

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



**FILED**  
2-20-14  
04:59 PM

Vaya Telecom, Inc. (U7122C) <i>Complainant,</i> v. Pacific Bell Telephone Company d/b/a AT&T California (U1001C) <i>Defendant</i>	C.10-12-001 (Filed Dec. 3, 2010)
And Related Matters.	C.11-02-015

**VAYA TELECOM, INC. (U-7122-C) APPLICATION FOR REHEARING  
OF DECISION REGARDING PAYMENT OF SWITCHED ACCESS CHARGES AND  
DELIVERY OF TRAFFIC TO LOCAL INTERCONNECTION TRUNKS**

**(PUBLIC VERSION)**

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February 20, 2014

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

As discussed in detail below, language in the ICA expressly states that the parties had failed to reach a meeting of the minds regarding VoIP termination. The Decision dismisses that evidence, concluding that the language was isolated to the subject of the amendment in which it appears. This failure to integrate all portions of the ICA, as expressly required by the ICA, is a further legal error. Having disregarded the express language that the parties failed to reach a “meeting of the minds” regarding VoIP, the Decision errs further by concluding that the terms of the ICA related to “telecommunications” services apply to VoIP. Such conclusion is contrary to state and federal law. Accordingly, pursuant to California contract law, the only basis on which the Commission could have reasonably concluded that the “telecommunications” provisions of the ICA apply to VoIP would have been a clear expression of the intent of the parties.

Vaya believes that the language excluding VoIP traffic from the ICA was clear. Nonetheless, even if the Commission disagrees with this conclusion, at most, the language of the ICA is ambiguous regarding VoIP termination. Under California law, ambiguity in a contract requires factual evidence to determine the parties’ intent. No factual evidence was submitted or considered yet in this proceeding because the Decision is limited expressly to providing a declaratory judgment as to whether the ICA applied to VoIP termination as a matter of law. Thus, at a minimum, rehearing is necessary to enable the parties to submit factual evidence from which the Commission can determine the parties’ intent concerning compensation for VoIP termination.

The purpose of an application for rehearing is to alert the Commission to legal or factual errors in a decision and to allow the Commission to correct the errors expeditiously.<sup>1</sup> Vaya respectfully submits that the Decision contains numerous legal and factual errors, which led to the erroneous declaratory judgment that the ICA applies to VoIP termination. Errors that must be corrected include: (1) the Decision's Finding of Fact that Vaya's traffic is not VoIP is based on no evidence in the record and is contradictory to the express assumption set forth in the Scoping Memo that Vaya's traffic is VoIP; (2) the Decision fails to integrate an ICA amendment that expressly excludes VoIP traffic from the ICA intercarrier compensation ("ICC") provisions, and (3) the Decision contradicts a prior California Public Utility Commission ("CPUC") order interpreting virtually identical language in a different ICA with AT&T.<sup>2</sup>

The Decision also contains the following legal and factual errors regarding VoIP traffic on local interconnection trunks: (1) the Decision fails to analyze or apply federal law that allows VoIP traffic to be placed on local interconnection trunks; and (2) the Decision imposes a requirement for "immediate" removal of inter-LATA traffic from local interconnection trunks in violation of the parties' Confidential Settlement Agreement filed and approved by the administrative law judge ("ALJ") earlier in this case.

Vaya respectfully submits that the Decision contains legal and factual errors that require rehearing. In addition, the erroneous declaratory judgment in the Decision should be set aside to permit the parties to proceed with an evidentiary hearing process (including discovery) as envisioned in the Scoping Memo.<sup>3</sup>

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<sup>1</sup> Rule 16.1(c) of the Commission's Rules of Practice and Procedure.

<sup>2</sup> The prior ICA is between Pacific Bell and AT&T (the legacy long distance carrier).

<sup>3</sup> Scoping Memo at p. 3, ¶3 ("This ruling affirms the preliminary categorization of this proceeding as adjudicatory and the need for evidentiary hearings.")

## **II. ARGUMENT**

### **A. Legal and Factual Errors Regarding VoIP Termination Under the ICA**

Vaya respectfully submits that D.14-01-006 contains numerous legal errors, but the most fundamental error is its flawed approach to contract interpretation. The Decision issues a declaratory judgment that, as a matter of law, the ICA between Vaya and AT&T applies to termination of VoIP. The Decision reaches this conclusion despite (1) the lack of any such express terms, (2) contradictory language in the ICA and (3) the lack of any extrinsic evidence from which the Commission could determine the intent of the parties regarding VoIP termination.

#### **1. The Decision Contradicts Contract Interpretation Rules**

The core legal issue in Vaya's complaint is whether the ICA between Vaya and AT&T includes provisions for assessing and calculating termination charges for VoIP traffic. At the beginning of the case, the Commission decided to examine this "threshold legal issue" based solely on legal briefs. Vaya adopted an ICA initially negotiated between Pacific Bell and Legacy AT&T, which became effective on August 14, 2000. At that time, VoIP was a nascent technology and the ICA did not include any terms or conditions for VoIP. Subsequently, the ICA was adopted by Cox Communications and in September of 2003 an amendment was included to address termination charges for ISP-bound traffic, but not VoIP. Rather, the parties agreed that they could not reach a "meeting of the minds" regarding VoIP and reserved their rights to advocate their positions in other another forum regarding how termination should be handled.<sup>4</sup> Vaya adopted the AT&T/Cox ICA, as amended.

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<sup>4</sup> Section 4.0 of 2003 ISP-bound Traffic Amendment.

After adopting the ICA in 2009, well after the 2003 Amendment was included, Vaya began sending VoIP traffic to AT&T for termination. A dispute arose when AT&T attempted to apply the terms and conditions of the ICA to that traffic. Vaya filed a complaint at the Commission to resolve the dispute. Given the disagreement between the parties regarding the applicability of the ICA to VoIP traffic, the parties agreed that the Commission should first conduct a threshold legal analysis of whether the terms of the ICA were applicable to VoIP.

