STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 08-028

Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc. Joint Petition for Authority to Block the Termination Of Traffic from Global NAPs

Reply Brief of Joint Intervenors

This reply brief is submitted on behalf of Granite State Telephone, Inc., Dunbarton Telephone Company, Inc., Northland Telephone Company of Maine, Inc., Bretton Woods Telephone Company, Inc., Dixville Telephone Company and Northern New England Telephone Operations LLC, d/b/a FairPoint Communications-NNE ("FairPoint") (collectively, the "Joint Intervenors") in response to the "Brief of Global NAPs, Inc." dated September 29, 2008 (the "Global NAPs Brief"). The Joint Intervenors continue to support the relief requested by Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company, Wilton Telephone Company, Inc. (the "Joint Petitioners").

The Global NAPs Brief makes a variety of claims that can be reduced to three basic categories: (i) The Commission's procedures in this Docket are flawed; (ii) the traffic at issue is interstate traffic over which this Commission lacks jurisdiction; and (iii) the traffic at issue is exempt from access charges. Global NAPs is wrong on all counts.

1. The Procedures in this Case Fully Conform to Due Process Requirements.

The due process claims of Global NAPs are completely without merit and should be rejected. Global NAPs may be "appalled" at the procedural course of this case (Global NAPs Brief, p. 3); the other parties to this case are appalled at the conduct of Global NAPs.

Based on data responses by Global NAPs and representations made by Global NAPs at technical sessions, the parties crafted the following stipulated fact:

> "Global NAPs customers represent in their contracts with Global NAPs that they are Enhanced Service Providers ("ESPs"); however, Global NAPs has not independently verified and does not independently verify the nature of the traffic being delivered to the Global NAPs affiliated companies."

In subsequent letters, counsel for Global NAPs admitted this fact. In response to the Commission's Secretarial Letter dated July 30, 2008, Global NAPs filed an "Objection to Stipulation of Facts" dated August 1, 2008 in which it responded to this stipulation as follows:

> "Admit with explanation. Global has no legal obligation to verify it's [sic] customers [sic] representations: Global honors the integrity of its customers [sic] statements."

The Commission fully afforded Global NAPs the opportunity to contest this factual statement and provide a description of the evidence that would support its objection. Global NAPs admitted its truth. In addition, in response to Stipulated Fact No. 13 attached to the Global NAPs objection that "Global NAPs does not know the original format of the traffic it receives," Global NAPs responded in relevant part:

> "If this means from the ESP's customer? Agreed."

Global NAPs now asserts that it knows the nature of the traffic traversing its network after all. The Global NAPs Brief states: "Not only is our traffic coming to us solely from ESPs, but, as previously discussed, [the New York Public Service Commission] determined, it is majority nomadic." Brief of Global NAPs, p. 10. Global NAPs demands the opportunity to present sworn testimony 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." Brief of Global NAPs, p. 2. This position taken in the Global NAPs Brief is a repudiation of the answers that Global NAPs presented above to the Commission, namely that, other than a representation in a service contract, Global NAPs has no idea what this traffic is. The Commission directed Global NAPs to provide a straight answer and evidence. Apparently, what the Commission received was obfuscation.

As to the Stipulated Fact No. 18 that "FairPoint-NNE terminates the traffic at issue in this proceeding the same way it terminates a traditional voice call, that is, through meet point billing with the independent ILEC," Global NAPs purported to deny this statement but provided no evidence on which it based its objection. Accordingly, as expressly specified in the July 30, 2008 Secretarial Letter, this fact is deemed admitted.

In short, Global NAPs does not know the nature of the traffic that it is carrying. What it does know is that it delivers this traffic to FairPoint (pursuant to its interconnection agreement) and then to the Joint Petitioners in the format of a traditional voice call with an originating carrier number and an originating NXX code. The relevant switching and billing equipment treats this traffic as access, and this treatment is the means by which Global NAPs is able to have such traffic terminated at all. What Global NAPs does not do is pay for this service that it receives.

In adjudicative proceedings before this Commission, the New Hampshire Supreme Court has described the applicable due process right as follows:

> "Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution, N.H. CONST. pt. I, art 15, guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner. [Citation omitted.] A fundamental requirement of the constitutional right to be heard is notice of the impending action that affords the party an opportunity to protect the interest through the presentation of objections and evidence."

Appeal of Concord Steam Corp., 130 N.H. 422, 427-428 (1988).

In this case, there is no question that Global NAPs has received notice of the requested action, i.e., to allow the Joint Petitioners to terminate access services that Global NAPs refuses to pay for. The parties worked to develop a stipulated set of facts to govern the Commission's decision. Global NAPs then repudiated the effort. When confronted and directed to state why it objected to these factual statements and to identify evidence that would support its objection, Global NAPs failed to follow this direction. Instead, Global NAPs purported to require other parties to agree with its legal position as a precondition for Global NAPs' agreement to the stipulation. A meaningful opportunity to be heard does not equate to a frivolous right to delay. An evidentiary hearing is not required when there are no genuine issues of material fact. Global NAPs is being provided with a full opportunity to express its legal position as it relates to the relevant facts. There is no due process violation here.

Global NAPs then claims that the Joint Petitioners are not entitled to relief because they have not presented evidence as to the traffic that Global NAPs presents to their networks. This is incredible. Global NAPs says that it does not know what this traffic is. For example, in their first set of data requests, the Joint Petitioners specifically propounded the following request to Global NAPs:

> "TDS:Global-2: Please identify the facts and criteria that GNAPs relies upon to establish the status that an ESP is exempt for the payment of terminating access charges for traffic that originates in time division multiplexing ("TDM")."

Global NAPs responded as follows:

> "Reply: Global makes no such determination independently, nor could it because Global does not know the format in which traffic is originated. Instead it relies on its customers' affirmations regarding the traffic which is buttressed by court determinations such as that relating to Transcom."

Global NAPs simply takes this traffic, the origination of which Global NAPs says it does not know, and sends it to the Joint Petitioners as toll traffic. Global NAPs would then impose on carriers who receive this traffic the obligation to determine its origin in order to collect tariffed access charges. There is no such obligation. The Joint Petitioners are entitled to receive access payments for traffic presented to them as access under such a circumstance.

Global NAPs has had a full opportunity to be heard. There are no genuine issues of material fact. Global NAPs has been provided a full opportunity to present its legal position on these facts. The Joint Petitioners are entitled to the relief that they seek.

2. This Commission Has Jurisdiction over the Traffic at Issue in this Case.

With regard to its claim that the traffic at issue is largely, if not exclusively, interstate, Global NAPs uses as its centerpiece that decision of the United States District Court for the District of Nebraska in Vonage Holdings Corp. v. Nebraska Public Service Commission, a copy of which is attached to the Global NAPs Brief. In that case, the District Court held that the State of Nebraska was without authority to impose state universal service funding obligations on the nomadic VoIP traffic carried by Vonage. The Court reasoned that this traffic was entirely interstate and the subject of preemption by the FCC.

The Nebraska case should be afforded no weight by this Commission. First of all, as a matter of precedent, this decision is not binding in the District of New Hampshire. Moreover, it is of no persuasive value here. It is the subject of an appeal pending before the United States Court of Appeals for the Eighth Circuit, and the FCC (the agency alleged to have preempted the state action at issue) has now filed a brief in the Eighth Circuit which is included in the Appendix to this Reply Brief. In its brief, the FCC asserts that its decisions do not have the preemptive effect determined by the District Court and that there readily are ways to apply state universal funding provisions to VoIP traffic. Since the FCC asserts that the Nebraska decision was wrongly decided, it should be given no weight here.

The effort of Global NAPs to send everyone off to the FCC is just another delaying tactic. While the FCC has preserved the option of issuing declaratory rulings, it has not done so on this issue, and there is case law to the effect that the FCC does not act as a collection agency for access charges. See Quest Service Corporation v. Federal Communications Commission, 509 F. 3d 531 (D.C. Cir. 2007) in which the Court stated:

> "Disputes over collection of tariffed charges often proceed before state agencies (when the charges are wholly intrastate) or in federal district court, and these disputes can only sometimes come before the [FCC] under 47 U.S.C. §§ 207 and 208 because the [FCC] does not entertain actions for unpaid tariffed charges. See In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt form Access Caharege, 19 FCC Rcd 7457, 7471 ¶ 223 n. 93 (2004). ("[T]he [FCC] does not act as a collection agent for carriers with respect to unpaid tariffed charges.").

509 F. 3d at 537.

The run-around would not stop there. If the parties pursue Global NAPs in court, presumably Global NAPs will argue that the question involves its interconnection agreement with FairPoint, which must be addressed in the first instance in the relevant ***state*** commission. See Illinois Bell Telephone Company v. Global NAPs Illinois, Inc. (N.D. Ill. 2007) (Appendix, p. 38); Ohio Bell Telephone Company v. Global NAPs Ohio, Inc. (S.D. Ohio, 2008) (Appendix, p. 44); Pacific Bell Telephone Company v. Global NAPs California, Inc. (C.D. Calif. 2007) (Appendix, p. 55). In eyes of the various Global NAPs entities, there is no correct forum to bring a claim against them. Based on the interconnection agreement between Global NAPs, Inc. and FairPoint and the intrastate access tariffs of FairPoint and the Joint Petitioners, this matter is properly pending before this Commission for decision.

Very importantly, in the Pacific Bell case, following the District Court's order, the matter proceeded before the California Public Utilities Commission ("CPUC"). On September 22, 2008, the CPUC issued its order on facts virtually identical to this case rejecting the jurisdiction argument, rejecting the "ESP Exemption" argument and determining that Global NAPs is required to pay for the access services it receives. In that case, Global NAPs has been ordered to pay in excess of $18,000,000. A copy of that decision is included in the Appendix to this Reply Brief.[1]

3. Global NAPs is not Relieved from Paying for Access Services by the So-called "ESP Exemption".

The bald assertions by Global NAPs that the FCC has already determined that Global NAPs' traffic is entitled to the so-called "ESP exemption" are simply not true. The relevant First Circuit and Eighth Circuit decisions are discussed in the initial brief of the Joint Intervenors, and those arguments will not be repeated here. Additionally, in the FCC order opening the IP enabled services rulemaking (*IP-Enabled Services*, 19 FCC Rcd 4863 (2004)), the FCC explicitly states in paragraph 61: "By seeking comment on whether access charges should apply to the various categories of service identified by the commenters, we are not addressing whether charges apply do or do not apply under existing law." The FCC reiterates in its brief to the Eighth Circuit that it has not acted to classify IP-enabled service as a telecommunications service or an information service. Appendix, pp. 32-35.

Thus, there is no FCC ruling that the Global NAPs traffic is exempt from access charges under an "ESP Exemption". The CPUC decision on this point is well reasoned and addresses this issue thoroughly.

[1] The Commission may wish note that this decision was issued a week before the filing of the Global NAPs Brief, and Global NAPs did not bring it to this Commission's attention.

Conclusion

The Joint Intervenors urge the Commission to proceed to a ruling on the merits in accordance with the requests of the Joint Petitioners and the Joint Intervenors and further urge the Commission to grant the relief requested by the Joint Petitioners.

Respectfully submitted,

GRANITE STATE TELEPHONE, INC.
DUNBARTON TELEPHONE COMPANY, INC.
NORTHLAND TELEPHONE COMPANY OF MAINE, INC.
BRETTON WOODS TELEPHONE COMPANY, INC.
DIXVILLE TELEPHONE COMPANY
NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC, D/B/A FAIRPOINT COMMUNICATIONS-NNE

By Their Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a PDF copy of the foregoing response was forwarded this day to the parties by electronic mail.

Dated: October 6, 2008

By: Frederick J. Coolbroth
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STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 08-028

Hollis Telephone Company, Inc., Kearsarge Telephone Company,
Merrimack County Telephone Company and Wilton Telephone Company, Inc.
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Of Traffic from Global NAPs

Appendix to
Reply Brief of Joint Intervenors

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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VONAGE HOLDINGS CORP. AND VONAGE NETWORK INC.,

Plaintiffs-Appellees,

v.

NEBRASKA PUBLIC SERVICE COMMISSION ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEBRASKA

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEBRASKA

BRIEF FOR AMICI CURIAE UNITED STATES AND
FEDERAL COMMUNICATIONS COMMISSION SUPPORTING
APPELLANTS' REQUEST FOR REVERSAL

STATEMENT OF INTEREST

The district court in this case issued a preliminary injunction that bars Defendant-Appellant Nebraska Public Service Commission (NPSC) from requiring Plaintiffs-Appellees Vonage Holdings Corporation and Vonage Network, Inc. (collectively, Vonage) to contribute to Nebraska's universal-service program. The district court granted such relief on the basis of its determination that Vonage was likely to prevail on its claim that the Federal

Communications Commission (FCC) had preempted the NPSC's state universal service contribution requirement.

