Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell Telephone Company, a California corporation d/b/a AT&T California (U1001C), Complainant, v. Global NAPs California, Inc. (U6449C), Defendant.	Case 07-11-018 (Filed November 19, 2007)

MODIFIED PRESIDING OFFICER'S DECISION FINDING GLOBAL NAPs CALIFORNIA IN BREACH OF INTERCONNECTION AGREEMENT

1. Summary

This decision finds that Global NAPs California (GNAPs) has breached its interconnection agreement with Pacific Bell Telephone Company doing business as AT&T California (AT&T), and owes AT&T the amount of $18,589,494.17 through the December 2007 bill, plus any charges that have accrued since that time.

In 2003, AT&T and GNAPs entered into an interconnection agreement, approved by the Commission in Decision (D.) 02-06-076, to interconnect their networks and exchange traffic. At GNAPs' request, AT&T established trunks to exchange traffic under the agreement, and GNAPs began delivering traffic to AT&T over those trunks. AT&T either terminates the traffic to its own end-user customers, or it hands the traffic off to other local telephone carriers for delivery

to their end-user customers. GNAPs has refused to pay for these services on the basis that (1) the Commission lacks jurisdiction to impose access charges for this traffic because it is jurisdictionally interstate; (2) pursuant to the federal regulation commonly referred to as the Enhanced Service Provider (ESP) exemption, the traffic is exempt from access charges; and (3) the charges are inaccurate because they do not reflect the nature of the calls.

In D.07-09-050, the Commission previously addressed and rejected GNAPs' arguments that we lack jurisdiction over this matter by virtue of the nature of the traffic at issue. In D.07-01-004 (modified by D.07-08-031, denying GNAPs' rehearing application), the Commission previously addressed and rejected GNAPs' arguments that the traffic is exempt from charges pursuant to the ESP exemption. The charges billed by AT&T accurately reflect the terms of the interconnection agreement.

We order GNAPs to pay AT&T the amount of $18,589,494.17 through the December 2007 bill, plus any charges that have accrued since that time, for AT&T's termination and transiting of traffic delivered to it by GNAPs.

2. Background

On November 30, 2001, GNAPs filed Application (A.) 01-11-045 for arbitration of an interconnection agreement to interconnect and exchange traffic with AT&T pursuant to Section 252(b) of the Telecommunications Act. The Commission, in D.02-06-076 (modified by D.03-07-039, denying rehearing), approved the interconnection agreement and ordered the parties to enter into it; the parties did so in 2003.

The interconnection agreement sets forth the terms and conditions under which the parties will interconnect their networks and exchange traffic. The interconnection agreement provides that traffic exchanged between the parties

will be classified as either local, transit, optional calling area, intraLATA toll, or interLATA toll traffic, and specifies the charges for each. The interconnection agreement specifies the different types of trunks that may be established between the parties' networks to exchange the different classes of traffic, and provides that local and intraLATA toll traffic may be combined on the same trunk groups, while interLATA traffic must be transported over a trunk group separate from local and intraLATA toll traffic. GNAPs submitted Access Service Requests to AT&T requesting the establishment of combined local/intraLATA toll trunks, and represented that either 99% or 100% of the traffic would be local. GNAPs and AT&T established combined local/intraLATA toll trunks for their exchange of traffic.

The interconnection agreement specifies the charges for traffic exchanged over the combined local/intraLATA toll interconnection trunks: (1) local calls that AT&T terminates to its own end-users are subject to local reciprocal compensation charges, (2) intraLATA toll calls that AT&T terminates to its own end-users are subject to the intraLATA toll or intrastate access charges specified in AT&T's intrastate access tariff, and (3) calls that AT&T transits to a third party carrier are subject to transit charges.

