GLOBAL NAPS

327 F.Supp.2d 290 (2004) | Cited 1 times | D. Vermont | January 9, 2004

OPINION AND ORDER

Global NAPS, Inc. ("Global") seeks review of a determination by theVermont Public Service Board ("Public Service Board" or "Board")requiring Global to pay access charges to Verizon New England Inc.("Verizon") for its long distance calls, and to cease using "virtual NXXservice" ("VNXX"). All parties[1] have moved for summary judgment. Forthe reasons that follow, Global's motion (Doc. 12) is denied; Verizon'scross-motion (Doc. 17) is granted; and the individual board members'cross-motion (Doc. 20) is denied as moot.Page 2

I. Background

A. The Telecommunications Act of 1996

The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56("Act" or "1996 Act") amended the Communications Act of 1934.See 47 U.S.C.A. §§ 151 et seq. (West 2001). Thelegislation was enacted in an effort "to promote competition and reduceregulation in order to secure lower prices and higher quality servicesfor American telecommunication consumers and encourage the rapiddeployment of new telecommunications technologies." Pub.L. No. 104-104.With the passing of the Act, Congress "ended the longstanding regime ofstate-sanctioned monopolies [of local telephone service]" by"fundamentally restructur[ing] local telephone markets." AT&TCorp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999); accord NewYork & Pub. Serv. Comm'n v. FCC, 267 F.3d 91, 96 (2d Cir. 2001);see also Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635,638 (2002) (Act created new telecommunications regime designed to fostercompetition in local telephone markets). The Act requires providers oftelecommunications services to interconnect directly or indirectly withthe facilities and equipment of other providers. 47 U.S.C.A. §§153(44), 251(a).

In order to foster the development of competitive local telephonemarkets, the Act imposes certain duties on thePage 3incumbent local exchange carrier ("ILEC"),[2] among them the dutyto provide interconnection with its network and to negotiate in goodfaith the terms and conditions of interconnection agreements with othercompetitive local exchange carriers ("CLECs"). Id. §§251(c)(1), (2). If parties cannot agree on the terms of theirinterconnection agreement, either party may petition the state commissionthat regulates the intrastate operations of carriers to arbitrate anyunresolved issues. See id. § 252(b)(1). The statecommission must limit its consideration to the issues presented in thepetition and any response thereto. Id. § 252(b)(4)(A). Itsresolution of any open issues must meet the requirements of § 251 andany regulations prescribed by the Federal Communications

Commission("FCC") pursuant to thatPage 4section. Id. §§ 252(c)(1), (e)(2)(B). The statecommission may also enforce other requirements of state law as long asthey do not prohibit or have the effect of prohibiting the ability of anentity to provide interstate or intrastate telecommunications service.Id. §§ 252(e)(3); 253(a). Any party aggrieved by thestate commission's determination may seek review of its action infederal district court. Id. § 252(e)(6).

1. Reciprocal Compensation

The 1996 Act requires interconnecting LECs to establish reciprocalcompensation arrangements for the transport and termination oftelecommunications. 47 U.S.C.A. § 251(b)(5). A reciprocalcompensation arrangement is one in which a carrier receives compensationfrom another carrier for the transport and termination oftelecommunications traffic on the first carrier's network facilities.See 47 C.F.R. § 51.701 (e) (2003).

Reciprocal compensation does not apply, however, to telecommunicationstraffic "that is interstate or intrastate exchange access, informationaccess, or exchange services for such access." Id. § 51.701(b)(1). Interstate and intrastate exchange service, commonly referred toas "long-distance" or "toll" calls, are subject to "access charges,"whereby the inter — or intra — exchange carrier pays the LECfor the use of its localPage 5network facilities. See, e.g.,47 C.F.R. § 69.124 (2003).[3] The FCC has authority over access charges forinterstate or foreign access services. See 47 C.F.R. pt. 69.States generally have authority over access charges for intrastateexchange access service. See, e.g., 47 U.S.C.A. §261(c); § 923 (West 2001). The FCC is empowered to prescribe rulesand regulations intended to implement the local competition provisionsof the 1996 Act, however, even though the rules affect intra-as wellas interstate matters. See 47 U.S.C. § 201(b);AT&T Corp. v. Iowa Utils., 525 U.S. at 377-78, 385;see also Pac. Bell v. Pac-West Telecomm, Inc.,325 F.3d 1114, 1126 & n.10 (9th Cir. 2003) (1996 Act granted FCCregulatory authority over those intrastate matters governed by the Act,and granted state commissions limited defined authority over interstatetraffic under §§ 251 and 252 of the Act).

B. The Regulation of ISP-Bound Traffic

Over the last few years, the FCC has undertaken to determinePage 6whether Internet telecommunications traffic should be subject toreciprocal compensation rules. Typically, individuals gain access to theInternet by directing their computers to dial a local number provided bytheir Internet Service Provider ("ISP"). Once the ISP modem "answers" thecall and connects the user, the user communicates over the Internet bytransmitting commands via the computer. The communication may then rangeworldwide. At issue has been whether dial-up customers make one or morethan one call when they communicate over the global computer network viaan ISP.

Calls to ISPs produce one-way traffic, from the calling party to theISP. Under reciprocal compensation rules, the originating carrier paysthe terminating carrier; thus the calling party's carrier would pay thecarrier that serves the ISP, if ISP-bound traffic were deemed localtraffic. As the FCC noted, treating ISP-bound traffic as subject toreciprocal compensation "created opportunities for regulatory arbitrageand distorted the economic incentives related to competitive entry intothe local exchange and exchange access markets" because "ISPs typicallygenerate large volumes of traffic that is virtually all one-way-that is,delivered to the ISP." Implementation of the Local CompetitionProvisions in the Telecomms. Act of 1996, Intercarrier Comp. forISP-Bound Traffic,Page 716 F.C.R.R. 9151, 9153 ¶ 2 (Apr. 27, 2001) ("RemandOrder").[4]

In 1999, the FCC issued a declaratory ruling that excluded ISP callsfrom the reciprocal compensation requirement on the theory that ISP callswere essentially non-local. See Implementation of the LocalCompetition Provisions in the Telecomms. Act of 1996, Inter-Carrier Comp.for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3690 ¶ 1 (Feb. 26,1999) ("Initial Order"). A panel of the D.C. Circuit Court of Appealsvacated the ruling in Bell Atlantic Telephone Cos. v. FCC,206 F.3d 1, 9 (D.C. Cir. 2000), finding that the FCC had not adequatelyexplained its reasoning.

On remand, the FCC again considered inter-carrier compensation forISP-bound traffic, and again concluded that such traffic is predominantlyinterstate access traffic and is not subject to reciprocal compensation.Remand Order at 9153 ¶ 1. It proceeded to establish an interimcompensation mechanism for the delivery of ISP-bound traffic that would"limit[] carriers' opportunit[ies] to recover costs from other carriersandPage 8requir[e] them to recover a greater share of their costs from theirISP customers." Id. at 9181 ¶ 67. It adopted a graduallydeclining cap over a 36-month period on the amount that carriers couldrecover from other carriers for delivering ISP-bound traffic.Id. at 9156 ¶ 7; 9187 ¶ 78. For interconnectionagreements entered into after the effective date of the order, carrierswould have to exchange ISP-bound traffic on a bill-and-keep basis.[5]Id. at 9188 ¶ 81.

