

**Docket No:** 08-0105  
**Bench Date:** 3/25/09  
**Deadline:** 4/5/08

**MEMORANDUM**

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**TO:** The Commission  
**FROM:** Eve Moran, Administrative Law Judge  
**DATE:** March 19, 2009  
**SUBJECT:** Illinois Bell Telephone Company, Inc.  
-vs-  
Global NAPs Illinois, Inc.

Complaint pursuant to Section 252(e) of the Federal Telecommunications Act of 1996, 47 U.S.C. §252(e), and Sections 4-101, 10-101, and 10-108 of the Illinois Public Utilities Act, 220 ILCS 5/4-101, 220 ILCS 5/10-101, and 220 ILCS 5/10-108.

**RECOMMENDATION:** Deny the Application for Rehearing.

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**I. Introduction**

The Illinois Commerce Commission (“Commission”) entered its Final Order in the above-captioned docket on February 11, 2009. It was served on the parties on February 13, 2009. Thereafter, on March 16, 2009, Global NAPs Illinois, Inc. (“Global Illinois”) filed an Application for Rehearing (Application”). By statute, this Commission only has until April 5, 2009 to enter its ruling.

An application for rehearing is directed to the Commission’s discretion. But that discretion is not unfettered. It must be grounded in sound legal principles and reasoning. In conjunction with the rules of practice, it is incumbent upon the Commission to apply the standards for discretion set out at 83 Ill. Adm. Code 200.25. This means that its discretion shall be exercised so as to accomplish the goals here set forth:

- a) **Integrity of the fact-finding process** – The principal goal of the hearing process is to assemble a complete factual record to serve as basis for a correct and legally sustainable decision.
- b) **Fairness** – Persons appearing in and affected by Commission proceedings must be treated fairly. To this end, parties which do not act diligently and in good faith shall be treated in such a manner as to negate any disadvantage or prejudice experienced by other parties.

- c) **Expedition** – Proceedings must be brought to a conclusion as swiftly as is possible in keeping with the other goals of the hearing process.
- d) **Convenience** – The hearing process should be tailored where practicable to accommodate the parties, staff witnesses, the Hearing Examiner and the Commission itself.
- e) **Cost-effectiveness** – Minimization of costs incurred by the Commission, and by both public and private parties, should be sought. (Source: Added at 10 Ill. Reg. 10481, effective May 30, 1986).

## II. The Rules that Govern Applications for Rehearing.

Section 200.880 of the Commission's rules of practice governs "Rehearing." Among other things, it requires the application to contain a brief statement of proposed additional evidence, if any, and an explanation of why such evidence was not previously adduced. 83 Ill. Adm. Code 200.880(a). This rule aims to maintain diligence and bring finality to the litigation.

Further, Section 200.880 provides that applications for rehearing that incorporate argument made in prior pleadings and briefs must be specific as to document and page. Id. at 200.880(b). This rule recognizes the statutory time constraints under which the Commission operates in ruling on a rehearing application and need for easy reference.

Finally, Section 200.880 provides that, if an application for rehearing alleges new facts, then the application must be filed with a verification. Id.

## III. Global Illinois' Rehearing Application.

According to the Application, Global Illinois seeks rehearing and reconsideration, based on the existing evidentiary record and applicable law, of the Commission's incorrect decision which granted the claims of Illinois Bell Telephone Co. ("AT&T") and found Global to be responsible for four types of charges:

- DS3 special access services representing charges for the special access service that AT&T allegedly provides to Global over DS3 circuits,
- Intrastate switched access charges are for traffic passed on from Global to AT&T that it asserts to be intrastate toll traffic,
- Reciprocal compensation charges are assigned to traffic passed on from Global to AT&T that is allegedly local traffic, and
- Transiting charges are for traffic passed on from Global to AT&T that is alleged to be traffic destined for a third telecommunications carrier and represents switching and transport components.

