STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, Inc.	:	
-vs-	:	
Global NAPs Illinois, Inc.	:	
	:	
Complaint pursuant to Section 252(e) of the Federal Telecommunications Act of 1996, 47 U.S.C. §252(e), and Sections 4-101, 10-101, and 10-108 of the Illinois Public Utilities Act, 220 ILCS 5/4-101, 220 ILCS 5/10-101, and 220 ILCS 5/10-108.	:	**08-0105**

ORDER

February 11, 2009

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ORDER

By the Commission:

On February 13, 2008, Illinois Bell Telephone Company, Inc. ("AT&T Illinois", "SBC" or "Ameritech") filed a Verified Complaint alleging that Global NAPs Illinois, Inc. ("Global Illinois" or "Global") had violated the parties' interconnection agreement ("ICA") and AT&T Illinois' ICC Tariff No. 21 by refusing to pay any of the amounts billed by AT&T Illinois for certain intrastate services and facilities, and further alleging that Global Illinois no longer satisfies the statutory requirements for maintaining certificates of service authority under Sections 13-403, 13-404, and 13-405 of the Illinois Public Utilities Act, 220 ILCS 5/13-403, 5/13-404, and 5/13-405.

Pursuant to due notice, a status hearing was held in the matter on February 27, 2008. On March 5, 2008, Global Illinois filed its appearance herein, and on March 31, 2008, simultaneously filed its Answer and Affirmative Defenses.

An evidentiary hearing was held on September 4, 2008. Admitted into the record were the testimony of Jeffrey Hoagg on behalf of Staff, and the individual testimonies of James Scheltema and Jeffrey Noack on behalf of Global Illinois. Patricia H. Pellerin, James W. Hamiter, Barbara A. Moore (adopted by Heather Lenhart), Rebecca Harlen, William Cole, Yolanda Williams all testified on behalf of AT&T Illinois and each account was admitted into the record. At the conclusion of the hearing on September 4, 2008, the record was marked "Heard and Taken."

On October 3, 2008, initial briefs were filed by AT&T Illinois, Global and Staff. The reply briefs of the parties and Staff were filed on October 24, 2008.

The Administrative Law Judge ("ALJ") issued a Proposed Order on November 24, 2008. Thereafter, briefs on exceptions were filed by Global, AT&T Illinois and Staff.

Each also filed a reply brief to exceptions. All matters set out in these filings were fully considered by the Commission in the making of this Order.

On the allegations of the complaint, the record and the parties' arguments, the Commission observes that there are four billed, but unpaid, items in dispute between AT&T Illinois and Global Illinois. In its exceptions, however, Global asks the Commission to defer ruling in this proceeding until such time as the Federal Communications Commission ("FCC") completes a contemplated rulemaking intended to reform intercarrier compensation and universal service. According to Global, the FCC's entry of its expected order will settle some of the complex cost allocation and jurisdictional issues raised in the instant case.

We reject Global's position on the matter for all the reasons set out by Staff and AT&T in their respective reply to exceptions briefs. Not only is it made clear that the FCC's pending rulemaking is far from relevant to the issues at hand, but, whatever the outcome, the new rules will surely operate prospectively and not apply retroactively or impinge on existing interconnection agreements. Such has been the practice at the FCC and it is grounded in notions of fairness. In this proceeding, to be sure, the issues put before the Commission concern Global's liability for certain charges already incurred over the past several years and, just as significantly, these arise under the parties' current interconnection agreement ("ICA"). As such, and on the whole, the Commission finds that delaying resolution of the instant dispute serves no legitimate purpose. We begin to consider the matter issue by issue.

In a related procedural matter, the Commission entered an Order, on January 22,2009, initiating an investigation into whether Global's certificates of authority should be revoked. Initiating Order, Docket 09-0053 at 3. In doing so, the Commission took "administrative notice of the orders, transcripts, exhibits, pleadings or any other matter . . ." contained in the record of the instant docket

I. WHETHER GLOBAL HAS VIOLATED AT&T ILLINOIS' INTRASTATE TARIFF BY FAILING TO PAY FOR DS3S PURCHASED THEREUNDER.

In order to directly exchange traffic, a competitive local exchange carrier ("CLEC") like Global and an incumbent local exchange carrier ("ILEC") like AT&T Illinois must physically interconnect their networks. The point at which the two carriers' networks are physically interconnected is called the "point of interconnection," or "POI." Carriers generally interconnect their networks using high-capacity facilities, upon which lower-level circuits are established. To actually exchange traffic, the carriers must establish trunks over these circuits, where each trunk is a single talking path between the two carriers' switches.

Staff explains that a POI functions not only as a point on an incumbent carrier's network where traffic is exchanged by the incumbent and another carrier, but also as a bright line demarcation that indicates which carrier is responsible for costs. The Commission has long held, and often reiterated, that each carrier is responsible for the costs of facilities and carrying traffic on its own side of the POI. *See, e.g.*, Arbitration Decision at 81, Docket 04-0469 (November 30, 2004); Arbitration Decision at 22, Docket 03-0239 (August 26, 2008).

A. AT&T Illinois' Position

AT&T Illinois explains that, in August 2001, Global requested to negotiate an ICA with AT&T Illinois to interconnect the parties' networks. The parties were unable to reach agreement, and the matter went to arbitration (such that the parties' ICA was not effective until late July, 2003). In the meantime, however, in order to establish interconnection and exchange traffic prior to completion of the arbitration and approval process, the parties had, on January 28, 2002, entered into an "interim interconnection agreement" ("Interim Agreement"). In this Interim Agreement, AT&T Illinois states, the parties agreed that Global and AT&T Illinois would interconnect at a single POI in each local access and transport area, and agreed that Global "shall be responsible for the cost and placement of fiber cable on its side of the POI."

According to AT&T Illinois, the Interim Agreement was still insufficient to resolve all the disputes between the parties regarding how and where they would interconnect their networks. Therefore, on May 22, 2002, the parties entered into an "amendment to interim interconnection agreement" ("Interim Agreement Amendment") to more specifically set forth how and where the parties would interconnect. In particular, the parties agreed that they would interconnect using a "SONET system fiber meet" between AT&T Illinois' LaGrange tandem building and the York Road location in Oak Brook at which Global had placed its equipment.

Global's Oak Brook location did not (and does not) belong to AT&T Illinois, it contends, but AT&T Illinois already had a fiber loop facility extending to that location. The parties disputed whether Global was entitled to interconnect at its Oak Brook location using the pre-existing fiber loop facility, or whether Global was required to interconnect at AT&T Illinois' LaGrange building using facilities provided or purchased by Global (including, for example, paying for use of AT&T Illinois' existing fiber facility connecting the Oak Brook location to the LaGrange building). At this juncture, AT&T Illinois states, the parties agreed to use the existing fiber to interconnect on an interim basis, and further agreed on how they would resolve their dispute over financial responsibility for that facility. More specifically, Global agreed that "[w]ithin 60 days of approval of the Global/SBC interconnection agreement by the Illinois Commission, Global will seek a determination by the Illinois Commission . . . as to (a) whether Global NAPs can interconnect with SBC at GNAPs facility; (b) if Global NAPs cannot interconnect with SBC at GNAPs facility, at what location or type of location can Global NAPs interconnect with SBC; and (c) what, if anything, Global NAPs owes SBC for the use of its fiber while the issue of the appropriate interconnection point is being resolved.

The parties' ICA was approved on July 23, 2003, but, AT&T Illinois notes, Global did not thereafter seek from the Commission a determination regarding whether or not Global could interconnect at its Oak Brook location. The Interim Agreement Amendment provided for just such an eventuality by stating that:

> In the event that there is no ruling . . . within 12 months of the date of interconnection, Global NAPs shall either:
>
> a. provide two fibers from the Global NAPs location to the SBC location (as noted in paragraph 1, above) no later than 12 months

> after the Illinois Commission has issued the final arbitration award. . . . ; or,
>
> b. if Global NAPs chooses not to provide its two fibers to complete this joint fiber meet between the two Parties, SBC will charge GNAPs for the facilities in place to provide this interconnection at rates commensurate with the FCC-AIT Interstate Access Tariff Rates.

According to AT&T Illinois, Global did not provide its own fibers from its Oak Brook location to AT&T Illinois' LaGrange location. Instead, to this day, the parties use AT&T Illinois' fiber facility to connect those locations. As a result, AT&T Illinois claims, and pursuant to the Interim Agreement Amendment, it is entitled to charge Global for the fiber facility.

Instead of charging Global for the entire fiber facility between Oak Brook and LaGrange, AT&T Illinois states that it has billed Global only for the specific capacity of the facility ordered by Global and dedicated to Global. In particular, AT&T Illinois says that it has billed Global only for the particular DS3 high-capacity circuits ordered by Global that were established over the fiber facility. As AT&T Illinois witness Lenhart explained, Global submitted Access Service Requests ("ASRs") for eleven DS3 circuits between Global's Oak Brook location and AT&T Illinois' LaGrange tandem location. AT&T Illinois explains that ASRs are industry-standard forms used by carriers to order access services and certain local services from another carrier. In four of its ASRs, AT&T Illinois observed Global to indicate that the "percent interstate use" was zero. As such, AT&T Illinois contends, Global represented that the DS3s would not be used for interstate services, and thus were being ordered under AT&T Illinois' intrastate tariff.

Pursuant to Global's ASRs, AT&T Illinois states that it provisioned the requested DS3 circuits, upon which trunks were subsequently established to exchange traffic between the parties. AT&T Illinois has billed Global the tariffed charges for these circuits every month, but Global has not paid a penny. Under these circumstances, AT&T Illinois asks the Commission to find Global in violation of the terms of AT&T Illinois' intrastate tariff, and order Global to pay the tariffed charges for these DS3 circuits.

According to AT&T Illinois, requiring Global to pay the intrastate tariffed charges for the intrastate DS3 circuits it ordered to connect its Oak Brook location to AT&T Illinois' LaGrange location is entirely consistent with the parties' ICA. That is because, in the ICA, the parties agreed that AT&T Illinois' location (*i.e.*, its LaGrange tandem building) would be the POI, and agreed that Global would be responsible for all facilities on its side of that POI – *i.e.*, that Global would provide or pay for the facilities running to the LaGrange location.

In the Interim Agreement Amendment, AT&T Illinois points out, the parties agreed in paragraph 1, that "[t]he standards for interconnection both interim and final shall be those agreed upon by the Parties (as shown in the agreed upon language in the interconnection agreement filed by SBC in the Illinois arbitration proceeding)," and further "agree[d] that the interconnection method identified herein is consistent with

design four (as noted in paragraph 1, above)." AT&T Ex. 1.0, Sch. PHP-2, at 1-2. "Design Four," as described in undisputed language of the final ICA, addresses the provision of fiber between the Global and AT&T Illinois locations, and specifies that "[t]he POI will be defined as being at the SBC-13STATE location." ICA, Appendix NIM, § 3.4.7.4; *see* AT&T Ex. 1.0 at 10. The final ICA makes clear that the parties chose this option, stating that "[t]he Parties agree to use the options set forth in 3.4.7.4." *Id.* § 3.4.7.

In short, AT&T Illinois contends, the final ICA makes clear that the POI is at AT&T Illinois' location, the LaGrange tandem, and not at Global's location in Oak Brook. As Global witness Noack stated, "Global chose to connect to the Illinois Bell network by connecting at a single point – the Illinois Bell tandem switch in LaGrange." Global Ex. 2.0 (Noack Direct) at 1. In addition, AT&T Illinois notes, the parties agreed that the POI "serves as a demarcation point between the facilities that each Party is responsible to provide," and agreed that "each party [is] financially responsible for all expenses relating to facilities on its side of the POI." ICA, Appendix NIM, § 1.11. Thus, it is clear under the ICA, AT&T Illinois argues, that Global is financially responsible for the facilities connecting its Oak Brook equipment (or more accurately, the equipment of Global's affiliates) to the POI, AT&T Illinois' LaGrange location.

For all the reasons set out on record and in argument, AT&T Illinois asks the Commission to find Global in violation of AT&T Illinois' intrastate tariff, and to order Global to pay all past-due tariffed charges for the intrastate DS3 circuits ordered by Global.

B. Global Response

Global was Entitled to Designate its Oak Brook Facility as the POI.

For the Commission to understand Global's position on why the POI is located at Global's Oak Brook facility, Global believes it essential to review the sequence of events that led up to this proceeding. In this regard, Global agrees with the timeline provided by AT&T Illinois witness Pellerin with one exception, i.e., the date of execution of the Amendment to the Interim Agreement. While Ms. Pellerin claims that it was executed on May 22, 2002, Global points out that this is only the date that AT&T signed the Interim Amendment. For its part, Global had already signed that Interim Amendment on May 10, 2002. According to Global, both dates are important because Global executed the Interim Amendment prior to the entry of the Commission order in the Arbitration and AT&T executed it *after* the entry of that order.

One of the provisions in the Interim Amendment was that Global would obtain an ICC order if it wished to locate the POI at its Oak Brook location instead of the AT&T LaGrange tandem office. A few days after Global executed that agreement, however, the Commission entered its order in the arbitration case finding as follows:

> As to Issue 2, the Commission is of the opinion that Ameritech and Global should be responsible both financially and physically on its side of the single POI. Ameritech's arguments, while lengthy are not persuasive to require the adoption of the Ameritech proposal. The Commission concurs that the transportation of calls to a single

> POI in each LATA would not significantly increase transport costs, but rather the incremental costs that Ameritech would incur would be *de minimus*. Ameritech's position could have the effect of undermining the single POI requirement. *Arbitration Decision*, Docket 01-0786 at 8 (May 14, 2002).

Thus, Global contends, after it executed the amendment requiring it to obtain a Commission finding, Global received exactly that - a Commission finding. While AT&T appears to be arguing here that Global should have gone back to the Commission yet again and after the arbitration decision, and once again asked if the Commission really meant it when it said that Global could choose its POI, Global does not believe that such a nonsensical action was required.

Jeff Noack, who is the Director–Network Operations for Global, Inc., provided testimony regarding the process of interconnection of the AT&T and Global networks. He testified that Global had expected to pay for the facilities on its end of the SONET because he understood that the parties shared the cost of that SONET when it was built. During the hearing, he further explained that the SONET between the AT&T and Global facilities was already in existence when Global moved into that location and thus, Global expected to pay for the equipment on its side of the SONET and AT&T would pay for the equipment on its side of the SONET. Tr. 143-44.

It is clear to Global that the Commission order in the arbitration case allowed Global to connect to AT&T's network at any technically feasible location. Global established the POI at its Oak Brook facility. Given that AT&T owns the Fiber Distribution Frame that is the termination of the SONET in the Oak Brook facility, Global should be allowed to designate the POI to be that Fiber Distribution Frame.

AT&T's Network Extends Beyond its Central Offices.

Global notes AT&T witness Hamiter to have testified that the POI could not be located on the Global end of the SONET because the POI must be within an AT&T facility. Thus, Global argues, even though AT&T owns the SONET and owns the Fiber Distribution Frame located in Global's Oak Brook facility, AT&T claims that it is not technically feasible to interconnect at that point because in AT&T's mind, its network does not extend that far. According to AT&T, once the SONET leaves the AT&T tandem switch, it is no longer part of AT&T's network.

Global contends that AT&T's argument is contrary to the Federal Telecommunications Act of 1996 which clearly and simply states that incumbent local exchange carriers must allow competitive local exchange carriers to interconnect "at any technically feasible point within the carrier's network." 47 USCA 251 (c)(2)(B). There is no verbiage with the additional requirement that POIs be within an incumbent's facilities. Obviously it is technically feasible to interconnect with AT&T at the Fiber Distribution Frame at the end of its SONET because the parties have been exchanging traffic that way for years. AT&T cannot evade the requirement of the Federal Act and this Commission's order in the arbitration proceeding by arbitrarily declaring that the SONET and Fiber Distribution Frame are not really part of its network.

As to AT&T Illinois' own practice, Global notes Mr. Hamiter to have admitted that AT&T interconnects with other incumbent local exchange carriers at a "meet point" that can be outside of an AT&T owned facility: "it could be anywhere, out in the middle of a field or something like that, it's more of an administrative meet point." He adds that in such a situation, the parties are not literally placing interconnection equipment in the middle of a field, rather, that they arbitrarily assign responsibility for an existing cable to each carrier: "They provision and construct the cable, and then some point on that cable, the lengths are divided, and you know, on this side, it's ours and on this side, it's the other LEC's cable." Tr. 65. Thus, AT&T has no problem interconnecting with other incumbent local exchange carriers at a location outside its own central offices. There is no technical or legal reason why AT&T should not be required to provide CLECs with the same ability.

It Is Irrelevant That Global "Ordered" Trunks Using AT&T's ASR Process.

According to Global, paragraph 4 of the Interim Interconnection agreement required Global to provide AT&T with trunk forecasts. But, it claims that AT&T Illinois would not accept a simple estimate. Rather, it demanded that Global "order" these trunks using its ASR process. Global witness testified that the ordering of those circuits was one of the major frustrations Global had with Illinois Bell.

According to Global, the mere fact that it followed AT&T Illinois' demands and provided it with ASRs that identified the circuits AT&T Illinois would need to have on its side of the SONET ring in no way implies that Global is responsible for the cost of those circuits. Global maintains that it should never have been forced to submit ASRs in the first place.

Global submits that the Commission should not allow AT&T to benefit from its own internal processes that turns a trunk forecast into a request for services subject to charges by imposing on its competitors the burden of right-sizing AT&T's side of the network (the side that AT&T agrees is its responsibility in order to exchange traffic).

Global contends that a review of the ASRs, AT&T Schedules BAM-1 through BAM-3, demonstrates how AT&T Illinois not only forced Global into "ordering" services it was not obligated to order, but it also prevented Global from identifying the nature of the traffic it intended to transmit. In particular, Global claims that AT&T Illinois prevented it from providing AT&T with information that would show that the traffic would be subject to the enhanced service provider ("ESP") exemption. As Global witness Noack explained, "There was simply no way to indicate in these ASRs that traffic would be entirely that of ESPs. Virtually the only thing that AT&T would allow us to say was if traffic would be intra LATA or inter LATA." Global Ex. 2.0, at 7.

Global witness Noack also testified that the ASR process was so difficult to implement for the traffic that Global was transmitting that he is not certain how some of the ASRs resulted in "local" trunks and others resulted in "interstate" trunks. The traffic over all trunks was the same, so there was no intention to order different trunks. Mr.

Noack further observed that:

> The fact that the ASRs resulted in charges under state and federal tariffs demonstrates both the difficulty of using the ASRs and the absurdity of using ASRs for this particular situation. All of the traffic passed on by Global to Illinois Bell is ESP traffic. The fact that some circuits are being charged under state and others under federal tariffs is most likely due to some confusion when attempting to complete these ASRS. The fact that different tariffs apply to circuits used for exactly the same thing demonstrates the problems Illinois Bell causes when, as here, it insists that Global fit a square peg into a round hole. Global Exhibit 2.0, at 8.

Global claims that it has been aggressively attempting to resolve its dispute with AT&T. Early in the companies' relationship, Mr. Noack had conversations with representatives of AT&T Illinois regarding the ASR form for not providing a proper option or an adequate manner to describe what Global was sought. He expressed the concern that Global might be improperly charged because it was submitting the ASRs demanded by AT&T. But, he was told that unless Global completed the form as presented a DS3 could not be ordered.

Global maintains that it did not "order" those DS3s as claimed by AT&T Illinois and it disputes AT&T Illinois' use of the ASR submitted by Global as a commitment from Global to "order" and pay for certain circuits. According to Global, the Interconnection Agreement requires Global to provide AT&T Illinois with information on the traffic it expects to send to, or receive from, AT&T. Global contends that AT&T Illinois only needed a traffic estimate, and yet AT&T required Global to provide specific network facilities information to right-size AT&T's side of the network using ASRs.

Global claims that complying with AT&T's demand does not mean that this action may now be used against Global as evidence that it "ordered" the DS3s necessary to carry that traffic. Very simply, Global argues, if the Commission determines (as it should) that the POI is at the Oak Brook facility, then these mandated ASRs cannot now be used as the premise upon which to base charges to Global for facilities that AT&T is otherwise obligated to provide under the parties' Interconnection Agreement.

Under the authority given it in the Commission's arbitration order, Global asserts, it chose to locate the POI at the AT&T Fiber Distribution Frame (obviously within AT&T's network) located in Global's Oak Brook facility. Thus, Global argues, it is responsible for all costs expended carrying traffic beyond that Fiber Distribution Frame and AT&T is responsible for the cost of carrying traffic on its side of the Fiber Distribution Frame. According to Global, the DS3s that AT&T is claiming Global "ordered" are on AT&T's side of the Fiber Distribution Frame meaning that Global is not responsible for the cost of those DS3s.

C. Staff Position

Staff details the course of events pursuant to which the parties here formed their ICA.

