ORIGINAL

Richard A. Chapkis
Vice President & General Counsel, Southeast Region
Legal Department

verizon

FLTC0007
201 North Franklin Street (33602)
Post Office Box 110
Tampa, Florida 33601-0110

Phone 813 483-1256
Fax 813 273-9825
richard.chapkis@verizon.com

April 25, 2003

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 011666-TP
Petition by Global NAPS, Inc. for arbitration pursuant to 47 U.S.C. 252(b) of interconnection, rates, terms and conditions with Verizon Florida Inc.

Dear Ms. Bayo:

Please find enclosed for filing an original and 15 copies of Verizon Florida Inc.'s Motion To Strike New Substantive Argument From GNAPS' Revised Post-Hearing Brief in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at (813) 483-1256.

Sincerely,

Richard A. Chapkis

RAC:tas
Enclosures

AUS
CAF
CMP
COM 3
CTR
ECR
GCL
OPC
MMS
SEC 1
OTH

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Global NAPs, Inc. for Arbitration Pursuant to 47 U.S.C. 252(b) of Interconnection Rates, Terms, and Conditions with Verizon Florida Inc.	)))))	Docket No. 011666-TP Filed: April 25, 2003

VERIZON FLORIDA INC.'S MOTION TO STRIKE NEW SUBSTANTIVE ARGUMENT FROM GNAPS' REVISED POST-HEARING BRIEF

Verizon Florida Inc. (Verizon) moves the Florida Public Service Commission (Commission) to strike the new substantive argument (highlighted in yellow on the attached pages) from the revised post-hearing brief of Global NAPs, Inc. (GNAPs), filed on April 15, 2003 (Revised Brief).

I. BACKGROUND

On April 10, 2003, GNAPs filed its post-hearing brief.[1] That brief violated Commission requirements in two respects.

First, it was almost twice the page limit permitted by Commission Rules and the Prehearing Order. That Order expressly states that "[p]ursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages."[2] Notwithstanding that express admonition, GNAPs' brief (including an appended statement of GNAPs' positions) was 76 pages long.

[1] This is not the first time GNAPs has disregarded Commission procedure and basic fairness. In this proceeding, GNAPs has not been serving Verizon with its filings. In fact, GNAPs did not even serve Verizon with its brief. There have also been other problems. For example, Verizon was compelled to seek leave to file surrebuttal testimony when GNAPs' witness Selwyn included new proposals for the first time in his rebuttal testimony.

[2] Prehearing Order, number PSC-03-0253-PHO-TP, at 4.

GNAPs has no excuse for its non-compliance and, indeed, has offered none. GNAPs regularly appears before this Commission and is very familiar with Commission rules and procedures. The 40-page limit on post-hearing submissions was stated in the draft Prehearing Order, as is customary. As GNAPs knows, requests for enlargement of the page limit are supposed to be made at the prehearing conference. Because GNAPs made no such request, the 40-page limit was included in the final Prehearing Order. Even so, GNAPs could have moved for leave to file a brief that exceeded the page limit. GNAPs did not do so.

Second, GNAPs' brief did not contain a summary of the company's positions. The Prehearing Order expressly provides that "each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement."[3] Again, GNAPs is very familiar with this requirement, yet failed to comply with it.

Verizon's inclination upon reading GNAPs' brief was to file a motion to strike everything over the 40-page limit, or, in the alternative, to compel GNAPs to file a compliant brief. Because Verizon struggled to address the wide variety of complex issues in this arbitration within the 40-page limit, and was forced to delete text that it would have otherwise included were the page limit longer, Verizon would have preferred to hold GNAPs to the strict letter of the Prehearing Order and Commission Rules.

Staff, however, had independently noticed that GNAPs' brief was defective and, as a professional courtesy, allowed GNAPs a few days to file a compliant brief. As Staff counsel correctly recognized in an April 17, 2003 e-mail to the parties in this case,

[3] Id. at 3-4.

"Verizon, however reluctantly, agreed to allow the filing of the compliant brief, so long as there was no prejudice as a result of GNAPs having read the Verizon brief, i.e., no new arguments not raised in the initial brief, etc."

This condition was, of course, particularly important to Verizon given that GNAPs had Verizon's post-hearing brief while GNAPs was correcting its original brief.