Upon review of the Remand Order, the D.C. Circuit Court of Appealspanel again remanded the case, finding the FCC's rationale for its rulinguntenable. See WorldCom, Inc. v. FCC, 288 F.3d 429, 434 (D.C.Cir. 2002), cert. denied, 123 S.Ct. 1927 (2003). The Court didnot vacate the Remand Order, however, finding that "there is plainly anon-trivial likelihood that the Commission has authority to elect such asystem [of compensation]." Id. It left in place the interimpricing limits, and declined to rule on the scope of the reciprocalcompensation obligation, or whether handling calls to ISPs constituted"exchange access" or "telephone exchange service" as defined in47 U.S.C. § 153(16) and (47). Id.Page 9

The Remand Order and the revised reciprocal compensation regulationsthus remain in effect pending further proceedings before the FCC.Although the Remand Order specifically acknowledged that carriersexchanging ISP-bound traffic pursuant to interconnection agreements madebefore June 14, 2001 (the effective date of the Remand Order)[6] may besubject to state commission-arbitrated reciprocal compensation rates, allISP-bound traffic exchanged pursuant to interconnection agreements madeafter that date is subject to bill-and-keep compensation. SeeRemand Order at 9189 ¶ 82.

C. VNXX Service

Whether a telephone call is subject to access charges, i.e., isconsidered a "toll" call, is based on the location of the central office"switch" where a call originates and terminates. The middle three digitsof a ten digit telephone number — the "NXX" — hashistorically been associated with a particular local calling area andwith a particular switch. A call to a particular NXX therefore wouldidentify the location where the call terminated.

It is possible, however, to assign customers "virtual NXXs," or"VNXXs," so that a call termination is identified not by itsPage 10physical location but by a location of the customer's choice. Thecustomer thus does not pay toll charges if the VNXX is the same as theNXX of the call termination, and the call would not be subject to accesscharges for purposes of intercarrier compensation. Essentially, VNXXservice converts what would otherwise be toll calls into local calls.

D. Proceedings Before the Vermont Public Service Board

Verizon is an ILEC in Vermont. Global is a CLEC with its principalplace of business in Quincy, Massachusetts. Its principal customers areISPs. Global offers co-location to its ISP customers, the majority ofwhom have located in Global's facility in Quincy. Global "aggregates" itstelecommunications traffic, meaning it receives dial-up Internet callsfrom various locations in Vermont, transports the traffic on its networkback to Quincy, and delivers the calls to the ISPs there. An ISP thusdoes not have to locate equipment to handle calls in each local callingarea, and Vermont users of the Internet have local Internet access.Global offers its customers VNXX service.

In January 2001 Global and Verizon began negotiating the terms of aninterconnection agreement in Vermont. On July 23, 2002 Global petitionedthe Board for arbitration. On December 26, 2002 the Board issued itsOrder with respect to twelve issues identified by the parties. Global haschallenged the Board's resolution of two of the issues. It contends firstthat thePage 11Board's Order unlawfully imposes exchange access charges on what itdefines as local telephone calls (Issue 3). Second, it contends that theOrder unlawfully prohibits VNXX service (Issue 4).

II. Discussion

A. Standard of Review

____The 1996 Act did not prescribe a standard of review for courts toapply in reviewing the action of a state commission under § 252(e)(6) of Title 47. When reviewing an action of a state agency forconsistency with federal law, "Chevron[7] style" deference tothe agency determination is not appropriate, however, and interpretationsof federal law are accorded de novo scrutiny. See Perry v.Dowling, 95 F.3d 231, 236 (2d Cir. 1996) (citing Turner v.Perales, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam)). The Third,Fourth, Fifth, Sixth, Ninth and Tenth Circuits have applied de novoreview to state commissions' interpretations of the Act and itsregulations. See Mich. Bell Tel. Co. v. MFS Intelenet ofMich., Inc., 339 F.3d 428, 433 (6th Cir. 2003); SouthwesternBell Tel. Co. v. Apple, 309 F.3d 713, 718 (10th Cir. 2002); MCITelecomm. Corp. v. Bell Atl. — Pa., 271 F.3d 491, 516 (3dCir. 2001), cert. denied, 537 U.S. 941 (2002);Southwestern Bell Tel. Co. v. Pub. Util. Comm'n, 208 F.3d 475,Page 12482 (5th Cir. 2000); GTE South, Inc. v. Morrison,199 F.3d 733, 745 (4th Cir. 1999); US West Communications v. MFSIntelenet, Inc., 193 F.3d 1112, 1117 (9th Cir. 1999).

A party is entitled to summary judgment if "the pleadings depositions,answers to interrogatories, and admissions on file, together with theaffidavits, if any, show that there is no genuine issue as to anymaterial fact and that the moving party is entitled to a judgment as amatter of law." Fed R. Civ. P. 56(c); see also Celotex Corp. v.Catrett, 477 U.S. 317, 322 (1986). "`Where cross-motions for summaryjudgment are filed, a court must evaluate each party's motion on its ownmerits, taking care in each instance to draw all reasonable inferencesagainst the party whose motion is under consideration.'" Boy Scoutsof Am. v. Wyman, 335 F.3d 80, 88 (2d Cir. 2003) (quoting HotelEmployees & Rest. Employees Union, Local 100 v. City of N.Y. Dep't ofParks & Recreation, 311 F.3d 534, 543 (2d Cir. 2002) (internalquotation marks omitted)).

B. Local Calling Areas (Issue 3)

In 1995 and 1997 the Public Service Board established the boundaries oflocal calling areas for the ILEC. See Petition of Global NAPs, Inc.for Arbitration, Docket No. 6742 (Vt. Pub. Serv. Bd. Dec. 26, 2002)at 12 & n.31 ("PSB Order") (Doc. 18, App. Tab 1). In a 1999 order,the Board ruled that CLECs are free to define their own local callingareas for purposes ofPage 13billing their retail customers, but the local calling areasestablished by the Board for the ILEC govern intercarrier compensation,i.e., whether the call is subject to reciprocal compensation or accesscharges. See Investigation into New England Tel. & Tel. Co's(NET's) Tariff Filing, Docket No. 5713 (Vt. Pub. Serv. Bd.Feb. 4, 1999) at 114 (rates for compensation among carriers will be basedupon local calling areas set out in Docket 5670); see also PSBOrder at 12 & n.32. In the arbitration proceedings, the partiessought a determination whether the Public Service Board ruling should bemodified to provide that the distinction between toll and local trafficfor purposes of intercarrier compensation would be defined by the localcalling area of the company that originates the call. The Board declinedto modify its 1999 ruling, concluding that "intercarrier compensationshall continue to be based on the local calling areas established inDocket 5670." PSB Order at 41.

Global contends that the Order violates 47 C.F.R. § 51.701 (b)(1),which defines telecommunications traffic, for purposes of reciprocalcompensation, as "telecommunications traffic exchanged between a LEC anda telecommunications carrier . . ., except for telecommunicationstraffic that is interstate or intrastate exchange access, informationaccess, or exchange services for such access."47 C.F.R. § 51.701 (b)(1). GlobalPage 14reasons that if reciprocal compensation applies to alltelecommunications traffic except exchange access, information access,and exchange services; and if exchange access is defined as the provisionof access to facilities for the purpose of the origination or terminationof telephone toll services; and if telephone toll service is defined as"telephone service between stations in different exchange areas for whichthere is made a separate charge not included in contracts withsubscribers for exchange service," 47 U.S.C.A. § 153(48); thentraffic is only subject to access charges when the originating customer'scarrier levies a separate toll charge. Therefore, it argues, the PublicService Board's Order contravenes federal regulations by imposing accesscharges on traffic originated by Global's customers that crossesVerizon's local calling area boundaries, regardless of whether Globalregards the call as local or toll for purposes of billing its customers.

Under Global's interpretation, a call from a Global customer in Vermontto anywhere in the world would not be telephone toll service for purposesof intercarrier compensation if Global offered the customer unlimitedworldwide calling for a flat fee. Setting aside the question whetherGlobal does now or ever intends to offer local calling service inVermont, the FCC in its Remand Order specifically stated that prior tothe enactment of the 1996 Act, the FCC and the states had in placeregimesPage 15applicable to access services — services that provide connectionto points beyond the local exchange — that Congress did not intendto disrupt when it created reciprocal compensation requirements. RemandOrder at 9168 ¶ 37. According to the FCC, the reciprocal compensationrequirements of the 1996 Act exclude traffic already subject tointerstate and intrastate access regulations. Id. & n.66.

The FCC has also made clear that state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. . . . We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.Implementation of the Local Competition Provisions in theTelecomms. Act of 1996, 11 F.C.C.R. 15, 499, 16, 013-14 ¶ 1035(Aug. 8, 1996) ("First Report & Order"), aff'd in part,vacated in part, Competitive Telecomms. Ass'n v. FCC,117 F.3d 1068 (8th Cir. 1997), and aff'd in part, vacatedin part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir.1997), aff'd in part, rev'd in part, AT&TCorp. v. Iowa Utils. Bd., 525 U.S. at 397. In a recent arbitrationin Virginia, the FCC reiterated that "statePage 16commissions have authority to determine whether calls passingbetween LECs should be subject to access charges or reciprocalcompensation for those areas where the LECs' service areas do notoverlap," and it declined to disturb the existing distinction in thatstate. Petition of WorldCom, Inc., 17 F.C.C.R. 27, 039, 27, 307¶ 549 (July 17, 2002) (mem. op. & order).

The historical practice of allowing state commissions to define localservice areas was not altered by the FCC's ruling in its Initial andRemand Orders that ISP-bound traffic was inherently interstate incharacter. Although carriers in Vermont as elsewhere who operate underinterconnection agreements made after the effective date of the RemandOrder must exchange ISP-bound traffic on a bill-and-keep basis, theRemand Order did not otherwise disrupt the state commissions' ability todefine local service areas. Global's contention that the Remand Order andits attendant regulations require the Board to cede its authority todefine local calling areas to Global is unfounded.

C. Prohibition of VNXX Service (Issue 4)

Before the Public Service Board Verizon sought a ruling that it neednot pay reciprocal compensation for traffic that only appeared to belocal by virtue of the VNXX, but was actually interexchange traffic. TheBoard ruled that the determination of whether traffic is "local" or"toll" is based upon the physical termination points of the calls, notthe rate center designatedPage 17by the carrier, PSB Order at 42, and it banned Global's use of VNXXin Vermont. Id. at 45.

Global argues first that the Public Service Board lacked the authorityto ban the use of VNXX service because neither party to the arbitrationraised the issue of the right to use VNXX service. The 1996 Act requiresa state commission that is arbitrating issues concerning aninterconnection agreement to limit its consideration to the open orunresolved issues presented by the petition for arbitration and anyresponse thereto. 47 U.S.C.A. § 252(b)(4)(A). Neither Global norVerizon objected to the use of VNXX; Verizon wanted only to ensure thatit need not pay reciprocal compensation for VNXX traffic. Global,however, squarely raised the issue of its right to use VNXX in itspetition for arbitration. Global's caption describing Issue 4 to theBoard stated: "Can Global assign to its customers NXX codes that are`homed' in a central office switch outside of the local calling area inwhich the customer resides?" See PSB Order at 10; Cross-Mot. ofBd. Member Defs. at 3 (Doc. 20). Global proceeded to present argumentsfor the use of VNXX service. Global did in fact raise the issue of itsright to use VNXX. That it and Verizon were amenable to differentsolutions than the one the Board adopted did not deprive the Board of theauthority to address the issue, once Global raised it.Page 18

Global also contends that the Board's Order unlawfully discriminatesagainst VNXX traffic. Verizon offers its customers Foreign Exchange("FX") service, which Global argues is functionally identical to VNXX,and therefore must be treated identically. Customers using FX servicepurchase an FX line, a link between two central offices, or switches.They pay costs that cover the cost of the line and the transportation oftraffic in bulk between the two points. Calls placed to the line areconsidered terminated at that end, even though the calls are transportedto the other end of the line and ordinarily would incur toll charges.See PSB Order at 21. FX service thus allows what would be atoll call to be treated as a local call, even though the call actuallyterminates at a point outside the customer's local calling area. In thatrespect FX service functions the same as VNXX service from the point ofview of the retail customer.

