

**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 08-028**

BRIEF OF GLOBAL NAPs, INC.

COMES NOW Global NAPs, Inc. ("Global") and submits its initial brief to the New Hampshire Public Utilities (the "Commission") to the Petition filed by Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company, and Wilton Telephone Company, Inc. (collectively referred to herein as "Petitioners") filed on February 19, 2008. A Pre-Hearing Conference took place, immediately followed by a Technical Conference on May 14, 2008 before this Commission which then set a further "Technical Conference" to discuss issues resulting from Plaintiff's Complaint. Such Session took place on July 9, 2008. At this second "Technical Conference" the Independents produced a number of proposed stipulated facts. Global did not concur with such facts, especially in the absence of having the parties stipulate to its proposed stipulated facts:

III. GLOBAL PROPOSED STIPULATED FACTS

26. Enhanced Service Providers (“ESPs”) are also Internet service providers (“ISPs”).
27. ESP traffic is exempt from access charges.
28. ESP/ISP traffic is jurisdictionally interstate.
29. It is impossible and/or impracticable to separate VoIP traffic as *intrastate* versus *interstate* traffic.
30. Fairpoint has no judicial determination of liability on Global’s part for the amounts it alleges are owed.

As a result, Global requested an evidentiary hearing as early as July 16 by letter, by Motion on July 23, and again in its August 1, filing. In an Order from the Commission dated September 17, the request for an evidentiary proceeding was denied; a briefing schedule was set; responses to interrogatories related to the ownership of, and corporate structure of, Global NAPs, Inc. and certain other entities were compelled; and, the facts upon which briefs would be filed were restricted to those proffered by the Independents.

Significantly, there has been no hearing, no sworn testimony that has been presented for cross examination, no opportunity for Global to present evidence even on the single most salient issue: the nature of the traffic that Global exchanges with Fairpoint (successor to Verizon’s land lines in New Hampshire) which is subsequently sent by Fairpoint to the Independents. In light of the failure of the parties to unanimously stipulate to all facts in this case, there is no stipulation, but merely a Commission determination to exclude evidence and eliminate Global’s opportunity to present its case and subject its opposition to the rigors of cross examination. Global’s filing not only objected to such stipulation, but Global also argued against introduction of all discovery responses

without a hearing.¹ Notwithstanding these limitations, Global is compelled to present certain factual premises in order to establish and explain its legal position(s) in response to Petitioners.

Global is appalled at the Commission's denial of due process. Global continues its objection(s) to the restricted nature of this proceeding; the wholesale acceptance of the Independents' Proposed Stipulated Facts; and, the Commission's unwillingness to have a complete factual record. Notwithstanding these continuing objections, Global files this brief in opposition to the Independents' claim(s).

1. The Independents assert that the traffic at issue originates within New Hampshire and terminates within New Hampshire and thus is indisputably intrastate in nature.

An assertion is all that the Independents can make with respect to the traffic at issue. There is no evidence in the record regarding the traffic at issue. Global has not had any opportunity to cross-examine witnesses regarding traffic studies offered by the Independents. Nor were the traffic studies part of evidence introduced, nor were they discovery responses that the Commission, in its September 17 Order deemed admitted. As such, there is no evidence on the traffic and thus no factual predicate upon which the Commission can make a determination – neither of any liability, nor, certainly to permit blocking traffic without this prior determination of liability.

The Commission's procedure eliminating an evidentiary proceeding has made it impossible for the Commission to have a full and complete record upon which to base any ruling against Global. However, the Commission is not precluded from ruling *for* Global. This is because the traffic at issue is the same type of traffic that the New York Public Service

¹ See Global Response to Proposed Stipulation of Facts at para 24 (Aug. 1, 2008). Parties agree that all discovery responses and exhibits attached thereto shall be admitted into evidence without further hearing.
Response:
Deny. Global believes that only a hearing will provide the requisite due process required in the determination of whether or not the Commission should impose the drastic action of blocking the exchange of traffic between carriers, especially in the absence of a finding of liability by a court of original jurisdiction.

Commission determined to be from Enhanced Service Providers and thus not subject to access charges. Thus, even without a fact-based determination, the Commission can rule on the precedent of the New York Commission's investigation of the traffic.

The New York Public Service Commission Staff's investigation revealed that "... most, if not all, the traffic GNAPs sends [to the TVC network] for termination is nomadic VoIP."²

This statement is of critical importance for at least two reasons. First, because in the absence of other testimony, it can and should be relied upon as the basis for any decision by this Commission. Second, because it indicates clearly that the traffic involved is from Enhanced Service Providers and even goes so far as to indicate what type of traffic it is, *i.e.*, "nomadic". This classification of traffic as "nomadic" is important because it indicates the extremely high probability that not all of the traffic terminated by Global to Fairpoint is sent and received entirely within New Hampshire. As a result of the traffic being at least partially nomadic, the New York Commission ruled that (a) the traffic was under the sole and exclusive jurisdiction of the FCC, and (b) no intrastate access charges could be imposed. *Id.*

However, the classification of traffic as nomadic, as important as it is, is not the sole determinant as to why the FCC has jurisdiction (rather than the Commission). Just as an ISP call did not need to traverse state boundaries to be declared interstate, an ESP call does not need to traverse state boundaries to be declared by the FCC to be jurisdictionally interstate. Thus, by declaring the traffic to be VoIP – irrespective of whether it was interconnected VoIP or nomadic

² *TVC d/b/a Tech Valley Communications v Global NAPs, Inc.*, NYPSC Case 07-C-0059 at 14 (March 20, 2008), Attachment 1.

VoIP is enough to remove the Commission's jurisdiction and for the FCC to assume such jurisdiction over this interstate traffic.³

Notwithstanding the paucity of available evidence, the Independents' pleadings are so bold as to ignore the Commission's jurisdictional limitations. At paragraph 14 (C. Jurisdiction) the Independents state they want to block calls **without distinction between interstate and intrastate traffic**. The Independents cannot deny, nor have they denied, that a substantial portion of the traffic originated from outside New Hampshire.

Aside from the characteristics of the traffic that subject it to the jurisdiction of the Federal Communications Commission's (the "FCC"), what matters for the purpose of determining jurisdiction is where the end points of a communication are located. The FCC has stated that "both court and [FCC] decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications." *In the Matter of Teleconnect Company v. The Bell Telephone Company of Pennsylvania*, 10 FCC Rcd 1626, 1995 FCC LEXIS 966 (1995); *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997). *See GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 17 (1998) ("the [FCC] traditionally has determined the jurisdictional nature of communications by the end points of the communication"). *See also Federal State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9173 (1997) (traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession or the District of Columbia"). If it was permitted to do so in an evidentiary proceeding,

³ See *Vonage Holdings Corp. v Nebraska Public Svc. Comm., et al.*, Case No. 4:07CV3277, U Dist. Ct. – NE at 8 (March 3, 2008) (Discussing the impossibility of separating mixed inter and intrastate traffic and FCC exerting exclusive jurisdiction as a result of such impossibility), Attachment 2.

Global could demonstrate that the originating end points of the subject traffic are to a significant degree from outside of New Hampshire. Significantly, the Independents certainly have filed tariffs with the FCC concerning the terms, conditions and rates of interstate service, thus conferring jurisdiction of such traffic with that agency – not with the New Hampshire Commission.