On April 16, 2003, six days receiving Verizon's post-hearing brief, GNAPs filed its Revised Brief. That brief is defective and prejudices Verizon in two respects.

First, it contains new substantive argument. A review of the attached pages reveals that GNAPs inserted new argument (highlighted in yellow) in the following sections of the Revised Brief: Introduction, Jurisdictional Statement, Issue No. 5 (VNXX), Issue No. 10 (Change-In-Law); and Issue No. 11 (Access to UNEs).

Second, the Revised Brief contains extensive "testimony" that is not in the record, concerning, among other things, the two-way trunking collocation, calling area, VNXX, insurance and audit issues.

As discussed below, the Commission should strike the new substantive argument and disregard the new "testimony" that is not supported by the record.

II. THE NEW SUBSTANTIVE ARGUMENT IN GNAPS' REVISED BRIEF IS IMPROPER AND MUST BE STRICKEN; THE NEW "TESTIMONY" IN GNAPS' REVISED BRIEF IS IMPROPER AND SHOULD BE IGNORED.

GNAPs was afforded leeway only to reduce the size of its brief—not to add or reframe arguments. It was improper for GNAPs to abuse the opportunity (graciously afforded by Legal Staff and Verizon) to rectify defects in its initial brief by including new substantive argument in its Revised Brief. Aside from the plain impropriety of abusing a professional courtesy, GNAPs' inclusion of new substantive argument – potentially in

response to arguments in Verizon's post-hearing brief, which GNAPs had for several days before GNAPs filed its Revised Brief – severely prejudices Verizon. The procedural schedule did not call for or in any way contemplate the filing of rebuttal briefs, and GNAPs would gain an unfair advantage if it were allowed to capitalize on its disregard for the Prehearing Order by getting the last word. The Commission should not countenance GNAPs' disregard of its orders, Verizon's due process rights, and basic fairness. It is impossible to completely remedy the harm to Verizon from GNAPs' disregard for the rules at this point. At the very least, however, the Commission should strike the new substantive argument from the Revised Brief in its entirety.

It was also improper for GNAPs to include new "testimony" in its Revised Brief that is not supported by the factual record. This "testimony" is extensive. It is also obvious because it contains no references or citations to the record. GNAPs' inclusion of this new "testimony" was a blatant attempt to bolster its case without affording Verizon the opportunity to conduct discovery or respond. Because Verizon is aware that this docket is staffed by skilled and experienced staff, Verizon trusts that Staff will disregard all of GNAPs' unsupported factual allegations when it makes its recommendation to the Commission, and Verizon simply requests that the Commission take care to ensure that it bases its decision only on that which is in the factual record.

III. CONCLUSION

For the foregoing reasons, the Commission should strike the new substantive argument (highlighted in yellow on the attached pages), and should disregard all improper "testimony" that is not supported by any record references.

Respectfully submitted on April 25, 2003.

By: _____

RICHARD A. CHAPKIS
201 North Franklin Street
MC FLTC0717
P.O. Box 110
Tampa, Florida 33601
Tel: 813-483-1256
Fax: 813-273-9825
e-mail: richard.chapkis@verizon.com

Attorney for Verizon Florida Inc.

Before the

STATE OF FLORIDA

PUBLIC UTILITIES COMMISSION

In the Matter of GNAPs NAPs, Inc. Petition for Arbitration Pursuant to 23 U.S.C. § 232(b) of Interconnection Rates, Terms and Conditions with Verizon Florida, Inc., *f/k/a* GTE Florida, Inc.	Case No. 011666-TP

Initial Brief of the Petitioner, Global NAPs, Inc.

Respectfully submitted by its attorneys:

Jon C. Moyle, Jr.
Florida Bar No. 727016
Moyle, Flanigan, Katz, Raymond and Sheehan, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301
Telephone: (850) 681-3828
Facsimile: (850) 681-8788
jmoylejr@moylelaw.com

James R. J. Scheltema
GNAPs NAPs, Inc.
5042 Durham Road West
Columbia, MD 21044
(617) 504-5513
jscheltema@gnaps.com

Date: April 15, 2003

I. INTRODUCTION.

One legal issue, jurisdiction, and eleven mixed issues of fact and law have been identified in this arbitration. *Petition by Global NAPS, Inc. for arbitration pursuant to 47 U.S.C. 252(b) of interconnection rates, terms and conditions with Verizon Florida Inc.*, Docket No. 011666-TP, Pre-Hearing Order, PSC-03-0253-PHO-TP (Feb 20, 2003) ("*Pre-Hearing Order*"). Pursuant to the *Pre-Hearing Order*, Global NAPs, Inc. ("GNAPs") submits the following brief dealing with said issues in order.