The agreement requires GNAPs to provide AT&T with quarterly usage reports showing the percent of the traffic delivered over the combined local/intraLATA toll traffic trunks that GNAPs charges as local versus toll,[1] or Percent Local Usage factor (PLU), for AT&T to use to distinguish between local and intraLATA toll traffic for billing purposes. AT&T notified all

[1] GNAPs has the discretion to establish the local calling area for its own customers and, therefore, define what is a local call versus a toll call. (See, *e.g.*, D.02-06-076, pp. 23-24.)

interconnecting carriers that, in the absence of receiving usage reports, it will apply a default PLU percentage of 83% local traffic and 17% intraLATA toll traffic. GNAPs has not provided AT&T with usage reports.

Beginning in or about March 2004, GNAPs has used the combined local/intraLATA toll trunks to deliver traffic to AT&T for termination to AT&T end-users and for transiting to third party carriers. AT&T has billed for terminating and transiting this traffic pursuant to the interconnection agreement, using the default PLU factor. GNAPs has declined to pay any of the billed charges. AT&T brought this action for breach of the interconnection agreement.

GNAPs defends its non-payment of the billed charges on three grounds: (1) the Commission does not have jurisdiction to require payment of access charges because the traffic at issue is jurisdictionally interstate, (2) the traffic for which AT&T seeks compensation is exempt from access charges pursuant to the Federal Communication Commission's (FCC) ESP exemption, and (3) the billed amounts are inaccurate because they do not reflect the nature of the traffic.

3. Nature of the Traffic

At the core of all three of its defenses, GNAPs claims that the traffic at issue is exempt from access charges by virtue of its physical and jurisdictional nature. Accordingly, before we consider GNAPs' legal claims, it is necessary to determine the physical nature of the traffic.

GNAPs claims that all of its customers are ESPs. As we stated in D.07-08-031, the more precise term is Internet service providers (ISPs), which are a subclass of ESPs. (D.03-07-039, p. 11.) Consistent with this more precise definition, GNAPs' Assistant General Counsel James Scheltema testified that all the traffic at issue involved the Internet, that is, Internet protocol (IP) format, at

some point in its transmission. AT&T does not appear to dispute this factual assertion.

GNAPs makes the further claim that all the traffic it exchanges is voice over the Internet protocol (VoIP) traffic. The record on this claim is inconclusive. GNAPs' Director of Network Operations Jeffrey Noack testified that GNAPs does not know whether the communication it receives from its customers is voice, data or a mix thereof, and does not know how the traffic was delivered to its ESP customers. In its opening brief, GNAPs points to a very recent decision of the New York Public Service Commission (New York PSC), which determined that the traffic at issue in that case was VoIP, as evidence of the factual nature of the traffic at issue here. However, that determination was based on affidavits from GNAPs' customers that send traffic to New York; we have no evidence in this record to determine that it is also the nature of the traffic that GNAPs sends to AT&T in California.[2] In its reply brief, GNAPs asserts that the nature of its California traffic is the same as its New York traffic, and that the same customers are involved in both sets of traffic. GNAPs' factual assertions in brief do not constitute evidence.

A further factor to be considered is whether the traffic *originated* as IP traffic, as opposed to on the public switched telephone network (PSTN). As discussed above, the evidence shows that GNAPs does not know how the traffic originated. Conversely, AT&T's Area Manager for Regulatory Relations Jason Constable testified that GNAPs' traffic patterns do not match the common traffic

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[2] New York Public Service Commission Order Directing Negotiation, *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges,* Case 07-C-0059 (March 20, 2008).

patterns for IP-originated VoIP. While IP-originated VoIP is typically sent in comparable amounts as it is received, over 97% of the traffic exchanged between GNAPs and AT&T is sent from GNAPs to AT&T. In addition, for the single day of January 8, 2008, AT&T matched nearly 3,500 billing records of GNAPs' traffic that terminated on AT&T's network with billing records for calls that originated from an AT&T incumbent local exchange carrier (ILEC) end-user on the PSTN, in another state dialing a 1+ (long distance) call.

In sum, we find that all of the traffic at issue was delivered to GNAPs from GNAPs' ISP customers (ISPs being a subclass of ESPs), and that GNAPs delivered it to AT&T for termination to AT&T's end-user customers or for transit to a third party carrier. There is no dispute that all of the traffic may have involved IP format at some point in its transmission. 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.

