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DRAFT

**Agenda ID # 2665
Ratesetting
Item 25 9/18/2003**

Decision

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Global NAPs, Inc. (U-6449-C)
Petition for Arbitration of an Interconnection
Agreement with Pacific Bell Telephone Company
Pursuant to Section 252(b) of the
Telecommunications Act of 1996.

Application 01-11-045
(Filed November 30, 2001)

In the Matter of Global NAPs, Inc. (U-6449-C)
Petition for Arbitration of an Interconnection
Agreement with Verizon California Inc. f/k/a
GTE California Inc. Pursuant to Section 252(b) of
the Telecommunications Act of 1996.

Application 01-12-026
(Filed December 20, 2001)

OPINION GRANTING MOTION OF VERIZON CALIFORNIA INC.

1. Summary

This decision grants Verizon California Inc.’s motion to require Global NAPs (GNAPs) to sign the conformed interconnection agreement (ICA) without alteration. The decision also clarifies that the ICA became effective when it was filed. This proceeding is closed.¹

¹ The caption of Verizon’s motion included that of Application (A.) 01-11-045, GNAPs’ arbitration with Pacific Bell Telephone Company. Verizon’s action triggered the

Footnote continued on next page

2. Background

Following an arbitration proceeding initiated by GNAPs against Verizon California Inc. in December 2001, the Commission issued its final arbitration decision on June 27, 2002, Decision (D.)02-06-076. The decision sets forth the Commission's final legal and policy determinations of the disputed issues, in accordance with § 252(b) of the Telecommunications Act of 1996 (Act), and directed the parties to sign and jointly file a conforming interconnection agreement with the Commission within 30 days of the Decision, which agreement was to take effect on the date filed. Subsequently, GNAPs filed an application for rehearing of the decision and requested an extension of time in which to file this conforming agreement until such time as the Commission acted on any application for rehearing. The request was granted by letter dated July 29, 2002 from Wesley M. Franklin, Executive Director of the Commission. By order dated July 10, 2003², the Commission denied GNAPs' application for rehearing, making a conformed interconnection agreement due 30 days following issuance of the order on rehearing.

To comply with the Commission's ruling, Verizon sent the approved Final Arbitration Agreement, conformed to D.02-06-076 and D.03-07-039, to GNAPs for signature. However, rather than executing the agreement, GNAPs returned to Verizon a signature page that was executed but materially altered to include provisions purporting to render "without effect" certain terms of the approved Final Arbitration Agreement.

opening of proceeding A.01-11-045, as well as A.01-12-026. Verizon's motion does not impact on A.01-11-045, and we will reclose that proceeding.

² D.03-07-039.

On August 11, 2003, Verizon filed a motion to require signature of the conformed interconnection agreement without alteration and to clarify its effect. GNAPs filed its Reply to Verizon's motion on August 21, 2003.

3. The Signature Page

GNAPs included the following statement on the signature page:

Global NAPs California, Inc. signs this agreement under protest. The FCC has held that Internet Service Provider (ISP)-bound traffic is jurisdictionally interstate in nature and is subject to an FCC-mandated inter-carrier compensation mechanism. As a result, state regulators no longer have authority to consider the issue of inter-carrier compensation for ISP-bound calls, and that the issue is no longer a fit subject for inclusion in interconnection agreements. *In the Matter of Implementation of the local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (Apr. 27, 2001) ("ISP Remand Order") ¶ 82. Accordingly, any portions of this Agreement that purport to control inter-carrier compensation for ISP-bound traffic are without effect. Global NAPs, Inc. also reserves all appellate rights.

Verizon asserts that GNAPs' statement materially alters the ICA and is not in compliance with D.02-06-076 and D.03-07-039. Verizon also requests that the Commission clarify that the approved final arbitration agreement is effective as of the date of filing and governs the parties' relationship in California and that both parties to the arbitration proceeding must comply in all respects with the final outcome.

GNAPs asserts that it is not challenging the Commission's Order; rather, it merely states what it considers to be obvious, namely "that any attempt to apply the Commission's determination for traffic which is exclusively the subject of federal jurisdiction is null and void *ab initio*." GNAPs goes on to say that

GNAPs is ensuring that the Commission does not become ensnared in litigation regarding its jurisdiction.

While GNAPs claims that it is not challenging the Commission's order, we disagree. GNAPs' statement is a direct challenge to our order. The net effect of the language GNAPs added to the signature page is to void portions of the ICA relating to reciprocal compensation that we decided after due consideration of the facts of the case and the pertinent law. We dispute GNAPs' contention that the outcome is contrary to the law, and we point to a recent decision of the Ninth Circuit Court of Appeals in support of our position that we have the authority to make ISP-bound traffic subject to reciprocal compensation provisions:

Because the FCC has yet to resolve whether ISP-bound traffic is "local" within the scope of § 251, the CPUC's decision to enforce an arbitration agreement that subjects ISP-bound traffic to reciprocal compensation was not inconsistent with § 251. We therefore reject Appellants' argument that the CPUC exceeded its statutory authority by approving the payment of reciprocal compensation for ISP calls. Indeed, following the D.C. Circuit's vacatur of its Declaratory Ruling, the FCC itself abandoned the distinction between local and interstate traffic as the basis for determining whether reciprocal compensation provisions in interconnection agreements apply to ISP-bound traffic.³

Clearly the Ninth Circuit's opinion supports our conclusion that this Commission has the authority under § 252 of the Act to approve an interconnection agreement that includes provisions for reciprocal compensation for calls to ISPs. It is immaterial whether that traffic is intrastate or interstate.

³ 325 F.3d. 1114, 1119-1120 (9th Cir. 2003).

The statement GNAPs appended to the signature page of the ICA has the effect of nullifying the outcome ordered by the Commission, namely that reciprocal compensation provisions apply to ISP-bound calls. We deplore GNAPs' attempt to alter the outcome in our decision, and order that GNAPs provide a signature page without any alterations.

GNAPs states that it has the right to appeal our order, and we do not question that right. However, GNAPs must abide by our order until it is stayed or overturned by a court of competent jurisdiction.

If GNAPs does not comply with this order in a timely fashion as ordered below, GNAPs shall be subject to monetary penalties. Section 2107 of the Public Utilities Code states:

Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part of provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500) nor more than twenty thousand dollars (\$20,000) for each offense.

Section 2108 clarifies that for continuing violations, each day's continuance thereof "shall be a separate and distinct offense." If GNAPs fails to file and serve a signature page in conformance with this order, GNAPs shall be subject to a penalty of \$1,000 per day. We expect utilities to comply with the orders of this Commission, and do not take lightly any utility's willful disregard of our orders.

GNAPs has also included a statement that it has signed the ICA under protest. This is an arbitration proceeding under the provisions of § 252 of the Act, and we anticipate that neither party will agree with all the outcomes ordered by the Commission. In addition, GNAPs states that it reserves all

appellate rights. There is no need to include that statement; the Act itself guarantees GNAPs right to appeal the order of a state commission and nothing in the Commission's order attempts to take away that right.

Verizon asks the Commission to clarify that the approved ICA was effective as of the date of filing and governs and parties' relationship in California. We concur with Verizon's statement. The ICA became effective on the date that the conformed ICA was filed.

4. Filing the Signature Page

Within 7 days of the date of this decision, GNAPS shall file and serve a signature page that conforms to the decisions herein. GNAPs should also serve a copy on the Director of the Telecommunications Division.

5. Waiver of Period for Public Review and Comment

The Public Utilities Code and our Rules of Practice and Procedure generally require that draft decisions be circulated to the public for review and comment 30 days prior to the Commission's vote.⁴

However, Rule 77.7(f)(5) provides that we may reduce or waive the period for public review and comment "for a decision under the state arbitration provisions of the Telecommunications Act of 1996." We consider and adopt this decision today under the state arbitration provisions of the Act.

Findings of Fact

1. The statement GNAPs included on the signature page of the ICA with Verizon serves to void portions of the ICA and the Commission's orders.

⁴ See Pub. Util. Code § 311(g)(1), and Rule 77.7 of the Commission's Rules of Practice and Procedure.

2. This is a proceeding under the state arbitration provisions of the Act.

Conclusions of Law

3. This Commission has the authority under § 252 of the Act to approve an ICA that includes provisions for reciprocal compensation for calls to ISPs.

4. The statement GNAPs has included on its signature page serves to invalidate portions of the Commission's order and portions of the ICA between GNAPs and Verizon.

3. The conformed ICA should be deemed effective as of the date it was filed.

4. The 30-day public review and comment period should be waived pursuant to Pub. Util. Code § 311(g)(3) and Rule 77.7(f)(5).

O R D E R

IT IS ORDERED that:

1. Global NAPs, Inc (GNAPs) shall serve and file a completed signature page to its agreement with Verizon California Inc, without alterations, within seven days of the issuance of this order.

2. GNAPs shall be subject to a penalty of \$1,000 per day for each day that it fails to file a signature page in conformance with the requirements of this order.

3. Application 01-11-045 and Application 01-12-026 are closed.

This order is effective today.

Dated _____, at San Francisco, California.