The Decision determined that the reservation of rights clause in the 2003 Amendment is limited in scope and means simply that the 2003 Amendment itself does not cover VoIP traffic. Thus, the Decision concludes that the 2003 Amendment does not address whether the remaining provisions of the ICA apply to VoIP traffic.<sup>5</sup> The Decision, however, ultimately concludes that the ICA itself applies to VoIP traffic on the basis that the ICA sets forth the terms and conditions for *all* traffic.<sup>6</sup> In other words, because VoIP traffic was sent by Vaya to AT&T, some provision in the ICA *must* be deemed to apply. This conclusion is legal error.

When interpreting an ICA, state commissions must apply state contract law.<sup>7</sup> The decision maker must ascertain and enforce the intent of the parties.<sup>8</sup> The California Supreme Court has held that rational contract interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.<sup>9</sup> Such evidence includes testimony as to the circumstances surrounding the making of the agreement, including the object,

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<sup>5</sup> D.14-01-006, at p. 15.

<sup>6</sup> *Id.*, at p. 13-14.

<sup>7</sup> *Connect Communications Corp.*, 467 F.3d 703, 708 (quoting *S.W. Bell Tel. Co. v. Pub. Util. Comm'n of Tex.*, 208 F3d 475, 485 (5<sup>th</sup> Cir. 2000)).

<sup>8</sup> *Lemm v. Stillwater Land & Cattle Co.*, 217 Cal. 474 (Cal. 1933) ("In the interpretation of contracts the duty of the court is to ascertain the intent of the parties. Although the language of the contract must govern its interpretation.")

<sup>9</sup> *Id.*, at 480 ("the meaning [of a contract] is to be obtained from the entire contract and not from any one or more isolated portions thereof").

nature, and subject matter of the writing. In that way, the court can place itself in the same situation in which the parties found themselves at the time of contracting.<sup>10</sup>

Other than the 2003 Amendment, the ICA itself does not contain the word “VoIP” anywhere. Further, the ICA does not state that it sets forth the terms and conditions for all traffic, regardless of technology used. Instead, the ICA expressly refers to “telecommunications” traffic throughout, and as explained in detail below, VoIP has never been classified as “telecommunications” by either the Federal Communications Commission (“FCC”) or the Commission. Moreover, the ICA was drafted in 2000, a time in which VoIP was nascent and it is almost certain that the original drafting parties did not even consider, much less intend to address VoIP<sup>11</sup>.

Indeed, the Decision does not assert that it believes it was the intent of the parties to address VoIP. Rather, the Decision reasons that simply because VoIP traffic was sent by Vaya to AT&T for termination, Vaya should have to pay pursuant to the ICA’s terms. Despite no language covering VoIP, according to the Decision, the only possible termination rates that could be applied are those contained in the ICA.

The Decision errs legally in this conclusion. Under California law, the decision maker must attempt to determine whether the parties had a meeting of the minds, and if so, effectuate their intent. Here, the ICA is devoid of references to VoIP, and instead references only

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<sup>10</sup> *Id.*, at 480-81 (“To assist it in the performance of this duty the court may look to the circumstances surrounding the parties at the time they contracted including the object, nature and subject matter of the agreement, and the preliminary negotiations between the parties, and thus place itself in the same situation in which the parties found themselves at the time of contracting.”) (citations omitted) *Hayter Trucking, Inc. v. Shell Western E&P, Inc.*, 18 Cal. App. 4th 1, 17 (Cal. App. 5th Dist. 1993) (citing *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37-40).

<sup>11</sup> In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, at n.9, (released Nov. 12, 2004).

“telecommunications,” a type of traffic that VoIP indisputably is not.<sup>12</sup> Without more, it is impossible for the decision maker to determine the intent of the parties.

Without any evidence of the intent of the parties, the Decision concludes that the VoIP language in the 2003 Amendment is limited only to that Amendment and therefore provides no guidance as to the intent of the parties regarding applicability of the ICA to VoIP. Nonetheless, even if the 2003 Amendment does not establish that the parties lacked a meeting of the minds regarding VoIP (as the Decision concludes) the Commission did not have affirmative evidence to establish the parties’ intent regarding VoIP termination. The only basis upon which the Decision concludes that the parties must have reached a meeting of the minds regarding VoIP termination is that VoIP traffic was sent to AT&T for termination. The act of sending traffic, without more, does not create an agreement as to how to handle termination of the traffic. This is particularly true because at the time the traffic was first sent to AT&T, although the FCC had concluded that VoIP was properly classified as an interstate service, it had not imposed switched access charges on VoIP. Moreover, courts and state commissions that had addressed the issue reached inconsistent conclusions. Therefore, the only basis on which the Commission could legitimately rule on the issue is the intent of the parties.

The fact that a dispute arose regarding termination of VoIP traffic strongly argues that the parties had not reached a meeting of the minds on VoIP termination, and thus there is no clear intent of the parties to apply. Further, the complete silence of the ICA on VoIP, and its singular reference to “telecommunications” traffic suggests there was no meeting of the minds. Finally, if the parties had already reached a meeting of the minds that the ICA applied to VoIP, there would have been no need to state that the parties did not have a meeting of the minds regarding VoIP termination in the 2003 Amendment.

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<sup>12</sup> See Attachment 18, Section 3.2.

Although Vaya believes it is clear that the 2003 Amendment clarified that the parties had no meeting of the minds regarding VoIP termination in any portion of the ICA, at the least, all of the contradictions above caused the ICA to be ambiguous regarding VoIP termination. When contract language is susceptible of two different interpretations, a court may rely on extrinsic evidence to determine the intent of the parties.<sup>13</sup> Here, the Decision did not consider extrinsic evidence because the initial phase of the proceeding was limited to a threshold determination of whether the ICA applied to VoIP based solely on legal theories and the four corners of the ICA. Because no factual evidence was permitted, no extrinsic evidence exists in the record from which the Commission could have determined the intent of the parties. Thus, the Commission should have concluded that it was not possible to issue a declaratory ruling on whether, as a matter of law, the ICA applied to VoIP traffic. Alternatively, the Commission should have ordered the parties to submit extrinsic evidence from which the intent of the parties could have been concluded. It was legal error, however, to proceed to issue a declaratory ruling on the applicability of the ICA to VoIP traffic when the ICA is silent and the intent of the parties, therefore, could not be determined without factual evidence.<sup>14</sup>

If the Decision had correctly concluded that the 2003 Amendment was intended to reserve the parties' rights to agree on VoIP termination at a future time, it would have had to conclude that it could not ascertain the parties' intentions. Under California law, if an essential element of a contractual promise is reserved for the future agreement of both parties, "the promise can give rise to no legal obligation until such future agreement."<sup>15</sup> Such option

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<sup>13</sup> *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40; *FPI Development, Inc. v. Nakashima*, 231 Cal. App. 3d 367, 390 (Cal. App. 3d Dist. 1991).

