Decision 03-07-039 July 10, 2003

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)

ORDER MODIFYING DECISION 02-06-076 AND DENYING REHEARING

I. SUMMARY

In this decision, we deny Global NAPs' application for rehearing of Decision 02-06-076, as GlobalNAPs has failed to demonstrate that the decision is erroneous. We also modify the decision to clarify that VNXX traffic presents unique intercarrier compensation issues because it is partly local and partly interexchange in nature.

II. BACKGROUND

Global NAPs, Inc. (GNAPs) is a competitive local exchange carrier that provides telecommunications service to Internet Service Providers (ISPs). GNAPS provides a special service called "Virtual NXX" (VNXX) designed to enable the ISPs' customers to be billed only for a local call to access the Internet via their ISP, even if the

customer is located more than 16 miles from the ISP, and the call would ordinarily be a toll call. VNXX traffic is "traffic where the NXX (central office codes) are used to provide locally-rated calling to customers who physically reside beyond the local calling area of the designated NXX code." (D. 02-06-076, p. 24, n. 11.) In other words, calls are rated as local regardless of whether the routing of the calls would ordinarily make them local calls or toll calls. As explained in D. 02-06-076, VNXX traffic differs from ordinary traffic in that its rating and routing points may be disparate. (See D. 02-06-076, pp. 24-28.)

GNAPs filed an application for arbitration of an interconnection agreement with Pacific Bell Telephone Company (Pacific) pursuant to Section 252(b) of the Telecommunications Act of 1996. A few weeks later, GNAPs filed a similar application for arbitration of an interconnection agreement with Verizon California, Inc. (Verizon). In these applications, GNAPs requested arbitration of 13 issues it had been unable to resolve with Pacific and 11 issues it had been unable to resolve with Verizon. Because some of the issues presented in the two applications are the same, the applications were consolidated.

An arbitration hearing was held on February 11, 2002, followed by briefing. The arbitrator, Administrative Law Judge Karen Jones, filed a Draft Arbitrator's Report (DAR) on April 8, 2002, addressing all contested issues.[1] After a round of comments and revisions in response to comments, the Final Arbitrator's report (FAR) was filed and served on May 15, 2002.

In D. 02-06-076, we adopted the Arbitrator's recommendations, with modifications, and approved the resulting Arbitrated Interconnection Agreements. The Decision resolved the challenging question of how to determine an appropriate method of intercarrier compensation for VNXX traffic. VNXX traffic does not fit easily into existing definitions typically used to determine which type of compensation applies

[1] By the date of the hearing, the parties had reached agreement on some of the issues identified in GNAPs' applications for arbitration.

(reciprocal compensation for "local traffic" and access charges, which are higher, for "interexchange" traffic). As we noted in D. 02-06-076, the FCC has recognized that VNXX traffic poses specific intercarrier compensation problems, and though it has called for comment on solutions to those problems, it has not yet resolved them.[2]

In D. 02-06-076, therefore, we were guided by the basic requirement that carriers should be reasonably compensated for use of their network by other providers (see D. 99-09-029, upon which the Decision relies). Based on the rating points of the calling and called numbers used for VNXX traffic (as opposed to the physical route the call takes), we concluded that "VNXX traffic is local traffic and is subject to reciprocal compensation requirements." (CL 11.) At the same time, the ILECs "should receive compensation for costs associated for the use of their networks for the transmission of traffic with disparate rating and routing points." (CL 3.)

GNAPs filed a timely application for rehearing, to which Pacific and Verizon have responded.

III. DISCUSSION

GNAPs' application for rehearing is only partially intelligible, and it largely fails to make clear what relief is requested. The application includes claims for relief that are vague, unclear, and/or that do not appear to be supported by any argument set forth in the application (see list of requests set forth in the section entitled "Conclusion," p. 15.)[3] Parties seeking rehearing of Commission decisions are required to "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." (Pub. Util. Code § 1732.) This requirement was included in the Code for good reason: We can only consider contentions that are specifically stated. Accordingly, in this order, we address those of GNAPs' contentions that are reasonably intelligible,

[2] See In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-031 (Intercarrier Compensation NPRM), ¶¶ 114, 115. A decision is expected in September 2003.

[3] In fact, GNAPs' list appears to include requests that have been granted.

and decline to attempt to address those that are not. Nor do we address claims for relief listed in the "Conclusion" that are not supported by any argument.

To the extent the application is intelligible, GNAPs appears to challenge the hybrid solution to intercarrier compensation set forth in the Decision. GNAPs contends that reciprocal compensation is the only appropriate form of intercarrier compensation for VNXX traffic because that traffic is "local traffic." GNAPs objects to being required to compensate the ILECs for the costs of transporting VNXX traffic that ordinarily would constitute toll calls, if the rating points were the same as the physical routing points. GNAPs contends that imposing any type of compensation other than reciprocal compensation for this traffic is contrary to federal law.

In support of this argument, GNAPs relies primarily on a decision issued on July 17, 2002, shortly after the Commission issued D.02-06-076, which GNAPs characterizes as a decision of the FCC.[4] GNAPs asserts that in this decision, "the FCC interpreted and endorsed Global Naps' positions in this docket [fn omitted], based on the FCC's interpretation of federal law." (App. Rhg., p. 1.) In fact, as Pacific and Verizon correctly point out, the Virginia Arbitration Order GNAPs relies on is an arbitration interconnection decision of the Wireline Competition Bureau of the FCC, "standing in the stead of the Virginia State Corporation Commission."[5] It is not a decision of the FCC, and it does not purport to be anything more than a resolution, by arbitration, of specific interconnection disputes. Thus, it is not a precedential decision binding on this Commission. Moreover, Global Naps was not a party to the Virginia Arbitration proceeding. It is not possible, therefore, that the FCC (or the Bureau) "endorsed Global Naps' positions" in that proceeding. Assuming that what GNAPs means is that the Virginia Arbitration Order approved a proposal similar to the one GNAPs advanced in this proceeding, it is by no means clear that the proposal before the Wireline Bureau in

[4] DA 02-1731 (the Virginia Arbitration Order).

[5] See FCC Memorandum Opinion and Order DA 02-2576, in CC Docket Nos. 00-218/00-249/00251 ("Virginia Arbitration Order"), ¶ 1..

that case is in fact similar. Verizon, in its response, disputes this assertion. It is unnecessary to resolve this issue, because the Bureau's Virginia Arbitration Order is a specific arbitration decision in an unrelated proceeding, which is not binding on this Commission. Even if it were, different circumstances might warrant different outcomes on this particular issue.[6] GNAPs' reliance on the Virginia Arbitration Order is misplaced.

In support of its argument that VNXX traffic must be treated as entirely "local" for purposes of intercarrier compensation, GNAPs also relies on the ISP Remand Order,[7] which we discussed at length in the Decision. GNAPs' arguments based on the ISP Remand Order were considered and rejected in earlier phases of this proceeding. GNAPs has failed to present any argument that persuades us that the ISP Remand Order requires a different result. As we noted in D.02-06-076, in the ISP Remand Order the FCC "has moved away from its initial use of the term 'local' to differentiate the traffic that is subject to reciprocal compensation." (D.02-06-076, p. 12.) As we also noted, the FCC has also acknowledged that VNXX traffic poses specific intercarrier compensation issues, and it has not yet resolved those issues. (See Intercarrier Compensation NPRM, FCC 01-032 (released April 27, 2001, the same date as the ISP Remand Order), ¶ 115.) Thus, GNAPs' argument that the ISP Remand Order mandates that VNXX traffic be compensated as local traffic, and only as local traffic, is unpersuasive.

In the interest of clarity, however, we acknowledge that the VNXX traffic at issue in this proceeding is a "hybrid" of sorts: part local, part interexchange. In effect, in

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[6] Moreover, as Verizon points out, in cases arguably more similar to this one, the FCC has determined that an ILEC is entitled to recover the costs of transporting traffic that would ordinarily constitute toll traffic, even if the traffic was rated so that the end-users were billed only for local calls. (Verizon response, pp. 5-6.) See, for example, *Mountain Communications Inc, v. Qwest Communications Int'l., Inc.*, No. EB-00-MD-017, Order on Review, (rel. July 25, 2002), affirming the Enforcement Bureau Judge's Memorandum Opinion and Order in that proceeding (17 FCC Rcd 2091 (2002)). In its order affirming the Bureau's order, the FCC ruled that the ILEC in that case, Qwest, could properly charge Mountain for the cost of transporting traffic billed under Mountain's "wide area calling service" which, like VNXX traffic, charges end-users for a local call even though the call would ordinarily be a toll call but for special rating arrangements.

[7] CC Docket No. 96-98, FCC 01-131.

D.02-06-076, we made a distinction between the portion of the VNXX traffic that is interexchange, and the portion that is "local." (Decision, p. 12.) We believe that this distinction is practical, reasonable, and permissible under the circumstances of this proceeding. The hybrid nature of VNXX traffic explains why we concluded that "VNXX traffic is local traffic and is subject to reciprocal compensation requirements" (FF 11) and that ILECs may not assess charges to transport "local" traffic subject to reciprocal compensation (FF5), and at the same time, for "calls that are interLATA in nature, e.g., those beyond 16 miles, traditional access charges will apply." (Decision, p. 24.) It also explains why, in a recent similar proceeding, we described VNXX traffic as "interexchange traffic":

> VNXX is a form of Foreign Exchange service where the purchaser of the VNXX is not physically located in the originating caller's local calling area, yet the originating call to the VNXX is considered local from the caller's perspective. VNXX traffic is interexchange traffic because it terminates outside of the originating calling area (exchange), although it is rated as a local call to the calling party. VNXX and Foreign Exchange differ from traditional local calling where the called NXX and caller's NXX resides within the same local calling area.
>
> (*Decision Approving Arbitrated Agreement Pursuant to Section 252, Subsection (e), of the Telecommunications Act of 1996,* D. 03-05-075, mimeo, p. 3.)

These statements are not inconsistent if it is understood that VNXX traffic is part local and part interexchange in nature.

We also modify D.02-06-076 by deleting language expressing an intent to provide "broad policy guidance" on the intercarrier compensation issues presented in this proceeding. The United States Court of Appeals for the Ninth Circuit recently held that this Commission's authority regarding interconnection agreements under the Telecommunications Act is limited to "arbitrating, approving, and enforcing" specific interconnection agreements, and that this Commission lacks general rulemaking authority regarding intercarrier compensation under the Act. (*Pacific Bell v. Pac-West Telecomm, Inc.* (9th Cir. 2003) 325 F.3d 1114).) In light of that holding, we recognize that this is not

a rulemaking proceeding, and we merely resolve the disputed issues presented in this arbitration proceeding.

IV. CONCLUSION

GNAPs has failed to demonstrate that the Commission's decision is legally erroneous. Accordingly, its application is denied.

Therefore, **IT IS ORDERED** that D.02-06-076 is modified as follows:

1. On page 13, second full paragraph, delete the second sentence, which reads: "In the following section, we provided broad policy guidance on the issues discussed."

2. On page 33, Finding of Fact 11 is modified to read:

   VNXX traffic is "hybrid" in nature: part "local" and part interexchange. To the extent it is local traffic, it is subject to reciprocal compensation. VNXX traffic is also, however, in part, interexchange in nature.

3. GNAPs' application for rehearing of D.02-06-076, as modified by this order, is denied.

4. This proceeding is closed.

This order is effective today.

Dated July 10, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners