

**State of New Hampshire
Before the New Hampshire Public Utilities Commission**

Joint Petition of Hollis Telephone Company,
Inc., Kearsarge Telephone Company,
Merrimack County Telephone Company, and
Wilton Telephone Company, Inc., for Authority
to Block the Termination of Traffic from
Global NAPS, Inc., to Exchanges of the Joint
Petitioners in the Public Switched Telephone
Network

Plaintiffs,

v.

GLOBAL NAPS, INC.,

Defendant

Case No. DT 10-137

INITIAL POST-HEARING BRIEF OF GLOBAL NAPS, INC.

BACKGROUND

As Global has stated in previous briefs to this Commission, this dispute began with Global's receipt of FairPoint's bills for access services, calculated at tariffed rates, which Global promptly protested on the grounds that, under the ICA, its traffic was not subject to tariffed access charges. *See* Opposition of Global NAPS to Motion of FairPoint to Terminate Interconnection (Filed May 25, 2010) at 3, 10; Global's Reply to FairPoint's Request for Assurances, at 1; Global's Bill Protests, Exhibit 3 to Motion of Global NAPS Inc. Pursuant to the Commission's June 9, 2010 Order. Having explained to FairPoint, in a letter concerning FairPoint's bills for traffic terminated in Maine and Vermont, that its invoices were incorrect,¹ Global offered to negotiate an appropriate

¹ Ex. B to Ex. 1 to Motion of Global NAPS in Response to The Commission's June 9, 2010 Order.

VoIP rate for its traffic.² But FairPoint refused to engage in negotiations or to accept less than its total demand for standard access charges on all minutes in all states. Exhibit A to Exhibit 1 to Motion of Global NAPs Inc. Pursuant to the Commission's June 9, 2010 Order. FairPoint does not dispute any of these facts and acknowledges that it has cut off service to Global in Maine and Vermont and is not interested in formal dispute resolution in New Hampshire, where it demands the payment of full legacy rates for its termination of Global's traffic.

Global has pointed to the words of the contract for the resolution of this issue.

I. THE TERMS OF THE CONTRACT DO NOT PROVIDE FOR THE IMPOSITION OF TARIFFED ACCESS CHARGES ON GLOBAL'S VOIP TRAFFIC AND SECTION 8.1 REQUIRES THAT ANY TERMINATION CHARGES IMPOSED ON VOIP TRAFFIC COMPORT WITH THE FCC-SET RATES FOR SUCH TRAFFIC

The governing clauses in this ICA are section 8.1, which establishes the procedure for postponing or determining the rate which internet traffic must pay and section 2.43, which defines internet traffic. "Internet Traffic" is defined in the contract as "[a]ny traffic that is transmitted to or returned from the internet *at any point during the duration of the transmission.*" ICA, §2.43 (emphasis added). The ICA's treatment of internet traffic is contained in Section 8.1, which provides:

Notwithstanding any other provision of this agreement or any tariff: (a) *the parties' rights and obligations with respect to any intercarrier compensation that may be due in connection with exchange of Internet Traffic shall be governed by the terms of the FCC Internet Order and other applicable FCC orders and FCC Regulations*; (b) a party shall *not* be obligated to pay intercarrier compensation for Internet Traffic that is *in excess of the intercarrier compensation for Internet Traffic* that such Party

² *Id.* at 1 (invoking dispute resolution procedures and stating that the billed charges were above those set out in the ISP Remand Order); Global also later offered in an e-mail, to negotiate an appropriate rate for its traffic. See Ex. 2 to Global's Opposition to FairPoint's Motion for Permission to Terminate Services.

is required to pay under the FCC Internet Order and other applicable FCC Orders and FCC Regulations.

(Emphasis added).

As Global explained, the definition of internet traffic includes all traffic which touches the internet, including VoIP, given that it includes any traffic which is sent to or from the internet at any point during its transmission. The NHPUC Staff and Intervenor TDS' lawyer, Mr. Phillips, attempted to disagree with Global's position based on the contention that "returned from or transmitted to" might mean that the traffic would have to be returned from or transmitted to the internet by Global itself. Hearing Trans. at 107-114. But that is not what the contract says. It states that "any" traffic that is "transmitted to or returned from the internet at *any* point during transmission" is "internet traffic." Its focus is the traffic, not the carrier. Contracts must be interpreted according to their plain terms. *Nault v. U.S.*, 517 F.3d 2, 4 (1st Cir. 2008). Thus, there is no room for insertion of any extra words into the definition of "internet traffic," the meaning of which is patent to render the clause irrelevant.

