UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AT&T CORP. AND SBC TELCOS,	§	
	§	
Appellants,	§	
	§	
v.	§	**CIVIL ACTION NO. 3: 05-CV-1209-B**
	§	
TRANSCOM ENHANCED SERVICES, LLC, et al.,	§	
	§	
Appellees.	§	

MEMORANDUM ORDER

Before the Court is Appellant AT&T Corp.'s Motion to Dismiss Appeal and Vacate Bankruptcy Court Order ("Motion to Dismiss") (no. 27), filed August 26, 2005. For the reasons stated below, the Court GRANTS the motion.

I. Factual and Procedural Background

To put AT&T's motion to dismiss in perspective, a brief description of the parties in this case and the events that have transpired in the bankruptcy court is in order. Appellee Transcom is a wholesale transmission services provider of an Internet Protocol-based network which allows its customers – mainly long-distance voice and data carriers – to transmit long distance calls. (April 28, 2005 Memorandum Opinion ["MO"] at 1-2). On July 11, 2003, Transcom entered into a "Master Agreement" with AT&T, a local exchange and long distance voice and data carrier, whereby AT&T was to provide local termination services to Transcom. (*Id.* at 3; AT&T Appellant's Brief ["AT&T App. Brief"] at 2-3). Appellants the SBC Telcos are local exchange carriers that originate and terminate long distance voice calls for carriers who do not have direct connections to end users.

(MO at 3). The SBC Telcos assess access charges for their services. "Enhanced Service Providers" ("ESP"), however, are exempt from such charges.[1]

On April 21, 2004, in a separate declaratory proceeding involving AT&T and SBC, the FCC entered an order declaring that a certain type of telephone service provided by AT&T did not qualify as an "enhanced service", thus rendering AT&T liable for access charges. (MO at 3). AT&T contends that the order makes clear that the FCC's ruling applies not only to AT&T, but to other parties providing similar phone services. (AT&T App. Brief at 3). Based on the FCC's order, AT&T decided to discontinue its service to Transcom, asserting that Transcom's services, which it believes are substantially similar to its own, are also subject to access charges. (MO at 3). In making the decision to suspend service to Transcom, AT&T relied on a provision in the Master Agreement purportedly allowing AT&T to discontinue service reasonably believed to be in violation of any laws and regulations. (*Id.*). For its part, Transcom maintains that it qualifies as an ESP, and is thus exempt from paying access charges, because it provides "enhanced" information services as opposed to basic telecommunication services.

On February 18, 2005, Transcom filed for Chapter 11 bankruptcy in the Northern District of Texas. Soon thereafter Transcom moved to assume the Master Agreement in the bankruptcy court. AT&T did not oppose the assumption provided that Transcom pay an appropriate "cure amount" and that the bankruptcy court not decide the question of whether Transcom qualifies as an ESP. According to AT&T, that issue is instead reserved for the courts of New York to decide

---

[1] The FCC has distinguished between "basic service" and "enhanced service." "A basic service is transmission capacity for the movement of information without net change in form or content. By contrast, an enhanced service contains a basis service component but also involves some degree of data processing that changes the form or content of the transmitted information." (FCC Order, WC Docket No. 02-361, at 3).

pursuant to a forum selection clause contained in the Master Agreement.

The bankruptcy court entered a Memorandum Opinion and Order Granting Debtor's Motion to Assume on April 28, 2005. In its ruling the bankruptcy court examined whether Transcom met the requirements of 11 U.S.C. § 365. Under 365(b)(1), a debtor that has previously defaulted on an executory contract may not assume the contract unless the trustee:

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365. Because only Transcom offered any evidence of a cure amount, totaling $103,262.55, the bankruptcy court accepted that amount, stating that "upon payment of the Cure Amount Debtor's Motion [to Assume] should be approved by the Court, provided the Debtor can show adequate assurance of future performance." (MO at 5). AT&T maintains that the bankruptcy court should have stopped there. The bankruptcy court, however, went further, concluding that it must also determine whether, in assuming the Master Agreement, Transcom was exercising proper business judgment. The bankruptcy court's concern was that Transcom's assumption of the contract could expose it to certain administrative claims AT&T had threatened to file to recover access charges allegedly owing under the Master Agreement should Transcom fail to qualify as an ESP.

The bankruptcy court proceeded to find that Transcom's "service is an 'enhanced service' not subject to the payment of access charges" and that, therefore, "it is within [Transcom's] reasonable business judgment to assume the Master Agreement." (MO at 12). It is this finding that is the subject of the present appeal to this Court. AT&T and the SBC Telcos each filed separate

appeals of the bankruptcy court's order in early May 2005. Those appeals were consolidated on July 6, 2005. Both AT&T and the SBC Telcos ask this Court to vacate the bankruptcy court's ruling to the extent it determined that Transcom is an ESP, claiming that the bankruptcy court lacked jurisdiction to decide that issue.[2]

On August 26, 2005, AT&T filed a motion to dismiss the appeal of the bankruptcy court's order on the ground that it is now moot because Transcom failed to pay the Cure Amount within the 10-day time frame established by the bankruptcy court's Memorandum Opinion and order. Because, under the bankruptcy court's rulings, Transcom's entitlement to assume the Master Agreement was dependent on the payment of the Cure Amount, AT&T contends that Transcom's failure to timely make payment prevents assumption and extinguishes any live controversy presented by its appeal. Transcom filed an opposition to AT&T's Motion to Dismiss. The SBC Telcos filed a response to AT&T's motion setting forth its agreement with AT&T that, should this Court find the present appeal moot, it should vacate the bankruptcy court's order.

II. Analysis

The United States Constitution empowers federal courts to hear only live cases and controversies. U.S. CONST. art. III, § 2; In re *Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731, 735 (5th Cir. 1990). "An appeal is properly dismissed as moot when . . . an appellate court lacks the power to provide an effective remedy for an appellant should it find in his favor on the merits." *Id.* Federal courts must eschew rendering advisory opinions. *C&H Nationwide, Inc. v. Norwest Bank Texas NA*, 208 F.3d 490, 493 (5th Cir. 2000); 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND

[2] The SBS Telcos also argue that the bankruptcy court, assuming it had jurisdiction to decide the question, erred in finding that Transcom qualifies as an ESP.

PROCEDURE § 3533 ("Courts do not wish to make law nor to waste their limited resources, simply to satisfy curiosity or a naked desire for vindication.").

AT&T argues that a live controversy no longer exists between it and Transcom because Transcom forfeited its right to assume the Master Agreement by failing to pay the Cure Amount within 10 days of the bankruptcy court's order, as directed by the bankruptcy court. There is no question that the bankruptcy court's decision to grant Transcom's motion to assume was conditioned upon the payment of the Cure Amount to AT&T, as its rulings are fraught with conditional language. *See e.g.* Order Granting Debtor's Motion to Assume ("Debtor may assume the Master Agreement *upon the payment* of the Cure Amount"); MO at 12-13 ("*To assume* the Master Agreement, the Debtor must pay this Cure Amount to AT&T within 10 days of the entry of the Court's order on this opinion."); MO at 5 ("*[U]pon payment* of the Cure Amount Debtor's Motion [to Assume] *should be approved* by the Court, *provided* the Debtor can show adequate assurance of future performance.") (emphasis added). These statements plainly demonstrate that payment of the Cure Amount was a condition precedent to Transcom's assumption of the Master Agreement. The fulfillment of that condition was no idle requirement – payment of the Cure Amount necessarily played an integral part of the bankruptcy court's finding that Transcom had met the statutory requirements to assume the contract. Section 365(b)(1) provides that a debtor cannot assume an executory contract unless it either cures its default or provides adequate assurance that such default will promptly be cured. Transcom's failure to pay the Cure Amount within the time frame specified by the bankruptcy court undermines the satisfaction of those requirements. Although the bankruptcy court did not specify the exact consequences that would result if Transcom failed to timely pay the Cure Amount, one thing is certain – under the bankruptcy court's rulings and § 365,

Transcom has not assumed the contract, nor can it at this time.[3] Its inability to do so renders moot the primary issue made the basis of the present appeal – whether the bankruptcy court exceeded its jurisdiction in deciding that Transcom is an ESP – for the bankruptcy court's resolution of that issue was necessarily predicated on its assumption that Transcom would be able to cure its default in accordance with § 365. *See* In re *Burrell*, 415 F.3d 994, 996-97 (9th Cir. 2005) (holding appellant's claims for denial of discharge of debt mooted by bankruptcy court's denial of discharge during pendency of appeal before the district court). At this point any opinion by this Court on the question of whether the bankruptcy court acted correctly in examining Transcom's ESP status would constitute nothing more than an impermissible advisory opinion.

Transcom contends that it was not obligated to comply with the bankruptcy court's order to pay the Cure Amount within 10 days because that order was appealed.[4] Not so. As AT&T points out, "[t]he taking of an appeal does not by itself suspend the operation or execution of a district-court judgment or order during the pendency of an appeal." 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3954. If Transcom desired to suspend the operation of the bankruptcy court's order it could have moved for a stay of that order, but it did not.