The district court's decision raises several issues of substantial interest to the FCC. First, the FCC has an important interest in ensuring that the courts correctly interpret the agency's precedents, especially where, as here, that precedent is construed to overturn a state's exercise of regulatory authority. Second, the FCC has a substantial interest in promoting universal service in an equitable and nondiscriminatory manner, as Congress directed in the Communications Act of 1934. *See* 47 U.S.C. § 254(b)(4). Third, the FCC has an interest in preventing the regulatory uncertainty that would result if the courts were to address in the first instance important legal and policy questions that are the subject of pending agency rulemaking proceedings—such as the question of how Internet telephony services such as Vonage's should be classified and regulated under the Communications Act.

For these reasons, and because we believe this Court would benefit from the FCC's considered views regarding federal and state authority over Internet telephony services, the United States and the FCC submit this amicus brief to urge the Court to reverse the district court's preliminary injunction in this case. The government is authorized to participate as amicus curiae by Rule 29(a) of the Federal Rules of Appellate Procedure and has filed with this Court a motion for leave to file this amicus brief out of time.

STATEMENT OF ISSUE

This amicus brief addresses the following issue: Whether the district court erred when it concluded that FCC precedent likely preempted the application of the NPSC's state universal-service contribution requirements to Vonage, a provider of interconnected Voice-over-Internet-Protocol service.

STATEMENT

1. Voice-over-Internet-Protocol (or VoIP, for short) refers to a technology that allows end users to engage in voice communications over a broadband Internet connection. *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007) (*MPUC*). Some VoIP services are "fixed," which means that the end user can use the service from only one location (such as the end user's home). *Id.* at 575. Vonage, however, provides a VoIP service that is "nomadic": its customers can place and receive VoIP calls from any broadband Internet connection anywhere in the world. *Ibid.* Vonage's VoIP service is also "interconnected," which means that its customers can place calls to, and receive calls from, anyone with a telephone connected to the traditional public switched telephone network (PSTN). *Id.* at 574; *see also* 47 C.F.R. § 9.3 (defining "interconnected VoIP service").

The development and growth of interconnected VoIP service present difficult regulatory issues under the Communications Act. One such issue is how this service should be classified and regulated. Under the Communications Act, it has been argued that interconnected VoIP service could be regarded as a "telecommunications service" – which is subject to common-carrier regulation under Title II of the Communications Act, 47 U.S.C. §§ 201-276 – because it is often viewed by consumers as a substitute for traditional telephone service. Or, it has been argued, interconnected VoIP service could be classified as an "information service" – which is subject to minimal regulation – because it employs Internet technology. *See* 47 U.S.C. § 153(20), (47) (defining "information service" and "telecommunications service"); *see also MPUC*, 483 F.3d at 575, 577-78. The FCC has an open rulemaking proceeding in which it is considering the regulatory classification issue. *See IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

Another important issue concerns the extent to which the states can regulate the intrastate component of a nomadic VoIP service, such as the one provided by Vonage. The Communications Act generally grants the FCC exclusive jurisdiction over interstate (and international) communications, while leaving the regulation of intrastate communications to the states. *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004); *see* 47 U.S.C. § 152(b). But the

FCC may preempt state regulation under the so-called "impossibility exception" in situations where "(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, *i.e.*, state regulation would conflict with federal regulatory policies." *MPUC*, 483 F.3d at 578; *see also Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). In the case of nomadic VoIP, at least one side of the communication always takes place "in cyberspace," *MPUC*, 483 F.3d at 574, making it difficult for providers to pinpoint the exact geographic location of one or both ends of a call for purposes of determining whether that call originated and terminated in the same state (and is therefore subject to state jurisdiction) or in different states (and is therefore subject to federal jurisdiction). Consequently, the FCC has the authority to preempt state regulation under the impossibility exception to ensure that valid federal regulatory objectives applicable to VoIP services are not frustrated. *Id.* at 576.

The FCC exercised that preemption authority in 2004 with respect to Minnesota's attempt to impose "traditional 'telephone company' regulations" to Vonage's VoIP service. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) (*Vonage Preemption Order*), *aff'd*, *MPUC*, 483 F.3d 570. The state regulations at issue in that case required

Vonage to obtain a state certificate and meet other entry conditions before providing intrastate service in Minnesota, and then to provide such service pursuant to tariff. *Id.* at 22408-09 ¶¶ 10-11 & n.30, 22430-31 ¶ 42 & n.148, 22432 ¶ 46.

The FCC found that those regulations conflicted with important federal policies applicable to the interstate component of Vonage's service. As the FCC explained, if interconnected VoIP service were to be classified as a telecommunications service, the state's certification and tariffing requirements would frustrate the FCC's policy of removing entry barriers and tariffing requirements in competitive telecommunications markets; on the other hand, if Vonage were to be considered an information-service provider, Minnesota's requirements would frustrate the FCC's policy of minimizing regulation of information services. *Id.* at 22415-18 ¶¶ 20-22. The FCC also found that "[t]here is, quite simply, no practical way to sever [Vonage's service] into interstate and intrastate communications that enables [Minnesota] to apply [its laws] only to intrastate calling functionalities without also reaching the interstate aspects" of the service. On the basis of those two findings – inseverability *and* frustration of federal purpose – the FCC concluded that preemption was necessary. *Id.* at 22423-24 ¶ 31. On review, this Court affirmed the FCC's preemption decision. *MPUC*, 483 F.3d 570.

2. The Communications Act establishes "the preservation and advancement of universal service" as an important federal policy goal. 47 U.S.C. § 254(b). To promote that goal, the Act requires "[e]very telecommunications carrier that provides interstate telecommunications services [to] contribute, on an equitable and nondiscriminatory basis" to the federal universal-service program. 47 U.S.C. § 254(d). The Act also authorizes the FCC, in its discretion, to extend the contribution requirement to "[a]ny other provider of interstate telecommunications … if the public interest so requires." *Ibid.*

In 2006, the FCC adopted rules requiring interconnected VoIP providers to contribute to the federal universal-service fund. *See Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7536 ¶ 34 (2006) (*VoIP USF Order*), *aff'd in part and rev'd in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007). Because the FCC has not yet determined whether interconnected VoIP service should be classified as a telecommunications service (and thereby subject to the Act's mandatory contribution obligation), the FCC invoked its permissive authority under § 254(d) over "provider[s] of interstate telecommunications" and concluded that requiring interconnected VoIP providers to contribute to universal service was in the public interest. The Commission explained that interconnected VoIP providers, like other fund contributors, "benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN." *Id.* at 7540-41 ¶ 43. The Commission also concluded that requiring interconnected VoIP providers to contribute to universal service would promote the "principle of competitive neutrality" by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations." *Id.* at 7541 ¶ 44.

Contributions to the federal universal-service fund are calculated on the basis of the end-user revenues that contributors earn from their provision of interstate (and international) telecommunications; revenues from intrastate communications are not used to calculate federal contribution amounts. Because of the difficulty that nomadic interconnected VoIP providers have in identifying interstate calls, the FCC established a "safe harbor" under which an interconnected VoIP provider may presume that 64.9 percent of its revenues arise from its interstate operations. *VoIP USF Order*, 21 FCC Rcd at 7544-45 ¶ 53. In the alternative, an interconnected VoIP provider also may conduct a traffic study to estimate the percentage of its revenues that derive from interstate traffic and use that percentage to calculate its contribution amount.

Id. at 7547 ¶ 57.[1] Finally, VoIP providers that are able to track the jurisdiction of their calls may calculate their federal contribution amounts using actual revenue allocations. *Id.* at 7544-45 ¶ 53.

3. The Communications Act provides that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). Consistent with that provision, and like many other states, Nebraska has established its own state universal-service fund. *In re Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for administration of the Nebraska Universal Service Fund*, App. No. NUSF-1, Prog. No. 18 (April 17, 2007) (*NPSC USF Order*), at 3-4. Contributions to the Nebraska state universal-service fund are calculated solely on the basis of telecommunications companies' intrastate revenues. *Id.* at 4.

In the order at issue in this case, the NPSC concluded that interconnected VoIP providers were among the entities required to contribute to the state's universal-service fund. *NPSC USF Order* at 2. To determine the revenue base

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[1] The FCC initially required interconnected VoIP providers to obtain the agency's approval of their traffic studies before using them to calculate universal-service payments. *VoIP USF Order*, 21 FCC Rcd at 7547 ¶ 57. The D.C. Circuit, however, vacated the agency's preapproval requirement. *Vonage Holdings Corp.*, 489 F.3d at 1243-44. Accordingly, interconnected VoIP providers currently may use traffic studies to calculate the amount of their universal-service contribution without the FCC's prior approval.

for calculating contributions to the state fund, the NPSC provided that "[i]nterconnected VoIP service providers can elect the same options provided by the FCC" in the *VoIP USF Order*: They can use (1) the safe harbor set forth in the *VoIP USF Order* under which 35.1 percent of their revenues are allocated to the intrastate jurisdiction (calculated by subtracting the federal safe-harbor amount (64.9 percent) from 100 percent); (2) their actual intrastate revenues; or (3) intrastate revenues determined through an FCC-approved traffic study. *Id.* at 13. Under the NPSC's rules, "the customer's billing address should be used to determine [the] state with which to associate telecommunications revenues of an interconnected VoIP service provider." *Id.* at 14.

4. On December 20, 2007, Vonage filed a complaint in the U.S. District Court for the District of Nebraska to challenge the validity of the *NPSC USF Order*. On March 3, 2008, the district court granted Vonage's request for a preliminary injunction prohibiting the NPSC from enforcing its contribution requirements against Vonage. *Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008).

The district court concluded that Vonage was entitled to a preliminary injunction because it was likely to succeed on the merits of its argument that the rationale of the *Vonage Preemption Order* preempted the *NPSC USF Order*. The district court acknowledged that the *Vonage Preemption Order* had not "expressly addressed" the states' authority to impose state universal-service contribution requirements on interconnected VoIP providers. 543 F. Supp. 2d at 1067. The district court nonetheless concluded that the *NPSC USF Order* was preempted because "it is impossible [for Vonage] to distinguish between interstate and intrastate calls." *Id.* at 1068. Citing this Court's decision in *MPUC* affirming the *Vonage Preemption Order*, the district court stated that "[t]here is not a shred of evidence that takes this case outside the 'impossibility exception.'" *Id.* at 1068.

The district court gave no weight to the FCC's decision in the *VoIP USF Order* to require interconnected VoIP providers to contribute to the federal universal-service fund; the district court simply stated that the *VoIP USF Order* "does not negate the fact that there is no way to distinguish between interstate and intrastate [VoIP] service." *Id.* at 1067. In addition, although the district court recognized that the FCC has not decided "whether an interconnected VoIP service should be classified as a telecommunications service or an information service," *id.* at 1065, the court dismissed the relevance of the *VoIP USF Order* by stating that it does not "affect the characterization of VoIP service as an information service," *id.* at 1067.

SUMMARY OF ARGUMENT

The district court erred when it concluded that Vonage was likely to succeed on its claim that the *NPSC USF Order* was preempted under the rationale of the *Vonage Preemption Order*. Unlike the state regulations at issue in the *Vonage Preemption Order*, Nebraska's decision to require interconnected VoIP providers to contribute to the state's universal-service fund does not frustrate any federal rule or policy. Rather, the *NPSC USF Order* is fully consistent with the FCC's conclusion in the *VoIP USF Order* that requiring interconnected VoIP providers to contribute to the federal universal-service fund would serve the public interest.

Moreover, the NPSC's methodology for calculating the amount of interconnected VoIP revenue that is intrastate in nature does not conflict with the FCC's contribution rule. Rather, the NPSC's methodology mirrors the FCC's rule, thereby ensuring that Vonage will not be required to classify as intrastate any revenue that would be classified as interstate under the FCC's contribution rule.

Finally, this Court need not – and should not – address the regulatory classification of Vonage's VoIP service in this case. The FCC is currently considering the classification issue in the context of a comprehensive rulemaking proceeding, which is a far more appropriate forum for resolving the technical and highly complex regulatory questions presented by interconnected VoIP service. Nor is it necessary for the Court to address the classification of Vonage's service in this case. The FCC's determination that interconnected VoIP providers should contribute to the federal universal-service fund shows that the *NPSC USF Order* is consistent with federal policy regardless of how VoIP services are classified under the Communications Act.

ARGUMENT

THE FCC HAS NOT PREEMPTED THE NPSC USF ORDER

In the *Vonage Preemption Order*, the FCC relied on the "impossibility exception" to preempt Minnesota's regulation of Vonage's VoIP service. Under the impossibility exception, the FCC may preempt state regulation of intrastate communications if "(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, *i.e.*, state regulation would conflict with federal regulatory policies." *MPUC*, 483 F.3d at 578; *see also Louisiana Public Serv. Comm'n*, 476 U.S. 375 n.4. With respect to the specific state regulations at issue in the *Vonage Preemption Order*, the FCC concluded that both components of this test had been met, and in *MPUC*, this Court affirmed the FCC's preemption analysis. The district court in this case concluded that this precedent compelled the conclusion that the *NPSC USF Order* was also preempted under the impossibility exception, because Vonage still cannot accurately determine whether particular VoIP calls are interstate or intrastate in nature. *See* 543 F. Supp. 2d at 1068 ("There is not a shred of evidence that takes this case outside the 'impossibility exception.' ").

The fundamental error in the district court's preemption analysis is that it fails to consider the critical question of whether preemption is necessary to prevent the state regulation at issue from frustrating a valid federal policy objective. It is not enough to simply conclude that it is impossible to separate the interstate and intrastate aspects of the service – that is a necessary, but not a sufficient, finding to support preemption. *MPUC*, 483 F.3d at 578. A finding that state regulation would conflict with federal regulatory policies is also required. *Ibid.* In the *Vonage Preemption Order*, the FCC found that Minnesota's entry and tariff regulations of Vonage's service conflicted with the FCC's deregulatory policies applicable to the interstate component of Vonage's service. The FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional "economic regulation." *See, e.g.*, *Embarq Broadband Forbearance Order*, 22 FCC Rcd 19478, 19481 ¶ 5 (2007) (distinguishing "economic regulation" from universal service obligations and other "non-economic regulations designed to further important public policy goals"). In contrast to the *Vonage Preemption Order*, the *NPSC USF Order* does not present a conflict with the FCC's rules or policies. Rather, the NPSC's decision to require interconnected VoIP providers to contribute to the state's universal service fund, and the contribution rules that the NPSC established to implement its decision, are fully consonant with the FCC's rules and policies and are contemplated by § 254(f) of the Act. Thus, in these specific circumstances, the rationale of the *Vonage Preemption Order* provides no basis to conclude that the FCC has preempted Nebraska's state universal-service contribution requirement.

1. The NPSC's decision to require interconnected VoIP providers to contribute to the state universal-service fund does not frustrate federal policy objectives, but, in fact, promotes them. In the *VoIP USF Order*, the FCC explained that it would be in the public interest to require interconnected VoIP providers to contribute to universal service because "much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN." *VoIP USF Order*, 21 FCC Rcd at 7540-41 ¶ 43. The Commission also found that requiring such contributions would promote competitive neutrality by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations." *Id.* at 7541 ¶ 44. Both of these considerations apply with equal force to the NPSC's decision in this case. Vonage benefits from the state's universal-service program because its customers in Nebraska (and elsewhere) undoubtedly value the ability to place calls to and receive calls from those in Nebraska who continue to rely on the PSTN for their telephony services. The *NPSC USF Order* also promotes competitive neutrality by ensuring that the burden of supporting universal service in Nebraska does not fall solely on Vonage's voice telephony competitors.

The NPSC's rule for determining the revenue base upon which the state's contribution requirements are assessed is also consistent with the FCC's contribution rules. The NPSC does not assess universal-service charges on any revenue deemed interstate; payments into the state fund are based solely on revenue deemed intrastate (which is, in turn, excluded from the interstate revenue base under the FCC's contribution rules). Nor does the NPSC require interconnected VoIP providers to classify as intrastate any revenue that the provider classifies as interstate under the FCC's rules. If an interconnected VoIP provider relies on the FCC's safe-harbor and presumes that 64.9 percent of its revenues flow from its interstate operations, under the *NPSC USF Order* it may use the equivalent presumption that 35.1 percent of its revenues are intrastate in nature. If an interconnected VoIP provider prepares a traffic study for the purpose of calculating its federal universal-service contribution, under the *NPSC USF Order* it may use the same traffic study to calculate its corresponding state universal-service payment.[2] The third possibility – that an interconnected VoIP provider develops the ability to accurately distinguish interstate from intrastate calls – similarly ensures that interstate and intrastate revenue bases remain distinct. Thus, this is not a case in which preemption is necessary because the state has adopted an "allocation of [revenue] different from the allocation set forth" in the FCC's rules. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 971 (1986). Rather, here, there is no possibility that an interconnected VoIP provider will be forced to pay into

[2] After the NPSC issued the *NPSC USF Order*, the D.C. Circuit invalidated the requirement that an interconnected VoIP provider obtain the FCC's preapproval before relying on a traffic study to calculate its federal universal-service contribution. *Vonage Holdings Corp. v. FCC*, 489 F.3d at 1243-44. Accordingly, the FCC no longer enforces the preapproval requirement against interconnected VoIP providers. For purposes of the conflict analysis in this brief, we assume that the NPSC would interpret the *NPSC USF Order*'s reference to an "FCC-approved traffic study" to mean a traffic study that the FCC allows an interconnected VoIP provider to use to calculate its federal universal-service contribution, regardless of whether the FCC has "preapproved" the traffic study.

Nebraska's universal-service fund on the basis of the same revenues that the provider uses to calculate its federal universal-service contribution.[3]

In sum, because the *NPSC USF Order* is not "inconsistent with the Commission's rules to preserve and advance universal service," 47 U.S.C. § 254(f), the district court erred in concluding that Vonage was likely to prevail on the merits of its preemption argument in this case.

2. The district court suggested that Vonage's preemption argument would likely prevail because interconnected VoIP service should be classified as an information service under the Communications Act. 543 F. Supp. 2d at 1067. The district court acknowledged that the FCC has not decided "whether an interconnected VoIP service should be classified as a telecommunications service or an information service." *Id.* at 1065. The district court suggested, however, that the information-service classification was compelled by this Court's decision in *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004) (*Vonage*).

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[3] The assertion by Vonage that our 2006 letter to the Court undermines the NPSC's rule, *see* Vonage Br. at 26-27, is wrong. The letter means what it says. A safe-harbor percentage proxy is useful for approximating the interstate (and hence intrastate) revenues needed to calculate universal-service contributions; it is not in and of itself useful for classifying particular traffic, which would be necessary for state and federal entry and tariffing policies to coexist.

Contrary to the district court's view, this Court did not consider the classification of Vonage's VoIP service in *Vonage*. In that case, this Court reviewed a Minnesota district-court decision that had concluded that Minnesota's regulation of Vonage's VoIP service – the same regulations at issue in the *Vonage Preemption Order* – was preempted because Vonage provided an information service under the Communications Act. *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. Civ. 03-5287 (MJD/JG), 2004 WL 114983 (D. Minn. Jan 14, 2004) . After the district court had issued its decision, the FCC released the *Vonage Preemption Order*, which preempted Minnesota's regulations under the impossibility exception without regard to the regulatory classification of VoIP service. Because the "the FCC's order preempting [Minnesota's regulation] dispositively support[ed] the District Court's [judgment]," and was immune from "collateral attack[]" in an appeal from that judgment, this Court "affirmed the judgment of the district court on the basis of the FCC Order." 394 F.3d at 569. The Court accordingly had no occasion to address the merits of the district court's characterization of Vonage's service as an information service under the Communications Act.

Nor should the Court attempt to resolve the regulatory classification of Vonage's service in this case. Questions of regulatory classification are inherently "technical, complex, and dynamic," and the "Commission is in a far better position to address these questions than [the courts] are." *National Cable and Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005). Premature adjudication of this issue by the courts would impinge on the FCC's statutory responsibility to interpret and implement the Communications Act and could create significant confusion and uncertainty in the regulated community.

Moreover, it is unnecessary for this Court to address the classification of interconnected VoIP service in order to resolve the preemption question presented in this case. The FCC's decision in the *VoIP USF Order* to require interconnected VoIP providers to contribute to the federal universal-service fund did not turn on the regulatory classification of VoIP services. Accordingly, even if interconnected VoIP services are information services under the Communications Act, the *NPSC USF Order* would be consistent with federal policy for the reasons discussed above. The regulatory classification of interconnected VoIP service simply has no bearing on the conflict analysis at issue in this case.

CONCLUSION

The Court should reverse the district court's preliminary injunction in this case.

Respectfully submitted,

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August 5, 2008

IN THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

VONAGE HOLDINGS CORP. AND VONAGE NETWORK INC., PLAINTIFFS-APPELLEES, v. NEBRASKA PUBLIC SERVICE COMMISSION ET AL., DEFENDANTS-APPELLANTS.	)	NO. 08–1764

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 3989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2003.

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August 5, 2008

C
Illinois Bell Telephone Co., Inc. v. **Global Naps** Illinois, Inc.
N.D.Ill.,2007.
Only the Westlaw citation is currently available.
United States District Court,N.D. Illinois,Eastern Division.
ILLINOIS BELL TELEPHONE COMPANY, INC., Plaintiff,
v.
GLOBAL NAPS ILLINOIS, INC.; **Global Naps** Inc.; **Global Naps** New Hampshire, Inc.; **Global Naps** Network, Inc; **Global Naps** Realty, Inc.; and Ferrous Miner Holdings, Ltd., Defendants.
No. 06 C 3431.

Dec. 17, 2007.

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MEMORANDUM OPINION AND ORDER

JOHN W. DARRAH, District Judge.
*1 Plaintiff, Illinois Bell Telephone Company, Inc. ("AT & T Illinois"), filed a ten-count Amended Complaint against Defendants-Global NAPs Illinois, Inc. ("Global Illinois"); Global NAPs, Inc.; Global NAPs New Hampshire, Inc.; Global NAPs Network, Inc.; Global NAPs Realty, Inc.; and Ferrous Miner Holdings, Ltd.-for violation of federal and state tariffs and for violation of an interconnection agreement ("the Agreement"). Global Illinois now contends that this Court must dismiss the Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3) for lack of subject-matter jurisdiction.

The Telecommunication Agreement of 1996

The Telecommunications Act of 1996 ("the Act") sought to deregulate the telecommunications industry. 47 U.S.C § 251, *et seq.* (2006). The Act requires that an incumbent or existing local exchange carrier ("ILEC") provide competing local exchange carriers ("CLECs") access to interconnect to its network for the "transmission and routing of telephone exchange service and exchange access."47 U.S.C, § 251(c)(2).

Under Sections 251 and 252 of the Act, ILECs and CLECs have the duty to negotiate in good faith to establish the terms and conditions of agreements regarding reciprocal compensation for the transport and terminations of certain calls. 47 U.S.C. §§ 251(c), 252. If the parties are unable to reach an agreement, either party may petition the state public utility commission or Federal Communications Commission ("FCC") for arbitration. 47 U.S.C § 252(b)(1). A final agreement, whether negotiated or arbitrated, is to be reviewed by the state commission or FCC in order to determine if the agreement complies with the Act. "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which the agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies."47 U.S.C. § 252(e)(1).

The state commission may only reject an agreement that has been negotiated if it finds that: "the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement" or (2) "the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity."47 U.S.C. § 252(e)(2)(A).

An agreement adopted by arbitration may be rejected if the state commission finds that it "does not meet the requirements of section 251 of [the Act], including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of [section 252]."47 U.S.C. § 252(e)(2)(B). The Act further allows any party that is "aggrieved" to bring an action in federal court to challenge the terms of the interconnection agreement:

> In any case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission make a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

*2 47 U.S.C. § 252(e)(6).

BACKGROUND

AT & T Illinois is an Illinois corporation, which has its headquarters and principal place of business in Chicago, Illinois. AT & T Illinois is an ILEC, as defined in Section 251(h) of the Act, in its authorized service areas in Illinois. 47 U.S.C. § 251(h).

Global Illinois is a Delaware corporation with its principal place of business in Massachusetts. Global Illinois is certified by the Illinois Commerce Commission ("ICC") as a CLEC to provide telecommunication services in Illinois. The remaining Defendants are all Delaware corporations and all have their principal place of business located at 10 Merrymount Street in Quincy, Massachusetts. AT & T Illinois alleges that all the Defendants are controlled as a single economic entity that provides telecommunications and related services under the "Global NAPs" name. AT & T Illinois contends that all the Defendants should be treated as a single enterprise.

AT & T Illinois and Global Illinois engaged in negotiations of the terms and conditions for the Agreement. The parties then arbitrated the remaining unresolved issues before the ICC in ICC Docket No. 01-0786. The ICC approved the final version of the Agreement in ICC Docket No. 03-0296. The Agreement was signed and took effect on February 10, 2003. The Agreement established the rates, terms, and conditions for the reciprocal compensation between AT & T Illinois and Global Illinois, as well as "transiting" service. Pursuant to this Agreement and AT & T Illinois' state and federal tariffs, AT & T Illinois has provided products and services to Global Illinois.

