FILE

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

GLOBAL NAPS OHIO'S REPLY TO AT&T OHIO'S OPPOSITION TO GLOBAL'S REQUEST FOR ARBITRATION

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Global NAPs Ohio ("Global") submits this Reply to AT&T Ohio's Opposition to Global's Request for Arbitration to establish rates, terms and conditions for the exchange of Voice Over Internet Protocol ("VoIP") traffic.

At the outset, we would like to separate out the surprisingly large and significant, range of facts upon which we agree with AT&T from the rather smaller, but also significant, facts upon which we disagree.

First, we agree with AT&T that the issues raised in its Complaint proceeding are, at their core, issues of contract interpretation. As AT&T correctly stated in its complaint, this is solely a contract dispute.[1] And it is first year law school instruction that the objective in resolving such disputes is to determine the intent of the parties[2].

[1] Complaint, p. 1.
[2] Episcopal Retirement Homes, Inc. v. Ohio Dept. of Industrial Relations (1991) 61 Ohio St. 3d 366, 369 575 N.E. 2d 134.

Second, we agree that AT&T's current complaint raises two separate arguments: (1) that the traffic that Global is sending it to terminate is not entirely VoIP traffic or (2) that, to the extent that it is VoIP traffic, the terms of the ICA should be read to make such VoIP traffic subject to the same rules that apply to traditional local and toll traffic.[3]

Third, we agree with AT&T that the Parties neither consensually agreed, nor had the PUCO set by arbitral award any provisions setting rates, terms or conditions for the exchange of VoIP traffic.[4] AT&T states: "Even if the parties did not agree into which "bucket" VoIP traffic might fall, that just means the Commission must now determine the appropriate treatment of the traffic."[5] This is both an admission and a novel procedural idea.[6] It proposes that, instead of *interpreting* the contract – determining the intent of the parties either from the express language of the agreement or, where ambiguity might exist, from parole evidence – the Commission should modify it retrospectively. Here we disagree. There is a fundamental difference between determining "the appropriate treatment of the traffic" as AT&T proposes, and determining the intent of the parties as to the appropriate treatment of the traffic, as Global proposes.

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[3] AT&T Opposition, p. 2.
[4] AT&T Opposition, p. 2., n. 2.
[5] Id. Out of prudence, we would note that the issue is not which of the local or toll "buckets" should contain VoIP. It is Global's position that VoIP is a separate class of service that is neither local nor toll and, as such, gets its own "bucket."
[6] AT&T further states in note 2 that, Global's "reliance on Section 16.9 to avoid paying for transiting" is baseless, "because Section 16.9 addresses reciprocal compensation, not transiting. " This is a further admission that Section 16.9 is conclusive, at least as to reciprocal compensation for local traffic – which is AT&T's primary claim in its complaint proceeding. We will address AT&T's assertion that the provision does not apply to transit traffic at a more appropriate time. However, Staff may find reading this provision and Section 9 of the Appendix together an instructive exercise.

I. AT&T offers no valid legal or policy arguments in opposition to Global's Request for Arbitration.

AT&T begins with a standard rhetorical flourish that Global's motion is "a thinly-veiled attempt to delay resolution of AT&T Ohio's complaint."[7] It is not. Global has not proposed to delay AT&T's complaint proceeding in any way, and granting AT&T's motion would not cause such delay. Indeed, AT&T essentially concedes the point when it states elsewhere in its Opposition that the issues "which are before the Commission as a result of AT&T Ohio's complaint, have nothing to do with the negotiation or arbitration of *new* interconnection agreement language, but concern the interpretation and enforcement of the *existing* ICA."[8] We agree fully. As a consequence, nothing in Global's arbitration motion precludes continued consideration of AT&T's complaint, and nothing in AT&T's complaint precludes consideration of Global's request for arbitration.

AT&T asserts that Global's request for arbitration is "premature" because the Commission has neither determined that Global's traffic is VoIP and has not yet determined that "Global NAPs Ohio's interpretation of Section 16.9 of the Reciprocal Compensation Appendix is correct."[9]

Each of these arguments is wrong. First, neither the current ICA nor sections 251 and 252 of the Act requires Global to demonstrate that it is already carrying VoIP traffic in order to arbitrate the proper treatment of such traffic.[10] Indeed, under this theory, no carrier could ever petition for arbitration with respect to a service it did not yet offer. The argument is frivolous.

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[7] AT&T Opposition, p. 1
[8] Id. p. 2
[9] Id. p. 3
[10] Although it is not necessary to prove the fact in order to seek arbitration, nevertheless, the evidence obtained to date from discovery casts serious doubt on AT&T's ability to prove that Global NAPs is not carrying VoIP traffic.

Second, nothing in Section 16.9 of the ICA must be resolved in AT&T's complaint proceeding before Global's right to arbitrate can be established. AT&T correctly states that its claims concern only "the interpretation and enforcement of the *existing* ICA" and that these legal issues "have nothing to do with the negotiation or arbitration of a *new* interconnection agreement." Even the provisions of the ICA that come into play in each case are different. AT&T's complaint must deal with the substantive and retrospective implications of the sentence which states that "The Parties further agree that this Appendix shall not be construed against either Party as a "meeting of the minds" that VOIP or Internet Telephony traffic is or is not local traffic subject to reciprocal compensation." Global's motion rests on the procedural and prospective implications of the sentence that states "By entering into the Appendix, both Parties reserve the right to advocate their respective positions before state ... commissions ... in ... arbitrations under Sec. 252 of the Act." This latter sentence does not arise in and need not be resolved by, the AT&T complaint proceeding.

AT&T's argument that Global has no right to seek arbitration under Section 251 of the Act simply misstates the issue. Global is not arguing that it has a generic right to arbitrate a new ICA. It is arguing that it has a contractual right to address a single, previously-deferred issue because, in Section 16.9 of the Reciprocal Compensation Appendix, the parties signed a clause on mutual consent, agreeing to "reserve the right . . to advocate their respective positions" before state commissions in "arbitrations under Sec. 252 of the Act."[11]

The key, of course, is the word "reserve," which the dictionary defines as "to keep back or save for future use." The alternative definition is "to retain or secure by express stipulation."[12] Both are plainly applicable here. Nothing in the Telecommunications Act precludes parties to an

[11] Of course, Section 251(a)(1) of the Act specifies that parties may enter into voluntary agreements without regard to the standards set forth elsewhere in the Act.
[12] Dictionary.com, "reserve."

ICA from stipulating on written consent so set aside an arbitral issue to be addressed on a later occasion. That is what the Parties did here.[13]

AT&T attempts to avoid the plain intent of this language by asserting that it merely "reserves" whatever rights the parties may have in a proper Section 252 arbitration."[14] This renders the language of the clause meaningless; a tautology: the parties reserve the right to do by contract only that which they already have the right to do by law. Interpretations of contract provisions that render them meaningless are, of course, highly disfavored.

Moreover, AT&T's argument simply doesn't square with the actual words of Section 16.9. The section does not "reserve" a generic right to initiate a "proper" (whatever that means) or full scale arbitration. It reserves the right to address on a future date the appropriate treatment of a particular and circumscribed set of issues; the treatment of Voice Over Internet Protocol. And of course, the use of the word "reserve" means to set aside and save for a future date, a right that existed at the time the ICA was signed.

Both the context of the clause and AT&T's own arguments further prove the point. Section 16.9 is the only clause in the contract that addresses VoIP. It plainly indicates that the parties could not agree on how to treat VoIP under the contract at the time they signed it. It says so. It also, plainly and twice, states that the parties agree to put the issue aside "reserving the right to raise the appropriate treatment" of this traffic at a latter date. Finally, it states that the reservation is with respect to a broad range of procedural options, including arbitration. Indeed, and ironically,

[13] This reading also comports with the basic policy intent of the Act to have the Parties, to the extent possible, deal with each other on a contract basis – with all of the flexibility that contracts provide. In 2002, the Parties needed an agreement, but didn't yet need an agreement on VoIP since Global was not then offering a VoIP terminating service. Like any sensible parties, they put it aside to close a deal, but reserved their rights to come back and solve (or fight over) it, later.

[14] AT&T Opposition, p. 4

AT&T itself interprets and relies upon the exact language that Global NAPs cites in exactly the same way that Global NAPs uses it here. AT&T states, at n. 2 of its Opposition:

> Even if the parties did not agree into which "bucket" VoIP might fall, that just means the Commission must now determine the appropriate treatment of the traffic. **That is why the parties agreed to "reserve the right to raise the appropriate treatment of [VoIP] traffic under the Dispute Resolution provisions of this Interconnection Agreement."**

AT&T is correct as to its procedural rights. It does have the right to bring its complaint.[15] But in asserting this right, AT&T doesn't complete either the thought or the clause. The Parties did not agree into which "bucket" VoIP might fall. That is why the parties agreed to reserve the right to raise the appropriate treatment of VoIP traffic under a variety of procedural arrangements, including both the Dispute Resolution provisions of the ICA, *and*, "arbitrations under Sec. 252 of the Act." Section 16.9 provides both options or neither.

In sum, AT&T is free to pursue in its complaint proceeding its contentions that the ICA as written means, and has meant since 2002, that VoIP traffic is subject to the same rates, terms and conditions as standard telephony. But Global is equally free to pursue its contentions regarding what the rates, terms and conditions regarding VoIP traffic should be under section 251 and 252 of the Act on a going forward basis.

For the reasons set forth above, Global believes it has a contractual right, binding on AT&T,[16] to arbitrate the proper treatment of VoIP. However, Global also believes that this is the most commercially reasonable basis for resolving this long-standing dispute. We appreciate AT&T's acknowledgement that Global has, in fact, tried on several occasions to open discussions with AT&T over the proper treatment of VoIP and its further acknowledgment that it

[15] This is, of course, a procedural right. Global does not agree that AT&T is correct in the substantive arguments raised in its complaint.
[16] And endorsed by the PUCO when it approved the ICA.

refused to enter into such discussions.[17] Global's approach was the correct one. We now know from the experience of others, that, rather than trying to force the very square peg of Internet Telephone into the very round hole of traditional telephony, the best way to address VoIP is separately, and on a negotiated basis.

The reality is that VoIP *is* -- legally, technologically and commercially -- different from traditional voice telephony. For instance, it is not merely a well established conclusion of law, but also a technological fact that VoIP traffic cannot be regulated on the basis of the assumption that NPA-NXX data correctly identify the geographic end points of calls. Nomadic VoIP is widely prevalent and NPA-NXX data do not provide any reliable guidance on where calls actually originate or terminate. In negotiated agreements regarding VoIP, the industry has responded sensibly to this fact, resolving the problem by doing away with the distinctions between local, toll, etc. and setting unitary rates for VoIP without regard to geography. To the best of our knowledge *every* agreement that AT&T has voluntarily entered into with another carrier – whether AT&T was a CLEC or an ILEC -- sets a single, unitary rate for VoIP traffic. This is certainly true of AT&T's agreements with Level 3, with Verizon (MCI) in Wisconsin, and, as a CLEC, with Verizon throughout the Verizon east coast footprint.

For the same reason, every negotiated VoIP contract of which we are aware allows VoIP traffic to be terminated over local interconnection trunks. Once parties agree to a rate for VoIP that doesn't turn on geographic end points, it becomes pointless to route such traffic over Feature Group D trunks. This was, of course, the conclusion of the Wisconsin Commission in AT&T's arbitration with MCI. More importantly, however, this what parties do when they negotiate in

[17] AT&T makes the strange argument that the fact that Global tried to initiate discussions over amendments to the ICA to address VoIP in the context of settlement discussions somehow voids Global's request. This argument is difficult to comprehend. AT&T's refusal to negotiate was plainly explained as without limitation – they would not discuss any changes to the ICA regarding VoIP on any basis. Hence, this petition seeks, as the Act expressly contemplates, a mediator to facilitate good faith negotiations.

good faith. Again to the best of our knowledge, the agreements that AT&T enters into when it is acting in a commercial not a litigating mode, *all* provide for the termination of VoIP traffic over local trunks.

These and other issues need to be addressed, and this brief discussion indicates both why and how such a review might be conducted in the context of a mediated negotiation and, if necessary an arbitration. There is now a field of study for the treatment of VoIP. These issues are solvable. But they cannot be solved so long as AT&T continues to refuse to meet and negotiate in good faith. Since both we and they agree that AT&T has refused to negotiate, we ask the Commission to grant the motion.

Respectfully submitted,

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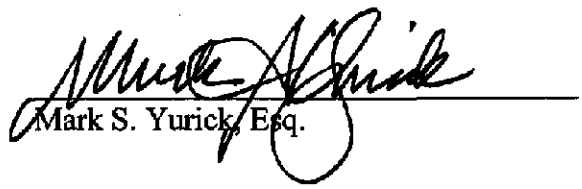
CERTIFICATE OF SERVICE

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 February 18, 2009.



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