

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on March 20, 2002

COMMISSIONERS PRESENT:

Thomas J. Dunleavy, Presiding
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 01-C-1119 - Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges.

ORDER REQUIRING PAYMENT OF
INTRASTATE CARRIER ACCESS CHARGES

(Issued and Effective May 31, 2002)

BY THE COMMISSION:

INTRODUCTION

On August 13, 2001, Frontier Telephone of Rochester, Inc. (Frontier) filed a complaint against US DataNet Corporation (DataNet) stating that DataNet has refused to pay tariffed and properly assessed intrastate access charges. Frontier requests the Commission order DataNet to pay Frontier's applicable past and present intrastate access charges together with late payment charges.¹ Frontier further requests us to declare that in the event of continued nonpayment, Frontier may terminate service to DataNet's long distance access numbers following the procedures outlined in its tariff upon appropriate notice to DataNet, PaeTec Communications, Inc.² and the Commission.

¹ FTR claims \$713,714.37 from August 1999 through May 2001.

² PaeTec Communications, Inc. is a competitive local exchange carrier providing switched dial tone and other services in Rochester and other areas. PaeTec is providing routing of DataNet's traffic.

In response to Frontier's complaint, DataNet explains that it provides long distance and other enhanced services to customers through what is commonly known as Internet protocol (IP) telephony,³ and therefore, under Federal law, is not required to pay intrastate access charges such as those billed by Frontier. DataNet asks the Commission to dismiss this complaint on these grounds, and implies that if we adopt a contrary position, it would raise significant policy issues of national importance and, therefore, should be referred to the Federal - State Joint Board.

Also in its response, DataNet points out that Frontier waited two years to raise these issues, despite its full knowledge of DataNet's operations. DataNet claims that it relied on Frontier's silence over that entire period as assent that no access charges were due. DataNet acknowledges that if Frontier had notified them that Frontier would be claiming an entitlement to access charges, it would have considered reconfiguring its network or its connections to the local exchange network and subscribed to less-costly methods of access. DataNet argues that any findings now that access charges are due must be strictly limited to prospective applicability only. Finally, DataNet requests that if we find that intrastate access charges apply, we conduct an investigation of the validity of Frontier's existing intrastate access rates, and pending completion of such a review, direct Frontier to establish interim rates equivalent to its comparable interstate access charges.

The Small Company Group (SCG) representing 28 rural New York telephone companies also filed comments regarding this complaint. The SCG believes that the issues raised by DataNet's operations are not limited to Frontier but apply to any local exchange carrier (LEC) where that LEC provides access services in an area where DataNet operates. Hence, SCG

³ Internet Protocol (IP) telephony services enable real-time voice transmission using Internet protocols. The services can be provided in two basic ways: through software and hardware at the customer's premises or through "gateways" that enable applications originating and/or terminating on the public switched telephone network (PSTN). Gateways are computers that transform the circuit-switched voice signal into IP packets, and vice versa, and perform associated signalling, control, and address translation functions. The voice communication can be transmitted along with other data on the "public" Internet, or can be routed through PSTNs or through intranets or other private data networks. (In the Matter of Federal-State Joint Board on Universal Service, cc Docket No. 96-45, 13 FCC RD 11501, Release Number 98-67, released April 10, 1998, Para 84).

requests the Commission to establish a new proceeding to address the policies and rules that will govern the establishment of relationships between similarly situated LECs and companies such as DataNet.

DataNet opposes SCG's request, and submits that the proceeding sought by SCG is inappropriate and unnecessary, and in any event should not occur in this forum. DataNet reiterates in its comments that IP telephony, such as that provided by DataNet, is an information service subject to Federal jurisdiction, and under existing FCC rules is not subject to access charges. DataNet notes that all policies relating to the existing exemption will continue to be established by the FCC, and to the extent that SCG wishes a reversal of that current Federal policy, the appropriate forum in which to pursue that relief is the FCC.

Taconic Telephone Corp. (Taconic) also submitted comments in support of the complaint filed by Frontier. It requests that the Commission enforce the intrastate access provisions of Frontier's tariff and order DataNet and other similarly-situated companies to pay all outstanding access charges. DataNet did not respond to Taconic's comments.

PETITION

In its complaint, Frontier explains that its Tariff P.S.C. No. 3, at §6.2.1(A), §17.4.1 and §17.4.2 identifies a charge for Local Transport plus a further charge for Local Switching per intrastate minute of usage. These tariffs are applicable for originating access to long distance carriers whose customers reach the carriers by dialing 7-digit numbers provided by a LEC to the long distance carrier through the "line side" of the central office switch serving the long distance carrier. This type of access is defined as Feature Group A (FG-A) services. It is also possible for long distance carriers to use 7-digit numbers with "trunk-side" access from their serving LEC, in which case this type of access is defined as Feature Group B (FG-B). Frontier's access charges for FG-A and FG-B are identical. Frontier believes that the call routing of DataNet's customers and the multiple switching aspects of its network entitles Frontier to FG-A and/or FG-B intrastate access charges.

