

BEFORE THE
STATE OF FLORIDA
PUBLIC UTILITIES COMMISSION

In the Matter of GNAPs, Inc.'s 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.

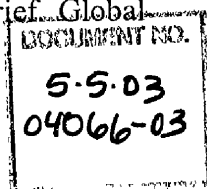
Case No. 011666-TP

Global NAPs South, Inc.'s Opposition to Verizon – Florida Motion to Strike Substantive Argument From G NAP's Revised Post-Hearing Brief

I. INTRODUCTION AND BACKGROUND.

The instant action pertains to the filing of Global NAPs South, Inc.'s ("Global's") Post-Hearing brief in the above referenced case. The arbitration was brought by Global, an Alternate Local Exchange Carrier, that sought interconnection with Verizon Florida, Inc. ("Verizon"). Global was unable to negotiate all necessary terms and conditions to adequately govern the exchange of traffic — and the intercarrier compensation related to such exchange — between the two parties. This action was brought under the Telecommunications Act of 1996, 47 U.S.C. §251, *et seq.* (the "Act"). The agreement at issue was filed in the above referenced case on April 15, 2002.

Verizon sets forth several contentions in its "Background" statement that are inaccurate. First, it notes that the brief under consideration is not Global's first brief. This is true. Global initially filed a brief that exceeded the Commission's prescribed page limitations. Staff, with Verizon's consent, allowed Global to reform its brief. Global



appreciates the opportunity they both provided. As Verizon itself notes, Global was forced to delete text that it would otherwise have included if not for the page limit.¹ However, the fact of filing a prior brief is not relevant to the issue under consideration which is whether substantive arguments from Global's April 15 brief should be struck.

A second contention was that Global failed to include a Statement of Issues and Positions. Global included within its brief of April 15th a statement of position, offset by multiple asterisks leading off its discussion of each individual issue.

Finally, in Footnote 1 of Verizon's Motion, Verizon asserts that Global did not serve its brief upon Verizon. A review of local counsel's fax record, appended hereto as Exhibit A, shows otherwise. Verizon's statement set forth in Footnote 1 that "In this proceeding, GNAPS has not been serving Verizon with its filings" is also false. In discussing this issue with counsel for Verizon, Verizon admitted that copies of pleadings were served, but just not by electronic mail. Applicable rules allow for service by mail, which was done in this case. Any oversight made in serving a brief (even assuming such was the case) to which responsive briefs are not permitted is irrelevant and the harm caused trivial at most when remedied.

II. ARGUMENT.

Verizon asserts two reasons for striking portions of the brief. It alleges that Global has introduced new substantive argument.² It also objects to the inclusion of "extensive testimony" in Global's brief.³ Trying to strike portions of the brief through these assertions is merely a convenient means to achieve its end of eliminating Global's

¹ Verizon Motion at 2.

² Verizon Motion at 1, 3.

³ *Id.* at 3.

persuasive legal arguments without addressing them. It is precisely for this reason that the provisions that Verizon desires struck remain.

Verizon also implies -- without direct accusation -- that Global took the opportunity afforded it to file arguments responsive to Verizon's brief. To guard against such a possibility, the attorney who made the revisions did not read Verizon's brief. Global did, however, anticipate many of Verizon's arguments but this is because Global and Verizon have been involved in arbitrations in many other state proceedings.

A. The Introduction and argument relating to the Commission's Jurisdiction is not new argument introduced by Global between its original submission and its revised brief.

Verizon's first objection and proposed section(s) to be struck relate to Global's response to the issue of the Commission's jurisdiction. Since this is a legal argument, and not a factual one, only Verizon's first objection that it is "new" argument is applicable. This is hardly the case. In fact, Global took great pains to delineate the extent to which the Commission's ruling would impact traffic that the FCC reserved exclusively and solely for its own governance.

Following is the material Verizon has requested be struck:

<p><i>From Global NAPs South, Inc.'s revised brief filed April 15th:</i></p>
<p>I. Introduction</p> <p>One legal issue, jurisdiction, and eleven mixed issues of fact and law have been identified in this arbitration. <i>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.</i>, Docket No. 011666-TP, Pre-Hearing Order, PSC-03-0253-PHO-TP (Feb 20, 2003) ("<i>Pre-Hearing Order</i>"). Pursuant to the <i>Pre-Hearing Order</i>, Global NAPs, Inc. ("GNAPs") submits the following brief dealing with said issues in order.</p>

This is simply an introduction, stating how the brief was organized. Admittedly the organization was new, but this is precisely why Global was told to reform its brief, to have a conforming organization and comply with the page limit.

From Global NAPs South, Inc.'s revised brief filed April 15th:

I. 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")⁴ ¶1. ¶59. The FCC specifically declared that these calls are interstate "information access" traffic, *Id.* ¶42,⁵ and expressly rejected the

⁴ 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.

⁵ 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").

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.)

This is hardly new argument. Global argues time and time again about the limitations of this Commission to rule in light of federal law. This is found in the initial brief when Global discusses its entitlement to use a single point of interconnection within a LATA, when discussing the financial responsibility between carriers, the use and operation of virtual NXX traffic, etc. Indeed, because Global’s business is primarily the carriage of traffic originated by Verizon’s end-users that is jurisdictionally interstate, virtually all of the issues before this Commission are impacted or controlled by federal law.

Nowhere is the integration of federal law more easily seen than in issues concerning intercarrier compensation. For example, in its originally-filed initial brief, Global argued at page 11:

From Global NAPs South, Inc.’s originally filed brief filed April 10th:

4. The ISP Remand Order preempts state regulation of ISP-bound traffic or treatment of ISP-bound traffic in interconnection agreements.

In the *ISP Remand Order*, the FCC determined that inter-carrier compensation for ISP-bound traffic is solely within the jurisdiction of the FCC and that on a going forward basis, state commissions have been preempted from

addressing the issue.⁶ Thus, the Commission has no jurisdiction to impose access charges or other limitations on ISP in-bound traffic.⁷ Similarly, inter-carrier compensation for ISP bound traffic is not an appropriate subject for an interconnection agreement.⁸ The Arbitration Order should be clear that the Interconnection Agreement is not intended to regulate inter-carrier compensation for ISP-bound traffic in any manner.⁹

There are other entire sections devoted to the overlap and limitations of federal law in the arbitration making decision process, *e.g.*, the discussion of the “mirror image rule” on page 32 of the original brief. It is inescapable that Global provided varied and lengthy references to the question of jurisdiction of this Commission and that reserved to the FCC. This is natural given that the arbitration was brought pursuant to Sec. 252 of the Act and this Commission makes its rulings under powers delegated by the federal government under the Act. Admittedly, certain portions may appear differently in context than as originally submitted, but that is expected when excising approximately 40 pages of text in order to comply with the Commission’s page limitation. Such editing does not, however, change the fact that these arguments were raised in the original brief and were not crafted as an afterthought.

⁶ *ISP Remand Order* ¶ 82.

⁷ Similarly, the Commission has no jurisdiction to determine who can or cannot terminate ISP-bound traffic. 47 CFR § 63.01(a) states that “[a]ny party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any point and to construct, acquire or operate any domestic transmission line...”

⁸ *ISP Remand Order* ¶ 82.

⁹ Verizon acknowledged this as a preliminary matter immediately preceding the arbitration hearing.

B. The argument relating to Verizon's inability to properly bill VNXX calls is not new argument introduced by Global between its original submission and its revised brief.

Verizon proposes to strike the following portion of Global's brief at page 23 related to Verizon's proposal to account for intercarrier compensation due when calls are provisioned using VNXXs:

From Global NAPs South, Inc.'s revised brief filed April 15th:

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.¹⁰

This argument can hardly be called "new". It appears almost word-for-word on page 35 of Global's brief as originally submitted:

From Global NAPs South, Inc.'s originally filed brief filed April 10th:

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

¹⁰ *Virginia Order* ¶¶ 286-288.

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.¹¹

Nor can Verizon assert that discussion of the FCC’s Virginia Arbitration Order qualifies somehow as “testimony” – a discussion of an FCC Order is a discussion of law. Verizon’s attempt to strike this portion of the brief is a ruse designed to obscure the fact that it has not yet implemented a workable billing system.

C. The argument relating to implementing the law is not new argument introduced by Global between its original submission and its revised brief.

Verizon objects to the inclusion of language insisting that it implement laws when they become effective. This argument is specious. Is Verizon actually objecting to the law? Global’s argument to implement the law — which Verizon apparently objects to — is found at page 28 of the revised brief:

From Global NAPs South, Inc.’s revised brief filed April 15th:

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.

At page 67 of the initially filed brief the following statement is found:

From Global NAPs South, Inc.’s originally filed brief filed April 10th:

Global submits both parties should follow the law.

The revised language, which states that Verizon may not apply its unilateral interpretations of the law but must follow final adjudications and determinations, may be more clear than “both parties should follow the law,” but the meaning is the same.

¹¹ *Virginia Order* ¶¶ 286-288.

D. The argument relating to the availability of new UNEs is not new argument introduced by Global between its original submission and its revised brief.

Verizon objects to the inclusion of language clarifying Global's position – irrespective of the phraseology of the issue. Global's clarification is found at page 28 of the revised brief:

From Global NAPs South, Inc.'s revised brief filed April 15th:

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

At page 67 of the initially filed brief the following statement is found:

From Global NAPs South, Inc.'s originally filed brief filed April 10th:

Global submits that Verizon framed the issue in such an argumentative and vague manner that Global cannot be expected to reply.

This argument goes beyond what Global originally stated, that it cannot be expected to respond to Verizon's argumentative and vague argument. However, Global's April 15 argument can hardly be viewed as harmful or prejudicial to Verizon. Setting forth Global's position should serve to help the Commission understand Global's position. This clarification does not harm Verizon, but without such clarification, the Commission would have difficulty understanding the nature of the issue.

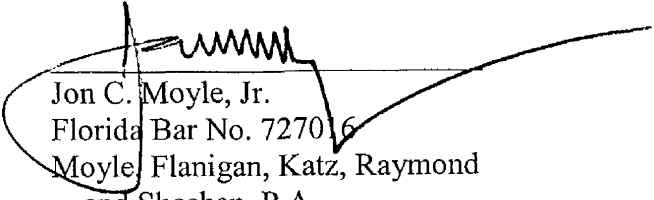
III. CONCLUSION.

Global respectfully requests this Commission to rule that its entire brief be admitted and that Verizon's vague and unsupported objections be rejected.

Date: May 5, 2003

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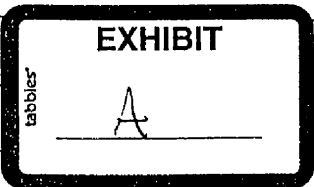
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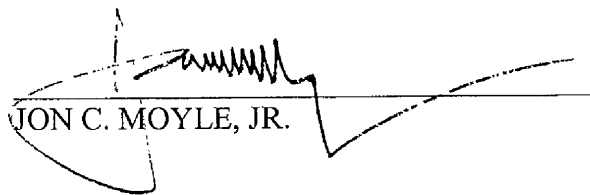
I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by hand delivery and electronic mail to those listed below with an asterisk (“**”) and by U.S. Mail and electronic mail to those listed below without an asterisk on this 5th day of May, 2003:

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