In order to serve its customers, Global Illinois obtained a number of services from AT & T Illinois. These services are ordered and provided under either AT & T Illinois' federal or state access tariffs or under the Agreement. Tariffs are public documents filed by a telephone company that define the rates, terms, and conditions on which it will provide certain services and facilities. When a customer orders services or facilities under a tariff, it accepts those rates, terms, and conditions. The two tariffs allegedly at issue in this case are; (1) AT & T Illinois' federal FCC Tariff No. 2, which governs interstate access service, the provision of dedicated "special access" facilities, the provision of Signal Transfer Protocol ("STP") dedicated network access links, and local number portability queries; and (2) AT & T Illinois' Illinois Commerce Commission Tariff 21, which governs intrastate access service and the provision of intrastate special access facilities.

AT & T Illinois filed its Complaint on June 23, 2006, alleging that Global Illinois has violated federal and state tariffs, as well as the Agreement, by refusing to pay any of the charges associated with the tariffs and the Agreement.

ANALYSTS

In reviewing a motion to dismiss for lack of subject-matter jurisdiction, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the petitioner. *See Alicea-Hernandez v. The Catholic Bishop of Chicago,* 320 F.3d 698 (7th Cir.2003): *Long v. Shorebank Dev. Corp.,* 182 F.3d 548, 554 (7th Cir.1999). If the motion to dismiss is based on denials of the truth of the allegations, however, the court may "look beyond jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject-matter jurisdiction exists."*Grafon Corp. v. Hausermann,* 602 F.2d 781, 782 (7th Cir.1979); *see also Capitol Leasing Co. v. Federal Deposit Insurance Corp.,* 999 F.2d 188, 191 (7th Cir.1993); *Amoakowaa v. Reno,* 94 F.Supp.2d 903, 905 (N.D.Ill.2000), A litigant cannot rely on frivolous claims to establish jurisdiction. *See Williams v. Aztar Ind. Gaming Corp.,* 351 F.3d 294, 300 (7th Cir.2003)(*Williams*).

*3 Here, AT & T Illinois alleges federal-question jurisdiction. Federal-question jurisdiction arises when a complaint establishes that federal law created the cause of action or that the litigant's right to relief necessarily depends on the resolution of a substantial question of federal law.*Williams,* 351 F.3d at 298. Counts I-IV allege that Global Illinois has utilized various services from AT & T Illinois under the FCC Tariff No. 2 and that Global Illinois has refused to pay the duly rendered bills. AT & T Illinois asserts that this Court has jurisdiction to resolve Counts I-IV of this Complaint under 28 U.S.C. §§ 1331, 1332, 1337, 2201, 2202, and 47 U.S.C. §§ 203 and 206-07, and that supplemental jurisdiction exists over Counts V-X under 28 U.S.C. § 1367. Global Illinois contends that each of AT & T Illinois' claims arise out of disputes over the interpretation of the Agreement entered into by the parties. As a result, Global Illinois argues that this Court does not have original jurisdiction to hear disputes regarding the interpretation and enforcement of the Agreement, as the disputes have not been addressed by the ICC, which approved the Agreement.

This Court does have subject-matter jurisdiction to hear requests for enforcement of federal tariffs. As the Seventh Circuit has recognized, a filed tariff is not to be treated as a mere contract under state law; rather, "tariffs are something more-at least the equivalent of federal regulations or law-so suits to challenge or invalidate tariffs arise under federal law."*Dreamscape Design, Inc. v. Affinity Network, Inc.,* 414 F.3d 665, 668-69 (7th Cir.2005), *citing Cahnmann v. Sprint Corp.,* 133 F.3d 484, 488-89 (7th Cir.1998)(*Cahnmann*). In *Cahnmann,* a consumer brought a state class-action suit against a long distance carrier, Sprint, which was removed to federal court, *Cahnmann,* 133 F.3d at 486. The Seventh Circuit affirmed the district court's grant of removal to federal court, as well as the district court's judgment on the pleadings, as the class had called for the district court to invalidate a federal tariff, which was prohibited by the Act.*Cahnmann,* 133 F.3d at 486. Most instructive as to the present issue in this case, the Seventh Circuit went on to discuss the significance of and remedy for a violation of a tariff. The Court stated that if:

> Sprint violated the tariff to her [plaintiff's] detriment, she would be entitled to proceed against Sprint under federal law. She could either seek reparations in an administrative proceeding before the FCC, or bring a suit for damages directly under the Communications Act, 47 U.S.C. §§ 206, 207....

Cahnmann, 133 F.3d at 487 (internal citations omitted), *citing United States v. Western Pacific R.R.,* 352 U.S. 59, 63-65, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956); *City of Peoria v. General Electric Cablevision Corp.,* 690 F.2d 116, 120-21 (7th Cir.1982); *National Communications Ass'n, Inc. v. American Tel. & Tel. Co.,* 46 F.3d 220, 222-23 (2d. Cir.1995); *Allnet Communications Service, Inc. v. National Exchange Carrier Ass'n, Inc.,* 965 F.2d 1118 (D.C.Cir.1992).

*4 Thus, a federal tariff is equal to that of a federal regulation; "and so a suit to enforce it, ... arise[s] under federal law."*Cahnmann,* 133 F.3d at 488-89,*citing Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.,* 460 U.S. 533, 555, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) (*per curiam*); *Louisville & Nashville R.R. v. Rice,* 247 U.S. 201, 38 S.Ct. 429, 62 L.Ed. 1071 (1918); *MCI Telecommunications Corp. v. Teleconcepts, Inc.,* 71 F.3d 1086, 1093-96 (3d Cir.1995); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.,* 391 F.2d 486 (2d. Cir.1968). Accordingly, following the Seventh Circuit's guidance in *Cahnmann,* this Court has subject-matter jurisdiction to proceed with AT & T Illinois' suit for damages arising from the FCC Tariff No. 2 pursuant to 47 U.S.C. §§ 206-07.

Supplemental Jurisdiction

Pursuant to 28 U.S.C § 1367(a), the state-law claims alleged against the Defendants fall within this Court's supplemental jurisdiction if they are "so related to [the federal] claims ... that they form part of the same case or controversy."The "federal court's original jurisdiction over federal questions carries with it jurisdiction over state-law claims that 'derive from a common nucleus of operative fact,' such that 'the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court compromises but one constitutional 'case.' "*Groce v. Eli Lilly & Co.,* 193 F.3d 496 (7th Cir.1999), *quoting City of Chicago v. International College of Surgeons,* 522 U.S. 156, 164-65, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997). The test is simply whether "a plaintiff's claims are such that he would be ordinarily expected to try them all in one judicial proceeding."*United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). However, a court may decline to exercise supplemental jurisdiction over a claim if "the claim raises a novel or complex issue of State law."28 U.S.C. § 1367(c)(1).

AT & T Illinois asks this Court to exercise supplemental jurisdiction over Counts V and VI, which involve collection claims under AT & T Illinois' state tariffs; over Counts VII-IX, which involve collection claims under the Agreement entered into under the Act; and over Count X, which requests damages in *quantum meruit.*Global Illinois argues that 47 U.S.C. § 252(e)(6) deprives this Court of jurisdiction over the claims.

Counts VII-IX

As other circuits have appreciated, Congress has not spoken on the method of interpretation and enforcement procedures of disputes arising from previously approved interconnection agreements. *Core Communications, Inc. v. Verizon Pa., Inc.,* 493 F.3d 333, 340-41 (3d Cir.2007)(*Core*). Under *Chevron v. Natural Res. Def. Council,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), federal courts must defer to an implementing agency's interpretation of a statute if (1) "the statute is silent or ambiguous with respect to the specific issue" in dispute and (2) "the agency's answer is based on a permissible construction of the statute."*In the Matter of Starpower Communications, LLC,* 15 F.C.C.R. 11277 (F.C.C.2000), the FCC recognized the statute's silence, stating, "[i]n applying Section 252(e)(2), we must first determine whether a dispute arising from interconnection agreements seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under Section 252, We conclude that it is." The Third Circuit noted the "responsibility" of a state commission in this regard can be subject to two interpretations: a narrow interpretation, which would suggest that a state commission has, at a minimum, a non-exclusive authority to enforce an interconnection agreement; or, alternatively, a broad interpretation, which allows for a state commission to have sole authority to hear the enforcement proceeding initially, subject to appellate review by a federal court. *Core,* 493 F.3d at 341-43. The *Core* court determined that a broad interpretation was appropriate, given the "symmetrical and coherent regulatory scheme" for which the Act provides through the state commissions. *Core,* 493 F.3d at 342-43. Moreover, as the Fifth Circuit held, "the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of the agreements that state commissions have approved."*Sw. Bell Tel. Co. v. PUC,* 208 F.3d 475, 479-80 (5th Cir.2000) (*Sw. Bell Tel. Co.*).

*5 Although the Seventh Circuit has not encountered this enforcement issue in the same context, in *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.,* 222 F.3d 323, 338 (7th Cir.2000)(*MCI*), the Seventh Circuit "decline[d] to read subsection 252(e)(6) so narrowly," holding "[a] state's commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission," In *Illinois Bell Tel. Co. v. Worldcom Tech., Inc.,* 179 F.3d 566, 574 (7th Cir.1999), the Seventh Circuit clarified a federal district court's role in deciding issues under the Act:

> Lest there be any misunderstanding about what this conclusion means, we add that any issues of state law remain open for determination in the proper forum. Section 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision "interpreting" an agreement contrary to its terms creates a different kind of problem-one under the law of contracts, and therefore one for which a state forum can supply a remedy.

The Supreme Court, in *Verizon Maryland, Inc. v. Public Service Com'n of Maryland,* 535 U.S. 635, 642, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)(*Verizon*), held that Section 252(e)(6) does "not *divest* the district courts of their authority under 28 U.S.C. § 1331 to review the Commission's order for compliance with federal law."Therefore, a federal district court can review a state commission's "interpretation or enforcement of an interconnection agreement"; but nothing in *Verizon* indicates or suggests that a federal district court has jurisdiction to decide such issues without prior review by the state commission.

In this case, AT & T Illinois did not seek enforcement of the Agreement through the ICC; and, thus, this Court cannot review a decision or determination which has yet to be made by the ICC Accordingly, this Court lacks subject-matter jurisdiction over these claims. *See AT & T Communications of Ill. Inc. v. Illinois Bell Tel. Co.,* 1998 WL 525437 (N.D.Ill. Aug.18, 1998) (holding that the court lacked subject-matter jurisdiction over claims that were not the subject of the ICC's determination).

AT & T also argues that a clause in the parties' Interconnection Agreement ("ICA") provides that it may pursue its remedies in this Court. Once the ICC approved the parties' ICA, the parties are bound to that agreement; and AT & T is within its right to bring suit in federal court to resolve a dispute arising under the ICA.

An agreed ICA must be submitted to the State commission for approval. 47 U.S.C, § 252(a)(1); (b)(1). The State commission may reject an ICA if it finds that it discriminates against a telecommunications carrier not a party to the ICA; it is inconsistent with the public interest, convenience or necessity; or does not meet the requirements of Section 251 of the Telecommunications Act. 47 U.S.C. § 252(e)(2)(A),(B).

*6 The Formal Dispute Resolution section of the parties' ICA relied upon by AT & T provides, in relevant part, that if certain claims, including all claims arising under federal or state statute, "are not resolved through informal dispute resolution, they will not be subject to arbitration and must be resolved through any remedy available to a party pursuant to law, equity or agency mechanism."

AT & T reads this clause as allowing it to bring its breach of contract claims directly to the ICC if it chose to do so; but it does not require it to do so, allowing it to bring its claims to this Court. However, AT & T reads the clause too broadly. The remedy must be available pursuant to law, equity or agency mechanism. As discussed above, the *law,* pursuant to the Act, requires that AT & T first bring its claims to the ICC. The parties cannot contract for jurisdiction in this Court, *see Adkim v. Illinois Central R.R. Co.,* 326 F.3d 828, 833 (7th Cir.2003), and cannot contract for judicial review that is contrary to the requirements of the Act. *See Bell Atlantic-Virginia, Inc. v. Worldcom Tech. of Virginia,* 70 F.Supp.2d 620, 626 (E.D.Va.1999).

For the reasons set forth above, this Court refuses to grant supplemental jurisdiction to Counts VII-IX. Additionally, this Court refuses to grant supplemental jurisdiction as to Counts V and VII, state-law tariff-collection claims, and as to Count X, a claim in *quantum meruit,* as these contractual matters are more appropriately handled in a state for- um.

CONCLUSION

For the foregoing reasons, Global Illinois' Motion to Dismiss is denied as to Counts I-IV. As discussed above, this Court refuses to extend supplemental jurisdiction to Counts V-X.

