

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company, Inc.)
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Global NAPs Illinois, Inc.)
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Docket No. 08-0105

REPLY BRIEF OF AT&T ILLINOIS

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Introduction

In 2002, Global NAPs Illinois, Inc. (“Global”) interconnected with Illinois Bell Telephone Company (“AT&T Illinois”) at AT&T Illinois’ tandem office in LaGrange using AT&T Illinois’ fiber facilities. Global’s affiliates then contracted with customers to “terminate” their traffic in Illinois (among other states). Neither Global nor its affiliates could actually terminate the traffic, however, because they do not serve any end-users in Illinois. So instead, Global for years has dumped Illinois-bound traffic onto AT&T Illinois’ network, leaving AT&T Illinois to terminate the traffic to its end-users, or, because some of the traffic delivered by Global was not even destined to one of AT&T Illinois’ end users, to “transit” Global’s traffic over AT&T Illinois’ network to the appropriate third-party local exchange carrier in Illinois.

While Global’s affiliates have reaped many millions of dollars for providing their “termination” service, Global has refused to pay AT&T Illinois a single penny for its use of AT&T Illinois’ facilities or for AT&T Illinois’ termination or transiting of the traffic. As a result, the Commission should find Global in breach of the parties’ interconnection agreement (“ICA”) and in violation of AT&T Illinois’ intrastate tariff, both of which require Global to pay for the services provided by AT&T Illinois. AT&T Illinois also requests that the Commission revoke Global’s certificates of service authority, because, as AT&T Illinois discovered and as the evidence establishes, Global is a shell company that has been structured and operated such that it has no assets, no customers, no revenues, and no ability to pay AT&T Illinois for any of the services AT&T Illinois provided to Global. Neither AT&T Illinois nor any other carrier in Illinois should be forced to continue doing business with such an obvious “front.”

In its initial brief, Global serves up a number of excuses for its refusal to pay any charges billed by AT&T Illinois. But none of Global’s excuses hold water.

AT&T Illinois has billed Global under AT&T Illinois' intrastate tariff for high capacity DS3 services ordered and used by Global to connect Global's facility in Oak Brook to the point of interconnection ("POI") at AT&T Illinois' LaGrange tandem office building. Global responds that the POI should be located at Global's facility in Oak Brook. As explained below in Section I, that is not what the ICA says. The ICA says the POI is at AT&T Illinois' location. What Global wants is to unilaterally rewrite the terms of the ICA, but neither Global nor this Commission have the power to lawfully do so. In any event, Global's attempt to manufacture a POI dispute is a red herring, because even if the POI were relocated in the manner that Global now seeks, it would not affect Global's liability for the charges that it has refused to pay since the moment it began to make use of AT&T Illinois' network and network services.

AT&T Illinois also has billed Global the charges specified by the ICA for transiting Global's traffic across AT&T Illinois' network, from Global to third-party carriers in Illinois. Global responds that the FCC has exempted "enhanced service provider" ("ESP") traffic from access charges. As explained below in Section II, Global's response is absurd. None of the FCC orders Global relies on even address *transiting* charges. And they certainly do not hold that carriers must provide transiting for free, or that a carrier like Global transporting alleged "ESP traffic" can ignore the terms of its ICA requiring payment for transiting service.

Where AT&T Illinois terminated Global's traffic to AT&T Illinois' end users, AT&T Illinois billed Global the local reciprocal compensation charges or intrastate terminating access charges specified by the ICA and AT&T Illinois' intrastate tariff, depending upon whether the calling party's telephone number showed the traffic to be local or intraLATA toll traffic. Global again responds that the FCC's "ESP exemption" somehow shields Global from these charges, because Global receives the traffic in question from its purported ESP customers. But once

again, Global is wrong, for a number of reasons. As explained in Section III below, (a) the “ESP exemption” only exempts *the ESP* from certain charges, not carriers like Global that purport to provide service to the ESP, (b) the “ESP exemption” is only an exemption from *interstate access charges*, not local reciprocal compensation or intrastate terminating access charges, and (c) in any event, Global has come nowhere close to proving that its traffic is “ESP” traffic (or Internet Protocol (“IP”)-enhanced or Voice over Internet Protocol (“VoIP”) traffic).

Finally, as explained in Section IV, Global’s attempt to refute AT&T Illinois’ and Staff’s exposé of Global’s startling lack of appropriate financial, managerial, and technical resources and abilities goes nowhere. That comes as no surprise, because Global cannot contest the facts marshaled by AT&T Illinois and Staff. The best Global can muster is to point out that it has not received any customer complaints. As Global is but a shell that has no customers to complain, that is hardly a demonstration of appropriate financial, managerial, and technical resources and abilities.

I. Global Has Violated AT&T Illinois’ Intrastate Tariff By Failing To Pay For DS3s Purchased Under That Tariff.

AT&T Illinois demonstrated in its initial brief (at 4-9) that Global has violated AT&T Illinois’ intrastate tariff by failing to pay for special access DS3s ordered and used by Global to connect its equipment in its Oak Brook location to the point of interconnection (“POI”) at AT&T Illinois’ LaGrange tandem office. Global attempts to excuse its failure to pay for these DS3s by arguing (1) “the POI is at the Global facility in Oak Brook,” and (2) “it is irrelevant that Global ‘ordered’ trunks using AT&T’s ASR process.” Global Br. at 5-8 & 8-10. Global’s first argument is wrong, and the second is a red herring.

A. The POI Is At AT&T Illinois' LaGrange Location.

Global argues 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 Global's Oak Brook facility to AT&T Illinois' LaGrange tandem office. As Staff correctly notes, Global's argument is refuted by the plain language of the parties' ICA.

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. 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." In other words, 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.

Global's argument to the contrary rests entirely upon the false premise that in the ICA arbitration (Docket No. 01-0786), the Commission ruled that Global was entitled to establish the POI at its Oak Brook facility. That simply is not the case. There is not one word in the Commission's arbitration decision that discusses whether the POI may be located at Global's Oak Brook facility. That is because the Commission did not address, much less rule upon, that issue. 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 instead specifies that the POI is at AT&T Illinois' location – *i.e.*, its LaGrange tandem office.

Global grossly mischaracterizes the POI issue resolved by the Commission in the arbitration, which was a very different issue. Global pretends that the Commission ruled Global had “the right to choose the POI at any technically feasible location.” Global Br. at 4. But that was not the issue in the arbitration. In its initial brief in the arbitration, Global itself explained that “[t]here is no fundamental disagreement between Ameritech Illinois and GNAPs . . . that GNAPs may receive interconnection through a single POI in each LATA,” and that AT&T Illinois “admits that it has an obligation to interconnect with Global at any single physical point of Global’s choosing on the AIT network.” Initial Br. of Global NAPs, ICC Docket No. 01-0786, at 5-6, 8 (filed March 1, 2002). Rather, the issue in the arbitration was 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. *See* AT&T’s Submission of Redlined ICA, ICC Docket No. 01-0786, App. NIM, proposed § 2.22 (filed Jan. 11, 2002); *see also* Arbitration Decision, ICC Docket No. 01-0786, at 3-8 (describing this issue and the Commission’s resolution of it). In the portion of the arbitration decision cited by Global in its brief here (at 6), 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). But that, of course, says nothing about where the POI is – *i.e.*, at AT&T Illinois’ LaGrange location or at Global’s facility in Oak Brook.

Global also argues that it is “technically feasible” to interconnect at Global’s facility in Oak Brook, and “[g]iven 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.” Global Br. at 7. But that ship has already sailed. While AT&T Illinois all along agreed that Global may designate the POI at a technically feasible point within AT&T’s network, AT&T Illinois did not (and does not) agree that Global’s Oak Brook location qualifies as such a point. But more importantly, as Staff correctly notes, 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. In particular, Global agreed, in the Interim Agreement Amendment, that if it wanted to “interconnect with SBC at GNAPs facility” – *i.e.*, at Global’s Oak Brook facility – it would “seek a determination by the Illinois Commission” “[w]ithin 60 days of approval of the Global/SBC interconnection agreement.” AT&T Ex. 1.0 (Pellerin Direct) Sch. PHP-2, ¶ 3. And 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.” *Id.* Sch, PHP-2, p.2. Global did not seek from the Commission a ruling as to whether Global may interconnect at Global’s Oak Brook facility rather than the LaGrange location, and it has never provided any fibers of its own between those locations. As a result, Global must pay AT&T Illinois for the facilities in place.

Global attempts to make much of the fact that it signed the Interim Agreement Amendment four days before the Commission’s arbitration decision. But that proves nothing. As demonstrated above, in the arbitration the Commission never addressed whether Global could interconnect at its Oak Brook facility rather than AT&T Illinois’ LaGrange location (the latter of which indisputably is a permissible point to interconnect, and which the parties designated as the

POI in the ICA itself). Moreover, the Interim Agreement Amendment expressly contemplated a *second* proceeding, to be initiated by Global if it wanted to “interconnect with SBC at GNAPS facility,” *after* the arbitration concluded and the parties’ ICA was approved – a clear acknowledgement by Global that that issue was not already pending before the Commission in the arbitration.

In short, as Staff correctly concludes, 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.¹

B. Global’s Trunk Orders Have Nothing To Do With The DS3 Charges AT&T Illinois Seeks To Collect.

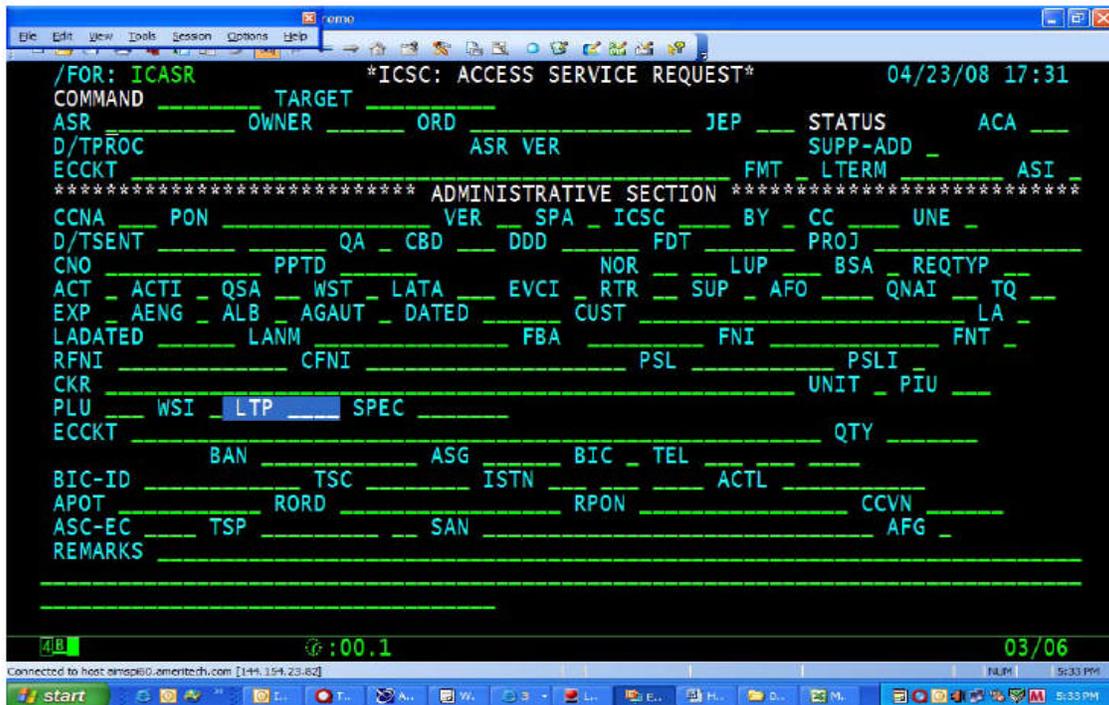
Global also suggests that AT&T Illinois’ position boils down to “[b]ecause Global submitted ASRs requesting trunks, it must pay for the trunks provided by AT&T pursuant to those ASRs.” Global Br. at 4. Global then argues that AT&T Illinois inappropriately “forced Global to submit ASRs requesting trunks,” when Global only wanted to submit a “trunk forecast,” and “[i]t has been and continues to be Global’s position that all it needs to provide to Illinois Bell is an estimate of the traffic it expects to send to Illinois Bell.” *Id.* at 8-9 (quoting Global Ex. 2.0 (Noack) at 4). Global’s argument is fatally flawed for a number of reasons.

As an initial matter, Global’s argument is just another example of Global’s scofflaw attitude. Global agreed in the parties’ ICA that ASRs would be used to establish trunks, and

¹ In any event, Global’s Oak Brook facility is not a permissible location for the POI. As Mr. Hamiter explained in uncontested testimony, the Oak Brook location is not an AT&T Illinois location. Rather, it is a third-party location to which AT&T Illinois had previously extended a fiber loop. *See* Hearing Tr. at 57, 62-63, 88-91 (Hamiter). Federal law requires incumbent carriers to provide interconnection at points “within” their networks. 47 U.S.C. § 251(c)(2)(B). A customer premises to which an incumbent carrier has extended a loop is not a location within the incumbent’s network. AT&T Illinois has loops extending to the homes and businesses of many thousands of customers in Illinois, but that does not mean a CLEC is entitled to demand interconnection at the premises of AT&T Illinois’ customers. *See also* AT&T Ex. 2.1 (Hamiter Rebuttal) at 11.

further agreed that, for two-way trunks, Global would bear the responsibility to submit ASRs. In particular, 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 that all it needs to provide to Illinois Bell is an estimate of the traffic” and its contention that AT&T Illinois inappropriately “forced” it to submit ASRs for trunks merely confirms Global’s blatant disregard of its obligations and commitments, including the ICA approved by the Commission.

Global’s assertion (at 9) that AT&T Illinois “not only forced Global into ‘ordering’ services it was not obligated to order,” but on the ASRs somehow “prevented Global from providing AT&T with information that would show that the traffic would be subject to the ESP exemption” is yet another example of the frivolity of Global’s arguments. Here is a screen shot of a blank ASR (taken from AT&T Ex. 4.0 (Harlen Direct), Sch. RMH-1):



The longest field (by far) in the ASR is the “Remarks” field at the bottom, where Global was free to provide whatever information it chose. 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, despite every opportunity to do so. *See* AT&T Ex. 1.1 (Pellerin Rebuttal) at 10-11.

More importantly, Global’s entire argument is a red herring, because Global’s trunk ASRs have nothing to do with the DS3 charges AT&T Illinois is seeking to collect. Contrary to Global’s specious suggestion (at 9), AT&T Illinois is not “claiming it is owed charges for . . . trunks,” and has never claimed any such thing. Trunks are individual call paths that connect two switches. *See* AT&T Ex. 2.0 (Hamiter Direct) at 5-6. AT&T Illinois does not charge for trunks. *See* AT&T Ex. 1.1 (Pellerin Rebuttal) at 7-8.

The tariffed special access charges that AT&T Illinois seeks to recover in this proceeding are for the few high-capacity DS3 circuits ordered by Global connecting its Oak Brook facility to AT&T Illinois’ LaGrange tandem, not the hundreds of trunks established between Global’s switch and AT&T Illinois’ switches. *See id.* at 7-8; Hearing Tr. at 95-96 (Hamiter) (explaining the difference between a DS3 and a trunk). As explained above and in AT&T Illinois’ initial brief, Global is obligated to pay for the facilities (not the trunks) connecting the Oak Brook and LaGrange locations. 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&T Illinois is seeking to recover the tariffed charges for these DS3s, and not any charges for trunks.

Global also suggests that the fact that some of the ASRs resulted in charges under the state tariff and others in charges under the federal tariff demonstrates “the absurdity of using ASRs,” because “[a]ll of the traffic passed on by Global to Illinois Bell is ESP traffic.” Global

Br. at 9-10 (quoting Global Ex. 2.0 (Noack) at 8). That assertion, of course, is completely unproven. But more importantly, whether Global's traffic was all ESP, ISP, local, or any other sort of traffic is beside the point, because, as explained above, Global is required to pay for the facilities connecting its Oak Brook facility to the POI in LaGrange. That is the case regardless of what types of traffic Global planned to transmit, so whether the DS3 ASRs had a box for "ESP traffic" is immaterial. The only issue was which tariff – state or federal – the DS3s would be provided and charged under, and Global made that choice itself. 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. *See* AT&T Ex. 3.0 (Lenhart Direct) at 5 & Sch. BAM 1-4.

Global's feigned confusion about the ASRs leads nowhere. Mr. Noack, who was personally responsible for the submission of Global's ASRs, has decades of experience working with ASRs. Hearing Tr. at 137-39 (Noack). Moreover, ASRs are standard industry forms that have been used for many years across the industry, and they are created by an industry group (not AT&T Illinois), which publishes a comprehensive guide available to subscribing carriers to use when populating ASRs. AT&T Ex. 1.1 (Pellerin Rebuttal) at 13. And, if Mr. Noack was truly confused about the ASRs for DS3s or did not agree with them, he should not have submitted them to AT&T Illinois; no one forced Global to fill out the DS3 ASRs and submit them to AT&T Illinois.

In any event, it is apparent that the only "confusion" Global had was how to avoid its obligation to pay for the facilities between Oak Brook and LaGrange. If "the ASR form did not provide a proper option or an adequate manner to describe what Global was [sic] sought"

(Global Br. at 10), that is only because what Global sought was to force AT&T Illinois to provide the DS3s for free, in violation of the Interim Agreement Amendment and the parties' ICA. But that kind of "confusion" obviously cannot and does not absolve Global of liability. Global knew that AT&T Illinois demanded that Global order and pay for the DS3s, "that AT&T would not budge," and "[e]ach time [Global] was instructed that unless Global completed the form as presented a DS3 could not be ordered'" (Global Br. at 10 (quoting Global Ex. 2.0 (Noack) at 9)) – and Global chose to go ahead and submit the ASRs. Indeed, in its ASRs for the intrastate DS3s, Global even tried to get the best rate available, choosing a long-term commitment with a lower rate – clear, objective evidence that Global knew AT&T Illinois would be billing Global for the DS3s it ordered. *See* AT&T Ex. 1.1 (Pellerin Rebuttal) at 14-15. And, most importantly, the Interim Agreement Amendment and ICA require Global to bear the cost of the facilities between Oak Brook and LaGrange, irrespective of Global's purported confusion.