Having found that the subject of the present appeal is moot, the Court will now examine whether it should vacate the bankruptcy court's order.[5] "The Supreme Court has recognized that

---

[3] The Court has no opinion on whether Transcom could assume the Master Agreement upon potential re-application to do so before the bankruptcy court.

[4] The Court notes that Transcom does not argue that any of the recognized exceptions to the mootness doctrine apply.

[5] Although Transcom challenged AT&T's argument that this appeal is moot, it offered no argument or authority showing that vacatur of the bankruptcy court's order would be improper in the event the Court found the appeal moot.

because of the unfairness of the enduring preclusive effect[6] of an unreviewable decision in the case of a civil action that has become moot on appeal, '[t]he established practice of the Court . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.'" In re *Burrell*, 415 F.3d at 999 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Vacatur is a creature of equity, and, as such, it may be inappropriately applied where the appellant causes the dismissal of the appeal through his own actions. *Id.* On the other hand, vacatur may be appropriate "when mootness results from unilateral action of the party who prevailed below." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'Ship*, 513 U.S. 16, 25 (1994). Here it was Transcom, not the Appellants, that rendered the appeal moot by failing to comply with the bankruptcy court's order. In re *Burrell*, 415 F.3d at 998 (vacating bankruptcy court judgment where appellee, not appellant, rendered appeal moot by its failure to comply with settlement conditions). Thus, because Transcom caused this appeal to become moot and because the bankruptcy court's order, even if not preclusive, is prejudicial to AT&T, the Court finds that the bankruptcy court's Memorandum Opinion and order should be vacated. *Mississippi Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 724 F.2d 1197, 1198 (5th Cir. 1984) (directing Federal Energy Regulatory Commission to vacate order "as moot so that it will spawn no further legal consequences or prejudice the rights of the parties in future litigation.").

III. Conclusion

For the reasons stated above, the Court GRANTS AT&T's Motion to Dismiss. The appeal from the Bankruptcy Court for the Northern District of Texas, Dallas Division, No. 3:05-CV-1209-B

[6] This Court does not opine on whether the bankruptcy court's rulings have any preclusive effect.

is accordingly DISMISSED as moot. The bankruptcy court's Memorandum Opinion and Order Granting Debtor's Motion to Assume, both entered April 28, 2005, are VACATED.

SO ORDERED.

SIGNED January 20th , 2006

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

The Ohio Bell Telephone Company, Inc., d/b/a AT&T Ohio 45 Erieview Plaza Cleveland, Ohio 44114, Plaintiff, v. Global NAPs Ohio, Inc., c/o CT Corporation Systems, Stat. Agent 1300 East 9th St. Cleveland, Ohio 44114, Defendant.	Case No: 2:06 CV 549 Judge Marbley Magistrate Judge Kemp

PLAINTIFF 'S FIRST SET OF REQUESTS TO ADMIT

Plaintiff The Ohio Bell Telephone Company, Inc. ("AT&T Ohio"), by and through its attorneys, pursuant to Rule 36 of the Federal Rules of Civil Procedure, hereby submits the following Requests for Admission to Defendant Global NAPs Ohio, Inc. ("Global"):

GENERAL OBJECTIONS

1. Defendant objects to each and every Request to the extent that they seek disclosure of information (a) protected by attorney-client privilege, (b) prepared in anticipation of litigation or for trial and subject to the work product doctrine, or (c) otherwise protected from discovery by an applicable privilege or protection afforded by the Federal Rules of Civil Procedure, the Federal Rules of Evidence, or other applicable state or federal laws, on the ground that privileged matter, attorney work product, and trial preparation materials are exempt from discovery.

9. Since September 2002, the trunks over which Global has delivered telecommunications traffic to AT&T Ohio were established pursuant to the Interconnection Agreement between Global NAPs Ohio, Inc. and AT&T Ohio.

RESPONSE: Admitted.

10. Global has not performed any independent investigation of the nature of the calls it delivers to AT&T Ohio to determine whether those calls originate with the calling party in an Internet Protocol format.

RESPONSE: Admitted.

11. Global relies solely on statements by its customers to support its position that the traffic it delivers to AT&T Ohio is traffic that originates with the calling party in an Internet Protocol format.

RESPONSE: Admitted.

12. The bills AT&T Ohio has sent to Global NAPs Ohio, Inc. each month since August 2004 for local number portability charges accurately reflect the number of calls Global NAPs Ohio, Inc. delivered to AT&T Ohio each month without first performing a local number portability query.

RESPONSE: Denied; investigation continues regarding the determination of the accuracy of charges.

16. None of the telecommunications traffic that Global delivers to AT&T Ohio for termination to AT&T Ohio's end user customers is traffic that originates and terminates in different local exchange areas within the same Local Access and Transport Area (LATA).

RESPONSE: Denied. Global has insufficient information upon which to base an admission. Global does not bill its ESP customers on a per call basis, and therefore does not monitor the ANI and DNIS of the calls from our ESP customers, nor perform any correlation of NXXs. Global asserts this to be an irrelevant calculation as all traffic from ESPs is exempt from the assessment of access charges.

17. Global NAPs Ohio, Inc. maintains no payroll account.

RESPONSE: Admitted.

18. Global NAPs Ohio, Inc. has no employees other than its officers.

RESPONSE: Admitted.

19. Global NAPs Ohio, Inc. has no assets other than its certificate of public convenience and necessity.

RESPONSE: Admitted.

20. The officers of Global NAPs Ohio, Inc. are Frank Gangi (President), Richard Gangi (Treasurer), and Michael Couture (Secretary).

RESPONSE: Admitted.

27. Any contracts that Global may have had with customers have expired or have been assumed by or transferred to Global NAPs Networks, Inc. or some other Global subsidiary, affiliate, or parent entity.

RESPONSE: Admitted.

28. Global has not paid any of the bills submitted to Global NAPs Ohio, Inc. by AT&T Ohio since June 2002.

RESPONSE: Denied.

29. Global maintains call detail records for every call it delivers and has delivered to AT&T Ohio.

RESPONSE: Denied. Global NAPs does not maintain any call data records. It does maintain a data base, but this includes calls only up to twenty days prior and the information contained therein is not in industry standard CDR format.

Respectfully submitted this 15th day of December, 2006.

Global NAPs Illinois, Inc.

By: Nelson Reid /CB

Nelson Reid
Sarah E. Hurst
Brickler & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Henry T. Kelly, Bar No. 6196301
KELLEY DRYE & WARREN LLP
333 West Wacker Drive
26th FloorChicago, IL 60606
Tel: (312) 857-2350
Fax: (312) 857-7095

Attorneys for Defendant

By: James R. J. Scheltema /CB

James R. J. Scheltema
Director, Regulatory Affairs
Global NAPs, Inc.
Southern Regional Office
4475 Woodbine Road, Ste. 7
Pace, FL 32504
Tel. (617) 504-5513
Fax (617) 507-5713

Dated: December 15, 2006.

December 12, 2005

VIA E-MAIL: jscheltema@gnaps.com
AND FAX: (617) 507-5713

Mr. James R. Scheltema
Director – Regulatory Affairs
Global NAPs, Inc.
4475 Woodbine Road - Suite 7
Pace, FL 32504

Re: The Ohio Bell Telephone Company d/b/a SBC Ohio's ("SBC Ohio")[1] Supplemental Response to Global NAPs Ohio, Inc.'s ("GNAPs Ohio" or "GNAPs") Correspondence Dated October 4, 2005

Dear Mr. Scheltema:

On August 9, 2005, SBC Ohio sent a demand for payment (the "Demand") to GNAPs Ohio requesting GNAPs to pay SBC Ohio over $33,000 for services rendered from January 2004 through July 2005.[2] GNAPs neither responded to the Demand nor paid any of the amounts set forth in the Demand. Accordingly, SBC Ohio sent a Notice of Suspension and Disconnection dated September 27, 2005 (the "Disconnection Notice").[3] On October 4, 2005, you sent a letter on behalf of GNAPs Ohio addressed to Mr. Faustmann of SBC Ohio. In that letter, GNAPs Ohio invoked dispute resolution pursuant to § 10.5 of the parties' agreement. In the letter, GNAPs also alleged that a similar dispute was pending between affiliates of the parties in California and Connecticut. Your letter also requested that the parties mediate the purported dispute, in order to resolve the "dispute" in an "amicable manner."

On October 5, 2005, SBC Ohio sent a response to GNAPs Ohio's invocation of dispute resolution which made several points.[4] First, SBC Ohio noted that GNAPs Ohio's outright failure to pay its bills when due did not constitute a proper "dispute" under the parties'

---

[1] As GNAPs may be aware, SBC Communications Inc. merged with AT&T Corp. on November 18, 2005. On that date, SBC Communications Inc. assumed the name AT&T Inc. References herein to "SBC Communications Inc." , "SBC Ohio" and "SBC" are used for the convenience of the reader and to maintain consistency with the parties' previous correspondence.