<sup>14</sup> As explained in a later section of this brief, the Decision should have at least considered Vaya's statements in its Verified Amended Complaint that Vaya chose the AT&T/Cox Agreement because of the uncertainty in the industry regarding VoIP and the language of the reservation of rights clause excluding VoIP from the ICA.

<sup>15</sup> *Roberts v. Adams*, 164 Cal. App. 2d 312, 315 (Cal. App. 2d Dist. 1958).

agreement, which leaves an essential term to future agreement, is not enforceable regarding the subject of the future agreement.<sup>16</sup> For these reasons, the Decision is in error in its conclusion that the ICA required VoIP traffic to be treated the same as “telecommunications” and its failure to conduct evidentiary hearings to ascertain the intent of the parties.

## **2. The Decision Includes a Finding of Fact Directly Contrary to the Scoping Memo and Which Serves as the Basis for the Erroneous Conclusions on VoIP Termination**

The Assigned Commissioner’s Scoping Memo set forth two threshold issues:

1. Whether access charges or other charges apply under the interconnection agreement and applicable law even *assuming that all of the traffic at issue was originated in Internet Protocol (IP) format?*<sup>17</sup>
2. Whether delivery of inter-local access and transport area traffic to Defendant over local interconnection trunks violates the parties’ interconnection agreement? Does this determination remain the same if the disputed traffic originated to Complainant in IP format?<sup>18</sup>

The Decision errs by issuing Findings of Fact that disregard and contradict the express assumption in the Scoping Memo by holding that “Vaya has not established that all the traffic sent to AT&T for termination or transit originates exclusively in IP format.”<sup>19</sup> The nature of Vaya’s traffic was not in dispute; rather for purposes of briefing the threshold legal issues, this Commission and the parties agreed to assume that all traffic sent to AT&T for termination or transit originates exclusively in IP format. No discovery or evidentiary hearings were held to resolve any factual dispute with regard to this issue and therefore Vaya had no opportunity to present its evidence demonstrating that its traffic originates in IP format. Nor did AT&T have

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<sup>16</sup> *Id.*

<sup>17</sup> Emphasis added.

<sup>18</sup> Scoping Memo at Section 5, pp. 3-4.

<sup>19</sup> Finding of Fact No. 4.

the opportunity to present any evidence to attempt to prove that Vaya's traffic did not originate in IP format. The Decision is required to base its conclusions solely on the record of the proceeding.<sup>20</sup> Thus, the Decision violates Section 1701.2 by issuing a Finding of Fact that is not based on record evidence and that contradicts an express assumption in the Scoping Memo.

Moreover, this erroneous Finding of Fact infects the entire decision because it is the express basis for other holdings and rulings in the Decision. For example the erroneous Finding of Fact No. 4, supports the Decision's erroneous Conclusion of Law No. 6, applying a prior decision of the Commission that centered on a factual question of whether a carrier's traffic was VoIP.<sup>21</sup> It is error to rely on an erroneous Finding of Fact to conclude that the *Pacific Bell v. GNAPs* case is applicable to this case, which as discussed in more detail below, it clearly is not. The *Pacific Bell v. GNAPs* case involved materially different facts.

### **3. The Decision Errs By Applying Access Charges to VoIP Traffic Despite Contrary Language in the Agreement**

#### ***a. The Decision Improperly Interprets the Contract to Nullify Key Terms***

The Decision wrongly reasons that Attachment 18, Section 3 of the ICA<sup>22</sup> subjects VoIP traffic to the same terms as apply to telecommunications traffic.<sup>23</sup> Consequently, the Decision erroneously concludes that the ICA provision that classifies traffic as Local, IntraLATA and InterLATA based on telephone numbers includes both TDM and VoIP Traffic.<sup>24</sup> The Decision

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<sup>20</sup> Cal. Pub. Util. Code Section 1701.2.

<sup>21</sup> See Conclusions of Law No. 6 at p. 20 and Section 3.2.2 pp. 9-11. ("Among other things, in *Pacific Bell v. GNAPs* the Commission concluded that GNAPs had failed to establish that VoIP Traffic flowed between the parties..." Decision at p. 11).

<sup>22</sup> The operative Attachment 18, Interconnection is located in the Two Way Trunking Amendment dated 8/20/02 at pp. 485-509 of the ICA. To the extent sections of Attachment 18 are cited in this brief, they refer to this Amendment.

<sup>23</sup> Section 3.3, pp. 12-14.

<sup>24</sup> *Id.*

selectively quotes from the ICA to reach its result. Contrary to the conclusion, the language of the parties' ICA does not support the Decision.

Decision Section 3.3 provides:

Section 3.2 of the Interconnection Agreement provides that the traffic exchanged between the parties will be classified as Local, Transit, IntraLATA toll or InterLATA toll. *There is no separate classification for VoIP traffic.*<sup>25</sup>

The Decision omits, however, the key language in the operative sentence of Section 3.2 which, contrary to the conclusion, limits the application of the classification process to “telecommunications” traffic. The full text reads:

For purposes of compensation under this Agreement, the *telecommunications* traffic traded between Cox and PACIFIC will be classified as either Local, Transit, IntraLATA Toll, or InterLATA toll.<sup>26</sup>

As discussed in more detail below, the FCC has never classified IP originated traffic as “telecommunications.” As late as November 2011, in its reasoning concerning the legal authority to include toll VoIP-PSTN traffic as Section 251(b)(5) traffic, the FCC observed, “Although the Commission has not classified interconnected VoIP services or similar one-way services as “telecommunications services” or “information services,” VoIP-PSTN traffic nevertheless can be encompassed by Section 251(b)(5).”<sup>27</sup> Even as it imposed transitional ICC obligations on toll VoIP-PSTN traffic, the FCC continued to decline to classify VoIP-PSTN traffic as telecommunications service.<sup>28</sup> Further, at no time since the ICC Reform Order has the FCC classified VoIP-PSTN traffic as telecommunications.