1. Global Illinois appears to have sought to interconnect with AT&T shortly after receiving its Certificate of Service Authority from the Commission. At this point, AT&T and Global Illinois executed an "interim ICA," pending resolution of disputed interconnection questions in a Section 252 arbitration proceeding. The interim ICA, dated January 28, 2002, provided that Global Illinois would be required to establish one POI in each LATA. Pursuant to the interim ICA, Global Illinois was responsible for the "cost and placement" of necessary fiber optic facilities on its side of the POI. The interim ICA further provided that, once the parties entered into a permanent ICA arrived at pursuant to arbitration, Global Illinois would have the option of: (a) establishing multiple POIs, on a facility lease basis at special access rates; or (b) establishing a single POI, on the terms and conditions set forth in the Network Interconnection Methods ("NIM") Appendix to the ICA ultimately arrived at through arbitration.

2. In May, 2002, AT&T and Global executed an amendment to the interim ICA. Pursuant to the interim ICA Amendment, Global Illinois was authorized, within 60 days of Commission approval of a permanent ICA, to seek a determination from the Commission regarding: (a) whether Global Illinois could interconnect with AT&T at a Global Illinois facility; (b) in the event the Commission determined that Global Illinois could <u>not</u> interconnect with AT&T at a Global Illinois facility, the location at which Global Illinois could interconnect with AT&T; and (c) what, if anything, Global Illinois owed AT&T for use of AT&T fiber optic facilities while the location of the POI was being resolved.

3. Global Illinois and AT&T duly submitted their interconnection disputes to arbitration by the Commission. On May 14, 2002, the Commission entered its Arbitration Decision in that proceeding. Arbitration Decision, Docket 01-0786 (May 14, 2002) (hereafter "Arbitration Decision"). In the Arbitration Decision, the Commission determined that "Global [Illinois] should be permitted to establish one POI per LATA at any technically feasible location in [AT&T]'s network[,]" and that "[t]he language for Appendix NIM, Section 1.11 of the Interconnection Agreement should reflect this agreement." The Commission further determined that "[AT&T] and Global [Illinois] should be responsible both financially and physically on its side of the single POI." *Id*. The Commission directed AT&T and Global Illinois to file an ICA consistent with the Arbitration Decision for approval by the Commission.

4. AT&T and Global Illinois executed such an ICA and presented it to the Commission for approval on May 6, 2003. And, on July 23, 2003, the Commission approved the ICA. Order, Docket 03-0296 (July 23, 2003).

The ICA, Staff observes, contains two sections of importance to this case. The first is titled General Terms and Conditions, and it provides that:

> "Point of Interconnection" (POI) is a physical location at which the Parties' networks meet for the purpose of

> establishing Interconnection. POIs include a number of different technologies and technical interfaces based on the Parties' mutual agreement shall have the definition ascribed to "meet point" at 47 C.F.R. Sec. 51.5. ICA, General Terms and Conditions, ¶1.1.95

A second relevant section, Staff notes to be Appendix NIM, and it provides that: "Fiber Meet Interconnection between [AT&T] and [Global Illinois] can occur at any technically feasible point that GNAPs designates." ICA, Appendix NIM, ¶3.4.1. It further provides that: "[w]hen the Parties agree to interconnect their networks pursuant to the Fiber Meet, a single point-to-point linear chain SONET system must be utilized. Only Interconnection trunking shall be provisioned over this jointly provided facility[.]" *Id*., ¶3.4.2. Appendix NIM goes into further detail, providing four general network designs for interconnection, *Id*., ¶¶ 3.4.7.1 – 3.4.7.4, and further stating that the parties agree to use the interconnection designs set forth in Paragraph 3.4.7.4. *Id*., ¶3.4.7. Paragraph 3.4.7.4 provides for the following design for interconnection:

> Both [Global Illinois] and [AT&T] each provide two fibers between their locations to terminate at each parties' FOT. This design may only be considered where existing fibers are available and there is a mutual benefit to both Parties. [AT&T] will provide the fibers associated with the working side of the system. [Global Illinois] will provide the fibers associated with the protection side of the system. The Parties will work cooperatively to terminate each other's fiber in order to provision this joint point-to-point linear chain SONET system. Both Parties will work cooperatively to determine the appropriate technical handoff for purposes of demarcation and fault isolation. **The POI will be defined as being at the [AT&T] location**. ICA, Appendix NIM, ¶3.4.7.4 (emphasis added)

In Staff's opinion, this provision compels a decision in favor of AT&T's position that the POI is located in the building housing AT&T's La Grange tandem switch. If the ICA language is clear – and in this case, Staff maintains that the ICA language is very clear – there is no reason to consider arguments regarding where the parties intended the POI to be, or where one of the parties thought the POI was. The POI is where the ICA provides that it is: at the AT&T location in La Grange.

This is easily confirmed, Staff contends, by reviewing the language that describes the other, rejected, interconnection designs. The first of these, and described in Paragraph 3.4.7.1, calls for interconnection at a mutually agreeable mid-point between the AT&T location in La Grange, and the Global Illinois location in Oak Brook. ICA, Appendix NIM, ¶3.4.7.4.1. In this configuration, "[t]he POI will be at the fiber termination panel at the midpoint meet." *Id*. So too, the second rejected design, described in Paragraph 3.4.7.2, provides that Global Illinois will provide fiber optic cable up to the last entrance manhole at the AT&T tandem or end office switch. ICA, Appendix NIM, ¶3.4.7.4.3. In this configuration, the POI is the manhole. *Id.* In the third

rejected design, while the design is somewhat different, the POI is the same – the last entrance manhole. ICA, Appendix NIM, ¶3.4.7.4.3.

In Staff's view, for the POI to be located where Global Illinois contends it to be – that is to say, located somewhere on, or generally on, the SONET facility running from the AT&T location in La Grange to the Global Illinois location in Oak Brook – the parties would have had to adopt the first design, described in Paragraph 3.4.7.1, which locates the POI at a mutually agreeable meet point on the SONET facility between the two locations. Yet, Staff observes, the parties specifically and explicitly agreed to use another design – the one in which the POI was at the AT&T location. Accordingly, Staff avers, Global Illinois' position finds no support whatever in the ICA itself.

In addition, Staff notes that Global Illinois' position finds no support in law or regulation. FCC rules establish general requirements regarding interconnection issues relating to the POI. In this regard, Staff sets out FCC Rule 51.305(a)(2), which speaks to carrier interconnection as occurring at a technically feasible point "within the incumbent LEC's network" 47 C.F.R. §51.305(a)(2).

While AT&T might, through negotiations, agree to locate the POI elsewhere, Staff asserts that it clearly has not done so here, and it is clearly not required by either FCC rule or the Arbitration Order to do so. This is fatal to Global Illinois' argument. Staff observes Global Illinois to contend that it did not agree to locate the POI at the La Grange tandem, but rather "intend[ed]" it to be the SONET facility. Global Illinois 2 at 2. Assuming the parties failed to agree regarding the location of the POI (and the terms of the ICA demonstrate conclusively to Staff that the parties *did* agree) Global Illinois' could not, consistent with law, suggest that the POI was anywhere not on the AT&T network.

Staff points out that the federal rules require the POI, all else equal, to be on the ILEC's network. 47 C.F.R. §51.305(a)(2). Just the same, Staff observes, the Commission found that the POI must be located on the AT&T network. Arbitration Decision at 8. Global Illinois, however, makes no case for the SONET facility being on AT&T's network; indeed, it appears to be Global Illinois' contention that the SONET facility was "jointly provisioned". In other words, Staff sees Global Illinois to contend that the POI was located somewhere that it could not be, as a matter of law, without AT&T specifically agreeing to it, which AT&T clearly never did.

Staff does not mean to suggest that Global Illinois might not have negotiated with AT&T to locate the POI somewhere other than on the AT&T network. And, Global Illinois might have sought a determination from the Commission that the POI should be located somewhere other than on the AT&T network; as noted, the terms of the interim ICA clearly permitted – indeed, arguably directed – Global Illinois to seek such a determination. But, Global Illinois did not avail itself of either of these avenues. Instead, Global Illinois appears to have proceeded on the assumption that the POI was somewhere other than where the ICA provided, with no basis for doing so other than its own view of the matter.

From its review and analysis, Staff concludes that the POI is located, by the plain terms of the ICA, at AT&T's facility in La Grange, precisely as AT&T contends. In Staff's

view, Global Illinois' position is contrary to the ICA, the applicable law, and the Commission's Arbitration Order, and appears to be based entirely on self-interest.

D. Commission Analysis and Conclusion.

The Commission finds that there is a fundamental disagreement regarding the location of the point of interconnection between the two carriers' networks. AT&T contends that it is located in the building housing AT&T's La Grange tandem switch, located at 20 S. Ashland Ave., La Grange, Illinois. Global Illinois initially states that it chose to connect to the Illinois Bell network by connecting at a single point – the Illinois Bell tandem switch in La Grange, but it later contends that the POI is in fact a SONET ring constructed between the AT&T La Grange tandem, and the Global Illinois Point of Presence ("POP") located in Oak Brook, Illinois. Global maintains that it never intended the POI to be located at the La Grange tandem.

In the Commission's analysis of this issue, we examined the functions of the POI, in both practical and legal terms, and we further consider the sequence of interconnection agreements between the parties. Staff has provided important work to guide our review in these respects.

AT&T Illinois directs our attention to the provisions of the parties ICA. More specifically, AT&T Illinois points out, Appendix Network Interconnection Methods ("NIM") of the ICA, which governs the manner in which the parties interconnect their networks, states that, "[t]here are four basic Fiber Meet design options" for interconnecting the parties' networks, and "[t]he Parties agree to use the options set forth in 3.4.7.4." ICA, App. NIM, § 3.4.7. This Section 3.4.7.4, in turn, describes "Design Four," whereby each party is supposed to provide fiber and "[t]he POI will be defined as being at the SBC-13STATE location." This showing makes clear to the Commission that Global agreed in the final, binding ICA, submitted to and approved by the Commission, that the POI would be at AT&T Illinois' location, not at Global's facility.

On the other hand, we observe Global Illinois to maintain that its Oak Brook facility is the POI, and that since each party must bear the cost of facilities on its side of the POI, Global cannot be required to pay for the DS3s it ordered to connect its Oak Brook facility to AT&T Illinois' LaGrange tandem office.

Global's position ignores the whole of the parties' ICA which states to the contrary. Instead, Global focuses exclusively, and draws our attention to its premise that, in the arbitration decision entered in Docket No. 01-0786, the Commission ruled that Global was entitled to establish the POI at its Oak Brook facility. Yet, a reasonable reading of the language on which Global relies and taken in full context shows Global's assertion is simply not borne out. We see not one word in this Commission's arbitration decision that discusses whether the POI may be located at Global's Oak Brook facility - simply because that particular issue was not at hand.

Both Staff and AT&T Illinois explain the nature of the POI issue resolved by the Commission in the arbitration. They show that a very different matter was considered at the arbitration. It concerned whether, if Global designated a single POI rather than multiple POIs, AT&T Illinois should be permitted to impose transport charges for what AT&T Illinois' proposed ICA language called "long haul calls," or calls to or from AT&T

Illinois end-users located in a different "tandem sector area" and a different local exchange than the POI. In the portion of the arbitration decision relied on by Global in its brief, the Commission rejected AT&T Illinois' proposal, and held that whether Global designates one POI or multiple POIs, each party must bear its own costs on its side of the POI(s). In the end, the Arbitration Decision says nothing about where the POI is – *i.e.*, at AT&T Illinois' LaGrange location or at Global's facility in Oak Brook. Thus, Global's arguments in this regard are rejected and the Commission relies on the parties' ICA.

The parties' ICA confirms that the Commission did not rule that Global may select its Oak Brook facility as the POI. The final, conforming ICA, submitted to the Commission after the arbitration decision, does not identify Global's Oak Brook facility as the POI, but specifies, with certainty, that the POI is at AT&T Illinois' location, *i.e.*, its LaGrange tandem office.

The record shows that Global agreed, in the Interim Agreement Amendment, that if it wanted to interconnect with SBC at Global NAPs facility, *i.e.*, at Global's Oak Brook facility, it would seek a determination by the Illinois Commission within 60 days of approval of the Global/SBC interconnection agreement. This same agreement sets out that, if Global did not seek and obtain such a ruling "within 12 months of the date of interconnection," then Global would either: (1) provide two fibers of its own from the Global NAPs location to the SBC location; or, (2) pay AT&T Illinois for the facilities in place. It cannot be disputed that Global did not seek a ruling from this Commission as to whether Global may interconnect at Global's Oak Brook facility rather than the LaGrange location, and, AT&T Illinois' assertion that Global has never provided any fibers of its own between those locations is unrefuted. This brings us to the determination that Global must pay AT&T Illinois for the facilities in place. If the arrangements were not to Global's liking, it has only itself to blame.

Global argues that it is "technically feasible" to interconnect at Global's facility in Oak Brook, and given that AT&T owns the Fiber Distribution Frame that is the termination of the SONET in the Oak Brook facility, Global should be allowed to designate the POI to be that Fiber Distribution Frame." We consider Global's arguments to be both untimely and irrelevant to this proceeding. As Staff has correctly put the matter into perspective, the ICA makes clear that the parties did *not* designate Global's Oak Brook location as the POI. Rather, in the ICA, Global agreed that the POI would be at AT&T Illinois' location, and the parties also agreed how they would resolve whether Global could instead designate its Oak Brook location as the POI. We agree with Staff's analysis that, whether interconnecting at Global's Oak Brook facility is theoretically "feasible" today (or yesterday) is wholly beside the point, because the binding ICA says the POI is at AT&T Illinois' location, and Global never sought a ruling from the Commission as to whether it could instead designate its Oak Brook facility as the POI.

The Commission is not persuaded by Global's assertion that AT&T Illinois inappropriately "forced" Global to submit ASRs requesting trunks, when Global only wanted to submit a "trunk forecast," and, for all this time, Global believes that all it needs to provide to AT&T Illinois is an estimate of the traffic it expects to send to AT&T Illinois. The record shows that Global agreed in the parties' ICA that ASRs would be

used to establish trunks, and further agreed that, for two-way trunks, Global would bear the responsibility to submit ASRs. Appendix ITR § 8.1 states that "[o]rders between the Parties to establish, add, change or disconnect trunks shall be processed by using an Access Service Request (ASR)," and "CLEC will have administrative control for the purpose of issuing ASR's on two-way trunk groups." Global's position here, that all it needs to provide to AT&T Illinois is an estimate of the traffic and its contention that AT&T Illinois inappropriately "forced" it to submit ASRs for trunks is unsustainable in light of the language of the parties' ICA.

Even more important to the dispute, AT&T Illinois tells this Commission that Global's trunk ASRs have nothing to do with the DS3 charges AT&T Illinois is seeking to collect. AT&T Illinois explains that it is not claiming it is owed charges for trunks, and has never claimed any such thing. It further explains that "trunks" are individual call paths that connect two switches and AT&T Illinois does not charge for trunks. To fulfill its responsibility to provide the transport facilities between those locations, Global submitted ASRs for high capacity DS3s (wholly apart from its ASRs for trunks), and AT&T Illinois provisioned the requested DS3s. At bottom, AT&T Illinois is seeking to recover the tariffed charges for these DS3s, and not any charges for trunks. In light of this clarification, the Commission seriously questions whether Global is so ill-informed about the nature of its business or whether it is so desperate to avoid making payments that it needs to distract the Commission from the real issues at hand.

We are not persuaded by Global's assertion of an inability to include its ESP exception on the ASRs. This claim is flatly contradicted by the objective record evidence of a screen shot of a blank ASR which shows that the longest field entry in the ASR is the "Remarks" field at the bottom, where Global would be free to provide whatever information it chose. According to AT&T Illinois, Global did not indicate in the Remarks field of any of the ASRs it filled out and submitted that it would be delivering purported "ESP" traffic. This shows that despite full opportunity to do what Global says it wanted to do, Global took no action. This is nothing short of unreasonable.

Global continues with the argument that some of the ASRs resulted in charges under the state tariff and others in charges under the federal tariff as showing the absurdity of using ASRs, because, according to Global, all of the traffic passed on by Global to Illinois Bell is ESP traffic. We see no proof of this claim. In any event, we agree with AT&T Illinois' assertion that, whether Global's traffic was all ESP, ISP, local, or any other sort of traffic is simply beside the point in the situation where Global is required to pay for the facilities connecting its Oak Brook facility to the POI in LaGrange. The record indicates that the only concern was which tariff (state or federal) the DS3s would be provided and charged under, and we further note that Global itself made that choice. As a result, AT&T Illinois billed some of the DS3s under its intrastate tariff and others under its interstate tariff because on some of its ASRs Global indicated the "percent interstate use" was zero, and on other DS3 ASRs it indicated that the DS3s would be used for interstate traffic. In the end, the Commission sees no merit to Global's contentions in the matter.

As an overall theme, we observe Global to express confusion about the ASRs. The Commission is surprised by such a charge. The record shows that these ASRs are standard industry forms that have been used for many years across the industry and

were created by an industry group (not AT&T Illinois), which publishes a comprehensive guide available to subscribing carriers to use when populating ASRs. The record also shows that Global witness Noack (who was personally responsible for the submission of Global's ASRs), has decades of experience working with ASRs. To the extent that Mr. Noack was truly confused about the ASRs for DS3s or did not agree with them, he need not have submitted them to AT&T Illinois. Yet, the record works against that notion because it shows that in its ASRs for the intrastate DS3s, Global tried to get the best rate available and chose a long-term commitment with a lower rate. This objective evidence effectively demonstrates to this Commission that Global knew well that AT&T Illinois would be billing Global for the DS3s it ordered. In these premises, Global's self-serving claim of confusion has no merit and does nothing to absolve Global of liability.

As Staff has well observed, Global Illinois assiduously avoids any mention of the specific terms and conditions of the ICA. It relies instead, and exclusively, on the Arbitration Decision. In the end, it provides no analysis of the events different from Staff or AT&T Illinois, and makes no challenge to the constructions of the Arbitration Decision, or the ICA language that Staff and AT&T Illinois discussed. This is assuredly for the reason that Global cannot legitimately or meaningfully dispute what has been provided on this record.

Contrary to Global's exceptions, the record clearly shows, as Staff points out, that after the Arbitration decision, and as a result of the Arbitration position, Global entered into an ICA which designates the POI as being at the AT&T location. While the LaGrange tandem might not be mentioned by name, we find through the detailed analysis provided by Staff and AT&T Illinois that such was agreed to by the parties, and Global took no action subsequent to change that designation. It is the ICA that controls on the issue and we are not persuaded by any of Global's attempts to undermine the ICA's authority and its finality in the designation of the POI.

By virtue of the specific terms of the Commission-approved ICA between the parties, we find that the POI is located at the AT&T tandem in La Grange. Identifying the location of the POI at the AT&T La Grange tandem resolves the ordering of facilities question in favor of AT&T as well. Consistent with our prior announcements in this area and as the Commission determined in the *Arbitration Decision* at 8, each party is responsible for the cost of providing facilities and transporting traffic on its own side of the POI. This means that Global Illinois is financially responsible for the facilities necessary to transport traffic to the AT&T La Grange tandem and responsible for the facilities that it ordered from AT&T to accomplish this.

The Commission thus finds Global's failure to pay as billed by AT&T Illinois for the cost of the interconnection facilities to be a violation of the ICA. Accordingly, AT&T's complaint is granted as to its claims for failure to make such payments, and judgment is entered for complainant AT&T and against respondent Global Illinois with respect to such claims. AT&T will submit a bill or invoice to Global Illinois, file a copy of same in this docket and provide a copy thereof to Commission Staff, within five days of the date of entry of this Order. We direct that Global make payments currently owing and with due haste, i.e., within 5 business days of receiving AT&T's bill or invoice for the services at issue.

II. WHETHER GLOBAL'S FAILURE TO PAY FOR TRANSITING IS A VIOLATION OF THE PARTIES' ICA.

The record explains "transiting" to be a service whereby a carrier agrees to act as a middleman. For this service, a transit provider accepts traffic from one carrier, transports the traffic across its network, and delivers it to a third-party carrier. The traffic thus, only "transits" the transit provider's network; it does not originate or terminate on the transit provider's network. By way of example, if Global has traffic from one of its affiliates' customers that is supposed to be delivered to an end-user customer of Comcast in Illinois, but Global is not directly interconnected with Comcast, Global can deliver the traffic to AT&T Illinois instead, and AT&T Illinois will "transit" the traffic across its network and deliver it to Comcast on Global's behalf.

A. AT&T Initial Position.

Under the parties' ICA, AT&T Illinois states, it agreed to provide transiting service to Global, and Global agreed to pay for that service. In particular, section 4.3 of Appendix Interconnection Trunking Requirements provides that, at least until certain events occur, "SBC-13 STATE will provide CLEC with transit service." And, section 9.1 of Appendix Reciprocal Compensation states that "[a] Transiting rate element applies to all MOUs ("minutes-of-use") between a Party and third party networks that transits an SBC-13STATE network," and the "rates that SBC-13STATE shall charge for transiting CLEC traffic are outlined in Appendix Pricing." See AT&T Ex. 1.0 at 27. According to AT&T Illinois' account, Appendix Pricing of the ICA in turn sets forth three rate elements and rates for transiting service.