Furthermore, the Intervenor's interpretation, that "returned from the internet" means that the traffic must be sent back to the carrier that sent it to the internet³ makes no sense, given that the words are "returned from" which indicates that the traffic had been on the internet and returned from it (to the PSTN). That is why they follow the words "transmitted to or." If the definition was only meant to encompass traffic was sent to the internet by the same carrier who received it, it would have said "transmitted to *and* returned from." Furthermore, the definition creates a classification for either traffic transmitted to the internet or traffic returned from the internet. No argument can

³ Hearing Trans., at 112, lines 2-8.

be made that Global's traffic has not been transmitted to the internet. Mr. Ladam, of the Staff, expressed confusion in regard to the definition's application to traffic that does not begin or end on the internet, stating that he believed it was a question of termination,⁴ but if that were the case, why would the definition state "at any point during transmission"?

Additionally, the interpretation that the term "internet traffic" and the attendant compensation requirements do not apply to any intermediate carriers makes no sense as an equitable argument. The FCC has ruled that toll charges should not apply to intermediate carriers such as Global unless such applicability is specifically stated:

We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers *and not against any intermediate LECs that may hand off the traffic to the terminating LECs*, unless the terms of any relevant contracts or tariffs provide otherwise.⁵

The Staff also stated that the definition of "internet traffic" could be construed to not cover VoIP. Hearing Trans., at 32, lines 22-23. But the contract belies such an interpretation, especially when the reader considers that Verizon was the drafter of section 2.43 and section 8.1 of the ICA. As the ILEC in the contract, Verizon New England was at the time paying high reciprocal compensation fees for sending traffic to the internet, and hoping to somehow avoid paying those fees pursuant to the contract. See Hearing Trans. at 32, lines 14-15. Additionally, as evidenced by the presence of

⁴ Hearing Trans., at 117, line 10.

⁵ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, FCC WC Docket No. 02-361, FCC 04-97 (released April 21, 2004) (*IP-in-the-Middle*) fn. 92 (emphasis added). Applying this rule the Maryland PSC ALJ stated that Global is not liable for access charges, as an intermediate carrier. See *Proposed Order In The Matter Of The Investigation, Examination And Resolution Of Payment Obligation Of Global NAPs - Maryland, Inc. For Intrastate Access Charges Assessed By Armstrong Telephone Company - Maryland* (December 30, 2009) at 24.

VoIP clauses in some ILEC contracts signed around that time,⁶ many of the ILECs were just beginning to send VoIP and recognizing that the FCC would soon opine on the appropriate compensation for it, so Verizon was clearly aware of it, and wanted to protect itself from paying the same high rates it had been paying for traffic to the internet. Hearing Trans., at 32, lines 29-31, at 33, lines 1-2, at 46, lines 1-14. Global, on the other hand, did not engage in any VoIP business at the time the parties entered into the contract, as it was only a dial-up company. See Hearing Trans. at 32, lines 14-15. As such, Global did not have to pay any charges for internet traffic in New Hampshire. Thus, it had to be Verizon that inserted sections 8.1 and 2.43 into the ICA.

When one understands that Verizon was the drafter of the clauses 2.43 and 8.1, it is clear that the term “internet traffic” was intended to cover all internet traffic, including VoIP traffic, in order to allow Verizon to achieve its pricing strategies of waiting for the FCC to opine on the appropriate compensation for traffic going to or from the internet, instead of having to pay high rates for it. Furthermore, all ambiguities are construed against the drafter,⁷ and thus against the drafter’s successor in interest, FairPoint. When one construes the clause against the drafter, it becomes impossible to read sections 8.1 and 2.43 as covering one type of internet traffic and not another and allowing VoIP to not be treated as internet traffic.

The staff also stressed that the traffic Global sends to FairPoint ends in TDM and is not transmitted to the internet at the end of the transmission; however they do not point to any clause in the contract or any court decision stating that for the purposes of

⁶ See e.g. Global NAPs Illinois Inc.-A&T ICA, available at: https://clec.att.com/clec_cms/clec/docs/cf2e4064d97b41c28d6ebd23949873fd.pdf

⁷ See *U.S. v. Newbert*, 504 F.3d 180, 185 (1st Cir. 2007); *LPP Mortg. Ltd. v. Sugarman*, 565 F.3d 28, 34 (1st Cir. 2009) (citing 2 *Farnsworth on Contracts* § 7.11 at 300-04)).

access charges the only portion of the traffic's transmission that matters is how it ends. If that were the law, Global and CommPartners would not have won recent cases decided by Judge Rakoff⁸ and Judge Robertson.⁹

In addition to arguing with Global about the transmission issues surrounding the definition of internet traffic, the Intervenor expressed some hesitation about the meaning of the word "internet" in the definition. Global's expert explained that "the Internet, with a 'I', what we always think of, is usually defined by application." Hearing Trans. at 129, lines 20-21. He then stated that for the purposes of this situation, "Internet" would be defined based on its connectivity, and stated that a network can be defined as being part of the public internet if it can access that internet:

And, I would say, if any of the switches that that traffic traverses have access to the global Internet or the Internet address space, then that makes those lines reachable, even though we would, I think, or these guys would agree that the voice packets that we're talking about don't go across the public Internet in that instance. So, we're talking about something that's connected to the Internet and could get to the Internet if it wanted to.¹⁰

None of the parties argued with this definition, which establishes that networks like those of Global and its ESPs customers, which employ IP and can (and in some instances do) access the public internet, are part of the internet, and not just private networks.

Global's interpretation of section 8.1 of the ICA met with less argument than did its explanation of the ICA's definition of "internet traffic." As Global explained, the meaning of section 8.1 of the contract, which states that the parties' rights to intercarrier compensation for internet traffic will be determined by applicable FCC orders, is that it

⁸ *Manhattan Telecommunications Corp. (MetTel) v. Global NAPs Inc.*, 2010 WL 1326095 at*2 (S.D.N.Y. Findings of Fact and Conclusions of Law issued March 31, 2010) (holding that access charges cannot be applied to Global's traffic, which Global proved to be VoIP).

⁹ *Paetec Communications Inc. v. CommPartners, LLC*, Civ. Action No. 08-0397, 2010 WL 1767193 at * 3. (D.D.C filed February 18, 2010) (*Paetec*) (holding that access charges are inapplicable to IP-originated VoIP).

¹⁰ Hearing Trans. at 130, lines 3-19.

will apply to internet traffic whatever rate the FCC sets in the future. Hearing Trans., at 101, lines 21-27. This is confirmed in that the section begins with the words “Notwithstanding any other provision of this agreement or any tariff,” clearly indicating that the other rates set out in the agreement and the tariffs will not apply to internet traffic, the subject of that section. Section 8.1 recognizes that the rates which apply to toll traffic are too high, stating that intercarrier compensation for internet traffic can be no more than that which is called for by the FCC. The FCC, in turn, has ruled only generally on the applicability of access charges to VoIP traffic. It has stated:

‘[IP] telephony . . . is exempt from the access charges that traditional long-distance carriers must pay.’¹¹

The FCC has not, however, ruled on what rate should apply to VoIP traffic. This inaction was acknowledged by two federal judges. Judge Robertson stated in a case involving CommPartners, one of Global’s suppliers, that:

The telecommunications industry has been ‘raging for years’ with debate about these arguments, Pl. reply at 7. The FCC, which has had the controversy on its docket for a decade, has been unable to decide it. (citation omitted).¹²

Judge Rakoff, in a case between Global and an independent telephone company in New York, similarly stated:

This action arises out of the complicated legal tangle resulting from the interconnection between traditional telephone service providers and providers of Voice over Internet Protocol (“VoIP”), exacerbated by the years-long failure of the Federal Communications Commission (“FCC”) to act in this area, despite soliciting multiple rounds of comments on proposed rule-making.¹³

¹¹ *IP-in-the-Middle* ¶ 9 (citing *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 F.C.C. Rcd 9610, 9657, ¶ 133 (2001)).