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<sup>25</sup> Emphasis added.

<sup>26</sup> Emphasis added.

<sup>27</sup> *In the Matter of Developing an Unified Inter-carrier Compensation Regime*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“ICC Reform Order”) at para. 954. The FCC defines VoIP-PSTN traffic as traffic exchanged between two carriers that is “exchanged over PSTN facilities that originates and/or terminates in IP format.” *Id.* at para. 940. Thus, it is the same type of traffic examined by this Commission in the threshold legal issues in this case.

<sup>28</sup> *ICC Reform Order* at footnote 2042.

Because the Section 3.2 classification process is expressly limited to telecommunications and the FCC has always refused, and continues to refuse, to classify VoIP-PSTN traffic as telecommunications, the Decision errs in concluding that the language of Section 3.2 applies to VoIP-PSTN traffic. Further, there is no state law defining VoIP as telecommunications. Because the FCC has jurisdiction over VoIP, it is not clear that the Commission could reach a contrary conclusion. In order for the Commission to have reached the conclusion that the ICA terms included VoIP, it would have had to ignore the word “telecommunications” in the sections of the Agreement that it relied upon to subject VoIP to wireline intercarrier compensation rules. Under California contract law, an interpretation rendering contract language nugatory or inoperative is disfavored, therefore this conclusion is in error.<sup>29</sup>

The Decision also cites Section 3.12 of Attachment 18 to support its conclusion that the ICA requires access charges to be applied to VoIP: “the Interconnection Agreement further provides that the parties shall classify traffic using the telephone numbers of a call based on the assigned NXX prefix of the calling and called parties.” This Section is included under the same heading “Compensation for Call Termination,” containing Section 3.2, which limits the classification process to “telecommunications.” The whole of a contract is to be read together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.<sup>30</sup> Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected.<sup>31</sup>

Nothing in Section 3.12 expands the classification process to include both “telecommunications” and VoIP traffic. No reason exists to interpret Section 3.12 of the same

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<sup>29</sup> *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4<sup>th</sup> 944, 957.

<sup>30</sup> Cal. Civ. Proc. Code § 1641; *see Boghos v. Certain Underwriters at Lloyd's of London*, (2005) 36 Cal4th 495, 503.

<sup>31</sup> Cal. Civ. Proc. Code § 1653.

section to be inconsistent with the limitation contained in Section 3.2. Indeed, VoIP traffic does not lend itself to jurisdictional classification based on NXX prefixes as does telecommunications traffic. For VoIP, the NXX prefix of the called or calling parties does not always match the geographic end points of the call. The *ICC Reform Order* informs the analysis on this issue as well. There, the FCC reiterated its earlier views that VoIP traffic is not appropriately jurisdictionalized based upon the assigned NXX prefix of the calling and called parties: “Because telephone numbers and other call detail information do not always reliably establish the geographic end-points of a call, we do not mandate their use.”<sup>32</sup> Additionally, the FCC stated, “[c]ontrary to some proposals, however, we do not require the use of particular call detail information to dispositively distinguish toll VoIP-PSTN traffic from other VoIP PSTN traffic, given the recognized limitations of such information. For example, the Commission has recognized that telephone numbers do not always reflect the actual geographic end points of a call.”<sup>33</sup>

In sum, because Section 3 of the ICA expressly limits its classification process to “telecommunications,” the Decision errs in concluding that it applies to VoIP.

***b. The ICA Expressly Excludes VoIP from ICA Termination Charges***

When determining the intent of the parties, a more specific term will control over a more general term.<sup>34</sup> Therefore, under California law, the Commission is obligated to rely on the express, specific provision regarding treatment of VoIP in the 2003 Amendment regardless of general provisions (including definitions) in the other parts of the ICA. Further, the Amendment expressly supersedes any conflicting provisions of the underlying ICA.

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<sup>32</sup> ICC Reform Order at para. 960.

<sup>33</sup> ICC Reform Order at para. 962 and footnote 1982.

<sup>34</sup> Cal. Civ. Proc. Code § 1859; *Kashmiri v. Regents of University of California* (2007) 156 CA4th 809, 833-34 (specific statements in university’s catalogues and website that professional degree fee would not be raised for continuing students controlled over general statement that fees could change at any time).

Section 4.1 of the 2003 Amendment expressly states that “nothing in this Amendment is meant to affect or determine the appropriate treatment of VoIP traffic under this or future Interconnection Agreements” and further that the parties “agree that this Amendment shall not be construed against either party as a ‘meeting of the minds’ that VOIP traffic is or is not local traffic subject to reciprocal compensation.”

Section 3.1 of the 2003 Amendment states that the Amendment is intended “to supersede any and all contract sections, appendices, attachments, rate schedules, or other portions of the underlying Interconnection Agreement that set forth rates, terms and conditions for the terminating compensation for ISP-bound Traffic and Section 251(b)(5) Traffic.” Further, Section 3.1 expressly states that “any inconsistencies between the provisions of this Amendment and provisions of the underlying Interconnection Agreement shall be governed by the provisions of this Amendment. Thus, when read together, the clear intention of the parties was to exclude VoIP from the ICC provisions in the ICA, even if some provision of the ICA could be interpreted to set forth termination charges for VoIP traffic. Nonetheless, the Decision ignores the exclusion in the Amendment and instead relies on the broad and generic definition of “local traffic” to find that termination charges may be applied to VoIP traffic. This approach constitutes legal error and must be reversed.

For one, the Decision should have (but did not) take account of facts in the record that explain the circumstances under which the ICA was adopted. These facts make clear that the exclusion of VoIP from the ICA’s ICC provisions was critical to the parties’ intent. As stated above, the Commission should ascertain that intent of the parties by looking to the circumstances surrounding parties at the time they contracted and thus place itself in the same situation in

which parties found themselves at time of contracting.<sup>35</sup> As discussed above, in addition to the Commission's failure to take evidence of the intent of the parties at the time of entering into the contract, California law also holds that it is presumed that parties to a contract have contracted with reference to existing conditions known to them.<sup>36</sup>

Even absent additional evidence, the current record includes information as to the conditions known to Vaya when it opted into the AT&T/Cox ICA. The Verified Complaint filed by Vaya in this case explains that at the time Vaya opted into the ICA in 2009, Vaya was aware of the widespread controversy in the telecommunications industry regarding the treatment of VoIP traffic for purposes of reciprocal compensation under Section 251(b)(5) of the Act. Thus, in Section 4.1, the parties agreed to disagree as to whether VoIP traffic is subject to reciprocal compensation.

