Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Co.; and New England Telephone and Telegraph Co.,	)	File No. EB-00-MD-009
Complainants,	)	
v.	)	
Global NAPs, Inc.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 2000 **Released:** October 26, 2000

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant the formal complaint filed pursuant to section 208 of the Communications Act of 1934, as amended (the "Act"),[1] by various affiliates of the former Bell Atlantic Corp., now known as Verizon Communications Inc. (collectively, "Verizon"), against Global NAPs, Inc. ("Global NAPs"), a competitive local exchange carrier ("CLEC"). Verizon challenges the lawfulness of Section 7 of Global NAPs' Tariff FCC No. 1 ("Second ISP Tariff" or "Tariff"), which seeks to charge a per-minute rate for calls originated by Verizon local exchange customers that are handed off to Global NAPs for delivery to its Internet Service Provider ("ISP") customers.[2] We agree with Verizon that Global NAPs' Second ISP Tariff is unjust and unreasonable under section 201(b) of the Act[3]

[1] 47 U.S.C. § 208.

[2] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1 at 81-83.2, Section 7 -- ISP Traffic Delivery Service (effective Feb. 14, 2000).

[3] 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful.").

because: (1) it conflicts with the parties' mutual understanding regarding the scope of their interconnection agreements in Massachusetts and New Jersey; and (2) it violates section 61.2 of our rules, which provides that tariffs must be clear and explicit. We therefore grant Verizon's complaint.

II. BACKGROUND

2. Verizon and Global NAPs have interconnection agreements in at least eight states.[4] The circumstances under which they reached agreements in Massachusetts and New Jersey are especially relevant and require brief description.

3. On April 15, 1997, Global NAPs and Verizon entered into an interconnection agreement for Massachusetts that, as far as our record indicates, continues in effect today.[5] Pursuant to this agreement, Verizon carries traffic from its end user customers in Massachusetts to a point of interconnection with Global NAPs in that state; Global NAPs then delivers that traffic from the point of interconnection to its ISP customers in Massachusetts.[6]

4. The parties executed their Massachusetts interconnection agreement despite their inability to reach a consensus on whether the agreement should require payment of reciprocal compensation for traffic delivered to ISPs, *i.e.*, calls made by one carrier's customers that are handed off to the other carrier for delivery to the latter carrier's ISP customers.[7] Verizon believed that it should not be required to make such payments, while Global NAPs disagreed. In light of their differences, Verizon and Global NAPs agreed to interpret the applicable language in their agreement in the same manner that identical language in other Verizon/CLEC interconnection agreements was ultimately construed by the Massachusetts Department of Telecommunications and Energy ("Massachusetts DTE").[8] Global NAPs argued that this

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[4] *See* Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues Pursuant to Section 1.732(h) and Joint Statement Pursuant to Section 1.733(7)(b)(2), *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed June 27, 2000) ("Joint Statement") at 2 ("Bell Atlantic and Global NAPs … have interconnection agreements in the states of New York, Massachusetts, New Hampshire, Rhode Island, Vermont, New Jersey, Delaware, and Maryland. The parties do not agree on the legal status of their physical interconnection in Virginia.").

[5] *See* Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, by and between New England Telephone and Telegraph Company and Global NAPs for Massachusetts (April 15, 1997) ("Massachusetts Interconnection Agreement"), *attached to* Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. E-99-22. The agreement's initial term ended on April 15, 2000, but the agreement provides that it will automatically renew and remain in effect unless (1) either party gives notice of termination at least 60 days before April 15, 2000; or (2) after that date, either party gives a 90-day notice of termination. Massachusetts Interconnection Agreement at 36, Section 21. The record does not indicate that either party has terminated the agreement.

[6] Massachusetts Interconnection Agreement at 14, Section 5.7.2. *See also* Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues Pursuant to Section 1.732(h) and Joint Statement Pursuant to Section 1.733(7)(b)(2), *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. E-99-22 (filed August 10, 1999) at 2.

[7] *See* Chronology of Events Submitted Pursuant to Staff Request of August 3, 1999, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. 99-22 (filed August 11, 1999) ("Chronology of Events") at 11-12.

[8] *Id.*

language applied to the delivery of ISP-bound traffic and required Verizon to compensate Global NAPs for such delivery.[9]

5. In New Jersey, Global NAPs and Verizon failed to reach their own interconnection agreement. Therefore, in mid-1998, Global NAPs sought to opt into a preexisting agreement between Verizon and another CLEC, MFS Intelenet of New Jersey, Inc. ("MFS"), pursuant to section 252(i) of the Act.[10] At that time, the New Jersey Board of Public Utilities ("New Jersey BPU") had not yet decided whether that agreement required compensation for the delivery of ISP-bound traffic. As in Massachusetts, Global NAPs argued to the state commission that the interconnection agreement required such compensation, while Verizon claimed it did not. On July 7, 1999, the New Jersey BPU permitted Global NAPs to opt into the preexisting interconnection agreement between Verizon and MFS. The agreement between Verizon and Global NAPS remains in effect today.[11]

6. Despite Global NAPs' efforts, both the Massachusetts DTE and the New Jersey BPU ultimately agreed with Verizon and found that the parties' interconnection agreements did not require compensation for the delivery of ISP-bound traffic.[12] While these proceedings were still pending, however, Global NAPs filed a federal tariff purporting to charge an interstate rate of $0.008 per minute for all ISP-bound calls for which Global NAPs did not receive compensation under an interconnection agreement ("First ISP Tariff").[13]

7. On July 8, 1999, after receiving several invoices from Global NAPs for charges allegedly incurred under the First ISP Tariff, Verizon filed a formal complaint with the Commission under section 208 of the Act challenging the relevant provisions of that tariff. On December 2, 1999, we issued our Memorandum Opinion and Order in that proceeding, finding that the provisions in Global NAPs' First ISP

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[9] *See Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Co. d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996,* Order, D.T.E. 97-116-C, at 10-19 (Mass. Dept. Telecom. & Energy May 19, 1999) ("Mass. DTE Decision"), *aff'd on recon.*, Order Denying Reconsideration and Dismissing Global NAPs Complaint (Mass. Dept. Telecom. & Energy Feb. 25, 2000), *denying motion to vacate,* Order Denying Global NAPs, Inc.'s Motion to Vacate the Department of Telecommunications and Energy's Orders, D.T.E. 97-116-C and D.T.E. 97-116-D/99-39, and to Reinstate D.T.E. 97-116 (Mass. Dept. Telecom. & Energy July 11, 2000), *attached to* Formal Complaint, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-MD-009, at Attachment H (filed May 26, 2000) ("Complaint").

[10] 47 U.S.C. § 252(i) ("A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier under the same terms and conditions as those provided in the agreement."). *See In the Matter of the Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Bell Atlantic-New Jersey, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Decision and Order, Docket No. TO98070426, at 6 (N.J. Bd. Pub. Utils. July 7, 1999) ("New Jersey BPU Decision"), *attached to* Complaint at Attachment J.

[11] New Jersey BPU Decision at 8 (establishing termination date of March 2, 2001 for interconnection agreement between Verizon and Global NAPs).

[12] *See* Mass. DTE Decision at 29; New Jersey BPU Decision at 11.

[13] *See Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc*, Memorandum Opinion and Order, FCC 99-381, at ¶ 11 (rel. Dec. 2, 1999) *("Global NAPs I"), aff'd on reconsideration,* Order on Reconsideration, 15 FCC Rcd 5997 (2000) ("*Global NAPs I Recon.*"), *petition for review filed*, Docket No. 00-1136 (D.C. Cir. filed Mar. 24, 2000).

Tariff purporting to charge for delivery of ISP-bound calls were unjust and unreasonable under section 201(b) of the Act.[14] We later rejected Global NAPs' petition for reconsideration of our order.[15]

8. Shortly after the release of *Global NAPs I*, Global NAPs revised its tariff, filing the provisions that are the subject of Verizon's instant formal complaint. Under its Second ISP Tariff, Global NAPs again seeks to charge local exchange carriers a fee of $0.008 per minute for the delivery of all jurisdictionally interstate ISP-bound calls for which Global NAPs does not receive compensation pursuant to an arrangement between carriers or state commission decision.[16] On March 1, 2000, Global NAPs forwarded a bill to Verizon seeking nearly $5.5 million for the delivery of ISP-bound traffic that Verizon had sent to Global NAPs in Massachusetts in February 2000.[17] Verizon has refused to pay this bill. Since then, Global NAPs has billed Verizon for additional traffic in Rhode Island, New York, Massachusetts, and New Hampshire.[18] Verizon has paid some, but not all, of these invoices pursuant to state-specific arrangements that are not relevant here.[19] Between February and July 2000, Global NAPs billed Verizon over $70 million for the delivery of ISP-bound traffic in Massachusetts alone.[20]

III. DISCUSSION

9. Verizon argues, *inter alia*, that Global NAPs' Second ISP Tariff violates section 201(b) of the Act by attempting to "preempt … state commission decisions that are not to its liking by unilaterally establishing a rate for … [the delivery of ISP-bound] traffic."[21] In support of this argument, Verizon essentially contends that Global NAPs' Second ISP Tariff, by imposing a charge for the delivery of ISP-bound traffic whenever an interconnection agreement between the parties does not do so, contradicts the parties' mutual understanding that their interconnection agreements *alone* would govern whether Global NAPs would receive such compensation; and because those agreements do not require such compensation, the Second ISP Tariff is unjust and unreasonable under section 201(b). Verizon also argues that the Tariff

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[14] *Global NAPs I.* We found that Global NAPs' First ISP Tariff violated sections 61.2 of our tariffing rules, which requires tariffs to be clear and explicit. *See, e.g., id.* at ¶ 21 (citing 47 C.F.R. § 61.2). We also found that the First ISP Tariff violated section 61.74 of our rules, which prohibits federal tariffs from including cross-references to other documents. *See, e.g., Global NAPs I* at ¶ 24 (citing 47 C.F.R. § 61.74).

[15] *Global NAPs I Recon*.

[16] Second ISP Tariff at 82, Section 7.2; *id.* at 83.2, Section 7.4. *See infra*, note 52.

[17] *See* Complaint at Attachment G (attaching Global NAPs invoices).

[18] *Id.*

[19] *See* Joint Statement at 2. *See also* Answer, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-MD-009, at 21, ¶ 48 (filed June 15, 2000) ("Answer") ("Bell Atlantic has paid for some ISP-bound traffic in New York and Rhode Island.").

[20] Global NAPs Initial Brief, *Bell Atlantic-Delaware, Inc. et al. v. Global NAPs, Inc.*, File No. EB-MD-00-009, at 3 (filed July 28, 2000) ("Global NAPs Initial Brief").

[21] Complaint at 6, ¶ 10; *see id.* at 10-12, ¶¶ 17-20. *See also* Complainants Initial Brief, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-MD-009 (filed July 28, 2000) ("Verizon Initial Brief") at 5; Bell Atlantic's Brief on Non-Cost Issues, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. E-99-22 (filed Sept. 2, 1998) at 10-12; Bell Atlantic Reply Brief on Non-Cost Issues, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. E-99-22 (filed Sept. 15, 1999) at 3-7.

is unlawful under section 201(b) because it violates section 61.2 of our rules, which provides that tariffs must be clear and explicit.[22] For the following reasons, we grant Verizon's complaint.[23]

A. The Second ISP Tariff Violates Section 201(b) Because It Conflicts With The Parties' Understanding Of The Scope Of Their Interconnection Agreements In Massachusetts And New Jersey.

10. The parties agree that, in several states, Verizon has paid for the delivery of ISP-bound traffic.[24] Thus, with respect to those states, Global NAPs does not assert that its Second ISP Tariff imposes payment obligations on Verizon, and Verizon does not assert that the Second ISP Tariff contradicts any of the parties' understandings. With respect to the delivery of ISP-bound traffic in Massachusetts and New Jersey, however, the respective state commissions have held that the parties' existing interconnection agreements *do not* require Verizon to pay Global NAPs. Thus, with respect to that traffic, Global NAPs claims that its Second ISP Tariff requires Verizon to make payments, while Verizon essentially asserts that the Tariff is unlawful because it contradicts the parties' understanding regarding the scope of their interconnection agreements.

11. Specifically, pointing to the Massachusetts and New Jersey proceedings, Verizon argues that "Global NAPs' tariff is simply an attempt at an end run around both its interconnection agreements and the state decisions interpreting them."[25] Global NAPs contends, on the other hand, that no such end run has occurred, because the Massachusetts and New Jersey commissions merely found that "the parties' agreements do not address it [the question of compensation for the delivery of ISP-bound traffic], which seems to nullify any possibility of actual conflict."[26] According to Global NAPs, "if an agreement is silent with respect to compensation for ISP-bound calling, there cannot be a 'conflict' between that agreement and a tariff calling for compensation."[27] In essence, Global NAPs argues against the existence of any understanding with Verizon that their interconnection agreements alone would govern whether Verizon owed Global NAPs compensation for the delivery of ISP-bound traffic, and not an FCC tariff.

12. We find that, under the particular circumstances of this case, Global NAPs' Second ISP Tariff is unjust and unreasonable under section 201(b) because it conflicts with the parties' understanding of the scope of their interconnection agreements. For the reasons explained below, the record supports a

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22 *See* Complaint at 8-9, ¶¶ 15-16.

23 Verizon also argues that the Second ISP Tariff is unlawful because: (1) it unlawfully cross-references other documents; (2) it violates the "ESP Exemption"; (3) it violates the Commission's rules on shared access arrangements; (4) it prejudges a pending Commission rulemaking; (5) it unlawfully attempts to force Verizon to take service involuntarily; (6) it charges for actions that benefit only Global NAPs, not Verizon; and (7) the tariffed rate is excessive. *See generally* Complaint. In light of our ruling in this Memorandum Opinion and Order, we need not and do not reach those arguments.

24 Joint Statement at 2.

25 *See* Verizon Initial Brief at 5.

26 Global NAPs Initial Brief at 21. *See also* Answer at 3, ¶ 6, *id.* at 14-16, ¶¶ 35-37; Initial Brief of Global NAPs, Inc. on Non-Cost Issues, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, E-99-22 (filed Sept. 2, 1999) at 4-5, 34-36, 45-47.

27 Global NAPs' Reply Brief, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009, at 5-6 n.5 (filed Aug. 4, 2000) ("Global NAPs Reply Brief").

reasonable conclusion that the parties agreed and understood that their interconnection agreements alone would govern whether Verizon owed compensation to Global NAPs for the delivery of ISP-bound traffic.

13. As we noted in *Global NAPs I*, Global NAPs knew of the dispute regarding compensation for ISP-bound traffic when it entered into an interconnection agreement with Verizon in Massachusetts. Rather than reaching its own agreement with Verizon on this issue, as some other carriers have done,[28] Global NAPs instead agreed to abide by the Massachusetts DTE's construction of another agreement, even though that agreement had no language explicitly addressing the ISP-bound traffic issue.[29] In New Jersey, Global NAPs opted into a similarly ambiguous preexisting interconnection agreement between Verizon and another carrier. Again, rather than reaching an independent agreement with Verizon on the question of compensation for delivery of ISP-bound traffic, Global NAPs chose to have the state commission decide the issue under the terms of the preexisting agreement.[30] Most important, before both the Massachusetts DTE and the New Jersey BPU, Global NAPs vigorously maintained that (i) the interconnection agreements addressed the issue of compensation for the delivery of ISP-bound traffic, and (ii) the agreements required compensation for such delivery. Indeed, Global NAPs continues to assert that both the Massachusetts and New Jersey interconnection agreements provide for compensation for delivery of ISP-bound traffic and therefore govern this issue.[31]

14. These actions demonstrate that Global NAPs and Verizon understood that the issue of ISP-bound traffic would be governed exclusively by their interconnection agreements in New Jersey and Massachusetts. In particular, Global NAPs understood that it would receive only the compensation required under these agreements, nothing more, nothing less. Thus, when the Massachusetts DTE, and later the New Jersey BPU, found that Global NAPs' interconnection agreements with Verizon did *not* require compensation for such traffic, it was unjust and unreasonable for Global NAPs in the particular circumstances here to attempt to use this Commission's tariff system to impose a separate compensation regime of its own.

15. It would be unjust and unreasonable to allow the issue of inter-carrier compensation for delivery of ISP-bound traffic to be subject to one outcome under a carrier's interconnection agreements and another pursuant to a federal tariff. Even Global NAPs acknowledges that "there does seem something unfair about a system that would allow a CLEC to duly and in good faith negotiate a contract with an ILEC for payment of (say) $0.002 per minute for ISP-bound traffic, then turn around and ignore the contract by asserting that a tariff providing for payment of $0.008 per minute for the same traffic actually

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[28] *See* Complaint at 7, ¶ 12 ("Bell Atlantic has entered into voluntary agreements with a half-dozen other competing local exchange carriers that specify the amount of inter-carrier compensation that will be paid for the exchange of Internet-bound (and other) traffic. Bell Atlantic has offered to negotiate similar terms and conditions with GNAPs on a region-wide basis, but GNAPs has thus far generally declined to enter into such negotiations."); *see also* Answer at 16, ¶ 38 ("Global NAPs is generally aware that some carriers appear to have agreed with Bell Atlantic with regard to intercarrier compensation for such traffic.").

[29] *Global NAPs I* at ¶¶ 4-5.

[30] New Jersey BPU Decision at 2-3.

[31] Global NAPs has appealed the Massachusetts DTE decision pursuant to section 252(e)(6). *See Global NAPs, Inc. v. New England Tel. & Tel. Co., et al.*, CA No. 00-CV-10407-RCL (D. Mass. 2000); *Global NAPs, Inc. v. New England Tel. & Tel. Co., et al.*, CA No. 00-CV-10502-RCL (D. Mass. 2000). Global NAPs has also appealed the New Jersey BPU decision. *See Global NAPs, Inc. v. Bell Atlantic-New Jersey, Inc.*, Civ. No. 99-4074 (JAG) (D.N.J. filed August 26, 1999).

governs."[32] Yet Global NAPs has behaved similarly here. By its own admission, Global NAPs sought to use its federal tariff as a "back-up defense" to force Verizon to pay for the delivery of ISP-bound traffic even though such compensation had been denied under the same interconnection agreements that both Verizon and Global NAPs understood controlled the issue.[33] Moreover, the fact that the interconnection agreements in Massachusetts and New Jersey neither require nor prohibit compensation for ISP-bound traffic[34] does not preclude a determination that the parties understood that their agreements, as interpreted by the respective state commissions, would resolve whether Verizon was required to pay such compensation to Global NAPs.

16. Serious policy concerns also compel a finding that Global NAPs' Second ISP Tariff is unjust and unreasonable under section 201(b). If a party to an interconnection proceeding could alter the outcome of the negotiation/mediation/arbitration processes set forth in sections 251 and 252 simply by filing a federal tariff, those processes could become significantly moot. Carriers and this Commission would be plunged into substantial uncertainty and an entirely new series of tariff disputes, as every carrier who lost on an arguably "interstate" issue before a state commission would simply file a federal tariff imposing a more favorable result, while simultaneously appealing the state decision to a federal district court pursuant to section 252(e)(6) of the Act.[35] Indeed, that is exactly what has occurred here.[36] Such an outcome could not have been intended by Congress, given the central role played by the section 251-252 process in the Telecommunications Act of 1996.[37] As we held in *Global NAPs I,* "[u]sing the tariff process to circumvent the section 251 and 252 process cannot be allowed."[38]

17. Moreover, although we do not apply the doctrine of equitable estoppel here, its underlying principles are instructive in assessing whether Global NAPs' Section ISP Tariff is "unjust and unreasonable" under section 201(b) of the Act. Under that doctrine, a party is deemed to have agreed to a particular course of action -- despite the lack of an explicit agreement to that effect -- where that party acted in a particular manner, intended another party to rely on its actions, and the other party reasonably

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[32] Global NAPs Initial Brief at 5.

[33] *See, e.g., Global NAPs I* at ¶ 23.

[34] *See* Verizon Response to Interrogatories, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed July 13, 2000) at 2 ("[T]hose [interconnection] agreements [with Global NAPs] neither prohibit nor require inter-carrier compensation in connection with such [ISP-bound] traffic.").

[35] *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.").

[36] *See supra,* note 31.

[37] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq. See Iowa Utilities Bd.*, 525 U.S. at 371-73. *See generally AT&T Corp. v. Bell Atlantic Corp.; MCI Telecom. Corp., et al. v. Bell Atlantic Corp.*, Memorandum Opinion and Order, FCC 00-303 (rel. Aug. 18, 2000) (citing comity with states and deference to interconnection negotiation, mediation, and arbitration process in sections 251 and 252 as factor in dismissing formal complaint).

[38] *Global NAPs I* at ¶ 23.

relied on that conduct to its detriment.[39] In this case, Global NAPs' actions indicated that it was following the negotiation, mediation, and arbitration process set forth in sections 251-252 of the Act[40] with respect to the issue of compensation for delivery of ISP-bound traffic. Global NAPs must have intended Verizon to rely on its participation in the section 251-252 process, because Global NAPs' actions reasonably indicated that it considered the interconnection process to be the exclusive forum for resolving disputes regarding payment of the delivery of ISP-bound traffic. If Global NAPs had not led Verizon to believe that Global NAPs considered the state interconnection proceedings dispositive with respect to the issue of ISP-bound traffic, then Verizon might have had a reasonable opportunity to seek language in its interconnection agreements with Global NAPs barring charges not required under those agreements. By relying on Global NAPs' actions in the state proceedings, Verizon reasonably assumed that those proceedings would resolve the issue. In light of these circumstances, we find that Global NAPs' Second ISP Tariff is unjust and unreasonable under section 201(b) because the Tariff attempts to impose compensation other than as determined in the section 251-252 process.