II. ARGUMENT.

A. The Commission has jurisdiction to arbitrate an interconnection agreement between the parties consistent with §§251 and 252 of the Telecommunications Act.

Legal Issue: What is the Commission's jurisdiction in this matter?

> ***The Commission has jurisdiction to resolve each issue raised in the petition and response consistent with the standards set out in 47 U.S.C.§252(c), but has no jurisdiction to regulate ISP-bound traffic.***

The Commission has jurisdiction to arbitrate the parties' interconnection agreement pursuant to 47 U.S.C. §252. Under §252(a)(4). The Commission must "limit its consideration of any petition … to the issues set forth in the petition and in the response," §252(a)(4)(A), and must "resolve each issue set forth in the petition and the response" as required by §252(c). §252(a)(4)(C).

The Commission has no jurisdiction, however, to regulate ISP-bound traffic. The FCC has declared that ISP-bound calls are jurisdictionally interstate and subject to that agency's authority under section 201 of the Telecommunications Act ("*Act*"). *In Re Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996, Intercarrier Compensation For ISP-Bound Traffic,* 16 F.C.C.R. 9 (2001) ("*ISP*

Remand Order")[1] ¶1. ¶59. The FCC specifically declared that these calls are interstate "information access" traffic, *Id.* ¶42, [2] and expressly rejected the suggestion that the "information access" definition engrafts a geographic limitation that renders this service category a subset of telephone exchange service. *Id.* ¶44 n.82. Most importantly, the FCC held that state regulators no longer had jurisdiction to consider the issue of inter-carrier compensation for ISP-bound calls, and that the issue was no longer a fit subject for inclusion in interconnection agreements. It stated, "Because we now exercise our authority under section 201, to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue." *ISP Remand Order.* ¶82. *See New York Telephone v. FCC,* 631 F.2d 1059, 1066 (2nd Cir. 1980)(Court rejected state commission's attempt to impose a surcharge on in-state portion of interstate service.)

B. GNAPs may designate a single point of interconnection per LATA and the parties are each responsible for transport on their side of the point of interconnection.

Issue 1: (A) May GNAPs designate a single physical point of interconnection per LATA on Verizon's existing network?

(B) If GNAPs chooses a single point of interconnection (SPOI) per LATA on Verizon's network, should Verizon receive any compensation from GNAPs for transporting Verizon local traffic to this SPOI? If so, how should the compensation be determined?

---

[1] The *ISP Remand Order* was appealed. On May 3, 2002, the D. C. Circuit in *WorldCom, Inc. v. Federal Communications Comm'n., et al.*, No. 01-1218, Slip. Op. (D.C. Cir. May 3, 2002) at 6-7, rejected certain aspects of the FCC's reasoning, not relevant here, but expressly recognized that other legal bases for the FCC's action may exist and expressly declined to vacate the rules established by the *ISP Remand Order.* Thus, the rules and obligations set forth in the *ISP Remand Order* remain in full force and effect.

[2] As the Ninth Circuit stated as recently as April 7, 2003, "the FCC and the D.C. Circuit have made it clear that ISP traffic is "interstate" for jurisdictional purposes." *Pacific Bell v. Pac-West Telecomm*, 2003 WL 1792957(9th Cir. 2003) at *8. *See also In the Matter of Starpower Communications v. Verizon South, Inc. (Starpower II).* 17 F.C.C.R. 6873, 6886 ¶30, 2002 WL 518062 (2002) ("ISP-bound traffic is jurisdictionally interstate").

numbers for free, it seeks imposition of access charges on GNAPs for terminating Verizon originated traffic.