N.D.Ill.,2007.
Illinois Bell Telephone Co., Inc. v. Global Naps Illinois, Inc.
Slip Copy, 2007 WL 4531790 (N.D.Ill.)

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H
Ohio Bell Tel. Co., Inc. v. Global Naps Ohio, Inc.
S.D.Ohio,2008.

United States District Court,S.D. Ohio,Eastern Division.
The OHIO BELL TEL. CO., INC., Plaintiff,
v.
GLOBAL NAPS OHIO, INC., et al., Defendants.
No. 06-CV-549.

March 31, 2008.

Background: Incumbent local exchange carrier (ILEC), within the meaning of the Telecommunications Act, sued a competing local exchange carrier (CLEC) who had allegedly refused to pay for telecommunications services and facilities, claiming violations of the provider's federal and state tariffs, breach of the parties' interconnection agreement (ICA), and a claim for quantum meruit. CLEC moved to dismiss for lack of subject matter jurisdiction.

Holdings: The District Court, Algenon L. Marbley, J., held that:
(1) Telecommunications Act obligates a ILEC to exhaust administrative remedies before the relevant state commission prior to bringing suit against a CLEC for breach of the parties' ICA;
(2) the Act's exhaustion requirement is not jurisdictional in nature, but must be raised as an affirmative defense;
(3) CLEC adequately raised the affirmative defense; but
(4) the court had subject matter jurisdiction to hear the federal tariff claims.

Motion granted in part and denied in part.

West Headnotes

[1] Telecommunications 372 902

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k902 k. Exhaustion of Remedies. Most Cited Cases
Telecommunications Act obligates an incumbent local exchange carrier (ILEC) to exhaust administrative remedies before the relevant state commission prior to bringing suit against a competing local exchange carrier (CLEC) for breach of the parties' interconnection agreement (ICA); in enacting the Telecommunications Act, Congress saw fit to endow state public-utility commissions with significant authority for resolving disputes that arise between carriers while negotiating ICAs and for ultimately approving or rejecting those ICAs, and recognizing the exhaustion requirement serves the dual objectives of the exhaustion doctrine. Communications Act of 1934, § 252(e)(6), 47 U.S.C.A. § 252(e)(6).

[2] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
Where Congress has delegated certain responsibilities to an administrative agency, courts are obligated to refrain from stepping in until the agency has acted, especially when the action under review involves exercise of the agency's discretionary power or application of its special expertise.

[3] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases

Where Congress specifically mandates, exhaustion of administrative remedies is required, but where Congress has not clearly required exhaustion, sound judicial discretion governs.

[4] Telecommunications 372 ⚷902

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k902 k. Exhaustion of Remedies. Most Cited Cases

Telecommunications 372 ⚷908

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k908 k. Pleading or Petition. Most Cited Cases

Telecommunications Act's exhaustion requirement, obligating an incumbent local exchange carrier (ILEC) to exhaust administrative remedies before the relevant state commission prior to bringing suit against a competing local exchange carrier (CLEC) for breach of the parties' interconnection agreement (ICA), is not jurisdictional in nature, but is claim-processing rule that must be raised as an affirmative defense. Telecommunications Act of 1996, § 101(e)(6), 47 U.S.C.A. § 252(e)(6).

[5] Telecommunications 372 ⚷908

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k908 k. Pleading or Petition. Most Cited Cases

Competing local exchange carrier (CLEC) adequately raised the affirmative defense of failure to exhaust administrative remedies in an incumbent local exchange carrier's (ILEC) action asserting breach of the parties' interconnection agreement (ICA); uncertainty in the law as to whether the defense was jurisdictional excused the omission of the defense in the CLEC's answer, and the CLEC asserted exhaustion in a motion to dismiss brought a year after the proceedings commenced and just six months after the ILEC filed an amended complaint. Telecommunications Act of 1996, § 101(e)(6), 47 U.S.C.A. § 252(e)(6).

[6] Telecommunications 372 ⚷908

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k908 k. Pleading or Petition. Most Cited Cases

Factual allegations of a complaint brought by an incumbent local exchange carrier (ILEC) against a competing local exchange carrier (CLEC), alleging violations of the ILEC's federal tariffs, were sufficient to invoke the court's subject matter jurisdiction to hear the tariff claims, even though thee CLEC may have been able to defend against the claims by relying on the parties' interconnection agreement (ICA), claims for violation of which had to first be presented to the relevant state commission pursuant to an administrative exhaustion requirement. Telecommunications Act of 1996, § 101(e)(6), 47 U.S.C.A. § 252(e)(6).

[7] Federal Courts 170B ⚷241

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(D) Pleading
170Bk241 k. Allegations in Pleadings in General. Most Cited Cases

Under the "well-pleaded complaint rule," so long as a basis for federal jurisdiction appears on the face of the plaintiff's complaint, the complaint is not jurisdictionally infirm.

***916** Mark Stephen Stemm, Daniel R Conway, Porter Wright Morris & Arthur LLP, Columbus, OH, Christian F Binnig, Dennis G Friedman, Hans

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OPINION AND ORDER

ALGENON L. MARBLEY, District Judge.

I. INTRODUCTION

Plaintiff, The Ohio Bell Telephone Company, Inc. ("Ohio Bell"), filed a nine-count amended complaint against Defendants Global NAPs Ohio, Inc., Global NAPs, Inc., Global NAPs New Hampshire, Inc., Global NAPs Networks, Inc., Global NAPs Realty, Inc., and Ferrous Miner Holding, Ltd. (collectively, "Global"). Ohio Bell alleges that since at least February 2004, it has provided Global with certain telecommunications services and facilities, but that Global has refused to pay. The amended complaint therefore alleges violations of Ohio Bell's federal tariffs (counts I-III) and state tariffs (counts IV-V), breach of the parties' interconnection agreement ("ICA") (counts VI-VIII), and a claim for quantum meruit (count IX). Global has moved to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction. Global argues that because Ohio Bell did not first submit its breach-of-ICA claims to the Ohio Public Utility Commission ("PUCO"), this Court lacks jurisdiction to hear them. Global asserts this same jurisdictional defect as to Ohio Bell's federal-tariff claims, arguing that these are actually disguised breach-of-ICA claims. In the absence of a federal question properly before this Court, Global requests that the Court dismiss the action entirely.

For the reasons described below, the Court construes Global's motion as one brought under Rule 12(c) and **GRANTS** it as to Ohio Bell's breach-of-ICA claims, but **DENIES** the motion in all other respects. Ohio Bell may continue to litigate its federal- and state-tariff claims and its common law claim in this Court.

*917 II. BACKGROUND

A. The Telecommunications Act of 1996

The purpose of the Telecommunications Act of 1996, 47 U.S.C. §§ 251 *et seq.,* is to promote competition in the telecommunications industry. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 638, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). Because entry into this market is often prohibitively expensive, the Act requires incumbent local exchange carriers ("ILECs"), such as Ohio Bell, to provide competing local exchange carriers ("CLECs") with access to their networks. 47 U.S.C. § 251(c)(2). According to the amended complaint, "[i]nterconnection between different carriers' networks allows the end-users of one carrier to make calls to and receive calls from the end-users of the interconnected carrier."

If a CLEC requests access to an ILEC's networks, the Act instructs the parties to enter into negotiations to establish an interconnection agreement (the aforementioned "ICA"). An ICA sets forth the terms, conditions, and pricing arrangements by which the communications traffic of the CLEC's customers will be transported over the ILEC's networks. 47 U.S.C. §§ 251(c)(2) & 252. Parties may establish an ICA through voluntary negotiation, mediation, or compulsory arbitration conducted by a state commission, such as PUCO. *See id.* at §§ 252(a) & (b). Once the parties have reached an agreement, the resulting ICA must be submitted to the state commission for approval. *See id.* at §

252(e). Generally speaking, a state commission may reject an ICA only if it finds that the agreement: (1) discriminates against a non-party telecommunications carrier; (2) is inconsistent with the public interest, convenience, and necessity; or (3) does not meet the requirements of § 251 or the regulations promulgated thereunder. *See id.* at § 252(e)(2). Finally, "any party aggrieved by [a state commission] determination may bring an action in an appropriate [f]ederal district court to determine whether the agreement ... meets the requirements of"§§ 251 and 252. *Id.* at § 252(e)(6).

B. Procedural History

Pursuant to §§ 251 and 252 of the Telecommunications Act, Ohio Bell and Global entered into negotiations to establish an ICA. They ultimately arbitrated certain unresolved issues before the PUCO and the PUCO subsequently approved the final agreement, which took effect in September 2002.

On June 30, 2006, Ohio Bell filed this lawsuit, alleging that Global has failed to pay for services-essentially the transportation and termination of various types of communications-rendered under the parties' ICA and Ohio Bell's state and federal tariffs. On December 19, 2006, Ohio Bell filed an amended complaint alleging the same claims, but adding affiliates of Global as defendants. Global answered the amended complaint on December 29, 2006, and now moves to dismiss Ohio Bell's claims for lack of subject matter jurisdiction.[FN1]

> FN1. Global NAPs Ohio, the lead defendant, answered on December 29, 2006. The other defendants answered on later dates.

III. STANDARD OF REVIEW

Federal courts are courts of limited subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Federal Rule of Civil Procedure 12(h)(3) instructs that "[w]henever it appears by the suggestion of the parties or ***918** otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The party that invokes federal jurisdiction has the burden of establishing its existence." *Moir v. Greater Cleveland Reg. Transit Auth.,* 895 F.2d 266, 269 (6th Cir.1990). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may attack the complaint on its face or may go beyond the complaint and challenge the factual existence of subject matter jurisdiction. *Golden v. Gorno Bros., Inc.,* 410 F.3d 879, 881 (6th Cir.2005).

IV. ANALYSIS

A. Ohio Bell's Breach-of-ICA Claims

The central question presented by Global's motion is this: Must Ohio Bell first litigate its breach-of-ICA claims before PUCO in order to seek review in this Court? The answer to this question depends on two things, including (1) whether the Telecommunications Act embodies an exhaustion-of-remedies requirement, and (2) if so, whether that requirement is a jurisdictional prerequisite to suit, or whether it is an affirmative defense that may be forfeited if not timely raised. Global points to the text of the Telecommunications Act as well as applicable case authority to support its position that Ohio Bell is required to seek a resolution from PUCO first, and that its failure to do so deprives this Court of jurisdiction. Ohio Bell disagrees, arguing that because the Court has subject matter jurisdiction over the federal-tariff claims, it may exercise supplemental jurisdiction over Ohio Bell's breach-of-ICA claims. In the alternative, Ohio Bell contends that even if the Act contains an exhaustion-of-remedies requirement, this requirement is not jurisdictional in nature, but is instead an affirmative defense that Global has waived.

1. *Does the Act Require Administrative Exhaus- tion?*

[1][2] The exhaustion doctrine "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan,* 503 U.S. 140, 145, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). Where Congress has delegated certain responsibilities to an administrative agency, courts are obligated to refrain from stepping in until the agency has acted, especially "when the action under review involves exercise of the agency's discretionary power or ... app[lication] [of] its special expertise." *Id.* Deference to the agency's judgment, at least in the first instance, also conserves resources by possibly mooting the need for judicial intervention and, if not, by developing "a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.*

[3] Congressional intent is the touchstone of the inquiry into whether a statute prescribes exhaustion of administrative remedies prior to filing suit. *Id.* at 144, 112 S.Ct. 1081. "Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *Id.; Bangura v. Hansen,* 434 F.3d 487, 494 (6th Cir.2006) (stating that whether the plaintiffs were required to exhaust their administrative remedies was a matter of judicial discretion because "no statute or administrative rule" required exhaustion).

Here, Global relies on § 252(e)(6) of the Act to support its argument that the Court lacks jurisdiction over Ohio Bell's breach-of-ICA claims. That section provides, in relevant part:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an ***919** appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

On its face, § 252(e)(6) does not "specifically mandate[ ]" exhaustion. *McCarthy,* 503 U.S. at 144, 112 S.Ct. 1081. Whether to construe the Act as prescribing an exhaustion requirement is therefore a matter for the Court's discretionary judgment. In this regard, the Court begins by analyzing the statutory text. As Global points out, § 252(e)(6) authorizes federal court actions challenging "determination[s]" of state commissions brought by "aggrieved" parties. Global contends that this language shows that Congress intended federal court interpretation and enforcement of ICAs to be restricted to appellate review of state commission decisions. Because there has been no PUCO "determination" here with respect to Ohio Bell's breach-of-ICA claims, and no "party aggrieved" by the non-existent "determination," Global says that this Court is powerless to hear the dispute.