In addition, Global states that this Application identifies several areas where the Commission should grant rehearing in order for Global to present evidence and arguments that it had not previously made in this proceeding. Here begins the analysis of the instant Application.

**1. The Commission Should Grant Rehearing In Order For Global to Present Evidence that AT&T's Charges to Global for Intrastate Switched Access, Reciprocal Compensation and Transiting Are Discriminatory, Unjust and Unreasonable Charges.**

Global contends that the Commission should grant rehearing in order for Global to present evidence and argument regarding the discriminatory, unjust and unreasonable rates that AT&T has attempted to charge in this proceeding. According to Global, these rates far exceed rates charged by or to AT&T or paid by other providers of Voice over Internet Protocol ("VoIP") service and far exceed the rates that other state commissions have approved or that the Federal Communications Commission ("FCC") is considering in a pending proceeding.

Global admits that it not develop any record in this proceeding on what it here claims is the extraordinary level of AT&T Illinois' charges to Global as relative to those being charged by, or between other carriers, or those as are being considered by the FCC in its Intercarrier Compensation Proceeding.

Global attempts to excuse its failure to do so by setting out two reasons. First, Global contends, there is the fact that the FCC's investigation into intercarrier compensation has continued for several years and the FCC decision has now extended beyond the initial administrative proceedings. Second, Global asserts that since the entry of the Commission's order, it has discovered the existence of AT&T interconnection agreements with other VoIP providers that show an extraordinary difference between the rates being charged Global and any other rate.

On this basis, Global requests rehearing in order to develop a record on this issue. And, it relies on the opinion in Illinois Bell Telephone Company, Inc. v. Global NAPs Illinois, 551 F.2d 587, 595 (7<sup>th</sup> Cir. 2008) ("Global") where the Court of Appeals in explaining why, in part, it was appropriate to remand this case from the U.S. District Court to this Commission, wrote that state commission are entrusted with federal statutory authority to determine "whether the contractual interpretation urged by one of the parties would result in price discrimination" prohibited by 47 USC sec. 252(d)(1)(A)(ii).

Global starts from the premise that it is a VoIP provider, but the record does not support this and accordingly, the Order did not so find. That said, this analysis continues.

Nothing that Global now wants to litigate on rehearing, arises on the basis of new or previously undiscoverable evidence. And, contrary to the requirements of Section 200.880(b), Global provides no explanation of why such evidence, i.e., other carrier rates, was not previously adduced. The significance of the FCC proceeding is not pertinent here because any rates it might set are prospective - whereas the dispute in this case looks backward. Indeed, the Application ignores the Order's discussion of this very point.

It is improper for a party to hold back on its arguments and evidence only to show its full hand at the rehearing stage. Global Illinois had every opportunity to challenge the rates and charges or the amounts AT&T Illinois showed to be owing (by Applicant) during the course of this proceeding. (Indeed, the ALJ held back one of AT&T Illinois' witness' to get an updated statement of the billings). That Global did not take the opportunity to do so is a matter of strategy and it must now accept the outcome of its own making.

Section 200.870 provides for "Additional Hearings" and it comes into play after the record in a proceeding has been marked "heard and taken" but before the issuance of a final order by the Commission. 83 Ill. Adm. Code 220.70. This was another option available to the Applicant in this situation where it wanted to bring in a different line of evidence. This option, however, was not pursued by the Applicant.

Finally, the question referred to by the Court of Appeals in Global was never put before or addressed in any way by Global. It is a question familiar to the Commission and important to its role of approving interconnection agreements and disputes thereon. It is also a question that need be raised and substantiated by the affected party. Global flatly failed in this regard.

**Recommendation:**

In the final analysis, the goals of Fairness and Expedition weigh heavily in favor of denying the Application on this issue.