With this understanding of the nature of the traffic at issue, we turn to GNAPs' legal defenses against paying the claimed charges.

4. Commission Jurisdiction

GNAPs argues that, because the traffic at issue is IP-enabled and/or VoIP traffic, it is jurisdictionally interstate in nature and the Commission may not exercise jurisdiction over AT&T's claim. GNAPs' argument is barred by the doctrine of judicial estoppel and, in any event, entirely without merit.

AT&T originally brought this claim before a federal court, but GNAPs successfully obtained its dismissal on the ground that this Commission has exclusive jurisdiction over claims for breach of the interconnection agreement. The federal court agreed with GNAPs that AT&T's interconnection agreement

claims must be presented to the Commission for interpretation of the parties' agreement in the first instance.

The doctrine of judicial estoppel bars GNAPs from taking a contrary position here. The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); the two positions are totally inconsistent; and (4) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997), 60 Cal.App.4th 171, 183.) These factors apply here.

In any event, the Commission previously rejected GNAPs' arguments, when it denied GNAPs' application for rehearing of D.07-06-044, in which the Commission suspended GNAPs' Certificate of Public Convenience and Necessity until it pays Cox California Telcom, LLC (Cox) amounts due under those parties' interconnection agreement. D.07-09-050 affirmed our authority under the Telecommunications Act of 1996 to arbitrate, interpret and enforce interconnection disputes, and went on to address GNAPs' specific arguments as follows:

> GNAPs relies on two primary sources to support for its contention that this Commission is without jurisdiction to adjudicate this complaint case that resulted from GNAPs' failure to honor its Interconnection Agreement with Cox. The first source is the Federal Communications Commission's ("FCC") *Notice of Proposed Rulemaking ("NPRM") on IP-Enabled Services* (2004) 19 FCC Rcd 4863, 4864-68. GNAPs asserts that the *NPRM* preempted all regulation of Voice over Internet Protocol (VoIP) traffic. The other source is *In the Matter of Vonage Holdings Corp (2004) 19 FCC Rcd 22404*, aff'd by *Minn. Pub. Util. Comm'n v. FCC* (8th Cir. 2007) 483 F.3d 570, 579. In *Vonage*, the FCC preempted a regulation promulgated by the Minnesota PUC that required

Vonage (a VoIP provider) to comply with state regulations governing telephone services. The Eighth Circuit upheld the FCC's ruling as reasonable because it was impractical or impossible to separate VoIP service into interstate and intrastate components.

GNAPs asserts that *Minn. PUC* upheld the FCC's determination that VoIP is jurisdictionally interstate and subject to the FCC's exclusive jurisdiction. [Fn. omitted.] While *Vonage* and *Minn. PUC* did indicate that state commissions cannot require VoIP providers to comply with state statutes and regulations governing telephone service within their jurisdiction, they did not conclude that state commissions cannot enforce interconnection agreements that require the payment of interconnection charges on VoIP calls that terminate on the PSTN. Thus, GNAPs' reliance on *Vonage* is misplaced. Vonage was solely a VoIP provider which sought to avoid regulation by the Minnesota PUC, whereas GNAPs is not a VoIP provider. The federal district court concluded in its *Order Denying Motion for Preliminary Injunction* in this proceeding that "[t]he fact that Global NAPs may use Internet protocols to receive traffic from its ESP customers before transmitting that traffic to an end point on the PSTN through Cox's facility does not make it a VoIP provider." [Fn. omitted.] Rather, GNAPs is a certificated carrier, licensed by this Commission, and subject to its jurisdiction.

Moreover, just because traffic may be jurisdictionally interstate does not preempt the Commission from review and enforcement of the interconnection agreements. GNAPs claimed that interstate traffic was preempted in the context of ISP-bound traffic, which is deemed to be interstate, and the Court rejected it. [Fn. omitted.] The Court noted that the *ISP Remand Order* "reserve[d] state commission authority in certain relevant matters," including the arbitration, review and enforcement of interconnection agreements, even where they dealt with ISP-bound (interstate traffic). [Fn. omitted.] This Commission also rejects GNAPs' argument.

Nor does the use of IP-enabled services in the transport of a call result in the states being deprived of jurisdiction. [Fn. omitted.] The *AT&T IP Decision* involved calls that were transported in

part over IP circuits, although they began and ended as landline-based phone calls over the PSTN. It was argued that the pending NPRM on IP-enabled services preempted state access charges for such calls, similar to GNAPs' argument here. Recognizing that the issue of applying access charges to traffic that uses IP was being considered in the NPRM, the FCC nevertheless held that intrastate access charges applies to these calls:

> We are undertaking a comprehensive examination of issues raised by the growth of services that use IP, including carrier compensation and universal service issues, in the *IP-Enabled Services* rulemaking proceeding. *In the interim, however, to provide regulatory certainty, we clarify that AT&T's specific service is subject to interstate access charges*…AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, *AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls. It is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN*, pending resolution of these issues in the *Intercarrier Compensation* and *IP-Enabled Services* rulemaking proceedings. [*Order, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges* (2004) 19 FCC Rcd 7457, 7464-65, ¶ 15.]

This statement makes clear that the mere use of IP in the transport of calls does not result in federal preemption, nor does the pendency of the NPRM on IP-enabled services.

(D. 07-09-050, pp. 8-12.)

GNAPs makes the same jurisdictional arguments here that the Commission addressed and rejected in D.07-09-050. We do not find them any more persuasive in their repetition.[3]

GNAPs supplements its previous argument with citations to two recent decisions, the New York PSC order discussed previously, and *Vonage Holdings, Corp. v. Nebraska Public Service Commission*, 2008 WL 584078 (D.Neb. 2008). Both of these decisions concern similar facts and appear to follow the earlier *Vonage* decision, and GNAPs' reliance on them is misplaced for the same reasons as is its reliance on *Vonage*. Specifically, these decisions merely reiterate that state commissions may not assess statutory or regulatory charges against VoIP providers; they do not deny the state commissions' authority under the Telecommunications Act of 1996 to arbitrate, interpret and enforce interconnection disputes. Indeed, the *New York PSC Order* affirms the state commissions' authority: rather than allow the complaining carrier to block traffic from the other for lack of compensation, the New York PSC exercised jurisdiction over the dispute by ordering the carriers to work out a traffic exchange agreement establishing rates, charges, terms and conditions for the VoIP traffic at issue there.

GNAPs argues that the billed amounts are intrastate access charges, which cannot be applied to its VoIP or IP-enabled traffic. GNAPs maintains that it should not be penalized for AT&T's failure to provide an interconnection option

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[3] Although AT&T does not raise it as an offense, the doctrine of collateral estoppel might reasonably be held to bar GNAPs' litigation of this jurisdictional issue, as it was conclusively determined as against GNAPs in D.07-09-050. (*Vandenburg v. Superior Court* (1999) 21 Cal.4th 815*; see also Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, upholding the trial court's discretion to use the doctrine offensively against the defendant.*)*

that reflects that the traffic is jurisdictionally interstate but not subject to access charges. GNAPs' argument is without merit. First, as the FCC determined in the AT&T IP Decision, intrastate access charges may apply to VoIP traffic that begins and ends as landline-based phone calls over the PSTN. (*AT&T IP Decision,* 19 FCC Rcd 7457, 7464-65, ¶ 15.) Even assuming that the traffic at issue here is VoIP (which we cannot determine on this record), it ends on the PSTN. The bar against intrastate access charges does not apply to this traffic. Second, the charges are not regulatory charges. Rather, they are contractual charges arising out of the parties' interconnection agreement.

5. ESP Exemption

GNAPs asserts that the traffic at issue is exempt from the charges billed by AT&T because the traffic involved the Internet or IP format and, as such, is subject to the FCC's ESP exemption.

The Commission previously rejected GNAPs' arguments that it presented in Case 06-04-026, *Cox California Telecom LLC v. Global NAPs California, Inc.* The Commission determined that "[t]he only relevant exemption from the access charge regime under Federal law is for *ISP-bound traffic* rather than *ISP-originated* traffic…." (D.07-01-004, p. 5, emphasis in original.)

GNAPs cites to ¶ 11 of the *ISP Remand Order* for its proposition that an ESP exemption applies to traffic that is routed to *or from* ISPs. To the contrary, nothing in ¶ 11 refers to traffic that is routed *from* ISPs:

> ISPs, one class of enhanced service providers (ESPs), also may utilize [local exchange carrier (LEC)] services to provide their customers with access to the Internet. In the *MTS/WATS Market Structure Order*, the [FCC] acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, […] the [FCC] has exempted ESPs from the payment of certain interstate access charges. Consequently ESPs, including ISPs,

> are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN). Thus, despite the [FCC's] understanding that ISPs use interstate access services, pursuant to the ESP exemption, the Commission has permitted ISPs to take service under local tariffs.

By its plain language, ¶ 11 refers to ISPs strictly in the context of their utilization of local exchange carrier services to provide their customers with access *to* the Internet. Here, in contrast, the traffic at issue is traffic that GNAPs receives *from* its ISP customers, not that it delivers *to* them.

GNAPs argues that removing the ESP exemption on the basis that GNAPs' customers, and not GNAPs itself, are ESPs would frustrate the FCC's intent to exempt this traffic from interstate access charges. We do not find intent by the FCC to exempt traffic that originates on the Internet from interstate access charges, regardless of GNAPs' status and the services that it provides to its customers. Even assuming that GNAPs shares the ESP status of its customers, the traffic does not utilize AT&T's services to provide access to the Internet. The ESP exemption does not apply to this traffic.

GNAPs points out that its network architecture is not that of a traditional local exchange carrier; its transport mode is ATM, not analog TDM. GNAPs argues that, although AT&T requires that GNAPs translate its digital traffic into analog TDM mode, this requirement by AT&T cannot be applied to strip it of its character as exempt traffic. These observations are irrelevant to the issue of whether the traffic at issue is ISP-bound. The ESP exemption is inapplicable to traffic that is not ISP-bound, regardless of the traffic's transport mode.

GNAPs argues that the interconnection agreement does not govern traffic that is beyond the Commission's regulatory authority and therefore cannot be

applied to overcome the application of the ESP exemption. This argument fails because, as we have discussed, its premise that the traffic is beyond the Commission's regulatory authority is without merit.

6. Accuracy of Billed Amounts

AT&T billed GNAPs for terminating and transiting traffic delivered over the combined local/intraLATA toll trunks. AT&T billed the terminating traffic using the default PLU factor to apply the local versus intraLATA toll charges, and billed the transited traffic at the transiting rate. GNAPs does not challenge AT&T's calculation of the bills. Rather, GNAPs asserts that AT&T's bills are inherently inaccurate for being based upon a comparison of NXX codes,[4] and for inappropriately imposing access charges and applying the PLU factor to IP-enabled traffic. We discuss these arguments below.

GNAPs argues that AT&T's invoices are inherently inaccurate because they are generated using Carrier Access Billing System (CABS) billing, which is premised upon a comparison of NXX codes. GNAPs points out that, for VoIP and IP-enabled traffic, the NXX codes do not necessarily reflect the end-user's physical location. Thus, for example, AT&T bills the traffic as local or intraLATA toll even if the end-user originating the call is physically located outside the geographic location pertaining to that particular NXX code. GNAPs argues that, therefore, the bills are inaccurate.

GNAPs is mistaken as to the billing procedure. AT&T did not use NXX codes to determine whether the traffic was local and/or intraLATA toll. Rather, the traffic at issue was deemed to be local and/or intraLATA toll based on its

delivery over the combined local/intraLATA toll trunks. Nor did AT&T use NXX codes to distinguish between local and intraLATA toll traffic. Pursuant to the interconnection agreement, all of the traffic that is delivered to AT&T's own end-users is billed either as local or intraLATA toll based on the PLU factor provided by GNAPs. Because GNAPs did not provide a PLU factor, AT&T applied the default PLU. NXX codes did not factor into AT&T's billing.

GNAPs argues that the billed amounts are intrastate access charges, which cannot be applied to its VoIP or IP-enabled traffic. GNAPs' argument is without merit. The billed amounts are transiting and terminating charges for traffic exchanged over local/intraLATA toll trunks pursuant to the interconnection agreement. Irrespective of the scope of any purported FCC access charge exemption for "ESP" or VoIP traffic, GNAPs is bound by its interconnection agreement and must pay the charges due under it.

GNAPs maintains that it should not be penalized for AT&T's failure to provide an interconnection option that would allow GNAPs to deliver traffic that is jurisdictionally interstate without subjecting it to the charges at issue. If GNAPs believed that the terms of the interconnection agreement should not apply to particular types of traffic, it could have sought arbitration of the issue before entering into the agreement. Having agreed in the interconnection agreement to pay for transiting and termination of traffic delivered over local/intraLATA toll trunks, GNAPs is bound by it. (*Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003)(citing 47 U.S.C. § 252(a)(1).)

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[4] NXX codes are the first three digits in a telephone number, and designate the central office or switch to which the number is assigned.

GNAPs asserts that the charges constitute access charges, which cannot be applied to GNAPs' IP-enabled traffic. As we discussed above, the charges are not regulatory charges. Rather, they are contractual charges arising out of the parties' interconnection agreement, which was approved by the Commission in the exercise of our authority under the Telecommunications Act of 1996 to arbitrate, interpret and enforce interconnection disputes.

GNAPs asserts that the PLU factor is inapplicable to its IP-enabled traffic. This argument reiterates GNAPs' position, which we reject, that IP-enabled traffic is exempt from charges under the interconnection agreement.

GNAPs notes that it provides no dial tone services like traditional carriers and that it only presents its traffic to AT&T in other than IP format because AT&T requires it to do so. These observations do not lead us to conclude that the billing calculation is inaccurate or that the traffic is not governed by the interconnection agreement.

We find that AT&T properly calculated $18,589,494.17 through the December 2007 bill, as the amount due and owed under the interconnection agreement.

7. Assignment of Proceeding, Hearings and Submission

Michael R. Peevey is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge and presiding officer in this proceeding.

Evidentiary hearing was held on March 25, 2008. Opening briefs were filed on April 14, 2008, and the proceeding was submitted upon the filing of reply briefs on April 24, 2008.

8. Appeal and Motion to Set Aside Submission

The Presiding Officer's Decision (POD) in this case was mailed on June 4, 2008. On July 3, 2008, GNAPs filed an appeal. On July 18, 2008, AT&T filed a

response to the appeal. GNAPs asserts, as it has throughout the case, that the traffic at issue is exempt from access charges by virtue of it being VoIP traffic, and maintains that the POD therefore errs by ordering GNAPs to pay AT&T termination and transiting charges due and owing under the interconnection agreement. The POD considers and rejects GNAPs' arguments.

GNAPs moved to set aside submission to take, as additional evidence, (1) a list of GNAPs' customers in New York and California, (2) a letter from a GNAPs customer describing the nature of its traffic as "nomadic VoIP," and (3) an affidavit of James Scheltema stating that GNAPs serves the same customers in New York and California and that their traffic is of the same nature in both states. GNAPs asserts that it could not offer this evidence in a timely fashion because it did not know, until AT&T briefed the issue, that the nature of the traffic was at issue. GNAPs' assertion is without merit. The assigned Commissioner's February 4, 2008, Scoping Memo identified the physical configuration of GNAPs' traffic as a factual issue, and directed GNAPs to present evidence on the issue pursuant to the adopted schedule of the proceeding. The motion is denied.

Findings of Fact

1. GNAPs filed A.01-11-045 for arbitration of an interconnection agreement with AT&T.

2. The Commission approved the interconnection agreement in D.02-06-076 (modified by D.03-07-039, denying rehearing) and ordered the parties to enter into it.