From the carriers' and regulators' points of view, however, theservices operate quite differently. When VNXX numbers are assigned,neither Global nor its customers purchase any equipment, nor do they payfor the costs of transporting the call. Instead Global relies on Verizon,the ILEC, to transport the calls, in accordance with Verizon's obligationto provide interconnecting services. Global does not dispute thedistinction, but considers it irrelevant.Page 19

The 1996 Act requires that Verizon and Global interconnect "on rates,terms, and conditions that are just, reasonable and nondiscriminatory."47 U.S.C.A. § 251(c)(2). The Public Service Board must ensure thatan arbitrated interconnection agreement meets the requirements ofsection 251. Id. § 252(c)(1). Because FX and VNXX arenot equivalent services, the Board's order, which allows any LEC that sochooses to provide FX service, but does not permit VNXX service, doesnot discriminate against Global in violation of § 252(c)(1).

Global next argues that the Public Service Board does not havejurisdiction to ban Global's use of VNXX to provide information accessservices because ISP-bound traffic is interstate in character andtherefore subject exclusively to FCC authority. See RemandOrder at 9154 ¶ 4; 9189 ¶ 82. The Remand Order made no suchsweeping preemptive claim. It expressly stated that access servicesremain subject to FCC jurisdiction "or, to the extent they are intrastateservices, they remain subject to the jurisdiction of state commissions."Id. at 9169 ¶ 39. It also acknowledged that ISP-boundtraffic has interstate and intrastate components that cannot be reliablyseparated. Id. at 9175 ¶ 52; see also La. Pub. Serv.Comm'n v. FCC, 476 U.S. 355, 360 (1986) (in practice, dual federaland state regulation over telephone service does not divide neatly intoseparate interstate and intrastate domains). The FCC stated that thePage 20Remand Order "does not preempt any state commission decisionregarding compensation for ISP-bound traffic for the period prior to theeffective date of the interim regime we adopt here."Remand Order at 9189 ¶ 82. Moreover, state commissions' power toarbitrate interconnection agreements, including those that involveISP-bound traffic, has not altered because the FCC has issued rulingsthat govern intercarrier compensation for ISP-bound traffic. SeeAT&T Corp. v. Iowa Utils. Bd., 525 U.S. at 385 (1996 Actentrusts state commissions with job of approving interconnectionagreements, even though FCC promulgates rules to guide state commissionjudgments).

Although Global characterizes the Board's Order as "determin[ing] whocan or cannot serve ISPs," Global's Mem. in Supp. at 13 (Doc. 13), theBoard did not bar Global from providing service to ISPs. It merely ruledthat Global could not obtain an unfair advantage in the market byoffering VNXX service with Verizon footing the bill.

Global also argues that federal law prohibits the Board from imposingintrastate access charges on ISP-bound traffic. In its Remand Order, theFCC ruled that as of the Order's effective date carriers entering intonew interconnection agreements "shall exchange ISP-bound traffic on abill-and-keep basis during this interim period." Remand Order at 9188¶ 81. Explaining its reasoning, the FCC stated, "we believe that astandstill on anyPage 21expansion of the old compensation regime into new markets is themore appropriate interim answer." Id. at 9189 ¶ 81.

With the Remand Order the FCC preempted state commissions' authorityto deal with intercarrier compensation for ISP-bound traffic.Id. at 9189 ¶ 82 ("Because we now exercise our authorityunder section 201 to determine the appropriate intercarriercompensation for ISP-bound traffic, . . . state commissions will nolonger have authority to address this issue."). The FCC did notdistinguish traffic between an ISP and its customer in different localcalling areas from traffic between an ISP and its customer in thesame local calling area. Intercarrier compensation for ISP-boundtraffic, regardless of the physical location of the ISP, is governedexclusively by the FCC. For existing compensation regimes, intercarriercompensation is at most $.0007/mou.[8] For interconnection agreementsentered into after June 14, 2001, such as the one at issue here, costrecovery is on a bill and keep basis. Id. at 9188 ¶ 81.

In the arbitration proceeding, the parties contested whether each partyshould be responsible for the costs associated with transportingtelecommunications traffic to their point of interconnection ("POI"). ThePublic Service Board's HearingPage 22Officer recommended that each party should be responsible for its owncosts of delivery to the POI, and noted that according to the FCC thereshould be no payment made to Verizon to transport Global's ISP-boundtraffic. PSB Order at 8-9. The Board accepted the Hearing Officer'srecommendation, and ruled that each party would be required to transporttraffic on its side of the POI at its own expense. Id. at 40.In the course of its discussion however, the Board opined that intrastatetoll traffic, whatever its destination, was unaffected by the FCC'sRemand Order, and that access charges would continue to apply to suchtraffic. Id. at 39.

To the extent that the Public Service Board ruled that access chargesapply to ISP-bound traffic, its ruling is at odds with the FCC's rulingin the Remand Order. Global did not appeal the Board's ruling on thisissue, however. Global's somewhat disjointed contention is that theBoard's prohibition of VNXX violates the Remand Order by enabling it toimpose access charges on ISP-bound traffic. Although the Board isprecluded from imposing access charges on ISP-bound traffic, it is notprecluded from banning VNXX.

Finally, Global argues that the filed rate doctrine prohibits theBoard from interfering with Global's federally tariffed service to itsISP customers by banning VNXX service. Global did not argue to theBoard that the filed rate doctrinePage 23prohibits it from barring VNXX service because the service isprovided pursuant to a federal tariff; thus the argument is waived.See Zatz v. United States, 149 F.3d 144, 146(2d Cir. 1998) (by failing to present jurisdictional argument to agency,petitioners waived right to present it to federal court; defect inagency's jurisdiction does not affect subject matter jurisdiction ofdistrict court). Even were the Court to consider Global's argument,however, the argument fails.

Section 203(a) of Title 47 requires every common carrier to file withthe FCC "schedules showing all charges for itself and its connectingcarriers . . . and showing the classifications, practices, andregulations affecting such charges." 47 U.S.C.A. § 203(a). Nocarrier may "extend to any person any privileges or facilities in suchcommunication, or employ or enforce any classifications, regulations, orpractices affecting such charges, except as specified in such schedule."Id. § 203(c). The purpose of the filed rate doctrineprovisions is to prevent unreasonable and discriminatory charges.Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.,524 U.S. 214, 221-22 (1998); see also Fax Telecommunicaciones Inc. v.AT&T, 138 F.3d 479, 488 (2d Cir. 1998) (filed rate doctrine iscentral to regulatory scheme for interstate telecommunications carriers).Rates filed with the FCC have the force of federal law, and completelyset forth the rights and liabilities between carrier and customer.ICOMPage 24Holding, Inc. v. MCI Worldcom, Inc., 238 F.3d 219, 221(2d Cir. 2001); AT&T Co. v. Cent. Office, 524 U.S. at 227.

Two principles underlie the filed rate doctrine: "(1) preventingcarriers from engaging in price discrimination as between ratepayers (the`nondiscrimination strand') and (2) preserving the exclusive role offederal agencies in approving rates for telecommunications services thatare `reasonable' by keeping courts out of the rate-making process (the`nonjusticiability strand'), a function that the federal regulatoryagencies are more competent to perform." Marcus v. AT&TCorp., 138 F.3d 46, 58 (2d Cir. 1998) (citing Wegoland Ltd. v.NYNEX Corp., 27 F.3d 17, 19 (2d Cir. 1994)); accord FaxTelecommunicaciones, 138 F.3d at 489. The filed rate doctrineapplies not only to rates or charges, but also to non-price aspects oftelecommunications services, such as special services or billing options.ICOM, 238 F.3d at 222; see also AT&T Co. v. Cent.Office, 524 U.S. at 224-25.

The Board's prohibition of VNXX service offends neither the"nondiscrimination strand" nor the "nonjusticiability strand" of thefiled rate doctrine. The ban does not have the effect of discriminating,or requiring Global to discriminate, among Global's customers; it simplydoes not permit Global to offer the service to any of its customers. Aban on VNXX service likewise does not involve the Board or this Court inany determination ofPage 25whether the rates or terms of the service are reasonable. TheBoard's ban has not varied the rates or terms of Global's tariff, nor hasit attempted to create or enforce obligations between Global and itscustomers that do not appear in the federal tariff. The filed ratedoctrine does not prevent the Public Service Board from prohibiting theuse of VNXX within Vermont.

III. Conclusion

The Public Service Board's determination that intercarrier compensationshall continue to be based on the local calling areas as established inprevious Board proceedings does not violate federal law. The Board's banon Global's use of VNXX likewise does not violate federal law. Global'smotion for summary judgment is denied; Verizon's cross-motion for summaryjudgment is granted; the individual Board members' cross-motion is deniedas moot.

1. The Board has been dismissed from this action by stipulation ofthe parties. See Stipulation of Dismissal of Vermont PublicService Board (Doc. 19).

2. A "local exchange carrier ("LEC") provides "telephone exchangeservice" or "exchange access." 47 U.S.C.A. § 153(26). "Telephoneexchange service is defined as (A) service within a telephone exchange, or within a connected system of

telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.Id. § 153 (47). "Exchange access" is defined as "theoffering of access to telephone exchange services or facilities for thepurpose of the origination or termination of telephone toll services."Id. § 153 (16).

3. The traditional regulatory distinction between telephone exchangeservice, commonly referred to as local calling, and telephone tollservice, commonly referred to as long distance, that originated whentelecommunications was in its infancy, may no longer make much sense inthe modern world of digital communications. See Jeffrey I.Ryen, The Battle over Reciprocal Compensation: The FCC's OngoingStruggle to Regulate Intercarrier Compensation Fees for ISP-BoundTraffic, 8 B.U.J. Sci. & Tech. L. 614, 632 (2002) (1996 Act andattendant ISP reciprocal compensation dispute offer glaring example oftechnology outpacing regulation; traditional regulatory assumptions thatrely on distinction between "local" and "long distance" create acutechallenges for FCC).

4. The FCC noted that "comments in the record indicate thatcompetitive local exchange carriers (CLECs), on average, terminateeighteen times more traffic than they originate, resulting in annual CLECreciprocal compensation billings of approximately two billion dollars,ninety percent of which is for ISP-bound traffic." Remand Order at9154-55 ¶ 5; see also WorldCom, Inc. v. FCC, 288 F.3d 429,431 ((D.C. Cir. 2002), cert. denied, 123 S.Ct. 1927 (2003)(system attracted LECs to enter business simply to serve ISPs, makingenough money from reciprocal compensation to pay ISP customers forprivilege of completing calls).

5. "`Bill and keep' refers to an arrangement in which neither of twointerconnecting networks charges the other for terminating traffic thatoriginates on the other network. Instead, each network recovers from itsown end-users the cost of both originating traffic that it delivers tothe other network and terminating traffic that it receives from the othernetwork." Remand Order at 9153 n.6.

6. The Remand Order and revisions to 47 C.F.R. pt. 51 becameeffective thirty days after publication in the Federal Register, or June14, 2001. See Remand Order, 16 F.C.C.R. at 9204, 66 Fed. Reg.26, 800 (May 15, 2001).

7. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,467 U.S. 837 (1984).

8. "mou" refers to "minute-of-use." See, e.g.,Remand Order at 9156 ¶ 8.Page 1