



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: MARCH 16, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (MARSHY) *cent RNT*
DIVISION OF LEGAL SERVICES (B. KEATING) *BK usd*

RE: DOCKET NO. 991267-TP - 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

AGENDA: 03/28/00 - REGULAR AGENDA - POST-HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\991267.RCM

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CASE BACKGROUND

On August 31, 1999, Global NAPs, Inc. (Global NAPs or GNAPs) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged breach of the parties' interconnection agreement. The subject agreement was initially executed by ITC^Deltacom, Inc., (DeltaCom) on July 1, 1997, and was previously approved by the Commission in Docket No. 970804-TP, Order No. PSC-97-1265-FOF-TP, issued October 14, 1997. DeltaCom's agreement is effective in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. On January 18, 1999, GNAPs adopted the DeltaCom agreement in its entirety.

In its complaint, GNAPs asserts that BellSouth has failed to properly compensate GNAPs for delivery of traffic to Internet Service Providers that are GNAPs' customers. GNAPs also alleges

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that the terms of the agreement provide for reciprocal compensation for the delivery of local traffic, including ISP traffic. GNAPs states that BellSouth has failed to comply with specific provisions of the agreement concerning the payment of reciprocal compensation to GNAPs. GNAPs asks for relief, including payment of reciprocal compensation and attorney's fees, plus interest.

On September 27, 1999, BellSouth filed its Answer to GNAPs' complaint. Based on the complaint, and BellSouth's response, this matter was set for hearing.

On November 15, 1999, DeltaCom filed a petition to intervene in this proceeding. By Order No. PSC-99-2526-PCO-TP, DeltaCom's petition was denied. A hearing was held on January 25, 2000.

DISCUSSION OF ISSUES

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?

RECOMMENDATION: Yes. Staff believes that reciprocal compensation is due under the agreement adopted by GNAPs for all local traffic, including traffic to ISPs, at the rate set forth in the agreement. (MARSH, B. KEATING)

POSITION OF THE PARTIES

GNAPs: 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."

BELLSOUTH: No. Both parties agree that the Agreement's plain language limits reciprocal compensation obligations to the delivery of local traffic. ISP traffic is interstate access

traffic, not local traffic. GNAPs cannot demonstrate any mutual intent to include ISP traffic in the definition of local traffic for purposes of the Agreement.

STAFF ANALYSIS: The issue before the Commission is to determine whether, according to the terms of their interconnection agreement, GNAPs and BellSouth are required to compensate each other for delivery of traffic to ISPs. The contract in question was an amended version of a contract between DeltaCom and BellSouth, executed in July 1997, and amended in August 1997. As with other cases that the Commission has decided on the matter, the ALEC, GNAPs, argues that the contract includes ISP traffic in the definition of local traffic, while BellSouth argues that it does not.

I. Contract Terms

The following provisions are pertinent to this dispute:

49. "Local Traffic" means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

(Exhibit 2, DeltaCom/BellSouth Agreement, Attachment B, page 8).

With the exception of the local traffic specifically identified in subsection (C) hereafter, each 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. Each Party will report to the other a Percent Local usage ("PLU") and the application of the PLU will determine the amount of local minutes to be billed to the other party. Until such time as actual usage data is available, the parties agree to utilize a mutually acceptable surrogate for the PLU factor. For purposes of developing the PLU, each party shall consider every local call and every long distance call. Effective on

the first of January, April, July and October of each year, the parties shall update their PLU.

(Exhibit 2, Fourth Amendment to DeltaCom/BellSouth Agreement, page 2).

GNAPS

GNAPS witness Rooney argues that BellSouth agreed to pay GNAPS reciprocal compensation for local traffic, including traffic to ISPs, pursuant to the language in the contract. (TR 34-35) He maintains that, otherwise, the parties did not discuss the topic of traffic to ISPs, nor did BellSouth tell GNAPS that it would not pay reciprocal compensation for traffic to ISPs under the adopted agreement. (TR 35) Witness Rooney explains that he found this particularly relevant, because in his experiences with LECs in other states, when GNAPS tried to adopt established agreements, if the LEC had a problem with provisions in the agreement, it would usually try to put conditions on the adoption. (TR 35) In this case, however, BellSouth did not. (TR 35) Witness Rooney notes that BellSouth was very explicit in discussion regarding the adoption about the term of the agreement.

Witness Rooney further emphasizes that the contract does not contain a means to segregate out traffic bound for ISPs from other traffic. Thus, the witness argues that it is clear that traffic to ISPs was subject to reciprocal compensation. (TR 36) Witness Rooney did agree that the obligation to pay reciprocal compensation only applies to local traffic. He adds, however, that at the time the agreement was drafted, ISP-bound traffic was being treated as local traffic, and nothing in the agreement indicates anything different. (TR 36) He notes that the FCC's ruling on the jurisdictional status of traffic to ISPs was released well after the DeltaCom/BellSouth agreement was executed. (TR 37) Staff notes that the FCC Order 99-68, issued February 26, 1999, was also released after GNAPS adopted the DeltaCom agreement. (EXH 1; TR 18) In addition, in response to questions about the impact of the FCC Order 99-68 on the definition of local traffic and reciprocal compensation under the agreement, Witness Rooney contends:

That definition [in the agreement] includes traffic that begins and ends within one LATA. And as I understand it, for purposes of the contract you begin and end in a LATA if it is rated to begin and end in a LATA. The thing

is that at the time this contract came about, this is before the decision by the FCC. So you have nothing that is going to suggest that what was understood here to be subject to reciprocal compensation is what the FCC is talking about.

(TR 45)

Witness Rooney emphasizes again that the FCC's decision came out after the DeltaCom agreement was executed:

So here you just have to look entirely within the contract as to what this means. And in here there is no way of separating out ISP-bound traffic from other local traffic, thus ISP-bound traffic is begin treated like other local traffic.

(TR 45)

BELLSOUTH

BellSouth's witness Scollard responds that the DeltaCom agreement has always stated that "reciprocal compensation is due only for the termination of local traffic and thus compensation is not due for ISP-bound traffic." (TR 205) (emphasis in original). Witness Scollard emphasizes that GNAPs adopted the agreement on January 18, 1999, some time after BellSouth had publicly stated that it would not pay reciprocal compensation for traffic to ISPs. (TR 205) He adds that the FCC upheld BellSouth's position just a little over a month later. (TR 206) The witness further emphasizes that on April 14, 1999, GNAPs filed a tariff with the FCC that acknowledged the interstate nature of ISP-bound traffic. (Scollard TR 206)

BellSouth witness Halprin also argues that the FCC Order 99-68 supports BellSouth's position. Witness Halprin contends that the FCC clearly stated that ISP-bound traffic remains classified as interstate and does not terminate locally. He adds that calls to ISPs are "technically indistinguishable" from interstate dial-around calls, and, therefore, they "transcend the confines of local exchange areas. . . ." (TR 293-294)

BellSouth witness Shiroishi concedes, however, that subsequent to the execution of the DeltaCom agreement, BellSouth did develop clarifying language dealing with traffic to ISPs.

(TR 242) Witness Shiroishi agrees that the clarifying language was never incorporated as an amendment to the agreement adopted by GNAPs, although she maintains that this was due to the clarity in the language already in the agreement. (TR 242)

In its brief, BellSouth further argues that the plain language in the agreement clearly provides only for reciprocal compensation for local traffic. BellSouth maintains that GNAPs has provided no evidence to demonstrate that the parties mutually intended to treat ISP traffic as if it were local for purposes of the Agreement. (BellSouth BR 5)

Analysis

Staff agrees with BellSouth that the agreement adopted by GNAPs only calls for reciprocal compensation for local traffic. The agreement does not, however, segregate traffic to ISPs from the rest of the local traffic.

In past decisions on similar issues, the Commission has determined that circumstances that existed at the time the companies entered into the agreement, as well as the subsequent actions of the parties should be considered in determining what the parties intended. (See Order No. PSC-98-1216-FOF-TP; and Order No. PSC-99-0658-FOF-TP; EXH 1). In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953), the Florida Supreme Court referred to Contracts, 12 Am.Jur. § 250, pages 791-93, for the general proposition concerning contract construction:

Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language . . . Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred . . . An interpretation which is just to both parties will be preferred to one which is unjust.

In Order No. PSC-98-1216-FOF-TP, the Commission also agreed that, in the construction of a contract, the circumstances in existence at the time the contract was made are evidence of the parties' intent. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rhq. den. (Fla. 1951). What a party did or omitted to do after the contract was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rhq. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958). See Order No. PSC-98-1216-FOF-TP at p. 16. (EXH 1, Item 2)

The evidence of record does not support BellSouth's contention that it intended traffic to ISPs to be excluded from the definition of "local traffic". Thus, based on the plain language of the agreement, staff recommends that reciprocal compensation is due for all local traffic, including traffic bound for ISPs.

As explained by GNAPs, there is nothing in the agreement that specifically addresses traffic bound for ISPs, nor is there any mechanism in the agreement to account for such traffic. Thus, nothing in the contract indicates that this traffic was intended to be treated differently than local traffic. In addition, although BellSouth may have already made its position on traffic to ISPs publicly-known by the time GNAPs adopted the DeltaCom agreement, BellSouth did not seek to put conditions on the adoption, as noted by GNAPs' witness Rooney. Witness Rooney noted that BellSouth had brought up the issue of the term of the agreement, but he did not recall any discussions about the handling of traffic to ISPs.

Furthermore, by the time GNAPs adopted the DeltaCom agreement, BellSouth had apparently developed some clarifying language addressing traffic to ISPs. However, as BellSouth witness Shiroishi conceded, that clarifying language was never added to the DeltaCom agreement prior to GNAPs' adoption of the agreement, nor did BellSouth seek to include it after the adoption had taken place. Thus, even though BellSouth may have publicly declared that reciprocal compensation was not due for traffic to ISPs, it did nothing to indicate to GNAPs that this position also applied to the specific terms of the DeltaCom/BellSouth agreement.

In addition, Global NAPS witness Selwyn testified that

One of the key points that the FCC made in the Declaratory Ruling was that nothing in that ruling was intended to set aside or upset the results reached by any state commission that had considered the question of ISP-bound calling prior to the time of that decision. If the FCC had any substantive difficulty with this treatment of what it itself pointedly classified as interstate traffic, it seems quite likely to me that it would have indicated its displeasure with that substantive result. And, of course, not only did the FCC not do that, it affirmatively invited state regulators to continue to address that question--and to reach the same answer--as long as the state-level reasoning did not conflict with the FCC's own views of its own regulatory authority over ISP-bound calls. (TR 153)

Staff agrees. Paragraph 27 Of the Declaratory Ruling states that

. . . nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate [it this order]. (EXH 1)

In addition, staff emphasizes that the FCC's Order was issued after GNAPs adopted the DeltaCom/BellSouth agreement; therefore, the FCC Order 99-68 cannot demonstrate or support any argument regarding the parties' intent or understanding of the law at the time the agreement was adopted.

For these reasons, staff believes that reciprocal compensation is due under the agreement adopted by GNAPs for all local traffic, including traffic to ISPs, at the rate set forth in the agreement.

II. Additional Arguments

In addition to the arguments regarding the contract language and the intent of the parties, the parties also presented policy arguments regarding traffic to ISPs and how this issue has been handled in other states. Although staff believes that the above analysis provides the basis for the Commission to determine that

reciprocal compensation is due under this adopted agreement, the following analysis on the policy arguments regarding traffic to ISPs is included to address the parties' arguments. The arguments presented regarding how this issue has been handled in other states are not addressed because they are beyond the scope of the issue in this case.

