BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of 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

BRIEF OF GLOBAL NAPS, INC.[1]

1. Introduction and Summary.

The basic issue in this case is whether the interconnection agreement between Global NAPs, Inc. ("Global NAPs") and BellSouth Telecommunications, Inc. ("BellSouth") encompasses traffic sent to Internet Service Providers ("ISPs") within the agreement's definition of "local" traffic. While it is clear that BellSouth ***wishes*** the answer were "no," it is equally clear that the answer actually is "yes."

The Commission has already dealt with this issue on two prior occasions. In both the *e.spire* case and the *WorldCom* case, the Commission held that ISP-bound traffic was "local" for purposes of those agreements.[2] Here, BellSouth's own witness has conceded that the relevant definition in Global NAPs' contract is not materially different from that at issue in *e.spire.* In light of this precedent, the Commission need not engage in any

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[1] The confidential version of this brief contains information that BellSouth has alleged to be confidential, which ***has been*** redacted here. In this brief, the location of allegedly confidential information is set off by triple brackets and is bolded and double-underlined, like III ___ III.

[2] Complaint of WorldCom Technologies, Inc. v. BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief, Docket Nos. 971478-TP *et al.,* PSC-98-1216-FOF-TP (September 15, 1998) ("*WorldCom Order*"); Request for Arbitration concerning complaint of American Communications Services of Jacksonville, Inc., d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. v. BellSouth Telecommunications, Inc. regarding reciprocal compensation for traffic terminated to internet service providers, Docket No. 981008-TP, PSC-0658-FOF-TP (April 6, 1999) ("*e.spire Order*").

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extended analysis to conclude that Global NAPs, too, is entitled to compensation for ISP-bound traffic.

In addition, in Alabama, BellSouth has fully and fairly litigated ***this exact question*** in the context of ***this exact contract,*** and lost. The Alabama PSC — using the specific criteria that the Federal Communications Commission ("FCC") has held should be applied to this issue — concluded that DeltaCom (the original alternative local exchange carrier ("ALEC") party to the contract here) was entitled to compensation for ISP-bound traffic. This holding plainly has a compelling effect as persuasive precedent in the case here. But beyond that, Global NAPs urges this Commission to rule that BellSouth is actually legally precluded from wasting this Commission's (and other parties') time by continuing to fight this issue, about this contract, here.

BellSouth's position, however, fares no better even if the Commission puts on blinders, ignores its own precedent and that from Alabama, and looks at this case as though the question were fresh and new. Although ISP-bound traffic is jurisdictionally complex, the FCC has held that state regulators may determine what compensation is due for it until the FCC issues generally applicable national rules. This expressly includes the authority to determine whether compensation is due under the terms of an existing interconnection agreement.[3] In its *Declaratory Ruling,* moreover, the FCC lays out a series of reasonable, logical factors that state regulators should apply in assessing whether any particular interconnection agreement includes ISP-bound traffic within the scope of "local" traffic subject to compensation.

BellSouth's witnesses inveigh in various respects against the FCC's analysis of this topic. But they do not, and cannot, refute the conclusion that, under the agreement at

[3] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (Feb. 26, 1999) ("*Declaratory Ruling*").

issue here, and the factors identified by the FCC, ISP-bound traffic is plainly "local" traffic. Briefly:

- Despite BellSouth's awareness of the FCC's longstanding treatment of ISP-bound calls as local, the agreement does not single out ISP-bound calls for special treatment.
- BellSouth charges local usage charges for ISP-bound calls made by customers on message/measured service plans.
- BellSouth accounts for the costs and revenues associated with ISP-bound calls as intrastate, not interstate.
- There would be no provision for compensation for such traffic in the agreement if ISP-bound calls are not treated as local.

Finally, under the FCC's present rules for determining the actual jurisdiction of ISP-bound traffic, the evidence in this case shows that well above 90% of that traffic is, in fact, "local." It follows that under any logical approach to this question, BellSouth's position that no compensation is due simply cannot be sustained.

Undeterred, BellSouth raises three main arguments to defend its failure to pay. First, it appears to assert that Global NAPs — which adopted the DeltaCom contract — is entitled to different (and lesser) rights than is DeltaCom itself. Its apparent theory is that even though the contractual language governing the relationship between BellSouth and Global NAPs is identical to the language governing BellSouth's relationship with DeltaCom, and even though BellSouth made no effort to deal separately with ISP-bound traffic in any communications it had with Global NAPs, somehow BellSouth's subjective view of what the DeltaCom contract means magically overrides Section 252(i) and leaves Global NAPs with different, and lesser, rights than DeltaCom has.

This position makes no sense, whether from the perspective of state law, federal law, or the evidence in this case. As a matter of state law, the terms of a contract cannot be altered by the subjective viewpoint of one of the contracting parties. BellSouth's failure to raise the issue of ISP-bound calling with Global NAPs, therefore, precludes BellSouth from prevailing on this claim. As a matter of federal law, the purpose of Section 252(i) is to prevent discrimination among ALECs. It would turn that purpose on

its head to allow an ILEC to vary its substantive obligations under an adopted contract simply by thinking about the contract differently from case to case. And as a matter of evidence, in this case BellSouth has presented no testimony or documentary materials from any competent witness to actually establish that its intent in dealing with Global NAPs was to avoid paying for ISP-bound traffic. So even if BellSouth's desired result were legally permissible in the abstract — which it isn't — BellSouth has simply failed to prove its case here.

Second, BellSouth disagrees with the FCC's analysis of the factors relevant to determining whether an interconnection agreement covers ISP-bound traffic as "local." It expresses its disagreement mainly in the form of expert testimony that either denigrates the FCC's specific discussion of this topic or blithely asserts that the FCC adopted an analysis favorable to BellSouth's viewpoint — even when that assertion is belied by the FCC's own specific language. The Commission's job in this case, however, is not to debate the abstract merits of whether the FCC's current approach is the correct one. The FCC itself is considering that issue in its ongoing rulemaking proceeding. For now, the task at hand is to analyze the parties' agreement under the terms laid out by the FCC. That analysis clearly shows that ISP-bound traffic is subject to compensation.

Third, BellSouth also disagrees with the underlying regulatory framework — specifically, the FCC's exemption of ISPs from paying access charges — that leads ISP-bound calls to be treated economically and technically like local calls. But this, too, is beside the point. Even if Global NAPs, BellSouth, and the Commission all agreed that it would be better public policy for the FCC to repeal the access charge exemption and establish other arrangements for compensating LECs that serve ISPs, that broader issue is not properly before the Commission in this case. The issue here — to the extent that these broader policy questions arise at all — is what kind of inter-carrier compensation mechanism makes sense in light of the fact that the access charge exemption exists and — for all it appears from the FCC — is here to stay. Clearly, compensation for these calls as though they were truly and unequivocally local is the only economically rational way to handle this issue.