18. To be lawful under section 201(b), Global NAPs' Second ISP Tariff should have comported with the parties' understanding regarding the scope of their interconnection agreements. Here, the record indicates that: (1) the parties understood that their interconnection agreements, as interpreted by the state commissions, would govern whether Verizon owed Global NAPs any compensation for the delivery of ISP-bound traffic; and (2) the parties' interconnection agreements in Massachusetts and New Jersey do not require Verizon to pay Global NAPs for the delivery of such traffic. Thus, to comply with section 201(b), Global NAPs' Second ISP Tariff could charge Verizon precisely *zero* for the delivery of ISP-bound traffic in Massachusetts and New Jersey.

19. Global NAPs cites to our *Reciprocal Compensation Order*, in which we found that ISP-bound traffic is "largely interstate."[41] According to Global NAPs, given this finding (and assuming its continued validity), section 203 of the Act[42] either permits or requires Global NAPs to file a federal tariff

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[39] *See Public Notice DA-0049 Auction of C and F Block Broadband PCS Licenses Nextwave Personal Communications, Inc. and Nextwave Power Partners, Inc. Petition for Reconsideration*, Order on Reconsideration, FCC 00-335, at ¶ 28 (rel. Sept. 6, 2000) (listing elements of equitable estoppel).

[40] 47 U.S.C. §§ 251, 252. These provisions set forth the process by which a CLEC can obtain access to the ILEC's network. The CLEC and the ILEC first engage in negotiations. *Id.*, § 252(a)(1). At the parties' request, the relevant state commission may act as a mediator. *Id.*, § 252(a)(2). "But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 372-73 (1999).

[41] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, 3690, ¶ 1, 3702, ¶ 18 (1999) ("*Reciprocal Compensation Order*"), *vacated and remanded, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

[42] 47 U.S.C. § 203(a). Section 203(a) states, in relevant part, that "[e]very common carrier … shall within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself … for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, … and showing the classifications, practices, and regulations affecting such charges." *Id.*

regarding the delivery of ISP-bound traffic.[43] Global NAPs asserts, therefore, that its Second ISP Tariff supersedes any other arrangement pursuant to the Filed Rate Doctrine, which bars carriers from charging rates other than those properly filed with this Commission.[44]

20. We disagree. As an initial matter, the Filed Rate Doctrine does not insulate tariffs from legal challenge.[45] As we have previously stated, "it is well established that the rates and practices carriers seek to shelter pursuant to the Filed Rate Doctrine are always subject to an inquiry into their reasonableness."[46] Where, as here, the Commission determines that a tariff violates section 201(b), the Filed Rate Doctrine is no defense.

21. Moreover, under the *Sierra-Mobile* exception to the Filed Rate Doctrine, tariff filings that conflict with preexisting contracts are generally unlawful.[47] The *Sierra-Mobile* doctrine "dictates the primacy of contract law in determining whether carriers may unilaterally revise agreed-upon rates and terms simply by amending their tariffs. Except in limited circumstances not applicable here, a tariff amendment filed without the customer's consent is 'a nullity.'"[48] The *Sierra-Mobile* doctrine has currency here, because the carriers entered into interconnection agreements that they agreed governed a particular question. Indeed, Global NAPs actually *suggests* that we "extend the logic of the *Sierra-Mobile* doctrine … [and] establish a substantive rule that requires tariffs for ISP traffic delivery service not to contradict the terms of a voluntarily-negotiated interconnection agreement relating to the same service."[49] Under the circumstances described above, we find that Global NAPs and Verizon understood that their interconnection agreements alone would decide the question of inter-carrier compensation for the delivery of ISP-bound traffic. Therefore, once those agreements were found not to provide such compensation, Global NAPs could not seek to avoid the scope of those agreements through our tariffing process.

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[43] *See, e.g.*, Answer at 3, ¶ 5; Global NAPs Reply at 3.

[44] Answer at 3, ¶ 6, *id.* at 22-23, ¶ 51, *id.* at 55, ¶ 3 (Proposed Conclusions of Law); Global NAPs Initial Brief at 21-22.

[45] *See, e.g., Security Services, Inc. v. K Mart Corp.*, 511 U.S. 431, 437-40 (1994) (holding that bankrupt motor carrier may not recover undercharges based on invalid tariff rates); *Halprin, Temple, Goodman, & Sugrue v. MCI Telecommunications Corp.; Freedom Technologies, Inc. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22579 (1998) ("*Halprin Order*"), *recon. denied*, Order on Reconsideration, 14 FCC Rcd 21092 (1999).

[46] *Halprin Order*, 13 FCC Rcd at 22579.

[47] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338-40 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). *See also MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300, 1302 (D.C.Cir.1981); *Bell Telephone Company of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974); *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, 10 FCC Rcd 654 (1995) (upholding Common Carrier Bureau decision denying formal complaint; citing *Sierra-Mobile* doctrine, holding Bureau properly refused to declare unlawful and abrogate a contract entered into between two carriers).

[48] *Global Access Ltd. v. AT&T Corp.*, 978 F. Supp. 1068, 1073 (S.D. Fla. 1997) (quoting *Mobile*, 350 U.S. at 347).

[49] Global NAPs Initial Brief at 20. Of course, Global NAPs argues that its Second ISP Tariff is consistent with its interconnection agreements, so application of the *Sierra-Mobile* doctrine is unnecessary. As discussed above, we disagree.

B. The Second ISP Tariff Is Unlawful Under Section 201(b) Because It Violates Section 61.2 Of Our Rules.

22. Verizon also alleges that Global NAPs' Second ISP Tariff is unjust and unreasonable under section 201(b) because it violates section 61.2 of our rules.[50] That provision states that "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations."[51] Under Global NAPs' Second ISP Tariff, a carrier is charged whenever it delivers traffic to Global NAPs for further delivery to an ISP, unless the originating carrier has already made "Alternative Payments."[52] These "Alternative Payments" for the termination of ISP-bound calls occur under two scenarios: (1) where the LEC (and presumably Global NAPs) "treats" the ISP-bound traffic as local; or (2) where "state regulators … direct other payment arrangements …."[53] Verizon contends that "based on this language, a carrier cannot determine if the tariff purportedly applies simply by reading the tariff language itself."[54]

23. We agree with Verizon that the Second ISP Tariff is unlawfully indeterminate. Under section 61.2, a tariff must be clear and explicit on its face as to when it applies, in order to give fair notice to carriers or other customers about the terms under which they might be taking service and incurring charges.[55] Under the Second ISP Tariff, however, a carrier cannot discern from the face of the Tariff whether it has incurred any charges thereunder. In *Global NAPs I*, we found Global NAPs' First ISP Tariff unlawful because carriers could only determine whether the tariff applied by first referring to their interconnection agreements.[56] The Second ISP Tariff does not give even that (inadequate) direction; instead, carriers must decipher the vague term "Alternative Payments" before they even begin to review the Tariff. If a carrier assumes that the phrase "Alternative Payments" refers to payments pursuant to an interconnection agreement or state commission decision, that carrier still must refer to those interconnection agreements or state decisions to determine if the Tariff applies.[57] As we stated in *Global NAPs I*, "[t]he

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50 *See, e.g.*, Complaint at 8-9, ¶¶ 15-16.

51 47 C.F.R. § 61.2.

52 The Second ISP Tariff states:

> Irrespective of the jurisdictionally interstate nature of the ISP-Bound Traffic subject to this Section, the Federal Communications Commission ("Commission") has held that such traffic may be treated by LECs as equivalent to local traffic under section 251(b)(5) of the Communications Act of 1934, as amended. The Commission has also ruled that state regulators may direct other payment arrangements for ISP-Bound Traffic. Actual payments by a Delivering LEC under either situation (treating ISP-bound traffic as local or an alternative state-directed arrangement) are referred to here as "Alternative Payments."

Second ISP Tariff at 82, Section 7.2.

53 *Id.*

54 Complaint at 9, ¶ 15.

55 *See* 47 C.F.R. § 61.2. *See also Halprin Order*, 13 FCC Rcd at 22574, 22576, ¶ 8, ¶ 13.

56 The First ISP Tariff applied whenever a carrier delivered ISP-bound traffic to Global NAPs, but failed to pay Global NAPs for delivering that traffic to the ISP under an interconnection agreement. *See Global NAPs I*, at ¶ 11 (quoting tariff language).

57 *See id.* at ¶¶ 21-23; *Global NAPs I Recon.*, 15 FCC Rcd at 6003-05. The Second ISP Tariff states that no other documents shall affect its application and that it is unnecessary to refer to any other document in order (continued….)

contingent and unclear application of the tariff defies the Commission's longstanding interpretation of section 201(b) of the Act, as reflected in section 61.2 of our rules. Those authorities require that the applicability of the tariff rate and its terms be clear and explicit."[58] Because "[f]ailure to comply with [the Part 61] rules has always been recognized as grounds for rejection,"[59] we find that Global NAPs' Second ISP Tariff is unlawful.

24. Global NAPs argues that the Second ISP Tariff is sufficiently clear under section 61.2 because it "applies unless a delivering LEC has already paid Global NAPs for that traffic."[60] But the Tariff does not simply require a carrier to determine whether it has made a payment to Global NAPs. Under the "Alternative Payments" language of the Tariff, a carrier must not only confirm that it made such a payment, but also whether the payment was for the delivery of ISP-bound traffic, and whether it occurred pursuant to an interconnection agreement, a state-directed payment arrangement, or some other scenario. Given this uncertainty, it is impossible to determine, from the face of the Second ISP Tariff, whether the Tariff applies.[61] Indeed, even Global NAPs appears somewhat confused about whether its interconnection agreements or its Second ISP Tariff determine its compensation for the delivery of ISP-bound traffic. Each invoice Global NAPs sent to Verizon describes the charges for delivery of ISP-bound traffic as pursuant to a "local interconnection agreement *and* our federal tariff (same rate)."[62] This is additional evidence of the Second ISP Tariff's unlawful ambiguity.[63]

25. Global NAPs also contends we have already found that its Tariff is lawful. In *Global NAPs I Recon.*, we observed that Global NAPs had filed the Second ISP Tariff, stating that "on February 14, 2000, Global NAPs revised the Tariff at issue in such a way as to eliminate the provisions that were found unlawful in our [*Global NAPs I] Order*."[64] Global NAPs argues that this statement amounts to a Commission finding that its current Tariff avoids the problems we identified in *Global NAPs I.*[65] This argument mischaracterizes our decision in *Global NAPs I Recon.* We were not reviewing the terms of the Second ISP Tariff in that decision. Rather, we were merely noting that Global NAPs had filed revisions to its Tariff to replace the provisions we had found unlawful in *Global NAPs I.* As such, our statement did

(Continued from previous page)
to determine whether the Tariff applies. Second ISP Tariff, at 82, Section 7.2. Mere *ipse dixit* statements that a tariff is self-contained, however, do not eliminate the references to voluntary and state-directed "arrangements," *see id.*, which we take to mean interconnection agreements and state commission decisions.

58 *Global NAPs I*, at ¶ 22.

59 *Amendment of Part 61 of the Commission's Rules Relating to Tariffs and Part 1 of the Commission's Rules Relating To Evidence*, Memorandum Opinion and Order, 40 F.C.C. 2d 149, 150, at ¶ 5 (1973).

