

ORIGINAL



Kimberly Caswell
Associate General Counsel
Legal Department

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

Phone 813 483-2606
Fax 813 204-8870
kimberly.caswell@verizon.com

February 14, 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

RECEIVED-PPSC
FEB 14 PM 1:51
COMMISSION
CLERK

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:

REC'D
FILED
MAR 11
OCT 11
ECL
GCL
OPC
MMS
SEC
OTH

Please find enclosed for filing in the above matter an original and 15 copies of Verizon Florida Inc.'s Motion for Leave to File Surrebuttal Or In The Alternative to Strike Portions of the Rebuttal Testimony of Global NAPs, Inc. Witness Lee L. Selwyn. Also enclosed are an original and 15 copies of the Surrebuttal Testimony of Terry Haynes on behalf of Verizon Florida Inc. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at (813) 483-2617.

Sincerely,

Kimberly Caswell

KC:tas
Enclosures

S.T. [Handwritten]
DOCUMENT NUMBER-DATE
01531 FEB 14 8
COMMISSION CLERK

RECEIVED & FILED
N-10
RECORDS

Motion
DOCUMENT NUMBER-DATE
01530 FEB 14 8
FPSC-COMM CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition By Global NAPs, Inc. for) Docket No. 011666-TP
Arbitration Pursuant to 47 U.S.C. 252(b)) Filed: February 14, 2003
of Interconnection Rates, Terms, and)
Conditions with Verizon Florida Inc.)
_____)

MOTION OF VERIZON FLORIDA INC. FOR LEAVE TO FILE SURREBUTTAL OR IN THE ALTERNATIVE TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF GLOBAL NAPs, INC. WITNESS LEE L. SELWYN

For the first time in this proceeding, Global NAPs, Inc. ("Global") witness Selwyn suggests in "rebuttal" testimony that the inquiry into what compensation applies to virtual NXX traffic destined to the Internet is separate and distinct from the inquiry into what compensation applies to virtual NXX traffic not destined to the Internet.¹ Moreover, Dr. Selwyn introduces for the first time in rebuttal testimony his proposal that the Florida Public Service Commission ("Commission") adopt a "local from everywhere" NXX code for use in Florida to allow access to Internet Service Providers ("ISPs").² There is no reason why Global could not have presented both these new positions in its Petition for Arbitration, direct testimony, or supplemental direct testimony. Instead, Global chose to debut them in rebuttal, in an apparent attempt to deprive Verizon Florida Inc. ("Verizon") of the opportunity to respond. The Commission should not tolerate Global's sandbagging tactic, and it should grant Verizon leave to file the attached, limited surrebuttal testimony of Verizon witness Haynes, responding to Global's newly introduced positions and recommendations.³

¹ See Selwyn Rebuttal Testimony (January 16, 2003) at 14-16.

² *Id.* at 17-19, 37.

³ See Haynes Surrebuttal Testimony (February 14, 2003) attached hereto.

DOCUMENT NUMBER DATE
01530 FEB 14 8
FPSC-COMMISSION CLERK

If the Commission does not permit Verizon to submit this testimony, then it should, in the alternative, strike those portions of Dr. Selwyn's "rebuttal" that introduce these new recommendations.⁴

Global has no legitimate explanation for leaving its new recommendations out of its direct testimony or for failing to submit any supplemental direct testimony raising these points. Dr. Selwyn's new position that the Commission cannot apply access charges to ISP-bound traffic purports to rest on the *ISP Order on Remand*.⁵ He presents this position after being asked: "Does the FCC's *ISP Remand Order* address the applicability of access charges on ISP-bound calls that extend beyond the ILEC's local calling area?"⁶ After responding, Dr. Selwyn proposes that the Commission designate a single "local from everywhere" NXX code for ISP access "in this arbitration and, more generally, for all LECs in the generic proceeding."⁷

Dr. Selwyn never presented this perspective of the *ISP Order on Remand* in his Direct Testimony, despite having spent several pages "describ[ing] the rules set forth in the FCC's *ISP Remand Order* which presumably govern intercarrier compensation in this instance."⁸ And he never recommended a "local from everywhere" virtual NXX code, as he has now. In fact, he made a totally different recommendation in his direct testimony. There, he told the Commission that if it determines at some future points

⁴ See Selwyn Rebuttal Testimony at 14-19, and 37 (lines 18-22).

⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Memorandum Opinion and Order, 16 F.C.C.R. 9151 (2001) ("*ISP Order on Remand*"), remanded, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

⁶ Selwyn Rebuttal Testimony at 14-15.

⁷ *Id.* at 17.

⁸ Selwyn Direct Testimony at 8, 72-80.

that “the specific intercarrier compensation rules set forth in the FCC’s *ISP Remand Order* do not apply to locally-rated traffic exchanges between Global NAPs and Verizon Florida (e.g., as a result of an appellate court ruling to reverse, vacate, or stay the *ISP Remand Order*), the Commission should apply a symmetric, TELRIC-based reciprocal compensation rate to all such traffic, including ISP-bound calls.”⁹

Verizon witness Haynes, of course, addressed his rebuttal testimony to the positions and recommendations in Dr. Selwyn’s Direct Testimony, which was the only testimony Dr. Selwyn had submitted at that time. Mr. Haynes has had no opportunity to address Dr. Selwyn’s new positions and recommendations, which conflict with Dr. Selwyn’s original positions. If the Commission does not remedy Global’s unexplained failure to raise these matters in its direct testimony, Verizon will be severely prejudiced.

