisions of this Appendix.

The definitions of traffic types *for billing purposes* are also set forth in the RC Appendix and are cross-referenced definitional provisions. Thus, for example, Sections 5 of the RC Appendix specifies that "**the compensation set forth below** will also apply to all "Local and Local ISP Calls **as defined in section 3.2 of this Appendix**." Section 3.2 specifies that "Local calls and Local ISP Calls **will be compensated** "so long as the originating end user of one Party and the terminating end user or ISP of the other Party are "both *physically located* in the same

[5] Neither the word "representation" nor the concept can be found anywhere in the ICA.

ILEC Local Exchange Area." If the Parties had intended what AT&T is now arguing, they would have defined "local calls" as "for billing purposes, calls that are routed over local/intraLATA trunks." No such language exists.

Second, nothing in the ITR Appendix states that use of a particular type of trunk constitutes a "representation" about how the traffic being routed should be billed. The subject of the ITR Appendix is engineering, not billing. Thus, Section 5.1 of the ITR Appendix, on which AT&T now relies, simply states that the following trunk groups 'shall be used to exchange *various types* of traffic." Section 1.1 states that the ITR Appendix "sets forth terms and conditions for Interconnection." In comparison, Section 1.1 of the RC Appendix states that it "sets forth the terms and conditions for Reciprocal Compensation."

The trunking provisions do not even capture all of the types of traffic that may be exchanged and, depending upon the terms of the RC Appendix, might be billed. This means, inevitably, that traffic is routinely routed over trunks but not billed on the basis of the routing arrangements. For instance, in addition to VoIP, the ICA permits the exchange of "Information Service" traffic. Yet none of the trunking categories identified in AT&T's Initial Brief mentions this traffic category. Under AT&T's current theory, if a CLEC decided to route Information Traffic over local trunks (which would be the norm since Information Service traffic is not subject to access charges) the CLEC would be "representing" that the traffic was Local, representing that it was not "Information Traffic" and would be committing to pay Reciprocal Compensation. However, Section 3.6 of the RC Appendix, which clearly intends to control pricing requirements, explicitly specifies that the [Reciprocal] compensation arrangements set forth in this Appendix "are not applicable to . . . Information Service traffic." Similarly, whatever trunking choices are made with respect to VoIP or Internet Telephony (both of which are

"Information Services" and both of which are not mentioned in the ITR) Section 16.9 of the RC Appendix specifies that the parties reached no meeting of the minds that VoIP traffic is "Local" for reciprocal compensation purposes. Finally, if there are inconsistencies between the RC Appendix provisions and the ITR Appendix, Section 1.5 of the RC Appendix sets forth that the Parties' Agreement shall control.[6]

In short, as the Wisconsin Commission found in the AT&T/Verizon arbitration, pricing obligations drive trunking obligations, not the other way round. *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration*, Case NO. 05-MA-138, 37-38, Wisconsin Public Util. Comm. (May 15, 2006) ("*MCImetro*"). Traffic that is subject to terminating switched access charges should be routed over access trunks, while traffic that is not subject to terminating switched access charges should not be routed over access trunks. Traffic that is subject to no price at all (for example, traffic that is subject to bill and keep agreements) still needs to be routed over trunks. Doing so does not alter existing pricing agreements. Trunking is the tail, not the dog. Pricing is set by the provisions of the RC Appendix.

Confirming this analysis, AT&T's billing witness testified that AT&T did not bill Global on the basis of trunk orders at all. AT&T billed on the basis of the originating and terminating NPA-NXX's of each individual call, and did so without regard to what trunks were used to route the traffic. Mr. Cole stated:

> AT&T Ohio takes the NPA-NXX of the originating number and matches it to internal tables to determine horizontal and vertical points (V&H). AT&T Ohio will also take the terminating NPA-NXX of the call and do the same matching

[6] Foreign Exchange ("FX") traffic is another class of traffic that may be exchanged and, regardless of how it is routed, may be billed as "intraLATA or interLATA depending upon its geographic end points, not on how it is routed. However, this traffic is treated as subject to Feature Group A pricing. *See* General Terms and Conditions, section 1.1.56.

> process. From the V&H determination process, AT&T Ohio will verify if the call is local or toll based on the call's geographic destination points.

(Tr. vol. 1, Ex. 4, p. 8 (Testimony of William L. Cole)).

In sum, Mr. Cole testified that AT&T never billed, or claimed the right to bill, Global on the basis of the trunking ordered and used. AT&T billed on the basis of NPA-NXX comparisons. Indeed, AT&T's entire argument in Claim 2 is predicated on the assumption that NPA-NXX information, and not trunking, determines jurisdiction for billing purposes.[7] The trunking provisions of the ITR Appendix are a red herring. The RC Appendix, as AT&T itself recognized in its Complaint, sets the rates and billing rules.

