STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 10-137

Northern New England Telephone Operations, LLC
d/b/a FairPoint Communications-NNE
Petition for Authority to Disconnect Global NAPs

BRIEF OF NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC D/B/A FAIRPOINT COMMUNICATIONS-NNE

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") with its Brief in accordance with the Staff's Technical Session Report dated July 1, 2010. As reported by the Staff Attorney, the parties agreed to brief the Commission on the following issues:

- Whether standard access charges are owed by Global NAPs to FairPoint under the terms of either FairPoint's intrastate access tariff or the FairPoint-Global NAPs Interconnection Agreement (ICA).

- Whether the ICA provides an exemption for certain types of traffic, including VoIP traffic.

As FairPoint explained in its initial Motion, GNAPs terminates non-local traffic to FairPoint's end users in New Hampshire. This is toll traffic, which by the terms of FairPoint's applicable tariffs and the ICA (which incorporates the tariffs by reference) is subject to access charges. While there is no evidence that this is VoIP or Internet traffic, it is still immaterial, since the ICA recognizes no distinction that would exempt the GNAPs traffic from access charges.

GNAPs disagrees and, relying on the four corners of the ICA, has presented an "all-or-nothing" argument in this particular case. It has conceded that the traffic at issue is not exempt

from intercarrier compensation charges *per se*.[1] Instead, it argues that the traffic is exempted by the implied terms of the ICA. This traffic, GNAPs maintains, is Internet traffic because it "touches the Internet" during its transmission, and so it follows that intercarrier compensation for this traffic is governed by the FCC's Internet Order. GNAPs further concedes that neither the Internet Order, nor any other FCC rulings, have established a rate for the termination of Internet traffic to local exchange customers. According to GNAPs, this silence means that it was the intent of the parties to table the matter of compensation for the termination of such traffic until such time as the FCC acted on this issue. In the interim, GNAPs claims, FairPoint has no grounds to charge GNAPs anything for terminating this traffic, although GNAPs is willing to pay what it purports to be a "standard industry rate" that is two orders of magnitude less than FairPoint's rate.

This argument fails in all respects. As discussed below, GNAPs has failed to produce any concrete evidence that the traffic is in fact Internet traffic. Furthermore, even if the traffic is transported to or from the Internet, the terms of the ICA still provide that tariffed access charges apply.

I. THERE IS NO EVIDENCE THAT THE TRAFFIC IS ANYTHING BUT TRADITIONAL ACCESS TRAFFIC.

GNAPs' entire case is predicated on its blanket assertion that the traffic it terminates to FairPoint is Internet traffic or that, in its words, the traffic "touches the Internet" at some point -- any point -- in the transmission. However, in the face of FairPoint's showing of millions of dollars of phone-to-phone calls, GNAPs has not produced any concrete evidence regarding the nature of its traffic. In DT 08-028, Global NAPs admitted that it did not know the original

[1] "We're not exempt. . . . it is postponed, as I would put it. We might owe millions." Tr. PM 32:15-21.

format of the calls it receives from its customers for transport, nor that it distinguished among the formats of the traffic it receives, be they time division multiplexing (TDM) bit streams, asynchronous transfer mode (ATM), or IP.[2] As to whether any of it is Internet traffic, the Commission observed in Docket DT 08-028 that, "[t]he only 'evidence' Global NAPs has provided . . . is in the form of boilerplate customer contract language which states that any calls made under that contract are ESP calls."[3] Un-persuaded by such a showing, the Commission found in favor of TDS and determined that the traffic was subject to tariffed access charges.[4]

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[2] DT 08-028, Order 25,402 at 22-23.

[3] *Id.*

[4] This failure of proof has been noted nationwide. *See, e.g.* Pacific Bell Telephone Co. d/b/a/ AT&T California v. Global NAPs California, Inc., Ca. P.U.C. Case 07-11-018, Decision 09-01-038 on Motion for Rehearing, at 6-11 (January 29, 2009) ("Arguments and assertions submitted in briefs are not evidence of anything. They are merely arguments and assertions, which require supporting evidence to be given any weight. . . . The record evidence (much of it submitted by GNAPs itself) did not support a determination that GNAPs delivered VoIP traffic. . . . Nothing in the evidence or our Decision suggests any portion of GNAPs traffic could be conclusively identified as VoIP. Our determination was reasonably based on evidence in the record before us, the lack of any evidence establishing GNAPs delivered VoIP traffic, relevant federal law and policies regarding the treatment of IP-enabled services, and state authority concerning the interpretation and enforcement of ICAs. GNAPs remaining arguments repeat and rely on its assertion of providing VoIP traffic. For the reasons stated above, that assertion is unsupported and we will not restate that finding.")

See also Illinois Bell Telephone Co. v. Global NAPs Illinois, Inc., Ill. C.C. Docket No. 08-0105, Order at 45 (February 11, 2009) ("[T]he 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. . . . 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.")

See also Complaint of AT&T Ohio v. Global NAPs Ohio, Inc, P.U.C. Ohio Case No. 08-690-TP-CSS, Opinion and Order at 31 (June 9, 2010) ("[T]he Commission finds that Global NAPs Ohio

Nothing has changed in this proceeding. GNAPs has testified that "when we set up interconnections with these customers it can be over a TDM connection it can be over an ATM connection it can be over an IP connection."[5] At the Technical Session in this proceeding, GNAPs offered the testimony of two witnesses, employed by commonly-held affiliates of GNAPs, who testified to the general nature of the traffic that GNAPs transports for them and who gave third hand accounts regarding the business of some of GNAPs' major customers.[6] The Staff heard testimony that 4 million minutes of traffic passed between a GNAPs affiliate, Broadvoice, and New Hampshire in 2009,[7] "some" of which was handled by GNAPs.[8] Other than this bit of information, Broadvoice's witness, (its president) could not testify to the rate it pays GNAPs to handle its traffic, nor whether it was a flat rate or per minute.[9] He did not know exactly which GNAPs entity his company does business with.[10] He believes he has customers in New Hampshire, although he was not sure how many,[11] nor does he believe that his company is registered to conduct business in New Hampshire.[12] In the meantime, no further specifics were

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has failed to demonstrate that all of the traffic in question is IP originated. Therefore, the Commission must conclude that the respondent is engaged in the provision of a telecommunications service subject to reciprocal compensation, access charges, or transiting compensation. In support of this conclusion, the Commission focuses on the fact that the record fails to identify that disputed traffic was IP originated and not originated on the public switched network. . . . Additionally, Global NAPs Ohio itself acknowledges that at least some percentage of this traffic terminated on AT&T Ohio's network originated on the public switched network.")

[5] Tr. AM 19:22-24.

[6] Tr. AM 29:1-30:31.

[7] Tr. AM 5:20-21.

[8] Tr. AM 7:6-9.

[9] Tr. AM 9:1-10:1.

[10] Tr. AM 14:1-15.

[11] Tr. AM 22:19-23:18.

[12] Tr. AM 26:30. For that matter, no GNAPs entity is in good standing in New Hampshire. *See* N.H. Corporation Division Business Name History (visited July 18, 2010) <https://www.sos.nh.gov/corporate/soskb/Corp.asp?418137>. This calls into question GNAPs' authority to operate in New Hampshire and terminate any traffic at all to FairPoint.

offered by any witness regarding traffic within New Hampshire, traffic transmitted to FairPoint, or traffic associated with the BANs under which GNAPS has been charged.

Lacking any solid evidence to support its claims, GNAPs instead has employed a litigation strategy of demanding "negative proof" from FairPoint. It is a master of this strategy. Rather than provide proof that its claims and defenses are true, GNAPs first begs the question that its defenses are valid, and then challenges the other party to disprove the claims that support those defenses -- all while it withholds the necessary evidence. It is a strategy of obfuscation.

For example, GNAPs has baldly asserted that all Internet traffic is exempt for access charges (a claim that FairPoint disputes), and then has demanded that FairPoint produce evidence that the traffic is not Internet traffic. It complains that FairPoint "has not yet made or attempted to make" a showing that the traffic at issue is not Internet traffic,[13] "produced no evidence" regarding the nature of GNAPS traffic[14] and that FairPoint has "not yet attempted to negotiate a VoIP rate with GNAPS,"[15] (despite GNAPs' failure to provide evidence that the traffic is VoIP.) This is the strategy that failed it in DT 08-028, where the Commission explained that:

> Global NAPs confuses the burden of persuasion with the burden of proof and misconstrues our ruling. . . . Rather than withholding evidence germane to the very essence of the argument that its traffic is exempt from any access charges, Global NAPs should have brought that evidence forward in the underlying proceeding. For whatever reason, it did not do so . . . . For these reasons, we confirm that our determination on the burden of proof in this docket was reasonable and lawful.[16]

The fact is, FairPoint has satisfied its burden of proof. In its Motion to Disconnect, it provided an exhibit, substantially in the form as provided by the TDS Companies in DT 08-028,

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[13] Opposition of Global NAPs Inc. to Motion of FairPoint Communications for Permission to Terminate Interconnection ("GNAPs Opposition") at 2 (May 25, 2010).

[14] *Id.* at 11.

[15] *Id.* at 15.

[16] DT 08-028, Order No. 25,088 Denying Motion for Stay, Rehearing or Reconsideration at 17-18 (Apr. 2, 2010).

of charges related to termination of GNAPs' switched access traffic. Perhaps afraid of what it might find, GNAPs never made any further inquiry of these charges and simply labeled the traffic as "Internet traffic" and challenged FairPoint to prove that it is not.

Like in DT 08-028, GNAPs has failed to clear the first threshold of establishing that the disputed traffic is not everyday PSTN traffic, clearly subject to intrastate access charges. Accordingly, this should conclude the Commission's inquiry and it should find in favor of FairPoint.

II. VOIP IS EXPRESSLY EXCLUDED FROM THE DEFINITION OF INTERNET TRAFFIC IN THE NEW HAMPSHIRE INTERCONNECTION AGREEMENT.

GNAPs claims that it is an intermediate carrier, or forwarder, of VoIP traffic for other carriers. As such, GNAPS argues, its traffic is "Internet Traffic" as defined by Section 2.43 of the ICA, and thus, pursuant to Section 8.1 of the Interconnection Attachment of the ICA, subject to an intercarrier compensation regime defined by the FCC Internet Order, not the ICA.

Section 8.1 of the Interconnection Attachment provides that:

> Notwithstanding any other provision of this Agreement or any Tariff: (a) the Parties' rights and obligations with respect to any intercarrier compensation that may be due in connection with their exchange of Internet Traffic shall be governed by the terms of the FCC Internet Order and other applicable FCC orders and FCC Regulations.

From this, GNAPs argues that this provision "renders internet [*sic*] traffic immune from the tariff rates at which FairPoint has billed Global's traffic, and permits internet [*sic*] traffic to be billed only at rates allowed by FCC orders and regulations."[17] Accordingly, because VoIP traffic is Internet Traffic, FairPoint cannot bill access charges for terminating VoIP traffic from GNAPs.

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[17] DT 10-137, Letter from J. Davidow, Counsel to GNAPs, to H. Malone, Counsel to FairPoint, at 2 (June 23, 2010) ("GNAPs Protest Letter").

However, that is not what the ICA says within its four corners. GNAPs is ignoring a provision of the ICA that *expressly excludes VoIP* from the definition of Internet Traffic. Section 13.6 of the Interconnection Attachment, discussing numbering resources for IANXX codes unique to New Hampshire, provides that:

> GNAPs shall utilize specified NXX blocks ("IANXX Codes") for Internet traffic only. GNAPS shall obtain certifications from its Customers that numbers utilizing IANXX Codes shall be used only for Internet traffic ***(which, for avoidance of doubt, does not include voice over Internet applications)***. Any intercarrier compensation to be paid for Internet traffic utilizing such IANXX Codes shall be as set forth in Section 8 of this Attachment. (emphasis added).[18]

This statement is clear and unequivocal. By the express terms of the ICA "Internet Traffic" *does not include VoIP traffic.*

Considering the tenor of the times during which the ICA was negotiated, it makes sense that this provision would have been in the ICA. GNAPs has testified that its only concern at the time of the arbitration was for dial-up Internet traffic,[19] and it is clear from reading the entire ICA, with its extensive treatment of dial-up "Measured Internet Traffic" as a distinct traffic category, that discussions of "Internet Traffic" were focused on dial-up traffic to Internet service providers.[20] Even in 2002, compensation for VoIP was a contentious issue in the industry, and so it is reasonable to assume that a party would want to reduce the possibility of unintended consequences by confining the terms of the agreement to the main issue at hand.[21]

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[18] GNAPs will no doubt grasp at the contention that "Internet traffic" with a lowercase "t" is not the same as "Internet Traffic" with an uppercase "T." Since there is no mention anywhere in the ICA of Internet traffic in any other context, however, it is hard to see how this is anything but a scrivener's error. Even GNAPs has been relaxed in this usage, writing it as "internet traffic" in both the GNAPs Protest Letter and the GNAPs Opposition.

[19] Tr. AM 32:11-20.

[20] *See* ICA §§ 2.57, 2.92; Interconnection Att. §§2.1.2, 2.2.1, 3.3, 6.1.1, 6.2, 8.5.1.

[21] However, as discussed *supra* at 11, it is *not* reasonable to assume that a party would merely table the issue and take a "wait-and-see" attitude.

Thus, VoIP is not "Internet Traffic" for purposes of the ICA. Other than "Internet Traffic," the ICA recognizes only four other kinds of traffic between customers of FairPoint and GNAPs: Reciprocal Compensation Traffic,[22] Measured Internet Traffic,[23] Ancillary Traffic,[24] and Toll Traffic.[25] Of these four, the ICA also provides that if the traffic is not of the first three types, then it must be Toll Traffic.[26]

GNAPs' VoIP traffic, by the express terms of the ICA, is not Internet Traffic. Neither is it Reciprocal Compensation Traffic, Measured Internet Traffic, or Ancillary Traffic. *Ergo*, it can only be Toll Traffic, which serves as the catch-all designation for all other traffic. The rates for Toll Traffic are provided in Attachment A of the Pricing Attachment, which states that FairPoint's interstate and intrastate access tariffs govern. Therefore, it is a moot question as to whether the ICA or the tariffs govern the treatment of the VoIP traffic at issue. The ICA provides that the VoIP traffic is "Toll Traffic," and the ICA incorporates the tariffs by reference. Like in DT 08-028, this traffic is deemed toll traffic subject to access charges.

III. EVEN IF VOIP TRAFFIC IS CONSIDERED INTERNET TRAFFIC, FAIRPOINT'S ACCESS TARIFFS APPLY.

Section 8.1 of the Interconnection Attachment provides that intercarrier compensation for Internet Traffic is governed by the Internet Order[27] and its progeny. As even GNAPs

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[22] ICA § 2.76.

[23] ICA § 2.57.

[24] ICA § 2.6.

[25] Toll Traffic: Traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network and is not Reciprocal Compensation Traffic, Measured Internet Traffic, or Ancillary Traffic. Toll Traffic may be either "IntraLATA Toll Traffic" or "InterLATA Toll Traffic", depending on whether the originating and terminating points are within the same LATA." ICA § 2.92.

[26] *Id.*

[27] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP Bound Traffic*, CC Docket

acknowledges, however, the Internet Order does not address the traffic at issue here; it is well settled in this Circuit that the Internet Order applies only to local, ISP-bound traffic, not the ILEC-bound traffic at the heart of the dispute in this Docket. The 1st Circuit Court of Appeals, based on advice it received from the FCC, confirmed that:

> the administrative history that led up to the [Internet Order] indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area. Thus [the FCC] concludes that the [Internet Order] "can be read to support the interpretation set forth by either party in this dispute." The FCC further notes that "in establishing the new compensation scheme for ISP-bound calls, the Commission was considering only calls placed to ISPs located in the same local calling area as the caller." According to the FCC, "[t]he Commission itself has not addressed application of the [Internet Order] to ISP-bound calls outside a local calling area"[28]

In short, the "court disagreed with GNAPs and held that the ISP Remand Order only clearly regulated local traffic."[29]

This does not mean, however, the carriers are left adrift in a no man's land of uncertainty regarding non-local traffic, as GNAPs would argue. Access charges are still applicable to non-local Internet traffic. As the 1st Circuit has confirmed:

> Indeed, in the *ISP Remand Order* itself, the FCC reaffirmed the distinction between reciprocal compensation and access charges. It noted that Congress, in passing the TCA, did not intend to disrupt the pre-TCA access charge regime, under which "LECs provided access services ... in order to connect calls that travel to points-both interstate and intrastate-beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time."[30]

Nos. 96-98 and 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*Internet Order*" or "*ISP Remand Order*").

[28] Global NAPs v. Verizon New England, Inc., *et al.*, 444 F.3d 59, 74 (1st Cir. 2006) ("GNAPS III").

[29] Global NAPs v. Verizon New England, Inc., *et al.*, 603 F.3d 71, 79 (1st Cir. 2010) (" GNAPS V").

[30] GNAPS III at 73 (citing *ISP Remand Order* ¶ 37).

In the absence of any express provisions related to particular types of traffic, then, Section 8.4 of the Interconnection Attachment provides that:

> [a]ny traffic not specifically addressed in this Agreement shall be treated as required by the applicable Tariff of the Party transporting and/or terminating the traffic.

To the extent that the ICA relies on the Internet Order, it is reasonable to assume that the parties selected the Internet Order because it addressed head-on the only type of Internet Traffic that was at issue during the negotiations -- dial-up Internet traffic.[31] If intercarrier compensation for VoIP traffic is not addressed in the ICA (which it is not), and it is not addressed in the Internet Order (which it is not), then it must, by the terms of Section 8.4, be addressed by the "applicable Tariff." The applicable tariffs in this case are FairPoint's access tariffs.

GNAPs argues otherwise. It asserts that "the standard for exemption from traditional charges under the FP contract turns not on whether the call originated in IP but only whether it was in IP at some point,"[32] and that Section 8.1 of the ICA "renders internet [*sic*] traffic immune from the tariff rates at which FairPoint has billed Global's traffic, and permits internet [*sic*] traffic to be billed only at rates allowed by FCC orders and regulations."[33] The striking conclusion, according to GNAPs, is that "that the parties will not know how much they owe each other for VOIP until the FCC acts,"[34] meaning that until that time "*there's no rate at all.*"[35]

Even though it produced no witnesses with first hand knowledge of the negotiations, GNAPs assured the Staff that, implausible as it sounds, it was Verizon's intent to leave the rate undetermined.

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[31] Tr. AM 32:11-20.

[32] GNAPs Objection at 6.

[33] GNAPs Protest Letter at 2.

[34] Tr. AM 33:19.

[35] Tr. AM 35:6-10 (emphasis supplied).

> MR. DAVIDOW: And so it was put in to say there's no VoIP rate now until the FCC sets one. And that's remember this clause should be to use the term construed against Verizon/FairPoint 'cause they put it in and they put it in and Verizon put it in because Verizon was in the process which happened all over the country of negotiating the 00045 because that was the industry's estimate of what the FCC would make the rate big.[36]

GNAPs goes on to say, again without foundation, that Verizon's motivation for this uncharacteristically open-ended provision was its imminent plans to enter the VoIP business:

> DAVIDOW: And, one of its global interests was to hold the world steady on VoIP until it evolved a strategy. It's strategy was buy MCI and go into the VoIP business, and then go for low rates.[37]

> DAVIDOW: Verizon bought MCI. So, Verizon both buys VoIP and sells VoIP. And, it wants its VoIP to be cheap and be competitive in the $14 a month service. And, in order to have its VoIP company be competitive, it does what it has to do, which is to give people, VoIP providers, what it wants its VoIP provider to have.[38]

This is an interesting story, but bad history. The FairPoint - GNAPs ICA was arbitrated in 2002. The Unitary Rate of $.00045 with some carriers was not negotiated until two years later, in late 2004 -- and one of several conditions of the amendment was that the non-Verizon party become current on all VoIP billings.[39] Furthermore, the MCI purchase wasn't even announced, let alone closed, until 2005.[40]

In addition to this newly revealed industry history, GNAPs is asking us to accept other implications that make no sense in light of the state of the industry and what we know of Verizon. First, to accept the GNAPs argument, we need to believe that Verizon, a Regional Bell Operating Company with a vast legal team and years of experience in negotiating contracts, was

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[36] Tr. AM 33:5-10.

[37] Tr. PM 29:3-6.

[38] Tr. PM 2:19-3:1

[39] *See supra*, at 14.

[40] *History of Verizon Communications* at 5 (visited July 18, 2010) <http://investor.verizon.com/profile/history/pdf/VerizonCorporateHistory_2010.pdf>.

content to leave unresolved the matter of compensation for the exchange of traffic that it knew was a growing market. This is very unlikely, especially considering that at the time the ICA was arbitrated, Verizon was already engaged in litigation with GNAPs over access charges for Internet traffic.[41] This proceeding, which began with the Massachusetts DTE, was appealed to the federal district court, litigated for eight years, and led eventually to the $57 million judgment against GNAPs and its placement in receivership. In a similar vein, we are also asked to believe that Verizon, knowing full well who it was dealing with, was content to accept a growing volume of terminating VoIP traffic from GNAPs at no charge for five years, from 2003 to 2008, and would make no attempt to remedy this grossly one-sided relationship, even though it could have terminated the agreement after two years.

Finally, GNAPs expects this Commission and its Staff to believe that, with no concessions from GNAPs, Verizon was willing to forgo access charges for "IP-in-the-Middle" traffic.[42] This may be the most compelling reason to be skeptical of GNAPs' argument. Although GNAPs' has not stated this plainly, its contention that the ICA exempts from access charges "any" traffic that "touches" the Internet appears to be a back-door argument that even "IP-in-the-Middle" traffic is exempt from access charges. There is virtually no chance that

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[41] Petition of Global NAPs, Inc. for Arbitration with Verizon New England, Inc. d/b/a Verizon Massachusetts, DTE 02-45 (filed July 30, 2002).

[42] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) ("AT&T IP-in-the-Middle Order"). AT&T sought a declaration that its "phone-to-phone" VoIP telephone services, which took PSTN traffic, converted it to IP for transport, and then reconverted it at the destination to interface to the PSTN, were exempt from access charges applicable to circuit-switched interexchange calls. The FCC rejected the notion that service thus provided was VoIP service or exempt from access charges, instead finding it to be telecommunications service. "[W]e clarify that AT&T's specific service is subject to interstate access charges. . . . AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls." *Id* ¶ 15.

Verizon would have accepted such a business arrangement, since it is on record at around that same time as arguing strongly to the effect that AT&T's phone-to-phone service is a telecommunications service to which interstate access charges apply.[43]

With its "touching the Internet" argument, GNAPs is asking the Commission to find that an *express* provision in the ICA, that Internet traffic does not include VoIP, is invalid against an *implied* provision, based on the purported intent of the parties as GNAPs envisions it. This view violates all tenets of contact interpretation and should be rejected by the Commission.

IV. THERE IS NO STANDARD INDUSTRY RATE FOR VOIP TRAFFIC.

Since December 2009, GNAPs has argued to the Commission that FairPoint, if it is entitled to compensation at all, is only entitled to the "standard industry rate" of $0.00045 per minute that Verizon has purportedly established as a "cost-based" rate for VoIP traffic. GNAPs has produced no evidence that this rate has been established by the FCC or any state commission in any order of general application. GNAPs has produced no evidence that this rate has ever been ordered in a specific arbitration proceeding. It has not demonstrated that this rate is posted in any SGAT or tariff. In fact, other than off-hand references to Verizon agreements with AT&T, Level 3 and Sprint, GNAPs has produced no evidence that this rate is widely recognized in the industry. What it has produced are snippets of testimony from other proceedings and

[43] AT&T IP-in-the-Middle proceeding, WC Docket No. 02-361, Verizon Comments at 5 (Dec. 18, 2002) ("AT&T is, therefore, an 'interexchange carrier' that uses Verizon's local switching to provide an interstate telecommunications service. . . . AT&T uses the LECs' networks, and it should have to pay for that use. AT&T's phone-to-phone voice telephony service competes with other phone-to-phone voice telephony services which pay access charges, and exempting AT&T's service would give it an artificial competitive advantage. And there is no justification for favoring IP technology over every other phone-to-phone voice telephony technology in the way AT&T requests.")

selected pages from a Verizon agreement in New York.[44]

A complete copy of the Verizon - AT&T Unitary Rate Amendment can be found in the amendment to the agreement between Verizon and SBC Long Distance, in DT 07-007 ("Unitary Rate Amendment"). Taken in its entirety, it becomes apparent that the unitary rate is not a cost-based "standard" rate, but the result of mutually negotiated concessions by both parties. For example, the Unitary Rate Amendment imposes a requirement for geographically relevant interconnection points ("GRIP") in each LATA, rather than a single point of interconnection ("POI"),[45] an issue that has been consistently important to Verizon for years. It requires direct end-office trunking when call volumes reach a certain level.[46] It clarifies that IP-in-the-Middle traffic is subject to access charges.[47] Furthermore, it requires that the non-Verizon party have no outstanding billing disputes, *including those for VoIP.*[48]

Finally, it should be noted that the Unitary Rate Amendment is structurally balanced in favor of Verizon, since the amendment, developed in 2004, is primarily concerned with what Verizon will *pay* to originate ISP-bound traffic, and much less concerned with what it will *charge* to terminate ISP-originated or VoIP traffic.[49] In fact, contrary to GNAPs claims, the Amendment does *not* establish a $0.00045 rate for VoIP. Instead, an incidental provision of the amendment clarifies that, while VoIP is *not* charged at the unitary rate, the parties have the right to dispute any VoIP termination charges that are above the unitary rate, pending further

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[44] DT 08-028, Motion of GNAPs to Stay Disconnection (Dec. 2, 2009); DT 08-028, Letter from J. Davidow, Counsel to GNAPs, to D. Howland, Commission Secretary (Dec. 23, 2009).
[45] Unitary Rate Amendment § 8(d)(ii).
[46] *Id.* § 8(b)(ii).
[47] *Id.* § 5(a).
[48] *Id.* § 2.
[49] *Id.* § 3.

developments in the law.[50] Overall, the Unitary Rate Amendment is structured to reduce Verizon's intercarrier compensation costs, or at least hold them steady, in a situation in which the traffic is expected to be greatly unbalanced. This may explain why, in the context of the Unitary Rate Amendment, Verizon might have been motivated to forego full payment of access charges on VoIP traffic where other carriers, including FairPoint, would not. In exchange for a rate that may not cover its costs for access traffic, Verizon reduces its payments for other types of traffic.[51] This may be a good deal for Verizon perhaps; however, it is not a good deal for FairPoint.

At the technical session, the Commission's Director of Telecommunication suggested to GNAPs that it could have effected this unitary rate with an ICA modification.[52] In light of the above revelations about the unitary rate, it is now easier to understand why GNAPs did not. GNAPs is constitutionally opposed to GRIP, having argued against such a requirement in the arbitration for the current ICA,[53] and it is known to resist attempts to enforce even a single POI requirement.[54] As discussed in the preceding section, GNAPs may have good reason to avoid

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[50] Unitary Rate Amendment § 5(b).

[51] Note that this rate was voluntarily negotiated under Section 252(a)(1) of the Telecommunications Act. Consequently, it is not subject to the cost-based pricing standards of Section 252(d)(2) and thus, contrary to GNAPs' assertions, is no indication of the actual costs of terminating this traffic.

[52] Tr. AM 33:12-13. Note that GNAPs could also have adopted the SBC Long Distance agreement, approved in DT 07-007, on 90 days notice any time in the last three years.

[53] *See* GNAPs Petition for Arbitration, DT 02-107, Final Order No. 24,807 at 8 (Nov. 22, 2002) ("GNAPs wants the Commission to find that it is not responsible for the transport costs associated with Verizon's originating traffic. Verizon's proposal that CLECs should have to pick up traffic from the ILEC at some point close to the location where the traffic originates, according to GNAPs, is simply an anti-competitive attempt to shift costs to the CLEC which the ILEC should have to bear. GNAPs asserts that if it had to bear these costs it would undermine its right to establish a single POI and could force GNAPs to exit the New Hampshire market.")

[54] *See* Illinois Bell Telephone Co. v. Global NAPs Illinois, Inc., Ill. C.C. Docket No. 08-0105, Order at 45 (February 11, 2009) ("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,

agreements that impose access charges on "IP-in-the-Middle" traffic. And, of course, we know that GNAPs does not pay for past services (or any services, for that matter).

GNAPs makes much of its attempts to offer the unitary rate to settle its dispute with FairPoint.[55] The cynicism of this ploy is now clear. By offering to unilaterally settle for $0.00045, GNAPs is attempting to achieve the benefits of the Unitary Rate Amendment without any of the concessions. The fact is, this rate is a unique rate amenable to certain situations involving Verizon. It is not suitable for FairPoint in general, and for this situation specifically, where the traffic is completely unbalanced.

In a last ditch appeal to sympathy, GNAPs defends the unitary rate as reasonable, complaining that anything greater than that will prove ruinous to its business.[56] However, history is replete with tales of companies ruined by bad contracts, to the point of cliché. The fact is, GNAPs' business strategy was a cynical one: to underprice its services and drive out competitors by not paying the bills for its underlying services. Eventually, such a strategy was bound to fail when suppliers revolted, as they have here and in many other states, but not until GNAPs accumulated tens of millions of dollars in debt that it will never pay.

Global entered into an ICA which designates the POI as being at the AT&T location. . . . [W]e are not persuaded by any of Global's attempts to undermine the ICA's authority and its finality in the designation of the POI. . . . 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." [Note that this is also an issue in a related dispute between FairPoint and GNAPs. In addition to access charges, GNAPs has failed to pay for interconnection facilities to the POI.]

[55] *See, e.g.* Tr. PM 33:1-6.

[56] Tr. AM 35:14-16.

IV. CONCLUSION

For the reasons explained herein, the traffic that GNAPs terminates to FairPoint is switched access traffic subject to the rates contained in FairPoint's applicable tariffs. FairPoint respectfully requests that, absent payment of all past due charges for this traffic, that the Commission grant FairPoint's request to disconnect GNAPs.

Respectfully submitted,

Northern New England Telephone Operations LLC
By its Attorneys,

Dated: July 19, 2010

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