Finally, Verizon has not proven that it has a workable manner of billing VNXX calls There is no readily available information that tells a carrier the physical location of a calling or called party, (nor is one needed because there is no reason to draw any distinction between "traditional" local service and VNXX local service as there are no additional costs imposed when VNXXs are used). For instance, Verizon's billing system does not identify each physical service location belonging to a single retail customer. There is, therefore, no reason to believe that carriers could readily obtain the information on which Verizon proposes to rely and no reason to create this functionality. This was the basis upon which the FCC's *Virginia Order* rejected Verizon's proposal to rate calls based not upon the originating and terminating central office codes, or NPA-NXXs, associated with the call but upon the geographic originating and end points of the call.[34]

G. The parties' interconnection agreement should include a change in law provision specifically devoted to the ISP Remand Order.

Issue 6: Should the parties' interconnection agreement include a change in law provision specifically devoted to the ISP Remand Order?

*** The parties' interconnection agreement should include a change in law provision specifically devoted to the ISP Remand Order.***

The proposed interconnection agreement submitted by Verizon acknowledged that GNAPs has a right to renegotiate the reciprocal compensation obligations if the current law is overturned or otherwise revised. The issue is simply whether Verizon's

[34] *Virginia Order* ¶¶ 286-288.

records, the costs of "sanitizing" these records would be prohibitive. There really is no need for Verizon to require this information since it should have its own records of calls exchanged with GNAPs and/or verify compliance with OSS procedures. GNAPs is amenable, however, to providing traffic reports and Call Data Records ("CDRs") necessary to verify billing.[41] With CDRs available, Verizon has no legitimate basis to insist on access to GNAPs' books and records

K. A change of law should be implemented when final.

Issue 10: When should a change in law be implemented?

A change in law should be implemented when there is a final adjudicatory determination which materially affects the terms and/or conditions under which the parties exchange traffic.

GNAPs submits that Verizon should not be permitted to use self help to apply changes of law as it unilaterally interprets them. Before applying a change of law, GNAPs submits that there must be a final adjudication or determination by the Commission, the FCC, or a court of competent jurisdiction.

L. GNAPs should be permitted access to network elements that have not already been ordered unbundled

Issue 11: Should GNAPs be permitted access to network elements that have not already been ordered unbundled?

GNAPs wants some protections that as a customer it will (a) have access to the same technologies deployed in Verizon's network and (b) Verizon will not deploy new technologies which will affect GNAPs' service quality without adequate advanced notice and testing.

Verizon characterizes GNAPs' position as an attempt to force Verizon to freeze its network in time or build a different network to suit GNAPs. This misapprehends GNAPs' position. GNAPs simply wants access to any new technology Verizon is

[41] GNAPs' proposed language is found at Exhibit B, Proposed Interconnection Agreement at GT&C § 7,

employing and appropriate notice before deployment to permit testing so GNAPs may maintain its network integrity.

III. CONCLUSION

GNAPs urges that the Commission issue an arbitration order consistent with the positions GNAPs set forth above.

Respectfully submitted by its attorneys:

Jon C. Moyle, Jr.
Florida Bar No. 727016
Moyle, Flanigan, Katz, Raymond and Sheehan, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301
Telephone: (850) 681-3828
Facsimile: (850) 681-8788
jmoylejr@moylelaw.com

James R. J. Scheltema
Global NAPs, Inc.
Southern Regional Office
1900 East Gadsden Street
Pensacola, FL 32501
(617) 504-5513
jscheltema@gnaps.com

Date: April 15, 2003

Interconnection Attachment Section 6.3, 10.13. Additional Services Attachment § 8.5.4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Motion To Strike New Substantive Argument From GNAPS' Revised Post Hearing Brief in Docket No. 011666-TP were sent via overnight mail on April 24, 2003 to the following:

Lee Fordham, Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

John C. Dodge, Esq.
David N. Tobenkin, Esq.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W., 2nd Floor
Washington, DC 20006

Jon C. Moyle, Esq.
Moyle Flanigan Katz Raymond & Sheehan P.A.
118 North Gadsden Street
Tallahassee, FL 32301

William J. Rooney, Jr., Esq.
Vice President and General Counsel
Global NAPS, Inc.
89 Access Road
Norwood, MA 02062

James R. J. Scheltema
Director-Regulatory Affairs
Global NAPs, Inc.
5042 Durham Road West
Columbia, MD 21044

Kelly L. Faglioni, Esq.
Edward P. Noonan, Esq.
Hunton & Williams
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, VA 23219-4074

Richard Chapkis