A. Interstate vs. Local Traffic

ARGUMENTS

Much was said by both parties on whether ISP traffic is local or interstate. BellSouth argues in its brief that the FCC has consistently held, starting with its original access order in 1983, that ESPs (including ISPs) serve their customers via interstate access. (BR 4) BellSouth witness Shiroishi testifies that "Throughout the evolution of the Internet, the FCC repeatedly has asserted that ISP-bound traffic is interstate." (TR 211) Witness Halprin opines that "It is a settled matter at this point in the public debate that the ISP Internet communications do not terminate at the ISP's local server." (TR 257) Witness Shiroishi points out that the FCC concluded in paragraph 12 of the Declaratory Ruling that "the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state." (TR 209-210)

GNAPs witness Selwyn agrees, to a point, stating that "The FCC has held since 1983 that calls placed to 'enhanced service providers'--the predecessors to today's ISPs--were jurisdictionally interstate." However, he also explains that the FCC has required in a number of contexts that ISP traffic should be treated as local. (TR 141)

Indeed, BellSouth does treat such traffic as local in a number of ways. Witness Halprin agreed that, among other things, the FCC "has directed that ISPs and other ESPs be provisioned out of intrastate tariffs, that revenues be counted as intrastate for ARMIS reports, etc." (TR 269) However, he argues that ILECs have no choice in these matters, noting that attempts to alter the reporting status of the traffic have been rebuffed by the FCC. (TR 269)

At issue is whether this means it is appropriate to treat such traffic as local for purposes of reciprocal compensation. GNAPS witness Goldstein argues that

[s]ince ISP-bound calls are technically identical to local calls, the logical result from a technical perspective is to include ISP-bound calls with the category of 'local' calls in contracts regarding interconnection between carriers and inter-carrier compensation. Any claim that contracting parties would have had any technical or cost-related reason for distinguishing ISP-bound calls from other local calls is false. (TR 96-97)

GNAPS witness Goldstein notes that, technically, ISP-bound calls are "indistinguishable from local voice calls." (TR 93) He states that "[f]rom a traffic perspective, an ISP's modem pool looks very much like an incoming PBX trunk group." (TR 95) GNAPS witness Selwyn added that ISP calls "in economic terms . . . are equivalent to traditional local calls. . . ." However, BellSouth witness Milner argues that the supervisory signals or the signaling protocol used does not determine the nature of the traffic. (TR 364)

BellSouth witness Halprin notes that, even though the FCC has stated that ISP traffic is interstate, "[If the FPSC] is willing to think about these issues because of its great concern for developing competition, I don't think . . . the need for [a state decision] is going to be obviated by a detailed decision from the FCC soon. . . ." (TR 338) GNAPS agrees with witness Halprin that it "would be unwise for this Commission to assume that the FCC will act any time soon. . . ." (BR 26) BellSouth witness Banerjee remarked that "[e]ven though the FCC has declared that ISP-bound traffic is, at best, jurisdictionally mixed and is, in most instances, interstate, no rulemaking has yet occurred to establish [usage-based charges analogous to carrier access charges] for ISPs, and it remains uncertain as to when rules to this effect will be established." (TR 397) Witness Banerjee adds ". . . it is reasonable to expect that a fairer system of inter-carrier compensation may yet be more widely adopted for all forms of one-way traffic." (TR 410)

Analysis

While the FCC has declared traffic to ISPs to be jurisdictionally mixed in nature, the FCC has left it to the states, at least for the time being, to decide how to compensate

carriers for delivery of such traffic. Therefore, the issue of jurisdiction is not significant in interpreting the GNAPs/BellSouth agreement.

B. Methods of Compensation

ARGUMENTS

Witness Banerjee argues that, because the FCC has ruled that ISP-bound calls are jurisdictionally interstate, not local, the proper model of interconnection that applies to ISP-bound calls is the same as that between an originating ILEC and an interexchange carrier (IXC). In support of this point, witness Banerjee states that the ISP is not an end-user (of a serving ALEC) but rather a carrier. (TR 370, 379-380)

Witness Banerjee further argues that the principle of cost causation suggests that,

for the purposes of an Internet call, the subscriber is properly viewed as a customer of the ISP, not of the originating ILEC (or even of the ALEC serving the ISP). The ILEC and the ALEC simply provide access-like functions to help the Internet call on its way, just as they might provide originating or terminating carrier access to help an IXC carry an interstate long distance call. [emphasis in original] (TR 379)

He opines that the ISP should compensate local carriers through usage-based access charges, as IXCs do, "and recover that cost directly from the ISP customer." (TR 370)