Further, the parties expressly reserved their rights to resolve this issue before state or federal commissions. Vaya's Verified Complaint explains that the inclusion of this clause in the Cox Agreement incited Vaya to opt in to this ICA since it was aware of the widespread industry disagreement on this issue and this language: (1) excluded VoIP from the application of this or future ICAs; (2) expressed that the parties had no "meeting of the minds" on how VoIP was to be compensated; (3) reserved the parties' rights to argue about how VoIP was to be compensated; and (4) enabled them to seek resolution of their dispute to the appropriate authority. The Decision should have taken account of the extreme uncertainty at the time of the ICA adoption regarding the appropriate ICC treatment for VoIP traffic. If the Decision had done so, it would have been clear that Section 4.1 of the Amendment was an agreement between the parties that the general ICC provisions of the ICA were not to be applied to VoIP traffic.

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<sup>35</sup> *Collins v. Home Sav. & Loan Assoc.* (1962) 205 Cal App 2d 86.

<sup>36</sup> *King v. Associated Constr. Corp.*, (1960) 183 Cal App 2d 818, 822.

*c. The Decision's Interpretation Conflicts with Commission Precedent*

Vaya's interpretation of this reservation of rights clause is reasonable and appropriate. Judge Pulsifer interpreted similar language in another AT&T ICA to reach the same conclusion. In 2006, prior to the time Vaya opted into this agreement with AT&T, Judge Pulsifer interpreted this reservation of rights clause language to mean that the parties "agreed to disagree" as to the application of reciprocal compensation to VoIP traffic.<sup>37</sup> There, as here, the parties were unable to reach an understanding as to the specific nature and amount of intercarrier compensation applicable to VoIP traffic. The reservation of rights clause enabled them to address the dispute through the ICA's dispute resolution process. The reservation of rights clause provided:

The Parties reserve the right to raise the appropriate treatment of [VOIP] or other Internet Telephony traffic under the Dispute Resolution provisions of this [ICA]....The Parties further agree that this Appendix shall not be construed against either party as a 'meeting of the minds 'that VOIP or Internet Telephony traffic is or is not local traffic subject to reciprocal compensation.<sup>38</sup>

As here, AT&T in that case argued that, despite this language, its opponent could only use the terms of the existing ICA (which like here, was devoid of VoIP language) to determine the appropriate compensation for VoIP termination. The ALJ rejected AT&T's argument:

Pacific claims, however, that under Sec. 13.6 of the ICA, Pac-West can only base its argument on existing language in the ICA prescribing how VOIP traffic is to be handled. *Yet, Pacific fails to explain how Pac-West could make reference to existing ICA language concerning the treatment of currently delivered VOIP traffic since parties expressly incorporated no language in the ICA purporting to define how VOIP traffic is to be treated. In this regard, Sec. 13.6 states: The Parties further agree that this Appendix shall not be construed against either party as a 'meeting of the minds 'that VOIP or Internet Telephony traffic is or is not local traffic subject to reciprocal compensation.'* Parties thereby agreed to disagree so that the ICA expressly remained silent concerning the applicability of

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<sup>37</sup> In re Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, R. 95-04-043, Administrative Law Judge's Ruling Granting The Pac-West Telecomm, Inc.'s Motion for Dispute Resolution, slip op. at 1, 2006 WL 325746 (Feb. 8, 2006). This Motion was brought under an expedited dispute process established in the early competition proceeding. The Commission's practice has changed, and if brought today the Pac-West filing would be required to be a Complaint, as Vaya has filed here.

<sup>38</sup> *Id.* at 2.

reciprocal compensation to VOIP traffic....Such an interpretation would seem to render the language meaningless in Sec. 13.6 reserving any rights for Pac- West to raise its arguments within the context of the existing ICA, given that parties expressly omitted any ICA language prescribing the treatment of VOIP.<sup>39</sup>

The Ruling correctly gave reasonable meaning and effect to the reservation of rights clause. The Decision should have concluded the same. Here the terms of the ICA do not mention VoIP except in Section 4.1 of the 2003 Amendment, the reservation of rights clause. Significantly, AT&T *included the exact same language* in its reservation of rights clause with Vaya that it included in the Pac-West ICA. Thus, as Judge Pulsifer concluded with regard to AT&T's dispute with Pac-West, the Commission should conclude here that the "Parties thereby agreed to disagree so that the ICA expressly remained silent concerning the applicability of reciprocal compensation to VOIP traffic." To hold as the Decision has held, that the underlying ICA applies to VoIP traffic despite this language would improperly interpret the ICA to nullify the clause. As demonstrated above, contract law prohibits an interpretation of a contract that would nullify its terms. Accordingly the Commission should reverse the Decision's interpretation of Section 4.1 of the 2003 Amendment in AT&T's ICA with Vaya to mean that the existing ICA between the parties – devoid of any language addressing VoIP traffic – to include terms relating to compensation for VoIP traffic.

At a minimum, the Decision should have found that Judge Pulsifer's interpretation of virtually the same reservation of rights clause to exclude the ICA's application to VoIP presents an alternative interpretation to that of the Proposed Decision so as to create an ambiguity regarding the language. As stated above, ambiguity in the language of a contract requires an examination of evidence about the parties' intent.<sup>40</sup>

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<sup>39</sup> Id. at 6-7.

<sup>40</sup> See Section A (1) above.

The Decision dismisses this precedent on the basis that, “a ruling is not the decision of the Commission.”<sup>41</sup> It is correct that Judge Pulsifer’s ruling was not adopted in a final Commission decision because the party seeking the ruling ultimately withdrew its request. The lack of a final Commission decision adopting the ruling, however, does not lessen the applicability of its reasoning on virtually identical contract language. Further, the Decision errs legally by asserting that Judge Pulsifer’s ruling has no applicability because it was in the body of ICA, while the reservation of rights language in Vaya’s ICA was contained in an amendment. The ICA expressly allows for amendments.<sup>42</sup> Further, the ICA includes an integration clause, which expressly incorporates all appendices and attachments (such as the 2003 Amendment), as part of the ICA. The 2003 Amendment expressly states that “Any inconsistencies between the provisions of this Amendment and provisions of the underlying Interconnection Agreement shall be governed by the provisions of this Amendment.”<sup>43</sup> Thus, the 2003 Amendment (and all other Amendments) are expressly incorporated into the ICA and have the same legal status as the body of the ICA. The Decision’s attempt to accord a lesser legal status to the reservation of rights language regarding VoIP termination in the 2003 Amendment than if the language had been in the body of the ICA is legal error.

#### **4. The Decision Errs by Applying the *GNAPs* cases.**

The Decision relies heavily on this Commission’s prior rulings in two cases involving Global Naps’ ICAs (“GNAPs”) to find that the AT&T-Vaya ICA requires Vaya to pay access

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<sup>41</sup> D.14-01-006, at p. 13.

<sup>42</sup> ICA General Terms and Conditions, Section 27.7

<sup>43</sup> 2003 Amendment, Section 1.3.

charges to AT&T on VoIP traffic.<sup>44</sup> To reach these conclusions, the Decision ignores critical legal differences and distinguishable facts by quoting selectively from these decisions.

**D. 07-01-004:** The Commission required GNAPs to pay Cox for terminating IntraLATA toll calls, including VoIP calls.<sup>45</sup> While the parties expressly agreed to subject “ISP bound” traffic to bill and keep, they did not include any language on how to treat “ISP originated” traffic that was subject to dispute.<sup>46</sup> Nor did they include a reservation of rights clause with regard to the treatment of ISP originated traffic.

As the 9<sup>th</sup> Circuit made clear in *Pacific Bell v. Pac-West*, “interconnection agreements are binding on the parties.”<sup>47</sup> Thus, the parties to an ICA are free to agree to apply access charges to VoIP traffic.<sup>48</sup> In other words, if the parties have agreed to apply ICC to VoIP traffic, or to apply an NPA NXX-based jurisdictional classification to all traffic generally regardless of its status as VoIP traffic, that agreement controls.<sup>49</sup> The Commission in GNAPs concluded:

Whether or not Cox and Global Naps could have agreed to an arrangement that differs from the access charge regime prescribed by the FCC, the fact remains that they did not. They entered an Interconnection Agreement that specifically obligates the originating carrier to compensate the terminating carrier for

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<sup>44</sup> Section 3.2.2, pp. 9-10; see also, Conclusions of Law Nos. 5 and 6.

<sup>45</sup> *Cox California Telecom, LLC v. Global Naps California, Inc.*, CPUC Decision No. D. 07-01-004 (1/11/2007)

<sup>46</sup> *Id.* at p. 5.

<sup>47</sup> *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1125 (9th Cir. 2003).

<sup>48</sup> “Global’s duty to compensate Cox stems from its contractual obligations....The very authorities Global cites to support its contention that VoIP traffic is exempt from federal access charges confirm that such traffic is subject to reciprocal-compensation obligations under section 251(b)(5).... Thus, we reject Global’s claim that federal law prohibits the CPUC from enforcing the terms of the Agreement with respect to VoIP traffic.” *Global NAPs California, Inc. v. Public Utilities Comm’n of State Of Cal.*, 624 F.3d 1225, 1234 (9th Cir. 2010) (“*Cox v. Global Naps*”).

<sup>49</sup>See *Cox v. Global Naps* at 1233 (“The CPUC did not require Global to compensate Cox under the federal access-charges regime. Instead, the CPUC required Global to compensate Cox ‘as provided in the Interconnection Agreement between the parties.’”); at 1234 (“Global’s duty to compensate Cox stems from its contractual obligations.”); and at 1232-33 (“[T]he CPUC determined that summary judgment was appropriate because the nature of the disputed traffic was immaterial to the question of contract interpretation before it. As discussed above, Global conceded that the disputed traffic was intraLATA toll traffic for billing purposes. In addition, Global offered no evidence to demonstrate that Cox was using improper NPA–NXX information as a basis for its charges.”) (Emphasis supplied).

terminating intra-LATA toll calls. That agreement governs the rights of the parties to this dispute and requires Global NAPs to pay termination charges....<sup>50</sup>

Here, the parties expressly agreed not to agree on the applicability of ICC to VoIP traffic. Further, the Decision's reliance on the *Cox* case is error because federal law has changed since that order was issued. In the *Cox* case, the Commission relied on tentative conclusions in the FCC's 2004 Notice of Proposed Rulemaking ("NPRM") in the *IP Enabled Services* docket to reject GNAPs' argument that VoIP should not be subject to the ICA. The NPRM's tentative conclusion was that all carriers that use the PSTN should be subject to similar compensation obligations.<sup>51</sup> In the 2011 *ICC Reform Order*, however, where the FCC ultimately refused to apply the same broken ICC scheme to VoIP-PSTN, the FCC states:

The pre-existing intercarrier compensation regime imposes significantly different charges for the same use of the network depending upon, among other things, the jurisdiction of the traffic at issue. A more uniform intercarrier compensation framework for all uses of the network will arise from the end point of reform adopted in this Order.<sup>52</sup>

\*\*\*\* [S]uch an outcome would require the Commission to enunciate a policy rationale for expressly imposing that regime on VoIP-PSTN traffic in the face of known flaws of existing intercarrier compensation rules and notwithstanding the recognized need to move in a different direction.<sup>53</sup>

In sum, it is legal error for the Decision to rely on the order in the *Cox v. GNAPs* case to justify applying switched access charges to VoIP because the language is not the same and the law relied upon by the Commission in that case has been overturned.

**D.08-09-027:** Similarly, the Decision errs in following the *GNAPs v. Pacific Bell* case to support its rejection of Vaya's arguments because the law and facts differ. In D.08-09-027, the

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<sup>50</sup> D. 07-01-004 at p. 6.

<sup>51</sup> D. 07-01-004 at pp. 5-6

<sup>52</sup> *ICC Reform Order* at para. 949.

<sup>53</sup> *Id.* at para. 948.

Commission held that the ICA language dictated the result. The Commission stated, "... the core issue driving our determination in D.08-09-027 is the ICA between GNAPs and AT&T, and our attendant authority to interpret and enforce such contracts. We believe that ultimately, the entire matter begins and ends with that."<sup>54</sup> Global NAPs did not argue as Vaya has here, that a reservation of rights clause excluded VoIP from the application of the ICA's compensation terms for traditional telecommunications traffic. Second, as alluded to above, the facts of this case are materially different than in the *GNAPs v. Pacific Bell* case. The fundamental basis for the result in D.08-09-027 was GNAPs' failure to prove that the traffic at issue was IP originated.<sup>55</sup> Thus, the Commission found that the traffic was basic telecommunications traffic.<sup>56</sup> Here, in stark contrast, the Scoping Memo instructed the parties to brief the issues *assuming that Vaya's traffic at issue is IP originated*. Thus it is legal error to rely on D.08-09-027 because that case did not address the key issue here – the ICA's application to VoIP when it is presumed that the traffic is VoIP.

#### **5. The Decision Errs in Concluding that Section 3.9 Controls**

In addition to Sections 3.1 and 3.2, the Decision cites to Attachment 18, Section 3.9 to support its conclusion that VoIP traffic should be compensated on the same terms as voice telecommunications traffic.<sup>57</sup> This Section addressed compensation for traffic originated by or terminated by either party to an information services provider.

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<sup>54</sup> Order Denying Rehearing of Decision (D.) 08-09-027, slip op. at 3 (2009). Similarly, the Federal Court decision upholding the CPUC also relied on the fact that the Commission was simply exercising its authority to enforce the terms of the ICA to which Global NAPs had agreed. See *Global NAPs Cal., Inc. v. Pub. Util. Comm'n of Cal.*, No. 2:09-cv-1927-ODW-PJW, Order re Motions to Dismiss for Failure to State a Claim, slip op. at 10-11 (C.D.Cal. Apr. 27, 2010).

<sup>55</sup> See, e.g., D.08-09-027 at 6 ("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."); see also Findings of Fact 19, 20, and 21.

<sup>56</sup> *Id.*

<sup>57</sup> PD at Section 3.3, p. 14.

The Decision's conclusion erroneously ignores the fact Section 3.9 was superseded by the 2003 Amendment. The 2003 Amendment expressly, "supersede[s] any and all contract sections, appendices, attachments, rate schedules, or other portions of the underlying interconnection agreement that set forth rates, terms and conditions for the terminating compensation for ISP-bound Traffic and Section 251(b) (5) Traffic exchanged between ILEC and CARRIER."<sup>58</sup> This is the same Amendment which includes the reservation of rights clause excluding VoIP. Thus, to the extent that Section 3.9 had applied to reciprocal compensation for information services traffic prior to the Amendment, the 2003 Amendment made clear that the prior Section 3.9 was superseded and the parties had no "meeting of the minds" as to how to treat VoIP.

The Decision notes that Vaya argued in its Comments on the Proposed Decision that Section 3.9 expressly was limited to reciprocal compensation traffic and was superseded by the 2003 Amendment and therefore, it should not be relied upon to determine that the ICA required VoIP to be treated the same as telecommunications. In response to this argument, the Decision explains that its conclusion that the ICA applies to VoIP primarily rests on "Sections 3.1 and 3.2 – regarding the classification of traffic exchanged according to the telephone numbers of the calling and called parties."<sup>59</sup> This is at least a tacit agreement with Vaya's argument that Section 3.9 does not apply here. This leaves only Sections 3.1 and 3.2 to support the Decision's imposition of access charges on VoIP. These sections are expressly limited, however, to telecommunications, which as demonstrated elsewhere in this brief, VoIP is not. Accordingly, no language in the ICA supports the Decision's conclusion that the ICA's intercarrier compensation provisions apply to VoIP.

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<sup>58</sup> Section 1.3 of the ICA Amendment.

<sup>59</sup> Decision at p. 18.

## **6. The Decision Errs by Holding that Federal Law Pre-ICC Reform Order Applies to VoIP**

The Decision concludes that “Vaya is incorrect in its claim that federal law and the ICA make access charges inapplicable to VoIP traffic.”<sup>60</sup> Just as it errs in interpreting the ICA, the Decision also errs in concluding that pre-ICC Reform Order, federal law applied access charges to VoIP traffic.

Prior to the 2011 FCC *ICC Reform Order*, the FCC had never established what ICC, if any, was due on VoIP traffic. For example, in the *ICC Reform NPRM*,<sup>61</sup> the FCC stated:

The Commission has never addressed whether interconnected VoIP is subject to intercarrier compensation rules and, if so, the applicable rate for such traffic. ... The Commission has declined to explicitly address the intercarrier compensation obligations associated with VoIP traffic. Given this lack of clear resolution ... disputes increasingly have arisen among carriers and VoIP providers regarding intercarrier compensation for VoIP.<sup>62</sup>

In the *ICC Reform Order*, the FCC for the first time allowed ICC to be applied to VoIP-PSTN traffic, and it did so only *prospectively*.<sup>63</sup> The FCC rejected the Decision’s conclusion, that competitive or technological neutrality require access charges to apply to toll VoIP traffic and that comparable uses of the network should be subject to comparable ICC schemes.<sup>64</sup> Instead the FCC held that the adoption of a bill and keep methodology for all ICC is appropriate.<sup>65</sup>

Federal law pre-ICC Reform Order did not apply access charges to VoIP. First, the federal rules regarding access charges limited the application of access charges to telecommunications traffic. 47 C.F.R. Section 69.2 defined “access service” as “services and facilities provided for the origination or termination of any interstate or foreign

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<sup>60</sup> Decision Section 3.2.2, p.10.

<sup>61</sup> *Connect America Fund, et. al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554 (2011) (ICC Reform NPRM)

<sup>62</sup> *Id.*, at paras. 608 and 610.

<sup>63</sup> ICC Reform Order at para. 935 and note 1874.

<sup>64</sup> PD Section 3.2.2, p. 10.

<sup>65</sup> *ICC Reform Order*, para. 954.