Global’s behavior is all the more egregious because it chose not to file any supplemental direct testimony. The express purpose of that supplemental direct testimony was to allow the parties to address the potential impact of the Commission’s order in the generic reciprocal compensation docket (000075-TP) on the virtual NXX issue in this arbitration.¹⁰ In the generic docket, the Commission permitted carriers to assign virtual NXX numbers, but held that, as a matter of law, reciprocal compensation does not apply to virtual NXX calls. The Commission agreed with Verizon that virtual NXX traffic “would be considered *intrastate exchange access*” under federal law and noted that “it seems reasonable to apply access charges” to virtual NXX traffic.¹¹ At the

⁹ *Id.* at 8, 79.

¹⁰ See Order Suspending Proceedings, PSC-02-0791-PCO-TP (June 10, 2002); Joint Motion to Suspend Arbitration Schedule and Applicable Statutory Deadlines (June 4, 2002).

¹¹ Order No. PSC-02-1248-FOF-TP at 31-32 (emphasis in original).

same time, the Commission left it to the parties to implement the specific compensation method under their interconnection agreements, noting that they might find it mutually advantageous to apply bill-and-keep to virtual NXX traffic.¹²

The Commission's resolution of the virtual NXX issues in the generic case—and particularly its observations about the nature of virtual NXX traffic under federal law and the application of access charges to this traffic—should certainly have prompted supplemental direct testimony from Dr. Selwyn, as Dr. Selwyn's new positions address these very issues. Having failed to properly raise its positions in its petition for arbitration or its direct testimony, Global should at least have done so in supplemental direct testimony, when Verizon could still have submitted rebuttal addressing these new positions. Instead, Global chose to remain silent until rebuttal, when it could “ambush” Verizon with its new positions.

The Commission should also take note that, despite Global's (changing) testimony on the appropriate compensation for virtual NXX traffic, Global never raised this issue in its arbitration petition. The only virtual NXX-related issue in that petition and designated for resolution in this arbitration is: “Should GNAPs be permitted to assign NXX codes to customers that do not physically reside in the local calling area associated with that NXX code?”¹³ As Global's arbitration petition and the parties' testimony make clear, however, there is no disagreement on the narrow issue articulated for arbitration. Global has not complained about any Verizon-proposed

¹² *Id.* at 33.

¹³ Issue 5, March 29, 2002 Order Establishing Procedure. See also Global Petition for Arbitration at 19 (Issue 4: “Can GNAPs assign to its customers NXX codes that are “homed” in a central office switch outside of the local calling area in which the customer resides?”).

contract provision preventing it from assigning virtual NXX codes—Verizon has never proposed any contract language preventing Global from doing so. So the only virtual NXX issue Global designated for arbitration is not in dispute. Although the parties do dispute the matter of intercarrier compensation for virtual NXX traffic, the Commission need not decide this issue in this arbitration, because Global did not properly raise it and it is not designated for resolution in this proceeding.

In summary, Global chose to forgo three separate opportunities to explain its late-introduced view that the Commission should carve out Internet-bound traffic from its consideration of the virtual NXX issue and implement some vague plan for reserving blocks of numbers just for ISPs. Its decision to introduce these issues on rebuttal deprives Verizon of an opportunity to be timely heard on these issues. As the United States Court of Appeals for the Sixth Circuit has held, evidence “that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case.”¹⁴ Because “[t]he opportunity to be heard is a cornerstone of due process,” a party to an arbitration proceeding must not be denied the opportunity to “make its case” on relevant issues.¹⁵

Verizon has a due process right to address Global’s newly raised issues.¹⁶ Accordingly, the Commission should grant Verizon leave to file the attached surrebuttal testimony of Verizon witness Haynes. In the alternative, the Commission should strike

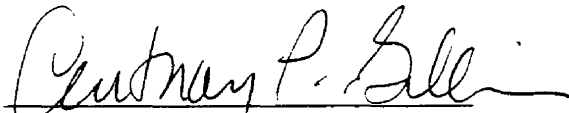
¹⁴ *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992) (citations omitted).

¹⁵ *MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766, 772-73 (E.D. Ky. 1998).

¹⁶ *See Morgan v. United States*, 304 U.S. 1, 18 (1938) (“The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.”).

the portions of Global witness Selwyn's testimony that present new analysis and recommendations that should have been presented earlier.¹⁷

Respectfully submitted on February 14, 2003.

BY: 

ew KIMBERLY CASWELL
P.O. Box 110, FLTC0007
Tampa, FL 33601-0110
Tel: (813) 483-2617
Fax: (813) 204-8870

RICHARD CHAPKIS
Vice President & General Counsel
Verizon Florida Inc.
112 South Lakeview Canyon Road,
CA501LB
Thousand Oaks, California 91362
Tel: (805) 372-6233
Fax: (805) 373-7515

KELLY L. FAGLIONI
EDWARD P. NOONAN
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Tel: (804) 788-8200
Fax: (804) 788-8218

Attorneys for Verizon Florida Inc.

¹⁷ See Selwyn Rebuttal Testimony at 14-19 and 37 (lines 18-22).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Surrebuttal Testimony of Terry Haynes and Verizon Florida Inc.'s Motion for Leave to File Surrebuttal Or In The Alternative to Strike Portions of the Rebuttal Testimony of Global NAPs, Inc. Witness Lee L. Selwyn in Docket No. 011666-TP were sent via electronic mail and overnight mail on February 13, 2003 to the following:

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

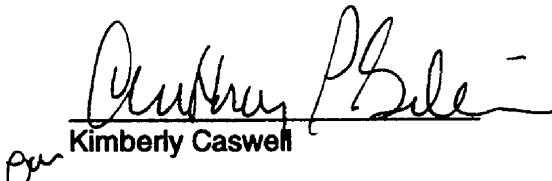
John C. Dodge, Esq.
David N. Tobenkin, Esq.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W., 2nd Floor
Washington, DC 20006

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


Kimberly Caswell