Because of its focus on the ITR Appendix provisions, AT&T makes little effort to justify its billing under the terms of the RC Appendix. It asserts that:

> Even if VoIP was "enhanced" traffic within the meaning of the contract "that traffic is still [t]elecommunications traffic exchanged between CLEC and ILEC" within the meaning of section 3.1 of the Appendix Reciprocal Compensation (and thus to be classified as either Local Calls, Transit Traffic, Optional Calling Area Traffic, IntraLATA Toll Traffic or InterLATA Toll Traffic" pursuant to that section."

(AT&T Initial Br., 8).

AT&T then asserts that the FCC has ruled that interconnected VoIP providers provide "telecommunications."

This composite argument is incorrect as to both federal and as to contract law. Starting at the end, AT&T has misrepresented the FCC's universal service ruling. While the FCC ruled that "interconnected VoIP providers provide "telecommunications" for purposes of contributions to the Universal Service fund, it did not rule that VoIP is a telecommunications 'service." Indeed,

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[7] Actually, AT&T engages in a "heads, I win; tails, you lose" theory here. It asserts that, if a connecting carrier sends non-local traffic over local trunks – for example, Information Services traffic or VoIP – it has agreed to pay reciprocal compensation by "representing" that its traffic was local even though the RC Appendix states that reciprocal compensation does not apply to Information Services. On the other hand, if a CLEC sends interLATA traffic over local trunks, the "representation" that the traffic is "local" no longer applies. *See* AT&T Claim Two.

the Federal District Court in *Vonage Holdings Corp.* explicitly rejected the interpretation of the FCC's decision that AT&T offers here:

> In its [USF] Order, the FCC did not decide whether an interconnected VoIP service should be classified as a telecommunications service or an information service. Instead, the FCC relied on its permissive authority under section 254(d) and its ancillary jurisdiction to require interconnected VoIP service providers to contribute to USF fund. FCC USF Contribution Order at para. 35.

Vonage Holdings Corp. v. Nebraska Public Service Commission, 543 F. Supp.2d 1062, 1065 (D. Neb. 2008).

However, the FCC has made it clear that, whatever rules apply to VoIP, apply to all parties in the transmission chain, including VoIP providers, ESPs and intermediate carriers. The FCC has repeatedly and explicitly made clear that, unless and until it rules otherwise, it does not allow switched access charges to be imposed on "VoIP providers and their connecting carriers" until expressly allowed to do so by the FCC. Instead, the FCC has directed that interconnecting carriers such as Global be allowed to interconnect with ILECs with pricing of VoIP to be set through negotiations pursuant to section 251 of the Telecommunication Act ("Act").

When AT&T attempted to exploit the FCC's uncertain rulings regarding VoIP by publishing a switched access tariff for VoIP, then-Chairman Michael Powell challenged AT&T. Only when AT&T represented that its tariff was purely optional, and asserted that it was making no unilateral attempt to treat VoIP traffic the same as a telecommunications service, did the FCC permit the tariff to become effective. Even then, however, Chairman Powell issued an FCC Press Release handing AT&T, and anyone with similar ideas, their figurative heads. The FCC Press Release states:

> [T]he Commission, state utility commissions, and the courts all are considering the question of whether legacy access charges should apply to VoIP services. SBC's tariff makes clear that TIPToP is not a mandatory offering and VoIP providers may continue to utilize alternatives to exchange their traffic. Should we conclude that this tariff is being used to justify the imposition of traditional

> tariffed access charges on VoIP providers or to discriminate against SBC's competitors, the Commission will take appropriate action including, but not limited to, initiating an investigation of SBC's interstate tariff and any other tariff that proposes similar terms. **Nothing in this tariff should be interpreted to force a set of compensation relationships on VoIP providers and their connecting carriers at this commission or in other venues.**

Press Release, FCC, Chairman Powell Issues Statement on SBC's TIPToP Service (November 26, 2004).

In the *Time Warner Declaratory Ruling*, the FCC again explicitly disavowed any claim that it had made, or was making, a determination as to whether VoIP was an information service or a telecommunications service:

> [W]e clarify that the statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b). Thus, we need not, and do not, reach here the issues raised in the IP-Enabled Services docket, including the statutory classification of VoIP services.

In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 2510 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP providers, No. 06-55, DA 07-709, ¶ 15 (March 1, 2007).

However, as noted in Global's Initial Brief, the FCC ruled in the Time Warner decision that compensation for terminating VoIP traffic should be established by the parties "under a section 251 arrangement" negotiated between an intermediate LEC and a terminating one. *Id.* at ¶ 17. The FCC did not authorize the imposition of tariff charges on the interconnecting carrier for terminating VoIP traffic.

Finally, in the *AT&T Declaratory Ruling*[8], the FCC adopted three distinct rules for the regulation of VoIP traffic. First, the FCC held that all traffic that begins in IP format and concludes in TDM format, that is, undergoes a net protocol conversion, is pure VoIP and is free of access charges. *AT&T Declaratory Ruling*, ¶ 9. Second, the FCC held that, if an interexchange carrier converts a TDM call to IP with no "enhanced functionality," as AT&T did, the traffic is not exempt from access charges. Id. By necessary implication, traffic *with* "enhanced functionality" is exempt, as the federal courts have found. Third, the FCC held that, even when non-enhanced PSTN to IP to PSTN traffic is subject to the payment of interstate switched access charges, intermediate carriers are relieved from responsibility of paying such charges.

> To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers **and not against any intermediate LECs that may hand off the traffic to the terminating LECs,** unless the terms of any relevant contracts or tariffs provide

Id. at 15.

In both the *Time Warner* and *AT&T Declaratory Ruling* decisions, therefore, the FCC focused on types of traffic, not types of companies (i.e., ESPs). Moreover, in both cases, the FCC was explicit in holding that the rules that applied to VoIP traffic applied specifically to "intermediate LECs," while the right to interconnect applied, not only to VoIP providers, but to their "connecting carriers."[9]

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[8] Referring to *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges,* 19 F.C.C.R. 7457 (2004) ("AT&T Declaratory Ruling") cited in Global's Initial Brief at 8-9.

[9] As the Supreme Court noted in *Nat'l Cable & Telecomms, Ass'n v, Brand X Internet Servs.*, 545 U.S. 967, 977 (2005), the FCC has found it ". . . unwise to subject enhanced *service* to common-carrier regulation given the fast moving competitive market in which they are offered." Significantly, the Court referred repeatedly to the 'service" not merely the first "providers" of the service as being exempt.

Furthermore, while the FCC has the authority to speak on these issues, in the absence of any definitive ruling from the FCC, the federal courts also have that authority.[10] The exigencies of litigation have compelled the federal courts to rule on the nature of VoIP. Indeed, it was AT&T's effort to persuade the federal bankruptcy court to rule that PSTN-originated traffic was per se VoIP that compelled the court to rule that VoIP traffic is an information service. In fact, in each of the cases the federal courts have determined that the types of traffic that Global carries and sends to AT&T are both enhanced services and information services. The three Transcom decisions cited in Global's Initial Brief are, in the absence of law from a higher authority to the contrary, conclusive as to federal law. VoIP traffic is both an enhanced and an information service.

Global has addressed each of the arguments AT&T makes in its Initial Brief because all of AT&T's arguments are wrong. However, these arguments are also largely beside the point. As noted in the beginning of this Reply Brief, Global is not relying on federal law to bypass or overturn the provisions of the ICA. Global is relying on the language of the ICA itself.

AT&T's argument that the traffic Global sends to AT&T must be "telecommunications," and thus must fall into one of the provisions of Section 3.1 of the RC Appendix, is false as to both premises. AT&T cites Section 3.1 of the RC Appendix for the proposition that telecommunications traffic exchanged between AT&T and Global must be classified as either Local, Transit, Optional, intraLATA or InterLATA. However, nothing in Section 3.1 states that this list of traffic is exclusive. In fact, the evidence shows that this is not an exclusive list. Various provisions of the RC Appendix set rates for traffic not mentioned in Section 3.1. Section 3.6, for example, excludes from "the compensation arrangements set forth in this Appendix,"

[10]As noted in Global's Initial Brief, the definitions of Enhanced Service and Information Service are found in federal statute and federal rule and those federal terms and definitions are incorporated by reference into the ICA.

"Information Service traffic" and "any other kind of traffic found to be exempt from reciprocal compensation by the FCC or the Commission." Section 16.9 of the RC Appendix adds two additional categories to the Appendix, VoIP and Internet Telephony, and specifies that the parties have not agreed on any specific treatment for these categories of traffic. The language could not be clearer that AT&T may not construe *anything* in the RC Appendix, including section 3.1, as constituting agreement that VoIP is to be treated as "Local."

AT&T asserts that section 16.9 of the RC Appendix "merely reserves the parties' rights to dispute whether VoIP traffic is subject to access charges, or should be treated as local traffic." (AT&T Initial Br., 9). While AT&T's assertion that traffic that is not subject to Reciprocal Compensation must inevitably be subject to access charges is false, this is not even an issue for this case, since AT&T has not raised a claim for access charges.[11] However, AT&T's admission that that the Agreement "reserves the parties' rights to dispute whether VoIP traffic . . . should be treated as local" is conclusive as to its Claim One. Contract rights and obligations arise out of the agreement of the parties and, where rights have been "reserved," no rights or obligations are created. AT&T concedes there is not an agreement on whether VoIP should be treated as local, and without an agreement AT&T has no claim.

Further, AT&T ignores the fact that Section 16.9 of the RC Appendix did more than memorialize the Parties' disagreement about whether VoIP and Internet Telephony calls were or were not Local. Section 16.9 made both VoIP and Internet Telephony defined (i.e., Capitalized) terms. The ICA sections on which AT&T relies for its claims apply solely to a list of enumerated, Capitalized categories of traffic. Section 5 of the RC Appendix, which is the basis for AT&T's Reciprocal Compensation claim, applies to "Local" and "Local ISP" traffic. Section

[11] AT&T stresses this point itself. AT&T Initial Brief, 3.

5 lists no other types of traffic and makes no reference to VoIP. In addition, Section 5 makes no reference to "Local VoIP" or "Local Internet Telephony." This is despite the fact that both VoIP and Internet Telephony were categories of traffic that were contemplated in other parts of the ICA.

Similarly, Section 9.1 of the RC Appendix limits the obligation to pay transit service charges to only four categories of traffic: "Local, Optional, intraLATA Toll Traffic, and 800 intraLATA Toll Traffic." Section 9.1 lists no other types of traffic. It makes no reference to VoIP, Internet Telephony, Local VoIP, Local Internet Telephony, intraLATA VoIP or intraLATA Internet Telephony. The Parties would have needed to make such references had they intended those provisions to have applied to Local and intraLATA traffic while still excluding interLATA VoIP and Internet Telephony.

Under these circumstances, the doctrine of *expressio unius est exclusio alterius* applies: when one or more things of a class are mentioned, others of the same class that are not mentioned are excluded. The failure to include the defined terms VoIP and Internet Telephony in the lists of defined terms set forth in Sections 5 and 9.1 must be presumed to be deliberate.

Third, AT&T's assumption that there are only two classes of traffic, traffic subject to access charges and traffic subject to Reciprocal Compensation charges, is simply not true, either as a matter of law or as a matter of the contract itself. To start, Section 16.9 says nothing about access charges, and AT&T's argument that traffic types must be subject to one regime or the other is not borne out by the language of the ICA or by the testimony of any witness.

Moreover, this is not a tariff case, despite AT&T's tendency to treat it as such. This is an ICA dispute. An ICA may have as many rates or as few as the Parties agree to. There is nothing in the Act that precludes an agreement not to charge for a service (for example, bill and keep) or

to establish rates that are entirely different from either access or reciprocal compensation charges. For example, AT&T has entered into VoIP agreements that permit the termination of VoIP traffic at rates of $0.0004 per minute.

Indeed, this ICA has several such classes of traffic. As demonstrated above, it is established federal law that "Information Services" are not subject to access charges because they are not "telecommunications services." Yet, this ICA also specifies at RC Appendix section 3.6 that "the [Reciprocal] compensation arrangements set forth in this Appendix are not applicable to . . . Information Service Traffic." Under the terms of the ICA as written, therefore, Information Service Traffic is not subject either to access charges or to reciprocal compensation charges.

Finally, AT&T has wholly failed to come to grips with the uncontested fact that IP-originated traffic does not satisfy any of the contract definitions for "Local" or "intraLATA" traffic. Although the burden is on plaintiff to generate and then marshal the evidence in support of its claim, AT&T apparently saw no reason to demonstrate either in its testimony or in its Initial Brief that the traffic it billed as "Local" satisfied the definition of Local set forth in Section 3.2 of the RC Appendix and section 1.1.75 of the Definitions section of the ICA. AT&T also did not make an effort to show that the traffic it billed as transit traffic was local or intraLATA. These points are discussed in detail in Global's Initial Brief, and will only be summarized here.