3. GNAPs and AT&T entered into the interconnection agreement in 2003.

4. The interconnection agreement provides that traffic exchanged between the parties will be classified as either local, transit, optional calling area, intraLATA toll, or interLATA toll traffic, and specifies the charges for each.

5. The interconnection agreement specifies the different types of trunks that may be established between the parties' networks to exchange traffic, and provides that local and intraLATA toll traffic may be combined on the same trunk groups, while interLATA traffic must be transported over a trunk group separate from local and intraLATA toll traffic.

6. The interconnection agreement provides that (1) local calls that AT&T terminates to its own end-users are subject to local reciprocal compensation charges, (2) intraLATA toll calls that AT&T terminates to its own end-users are subject to the intraLATA toll or intrastate access charges specified in AT&T's intrastate access tariff, and (3) calls that AT&T transits to a third party carrier are subject to transit charges.

7. The interconnection agreement requires GNAPs to provide AT&T with quarterly usage reports showing the percent of the traffic delivered over the combined local/intraLATA toll traffic trunks that GNAPs charges as local versus toll, or Percent Local Usage factor (PLU), for AT&T to use for billing purposes.

8. GNAPs submitted Access Service Requests to AT&T requesting combined local/intraLATA toll trunks, and representing that either 99% or 100% of the traffic would be local.

9. AT&T and GNAPs established combined local/intraLATA toll trunks to interconnect the parties' networks.

10. AT&T notified all interconnecting carriers that, in the absence of receiving usage reports, it will apply a default PLU percentage of 83% local traffic and 17% intraLATA toll traffic.

11. Beginning in or about March 2004, GNAPs has used the combined local/intraLATA toll trunks to deliver traffic to AT&T for termination to AT&T end-users and for transiting to third party carriers.

12. GNAPs has not provided usage reports to AT&T.

13. AT&T applied the default PLU to the traffic that it terminated to its own end-user customers.

14. AT&T has billed for terminating and transiting this traffic pursuant to the interconnection agreement.

15. GNAPs has not paid any of the billed charges.

16. All of GNAPs' customers are ISPs, which are a subclass of ESPs.

17. GNAPs received all of the traffic at issue from its ISP customers.

18. There is no dispute that all of the traffic at issue involved IP at some point in its transmission.

19. GNAPs does not know whether the communication it receives from its customers is voice, data or a mix thereof, and does not know how the traffic was delivered to its ESP customers.

20. We cannot find, on the basis of this record, that the traffic at issue is VoIP traffic.

21. The evidence suggests that the traffic originated on the PSTN, not on the Internet.

22. None of the traffic at issue was delivered to the Internet.

23. AT&T originally brought this claim before a federal court, where GNAPs successfully obtained its dismissal on the ground that this Commission has exclusive jurisdiction over claims for breach of the interconnection agreement.

24. AT&T properly calculated $18,589,494.17 through the December 2007 bill, as the amount due and owed under the interconnection agreement.

Conclusions of Law

1. The interconnection agreement governs the terms and conditions under which GNAPs and AT&T will interconnect their networks and exchange traffic.
2. The doctrine of judicial estoppel bars GNAPs from arguing that the Commission lacks jurisdiction over AT&T's claim.
3. The Commission has authority consistent with state and federal law to resolve interconnection disputes.
4. The use of IP-enabled services in the transport of a call does not deprive the Commission of jurisdiction to resolve interconnection disputes.
5. The FCC's ESP exemption from access charges applies only to traffic that is routed to the Internet; it does not apply to the traffic at issue here.
6. Charges for services under the interconnection agreement are contractual charges, not regulatory access charges.
7. The use of IP format in the transmission of traffic prior to its delivery to AT&T does not exempt it from charges under the interconnection agreement.
8. GNAPs should pay AT&T the claimed charges.
9. This case should be closed.

O R D E R

IT IS ORDERED that:

1. Global NAPs California, Inc. shall pay to Pacific Bell Telephone Company, d/b/a AT&T California the amount of $18,589,494.17 through the December 2007 bill, plus any charges that have accrued since that time.
2. Case 07-11-018 is closed.

This order is effective today.

Dated _____, at San Francisco, California.