¹² *Paetec Communications Inc.*, at * 3.

¹³ *MetTel*, at *1.

Given that the FCC has not yet stated what rate should apply to internet traffic, but has stated that access charges do not apply to it, the only rate the parties could arrive at under the ICA would be a negotiated rate. Such rate would, in turn, have had to be cost-based, non-discriminatory and procompetitive. *See* 47 U.S.C. 251(c)(2)(D); 47 U.S.C. 252(d)(1)(A)(i-ii). Based on the rates other contracts, both in New Hampshire¹⁴ and in other states¹⁵ charge for VoIP, the appropriate rate would be \$.00045.

FairPoint's only response to Global's analysis has been to cite inapplicable law. In its Objection to Motion of Global NAPs Inc. (FP Obj.), filed on July 14, 2010, FairPoint states, as it did at the hearing, that Global's \$57 million loss in Massachusetts somehow indicates that its reading of clause 8.1 in the New Hampshire contract has been rejected elsewhere in the First Circuit. FP Obj., at 8. That is not true, and FairPoint knows it is not true.

Global's loss (still subject to possible Supreme Court review) was based on a dispute about paying VNXX charges on cross-Massachusetts ISP-bound calls, as Mr. Masuret explained in the presence of the Commission and FairPoint's counsel at the technical hearing. Hearing Trans. at 20, lines 7-23. Such loss was bottomed on an order of the Massachusetts DTE inserting into the ICA a clause directly calling for payment for *originating* access charges on VNXX calls. *Global NAPs Inc. v. Verizon New England*, 603 F.3d 71, 78 (1st Cir. 2010) (" . . . the Massachusetts DTE sided with Verizon. It ordered the parties to adopt an ICA requiring them to pay reciprocal fees for genuinely

¹⁴ Verizon-SBC Amendment §3(a), at 34, available at:
<http://www.puc.nh.gov/Telecom/Filings/Interconnection%20Agreements/DT%2007-007%20SBC%20Long%20Distance-VZ%20amendment%2001-16-07.pdf>

¹⁵ See Verizon North, South-AT&T Illinois ICA, Amendment available at:
<http://www.icc.illinois.gov/docket/files.aspx?no=04-0777&docId=72900> at section 3(a), at 8.

local calls and GNAPs to pay access charges when an ISP was actually located outside the internet customer's local area.”).

The contested issue in that case was whether the FCC’s 2001 ISP Remand Order and its 2008 Second Remand Order preempted the charges imposed by the state commission for the instate segments of calls to the internet. *Id.*, at 76 (“GNAPs argues that the FCC's 2008 Second Remand Order establishes that the 2001 ISP Remand Order preempted intercarrier compensation for all ISP-bound traffic and so preempts the DTE's 2002 decision that GNAPs must pay access charges for interexchange VNXX traffic. We review that preemption claim de novo.”). No VoIP issue was presented or discussed in regard to the charges awarded in that case.

II. GLOBAL SHOWED, AT THE TECHNICAL HEARING, THAT ITS TRAFFIC IS THE SORT OF INTERNET TRAFFIC THAT CANNOT BE BILLED ACCESS CHARGES UNDER THE ICA

Global proved, through its witnesses, that all of its traffic is transmitted to or returned from the internet at some point in transmission, due to the fact that it either begins on the internet or crosses the internet at a later point in its journey. Global presented an expert witness, Dr. Fike, who had testified for Global as an expert on telecommunications in the past and whose status as an expert was not challenged by the staff or the opposing parties. Dr. Fike testified that Global’s traffic falls within the contract’s definition of “internet traffic”:

MR. DAVIDOW: Are you familiar with the definition 2.43 in the contract?

DR. FIKE: This is the agreement between Global NAPs and Verizon?

MR. DAVIDOW: Yes.

DR. FIKE: Internet traffic. Traffic that is transmitted to or returned from the Internet at any point during the duration of the transmission?

MR. DAVIDOW: Yes.

DR. FIKE: Yes.

MR. DAVIDOW: So you've read that and thought about it.

DR. FIKE: I believe I have understanding as far as what the words say. Yes.

MR. DAVIDOW: All right then the question is did you reach a conclusion as to whether Global's traffic comes within that definition? Global's VOIP traffic.

DR. FIKE: Yes I have reached a conclusion.

MR. DAVIDOW: What is the conclusion?

DR. FIKE: That it does fall under the definition.¹⁶

He explained that Global's traffic is "transmitted to or returned from the internet"

at least at some point in its transmission, because:

at least for that portion of the traffic that originates with companies like BroadVoice, Magic Jack and Vonage which is Vonage traffic some Vonage traffic that flows to Global NAPs that traffic is in [IP] IP frames at the time that it leaves the Vonage or Magic Jack customer premise. So it clearly crosses the Internet. Other traffic is in IP form during at least part of its journey or all of its journey and is [*sic*] crosses the Internet during that journey from the originating caller to the company like Transcom then to Global NAPs and it's an [*sic*] IP in that portion.¹⁷

Mr. Masuret, Global's Vice President of Sales, also testified that Global receives calls

from any of its suppliers: BroadVoice, Transcom etc., over the public internet:

MS. FABRIZIO: Is Global NAPs somehow connected to the Internet or is Global NAPs --

MR. MASURET: Yes.

MS. FABRIZIO: And, how is Global NAPs directly feeding into and out of the Internet?

MR. MASURET: So, we receive phone calls, are transmitted to us, --

MS. FABRIZIO: From a customer such as BroadVoice?

MR. MASURET: From a customer like a BroadVoice, like a customer like a MagicJack, like a customer like a Transcom, over the Internet, the public Internet.

MS. FABRIZIO: So, that it --

¹⁶ Hearing Trans. at 42, lines 6-31, at 43, line 1.

¹⁷ Hearing Trans. at 43, lines 6-12.

MR. MASURET: So, we receive calls into our switches, our conversion switches, and that's where Greg [Eccles] works, over the Internet, see what we need to do with them. And, in the case of this, of this, of why we're here today, route them to New Hampshire. Convert them at our point of interconnection with FairPoint to TDM, to hand off to FairPoint.

MS. FABRIZIO: So, it goes to New Hampshire via Internet, and it's converted at the tandem?

MR. MASURET: It comes into our network, the Global NAPs network, as IP, and then we put it over our own backbone, which happens to be ATM, and IP is involved with it as well.

Hearing Trans. at 121-123.

The above-quoted testimony thus conclusively established that Global receives its traffic in IP, meaning that traffic has been transmitted to the internet and/or returned from it. Mr. Masuret also explained that Vonage, who does not deal directly with local exchange carriers, sends its traffic to Transcom, PointOne or CommPartners, who (unlike Global) have sufficient resources to handle the call. Hearing Trans. at 30, lines 1-2, 10-11, 27-31. He stated that Transcom and CommPartners then send that traffic to Global, as Global is certified in states such as New Hampshire and is interconnected with the local exchange carriers there, allowing it to carry the call to the point where it terminates. Hearing Trans. at 29, lines 7-9, 13-21. This established that Global's suppliers who do not originate traffic in IP themselves receive traffic from Vonage, whose calls begin in IP and thus are transmitted to the internet.

As mentioned in Mr. Masuret's testimony, Mr. Eccles, the president of Convergent, the maker of the switches Global and Broadvoice use to receive traffic in IP,¹⁸ testified that "we make a telephone switch that switches calls from a TDM network to an IP network or an IP to IP or IP to ATM." Hearing Trans. at 27, lines 4-8, 30-31.

¹⁸ Mr. Eccles also testified that CommPartners has also used Convergent's equipment. Hearing Trans. at 28, lines 7-8.

This testimony demonstrates that Global and its suppliers specifically purchase equipment that allows them to receive IP traffic; traffic that has been transmitted to the internet.

Further, Broadvoice, one of Global's suppliers, testified that it is a VoIP provider and that it has obtained and sold a number of New Hampshire numbers to subscribers who make calls from those numbers by connecting to the internet, from anywhere in the world. Hearing Trans. at 4, lines 19-20; Hearing Trans. at 6, lines 18-26; Hearing Trans. at 22, lines 19-28. It is clear, based on this testimony, that although some calls Global delivered may have come from New Hampshire phone numbers they could have come from an entirely different location, where they started on the internet. In light of this, it is clear that it would be inappropriate to bill Global for local calls based on the phone numbers those calls came from, as they likely did not originate in New Hampshire and began on the internet.

III. BOTH THE ICA AND FEDERAL TELECOMMUNICATIONS LAW ESTABLISH THE PRIMACY OF THE ICA'S LIMITATIONS OVER THE TARIFFS

Despite hearing the evidence presented by Global and failing to weaken it by cross-examination or refute it with any evidence of its own, FairPoint insisted that Global's VoIP calls are billable under its tariffs.

But the contract does not support such an interpretation. The ICA covers compensation for all internet traffic, as stated above, and thus excludes it from being billed under any tariffs. Section 8.1 of the ICA begins with the words "Notwithstanding any other provision of this agreement or any tariff." This statement acknowledges that the section of the ICA governing compensation for internet traffic supercedes and

excludes the tariff provisions, requiring internet traffic to be billed at the FCC-mandated rate.

Furthermore, Clause 1.2 of the “General Terms and Conditions” in the ICA provides that in the event of conflict, the “Principal Document,” (i.e. the ICA), shall take “precedence” over the tariffs.¹⁹ Thus, the provisions of the contract clearly take priority over the tariffs in places where the tariffs may try to cover the same type of traffic already covered by the ICA, in this case, internet traffic.

The ICA’s intention that VoIP be billed only at FCC-approved rates and not at tariff rates is confirmed by another Verizon contract, which states that VoIP will be billed at a unitary rate of \$.0004 until and unless the FCC rules at some point in the future that access charges apply to VoIP.²⁰ This demonstrates that Verizon understood that the FCC did not approve of access charges being assessed on VoIP and that it would likely set a rate for VoIP that was around \$.0004, if not lower.²¹

In addition to the words of the ICA, federal telecommunications law dictates that parties who have ICAs cannot sue each other under tariffs. In *U.S. West Communications Inc. v. Hix*, 183 F.Supp.2d 1249, 1266 (D.Colo. 2000), the Colorado district court concluded:

The Court finds that allowing a CLEC that has executed an interconnection agreement to use a tariff to supplement or supplant any

¹⁹ Clause 1.2 states in pertinent part: . . . “conflicts among provisions in the Principal Document, Tariffs, and an Order by a Party that has been accepted by the other party, shall be resolved in accordance with the following order of precedence, where the document identified in subsection ‘(a)’ shall have the highest precedence: (a) the Principal Document; (b) the Tariffs

²⁰ Verizon-SBC Amendment, §3(a), at 34, available at: <http://www.puc.nh.gov/Telecom/Filings/Interconnection%20Agreements/DT%2007-007%20SBC%20Long%20Distance-VZ%20amendment%2001-16-07.pdf>

²¹ Another Verizon contract indicates \$.0007 as a unitary rate. See § (1)(a)(iii) in Verizon-MCIMetro Access-New England Fiber Communications ICA, Available at: <http://www.puc.nh.gov/Telecom/Filings/Interconnection%20Agreements/DE%2007-155%20Amendment%202%20MCI%20-%20NE%20FIBER%20SYS%20-%20VZ.pdf>

term, condition, or price that is covered by the agreement VIOLATES the Act. That is because such a provision would eviscerate the provisions of 251 and 252 of the Act which require that the parties negotiate the terms of an interconnection agreement and arbitrate those terms that they are not able to agree to. As one court stated the issue, "permitting CLECs to incorporate non-negotiated tariff provisions into their interconnection agreements bypasses the Act entirely and ignores the procedures and standards that Congress has established." *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157, 1178 (D.Or.1999).

Writing for the Seventh Circuit Court of Appeals, Judge Posner cited *Hix* with approval, and stated that a tariff cannot trump an ICA:

if an interconnection agreement specifies a particular price for a particular service, the seller cannot, simply by filing a tariff, prevent the buyer from challenging the price in the tariff as discrepant with the price in the interconnection agreement.²²

Not only can tariffs not be imposed on services covered by an ICA, but they are also inappropriate for application to information services, as found by Judge Robertson, in the District of Columbia. In *Paetec*, Judge Robertson stated that "information services are not subject to the access charge regime." *Paetec*, at * 2. He then held that IP-originated VoIP undergoes a "net protocol conversion" making it an information service, as was recognized in two previous federal cases, *Southwestern Bell v. Mo. Pub. Serv. Comm'n*, 461 F.Supp.2d 1055, 1081-82 (E.D.Mo. 2006) and *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F.Supp.2d 993, 999-1001 (D.Minn. 2003). *Id.*, at * 3. He thus concluded that:

[b]ecause the access charge regime is inapplicable to VoIP-originated traffic and because a filed tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated, the filed-rate doctrine must yield in this case.²³

²² *Illinois Bell Tel. v. Global NAPs Illinois Inc.*, 551 F.3d 587, 593 (7th Cir. 2008).

²³ *Id.*, at *4.

Given this holding, FairPoint's tariffs could not be applied to Global's traffic which Global proved is an information service. As stated above, Global proved that much of its traffic is VoIP-originated, given that it either begins on the internet with BroadVoice, Reynwood or MagicJack, or it comes from Vonage to Transcom and CommPartners. Hearing Trans. at 43, lines 6-12; Hearing Trans. at 30, lines 1-2, 10-11, 27-31.

Furthermore, Global's witness, Dr. Fike, testified as to the enhancements Global's ESP suppliers make to the traffic they send to Global. He stated that Global's suppliers remove background noise, insert lost packets, offer short codes and insert comfort noise. Hearing Trans. at 78, lines 21-31, at 79, lines 1-26. These features all *transform* the traffic and thus the traffic fits within the TCA definition of "information services" which are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . ." 47 U.S.C. § 153(20), and were described by Judge Robertson as "not telecommunications services, which merely transmit without alteration." *Paetec*, at * 2.

Based on the changes in form and content which the above enhancements bring about,²⁴ Global's traffic also constitutes an "enhanced service" which is defined by the FCC as a service "which employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 67.702(a). Enhanced services also cannot be billed tariffed access charges, as noted by the Supreme

²⁴ See Hearing Trans., at 76-77.

Court in *Nat'l Cable & Telecomms, Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005), where it explained that the FCC has found it “. . . unwise to subject enhanced services to common-carrier regulation given the fast moving competitive market in which they are offered.”²⁵

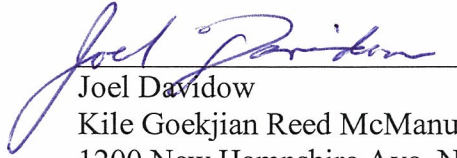
It should also be noted that the classification of Global's services as information or enhanced services also prevents them from being billable under the ICA. The ICA does not permit information or enhanced services to be billed as intraLATA toll traffic, as that billing category can only apply to telecommunications traffic that is unchanged in form and content, as discussed by Global in its Motion Opposing FairPoint's Request for Permission to Disconnect Global, at 10.

CONCLUSION

The evidence Global presented to the NHPUC at the technical hearing proves that its traffic falls within the ICA's definition of “internet traffic” because it is all either “transmitted to” or “returned from” the internet. Global's traffic is thus only billable under section 8.1 of the contract, and not FairPoint's tariffs. As section 8.1 only allows internet traffic to be billed at an FCC-approved rate and the FCC has not yet stated what rate it approves, the only rate at which Global's VoIP traffic can be billed at this time is a rate negotiated between the parties.

²⁵ *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633 (1988) (stating that “the imposition of access charges ...could cause such disruption...that the provision of enhanced services might be impaired”); *See also In the Matter of MTS and WATS Market Structure, Memorandum Opinion and Order*, 97 FCC 2d 682, ¶¶ 77-83 (1983) (noting rate shock that enhanced service providers would experience if full access charges were imposed).

Respectfully Submitted,



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Dated: July 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing to be served on the attached service list.

Executed this day, July 19, 2010.



Victoria Romanenko

State of New Hampshire
Before the New Hampshire Public Utilities Commission

DT 10-137

Joint Petition of Hollis Telephone Company, Inc., Kearsarge
Telephone Company, Merrimack County Telephone
Company, and Wilton Telephone Company, Inc., for
Authority to Block the Termination of Traffic from
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Petitioners in the Public Switched Telephone Network

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