II. Global Has Violated The Parties' ICA By Failing To Pay For Transiting.

As AT&T Illinois demonstrated in its initial brief, Global has violated the parties' ICA by refusing to pay AT&T Illinois for transiting service. Under the ICA, AT&T Illinois agreed to "transit" to third party carriers traffic AT&T Illinois received from Global that was destined to end-users of those third party carriers, relieving Global of the burden of directly interconnecting with those third party carriers to deliver the traffic to them. In return, Global agreed to pay AT&T Illinois for this transiting service. But Global has refused to pay a single penny for the transiting service provided by AT&T Illinois, in breach of the parties' ICA.

Global has no valid excuse for its failure to pay the transiting charges. In its initial brief, Global barely mentions the transiting charges. Global's sole argument regarding the transiting charges is found on page 13 of its initial brief, where Global asserts that "the FCC does not allow any of the charges that Illinois Bell is attempting to recover in this proceeding," including special

access, local, intrastate toll, and transiting charges, because Global’s traffic is “enhanced services traffic.”

Putting aside Global’s failure to prove all or any of its traffic is “enhanced services traffic” (a failure addressed below in Section III(C)), Global’s argument goes nowhere. Global is not accurately portraying to the Commission the FCC’s rules and orders, and its argument is frivolous.

While Global represents to the Commission that the FCC does not allow transiting charges on enhanced services traffic, it does not cite a single FCC order to that effect. That is because none exists. None of the FCC orders cited by Global addresses transiting charges, much less holds that enhanced services traffic is exempt from transiting charges.

The “exemption” Global refers to is the FCC’s “enhanced service provider” (or “ESP”) exemption, which exempts *ESPs* (and only *ESPs*) from certain *access charges*. The exemption has nothing to do with transiting charges, and Global is not an ESP in any event. As the FCC explained in the *ISP Remand Order*, the “ESP exemption” is “a long-standing Commission policy that affords one class of entities using interstate access – 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,” such that ESPs may “choos[e] . . . to pay local business rates, rather than the tariffed interstate access charges that other users of interstate access are required to pay.” *ISP Remand Order*, ¶ 27 (emphasis in original).² Access charges are payments “ma[d]e to local exchange carriers (LECs) to originate

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd. 9151 (2001) (“*ISP Remand Order*”) (subsequent history omitted), available at 2001 WL 455869.

and terminate long-distance calls” on the LEC’s local network. *Intercarrier Compensation NPRM*, ¶ 1 n.2.³

The transiting charges AT&T Illinois seeks to collect are not access charges, because they are not charges for originating or terminating traffic on AT&T Illinois’ network. Rather, 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 exempts enhanced services traffic (or any other communications traffic) from such charges, even if some “access charge” exemption applied here. When Global avers to the contrary that “the FCC has been clear with respect to information services being entitled to exemption from access *and other charges*” (Global Br. at 19 (emphasis added) (citing no authority)), it is simply making it up.

Indeed, the FCC itself has confirmed that it has not promulgated rules governing compensation for transit service – which is why the FCC called for comments on transit service in its *Intercarrier Compensation NPRM*. In that 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 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.*

Moreover, the FCC also 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.* That is precisely the case here.

³ Further Notice of Proposed Rulemaking, *In re Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 (2005) (“*Intercarrier Compensation NPRM*”), available at 2005 WL 495087.

As AT&T Illinois demonstrated in its initial brief, AT&T Illinois agreed in the parties' ICA to provide transiting service to Global, and did provide such service, for a *fee*. And, pursuant to the ICA, Global agreed to pay that fee for AT&T Illinois' provision of transiting service. Global's steadfast refusal to pay that fee after it began to make use of AT&T Illinois' transit service is an obvious breach of the ICA.

Finally, even if the FCC *had* exempted enhanced services traffic – and all transporters of enhanced services traffic – from transiting charges (though it did not), and even if Global *had* proven the traffic it passed on to AT&T Illinois was enhanced services traffic (though it has not), that would not help Global here. This dispute is governed by the parties' ICA, not the FCC's rules, and Global is bound by the ICA irrespective of the FCC's rules. As explained in AT&T Illinois' initial brief (at 13), under the 1996 Act, and as a matter of federal law, parties can negotiate ICA terms without regard to the FCC's rules, and their ICAs are “binding.” *See, e.g.*, 47 U.S.C. § 251(c)(1), § 252(a)(1); *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1151 (9th Cir. 2006) (“[p]arties who enter into a voluntary interconnection agreement need not conform to the requirements of the Act,” and an ICA departing from the FCC's rules “would be binding on the parties regardless of” the FCC's orders); *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) (the 1996 Act “mandate[s] that interconnection agreements have the binding force of law”); *Verizon Maryland, Inc. v. RCN Telecom Servs.*, 232 F. Supp. 2d 539, 551, 555 (D. Md. 2002) (same). Here, Global agreed in the ICA to pay for transiting service, and that is the end of the matter.

III. Global Has Violated The Parties' ICA And AT&T Illinois' Intrastate Tariff By Failing To Pay Reciprocal Compensation And Intrastate Access Charges.

Global's excuse for its refusal to pay local reciprocal compensation and intrastate access charges for traffic terminated by AT&T Illinois also rests upon its frivolous attempt to re-cast the

FCC’s “ESP exemption.” *See* Global Br. at 10-22. But as Staff correctly concludes, that 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.

A. The ESP Exemption Does Not Apply To Global.

Global asserts (at 16) that “[s]ince 1983 the FCC has held that interstate access charges may not be applied to traffic that is delivered from ESPs.” That assertion is both false and irrelevant, as AT&T Illinois is not seeking recovery of any interstate access charges in this proceeding. As a threshold matter, the FCC’s ESP exemption is an exemption that applies only to ESPs themselves, and is only an exemption from certain (*i.e.*, originating) “interstate access charges.” As the FCC stated in the *ISP Remand Order* (¶ 11), “[s]ince 1983, . . . the Commission has exempted ESPs from the payment of certain *interstate access* charges.” (Emphasis added). *See also infra* n.7 and accompanying text (quoting the FCC orders cited by Global, all of which refer only to *interstate access* charges). The ESP exemption has no application to the charges at issue here, which are all *intrastate* charges (*i.e.*, local reciprocal compensation and intrastate access charges, as well as the transiting charges addressed above), not interstate access charges. The fact that interstate access charges are not at issue here dooms Global’s argument; the Commission need not consider it further.

In addition, even if the FCC’s ESP exemption applied to local reciprocal compensation and intrastate access charges (not just originating interstate access charges), that exemption still would not help Global here. Contrary to Global’s suggestion (at 16), 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 (as Global itself has no customers) were in fact ESPs.

As noted above, the FCC explained in the *ISP Remand Order* that the "ESP exemption" is "a long-standing Commission policy that affords one class of entities using interstate access – 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," such that ESPs may "choos[e] . . . to pay local business rates, rather than the tariffed interstate access charges that other users of interstate access are required to pay." *ISP Remand Order*, ¶ 27 (emphasis in original). *See also id.* ¶ 11 ("ESPs, including ISPs, are treated as end-users for the purpose of applying access charges," and hence "pay local business rates"). Thus, if they choose to invoke the ESP exemption, the *ESP customers* of Global's affiliates (assuming for the moment they are in fact ESPs) can purchase local business services just like Mike's Auto Repair or any other business customer; and, like Mike's Auto Repair or any other business end-user, those *ESPs* are not treated like interexchange carriers, and thus do not have to pay the originating interstate access charges that carriers pay to LECs like AT&T Illinois.

But that does not mean the *carrier* from whom an ESP purchases service to terminate its subscribers' traffic *also* is suddenly exempt from paying other carriers for inter-carrier services, such as terminating or transiting traffic on the other carrier's network. Mike's Auto Repair does not pay interstate access charges (or any other intercarrier compensation) to its LEC for originating or terminating calls, because Mike's Auto Repair is an end-user purchasing local business service, not a carrier. The carrier providing service to Mike's Auto Repair, however, is not exempt from carrier-to-carrier charges. Similarly, even if the customers of Global's affiliates were entitled to be treated as end-users because they are ESPs, such that those customers are not

subject to carrier-to-carrier charges, that does not mean *Global* is entitled to be treated as an end-user rather than a carrier, so that *Global* also is exempt from carrier-to-carrier charges.

None of the three orders cited by *Global* in support of its assertion that “the FCC has held that interstate access charges may not be applied to traffic that is delivered from ESPs” supports that assertion. *Global Br.* at 16 & n.14. Instead, all three orders confirm that the FCC’s interstate access charge exemption applies *to the ESP*, not to carriers like *Global*. In the *MTS/WATS Order* (where the FCC first created the exemption), the FCC explained that it was exempting “enhanced service providers” (not all carriers that may transport enhanced services traffic) from access charges: “Other users who employ exchange service for jurisdictionally interstate communications, including . . . enhanced service providers, . . ., who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. . . . Were we at the outset to impose full carrier usage charges on enhanced service providers . . . who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.”⁴ Similarly, in its *1998 Access Charge Order*, the FCC “decided not to eliminate the exemption from interstate access charges currently permitted *enhanced service providers*.”⁵ The FCC noted that in 1983, “we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers.” *Id.* ¶ 2. Carriers that are not ESPs, but merely transmit purported enhanced services traffic (like *Global*) were not among the classes of exchange access users granted a temporary exemption. And in its *1997 Access Charge Reform*

⁴ Memorandum Opinion and Order, *In re MTS and WATS Market Structure*, 97 FCC 2d 682, ¶ 83 (1983) (“*MTS/WATS Order*”), available at 1983 WL 183026.

⁵ Order, *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631, ¶ 1 (1988) (emphasis added) (“*1998 Access Charge Order*”), available at 1988 WL 488404.

Order, the FCC explained that in 1983, it “decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls, ISPs should not be required to pay interstate access charges.”⁶ The FCC decided to retain this exemption, “conclud[ing] that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges *on ISPs*,” and “ISPs should remain classified as end users for purposes of the access charge system.” *Id.* ¶¶ 344, 348 (emphasis added). Here, of course, *Global* is using AT&T Illinois’ facilities to terminate traffic – and *Global* is not an ESP, an ISP, or an end-user.⁷

Other FCC orders confirm that the ESP exemption applies only to ESPs themselves, not to carriers like *Global* and/or its affiliates that purport to serve ESPs. For example, in a 1992 order, the FCC explained that under its ESP exemption “enhanced service providers are treated as end users for purposes of [the FCC’s interstate] access charge rules” (and thus pay end user charges rather than access charges), but “[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers.”⁸ In other words, ESPs may be exempt from interstate access charges because they are treated as end-users, but that does not create an access charge exemption for the carriers from whom the ESP/end-user purchases service (*i.e.*, *Global*). The exemption applies to the ESP, not a carrier serving the ESP.⁹

⁶ First Report and Order, *In re Access Charge Reform*, 12 FCC Rcd. 15982, ¶ 341 (1997) (“*Access Charge Reform Order*”), available at 1997 WL 268841.

⁷ These same three FCC orders also confirm that the FCC’s ESP exemption is for *interstate* access charges, not intrastate charges of the sort at issue here.

⁸ *In re Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987), *vacated on other grounds*, 7 FCC Rcd 5644 (1992).

⁹ Indeed, *Global*’s suggestion that the ESP exemption means “enhanced services traffic” (rather than just the ESP itself) is exempt from intercarrier compensation charges is belied by the entire *ISP Remand Order*. At the outset of that order, the FCC recognized that the ESP exemption applies to ISPs (a subset of ESPs), such that “ESPs, including ISPs, are treated as end-users for the purpose of applying access charges,” and instead “pay local business

Global’s assertion (at 16) that “[t]he FCC also has exempted IP-enabled traffic delivered to the PSTN from access charges” is yet another outright fabrication. The FCC has never 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 cites in support of its assertion is pages 22414-15 of the FCC’s *Vonage Order*.¹⁰ But the FCC said nothing about access charges there, or anywhere else in the *Vonage Order*; indeed, the term “access charges” does not even appear in the *Vonage Order*.

Rather, at pages 22414-15 of the *Vonage Order*, the FCC addressed its authority to preempt state regulation (including regulation of rates) for services that have both interstate and intrastate aspects where “separating [the] service into interstate and intrastate communications is impossible or impractical.” *Vonage Order*, ¶ 19. The FCC went on to hold that Vonage’s DigitalVoice service, which originates in IP format over a broadband connection to the Internet, is such a service, such that the Minnesota commission should be preempted from engaging in “economic regulation” of the service. *See id.*, ¶¶ 1, 5.¹¹ That holding has nothing to do with this case. AT&T Illinois is not proposing that 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

rates.” *ISP Remand Order*, ¶ 11. Under Global’s over-expansive (and ever-expanding) view of the ESP exemption, that would mean that all ISP traffic is exempt from intercarrier compensation. Of course, that is not what the FCC held in the *ISP Remand Order*. To the contrary, after acknowledging that ISPs are not subject to interstate access charges, the FCC went on to determine the appropriate intercarrier compensation for carriers serving ISPs – unequivocally demonstrating that the exemption applies to *the ESP itself*, not to every carrier that touches the traffic.

¹⁰ Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utils. Comm’n*, 19 FCC Rcd. 22404 (2004) (“*Vonage Order*”), available at 2004 WL 2601194.

¹¹ As the FCC recently explained in a brief to the Eighth Circuit, “[i]n the [*Vonage Order*], the FCC found that Minnesota’s entry and tariff regulations of Vonage’s service conflicted with the FCC’s deregulatory policies applicable to the interstate component of Vonage’s service,” but “[t]he FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional ‘economic regulation.’” Brief for Amici Curiae United States and FCC, *Vonage Holdings Corp. v. Nebraska Public Serv. Comm’n*, No 08-1764, at 14 (8th Cir. Filed Aug. 5, 2008) (“FCC Amicus Brief”) (attached as Exhibit C hereto).

services they may provide to subscribers. Rather, AT&T Illinois 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.

In short, as Staff correctly concludes, Global’s suggestion that the FCC’s orders somehow exempt Global from the charges AT&T Illinois seeks to collect goes nowhere. None of the FCC orders to which Global points provide any support for Global’s suggestion. To the contrary, those orders confirm that the FCC has merely exempted *ESPs* (not carriers like Global) from certain *interstate* access charges (not *intrastate* charges like local reciprocal compensation and intrastate access charges).

B. Global’s Jurisdictional Argument Is A Red Herring.

Lacking any support for its bald assertions that the FCC’s orders exempt it from the intrastate tariff and ICA charges that it owes AT&T Illinois, Global instead devotes the bulk of its argument to expounding on the FCC’s purported exclusive jurisdiction over interstate “IP-enabled” services. *See* Global Br. at 14, 16-19. That is a red herring that can only be intended to distract and confuse the Commission.

Global’s jurisdictional discussion is beside the point 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, Global is

not Vonage, and does not offer subscribers *any* of the IP-based services that Vonage and other VoIP service providers offer.

Stated another way, Global’s jurisdictional argument is a red herring because AT&T Illinois is not asking the Commission to regulate the provision of service by purported ESPs (including the purported ESP customers of Global’s affiliates), or to otherwise intrude on the FCC’s turf. Rather, AT&T Illinois merely asks 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). It is beyond dispute that state commissions have authority to interpret and enforce ICAs. Indeed, this case is currently pending before this Commission because Global successfully convinced a federal district court that this Commission has the *sole* authority, at least in the first instance, to resolve AT&T Illinois’ ICA and intrastate tariff claims. *See* AT&T Cross-Ex. 4 (Global’s motion to dismiss the federal lawsuit).

The *Vonage* orders on which Global relies (at 14 & 16-19) addressed whether state commissions could regulate a particular *service* – Vonage’s broadband-based, “nomadic” VoIP service. In its *Vonage Order*, the FCC decided to preempt the Minnesota commission from “applying its traditional ‘telephone company’ regulations to Vonage’s DigitalVoice service,” because the service “cannot be separated into interstate and intrastate communications for compliance with Minnesota’s requirements without negating valid federal policies and rules.” *Vonage Order*, ¶ 1. The Minnesota commission had “issued an order asserting regulatory jurisdiction over Vonage and ordering the company to comply with all state statutes and regulations relating to the offering of telephone service in Minnesota.” *Id.* ¶ 11. Similarly, the Nebraska district court preliminarily concluded that, in light of the FCC’s *Vonage Order* and the

Eighth Circuit's affirmance of that order, the Nebraska commission could not impose universal service fees on Vonage. *Vonage Holdings Corp. v. Nebraska Public Service Com'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008). (The Nebraska court did not decide to "not apply access charges to VoIP," as Global misrepresents (at 14).) None of these Vonage orders addressed access charges, whether interstate or intrastate, or local reciprocal compensation charges (or, for that matter, transiting or special access charges). Rather, these orders addressed whether a state commission could regulate Vonage's provision of its "nomadic VoIP" service.¹²

Here, no one is asking the Commission to regulate the provision of VoIP service by Vonage or any other ESP. Global does not provide VoIP or any other "enhanced" service, and is not an ESP. Global is a carrier, certificated by the Commission, that entered into an ICA with AT&T Illinois that was arbitrated and approved by the Commission. Global delivered traffic to AT&T Illinois pursuant to that ICA, AT&T Illinois terminated the traffic as it was required to do by the ICA, and AT&T Illinois merely asks the Commission to enforce the ICA by requiring Global to pay the charges specified by the ICA.

Similarly, whether "nomadic VoIP" can be separated into interstate and intrastate communications so that it can be regulated by both the FCC and state commissions is beside the point. As an initial matter, Global has never claimed that *all* its traffic is "nomadic VoIP" (and, as explained below, has not proven that *any* of its traffic is nomadic VoIP). But even assuming *arguendo* that Global handed off nomadic VoIP traffic to AT&T Illinois, that would be irrelevant here. The issue here is the compensation that applies *under the ICA* to the traffic delivered by

¹² Moreover, the FCC has filed an amicus brief with the Eighth Circuit asserting that the Nebraska court's decision should be overturned, because nothing in the FCC's *Vonage Order* preempts the Nebraska commission's attempt to impose universal service charges on Vonage. The FCC noted that "[i]t is not enough to simply conclude that it is impossible to separate the interstate and intrastate aspects of the service . . . to support preemption"; rather, preemption must be "necessary to prevent the state regulation at issue from frustrating a valid federal policy objective," and nothing in the Nebraska commission's order "present[s] a conflict with the FCC's rules or policies." FCC Amicus Brief at 14-15.

Global to AT&T Illinois for termination. And the ICA specifies how the parties are to determine what compensation applies. In particular, 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. Whether this traffic is distinctly “intrastate” for jurisdictional purposes such that the Commission could regulate the provision of service by the purported ESP customers of Global’s affiliates is a completely different issue, and one which does not concern the Commission here.

Indeed, the FCC has confirmed that its decision to classify an enhanced service as “interstate” does not affect the issue here – the appropriate compensation under an ICA for termination of the traffic – or deprive state commissions of authority to interpret and enforce ICA provisions. While dial-up ISP traffic is not at issue in this case, the FCC’s orders regarding intercarrier compensation for that particular species of enhanced services traffic are instructive. In its first ISP compensation order, the FCC concluded “that ISP-bound traffic is largely interstate.” *ISP Compensation Order*, ¶ 23.¹³ Nevertheless, the FCC noted that “[w]here parties have agreed to include this traffic within their section 251 and 252 interconnection agreements,

¹³ Declaratory Ruling, *In re Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (1999) (“*ISP Compensation Order*”), available at 1999 WL 98037, overruled by *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

they are bound by those agreements, as interpreted and enforced by the state commissions.” *Id.* ¶ 22. Similarly, upon remand from the D.C. Circuit, 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. *See also Verizon California*, 462 F.3d at 1151 (because “[p]arties who enter into a voluntary interconnection agreement need not conform to the requirements of the Act,” 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*”).

Finally, Global’s jurisdictional argument has already been rejected by at least one federal court, when the court rejected Global NAPs California’s challenge to a California Public Utilities Commission (“CPUC”) order requiring Global NAPs California to pay intrastate access charges, pursuant to its ICA, for the termination of allegedly “IP-enabled” or “VoIP” traffic. The court explained:

Global NAPs contends that the FCC’s order in *Vonage*, which the Eighth Circuit upheld, preempts the CPUC’s alleged “regulation” of VoIP services through enforcement of the ICA. While the FCC in *Vonage* clearly stated that state commissions cannot require VoIP providers to comply with state statutes and regulations that govern the offering of telephone service within their jurisdiction, it in no way communicated an intent to preclude state commissions from enforcing ICAs that require the payment of interconnection charges on VoIP calls that terminate on the PSTN. Because such an intent is neither clear nor explicit on the face of the ruling, the court will not infer it here, particularly in light of the [1996 Telecommunications Act’s (“TCA”)] reservation to state commissions of the authority to

interpret and enforce ICAs, and other FCC pronouncements, such as the *ISP Remand Order*, that recognize such authority.

Global NAPs argues that the intent to preempt is clear because the FCC in *Vonage* found that VoIP traffic was “jurisdictionally interstate.”

Global NAPs asserts that, simply because traffic is “jurisdictionally interstate,” the CPUC is preempted from imposing access charges on it. Several courts have rejected this proposition in the context of ISP-bound traffic, which is deemed to be interstate traffic. [Case citations omitted.] As these cases demonstrate, the mere fact that VoIP traffic is “interstate” does not preclude the state commissions from exercising limited authority over it.

It is well settled, for example, that state public utility commissions have the power to arbitrate, approve, interpret and enforce ICAs under the TCA. [Case citations omitted.] Consequently, the CPUC had authority to interpret and enforce the ICA between Global NAPs and Cox.

Global NAPs 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 (attached as Exhibit A hereto). The Commission should reach the same conclusion here, and reject Global’s specious “jurisdictional” argument.

C. 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, 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 that Global seems to use interchangeably).

Global points (at 10) to the testimony of Mr. Noack 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 (at 12-13) to the testimony of Mr. Scheltema that Global sends AT&T Illinois traffic from the “ESP customers” of Global’s affiliates. But Global offered no competent evidence to back up those assertions. The fact that Global, Mr. Noack, and Mr. Scheltema call the customers

of Global's affiliates "ESPs" proves nothing. 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.¹⁴

Indeed, 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. Hrg. Tr. at 141 (Noack). 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. *Id.* at 142.

Global's unsupported assertions also are refuted by the only *objective* evidence regarding the traffic Global handed off to AT&T Illinois: the traffic studies performed by AT&T Illinois and described by Mr. Hamiter. As explained in AT&T Illinois' initial brief (at 18-19), 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 (at 13) 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." That too

¹⁴ 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 hereto, at 4.

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. Hrg. Tr. at 141 (Noack).

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, 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, in the *IP Access Charge Order*,¹⁵ the FCC held that such services are "telecommunications services," not "enhanced" services, and that

¹⁵ Order, *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457 (2004) ("*IP Access Charge Order*"), available at 2004 WL 856557.

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.*

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, *see* Global Br. at 20-21), 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. The FCC expressly noted that “carriers such as . . . competitive LECs may qualify as interexchange carriers for purposes of this rule.” *Id.* ¶ 19 n.80.¹⁶

Again, Global concedes here 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. *See* Hrg. Tr. at 141-42 (Noack). 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, 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.

IV. The Commission Should Revoke Global’s Certificates Of Service Authority.

In addition to finding Global in breach of the parties’ ICA and AT&T Illinois’ intrastate tariff, the Commission should also, as Staff recommends, revoke Global’s certificates to provide service in Illinois, because Global lacks the requisite financial, managerial, and technical resources and abilities.

¹⁶ Here, to the extent that Global is now asserting that the traffic it hands off to AT&T Illinois over trunks reserved for local and intraLATA toll traffic is, in fact (and in clear breach of the parties’ ICA) interexchange interstate traffic, then Global and its affiliates plainly act as an interexchange carrier of that traffic. Like an interexchange carrier, Global and its affiliates do not originate any traffic. Rather, they take traffic from their “ESP customers,” transport it across exchanges (and across the country) where necessary, and hand the traffic off to AT&T Illinois and other local exchange carriers for termination, just like an ordinary long distance interexchange carrier. Moreover, as explained above and in AT&T Illinois’ initial brief, the terms of the parties’ ICA require Global to pay local reciprocal compensation and intrastate access charges for the traffic that Global delivers to AT&T Illinois for termination over trunk groups reserved for local and intraLATA toll traffic.

In its initial brief, Global makes no real effort to demonstrate that it possesses appropriate financial, managerial, and technical resources and abilities, but instead takes potshots at AT&T Illinois' and Staff's testimony on the issue. Global misses the mark.

Global first argues (at 23) that it is "inappropriate" for AT&T Illinois to request revocation of Global's certification, because AT&T Illinois is a competitor involved in a billing dispute. Global is wrong. AT&T Illinois is directly harmed by Global's lack of appropriate qualifications. Because Global was certificated by the Commission, AT&T Illinois was forced to enter into an ICA and do business with Global. However, Global not only has refused to pay AT&T Illinois a single penny for any of the services provided by AT&T Illinois, but Global was managed and structured as an assetless shell (which it does not deny). As a result, Global has no financial ability to pay a single penny to AT&T Illinois, or any other creditor, for liabilities incurred as a result of providing service in Illinois.

Global also points out (at 23) that "none of the judgments or claims cited by AT&T that are against Global have been made against Global Illinois." It is true that the multitude of judgments and claims identified by AT&T Illinois were made against affiliates of Global, as well as Global's parent company (Ferrous Miner Holdings), in other states. But that does not negate the significance of these other judgments and claims. 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. These numerous claims and judgments (including the judgment of the Connecticut federal court entered as a sanction for lying to and committing a fraud upon the court in connection with claims for unpaid charges brought by another local exchange carrier, SNET) demonstrate the managerial incompetence, and outright malfeasance, of those persons who control and manage Global.

Rather than address the “qualifications” of its management, Global attempts to sing its own praises, asserting (at 23) that “[n]o customer has ever complained about the service they receive or charges that they pay to Global.” As Staff correctly recognizes, that assertion falls flat. Global has no customers, and no one pays anything to Global, and hence there is no one to complain. If AT&T Illinois had no customers and imposed no charges, it too undoubtedly would never receive a customer complaint.¹⁷

For the same reasons, Global’s assertion that “there is no threat to the safety of Illinois’ citizens or even to the loss of their dial tone” only undermines Global’s position. Global Br. at 26. If the Commission 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. Rather, the only effect on Illinois citizens will be that they will no longer have to subsidize Global’s attempt to free ride on the public switched telephone network in Illinois, while Global’s affiliates in Massachusetts pocket the revenues.

As for Global’s financial qualifications, Global does not dispute that it has no assets, no revenues, and no income. Instead, Global points to a “guarantee” provided by Global NAPs, Inc. *See* Global Br. at 23-24. As AT&T Illinois demonstrated in its initial brief (at 35-36), that “guarantee” is worthless, because Global NAPs, Inc. is an assetless shell just like Global. AT&T Illinois presented extensive evidence of this, yet Global has made no attempt to demonstrate that Global NAPs, Inc. has *any* financial resources of its own, such that its “guarantee” is sufficient to

¹⁷ While Global has admitted it has no customers (*see* AT&T Br. at 31), at times it has suggested that its affiliate Global NAPs Networks (which purports to hold all the customer contracts, notwithstanding the fact that it is not certificated in Illinois) is its “customer.” But Global does not collect any revenues from Global NAPs Networks, and in any event Global NAPs Networks is owned and operated by the same cast of characters as Global, so it should come as no surprise that Global NAPs Networks has never complained about Global.

establish Global's financial viability. The Commission can only take Global's silence for what it is – a concession that Global NAPs, Inc. has no more financial resources than Global itself.

Global's suggestion (at 25) that its "corporate structure was modeled after that of Verizon's corporate structure" fares no better. There is no evidence that Verizon structured its certificated subsidiaries (or any subsidiaries, for that matter) as shells without assets, employees, customers, or revenues. To the contrary, as Ms. Pellerin explained in her surrebuttal testimony (AT&T Ex. 1.2 at 5-6 & Sch. PHP-32, 33, 34, and 35), unlike Global, Verizon's certificated entities in Illinois (Verizon North and Verizon South) have their own employees and assets and revenues and actually provide service to end users – and hence have financial resources and can pay creditors.

Finally, it is telling that throughout this proceeding, Global has never once attempted to explain any legitimate purpose for the manner in which it is operated and structured – *i.e.*, why all the assets, network facilities, customer contracts, and revenues are assigned to other, non-certificated affiliates, while Global itself is left with nothing. Certainly nothing in Illinois law requires such a structure, and there is no evidence that *any* other carrier in Illinois (or anywhere else) is structured or operated in such a manner. The only reasonable conclusion the Commission can draw is the obvious one – that Global was structured and operated in this manner in order to defraud AT&T Illinois and any other creditors in Illinois, by attempting to make Global "judgment-proof" with respect to the operations of Global and its affiliates in Illinois. The Commission need not and should not countenance such a ploy, but, as Staff recommends, should exercise its discretion to revoke Global's certificates of service authority on the grounds that Global lacks the requisite financial, managerial, and technical resources and abilities required under the PUA to provide service in Illinois.

Conclusion

For the foregoing reasons and those explained in AT&T Illinois' initial brief, AT&T Illinois respectfully requests that the Commission enter an order finding that Global has breached the parties' ICA and AT&T Illinois' intrastate tariff, finding that Global owes AT&T Illinois the amount of \$1,071,796.54, plus late payment charges and any amounts that have accrued since March 2008, and revoking Global's certificates of service authority.

Respectfully submitted,

/s/ Mark R. Ortlieb
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