Global's construction of § 252(e)(6) is not without persuasive force, and its argument finds support in applicable case law. In *Core Communications, Inc. v. Verizon Pennsylvania, Inc.,* 493 F.3d 333 (3d Cir.2007), the Third Circuit held that claims predicated on alleged violations of an ICA must first be adjudicated by the relevant state commission before review in the federal courts may be sought. The court premised its ruling on the Federal Communications Commission's ("FCC") decision, *In the Matter of Starpower Communications,* 15 F.C.C.R. 11277 (2000), and on the overall thrust of the Telecommunications Act.

The Third Circuit began by discussing *Starpower,* in which the FCC held that state commissions have "responsibility" under § 252(e)(5) not just for superintending the formation of ICAs, but also for interpreting and enforcing them. *Starpower,* 15 F.C.C.R. at 11279. The agency reasoned that the extension of the state commissions' authority to post-formation disputes makes sense because "due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements." *Id.* at 11280.

The Third Circuit acknowledged that *Starpower* did not reach the question of whether state commissions have exclusive jurisdiction in the first instance over disputes arising from existing ICAs. *Core,* 493 F.3d at 341-42. Nonetheless, the court read *Starpower* as supportive of this view because "the FCC's language-calling interpretation and enforcement disputes part of the states' 'responsibility' under § 252-suggests that there is not a shared role for the federal courts in the first instance." *Id.* at 342. Further, the Third Circuit believed that the FCC had "concluded that such a delegation of responsibility best fit the statutory scheme created by Congress." *Id.*

The *Core* court further held that construing the Telecommunications Act "as a symmetrical and coherent regulatory scheme," requires according state commissions the initial opportunity to resolve breach-of-ICA claims because to do otherwise would undermine the role Congress intended state commissions to play in the regulatory scheme. *Id.* at 343 (quoting *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Borrowing from the reasoning of a sister circuit, the *Core* court explained:

> [A] state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved. A court might ascribe to the agreement a meaning***920** that differs from what the state commission believed it was approving-indeed, the agreement as interpreted by the court may be one the state commission would never have approved in the first place. To deprive the state commission of authority to interpret the agreement that it has approved would thus subvert the role that Congress prescribed for state commissions.

Core, 493 F.3d at 343 (quoting *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.,* 317 F.3d 1270, 1278 n. 9 (11th Cir.2003)); *see also Ill. Bell Tel. Co., Inc. v. Global Naps Ill., Inc.,* No. 06-3431, 2007 WL 4531790 (N.D.Ill. Dec. 17, 2007) (dismissing claims arising from previously approved ICA because the plaintiff failed to first seek enforcement through the state commission); *Contact Commc'ns v. Qwest Corp.,* 246 F.Supp.2d 1184, 1189 (D.Wyo.2003) (stating that "[i]t is clear to this Court that absent a prior determination of the issue by the state PSC, no federal court jurisdiction exists" and collecting cases); *AT&T Commc'ns of Ohio, Inc. v. Ohio Bell Tel. Co.,* 29 F.Supp.2d 855, 856 (S.D.Ohio 1998) ("The statutory scheme does not permit this Court to review disputes arising out of interconnection agreements not previously subject to action by a state commission.").

The Court finds the Third Circuit's reasoning convincing. In enacting the Telecommunications Act, Congress saw fit to endow state public-utility commissions with significant authority for resolving disputes that arise between carriers while negotiating ICAs and for ultimately approving or rejecting those ICAs. *See*47 U.S.C. §§ 252(a), (b), & (e); *Global Naps, Inc. v. Mass. Dep't of Telecomm. and Energy,* 427 F.3d 34, 46 (1 st Cir.2005) ("Congress enlisted the aid of state public utility companies to ensure that local competition was implemented fairly and with due regard to the local conditions and the particular historical circumstances of the local regulation under the prior regime."). The interpretation of the Act as a whole, and of § 252(e)(6), that is most consistent with Congress's broad grant of responsibility to state commissions is one which requires litigants like Ohio Bell to first raise their breach-of-ICA claims before the state commissions. Recognizing this exhaustion requirement will also serve the dual objectives of the doctrine. The decisionmaker that has the greatest experience and expertise with the contested issues-the state commission-will get the first opportunity to resolve them. The federal courts will be called on only when a party dissatisfied with the state commission's ruling seeks judicial review. This in turn will promote efficiency by limiting the number of cases the federal courts are petitioned to resolve, and will also promote better judicial decisionmaking by supplying federal judges with a factual record and the considered opinion of an expert agency. For these reasons, the Court holds that Ohio Bell was obligated to exhaust its administrative remedies by first litigating its breach-of-ICA claims before PUCO.

This does not put an end to matters, however. There remains the question of whether the administrative-exhaustion requirement is a jurisdictional bar to suit or whether it is an affirmative defense that may be forfeited if not timely raised. It is to this subject that the Court now turns.

2. *Is the Exhaustion Requirement Jurisdictional in Nature or an Affirmative Defense?*

[4] Global insists that the Act's exhaustion requirement is jurisdictional in nature, and it cites a plethora of district court opinions dismissing for lack of jurisdiction breach-of-ICA claims that were not previously litigated before the state commission. *See e.g., Contact Commc'ns,* 246 F.Supp.2d at 1188 (concluding that § 252(e)(6)"strips federal district courts of jurisdiction" with respect to "claims that ***921** have not been presented to a" state commission); *Atl. Alliance Telecomms., Inc. v. Bell Atl.,* No. 99-CV-4915, 2000 WL 34216867, *3 (E.D.N.Y. Apr. 19, 2000) ("[C]ourts have held that disputes over the interpretation of terms in agreements that have already been approved must first be presented to state commissions before a federal court has jurisdiction."); *Bell Atl.-Va., Inc. v. WorldCom Techs. of Va., Inc.,* 70 F.Supp.2d 620, 626 (E.D.Va.1999) ("[T]he Court holds that it lacks subject matter jurisdiction over this dispute *until* the Virginia Commission makes an initial determination."). These authorities are of little help, however, because they contain no reasoning as to why the courts deemed § 252(e)(6)'s exhaustion requirement a jurisdictional bar, rather than an affirmative defense.

It is well established that not all exhaustion requirements are jurisdictional requirements. Some are instead affirmative defenses subject to waiver, tolling, and estoppel. *See e.g. Knight v. Int'l Longshoremen's Ass'n,* 457 F.3d 331, 344 (3d Cir.2006) ("Failure to exhaust administrative remedies is generally an affirmative defense subject to waiver.") (internal citation omitted); *Mosely v. Bd. of Educ.,* 434 F.3d 527, 533 (7th Cir.2006) ("A failure to exhaust is normally considered to be an affirmative defense."). Even though courts regularly confuse the two doctrines, *see e.g., Paese v. Hartford Life & Accident Ins. Co.,* 449 F.3d 435, 443 (2d Cir.2006) (noting that the Second Circuit has sometimes described an ERISA [Employee Retirement Income Security Act] provision as "jurisdictional" and at other times has suggested that it is an affirmative defense), the distinction is crucial because "lack of exhaustion usually is waivable, as lack of jurisdiction is not." *Mosely,* 434 F.3d at 533. Indeed, the Supreme Court recently cautioned the lower federal courts to take greater care in distinguishing between "claim-processing rules" and jurisdictional bars to suit. In *Eberhart v. United States,* 546 U.S. 12, 16, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005), the Court stated: "Clarity would be facilitated ... if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."(internal quotation marks and citation omitted).

Determining in which category ("claim-processing rule" or jurisdictional bar) § 252(e)(6)'s exhaustion rule belongs requires resort to the statutory text. As has already been shown, § 252(e)(6) by its plain terms does not mandate exhaustion. Although the text of the Act generally, and of § 252(e)(6) in particular, can be read (properly in this Court's view) to embody an exhaustion requirement, Congress in no way expressly said as much. Even if exhaustion requirements may be judicially engrafted onto statutes based on what can be inferred from their text and purpose and Congress's intent, courts require the language of the statutes in question to speak with much greater clarity than does § 252(e)(6), for the exhaustion requirement to take on jurisdictional significance. *See e.g., Richardson,* 347 F.3d 431, 434 (2d Cir.2003) (stating, in the context of the Prison Litigation Reform Act, that "[n]umerous circuits have pointed out that [the PLRA] lacks the sweeping and direct language that would indicate a jurisdictional bar rather than a mere codification of administrative exhaustion requirements") (internal quotation marks omitted).

In holding that the Telecommunications Act's exhaustion requirement is not jurisdictional in nature, this Court follows the precedent of recent decisions from the Fifth Circuit and the District of Connecticut.

In ***922***Premiere Network Services. v. SBC Communications, Inc.,* 440 F.3d 683 (5th Cir.2006), the Fifth Circuit affirmed the district court's dismissal of the plaintiff's Telecommunications Act claims on the grounds that where the plaintiff had already sought relief before the FCC, federal court review was precluded by the Act's election-of-remedies provision in § 207. The central holding of *Premiere* is thus remote from any of the dispositive issues in this case. What is instructive about *Premiere,* however, is the Fifth Circuit's observation that because the district court dismissed the plaintiff's claims for failure to exhaust administrative remedies under § 252(e)(6), it should have couched its dismissal order in terms of failure to state a claim, not failure of jurisdiction. The Fifth Circuit reasoned:

> 'Whenever the Congress statutorily mandates that a claimant exhaust administrative remedies, the exhaustion requirement is jurisdictional....' *Taylor v. United States Treasury Dep't,* 127 F.3d 470, 475 (5th Cir.1997). But where a statute does not textually require exhaustion, only the jurisprudential doctrine of exhaustion controls, which is not jurisdictional in nature. Section 252(e)(6) does not expressly require exhaustion of administrative remedies, thus only the jurisprudential doctrine of exhaustion is applicable.'

Id. at 687 n. 5.

Similarly, in *The Southern New England Tel. Co. v. Global NAPs, Inc.,* 520 F.Supp.2d 351 (D.Conn.2007)*("SNET"),*[FN2] the court assumed without deciding, that the Telecommunications Act contains an administrative-exhaustion requirement, but it concluded that the requirement was in the mold of an affirmative defense, not a jurisdictional bar. The *SNET* court noted that "there is no language in the Telecommunications Act that expressly proscribes a district court from hearing a dispute concerning an ICA."*Id.* 520 F.Supp.2d at 354.In addition, the court noted that in *Core,* the Third Circuit expressed no view on whether the exhaustion requirement is jurisdictional or an affirmative defense. That being said, the Third Circuit left undisturbed language in the underlying district court opinion that:

> FN2. Following the completion of briefing on Global's motion to dismiss, the parties filed notices of supplemental authority as additional pertinent decisions were issued by other federal courts. In response to a supplemental-authority filing by Ohio Bell, alerting this Court to the *SNET* opinion, Global filed an opposition memorandum in which it attempted to distinguish and marginalize *SNET.* Ohio Bell moved to strike Global's opposition on the grounds that Global violated Local Rule 7.2(a)(2) by failing to seek leave of Court before filing additional legal arguments. Global's unauthorized filing did constitute a violation of the Local Rule. Notwithstanding this fact, the Court **DENIES** Ohio Bell's motion to strike because the additional legal arguments were helpful to the Court in resolving the complex issues raised by Global's motion and because Ohio Bell was not in any way prejudiced by Global's filing: Ohio Bell took Global's opposition as an opportunity to convince the Court of *SNET*'s merits by filing its own substantive brief.

> [t]he issue is not one of federal jurisdiction. Requiring parties to seek review by a state commission of a dispute arising out of an approved interconnection agreement does not exclude federal jurisdiction. It only imposes an intermediate step before getting to the federal court, not unlike an exhaustion requirement.
> *Id.* 520 F.Supp.2d at 354 (quoting *Core Commc'ns v. Verizon Pa.,* 423 F.Supp.2d 493, 500 (E.D.Pa.2006)).

Global urges this Court to resist following *SNET* on the grounds that the *SNET* court was applying Second Circuit law, which differs from controlling Sixth Circuit ***923** law. True, the *SNET* court's decision was predicated in part on Second Circuit precedent holding that an exhaustion requirement is jurisdictional only if it is "essential to the existence of the claim, or to ripeness, and therefore to the presence of an Article III case or controversy." *Id.* at 353 (quoting *Richardson,* 347 F.3d at 434). Although no similar analysis appears to exist in Sixth Circuit case law, Global is wrong when it claims that the Sixth Circuit treats all exhaustion requirements as automatically jurisdictional. Global cites only a single generalized sentence from *Bangura,* 434 F.3d at 493, to support this proposition ("Where a statute requires a plaintiff to exhaust his or her administrative remedies before seeking judicial review, federal courts do not have subject matter jurisdiction to review the plaintiff's claim until the plaintiff has exhausted his or her administrative remedies."); ignores the fact that the *Bangura* court did not actually treat the exhaustion provision there as jurisdictional and in fact declined to require exhaustion at all; and further ignores Sixth Circuit case law holding that particular administrative-exhaustion requirements are not jurisdictional. *See e.g. McFarland v. Henderson,* 307 F.3d 402, 406 (6th Cir.2002) (stating that Title VII administrative-exhaustion requirements are not jurisdictional prerequisites and therefore are "subject to waiver, estoppel, and equitable tolling").