Witness Banerjee recognizes that this model is not a viable one at present for ILECs, "because the FCC currently exempts ISPs from paying access charges. . . ." He argues that, while ILECs cannot charge access charges, the ALECs are certainly free to do so. (TR 397) He disagrees with the FCC regarding the appropriateness of the access charge exemption, because he believes it is a form of subsidy to ISPs, their customers, and the ALECs that serve the ISPs. He argues that the

subsidy likely stimulates demand for Internet use beyond economically efficient levels--a fact not lost on anyone who has followed the phenomenal growth of Internet traffic over the past five years. However, if that subsidy to Internet users and providers (in short,

the "Internet industry") were deemed to be in the public interest, then, as I explained before, it should be made explicit and provided for in a competitively neutral manner. (TR 412)

He continues that "the next-best cost-causative form of compensation would be an equitable sharing (between the ILEC and the ALEC) of revenues earned by the ALEC from the lines and local exchange usage that it sells to the ISP." (TR 391)

After the first two choices for a compensation model, which would likely each earn considerable revenues for the ILEC, witness Banerjee states that "t]he third-best and a reasonable interim form of compensation would be bill and keep or, in effect, exchange of ISP-bound traffic between the ILEC and the ALEC at no charge to each other." (TR 392) However, GNAPs witness Selwyn states that bill and keep is based on the notion that the volume of calls flowing in each direction will roughly balance out. (TR 134-135)

Witness Selwyn continues that, where traffic is not likely to be in balance, carriers have typically adopted the reciprocal compensation model. (TR 135) Understandably, given current traffic patterns, Banerjee opines that "[r]eciprocal compensation of the form being requested by Global NAPs should be a distant fourth option," although he further states that, because it is not based on cost causation, it should not be an option at all. (TR 392)

Analysis

The parties have discussed several viable options to compensate for ISP traffic. However, none of these options was included in the contract that GNAPs adopted. The issue to be addressed is what does the contract say and what does it require. In this case, the only compensation method addressed for local traffic is reciprocal compensation. Therefore, staff recommends that none of the other compensation methods offered by the witnesses should be considered.

C. Cost Recovery

ARGUMENTS

If reciprocal compensation is not paid, GNAPs witness Selwyn argues that the originating carrier avoids the costs associated

with call termination. (TR 136) GNAPs witness Rooney agrees, stating that "If BellSouth does not pay compensation to Global NAPs for local traffic delivered to ISPs that are Global NAPs' end-user customers, the effect is that BellSouth uses Global NAPs' facilities for free, to the detriment of Global NAPs." (TR 20)

BellSouth witness Banerjee argues that when the compensation exceeds the actual cost to the ALEC of handling that traffic, "the ALEC will have a strong incentive to receive as much ISP-bound traffic as possible." (TR 407) BellSouth witness Halprin states that the current model results in reciprocal compensation that provides "many times the actual costs ALECs incur to carry ISP Internet traffic that originates on BellSouth's network. Because of the major differences between Internet usage and usage of the public switched telephone network, a per-minute charge is not appropriate if it is developed on the basis of the characteristics of local voice calling patterns." (TR 288)

BellSouth witness Halprin continues,

Call set-up represents a significant portion of the total costs a LEC incurs to terminate a call that originates on another LEC's network. However, the per-minute reciprocal compensation rate is the same for each minute of a call. But because the average Internet communication lasts far longer than the average voice call, application of the reciprocal compensation rate to such ISP-bound traffic will result in a significant over-recovery of the ALEC's cost. (TR 288-289)

GNAPs witness Selwyn notes that the \$.009 per minute rate contained in the DeltaCom agreement represents the cost that each participating LEC (BellSouth and the interconnecting ALEC) incurs in terminating local traffic, or conversely avoids when someone else assumes responsibility for that function. In the case of a BellSouth customer and an ISP served by BellSouth, BellSouth would incur a termination cost for traffic delivered to the ISP which is avoided if the ISP is instead an ALEC customer. According to witness Selwyn, in either case, BellSouth would have the same cost; therefore, he argues, this should be economically neutral to BellSouth. (TR 165-166)

On the other hand, according to witness Selwyn, "if the rate were set too low relative to cost, then ALECs would be seeking out high-volume call origination customers (such as

telemarketers) because it would be underpaying BellSouth for terminating that traffic." (TR 170) Given the consequences of an incorrect rate, witness Selwyn believes "BellSouth had a strong incentive, in setting the specific reciprocal compensation rate in the DeltaCom contract, to get it right. . . ." (TR 171)

As regards the use of a separate call set-up rate, witness Selwyn opines that "there is no reason why the rate could not have consisted of separate call set-up and call duration elements if in fact the long duration property of ISP-bound calls would materially affect the ALEC's (as well as the ILEC's) costs." [italics omitted] (TR 172) He points out, however, that such a provision is not in the DeltaCom agreement. (TR 172)

Based on the evidence, there is no question that a cost is involved in delivery of traffic. That is the apparent basis for the inclusion in the agreement of reciprocal compensation for local traffic transport and termination. While a different rate or rate structure could have been adopted from the one included in the contract, it was not. The rate in the contract was set before GNAPs adopted it and was not modified at the time of the adoption. Therefore, there is no basis to set a different rate in this case.

D. Collateral Estoppel

GNAPs further argues that a decision reached in Alabama interpreting the DeltaCom agreement to require reciprocal compensation for traffic to ISPs collaterally estops BellSouth from even arguing this case in Florida on the same contract. GNAPs argues:

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. (GNAPs BR 15)

It appears, however, that GNAPs raises the issue of collateral estoppel for the first time in its post-hearing brief; therefore, BellSouth did not have an opportunity to address this argument. Nevertheless, staffs notes that it disagrees with GNAPs' assertion. For reference purposes only, staff includes the following explanation of the doctrine of collateral estoppel, as provided by the administrative law judge in McCabe v. Woodland Towers, Case No. 98-3082, 1999 Fla. Div. Admin. Hear. LEXIS 183, in a recent recommended order:

The essential elements of collateral estoppel are that the parties and issues be identical; that the particular matter be fully litigated and determined in a previous proceeding that a final decision has resulted from that proceeding and that it be a decision by a court of competent jurisdiction over the relevant issues and parties.

The administrative law judge also noted that Florida courts have recognized that collateral estoppel attaches to decisions of administrative agencies. See Akins v. Hudson Pulp & Paper Co., Inc., 330 So. 2d 757 (Fla. 1st DCA 1976); United States Fidelity & Guaranty Co. v. Odoms, 444 So. 2d 78 (Fla. 5th DCA 1984).

Analysis

While the issue in this case is apparently the same issue addressed by the Alabama Commission, the parties are not the same and the means by which the companies entered into the agreement are not the same. Thus, based on the foregoing, staff does not believe that BellSouth is barred by collateral estoppel or res judicata from pursuing its position in this case.

III. Conclusion

Staff notes that disputes regarding traffic bound for ISPs are ongoing, and the witnesses in this case expressed skepticism that the FCC would settle the matter in the near future. While this docket does not have sufficient evidence to establish a different conclusion, a future proceeding may be warranted to establish an interim compensation methodology until the FCC acts

on the issue. Staff notes that a generic docket has been established to address reciprocal compensation issues.

Based on the record, staff believes that reciprocal compensation is due under the agreement adopted by GNAPs for all local traffic, including traffic to ISPs, at the rate set forth in the agreement.

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

RECOMMENDATION: Yes. The interconnection agreement provides that the prevailing parties are entitled to receive attorney's fees. Thus, if the Commission approves staff's recommendation in Issue 1, GNAPs would be entitled to attorney's fees. **(MARSH)**

POSITION OF THE PARTIES

GNAPS: 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.

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

STAFF ANALYSIS: The parties have taken similar positions on this issue. As BellSouth states in its brief, "the plain language of the Agreement is unambiguous. The prevailing party is entitled to recover its reasonable attorney's fees under the Agreement." (BR 16)

Conclusion

The interconnection agreement clearly provides that the prevailing party is entitled to receive attorney's fees. Thus, if the Commission approves staff's recommendation in Issue 1, GNAPs would be entitled to attorney's fees.

DOCKET NO. 991267-TP
DATE: March 16, 2000

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, this docket should be closed. (B. KEATING)

STAFF ANALYSIS: No further action is required in this docket;
therefore, it should be closed upon issuance of the Order.