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Docket No. 21905

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In Re: Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.

**ORDER ADOPTING IN PART AND MODIFYING IN PART
THE HEARING OFFICER'S INITIAL DECISION**

I. Background

On November 17, 2005, Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company and Waverly Hall Telephone LLC ("Independent Companies") filed a Request for Expedited Declaratory Ruling ("Request").

The Independent Companies requested that the Commission find and declare that:

1. the traffic sent to the Independents for termination by Global NAPs, Georgia, Inc. ("GNAPs" or "Global NAPs") is subject to the rates, terms and conditions of the Independents' respective intrastate access tariff;
2. GNAPs has unreasonably refused to pay properly assessed intrastate access charges by each of the Independents;
3. GNAPs must comply with the terms and conditions of the Independents' lawfully filed intrastate access tariff, including, without limitation, the payment and interest sections of such tariff; and
4. the filing of its declaratory ruling petition tolls any applicable statute of limitation applicable to the traffic under dispute.

(Request, p. 1)

On January 25, 2006, GNAPs filed its Answer to the Request. On February 17, 2006 and March 31, 2006, respectively, BellSouth Telecommunications, Inc. ("BellSouth") and Hart Telephone Company filed for intervention.

On March 10, 2006, the Commission assigned the matter to a hearing officer. On April 20, 2006, GNAPs filed a Motion to Dismiss, Or, In the Alternative, to Hold Proceeding in Abeyance. In its Motion, GNAPs argued that the Request is not premised on Georgia statutes or Commission rules or orders that are the governing law, and the FCC has exclusive jurisdiction over the issues raised in the Request. (Motion, p. 8). The Independent Companies filed their Response to the Motion to Dismiss on May 22, 2006. On June 1, 2006, GNAPs filed its Reply to the Independent Companies Response the Motion to Dismiss. Oral argument on the Motion to Dismiss took place on November 29, 2006. On March 12, 2007, the Hearing Officer issued an order denying GNAPs's Motion to Dismiss. In reaching this conclusion, the Hearing Officer stated that the record did not support GNAPs's contention that the traffic at issue is internet protocol ("IP") enhanced. (Order Denying Motion to Dismiss, p. 2).

On April 12, 2007, after receiving recommendations from the parties, the Hearing Officer issued a Procedural and Scheduling Order. On April 16, 2007, the Hearing Officer issued an Amended Procedural and Scheduling Order ("Amended PSO"). Pursuant to the Amended PSO, the parties served discovery upon each other on May 11, 2007. On May 17, 2007, Motions to Compel were filed by both the Independent Companies and GNAPS. On May 24, 2007, the Hearing Officer issued an Order on Motions to Compel Discovery that granted in part and denied in part the motions.

In advance of the evidentiary hearing, the parties pre-filed direct, rebuttal and surrebuttal testimony. Hearings took place before the Hearing Officer on September 19-20, 2007. Post-Hearing briefs were filed by the Independent Companies and GNAPs on October 31, 2007. On November 1, 2007, BellSouth filed a Post-Hearing Submission In Lieu of a Formal Brief. The Independent Companies and GNAPs filed Reply Briefs on November 13, 2007.

On April 8, 2008, the Hearing Officer issued an Initial Decision. The Initial Decision reached the following findings and conclusions:

1. each of the Petitioner's rates, terms and condition contained in their intrastate access tariffs are to be applied to GNAPs's traffic;
2. GNAPs has unreasonably refused to pay properly assessed intrastate access charges by each of the Independent Companies;
3. that GNAPS must comply with the terms and conditions of each of the Petitioner's lawfully filed intrastate access tariff, including, without limitation, the payment and interest sections of such tariff; and

4. that the Commission directs GNAPs to pay immediately all charges that each of the Independent Companies have billed GNAPs pursuant to the terms and conditions of each Independent Company's tariff.

(Initial Decision, p. 12).

On May 7, 2008, GNAPs filed its Application for Review of the Hearing Officer's Initial Decision and Request for Oral Argument, and its Memorandum in Support of Its Application for Review ("Memorandum"). In its Application for Review, GNAPs alleged that the Initial Decision contained the following errors:

1. The Initial Decision directs its ordering clauses to "Global NAPs, Inc." but the respondent, as identified in the Independent Companies' pleadings, is "Global NAPs Georgia, Inc."
2. The Initial Decision directs Global NAPs, Inc. to comply with the rates, terms and conditions of the Independent Companies' intrastate access tariffs, which are to be applied to the subject traffic, but the Commission lacks substantive jurisdiction to declare the rates, terms and conditions of interstate access service. The evidence reflected that a substantial portion of the traffic originated from outside Georgia.
3. The Initial Decision purports to exercise Commission jurisdiction of the subject traffic, the majority of which was voice over Internet Protocol ("VoIP") traffic. The Commission lacks jurisdiction, under state and federal law, to impose access charges for this traffic. In addition, the traffic terminated by the Independents was from enhanced service providers ("ESPs"). The FCC also has consistently held that access charges may not be applied to traffic that is delivered from ESPs. State law removes Commission jurisdiction of VoIP. The Initial Decision, pp. 2-3, 8-13, is in error in determining that the Commission has jurisdiction of the subject traffic.
4. The Commission does not have the authority to impose the remedies directed by the Initial Decision.
5. The Initial Decision lacks substantial evidence on the record because it relied upon impermissible hearsay to support its findings.
6. The Independent Companies provided EMI call detail records and SS7 traffic studies. This evidence is unreliable and inconsistent. According to the EMI records, all of the subject traffic was intrastate and intraLATA toll. According, however, to the SS7 traffic studies, the subject traffic was substantially interstate, when measured on the basis of NXX codes of the origin and called numbers. However, such measurements are inherently inaccurate for measuring distances in order to determine costs and jurisdiction of the subject "nomadic" VoIP traffic, as administratively and judicially determined.

7. The Initial Decision arbitrarily expands the orders in Docket No. 16772-U by relying upon EMI records without foundational evidence. Also, the Initial Decision inappropriately encroaches on FCC jurisdiction and violates the Commerce Clause. The Initial Decision thereby also unreasonably and arbitrarily violates state and federal statutes in directing the payment of access charges, and would not sustain constitutional challenge on the grounds of due process and equal protection. Fourteenth Amendment to the United States Constitution; Ga. Const. Ga. Const. Art. I, § I, Para. I, Art. I, § I, Para. II.
8. The Initial Decision charged GNAPs with notice of the terms and conditions of the “NECA F.C.C. Tariff No. 5,” even though the tariff was not maintained by the Commission during all times relevant to the Independent Companies’ billings.
9. The Initial Decision erroneously and impermissibly shifts the burden of proof. *See* Initial Decision, p. 4 and p. 7 n. 2. At all times the burden of proof remained with the Independents to demonstrate that the subject traffic is not IP-enabled. The Independents did not sustain that burden.

On May 30, 2008, the Independent Companies filed their Reply to GNAPs’s Application for Review. On June 17, 2008, GNAPs filed its Response to the Independent Companies’ Reply.

II. Jurisdiction

The Commission has the authority to issue declaratory rulings pursuant to O.C.G.A. § 50-13-11 and Commission Rule 515-2-1-.12. The Commission has general jurisdiction over this matter pursuant to O.C.G.A. §§ 46-2-20(a) and (b), which vests the Commission with authority over all telecommunications carriers in Georgia. The Commission also has jurisdiction over this matter pursuant to the “Georgia Telecommunications and Competition Development Act,” O.C.G.A. § 46-5-160 through 174. O.C.G.A. § 46-5-168 vests the Commission with jurisdiction in specific cases in order to implement and administer the provisions of the State Act.

As is more fully discussed in Section IV.C., the Commission is not preempted from ordering access charges for the intrastate calls included in the subject traffic. First, Global NAPs did not demonstrate that the subject traffic was ESP. Second, persuasive record evidence indicated that the traffic at issue was traditional voice traffic. Third, relevant decisions of the FCC indicate that the Commission is not preempted from determining that access charges are due for intrastate calls terminated to the PSTN, even if the subject traffic was ESP traffic. *See In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended to Provide Wholesale Telecommunications Services to VoIP Providers, Memorandum Opinion and Order (“Time Warner Decision”); In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charge, Order, WC Docket No. 02-362, FCC 04-97, released April 21, 2004 (“AT&T Decision”); In the Matter of IP-Enabled Services, WC Docket No. 04-36, released March 10, 2004 (“IP-Enabled Services”).* As is also discussed in more detail in Section IV.C., the Competitive Emerging Communications Technologies Act, O.C.G.A. §§ 46-5-220 through 222, does not preclude the Commission from imposing access charges on the subject traffic.