Thus, at a minimum, even accepting *arguendo* the Independents’ other arguments regarding the traffic at issue, this Commission lacks substantive jurisdiction to declare the rates, terms and conditions of interstate access service. The FCC has exclusive jurisdiction over interstate communications services. *See, e.g.*, 47 U.S.C. § 151 (creating the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio”); 47 U.S.C. § 152(a) (“the provisions of the [Communications Act of 1934] shall apply to all interstate and foreign communications by wire”); 47 U.S.C. § 201(b) (requiring all charges for interstate and foreign common carrier communications services to be “just and reasonable”); 47 U.S.C. § 203(a) (requiring carriers to file tariffs specifying those charges with the FCC); *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22412, ¶ 16 (2004) (stating that the FCC has “exclusive jurisdiction over ‘all interstate and foreign communication’”); *Mobile Telecommunications Technologies Corp.*, 6 FCC Rcd 1938, 1941 n.6 (1991) (“[u]nder the Communications Act, states may not engage in tariff regulation of interstate services ... [t]he [Communications] Act grants [the FCC] exclusive authority to regulate the charges and services of interstate common carriers”). *See also, e.g.*, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1516-17 (2007) (noting that Title II of the Communications Act of 1934 sets up a “traditional regulatory system” in which the FCC “would determine a rate’s reasonableness”); *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992)(“[t]he FCC has

exclusive jurisdiction to regulate interstate common carrier services including the setting of rates.”); *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (“[i]nterstate communications are totally entrusted to the FCC”); *AT&T and the Associated Bell System Cos. Interconnection With Specialized Carriers*, 56 FCC 2d 14, 20, ¶ 21 (1975) (“the States do not have jurisdiction over interstate communications”), *aff’d*, *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977) (*per curiam*).

But, importantly, if there was evidence on this issue, it is probable that the subject traffic is—even when measured using traditional voice telephony NXX comparisons of called and calling parties—to a large degree “interstate”. Recent pronouncements in this area prevent the Commission making any determination which affects the traffic, whether it is with respect to opining on any intercarrier compensation or whether it is to block the continued flow of traffic. This was made clear in the Nebraska Vonage decision which was distributed by Global at the Preliminary Hearing.⁴ Essentially, as with in-bound ISP traffic, it is equally difficult to determine the jurisdiction of ESP traffic.

Moreover, 47 U.S.C. § 152(b)(1) – which implies state jurisdiction of “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire” – merely seeks to preserve state power to regulate certain matters in connection with intrastate communications service and cannot be construed as empowering state utility commissions to nullify effective federal tariffs for interstate service nor to confer any power upon any state to regulate any charge for interstate communications service. *Chesapeake & Potomac Tel. Co. of Md. & American Tel. & Tel. Co.*, 2 FCC 3528, ¶ 28 (1987). Section 152(b):

deprive[s] the [FCC] of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of

⁴ See *Id* at 7 (discussing FCC jurisdiction of traffic) and at 8 (discussing “impossibility exception”).

intrastate communication, that in effect encroaches substantially upon the [FCC's] authority under sections 201 through 205.

North Carolina Utilities Commission v. United States, 537 F.2d 787, 793 (4th Cir. 1976). State regulation that “encroaches substantially” upon FCC jurisdiction occurs when state utility commissions purport to declare the terms, conditions and rates of service governed by FCC tariffs.

As reasoned in the Nebraska decision, to the extent that intrastate and interstate transactions cannot be separated in a given proceeding, the execution by Congress of its power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective control of interstate commerce by the Congress incidentally controls intrastate commerce. Where interstate and intrastate commerce are served by the same instrumentalities, and it appears that state regulation applied directly to intrastate business may in fact burden interstate commerce, such state regulation must yield to the federal power to assure adequate interstate service.

2. The Independents assert that the traffic at issue shows a variety of originating and terminating telephone numbers which is typical of voice traffic compared to the single or limited number of end-user customers that would be typical of ISP-bound traffic.

Again, in the absence of evidence, these remain merely unsupported assertions. However, Global the Commission deserves some counter against which to weigh these assertions. First, the Independents may be confusing the called and calling parties. In the instance where one of their end-users calls a Global-served ISP, there are a limited number of end-user customers as it would be implausible for an end-user to subscribe to multiple Internet service providers. Moreover, as broadband expands, there are also less calling parties placing such calls which may lead to the conclusion that there is a pattern and a conclusion that can be drawn. Such simplification ignores the

vast distinction between the type of traffic and Global's customers versus the traffic and customers typical of an incumbent LEC.

