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 ORDER NO. PSC-03-0724-FOF-TP ISSUED: June 18, 2003

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
BRAULIO L. BAEZ
CHARLES M. DAVIDSON

ORDER GRANTING IN PART AND DENYING IN PART VERIZON MOTION TO STRIKE

BY THE COMMISSION:

Background

On December 20, 2001, Global NAPS, Inc. (GNAPs) petitioned the Commission to arbitrate certain unresolved terms and conditions of an interconnection agreement with Verizon Florida Inc. (Verizon). Verizon filed a response and the matter was considered in a hearing held March 10, 2003, in which all testimony and exhibits were stipulated and cross examination was waived.

Order No. PSC-03-0253-PHO-TP, issued on February 20, 2003, states, among other things:

> 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. If a party's position has not changed since the issuance of the prehearing

> order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.
>
> Pursuant 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, and shall be filed at the same time.

On April 10, 2003, GNAPs filed its Initial Brief of Petitioner. It was noted by our staff and by Verizon that the Brief was not in compliance with the above provisions in two regards:

1) The brief was 76 pages in length; and

2) It did not state GNAPs' position on each of the issues.

As a professional courtesy, with the reluctant agreement of Verizon, we gave GNAPs a few days to file a 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.

On April 16, 2003, GNAPs filed its Revised Brief. Verizon alleged that the Revised Brief raised new argument not found in the initial brief and, also, contained testimony not found in the record. On April 25, 2003, Verizon filed its Motion to Strike New Substantive Argument From GNAPs' Revised Post-Hearing Brief.

This Order addresses Verizon's Motion to Strike.

Discussion

Verizon Motion

Verizon notes that GNAPs' initial brief violated Commission rules and the Prehearing Order in two respects. First, it was 76 pages in length, violating the 40 page limit. Second, GNAPs' brief did not contain a summary of the company's positions, as required by the Prehearing Order. Verizon argues that GNAPs regularly appears before this Commission and is very familiar with Commission rules and procedures. Accordingly, GNAPs has no excuse for its non-compliance.

Verizon reports that its inclination upon reading GNAPs' initial 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. Verizon would have preferred to hold GNAPs to the strict letter of the Prehearing Order and Commission Rules. However, Verizon reluctantly agreed to allow the filing of a compliant brief, so long as there was no prejudice as a result of GNAPs having read the Verizon brief.

Upon reviewing GNAPs' Revised Brief, filed April 16, 2003, Verizon urges that it was found to be defective and prejudices Verizon in two respects:

1) It contains new substantive argument; and

2) It contains extensive testimony that is not in the record.

Verizon argues that 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 to rectify defects in its Initial Brief by including new substantive argument in its Revised Brief. Further, Verizon argues that it is severely prejudiced by the new substantive argument.

Additionally, Verizon argues that it was improper for GNAPs to include new "testimony" in its Revised Brief that is not supported by the factual record. Verizon claims that the inclusion of this "testimony" was a blatant attempt to bolster its case without

affording Verizon the opportunity to conduct discovery or respond. However, Verizon states that in light of the skilled and experienced staff assigned to this Docket, it will trust that our staff will disregard all of GNAPs' unsupported factual allegations when it makes its recommendation to us, and Verizon simply requests that we take care to ensure that we base our decision only on that which is in the factual record.

Attachment A contains excerpts from GNAPs' Revised Brief with the alleged new substantive argument which Verizon is requesting be underlined.

GNAPs' Response to Motion to Strike

GNAPs argues that Verizon's efforts to strike portions of its Revised Brief are merely a convenient means for Verizon to eliminate persuasive legal arguments without addressing them. GNAPs reports that in order to guard against arguments in response to Verizon's brief, the attorney who prepared the Revised Brief had not read Verizon's Brief. Rather, GNAPs asserts that it anticipated many of Verizon's arguments based on proceedings in other states.

Next, GNAPs addresses each of the challenged portions of its Revised Brief with specificity. Generally, GNAPs argues that these portions are not new argument and, in some cases, are verbatim from its Initial Brief. Accordingly, GNAPs is urging that Verizon's Motion to Strike be denied.

Analysis

Verizon's Motion to Strike challenges an introduction and four issues of GNAPs' Revised Brief. These points will be addressed herein in the order of the challenge.

INTRODUCTION:

As reflected in Attachment A, Verizon is challenging the introductory paragraph in GNAPs' Revised Brief. Though we agree with Verizon that the introductory paragraph did not appear in GNAPs' Initial Brief, it contains no argument of any kind, legal or substantiative. Therefore, the inclusion could in no way prejudice

Verizon. On the other hand, its exclusion could in no way prejudice GNAPs, as it was only intended for what the title suggests, an introductory statement. Accordingly, since it was not a part of the Initial Brief, we find that it shall be stricken.

ISSUE A:

This is a legal issue dealing with our jurisdiction to arbitrate an interconnection agreement between the parties. It presents the most difficult decision for any of the challenges in Verizon's Motion. GNAPs' Initial Brief was not properly organized around the issues as they appeared in all other documents in this proceeding, making its arguments somewhat difficult to follow. Based on an in depth examination of the Initial Brief, however, we find that there is no new argument on this issue in the Revised Brief, nor do there appear to be any new issues raised. Conceding Verizon's assertion that this wording does not appear in the Initial Brief, it would appear that exclusion of this portion of the Revised Brief would amount to a classic victory of form over substance. Accordingly, we find that this portion of Verizon's Motion to Strike shall be denied.

ISSUE 5:

Verizon asserts that the highlighted portion of Issue 5 is new argument. Upon examination, however, we find that only the first sentence of the challenged paragraph is new argument. The remainder of the paragraph is a verbatim quote from the Initial Brief. Accordingly, we find that the first sentence of the challenged paragraph shall be stricken, and the remainder of that paragraph remain.

ISSUE 10:

We agree with Verizon that the challenged portion of this issue in GNAPs' Revised Brief adds argument not found in its Initial Brief. Though GNAPs urges that the Revised Brief makes this issue "more clear," that is no justification for adding argument in its revision. Obviously, it is expected that each party will "follow the law" in the conduct of their business. Accordingly, we find that Verizon's Motion shall be granted as to its challenge to Issue 10.

ISSUE 11:

In its Initial Brief, GNAPs made no argument at all on this issue, stating that "Verizon framed the issue in such an argumentative and vague manner that Global cannot be expected to reply." In its Revised Brief, however, GNAPs did reply, thereby making argument in its Revised Brief not contained in its Initial Brief. Accordingly, Verizon's Motion is granted as to Issue 11.

In summary, we find that Verizon's Motion to Strike is granted in part and denied in part, as described in the body of this recommendation.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Verizon Florida Inc.'s Motion to Strike Global NAPs, Inc.'s Motion to Strike New Substantive Argument From GNAPs' Revised Post-Hearing Brief is hereby granted in part and denied in part, as described in the body of this Order. It is further

ORDERED that Docket No. 011666-TP shall remain open pending resolution of the remaining issues.

By ORDER of the Florida Public Service Commission this 18th Day of June, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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:

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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:

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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:

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