AT&T Illinois contends that Global has for years taken advantage of the transiting service offered by AT&T Illinois, delivering to AT&T Illinois significant amounts of traffic that were not destined to AT&T Illinois' end-user customers, but that instead were destined to end-users of third-party carriers in Illinois. In accordance with the ICA, AT&T Illinois says, it transited these calls on behalf of Global, and billed Global for transiting pursuant to the terms of the ICA. Global, however, has refused to pay AT&T Illinois for transiting.

AT&T Illinois asks the Commission to hold Global to its contractual commitment, find that Global has breached the ICA by failing to pay for transiting, and order Global to pay AT&T Illinois all overdue charges for transiting service.

<u>The FCC's ISP Remand Order Does Not Relieve Global Of Its Obligations.</u>

AT&T Illinois points out that, under the provisions of the parties' ICA, and in order to contest a bill from AT&T Illinois, Global was required to notify AT&T Illinois of the precise nature of the dispute. See ICA, General Terms and Conditions §10.4. Global purported to do so, according to AT&T Illinois, by submitting dispute forms asserting that AT&T Illinois was seeking to assess charges on "ISP-bound traffic," and claiming that "compensation for this traffic is defined solely and exclusively by the Federal Communications Commission" and "any additional charges upon such traffic violate Federal law." AT&T Ex. 6.0 at 14. But, AT&T Illinois challenges the validity of that assertion.

In AT&T Illinois' view, Global's reliance on the FCC's rules for ISP-bound traffic, promulgated in the ISP Remand Order, lacks merit because that order only applies to dial-up Internet access traffic delivered to an Internet service provider (ISP) (*i.e.*, "ISP-bound" traffic originating with the end-users of AT&T Illinois and delivered to Global) which, AT&T Illinois maintains, is not the type of traffic at issue here. Instead, Global delivered the traffic to AT&T Illinois, and AT&T Illinois transited the traffic to other local exchange carriers in Illinois for termination to their end-users.

In the *ISP Remand Order*, AT&T Illinois observes the FCC to have explained that its order addresses intercarrier compensation for "the delivery of calls from one LEC's [local exchange carrier's] end-user customer to an ISP in the same local calling area that is served by a competing LEC," whereby "(a) consumer with access to a standard phone line is able to communicate with the Internet." *Id.* ¶¶ 13, 18. See also *id.* ¶¶ 1, 10 (describing the Internet access at issue in the order). Here, the traffic that AT&T Illinois transited for Global was not "dial-up Internet" traffic that AT&T Illinois or Global delivered to an ISP, allowing end-users to surf the Internet. Rather, Global delivered the calls to AT&T Illinois, and AT&T Illinois transited those calls to other local exchange carriers, for termination to those latter carriers' end-users. AT&T Ex. 1.0 at 28; AT&T Ex. 5.0 at 3-4. In other words, AT&T Illinois asserts, this is "end-user-bound" traffic – and not ISP-bound traffic. Thus, AT&T Illinois asserts, Global can find no refuge in the FCC's ISP Remand Order.

The FCC's "ESP Exemption" Does Not Relieve Global Of Its Obligation To Pay For Transiting Service.

AT&T Illinois notes Global to have more recently suggested that it has no obligation to pay for transiting because the traffic it sends AT&T Illinois is "enhanced service provider" ("ESP") traffic or, more specifically, voice over Internet protocol ("VoIP") traffic.

As an initial matter, AT&T Illinois suggests that Global should be precluded from contesting AT&T Illinois' charges on any basis other than its oft-repeated assertion that the FCC's ISP Remand Order prohibits the charges in question. Pursuant to the parties' ICA, AT&T Illinois points out, in order to dispute any of the charges it was billed by AT&T Illinois, Global must specifically identify the basis for its dispute to permit AT&T Illinois to investigate the merits of the dispute. ICA, General Terms and Conditions § 10.4. In this instance, AT&T Illinois observes that Global disputed AT&T Illinois' bills for transiting (and all other charges) on the singular ground that the traffic is "ISP-bound traffic, and not on the grounds that an "ESP exemption" prohibited the charges. Thus, AT&T Illinois argues, Global should not be allowed to raise any new claims now.

In any event, AT&T Illinois asserts, Global's suggestion that an "ESP exemption" relieves it of its contractual obligation to pay for transiting falls flat, for at least three independent reasons: (1) the parties' ICA requires Global to pay for transiting irrespective of any "ESP exemption"; (2) the "ESP exemption" has nothing to do with transiting charges or with one carrier's delivery of traffic to another carrier; and (3) in any event, Global has failed to prove that the traffic it delivered to AT&T Illinois was "ESP" or "VoIP" traffic.

Global is bound by its ICA irrespective of any "ESP exemption."

The "ESP exemption" is irrelevant here, AT&T Illinois argues, because Global is bound by the ICA. As a matter of federal law, it explains, interconnection agreements are the binding statement of the parties' rights and obligations. In the Telecommunications Act of 1996 ("1996 Act"), AT&T Illinois explains, Congress mandated that carriers implement the duties imposed by the Act through interconnection agreements. See 47 U.S.C. § 251(b)-(c); AT&T *Corp. v. Iowa Utils. Board,* 525 U.S. 366, 372 (1999). Highly significant, AT&T Illinois asserts, is that the 1996 Act requires carriers to negotiate their agreements in the first instance, and permits carriers to enter into a "binding agreement . . . without regard to the standards" set forth in § 251. 47 U.S.C. § 251(c)(1), § 252(a)(1).

According to AT&T Illinois, Global agreed to pay for transiting in its' ICA with AT&T Illinois, and under section 252 of the 1996 Act, this Commission's approval of the ICA "made it finally binding on the private parties involved," and, to this end, "(f)ederal law thus gives [AT&T Illinois] the right to insist that it be held only to the terms of the interconnection agreement to which it actually agreed." *Verizon Maryland, Inc. v. RCN Telecom Servs*., 232 F. Supp. 2d 539, 551, 555 (D. Md. 2002). Having agreed in the ICA to pay for transiting, AT&T Illinois maintains that Global cannot now claim that some FCC ESP exemption "effectively changes the terms of" its ICA. *Pacific Bell*, 325 F.3d at 1127. AT&T Illinois points out that Global agreed to pay for transiting in the ICA, never sought arbitration of that issue, and cannot now avoid its contractual commitment.

The "ESP exemption" only exempts ESPs from certain originating interstate access charges, and not CLECs from other types of charges.

AT&T Illinois explains that the "ESP exemption" that was created by the FCC, only exempts ESPs from originating interstate access charges for traffic between the ESP and its customers. It does not exempt a carrier like Global from transiting charges, AT&T Illinois asserts, and thus does not help Global in this dispute even if its traffic were "ESP" or "VoIP" traffic.

In 1983, AT&T Illinois explains, and in connection with the break-up of "Ma Bell," the FCC created the "access charge" regime to govern payments from long distance (or "interexchange") carriers to local telephone companies (local exchange carriers, or LECs), for access to and use of the latter's networks. For example, when an end-user places a long distance call from New York to Illinois, the call would originate on the network of the end-user's local carrier in New York, would be handed-off to the end-user's long distance carrier for transport across the country, and would then be handed-off to the appropriate local carrier in Illinois for delivery to the Illinois end-user being called. Under the access charge regime, the long distance carrier pays the New York LEC "originating access" charges for originating the call on its network, and pays the Illinois LEC "terminating access" charges for terminating the call on its network.

At the same time, the FCC considered whether ESPs should be required to pay originating interstate access charges. An ESP, just like a long distance carrier, may access its customer by using the local network of the customer's local carrier (LEC),

and, like a long distance carrier, after receiving the call from the LEC, the ESP may then transport that traffic outside of the local exchange. For example, an Internet service provider providing dial-up Internet access (which is one species of an ESP) uses the local networks of LECs to connect to its customers; that is, customers place calls to the ISP from their computer modems, and those calls originate on and travel over the local network of the customer's local exchange carrier. After receiving the calls, the ISP may transport the calls to distant points just like a long distance carrier; in particular, the ISP transports the calls to servers located around the country or the world, allowing customers to surf the Internet.

As a policy matter, the FCC concluded in 1983 that ESPs should not have to pay access charges for using LEC networks in this manner, but instead should be treated by the LEC like business customer end-users (not like residential customer end-users or like long distance carriers). That is, for example, just as an auto mechanic or dentist's office purchases local business service in order to receive calls from customers, and is not required to pay additional access charges on every call received, so too the FCC concluded that ESPs should be permitted to purchase local business service in order to receive calls from their customers, without paying additional access charges, even though the ESP may engage in additional transport of the call. In the ISP Remand Order at ¶ 11, AT&T Illinois notes the FCC to have explained that:

> In the [1983] MTS/WATS Market Structure Order, the Commission acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, however, the Commission has exempted ESPs from the payment of certain interstate access charges. Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN).
>
> …
>
> This policy is known as the ESP exemption. *Id*. at n.18.

This "ESP exemption," AT&T Illinois asserts, plainly has no application here. AT&T Illinois is not seeking to recover interstate access charges from an ESP. It is seeking to recover transiting charges from a carrier, Global, which has admitted that it does not claim to be an ESP. Tr. at 195, 201. This transiting service was very valuable to Global, AT&T Illinois contends, because it allowed Global to avoid directly interconnecting with multiple carriers in Illinois to deliver traffic destined to the end-users of those carriers. Instead, AT&T Illinois agreed that Global could deliver this traffic to AT&T Illinois, and that AT&T Illinois would use its local network to transport or "transit" the traffic to the appropriate carriers in Illinois. Nothing in the "ESP exemption" requires AT&T Illinois to provide this service to Global for free, AT&T Illinois argues, and nothing in the "ESP exemption" allows Global to renege on its contractual commitment to pay for this transiting service.

Global has failed to prove that the traffic it delivered AT&T Illinois was "ESP" or "VoIP" traffic.

AT&T claims that Global has failed to prove that any (much less all) of the traffic it sent to AT&T Illinois was "ESP" or "VoIP" traffic. While Global's witnesses asserted that its customers are "enhanced service providers" or "VoIP" carriers, no competent evidence was introduced to support these bald assertions. The only objective evidence on point, AT&T Illinois asserts, are the actual traffic studies conducted by AT&T Illinois, and these prove that significant portions of the traffic at issue were plain old long distance telephone calls.

In his direct testimony, AT&T Illinois notes, Global witness Noack had simply asserted that "(a)ll of Global's outbound traffic comes to it from ESPs." Global Ex. 2.0 at 5. At the hearing, however, Mr. Noack admitted that Global has no way of telling what format (e.g., Internet protocol (IP) or traditional time-division-multiplexing (TDM)) the calls it carries originate in. Tr. at 141. Similarly, AT&T Illinois observes Mr. Noack to have admitted that Global does not know whether the traffic it carries originates in the ordinary manner with an end-user picking up a phone and dialing 1, an area code, and a telephone number. Tr. at 142.

Maintaining that Global had every opportunity (in the two years since AT&T Illinois first filed suit) to procure reliable evidence to show that its traffic is "ESP" or "VoIP" traffic, AT&T Illinois points out that Global only introduced in the proceeding two letters that were attached to the testimony of its witness Scheltema. In AT&T Illinois' view, these letters prove nothing.

First, AT&T Illinois claims, Global has not demonstrated that any significant portion of the traffic it delivered to AT&T Illinois came from these two customers, as opposed to other customers of Global's affiliates. Second, AT&T Illinois contends, the letters are unreliable and should be given no weight. AT&T Illinois explains that the letters in question are unsworn statements from third parties and are plainly hearsay. Neither the parties nor the Commission, AT&T Illinois points out, were able to test the veracity of the authors' statements at the hearing or by any other means. Moreover, there is no indication that the letters are reliable. Among other things, they were plainly solicited by Global NAPs and prepared specifically for Global NAPs' use in litigation, and there is no indication of the basis for the statements in the letters. Further, AT&T Illinois argues, it is not clear whether the authors of these letters have any personal knowledge regarding the nature of the traffic those customers carry or, more particularly, the nature of the traffic they delivered to Global's affiliates for termination in Illinois.

According to AT&T Illinois, the only real evidence submitted in this proceeding regarding the nature of Global's traffic conclusively proves that it is not VoIP traffic. As AT&T Illinois' witness James Hamiter explained, for one day each month between January 2005 and April 2008, AT&T Illinois tested the traffic that Global delivered, by matching the terminating records of Global's traffic to the originating records for regular "1+" long distance calls (of at least 3 minutes in duration) that originated from end users on AT&T's public switched telephone network ("PSTN") in twelve states. AT&T Ex. 2.1 at 12-15. AT&T Illinois found that on each of the tested days, Global sent AT&T Illinois

hundreds or thousands of such calls – *i.e.*, calls that were not IP-originated VoIP at all, but were ordinary "1+" long distance calls that originated on the network of one of the AT&T ILECs that collectively operate in twelve states. *Id.* at Sch. JWH-9.

This data conclusively proves that Global sent AT&T Illinois many thousands of calls that were not VoIP, because they originated as ordinary long distance calls on AT&T's PSTN. At the same time, this data does not show that any calls were VoIP. AT&T Illinois' test was limited to records readily available to AT&T Illinois, i.e., the originating records of AT&T Illinois' ILEC affiliates in the twelve state geographic areas where those ILEC affiliates operate. AT&T Illinois could not test calls coming from other geographic areas or even from other ILECs within those twelve states, and it further limited its population of tested calls to calls that were three minutes or more in length. See *id.* at 13-15. But given the fact that, within this limited sampling, on each day that was tested Global delivered hundreds or thousands of ordinary long distance calls that were longer than three minutes and originated from AT&T's PSTN in these twelve states, then it stands to reason that Global delivered many thousands more calls of less than three minutes in length that originated on AT&T's PSTN in the twelve states. It also stands to reason that Global also delivered many thousands more calls that originated on the PSTN of other incumbent carriers, both in the areas of the twelve states that AT&T examined that are served by other incumbents (e.g., Verizon's ILEC territory in Illinois) and in the other 39 states.

In short, AT&T Illinois asserts, there is no evidence that a single call delivered by Global to AT&T Illinois was VoIP, and the only testing undertaken conclusively establishes that Global delivered many thousands of calls to AT&T Illinois that were not VoIP.

On the whole of the record, AT&T Illinois asks the Commission to find that Global has breached the ICA by failing to pay AT&T Illinois for transiting, and order Global to pay AT&T Illinois all amounts owed for such service under the parties' ICA.

B. Global Response.

Global Has Not Violated The Parties' ICA By Failing To Pay For Transiting.

Global rejects the claim that it should be liable for transiting charges being assessed by AT&T. It maintains that the charges that AT&T is attempting to assess against Global are for traffic that is interstate in nature. According to Global, that traffic is both ISP bound, and thus subject to the FCC's rules for ISP bound traffic. So too, it is ESP traffic using VoIP technology and thus subject to the FCC's ESP exemption. Global asserts that such traffic is not subject to AT&T's intrastate tariffs and instead is subject to charges that the FCC must determine. On this basis, and in Global's view, AT&T cannot assess intrastate charges for that traffic and this Commission has no jurisdiction to determine if those charges, i.e., interstate charges, are owed by Global.

Global notes AT&T Illinois to admit that Global brought the issue of the ISP bound nature of its traffic to AT&T Illinois' attention when it first received bills from AT&T for transiting traffic. As such, Global contends, it has acted in good faith throughout the time of dispute and this proceeding.

Global claims, generally, that its business plan evolved as Global found itself transmitting traffic from its ESP customers using VoIP technology. Quite simply, Global maintains, dial-up internet access became antiquated in light of other broadband alternatives. To be sure, Global observes AT&T Illinois tries to dismiss this latter justification as being brought too late for consideration in this proceeding. Global points out, however, that it did raise the issue from the early onset of this proceeding when it filed the direct testimony of James Scheltema. Simply because Global's initial dispute letters from several years ago did not discuss the ESP exemption is not, Global argues, good reason for ignoring the fact that it has brought the matter in timely fashion to this Commission.

Global sees AT&T to assert that the parties' interconnection agreement overrides any FCC orders on charges for transiting traffic, but Global disagrees with this proposition on grounds that, if the traffic in question is itself interstate in nature, the parties cannot override that status by calling it something else in their interconnection agreement. According to Global, it is necessary to remember that this is an interconnection agreement that sets the terms and conditions for the parties to connect their networks and exchange local traffic. By definition, Global argues, it is not intended as a means of establishing terms and conditions for exchange of interstate traffic. In any event, Global asserts, such a direct override of federal law, even if it were possible, should be done explicitly and clearly. Yet, Global claims that there is nothing set out by AT&T Illinois other than the general transiting language in the Interconnection Agreement.

Global observes AT&T to argue that the ESP exemption is not an exemption from transiting charges and does not apply to CLECs like Global. According to AT&T, the ESP exemption "only exempts ESPs from originating interstate access charges for traffic between the ESP and its customers." (AT&T Brief at 14). While Global agrees that AT&T has correctly recited the history of the ESP exemption and its application in the assessment of interstate access charges, it maintains that none of the FCC orders addressing the ESP exemption prohibit the application of that exemption to transiting traffic.

Global believes that the rationale behind the ESP exemption should be applied in this situation. , Global observes, that, in the ISP Remand Order, the FCC's 1983 MTS/WATS Market Structure Order "had acknowledged that ESPs were among a variety of users of LEC interstate access services." It is necessary, Global asserts, to start with the first step, i.e., if ESP traffic is interstate traffic, one need not reach the next step of determining if intrastate transiting charges should apply. That latter question is preordained by the answer to the first question. Here, Global claims, the traffic is ESP traffic. Thus, transiting charges cannot apply. According to Global, if the ESP exemption was applicable to ESPs but not to carriers, then the traffic could never terminate without it being subject to the very charges it is exempt from. AT&T would achieve through the back door what the FCC has explicitly prohibited it from doing. Thus, Global maintains, the traffic is exempt from the source to its destination, regardless of the nature of the entity that carries the traffic.

Global notes AT&T to argue that the traffic of Global is not VoIP on the claim that neither of Global's two witnesses Scheltema and Noack could definitively state that all

of Global's traffic was VoIP. While it is true, Global admits, that it cannot prove that each and every one of its calls was VoIP, Global witness Noack provided unrebutted testimony that Global markets its services to a handful of ESPs and that the nature of its traffic is indeed VoIP. He stated that, "All of Global's outbound traffic comes to it from ESPs, not individual customers making voice calls or third party carriers transmitting voice calls." Global Exhibit 2.0 at 5. Similarly, Global points out that its witness Scheltema testified that Global does not provide dial tone to end users in Illinois and instead provides outbound services for Global's ESP customers and inbound services for Internet Service Providers.

Global further responds to the evidence of AT&T's traffic studies showing that significant portions of the traffic at issue were plain old long distance telephone calls. Assuming arguendo that AT&T is correct in this assertion, Global maintains that "significant portions" is not good enough in this context. According to Global, the FCC had long ago decided that lines carrying both intrastate and interstate traffic are subject to the FCC's jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction. In the *MTS/WATs* Market Structure Order, the FCC found that special access lines carrying more than a de minimis amount of interstate traffic should be assigned interstate jurisdiction. Global explains that the FCC defined de minimis as when the interstate traffic is less than ten percent of the total traffic of the special access line. The AT&T evidence, Global argues, proves only that some of Global's traffic may not be VoIP, not that less than ten percent of Global's traffic is VoIP. Moreover, Global contends that its VoIP traffic is nomadic, making it impossible to determine from an NXX code the origination point of a call. In Global's view, therefore, AT&T's traffic studies are useless for present purposes.

Reviewing the same information provided in this proceeding, Global notes that the New York Commission determined that Global's traffic is nomadic VoIP traffic, and not, as AT&T claims here, local traffic or 1+ traffic from a fixed location. Global also points to the Nebraska Federal District Court's determination that it is impossible to make an accurate breakdown of intra versus interstate jurisdiction of VoIP traffic, when the Court rejected the application of access charges to VoIP. *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 2008 WL 584078, (D. Neb.2008)

Global asks this Commission to determine that Global's traffic is VoIP and that it is not subject to the charges claimed by AT&T.

C. Commission Analysis and Conclusion.

As a preliminary matter, the Commission finds itself concerned about what occurred during the parties' dispute process. We are made to understand that the parties' ICA, much like the statutory process for perfecting an appeal of Commission's orders, essentially requires an exhaustion of remedies. In other words, to properly dispute its billing charges with AT&T Illinois, Global was required to specifically identify the basis for its dispute. This was critical to giving AT&T Illinois fair notice as it begins an investigation of the matter.

Global does not deny that the ICA requires such an undertaking in the agreed dispute process. Nor does Global deny that the claim it articulated during the dispute process was the assertion of an ISP exemption only. Yet, Global professes to have

acted timely and in good faith because it identified new grounds with pre-filed testimony in this proceeding. This assertion flatly fails and raises questions about Global's business acumen, if not its credibility. The Commission will consider the substantive arguments and evidence in reliance on the fact that AT&T Illinois has pushed forward with a position on the merits.

The situation does not get better. Global's initial brief barely mentions, much less discusses the transiting charges. Global simply asserts that the FCC does not allow any of the charges that AT&T Illinois is attempting to recover in this proceeding, including special access, local, intrastate toll, and transiting charges, because its traffic is "enhanced services traffic." We question Global's failure to be upfront on the issue in a way that would both inform the Commission and also permit AT&T Illinois to respond to its arguments directly.

With respect to what Global ultimately does put forward on the merits, we are not persuaded. While Global represents that the FCC does not allow transiting charges on enhanced services traffic, it does not cite to a single FCC order to that effect. For its part, AT&T Illinois contends that none exists and further shows that none of the FCC orders that Global does cite addresses transiting charges, much less hold that enhanced services traffic is exempt from transiting charges.

Global claims that it has an exemption and does not need to pay AT&T Illinois anything for transiting. The Commission is not convinced in these premises. The "exemption" on which Global would rely, is the FCC's "enhanced service provider" exemption, which exempts ESPs*,* and *only* ESPs*,* from certain access charges. We are never shown, however, what this exemption has to do with transiting charges. Nor is it even established that Global is an ESP. The ISP Remand Order explains the "ESP exemption" to be a long-standing FCC policy that affords one class of entities using interstate access, *i.e.*, information service providers, the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXCs. This allows ESPs to choose to pay local business rates, rather than the tariffed interstate access charges that other users of interstate access are required to pay. These access charges are payments "made to local exchange carriers (LECs) to originate and terminate long-distance calls" on the LEC's local network.

The transiting charges AT&T Illinois seeks to collect are not access charges, because these are not charges for originating or terminating traffic on AT&T Illinois' network. On this record, AT&T Illinois explains that the transiting charges are for traffic that AT&T Illinois agreed to transport across its network and hand-off to third party carriers on Global's behalf. Nothing in the FCC's rules, AT&T Illinois asserts, exempts enhanced services traffic (or any other communications traffic) from such charges, even if some "access charge" exemption applied here. While Global claims to the contrary that the FCC has been clear with respect to information services being entitled to exemption from both access "and other charges," it provides us with no legal authority in support of that assertion. As such, the Commission rejects Global's assertions.

We find it telling that the FCC has itself confirmed that it has not promulgated rules governing compensation for transit service. Moreover, AT&T Illinois informs that

this is why the FCC has called for comments on transit service in its *Intercarrier Compensation NPRM.* In its Notice, the FCC explained that transiting involves the exchange of traffic by "two carriers that are not directly interconnected . . . by routing the traffic through an intermediary carrier's network," and "[t]ypically, the intermediary carrier is an incumbent LEC." *Intercarrier Compensation NPRM,* ¶ 120. The FCC also stated that it "has not had occasion to determine whether carriers have a duty to provide transit service," and "the Commission's reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider." *Id.* So too, the FCC acknowledged that "many incumbent LECs . . . currently provide transit service pursuant to interconnection agreements," and "[t]he intermediary (transiting) carrier . . . charges a fee for use of its facilities." *Id.* These introductory pronouncements by the FCC identify the situation in the parties' ICA: AT&T Illinois agreed to provide, and did provide, transiting service to Global for a fee, and Global agreed to pay that fee to AT&T Illinois for providing transiting service. This only shows that the FCC is beginning to assess transiting matters, and, thus, the issues are not settled in any way that favors Global.

That said, the Commission turns its attention to the real authority that governs this dispute. What Global fails to recognize, to its detriment, is that this dispute is governed by the parties' ICA. The 1996 Act states that the interconnection agreement can have terms that differ from the standards established pursuant to Section 251(b) and (c). This allows parties to negotiate transport and termination charges. *See Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1151 (9th Cir. 2006) (stating that parties who enter into a voluntary interconnection agreement or reach an agreement with the assistance of a private arbitrator do not need to conform to the requirements of Section 252 (b) and (c))); *Pacific Bell v. Pac West Telecomm, Inc.,* 325 F.3d 1114, 1127 (9th Cir. 2003) (holding that the 1996 Act mandates that interconnection agreements have the binding force of law); *Verizon Md., Inc. v. RCN Telecom Servs.*, 248 F. Supp. 2d 468, 480 (N.D. MD 2003) (federal law does not define the entire contractual relationship between parties to interconnection agreements; local exchange carriers may enter into agreements without regard to the 1996 Act's §252(a)(1)) (remanded for reconsideration on other grounds). Moreover, "every relevant FCC ruling, order, decision, and regulation has permitted ILECs and CLECs . . . to agree to pay reciprocal compensation for ISP-bound traffic -- regardless whether the FCC categorized such traffic as local, nonlocal, or "information access" service. *Verizon Md., Inc. v. RCN Telecom Servs.*, 248 F. Supp. 2d at 485-86 (remanded for reconsideration on other grounds). Though not binding upon us, the United States 4th Circuit Court of Appeals' statement on a similar issue is informative

> An interconnection agreement is likewise a 'creation of federal law,' specifically, the 1996 Act. As one court has said, interconnection agreements are the 'tools through which [the 1996 Act] is [implemented and] enforced."[*cite omitted*] . . . Interconnection agreements are thus the vehicles chosen by Congress to implement the duties imposed in §251. They are, in short, federally mandated agreements, and "to the extent [an agreement] imposes a duty consistent with the Act …that duty is a federal requirement." *Central Airlines*, 372 U.S. at 695. The contractual duty at issue in

> this case - to pay reciprocal compensation "for transport and termination of Local Traffic" - is a duty imposed by the 1996 Act.
>
> *Verizon Md., Inc. v. Global Naps*, 377 F.3d 355, 364-65 (4th Cir. 2004).

These are the standards that inform our decision.

Global takes exception to the determination that it owes AT&T Illinois for transiting charges. Its arguments on exceptions, however, are not persuasive and are well-responded to by AT&T. In particular, we agree with the concept expressed by AT&T that, even if the traffic in question were shown to be interstate, nothing prevents parties to an ICA from agreeing to provisions that address traffic that is "interstate in nature" and nothing relieves parties from their contractual obligations merely because traffic is "interstate in nature." Our view on an ICA's authority in these respects, and AT&T's assertions in these premises, are each firmly grounded on the FCC's own pronouncements.

The courts have held that interconnection agreements have the force of law. ICAs are binding on the parties, and it is not for this Commission, in a complaint case, to change an ICA's language, terms or conditions. Our role is to interpret and enforce the parties' agreements as written. In the case at hand, the Commission finds that Global agreed in the ICA to pay for transiting service. By not paying AT&T Illinois as agreed, Global is in violation of the parties ICA. Accordingly, AT&T's complaint is granted as to its claims for failure to make such payments, and judgment is entered for complainant AT&T and against respondent Global Illinois with respect to such claims. AT&T will submit a bill or invoice to Global Illinois, file a copy in this docket and provide a copy thereof to Commission Staff, all within five days of the date of entry of this Order. Under our enforcement authority, we direct Global to pay the amounts owing to AT&T Illinois current to the date of this order and within five (5) days of receiving AT&T's bill or invoice for the services at issue.

III. WHETHER GLOBAL'S FAILURE TO PAY RECIPROCAL COMPENSATION AND INTRASTATE ACCESS CHARGES VIOLATES THE PARTIES' ICA AND AT&T ILLINOIS' INTRASTATE TARIFF

AT&T Illinois explains that it "transited" only that portion of the traffic delivered by Global that was destined to the end-users of third party carriers in Illinois. For the portion of the traffic delivered by Global that was destined to end-users of AT&T Illinois, AT&T Illinois routed the traffic across its network and delivered (or "terminated") it to the appropriate end-users. It then billed Global the reciprocal compensation and intrastate access charges required under the ICA and AT&T Illinois' intrastate tariff for terminating this traffic for Global. According to AT&T Illinois, Global has refused to pay a single penny of these charges for the same reasons it has refused to pay a single penny for transiting

A. AT&T Illinois' Position

Pursuant to the ICA, AT&T Illinois points out, Global ordered the establishment of combined local/intraLATA toll trunks (which are reserved for transmitting local and intraLATA toll traffic) to deliver traffic to AT&T Illinois. Global then began delivering

traffic to AT&T Illinois over those trunks and, pursuant to its agreement under the ICA, AT&T Illinois terminated the traffic on its network and billed Global the rates specified by the agreement – local reciprocal compensation charges for local traffic and tariffed intrastate access charges for intraLATA toll traffic. Global, however, has refused to pay any of these charges, in violation of the ICA and the state tariff.

The parties entered into the ICA in order to exchange traffic. In Appendix NIM (Network Interconnection Methods), the parties agreed how they would physically interconnect their networks using high-capacity facilities. *See* Appendix NIM § 1.1 ("This Appendix describes the physical architecture for Interconnection of the Parties' facilities . . . ."). To actually exchange calls, however, the parties must establish "trunks" over those facilities. A trunk, AT&T Illinois explains, is a dedicated call path capable of carrying an individual call and because a single trunk can carry only one call at a time, multiple trunks are established together in arrangements known as trunk groups.

In Appendix ITR (Interconnection Trunking Requirements), AT&T Illinois points out, the parties specified the six different types of trunks that could be established between the parties to exchange traffic. In particular, in section 5.1 of Appendix ITR, the parties agreed: "The following trunk groups *shall* be used to exchange various types of traffic between CLEC and SBC-13STATE": (1) "Local and IntraLATA Interconnection Trunk Group(s)" (§ 5.3); (2) "InterLATA (Meet Point) Trunk Group" (§ 5.4); (3) "800/(8YY) Traffic" trunk groups (§ 5.5); (4) "E911 Trunk Group" (§ 5.6); (5) "High Volume Call In (HVCI)/Mass Calling (Choke) Trunk Group" (§ 5.7); and (6) "Operator Services/Directory Assistance Trunk Group(s)" (§ 5.8). The parties further specified that local and intraLATA toll traffic may be combined on the "Local and IntraLATA Interconnection Trunk Groups" (§§ 5.3.1.1, 5.3.2.1), while "InterLATA traffic shall be transported . . . over a 'meet point' trunk group separate from local and IntraLATA toll traffic" (§ 5.4.1).

AT&T Illinois points out that the parties' ICA also specifies the compensation that Global must pay AT&T Illinois for terminating local and intraLATA toll traffic. In particular, section 5 of Appendix Reciprocal Compensation states that Global will pay AT&T Illinois reciprocal compensation for the termination of local calls: "The Parties agree to compensate each other for the termination of Local Calls . . . on a 'bifurcated' basis, meaning assessing an initial Call Set Up charge on a per Message basis, and then assessing a separate Call Duration charge on a per Minute of Use (MOU) basis." ICA, App. Recipt. Comp. § 5.2. Appendix Reciprocal Compensation describes the particular rate elements that apply, and incorporates the rates "shown in Appendix Pricing." *Id.* §§ 5.2 – 5.4. The same appendix addresses compensation for intraLATA toll traffic, stating that "[f]or intrastate intraLATA toll traffic, compensation for termination of intercompany traffic will be at terminating access rates . . . as set forth in each Party's Intrastate Access Service Tariff." *Id.* § 13.1.

Upon agreeing to these provisions, Global proceeded to order combined local/intraLATA toll trunks from AT&T Illinois. Appendix ITR § 8.1 states that "[o]rders between the Parties to establish, add, change or disconnect trunks shall be processed by using an Access Service Request (ASR)," and "CLEC will have administrative control for the purpose of issuing ASR's on two-way trunk groups" (*i.e.*, trunk groups, like those used by AT&T Illinois, that are capable of carrying traffic in both directions). As Ms.

Harlen explained, Global submitted 74 separate ASRs to AT&T Illinois requesting the establishment of combined local/intraLATA toll trunks, representing to AT&T Illinois that it would be delivering local and intraLATA toll traffic over those trunks. AT&T Ex. 4.0 (Harlen Direct) at 2-5.

After the local/intraLATA toll trunks were established, Global began delivering local and intraLATA toll traffic over those trunks, AT&T Illinois terminated the traffic to its end-users, and AT&T Illinois billed Global the termination charges specified by the ICA for the local and intraLATA toll traffic. As Mr. Hamiter explained, carriers traditionally use the Calling Party Number ("CPN") (*i.e.*, the telephone number of the person placing the call) to determine whether a call is local, intraLATA toll, or interLATA in nature. AT&T Ex. 2.0 at 12. In accordance with this standard practice, the parties' ICA contemplated that the parties would use CPN to determine the appropriate compensation for terminating traffic. Among other things, in Appendix Reciprocal Compensation, the parties agreed to pass "the original and true Calling Party Number (CPN)" where available (§ 4.2), agreed that if less than 90% of a party's calls had CPN then "all calls passed without CPN will be billed as intraLATA switched access" (§ 4.4), and agreed that if more than 90% of the calls had CPN, then "all calls exchanged without CPN information will be billed as either Local Traffic or intraLATA Toll Traffic in direct proportion to the minutes of use (MOU) of calls exchanged with CPN information" (*id.*).

Mr. Cole explained how AT&T Illinois used the CPN of the traffic delivered by Global to identify which traffic was local and which was intraLATA toll, and to bill the traffic accordingly. AT&T Illinois' switches recorded information for every call delivered by Global, including the CPN. AT&T Ex. 5.0 at 8-9. To determine which calls were local and which calls were intraLATA toll, AT&T Illinois' systems compared the telephone numbers of the calling and called parties. *Id.* This information was then used to automatically generate bills to Global for reciprocal compensation (for the local calls) and intrastate access charges (for the intraLATA toll calls). *Id.*

Global has refused to pay AT&T Illinois' bills for local reciprocal compensation and intrastate access charges. As explained above, under the ICA, Global is obligated to pay AT&T Illinois local reciprocal compensation charges for the local traffic and intrastate access charges at the tariffed rate for the intraLATA toll traffic that Global delivered over the combined local/intraLATA toll trunks and that AT&T Illinois terminated for Global. Moreover, AT&T Illinois contends, Global's excuses for refusing to pay these charges are baseless. As a result, AT&T Illinois requests that the Commission hold Global to its contractual commitment, find that Global has breached the ICA by failing to pay AT&T Illinois local reciprocal compensation and intrastate access charges for the traffic terminated by AT&T Illinois, and order Global to pay AT&T Illinois all amounts owed for such services.

The FCC's ISP Remand Order Does Not Exempt Global From These Charges.

When it disputed AT&T Illinois' bills pursuant to the ICA's dispute procedures, Global asserted that the traffic it sent to AT&T Illinois was ISP-bound traffic such that the FCC's *ISP Remand Order* governed intercarrier compensation, and trumped the compensation provisions of the parties' ICA. According to AT&T Illinois, however, the

traffic at issue here is not ISP-bound traffic addressed by the *ISP Remand Order*. The traffic handed off by Global and which AT&T Illinois then terminated to its own end-users was not ISP-bound traffic, but was AT&T Illinois-end-user-bound traffic that was terminated on AT&T Illinois' local network.

The FCC's "ESP Exemption" Does Not Exempt Global From These Charges.

AT&T Illinois observes that Global also suggests that it is exempt from local reciprocal compensation and intrastate access charges because of the FCC's "ESP exemption." According to AT&T Illinois, Global is wrong for a number of reasons.

First, AT&T Illinois argues, Global should be precluded from contesting AT&T Illinois' charges on the ground that the "ESP exemption" applies, because the only ground Global asserted when it disputed AT&T Illinois' bills was that the traffic was "ISP-bound."

Second, it contends that Global's reliance on the "ESP exemption" is misplaced because this dispute is governed by the parties' ICA, and Global cannot avoid its contractual obligations by pointing to any FCC exemption.

Third, AT&T Illinois maintains that Global has failed to prove that any, much less all, of the traffic it delivered to AT&T Illinois for termination to AT&T Illinois end-users was "ESP" or "VoIP" traffic. To the contrary, AT&T argues, Global's Director of Network Operations disclaimed any real knowledge of the nature of the traffic coming from Global's purported "ESP" customers. Tr. 141, 142.

Fourth, AT&T points out that the "ESP exemption" does not exempt a CLEC from reciprocal compensation and intraLATA toll charges. The "ESP exemption" exempts an *ESP* from certain *originating interstate access* charges for traffic between the ESP and its customers. AT&T Illinois is not seeking to recover any interstate access charges from any ESP for any traffic between the ESP and its customers. Rather, AT&T Illinois is seeking to recover local reciprocal compensation and intrastate access charges from Global, which does not purport to be an ESP, for termination of traffic that originated from end-user customers of other carriers (the calling party) and is terminated by AT&T Illinois to its own end-user customers (the called party).

AT&T Illinois maintains that the "ESP exemption" is irrelevant here, because that exemption applies only to the connection between an ESP and the ESP's customers. As explained above, the purpose of the exemption is to exempt ESPs from originating interstate access charges that would otherwise apply to the ESP when it uses the public switched telephone network (PSTN) to connect to and receive calls from the ESP's customers. As the FCC explained in the *ISP Remand Order* (¶ 11), under the exemption ESPs are "entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network." But the charges at issue here have nothing to do with the ESPs' connections to their customers, which occur before Global even receives the traffic from its alleged "ESP" customers. Rather, the local reciprocal compensation and intrastate access charges AT&T Illinois seeks to collect are for terminating traffic on the PSTN to *AT&T Illinois'* end users.

Indeed, AT&T Illinois points out, other state commissions and at least one federal court have rejected attempts (including by Global's affiliates) to avoid charges under the

"ESP exemption." For example, the California Public Utilities Commission ("CPUC") has recognized that the "ESP exemption" has no application to traffic *from* an ESP that is terminated on the PSTN. In the Pacific Bell/MCI arbitration, the parties asked the CPUC to arbitrate appropriate ICA language governing the exchange of and compensation for such traffic. The CPUC concluded that "not all information or enhanced services qualify for the ESP exemption." *Pacific Bell/MCI Decision* at 127-29. Rather, the CPUC agreed with AT&T California that the exemption "applies only to an ESP's use of the PSTN as a link between the ESP and its subscribers," and thus concluded that the exemption does not apply to "IP-PSTN" traffic, or traffic *from* an ESP in the Internet protocol (IP) format that is then terminated on the PSTN like any other call. *Id.* at 127.

According to AT&T Illinois, the CPUC recently reached the same conclusion in the *Cox v. Global NAPs California* case, involving the same type of traffic (*i.e.*, traffic from the purported "ESP" customers of Global California's affiliates that Global California delivered to Cox in California for termination on the PSTN). The CPUC held that Global California was obligated, pursuant to an ICA, to pay Cox intrastate access charges for Cox's termination of the intraLATA toll traffic at issue, and rejected Global California's argument that it should be exempt from such intrastate access charges. *Cox/Global California Decision* at 5. On appeal, the federal district court rejected Global California's request for a preliminary injunction, agreeing with the CPUC that state commissions may "enforc[e] ICAs that require the payment of interconnection charges on VoIP calls that terminate on the PSTN." *Global California, Inc. v. Public Utilities Commission of the State of California*, Case No. CV 07-04801 (C.D. Cal. Aug. 28, 2007), at 13-15. The court also rejected Global California's suggestion that by enforcing the compensation provisions of an ICA, "the CPUC has impermissibly set rates for VoIP traffic," noting that "[a] state commission can enforce the terms of an ICA even if the agreement is not consistent with the federal baseline." *Id.* at 15 n.34. The court concluded that "the traffic that was the subject of the CPUC's order was not ISP-bound, but PSTN-bound, traffic," noted the FCC's statement that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations," and held that "[t]he fact that the traffic that came into Global NAPs' facility in Los Angeles was IP-originated does not necessitate a finding that it is exempt from regulation by the CPUC because that traffic was bound for, and terminated on, the PSTN." *Id.* at 16. Finally, the court concluded that Global California had not even demonstrated that it was a VoIP provider. "The fact that Global NAPs may use Internet protocols to receive traffic from its ESP customers before transmitting that traffic to an end point on the PSTN through Cox's facility does not make it a VoIP provider." *Id.* at 18.

More recently, AT&T Illinois notes, the CPUC again rejected Global California's arguments and found that Global California is liable to AT&T Illinois' affiliate, Pacific Bell, under the parties' ICA for nearly $19 million in transiting charges, local reciprocal compensation charges, and intrastate access charges for the traffic that Global California delivered to Pacific Bell and Pacific Bell then transited or terminated pursuant to the ICA. *Pacific Bell/Global California Order* at 1. The CPUC rejected Global California's argument that such charges "cannot be applied to its VoIP or IP-enabled traffic," and concluded that "intrastate access charges may apply to VoIP traffic that begins and ends as landline-based phone calls over the PSTN." *Id.* at 10. The CPUC

also concluded that, notwithstanding Global California's repeated reliance on various FCC pronouncements, the charges in question "are contractual charges arising out of the parties' interconnection agreement," and it rejected any suggestion "that IP-enabled traffic is exempt from charges under the interconnection agreement." *Id.* at 11, 15.

