Decision 09-01-038 January 29, 2009

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)

ORDER DENYING REHEARING OF DECISION (D.) 08-09-027

I. INTRODUCTION

In this Order we dispose of the application for rehearing of Decision (D.) 08-09-027 (or "Decision") filed by Global NAPs California, Inc. ("GNAPs").

In D.08-09-027, we resolved a complaint filed by Pacific Bell Telephone Company d/b/a/AT&T California ("AT&T") against GNAPs, which sought Commission enforcement of AT&T's interconnection agreement ("ICA") with GNAPs.[1] The ICA

[1] The Telecommunications Act of 1996 ("Act"), Pub. L. No. 104-104, 110 Stat. 56, requires incumbent local exchange arriers ("ILECs" such as AT&T) to allow competitive local exchange carriers ("CLECs" such as GNAPs) to interconnect with their networks. (47 U.S.C. § 251(c)(2).) Interconnection permits customers of one local exchange carrier to make calls to, and receive calls from, customers of other local exchange carriers. The Act requires ILECs to negotiate in good faith the terms of ICAs with the CLECs. (47 U.S.C. § 251(c)(1).) The Act also authorizes the Commission to arbitrate disputed ICA issues. (47 U.S.C. § 252(b).)

The Commission approved the arbitrated ICA between AT&T and GNAPs in *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* ("*Order Approving AT&T & GNAPs ICA*") [D.02-06-076] (2002) __ Cal.P.U.C.3d __, 2002 Cal.PUC LEXIS 319.

requires payment of reciprocal compensation charges, intraLATA toll or intrastate access charges, and transiting charges for interconnection and transport services AT&T provides to GNAPs.

In D.08-09-027, we determined that GNAPs had indeed breached the ICA, and owed AT&T charges in the amount of $18,589,494.17 through December 2007, plus any charges that have accrued since that time.

A timely application for rehearing was filed by GNAPs challenging the Decision on the grounds that it: (1) ignores evidence establishing that GNAPs traffic is Voice over Internet Protocol ("VoIP") traffic; (2) misstates and thus fails to apply the Enhanced Service Provider ("ESP") exemption from access charges; (3) wrongly concludes that GNAPs is bound by the terms of its ICA; (4) imposes discriminatory charges; and (5) wrongly denies GNAPs motion to set aside submission and reopen the record to take additional evidence. GNAPs also requests oral argument.[2]

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that good cause has not been established to grant rehearing of D.08-09-027. Accordingly, GNAPs application for rehearing is denied. We also deny GNAPs request for oral argument.

[2] On November 12, 2008, GNAPs filed a motion requesting that we take official notice of the Federal Communications Commission's ("FCC") *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking* ("*FCC Order and NPRM*"), FCC 08-262, issued November 5, 2008. (Document available at: http://www.fcc.gov.) According to GNAPs, the *FCC Order and NPRM* contains directives regarding compensation rates for VoIP and Internet Service Provider bound traffic. The Commission may take official notice of the *FCC Order and NPRM* pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure. (Cal. Code of Regs., tit. 20, § 13.9.). While we take notice of the *FCC Order and NPRM*, we find it has no bearing on the issues in this proceeding for many of the same reasons as recently articulated by the United States District Court Central District of California, in *Global NAPs California, Inc. v. PUC* ("*GNAPs v. PUC*") Case No. CV 07-04801-MMM(SSX) ("*Summary Judgment Order*"). In addition, GNAPs failed to establish that its traffic is VoIP or Internet Service Provider bound. The FCC's Order also does not adopt new rules, and even if it did, they would only operate prospectively. Such rules would not impact our enforcement of the existing ICA between GNAPs and AT&T.

II. DISCUSSION

As discussed in Part A of this Order, the core issue driving our determination in D.08-09-027 is the ICA between GNAPs and AT&T, and our attendant authority to interpret and enforce such contracts. We believe that ultimately, the entire matter begins and ends with that.[3] However, GNAPs frames its arguments against the larger backdrop of federal and state jurisdiction regarding the differing regulatory treatment applicable to certain telecommunications services. Thus we will discuss those issues and arguments as well.

A. The ICA

GNAPs contends that because its traffic is VoIP, the Decision errs in finding that its traffic is subject to local, intraLATA, and transit charges under the ICA. (GNAPs Rhg. App., at pp. 11-14.)[4]

The ICA between the parties was approved by the Commission after GNAPs and AT&T brought it to the Commission for arbitration under 47 U.S.C. § 252(b).[5] As demonstrated below, the executed ICA overrides prospective FCC interconnection rules, and Commission authority to interpret and enforce such executed ICAs is well founded.

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[3] Our conclusion is supported by the recent order of the United States District Court Central District of California, in *Global NAPs California, Inc. v. PUC* ("*GNAPs v. PUC*") Case No. CV 07-04801-MMM(SSX) ("*Summary Judgment Order*"). The matter involves a Commission determination rejecting GNAPs alleged provision of nomadic VoIP in *Cox California Telecom, LLC v. Global NAPs California, Inc.* [D.07-01-004] (2007) 2007 Cal.PUC LEXIS 8, __ Cal.P.U.C. 3d __; as modified by *Cox California Telecom, LLC v. Global NAPs California, Inc.* [D.07-08-031] (2007) __ Cal.P.U.C.3d __, 2007 Cal.PUC LEXIS 475. The issues in *GNAPs v. PUC* are potentially related on their facts, and GNAPs raised many of the same arguments in that case as it now raises in its application for rehearing of D.08-09-027. In *GNAPs v. PUC*, the Court rejected GNAPs arguments for reasons consistent with the rationale contained in this Order. Further, the Court found that because our enforcement of an ICA was not preempted, whether or not GNAPs is a VoIP provider is a moot question. (See *Summary Judgment Order*, at p. 24 (slip op.)

[4] GNAPs relies on *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs for Failure to Pay Intrastate Access Charges* ("*TVC Albany*") (2008) 2008 N.Y. PUC LEXIS 101; and *Minnesota Public Utilities Commission v. FCC* ("*Minn. v. PUC*") (8th Cir. 2007) 483 F.3d 570 (affirming *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission* ("*Vonage*") (2004) 19 FCCR 22404. Our reasons for rejecting GNAPs arguments concerning these cases are discussed and Part B & C of this Order.

[5] See *ante*, fn. 1.

This is true even where such ICAs may involve long-distance or other forms of communications over which State jurisdiction has been otherwise preempted.

In particular, our Decision is founded on federal authority establishing that even if GNAPs traffic were VoIP, it would not be relieved of the obligation to pay charges agreed to under the ICA. The FCC has not yet adopted final classification and compensation rules for VoIP and ISP-bound traffic. Regardless, the FCC has recognized that parties may voluntarily include VoIP traffic in their ICAs.[6]

In doing so, carriers may opt out of any existing regulatory regime, and once they do so, the ICA will have the binding force and effect of law.[7] State commissions may then lawfully arbitrate, interpret and enforce ICAs, as well as determine whether and how interconnecting carriers should be compensated for carrying ISP-bound traffic.[8]

Although GNAPs now claims that it delivered VoIP traffic to AT&T, there was no evidence that GNAPs ever submitted service requests for VoIP traffic or notified AT&T that the terms under the ICA might require renegotiation or arbitration. Rather, the evidence indicated that GNAPs service requests identified all its traffic as 99-100% local and intraLATA traffic, as contemplated under the ICA.[9] Accordingly, or Decision is consistent with federal law mandating that ICAs are binding and GNAPs is bound by that agreement.

GNAPs attempts to counter this result by arguing it was not in the VoIP business when it entered the ICA, thus the ICA does not contemplate or explicitly address

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[6] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic* ("*ISP Remand Order*") (2001) 16 FCCR 9151, at ¶ 15, remanded (but not vacated) by *WorldCom, Inc. v. FCC* (D.C. Cir. 2002) 288 F.3d 429.

[7] See e.g., *Verizon California, Inc. v. Peevey* ("*Verizon v. Peevey*") (9th Cir. 2006) 462 F.3d 1142, 1151; *Verizon New York v. Global NAPs, Inc.* (*Verizon N.Y. v. GNAPs*") (E.D.N.Y. 2006) 463 F.Supp.2d 330, 342; *Pacific Bell v. Pac West Telecom, Inc.* ("*Pac Bell v. Pac West*") (9th Cir. 2003) 325 F.3d 1114, 1127-1128; and *AT&T v. Iowa Utilities Board* (1998) 525 U.S. 366, 372-373.

[8] See *ante*, fn. 7. See also fn. 3 discussing the District Court's recent *Summary Judgment Order* in *GNAPs v. PUC*, which recognized this authority and found that this Commission was not preempted from adjudicating ICA issues simply because they may at some point involve traffic transported by IP.

[9] D.08-09-027, at p. 3; Exh. 4 (AT&T/Constable), at p. 5.

the treatment of IP or VoIP traffic. GNAPs also claims the arbitration rulings approving the ICA do not address the treatment of such traffic. We find these arguments to be unpersuasive.

The complete agreement between GNAPs and AT&T is comprised of two documents, the ICA and the Appendix to the ICA. GNAPs entirely ignores that the Appendix contains multiple provisions which clearly contemplate the treatment of IP and ISP-bound traffic.[10] Moreover, our decision approving the ICA specifically noted that the ICA did contemplate the treatment of ISP-bound traffic.[11] We may not have used the term VoIP, but it is wrong that such Internet-related traffic was not contemplated or outside the scope of the agreement.[12]

Lastly, GNAPs contends it is unfair to subject it to charges under the ICA because most modern ICAs contain massive discounts on access charges (approximately 90%). To support this claim GNAPs points to portions of four ICAs between other companies.[13] Apart from the fact these contracts are not record evidence, these other agreements are not relevant to interpretation and enforcement of the executed ICA at issue here. At most they might only be relevant as potential evidence in any proceeding to renegotiate or modify the ICA, something GNAPs chose not to do.[14]

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[10] See e.g. Exh. 1, Att. 1, Appendix to ICA, at §§ 3.1, 3.6, 5.1, 5.5, 5.6, 16.1 – 16.9 [Section 16.9 specifically mentioning VoIP].