**2. The Commission Should Reconsider Its Decision that That Global Is Responsible For All Charges for Intrastate Switched Access Service, Reciprocal Compensation and Transiting Being Assessed by AT&T And Grant Rehearing to Develop Appropriate Charges.**

Global contends that the Commission should reconsider its decision that Global is obligated to pay standard long distance company rates for intrastate switched access, reciprocal compensation and transiting charges for intrastate traffic because Global's traffic is not and cannot be traditional telephony subject to the charges sought by AT&T.

It is Global's position that the rates that AT&T should be charging Global for termination traffic should have been subject to negotiation pending the setting of rates currently being determined by the FCC. As such, the Application contends that the Commission's decision on this issue is clearly discriminatory and in violation of the 1996 Act and Illinois administrative law.

According to Applicant, the Commission should grant rehearing in order to determine precisely what percentage of Global's traffic, if any, is VoIP or raises issues of characterization that must await FCC clarification. Such a proceeding on rehearing, it asserts, would allow the parties to negotiate an appropriate rate for the traffic, based either on FCC determined rates in its pending Intercarrier Compensation Proceeding<sup>1</sup> or on rates that AT&T is currently charging or paying.

Global distorts the record when arguing that the Commission should reconsider its decision that Global's traffic is not VoIP and grant rehearing to determine what percentage of Global's traffic if any, is not VoIP.

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<sup>1</sup> *Developing a Unified Intercarrier Compensation Scheme*, Notice of Proposed Rulemaking, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001), Further Notice of Proposed Rulemaking, FCC 05-33 (rel. March 3, 2005) (hereinafter, the "*Intercarrier Compensation Proceeding*").

Applicant claims that the testimony of Global witnesses Noack and Scheltema, and the letters from two carrier–customers provided overwhelming evidence to support to support Global’s position that the traffic it terminates on AT&T’s system is primarily VoIP. It takes issue with the Order’s assessment of the letter evidence as found on page 45 of the Order and asserts reversible error in that the Commission’s decision is not supported by credible evidence.

In making such a claim, Global gives the Commission an inaccurate account of the rulings made by the ALJ in this proceeding, to wit:

....the Administrative Law Judge chose to deny admission of the evidence from Global’s two customers that provided details of the services they provide. The ALJ incorrectly assumed such important evidence was unreliable hearsay. Those letters should have been admitted here and it was error to strike them from the record and for the Commission to disregard them. While those letters would be considered hearsay under the rules of evidence, the Commission rules provide: “Evidence not admissible under such rules may be admitted if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs.”<sup>2</sup> A review of those letters shows that a reasonably prudent person would indeed rely upon those letters. Both are from companies that advertise the same services to the trade in their web sites, and that do business with the trade. Both were written by legal counsel for the customers of Global. Attorneys are unlikely to expose themselves to discipline for making false statements to a legal body. Both provide considerable detail regarding the VoIP providers whose traffic they aggregate and the nature of the traffic they pass on to Global. Such evidence was accepted by a sister state commission. Nor was Global given an opportunity to replace the letters with affidavits. Thus, striking those letters from the record was contrary to the Commission’s own rules and to due process. The Commission should grant rehearing to take those letters into evidence, allow Global to validate or corroborate the same points in more ways and to allow Global to present additional evidence regarding the nature of the services of its customers. Such evidence could include publicly available materials from Global’s customers to end users, such as web sites and marketing materials and more definitive, verified statements from its customers. (Application at page 11 ). (Emphasis added).

The denial of an opportunity to introduce competent, reliable, and relevant evidence is a serious charge. But, it is not reasonable for the Applicant to make such a claim in this case. Contrary to what the Applicant would tell this Commission, the record shows that:

- The letter evidence Global complains of was admitted - not excluded. See ALJ Ruling at 2, September 17, 2008. (Copy attached hereto).
- Global, Staff and AT&T Illinois, all addressed this evidence in their arguments.
- The Commission considered the evidence and made specific, though guarded, conclusions on the evidence (due to its confidential status).