*telecommunication.*” In addition, 47 C.F.R. Section 69.5(b) provided that a filing carrier’s charges shall be assessed “upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign *telecommunications* services.” As discussed above, the FCC has never classified VoIP traffic as “telecommunications.”<sup>66</sup>

Moreover, the Decision’s application of intrastate access charges to VoIP is particularly troubling. In its decision to temporarily impose access charges on VoIP traffic, the FCC expressly refused to impose the entire broken wireline intercarrier compensation regime to VoIP by capping toll VoIP traffic at interstate access rates.<sup>67</sup> While the FCC’s Order is prospective only, it nonetheless recognizes the flaws in applying intrastate access charges to VoIP at any point in time. The FCC ruled:

Further, such an outcome would require the Commission to enunciate a policy rationale for expressly imposing that regime on VoIP-PSTN traffic in the face of the known flaws of existing intercarrier compensation rules and notwithstanding the recognized need to move in a different direction. Moreover, requiring payment of all existing intercarrier compensation rates applicable to traditional telephone service traffic as part of a transitional regime for VoIP-PSTN traffic would, in the aggregate, increase providers’ reliance on intercarrier compensation at the same time the Commission’s broader reform efforts seek to move providers away from reliance on intercarrier compensation revenues. Nor are we persuaded that such an outcome is necessary to advance competitive or technological neutrality.

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Many of these commenters also argue that comparable uses of the network should be subject to comparable intercarrier compensation charges. We agree with that policy principle, but observe that the intercarrier compensation regime applicable to traditional telephone service—which they seek to apply to VoIP-PSTN traffic—is at odds with that policy. The pre-existing intercarrier compensation regime imposes significantly different charges for the same use of the network depending upon, among other things, the jurisdiction of the traffic at issue. A more uniform intercarrier compensation framework for all uses of the network will arise from the end-point of reform adopted in this Order.<sup>68</sup>

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<sup>66</sup> *ICC Reform Order*, para. 954.

<sup>67</sup> *ICC Reform Order* at paras. 933-935, 944, 948-949.

<sup>68</sup> *ICC Reform Order* at paras. 948-949 (footnotes excluded).

For all of these reasons, because the Decision errs by concluding that federal law pre-ICC Reform Order imposed access charges, particularly *intrastate* access charges on VoIP traffic, the Commission should reconsider and reject this conclusion.

## **B. Legal and Factual Errors Regarding Routing VoIP Traffic through Local Interconnection Trunks**

The Decision concludes that Vaya improperly routes its VoIP traffic through interconnection trunks. The Decision is in error.

### **1. Federal Law Allows Routing VoIP Traffic over Local Interconnection Trunks**

Vaya's interconnection agreement with AT&T does not prohibit Vaya from sending IP originated traffic over Local Interconnection ("LIS") trunks. The ICA between AT&T and Vaya established two types of interconnection trunks to connect their networks. "Switched Access Trunks" are used to exchange traffic that is subject to Switched Access Charges. Attachment 18, Section 1.1 of that ICA provides:

The Parties will establish Local Interconnection Trunks to exchange Local Traffic, IntraLATA Toll Traffic, and Transit Traffic; provided, however, that either Party may also deliver Local and IntraLATA Toll Traffic to the other Party over *Switched Access trunks*. Local Interconnection Trunks will be provisioned as two-way trunks unless both Parties agree to implement one-way trunks on a case-by-case basis. Neither Party shall terminate interLATA traffic over Local Interconnection Trunks.<sup>69</sup>

As demonstrated above, the IP originated traffic Vaya transported through its LIS trunks was not "Switched Access" traffic nor is it "interLATA traffic" since these classifications are limited to "telecommunications."

Furthermore, the FCC confirmed in the *ICC Reform Order* that both pre- and post-*ICC Reform Order*, it was and is appropriate for carriers to route VoIP traffic over LIS trunks. The

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<sup>69</sup> Emphasis added.

*ICC Reform Order* clarified that a carrier “that otherwise has a section 251(c) (2) interconnection agreement is free to deliver toll VoIP-PSTN traffic through that arrangement as well.”<sup>70</sup> The FCC found as long as the carrier is exchanging some local exchange and/or exchange access traffic over those trunks, the Act does not prohibit carriers from also transmitting information services over the same facility. This is consistent with prior holdings of the FCC, including the Local Competition First Report and Order (“we also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a) (1), 251(c) ((2) or 251(c) (3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well.”)<sup>71</sup> Here Vaya currently transmits traditional wireline local, local VoIP and toll VoIP traffic over its local interconnection trunks with AT&T. Under federal law, this is appropriate both pre-*ICC Reform Order* and post-*ICC Reform Order*. Thus the Decision errs by concluding otherwise.

## **2. Immediate Removal of InterLATA Traffic from Local Interconnection Trunks**

The Decision orders Vaya to “immediately” cease delivering interLATA traffic to AT&T over LIS trunks.<sup>72</sup> The immediate nature of this order violates the parties “Confidential Settlement Agreement” which was filed by the parties and approved by the ALJ in this case.

As the Commission is aware, on February 10, 2011, the parties entered into a settlement agreement that governed the parties conduct during the pendency of this case. Among other matters, AT&T agreed to permit Vaya to continue to route all of its traffic over the LIS trunks until a final decision is issued by the Commission “resolving the Complaint.” The ALJ

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<sup>70</sup> *ICC Reform Order* at para. 972.

<sup>71</sup> *Id.*, and note 203.

<sup>72</sup> Decision at p. 22, Ordering para. 3.

in this matter reviewed the Settlement Agreement and approved it in a Ruling issued on March 29, 2011.

The Commission's Decision thus far has resolved the threshold legal issues before it, but it has not resolved all matters addressed by the parties' complaints. For instance, the Decision specifically held the cases open to resolve issues regarding the amounts due to AT&T pursuant to the interconnection agreement.<sup>73</sup> Under these circumstances, the Decision erred in ordering Vaya to routing traffic over the LIS trunks before all other issues between the parties have been resolved.

### **III. CONCLUSION**

Vaya has demonstrated herein that the Decision contains legal and factual errors that must be corrected. Therefore, Vaya respectfully requests that the Commission reconsider its Decision and grant Vaya rehearing as described herein.

Signed and dated February 20, 2014 at Walnut Creek, CA

Respectfully Submitted,

/s/ Anita Taff-Rice

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<sup>73</sup> *Id.*, Ordering para. 4.