In June and July 2001, Frontier billed intrastate access charges to DataNet based on Frontier's count of actual minutes originating with Frontier's local exchange customers and terminating to DataNet's long distance access numbers. Normally Frontier would apply a

Percentage of Interstate Usage (PIU) factor⁴ to DataNet's total minutes of use in order to determine the minutes applicable to intrastate access charges. However, Frontier claims that it had no means of determining whether a caller reaching DataNet's switch was making an interstate or an intrastate call, and DataNet would not supply Frontier with a PIU factor. Pursuant to Tariff P.S.C. No. 3, §2.3.10(A), when a long distance carrier uses FG-A or FG-B access, it is required to provide the PIU factor to Frontier. Frontier states that it had no means of directly measuring the PIU factor because the long distance number is not dialed until after the call leaves the Frontier network. Therefore, Frontier billed DataNet's total minutes at its tariffed intrastate access charge rate. Frontier notes that it is willing to apply a reasonable PIU on a retroactive basis if DataNet complies with Frontier's tariff by providing a reasonable PIU and by paying Frontier's applicable tariffed access charges.

DataNet, a Syracuse, New York based company, states that it provides service to customers in the Rochester local service territory as well as throughout New York, through what is commonly known as Internet protocol (IP) telephony. It claims that through its use of IP telephony, it is able to provide high quality inter-city service to the general public at a price significantly less than what is being demanded by the major long distance carriers. DataNet acknowledges that the efforts of Frontier and other LECs to demand access charges from providers of IP telephony such as DataNet are not new. However, DataNet believes that such efforts remain completely contrary to Federal policies and requirements and has refused to pay Frontier the intrastate access charges that Frontier has billed.

In order to resolve the various issues that Frontier presented in its complaint against DataNet, a clear description and discussion of DataNet's network configuration is necessary. According to Frontier's complaint and DataNet's response, the dialing pattern for customers in the Rochester service territory accessing DataNet's long distance service is as follows:

- (a) The customer dials a local Rochester number, which is DataNet's 7-digit long distance access number that is provided by PaeTec Communications, Inc., a CLEC operating in Rochester.

⁴ The amounts for Interstate and Intrastate access charges are very different in Frontier's tariffs. Absent other information, Frontier's petition assumed all applicable charges at the higher Intrastate rate. DataNet stated that it could provide the Commission with the Percent Interstate Usage (PIU) so that the proper amounts can be calculated.

- (b) If DataNet's Caller ID technology recognizes that the call is coming from a customer who has an account with them, the call is processed. Otherwise, the customer is prompted to enter an authorization code (also known as a Personal Identification Number – "PIN").
- (c) Once a caller is authorized, the customer gets an interactive response unit that prompts the customer (if all information is correct to this point) to dial the area code and telephone number of the party to be reached.

By means of this dialing scheme, DataNet's customers are able to make calls anywhere within New York and elsewhere within the United States and Canada.

DataNet's corresponding network configuration for a customer making a long distance voice call is described as:

- (a) The call goes over the local Frontier loop serving the customer placing the call.
- (b) It then goes to Frontier's local central office where the call is switched.
- (c) The switched call goes over Frontier's interoffice trunks to Frontier's tandem.
- (d) The call is switched by the tandem and routed over an intercarrier trunk to PaeTec's switch.
- (e) In the PaeTec switch, the call goes over local access facilities which are leased by DataNet from PaeTec and is delivered to DataNet's IP network.
- (f) DataNet takes the signal from PaeTec and converts it to IP for transmission over its system. At the terminating end, the protocol is converted back to a signal compatible with the public switched telephone network.
- (g) Approximately 40% of the time, DataNet's IP network does not serve the called party's general location, in which case, DataNet uses the facilities of inter-exchange carriers to complete its calls, and therefore, no protocol conversion is used or needed.

Frontier argues that based on the call routing and DataNet's network configuration, it is entitled to assess intrastate access charges to DataNet pursuant to its Local Switching and Local Transport tariffs in P.S.C. No. 3, §6.2.1(A), 17.4.1 and 17.4.2. It asserts that DataNet advertises that it "uses Voice-over Internet Protocol to route calls over our private network using Internet technology," which would indicate that it provides services as an Internet protocol telephony provider. However, Frontier believes that DataNet does not use the public Internet to route its calls -- it uses IP only within its own network, and both caller and called parties send and receive analog voice signals using ordinary telephones. Frontier further asserts

that DataNet bills its customers like a telecommunications carrier, including taxes and surcharges.

Frontier claims that DataNet's network configuration requires multiple switching and transport operations before an originating DataNet call from a customer in Frontier's local service territory leaves Frontier's network. Frontier acknowledges that DataNet could avoid the Local Transport rate charges by taking originating traffic at each of Frontier's host central offices through collocation arrangements. Frontier believes that since it switches and routes these calls, it is entitled to assess intrastate access charges on DataNet's traffic for both Local Switching and Local Transport, pursuant to Frontier's Tariff P.S.C. No. 3, §6.2.1(A), 17.4.1 and 17.4.2.

DISCUSSION

In addressing Frontier's complaint, separate informal meetings were held with both parties, and we reviewed the FCC's views of Internet protocol telephony providers. Based on our analysis, the Commission concludes that DataNet is not providing enhanced information services, but rather telecommunication services for which access charges should apply.

The FCC made an extensive analysis of telecommunications services, enhanced services and IP telephony in particular. It stated:

"We recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. We therefore examine in this section Internet-based services, known as IP Telephony, that most closely resemble traditional basic transmission offerings. The Commission to date has not formally considered the legal status of IP telephony. The record currently before us suggests that certain "phone-to-phone IP telephony" services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services." (In Matter of Federal-State Joint Board on Universal Service (cc Docket No. 96-45, 13 FCC RD 11501, Release Number 98-67, released April 10, 1998, Para. 83, citations omitted)

The FCC noted that the 1996 Telecommunications Act defined "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received," and defined "information service" to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not

include any use of any such capability for the management, control or operation of the telecommunications system or the management of telecommunications service.” (Id. Para. 30)

Accordingly, the FCC concluded that an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers “telecommunications.” (Id. Para. 39). Continuing, the FCC noted that certain protocol processing services that result in no net protocol conversion to the end user are deemed telecommunications services (Id. Para. 50). “The protocol processing that takes place incident to phone-to-phone IP Telephony does not affect the service’s classification, under the Commission’s current approach because it results in no protocol conversion to the end user.” (Id. Para. 52, citations omitted).

The FCC stated that this functional approach is consistent with Congress’s direction that the classification of a provider should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service (Id. Para. 59).

More specifically, the FCC defined “phone-to-phone” IP telephony as a service which: 1) holds itself out as providing voice telephony service; 2) does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call over the public switched telephone network; 3) allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and 4) transmits customer information without net change in form or content. (Id. Para. 88)

The FCC noted that when an IP telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over an “IP network.” These providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate calls. From a functional standpoint, according to the FCC, users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. (Id. Para. 89).

Thus the FCC concluded that: “users of certain forms of phone-to-phone IP telephony appear to pay fees for the sole purpose of obtaining transmission of information without change in form or content. Indeed, from the end-user perspective, these types of phone-to-phone IP telephony service providers seem virtually identical to traditional circuit-switched carriers. The record currently before us [FCC] suggests that these services lack the characteristics that would render them “information services” within the meaning of the statute, and instead bear the characteristics of “telecommunications services.” (Id. Para. 101, citations omitted).

Finally, specifically addressing the issue of access charges the FCC stated: “We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are “telecommunications services,” and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges.” (Id. Para 91)

In the instant case, the Commission focused on an individual service offering. We reviewed all the submissions, the configuration of DataNet’s system, the nature of the service provided, and the FCC decisions. Based on that review the Commission finds that:

- (a) DataNet holds itself out as providing voice telephony service.
- (b) It does not provide enhanced functionality to its customers, such as storing, processing or retrieving information.
- (c) Its customers are not required to use CPE different from the CPE used to place ordinary calls over the public switched telephone network.
- (d) Its customers place calls to telephone numbers assigned in accordance with the North American Numbering Plan.
- (e) Its use of Internet protocol is only incident to its own private network and does not result in any net protocol conversion to the end user.
- (f) A substantial portion of its traffic uses no IP conversion at all and is handled by interexchange carriers (IXCs).
- (g) It uses the same circuit-switched access as obtained by IXCs and imposes the same burdens on the local exchange as do IXCs.

Accordingly, we conclude that the service provided by DataNet is simple, transparent long distance telephone service, virtually identical to traditional circuit-switched

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carriers. Its service fits the definition of "telecommunications" contained in the 1996 Telecommunications Act and is not "information service" or "enhanced service." Thus, its traffic is access traffic just like any other IXC's traffic. We also conclude that DataNet imposes the same burdens on the local exchange as do other interexchange carriers and should pay all applicable and appropriate charges paid by other long distance carriers, including access charges. In addition, we find that Frontier raised the issue of access charges in a timely manner, as soon as it discovered the nature of DataNet's service, and did not intentionally delay its request for payment.

Finally, we note that the issue here is a specific complaint concerning DataNet's service, and not a general policy discussion that might involve the Federal-State Joint Board as DataNet suggests. Further, we see no need for the initiation of a new proceeding as suggested by the SCG. Therefore, we will direct DataNet and Frontier to meet and discuss the access charges owed Frontier consistent with the determination in this proceeding. If they cannot agree on an amount and payment schedule, they may petition the Commission and/or seek the intervention of Staff.

CONCLUSION

Based on our findings the Commission concludes that DataNet is liable for properly billed access charges for past and present service. The parties are directed to meet to attempt to work out an agreement on a reasonable payment schedule. Absent agreement the parties may seek further relief.

The Commission orders:

1. To the extent consistent with the findings and conclusion of this Order, the requests of Frontier Telephone of Rochester, Inc. are granted and in all other respects are denied.
2. All other relief is denied.
3. This proceeding is continued.

By the Commission,

(SIGNED)

JANET HAND DEIXLER
Secretary