AT&T cannot impose billing requirements that apply to "Local" traffic to any traffic that does not fall within the contract definitions of "Local." Section 3.2 of the RC Appendix specifies that calls "will be compensated" as "Local Calls" "so long as the *originating end user of one Party* and the terminating end user or ISP of the other Party are: (a) both *physically located* in the

same ILEC Local Exchange Area ." (emphasis added). Section 1.1.75 of the Definitions section of the Agreement further specifies that "for purposes of intercarrier compensation . . . Local Calls must *actually originate* and *actually terminate* to parties *physically located* within the same common local or common mandatory local calling area." (emphasis added). Section 1.1.47 states that "'End Users' means a third party residence or business that subscribes to Telecommunications Services provided by any of the Parties at retail."

AT&T cannot meet its burden to prove that any of Global's traffic was "Local" within the meaning of these definitions because it was not. The definitions do not fit the undisputed facts. First, traffic is local for purposes of this Agreement only when the "*originating end user* ***of one Party***" is actually physically located in the same local calling area as the terminating end user of the other Party. The full phrase of the contract is explicit in this regard, and the modifying clause "of one Party" may not be ignored. There is, presumably, an originating end user somewhere that is served by someone for the calls that Global receives and forwards, but they are not "end users" "of Global." Global does not have any "originating end user" customers. Global does not know who the originating end users are, and the end users know nothing of Global. Neither has a relationship, commercial or otherwise, with the other. The ESPs who are Global's customers are not located in Ohio, are not end users, do not originate traffic, and do not originate traffic with Global in Ohio. (Tr. vol. 3, 380)

Consistent with this language, Section 1.1.47 of the ICA defines End User as a "business or residential purchaser who 'subscribes to Telecommunications Services provided by any of the Parties *at retail.*" Global does not provide any service "at retail", none of Global's customers *subscribe* to the services it sells and all of its customers are ESPs. Moreover, the analysis of Mr. Masuret in Exhibit 8 of his testimony shows that the companies providing "originating service"

for local calls (e.g. Vonage, MagicJack, Packet 8) are not offering "Telecommunications Services." They are VoIP service providers. Most of them are not common carriers and the few that are, including AT&T, are not selling telecommunications services with respect to the traffic at issue. The originating companies are selling broadband services or are selling telephone numbers to companies selling broadband services. Their traffic would not be either Local or intraLATA Toll Traffic.

Similarly, as demonstrated in Global's Initial Brief, nothing in AT&T's billing system would allow it to determine that IP-originated traffic was intraLATA Toll Traffic within the meaning of the ICA, because Section 1.1.67 specifies that traffic fits this definition "where one of the locations is outside the local calling area as defined by the applicable Commission." As the Pennsylvania ALJ just concluded, there is no possible way to determine that traffic is intraLATA by applying standard billing methods to VoIP traffic. Further, VoIP traffic is not jurisdictionally intrastate, as the federal courts have ruled conclusively in the Vonage cases, and as both the New York and the Pennsylvania Commissions have found with respect to Global .

In short, nothing about what Global does as an entity, what it sells or who it sells to makes it liable for reciprocal compensation for sending "Local" traffic to AT&T or for sending local or intraLATA Toll Traffic to AT&T for transit.

This analysis proves that Global is not liable for any of the reciprocal compensation or tandem transit charges that AT&T has billed to date because they are charges for Local and intraLATA Toll traffic and Global does not send Local and intraLATA Toll traffic to AT&T. Global sends VoIP traffic. And Global is not liable to AT&T for sending it VoIP traffic because AT&T refuses to recognize that Global's traffic is, in fact VoIP (even though its own expert testifies that it is) and refuses to negotiate a rate for terminating and transiting VoIP traffic.

Further, accepting for argument's sake AT&T's contention that VoIP traffic can be divided into "Local VoIP" "intraLATA VoIP" and "interLATA VoIP," AT&T still has the burden of proving that it had made the proper geographic distributions of the traffic for billing purposes. Section 3.2 of the RC Appendix specifies that calls are defined as "Local Calls" 'so long as the originating end user of one Party and the terminating end user or ISP of the other Party are: (a) both *physically located* in the same ILEC Local Exchange Area." (emphasis added). Section 1.1.75 of the Definitions section of the Agreement further specifies that "for purposes of intercarrier compensation . . . Local Calls must *actually originate* and *actually terminate* to parties *physically located* within the same common local or common mandatory local calling area." (emphasis added).