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III. Staff Recommendation

Staff recommended that the Commission find that the Independent Companies are entitled to recover intrastate access charges for the subject traffic to the extent that the traffic is intrastate. In reaching this recommendation, Staff recommended that the Commission adopt the conclusions set forth in the Initial Decision for the reasons explained below with the following exceptions:

- (1) Staff recommended that the Commission modify the Initial Decision to apply to Global NAPs Georgia, Inc.” instead of “Global NAPs, Inc.”
- (2) Staff recommended that the Commission decline to adopt the finding that Global NAPs waived any objection to the identification of the subject traffic as intrastate.
- (3) Staff recommended that the Commission find that the evidence reflected that a substantial portion of the subject traffic was interstate.
- (4) Given that this matter came to the Commission as a request for a declaratory ruling, Staff recommended that the Commission limit the relief granted in this proceeding to a declaration of the applicability of the pertinent statutes, rules and orders, as opposed to the ordering of damages or equitable relief.

At its Administrative Session held on July 21, 2009, the Commission adopted the Staff’s recommendation.

IV. Findings of Fact and Conclusions of Law

A. The decision applies to “Global NAPs Georgia, Inc.”

The Initial Decision identified the respondent as “Global NAPs, Inc.” (Initial Decision, p. 1). GNAPs argues that the Independent Companies identified “Global NAPs Georgia, Inc.” as the respondent. (Memorandum, p. 2). GNAPs also argues that the Commission does not have substantive and personal jurisdiction over “Global NAPs, Inc.” *Id.*

Staff recommended that the Commission modify the Initial Decision to apply to Global NAPs Georgia, Inc.” instead of “Global NAPs, Inc.” The Commission finds that this recommendation is reasonable. The Commission adopts this recommendation.

B. Access charges are due for the intrastate portion of the traffic.

The Hearing Officer found that the Signaling System No. 7 (“SS7”) record evidence submitted by the Independent Companies reflected that the traffic that GNAPs terminated to the public switched telephone network (“PSTN”) to be largely intrastate. (Initial Decision, p. 6). Furthermore, the Hearing Officer concluded that GNAPs waived its objection to those calls that were interstate by not following the procedures in the applicable tariff. *Id.*

GNAPs argued that the evidence reflected that a substantial amount of the traffic was interstate. (Memorandum, p. 3). GNAPs stated that the Commission does not have jurisdiction to set the rates, terms and conditions of interstate access service. *Id.* at 4. The Independent Companies acknowledged that certain calls within the subject traffic are interstate, but claimed that GNAPs waived any objection to this classification by not following procedures in the applicable tariff. (Independent Companies' Post-Hearing Brief, FN 7).

Staff recommended that the Commission limit its conclusion to the finding that access charges are due for the intrastate portion of the traffic. First, neither the Initial Decision nor the Independent Companies' Post-Hearing Brief identifies the specific provisions of the tariff that GNAPs failed to follow. Instead, the Independent Companies made the unsupported claim that GNAPs did not follow certain procedures, and that the consequence of not following these procedures is that all of the calls should be deemed intrastate, even though it is clear that certain calls were interstate.

Furthermore, under the NECA No. 5 tariff that is referenced in the Independent Companies' tariffs, it is not clear that GNAPs waived any objection to the classification of the calls as intrastate. Section 2.311(C)(4)(a) of the NECA No. 5 tariff provides that a telephone company may require the customer, GNAPs, to provide the data the customer used to determine the projected PIU factor. This section continues to provide the telephone company with the ability to audit the data. The Independent Companies did not argue in brief that they requested this information, or that any audit of the PIU data was conducted. The dispute between the parties largely concerned whether the traffic that Global NAPs was terminating to the PSTN was exempt from access charges given Global NAPs claim that it was enhanced service provider ("ESP") traffic. The Commission finds that there is not an adequate basis to determine that GNAPs waived objection to the classification of certain calls as intrastate.

Finally, the sample SS7 records indicate that a substantial percentage of the calls in the records presented are interstate calls. (Independent Companies Exhibit 7, MH-5, Tr. 160-62). The Commission finds that while the evidence is not sufficient to determine the precise percentage of calls that are interstate, it is clear that the subject traffic includes both inter- and intrastate calls.

C. The Commission is not preempted from ordering access charges for the intrastate calls included in the subject traffic.

The Hearing Officer concluded that the Commission is not preempted from ordering access charges for the subject traffic. (Initial Decision, pp. 8-11). First, the Hearing Officer found that GNAPs did not establish that the subject traffic is ESP traffic. *Id.* at 8-9. Next, the Hearing Officer concluded that assuming *arguendo* that the traffic is ESP or ISP traffic, the Commission would still not be preempted from finding that intrastate access charges are due. *Id.* at 9-11.

GNAPs argued that the calls at issue were ESP, and exempt from access charges. (Memorandum, p. 10). GNAPs claimed that allowing individual states to impose regulations on internet traffic would frustrate national regulatory schemes. *Id.* at 11. In addition, GNAPs stated that the FCC has determined that it is not possible to separate the intrastate portions of Voice

over Internet Protocol (“VoIP”) traffic from the interstate portions of such traffic.¹ Vonage Decision, 19 F.C.C. Rcd at 22404-05 (2004). From this FCC decision, GNAPs argued that the Commission is preempted from concluding that intrastate access charges are due in connection with the subject traffic. (Memorandum, p. 12). GNAPs also relied upon state law. Specifically, GNAPs asserted that the Competitive Emerging Communications Technologies Act, O.C.G.A. §§ 46-5-220 through 222, precluded the Commission from imposing access charges on the subject traffic. *Id.* at 14-16. Finally, GNAPs argued that the case law relied upon by the Hearing Officer does not support the conclusion in the Initial Decision. *Id.* at 19-20.

Staff recommended that the Commission conclude that it is not preempted from finding that the Independent Companies are due access charges from GNAPs for the intrastate portion of the subject traffic. First, GNAPs did not make a showing that the subject traffic was ESP. Instead, GNAPs merely presented unsubstantiated claims regarding the nature of the traffic. As will be addressed in more detail in Staff’s recommendation on GNAPs’s alleged error number 9, the Initial Decision properly determined that the burden of proof was on GNAPs to demonstrate that the Commission is preempted with regard to the subject traffic. *See Fifth Third Bank ex rel. Trust Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005). GNAPs claimed that the “sole competent evidence” is that the customers sending the subject traffic are ESPs. (Memorandum, p. 9). In support of this statement, GNAPs cited to the pre-filed testimony of James R. J. Scheltema, Vice President of Regulatory Affairs for GNAPs. However, Mr. Scheltema’s testimony only stated that GNAPs’s customers are ESPs. GNAPs did not provide any support for this assertion. The Commission finds that the Hearing Officer’s conclusion that GNAPs failed to carry its burden to show that the subject traffic is ESP traffic is reasonable. The Commission adopts the conclusion.

The conclusion reached in the Initial Decision finds additional support in the evidence presented by the Independent Companies. The Independent Companies sponsored expert witnesses who testified that in their opinion the subject traffic was traditional voice traffic. Witnesses for each of the Independent Companies testified that they concluded the subject traffic was traditional voice calls based on a review of the underlying terminating traffic, the holding times and the called-to numbers. (Tr. 34, 56, 86-87, 107). The witnesses also reviewed a sample of the SS7 records provided by BellSouth, and were not aware of any of the terminating numbers being assigned to an ISP. (Tr. 34, 56, 86-87, 107). Michael E. Hicks, on behalf of Blue Ridge, presented sample SS7 records. (Independent Companies Exhibit 7, MH-5). The SS7 records were provided to TDS TELECOM, the parent company of Blue Ridge, by BellSouth. The records showed the data for traffic received from GNAPs and switched through BellSouth’s access tandem. (Tr. 127). The information contains both the actual originating telephone number and the actual terminating number, and identifies the exchange or wireless carrier serving the originating end user. (Tr. 127). Mr. Hicks testified that this data demonstrated that the calls in question originate and terminate as traditional voice traffic. (Tr. 139). At most, the traffic is what is known as “IP-in-the-Middle traffic. (Tr. 139). The term “IP-in-the-Middle” traffic describes a call that originates from a regular telephone and is converted into an IP format

¹ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 004-267 (rel. November 9, 2004) (“Vonage Decision”)

over the telecommunication company's network before being terminated to the called party over a local exchange carrier's line. (AT&T Decision, p. 1). In the AT&T Decision, the FCC determined that this type of traffic was subject to access charges. AT&T Decision, ¶¶ 14-15, n. 61.

GNAPs contended that the AT&T Decision should not be relied upon in this case. First, GNAPs stated that while AT&T had individual end user customers, the customers sending the traffic in this case are ESPs. (Memorandum, p. 19). However, the Hearing Officer found that GNAPs did not carry its burden in demonstrating that the subject traffic originated from ESPs. (Initial Decision, pp. 8-9). The Commission accepted Staff's recommendation to adopt this finding of fact. GNAPs's next argument in support of why the AT&T Decision should not be given weight is that the AT&T calls were traditional long distance calls. (Memorandum, p. 19). This argument appears to be little more than the corollary to the first point that GNAPs raised. Again, the Commission adopted the Hearing Officer's findings and conclusions that GNAPs failed to meet its burden of demonstrating that the Commission was preempted from finding access charges are due for the subject traffic, and that the Independent Companies presented persuasive evidence that the traffic was voice traffic. (Initial Decision, pp. 8-9). GNAPs's final argument is that the AT&T Decision applied to an interexchange carrier; whereas it is an intermediate LEC. (Memorandum, p. 19). The Hearing Officer determined that GNAPs met the definition of "Interexchange Carrier" set forth in the Georgia Telephone Association's ("GTA") Member Tariff. (Initial Decision, pp. 7-8). Section 2.6 of GTA's tariff provides as follows:

The terms "Interexchange Carrier" (IC) or "Interexchange Common Carrier" denotes any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in interstate or foreign communication by wire or radio, between two or more exchanges.

There is no dispute that GNAPs acted as a "corporation engaged for hire" when it provided its service to customers that resulted in calls being terminated to the PSTN. In addition, GNAPs has contended that the subject traffic constitutes interstate communications by wire between two exchanges. Therefore, the Commission finds that GNAPs is an interexchange carrier under GTA's tariff. The AT&T Decision is relevant to this case.

In concluding that the Commission would not be preempted even if the subject traffic was ESP or ISP traffic, the Hearing Officer relied upon the FCC's Time Warner Decision. In that case, the FCC found that the wholesale telecommunications carriers assumed the responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between the parties. (Time Warner Decision, ¶ 17). GNAPs argued that the Commission should not rely on the Time Warner Decision because it involved a section 251 agreement as opposed to the tariff arrangement in this case. (Memorandum, p. 14). However, GNAPs did not explain why this distinction alters the principle that it should not have a "free ride" on the system. The Commission concludes that, under the terms of the applicable tariff, access charges are due for termination of the subject traffic to the PSTN.

Moreover, the Hearing Officer's conclusion is consistent with federal policy. The FCC has stated that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP

network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.” (IP-Enabled Services at ¶33.) In addition, the FCC requested comments from parties on the question of whether states are preempted with respect to IP-enabled services. *Id.* at ¶ 41. It is well-established that there cannot be a finding that the historic police powers of the state are preempted, unless it is the clear and manifest purpose of Congress. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). That the FCC is requesting comment on this issue illustrates that the federal government has not expressed a definitive intent to preempt states in this area.

The First Circuit has concluded that the FCC has not preempted this area. In *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 61 (1st Cir. 2006), the Court held that “the FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls . . . leaving the DTE free to impose access charges for such calls under state law.” This case supports the conclusion reached by the Hearing Officer that this Commission is not preempted from finding that access charges are due for IP intrastate traffic.

GNAPs relied on the Vonage Decision in support of its position that the Commission is preempted from assessing access charges. However, GNAPs has not established that the service it offers is the same as the services at issue in the Vonage Decision. In addition, in the Vonage Decision, the FCC preempted state regulations that pertained to operating authority, the filing of tariffs and the provisioning and funding of 911 services. (Vonage Decision, ¶ 10). At issue in this case are regulations regarding the payment of intrastate access charges for calls that terminate on the PSTN. The FCC has not preempted states regarding this issue. Should Congress or the FCC take additional action on the extent to which states are preempted in this area, the Commission may re-examine the preemption issue at that time. The Commission’s decision is based on the specific facts of this case.

GNAPs’s contention that the Competitive Emerging Communications Technologies Act, O.C.G.A. §§ 46-5-220 through 222, precludes the Commission from imposing access charges on the subject traffic also must fail. The Commission is precluded from imposing “any requirement or regulation relating to the setting of rates or terms and conditions for the *offering* of broadband service, VoIP, or wireless service.” O.C.G.A. § 46-5-222(a) (emphasis added). This case does not involve the “offering” of any such service. It involves the payment of access charges for the use of the PSTN. There is no indication, either express or implied, that the Georgia General Assembly intended to provide certain telecommunications companies with a “free ride” at the expense of other companies. The Commission concludes that this Act does not preclude the imposition of access charges on the subject traffic.

D. A ruling that states the Commission’s finding as to the parties’ rights under the law is consistent with the purpose of a declaratory ruling.

GNAPs argued that the Initial Decision steps beyond the limits of the Commission’s jurisdiction to order relief. Specifically, GNAPs contends that the Commission does not have the authority to order damages or direct the disconnection of services. The Independent Companies filed a request for a declaratory ruling. The purpose of a declaratory ruling is for the agency to rule upon the applicability of a statutory provision, or any rule or order of the agency. *See* O.C.G.A. § 50-13-11, *Ga. Oilmen’s Ass’n v. Ga. Dep’t of Revenue*, 261 Ga. App. 393, 399-400

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(2003). By ruling that the Independent Companies are entitled to intrastate access charges from GNAPs for the intrastate portion of the subject traffic, the Commission would be acting consistent with the purpose of a declaratory ruling. No further relief needs to be granted in the context of this proceeding.

E. The Commission may rely upon the SS7 and EMI records.

GNAPs claimed that the Hearing Officer erred by allowing the admission of EMI and SS7 records. GNAPs charged that such documents are hearsay because they were provided by BellSouth, and no BellSouth witness authenticated the documents. (Memorandum, pp. 25-28). For the following reasons, which were set forth in the Staff Recommendation, the Commission rejects this argument: First, the exclusion of these records from evidence would not change the proper resolution of this matter. These records indicated that the subject traffic was voice traffic, and that the Commission was therefore not preempted from finding that access charges were due for the intrastate portion of the traffic. As will be discussed in more detail below, preemption is an affirmative defense and the party raising it bears the burden of proof. GNAPs did not meet this burden. As a result, the Hearing Officer could reasonably find that the Commission was not preempted from ruling upon the subject traffic, even in the absence of the disputed records. The Commission adopts this finding of fact.

Second, the Commission is not bound by the strict rules of evidence, and “may exercise such discretion as will facilitate its efforts to ascertain the facts bearing upon the right and justice of the matters before it.” O.C.G.A. § 46-2-51. The Commission has the discretion under this section to afford the records the weight that it concludes this evidence is due. Finally, the Administrative Procedure Act (“APA”), O.C.G.A. § 50-13-23 *et seq.*, provides that agencies may admit otherwise inadmissible evidence that is “of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.” O.C.G.A. § 50-13-15(1). Mr. Hicks, the Manager Carrier Relations for TDS Telecom, testified that AT&T provides these call detail records to the Independent Companies containing information necessary to bill the originating carriers. (Tr. 132-33). Mr. Hicks also pointed out that the Commission has previously deemed these billing records sufficient for the billing of access charges. (Tr. 133). Therefore, the Commission finds that these records are relied upon in the industry, and meet the standard set forth in the APA for admission.

F. The SS7 records provide additional support for the conclusion that the subject traffic is voice traffic, but these records do not indicate that the traffic is all, or almost all, intrastate.

GNAPs claimed that the EMI and SS7 records are contradictory and unreliable. GNAPs claimed that the EMI records show the traffic to be intrastate, but the SS7 records show a substantial percentage of the traffic to be interstate. As addressed in the discussion of sections IV B and C above, the sample SS7 records support the conclusion that the subject traffic consists of voice calls. However, these records also indicate that a substantial percentage of the calls in the records presented are interstate calls. Therefore, this decision addresses GNAPs’s concern on the conflict between the EMI and SS7 records.

G. The Hearing Officer did not arbitrarily expand the Commission's Transit Traffic Orders.

GNAPs's complaint that the Hearing Officer expanded the scope of the Commission's Transit Traffic Orders is based on its contention that the EMI call detail records were inadmissible and unreliable. This contention has already been addressed in the discussion of sections IV. B, C, E and F above.

H. The NECA No. 5 tariff was in effect during the time relevant to the Request for Declaratory Ruling.

GNAPs argued that the NECA No. 5 tariff was not maintained by the Commission, and therefore, GNAPs should not be charged with notice of the terms and conditions. The Hearing Officer dismissed GNAPs argument. First, the Hearing Officer concluded that the January 2, 1992 Order in Docket No. 3921² established that the Commission determined GTA had properly filed its tariffs. (Initial Decision, pp 4-5). The Orders provide as follows:

On August 30, 1991, the GTA and Southern Bell filed a de-pooling proposal with the Commission, as set forth in Appendix A, attached hereto. Also included with this filing was a copy of the National Exchange Carrier Association (NECA) Tariff No. 5, which was being concurred in by all GTA pool participants with the exception of GTE-South, Inc. (GTE) and Contel Of The South, Inc. (Contel). The intent being that the rates and charges specified in NECA tariff No. 5, would become the basis for the proposed intraLATA access compensation arrangement and would replace the existing intraLATA pooling compensation arrangement, effective January 1, 1992.

On October 15, 1991, the GTA filed on behalf of twenty nine (29) of its members tariff amendments, as appropriate, to the NECA Tariff No. 5

. . . It is therefore in the public interest to approve the tariffs as filed to become effective January 1, 1992.

The Commission adopts the Hearing Officer's conclusion that the Commission has previously determined these tariffs were properly filed.

Second, the Hearing Officer determined that the affidavits submitted by Commission Staff members corroborated the Commission's statements in the January 2, 1992 Order. (Initial Decision, p. 5). The Commission adopts the Hearing Officer's conclusion that the affidavits indicate that the tariffs were filed in the August 1991 timeframe.

² *In Re: The Commission's Rule Nisi Investigation to Adjust Intrastate Rates and Charges for Telephone Service in the State of Georgia for Southern Bell Telephone and Telegraph Company, Order Establishing the Georgia Depooling Plan Procedures and Requirements for IntraLATA Toll Revenue,*

Third, the Hearing Officer noted the submission of the GTA Member Tariff, along with the transmittal letter used for that filing. (Initial Decision, p. 5). The Independent Companies submitted the current rates they are each using for the assessment of intrastate access charges to carriers. Finally, the Hearing Officer found that the evidence supports that carriers have been paying intrastate access charges to the Independent Companies over all the years that the tariff has been in effect. *Id.* The Commission adopts the Hearing Officer's findings on this issue.

The Commission adopts the Hearing Officer's conclusion that the GTA tariffs were in effect over the relevant time period for this Declaratory Ruling Request.

I. GNAPs has the burden to demonstrate that the Commission is preempted from finding that access charges are due for the intrastate portion of the subject traffic.

GNAPs's position is that the subject traffic is ESP traffic, and that therefore, the Commission is preempted from finding that GNAPs owes the Independent Companies access charges in relation to it. The Hearing Officer concluded that GNAPs had the burden to demonstrate the nature of the traffic, and that it failed to do so. GNAPs claimed that the Hearing Officer erred in placing this burden on GNAPs. (Memorandum, pp. 41-42).

Courts have found that the party raising the affirmative defense has the burden of proof. *Buist v. Time Domain Corporation*, 926 So. 2d 290, 296 (2005). Under this principle, GNAPs had the burden of proof to demonstrate the subject traffic was of such a nature as to preempt the Commission. GNAPs failed to present any evidence beyond unsubstantiated claims regarding the nature of the traffic. GNAPs claimed that this general rule does not apply to this case because the case is styled as a declaratory ruling, which necessarily involves "uncertainty" or "insecurity" over a party's rights. (Memorandum, p. 42). This argument is not persuasive. The issue is whether GNAPs owes access charges for the subject traffic. The Independent Companies alleged that they received traffic from GNAPs for termination, and asked that the Commission declare that they are entitled to access charges in connection with such traffic. GNAPs raised the affirmative defense of preemption in an effort to avoid making such payment. There is no reason why the styling of this proceeding as a declaratory ruling should excuse GNAPs from supporting its claim of preemption. Furthermore, regardless of which party has the burden of proof, the record supports the finding that the Independent Companies are entitled to access charges for the intrastate portion of the traffic.

V. **Ordering Paragraphs**

WHEREFORE, IT IS ORDERED, that the Commission adopts the Hearing Officer's Initial Decision, except as modified in this order.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

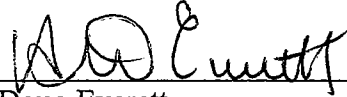
ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 21st day of July, 2009.



Reece McAlister
Executive Secretary

Date: 7-29-09



H. Doug Everett
Chairman

Date: 07/29/09