[2] A copy of the Demand is attached hereto as Exhibit 1. Please note that the original Demand included two Billing Account Numbers ("BANs") for which SBC Ohio sought payment. SBC Ohio is no longer seeking collection for amounts due under the second BAN (No. 216S672751751, in an amount of $4,830.16) as part of these collection efforts. The amounts due under the remaining BAN (No. 216G671818818, in an amount of $28,555.36) continue to be the subject of SBC Ohio's current collection efforts.

[3] A copy of the Disconnection Notice is attached hereto as Exhibit 2. *See, also,* fn. 2, *supra.*

[4] A copy of SBC Ohio' response to your October 4, 2005 letter is attached hereto as Exhibit 3.

interconnection agreement. Second, although SBC Ohio did not believe that GNAPs Ohio had presented a legitimate dispute, SBC Ohio was willing to engage in informal dispute resolution as requested by GNAPs. Third, because GNAPs Ohio had represented that the parties had previously (and exhaustively) raised this dispute in other contexts, SBC Ohio requested GNAPs to provide Ohio-specific information pertaining to the dispute to SBC Ohio *prior* to a settlement conference between the parties. Finally, in light of the substantial delay caused by GNAPs Ohio's failure to pay a years' worth of invoices, SBC Ohio requested that the parties meet on October 7, 2005.

The parties' representatives did, in fact, meet on October 7, 2005 in order to resolve the dispute. To the disappointment of SBC Ohio, GNAPs Ohio failed to present any new information to SBC Ohio. Rather, GNAPs repeated groundless arguments as to why it should not have to pay any amounts due for services rendered by SBC Ohio. Because GNAPs has raised these baseless arguments before in other jurisdictions, and based upon GNAPs Ohio's representation that the issues raised by GNAPs are similar to those that have already led to litigation in different jurisdictions, SBC Ohio sees no reason to continue informal dispute resolution. Moreover, since the parties' October 7 meeting, GNAPs has not made any further effort to continue dispute resolution. Consequently, SBC Ohio hereby is serving notice to GNAPs Ohio of its intent to (1) terminate informal dispute resolution and (2) proceed in a manner consistent with the Disconnection Notice.[5]

As set forth in more detail below, SBC Ohio submits that GNAPs Ohio's failure to pay properly rendered invoices constitutes grounds for disconnection under the parties' agreement. Although GNAPs claims that it has certain "questions" about the rates applied by SBC Ohio to the traffic billed under the invoices, GNAPs has not raised these issues in the manner required by the agreement. In any event, GNAPs' contentions do not excuse GNAPs' failure to pay the bills in their entirety. Finally, certain statements made in your October 4, 2005 require a response from SBC Ohio, separate and apart from any earlier correspondence.

A. SBC OHIO HAS RENDERED APPROPRIATE BILLS TO GNAPS.

Under the interconnection agreement arbitrated and approved by the Ohio Public Service Commission, GNAPs Ohio routes traffic to SBC Ohio for transport and termination. Pursuant to Appendix Reciprocal Compensation of the parties' agreement, GNAPs Ohio is required to compensate SBC Ohio for transporting and terminating this traffic. SBC Ohio renders monthly bills for this service to GNAPs Ohio, in an industry standard format known as CABS. There is no dispute that SBC Ohio rendered, and GNAPs Ohio received, the bills and invoices required

[5] *See*, fn. 2, *supra*.

under the agreement. Under the agreement, GNAPs Ohio is required to pay all bills within thirty days. (Agreement at General Terms and Conditions at § 8.1.1).

B. <u>GNAPs OHIO UNJUSTIFIABLY REFUSED TO PAY ITS BILLS AND FAILED TO DISPUTE THE BILLS IN THE MANNER REQUIRED BY THE AGREEMENT.</u>

GNAPs Ohio failed to pay any of the bills rendered by SBC Ohio. Accordingly, SBC Ohio sent the August 9, 2005 Demand to GNAPs Ohio, pursuant to Section 9.2 of the General Terms and Conditions of the parties' agreement:

> 9.2 Failure to pay charges may be grounds for disconnection of Interconnection, Resale Services, Network Elements, functions, facilities, products and services furnished under this Agreement. If a Party fails to pay by the Bill Due Date, any and all charges billed to it under this Agreement, including any Late Payment Charges or miscellaneous charges ("Unpaid Charges")**,** and any portion of such Unpaid Charges remain unpaid after the Bill Due Date, the Billing Party shall notify the Non-Paying Party in writing that in order to avoid disruption or disconnection of the applicable Interconnection, Resale Services, Network Elements, functions, facilities, products and services furnished under this Agreement, the Non-Paying Party must remit all Unpaid Charges to the Billing Party.

Upon receipt of the Demand, the agreement requires GNAPs Ohio to take specific actions, within specific timeframes, in order to avoid further collection activity. Specifically, GNAPs Ohio was required to pay those amounts that it acknowledged were due and owing and to identify those amounts which it disputed, in writing and with specificity:

> 9.3 If the Non-Paying Party desires to dispute any portion of the Unpaid Charges, the Non-Paying Party shall take all of the following actions not later than fourteen (14) calendar days following receipt of the Billing Party's notice of Unpaid Charges:
>
> 9.3.1 notify the Billing Party in writing which portion(s) of the Unpaid Charges it disputes, including the total amount disputed ("Disputed Amounts") and the specific details listed in Section 10.4.1 of this Agreement, together with the reasons for its dispute; and

9.3.2 immediately pay to the Billing Party all undisputed Unpaid Charges; and

9.3.3 pay all Disputed Amounts relating to Resale Services and Network Elements into an interest bearing escrow account that complies with the requirements set forth in Section 8.4.

9.3.4 With respect to Resale Services and Network Elements, evidence that the Non-Paying Party has established an interest bearing escrow account that complies with all of the terms set forth in Section 8.4 and deposited a sum equal to the Disputed Amounts into that account must be furnished to the Billing Party before the Unpaid Charges will be deemed to be "disputed" under Section 10 of this Agreement.

GNAPs Ohio took no action on these invoices to place them in dispute: GNAPs did not timely pay the invoices; GNAPs did not raise its objections within fourteen days of the Demand; and it did not comply with the requirements of Section 10.4. These amounts, therefore, are "undisputed" for purposes of the agreement, and can serve as the basis for disconnection:

9.5 SBC-AMERITECH only

9.5.1 Notwithstanding anything to the contrary herein, if the Non-Paying Party fails to (i) pay any undisputed amounts by the Bill Due Date, (ii) pay the disputed portion of a past due bill for Resale Services or Network Elements into an interest-bearing escrow account with a Third Party escrow agent, (iii) pay any revised deposit or (iv) make a payment in accordance with the terms of any mutually agreed upon payment arrangement, the Billing Party may, in addition to exercising any other rights or remedies it may have under Applicable Law, provide written demand to the Non-Paying Party for failing to comply with the foregoing. If the Non-Paying Party does not satisfy the written demand within five (5) Business Days of receipt, the Billing Party may exercise any, or all, of the following options:

9.1.5.1 assess a late payment charge and where appropriate, a dishonored check charge;

9.1.5.2 require provision of a deposit or increase an existing deposit pursuant to a revised deposit request;

9.1.5.3 refuse to accept new, or complete pending, orders; and/or

9.5.1.4 discontinue service.

C. GNAPS HAS NOT, AND CAN NOT, JUSTIFY ITS REFUSAL TO PAY.

Rather than follow the procedures for disputing invoiced amounts, GNAPs has, on occasion, raised a number of spurious reasons as to why it did not pay any billed amounts. GNAPs Ohio has never detailed these reasons in writing and has never specifically identified the basis (legal or otherwise) underlying these reasons. Rather, during conversations between representatives of the parties, GNAPs Ohio has made several excuses to justify its nonpayment. None of these "explanations," however, excuse GNAPs' failure to pay.

For example, GNAPs Ohio has asserted that SBC Ohio has "mischaracterized" the traffic, and billed the traffic at the "wrong" rates. GNAPs Ohio, however, has never adequately explained its reasoning. For example, GNAPs Ohio has never identified what it believes is the proper "characterization" of the traffic terminated on SBC Ohio's network. Further, GNAPs Ohio has never identified the "right" rate that it believes should be applied. At best, GNAPs Ohio has claimed that SBC Ohio has assessed "access charges on traffic exempt from access charges." (October 4, 2005 Letter at p. 1) SBC Ohio disputes GNAPs Ohio's allegations. In any event, there is no dispute that some rate (whether access charges, reciprocal compensation or ISP-bound traffic compensation) applies to the exchange of this traffic. Under the agreement, it is incumbent upon GNAPs to pay the rate it considers "correct," i.e., the "undisputed amounts." Any incremental amount above the rate GNAPs considers correct –upon proper identification of the amount and the reasons for withholding—can be properly disputed under the agreement. *Manifestly, there is no justification under the agreement or the law for GNAPs to withhold payment of all amounts for services rendered merely because it has certain unarticulated disagreements with its bills.*

On other occasions, GNAPs has requested additional information from SBC Ohio pertaining to the billed charges. For example, GNAPs has requested a high-level summary of the minutes of use ("MOUs") billed by SBC Ohio. As SBC Ohio has pointed out, however, SBC Ohio has rendered all bills to GNAPs in an industry standard, commission approved format. SBC Ohio has no contractual obligation to provide GNAPs Ohio with bills or billing information in a manner different than the bills it provides other CLECs. Further, GNAPs has refused to commit to pay SBC Ohio for outstanding amounts, even if SBC Ohio took the unwarranted step of providing the information requested by GNAPs. In short, GNAPs can not refuse to pay on the pretext that it wants further information in a format to which it is not contractually entitled.

Finally, GNAPs has expressed a desire to settle all billing issues on a "national" basis. Presumably, GNAPs desires to settle all outstanding payment issues with SBC Ohio and its affiliates at one time. Plainly, GNAPs' desire for a "global" settlement does not excuse its failure to pay SBC Ohio. Indeed, SBC Ohio's agreement with GNAPs Ohio unequivocally states that nonpayment and disconnection procedures are to be applied separately in each state. (Id. at § 9.1.1) Moreover, GNAPs' expression of a wish to settle on a "national" basis rings hollow in light of the fact that GNAPs has refused to offer one cent in payment to SBC Ohio or any of its affiliates.

E. LITIGATION AND CLAIMS PENDING IN OTHER STATES AND JURISDICTIONS ARE IRRELEVANT TO SBC OHIO's RIGHT TO DISCONNECT FOR NONPAYMENT.

In its October 4th letter, GNAPs Ohio points to the litigation currently pending between separate GNAPs affiliates and separate ILEC affiliates of SBC Communications Inc. in California and Connecticut. Presumably, GNAPs Ohio relies upon this litigation to establish that it has properly disputed the invoices that are the subject of SBC Ohio's Disconnection Notice. GNAPs' contention lacks merit for several reasons. First, the litigation in Connecticut and California concern different parties, different claims and different agreements.[6] Second, neither the Connecticut District Court nor the California District Court has exercised jurisdiction over SBC Ohio and GNAPs Ohio or their claims. Third, claims and proceedings pending in other states do not excuse GNAPs' failure to pay in Ohio. Finally, as noted above, SBC Ohio's agreement with GNAPs Ohio unequivocally states that nonpayment and disconnection procedures are to be applied separately in each state. (Id. at § 9.1.1) Accordingly, GNAPs can not rely upon claims raised in other jurisdictions to forestall disconnection in Ohio.

Similarly inapposite is GNAPs' reference to SBC Communications Inc.'s recent petition for declaratory ruling from the FCC. The petition has nothing to do with GNAPs' outstanding bills with SBC Ohio. The petition requests the FCC to determine the party (ies) responsible for the payment of access charges under SBC Ohio's tariffs when one or more parties are involved in the transmission of interexchange calls. The bills at issue here are for compensation for traffic delivered by GNAPs Ohio to SBC Ohio and terminated on SBC Ohio's network. Accordingly, the petition pending before the FCC has no bearing upon GNAPs' responsibility to pay SBC Ohio for the transport and termination of this traffic.

[6] Indeed, during the recent mediation that occurred in the context of the Connecticut litigation, Magistrate Garfinkel was apprised that the mediation was limited to issues pending in Connecticut and was without prejudice to claims pending in other jurisdictions. In any event, the Connecticut mediation proved to be pointless, because GNAPs' affiliate never presented a settlement offer to SBC Connecticut, despite GNAPs' representation that it intended to do so.

F. SBC OHIO's DEMAND FOR PAYMENT IN ACCORDANCE WITH THE PARTIES' AGREEMENT IS NOT ANTICOMPETITIVE.

GNAPs' October 4, 2005 letter characterizes SBC Ohio' demand for payment as a "thinly veiled harrassment [sic] of its competition." (Letter at p. 1) GNAPs' characterization is patently and demonstrably false. GNAPs Ohio has failed to pay any amounts for charges legitimately assessed by SBC Ohio. GNAPs' refusal to pay is a plain breach of the parties' agreement, justifying SBC Ohio's disconnection of GNAPs' service. By failing to pay for use of SBC Ohio's network, GNAPs has wrongfully retained revenue due and owing to SBC Ohio. Moreover, by unjustifiably refusing to pay SBC Ohio for usage, GNAPs has attempted to obtain a competitive advantage over other CLECs that pay their bills when due.

*** * * ***

For the foregoing reasons, SBC Ohio hereby rejects GNAPs' "offer" to further "mediate" these outstanding invoices. In addition, to the extent necessary, SBC Ohio hereby serves notice that it considers informal dispute resolution closed. Accordingly, if payment is not made on BAN 216G671818818 within seven days of this letter on the terms set forth in the parties' agreement, SBC Ohio will continue to pursue its rights under the interconnection agreement, up to and including disconnection.

Very truly yours,

Peggy Beata

Global NAPS, Inc.
89 Access Road
Norwood, MA 02169
Telephone (781) 551-9707
Fax (781) 551-9984
www.gnaps.com

James R. J. Scheltema
Admitted in Florida, Maryland
& the District of Columbia

Direct Dial
617-504-5513
Fax
617-507-5713

jscheltema@gnaps.com

Virginia office
12347 Sunrise Valley Drive
Reston, Virginia 20191
Tel. (703) 391-8057

Southern Regional Office
4470 Woodbine Road
Suite 7
Pace, FL 32571
Tel. (617) 504-5513

December 15, 2005

VIA FACSIMILE (312) 335-2926:

Peggy Beata
Director-Regional Account Management

VIA FIRST CLASS POSTAGE:

Jamie R. Minner
Customer Service Representative
722 North Broadway
Floor 11
Milwaukee, WI 53202

Re: SBC OH Bill to Global

Dear Ms. Beata:

I am in receipt of a faxed copy your correspondence directed to Global NAPs, Inc. dated December 12, 2005. I noted a number of inaccuracies, such as your statement that we have never disputed SBC-Ohio invoices. Further, as you must be aware from our discussions, we characterized our traffic as Internet traffic; not subject to access charges by virtue of is originating solely and exclusively with exempt service providers.

Irrespective of these issues, I acknowledge that we do appear at an impasse that mediation will not resolve. Thus, despite my preference to reach an accord amicably, we accede to your request/statement that SBC has closed its informal dispute resolution process.

I would, however, request that should SBC-OH determine that it shall discontinue services prior to a adjudication of the issues in conflict, that it provide Global NAPs with reasonable notice in order to seek an injunction should such be necessary. Global NAPs believes the amount in dispute is relatively minimal, especially considering the size of SBC, (now AT&T), and as such should not require such drastic action to be taken prior to adjucation. However, in the event that SBC-OH elects to do so, Global NAPs asserts that, if necessary, an injunction is in the best interests of both Global's and SBC's customers. Thus, I request both as a matter of professional courtesy and for the benefit of our mutual customers a fifteen (15) day notice prior to any service disruption.

I respectfully ask a response to this request and look forward to working with you in the future to resolve these issues.

Sincerely,

James R. J. Scheltema

jjrs/WR/RF

James R. J. Scheltema
Director – Regulatory Affairs
Global NAPs, Inc.
4475 Woodbine Road
Suite 7
Pace, FL 32504
Tel. 617-504-5513
Fax 617-507-5713
jscheltema@gnaps.com

Decision 08-09-027 September 18, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell Telephone Company, a California corporation d/b/a AT&T California (U1001C), Complainant, v. Global NAPs California, Inc. (U6449C), Defendant.	Case 07-11-018 (Filed November 19, 2007)

MODIFIED PRESIDING OFFICER'S DECISION FINDING GLOBAL NAPs CALIFORNIA IN BREACH OF INTERCONNECTION AGREEMENT

1. Summary

This decision finds that Global NAPs California (GNAPs) has breached its interconnection agreement with Pacific Bell Telephone Company doing business as AT&T California (AT&T), and owes AT&T the amount of $18,589,494.17 through the December 2007 bill, plus any charges that have accrued since that time.

In 2003, AT&T and GNAPs entered into an interconnection agreement, approved by the Commission in Decision (D.) 02-06-076, to interconnect their networks and exchange traffic. At GNAPs' request, AT&T established trunks to exchange traffic under the agreement, and GNAPs began delivering traffic to AT&T over those trunks. AT&T either terminates the traffic to its own end-user customers, or it hands the traffic off to other local telephone carriers for delivery

to their end-user customers. GNAPs has refused to pay for these services on the basis that (1) the Commission lacks jurisdiction to impose access charges for this traffic because it is jurisdictionally interstate; (2) pursuant to the federal regulation commonly referred to as the Enhanced Service Provider (ESP) exemption, the traffic is exempt from access charges; and (3) the charges are inaccurate because they do not reflect the nature of the calls.

In D.07-09-050, the Commission previously addressed and rejected GNAPs' arguments that we lack jurisdiction over this matter by virtue of the nature of the traffic at issue. In D.07-01-004 (modified by D.07-08-031, denying GNAPs' rehearing application), the Commission previously addressed and rejected GNAPs' arguments that the traffic is exempt from charges pursuant to the ESP exemption. The charges billed by AT&T accurately reflect the terms of the interconnection agreement.

We order GNAPs to pay AT&T the amount of $18,589,494.17 through the December 2007 bill, plus any charges that have accrued since that time, for AT&T's termination and transiting of traffic delivered to it by GNAPs.

2. Background

On November 30, 2001, GNAPs filed Application (A.) 01-11-045 for arbitration of an interconnection agreement to interconnect and exchange traffic with AT&T pursuant to Section 252(b) of the Telecommunications Act. The Commission, in D.02-06-076 (modified by D.03-07-039, denying rehearing), approved the interconnection agreement and ordered the parties to enter into it; the parties did so in 2003.

The interconnection agreement sets forth the terms and conditions under which the parties will interconnect their networks and exchange traffic. The interconnection agreement provides that traffic exchanged between the parties

will be classified as either local, transit, optional calling area, intraLATA toll, or interLATA toll traffic, and specifies the charges for each. The interconnection agreement specifies the different types of trunks that may be established between the parties' networks to exchange the different classes of traffic, and provides that local and intraLATA toll traffic may be combined on the same trunk groups, while interLATA traffic must be transported over a trunk group separate from local and intraLATA toll traffic. GNAPs submitted Access Service Requests to AT&T requesting the establishment of combined local/intraLATA toll trunks, and represented that either 99% or 100% of the traffic would be local. GNAPs and AT&T established combined local/intraLATA toll trunks for their exchange of traffic.

The interconnection agreement specifies the charges for traffic exchanged over the combined local/intraLATA toll interconnection trunks: (1) local calls that AT&T terminates to its own end-users are subject to local reciprocal compensation charges, (2) intraLATA toll calls that AT&T terminates to its own end-users are subject to the intraLATA toll or intrastate access charges specified in AT&T's intrastate access tariff, and (3) calls that AT&T transits to a third-party carrier are subject to transit charges.

The agreement requires GNAPs to provide AT&T with quarterly usage reports showing the percent of the traffic delivered over the combined local/intraLATA toll traffic trunks that GNAPs charges as local versus toll,[1] or Percent Local Usage factor (PLU), for AT&T to use to distinguish between local and intraLATA toll traffic for billing purposes. AT&T notified all

[1] GNAPs has the discretion to establish the local calling area for its own customers and, therefore, define what is a local call versus a toll call. (See, *e.g.*, D.02-06-076, pp. 23-24.)

interconnecting carriers that, in the absence of receiving usage reports, it will apply a default PLU percentage of 83% local traffic and 17% intraLATA toll traffic. GNAPs has not provided AT&T with usage reports.

Beginning in or about March 2004, GNAPs has used the combined local/intraLATA toll trunks to deliver traffic to AT&T for termination to AT&T end-users and for transiting to third-party carriers. AT&T has billed for terminating and transiting this traffic pursuant to the interconnection agreement, using the default PLU factor. GNAPs has declined to pay any of the billed charges. AT&T brought this action for breach of the interconnection agreement.

GNAPs defends its non-payment of the billed charges on three grounds: (1) the Commission does not have jurisdiction to require payment of access charges because the traffic at issue is jurisdictionally interstate, (2) the traffic for which AT&T seeks compensation is exempt from access charges pursuant to the Federal Communication Commission's (FCC) ESP exemption, and (3) the billed amounts are inaccurate because they do not reflect the nature of the traffic.

3. Nature of the Traffic

At the core of all three of its defenses, GNAPs claims that the traffic at issue is exempt from access charges by virtue of its physical and jurisdictional nature. Accordingly, before we consider GNAPs' legal claims, it is necessary to determine the physical nature of the traffic.

GNAPs claims that all of its customers are ESPs. As we stated in D.07-08-031, the more precise term is Internet service providers (ISPs), which are a subclass of ESPs. (D.03-07-039, p. 11.) Consistent with this more precise definition, GNAPs' Assistant General Counsel James Scheltema testified that all the traffic at issue involved the Internet, that is, Internet protocol (IP) format, at

some point in its transmission. AT&T does not appear to dispute this factual assertion.

GNAPs makes the further claim that all the traffic it exchanges is voice over the Internet protocol (VoIP) traffic. The record on this claim is inconclusive. GNAPs' Director of Network Operations Jeffrey Noack testified that GNAPs does not know whether the communication it receives from its customers is voice, data or a mix thereof, and does not know how the traffic was delivered to its ESP customers. In its opening brief, GNAPs points to a very recent decision of the New York Public Service Commission (New York PSC), which determined that the traffic at issue in that case was VoIP, as evidence of the factual nature of the traffic at issue here. However, that determination was based on affidavits from GNAPs' customers that send traffic to New York; we have no evidence in this record to determine that it is also the nature of the traffic that GNAPs sends to AT&T in California.[2] In its reply brief, GNAPs asserts that the nature of its California traffic is the same as its New York traffic, and that the same customers are involved in both sets of traffic. GNAPs' factual assertions in brief do not constitute evidence.

A further factor to be considered is whether the traffic *originated* as IP traffic, as opposed to on the public switched telephone network (PSTN). As discussed above, the evidence shows that GNAPs does not know how the traffic originated. Conversely, AT&T's Area Manager for Regulatory Relations Jason Constable testified that GNAPs' traffic patterns do not match the common traffic

[2] New York Public Service Commission Order Directing Negotiation, *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges,* Case 07-C-0059 (March 20, 2008).

patterns for IP-originated VoIP. While IP-originated VoIP is typically sent in comparable amounts as it is received, over 97% of the traffic exchanged between GNAPs and AT&T is sent from GNAPs to AT&T. In addition, for the single day of January 8, 2008, AT&T matched nearly 3,500 billing records of GNAPs' traffic that terminated on AT&T's network with billing records for calls that originated from an AT&T incumbent local exchange carrier (ILEC) end-user on the PSTN, in another state dialing a 1+ (long distance) call.

In sum, we find that all of the traffic at issue was delivered to GNAPs from GNAPs' ISP customers (ISPs being a subclass of ESPs), and that GNAPs delivered it to AT&T for termination to AT&T's end-user customers or for transit to a third party carrier. There is no dispute that all of the traffic may have involved IP format at some point in its transmission. We cannot determine on this record whether the traffic at issue is VoIP. However, assuming that some or all of it was VoIP traffic, we find that it likely originated on the PSTN, not on the Internet.

With this understanding of the nature of the traffic at issue, we turn to GNAPs' legal defenses against paying the claimed charges.

4. Commission Jurisdiction

GNAPs argues that, because the traffic at issue is IP-enabled and/or VoIP traffic, it is jurisdictionally interstate in nature and the Commission may not exercise jurisdiction over AT&T's claim. GNAPs' argument is barred by the doctrine of judicial estoppel and, in any event, entirely without merit.

AT&T originally brought this claim before a federal court, but GNAPs successfully obtained its dismissal on the ground that this Commission has exclusive jurisdiction over claims for breach of the interconnection agreement. The federal court agreed with GNAPs that AT&T's interconnection agreement

claims must be presented to the Commission for interpretation of the parties' agreement in the first instance.

The doctrine of judicial estoppel bars GNAPs from taking a contrary position here. The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); the two positions are totally inconsistent; and (4) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997), 60 Cal.App.4th 171, 183.) These factors apply here.

In any event, the Commission previously rejected GNAPs' arguments, when it denied GNAPs' application for rehearing of D.07-06-044, in which the Commission suspended GNAPs' Certificate of Public Convenience and Necessity until it pays Cox California Telcom, LLC (Cox) amounts due under those parties' interconnection agreement. D.07-09-050 affirmed our authority under the Telecommunications Act of 1996 to arbitrate, interpret and enforce interconnection disputes, and went on to address GNAPs' specific arguments as follows:

> GNAPs relies on two primary sources to support for its contention that this Commission is without jurisdiction to adjudicate this complaint case that resulted from GNAPs' failure to honor its Interconnection Agreement with Cox. The first source is the Federal Communications Commission's ("FCC") *Notice of Proposed Rulemaking ("NPRM") on IP-Enabled Services* (2004) 19 FCC Rcd 4863, 4864-68. GNAPs asserts that the *NPRM* preempted all regulation of Voice over Internet Protocol (VoIP) traffic. The other source is *In the Matter of Vonage Holdings Corp (2004) 19 FCC Rcd 22404*, aff'd by *Minn. Pub. Util. Comm'n v. FCC* (8th Cir. 2007) 483 F.3d 570, 579. In *Vonage*, the FCC preempted a regulation promulgated by the Minnesota PUC that required

Vonage (a VoIP provider) to comply with state regulations governing telephone services. The Eighth Circuit upheld the FCC's ruling as reasonable because it was impractical or impossible to separate VoIP service into interstate and intrastate components.