2. Summary Statement Of Positions On The Issues.

Pursuant to Section IV of the Pre-Hearing Order, Global NAPs sets out below its positions on the specified issues in this case, set off by asterisks, in 50 words or less.

Issue 1: Under the Adoption Agreement and underlying Interconnection Agreement Between DeltaCom, Inc. and BellSouth Telecommunications, Inc. that was adopted by Global NAPs, Inc., are Global NAPs and BellSouth required to pay each other reciprocal compensation for the delivery of calls to Internet Service Providers (ISPs) that originate within the same LATA or EAS? If so, what action should be taken?

*****Yes. Global NAPs now has the same rights as DeltaCom. The Alabama PSC found that the DeltaCom agreement requires compensation, and this Commission should too, under relevant FCC rulings, its own precedent, and collateral estoppel. The Commission should order BellSouth to pay for ISP-bound traffic as "local traffic."*****

Issue 2: Is the prevailing party entitled to attorney's fees under the Interconnection Agreement?

*****Yes. Section XXV.A. of the Agreement provides for payment by the losing party of the winning party's reasonable costs, including attorney's fees and other legal expenses. The Commission may enforce interconnection agreements under its authority pursuant to Section 252 of the Communications Act, 47 U.S.C. § 252.*****

3. The Commission Has Already Dealt With This Question In Other Cases.

a. The Commission Has Previously Ruled That ISP-Bound Traffic Is Subject To Compensation As "Local" Traffic In Highly Similar Circumstances.

The question of compensation for ISP-bound traffic is not new to this Commission. In the proceedings leading up to both the *e.spire Order* and the *WorldCom Order,* BellSouth claimed that a general reference to "local" traffic in an interconnection agreement did not encompass ISP-bound traffic. In each case, the Commission ruled that such traffic was, indeed, covered.

When all the dust settles, there is no reason to reach a different conclusion in this case. The underlying policy questions concerning whether compensation should be paid are basically identical. And, as BellSouth's own witness concedes, the relevant contract language at issue here and in *e.spire* is essentially the same.[4] The DeltaCom 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 (Hearing Exhibit 2), Definitions, ¶ 49. In *e.spire*, the parallel definition is:

> telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange.

See e.spire Order at 4. Indeed, to the extent there is any difference between the two definitions, the DeltaCom agreement actually encompasses more traffic, since under the DeltaCom agreement, any call within the same ***LATA*** is local (for purposes of the agreement), whereas in the e.spire agreement, only calls rated as local to the end user would normally be classified as "local."

In any case, in the *e.spire Order,* the Commission determined that the (materially identical) contractual definition of "local" traffic encompasses ISP-bound calls. That fact alone shows that the same result should obtain here.

The similarities between *e.spire* and this case do not end there, however. In the *e.spire Order,* the Commission held that:

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[4] *See* Transcript of Proceedings, page 245, line 20, through page 246, line 3 (testimony of Ms. Shiroishi). In this regard, the language defining "local" traffic in the *e.spire* case is quite similar to the language defining "local" traffic in the *WorldCom* case as well. *Compare e.spire Order* at 12 *with WorldCom Order* at 5. Citations to the transcript will take the form "Tr. (footnote continued)...

> ... BellSouth witness Hendrix acknowledged that ISP traffic was not discussed during negotiations. It seems reasonable to us that if the parties had intended to exclude traffic to ISPs from the definition of the term "local traffic," there would have been some discussion on the subject ...

e.spire Order at 10. Here uncontested testimony from Mr. Rooney establishes that ISP traffic was not discussed in the course of Global NAPs' adoption of the DeltaCom contract.[5] To the extent that the circumstances surrounding the adoption of the contract are relevant (and Global NAPs believes they probably are not, as explained below), this further establishes that ISP-bound traffic ***is*** to be included within the scope of "local" traffic covered by the agreement.

Also in the *e.spire Order,* the Commission held that under Florida contract law, "[w]hat a party did or omitted to do after the contract was made may be properly considered. Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language." *e.spire Order* at 10 (citations omitted). Here, the record shows that after the contract was signed and in effect between the parties, BellSouth [redacted]

...(note continued)
PAGE:LINE-LINE" or "Tr. PAGE:LINE-PAGE:LINE," as appropriate, so the earlier citation would be "Tr. 245:20-246:3."

[5] *See* Tr. 35:8-36:3 (testimony of Mr. Rooney). As noted there, other ILECs have actively articulated their arguments against paying for ISP-bound traffic in the context of ALEC efforts to adopt agreements calling for such compensation. BellSouth, by contrast, never raised the issue in any way. *See also* nn. 12-13, *infra* (discussing the FCC's Rule 51.809, which permits ILECs to avoid extending substantively unreasonable terms to additional ALECs, notwithstanding Section 252(i)).

Moreover, in the *e.spire Order,* the Commission affirmed its conclusion in the *WorldCom Order* that "in the construction of a contract, the circumstances in existence at the time the contract was made are evidence of the parties' intent." *e.spire Order* at 10. Here, uncontradicted testimony from Mr. Rooney establishes that as of the time that Global NAPs was adopting the DeltaCom contract, every state regulator to have considered the question had concluded that ISP-bound traffic was subject to compensation as "local" traffic.[6] This clearly establishes the key "circumstances in existence" at the time Global NAPs adopted the DeltaCom contract, and clearly establishes that if BellSouth somehow wanted to depart from those "circumstances," it was incumbent on BellSouth to say something about it.[7]

But these legal "circumstances" were not limited to state regulators (whom BellSouth will likely suggest were misguided, since they were acting without the benefit of the FCC's *Declaratory Ruling*). To the contrary, the *Declaratory Ruling* itself

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[6] *See* Tr. 27:8-14. These state-level decisions, of course, included this Commission's own *WorldCom Order.* Moreover, as Dr. Selwyn testified, the vast majority of state regulators to have considered the question ***after*** the FCC's *Declaratory Ruling* have also concluded that ISP-bound traffic should be treated as local. *See* Selwyn Prefiled Direct at 26:17-21.

