

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and/or  
petition for arbitration by  
Global NAPS, Inc. for  
enforcement of Section VI(B) of  
its interconnection agreement  
with BellSouth  
Telecommunications, Inc., and  
request for relief.

DOCKET NO. 991267-TP  
ORDER NO. PSC-00-0142-PHO-TP  
ISSUED: January 21, 2000

Pursuant to Notice and in accordance with Rule 28-106.209,  
Florida Administrative Code, a Prehearing Conference was held on  
January 10, 2000, in Tallahassee, Florida, before Commissioner E.  
Leon Jacobs, Jr., as Prehearing Officer.

APPEARANCES:

Jon C. Moyle, Jr., Esquire, and Cathy M. Sellers,  
Esquire, Moyle Flanigan Katz Kolins Raymond & Sheehan,  
P.A., 118 North Gadsden Street, Tallahassee, Florida  
32301  
On behalf of Global, NAPS, Inc..

Michael P. Goggin, Esquire, 150 South Monroe Street,  
#400, Tallahassee, Florida 32301  
On behalf of BellSouth Telecommunications, Inc..

Beth Keating, Esquire, Florida Public Service Commission,  
2540 Shumard Oak Boulevard, Tallahassee, Florida  
32399-0850  
On behalf of the Commission Staff.

**PREHEARING ORDER**

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this  
Order is issued to prevent delay and to promote the just, speedy,  
and inexpensive determination of all aspects of this case.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

## II. CASE BACKGROUND

On August 31, 1999, Global NAPs, Inc. (GNAPs) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged breach of the parties' interconnection agreement. GNAPs asserts that BellSouth has failed to properly compensate GNAPs for delivery of traffic to Internet Service Providers that are GNAPs' customers. On September 27, 1999, BellSouth filed its Answer to GNAPs' complaint. This matter has been set for an administrative hearing on January 25, 2000.

## III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183(4), Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct and</u> <u>Rebuttal</u>		
William J. Rooney, Esquire (Direct only)	Global	1 and 2
Fred R. Goldstein	Global	1
Dr. Lee L. Selwyn	Global	1
Albert Halprin	BellSouth	1
David Scollard (Direct only)	BellSouth	1
Beth Shiroishi	BellSouth	1 and 2
Keith Milner (Rebuttal only)	BellSouth	1
Andy Banerjee (Rebuttal only)	BellSouth	1

VII. BASIC POSITIONS

GLOBAL:

BellSouth has breached its Agreement with Global NAPs, Inc., under which Global NAPs adopted the Interconnection Agreement Between DeltaCom, Inc. and BellSouth Telecommunications, Inc. (hereafter "Interconnection Agreement"), by failing to pay to Global NAPs reciprocal compensation due for Global NAPs' delivery of local traffic that originates with BellSouth end-user customers and is delivered to Internet Service Providers (ISPs) that are Global NAPs end-user customers, as required by the underlying Interconnection Agreement. The Interconnection Agreement requires the parties to exchange traffic and to pay reciprocal compensation to each other for delivery of local traffic. The Interconnection Agreement defines local traffic as "any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA, or a corresponding Extended Service Area ("EAS") exchange." The Interconnection Agreement further provides that "[E]ach party agrees to terminate local traffic originated and routed to it by the other party. Each party will pay the other for

terminating its local traffic on the other's network the local interconnection rate of \$.009 per minute of use in all states." Despite the plain language of these provisions, BellSouth refuses to compensate Global NAPs for calls that originate with BellSouth customers and are delivered to ISPs that are Global NAPs customers within the same LATA or EAS. This is contrary to the Interconnection Agreement, the Adoption Agreement, and decisions of this Commission and regulatory authorities in other states that have interpreted similar agreements or the same Interconnection Agreement that is at issue in this proceeding.

**BELLSOUTH:**

Each of the individually numbered issues in this docket represent a specific dispute between BellSouth and Global NAPs, Inc. ("GNAPs") as to the proper interpretation of the provisions of the Interconnection Agreement between BellSouth and GNAPs ("BellSouth/GNAPs Agreement") dated January 18, 1999. BellSouth's positions are rational and reasonable interpretations of the BellSouth/GNAPs Agreement and should be sustained by the Commission.

**STAFF:**

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

**ISSUE 1:** Under their Florida Partial Interconnection Agreement, are Global NAPs, Inc. and BellSouth Telecommunications, Inc. Required to compensate each other for delivery of traffic to Internet Service Providers (ISPs)? If so, what action, if any, should be taken?

**POSITIONS**

**GLOBAL:**

Yes. Global NAPs adopted the Interconnection Agreement pursuant to an Adoption Agreement it executed with BellSouth in January 1999. Section VI(B), as amended, of the

Interconnection Agreement requires each party to pay the other for terminating its local traffic on the other's network at the rate of \$.009 per minute. The Interconnection Agreement defines "Local Traffic" as "any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA or a corresponding Extended Service Area ("EAS") exchange." Attachment B of Interconnection Agreement, Definitions, paragraph 49. The Interconnection Agreement makes no distinction, for local traffic purposes and for reciprocal compensation purposes, between ISP traffic and non-ISP traffic that is delivered within the same LATA or EAS in which the call originated. Had the parties intended for ISP-delivered traffic within the same LATA or EAS as the call originates to be excluded from the definition of local traffic or not subject to reciprocal compensation, the Interconnection Agreement would have expressly provided such a distinction. This Commission previously has interpreted local traffic and reciprocal compensation provisions contained in the Interconnection Agreement Between ACSI and BellSouth, in the e.spire case, Docket No. 98-1008TP. The local traffic and reciprocal compensation provisions in that agreement are substantially the same as the local traffic and reciprocal compensation provisions in the Interconnection Agreement at issue in this case. In the e.spire Case, the Commission determined that ISP traffic delivered within the same LATA or EAS as the call originated was included within the definition of local traffic for purposes of being subject to the payment of reciprocal compensation under the agreement. The Commission expressly stated that had the parties intended otherwise, the Interconnection Agreement would have distinguished between ISP-traffic and non-ISP traffic within the same LATA or EAS as the original call, for reciprocal compensation purposes. The Commission thus ordered BellSouth to pay e.spire reciprocal compensation for ISP-delivered traffic within the same LATA or EAS in which the call originated.

Likewise, in this case -- which involves substantially the same provisions as were at issue in the e.spire case -- the Interconnection Agreement does not make such a distinction. Accordingly, under the language of the Interconnection Agreement, as that language previously has been interpreted by this Commission in precedential proceedings, Global NAPs is entitled to payment of reciprocal compensation by BellSouth for its delivery of ISP-bound traffic that originates with BellSouth customers within the same LATA or EAS.

Therefore, the Commission should enter an Order requiring BellSouth to pay to Global NAPs the reciprocal compensation that is due to Global NAPs pursuant to the terms of the Adoption Agreement and Interconnection Agreement.

**BELLSOUTH:**

No. The plain language of the contract clearly states that reciprocal compensation will only apply to local traffic. The FCC's recent Declaratory Ruling in CC Docket Nos. 96-98 and 99-68, released on February 26, 1999, confirmed unequivocally that traffic bound for the Internet through ISPs ("ISP-bound traffic") is interstate in nature, not local. Under the provisions of the 1996 Act and FCC rules, only local traffic is subject to reciprocal compensation obligations. Thus, reciprocal compensation is clearly not applicable to ISP-bound traffic. Further, Global NAPs expressly acknowledged the interstate nature of ISP-bound traffic by filing a specific tariff dealing with such traffic at the FCC. (FCC Tariff No. 1, Section 7A-ISP Traffic Delivery Service) In addition to being contrary to the law, treating ISP-bound traffic as local for reciprocal compensation purposes is contrary to sound public policy.

As ISP traffic is clearly interstate, the only issue arguably remaining is whether BellSouth voluntarily agreed to pay reciprocal compensation for ISP traffic under the reciprocal compensation provisions of the BellSouth/Global NAPs Interconnection Agreement. In support of its position, Global NAPs cites prior decisions of the Commission that were based on findings that the parties intended to pay reciprocal compensation for ISP-bound traffic. At the time of the execution of the BellSouth/Global NAPs Interconnection Agreement (January 18, 1999), however, BellSouth had stated publicly and repeatedly that reciprocal compensation was not due for ISP traffic under the provisions of BellSouth's interconnection agreements. It is quite obvious that Global NAPs adopted the terms and provisions of the July 1, 1997, BellSouth/DeltaCom Interconnection Agreement simply to circumvent negotiating with BellSouth on the reciprocal compensation issue.

**STAFF:**

Staff takes no position at this time.



**ISSUE 2:** Is the prevailing party entitled to attorney's fees under the agreement?

**POSITIONS**

**GLOBAL:**

Yes. Section XXV.A. of the Interconnection Agreement provides for payment by the non-prevailing party of all reasonable costs, including attorney's fees and other legal expenses, to the prevailing party. Under this provision, the prevailing party is entitled to the payment of reasonable attorney's fees and costs incurred in this proceeding.

**BELLSOUTH:**

Yes, the prevailing party is entitled to the recovery of reasonable attorney's fees under the provisions of the Interconnection Agreement.

**STAFF:**

Staff takes no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
William J. Rooney, Esquire	Global	_____ (WJR-1)	Interconnec- tion Agreement B e t w e e n DeltaCom, Inc. and BellSouth Telecommunica- tions Inc., as amended.
		_____ (WJR-2)	A d o p t i o n A g r e e m e n t Between Global NAPs and BellSouth, January 18, 1999

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
William J. Rooney, Esquire	Global	_____ (WJR-3)	Testimony of James C. Wilkerson on Behalf of ITC DeltaCom, Docket 26619
Dr. Lee Selwyn	Global	_____ (LLS-1)	Statement of Qualifications of Dr. Lee L. Selwyn
		_____ (LLS-2)	bellsouth.net dial-in access numbers for Florida
Beth Shiroishi	BellSouth	_____ (BS-1) (ERAS-1)	Network diagrams
Albert Halprin	BellSouth	_____ (AH-1)	Curriculum Vitae
		_____ (AH-2)	FCC Tariff Filed by GNAPs
Albert Halprin	BellSouth	_____ (AH-3)	FCC Order dismissing GNAPs Tariff filing
Andy Banerjee	BellSouth	_____ (AB-1)	Curriculum Vitae

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PENDING CONFIDENTIALITY MATTERS

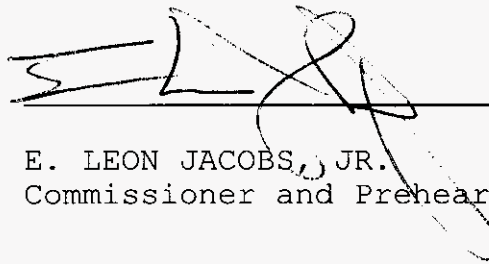
I note that there are no pending requests for confidential treatment filed in this docket.

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It is therefore,

ORDERED by Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 21st day of January, 2000.



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E. LEON JACOBS, JR.  
Commissioner and Prehearing Officer

( S E A L )

BK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2)

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reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.