[11] *Order Approving AT&T & GNAPs ICA*,[D.02-06-076], *supra*, 2002 Cal.P.U.C. LEXIS 319, __ Cal.P.U.C.3d __ at p. 30 (slip op.).

[12] Claiming it would not have voluntarily submitted to ICA charges for IP or VoIP calls, GNAPs contends the Decision wrongly presumes GNAPs waived its right to contest the imposition of ICA charges. GNAPs argues such reasoning contravenes the requirement that waiver be a voluntary and intentional act. (GNAPs Rhg. App., at p. 14, fn. 27.) GNAPs waiver theory is wrong. We based our determination on the evidence presented, GNAPs agreement under the ICA, and relevant FCC and court determinations regarding Internet-related services and the federally recognized binding nature of ICAs.

[13] The four ICAs are submitted as attachments to GNAPs application for rehearing. (GNAPs Rhg. App., Att. H, I, J, & K representing ICAs between Verizon and MCI, Verizon and Level 3, AT&T and Verizon, and AT&T and MCI, respectively.)

[14] We also note that nothing in these late proffered documents appears to reflect any discounts. In fact, they indicate the respective carriers agreed to treat VoIP as subject to the same access charges applicable to other local traffic, at least until the FCC adopts final rules on the matter which might prompt renegotiation or arbitration of the agreements. (See GNAPs Rhg. App., Att. H, § 2 [VoIP treated as

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B. Record Evidence Regarding Nature Of The Traffic

The Decision finds that GNAPs failed to establish that the traffic at issue in this proceeding is VoIP.[15] GNAPs contends we erred by failing to consider GNAPs evidence and various legal authorities it presented regarding this issue. (GNAPs Rhg. App., at pp. 8-11.)[16]

GNAPs application for rehearing does not identify any actual record evidence that we failed to consider. Instead, GNAPs asserts that its position was confirmed by arguments it raised in briefs. We disagree. Arguments and assertions submitted in briefs are not evidence of anything. They are merely arguments and assertions, which require supporting evidence to be given any weight.

GNAPs also argues its position was confirmed by various other documents it claims are in the record. In fact, the documents GNAPs relies on were not offered or entered into the record during the proceeding. It was only after the record closed and the Presiding Officer's Decision had been issued that GNAPs sought to submit this new and additional evidence.[17] As explained in Part E of this Order, GNAPs request to submit additional evidence was lawfully denied. Thus, the referenced documents are not in the record and we cannot rely on them here. Moreover, as also explained in Part E, the additional evidence still does not prove GNAPs delivered VoIP traffic. Thus, even had

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telecommunications traffic and subject to either switched access rates or Unitary Rates]; Att. I, § 3 [VoIP traffic that originates and terminates on the PSTN shall be subject to interstate access charges, and other VoIP traffic shall be subject to intercarrier compensation charges applicable to other traffic]; Att. J, § 5 [VoIP traffic shall be subject to either interstate access charges or the Unitary Rate applicable to other traffic]; & Att. K, § 16 [VoIP subject to rates applicable to other ISP-bound local traffic].)

[15] D.08-09-027, at p. 18 [Finding of Fact Number 20].

[16] GNAPs relies on *Brown v. Rock Creek Mining Company, Inc.* ("*Brown*") (1993) 996 F.2d 812, for the general proposition that an agency must explain and justify its ruling, taking into consideration all the facts available to it. We agree with this proposition. However, our Decision is consistent with the principles set forth in *Brown* by specifically discussing the evidence we relied upon, and setting forth corresponding findings and conclusions to explain the basis of the determination. (See e.g., D.08-09-027, at pp. 4-6, 16-20.)

[17] GNAPs Motion To Set Aside Submission And Reopen The Record For The Taking Of Additional Evidence, dated July 17, 2008.

we considered the evidence, for the sake of argument, it would not change our determination.

Notably, GNAPs fails to show that any of the record evidence which we did rely on is incorrect. Specifically, we did take into account that GNAPs traffic may involve IP format at some point in its transport.[18] However, as we noted, and GNAPs continues to disregard, relevant 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.[19] Similarly, it does not automatically result in federal preemption, nor deprive state commissions of authority to interpret and enforce the terms of an ICA.[20]

The record evidence (much of it submitted by GNAPs itself) did not support a determination that GNAPs delivered VoIP traffic. Our Decision noted that such

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[18] D.08-09-027, at pp. 4-5.

[19] See D.08-09-027, at p. 9 relying on the FCC's *IP Access Charge Order, supra,* 19 FCCR 7457, ¶ 15. Specifically, the FCC stated:

> 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. (emphasis added)

See similar Commission determination reached in *Cox California Telecom, LLC v. Global NAPs, Inc.* ("*Cox v. GNAPs*") [D.7-09-050] (2007) 2007 Cal.PUC LEXIS 503, __ Cal.P.U.C.3d __, at pp. 10-11 (slip op.).

[20] D.08-09-027, at pp. 5, 9, 19 [Conclusion of Law Numbers 4, 7].). See also, e.g, *ISP Remand Order, supra,* 16 FCCR 9151, ¶ 15, remanded (but not vacated) by *WorldCom, Inc. v. FCC, supra*, 288 F.3d 429; *Southwestern Bell Telephone Company v. PUC* ("*Southwestern Bell*") (5th Cir. 2000) 208 F.3d 475, 479-480; *Pac Bell v. Pac West, supra,* 325 F.3d at pp. 1126-1127; *Verizon v. Peevey, supra,* 462 F.3d at p. 1153; and *Global Naps, Inc. v. Verizon New England, Inc.*("*GNAPs v. Verizon*") (2d Cir. 2006) 444 F.3d 59, 72-74.

evidence includes: (1) testimony of GNAPs own witness admitting that GNAPs has no way to determine whether its traffic may be interconnected or nomadic (VoIP);[21] (2) testimony of its own witness stating GNAPs does not know the type of equipment or communication (voice, data, or mix) used in relation to its traffic;[22] and (3) testimony of AT&T indicating that GNAPs billing records show that its traffic patterns are inconsistent with IP or VoIP traffic.[23]

Despite this evidence, GNAPs reiterates its argument that certain decisions should have persuaded us that its California traffic is VoIP. (GNAPs Rhg. App., at pp. 8-11 relying on *In re Transcom* ("*Transcom*") (Bankr. N.D. Tex., April 28, 2005) 2005 Bankr. LEXIS 1244; *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Interconnection Terms and Conditions and Related Arrangements with Wisconsin Bell, Inc. d/b/a/ SBC Wisconsin Pursuant to 47 U.S.C. § 252(b)* ("*Wisc. PSC*") PSC Ref. No. 54417, Arbitration Award dated May 16, 2006;[24] and *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges* ("*TVC Albany*") (2008) 2008 N.Y. PUC LEXIS 101.) We considered these cases in reaching our original determination. However, the most obvious problem with any of the cases is that they do not address the factual record in this case, and we continue to reject their applicability here.

In *Transcom*, the U.S. Bankruptcy Court for the Northern District of Texas determined that Transcom's traffic should not be subject to access charges.[25] GNAPs

[21] Exh. 6 (GNAPs/Scheltema), at p. 4.

[22] Exh. 5 (GNAPs/Noack), at p. 4.

[23] Exh. 4 (AT&T/Constable), at pp. 8-12 & Att. 5.

[24] The *Wisc. PSC Order* is not available on LEXIS, but was provided with GNAPs application for rehearing at Att. B.

[25] *Transcom, supra*, 2005 Bankr. LEXIS 1244, at *16-*17. As a result Transcom's traffic was subject to other end user charges rather than access charges.

claims that Transcom is GNAPs primary supplier of traffic, thus GNAPs California traffic should also be exempt from access charges. (GNAPs Rhg. App., at pp. 8-9.)

We are not persuaded by *Transcom.* The Court's opinion does not identify what evidence it relied on in reaching its conclusion regarding Transcom's traffic. And there is no evidence in the record of this proceeding that would adequately connect or demonstrate a match between Transcom's Texas traffic and GNAPs California traffic. We also note that *Transcom* is inapposite as it does not involve issues related to State commission interpretation of an executed ICA.[26] Moreover, the determination was subsequently vacated, without any final resolution of the proper designation of Transcom's traffic.[27]

TVC Albany is also unavailing. In that case, the New York Public Service Commission ("NYPSC") held it was precluded from imposing intrastate access charges on GNAPs traffic. GNAPs had submitted confidential customer affidavits which convinced the NYPSC staff that at least most of GNAPs New York traffic was nomadic VoIP.[28] Unlike *TVC Albany*, GNAPs submitted no customer affidavits in this proceeding to establish its traffic is nomadic VoIP. Indeed, GNAPs own witness testimony

[26] GNAPs argues that AT&T lost in *Transcom,* and thus should be barred by collateral estoppel from seeking to win here. (GNAPs Rhg. App., at p. 9.) We reject this argument because GNAPs offers no legal authority or analysis to support its claim the doctrine applies here. Moreover, to the extent the doctrine might have some applicability if this case involved litigation regarding Transcom's California traffic, the fact remains there is no evidence that is the case.

[27] See *AT&T Corp. v. Transcom Enhanced Services, LLC* (2006) 2006 U.S. Dist. LEXIS 97000. GNAPs argues it is irrelevant that *Transcom* was vacated, because in the Bankruptcy Court was eventually convinced that Transcom provided an information service. (GNAPs relying on *In re Transcom,* Case No. 05-31929-HDH-11 (Sept. 20, 2007). To support its claim, GNAPs submits with its application for rehearing limited transcript portions from the 2007 proceeding. As previously discussed, such new and additional evidence is impermissible and must be rejected. Our review of the rehearing application is based on the record before us, and not on new evidence now offered after the submission of the case. Further, it does not overcome the lack of relevant evidence we described here. It also appears the transcript contradicts the Court's finding that Transcom provided enhances services, indicating only that Transcom "facilitated" the transport of calls. Also, this Commission is not legally bounded by the facts of that decision that has no relevance, or was considered for a different purpose.

[28] *TVC Albany, supra,* 2008 N.Y. PUC LEXIS, at *23 -*24.

contradicts such a conclusion.[29] The matter also did not involve interpretation and enforcement of a negotiated ICA, and the NYPSC specifically noted that it if there was an ICA (as there is here), its authority regarding applicable rates would not be limited by federal law.[30]

In *Wisc. PSC*, the Wisconsin Public Service Commission ("WPSC") concluded that the ESP exemption from access charges applies to IP-PSTN traffic such as GNAPs claims to provide here.[31] However, *Wisc. PSC* does not help GNAPs here, because the WPSC applied the exemption to only the ESP itself.[32] As discussed in Part B of this Order, GNAPs is not, and does not claim to be, an ESP.

Finally, GNAPs asserts that we based our determination on the "shaky legal theory" that if some of GNAPs traffic is not VoIP, then it must pay full rates on all its traffic.[33] (GNAPs Rhg. App., at p. 11.) That is incorrect. Nothing in the evidence or our Decision suggests any portion of GNAPs traffic could be conclusively identified as VoIP. Our determination was reasonably based on evidence in the record before us, the lack of any evidence establishing GNAPs delivered VoIP traffic, relevant federal law and policies regarding the treatment of IP-enabled services, and state authority concerning the interpretation and enforcement of ICAs.

GNAPs remaining arguments repeat and rely on its assertion of providing VoIP traffic. For the reasons stated above, that assertion is unsupported and we will not

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[29] Exh. 6 (GNAPs/Scheltema), at p. 4.

[30] *TVC Albany, supra*, 2008 N.Y. PUC LEXIS 101, at *24-*25.

[31] *Wisc. PSC, supra,* GNAPs Rhg. App., Att. B, at p. 32. GNAPs again argues that AT&T should be collaterally estopped from relying on its evidence here because its evidence in this proceeding is the same as evidence the WPSC rejected as unreliable. We reject GNAPs argument because it again offers no legal authority or analysis to support application of the doctrine.

[32] *Wisc. PSC, supra,* GNAPs Rhg,. App., Att. B, at p. 27.

[33] GNAPs relies on *Southern New England Telephone Company v. Global NAPs* ("*SNET*") (2005) 2005 U.S. Dist. LEXIS 25898 [unpublished], for the proposition that before collecting access charges, the plaintiff (here AT&T) has the burden to establish how much traffic does not touch the internet. That is wrong. Nothing in *SNET* discusses burden of proof, and the Court ultimately declined to resolve questions of classification or compensation for IP traffic, pending final rulemaking determinations by the FCC. (*Id.* at *27.)

restate that finding. Our Order will address the additional reasons why we reject GNAPs arguments.

C. The ESP Exemption

Federal law established an exemption from intrastate access charges for ESPs.[34] Internet Service Providers ("ISPs") are considered to be a class of ESPs.[35] The Decision finds that GNAPs does not qualify for the exemption, because although its traffic may be ISP-originated, it terminates on the PSTN. To qualify for the exemption, however, the traffic must be routed *to* an ISP, i.e., it must be ISP-bound.[36]

GNAPs argument is not that its traffic is ISP-bound. Rather, GNAPs contends that we misstated the test. GNAPs also reiterates its argument that the FCC has exempted all VoIP traffic from access charges. (GNAPs Rhg. App., at p. 5 relying on *IP Access Charge Order, supra*; and *IP-Enabled Services, supra*.)

At the outset, it appears to us that GNAPs seems to conflate its reference to the specific ESP exemption with a much broader argument of State preemption regarding VoIP. The test we applied relates to the FCC's distinct policy regarding the ESP exemption.[37] And FCC orders support our conclusion that the ESP exemption applies only to ISP-bound traffic.[38] In addition, GNAPs ignores that the exemption applies only to the ESP itself, not to the carrier of ESP traffic (e.g., GNAPs).[39] GNAPs did not itself claim to be an ESP. It merely asserted that some customers may be ESPs.[40] Accordingly,

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[34] See e.g., *ISP Remand Order, supra,*16 FCCR 9151, at ¶ ¶ 1, 11, 15, remanded (but not vacated) by *WorldCom, Inc. v. FCC, supra,* 288 F.3d 429.

[35] *ISP Remand Order, supra,* 16 FCCR 9151, at ¶ 11.

[36] D.08-09-027, at pp. 11, 18 [Finding of Fact Number 22] & p. 19 [Conclusion of Law Number 5].

[37] See e.g., *In the Matter of MTS and WATS Market Structure, Memorandum Opinion and Order* ("*MTS/WATS*") (1983) 97 FCC2d 682, ¶ 83; *IP-Enabled Services, supra,*19 FCCR 4863, at ¶ 25; *ISP Remand Order, supra,* 16 FCCR 9151, at ¶ 11, fn. 18 ["This policy is known as the "ESP exemption"].

[38] See e.g., *ISP Remand Order, supra,* 16 FCCR 9151, at ¶ 1; also fn. 27.

[39] See *MTS/WATS, supra,* 97 FCC2d 682, at ¶ 83; *ISP Remand Order, supra,* 16 FCCR 9151, at ¶ 11.

[40] Exh. 6 (GNAPS/Scheltema), at p. 3.

GNAPs is wrong that we misstated the legal standard and/or erred in concluding that it does not qualify for the exemption.

We continue to reject any reliance on *IP-Enabled Services* and the *IP Access Charge Order* to assert that the Commission is preempted from adjudicating ICAs involving IP-related services. The FCC has not adopted any final classification or compensation rules regarding the regulatory treatment of VoIP or IP-enabled services.[41] *IP-Enabled Services* only went so far as to seek further comment on whether access charges should apply to VoIP and other IP-enabled services.[42] It did not establish any absolute VoIP exemption. Our Decision reasonably took into account the fact 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.[43]

The *IP Access Charge Order* addressed whether AT&T's specific "phone-to-phone" IP services should be exempt. There too, the calls in question terminated on the PSTN. While the FCC considered the traffic to be a form of VoIP or IP-enabled service, it was deemed a telecommunications service which *should* be subject to access charges.[44]

Nevertheless, GNAPs reiterates its reliance on *Wisc. PSC* and *TVC Albany* to argue GNAPs IP-PSTN traffic should also be exempt from access charges. (GNAPs Rhg. App., at pp. 5-6.).[45] *Wisc. PSC* did apply the ESP exemption to IP-PSTN traffic.[46] However, as previously noted, the WPSC's determination does not help GNAPs here

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[41] See *ante,* fn. 2.

[42] *IP-Enabled Services, supra,* 19 FCCR 4863, at ¶ 69.

[43] *IP-Enabled Services, supra,* 19 FCCR 4863, at ¶ 61.

[44] See *IP Access Charge Order, supra,* 19 FCCR 7457, at ¶¶ 11, 15.

[45] GNAPs contends *Minn. v. FCC, supra,* 483 F.3d 570 (affirming *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission* ("*Vonage*") (2004) 19 FCCR 22404), preempt this Commission's authority to enforce its ICA with AT&T because these cases establish that nomadic VoIP traffic is interstate and subject to exclusive federal jurisdiction. GNAPs is wrong. The *Vonage* cases preclude only direct or traditional economic regulation of VoIP providers. (See *Minn. v. FCC, supra,* 483 F.3d at 576, 579-580.) They do not address interpretation and enforcement of existing ICAs under 47 U.S.C. §§ 251-252 and do not preempt or limit a state commission's authority to interpret and enforce ICAs.

[46] *Wisc. PSC, supra,* GNAPs Rhg. App., Att. B, at p. 32.

since the exemption was applied to only the ESP itself.[47] *TVC Albany* is inapplicable for the same reasons articulated in Part B of this Order.

Next, GNAPs suggests it is unfair not to allow a VoIP exemption for its traffic, because this Commission has already recognized such an exemption, and have already approved it for GNAPs rival, Level 3. (GNAPs Rhg. App., at p. 6 , relying on *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice over Internet Protocol Should be Exempted From Regulatory Requirements* ("*VoIP NPRM*") [I.04-02-007] (February 1, 2004),[48] and *In re Level 3* ("*Draft Arbitrator's Report*") (December 22, 2004).[49] GNAPs misinterprets the referenced documents.

We have not adopted any formal position or rules regarding VoIP and other IP-enabled services. We found it prudent to defer such until the FCC issues its final determination on the matter.[50] That said, our initial inclination was to view VoIP which interconnects to the PSTN as a public utility telecommunications service.[51] We also did not approve any VoIP exemption for Level 3. The referenced *Draft Arbitrator's Report* was never formally adopted and the proceeding was ultimately dismissed.[52]

Finally, GNAPs argues that three cases dictate that AT&T's attempt to collect access charges here should be rejected. (GNAPs Rhg. App., at p. 7 relying on *Southwestern Bell Telephone, L.P. v. Vartec Telecom, Inc.* ("*Vartec*") (E.D. Mo. 2005)

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[47] *Wisc. PSC, supra,* GNAPs Rhg. App., Att. B, at p. 27.

[48] *VoIP NPRM, supra,* available at http://docs.cpuc.ca.gov/WORD_PDF/FINAL_DECISION/34221.PDF.

[49] The *Draft Arbitrator's Report* can be located by accessing the "Docket Card" on the Commission's website for proceeding A.04-06-004.

[50] *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice over Internet Protocol Should be Exempted from Regulatory Requirements* ("*Opinion Closing Proceeding*") [D.06-06-010] (2006) __ Cal.P.U.C.3d __, at p. 3 (slip op.). Even if the Commission had adopted a general policy regarding the treatment of VoIP, it would not control here. The resolution of issues in this proceeding is governed by the interpretation and enforcement of the terms of an ICA.

[51] See *VoIP NPRM, supra,* available at http://docs.cpuc.ca.gov/WORD_PDF/FINAL_DECISION/34221.PDF, at p. 15 (slip op.)

[52] *In re Level 3* [D.05-05-023] (2005) ___ Cal.P.U.C.3d ___, 2005 Cal.P.U.C. LEXIS 214.

2005 U.S. Dist. LEXIS 26166; *SNET, supra,* 2005 U.S. Dist. LEXIS 25898; and *Transcom, supra,* 2005 Bankr. LEXIS 1244.)[53] We disagree.

Vartec and *SNET* offer no guidance here. The respective Courts declined to reach any substantive determination regarding the regulatory treatment of VoIP or IP-related services, reasoning that the FCC has primary jurisdiction regarding the matter and it has not yet rendered a final determination.[54] *Transcom* is not dispositive for the reasons articulated in Part B of this Order.

D. Discrimination

GNAPs contends the Decision errs because it constitutes an invidious discrimination. (GNAPs Rhg. App., at p. 14.)

We find no basis to this argument since GNAPs provides no legal authority or analysis which would demonstrate how our Decision violates any relevant authority. Thus, GNAPs fails to meet the statutory requirement that applications for rehearing set forth specifically the ground or grounds on which the Decision is unlawful (Pub. Util. Code, § 1732.).[55] Accordingly, we reject GNAPs' discrimination contention.

E. Motion To Set Aside Submission And Take Additional Evidence

GNAPs contends the Decision errs because the Commission wrongfully denied its motion to set aside the proceeding and reopen the record to take additional evidence ("Motion").[56] (GNAPs Rhg. App., at p. 15.)

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[53] GNAPs also contends that pursuant to *In re Time Warner Cable* ("*Time Warner*") (2007) 22 FCCR 3513, parties disputing VoIP charges should simply negotiate appropriate rates for such traffic. (GNAPs Rhg. App., at p. 7.) GNAPs reliance on this case is misplaced. In *Time Warner* the FCC explicitly stated it did not yet reach any determination regarding the classification of VoIP or compensation for VoIP. (*Id.* at ¶ ¶ 15, 17.) And the FCC recognized the validity of any compensation responsibilities assumed for such services under ICAs. (*Id.* at ¶ 17.)

[54] See *Vartec, supra,* 2005 U.S. Dist. LEXIS 26166, at *9 -*13; *SNET, supra,* 2005 U.S. Dist. LEXIS 25898, at *19-*21, *27.

[55] See also Cal. Code of Regs., tit. 20, § 1732.

[56] GNAPs Motion to Set Aside Submission and Reopen the Record for the Taking of Additional Evidence, dated July 17, 2008.

Rule 13.14 of the Commission's Rules of Practice and Procedure governs motions to set aside submission and reopen the proceeding. The Rule requires that a motion:

> …specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or law alleged to have occurred since the conclusion of the hearing….and explain why such evidence was not previously adduced.

(Cal. Code of Regs., tit. 20, § 13.14, subd. (b).)

GNAPs Motion was properly rejected because GNAPs failed to set forth any material changes of fact or law that occurred since completion of the hearing. Instead, GNAPs maintains its Motion should have been granted because after the record had closed, AT&T first raised the argument that GNAPS failed to submit evidence its traffic is nomadic VoIP. GNAPs also suggests it is prejudicial not to allow additional evidence, since the Presiding Officer's Decision rejected the argument that *TVC Albany* proved GNAPs California traffic is nomadic VoIP. (Motion, at p. 2.)

These claims are dubious, at best. The nature of GNAPs traffic was a cornerstone issue from the outset of the proceeding. The Scoping Memo explicitly called for evidence to address the physical configuration of GNAPs traffic and whether it should be exempt from interconnection agreement charges.[57] The testimony of both GNAPs and AT&T in this proceeding presented each party's position and evidence regarding the nature of GNAPs traffic, including whether it is nomadic VoIP.[58] And GNAPs own opening brief began with the assertion that its traffic was VoIP.[59] Predictably, AT&T argued in its reply brief that GNAPs had failed to make its case. That GNAPs feared AT&T might be right is not reason to reopen the proceeding. We have similarly declined to allow additional evidence when a party could have, and should have, submitted its

[57] Scoping Memo and Ruling of Assigned Commissioner, dated February 4, 2008.

[58] See e.g., Exh. 6 (GNAPs/Scheltema), at p. 3 & 4; Exh. 5 (GNAPs/Noack), at p. 4; and Exh. 4 (AT&T/Constable).

[59] GNAPs Opening Brief, dated April 14, 2008.

evidence in a timely fashion.[60] Further, that a proposed decision rejects any particular argument is not a sound or lawful basis for the Commission to reopen the record to give the other side an additional opportunity to make its case.

Had we considered GNAPs proposed evidence, it would still not establish GNAPs claim. The Motion sought to submit: (1) a list of five customers purported to be GNAPs customers in both New York and California; (2) a supplemental affidavit of GNAPs witness, Mr. Scheltema, stating his belief that GNAPs traffic is nomadic VoIP; and (3) a letter from GNAPs Transcom stating that it is an ESP serving the VoIP industry.

GNAPs customer information is merely a list of companies GNAPs purports to be the same in New York and California. Had GNAPs wished to provide reliable verification of its New York and California customers, it could have submitted customer contracts (under protective seal, if necessary), or at least sworn customer affidavits such as those it submitted to the NYPSC in *TVC Albany.* But GNAPs did not. And *TCV Albany* offers no assistance since the customers at issue in New York were not identified. The letter from Transcom is equally problematic.[61] A letter from one customer does not establish that all, or even most of, GNAPs traffic is VoIP. There is no evidence that any other customer's traffic is the same as Transcom's.[62]

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[60] See e.g., *Re Camp Meeker Water System* [D.89-10-033] (1989) 33 Cal.P.U.C.2d 253, 261.

[61] In its Motion, GNAPs asserted it was unable to obtain Transcom's letter during the course of the proceeding. We are perplexed as to why GNAPs could submit a Transcom affidavit to the NYPSC in March, but it could not so for this Commission.

[62] GNAPs again references the determinations in *Transcom, supra,* 2005 Bankr. LEXIS 1244, and the *Wisc. PSC , supra,* at GNAPs Rhg. App., Att. B, to argue such determinations are not evidence and are precedent which act to collaterally estop AT&T from asserting its complaint here. (GNAPs Rhg. App., at p. 15.) As previously discussed, GNAPs collateral estoppel arguments are without merit.

GNAPs also references a preliminary determination of Judge Morrow in *GNAPs v. PUC, supra,* Case No. CV 07-04801-MMM(SSX). As discussed in footnote 3 above, the final Court determination in this matter supported this Commission's authority to interpret and enforce an executed ICA. Further, the Court rejected GNAPs arguments that any of the cases it relied upon (and also relied upon here), preempt our authority or relieve GNAPs of its obligation to pay local, intraLATA, or transit charges under an ICA.

Mr. Scheltema's new affidavit states GNAPs is "convinced and has been assured" that its customers are ESPs which do or "may be" providing VoIP. (GNAPs Rhg. App., Att. F.) We find this new statement to be unconvincing, particularly since it is difficult to reconcile with GNAPs prior testimony (including Mr. Scheltema's) that GNAPs has no way to determine the extent to which the traffic it receives is nomadic VOIP,[63] and does not know the type of equipment its customers use or the type of communication.[64] Though Mr. Scheltema states his new conclusions are based on specific clauses of customer contracts, no actual contracts were offered to act as verifiable evidence.

Finally, GNAPs requests that we remand this proceeding so that GNAPs can negotiate market rates for VoIP access. GNAPs claims it is in the public interest of consumers to relieve GNAPs of "old-fashioned access charges," and it would level the playing field between GNAPs and other carriers that may pay lesser charges. GNAPs request should be denied. Even if GNAPs had proved its claim of providing VoIP, no legal authority is presented to justify dissolving GNAPs ICA in such a manner.

F. Request For Oral Argument

GNAPs requests oral argument on the application for rehearing pursuant to Rule 16.3 of the Commission's Rules of Practice and Procedure. (GNAPs Rhg. App., at p. 16.)

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[63] Exh. 6 (GNAPs/Scheltema), p. 4. GNAPs contends we must accept the truth of Mr. Scheltema's affidavit unless the statements are inherently incredible. (GNAPs Rhg. App., at p. 15 relying on *Mattis v. United States Immigration and Naturalization Service* ("*Mattis*") (1985) 774 F.2d 965, and *Agustin v. Immigration and Naturalization Service* ("*Agustin*") (1982) 700 F.2d 564. Neither case is analogous. In *Mattis*, the petitioner moved to reopen the record to submit evidence of changed facts and circumstances which occurred after the deportation hearing. Specifically, evidence that he had married a U.S. citizen. The determination to deny that motion was overturned because it lacked any reasoned explanation. (*Mattis, supra,* at pp. 967-968.) Unlike *Mattis*, GNAPs did not offer evidence of changed facts or circumstances. And the determination to deny GNAPs motion was supported by a reasoned explanation. (D.08-09-027, at pp. 15-16.) *Agustin* offers no guidance since the Court merely upheld a determination not to reopen the proceeding. (*Agustin, supra,* at pp. 565-566.) Both cases also acknowledge that a decisionmaker has broad discretion when ruling on such motions.

[64] Exh. 5 (GNAPs/Noack, at p. 4.).

Rule 16.3 provides the following:

> (1) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
>
> (a) adopts new precedent of departs from existing Commission precedent without adequate explanation;
>
> (b) changes or refines existing Commission precedent;
>
> (c) presents legal issues of exceptional controversy, complexity, or public importance; and/or
>
> (d) raises questions of first impression that are likely to have significant precedential impact.

(Cal. Code of Regs., tit. 20, § 16.3, subd. (a).)

GNAPs contends that oral argument will materially assist the Commission in resolving this matter. However, the parties have already submitted testimony and fully briefed the issues. GNAPs fails to specify or demonstrate how oral argument will shed any new or meaningful light on this matter.

GNAPs also contends oral argument is warranted because the Decision departs from, changes, or refines Commission precedent regarding VoIP, and because it presents questions regarding the complex legal framework applicable to VoIP. GNAPs failed to establish the Decision is contrary to any prior Commission precedent, or specify how the complexity of the legal framework in this case warrants an oral argument when the Commission routinely handles highly complex and technical matters.

Accordingly, there is no basis to conclude oral argument will benefit disposition of the application for rehearing. The request for oral argument is denied.

III. CONCLUSION

For the reasons stated above, the application for rehearing of D.08-09-027 is denied. The request for oral argument is also denied.

THEREFORE IT IS ORDERED that:

1. The application for rehearing of D.08-09-027 is hereby denied.
2. This proceeding, Case (C.) 07-11-018, is closed.

This order is effective today.

Dated January 29, 2009, at San Francisco, California.

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