Even ignoring the "end user of one Party" roadblock that Global has discussed above, AT&T still needs to prove that it properly billed as "Local" only calls where both the originating and terminating end users were actually physically located in the same local calling. AT&T has not and cannot meet its burden of proof in this regard either. Contradicting its earlier argument that all traffic carried over "Local" interconnection trunks may be billed as "Local", AT&T quotes Mr. Hamiter as saying that "carriers traditionally use CPN to determine whether a call is local, intraLATA toll, or interLATA in nature." (AT&T Initial Br., 7). However, Mr. Hamiter is not AT&T's billing witness, and candidly expresses virtually complete ignorance about IP-originated traffic. (Tr. vol. 1, 30 (Cross of James Hamiter)). It is Mr. Cole who is AT&T's expert on billing and, more explicitly, on billing for VoIP. Mr. Cole testified that tradition is put aside for contracts that allow for VoIP traffic because the traditional rules for billing don't meet the contractual requirements for billing VoIP traffic accurately. His testimony is explicit that, when AT&T enters into a contract to terminate VoIP traffic, it does one of two things. Either it agrees

to a Unitary Rate that allows it to bill without regard to jurisdictional end points of traffic, or it undertakes a special study to determine how much of the interconnected carriers' traffic is VoIP and how it is to be treated. (Tr. vol 1, 111 (Cross of William Cole)).

In this case, AT&T entered into a VoIP contract with Global, but AT&T declined to do either of the things Mr. Cole testified AT&T normally does for VoIP traffic. Mr. Cole testified, AT&T never determined how much of Global's traffic was VoIP and never attempted, as to the VoIP traffic that Global did send to AT&T, to determine geographic end points on the basis of a special study. Asked by the Hearing Examiner "does your billing system take into account the ability to track the VoIP calls so that they do not get included as part of the local traffic that is billed as recip comp?" Mr. Cole stated "And the answer to your question, Your Honor, is that no, there is no indication in the signaling or in the recording that tells us that it's a VoIP call . . . so, no, the billing system is not going to be able to handle it because there's nothing in the record that will tell you anything." (Tr. vol. 1, 125-126 (Cross of William Cole)). Global agrees.

In sum, AT&T has not and cannot meet its burden of proof to support its claimed right to be paid reciprocal compensation for terminating "Local" traffic or Trandem Transit charges for local and intraLATA Toll Traffic. The traffic is not "Local" or intraLATA within any definition of the ICA. It is VoIP. And AT&T's total refusal to ever acknowledge what all the evidence confirms (that all of Global's "Local" traffic and more than 98% of its interexchange traffic is IP-originated VoIP) means that, even under its own theory of the agreement, AT&T failed to accommodate the technological differences between IP-originated and PSTN-originated traffic and thus produced bills that its own witnesses concede are worthless.

AT&T's few remaining arguments are essentially attempts to impose an equitable remedy where the contract does not say what AT&T would like it to say. This is, in the first

instance, a tacit acknowledgement that its contract claims are without merit. It is, however, not a basis that can in law, or should in equity, grant AT&T the relief it seeks.

AT&T asserts that the cases show that "a party who accepts the benefits of a contract or a transaction will be estopped to deny *the obligations imposed on it by the same contract* or transaction." (AT&T Initial Br., 10) (emphasis added). It is a good principle of law, but it is inapplicable here because, as Global has demonstrated above, the contract doesn't impose any obligation on Global to pay reciprocal compensation rates for VoIP. The contract states that there is no such agreement. AT&T doesn't want to *enforce* the agreement, it wants to *amend* it, by having the Commission impose reciprocal compensation rates for "Local" traffic applied to VoIP traffic, even though the contract specifies that the Parties' did not agree to such pricing. Hence, the obligation that AT&T wants "imposed" is not one that can be found in the Agreement. "It is well settled that a party may not recover in quasi-contract in the face of an express contract governing the same subject matter." *Fitness Quest Inc. v. Monti*, 560 F. Supp 2d 598, 611 (N.D. Ohio 2008) (citation omitted) (vacated on other grounds by *Fitness Quest, Inc. v. Monti*, 2009 WL 1290341 (Fed. Cir. May 12, 2009)).

AT&T continues to press its assertion that Global is seeking a free ride despite uncontroverted record evidence proving the assertion is false. Global is not seeking a free ride, it is seeking a negotiated rate. It has tried to get one from AT&T repeatedly and, repeatedly, AT&T has refused to negotiate over the matter. Again, the record is uncontested that this is true.

Similarly, AT&T's argument that the contract specifies that it is not obligated to terminate traffic for free does not mean that it can discontinue accepting Global's traffic. The contract also specifies that VoIP traffic would exist. The best reading of the provisions *in pari materia* is that it compels Global to negotiate with AT&T on demand (which Global would

always have done) but requires AT&T either to negotiate a rate or waive its right to be paid. AT&T cannot refuse to negotiate a rate and then refuse to carry traffic that the contract specifies may be exchanged, on the ground that the contract has no rate. That would put it in breach without any originating breach by Global. The prevailing rates in the market are generally between 0.0004 and 0.0007 cents per minute.[12]

Moreover, AT&T is not, in fact, arguing that it should be paid for terminating VoIP traffic. If that was what it really wanted, it could have been paid years ago. AT&T is really arguing that it should be paid the rates set forth in the contract for non-VoIP services, even though the Parties never agreed that those rates apply to VoIP. It is not entitled to impose non-negotiated rates by refusing to negotiate and then complaining that it has not been paid. Self-inflicted wounds are not the basis for an equity claim.

Global was, and still is, prepared to negotiate a terminating traffic rate. It is prepared to negotiate over whether it should pay for transit traffic as well. However, Global would, in such negotiations, point out that existing ICA Amendments that have negotiated rates for VoIP traffic appear not to impose special charges for transit traffic. Transit traffic is treated at the Unitary rate. *See* AT&T/Verizon Amendment. A likely reason is that interLATA traffic is excluded from transit traffic charges, and negotiated VoIP agreements tend to avoid requiring the ILEC to make geographic distinctions for billing purposes, since they do this badly and at great expense.

In sum, AT&T has no claim against Global for reciprocal compensation for the termination of local traffic or for Local or IntraLATA Toll Transit Traffic.

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[12] AT&T coyly states at footnote 7 that "Many competitive carriers have argued that all VoIP traffic should be treated like local traffic, subject tto the same reciprocal compensation rate (which is generally $0.0007) . . ." Among the competitive carriers is, of course, AT&T itself. Its agreement with Verizon provides a terminating rate of $0.0004.

IV. AT&T Has Not Proven That Global Has Improperly Routed InterLATA Traffic.

As Global demonstrated in its Initial Brief, AT&T's Claim 2 is very limited. The Complaint states:

> By sending interLATA interexchange traffic to AT&T Ohio over trunks reserved for local and intraLATA toll traffic, Global Ohio has breached Sections 5.3 and 5.4 of Appendix ITR of the parties' ICA.

(Compl., ¶ 35).

To sustain this claim, AT&T has the burden of proving that Global is sending interLATA interexchange traffic over these trunks. AT&T's testimony makes clear that they are not arguing that interLATA VoIP is a subset of interLATA, interexchange traffic and should have been routed accordingly. Rather, they are excluding what they would call "Enhanced" traffic and are asserting only that Global is sending "traditional" traffic in the guise of VoIP. Mr. Hamiter testified that his three minute reports "provide evidence that this traffic is not ESP traffic. (Tr. vol. 1, 4 (Cross of James Hamiter)). Instead, much of this traffic is traditional telephony, including interstate, interLATA traffic (i.e., traditional long distance traffic)." *Id.*

The simple response is that AT&T has totally failed to prove the elements of the Claim. As Global has demonstrated above, the uncontroverted evidence of record shows that none of Global's traffic to AT&T is "traditional long distance." Ninety eight to 99% of it is IP-originated. Of the remainder, all is delivered through an ESP, is converted to IP format, and is enhanced. It was Mr. Hamiter's candid admission that traffic routed as all of Global's traffic is routed is not traditional long distance as he understands the term. (Tr. vol. 1, 56 (Cross of James Hamiter)).

Moreover, Sections 5.3 and 5.4 of the ITR Appendix do not establish mandatory rules for routing VoIP traffic. As Global noted above, these are engineering rules, not pricing rules.

Section 5.3 simply informs the CLEC when and how to use tandem trunks in single LATA and multi-LATA states. Section 5.4 specifies that interLATA traffic shall be managed through "meet point" trunk groups. But meet point trunk groups exist to share access revenues. Where no such revenues exist (which is the case for VoIP under both this contract and federal law) meet point trunks are inapplicable as a matter of the engineering. There is nothing for the carriers to 'share."

In a complete turn about, AT&T has suddenly decided to argue at page 30 that Global has improperly routed VoIP traffic over local or intraLATA toll trunks. (AT&T Initial Br., 30). AT&T's Complaint contains no such claim, and it is far too late to amend now. Moreover, AT&T has not even bothered to show which provisions of the ITR appendix Global is alleged to have violated by routing VoIP traffic over local trunks. AT&T's Complaint does not raise the claim and its witness testimony is silent on the topic. Finally, AT&T attempts to claim an award of damages equal to what it would have been paid if the ICA specified that VoIP traffic should be billed as "Local," is a transparent attempt to rewrite the agreement and ignore the ICA's specification that the parties have not agreed to treat VoIP as local for reciprocal compensation purposes.

V. AT&T Has Made No Case For Withdrawing Global's Certificate

AT&T's final argument, that the Commission should revoke Global's Certificate of Public Convenience, is without evidentiary support and should be rejected. In the March 16 Entry in this case, the Hearing Examiner ruled:

> The issues raised in this proceeding are to be considered based on the record in this case regarding the traffic transmitted between the parties and based on the interpretation of the specific contractual arrangements between the parties.

(March 16, 2009 Entry, ¶ 14).

The Hearing Examiner made clear that it is the contract and the behavior of the firms in this state and in this case that will be decisive. AT&T has peppered the record with its favorite quotations and arguments from other states, but it has proven no misconduct by Global in Ohio. There are no complaints against Global for providing poor service here. Neither Global's customers nor AT&T's end users have had reason to complain. Aside from its claims in this case, there is no creditor asserting failure to pay any bill. AT&T asserts that "Global lacks the financial and technical resources necessary to provide services in Ohio." Global's customers beg to differ and, notwithstanding AT&T's undocumented assertion, Global continues to provide high quality service. Similarly, AT&T asserts that "devoid of assets, equipment, employees, or revenues, Global plainly has no ability to provide the services for which it obtained certification." Miraculously, however, Global continues to provide services to its customers reliably and without complaint.

Moreover, while the record does not show an inability of Global to serve its customers, it shows an inability of AT&T to do so. AT&T's behavior in this dispute, not merely during the litigation phase but from the very inception of the ICA, has been unprofessional in the extreme. AT&T signed an agreement with Global that contemplated the exchange of VoIP traffic. When Global began to send AT&T traffic and to claim that it was VoIP, AT&T had no valid reason for disbelieving Global. VoIP was a growing industry. AT&T, as a participant in the intermediate carrier business understood the need for carriers to fulfill the role. AT&T knew Global was a carrier's carrier and knew for a fact that some of the customers that Global served were bona fide ESPs, at least part of whose business was routing IP-originated traffic from firms like Vonage. If AT&T suspected that some of Global's traffic was IP in the Middle, it had not the slightest reason to believe that all of it was.

Under these conditions, what AT&T should have done was explore with Global how much of its traffic AT&T would credit as "true" VoIP, while establishing routing and billing arrangements for that traffic and agreeing on a rate. This is what Mr. Cole testified AT&T does with other customers. AT&T did nothing of the kind here, however. Instead, it simply announced that none of Global's traffic was VoIP. This gave AT&T the convenient option of ignoring its obligations under the ICA to distinguish Global's VoIP traffic from other traffic (under whatever definition of VoIP the parties could agree to) and then to manage the VoIP traffic that was sent to it.

When AT&T began this litigation, it continued to argue that none of Global's traffic was VoIP. But about this point, AT&T had to know that this was untrue. It had performed its three minute reports, and the data from those reports showed conclusively, not merely that much of Global's traffic was VoIP, but that nearly all of it was and under any definition.

Rather than regrouping, AT&T apparently decided to bluff its way through this litigation. It continues to argue in its Initial Brief that its study discovered "many thousands" of PSTN originated calls and, on a logic that it never explains, asserts that on the basis of these data, the Commission should conclude that none of Global's traffic was IP-originated VoIP. As noted above, AT&T even attempted to use the TMRs as evidence about local traffic.

The record evidence shows that Global and AT&T are direct competitors in the market for providing interconnecting transport services from ESPs of VoIP traffic. Indeed, they directly compete for the business of Sage, and compete on the basis of price. They are both "least cost routers. AT&T has no standing to challenge Global's right to serve its customers when those customers are plainly satisfied with Global's service and when AT&T stands itself in the wings, waiting to take the business of Global's customers (at a higher price) once Global is forced to

exit the market. There is neither a legal basis nor a policy justification for permitting that outcome.

VI. Conclusion

For the reasons set forth in Global's Initial Brief and in this Brief, AT&T's Claims should be denied and its Complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following parties of record or as a courtesy, via U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission, on September 17, 2009.

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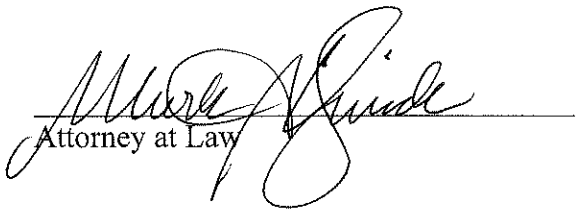

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Summary: Brief Global NAPs Ohio, Inc.'s Reply Brief electronically filed by Christine Schulenberg on behalf of Global NAPs Ohio, Inc.