In short, AT&T urges the Commission to reject Global's suggestion that the "ESP exemption" permits Global to evade local reciprocal compensation and intrastate access charges for traffic terminated by AT&T Illinois on the PSTN.

In Any Event, Global Has Not Proven Its Traffic Was Enhanced Services Or IP Traffic.

Wholly apart from Global's faulty construction of the FCC's orders granting a limited exemption to ESPs from certain interstate access charges, AT&T Illinois contends that Global's arguments are fatally flawed because Global has failed to prove that the traffic it handed off to AT&T Illinois was enhanced services, IP-enabled, or VoIP traffic (terms Global uses interchangeably).

AT&T Illinois observes that Global points to the testimony of its witness Noack stating that Global does not "receive traffic from any carrier using a 1+ method" and "[a]ll of Global's outbound traffic comes to it from ESPs," and to the testimony of its other witness Scheltema stating that Global sends AT&T Illinois traffic from the "ESP customers" of Global's affiliates. But, AT&T Illinois itself points out that Global offered no competent evidence to back up those assertions. Simply because Global, Mr. Noack, and Mr. Scheltema call the customers of Global's affiliates "ESPs" proves nothing in AT&T Illinois' view. And, in light of the long track record of Global's officers and affiliates in making misrepresentations to adjudicators, the Commission should be especially hesitant to accept Global's representations at face value without concrete, objective evidence to support them.[1]

Indeed, AT&T Illinois contends, Mr. Noack's own testimony completely undermines Global's speculation that the traffic it handed off to AT&T Illinois was VoIP traffic. At the hearing, Mr. Noack conceded that Global has no way of telling what format (*e.g.*, Internet protocol (IP) or traditional time-division-multiplexing (TDM)) the calls it delivers to AT&T Illinois originate in. Tr. at 141. Similarly, Mr. Noack admitted that Global does not know whether the traffic it delivers to AT&T Illinois originates in the ordinary manner with an end-user picking up a phone and dialing 1, an area code, and a telephone number.

According to AT&T Illinois, Global's unsupported assertions also are refuted by the only *objective* evidence regarding the traffic Global handed off to AT&T Illinois: the

[1] For example, as noted in AT&T Illinois' initial brief (at 35), Global's affiliates and parent company were recently sanctioned by the federal court in Connecticut for, among other things, lying to and committing a fraud upon the court. More recently, the court refused to credit conclusory assertions in declarations submitted by Global's President and CEO and bookkeeper, where the defendants "offered no objective information to support these declarations." *See* Exhibit B at 4.

traffic studies performed by AT&T Illinois and described by Mr. Hamiter. As AT&T Illinois' explained, those studies prove that much of the traffic in question is not VoIP, but originated as ordinary long distance calls on the public switched telephone network of one of AT&T Illinois' incumbent local exchange carrier affiliates.

Global also points to a decision of the New York Public Service Commission ("NYPSC") that accepts an NYPSC Staff finding that most of the traffic that Global's affiliate, Global NAPs, Inc., delivered to TVC Albany, Inc. in New York is "nomadic VoIP." In AT&T Illinois' view, this too proves nothing. The traffic Global NAPs, Inc. delivered to TVC Albany in New York is not at issue here; rather, this proceeding concerns traffic delivered by Global to AT&T Illinois in Illinois. While the Staff of the NYPSC may have concluded that Global's affiliate Global NAPs, Inc. presented evidence that its New York traffic delivered to TVC Albany largely consists of VoIP traffic, Global has presented no evidence to *this* Commission that the traffic at issue here is "nomadic VoIP" – and indeed Global admitted here that it has no way of telling whether the traffic originated in IP format like nomadic VoIP does. Tr. at 141 .

In addition, we do not know what evidence Global NAPs, Inc. presented to the NYPSC Staff upon which the NYPSC Staff based its conclusion that the New York traffic delivered to TVC Albany appears to be nomadic VoIP. Perhaps the New York commission and staff, unaware of Global NAPs, Inc.'s track record, made the fatal mistake of accepting Global NAPs, Inc.'s representations at face value, in the absence of objective, verifiable evidence. In any event, the New York commission and staff plainly did not have the benefit of AT&T Illinois' traffic studies.

Finally, AT&T asserts, while Global or its affiliates or their customers may transmit traffic in the IP format, that is not enough to show that the traffic is "enhanced" or "information services" traffic of the sort that might entitle *an ESP* to the benefit of interstate access charge exemption. The FCC has made clear that traffic that originates like ordinary telephone service on the public switched telephone network ("PSTN"), that is merely converted to Internet Protocol for some portion of its transport, and that is then terminated on the PSTN like ordinary traffic, is not subject to any special treatment. In particular, AT&T Illinois notes, in the *IP Access Charge Order*, the FCC held that such services are "telecommunications services," not "enhanced" services, and that interexchange carriers who carry such traffic must pay applicable access charges. In that proceeding, AT&T had petitioned the FCC for a declaration that its "phone-to-phone IP telephony services" were exempt from access charges. *Id.* ¶ 1. The services at issue used IP only in the middle: an interexchange call would be "initiated in the same manner as traditional interexchange calls," once the call "reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone," and "AT&T then converts the call back from the IP format and delivers it to the called party through [the local exchange carrier's PSTN]." *Id.*

AT&T Illinois asserts that the FCC rejected the very "policy" argument that Global makes here (that IP-enabled traffic should be exempt from access charges to promote the deployment of IP networks), and held that such traffic remains subject to access charges. The FCC concluded that "IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges." *IP Access Charge Order*, ¶ 18. Moreover, "under the current

rules," the FCC squarely held, this kind of IP-enabled service "is a telecommunications service upon which interstate access charges may be assessed." *Id.* Thus, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges," and this is the case "regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport." *Id.* ¶ 19. Further, AT&T Illinois points out, the FCC expressly noted that "carriers such as competitive LECs may qualify as interexchange carriers for purposes of this rule."

AT&T Illinois observes Global to concede that it does not know whether the "IP-enabled" traffic it delivered to AT&T Illinois is true IP-originated VoIP traffic or whether it is traffic that originated and terminated on the PSTN like ordinary telephone traffic and was merely converted to the IP format somewhere along its transmission path. Tr. at 141-42. As a result, Global has failed to demonstrate that the traffic it delivered is of the sort that even implicates the ESP interstate access charge exemption, as opposed to the sort of "IP-enabled voice services" traffic that the FCC squarely held remains subject to interstate access charges.

In short, AT&T argues, Global's assertions regarding the purported "VoIP" nature of the traffic it delivered to AT&T Illinois are not only a red herring (since this case does not involve interstate access charges to ESPs), but also completely unproven.

B. Global's Response.

Global contends that one of the problems with AT&T's ordering system is that Global was treated like any other telephone company providing traditional local exchange and intrastate toll services. Yet, Global claims that its witness Noack showed that Global's traffic is not "traditional" telephony when he explained that Global is not a long distance carrier; nor does Global receive traffic from any carrier using a 1+ method, nor does Global have interconnection directly with long distance carriers. According to Noack, Global's traffic is not local exchange traffic subject to reciprocal compensation and of Global's outbound traffic comes to it from ESPs, not individual customers making voice calls or third party carriers transmitting voice calls.

According to Mr. Noack, Global can receive and terminate traffic in both asynchronous transmission ("ATM") and IP format. Although Global would prefer to deliver traffic to AT&T in IP format through an optical interconnect, Illinois Bell requires Global to translate the traffic into time division multiplexing ("TDM") to accommodate their network. Because it is using ATM for transport, Global contends it is not using feature group D trunks, for which the competitive carrier paid originating access.

Mr. Noack further explained that under TDM, each communication requires a dedicated slot on a circuit that is established when the call begins and is freed when the call ends. An IP telephony solution, on the other hand, allows telephone conversations to travel over the same IP networks used for data communications. Such packet-switched communications rely on "connectionless routing", in which calls are divided into digital packets that are dispersed among multiple circuits that travel different paths to their destinations, and are transmitted only with other packets carrying other

information. The use of IP to transmit voice enables a wide range of capabilities that are not available with traditional phone service - and to integrate various capabilities seamlessly, enabling more efficient communications.

Global's Outbound Traffic To AT&T Illinois Is ESP/VoIP.

Global contends that the nature of Global's network is important because it affects the charges it must pay AT&T. As shown by Mr. Noack above, however, Global's network is not a traditional telecommunications network. Rather Global uses an IP network to provide enhanced services and VoIP. Global witness James Scheltema, Vice President of Regulatory Affairs for Global NAPs, Inc., provided testimony on the nature of Global's traffic and he stated that Global does not provide dial tone to end users in Illinois. Instead, Global provides outbound services in Illinois for Global's customers, which are Enhanced Service Providers ("ESPs") whose outbound traffic is sent by Global to Illinois Bell. The traffic that Global sends to Illinois Bell in Illinois is solely ESP traffic, and Global's customers for its inbound traffic received from Illinois Bell are typically Internet Service Providers ("ISPs"). In summary, Global argues, *all* of Global traffic is enhanced services traffic and has thus been incorrectly characterized by Illinois Bell as special access, local, intrastate toll traffic or transit traffic. And, because Global traffic is enhanced services traffic, the allowable charges for that traffic are set by the FCC. At the current time, Global notes, the FCC does not allow any of the charges that Illinois Bell is attempting to recover in this proceeding.

Global maintains that its traffic is the same type of traffic that the New York Public Service Commission found to be Voice over Internet Protocol ("VoIP"), and more specifically, that much of the traffic was "nomadic" VoIP that is not associated with a fixed location. Mr. Scheltema explained that nomadic VoIP allows the caller to place a call from anywhere that the user has access to the Internet. As such, the NXX codes are inapplicable as a means to measure distance. NXX codes are arbitrary and only when the user is in the same geographic region as the assigned number will such measurement of distance be accurate. Thus, even if the user is assigned a geographically-correlated NXX code, his movement can and does eliminate this correlation.

Global asks the Commission to find, as did the New York Commission, that Global's traffic is VoIP that is not subject to access charges. In the alternative, Global asks the Commission to determine, as did the Florida commission, that it should defer judgment until such time as the FCC clarified many of the issues surrounding this national Internet-based traffic. In Global's view, deferring or dismissing the present proceeding is also justified by the simple circumstance that, as noted by the Nebraska Federal District Court, it is impossible to make an accurate breakdown of intra versus interstate traffic. For that reason, the Nebraska Court did not apply access charges to VoIP The difficulty of determining jurisdiction of VoIP is complicated by the fact that much VoIP, such as Global's is "nomadic". The Nebraska District Court relied upon the FCC determination in *Vonage* and the 8th Circuit's affirmance of that FCC decision to determine that it is impossible to distinguish between interstate and intrastate traffic when faced with nomadic VoIP:

> The Defendants' position is largely overcome by the Eighth Circuit Court's affirmance of the FCC Preemption Order, and the Eighth Circuit Court's observation that the basis for the FCC's preemption ruling was that, as least with interconnected VoIP service that is nomadic (including DigitalVoice), it is impossible to distinguish between interstate and intrastate calls. *See Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007), affirming *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 F.C.C. Rcd. 22,404 (Nov. 12, 2004). The Eighth Circuit Court stated, "[t]he impossibility exception, if applicable, is dispositive of the issue whether the FCC has authority to preempt state regulation of VoIP services." *Minn. Pub. Utils. Comm'n*, 483 F.3d at 578. There is not a shred of evidence that takes this case outside the "impossibility exception."

The concept of ESP traffic Global explains, is based on the Telecommunications Act of 1996 (the "1996 Act"), which describes these services as "information services." Information services are not regulated as common carrier services under Title II of the Communications Act of 1934, as amended by the 1996 Act, including the imposition of access charges. All of the services that the FCC has considered "enhanced services" are "information services." According to Global, however, "information service" is broader even than "enhanced service"; *e.g.,* under FCC precedent, enhanced services are limited to services offered over common carrier transmission facilities, and services that are not enhanced services but are offered "via telecommunications," such as live operator tele-messaging services that do not involve computer processing applications, are information services.

IP-enabled services include VoIP, Global contends and are broadly defined by the FCC to include:

> services and application relying on the Internet Protocol family. IP-enabled 'services' could include the digital communications capabilities of increasingly higher speeds ... IP-enabled 'applications' could include capabilities based in higher-level software that can be invoked by the customer...to provide functions that make use of communications services.

Further, Global notes, the FCC has concluded that "[w]hen VoIP is used, a voice communication traverses *at least a portion of* its communications path in an IP packet format using IP technology and IP networks." Since 1983 the FCC has held that interstate access charges may not be applied to traffic that is delivered from ESPs. The FCC also has exempted IP-enabled traffic delivered to the PSTN from access charges.

This FCC exemption Global argues, must be honored by this Commission. In *Vonage* the FCC preempted state jurisdiction purporting to regulate IP-PSTN transmissions of IP-enabled traffic, specifically, VoIP. The FCC found that IP-PSTN

communications, although jurisdictionally mixed, are subject to the FCC's exclusive jurisdiction, thus preempting inconsistent state regulation in order to fulfill a valid federal regulatory objective. Although the subject service In that case clearly facilitated intrastate communications, the FCC determined that state efforts to regulate the intrastate components of IP-enabled communications relating to rates would negate critical federal regulatory objectives, and would retard the growth of the Internet, including VoIP and other IP-enabled services.

Thus, Global observes, the FCC preempted state jurisdiction, not because separate federal or state regulation is literally impossible, but because dual regulation would negate or defeat FCC policies. The FCC clearly stated the federal policy justifying preemption:

> The fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation. We have acknowledged similar 'intrastate' communications capabilities in other services involving the Internet, where for regulatory purposes, treatment as an interstate service prevailed despite this 'intrastate' capability.

In so holding, Global notes, the FCC analogized to its *GTE ADSL* order in which the FCC concluded that, even if some traffic using GTE's service would, in fact, be terminated in the state where it originated, or even locally, the service nonetheless is an interstate service and is properly tariffed at the federal level.

Accordingly, the FCC III *Vonage* determined that the attempts by states to exercise jurisdiction:

> were inconsistent with the FCC's deregulatory policies, and that preemption was consistent with federal law and policies intended to promote the continued development of the Internet, broadband and interactive services. Divergent state rules ... could impede the rollout of such services that benefit consumers by providing them with more choice, competition and innovation.

In that case, Global observes, the FCC dismissed the suggestion made by many commenting in *Vonage* that the "traditional dual regulatory scheme must nevertheless apply to DigitalVoice because it is functionally similar to traditional local exchange and long distance voice service."

Rather than specifying the parameters of the services at issue, Global contends, the FCC broadly preempted state jurisdiction regarding IP-PSTN transmissions. Again, it stated that, the FCC, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities." Thus "questions regarding the regulatory obligations of providers of IP-enabled services", will be addressed by the FCC in its *IP-Enabled Services Proceeding,* in a manner fulfilling Congress' directions "to promote the

continued development of the Internet" and to "encourage the deployment" of advanced telecommunications capabilities

The FCC's preemption in *Vonage*, Global asserts, is consistent with other FCC actions regarding IP enabled services. The FCC's conclusion is consistent, for example, with the FCC's determination in the *IP-Enabled Services Proceeding* that "[p]ackets routed across a global network with multiple access points defy jurisdictional boundaries." Thus, the FCC addressed "the fact that multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states." Indeed, "the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation." Consequently, Global observes, the FCC, "not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities."

As for "questions regarding the regulatory obligations of providers of IP-enabled services", Global notes that the FCC in its *ISP Remand Order* reiterated its plan to address those issues in its *IP-Enabled Services Proceeding,* in a manner fulfilling Congress' directions "to promote the continued development of the Internet" and to "encourage the deployment" of advanced telecommunications capabilities. Thus, while the FCC may not yet have announced new regulatory policy regarding the treatment of VoIP traffic, Global observes that it has been explicit in asserting that *it,* and not others, will set that policy. Moreover, the FCC has been clear with respect to information services being entitled to exemption from access and other charges. According to Global, there are proposals to change the exemption, however, the exemption is binding federal law operating to preclude the assessment of access charges unless and until such law is changed.

The policy supporting the ESP exemption has been reviewed by the FCC on a number of occasions and has been retained each time. First, access charges on ESP-related traffic would discourage investment in and the design and operation of IP-enabled technologies, and correspondingly discourage the availability and use of such services to consumers, negating the national policy of ensuring broad penetration of IP-enabled services. Second, promoting the use of the Internet· and providing innovative communications products is why the FCC found in 1988 that "the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired." Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, *supra*, 3 FCC Red at 2633. Again in 1997, Global notes, the FCC held that:

> [m]aintaining the existing pricing structure avoids disrupting the still evolving information services industry and advances the goals of the 1996 Act 'to preserve the vibrant and competitive free market that presently exists for the Internet ... unfettered by Federal and State regulation.' Access Charge Reform Order, supra, 12 FCC Red at 16133, quoting 47 U.S.C. § 230(b) (2).

Hence, Global argues, like originating access charges, the imposition of terminating access charges on traffic that is transmitted through ESPs would be inconsistent and interfere with the goals and policies that the FCC has fostered in developing the market for alternatives to traditional telephony. Additionally, the efficient routing of IP traffic, and the development of new and innovative IP-enabled services, depends on the free flow of packets irrespective of the kind of point-to-point routing and the location of servers or switches characteristic of circuit-switched networks. The open architecture of the Internet allows data to be transmitted in a way fundamentally different from circuit-switched service. As explained by Global witness Noack, packet-switched communications are different from the traditional circuit-switched communications and enable a wide range of capabilities that are not available with traditional phone service. Global Ex. 2.0 at 6. Part of the federal interest in IP-enabled services is the extent to which innovative applications and service arrangements will develop that will allow consumers to send and receive communications from many points, some of which may be fixed end points on managed networks, and some of which even may be "nomadic" end-points on IP networks; some of which may be within a given state and some between states. By affecting a national policy, a coordinated regulatory scheme can be applied in a cohesive manner across state borders to reduce or even eliminate barriers that might otherwise be erected to thwart the free-flow of IP-enabled services.

Global notes that the FCC is revisiting the ESP exemption. Communications services have been radically altered by the advent of the Internet and the nature of Internet communications. Given increasing competition and new technologies, such as Internet and Internet-based services, the FCC has commenced a comprehensive re-examination of all currently-regulated forms of intercarrier compensation, including for IP-enabled services. (*Developing a Unified Intercarrier Compensation Scheme,* Notice of Proposed Rulemaking, CC Docket No. *01-92,16 FCC* Rcd 9610 (2001), Further Notice of Proposed Rulemaking, *FCC* 05-33 (reI. March 3, 2005) (hereinafter, the *"Intercarrier Compensation Proceeding"*)). But while the FCC is considering these issues, this Commission must abide by the current status of the law and give deference to the FCC. The resolution of issues regarding ESP, ISP-bound traffic, VoIP and the matrix of national policy, technology and legal issues informing it, are within the exclusive jurisdiction of the FCC, which is currently, actively and comprehensively reviewing these and related issues in its *IP-Enabled Services Proceeding* and *Intercarrier Compensation Proceeding.* In any event, it is unlikely that any decisions made will be applied retroactively to affect the current law imposing the mandatory exemption from access charges.

C. Staff's Position.

Global Illinois is Not Entitled to the ISP / ESP or VoIP Exemptions From Access Charges

Staff observes Global Illinois to claim that the traffic it delivers to AT&T is enhanced service provider ("ESP") or Voice over Internet Protocol ("VoIP") traffic. It further claims that the Commission has no authority to require Global Illinois to pay access charges on such traffic, which is exempt from interstate access as a result of certain FCC orders. Global Illinois is incorrect, Staff says, and the Commission should

ignore its arguments, as have the California and Georgia Commissions. Simply put, the traffic Global Illinois delivers to AT&T is not ESP / ISP traffic, and the evidence indicates that much of it cannot possibly be VoIP traffic. Further, Staff points out, the parties' ICA governs the jurisdictional nature of the traffic.

In its ESP Order, Staff observes, the FCC determined that enhanced services providers ("ESPs") were to be treated as end users rather than telecommunications carriers for purposes of assessing intercarrier access charges. ESP Order, ¶17; *see also* n.8 (By previous FCC decision, ESPs are "end users" under 47 C.F.R. §69.2(m), and thus exempt from access charges). In Staff's view, however, this exemption appears to be of no relevance to this proceeding.