[5] Having concluded that the Act's exhaustion requirement is best treated as an affirmative defense, not a jurisdictional bar, the Court must now determine whether Global has forfeited the defense. Ohio Bell argues that by failing to plead exhaustion in its answer and by waiting a year from the initiation of this action to raise it, Global is not entitled to the benefit of the defense.

This Court disagrees. As a threshold consideration, Global has relied on the not-insubstantial body of authority characterizing the Act's exhaustion requirement as jurisdictional, and therefore likely did not believe that the requirement was an affirmative defense it was obligated to plead. The uncertainty in this area of the law excuses Global's omission in its answer. *See e.g. Johnson v. Johnson,* 385 F.3d 503, 516 (5th Cir.2004) (stating that "failure to plead exhaustion in the answer is especially excusable here given that the law on the topic is not clearly settled"). Further, Global asserted exhaustion in its motion to dismiss, which it brought a year after these proceedings commenced and just six months after Ohio Bell filed its amended complaint. *See Massey v. Helman,* 196 F.3d 727, 735 (7th Cir.1999) (stating that the defendants sufficiently preserved their exhaustion defense by "making the argument in their motion to dismiss"). Unlike in *SNET,* where the court found that Global waited three years to assert the defense, Global has not "foregone extensive opportunities to litigate it" in this Court. *SNET,* 520 F.Supp.2d at 355.

Accordingly, the Court holds that the exhaustion requirement of § 252(e)(6) is an affirmative defense that Global has properly invoked. Ohio Bell's breach-of-ICA claims are therefore dismissed.[FN3]

> FN3. The Court rejects Ohio Bell's contention that a provision in the ICA permits it to bypass PUCO. The provision that Ohio Bell relies on says that in the event of a dispute, either party may pursue "any remedy available to it pursuant to law, equity, or agency mechanism." Contrary to Ohio Bell's claim, this provision does not enable it to avoid the exhaustion requirement of §

> 252(e)(6). The provision says only that a party may pursue "any remedy available to it," including a judicial remedy. As discussed above, federal review of Ohio Bell's breach-of-ICA claims is still available, but Ohio Bell must first seek relief before PUCO.

*924 Finally, a word about the procedural basis for the Court's order. Global has styled its motion as one for dismissal under Rule 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction. Because the Court concludes that the exhaustion requirement is not jurisdictional, it is precluded from dismissing the breach-of-ICA claims pursuant to the Rule provisions under which Global has moved. Nonetheless, the Court will treat Global's motion as a Rule 12(c) motion for judgment on the pleadings and grant it on that basis. In *Premiere,* the Fifth Circuit suggested that the district court should have treated the defendant's motion as a Rule 12(b)(6) motion for failure to state a claim. 440 F.3d at 687 n. 5. Ordinarily, though, this is disfavored because a plaintiff is not required to plead facts negating an affirmative defense. *See Mosely,* 434 F.3d at 533. "That means that the earliest possible time to consider [Global's affirmative defense] would normally be after the answer has been filed, if it is possible to decide the issue through a Rule 12(c) motion for judgment on the pleadings." *Id.* Global has answered the amended complaint so a Rule 12(c) motion is not premature. Moreover, because the issue is ripe for resolution now and because Ohio Bell does not dispute that it has not, in fact, sought relief before PUCO, the Court holds that the fairest and most expeditious route is to dispose of Global's motion as if it were a Rule 12(c) motion.

B. Ohio Bell's Federal-Tariff Claims

[6] There is no question that federal courts are vested with jurisdiction to adjudicate federal-tariff claims. *See MCI Telecomms. Corp. v. Graham,* 7 F.3d 477 (6th Cir.1993). Global does not dispute this principle, but contends that resolution of each of Ohio Bell's federal-tariff claims depends upon an interpretation of the ICA, and that therefore these claims must first be presented to PUCO. Global is wrong. With respect to all three of its federal-tariff claims, Ohio Bell has pleaded that it has provided and billed Global for services it has rendered pursuant to its federal tariff, but that Global has refused to pay.

[7] Under the well-pleaded complaint rule, so long as a basis for federal jurisdiction appears on the face of the plaintiff's complaint, the complaint is not jurisdictionally infirm. *Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149, 154, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Here, the first three counts of the amended complaint expressly allege violations of Ohio Bell's federal tariffs: Count one alleges that Ohio Bell has billed Global for two "SS7 links at the tariffed rate, but [Global] ha[s] not paid any of the charges." Count two alleges that Ohio Bell has billed Global for "the transport and termination of interstate toll traffic" under Ohio Bell's federal tariff, but Global has refused to pay. Count three alleges that Global has "violated [Ohio Bell's] federal tariff by failing to pay the tariffed rates for the local number portability queries performed by [Ohio Bell] on [Global's] behalf." These factual allegations are sufficient to invoke the Court's subject matter jurisdiction to hear Ohio Bell's federal-tariff claims. The fact that Global may defend against these claims by relying on the ICA does not eliminate this Court's jurisdiction. *See Peters v. Lincoln Elec. Co.,* 285 F.3d 456, 468 (6th Cir.2002) ("To determine whether a claim arises under federal law, a court, under the 'well-pleaded complaint' rule, generally looks only to the plaintiff's complaint.").

Accordingly, the Court **DENIES** Global's motion as to Ohio Bell's federal-tariff claims.

*925 V. CONCLUSION

For the reasons set forth above, the Court construes Global's motion as a Rule 12(c) motion for judgment on the pleadings and **GRANTS** it as to Ohio

Bell's breach-of-ICA claims, but **DENIES** it in all other respects. The Court further **DENIES** Ohio Bell's motion to strike.

IT IS SO ORDERED.

S.D.Ohio,2008.
Ohio Bell Tel. Co., Inc. v. Global Naps Ohio, Inc.
540 F.Supp.2d 914

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PACIFIC BELL TELEPHONE COMPANY, d/b/a AT&T CALIFORNIA, Plaintiff, vs. GLOBAL NAPS CALIFORNIA, INC., et al., Defendants.	CV 05 - 7734 ODW (PJWx) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

This matter comes before the Court on Defendants Global NAPs California, Inc., Global NAPs, Inc., Global NAPs Networks, Inc., and Global NAPs Realty, Inc.'s (collectively, "Defendants") Motion to Dismiss for Lack of Subject Matter Jurisdiction.[1] Having been fully briefed, and after hearing oral argument, the Court rules as follows.

I. BACKGROUND

The Federal Telecommunications Act of 1996 (the "Act") requires competing carriers to interconnect their networks to enable customers of one network to call customers of another. 47 U.S.C. § 251. Pursuant to the Act, competing local telephone companies must make arrangements to pay each other reciprocal compensation for telecommunications. Reciprocal compensation is the arrangement between two carriers in which each receives compensation from the other carrier

[1] Joining in this Motion are Specially Appearing Defendants Ferrous Miner Holdings, Ltd. and Global NAPs New Hampshire, Inc.

for the transport and termination on each carrier's network of local telecommunications traffic that originates on the network of the other carrier. Reciprocal compensation arrangements are given effect through interconnection agreements. These interconnection agreements can be arrived at through negotiation or arbitration. However, any agreement adopted by such means must then be submitted for approval to the relevant state commission. *Id.* at § 252(e).

Plaintiff AT&T California ("Plaintiff") and Defendant Global California are telecommunications carriers that entered into an "Interconnection Agreement" (the "Agreement"), as required by the Act. (SAC ¶ 1.) The Agreement specifies the rates, terms, and conditions upon which AT&T California and Global California interconnect their networks and exchange certain communication traffic. (*Id.*) Issues not initially agreed upon by the parties were submitted to the California Public Utilities Commission ("CPUC") for arbitration, pursuant to § 252(b) of the Act. (SAC ¶ 18.) After arbitrating the open issues, CPUC approved the parties' Agreement. (*Id.*) Neither party sought review of the CPUC's determination and, as a result, the Agreement became effective on August 11, 2003. (*Id.*)

In accordance with the Agreement, from March 2004 to the present, AT&T California has provided a number of services to Global California, including: (1) using AT&T California's local network to complete local and long distance calls that Global California delivers to AT&T California, and (2) acting as a middleman to transport and route traffic destined to a third party carrier where Global California delivers the traffic to AT&T California rather than a third party carrier. (SAC ¶ 2.) Global California allegedly failed to pay for these services . (*Id.*)

On September 23, 2006, Plaintiff filed suit against Defendants in state court seeking payment of amounts due them under the Agreement. On October 28, 2006, Defendants removed the case to federal court. Plaintiff then amended its complaint to add a quasi-contract/unjust enrichment claim. On February 20, 2007, Plaintiff filed a Second Amended Complaint which added five additional defendants: Global NAPS, Inc. ("Global Inc."), Global NAPS Networks, Inc. ("Global Networks"), Global NAPS Realty, Inc. ("Global Realty"), Global NH, and Ferrous Miner.

Presently pending before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction. Defendants assert that this Court lacks jurisdiction over Plaintiff's first cause of action for breach of contract (reciprocal compensation and intralata toll charges), second cause of action for breach of contract (transiting charges), and fourth cause of action for unjust enrichment.

II. LEGAL STANDARD

It is well established that Federal courts are courts of limited jurisdiction without general subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They can adjudicate only those cases which the Constitution and Congress authorize them to adjudicate. *See id.* As such, Federal courts are presumptively without jurisdiction over civil actions and the burden of establishing the contrary rests upon the party asserting jurisdiction. *KVOS v. Associated Press*, 299 U.S. 269, 278 (1936). Because of this, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). And in order to sustain federal jurisdiction, the complaint must allege a claim under the Constitution or relevant federal statute and must not be made solely for the purpose of obtaining federal jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

A party challenging the court's jurisdiction under Rule 12(b)(1) may do so by raising either a facial attack or a factual attack. *See White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000). A facial attack is one where "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In evaluating a facial attack to jurisdiction, the Court must accept the factual allegations in plaintiff's complaint as true. *See Miranda v. Reno*, 238 F.3d 1156, 1157 n. 1 (9th Cir. 2001). For a factual attack, in contrast, the Court may consider extrinsic evidence. *See Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Further, the court does not have to assume the truthfulness of the allegations, and may resolve any factual disputes. *See White*, 227

F.3d at 1242. Thus, "[o]nce the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or evidence properly before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

III. DISCUSSION

In support of their Motion, Defendants' primary contention is that this Court has no subject matter jurisdiction over Plaintiff's first, second and fourth causes of action because "federal courts do not have jurisdiction to hear disputes arising out of the interpretation and enforcement of interconnection agreements unless they have been addressed in the first instance by the State commission that approved the [Agreement]." (Mot. at 5.) Rather than address this argument head on, Plaintiff's opposition is rife with creativity. Specifically, Plaintiff's arguments, among others, are: (1) that this Court has supplemental jurisdiction over the claims Defendants seek to dismiss; (2) that Defendants have waived any lack of subject matter jurisdiction argument; and (3) that Defendants have contracted for § 1331 jurisdiction.

A. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs Breach Of Contract Claims.

As a threshold matter, Plaintiff's assertion that Defendants have waived their "theory" for lack of subject matter jurisdiction "by waiting so inordinately long to raise it," is without merit. (Opp'n at 12). The Federal Rules clearly permit any party to address a court's subject matter jurisdiction "[w]henever it appears . . . that the court lacks jurisdiction of the subject matter." Fed. R. Civ. P. 12(h)(3). Accordingly, "challenges to subject matter jurisdiction cannot be waived and may be raised at any point in the proceeding." *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1163-64 (9th Cir. 2002).

Proceeding now to the merits of the underlying Motion, Defendants argue that § 252(e)(6) deprives this Court of jurisdiction over Plaintiff's breach of contract claims.[2] That section reads:

[2] In arguing to the contrary Plaintiff states the following: "Defendants have relied on cases that discuss jurisdiction under § 252(e)(6) of the Act, but those cases have no bearing here. Plaintiff didn't file any § 252(e)(6)

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

In finding that this section illustrates Congressional intent to deprive this Court of jurisdiction over disputes arising from the Agreement, at least in the first instance, the Court follows the reasoning behind the Third Circuit's recent decision, *Core Communications, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007).

There, proceeding under the deferential standard espoused in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)[3], the Third Circuit found that Congress has not yet spoken on the proper interpretation and enforcement procedure of disputes arising from already approved interconnection agreements. *Core*, 493 F.3d at 340-41. Because the Act did not set out an enforcement scheme for a pure claim for breach of an interconnection agreement, the court turned to the Acts implementing agency, the Federal Communications Commission's ("FCC"), and its opinion and order in *In the Matter of Starpower Communications, LLC*, 15 F.C.C.R. 11277 (F.C.C. 2000) to fill the "gap" left by the Act's silence. *Core*, 493 F.3d at 341. In *Starpower*, the FCC stated, "[i]n applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252. We conclude that it is." 15 F.C.C.R. at 11279. This "responsibility" of a state commission, *Core* noted, was subject to two different interpretations. *Core*, 493 F.3d at 341-43. On the one hand, a narrow interpretation of

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appeal in this case. We've never asserted that § 252(e)(6) is the bases for this Court's jurisdiction." (Tr. Sep. 24, 2007.) For lack of a better word, the Court's response is: Exactly! Our opinion follows that reached in *Core*, *infra*. Accordingly, our position is that federal courts may only review matters which have first been presented to the appropriate state commission. Because it is undisputed that Plaintiff does not bring an "appeal" from a determination made by the CPUC, we do not have jurisdiction over their breach of contract claims.

[3] Under *Chevron*, federal courts must defer to an implementing agency's (here, the FCC) interpretation of a statute within its jurisdiction if (1) "the statute is silent or ambiguous with respect to the specific issue" at hand, and (2) "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

"responsibility" would suggest that state commissions have, at a minimum, the non-exclusive authority to hear post-formation disputes involving approved interconnection agreements.[4] *Id.* at 342. On the other, however, a state's "responsibility" under § 252 suggests that there is not a shared role for the federal courts. *Id.* Looking at the structure of the statutory scheme as a whole, and finding no indication in other FCC decisions that the state commissions' jurisdiction over post-formation disputes is shared with the federal courts, *Core* followed the latter, more broad interpretation. *Id.* Specifically, *Core* stated, "a 'symmetrical and coherent regulatory scheme' is one where the bodies that considered formation problems also resolve interpretation difficulties. As with formation problems, federal court jurisdiction over state commission interpretation and enforcement decisions should be limited to appellate review." *Id.* at 342-43.

Though this precise question has not been heavily litigated, the Court finds no reason to stray from *Core's* conclusions. In so holding, we recognize that at the heart of the Act is a scheme of "cooperative federalism" whereby states were given primary responsibility over interconnection agreements. As noted, "[r]ather than placing the entire scope of regulatory authority in the federal government, 'Congress enlisted the aid of state public utility commissions to ensure that local competition was implemented fairly and with due regard to the local conditions and the particular historical circumstances of local regulation under the prior regime.'" *Global Naps, Inc. v. Mass. Dep't of Telecomm. and Energy*, 427 F.3d 34, 46 (1st Cir. 2005) (citation omitted). Permitting parties to proceed straight to federal court would therefore circumvent the role of the relevant state commission and would jeopardize the entire system of review established by the Act. *Ind. Bell Tel. Co., Inc. v. McCarty*, 30 F.Supp.2d 1100, 1104 (S.D. Ind. 1998); *accord BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.* 317 F.3d 1270, 1278 n. 9 (11th Cir. 2003) (noting, "[a] court could ascribe to the agreement a meaning that differs from what the state commission believed it was approving .... To deprive the state commission of authority to interpret the agreement that it has approved would thus subvert the role that Congress prescribed for state commissions."); *accord Sw. Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000)

[4] Indeed, it is this view Plaintiff relies upon in its Opposition. (Opp'n at 11) ("*Starpower* . . . merely "graft[ed] onto the [1996] Act an exhaustion requirement.").

("the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.").

Here, Plaintiff's first and second causes of action allege pure claims for breach of their Agreement. In particular, Plaintiff seeks recovery of certain (large) sums of money for Defendants' failure to pay reciprocal compensation and transiting charges. Though cognizant of Plaintiff's plight, the Court, at this time, cannot provide any redress. Without delving into the merits of Plaintiff's claims, the Court notes that enforcement of the parties' Agreement necessarily entails interpretation of the terms and conditions contained therein - determinations which, the Court is persuaded, ought to be addressed, in the first instance, by the CPUC. To the extent a select minority of cases hold otherwise, the Court declines to follow them. Interconnection agreements are the tools through which the Act is enforced and we find it entirely consistent with the Act to have the CPUC interpret the parties' Agreement in the first instance, and then subject their interpretations to federal review.[5] *See BellSouth Telecomms.*, 317 F.3d. at 1278.

<u>B. The Parties Cannot Invoke This Court's Jurisdiction By Agreement</u>

In further support of their position that this Court has subject matter jurisdiction over their breach of contract claims, Plaintiff's point to language in the parties' Agreement which provides that any party may pursue "any remedy available to it pursuant to law, equity or agency mechanism." (Opp'n at 10.) Plaintiff's argument fails for two reasons. First, because the Court is of the opinion that Plaintiff's breach of contract claims must first be presented to the CPUC,

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[5] At this point the Court finds it appropriate to address the Supreme Court's decision in *Verizon Md Inc. v. Pub Serv. Comm'n of Md*, 535 U S. 635 (2002). Plaintiff argues, both in their papers and at the September 24, 2007 hearing, that the Court's position is inconsistent with *Verizon Md.* The Court, however, finds that no inconsistency exists. The Supreme Court held only that § 252(e)(6) does not divest the district courts of their authority under 28 U.S.C. § 1331 to review a state commission's order for compliance with federal law. *Verizon Md.*, 535 U.S. at 642. In other words, the Supreme Court merely settled the question of whether federal courts could review a state commission's "interpretation or enforcement of an [existing] interconnection agreement" because only arbitration and approval are expressly mentioned in § 252. *Id.* The court concluded that nothing in either § 252(e)(6) or in the rest of the Act limited federal jurisdiction that would otherwise exist under § 1331 over rulings that were allegedly violative of federal law. *Id.* It did *not*, however, hold that federal district courts have jurisdiction to decide such questions in the first instance, prior to consideration and decision by a state commission. Indeed, the Supreme Court's holding actually *presupposes* a determination made by the appropriate state commission in the first instance; a determination which we do not have here.

bringing those claims to this Court is not an "available" remedy. Second, and more pointedly, in foreclosing this exact argument the Eastern District of Virginia, when faced with much more unambiguous contractual language, stated, "parties cannot contract for judicial review in direct contravention to the Telecommunications Act." *Bell Atl. Va., Inc. v. Worldcom Techs. of Va.*, 70 F.Supp.2d 620, 626 (E.D. Va. 1999); *accord AT&T Commc'ns of Ohio v. Ohio Bell Tel. Co.*, 29 F.Supp.2d 855, 856-57 (S.D. Ohio 1998).[6] Accordingly, Plaintiff cannot seek refuge in the parties' dispute resolution clause.

C. <u>The Court Will Not Exercise Supplemental Jurisdiction</u>

Finally, as alluded to above, the thrust of Plaintiff's argument is that this Court's jurisdiction over Plaintiff's third cause of action for failure to pay federal tariff rates permits the exercise of supplemental jurisdiction over its breach of contract claims. Plaintiff is incorrect. As already discussed, bringing to the federal courts, in the first instance, claims for breach of an interconnection agreement would undermine the role Congress has prescribed for state commissions. For those same reasons, Plaintiff's attempt to "back-door" it's claims as supplemental must fail as well.[7]

To be clear, the Court recognizes that judicial efficiency could best be served by hearing all of Plaintiff's claims at the same time. Therefore, it is at this point where we pick up where *Core* left off and find that a stay of Plaintiff's federal tariff claim would be appropriate pending refiling, if any, of Plaintiff's first and second causes of action once CPUC has made its determination. And because we find, and both parties agree, that Plaintiff's fourth cause of action

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[6] The relevant contractual language in *Bell Atl Va., Inc* stated, "[a]ny dispute between the Parties regarding the *interpretation or enforcement* of this Agreement or any of its terms shall be addressed by good faith negotiation between the Parties, in the first instance Should such negotiations fail to resolve the dispute in a reasonable time, *either Party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction*." *Bell Atl. Va, Inc.*, 70 F.Supp.2d at 626 (emphasis in original).

[7] In arguing to the contrary, Plaintiff relies on *Mich Bell Tel. Co v MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 355-56 (6th Cir. 2003), *Connect Comms Corp. v. Sw Bell Tel*, 467 F 3d 703, 707-09 (8th Cir. 2006), and *Sw. Bell Tel. Co. v. Brooks Fiber Comms. of Okla., Inc.*, 235 F.3d 493, 498 (10th Cir. 2000). Plaintiff drastically misstates the conclusions reached in these cases regarding supplemental jurisdiction. These cases do not, as Plaintiff contends, stand for the proposition that federal courts may hear, pursuant to § 1367, claims for breaches of interconnection agreements that were not first presented to the appropriate state commission. Rather, these cases merely asserted that federal courts may invoke supplemental jurisdiction over a state commission's state law determinations.

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for damages in quasi-contract cannot be presented before the CPUC, and to the extent that it is directly intertwined with Plaintiff's other breach of contract claims, that claim is dismissed without prejudice.

IV. CONCLUSION

For the forgoing reasons the Court finds that the Act makes only a limited grant of jurisdiction to the federal district courts to review only those disputes that have been first presented to the appropriate state utilities commission. We find especially persuasive the reasoning adopted by the Third and Eleventh Circuits and conclude that the statutory scheme set forth in the Act makes the state regulatory commissions the initial decision-makers in disputes involving interconnection agreements. Accordingly, Plaintiff's first and second causes of action are hereby DISMISSED without prejudice, pending any refiling once CPUC has made its determinations. Plaintiff's third cause of action is hereby STAYED and Plaintiff's fourth cause of action is DISMISSED without prejudice.[8]

IT IS SO ORDERED.

DATE: October 1, 2007

OTIS D. WRIGHT II
UNITED STATES DISTRICT JUDGE

[8] Though the Court appreciates Plaintiff's concerns, dismissal at this stage in the proceedings will not be exceptionally prejudicial. Undoubtedly, all discovery already completed will be invaluable in proceedings before the CPUC and to any future litigation in this Court.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PACIFIC BELL TELEPHONE COMPANY, a California Corporation d/b/a AT&T California,

Plaintiff,

v.

GLOBAL NAPS CALIFORNIA, INC., et al.,

Defendants.

Case No. CV05-7734 ODW (PJWx)

STATUS REPORT RE: FINAL RULING BY CALIFORNIA PUBLIC UTILITIES COMMISSION

The Honorable Otis D. Wright, II

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

Pursuant to the Court's June 30, 2008 Order, Plaintiff Pacific Bell Telephone Company d/b/a AT&T California ("AT&T California") hereby notifies the Court that, on September 22, 2008, the California Public Utilities Commission issued its final Modified Presiding Officer's Decision Finding Global NAPs California in Breach of Interconnection Agreement (the "Modified Decision") in Pacific Bell Telephone Company v. Global NAPs California, Inc., California Public Utilities Commission Case No. 07-11-018 (the "CPUC Case").[1] A copy of the Modified Decision is attached hereto as Exhibit A.

The Modified Decision adopts with slight modification the June 4, 2008 decision of Administrative Law Judge Hallie Yacknin finding that Global NAPs California, Inc. ("Global NAPs") breached the parties' interconnection agreement. In summary, the Modified Decision "finds that Global Naps California (GNAPs) has breached its interconnection agreement with . . . AT&T California . . . 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." Modified Decision at 1.

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[1] AT&T California initiated the CPUC Case following the Court's grant of the Motion to Dismiss for Lack of Subject Matter jurisdiction filed by defendants Global NAPs California, Inc., Global NAPs, Inc., Global NAPs Realty, Inc., Global NAPs Networks, Inc., Global NAPs New Hampshire, Inc., and Ferrous Miner Holdings, Ltd.

Pursuant to the CPUC Rules of Practice and Procedure, Global NAPs may file an application for rehearing with the CPUC within 30 days of the date of mailing of the Modified Decision. *See* CPUC Rule 16.1(a).

Dated: September 24, 2008

MAYER BROWN LLP
CHRISTIAN F. BINNIG
JOHN NADOLENCO
HANS J. GERMANN
MATTHEW H. MARMOLEJO

By: /s/ Matthew H. Marmolejo
Matthew H. Marmolejo
Attorneys for Plaintiff
PACIFIC BELL TELEPHONE COMPANY

Exhibit A

ALJ/MOD-POD/HSY/tcg **Date of Issuance 9/22/2008**

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

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[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]

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[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

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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

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[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