GNAPs asserts that *Minn. PUC* upheld the FCC's determination that VoIP is jurisdictionally interstate and subject to the FCC's exclusive jurisdiction. [Fn. omitted.] While *Vonage* and *Minn. PUC* did indicate that state commissions cannot require VoIP providers to comply with state statutes and regulations governing telephone service within their jurisdiction, they did not conclude that state commissions cannot enforce interconnection agreements that require the payment of interconnection charges on VoIP calls that terminate on the PSTN. Thus, GNAPs' reliance on *Vonage* is misplaced. Vonage was solely a VoIP provider which sought to avoid regulation by the Minnesota PUC, whereas GNAPs is not a VoIP provider. The federal district court concluded in its *Order Denying Motion for Preliminary Injunction* in this proceeding that "[t]he fact that Global NAPs may use Internet protocols to receive traffic from its ESP customers before transmitting that traffic to an end point on the PSTN through Cox's facility does not make it a VoIP provider." [Fn. omitted.] Rather, GNAPs is a certificated carrier, licensed by this Commission, and subject to its jurisdiction.

Moreover, just because traffic may be jurisdictionally interstate does not preempt the Commission from review and enforcement of the interconnection agreements. GNAPs claimed that interstate traffic was preempted in the context of ISP-bound traffic, which is deemed to be interstate, and the Court rejected it. [Fn. omitted.] The Court noted that the *ISP Remand Order* "reserve[d] state commission authority in certain relevant matters," including the arbitration, review and enforcement of interconnection agreements, even where they dealt with ISP-bound (interstate traffic). [Fn. omitted.] This Commission also rejects GNAPs' argument.

Nor does the use of IP-enabled services in the transport of a call result in the states being deprived of jurisdiction. [Fn. omitted.] The *AT&T IP Decision* involved calls that were transported in part over IP circuits, although they began and ended as landline-

based phone calls over the PSTN. It was argued that the pending NPRM on IP-enabled services preempted state access charges for such calls, similar to GNAPs' argument here. Recognizing that the issue of applying access charges to traffic that uses IP was being considered in the NPRM, the FCC nevertheless held that intrastate access charges applies to these calls:

> We are undertaking a comprehensive examination of issues raised by the growth of services that use IP, including carrier compensation and universal service issues, in the *IP-Enabled Services* rulemaking proceeding. *In the interim, however, to provide regulatory certainty, we clarify that AT&T's specific service is subject to interstate access charges*…AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, *AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls. It is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN*, pending resolution of these issues in the *Intercarrier Compensation* and *IP-Enabled Services* rulemaking proceedings. [*Order, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges* (2004) 19 FCC Rcd 7457, 7464-65, ¶ 15.]
>
> This statement makes clear that the mere use of IP in the transport of calls does not result in federal preemption, nor does the pendency of the NPRM on IP-enabled services.

(D.07-09-050, pp. 8-12.)

GNAPs makes the same jurisdictional arguments here that the Commission addressed and rejected in D.07-09-050. We do not find them any more persuasive in their repetition.[3]

[3] Although AT&T does not raise it as an offense, the doctrine of collateral estoppel might reasonably be held to bar GNAPs' litigation of this jurisdictional issue, as it was conclusively

Footnote continued on next page

GNAPs supplements its previous argument with citations to two recent decisions, the New York PSC order discussed previously, and *Vonage Holdings, Corp. v. Nebraska Public Service Commission*, 2008 WL 584078 (D.Neb. 2008). Both of these decisions concern similar facts and appear to follow the earlier *Vonage* decision, and GNAPs' reliance on them is misplaced for the same reasons as is its reliance on *Vonage*. Specifically, these decisions merely reiterate that state commissions may not assess statutory or regulatory charges against VoIP providers; they do not deny the state commissions' authority under the Telecommunications Act of 1996 to arbitrate, interpret and enforce interconnection disputes. Indeed, the *New York PSC Order* affirms the state commissions' authority: rather than allow the complaining carrier to block traffic from the other for lack of compensation, the New York PSC exercised jurisdiction over the dispute by ordering the carriers to work out a traffic exchange agreement establishing rates, charges, terms and conditions for the VoIP traffic at issue there.

GNAPs argues that the billed amounts are intrastate access charges, which cannot be applied to its VoIP or IP-enabled traffic. GNAPs maintains that it should not be penalized for AT&T's failure to provide an interconnection option that reflects that the traffic is jurisdictionally interstate but not subject to access charges. GNAPs' argument is without merit. First, as the FCC determined in the AT&T IP Decision, intrastate access charges may apply to VoIP traffic that begins and ends as landline-based phone calls over the PSTN. (*AT&T IP Decision,* 19

---

determined as against GNAPs in D.07-09-050. (*Vandenburg v. Superior Court* (1999) 21 Cal.4th 815*; see also Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, upholding the trial court's discretion to use the doctrine offensively against the defendant.*)*

FCC Rcd 7457, 7464-65, ¶ 15.) Even assuming that the traffic at issue here is VoIP (which we cannot determine on this record), it ends on the PSTN. The bar against intrastate access charges does not apply to this traffic. Second, the charges are not regulatory charges. Rather, they are contractual charges arising out of the parties' interconnection agreement.

5. ESP Exemption

GNAPs asserts that the traffic at issue is exempt from the charges billed by AT&T because the traffic involved the Internet or IP format and, as such, is subject to the FCC's ESP exemption.

The Commission previously rejected GNAPs' arguments that it presented in Case 06-04-026, *Cox California Telecom LLC v. Global NAPs California, Inc.* The Commission determined that "[t]he only relevant exemption from the access charge regime under Federal law is for *ISP-bound traffic* rather than *ISP-originated* traffic…." (D.07-01-004, p. 5, emphasis in original.)

GNAPs cites to ¶ 11 of the *ISP Remand Order* for its proposition that an ESP exemption applies to traffic that is routed to *or from* ISPs. To the contrary, nothing in ¶ 11 refers to traffic that is routed *from* ISPs:

> ISPs, one class of enhanced service providers (ESPs), also may utilize [local exchange carrier (LEC)] services to provide their customers with access to the Internet. In the *MTS/WATS Market Structure Order*, the [FCC] acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, […] the [FCC] 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). Thus, despite the [FCC's] understanding that ISPs use interstate access services, pursuant

> to the ESP exemption, the Commission has permitted ISPs to take service under local tariffs.

By its plain language, ¶ 11 refers to ISPs strictly in the context of their utilization of local exchange carrier services to provide their customers with access *to* the Internet. Here, in contrast, the traffic at issue is traffic that GNAPs receives *from* its ISP customers, not that it delivers *to* them.

GNAPs argues that removing the ESP exemption on the basis that GNAPs' customers, and not GNAPs itself, are ESPs would frustrate the FCC's intent to exempt this traffic from interstate access charges. We do not find intent by the FCC to exempt traffic that originates on the Internet from interstate access charges, regardless of GNAPs' status and the services that it provides to its customers. Even assuming that GNAPs shares the ESP status of its customers, the traffic does not utilize AT&T's services to provide access to the Internet. The ESP exemption does not apply to this traffic.

GNAPs points out that its network architecture is not that of a traditional local exchange carrier; its transport mode is ATM, not analog TDM. GNAPs argues that, although AT&T requires that GNAPs translate its digital traffic into analog TDM mode, this requirement by AT&T cannot be applied to strip it of its character as exempt traffic. These observations are irrelevant to the issue of whether the traffic at issue is ISP-bound. The ESP exemption is inapplicable to traffic that is not ISP-bound, regardless of the traffic's transport mode.

GNAPs argues that the interconnection agreement does not govern traffic that is beyond the Commission's regulatory authority and therefore cannot be applied to overcome the application of the ESP exemption. This argument fails because, as we have discussed, its premise that the traffic is beyond the Commission's regulatory authority is without merit.

6. Accuracy of Billed Amounts

AT&T billed GNAPs for terminating and transiting traffic delivered over the combined local/intraLATA toll trunks. AT&T billed the terminating traffic using the default PLU factor to apply the local versus intraLATA toll charges, and billed the transited traffic at the transiting rate. GNAPs does not challenge AT&T's calculation of the bills. Rather, GNAPs asserts that AT&T's bills are inherently inaccurate for being based upon a comparison of NXX codes,[4] and for inappropriately imposing access charges and applying the PLU factor to IP-enabled traffic. We discuss these arguments below.

GNAPs argues that AT&T's invoices are inherently inaccurate because they are generated using Carrier Access Billing System (CABS) billing, which is premised upon a comparison of NXX codes. GNAPs points out that, for VoIP and IP-enabled traffic, the NXX codes do not necessarily reflect the end-user's physical location. Thus, for example, AT&T bills the traffic as local or intraLATA toll even if the end-user originating the call is physically located outside the geographic location pertaining to that particular NXX code. GNAPs argues that, therefore, the bills are inaccurate.

GNAPs is mistaken as to the billing procedure. AT&T did not use NXX codes to determine whether the traffic was local and/or intraLATA toll. Rather, the traffic at issue was deemed to be local and/or intraLATA toll based on its delivery over the combined local/intraLATA toll trunks. Nor did AT&T use NXX codes to distinguish between local and intraLATA toll traffic. Pursuant to the interconnection agreement, all of the traffic that is delivered to AT&T's own

[4] NXX codes are the first three digits in a telephone number, and designate the central office or switch to which the number is assigned.

end-users is billed either as local or intraLATA toll based on the PLU factor provided by GNAPs. Because GNAPs did not provide a PLU factor, AT&T applied the default PLU. NXX codes did not factor into AT&T's billing.

GNAPs argues that the billed amounts are intrastate access charges, which cannot be applied to its VoIP or IP-enabled traffic. GNAPs' argument is without merit. The billed amounts are transiting and terminating charges for traffic exchanged over local/intraLATA toll trunks pursuant to the interconnection agreement. Irrespective of the scope of any purported FCC access charge exemption for "ESP" or VoIP traffic, GNAPs is bound by its interconnection agreement and must pay the charges due under it.

GNAPs maintains that it should not be penalized for AT&T's failure to provide an interconnection option that would allow GNAPs to deliver traffic that is jurisdictionally interstate without subjecting it to the charges at issue. If GNAPs believed that the terms of the interconnection agreement should not apply to particular types of traffic, it could have sought arbitration of the issue before entering into the agreement. Having agreed in the interconnection agreement to pay for transiting and termination of traffic delivered over local/intraLATA toll trunks, GNAPs is bound by it. (*Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003)(citing 47 U.S.C. § 252(a)(1).)

GNAPs asserts that the charges constitute access charges, which cannot be applied to GNAPs' IP-enabled traffic. As we discussed above, the charges are not regulatory charges. Rather, they are contractual charges arising out of the parties' interconnection agreement, which was approved by the Commission in the exercise of our authority under the Telecommunications Act of 1996 to arbitrate, interpret and enforce interconnection disputes.

GNAPs asserts that the PLU factor is inapplicable to its IP-enabled traffic. This argument reiterates GNAPs' position, which we reject, that IP-enabled traffic is exempt from charges under the interconnection agreement.

GNAPs notes that it provides no dial tone services like traditional carriers and that it only presents its traffic to AT&T in other than IP format because AT&T requires it to do so. These observations do not lead us to conclude that the billing calculation is inaccurate or that the traffic is not governed by the interconnection agreement.

We find that AT&T properly calculated $18,589,494.17 through the December 2007 bill, as the amount due and owed under the interconnection agreement.

7. Assignment of Proceeding, Hearings and Submission

Michael R. Peevey is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge and presiding officer in this proceeding.

Evidentiary hearing was held on March 25, 2008. Opening briefs were filed on April 14, 2008, and the proceeding was submitted upon the filing of reply briefs on April 24, 2008.

8. Appeal and Motion to Set Aside Submission

The Presiding Officer's Decision (POD) in this case was mailed on June 4, 2008. On July 3, 2008, GNAPs filed an appeal. On July 18, 2008, AT&T filed a response to the appeal. GNAPs asserts, as it has throughout the case, that the traffic at issue is exempt from access charges by virtue of it being VoIP traffic, and maintains that the POD therefore errs by ordering GNAPs to pay AT&T termination and transiting charges due and owing under the interconnection agreement. The POD considers and rejects GNAPs' arguments.

GNAPs moved to set aside submission to take, as additional evidence, (1) a list of GNAPs' customers in New York and California, (2) a letter from a GNAPs customer describing the nature of its traffic as "nomadic VoIP," and (3) an affidavit of James Scheltema stating that GNAPs serves the same customers in New York and California and that their traffic is of the same nature in both states. GNAPs asserts that it could not offer this evidence in a timely fashion because it did not know, until AT&T briefed the issue, that the nature of the traffic was at issue. GNAPs' assertion is without merit. The assigned Commissioner's February 4, 2008, Scoping Memo identified the physical configuration of GNAPs' traffic as a factual issue, and directed GNAPs to present evidence on the issue pursuant to the adopted schedule of the proceeding. The motion is denied.

Findings of Fact

1. GNAPs filed A.01-11-045 for arbitration of an interconnection agreement with AT&T.

2. The Commission approved the interconnection agreement in D.02-06-076 (modified by D.03-07-039, denying rehearing) and ordered the parties to enter into it.

3. GNAPs and AT&T entered into the interconnection agreement in 2003.

4. The interconnection agreement provides that traffic exchanged between the parties will be classified as either local, transit, optional calling area, intraLATA toll, or interLATA toll traffic, and specifies the charges for each.

5. The interconnection agreement specifies the different types of trunks that may be established between the parties' networks to exchange traffic, and provides that local and intraLATA toll traffic may be combined on the same

trunk groups, while interLATA traffic must be transported over a trunk group separate from local and intraLATA toll traffic.

6. The interconnection agreement provides that (1) local calls that AT&T terminates to its own end-users are subject to local reciprocal compensation charges, (2) intraLATA toll calls that AT&T terminates to its own end-users are subject to the intraLATA toll or intrastate access charges specified in AT&T's intrastate access tariff, and (3) calls that AT&T transits to a third-party carrier are subject to transit charges.

7. The interconnection agreement requires GNAPs to provide AT&T with quarterly usage reports showing the percent of the traffic delivered over the combined local/intraLATA toll traffic trunks that GNAPs charges as local versus toll, or Percent Local Usage factor (PLU), for AT&T to use for billing purposes.

8. GNAPs submitted Access Service Requests to AT&T requesting combined local/intraLATA toll trunks, and representing that either 99% or 100% of the traffic would be local.

9. AT&T and GNAPs established combined local/intraLATA toll trunks to interconnect the parties' networks.

10. AT&T notified all interconnecting carriers that, in the absence of receiving usage reports, it will apply a default PLU percentage of 83% local traffic and 17% intraLATA toll traffic.

11. Beginning in or about March 2004, GNAPs has used the combined local/intraLATA toll trunks to deliver traffic to AT&T for termination to AT&T end-users and for transiting to third-party carriers.

12. GNAPs has not provided usage reports to AT&T.

13. AT&T applied the default PLU to the traffic that it terminated to its own end-user customers.

14. AT&T has billed for terminating and transiting this traffic pursuant to the interconnection agreement.

15. GNAPs has not paid any of the billed charges.

16. All of GNAPs' customers are ISPs, which are a subclass of ESPs.

17. GNAPs received all of the traffic at issue from its ISP customers.

18. There is no dispute that all of the traffic at issue involved IP at some point in its transmission.

19. GNAPs does not know whether the communication it receives from its customers is voice, data or a mix thereof, and does not know how the traffic was delivered to its ESP customers.

20. We cannot find, on the basis of this record, that the traffic at issue is VoIP traffic.

21. The evidence suggests that the traffic originated on the PSTN, not on the Internet.

22. None of the traffic at issue was delivered to the Internet.

23. AT&T originally brought this claim before a federal court, where GNAPs successfully obtained its dismissal on the ground that this Commission has exclusive jurisdiction over claims for breach of the interconnection agreement.

24. AT&T properly calculated $18,589,494.17 through the December 2007 bill, as the amount due and owed under the interconnection agreement.

Conclusions of Law

1. The interconnection agreement governs the terms and conditions under which GNAPs and AT&T will interconnect their networks and exchange traffic.

2. The doctrine of judicial estoppel bars GNAPs from arguing that the Commission lacks jurisdiction over AT&T's claim.

3. The Commission has authority consistent with state and federal law to resolve interconnection disputes.

4. The use of IP-enabled services in the transport of a call does not deprive the Commission of jurisdiction to resolve interconnection disputes.

5. The FCC's ESP exemption from access charges applies only to traffic that is routed to the Internet; it does not apply to the traffic at issue here.

6. Charges for services under the interconnection agreement are contractual charges, not regulatory access charges.

7. The use of IP format in the transmission of traffic prior to its delivery to AT&T does not exempt it from charges under the interconnection agreement.

8. GNAPs should pay AT&T the claimed charges.
9. This case should be closed.

O R D E R

IT IS ORDERED that:

1. Global NAPs California, Inc. shall pay to Pacific Bell Telephone Company, d/b/a AT&T California the amount of $18,589,494.17 through the December 2007 bill, plus any charges that have accrued since that time.
2. Case 07-11-018 is closed.

This order is effective today.

Dated September 18, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

ALJ/KJB/hkr **Mailed 1/12/2007**

Decision 07-01-004 January 11, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Cox California Telecom, LLC (U-5684-C), Complainant, vs. Global NAPs California, Inc. (U-6449-C), Defendant.	Case 06-04-026 (Filed April 28, 2006)

OPINION GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

Summary

The motion of Cox California Telecom, LLC (Cox) for summary judgment is granted. Global NAPs California, Inc. (Global NAPs) is ordered to pay Cox the sum of $985,439.38 plus interest on overdue amounts at the rate of one and one-half percent per month.

Background

Global NAPs and Cox are both competitive local exchange carriers licensed by this Commission to provide local exchange service in California. On October 29, 2003, Global NAPs and Cox entered into a network interconnection agreement (the Interconnection Agreement) that set forth "the terms, conditions and pricing" under which the two companies would provide interconnection to each other within the state of California.

Pursuant to Section 5.7 of the Interconnection Agreement, two different billing arrangements were agreed upon, based on the nature of the traffic being interconnected. As a general rule, the Interconnection Agreement provides that the terminating carrier shall charge the originating carrier a fee based on minutes of use for terminating a call. The fees for such terminations are set out in an appendix to the Interconnection Agreement. However, the Interconnection Agreement contains an exception to the termination fee regime. For "Local Traffic" and "ISP-bound Traffic," as those terms are used in the Interconnection Agreement, neither party pays the other for terminating calls originated by the other party, an arrangement generally known as "bill and keep."

Section 1.25 of Interconnection Agreement defines "Local Traffic" as "traffic other than ISP-bound Traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other party on that other Party's network." The Interconnection Agreement contains further technical specifications to identify Local Traffic and separate it, for billing purposes, from traffic subject to the termination fee arrangement. The result of applying these specifications to the traffic between these carriers is that toll calls originating and terminating within a single local access and transport area (LATA) are subject to termination fees.

Beginning in June 2004, Cox commenced monthly billing to Global NAPs for intra-LATA toll calls terminated by Cox on behalf of Global NAPs. On June 25, 2004, Cox received a letter from Robert J. Fox, Vice President—Industry Relations of Global NAPs, declining to pay the June 2004 invoice. After first stating erroneously that "our companies do not have an interconnection agreement governing the terms and conditions of exchanging

telecommunications services," Fox went on to refuse payment of the Cox's invoice on the grounds that:

> [T]he traffic you deliver and receive from my company, Global NAPs, Inc., or its affiliates and subsidiaries, is "information access traffic." As such, the intercarrier compensation controlling the traffic is subject to federal law, specifically the provisions delineated in the ISP Remand Order. Simply put, the ISP Remand Order provides for bill-and-keep on the traffic we exchange since we were not exchanging traffic prior to the effective date of the Order in 2001. Accordingly the invoice and account are disputed in full.[1]

Subsequent monthly bills from Cox to Global NAPs were responded to in similar fashion.

Following unsuccessful efforts to resolve the fee dispute informally, pursuant to Section 28.8.4 of the Interconnection Agreement, on April 28, 2006 Cox brought this action for breach of the Interconnection Agreement. On June 9, 2006, Global NAPs filed a motion to dismiss or stay the action. On June 26, 2006, Cox filed a response to the motion and on July 5, 2006, the assigned Administrative Law Judge (ALJ) denied the motion.

On September 15, 2006, Cox filed its motion for summary judgment.

Discussion

Although Rule 11.2 of the Commission's Rules of Practice and Procedure (Rules) regarding time to file motions based on pleadings does not discuss the standards to be applied when we consider a motion for summary adjudication, we have generally followed the standard set forth in Civil Code § 437(c) which

[1] The ISP Remand Order referred to in the letter text is the *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, FCC 01-31 (released April 27, 2001).

directs that a motion for summary judgment shall be granted when the pleadings demonstrate "that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Cox's motion is based on three undisputed factual assertions:

1. All the calls for which Cox has billed Global NAPs are intra-LATA toll calls.[2]
2. None of the calls for which Cox has billed Global NAPs are ISP-bound calls.
3. The Interconnection Agreement between Cox and Global NAPs directs the party originating intra-LATA toll calls that are not ISP-bound to pay termination charges to the terminating party.

In his July 5 ruling, the assigned ALJ found that the Commission is not pre-empted by the Federal Communications Commission (FCC) from arbitrating this dispute and further found this to be a straightforward case of contract interpretation. Applying that understanding to the instant motion and Global NAPs' response, we find that there are no triable issues of material fact; that the Interconnection Agreement clearly establishes the legal rights of the parties; that under the terms of the Interconnection Agreement, Global NAPs is obligated to pay Cox for terminating intra-LATA toll calls at the rates set forth in Appendix 1 to that agreement; and that the Interconnection Agreement further entitles Cox to charge interest at the rate of one and one-half percent per month on overdue amounts.

[2] In ¶ 10 of its answer to the Cox's complaint, Global NAPs admits that "the sole area of dispute presented in the complaint relates to compensation for the termination by Cox of intraLATA toll calls within the state of California."

In its response to Cox's motion for summary judgment, Global NAPs argues that because the traffic it sent to Cox originated with Internet Service Providers (ISPs), it was exempt from access charges. But this response misreads applicable law. The only relevant exemption from the access charge regime under Federal law is for ***ISP-bound traffic*** rather than ***ISP-originated*** traffic, a conclusion we reached in our recent *AT&T-MCImetro* decision involving facts very similar to those in this case.[3]

Alternatively, Global NAPs argues that it should not be subject to termination fees because it does not originate the traffic terminated by Cox. The traffic originates with an ISP, which hands it off to Global NAPs and Global NAPs in turn sends to Cox. But this is a distinction without a difference. Every phone call originates with a customer rather than a carrier. As the FCC pointed out in a March 10, 2004 Notice of Proposed Rulemaking in its *IP-Enabled Services* docket, Federal policy is to ensure that the cost of terminating calls on the Public Switched Telephone Network (PSTN) is shared equitably among all those sending calls to the PSTN, specifically including carriers like Global NAPs who are sending ISP-originated calls:

> As a policy matter, we believe 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**. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[4] **(**Emphasis supplied.)

---

[3] D.06-08-029.

[4] *In the Matter of IP-Enabled Services* Notice of Proposed Rulemaking, WC Docket 04-36 (March 10, 2004), ¶¶ 33, 61.

Whether or not Cox and Global NAPs could have agreed to an arrangement that differs from the access charge regime prescribed by the FCC, the fact remains that they did not. They entered an Interconnection Agreement that specifically obligates the originating carrier to compensate the terminating carrier for terminating intra-LATA toll calls. That agreement governs the rights of the parties to this dispute and requires Global NAPs to pay termination charges to Cox.

Categorization and Need for Hearing

On May 10, 2006, this case was preliminarily classified as adjudicatory. The preliminary classification is confirmed. In view of the disposition of the motion for summary judgment, no hearings are required.

Comments on Proposed Decision

The proposed decision of ALJ Bemesderfer in this matter was mailed on November 17, 2006 to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a). Comments were received on December 7, 2006. In its comments, Cox identifies two errors in the proposed decision. Finding of Fact 3 is unnecessary to the decision. Accordingly, it is deleted. In addition, Cox points out that although the complaint quantifies amounts owed by Global NAPS to Cox as of September 5, 2006, Global NAPS has a continuing obligation under the Interconnection Agreement to pay Cox for terminating intraLATA toll calls sent by Global NAPS to Cox after September 5, 2006. Accordingly, Ordering Paragraph 3 is amended to reflect the continuing obligation to pay termination charges and interest on unpaid amounts through the expiration date of the Interconnection Agreement.

Cox also asks that we order Global NAPS to pay Cox at tariffed rates for intraLATA toll calls sent to Cox for termination after the expiration date of the

Interconnection Agreement. This we decline to do. We limit this decision to enforcing the terms of the Interconnection Agreement so long as it is in effect.

Global NAPS' comments re-argue positions rejected by the proposed decision and require no further modification of the decision.

Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ in this proceeding.

Findings of Fact

1. Global NAPs and Cox are parties to a network Interconnection Agreement dated as of October 29, 2003.

2. The Interconnection Agreement provides for the payment of termination charges (including interest for overdue payments) for intra-LATA toll calls originated by one party and terminated by the other.

3. From and after the effective date of the Interconnection Agreement, Cox has terminated intraLATA toll calls originated by Global NAPs.

4. Cox has invoiced Global NAPs for the cost of terminating intra-LATA toll calls at the rate set out in the Interconnection Agreement.

5. Global NAPs has refused to pay Cox's invoices.

6. None of the calls for which Global NAPs has refused to make payment are ISP-bound calls.

Conclusions of Law

1. Federal law does not pre-empt the Commission from arbitrating this dispute.

2. The rights and obligations of the parties are governed by the terms of the Interconnection Agreement.

3. There are no triable issues of material fact.

4. Global NAPs owes Cox termination fees for any intra-LATA toll calls originated by Global NAPs and terminated by Cox from and after the effective date of the Interconnection Agreement.

5. Global NAPs owes Cox interest on overdue amounts at the rate of one and one-half percent per month, as specified in the Interconnection Agreement.

O R D E R

IT IS ORDERED that:

1. The motion of Cox California Telecom, LLC for summary judgment is granted.

2. Global NAPs California, Inc. shall pay to Cox California Telecom, LLC the sum of $985,439.38 plus interest on overdue sums at the rate of one and one-half percent per month, as provided in the Interconnection Agreement between the parties.

3. Global NAPS shall pay to Cox termination fees for any intraLATA toll calls originated by Global NAPS and terminated by Cox from and after September 5, 2006 though the termination date of the Interconnection Agreement.

4. No hearing is necessary in this proceeding.

5. Case 06-04-026 is closed.

This order is effective today.

Dated January 11, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

Summary: Exhibit for Patricia H. Pellerin Testimony electronically filed by Mrs. Verneda J. Engram on behalf of AT&T Ohio