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<sup>2</sup> Section 83 IAC 200.610

- Global had full opportunity to replace the letters with affidavits in the form of a motion to file instant or other pleading. It chose not to do so.
- Global had full opportunity to bring in the authors of the letters to testify and be subject to the truth-seeking process of cross-examination. It chose not to do so.

In other words, the Application is wrong on the facts and wrong on the characterization of the facts it would present. The relief it asks for on rehearing (the opportunity to bring in certain additional evidence) was all available to Global Illinois in the course of the proceeding. Global has not and cannot show otherwise. Nor does Global detail or explain to the Commission what that evidence would show or why it did not bring in all its desired evidence at the very start. See 83 Ill. Adm. Code 200.880.

#### Global appears to be shifting positions

Global contends that the Order's finding that Global's traffic is not VoIP is not supported by the weight of the evidence. Having said that, the Applicant takes a shift in position to further say that:

if some of its customers have transmitted to Global traffic that is not computer origin VoIP and instead is insufficiently unenhanced "IP in the middle" traffic originating on the PSTN, which Global then passed on to AT&T, then Global is now willing to pay AT&T the tariffed or interconnection agreement charges that are appropriate for that small fraction of traffic. (Application at 13) .

According to Applicant, AT&T's three minute reports and peg count reports provide a blueprint for such traffic studies and a rough indication of the percentages that will be revealed by such studies. Applicant claims that AT&T is very familiar with techniques of identifying traffic that is appropriately charged as VoIP and traffic that is not. And, it points out that AT&T's interconnection agreement with another carrier, Level 3, provides considerable detail regarding the process the two parties will follow to segregate charges for VoIP traffic and non-VoIP traffic. (Attachment 1, to the Application, para. 7.0.)

Applicant contends that AT&T's failure to do so with Global demonstrates a willingness to show blissful ignorance and charge as if all of Global's traffic was traditional telecommunications carrier rather than to make a serious attempt to work with Global to agree to appropriate charges for its VoIP traffic. It wants the Commission to grant rehearing in order to take evidence that can identify the percentage of Global's traffic originating from the PSTN and thus subject to appropriate charges for intrastate switched access, transiting or reciprocal compensation. To the extent that traffic is VoIP, however, Global believes that appropriate charges should be established.

It appears that the Applicant is shifting away from the "owe nothing, pay nothing" position that it maintained throughout this proceeding to a concession that "maybe we do owe something." The problem is that Global Illinois never developed a record to support its current leanings. Moreover, to the extent that Global has long been in possession of AT&T Illinois' evidence and yet has done nothing productive up to this time in furtherance of its revised proposition, speaks to further delay in a final resolution to this case.

From the whole of the Application, it is clear that AT&T Illinois negotiated an Amended ICA with Level 3, and now Global Illinois wants the same terms as Level 3. But, Global Illinois has always had the right to negotiate, in times before and possibly even during the pendency of this case. The Commission can not automatically give Global Illinois what it must obtain through negotiations. That is a different matter than an approval of an amended ICA and the Application does not explain how the two can be reconciled. It is not for the Commission to speculate or to do the Applicant's work.

The Applicant's contention that the existing Global Illinois/AT&T interconnection agreement (ICA) is outdated says nothing about its pursuit of an amendment to the ICA.

With no citation to the Order or context, Applicant contends that the Commission erred when it determined that the terms and conditions of the interconnection agreement are determinative in this proceeding. Global points out that the ICA was negotiated and executed at the time when Global was terminating AT&T originated ISP traffic with ISPs that were the customers of Global. Thus, Applicant claims, the existing ICA contains no provisions regarding IP traffic or the termination on either party's network of VoIP traffic. Applying that ICA to today's conditions, Applicant argues, is attempting to fit a square peg into a round hole. Hence, the Commission should reconsider its decision to allow AT&T to charge Global for intrastate switched access, reciprocal compensation and transiting and should grant rehearing to determine what charges are negotiable or otherwise appropriate for Global's VoIP traffic.

The argument in this part of the Application leads to one inevitable question: if Global were really moving into different services why did it not negotiate amendments to its ICA? (Indeed, the Commission is asked to approve many such amended ICA's each year). The Applicant says nothing in this respect. It simply asks the Commission to accept that the existing ICA that Global itself negotiated is now irrelevant and be done with it. There is something seriously wrong here.

**Recommendation:** The goals of fairness, expedition, cost-effectiveness all weigh in favor of denying rehearing on this issue.

### **3. The Commission Should Reconsider Its Decision That Global Is Responsible For Charges for DS3s.**

According to the Applicant, the Order incorrectly found that the legal point of interconnection ("POI") between the parties' two networks could be located at AT&T's LaGrange tandem office due to AT&T's choice and that Global was responsible for the cost of lines between its chosen POI in Oakbrook and that tandem office despite the fact that the Oak Brook location was already served by AT&T wires and thus really was a part of AT&T's network to which Global could interconnect without charge.

The Application goes on with several more paragraphs of argument but points to nothing of merit that the Commission failed to consider. This particular issue was addressed in depth and fine detail by Staff, as well as by AT&T Illinois and Global. All of the facts and arguments were considered and the Order provides a full and correct analysis of the issue and the Commission's decision. There is no good reason to revisit the matter.

**Recommendation:** Rehearing on this issue is unwarranted.

**4. The Commission Should Reconsider Its Decision That Global No Longer Possesses the Technical, Managerial and Financial Qualifications to Maintain its Certificates of Service.**

Applicant maintains that the Commission should reconsider its decision to address, let alone rule upon, AT&T's claim that Global's certificates of service should be revoked. According to the Applicant, such action was contrary to law, not supported by the evidence, and it relies heavily on case law involving Global NAPs that is now on appeal. Applicant states that this Commission has never revoked the certificates of a telecommunications carrier other than for reasons such as failure to maintain corporate status or the failure to file annual reports with this Commission. No carrier, Global argues, has lost its certificate even for slamming, or for providing poor service or any other serious service deficiency. According to the Applicant, the Commission's determination that Global lacks fitness to provide service is not supported by the record; it deprives Global of due process; and, it is discriminatory.

A simple reading of the Order shows that the Commission did not allow AT&T Illinois to turn a complaint proceeding into an investigation of Global's fitness for certification. The Commission took that initiative and, as Global well knows, it established a new and separate proceeding based in large part on the analyses presented by Staff. In other words, Global has and is continuing to receive all the process it is due.

The Application contains general arguments with respect to what other carriers have done, or how they were treated, but these are neither informative nor persuasive. While Global appears to suggest disparity in treatment, the Commission is provided none of the pertinent facts or circumstances to make an assessment of such a claim, i.e., parties in a like situation being treated differently. It is reasonable to derive a negative inference from Global's failure to do so.

Global hinges its position on there being no evidence that Global is not providing reliable service in the State of Illinois. Reliability however, is only one factor to be considered and even then in a proper context. Notably, Applicant does not discuss the requisite requirements of financial, managerial, and technical resources and abilities that it is required to possess in order to maintain its certificates of service. Yet, these are the critical factors studied and at issue in the Order. The Application, however, does not, and indeed cannot, challenge the significance of these factors or the Order's assessment thereof.

**Recommendation:** There is nothing in the Application to warrant rehearing on this issue.

**IV. Final Discussion and Recommendation.**

During this lengthy proceeding, Global Illinois had sufficient time and ample opportunity to develop its theory of the case, to present competent evidence in support, and to offer alternatives to the Commission. The Application appears to recognize that Global Illinois came up short in several respects and it now wants what amounts to a second chance. The question

for this Commission is whether the goals of integrity, fairness, expedition and cost-effectiveness outweigh giving Global yet another opportunity to do what it could well have done at the start. My answer and recommendation is to deny rehearing,

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