The Independents have a basic misunderstanding of the function of calling party numbers where ESPs are concerned. Numbers are necessary because carriers wouldn't carry a communication without CPNI. That aside, there is a disjunction when trying to apply traditional telephony NXX comparisons using the NXXs of called and calling parties to determine jurisdiction to ESP traffic. This is precisely why the FCC has declared this traffic to be subject to its jurisdiction. Again, the traffic that we receive from ESPs is transported in ATM format. It is only because Verizon/Fairpoint and the Independents require us to use time-division-multiplexing ("TDM") format that Global is forced to step our superior packet-based switching down from ATM format to the archaic TDM format. This compulsion to convert traffic to TDM makes any claims the Independents assert of "IP-in-the-middle" absurd.

The fact that traffic must be handed off to Fairpoint as time division multiplexing ("TDM") does not change the treatment of traffic. "[A]ny entity that actually provides enhanced services should be treated as an 'enhanced service provider,' regardless of any other services that entity might provide." In the Matter of Northwestern Bell Telephone Company, Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 2 F.C.C.R. 5986, 2 FCC Rcd. 5986 (rel. October 5, 1987), ¶ 18.⁵ See In the Matter of WATS Related and Other Amendments of Part 69 of the Commission's Rules, 86-1, 3 FCC Rcd. 496 (rel. February 1, 1988). Global is handing the call off in TDM to Fairpoint because that is the only way Fairpoint will accept the call. It would be patently unfair for a carrier to be "penalized" by having to pay access charges merely because Fairpoint requires the call to be in

⁵ In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling and WATS Related and Other Amendments of Part 69 of the Commission's Rules, *Memorandum Opinion and Order*, CC Docket No. 86-1, 7 FCC Rcd. 5644 (rel. September 4, 1992), vacated as moot the cited decision because the service configurations at issue were never implemented.

TDM for traffic exchange. Indeed, Global is taking an extra step by being compelled to translate the traffic from the ATM protocol which it transports traffic in on its own network to the compelled TDM protocol. The fact that a transmission is in TDM is not dispositive: “When VoIP is used, a voice communication traverses *at least a portion of* its communications path in an IP packet format using IP technology and IP networks.” *AT&T Decision*, ¶ 3 (*Emphasis added*).

However, even if one wanted to ignore the FCC’s mandates, (as Global believes California did), our traffic is especially difficult to measure using traditional means. Global has already had our traffic examined in particularity by the New York PSC. Not only is our traffic coming to us solely from ESPs, but, as previously discussed, they determined, it is majority nomadic. This means that there may or may not be any significance to the NXX code being used to the location of the calling party. Indeed, calls are often placed using laptop computers – which may be, for example, from my home in Pensacola, Florida or from Concord, New Hampshire and have a Boston Massachusetts number assigned to it. Or, a call may have been placed from a Verizon wireless card with an NXX assigned to anytown USA, or instead using wired Internet access or placing the call using the hotel’s facilities from another country.

There are other distinctions between the traffic that this Commission typically regulates as carried by the wireline carriers. Global is not an analog switched carrier operating like other CLECs. Global uses soft switches to move data packets – *i.e.*, packet switching - in a non-linear fashion to the end destination. Global receives outbound traffic from ESPs, transports the traffic in asynchronous transfer mode (“ATM”), and hands that traffic to Verizon/Fairpoint.

These differences in Global’s network topology and its customers are not academic they are extremely important and show exactly why the Nebraska decision indicating it is, from a practical perspective, impossible to determine the jurisdiction of the traffic. That is why the New

York PSC decided that it could not apply an Independent LEC's intrastate access charges against Global. It is probably also why the Court in Florida decided that rather than approving an Independent's access charges, it should defer any ruling until such time as the FCC has issued additional guidance.⁶ The common theme is that, whether it is Minnesota, Nebraska, Florida or New York, imposition of access charges is not a solution.

3. The Independents assert that the end-users' numbers are served by a variety of LECs and thus it is unlikely that the traffic is in IP-format and contentions to the contrary lack legal or factual support.

Unfortunately, in the absence of being able to present any evidence on this topic, it is impossible to say which LECs are providing what services, just as it is certainly impossible to draw conclusions from the Independents' unsupported hypotheses. Suffice it to say that Global contends that the traffic it receives for termination to the Independents is solely from ESPs as the New York Public Service Commission's determination discusses at length. The Independents imply that in the absence of traffic being in IP-format, there can be no ESP. This assertion has not been supported, nor can it stand in the face of reason. An ESP is not so narrowly defined as to be entirely dependent on whether or not traffic is in IP-format.

Rather than rely on assertions from the Independents, Global suggests reliance on the FCC's regulations to describe how ESPs are end users that provide enhanced services. 47 C.F.R. 64.702(a) states that the:

term *enhanced service* shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ 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

⁶ *Florida Digital Networks, Inc. d/b/a FDN Communications v Global NAPs, Inc.*, Case No. 48-2006-CA-000788-0 Fl 9th Cir. (May 5, 2008), Attachment 3.

information. Enhanced services are not regulated under title II of the [Communications] Act.

ESPs include Internet Service Providers (“ISPs”). Any conclusion by this Commission that its jurisdiction is “not altered as a result of whether the traffic . . . is or is not ESP traffic delivered for termination or Internet Protocol-enabled (“IP-enabled”) traffic” is mistaken and the Independents request to ignore the traffic’s jurisdiction is foolhardy. Such a conclusion is contrary to precedents established by the FCC and the courts and as a result, this Commission lacks substantive jurisdiction to determine that access charges are due for the subject traffic.

4. The Independents Ignore the Jurisdictional Issues and Ask This Commission To Do the Same.

As discussed above, the criteria to determine what is “enhanced traffic” is a function of federal – not state – law. Moreover, when established as enhanced traffic, there is no doubt that intercarrier compensation for this interstate traffic is also a function of federal law. Indeed, the issue of whether or not the subject traffic is subject to any access charges (be they intra or inter state) or whether the traffic is exempt from such charges, is also a matter of federal law. And, certainly, to the extent that traffic is shown not to have geographical end-points solely within New Hampshire, irrespective of even they type of traffic (*i.e.*, traditional voice telephony or VoIP information services), the traffic is subject to federal regulation. Thus, at least part, if not all, of the traffic at issue requires a discussion of federal versus state jurisdiction.

Since 1983 the FCC has consistently held that access charges may not be applied to traffic that is delivered from ESPs. *See, e.g., First Reconsideration of 1983 Access Charge Order (MTS and WATS Market Structure)*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, CC Docket No. 87-215, 3 FCC Rcd 2631 (1988); *Access Charge Reform Order*, First Report and

Order, 12 FCC Rcd 15982 (1997). It is logical that the exemption as applied to ESPs also does not result in the imposition of access charges on carriers that receive ESP traffic. Otherwise, to apply the ESP exemption to the ESP and not to the local exchange carrier that is receiving that traffic would invariably result in cost recovery of the access charges from the ESP, thus removing any benefit that such traffic enjoys by operation of the exemption. Clearly the FCC's intent is for the traffic to enjoy the exemption from access charges. If a carrier were to bear access charges, it would, of necessity, be forced to pass on those charges, thus burdening the traffic and effectively removing the exemption.

Although the FCC is reviewing its Intercarrier Compensation plans, the FCC continues to reinforce the ESP exemption. The FCC, in exempting ISP traffic from access charges, stated:

'Information access' was meant to include all access traffic that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 F.C.C.R. 9151, CC Docket No. 96-98, Order on Remand and Report and Order, FCC 01-131, 2001 WL 455869 (F.C.C.), 16 F.C.C.R. 9151, 16 FCC Rcd. 9151 (rel. April 27, 2001) ("ISP Remand Order"), ¶ 44, *remanded but not vacated*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Likewise, the FCC has observed that "long distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption." *Developing a Unified Intercarrier Compensation Scheme*, Notice of Proposed Rulemaking, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001), ¶ 6.

5. Unless and Until A Distinction Can Be Made Between What is Interstate and What is Intrastate Traffic, Permitting "Blocking" Would Violate Federal Law.

Even if, *arguendo*, this Commission found VoIP to be not interstate, but at least partially intrastate, traffic, a decision imposing liability on Global is impossible given the lack of evidence to determine what is or is not interstate traffic. Clearly, blocking Global's interstate traffic is beyond the Commission's authority to impose. First and foremost, the traffic which the Petitioners seek to block is jurisdictionally interstate.⁷ This is because it is practically impossible to separate the subject traffic between inter and interstate, especially when the "majority" of it is nomadic, as the New York Commission declared and thus not able to be measured using traditional NXX comparisons. Indeed, Verizon filed an ex parte pleading just this past week indicating that it wanted a unified rate for traffic (such as Global's) of \$.0007 per minute of use, consistent with federal intercarrier compensation rules instead of applying access charges both because of the regulatory uncertainty associated with compensation determined on a state-by-state basis and because it was impossible to measure the traffic using traditional NXX to NXX measurements.⁸

Further, the Petitioners' request for blocking traffic is extraordinary and without justification in the law, which favors interconnection. *See* 47 U.S.C. § 251. To order blocking would be to go beyond even the powers of courts, which lack the authority, in awarding a judgment for damages, to at the same time peremptorily direct the taking of property if the judgment is not paid.

No law has been violated by Global and the Petitioners have failed to point to any statute or rule that would justify the ordering of blocking. Instead, Petitioners assert that the Commission has "general supervisory authority over public utilities and their plant in New Hampshire."⁹ It then urges the Commission, solely under this general supervisory authority, to take action which is tantamount to a taking – blocking the exchange of traffic. Moreover, as discussed, it asks this be done without a finding of liability and that it extend this power beyond its jurisdiction and extend it

⁷ See *Vonage Nebraska* at 7.

⁸ See Verizon Ex Parte (Sept. 23, 2008).

⁹ Petition at ¶14.

to jurisdictionally interstate services. And, it requests this be done in spite of the Commission's clear duty under the Telecommunications Act to "promote" competition rather than terminate it. Accordingly, the Request for Expedited Declaratory Ruling should be dismissed for lack of jurisdiction, because it is anti-competitive, because there is no finding of liability and/or because such drastic action is directly counter to the Telecommunications Act's mandate to promote competition.

6. Petitioners Have Failed to Prove Applicability of Intrastate Access Charges.

Petitioners requested relief is based on a finding that Global is liable to them for intrastate access charges, *i.e.*, because Global owes sums billed to it, the Commission can take drastic efforts of blocking traffic to protect the Petitioners. As an initial matter, no liability has been established on the facts. Clearly this is the case as there are no facts on the record. But even should the Parties presentations be accepted as evidence, there still would not be sufficient evidence upon which to base a finding of liability.

All of the documents upon which the Petitioners may¹⁰ rely to purportedly demonstrate the application of access charges to the subject traffic were reportedly provided to the Petitioners by Fairpoint. Consequently, the testimony that is based on such documents, as well as the documents themselves, would be hearsay; however, the objections by Global to the Petitioners' evidence¹¹ are not premised merely on the fact that the documents and the resulting testimony are Fairpoint's out-of-court statements that the Petitioners proffer for the truth of those assertions. Rather, the Petitioners' evidence is uncorroborated hearsay of the kind that is *most* prejudicial to the party against whom it is proffered, *i.e.*, Global, and *least* probative as to the

¹⁰ No testimony has been introduced and accepted into the record; no opportunity to investigate the veracity or accuracy of any facts has been afforded to any Party.

¹¹ The documents referred to include purported traffic studies of Global's traffic.

issues in this case. Even if proffered, the evidence if introduced, would be, as discussed below, is *self-contradictory* and thus provides no reliable, probative and substantial evidence for review.

7. This Commission Should Not Rule On Interstate Traffic, But Instead Refer The Independents' Complaint To The FCC.

As has been discussed, all or by any measure substantially all, of the subject traffic is interstate jurisdictionally. Pursuant to its conferred powers, the FCC is conducting a number of proceedings to determine appropriate intercarrier compensation. Congress' clear intent is to have internet enabled traffic a matter of federal policy and subject it to federal regulation. In the *AT&T Decision*, as well as in the *ISP Remand Order* and *Vonage*,¹² the FCC deferred "questions regarding the regulatory obligations of providers of IP-enabled services", to its *IP-Enabled Services Proceeding*, in a manner fulfilling Congress' directions "to promote the continued development of the Internet" and to "encourage the deployment" of advanced telecommunications capabilities.¹³ The FCC's policies consistently have called for the FCC, not state commissions, to determine the issues of state regulation and access charges for enhanced services.¹⁴ In *Vonage*, the FCC stated that

the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation. We have acknowledged similar 'intrastate' communications capabilities in other services involving the Internet, where for regulatory purposes, treatment as an interstate service prevailed despite this 'intrastate' capability.

Id., at ¶ 22. (Emphasis added.) Accordingly, the FCC in *Vonage* determined that the attempts by states to exercise jurisdiction:

¹² *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22,404 (2004).

¹³ *Vonage*, at ¶ 2, quoting 47 U.S.C. § 230(b) (1) and 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996).

¹⁴ Georgia also has recognized the importance of national policymaking in this area, by removing VoIP and broadband access from Commission jurisdiction. See O.C.G.A. § 46-5-202.

were inconsistent with the FCC's deregulatory policies, and that preemption was consistent with federal law and policies intended to promote the continued development of the Internet, broadband and interactive services. Divergent state rules ...could impede the rollout of such services that benefit consumers by providing them with more choice, competition and innovation.¹⁵

Again, the FCC, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities."¹⁶ As recognized by the FCC, the problem is that "multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states."¹⁷ In order to avoid such a result, this Commission should refer this Complaint to the FCC to make further determinations with a more complete factual record. Accordingly, the Commission should defer to the FCC's jurisdiction.

IV. Conclusion

For the reasons stated, the Commission lacks substantive jurisdiction, and the Petitioners have failed to demonstrate that they are entitled to recovery of intrastate access charges. Further, it is clear that some, if not all, of the subject traffic is not subject to state, but rather to federal, regulation. Global NAPs has been denied its opportunity to present material facts and there are insufficient sworn facts on the record upon which a decision can be based. In order to avoid the potential for a jurisdictional conflict between federal and state regulation of this traffic, and in order to have a factual record upon which reasoned determinations may be made, this Complaint should be referred to the FCC for further action.

¹⁵ "FCC Finds Vonage Not Subject to Patchwork of State Regulations Governing Telephone Companies," Press Release, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254112A1.pdf

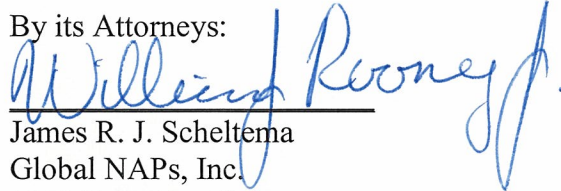
¹⁶ *Id.* at ¶ 1.

¹⁷ *Id.* at ¶ 14.

Respectfully submitted this 29th day of September 2008.

GLOBAL NAPS, INC.

By its Attorneys:

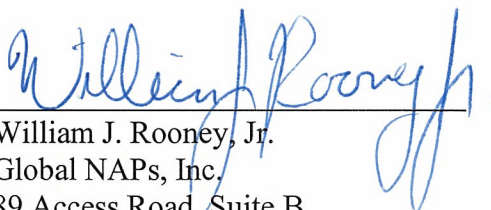


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CERTIFICATE OF SERVICE

I, William J. Rooney, Jr., hereby certify that on September 29, 2008, I caused a copy of the foregoing to be served on the attached service list by Email.



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

DT 08-028

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SERVICE LIST

Original + 7 hardcopies + E-mail:

Debra A. Howland
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