Staff notes that the ESP Order is over 20 years old, and therefore, at the risk of stating the obvious, predates the enactment of the federal Telecommunications Act of 1996 by nearly eight years. This has led to changes in terminology relevant to this proceeding. The FCC has recognized that the term "enhanced service" as used prior to the advent of the Telecom Act is intended to be identical to "information service" as defined in Section 153(20) of the Act. *See, e.g.,* Memorandum Opinion and Order, n. 11, In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, FCC No. 07-212; 22 FCC Rcd 21293; 2007 FCC Lexis 9071; 43 Comm. Reg. (P & F) 377 (Rel. December 5, 2007)("Although the [FCC] used the term 'enhanced service' in [prior] decisions and the Act uses the term 'information service,' the [FCC] has determined that 'Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in [prior] proceeding[s]'")

According to Staff, what Global Illinois is asserting here is essentially an ISP exemption. In Staff's view, however, Global Illinois is not entitled to an ISP exemption at least with respect to AT&T. Global Illinois, by its own admission, is seeking to assert the ISP exemption with respect to traffic it receives from other carriers and delivers to AT&T for termination to AT&T end user customers. Staff explains, however, that the ISP exemption applies, by its terms, to traffic that is originated on the public switched network and terminated by an ISP. As the FCC stated in its *Access Charge Order*:

> We explained [in the NPRM leading to this Order] that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because **ISPs use incumbent LEC networks to receive calls from their customers.** [fn] We solicited comment on the narrow issue of whether to permit incumbent LECs to assess interstate access charges on ISPs. [fn] In the companion Notice of Inquiry (NOI), we sought comment on broader issues concerning the development of information services and Internet access. [fn]
>
> *First Report and Order*, ¶343, In the Matter of Access Charge Reform; Price Cap Performance Review for Local

> Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges, FCC No. 97-158; CC Docket No. 96-262; CC Docket No. 94-1; CC Docket No. 91-213; CC Docket No. 95-72; 12 FCC Rcd 15982; 1997 FCC Lexis 2591; 7 Comm. Reg. (P & F) 1209 (Rel. May 16, 1997) (hereafter "Access Charge Order") (footnotes omitted; emphasis added)

Staff asserts that other portions of the Access Charge Order indicate that the FCC intended the ISP exemption to apply primarily to dial-up internet access, and exclusively to calls to ISPs. The FCC noted that:

> ISPs … pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. Access Charge Order, ¶346

And, Staff observes that the FCC has reiterated this position on several occasions. In its ISP-Bound Traffic Order, the FCC described ISP-bound traffic as follows:

> An ISP is an entity that provides its customers the ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers. [fn] Under one typical arrangement, **an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area**. The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." [fn] Under this arrangement, the end user generally pays the LEC a flat monthly fee for use of the local exchange network and generally pays the ISP a flat, monthly fee for Internet access. [fn] **The ISP typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls.**

Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, ¶4, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, FCC No. 99-38; CC Docket No. 96-98; CC Docket No. 99-68; 14 FCC Rcd 3689; 1999 FCC LEXIS 821; 15 Comm. Reg. (P & F) 201 (Rel. February 26, 1999) (footnotes omitted; emphasis added)

Staff maintains that clearly none of this applies in the current matter. According to Staff, Global Illinois purports to deliver traffic to AT&T from ISPs. It cannot, therefore, claim an exemption applicable to ISP *bound* traffic, terminated to an end user that is an

ISP. In any case, the exemption runs in favor of the ISP, not Global Illinois, inasmuch as Global Illinois is, at best, not clear as to whether any Global entity is itself an ESP or ISP. Tr. at 194-95.

Staff notes that at least one state Commission has rejected Global Illinois' argument that it is entitled to an ISP exemption. The California Public Utilities Commission (hereafter "CPUC") noted that "the only relevant exemption from the access charge regime under Federal law is for *ISP-bound* traffic rather than *ISP-originated* traffic[.]" *Opinion Granting Complainant's Motion for Summary Judgment* at 5 (Decision No. 07-01-004), Cox California Telecom, LLC v. Global NAPs California, Inc., CPUC Docket No. 06-04-026 (January 11, 2007) (italics in original).

Staff questions Global Illinois' assertion that the traffic it delivers to AT&T is not subject to access charges because it is VoIP traffic. What has been offered as evidence, however, does not persuade Staff of Global's assertion that all of the traffic it delivers to AT&T is VoIP traffic. And, Staff provides reasons to support its position on the matter.

First, Staff claims that the confidential evidence offered by Global does not bear scrutiny. For its part, AT&T produced evidence showing that a considerable portion of the traffic in question - depending upon which group of three minute reports are used – unquestionably originates on the public switched network with AT&T end-user customers. AT&T Ex. 2.1 at 14. And, Staff observes, these figures appear not to include traffic originated by customers of other landline carriers. *Id.*at 13. Accordingly, in Staff's view, the statements set out in Global's confidential evidence are clearly not correct. Moreover, Staff points out, the statements in question are unsworn, the declarants have not been subjected to cross-examination, and the statements were, as the ALJ notes, prepared for purposes of this litigation. All of this, Staff charges, leaves Global's evidence markedly less reliable of where such traffic originates than the evidence presented by AT&T, which analyzes the originating and terminating point of specific individual phone calls delivered by Global Illinois to AT&T for completion, and shows that a great many of the calls in question originate on the PSTN. This is especially true, Staff observes, to the extent that the customer carriers might, by so asserting, themselves avoid obligations to pay access charges. Further, Global Illinois urges the Commission to make a substantial cognitive leap from the proposition Global suggests in the evidence, to the ultimate proposition it hopes to establish, i.e., that all traffic delivered by Global Illinois to AT&T is VoIP traffic. The Staff urges the Commission not to make such a leap.

In light of the fact that a substantial amount of the traffic handed off by Global Illinois to AT&T does indeed originate on the PSTN, Staff considers Global Illinois' assertion that it is responsible for absolutely no access charges to fail. The FCC has addressed precisely this issue in the past, in its Order, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, FCC No. 04-97, WC Docket No. 02-361 (Rel. April 21, 2004)(hereafter "AT&T VoIP Order"). There, AT&T sought a declaration that its "phone-to-phone" VoIP telephone services were exempt from access charges applicable to circuit-switched interexchange calls. AT&T VoIP Order, ¶1. The record reflected that AT&T provisioned the calls in question in the following manner:

> AT&T's specific service consists of a portion of its interexchange voice traffic routed over AT&T's Internet backbone. [fn] Customers using this service place and receive calls with the same telephones they use for all other circuit-switched calls. The initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC. [fn] Once the call gets to AT&T's network, AT&T routes it through a gateway where it is converted to IP format, then AT&T transports the call over its Internet backbone. This is the only portion of the call that differs in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network. [fn] To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks. [fn] Therefore, AT&T does not pay terminating interstate access charges on these calls.[fn]. AT&T VoIP Order, ¶11 (footnotes omitted).

The FCC rejected the notion that service thus provided was VoIP service or exempt from access charges, instead finding it to be telecommunications service. *Id*., ¶12. In support of this finding, the FCC stated as follows:

> AT&T's specific service consists of a portion of its interexchange voice traffic routed over AT&T's Internet backbone. [fn] Customers using this service place and receive calls with the same telephones they use for all other circuit-switched calls. The initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC. [fn] Once the call gets to AT&T's network, AT&T routes it through a gateway where it is converted to IP format, then AT&T transports the call over its Internet backbone. This is the only portion of the call that differs in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network. [fn] To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks. [fn] Therefore, AT&T does not pay terminating interstate access charges on these calls. [fn]. *Id.* (footnotes omitted).

The FCC determined that such services were, moreover, subject to intercarrier access charges, stating as follows:

> [W]e clarify that AT&T's specific service is subject to interstate access charges. End users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit-switched long-distance network. Customers of AT&T's specific service receive no enhanced functionality by using the service. 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. [fn] 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. [fn]. *Id.*, ¶15.

Staff can discern little or no difference between the service provided by AT&T and the service provided by Global Illinois here. As noted, the evidence points to traffic delivered by Global Illinois to AT&T originating substantially on the PSTN. The traffic undergoes a protocol conversion, is transported on Global Illinois' network, and undergoes another protocol conversion before Global Illinois delivers it to AT&T. Global Ex. 1 at 13-14. In the Staff's opinion, therefore, Global Illinois is liable for applicable access charges.

Finally, Staff notes that the FCC set out its high-level views on intercarrier compensation in its *IP-Enabled Services NPRM*, where it stated that:

> As a policy matter, we believe that any service provider that sends traffic to the [public switched telephone network] should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways. *Notice of Proposed Rulemaking*, ¶33, In the Matter of IP-Enabled Services, FCC No. 04-28; WC Docket No. 04-36; 19 FCC Rcd 4863; 2004 FCC Lexis 1252 (Rel. March 10, 2004).

Staff considers this assessment is important. Here, it notes, the FCC expresses the view that cost causers should pay the costs thus caused, regardless of the manner in which traffic is delivered. Global Illinois, and the whole family of Global entities, appear more averse to paying the costs and charges they incur and cause than any other corporate family with which Staff is familiar. Staff recommends that the Commission not countenance this, and find that Global Illinois is obliged to pay access charges with respect to at least a fair portion of the traffic in question.

D. Commission Analysis and Conclusion.

Once again, we observe Global to attempt to excuse its refusal to pay local reciprocal compensation and intrastate access charges for traffic terminated by AT&T Illinois by raising the FCC's "ESP exemption." But, AT&T Illinois and Staff inform, and correctly so, that this exemption does not shield Global from local reciprocal compensation and intrastate access charges any more than it shields Global from the transiting service charges it owes AT&T Illinois under the parties' ICA.

Once again, Global causes a mismatch of fact to law by asserting that, since 1983, the FCC has held that interstate access charges may not be applied to traffic that is delivered from ESPs. To be sure, there is no relevancy to that assertion where, as here, AT&T Illinois is not seeking recovery of any interstate access charges. In any event, it is well established on record, and to more than a reasonable degree of certainty, that the FCC's ESP exemption applies only to ESPs themselves, and is only an exemption from certain (*i.e.*, originating) "interstate access charges." As such, the ESP exemption has no application to the charges at issue here, which are all *intra*state charges (*i.e.*, local reciprocal compensation and intrastate access charges, as well as the transiting charges that we addressed above), not interstate access charges. Even more to the point, the FCC's exemption does not apply "to traffic that is delivered from ESPs." Rather, it applies *to ESPs themselves*, exempting *ESPs* from certain interstate access charges. Global is a carrier, not an ESP, and hence the ESP exemption does not apply to Global, even if the customers of Global's affiliates (and Global itself has no customers) were in fact ESPs. Thus, the ESP exemption offers Global no relief.

Global asserts that the FCC also has exempted IP-enabled traffic delivered to the PSTN from access charges, but there is nothing specific on which Global can rely upon for this proposition. Nothing on record shows the FCC to have ever held that IP-enabled traffic or enhanced service traffic delivered to the PSTN is exempt from access charges (or local reciprocal compensation or other charges). The only authority Global does cite in support of its assertion is the FCC's *Vonage Order*. In that federal Order, however, the FCC says nothing about access charges -- either on the pages Global cites or anywhere else. To be sure, the term "access charges" does not even appear in the *Vonage Order* and for good reason. The FCC was addressing its authority to preempt state regulation (including regulation of rates) for services that have both interstate and intrastate aspects in the situation where separating the service into interstate and intrastate communications is impossible or impractical. Neither that situation nor the FCC's holding in the matter have anything to do with the issues in the case. There is no proposal from AT&T Illinois or any other party to have the Commission regulate the rates charged by Vonage or any of the purported "ESP" customers of Global's affiliates for any IP-enabled or enhanced services they may provide to subscribers. AT&T Illinois here seeks compensation from another carrier – Global – for terminating traffic delivered by Global. The *Vonage Order* says nothing about compensation between carriers for terminating traffic, including IP-enabled or enhanced services traffic.

The Commission finds that Global's arguments never get to the point at hand. For its part, AT&T Illinois explains that Global's jurisdictional discussion is wholly irrelevant because neither Global nor its affiliates provide VoIP or other IP services to

subscribers, including services that enable those subscribers to make or originate calls in an IP format. In fact, Global has no customers at all, and its affiliates (Global NAPs, Inc. and Global NAPs Networks, Inc.) likewise have no end-user subscribers. Neither Global nor its affiliates provide, either through tariffs or contracts, IP-based services to subscribers that enable those subscribers to make IP-based calls. In short, we are told, Global is not Vonage, and does not offer subscribers *any* of the IP-based services that Vonage and other VoIP service providers offer.

In this regard, the Commission believes it necessary to address Global's claim that all of the traffic it delivers to AT&T Illinois is VoIP traffic. As we consider this claim, the Commission sees nothing to support Global's assertion other than documents that both Staff and AT&T Illinois have persuasively challenged on several grounds. On the record as a whole as well on the specifics of the challenges to Global's evidence, the Commission is not convinced that these documents show what Global intends for them to show. In other words, the evidence is incomplete for that proposition and raises far more questions than it answers. As such, the Commission is persuaded to give it minimal weight.

The decision of the New York PSC, on which Global relies yet again in its exceptions, proves nothing to this Commission. Global does not identify the evidence it presented to that agency. Nor do we know what standards were being applied. Further, AT&T Illinois tells us that no ICA existed between the parties before the New York PSC which itself means that the issues were of a different character. Finally, our Staff is advising us differently in these premises than was the situation in New York. In other words, while the staff of the New York commission led that authority to find that most of the traffic that Global's affiliate, i.e., Global NAPs Inc., delivered to TVC Albany, Inc., was nomadic VoIP, our own Staff has not come to the same determination on the record at hand.

It is the evidence that Global chose to present to this Commission that matters, and that unsworn evidence was brought in a form and manner incapable of being tested or reasonably evaluated. Highly questionable in and of itself, the reliability of this evidence is made ever more suspicious when considered in light of the entirety of the record.

For its part, Staff considers Global's claim of its customers being just ESPs that provide VoIP service to end users, to be in the nature of an affirmative defense. This is so, Staff observes, because Global appears to give color to all of AT&T's assertions, i.e., that it delivered traffic to AT&T over trunks which would, in the ordinary course of events, be subject to reciprocal compensation. What Global then asserts, Staff notes, is that due to a federal exemption for VoIP, it is not obligated to pay such charges. According to Staff, however, Global has not carried its burden of proof on the matter. (Staff Reply to Exceptions brief at 4). Given the record in this case, and the reasonable expectations of the showing to be made when asserting this type of affirmative matter, we must agree. Global has not brought sufficient credible evidence to support its own claims and these fail in the face of other objective evidence on record.

In the end, this Commission concludes that it is in no way intruding on FCC matters or anything else outside its jurisdiction. Our role here is only to interpret and

enforce ICAs. In this instance, AT&T Illinois asks nothing more than to have the Commission to interpret and enforce AT&T Illinois' ICA with Global, including the provisions of the ICA requiring Global to pay for certain services (such as the termination of local and intraLATA toll traffic). This is a serious matter because provisions in the ICA are not to be considered lightly either by the parties or this Commission.

What is at issue is the compensation that applies under the parties' ICA to the traffic delivered by Global to AT&T Illinois for termination, and Global does not directly challenge the ICA language that specifies how the parties are to determine what compensation applies. To be specific, the terms in the parties' ICA contemplates that the parties will use the Calling Party Numbers of the traffic, *i.e.*, the parties will look at the telephone numbers, to determine whether, for compensation purposes, the traffic is local (so that local reciprocal compensation charges apply), intraLATA toll (so that intrastate access charges apply), or interstate (so that interstate access charges apply). *See* ICA, App. Recip. Comp. §§ 4.2, 4.4. According to the telephone numbers, much of the traffic that Global handed off to AT&T Illinois and that AT&T Illinois terminated for Global was local traffic, and much was intraLATA toll traffic. Thus, under the ICA, AT&T Illinois is entitled to charge local reciprocal compensation and tariffed intrastate access charges for terminating this traffic. Global has not shown why it should be released from the terms of the parties' agreement. Notably too, Global has not challenged the particulars or amounts of AT&T Illinois actual billings. It has simply not paid them.

Further, the FCC and the courts have consistently been attentive to and upheld the sanctity of contract as written. For example, in its first ISP compensation order, the FCC concluded that ISP-bound traffic is largely interstate," yet noted that where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions. *ISP Compensation Order*, ¶ 23. ¶ 22. Similarly, upon remand from the D.C. Circuit Court, the FCC again concluded in the *ISP Remand Order* that "ISP traffic is properly classified as interstate" and is thus subject to regulation by the FCC, and the FCC proceeded to promulgate a new compensation regime for dial-up ISP traffic. *ISP Remand Order*, ¶ 53. Nevertheless, the FCC once again acknowledged that its new compensation regime for this species of enhanced services traffic "does not alter existing contractual obligations." *Id.* ¶ 82. In the opinion of *Verizon California*, 462 F.3d at 1151 (the court concluded that because "[p]arties who enter into a voluntary interconnection agreement need not conform to the requirements of the Act," (*i.e.*, 47 U.S.C. §§251(b) and (c)) where parties entered into a "private agreement imposing reciprocal compensation on ISP-bound traffic above the FCC's mandated rate caps [in the *ISP Remand Order*] . . . that agreement would be binding on the parties regardless of the *ISP Remand Order*").

On all the evidence of record and in full consideration of the arguments, the Commission finds that Global Illinois is in violation of the parties' ICA and AT&T Illinois' intrastate tariff for failing to pay reciprocal compensation and intrastate access charges. Accordingly, AT&T's complaint is granted as to its claims for failure to make such payments, and judgment is entered for complainant AT&T and against respondent Global Illinois with respect to such claims. AT&T will submit a bill to Global Illinois, file a

copy in this docket and provide a copy thereof to Commission Staff, all within five days of the date of entry of this Order. Global is directed to immediately pay AT&T Illinois the charges owing current to the date of this Order and within 5 days of receiving AT&T's bills and invoices submitted in compliance with this Order.

IV. WHETHER THE COMMISSION SHOULD REVOKE GLOBAL'S CERTIFICATES OF SERVICE AUTHORITY.

Section 13-403 of the Public Utilities Act ("Act") provides that the Commission shall approve an application for a Certificate of Interexchange Service Authority only upon a showing that the applicant "possesses sufficient technical, financial and managerial resources and abilities" to provide interexchange telecommunications service. The same standards appear in Section 13-405 of the Act where the Commission is to approve an application for a Certificate of Exchange Service Authority only upon a showing that the applicant possesses sufficient technical, financial, and managerial resources and abilities to provide local exchange telecommunications service. 220 ILCS 5/13-405. Finally, the directives and the standards for approval in Section 13-404 are the same. 220 ILCS 5/13-404.

On October 24, 2001, the Commission granted Global certificates to provide facilities-based local exchange service, resold service, and interexchange service. Order, Docket 01-0445 (Oct. 24, 2001) ("Certification Order"). This certification was granted pursuant to Sections 13-403, 13-404 and 13-405 of the Act.

A. AT&T Illinois' Position.

AT&T Illinois states that the Commission should revisit its certification of Global because it is apparent that Global no longer possesses sufficient technical, financial and managerial resources and abilities" to provide such services. 220 ILCS 5/13-403, 13-404, & 13-405. According to AT&T Illinois, it is undisputed that Global has no assets; it is undisputed that Global has no employees; it is undisputed that Global has no network or other equipment to provide communications services; and, it is undisputed that Global has no revenues or customers. On this evidence, AT&T Illinois argues, Global lacks the financial and technical resources necessary to provide services in Illinois.

AT&T asserts that Global, being devoid of assets, equipment, employees, or revenues, indicates that it has no ability to provide the services for which it obtained certification, or to provide the services described in the tariff it filed with the Commission. As importantly to AT&T Illinois, Global does not have the financial and technical resources necessary to satisfy any of its obligations as a certificated carrier in Illinois, including obligations Global incurs to other Illinois carriers with whom it exchanges traffic.

In the application process, AT&T Illinois notes, Global made a number of representations to the Commission, including representations that it intended to provide facilities-based and/or resale services in Illinois, that it utilizes its own equipment and/or facilities, that it would bill directly for its services, that it intended to hire employees, and that it proposed to offer local data and point to point services throughout the state. As it turned out, AT&T Illinois asserts, none of these representations were true. Instead,

Global was created as a mere "paper company" with no assets, income, customers, employees, or operations.

AT&T Illinois avers that Global's managers never intended for Global to have actual operations in Illinois or to stand on its own feet as a viable carrier in Illinois. Rather, the sole purpose of the creation and certification of "Global NAPs Illinois" appears to have been to defraud creditors and the Commission, and shield any revenues and assets associated with providing service in Illinois from legitimate creditors like AT&T Illinois. AT&T Illinois maintains that Global was created to obtain from this Commission certificates to provide telecommunications services in Illinois, and thereafter enter into the arrangements with other telecommunications carriers, including the ICA with AT&T Illinois, necessary to provide service in Illinois. The customers and revenues associated with these operations, however, were assigned to different Global NAPs entities, such that Global has always remained an "assetless" shell.

In addition, AT&T Illinois argues, Global has conspired to allow its affiliates to provide service in Illinois without obtaining certificates from the Commission, and hence to avoid the Commission's regulatory oversight and authority. Global's affiliate Global NAPs, Inc. ("Global NAPs") entered into contracts with customers to terminate traffic in Illinois (and other states), and later purportedly assigned those contracts to yet another affiliate, Global NAPs Networks, Inc. Further, Global NAPs purportedly owned much of the Global NAPs organization's network, but that network is now purportedly owned and operated by Global NAPs Networks, including in Illinois. AT&T Illinois points out that neither Global NAPs nor Global NAPs Networks are certificated in Illinois. This misuse of Global's certification by other, non-certificated entities to offer and provide service in Illinois, AT&T Illinois contends, further confirms Global's lack of appropriate managerial resources and abilities.

AT&T Illinois further asserts that Global violated the conditions imposed by the Commission when it granted Global's certificates. It points out that Global requested a waiver from the requirement to maintain its accounting records in accordance with the USOA, claiming that by using Generally Accepted Accounting Principles (GAAP) instead "the Commission will be able to obtain any information necessary to evaluate the Applicant's performance," and it claimed that its accounting system would "provide an equivalent portrayal of operating results and financial conditions as the USOA." AT&T Ex. 1.0 at 35 (quoting portions of Global's application papers). AT&T Illinois notes that the Commission granted this waiver request, but ordered Global to "establish books of account such that revenues from its telecommunications services . . . are segregated from the revenues derived from other business activities not regulated by the Commission," and to "maintain its accounting records in accordance with Generally Accepted Accounting Principles and at a level of detail substantially similar to the accounting system which it currently uses pursuant to its Chart of Accounts." Certification Order at 3, 5. But, AT&T Illinois contends, Global has never kept such records. AT&T Illinois says that, given that Global's representations to the Commission were false, Global stands in violation of the express conditions of its certification.

AT&T Illinois points out that the activities of Global's affiliates in other states (also owned by Ferrous Miner and operated under the direction of Ferrous Miner's sole owner, Frank Gangi), reveal a lack of appropriate managerial resources and abilities. In

this regard, AT&T Illinois informs that Global's California affiliate (Global NAPs California, Inc., or "Global California") recently lost its certification to provide service in California, and the California commission ordered other local carriers in California to cease exchanging traffic with it. That proceeding arose where Global California, like Global Illinois here, had refused to pay other carriers for terminating traffic in California, while its affiliates reaped revenues. The California commission found Global California liable to Cox Communications for about $1 million in intrastate access charges for terminating intraLATA toll traffic, and revoked Global California's certification when Global California violated the commission's order to pay Cox.

AT&T Illinois also points out that the California commission found Global California liable to AT&T California for nearly $19 million in unpaid local reciprocal compensation, transiting, and intraLATA toll charges, not including any late payment or interest charges. See Pacific Bell/Global California Order at 1. Yet Global California purported to have about $100 to its name, with no liquid assets, offices, or real or personal property in California. AT&T Ex. 1.0 (Pellerin Direct) at 47. That is, Global California was structured by its managers just like Global here – as an empty shell without any assets to pay any creditors in connection with the provision of certificated services.

A similar story recently played out in Connecticut, according to AT&T Illinois, where Southern New England Telephone ("SNET") sued the certificated Global affiliate in that state, i.e., Global NAPs, to recover more than $5 million in unpaid tariff charges. After the federal court awarded SNET a prejudgment remedy of $5.25 million, Global NAPs (the entity that Global claims here to "guarantee" Global's financial obligations) purported to have virtually no assets, virtually no network equipment, and no customers, because it had transferred its equipment and customer contracts – without compensation – to Global NAPs Networks. See AT&T Ex. 1.1 at 36-37, 48-51. When SNET attempted to pursue discovery of the financial and accounting records of Global NAPs, and its affiliated co-defendants, including the parent company Ferrous Miner, it was determined that these entities concealed and destroyed records, and lied to both SNET and the federal court. This behavior, AT&T Illinois observes, led the court to impose the ultimate sanction of a default judgment against Global NAPs and its affiliated co-defendants. *Id.* In AT&T Illinois' view, the conduct of Global NAPs, Ferrous Miner, and their affiliated co-defendants in the Connecticut case, is clear evidence of a lack of appropriate managerial resources and abilities.

AT&T Illinois notes Global to have pointed out in testimony that, in granting Global the certificates it requested, the Commission relied upon a financial guarantee provided to Global by its affiliate Global NAPs. GNAPs Ex. 1.0 at 27. In connection with that guarantee, Global provided a Global NAPs "financial statement" showing millions in revenues and more millions in assets. AT&T Ex. 1.1 at 37. AT&T Illinois contends, however, that this financial guarantee, and those revenues and assets, are illusory. According to AT&T Illinois, when Global NAPs itself became the target of creditors, all those revenues and assets were shuffled to yet other affiliates, to the point that Global NAPs has stated it is unable to pay the judgment entered against it by the Connecticut court. Thus, AT&T Illinois contends, Global NAPs' "guarantee" of Global's obligations is worth nothing.

Even before the Connecticut district court's entry of default judgment against Global NAPs and its co-defendants, AT&T Illinois points out, Global NAPs represented to a federal court in Massachusetts (in litigation with Verizon New England for Global NAPs' non-payment of more than $70 million in charges due to Verizon New England) that it lacked the financial resources to post a cash bond to cover its potential obligations to Verizon New England pending the filing of an interlocutory appeal in that case. In connection with Global NAPs' request that the Massachusetts district court not dissolve a temporary injunction previously entered against Verizon New England, pending Global NAPs' interlocutory appeal, Verizon New England had proposed that the Court require Global NAPs to post a $55 million cash bond as additional security; Global NAPs had proposed a non-cash assignment of approximately $16 million in debt that Global NAPs asserted it was owed by Verizon (but which Verizon New England pointed out was more than offset by the amounts Global NAPs owed Verizon New England).

In its filings with the Massachusetts district court, Global NAPs represented that the "combined Global entities" had "accumulated a deficit in excess of $1 million" in the first nine months of 2005. AT&T Illinois Exhibit B. The Massachusetts district court ultimately agreed with Global NAPs' request that Global NAPs only be required to assign its alleged "Verizon debt" (in the amount of $15 million) as additional security for the court not dissolving its temporary injunction pending Global NAPs' interlocutory appeal. AT&T Illinois Exhibit C. Moreover, when the district court had earlier required Global NAPs to post $1 million in security in June 2005 in connection with the court's issuance of a temporary injunction against Verizon New England (AT&T Illinois Ex. D), Global NAPs purportedly financed that security by obtaining a $1 million "loan" from its affiliate Chesapeake Investment Services, Inc. ("Chesapeake"), another wholly-owned subsidiary of Ferrous Miner, which loan Global NAPs has never repaid. In exchange for this "loan," Global NAPs purportedly gave Chesapeake a lien on all of Global NAPs' assets, whether existing or thereafter acquired, which lien Chesapeake recorded through the filing in Massachusetts of an UCC-1 financing statements. AT&T Ex. E When Global NAPs lost its interlocutory appeal, the temporary injunction was dissolved and both the $1 million cash bond and the $15 million assigned "Verizon debt" were awarded to Verizon New England. AT&T Ex. F.

Finally, AT&T asserts that Global's lack of appropriate financial, technical, and managerial resources and abilities harms Illinois carriers and consumers. By operating Global as a shell company, AT&T Illinois argues, Global's managers are attempting to enjoy a free ride on AT&T Illinois' public switched network, while shielding their revenues from creditors. While AT&T Illinois (and ultimately its customers) is thus forced to subsidize Global's "business" in Illinois, other CLECs and carriers pay for the services they receive from AT&T Illinois. As a result, AT&T Illinois contends, Global's managers obtain an unfair and inappropriate competitive advantage over other carriers, distort the market and harm competition.

For these reasons, AT&T Illinois asks the Commission to conclude that Global does not "possess sufficient technical, financial and managerial resources and abilities" to provide the services for which it is certificated (220 ILCS 5/13-403, 13-404, & 13-405), and, on this basis, revoke Global's certificates.

B. Global's Response.

As part of its effort to collect the charges that it is claiming in this proceeding, Global maintains that AT&T Illinois has raised the totally irrelevant issue of Global's fitness to continue to provide telecommunications service in Illinois. According to Global, AT&T's claim in this regard is an inappropriate collection mechanism in what is essentially a billing dispute. Global views AT&T's request to be nothing more than a strong-arm tactic to eliminate Global as a competitive threat. Contrary to AT&T's claims, Global has met and continues to meet the technical, managerial and financial requirements set forth in the Illinois Public Utilities Act.

Global considers it entirely inappropriate for the incumbent local exchange carrier to attempt to have the Commission revoke the certificate of one of its competitors in the context of a billing dispute. Global witness Scheltema asserts that this case is a business dispute over the nature of the responsibilities of each of the parties to an interconnection agreement approved by this Commission. He concludes that the remedies available to each of the parties should be those available to any dispute based on an interconnection agreement and not involve attacks on each other's certificates to provide telecommunications service. Global points out that AT&T Illinois is a competitor; the Commission should be hesitant to allow an incumbent local exchange carrier to challenge the certificates of its competitors.

Substantively, Global asserts that the facts at hand do not justify the relief requested by AT&T Illinois. It points out that none of the judgments or claims cited by AT&T Illinois and that are against Global have been directed against Global Illinois. All of those cases, Global notes, are in other states. This proceeding is the only case in Illinois that has involved Global. Global also argues that no Illinois customer has ever complained about the service they receive, or charges that they pay to Global. Moreover, Global explains that all of the complaints in other jurisdictions that have been identified by AT&T Illinois are all billing disputes raising the same issue before this Commission, i.e., the attempt by AT&T affiliates and other incumbent local exchange carriers to impose charges on Global that the FCC has determined are not allowable.

Global also takes issue with AT&T Illinois' argument that Global's corporate structure impacts its ability to maintain financial viability. It points out that there was a guarantee provided to Global Illinois, Inc. by Global NAPs Inc. and it states that: "Please be advised that Global NAPs, Inc. will guarantee all obligations of Global NAPs Illinois, Inc. until such time as Global NAPs Illinois is financially able to meet its own obligations." This guarantee was sufficient when submitted to the Commission to obtain certification, Global argues, and it remains sufficient today.

According to Global, AT&T has not shown how the Global corporate structure has affected its technical or managerial ability. Global believes it telling that there have been no complaints against Global for either technical failures or managerial failures.

Global observes Staff witness Hoagg to expresses concern with Global having provided information in its certificate proceeding about plans for financing, staffing and technology, that he finds to be no longer accurate. These concerns, Global asserts, should not lead to the revocation of Global's certificates. Global asserts that changes to its business plan, from the time it received its certificates, is hardly unique in the

telecommunications industry. According to Global, those carriers who did not alter their plans are, generally speaking, defunct, e.g., WorldCom and other CLECs. On the other hand, Global asserts, the carriers that have survived since they obtained their certificates are those that modified their business plans in the face of those changes.

Global questions whether this Commission is really interested in bringing in each of the certificated carriers in this state and determining if they are operating exactly as they said they would when they first obtained their certificates. In Global's view, the inquiry should not be whether a carrier has modified the style of its business following certification but whether a carrier is currently providing service to their customers in a manner that shows technical and managerial competence and financial viability. In Global's view, to the extent that carriers are still operating, it is a testament to their financial depth, their management, and their technical expertise.

Global witness Scheltema explains how the changes in Global's business plan have been justified and have resulted in a company that is providing service to its customers with an efficient, streamlined network. For example, he testifies that Global had a switch technician in Illinois for extended periods but found it uneconomical to have a full-time dedicated employee given the level of business it had garnered. Instead, technical and managerial assistance is provided through Global's affiliated companies, such as legal and administrative from Global NAPs, Inc. and physical and technical support through Global NAPs Networks, Inc. Mr. Scheltema also testifies that many telecommunications carriers use a corporate structure such as Global's, and that Global's corporate structure was modeled after Verizon's corporate structure. There were business considerations, Global avers, that effectively precluded it from making additional investments that would imperil its financial condition. According to Global, this course of action proved to be prudent given the number of bankruptcies in the telecommunications industry. Additionally, Global contends that technology has changed since it first obtained its certificate. This increasingly efficient technology, it argues, has reduced need for the facilities Global had first envisioned.

With respect to Staff witness Hoagg's concern about Global's lack of customers, Mr. Scheltema explained that Global's customers are enhanced service providers with nomadic VoIP customers. He testified that a particular customer of any jurisdiction may be within Illinois or an Illinois customer may be elsewhere at any given time. When viewed strictly in the light of a traditional PSTN regime, Global may or may not have customers within Illinois, Mr. Scheltema observed, but it is more likely that they serve affiliates' customers through facilities in Illinois, hence the traffic being exchanged.

In sum, Global argues, the record shows no threat to the safety of Illinois' citizens or even to the loss of their dial tone. Few, if any of the currently certified carriers in Illinois are providing service exactly as they planned when they first obtained their certificates of service. According to Global, this Commission should only consider examining the fitness of a carrier when there is evidence of failures of management, technology or financial viability. In other words, Global believes that the Commission should not be in the business of micro-managing what few competitive carriers remain. There are no management, technological or financial viability concerns here, Global avers, as this is a billing dispute and nothing more.

C. Staff's Position.

As a matter of statutory law, Staff asserts, a certificated carrier in Illinois must show and maintain sufficient technical, financial and managerial resources and abilities to provide any services it seeks to provide. In Staff's view, Global Illinois very clearly no longer possesses adequate financial or managerial resources and abilities to provide service in Illinois and these three competencies are not severable.

Financial resources and abilities

There is no dispute, Staff points out, that Global Illinois has no employees or assets other than its Certificate of Service Authority. In its Application for Certificate of Service Authority, and associated filings, Staff notes Global Illinois to have asserted that it intended to invest the sum of $100,100 in telecommunications facilities within Illinois. Global Illinois further produced a pro forma balance sheet showing $1 million in investment in Illinois. Further, Global Illinois stated in support of its Application that it intended to hire two employees in Illinois. *Id.* at 9-11. It is undisputed, Staff says, that Global Illinois currently has no assets (save, perhaps, a de minimus bank account) and no employees in Illinois or elsewhere.

Staff observes Global Illinois to claim that it nonetheless possesses financial resources and abilities sufficient to justify retention of its certificate, as a result of and through its affiliate, Global NAPS, Inc. Global Illinois also states that, since Global NAPs, Inc., possesses adequate financial resources and abilities, and guarantees Global Illinois' obligations, the Commission has no basis for concern regarding Global Illinois' financial resources and abilities. Staff urges the Commission to reject this contention.

Staff observes that the Commission granted Global Illinois a Certificate of Service Authority based, in part, upon a July 27, 2001 statement by Global NAPs, Inc. and offered as a late-filed exhibit in Docket 01-0445, setting out that, "Global NAPs, Inc. will guarantee all obligations of [Global Illinois] until such time as [Global Illinois] is financially able to meet its own obligations." Global Illinois Ex. 1.0, Sched. JS-5. By way of demonstrating that it was able to satisfy Global Illinois' obligations, Staff explains that Global NAPs submitted, along with the guarantee, a document, "prepared exclusively for the Illinois Commerce Commission," which purported to "summarize the financial performance and condition of Global NAPs, Inc. as of September 30, 2000." *Id.* According to Staff, this "confidential" financial summary purported to show a certain approximate net profit and a certain approximate net worth. In this proceeding Staff understands Global Illinois to state that, in light of the fact that it has no customers or revenues, this guarantee remains in effect. Global Illinois Ex. 1.0 at 27. As Global Illinois concedes, Staff believes it appropriate to evaluate Global Illinois' financial resources and abilities with reference to Global NAPs, Inc.'s financial resources and abilities.

Staff also observes, even if Global NAPs were financially robust, the task of assessing Global NAPs' financial position is near impossible because Global NAPs, based on its own representation, lacks a great many of the financial records necessary to show its financial state. Tr. at 237-38. Specifically, Staff points the Commission to a litigation in Connecticut, i.e., Southern New England Telephone Co. v. Global Naps, Inc., where a U.S. District Court ordered Global NAPs to produce its corporate books,

including but not limited to "'balance sheets, cash statements, registers, journals, ledgers' in 'the form in which the records are kept,' [and] … other financial documents that may have had to be gathered from third parties." AT&T Ex. 1.1, Sched. PHP-27 at 7. Staff observes that Global NAPs failed or refused to make any such production, claiming that responsive documents were in possession of third-party accountants and bookkeepers, who refused to turn the said documents over to it. *Id.* The court later found these assertions to be "lie[s] intended to delay the production of financial records[.]" *Id.*

After Global NAPs' misrepresentations were, in the court's words, "exposed", *Id.* at 5-6, Staff notes that Global NAPs claimed the records had been destroyed when a third-party bookkeeper's computer either "crashed", or was otherwise accidentally destroyed. *Id.* at 7-8. According to Staff, the Court viewed this contention as entirely false and completely risible, *Id.* at 18-22, especially since another computer's hard drive, which was subsequently recovered, proved to have been permanently erased using two data-wiping programs several days before Global NAPs would have been required to turn over the information on it. *Id.* at 9-10. The Court found that Global NAPs had destroyed financial documents in bad faith rather than produce them. *Id.* at 18, 20.

Staff asserts that, even in the light most favorable to Global NAPs and Global Illinois, Global NAPs has no present ability to make a showing regarding its current financial state. Whether one chooses to believe that the records in question were accidentally destroyed, as Global NAPs argued, or that Global NAPs intentionally destroyed them, as the U.S. District Court found, they simply do not exist. As such, Staff argues, the Commission will be without an objective basis at this point in time for determining whether Global NAPs can satisfy Global Illinois' obligations.

At hearing, Staff observes Global Illinois witness Scheltema to have reiterated the untenable and incredible position that Global NAP's financial information is not relevant to this proceeding. He did so, Staff argues, despite Global Illinois' admitted total reliance upon Global NAPs to guarantee its financial obligations. Staff offers a portion of that questioning, to wit:

> Q: So if I could just summarize your testimony, in one respect it is your testimony here today and it is Global NAPs-Illinois' position, and presumably Global NAPs, Inc.'s position, that notwithstanding the requirement that telecommunications carriers have sufficient financial, and managerial resources, and abilities, and notwithstanding the fact that Global-Illinois relies for all of its financial resources and abilities on Global NAPs, Inc. -- Global NAPs, Inc.'s financial information is not relevant to this proceeding?
>
> A: Yes, with explanation. Global NAPs currently provide service. It has zero registered complaints at the Commission and, obviously, has financial and managerial capabilities to do so over a number of years without any complaints reported. Tr. at 244

Staff says that the Commission should not countenance such an evasion. The Public Utilities Act requires that an applicant demonstrate it has sufficient financial resources and abilities as a condition for certification. Staff believes that subsequent to certification, where – as here – the financial soundness of a telecommunications provider operating in Illinois is under serious question, the Commission can and must require a demonstration of adequate financial resources and capabilities. In Staff's view, a failure to provide such demonstration is grounds for revocation of an existing certificate. Here, Global Illinois declines and/or is unable to provide such a demonstration for its purported financial guarantor – Global NAPs. This fact alone, Staff asserts, is sufficient grounds for the Commission to revoke the operating certificate currently held by Global Illinois.

Staff asserts that the record evidence shows that Global NAPs' financial state does not afford much confidence that Global NAPs has any ability to meet its own obligations, much less those of Global Illinois. For example, Staff points out, Global NAPs owes – jointly and severally – a judgment debt to the Southern New England Telephone Company in the amount of approximately $5.9 million, which, in affidavits attached to a motion to stay execution of the judgment in question, Global says that it lacks sufficient assets to obtain an appeal bond. So too, Staff notes, the Georgia Public Service Commission ("GPSC") has found Global NAPs liable for an unliquidated sum to several independent telephone companies in that state, based upon unpaid intrastate access charges which the GPSC found to be due and owing. This is not even the full extent of Global NAPs, Inc.'s liabilities, Staff observes. In Global NAPs, Inc. v. Verizon New England, 2006 U.S. Dist. Lexis 65458 (D. Mass. 2006), a U.S. District Court found Global NAPs, Inc., liable in damages to Verizon New England for an unliquidated amount, based on claims similar to those advanced by AT&T here, and determined that Verizon New England had made a showing entitling it to a prejudgment attachment of $70 million, subject to calculation of Verizon's actual damages. *Id.* at 22-24.

According to Staff, Global affiliates have fared no better. For example, Staff notes that the California Public Utilities Commission ("CPUC") has entered judgment against Global NAPs California, Inc. ("Global California") in the amount of $985,439.38 in favor of Cox California Telecom, LLC. Further, on September 22, 2008, the CPUC entered judgment against Global California in the amounts of $18,589,494.17, in favor of the Pacific Bell Telephone Company. Modified Presiding Officer's Decision Finding Global Naps California in Breach of Interconnection Agreement at 18 (Decision No. 08-29-07), *Pacific Bell Telephone Company, d/b/a AT&T California v. Global NAPs California, Inc.*, CPUC Docket No. 07-11-018 (September 22, 2008). Staff notes that Global California, like Global Illinois here, has no assets. Notably, Staff observes, the CPUC has directed other carriers to cease exchanging traffic with Global California.

While Global NAPs has not undertaken to guarantee Global California's obligations – which, as noted, now exceed $19 million in judgment debt alone, Staff believes that judgment creditors will seek recourse against Global NAPs. In California, as in Illinois, creditors with a judgment against an insolvent corporation can seek recourse against its shareholders on a "piercing the corporate veil" theory. One of the factors that courts have used to determine whether piercing the corporate veil is appropriate, i.e., whether recognition of the corporate limitation of personal liability of

shareholders would be unjust, is whether the corporation totally lacks assets or capital. Global California clearly has no assets, so that entities holding judgments against Global California may well seek recourse against its shareholders and affiliates, including Global NAPs. Further, Staff notes that the Global entities, while they allegedly supply various services and resources to one another, appear not to reduce agreements to provide such services and resources to writing. Tr. at 228-29. In any case, Global California, and by extension, the other Global affiliates, are effectively prohibited from doing business in the nation's most populous state, and that cannot give the Commission confidence in the solvency of Global NAPs' or any of the Global entities.

In sum, Staff points out, Global NAPs currently owes a great deal of money (millions of dollars in judgment debt alone) to a number of entities, and its representatives have attested to the fact that it lacks assets even sufficient to obtain an appeal bond such as would enable it to stay enforcement of one of those obligations. The Global affiliates owe millions more, and are without assets. This shows that Global NAPs is thus unable to satisfy its own obligations, much less those of Global Illinois. Since Global Illinois is likewise unable to satisfy its own obligations, Staff recommends that the Commission conclude that it lacks financial resources and abilities sufficient to hold a Certificate of Service Authority.

Managerial resources and abilities

Staff sees Global Illinois to contend that it possesses adequate managerial resources and abilities to maintain its Certificate of Service Authority. In particular, it claims to obtain such managerial and administrative resources as it requires, from its affiliates Global NAPs, Inc. and Global Realty.

As Global Illinois has no employees, Staff understands that it must necessarily rely upon its affiliates for managerial and administrative support. Again, Global Illinois relies in part on Global NAPs for such support, so that, notwithstanding Global NAPs protestations to the contrary, a review of Global NAPs' managerial abilities is warranted.

Staff notes that Global NAPs has experienced a great difficulty producing documents pursuant to court orders, obeying court orders, and making truthful representations to courts generally. Staff maintains that a more detailed review of the matter is warranted, and thus, begins its account.

Staff points out the U.S. District Court for the District of Connecticut noted in its Second Amended Ruling *Re: Plaintiff's Redacted Motion for Default Judgment, Plaintiff's Motion for Default Judgment*, and *Defendant's Motion to Modify the Court's October 19, 2007 Order* in *Southern New England Telephone Co v. Global NAPs, Inc., et al*, 3:04 – cv – 2075, 2008 U.S. Dist. Lexis 49061 (D. Conn. July 1, 2008), Global NAPs has been singularly dishonest in its dealing with that court. The court observed that, on May 5, 2006, and again on May 26, 2006, it ordered Global NAPs to produce certain financial documents to the Southern New England Telephone Company (hereafter "SNET"). AT&T Ex. 1.0, PHP-27 at 3; 2008 U.S. Dist. Lexis 49061 at 5. Global failed to do so, whereupon the court found that "Global [NAPs] had failed to 'comply to date in any acceptable manner.'" *Id.* The court ordered Global NAPs to produce an employee for deposition, and to produce the financial records in question at

the deposition. *Id.*; 2008 U.S. Dist. Lexis 49061 at 5-6. Global NAPs produced its treasurer, Richard Gangi, for this deposition. *Id.*; 2008 U.S. Dist. Lexis 49061 at 6. Mr. Gangi testified that he had brought no records with him, that he had "never seen" a financial statement for any Global entity, and that the only financial statement that was prepared was that of corporate parent Ferrous Miner. *Id.* Likewise, Mr. Gangi testified, and Global NAPs thereafter stated, that Global NAPs was unable to obtain general ledgers and tax records from third-party bookkeeping services and accountants, despite having specifically requested them. *Id.* at 4; 2008 U.S. Dist. Lexis 49061 at 7-8.

Staff points out that the court found these statements were all "patently untrue", in light of Mr. Gangi's prior identification of financial statements at a deposition in different litigation. *Id.*, and n.2. The court determined that Global NAPs's failure or refusal to produce financial documents was a "clear" violation of the court's order, in light of Mr. Gangi's "demonstrably false" statements regarding their nonexistence. *Id.* at 4; 2008 U.S. Dist. Lexis 49061 at 8. The court further found that Global NAPs had been "'anything but forthcoming in complying with the court's May 5 and 26 Orders[.]'" *Id.* The court ordered Global NAPs to produce the requested documents or face judgment by default. *Id.* at 5; 2008 U.S. Dist. Lexis 49061 at 8-9. Global still refused to produce the documents. *Id.*; 2008 U.S. Dist. Lexis 49061 at 9.

The court subsequently found that Global NAPs' assertion that third-party accountants and bookkeepers had refused to surrender financial documents "was a lie intended to delay the production of financial records in compliance with SNET's discovery requests and the court's discovery Orders." *Id.* at 5; 2008 U.S. Dist. Lexis 49061 at 9. Even after this "fiction" was exposed, however, Global NAPs refused to turn over ledgers. *Id.* at 6; 2008 U.S. Dist. Lexis 49061 at 10. As the court noted:

> On May 2, 2008, almost exactly two years after the court originally ordered Global to produce its financial records, when asked by the court why Global had failed to produce its general ledger, Global's counsel was unable to offer any credible explanation. *Id.*

Staff observes Global NAPS to have also asserted that it was unable to produce certain financial records because a computer hard drive upon which the data had been stored was "dropped" by the third-party bookkeeper using it, or otherwise "crashed," in either case destroying the records in question. *Id*. at 8; 2008 U.S. Dist. Lexis 49061 at 14. Neither this computer, nor any of its component parts were ever produced. *Id.* at 9; 2008 U.S. Dist. Lexis 49061 at 15. According to Global NAPs, a second computer used by the same third-party bookkeeper met with a similar fate; very little Global NAPs data could be discovered on it. *Id.* at 9-10; 2008 U.S. Dist. Lexis 49061 at 16. The court found, however, that this was due to the fact that the third-party bookkeeper used a utility called "Window Washer," ostensibly to destroy personal data; the utility was used in its most potent "Wash with Bleach" configuration. *Id.* at 10-11; 2008 U.S. Dist. Lexis 49061 at 17-18.

Next, Staff observes Global NAPs to have asserted that some financial documents could not be produced due to the regrettable intervening circumstance of Richard Gangi's death. *Id.* at 12; 2008 U.S. Dist. Lexis 49061 at 20. According to Global

NAPs, Mr. Gangi died intestate, and as such any Global NAPs financial documents in his possession could not, as a matter of Massachusetts probate law, be removed from his house. *Id.* The court, however, preferred to give credence to the testimony of Mr. Gangi's ex-wife, who stated that Global NAPs representatives removed all such records from Mr. Gangi's house, the niceties of Massachusetts probate law notwithstanding. *Id.* at 12-13; 2008 U.S. Dist. Lexis 49061 at 20-21.

Having previously found Global NAPs in civil contempt for failure to produce the records in question; *Id.* at 25; 2008 U.S. Dist. Lexis 49061 at 40; the court determined that holding Global NAPs in default was the appropriate sanction. *Id.* at 28; 2008 U.S. Dist. Lexis 49061 at 45. In so holding, the court found that: "[a] clear and unambiguous warning that default would enter is apparently not enough to cause Global to comply with this court's Orders." *Id.* at 27; 2008 U.S. Dist. Lexis 49061 at 44

Staff argues that the court found that Global NAPs and its representatives made "patently untrue" and "demonstrably false" statements to the court, in some cases on their oath; "lie[d] … to delay the production of financial records," and regarding other matters. The court found that Global NAPs "ha[s] demonstrated that [it] will mislead, and ha[s] misled, the court." *Id.*, n.7. The court further found "[t]he suggestion that [the Global defendants] have no complete financial records as a matter of practice, rather than because they willfully destroyed them to avoid discovery, is incredible[,]" *Id.*, n.5, and therefore found that the company destroyed records rather than turn them over as ordered.

The events described above, Staff asserts, bear on the question of Global NAPs' managerial resources and abilities in an obvious way. A federal court has found as a fact that Global NAPs either does not maintain adequate records, or – more probably - intentionally destroys them in the event that their production would expose it to legal jeopardy. It repeatedly violates court orders. Staff contends that adequately managed companies do none of these things.

More particularly, Staff observes that the Commission relies heavily upon the integrity of the entities it regulates to file accurate and truthful reports, responses to data requests, and other documents. It is apparent from the Connecticut litigation that Global NAPs lacks the willingness to do so. This alone, in Staff view, should disqualify it from holding a Certificate of Service Authority.

According to Staff, Global NAPs' unwillingness to produce financial documents is amply demonstrated by reference to this record. Here, Global NAPs claims to guarantee the obligation of Global Illinois, and urges the Commission to accept this guarantee as having some value, but nonetheless insists that its financial resources are irrelevant to the proceeding, and refuses to produce them -even upon Staff's request. Tr. at 240-41. This is not indicative of corporate management being prepared to satisfy regulatory requirements.

Global Illinois, likewise, cannot argue that it is differently managed than other Global entities. It is clear from its own testimony that Global Illinois is for all intents and purposes managed by Global NAPs. In any case, Staff notes, since Global Illinois' and Global NAPs' officers of record appear to be identical – namely, Frank Gangi – this is, at best, a distinction without a difference.

In Staff's view, Global Illinois' assertion that the Commission has received no complaints is entirely meretricious. By its own admission, Staff notes, Global Illinois has no customers. Global NAPs provides service in Illinois exclusively to carrier customers. Ignoring for the moment the fact that Global NAPs has no Certificate of Service Authority, it (or one or another of the other Global entities) provides service exclusively to other carriers, a group unlikely to complain to the Commission's Consumer Services Division. Further, Staff considers that Global's carrier customers may have no reason to complain, insofar as they are evading potential intercarrier compensation obligations as a result of Global Illinois' and Global NAPs' complete lack of inquisitiveness regarding the type and nature of traffic that the Global entities deliver to AT&T on their behalf.

Staff notes that, while Global Illinois asserts that all of the traffic it delivers to AT&T originates with VoIP providers, it concedes that it makes no attempt whatsoever to independently verify this, apparently choosing to rely upon its carrier-customers' representation that the traffic is in all cases VoIP traffic. See Tr. at 141 (Global Illinois witness Jeffrey Noack states that Global Illinois has no way of knowing the format that traffic it receives from other carriers for completion to AT&T originated in); Tr. at 142 (Mr. Noack concedes that Global Illinois has no knowledge of whether traffic it receives from other carriers for completion to AT&T is 1+ dialed PSTN traffic); Tr. at 160 (Global Illinois' counsel states that the only way for Global Illinois to determine the nature of such traffic is to rely on customer representations).

Staff observes that Global Illinois has no explanation whatsoever for the fact that, contrary to its assertions, a considerable portion of the traffic in question, depending upon which group of three minute reports are used, unquestionably originates on the public switched network with AT&T end-user customers. AT&T Ex. 2.1 at 14. These figures appear not to include traffic originated by customers of other landline carriers. *Id.* at 13. It appears possible to Staff that some of the carriers with which Global Illinois (or whatever affiliate is providing service that day) does business may be utilizing Global Illinois' service to avoid paying intercarrier compensation to terminating carriers, which is of course unlawful. To the extent this is the case, Staff states, the Global entities are making possible, an activity which the Commission should not countenance.

Finally, Staff notes that, in terms of Global operations generally, Global Illinois does nothing whatever but possess a certificate. It appears not to provide service or have customers, or any contact with customers. All actual service appears to be provided by Global Networks, an un-certificated entity. To the extent that Global is providing service through an un-certificated entity, it again bespeaks a lack of managerial resources and abilities.

Staff is recommending revocation based on the facts and circumstances before the Commission. Staff informs, however, that were the Commission to revoke Global Illinois' certificate, it will not be the first state commission to take such action against a Global entity, given that the California PUC has suspended Global California's certificate in that state, and directed carriers to cease exchanging traffic with it. Staff believes it clearly established that Global Illinois lacks managerial resources and abilities adequate to maintain its Certificate of Service Authority, which the Commission should, therefore, revoke.

D. Commission Analysis and Conclusion.

There is no evidence, Global argues, to show that it is not providing reliable service in the State of Illinois. According to Global, the only reason this Commission should be investigating a carrier's fitness is if there is evidence that it is not providing service to its customers in an adequate manner and there is a threat of harm to Illinois customers as a result. There is no allegation of such harm in this case, Global contends, and thus, this Commission should reject the revocation relief sought by AT&T Illinois and supported by the Staff.

We disagree with Global in many respects. This Commission is bound to follow the law, and the certification statutes direct precisely in what matters the Commission need satisfy itself before giving its approval. Such approval, when given, is ultimately set out in a formal order. All Orders that issue a certificate of authority to a competitive local exchange carrier make findings on a carrier's suitability to provide service in Illinois. That is because, on each request for a certificate, the Commission requires the applicant to satisfactorily show that it possesses the requisite "financial," "managerial" and "technical" resources and abilities required to provide services in Illinois. Each of these terms has meaning. Each must be independently assessed and satisfied. Each of these statutorily-ordained qualifications, we submit, is intended to promote fair dealing, business competence, financial integrity and ethical practices in service to the citizens of the State of Illinois. The General Assembly has also provided the Commission with authority to revoke approval.

The record before us today reflects little to no effort by Global to demonstrate that it possesses the requisite financial, managerial and technical resources and abilities essential to its continuing certification in Illinois. Given what AT&T Illinois and our Staff have provided to this Commission, there may be nothing for Global to say.

On the other hand, Staff has comprehensively and convincingly shown this Commission that Global Illinois' financial resources and managerial abilities to maintain certification are questionable. Most particularly, Staff's detailed account of Global NAPs' behavior in court proceedings raises in this Commission a loss of trust that Global NAPs or interchangeably Global Illinois, will file accurate and truthful reports, answers to data requests or other documents as we may require, or that its books and records are properly maintained.

For its part, AT&T Illinois tells us that this case is much more than a billing dispute but that it is directly harmed by Global's lack of appropriate qualifications. Because Global was certificated by the Commission, AT&T Illinois explains that AT&T Illinois was forced to enter into an ICA and do business with Global. Yet, Global not only has refused to pay AT&T Illinois anything for any of the services provided by AT&T Illinois, but Global was managed and structured as an empty "assetless" shell. AT&T Illinois asserts that Global has no financial ability to pay anything to AT&T Illinois, or any other creditor, for liabilities incurred as a result of providing service in Illinois.

Global does not dispute that it has no assets, no revenues, and no income. It points, however, to a "guarantee" provided by Global NAPs, Inc. Yet, Global has made no attempt to demonstrate that Global NAPs, Inc. has any financial resources of its own,

as would make its "guarantee" sufficient to establish Global's financial viability and cover the payments it owes.

AT&T Illinois states, that the multitude of judgments and claims identified in the record were made against affiliates of Global, as well as Global's parent company (Ferrous Miner Holdings), in other states. But, it argues, that this does nothing to negate the significance of these judgments and claims in the situation here where Global has no employees of its own, but is managed and operated entirely by the same persons that manage and operate Ferrous Miner and Global's affiliates in other states. We agree with AT&T Illinois that the conduct exhibited before the Connecticut federal court (which imposed judgment for unpaid charges brought by another local exchange carrier, SNET as a sanction for lying to, and committing a fraud upon the court) demonstrates a deep level of managerial incompetence, if not outright malfeasance, of the persons who control and manage Global. This is far from keeping to the statutory standards for holding a certificate in Illinois.

Since Global has not addressed its' management abilities in any meaningful way, the Commission observes Global to settle on the singular claim that no customer has ever complained about the service they receive or charges that they pay to Global. On the evidence of record, this assertion rings hollow. It is well-evident that Global has no customers, and no one pays anything to Global, and hence there is no one to complain. And, this evidence informs the Commission that, if it revokes Global's certificates, no Illinois citizens will lose their dial tone or have their safety threatened (e.g. by the loss of 911 service), because Global does not provide dial-tone service to any end users in Illinois.

Staff expresses deep concern in that Global Illinois only possesses a certificate and relies on Global Networks, an un-certificated entity, to provide all actual services. This brings up AT&T Illinois' concern of having to do business with an empty shell. The Commission can draw nothing good from such a situation that is unlike anything we, or our Staff, have ever seen. Indeed, it has become obvious to the Commission that Global has structured itself and operated in this manner in order to defraud its creditors in Illinois, and to make Global "judgment-proof" with respect to the operations of Global and its affiliates in Illinois. The Commission cannot condone nor need it ignore such a ploy. If nothing else, we must uphold our integrity as much as we rely on the integrity of the entities we supervise.

All of the evidence on record, viewed in a reasonable light, demonstrates to the Commission, that Global lacks the requisite financial, managerial, and technical resources and abilities that it required to possess under the law. That said, we might agree with Global in one minor respect. Despite the evidence that the Commission has heard, this proceeding may not be the proper vehicle for revoking a certificate of authority.

On the record before us, we concluded that time is of the essence. As such, on January 22, 2009, we directed Staff to immediately initiate Docket 09-0053, in which Global is to appear and show cause why its certificates of authority should not be revoked. In addition, Global is to bring to that proceeding, all records, financial statements and other documents relevant to the matter there at hand. We further

directed that the record in this case, in its relevant parts, be input and adopted into the citation proceeding in Docket 09-0053. It is in that docket, that the concerns raised herein are to be addressed.

Finally, Global is directed in this proceeding to pay the full amounts owed to AT&T Illinois on all claims here adjudicated and current to the date of the instant order. It shall do so by a date certain, i.e., 5 business days after the receipt of the updated billing.[2] Global's timely payment and proof thereof is a requirement for the citation proceeding.

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the parties and the subject matter herein;

(2) the findings and conclusions stated in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and Conclusions of law.

(3) on the complaint filed on February 13, 2008, by Illinois Bell Telephone Company (AT&T Illinois) and against Global NAPs Illinois, Inc., and alleging violations of the these parties' interconnection agreement ("ICA"), the Commission finds that:

a. Global is in violation of the parties' ICA for failure to pay AT&T Illinois all amounts owing for DS3 facilities ordered by Global Illinois to transport traffic from its Oak Brook facility to the parties' POI at the AT&T La Grange tandem. Accordingly, AT&T's complaint is granted as to its claims for failure to make such payments, and judgment is entered thereon for complainant AT&T and against respondent Global Illinois with respect to such claims. AT&T will submit a bill or invoice to Global Illinois, file a copy in this docket and provide a copy thereof to Commission Staff, all within five days of the date of entry of this Order, with payment to be made by Global Illinois within 5 days thereafter.

b. Global is in violation of the parties' ICA for failure to pay AT&T Illinois all amounts owing for Transiting. Accordingly, AT&T's complaint is granted as to its claims for failure to make such payments, and judgment is entered thereon for complainant AT&T and against respondent Global Illinois with respect to such claims.

[2] We note that the billing amounts owing on each claim current to the date of hearing were set out in AT&T Illinois' testimony. These amounts were not challenged by Global.

AT&T will submit a bill or invoice to Global Illinois, file a copy in this docket and provide a copy thereof to Commission Staff, all within five days of the date of entry of this Order, with payment to be made by Global Illinois within 5 days thereafter.

c. Global is in violation of the parties' ICA for failure to pay AT&T Illinois all amounts owing for reciprocal compensation. Accordingly, AT&T's complaint is granted as to its claims for failure to make such payments, and judgment is entered thereon for complainant AT&T and against respondent Global Illinois with respect to such claims. AT&T will submit a bill or invoice to Global Illinois, file a copy in this docket and provide a copy thereof to Commission Staff, within five days of the date of entry of this Order, with payment to be made by Global Illinois within 5 days thereafter.

d. The bills or invoices submitted by AT&T shall be incorporated by reference into this order and shall become a part hereof.

(4) The record in this proceeding shows that Global no longer possesses the technical, managerial and financial qualifications that are statutorily required under Section 13-403, 13-404, and 13-405 of the Act.

IT IS ORDERED that the Complaint filed by AT&T Illinois and against Global is granted.

IT IS FURTHER ORDERED that Global will pay the total amounts owed to AT&T Illinois within 5 days of the billing tendered by AT&T Illinois as directed.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code Section 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 11th day of February, 2009.

(SIGNED) CHARLES E. BOX

Chairman

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CERTIFICATE

Re: 08-0105

I, ELIZABETH A. ROLANDO, do hereby certify that I am Chief Clerk of the Illinois Commerce Commission of the State of Illinois and keeper of the records and seal of said Commission with respect to all matters except those governed by Chapters 18a and 18c of The Illinois Vehicle Code.

I further certify that the above and foregoing is a true, correct and complete copy of the Order made and entered of record by said Commission on February 11, 2009.

Given under my hand and seal of said Illinois Commerce Commission at Springfield, Illinois, on February 13, 2009.

Chief Clerk