60 Answer at 19, ¶ 43.

61 *See, e.g., In the Matter of GTE Telephone Operating Companies*, Order, 11 FCC Rcd 3698, ¶ 7 (1995).

62 *See* Complaint, Attachment G (emphasis added).

63 *See Theodore Allen Commun., Inc. v. MCI Telecom. Corp.*, 12 FCC Rcd 6623, 6634, ¶ 25 (Com. Car. Bur. 1997) (citing confusion among MCI personnel regarding meaning of MCI tariff as evidence that tariff was unclear).

64 *Global NAPs I Recon.*, 15 FCC Rcd at 6007, ¶ 28.

65 *See, e.g.*, Answer at 5, ¶ 12. In its brief, Global NAPs appears to back away from this argument. Global NAPs Initial Brief at 8.

not constitute a finding that the Second ISP Tariff had somehow "cured" the problems we identified in Global NAPs' earlier tariff provisions.

C. Global NAPs' Additional Defenses Are Meritless.

26. Global NAPs asserts additional arguments that require discussion. First, Global NAPs makes several standing-related claims that rest upon Verizon's alleged failure to pay Global NAPs' invoices under the Second ISP Tariff. Global NAPs contends that Verizon lacks standing under section 208 to file a formal complaint challenging the Second ISP Tariff because Verizon allegedly has not incurred the injury of paying Global NAPs' bills.[66] Global NAPs also argues that Verizon's alleged refusal to pay Global NAPs' invoices under the Second ISP Tariff constitutes "impermissible self help," as well as an unjust and unreasonable practice in violation of section 201(b) of the Act.[67] According to Global NAPs, therefore, Verizon may not file a formal complaint under section 208 until it has paid the bills under Global NAPs' Second ISP Tariff.

27. To begin with, Global NAPs' claims simply are factually incorrect. Verizon *has* been damaged by incurring what Global NAPs describes as "$+70 million in debt for ISP-bound minutes in Massachusetts" alone.[68] Thus, even if we were to adopt -- and we do not -- Global NAPs' unique interpretation of section 208, Verizon still would have standing under that provision.[69]

28. Even if we assume that Global NAPs' factual claims are true, Global NAPs' arguments have no support in either the language of section 208 or the caselaw interpreting it. First, section 208 states plainly and expansively that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant."[70] We know of no case or other authority (and Global NAPs has provided us with none) holding that a plaintiff must pay the charges under an allegedly invalid tariff before it may challenge that tariff under section 208.[71]

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66 Answer at 6, ¶¶ 14-17. *See also id.* at 48, ¶ 4 (Affirmative Defenses).

67 *Id.* at 6, ¶ 15; *id.* at 48, ¶¶ 4, 5 (Affirmative Defenses); *id.* at 57 (Proposed Conclusions of Law).

68 Global NAPs Initial Brief at 3.

69 Moreover, as far as our record indicates, Verizon *has* paid some of the bills submitted to it under the Second ISP Tariff, thereby establishing direct injury and eliminating Global NAPs' "self help" defense. *See* Joint Statement at 2. *See also* Complaint at Exhibit I (attaching Global NAPs bills for New York and Rhode Island "per our local interconnection agreement and our federal tariff (same rate)"); Answer at 21, ¶ 48 ("Bell Atlantic [Verizon] has paid for some ISP-bound traffic in New York and Rhode Island."), *id.* at 53, ¶ 7 (Global NAPs Proposed Findings of Fact) ("In New York and Rhode Island, Bell Atlantic [Verizon] has paid for those minutes which it does not contest.").

70 47 U.S.C. § 208(a).

71 *See, e.g., MCI Telecomm. Corp. v. US West Commun., Inc. et al.*, Memorandum Opinion and Order, 15 FCC Rcd 9328, 9329 (2000) (holding that MCI had standing to challenge fee assessed by local exchange carriers against end user customers); *Marzec v. Power*, Order, 15 FCC Rcd 4475, 4479 (Enf. Bur. 2000) (holding that complainant had standing under section 208 even if she "did not suffer any redressable injury from [defendant's] actions").

29. As for Global NAPs' "self-help" arguments, the cases cited by Global NAPs in support of its claims do not apply here.[72] Each of those cases arose in the context of requests for emergency or interim relief in which the movants sought to avoid disconnection of telephone services for failure to pay their bills. In each case, the Commission found that such relief was inappropriate in "self-help" situations because the movant had failed to demonstrate it "would be irreparably injured by paying the disputed amounts … or by meeting … security or advance payment requirements, and that it cannot be made whole should it ultimately prevail on the merits of its complaint."[73] Thus, the cases cited by Global NAPs do not stand for the proposition that carriers who engage in self-help may not file a formal complaint. Rather, these cases only mean that the use of "self-help" undercuts a claim of irreparable injury for the purpose of emergency relief.[74]

30. Finally, Global NAPs has requested that, in the event we find its Second ISP Tariff to be unlawful, we allow it to revise its Tariff rather than invalidating the provisions altogether.[75] Global NAPs contends that "cancellation of the tariff *ab initio* would retroactively relieve [Verizon] of the obligation to pay anything at all for the work Global NAPs performs in delivering jurisdictionally interstate ISP-bound traffic at [Verizon's] behest."[76] According to Global NAPs, "such a result would be unjust and unreasonable and amount to a confiscation in violation of the Fifth Amendment to the Constitution."[77]

31. We reject this request because, contrary to Global NAPs' claims, our holding does not unfairly eliminate Global NAPs' opportunity to obtain compensation for the delivery of ISP-bound traffic originating from Verizon. In the first place, Global NAPs had ample opportunity apart from the federal tariffing process to obtain such compensation. In both Massachusetts and New Jersey, Global NAPs could have done what some other carriers have done, and reached agreements with Verizon on the specific