[7] In this regard, it is notable that there is ***no*** competent legal evidence here from BellSouth regarding its subjective "intent" either with respect to the original DeltaCom agreement that Global NAPs adopted, or with respect to the arrangements leading to the adoption of that agreement. BellSouth's only "intent" witness was Ms. Shiroishi, who admitted that she had nothing personally to do either with the negotiation of the DeltaCom agreement (which occurred before she was hired) or with the adoption of that agreement by Global NAPs (which was handled by another BellSouth employee, a Ms. Arrington). *See* Tr. 239:5-13; 241:22-242:13. *See also* Confidential Exhibit 4. This is in contrast to the situation in both *e.spire* and *WorldCom,* where BellSouth put forward the testimony of Mr. Hendrix, who was actually involved in negotiating the contracts at issue. *See e.spire Order, passim; WorldCom Order, passim.* The only reasonable conclusion to draw from this inexplicable failure by BellSouth to present evidence of its actual negotiating intent from its own employees, uniquely under its own control, is that their evidence would be unfavorable to BellSouth. *See Martinez v. State,*478 So. 2d 871, 871-72 (3d Ct. App. 1985). In this regard, though, the fact that the Commission had already explicitly rejected BellSouth's evidence regarding its "intended" meaning of similar language in the *e.spire* case might have affected BellSouth's thinking. If the testimony of the people actually involved in negotiating the contract can't win the case, why not try witnesses who weren't involved? Plainly, though, as discussed at the hearing, Mr. Shiroishi's testimony should not have been admitted at all under Section 96.04 of the Florida Evidence Code. *See* Tr. 198:7-202:6. But having admitted it, the Commission should now — in order to avoid reversible error — give it no weight.

confirms that the relevant legal "circumstances in existence" uniformly treated ISP-bound calls as local. In that ruling, the FCC expressly acknowledged that it has a "longstanding policy of treating ISP-bound traffic as local," *id.* at ¶ 28; that its decision to treat ISPs as end users implied that it would "treat ISP-bound traffic as local," *id.* at ¶ 16; and that the "context" of the FCC's "longstanding policy of treating this traffic as local" provided the negotiating environment for interconnection agreements, *id.* at ¶24. Significantly, these FCC statements cover not only the time period when Global NAPs and BellSouth were arranging for Global NAPs to adopt the DeltaCom agreement; they cover as well the period when the relevant provisions of the DeltaCom agreement were being negotiated between BellSouth and DeltaCom.

To give a single, but telling, example, in ***May 1997*** the FCC issued its *Access Charge Reform Order*.[8] In that order, the FCC specifically affirmed that ISPs had been treated as end users since 1983, and would continue to be treated as end users. The FCC specifically noted that, in light of the exemption from access charges, "[t]o maximize the number of subscribers that can reach them ***through a local call,*** most ISPs have deployed points of presence." *Access Charge Reform Order* at ¶ 342 n.502. So there was no serious basis for questioning, as of May 1997, that the legal "circumstances in existence" were that ISP-bound calls were, indeed, "local" calls. Yet when BellSouth and DeltaCom amended their agreement to establish compensation arrangements for local calls ***in August 1997***, nothing in the newly-adopted contractual language makes any effort to segregate out ISP-bound calls from the general class of "local" calls.[9] Again, while BellSouth doubtless wishes, now, that it had made some effort to stake a claim that ISP-

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[8] Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) ("*Access Charge Reform Order*"), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[9] *See* Hearing Exhibit 2 (the DeltaCom contract adopted by Global NAPs), Amendment 4, page 2 (showing execution date for amendment 4 of August 22, 1997).

bound calls were somehow different for compensation purposes, it simply did not do so, either with DeltaCom (as evidenced by the contract itself) or with Global NAPs.[10]

So whether the focus here is on the time that the DeltaCom contract was originally established, or on the time that Global NAPs adopted it, the legal "circumstances in existence" regarding the treatment of ISP-bound calls as local are the same: a clear FCC "policy" of treating such calls as local that establishes a "context" within which sophisticated industry parties such as BellSouth must be presumed to act. Aside from making it all the more odd that BellSouth said nothing about this issue to Global NAPs at the time the DeltaCom agreement was adopted, this shows that, under the logic of the *e.spire Order,* the only reasonable interpretation of the contract between Global NAPs and BellSouth is that ISP-bound traffic is included under the definition of "local" traffic.

In light of the compelling similarities between this case and *e.spire,* Global NAPs submits that the Commission's precedent alone is an adequate basis for decision here. No extended analysis is called for. There is no sound reason to construe the language in the agreement at issue here differently from the similar language, already construed in the *e.spire Order*. It follows that the agreement between Global NAPs and BellSouth should be found to require compensation for ISP-bound traffic.

b. Section 252(i) Does Not Support Reaching A Different Result In This Case.

The FCC has characterized Section 252(i) as "a primary tool of the 1996 Act for preventing discrimination."[11] And, on its face, the purpose and effect of Section 252(i) is

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[10] As another example, according to Mr. Halprin, in July 1997 BellSouth filed comments at the FCC stating its view (contrary to that of ALECs and others) that ISP-bound calls were not local. *See* Halprin Prefiled Direct at 14:5-17. Yet despite BellSouth's obvious general "awareness" of the issue, proven by its FCC filing, nothing in the contractual language reflects that awareness. The only possible conclusion is that BellSouth was content to rest in this contract with the general understanding, expressed by the FCC itself as recently as May 1997, that ISPs — by virtue of the access charge exemption — receive "local" calls.

to ensure that one ALEC (such as Global NAPs) can obtain interconnection on the same terms and conditions that BellSouth has provided to any other ALEC (such as DeltaCom). As a matter of logic and common sense, this strong anti-discrimination objective could not be achieved if BellSouth could interfere at will with the ability of one ALEC to adopt a contract entered into by another. It follows that if the DeltaCom agreement calls for compensation for ISP-bound traffic as between BellSouth and DeltaCom, that same agreement ***must*** provide for such compensation as between BellSouth and Global NAPs, when Global NAPs adopts it.

This purpose would be utterly frustrated if BellSouth could vitiate the impact of any provision it doesn't like, simply by announcing its own special "interpretation" of that provision to the public. Under such an approach, Section 252(i) would not be any sort of shield against ILEC discrimination. To the contrary, such an approach would affirmatively encourage discrimination by permitting an ILEC to nullify the impact of any contract litigation which it loses by the mere act of publicly stating its disagreement with the ruling from this Commission. For example, in the *e.spire Order,* this Commission held that the proper interpretation of the contract between e.spire and BellSouth entailed compensation for ISP-bound calls. BellSouth obviously disagrees with that ruling; yet if e.spire is entitled to compensation for ISP-bound calls, then surely, if Section 252(i) is to act as "a primary tool ... for preventing discrimination," any other party ***adopting*** the e.spire agreement would also be entitled to compensation for such calls. Otherwise, Section 252(i) would be a nullity.

Consequently, what matters in this case is not primarily what the parties said or thought during the period that Global NAPs was adopting the DeltaCom agreement.

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[11] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16013 (1996) ("*Local Competition Order*") at ¶ 1296, *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

Under Section 252(i), the only relevant "intent" during that period was an "intent" to have Global NAPs adopt, and operate under, the same terms and conditions under which DeltaCom operates. *See* Tr. 62:20-24. To the extent that any inquiry beyond the terms of the agreement is called for, what matters is the parties' "intent" at the time of the DeltaCom agreement.

As described above (and as discussed in more detail in Section 4, below), it is quite clear that the relevant "intent" at the time of the DeltaCom agreement was that ISP-bound calls would be treated as "local." Perhaps because this conclusion is so obvious under the relevant legal standards, BellSouth had to try to refute it. To this apparent end, BellSouth presented testimony to the effect that the mere fact that its opposition to paying compensation for ISP-bound calls was publicly known somehow establishes that the parties "intent" for purposes of Global NAPs adopting the DeltaCom agreement did not include compensation for ISP-bound calls. *See* Prefiled Direct Testimony of Halprin at 12:13-13:21; Prefiled Direct Testimony of Shiroishi at 17:19-25.

This position cannot be squared with Section 252(i). The entire point of Section 252(i) is to spare ALECs the time, expense and hassle of having to actually ***negotiate*** an agreement with the ILEC. Instead, the terms and conditions of existing agreements are available to ALECs as a matter of law, precisely to insure that any one ALEC can automatically operate under the same terms and conditions as any other ALEC. It would make a mockery of this non-discriminatory purpose to allow an ILEC to pick and choose which pre-existing terms and conditions it will make available to ALECs by announcing its own views of which ones it continues to accept and which ones it now rejects. Yet that is exactly what BellSouth's witnesses claim this Commission should rule.[12]

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[12] This is not to say that an ILEC is utterly unable to avoid extending terms that have become substantively unreasonable (as opposed to merely unpleasant to the ILEC). To the contrary, the FCC recognized that there may be circumstances where a term or condition in an approved agreement may have become unreasonable. As a result, it promulgated a rule that allows an ILEC to avoid extending such an unreasonable term to additional ALECs. *See* 47 C.F.R. §§ 51.809(b), (c). There is no contention, however, that BellSouth in this case ever tried to avoid extending compensation for ISP-bound calling to Global NAPs. In this regard, while the (footnote continued)...

As described above, looking at the parties apparent "intent" (judging from their behavior) while the DeltaCom agreement was being adopted, the only reasonable conclusion is that ISP-bound calls are covered under the rubric of "local" calls. But under Section 252(i), the only "intent" that can really matter is the "intent" that establishes the meaning of the DeltaCom agreement itself. It follows that Section 252(i) insulates Global NAPs from any BellSouth claim that by late 1998, Global NAPs somehow knew or should have known that BellSouth did not want to pay compensation for ISP-bound calls. If the DeltaCom contract calls for such compensation — which it clearly does — then it matters not at all whether BellSouth wanted to pay it, or whether BellSouth made its opposition to paying public.

As Global NAPs understands BellSouth's argument, however, Section 252(i) operates as some sort of insurance policy against erroneous BellSouth negotiating decisions. As Global NAPs understands it, if BellSouth agrees to contract language with ALEC #1 that is interpreted by the Commission to require some substantive result that BellSouth doesn't like (here, an obligation to pay compensation for ISP-bound calls), that particular obligation cannot be adopted by any other ALEC. Instead, according to BellSouth, all it needs to do is publicly disavow that it ever meant to undertake such an obligation. Once it takes that step, the unwanted obligation is ***not*** available to any other ALEC. This is supposedly not really discriminatory because BellSouth's subjective "intent" in all cases is to disavow the contested obligation. *See* Prefiled Rebuttal Testimony of Shiroishi at 2:1-5:5.

It is evident that such an approach would gut the provisions of Section 252(i). BellSouth may sincerely wish, in retrospect, that it had not agreed to undertake some particular obligation to an ALEC; and may even sincerely believe that the contractual language that it agreed to did not, in fact, encompass such an obligation. But if this

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FCC's rule was originally stayed, the Supreme Court's January 25, 1999 decision reinstating it was released prior to BellSouth's filing the adoption agreement in this case for approval by the Commission in early February 1999.

Commission rules that the obligation in question exists under the affected agreement, then it exists. To fail to make that same interconnection "term" or "condition" available to any ALEC that wants to adopt it would put the first ALEC in an unreasonably favored position.[13]

For all these reasons, nothing about the fact that Global NAPs adopted the DeltaCom agreement under Section 252(i) remotely supports a claim that Global NAPs could end up with fewer or different substantive rights under that agreement than DeltaCom itself has. It follows that any particular "intent" or "purpose" or "interpretation" that BellSouth might have had (or might have now) of the meaning of the language in that contract cannot affect Global NAPs' rights under it. That question — what rights exist under the DeltaCom agreement — is addressed in detail in Section 4, below, which shows that ISP-bound traffic is indeed covered as "local" traffic under the agreement.

c. BellSouth May Not Legally Dispute The Conclusion That The DeltaCom Contract Covers ISP-Bound Traffic.

There is another reason that the Commission should grant Global NAPs' position in this case — BellSouth is legally barred from claiming that its contract with DeltaCom does not cover ISP-bound traffic within the "local" category.

BellSouth and DeltaCom entered into a contract that on its face covers all BellSouth states. BellSouth apparently is taking the position region-wide that it does not need to pay compensation for ISP-bound traffic. This led to a complaint case between DeltaCom and BellSouth about the precise issue of whether the precise contract language

[13] Again, as noted above, if the particular term or condition is in some substantive way unreasonable, then BellSouth has a direct opportunity to avoid extending it to additional ALECs under the terms of FCC Rule 51.809.

at issue here required such compensation. After a full and fair opportunity to litigate this question, the Alabama PSC held that BellSouth did indeed have to pay compensation.[14]

This decision by the Alabama PSC collaterally estops BellSouth from disputing that same result here in Florida. Under the Florida rule, a party is estopped from relitigating in a second case a determination made in an earlier case as long as the issues are the same and the parties are either identical or in privity with each other. *See Stogniew v. McQueen,* 656 So. 2d 917 (Fl. 1995); *Sentry Insurance v. FCCI Mutual Life Insurance Co.,* 745 So. 2d 349 (Fl. 4th App. Dist. 1999). This rule clearly applies here. The issue at hand in this case — whether the DeltaCom agreement, that Global NAPs adopted under Section 252(i), calls for compensation for ISP-bound calling — is ***exactly*** the issue that BellSouth fought and lost in Alabama. And while Global NAPs is a different entity from DeltaCom, Global NAPs submits that its adoption of the DeltaCom contract under Section 252(i) means that, as a matter of law, it is in privity with DeltaCom on the question of the meaning of the DeltaCom contract that Global NAPs has adopted here. It follows that BellSouth may not properly relitigate that issue in this case.[15]

The purpose served by the doctrine of collateral estoppel is to conserve judicial resources that would otherwise be wasted in allowing a party to litigate the same question over and again in different forums. It is plain that this purpose would be served by barring BellSouth from relitigating this issue here. BellSouth voluntarily chose to enter into a single interconnection contract to cover multiple jurisdictions. Neither the contract (viewed objectively) nor BellSouth (viewed subjectively) could reasonably be found to

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[14] *See* In re: Emergency Petitions of ICG Telecom Group Inc. and ITC DeltaCom Communications, Inc. for Declaratory Ruling, Order in Docket No. 26619 (Alabama PSC March 4, 1999).

[15] Under the federal rule regarding collateral estoppel — which may apply here, since this question arises in some sense under the federal Communications Act — identity and/or privity of parties is not required. *Stogniew v. McQueen, supra,* 656 So. 2d at 919-920 (noting federal rule). To the extent that federal law applies, therefore, it is quite clear that BellSouth should be barred from contesting its liability on the issue of ISP-bound calling, due to its loss on this precise question in Alabama.

have a different "intention" in the different states. To the contrary, BellSouth is simply digging in its heels to force every ALEC with whom it does business to incur the expense and delay of litigation on this issue. From this perspective, it is already too late for Global NAPs — the litigation has occurred.[16] But by holding that BellSouth's claims will not be considered on the merits when it has already fought out the identical issue, and lost, in another jurisdiction, this Commission will save itself the time and effort of litigating this issue (and, potentially, others) in the context of other ALECs that may have adopted either the DeltaCom agreement, or other multi-state agreements that have been authoritatively interpreted by other bodies.

In this regard, even if BellSouth is not formally barred from litigating the issue here in Florida, the Alabama decision on this precise point is compelling precedent for the proposition that this contract calls for compensation for ISP-bound traffic. Indeed, in Alabama BellSouth made a point of presenting testimony from officials (such as Mr. Jerry Hendrix) who were actually involved in negotiating the agreement in question. Despite this direct evidence of BellSouth's supposed "intent" regarding compensation, the Alabama PSC properly applied the various factors identified by the FCC for interpreting interconnection contracts and found that compensation is required. In the face of this ruling, it would seem that BellSouth would have wanted to present truly compelling evidence in this proceeding that the Alabama PSC committed some egregious error in analyzing the relevant issues.

In fact, however, BellSouth did nothing of the sort. To the contrary, it presented no competent evidence of its own subjective "intent" with regard to the DeltaCom contract (even assuming such subjective intent is relevant). Its only witness on this point was not involved either in the negotiation of the DeltaCom contract or in the arrangements leading up to Global NAPs' adoption of that contract.[17] By contrast,

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[16] The provision for the payment of attorneys' fees and legal costs mitigates the harm to Global NAPs to some extent.

[17] *See* Tr. 239:5-13; 241:22-242:3 (testimony of Ms. Shiroishi); Confidential Exhibit No. 4.

DeltaCom's intent with regard to this contract is in the record (as an attachment to Mr. Rooney's testimony), and Global NAP's intent in adopting it (to the extent that separate intent is relevant) is also in the record, in the form of Mr. Rooney's testimony. To the extent that the subjective intent of the parties is relevant, therefore, the weight of the evidence clearly shows that the "intent" was to have ISP-bound calls covered within the definition of "local." DeltaCom thought so; Mr. Rooney thought so; and BellSouth has offered not a shred of legally competent contrary evidence.

4. The Contract Clearly Treats ISP-Bound Traffic As Local.

a. Application Of The FCC's Criteria For Interpreting Contracts Plainly Shows That The Parties' Agreement Treats ISP-Bound Traffic As Local.

As noted above, this Commission has already decided — twice — that contracts referring to "local" traffic, without a separate provision for identifying ISP-bound traffic include ISP traffic under the "local" category. And BellSouth has already litigated, and lost, the question of whether the language of ***this precise contract*** covers ISP-bound calls. It would therefore be reasonable, on the grounds outlined above, for this Commission to decide this case in Global NAPs' favor without an elaborate review of the contract and how it should be interpreted.

That said, it is quite clear that the contract, properly read, embraces ISP-bound calls within the "local" rubric.

The substantive terms of Global NAPs' relationship with BellSouth are spelled out in the DeltaCom agreement that Global NAPs adopted. That agreement is an "existing interconnection agreement" between the parties which needs to be interpreted on this point.

The FCC has provided a clear and reasonable set of criteria to use for this purpose. *See Declaratory Ruling* at ¶ 24. Application of these criteria plainly shows that ISP-bound traffic is properly treated as "local" under the agreement. These factors are:

- The "negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local."
- The "conduct of the parties pursuant to those agreements."
- "[W]hether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs."
- "[W]hether revenues associated with those services were counted as intrastate or interstate revenues."
- "[W]hether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation."
- "[W]hether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges." and
- "[W]hether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic."

As described below, the evidence in this case plainly establishes that the overwhelming weight of these factors supports the conclusion that ISP-bound calls are, indeed, to be treated as "local" under the terms of the parties' interconnection agreement.

First, there can be no question that the DeltaCom agreement was negotiated "in the context of the [FCC's] longstanding policy of treating these calls as local." As noted above, the relevant language of the DeltaCom agreement was added by an amendment executed in August 1997. A few months earlier, the FCC, in the *Access Charge Reform Order,* had expressly reaffirmed that ISPs were exempt from access charges and that, as a result of that exemption, had established numerous points of presence in order to ensure that they could receive "local calls" from their customers.[18] And the FCC in the *Declaratory Ruling* expressly noted that its "policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of

[18] Indeed, uncontradicted testimony from Dr. Selwyn in this matter shows that BellSouth's ***own*** affiliated ISP, bellsouth.net, continues to take advantage of the access charge exemption for precisely the purpose of ensuring that its customers can access the Internet by means of a local call. *See* Selwyn Prefiled Direct at 22:4-23:8 and Composite Exhibit 6 (attachments to Selwyn Direct regarding bellsouth.net).

reciprocal compensation, suggest that such compensation is due for that traffic."[19] This factor plainly supports a conclusion that the interconnection agreement at issue here includes ISP-bound calling within the definition of "local" traffic.[20]

Second, nothing about the conduct of the parties — whether viewed as BellSouth and DeltaCom or BellSouth and Global NAPs — indicates that ISP-bound traffic is anything other than local. In this regard, as noted above, [redacted] Moreover, while Mr. Scollard testified that BellSouth had made some internal efforts to identify which calls were ISP-bound and which were not, [redacted]

[19] *Declaratory Ruling* at ¶ 25. BellSouth's main policy witness, Mr. Halprin, does not so much rebut this factor as pretend that it does not exist. His prefiled testimony basically argues with the FCC, denigrating the interpretive factors the FCC laid out as mere "dicta." Halprin Prefiled Direct at 17:24-21:5; Halprin Prefiled Rebuttal at 18:15-22:21. On cross-examination, his disagreement with the FCC is patent. For example, while the FCC itself recognized that the access charge exemption "suggests" that local compensation should be due for ISP-bound traffic, *Declaratory Ruling* at ¶ 25, Mr. Halprin denies that the access charge exemption "suggests" anything of the sort. *See* Tr. 318:15-25. The FCC expressly acknowledges that its regulatory rulings have created a "context" of policies in which ISP-bound calls are treated as local, *Declaratory Ruling* at ¶ 24, but Mr. Halprin flatly denies that any such "context" exists. Halprin Prefiled Rebuttal at 8:15. And while the FCC was quite clear in the *Declaratory Ruling* that its legal, jurisdictional ruling that much ISP-bound traffic is technically interstate did not deterimne whether compensation for such traffic would be due, *see Declaratory Ruling* at ¶ 20, Mr. Halprin testified that in his view, the largely interstate nature of such traffic would be dispositive of the issue. Tr. 319:9-19. And while the FCC has not held that ISP-bound traffic is nonsegregable (that is, that it cannot be separated into inter- and intrastate portions) — and, indeed, has an ongoing rulemaking on precisely that topic (*see Declaratory Ruling* at ¶ 31) — Mr. Halprin testified without qualification that the traffic was, indeed, nonsegregable. Tr. 322:17-18. With due respect, it is quite clear that Mr. Halprin's testimony fails to distinguish between what, in his opinion, the FCC ***should*** do, and what the FCC has, in fact, actually done.

[20] In contrast to Mr. Halprin's testimony, which is contradicted by the FCC's own direct statements, Dr. Selwyn's testimony for Global NAPs is plainly directly in accord with the FCC's own understanding. *Compare Declaratory Ruling* at ¶¶ 16, 24-25 *with* Selwyn Prefiled Direct Testimony at 18:4-25:16. This strongly suggests that, for these purposes, Dr. Selwyn is a more credible and reliable witness than is Mr. Halprin.

]]] Finally, Mr. Goldstein explained that, to the extent that there are technical differences between the routing and signaling associated with local and toll calls, ISP-bound calls are handled in the same manner as local calls.[21]

Third, it is quite clear that when BellSouth serves ISPs, it does so out of its intrastate business tariffs. *See* Selwyn Prefiled Direct at 22:4-23:8.

Fourth, it is also undisputed that BellSouth accounts for the costs and revenues associated with serving ISPs as intrastate, not interstate, in nature. *See* Selwyn Prefiled Direct at 23:10-24:2. In this regard, the FCC has actually ***required*** that ILECs subject to the separations rules continue to treat costs and revenues associated with this traffic as intrastate. *See Declaratory Ruling* at ¶ 36. This does not, as Mr. Halprin suggests (*see* Halprin Prefiled Rebuttal at 19:5-22) indicate that this factor should be given no weight. To the contrary, it shows that the FCC was completely cognizant of the fact that its own regulatory policies have created an environment in which the "default" condition is that ISP-bound traffic is to be considered "local," and any effort by an ILEC to defeat that conclusion must be plain and explicit.

In this regard, the fifth factor — whether the parties made any effort to separately meter ISP-bound traffic, ***especially in the context of billing*** — also plainly supports the conclusion that ISP-bound traffic is to be treated as local under the parties' agreement. While BellSouth testified to some haphazard internal efforts to identify which calls were ISP-bound and which were not, nothing in the agreement segregates ISP-bound calls from other local calls in any way. There is simply no provision in this agreement that would permit or encourage parties to separately identify and bill for ISP-bound calls. *See* Tr. 29:10-18; 35:21-36:3; 47:22-48:3 (Rooney).

[21] BellSouth's Mr. Milner disagrees with Mr. Goldstein's conclusion that the technical treatment of ISP-bound calls in the same manner as local calls is significant to this case, but a careful review of his rebuttal testimony shows that he does not fundamentally disagree with Mr. Goldstein's actual factual statements.

Sixth, as Dr. Selwyn testified, under BellSouth's local calling plans in Florida, it is quite clear that customers with local measured or local message service would be billed local usage charges for calls to ISPs not covered by any applicable "free" calling allowance. *See* Selwyn Prefiled Direct at 24:4-15.

While all of these factors support the conclusion that the parties' interconnection agreement considers ISP-bound traffic to be local, on some level the most important, and most compelling factor, is the last one the FCC identified: whether, if the agreement is treated as ***not*** providing compensation, the parties would receive any compensation for delivering that traffic. As described below, this factor fully supports the conclusion that compensation is due here.

If ISP-bound traffic is not treated as local, there is no provision in the agreement that would permit Global NAPs (or, for that matter, DeltaCom) to get paid for the millions of minutes of switching services that it provides to BellSouth to route calls from BellSouth end users to ISPs served by Global NAPs (or DeltaCom). It is inconceivable that DeltaCom or any other ALEC would have entered into an agreement that subjected it to the prospect of performing this work for free. In contrast, BellSouth end users pay BellSouth handsomely for services that include delivering calls to ISPs. With that revenue coming in the door, there is nothing irrational about BellSouth agreeing to pay for such calls when an ALEC delivers them to the ISP.[22]

In this regard, the Commission need not, in this case, linger long over testimony such as that offered by Dr. Banerjee. His basic point is that exempting ISPs from access

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[22] BellSouth's witness Ms. Shiroishi claimed that BellSouth "loses money" on end users that place calls to ISPs, *see* Shiroishi Prefiled Direct at 19:12-20:21, but, as Dr. Selwyn demonstrates, this claim is simply mathematically inaccurate. *See* Selwyn Prefiled Rebuttal at 13:8-14:5. Testimony at the hearing revealed that there may be some customers — including, for example, Mr. Halprin — whose usage is so intense that the local service revenues they generate do not cover the costs of their usage (including compensation payments). Tr. 339:14-340:22 (16 to 24 hours of usage per day). But as Dr. Selwyn explained, because local usage rates are applied on an average basis to a large body of customers, the cases of extremely high individual usage levels must be averaged out against the large number of individuals with low usage.

charges doesn't make sense because, in his view, ISPs function economically like long distance carriers, and so should be charged access charges. No one disputes that, if ISPs paid access charges, there would be no need for payments from the originating carrier to the carrier serving the ISP. In that case, the ISP itself would pay for the costs of switching incoming calls to the appropriate incoming line. *See* Selwyn Prefiled Direct at 15:10-19. But ISPs do not pay access charges — the FCC forbids it. And the FCC itself has noted that the practical impact and logical implication of exempting ISPs from access charges, and allowing them to interconnect like end users, is that calls to them are "local" in nature, suggesting that compensation is due.[23]

Moreover, the FCC has made very clear that the continued vitality of the access charge exemption is ***not*** up for debate in the ongoing rulemaking. To the contrary, the FCC believes that its policies in this regard have contributed to the widespread growth and development of affordable Internet access within the United States.[24] It follows that — whatever its possible policy flaws — the FCC's commitment to keeping ISPs exempt from access charges, precisely so that people may call ISPs on a "local" basis is not changing. The FCC's emphasis on the need for ILECs and ALECs alike to be compensated for the work they do in delivering locally-dialed calls to ISPs in interpreting individual interconnection agreements, *see Declaratory Ruling* at ¶ 24, flows directly from this commitment. If ISP-bound calls are to be treated as local to end users — and

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[23] *Declaratory Ruling* at ¶¶ 16, 24, 25; *Access Charge Reform Order* at ¶ 342 & n.502.

[24] *See Declaratory Ruling* at ¶ 34 ("We emphasize, however, that we do not seek comment on whether interstate access charges should be imposed on ESPs as part of this proceeding. We recently reaffirmed that exemption in the *Access Charge Reform Order*, and we do not reconsider it here."); *id.* at ¶ 6 ("In 1997, we decided that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the 1996 Act to 'preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.' This Congressional mandate underscores the obligation and commitment of this Commission to foster and preserve the dynamic market for Internet-related services. We emphasize the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet ... or the development of competition.") (footnotes omitted in both cases).

they are — then the only practical way for a LEC serving ISPs to get paid for switching incoming calls is through some form of inter-carrier compensation.[25]

b. The Fact That Some Portion Of ISP-Bound Traffic Is Jurisdictionally Interstate Does Not Affect The Proper Resolution Of This Dispute.

BellSouth will no doubt argue that (a) the FCC has determined that ISP-bound calls are jurisdictionally interstate and that therefore (b) those calls cannot be "local" calls subject to compensation under the parties' interconnection agreement. While this argument is obviously wrong, Global NAPs will explain why for the record.

At the outset, the question at hand is not whether ISP-bound traffic is now (that is, in February 2000) recognized as largely interstate in nature. The question at hand is whether ISP-bound traffic meets the definition of "local" traffic under the parties' interconnection agreement.

In this regard, the FCC was quite clear in the *Declaratory Ruling* that its conclusion that ISP-bound traffic was "largely" interstate did not determine either (a) whether parties to any particular interconnection contract had agreed to treat such traffic as local, or (b) whether, if not, a state commission should establish some other (and perhaps economically equivalent) compensation mechanism. Indeed, the entire purpose of the FCC's identification and discussion of factors relevant to interpreting individual interconnection agreements is premised on the notion that many if not most agreements actually did contemplate treating ISP-bound traffic as local, notwithstanding its (presumed) interstate nature.

While Global NAPs cannot completely anticipate BellSouth's arguments, its presentation at the hearing suggests that it will try to engage in some rhetorical sleight-of-

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[25] In this regard, while the FCC indicated that a state might, in an individual case, conclude that "reciprocal compensation" as such would not apply to ISP-bound calls, in any case where compensation would not be forthcoming under the terms of an interconnection agreement, the state must then "adopt another compensation mechanism." *Declaratory Ruling* at ¶ 26.

hand to obscure the difference between what industry participants ***now understand*** to be the prevailing jurisdictional analysis of this traffic, on the one hand, and what the parties' actual interconnection agreement means, on the other.

The question of what the interconnection agreement means has been discussed above. Global NAPs would simply note again that the relevant language in the DeltaCom agreement was added in August 1997, a few months after the FCC reaffirmed the access charge exemption and expressly noted that ISPs operating under that exemption used it to receive "local" calls. Global NAPs would also note again that at the time it adopted the DeltaCom agreement, every state regulator to have considered the question — including this Commission — had concluded that ISP-bound calls were subject to compensation as "local" traffic. The legal and regulatory context at the time the DeltaCom agreement was negotiated, and at the time that Global NAPs adopted it, clearly supports treating these calls as local.

These facts, however, did not deter BellSouth from advancing temporally irrelevant evidence. Thus, BellSouth focused on Global NAPs' federal tariff for ISP-bound traffic, even though that tariff was filed ***after*** the FCC's *Declaratory Ruling* stating that ISP-bound traffic was "largely interstate."[26] And BellSouth cross-examined Mr. Rooney with some statements made by a DeltaCom official about the jurisdictional nature of ISP-bound traffic made in a deposition in October 1999, eight months ***after*** the *Declaratory Ruling*, as though such statements made in the context of arbitrating a new interconnection agreement could logically affect the parties' intent in establishing an older one.[27] While BellSouth may recognize the illogic of this approach, some ILECs have even been known to quote the jurisdictional conclusions in the February 1999

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[26] Note, however, that Global NAPs' tariff does not purport to declare all, or any particular portion of such traffic to be interstate. It simply establishes a compensation regime applicable to ISP-bound traffic that (a) may be properly classified as interstate and (b) is not covered by an interconnection agreement. *See* Tr. 53:7-11; 54:4-11; 54:24-55:9 (discussing operation of federal tariff).

[27] *See* Tr. 50:6-51:20 (cross-examining Mr. Rooney regarding a DeltaCom deposition from a few months ago).

Declaratory Ruling as though those conclusions could actually retroactively affect the meaning of contracts entered into before that ruling was issued.[28]

Without having seen BellSouth's specific argument on this point, Global NAPs can only point out that the specific conclusions of the FCC's February 1999 *Declaratory Ruling* cannot magically be held to have retroactively informed the parties' intent in entering into the contract at issue here. Any argument that attempts to project the *Declaratory Ruling's* jurisdictional conclusion backwards in time to 1997 (when the DeltaCom agreement was negotiated and signed) or even to late 1998 and January 1999 (when arrangements were being made for Global NAPs to adopt that agreement) is completely illogical, and must be rejected.

c. The Specific Evidence In This Case Shows That, Under The FCC's Approach To Jurisdiction, More Than 90% Of ISP-Bound Traffic Is Local In Nature.

One of the many areas in which BellSouth witness Mr. Halprin differs with the FCC is in the theory on which ISP-bound traffic is jurisdictionally classified. The FCC took the (traditional) position that the way to tell whether any particular part of an ISP-bound call is interstate or intrastate is to look at where that particular part of the call goes. Downloaded data from a local ISP email server or web cache is intrastate, not interstate; but downloaded data from a distant web site is interstate. *See Declaratory Ruling* at ¶ 18. Mr. Halprin, however, took a radically different view. As he sees things, the fact that the Internet spans state and national boundaries means that each and every connection to the Internet is, itself, wholly interstate in nature. *See* Halprin Prefiled Direct at 25:17-27:12; Tr. 319:11-15.

The difference in these two views is profound. Under the FCC's approach, states retain jurisdiction over the intrastate portion of connections that end users make to the

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[28] The Commission implicitly recognized the illogic of such an approach in the *e.spire Order,* where it recognized that what matters is "the circumstances in existence ***at the time the contract was made*** ... ." *e.spire Order* at 10.

Internet via ISPs. Only if there is no practical way to segregate the traffic into inter- and intrastate components — and, as discussed below, it seems clear that there is — would the traffic all be deemed irrevocably interstate. That precise question is now before the FCC in its inter-carrier compensation rulemaking, so it simply cannot be the case that the FCC has already concluded that ISP-bound traffic is 100%, nonsegregably interstate.

Whatever the FCC might ultimately do in its rulemaking — and Global NAPs agrees with Mr. Halprin (*see* Tr. 38:9-21) that it would be unwise for this Commission to assume that the FCC will act any time soon — it is clear that as of today the rule is that the portion of ISP-bound traffic that actually traverses state lines is interstate, but the portion that stays with the local ISP is intrastate and, indeed, local.

With that framework in mind, Global NAPs presented expert testimony from Mr. Goldstein regarding what portion of actual ***traffic*** sent to ISPs would properly be classified as interstate, and what portion would properly be classified as intrastate and local. His analysis shows that the overwhelming majority of that traffic — that is, an overwhelming majority of the minutes of use that BellSouth sends to Global NAPs under the parties' agreement — contains signals that never go farther than the ISP's own modem banks. *See* Goldstein Prefiled Rebuttal Testimony at 13:1-14:6.

Briefly, this phenomenon occurs because while end users may indeed download a wide variety of web pages or other materials from interstate locations, most of the time during an online session, the end user is reviewing information that has been downloaded, not sending or receiving data from interstate locations. Moreover, as Mr. Goldstein explained, during the time that the end user is not downloading information, the line between the end user and the ISP is not in any sense "dead" or "idle." To the contrary, modern high-speed modems (that is, the end user's local CPE, and the ISP's local CPE) are constantly sending highly structured, modulated signals to each other. These signals constitute the bulk of the "traffic" that is exchanged between an ILEC serving an end user and an ALEC (such as Global NAPs) serving an ISP.

On this analysis — that is, using an approach that takes full account of the FCC's jurisdictional analysis in the *Declaratory Ruling* — between 92% and 96% of the actual traffic exchanged between BellSouth and Global NAPs is not merely "treated as" local under the parties' agreement. Between 92% and 96% of that traffic actually, truly ***is*** "local." *See* Goldstein Prefiled Rebuttal at 20:5-19.

Mr. Halprin took a stab at rebutting Mr. Goldstein's analysis, but he was unable to do so. He suggested two possible problems with Mr. Goldstein's approach: multiple web "windows" open at the same time, and instant messaging/buddy chat type services such as those offered by AOL. *See* Tr. 327:14-328:16. Neither phenomenon undercuts Mr. Goldstein's conclusions.

As to multiple windows containing information that has been downloaded from different web sites, this is actually irrelevant. When all the dust settles, the downloaded material in the various windows will be reviewed by the person that downloaded the information. That review is what, on the whole, generates the periods during which modem-to-modem signaling, but not interstate data downloads, occupies the circuit-switched connection between the end user and the ISP.

As to instant messaging, while Mr. Halprin originally implied that the frequent updating of the "buddy list" might lead to more actual data being exchanged, on cross-examination he admitted that updating the "buddy list" takes less than a second out of every five minutes. *See* Tr. 328:12-16. This is even a lower percentage of time than the 92% -96% local figure developed by Mr. Goldstein.

More fundamentally, neither of Mr. Halprin's points engages with the basic engineering reality that underlies Mr. Goldstein's analysis. As Mr. Goldstein explained, ISPs provision their own networks using an approximate 10:1 ratio of bandwidth coming into their modem banks from the public network to bandwidth going out of their modem banks to their own servers and routers. *See* Goldstein Prefiled Rebuttal at 19:1-20:3. This 10:1 ratio can only work as an engineering matter if data has to move beyond the modems only about 10% of the time. Since ***some*** of the data that moves beyond the

modem doesn't move very far — that is, it only goes to, and comes from, the ISP's own local email and cache servers — simple mathematics shows that less than 10% of total traffic coming into the modems from the network is anything other than local.

As Mr. Goldstein himself acknowledges, it may not be necessary for the Commission to consider what actually happens with ISP-bound traffic. After all, the basic point of the FCC's discussion of factors to consider in assessing parties' agreements is that ISP-bound traffic will likely have been ***treated as*** local even though it may "really be" interstate. From that perspective, it doesn't matter at all what portion of the traffic "really is" local. But if the Commission does find it useful to examine the latter question, then Mr. Goldstein's analysis provides solid evidence that BellSouth owes Global NAPs compensation for the overwhelming majority of the traffic in dispute.

5. Conclusion.

Global NAPs adopted the DeltaCom agreement and is entitled to the rights that the terms of that agreement confer. Applying this Commission's precedent, the FCC's list of relevant factors, and the precedent on this precise issue from Alabama, it is clear that ISP-bound calls are covered under the agreement's definition of "local traffic." It follows that BellSouth owes Global NAPs compensation under the contract for calls that BellSouth sends to ISPs served by Global NAPs. As a result, BellSouth also owes Global NAPs its reasonable costs and attorneys fees in this matter.

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