

Decision **PROPOSED DECISION OF ALJ MACDONALD**

(Mailed 12/10/2013)

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

Vaya Telecom, Inc. (U7122C),

Complainant,

v.

Pacific Bell Telephone Company d/b/a  
AT&T California (U1001C),

Defendant.

Case 10-12-001  
(Filed December 3, 2010)

And Related Matter.

Case 11-02-015

**DECISION REGARDING THE PAYMENT OF SWITCHED ACCESS CHARGES  
AND DELIVERY OF TRAFFIC TO LOCAL INTERCONNECTION TRUNKS**

**1. Summary**

After consideration of the parties' briefs, we find that Vaya Telecom, Inc. (Vaya) is subject to access charges when it delivers interexchange traffic to Pacific Bell Telephone Company d/b/a AT&T California (U1001C) (AT&T) whether or not the traffic originated in Voice over Internet Protocol (VoIP). The parties' interconnection agreement (ICA) provides that traffic exchanged between the

parties will be classified, for purposes of compensation, as Local, Transit, intra-Local Access Transport Area (LATA) toll,<sup>1</sup> or interLATA toll, based on the telephone numbers of the calling and called parties. There is no separate classification for VoIP traffic. We reject Vaya's claim that the traffic it sends to AT&T for termination or transit cannot be classified simply because it originates in Internet Protocol format. We also find that delivery of InterLATA traffic to AT&T over the local interconnection trunks violates the parties' ICA, whether or not that traffic is VoIP traffic.

## 2. Background

Pacific Bell Telephone Company d/b/a AT&T California (AT&T) is an incumbent local exchange carrier (ILEC). Decision (D.) 09-01-012 granted Vaya Telecom, Inc. (Vaya) a certificate of public convenience and necessity to operate in California as a competitive local exchange carrier (CLEC) and as an interexchange carrier. Vaya and AT&T are parties to an interconnection agreement (ICA) adopted by Vaya pursuant to 47 U.S.C. § 252(i).<sup>2</sup> Pacific Bell Telephone Company and AT&T Communications of California entered into a previous version of the ICA, which became effective on August 14, 2000, and was later adopted by Cox California Telecom, LLC in Advice Letter No. 96 (hereinafter referred to as the "Cox Agreement"), dated December 14, 2001.

---

<sup>1</sup> California now contains ten Local Access Transport Areas (LATAs), each served by various local telephone exchanges. InterLATA traffic is traffic that originates and terminates in different LATAs. IntraLATA traffic is traffic that originates and terminates in the same LATA.

<sup>2</sup> The ICA is publically available at:  
[https://clec.att.com/clec\\_cms/clec/docs/5ea2252c1e944cdb9ebd0ed32b4e886e.pdf](https://clec.att.com/clec_cms/clec/docs/5ea2252c1e944cdb9ebd0ed32b4e886e.pdf).

AT&T accepted Vaya's request to adopt the Cox Agreement pursuant to 47 U.S.C. § 252(i) in a letter dated June 19, 2009.

Vaya transported interexchange traffic from Vaya's customers to AT&T for termination. AT&T assessed switched access charges on the traffic Vaya delivered to AT&T. The assigned Commissioner's Ruling and scoping memo identifies the ultimate issues before the Commission in this case, which are:

- Whether access charges or other charges apply under the parties' ICA and applicable law even assuming all of the traffic at issue was originated in Internet Protocol (IP) format?
- Whether delivery of Inter-Local Access and Transport Area (interLATA) traffic to AT&T over local interconnection trunks violates the parties' interconnection agreement? Does this determination remain the same if the disputed traffic originated to Vaya in IP format?

### **2.1. Procedural Background**

On December 3, 2010, Vaya filed a complaint Pacific Bell Telephone Company d/b/a AT&T California. On, January 18, 2011, Vaya amended the complaint. Vaya subsequently filed the *Emergency Motion of Vaya Telecom, LLC (U7122C) for Immediate Ruling or Ex Parte Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should not Issue Prohibiting A&T& California from Disrupting Interconnecting Services* on January 21, 2011. On January 25, 2011, the Chief Administrative Law Judge (ALJ) issued a *Notice of Law and Motion Hearing* for February 2, 2011. On January 28, 2011, the parties requested an extension of the February 2, 2011, Law and Motion hearing to give them additional time to negotiate an interim settlement agreement. On February 11, 2011, parties notified the ALJ that they had reached an interim settlement agreement and would move to have the interim settlement agreement approved by the Commission.

AT&T timely filed the *Answer and Defenses of Pacific Bell Telephone Company (U1001C) d/b/a AT&T California to the Amended Complaint* on February 17, 2011. On the same date, AT&T filed a complaint (Case (C.) 11-02-015) against Vaya. On March 1, 2011, AT&T moved to consolidate the two complaints.

On March, 28, 2011, Vaya and AT&T jointly filed the *Motion for Ruling Approving Confidential Interim Settlement Agreement*. The following day the assigned ALJ issued a ruling approving the confidential interim settlement agreement. Despite the efforts of the parties and the Commission there were several delays in meeting the terms of the Confidential Settlement. These delays were outside the parties' control.

On April 12, 2011, a Prehearing Conference (PHC) was noticed in both C.11-02-015 and C.10-12-001 for April 26, 2011. During the April 12, 2011 hearing, parties discussed issues that each believed should be included within the scope of the proceeding and the procedural schedule. During the PHC, the ALJ also granted AT&T's motion to consolidate the two complaints. On April 13, 2011, Vaya filed the *Answer and Defenses of Vaya Telecom, Inc. (U7122C) to Complaint*.

On December 5, 2011, Commissioner Catherine J.K. Sandoval issued the *Assigned Commissioner Scoping Memo and Ruling* setting forth the schedule and scope of the issues to be considered by the Commission. As a result of the discussions at the PHC, the scoping memo directed parties to submit legal briefs on two issues prior to determining whether evidentiary hearings would be necessary.

On December 9, 2011, the parties filed the *Joint Statement of Stipulated Facts and Authorities*. On December, 19, 2011, Vaya filed *Vaya Telecom, LLC Opening Brief on Legal Issues*. December 28, 2011, AT&T filed the *Amended Pacific Bell*

*Telephone Company (U 1001 C) d/b/a AT&T California's Opening Brief on legal issues.*  
On January 9, 2012, both parties filed reply briefs on legal issues.

On December 15, 2011, the Commission issued a decision extending the statutory deadline to December 18, 2012. On November 29, 2012, the Commission issued a decision extending the statutory deadline to December 18, 2013.

## **2.2. Jurisdiction**

Our jurisdiction to hear these complaints is clear. Both Vaya and AT&T are certificated as public utilities in California and under Pub. Util. Code § 701, which is broadly applicable to every public utility in this state, the Commission “may supervise and regulate ... and do all things ... which are necessary and convenient” in the exercise of its lawful authority over such entities. In addition, the Commission is statutorily authorized to hear complaints under Pub. Util. Code §§ 1702 and 1707. Section 1702 requires a complaint to set forth “any act or thing done or omitted to be done by any public utility ...”; this complaint alleges that AT&T has assessed switched access tariff charges in violation of the negotiated ICA on Voice over Internet Protocol (VoIP) traffic Vaya terminates to AT&T, which Vaya asserts should be properly subject to reciprocal compensation and on certain transit traffic, including VoIP traffic, which Vaya complains is properly subject to transit charges. AT&T complains that Vaya has violated the parties’ ICA by delivering InterLATA traffic to AT&T over Local Interconnection Trunks and that Vaya has failed to pay switched access charges it owes under AT&T’s intrastate and interstate tariffs filed with this Commission. As such, the complaint concerns calls made by California callers to other Californians that are carried over telephone lines within California using the Public Switched Telephone Network (PSTN).

Each party has filed a complaint against the other. We have consolidated the two complaints into one proceeding. The complaining party bears the burden of proof to make its case by a preponderance of evidence.<sup>3</sup> Each party has the burden of proof as to the affirmative defenses it asserts.

### **3. Discussion**

#### **3.1. Overview – Summary of Dispute**

We first begin with a summary of the disputes at issue. Vaya complains that AT&T improperly assessed switched access charges on VoIP traffic Vaya delivers to AT&T for termination and on certain transit, including VoIP traffic. According to Vaya both federal law and the parties' ICA make switched access charges inapplicable to VoIP, irrespective of how that traffic is classified. Vaya contends that VoIP traffic, whether Internet Protocol-originated or Internet Protocol-terminated, is properly subject to reciprocal compensation charges.

Vaya contends it paid switched access charges on VoIP traffic Vaya terminated to AT&T prior to July 26, 2010.<sup>4</sup> Beginning with AT&T invoices sent to Vaya on or after July 26, 2010, Vaya reduced the amounts paid to AT&T to compensate AT&T for traffic at the lower reciprocal compensation rate.

In contrast, AT&T complains that under the parties' ICA, Vaya owes AT&T on a per minute basis at the switched access rates as set forth in its switched access tariffs when it delivers interLATA traffic to AT&T for termination. AT&T contends it properly invoiced Vaya. AT&T also argues that Vaya is not permitted by the ICA to deliver interLATA traffic to AT&T over local interconnection trunks.

---

<sup>3</sup> Office of Ratepayer Advocates v. Pacific Bell Telephone Company, D.01-08-067 at 6.

### 3.2. The Traffic at Issue

The traffic at issue is historical traffic, delivered and invoiced from July 26, 2010 to the present. Except as specifically noted below, our decision does not apply prospectively.

While there is some dispute as to the specifics, there seems to be general agreement that most of the traffic was intraLATA or interLATA toll and certain transit traffic (sent to AT&T for delivery to another carrier), i.e., it was not local traffic (less than 12 miles from originating to terminating number).<sup>5</sup> Vaya does not readily identify what type of traffic is at issue, instead contending only that traditional time-division-multiplex (TDM) categories cannot be applied to VoIP traffic under the ICA or applicable law. As discussed below, the fact that the traffic may have been IP enabled (or VoIP) traffic at its inception does not alter our analysis. When Vaya delivered it to AT&T, it was in traditional TDM form.

Vaya is a wholesale provider of VoIP routing services for retail VoIP service providers such as Skype and Vonage.<sup>6</sup> As discussed herein, VoIP traffic is voice traffic that originates over a broadband connection in IP format as opposed to originating in the TDM format traditionally used by local telephone networks. Neither party asserts that any of the traffic at issue here is dial-up Internet traffic bound for an Internet Service Provider (ISP). Vaya transported

---

<sup>4</sup> Vaya Complaint at 6.

<sup>5</sup> To the extent that Vaya can produce hard evidence that an identifiable and quantifiable part of the disputed traffic was transit traffic, i.e., sent to AT&T for termination to other carriers, that traffic would be subject to the provisions of the ICA relating to transit traffic.

<sup>6</sup> Vaya Opening Brief at 3.

traffic from Vaya's customers to AT&T for termination or for transit to a third-party carrier serving the end-user.

AT&T explains that in general interexchange traffic can be divided into essentially two types of traffic: interLATA traffic and intraLATA traffic. The parties' briefs tend to use the term "intraLATA toll" to mean any call made within a LATA that is not a local call - that is, any intrastate call subject to access charges - and this decision follows that convention.

Vaya states that it terminates, and has terminated VoIP traffic to AT&T since November 3, 2009. Vaya paid invoices sent by AT&T prior to June 26, 2010. Vaya acknowledges that AT&T properly invoiced transit charges on certain transit traffic, including VoIP traffic.<sup>7</sup> Since approximately July 2010, Vaya paid AT&T the reciprocal compensation rate of \$.0007 per minute of use rather than the switched access charges that AT&T invoiced. Vaya contends that AT&T has invoiced Vaya switched access tariff charges materially in excess of one million dollars (\$1,000,000) above the reciprocal compensation charges Vaya has paid for terminating or transiting VoIP traffic. Ultimately, Vaya argues that the traffic it sends to AT&T for termination or transit is only subject to reciprocal compensation because the traffic originates as VoIP traffic which cannot be classified under the terms of the ICA or applicable law. The disputed traffic is ongoing.

### **3.2.1. Call Transmission**

The traffic at issue here originates with Vaya's customers, such as Skype and Vonage. After Vaya receives this traffic from its customers, it converts the traffic from IP format to TDM format and then delivers the traffic to AT&T for



termination to its California end-users or for transit routing service to another carrier.

For purposes of this discussion, we are assuming that all of the traffic originates exclusively in VoIP format, although there is a factual dispute between the parties regarding whether, or to what extent, the traffic delivered by Vaya to AT&T consists of VoIP traffic. Moreover, from the standpoint of the individuals who send and receive these calls, the specific technologies involved in originating and terminating them are invisible. The individuals at both ends of the call experience (typically) seamless and very audible voice service, indistinguishable from the “plain old telephone service” of a not-so-distant era that relied exclusively upon the copper-wire systems now found largely within the domains of legacy ILECs.

The traffic received by AT&T has already been converted into TDM format and is indistinguishable from any other voice traffic delivered to AT&T. This would be equally true for traffic any other intermediate carrier delivered to the ILEC tandem on behalf of a different, originating carrier.

### **3.2.2. IP Origin Issues**

Vaya claims that both federal law and the parties’ ICA make access charges inapplicable to VoIP traffic. Vaya is plainly incorrect.

In several previous cases that required interpretation of an ICA, the Commission examined the implications of IP on intrastate traffic transmission over the PSTN and necessarily reviewed federal law. This case seems most similar to *Cox v. GlobalNAPs* (GNAPs), which concerned traffic, as here, that began in the IP world, and was then forwarded by GNAPs as TDM traffic to

---

<sup>7</sup> Vaya Amended Complaint at 3.

Cox for termination to Cox's customers. In GNAPs, the Commission succinctly described the regulatory backdrop for these issues:

The milieu in which we find ourselves is the PSTN, which is comprised of many providers, including local telephone companies, long distance telephone companies, cable telephone providers, and wireless telephone providers. The providers are expected to pay their fair share of costs for using the PSTN. [fn omitted] They use different means of transmitting their traffic, but are all considered to be "telecommunications carriers," as defined by State and Federal law. [fn omitted] (*Cox v GNAPs*, D.07-08-031 at 4. [Order mod. D.07-01-004 and denying reh'g.] emphasis added.)

On the central issue in that case, inter-carrier compensation for toll traffic that was *not* ISP-bound, the Commission stated:

[T]oll calls that are not ISP-bound and terminate on the PSTN are subject to access charges. Contrary to GNAPs' claims, the origin of its ISP calls is irrelevant for purposes of reciprocal compensation. (*Cox v GNAPs*, D.07-08-031 at 7-8.)

On appeal to federal court, the District Court for the Central District of California agreed with the Commission's analysis and conclusion in *Cox v. GNAPS*, and the Ninth Circuit affirmed the district court's judgment. (*GlobalNaps CA Inc. v. PUC*, 2008 U.S. Dist. LEXIS 118584 (C.D. CA Dec. 23, 2008), *aff'd*, 624 F.3d 1125 (9<sup>th</sup> Cir. 2010) (Commission correctly applied ICA's intercarrier compensation (ICC) rates for intraLATA toll traffic to VoIP Traffic).)

In the subsequent case, *Pacific Bell v GNAPS*, the Commission examined GNAP's claim that the Federal Communications Commission (FCC) had exempted all VoIP Traffic from access charges and found that claim to be incorrect for a number of reasons. The Commission stated:

[R]elevant federal law provides that the mere use of IP in the transport of calls does not automatically qualify the traffic as VoIP or exempt it from the payment of access charges.

[footnote omitted] Similarly, it does not automatically result in federal preemption, nor deprive state commissions of authority to interpret and enforce the terms of an ICA. [footnote omitted] (*Pacific Bell v GNAPS*, D.09-01-038 at 7 [Order denying reh. D.08-09-027].)

Among other things, in *Pacific Bell v GNAPS* the Commission concluded that GNAPS had failed to establish that VoIP Traffic flowed between the parties; that even if there was VoIP Traffic, the traffic was not ISP-bound and moreover, because GNAPS itself was not an ISP or Enhanced Service Provider (ESP),<sup>8</sup> it was not entitled to the ESP exemption provided under federal law; and, that the FCC “expressed a general policy view that services which terminate on the PSTN, such as GNAPS, should not be exempt from access or similar charges.” [footnote omitted] (*Pacific Bell v GNAPS*, D.09-01-038 at 12.)

Vaya relies upon its CLEC status to interconnect with AT&T. Vaya simply cannot be both entitled to interconnect with AT&T and an ESP properly within the ESP exemption provided under federal law.

### **3.2.3. The FCC’s 2011 USF/ICC Transformation Order**

More recently the November 2011 FCC decision often referred to as the USF/ICC Transformation Order explicitly requires payment of access charges on IP-originated traffic. The FCC decision is forward looking, and imposes, beginning on December 29, 2011, what it terms a “transitional compensation framework” which includes the directive that “[d]efault intercarrier compensation rates for toll VoIP-PSTN traffic are equal to interstate access

---

<sup>8</sup> An Enhanced Service Provider is defined as a provider of enhanced or information services.

rates,”<sup>9</sup> and then seeks to bring the interstate access rates down to the reciprocal compensation rate of \$.0007 applicable to local traffic. The FCC makes clear that in the future the transitional USF/ICC framework will give way to a “final intercarrier compensation regime” based upon a bill-and-keep framework.<sup>10</sup> The USF/ICC Transformation Order seeks to accomplish these changes by requiring terminating carriers to amend their tariffs on file for these services. Of more immediate importance, the USF/ICC Transformation Order makes clear that IP enabled traffic (including VoIP) is not immune from intercarrier compensation requirements.

The USF/ICC Transformation Order is prospective in nature and does not address compensation prior to December 29, 2011. Thus, it does not change existing federal law or preempt existing state law. The USF/ICC Transformation Order does not purport to resolve disputes about access charges prior to its effective date. Prospectively, Vaya might have an argument for amending its ICA with AT&T, but until that time, the ICA trumps any tariffs filed by AT&T.

As discussed in greater detail below, Vaya and AT&T are parties to an ICA which sets forth the terms and conditions under which the parties will interconnect their networks and exchange traffic.

---

<sup>9</sup> USF/ICC Transformation Order, 26 FCCR at 18002 ¶ 933.

<sup>10</sup> A prior FCC decision explains that “bill-and-keep” refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network.” (ISP Remand Order, 16 FCCR at 9153 ¶2, n.6 [citation omitted].)

### 3.3. The Interconnection Agreement

Vaya contends that the ICA specifically states that the parties have not come to an agreement on the treatment of VoIP Traffic. Therefore, Vaya argues the traffic is subject to reciprocal compensation, like local traffic, as a matter of law. We disagree.

Congress mandated that carriers implement the duties imposed by the 1996 Telecommunications Act through ICAs. These agreements were found to have the “binding force of law” and are enforceable even when parties chose not to conform to the requirements of the 1996 Telecommunications Act.<sup>11</sup> Thus, our duty here is to interpret the ICA, which – as the Ninth Circuit has pointed out – is essentially a contract interpretation question under state law.<sup>12</sup>

The ICA sets forth the terms and conditions under which the parties will interconnect their networks and exchange traffic. The ICA specifically addresses compensation for call termination between the parties.<sup>13</sup> Section 3.2 of the ICA 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.

Section 3.12 of the ICA further provides that the parties shall classify traffic using the telephone numbers of a call based on the assigned NXX prefix of the

---

<sup>11</sup> Pacific Bell v. Pac West Telecomm, Inc., 325 F.3d 1114, 1127 (9th Cir. 2003 (citing 47 U.S.C. § 252(a)(1).) and Verizon Cal., Inc. v. Peevey 462 F.3d 1142,1151 (9th Cir. 2006).

<sup>12</sup> GlobalNaps CA Inc. v. PUC, 2008 U.S. Dist. LEXIS 118584 (C.D. CA Dec. 23, 2008), aff’d, 624 F.3d 1125 at 1128-1129 (9th Cir. 2010).

<sup>13</sup> ICA 3.0.

calling and called parties.<sup>14</sup> “Local calls” are defined by the parties’ ICA as “all 0-12 mile calls based on the rate centers of the originating and terminating NPA-NXXs of the callers...”<sup>15</sup>

The ICA does not classify traffic for purposes of compensation based on whether the traffic originates on the PSTN or an IP network. Simply put, when Vaya delivers a call to AT&T, Vaya must pay for the termination of that call based on the classification of the call as either local, transit, IntraLATA Toll, or InterLATA toll. Finally, the ICA specifies that all traffic exchanged between the parties, which is originated or terminated to an ESP, will be settled on the same basis as if it were a voice telephone call.<sup>16</sup>

We find the 2003 Amendment to the ICA (2003 Amendment, also known as the California Reciprocal Compensation Amendment) does not change or modify how the traffic at issue is classified for purposes of compensation. Vaya’s interpretation of the 2003 Amendment to ICA is incorrect.

Section 1.0 Scope of the 2003 Amendment specifically states that the amendment’s purpose is to include in the ICA the rates, terms and conditions of the FCC’s interim ISP terminating compensation plan for the exchange of *ISP-Bound traffic and Section 251(b)(5) traffic*.<sup>17</sup> Neither form of traffic is at issue here. The traffic at issue is not ISP bound traffic. It cannot be defined as Section 251 (b)(5) traffic because such traffic is limited to “local” traffic based on a

---

<sup>14</sup> An NXX prefix is the first three digits of a seven-digit telephone number. Each NXX is associated with a particular local exchange area.

<sup>15</sup> Amended Opening Brief Pacific Bell, Exhibit C.

<sup>16</sup> ATT 18 at 3.9. ICA 3.9.

<sup>17</sup> Section 251(b)(5) traffic is local traffic as defined by the 2003 Amendment.

comparison of the telephone numbers of a call – instead it is voice traffic destined for AT&T California’s end users or for transit routing to another carrier.

We disagree with Vaya’s conclusion that Section 4.1 of the 2003 Amendment evidenced that the parties to the agreement had not yet come to an agreement on the treatment of VoIP traffic. The 2003 Amendment entitled, Reciprocal Compensation Amendment for ISP-Bound Traffic and Federal Telecommunications Act Section 251(b)(5) traffic, was added to address only the ISP Compensation order and implement rules for compensation for the termination of internet service provider-bound traffic. We conclude that Section 4.1 of the Amendment plainly states that it was not intended to affect the treatment of VoIP traffic under the ICA. Section 4.1 states:

[AT&T] and [Vaya] agree that nothing in this Amendment is meant to affect or determine the appropriate treatment of Voice Over Internet Protocol traffic under this or future Interconnection Agreements. The Parties further agree that this Amendment shall not be construed against either party as a ‘meeting of the minds’ that VOIP is or is not local traffic subject to reciprocal compensation. By entering into the Amendment, both Parties reserve the right to advocate their respective positions before state or federal commissions whether in bilateral complaint dockets, arbitrations under Section 252 of the Act, commission established rulemaking dockets or before any judicial or legislative agency.

The reservation contained in Section 4.1 of the Amendment applies only to the 2003 Amendment itself and explains that the Amendment does not affect or determine the compensation for VoIP traffic under other provisions of the ICA.

By the Amendment's own stated purpose<sup>18</sup>, scope and terms, the Amendment specifically addresses and modifies only the treatment of ISP-Bound Traffic and Federal Telecommunications Act Section 251(b)(5) Traffic, neither of which are at issue here.<sup>19</sup>

Finally, we find that Vaya's argument that VoIP traffic should be treated as Section 251(b)(5) traffic lacks merit. Such treatment is precluded by the terms of the ICA itself. The parties' ICA defines Section 251(b)(5) traffic as "Local Traffic" as all 0-12 mile calls based on the rate centers of the originating and terminating NPA-NXXs of the callers.<sup>20</sup> As a result, the traffic at issue cannot be defined as local traffic based on a comparison of telephone numbers of a call and is properly subject to switched access charges as invoiced by AT&T.

#### **4. Delivery of InterLATA Traffic to Local Interconnection Trunks Violated the Terms of the ICA**

AT&T complains that Vaya violated the parties' ICA by delivering interLATA traffic to AT&T over local interconnection trunks. Vaya disagrees because it reasons that VoIP traffic is not subject to switched access and as a result may be delivered over local interconnection trunks.

The ICA specifically provides that neither party shall terminate interLATA traffic over Local Interconnection Trunks.<sup>21</sup> We find that Vaya's delivery of

---

<sup>18</sup> See introductory paragraph, which in relevant part states that [parties] "hereby execute this Reciprocal Compensation Amendment for ISP-Bound Traffic and Federal Telecommunications Act Section 251(b)(5) traffic."

<sup>19</sup> See Amendment Section 1.0 Scope of Amendment,

<sup>20</sup> See Section 2.0 of the 2003 Amendment which defines Section 251(b)(5) traffic as defined in Attachment 1 of the underlying interconnection agreement.

<sup>21</sup> See Exhibit B, Attachment 18 at Section 1.1.



interLATA traffic to local interconnection trunks violated the terms of the ICA. Vaya shall cease delivering to AT&T interLATA traffic over Local Interconnection Trunks.

## **5. Conclusion**

In conclusion, the Commission finds that under the parties' ICA and applicable law, Vaya must pay switched access charges when it delivers interexchange traffic to AT&T for termination, irrespective of whether or not the traffic is VoIP traffic. In addition, delivery of interLATA traffic to AT&T over Local Interconnection Trunks violates the parties' ICA whether or not the interLATA traffic is VoIP traffic. Within 10 business days of the effective date of this decision, Vaya and AT&T must meet and confer to jointly file a statement showing the amount of traffic transmitted by Vaya to AT&T, the classification of that traffic pursuant to the terms of the ICA, amounts paid to AT&T for transmission of that traffic and additional amounts due to AT&T for termination of the subject traffic under the terms of the ICA. The joint statement is due no later than 15 business days following the effective date of this decision.

The parties may request assistance from the assigned ALJ if they are unable to agree on a joint statement. The assigned ALJ may order evidentiary hearings to evaluate the amounts at issue.

## **6. Comments on Proposed Decision**

The proposed decision of the ALJ MacDonald in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Vaya filed comments on December 30, 2013. On January 6, 2014, AT&T filed reply comments. We have reviewed the comments and reply comments. Vaya's comments essentially reiterate arguments considered and

rejected in the proposed decision, and we accord them no weight. Although no changes were made in finalizing this decision we address several specific comments for clarification.

In addition to arguments made previously, Vaya now asserts that the interpretation of the ICA conflicts with Commission precedent citing a ruling made by Judge Pulsifer. Vaya is in error. A ruling is not the decision of the Commission. In addition, the ruling was made only to address whether or not a dispute resolution provision, contained within the underlying ICA in that case, could be invoked to determine appropriate compensation for VoIP traffic. Here, the language that Vaya relies upon is not in the ICA at issue, but instead only in the 2003 Amendment to the ICA that specifically addresses only ISP-bound traffic and Section 251(b)(5) traffic, neither of which is at issue in this decision.

Vaya further argues that the proposed decision inappropriately relies on Section 3.9 of Attachment 18 to conclude that VoIP traffic should be compensated on the same terms as traditional voice telecommunications traffic. Vaya is in error. Rather, the proposed decision relies primarily on Sections 3.1 and 3.2 - regarding the classification of traffic exchanged according to the telephone numbers of the calling and called parties.

Vaya now argues that the conclusions reached in the proposed decision would somehow mean tariff reductions would not apply to Vaya's delivery of "toll VoIP" to the PSTN. This argument is disingenuous. The proposed decision correctly concluded that the parties' ICA is controlling. The parties ICA incorporates such tariffed rate reductions and the decision does not conclude otherwise.

Finally, to the extent that Vaya seeks to raise new issues of overbilling by AT&T, these issues are untimely in this proceeding. This decision requires Vaya

and AT&T to meet and confer to jointly file a statement showing the amount of traffic transmitted to AT&T, the classification of such traffic, amounts already paid to AT&T, and the amounts due to AT&T for termination of the subject traffic under the terms of the ICA.

## **7. Assignment of Proceeding**

Catherine J.K Sandoval is the assigned Commissioner and Katherine Kwan MacDonald is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. The traffic at issue, which Vaya sends to AT&T, consists of voice transmission over the PSTN.
2. VoIP traffic is voice traffic that originates over a broadband connection in IP format as opposed to TDM format.
3. The traffic at issue originates with customers of Vaya, and is converted from IP format to time-division multiplex format for termination by AT&T or for transit by AT&T to a third-party carrier.
4. Vaya has not established that all the traffic sent to AT&T for termination or transit originates exclusively in IP format.
5. The traffic received by AT&T has already been converted into TDM format and is indistinguishable from any other voice traffic delivered to AT&T.
6. Vaya relies upon its status as a CLEC to interconnect with AT&T.
7. Neither party contends that any of the traffic at issue is ISP-bound.
8. Vaya and AT&T are parties to an ICA.

### **Conclusions of Law**

1. The Commission has jurisdiction to hear this complaint under Pub. Util. Code §§ 701, 1702, and 1707.
2. The consolidated complaints comply with Pub. Util. Code § 1702.

3. The standard of proof in this complaint case is a preponderance of the evidence.

4. Pursuant to 47 U.S.C. § 252(a), only telecommunications carriers may interconnect by right with an ILEC such as AT&T.

5. Pursuant to D.07-08-031 (*Cox v. GNAPs*), intrastate toll/long distance calls that are not ISP-bound and that terminate on the PSTN are subject to access charges.

6. As explained in D.09-01-038, (*Pacific v. GNAPs*), under applicable federal law the mere use of IP in the transport of calls does not automatically qualify the traffic as VoIP or exempt it from the payment of access charges.

7. The FCC's USF/ICC Transformation Order (26 FCR 17663), which explicitly requires payment of access charges on intrastate IP-originated traffic beginning on December 29, 2011, does not change existing federal law or preempt existing state law.

8. The ICA governs the terms and conditions under which Vaya and AT&T will interconnect and exchange traffic.

9. The Commission has authority consistent with state and federal law to resolve interconnection disputes.

10. 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.

11. The ICA provides that traffic exchanged between the parties will be classified as either local, transit, intraLATA toll, or InterLATA toll, and specifies a charge for each.

12. The use of IP format in the transmission of traffic prior to its delivery to AT&T does not exempt that traffic from charges under the ICA.

13. The ICA provides that parties shall classify traffic using the telephone numbers based on the assigned NXX prefix of the calling and called parties.

14. The 2003 Amendment to the ICA does not change or modify how the traffic at issue is classified for purposes of compensation.

15. The purpose of the 2003 Amendment to the ICA is to include in the ICA the rates, terms, and conditions of the FCC's interim ISP terminating compensation plan for the exchange of ISP-bound traffic and Section 251(b) traffic.

16. Section 4.1 of the 2003 Amendment applies only to the 2003 Amendment itself and does not affect or determine the compensation for VoIP traffic under other provisions of the ICA.

17. The traffic at issue is not Section 251(b) traffic because such traffic is limited to "local" traffic based on a comparison of the telephone numbers of a call.

18. Vaya must pay AT&T switched access rates when it delivers interexchange traffic to AT&T for termination, irrespective of whether or not the traffic is VoIP traffic.

19. The ICA specifies that interLATA traffic may not be transported over Local Interconnection Trunks.

20. Vaya's delivery of interLATA traffic to AT&T California over local interconnection trunks constitutes a violation of the parties' ICA, whether or not the interLATA traffic originates as VoIP traffic.

**O R D E R**

**IT IS ORDERED** that:

1. Vaya Telecom, Inc. (U7122C) (Vaya) must compensate Pacific Bell Telephone Company d/b/a AT&T California (AT&T) on a per minute basis at the switched access rates set forth in AT&T's intrastate and interstate switched access tariffs for all inter-Local Access Transport Area calls delivered by Vaya to AT&T.

2. Vaya Telecom, Inc. (U7122C) (Vaya) and Pacific Bell Telephone Company d/b/a AT&T California (AT&T) shall meet and confer within 10 business days of the effective date of this Decision and jointly file a statement within 15 business days of the effective date of this decision showing the amount of traffic transmitted by Vaya to AT&T, the classification of that traffic pursuant to the terms of the interconnection agreement (ICA), amounts paid to AT&T for transmission of that traffic and additional amounts due to AT&T for termination of the subject traffic under the terms of the ICA.

3. Vaya Telecom, Inc. (U7122C) shall immediately cease delivering to AT&T California Inter-Local Access Transport Area traffic over Local Interconnection Trunks.

4. Case 10-12-001 and Case 11-02-015 remain open for the limited purpose of resolving the amounts due pursuant to the parties' interconnection agreement.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.