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[72] *See* Answer at 6 n.9, ¶ 15 n.9 (citing *Communique Telecomm.*, 10 FCC Rcd 10399, 10405 (1995); *Business Choice Network v. AT&T*, 7 FCC Rcd 7702, 7702 (1992); *Affinity Network, Inc. v. AT&T*, 7 FCC Rcd 7885 (1992); *Nos Commun., Inc. v. AT&T*, 7 FCC Rcd 7889 (1992); *Business WATS, Inc. v. AT&T*, 7 FCC Rcd 7942 (1992); *MCI Telecomm. Corp.*, 62 F.C.C. 2d 703, 706 (1976)). In its Proposed Conclusions of Law, Global NAPs also quotes the following statement in support of its argument: "[t]he Commission previously has stated, moreover, that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations." *Brooten v. AT&T*, 12 FCC Rcd 13343, 13351 n.53 (Com. Car. Bur. 1997), *quoted in* Answer at 57-58, ¶ 11. But this statement does not support Global NAP's argument. Rather, the quoted language merely states that a customer should pay its bills under a carrier's lawful tariff where the customer nevertheless disputes those charges. Indeed, in this case, the "rule" sought by Global NAPs would be unworkable, since the indeterminacy of the Second ISP Tariff makes it difficult for carriers to determine whether they are incurring charges under the Tariff in the first place. We also note that Global NAPs incorrectly cites this statement as issuing from the Commission itself, rather than from the Common Carrier Bureau under delegated authority, and as located in the text of the order, rather than in a footnote. *See* Answer at 57, ¶ 11.

[73] *Business WATS, Inc.*, 7 FCC Rcd at 7942.

[74] *See generally American Tel. & Tel. Co. v. The People's Network, Inc.*, Civ. A. No. 92-3100 (AJL), 1993 WL 248165, at *13 (D. N.J. Mar. 31, 1993).

[75] *See, e.g.*, Answer at 7, ¶ 18.

[76] *Id.*

[77] *Id.*

question of inter-carrier compensation for such traffic.[78] Alternatively, Global NAPs could have refused to agree to any contract language that arguably covered ISP-bound traffic, and asked the respective state commissions via arbitration to impose clear and specific language requiring Verizon to compensate Global NAPs for delivery of ISP-bound traffic. Instead, Global NAPs chose to enter into interconnection agreements without language explicitly addressing the compensation issue, fully aware that Verizon would argue to the state commissions that those agreements required no compensation for the delivery of ISP-bound traffic.[79] Having gambled and lost, Global NAPs may not plead the equities to us now.

32. Moreover, Global NAPs could still reach an agreement with Verizon on compensation for the delivery of ISP-bound traffic, even apparently on a retroactive basis.[80] In their decisions rejecting Global NAPs' arguments about its interconnection agreements with Verizon, both the Massachusetts and New Jersey commissions encouraged carriers to enter into negotiations regarding the delivery of ISP-bound traffic.[81] As noted above, Verizon has reached agreements on the treatment of ISP-bound traffic with other carriers, but Global NAPs has thus far refused to opt into those agreements.[82] Finally, in Massachusetts at least, Global NAPs has an existing right to compensation for the delivery of ISP-bound traffic -- Verizon must pay an amount equal to the interconnection agreement's reciprocal compensation rate applied to the traffic not in excess of a 2:1 terminating-to-originating ratio.[83] In light of the foregoing, it is hardly unfair or in any way a "taking" to prohibit altogether Global NAPs from seeking yet another "bite at the apple" via the federal tariffing process.[84]

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78 *See supra*, note 28.

79 *See Global NAPs I Recon.*, 15 FCC Rcd 5997, ¶ 14; New Jersey BPU Decision at 2-3.

80 *See* Complaint, Attachment B (attaching March 31, 2000 letter from Verizon counsel to counsel for Global NAPs; "[T]he terms and conditions that Bell Atlantic has offered to GNAPs in the past, and that a number of other carriers have accepted, remain open, and Bell Atlantic hereby offers to enter into negotiations to avoid the need to file a complaint."). *See* Massachusetts DTE Decision at 19-20 (noting the possibility for compensation arrangements on a retroactive basis). *See also Global NAPs I Recon.* at ¶ 15.

81 The state commissions did not forbid carriers from negotiating other compensation arrangements for the delivery of ISP-bound traffic. For example, the Massachusetts DTE strongly urged carriers to engage in negotiations, and stated that it would, in appropriate cases, mediate and arbitrate disputes about whether compensation for ISP-bound traffic was owed based on "contractual principles or other legal or equitable considerations." Mass. DTE Decision at 29-30. *See also Global NAPs I* at ¶ 12. The New Jersey BPU similarly stated that "[w]e expect that [Global NAPs] will be compensated by its end user customers and/or by ISPs themselves for the ISP-bound traffic which it carries…. Of course, the parties themselves are not foreclosed from future negotiations to develop more appropriate forms of compensation." New Jersey BPU Decision at 11.

82 Complaint at 7, ¶ 12; Answer at 16, ¶ 38. *See* 47 U.S.C. § 252(i).

83 *Global NAPs I Recon.*, 15 FCC Rcd 5997, ¶ 15.

84 Global NAPs does not contend or demonstrate that the net effect of the decision here would produce an overall impact that jeopardizes its financial integrity, either by leaving it without insufficient operating capital or by impeding its ability to raise future capital. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312-14 (1989).

IV. ORDERING CLAUSE

33. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, that Verizon's formal complaint IS GRANTED, to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary