

Decision 07-01-004 January 11, 2007

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Cox California Telecom, LLC (U-5684-C),

Complainant,

vs.

Global NAPs California, Inc. (U-6449-C),

Defendant.

Case 06-04-026  
(Filed April 28, 2006)

**OPINION GRANTING COMPLAINANT'S MOTION  
FOR SUMMARY JUDGMENT**

**Summary**

The motion of Cox California Telecom, LLC (Cox) for summary judgment is granted. Global NAPs California, Inc. (Global NAPs) is ordered to pay Cox the sum of \$985,439.38 plus interest on overdue amounts at the rate of one and one-half percent per month.

**Background**

Global NAPs and Cox are both competitive local exchange carriers licensed by this Commission to provide local exchange service in California. On October 29, 2003, Global NAPs and Cox entered into a network interconnection agreement (the Interconnection Agreement) that set forth "the terms, conditions and pricing" under which the two companies would provide interconnection to each other within the state of California.

Pursuant to Section 5.7 of the Interconnection Agreement, two different billing arrangements were agreed upon, based on the nature of the traffic being interconnected. As a general rule, the Interconnection Agreement provides that the terminating carrier shall charge the originating carrier a fee based on minutes of use for terminating a call. The fees for such terminations are set out in an appendix to the Interconnection Agreement. However, the Interconnection Agreement contains an exception to the termination fee regime. For “Local Traffic” and “ISP-bound Traffic,” as those terms are used in the Interconnection Agreement, neither party pays the other for terminating calls originated by the other party, an arrangement generally known as “bill and keep.”

Section 1.25 of Interconnection Agreement defines “Local Traffic” as “traffic other than ISP-bound Traffic that is originated by a Customer of one Party on that Party’s network and terminates to a Customer of the other party on that other Party’s network.” The Interconnection Agreement contains further technical specifications to identify Local Traffic and separate it, for billing purposes, from traffic subject to the termination fee arrangement. The result of applying these specifications to the traffic between these carriers is that toll calls originating and terminating within a single local access and transport area (LATA) are subject to termination fees.

Beginning in June 2004, Cox commenced monthly billing to Global NAPs for intra-LATA toll calls terminated by Cox on behalf of Global NAPs. On June 25, 2004, Cox received a letter from Robert J. Fox, Vice President – Industry Relations of Global NAPs, declining to pay the June 2004 invoice. After first stating erroneously that “our companies do not have an interconnection agreement governing the terms and conditions of exchanging

telecommunications services," Fox went on to refuse payment of the Cox's invoice on the grounds that:

[T]he traffic you deliver and receive from my company, Global NAPs, Inc., or its affiliates and subsidiaries, is "information access traffic." As such, the intercarrier compensation controlling the traffic is subject to federal law, specifically the provisions delineated in the ISP Remand Order. Simply put, the ISP Remand Order provides for bill-and-keep on the traffic we exchange since we were not exchanging traffic prior to the effective date of the Order in 2001. Accordingly the invoice and account are disputed in full.<sup>1</sup>

Subsequent monthly bills from Cox to Global NAPs were responded to in similar fashion.

Following unsuccessful efforts to resolve the fee dispute informally, pursuant to Section 28.8.4 of the Interconnection Agreement, on April 28, 2006 Cox brought this action for breach of the Interconnection Agreement. On June 9, 2006, Global NAPs filed a motion to dismiss or stay the action. On June 26, 2006, Cox filed a response to the motion and on July 5, 2006, the assigned Administrative Law Judge (ALJ) denied the motion.

On September 15, 2006, Cox filed its motion for summary judgment.

## **Discussion**

Although Rule 11.2 of the Commission's Rules of Practice and Procedure (Rules) regarding time to file motions based on pleadings does not discuss the standards to be applied when we consider a motion for summary adjudication, we have generally followed the standard set forth in Civil Code § 437(c) which

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<sup>1</sup> The ISP Remand Order referred to in the letter text is the *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, FCC 01-31 (released April 27, 2001).

directs that a motion for summary judgment shall be granted when the pleadings demonstrate “that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

Cox’s motion is based on three undisputed factual assertions:

1. All the calls for which Cox has billed Global NAPs are intra-LATA toll calls.<sup>2</sup>
2. None of the calls for which Cox has billed Global NAPs are ISP-bound calls.
3. The Interconnection Agreement between Cox and Global NAPs directs the party originating intra-LATA toll calls that are not ISP-bound to pay termination charges to the terminating party.

In his July 5 ruling, the assigned ALJ found that the Commission is not pre-empted by the Federal Communications Commission (FCC) from arbitrating this dispute and further found this to be a straightforward case of contract interpretation. Applying that understanding to the instant motion and Global NAPs’ response, we find that there are no triable issues of material fact; that the Interconnection Agreement clearly establishes the legal rights of the parties; that under the terms of the Interconnection Agreement, Global NAPs is obligated to pay Cox for terminating intra-LATA toll calls at the rates set forth in Appendix 1 to that agreement; and that the Interconnection Agreement further entitles Cox to charge interest at the rate of one and one-half percent per month on overdue amounts.

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<sup>2</sup> In ¶ 10 of its answer to the Cox’s complaint, Global NAPs admits that “the sole area of dispute presented in the complaint relates to compensation for the termination by Cox of intraLATA toll calls within the state of California.”

In its response to Cox's motion for summary judgment, Global NAPs argues that because the traffic it sent to Cox originated with Internet Service Providers (ISPs), it was exempt from access charges. But this response misreads applicable law. The only relevant exemption from the access charge regime under Federal law is for *ISP-bound traffic* rather than *ISP-originated* traffic, a conclusion we reached in our recent *AT&T-MCI metro* decision involving facts very similar to those in this case.<sup>3</sup>

Alternatively, Global NAPs argues that it should not be subject to termination fees because it does not originate the traffic terminated by Cox. The traffic originates with an ISP, which hands it off to Global NAPs and Global NAPs in turn sends to Cox. But this is a distinction without a difference. Every phone call originates with a customer rather than a carrier. As the FCC pointed out in a March 10, 2004 Notice of Proposed Rulemaking in its *IP-Enabled Services* docket, Federal policy is to ensure that the cost of terminating calls on the Public Switched Telephone Network (PSTN) is shared equitably among all those sending calls to the PSTN, specifically including carriers like Global NAPs who are sending ISP-originated calls:

As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, **irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.** We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.<sup>4</sup> (Emphasis supplied.)

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<sup>3</sup> D.06-08-029.

<sup>4</sup> *In the Matter of IP-Enabled Services* Notice of Proposed Rulemaking, WC Docket 04-36 (March 10, 2004), ¶¶ 33, 61.

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

### **Categorization and Need for Hearing**

On May 10, 2006, this case was preliminarily classified as adjudicatory. The preliminary classification is confirmed. In view of the disposition of the motion for summary judgment, no hearings are required.

### **Comments on Proposed Decision**

The proposed decision of ALJ Bemserfer in this matter was mailed on November 17, 2006 to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a). Comments were received on December 7, 2006. In its comments, Cox identifies two errors in the proposed decision. Finding of Fact 3 is unnecessary to the decision. Accordingly, it is deleted. In addition, Cox points out that although the complaint quantifies amounts owed by Global NAPS to Cox as of September 5, 2006, Global NAPS has a continuing obligation under the Interconnection Agreement to pay Cox for terminating intraLATA toll calls sent by Global NAPS to Cox after September 5, 2006. Accordingly, Ordering Paragraph 3 is amended to reflect the continuing obligation to pay termination charges and interest on unpaid amounts through the expiration date of the Interconnection Agreement.

Cox also asks that we order Global NAPS to pay Cox at tariffed rates for intraLATA toll calls sent to Cox for termination after the expiration date of the

Interconnection Agreement. This we decline to do. We limit this decision to enforcing the terms of the Interconnection Agreement so long as it is in effect.

Global NAPS' comments re-argue positions rejected by the proposed decision and require no further modification of the decision.

### **Assignment of Proceeding**

Rachelle B. Chong is the assigned Commissioner and Karl J. Bemesderfer is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. Global NAPs and Cox are parties to a network Interconnection Agreement dated as of October 29, 2003.
2. The Interconnection Agreement provides for the payment of termination charges (including interest for overdue payments) for intra-LATA toll calls originated by one party and terminated by the other.
3. From and after the effective date of the Interconnection Agreement, Cox has terminated intraLATA toll calls originated by Global NAPs.
4. Cox has invoiced Global NAPs for the cost of terminating intra-LATA toll calls at the rate set out in the Interconnection Agreement.
5. Global NAPs has refused to pay Cox's invoices.
6. None of the calls for which Global NAPs has refused to make payment are ISP-bound calls.

### **Conclusions of Law**

1. Federal law does not pre-empt the Commission from arbitrating this dispute.
2. The rights and obligations of the parties are governed by the terms of the Interconnection Agreement.
3. There are no triable issues of material fact.

4. Global NAPs owes Cox termination fees for any intra-LATA toll calls originated by Global NAPs and terminated by Cox from and after the effective date of the Interconnection Agreement.

5. Global NAPs owes Cox interest on overdue amounts at the rate of one and one-half percent per month, as specified in the Interconnection Agreement.

## **O R D E R**

**IT IS ORDERED** that:

1. The motion of Cox California Telecom, LLC for summary judgment is granted.

2. Global NAPs California, Inc. shall pay to Cox California Telecom, LLC the sum of \$985,439.38 plus interest on overdue sums at the rate of one and one-half percent per month, as provided in the Interconnection Agreement between the parties.

3. Global NAPS shall pay to Cox termination fees for any intraLATA toll calls originated by Global NAPS and terminated by Cox from and after September 5, 2006 though the termination date of the Interconnection Agreement.

4. No hearing is necessary in this proceeding.

5. Case 06-04-026 is closed.

This order is effective today.

Dated January 11, 2007, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners

