BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Global NAPs, Inc., Against BellSouth Telecommunications, Inc., for Enforcement of Section VI(B) of its Interconnection Agreement with BellSouth Telecommunications, Inc., and Request for Relief.	Docket No. 991267-TP Filed May 24, 2000

ORIGINAL

RESPONSE OF GLOBAL NAPs, INC. TO BELLSOUTH TELECOMMUNICATION INC.'S MOTION FOR RECONSIDERATION

Global NAPs, Inc., through its undersigned counsel, files this Response to BellSouth Telecommunications, Inc.'s Motion for Reconsideration ("Motion") in the above-styled matter. In support of its Response, Global NAPs states the following:

1. BellSouth Does Not Raise Any Issues That Justify Granting Reconsideration.

A party seeking reconsideration must identify issues of fact or law that the agency overlooked or failed to consider in rendering its decision. Reconsideration is not called for based on a party's arbitrary feeling or assertion that the agency may have made a mistake. *Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King,* 146 So. 2d 889, (Fla. 1962). This Commission has previously recognized that reconsideration is not a means for a party to advise the Commission of its disagreement with the Commission's decision, reargue matters already presented, or ask the Commission to reweigh evidence or change its mind with respect to a matter that already has received its careful attention. *In re: Petition for Arbitration of Dispute with BellSouth Telecommunications, Inc. Regarding Call Forwarding, by Telenet of South Florida, Inc.,* 97 FPSC 7:485 (1997), citing *Sherwood v. State,* 111 So. 2d 96, 97-98 (Fla. 3d DCA 1959).

APP ___
CAF ___
CMP Mush
COM 3
CTR ___
ECR ___
LEG 1
OPC ___
PAI ___
RGO ___
SEC 1
SER ___
OTH ___

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Here, BellSouth obviously disagrees with the Commission's decision on Global NAPs' Complaint against BellSouth, but all it seeks is to reargue matters already presented and to have the Commission reweigh the evidence and change its mind. In other words, as discussed below, BellSouth does not raise any factual or legal issues that have not already been considered and decided by the Commission. Accordingly, BellSouth's motion should be denied.

2. The Commission's Decision was Based Exclusively on Facts in the Record.

BellSouth first claims that the Commission's decision is based on facts outside the record. BellSouth is incorrect.

First, BellSouth does not, and cannot, identify any extra-record facts on which the Commission supposedly relied. In fact, the Commission's Order clearly identifies the facts on which it is based, ***all*** of which are in the record in this proceeding.

Specifically, after considering the testimony of all witnesses, the Commission found that the plain language of the Agreement between Global NAPs and BellSouth provides that calls bound for Internet Service Providers ("ISPs") are included within the Agreement's definition of "local traffic" (Order, pp. 3-4, 7). This conclusion was based primarily on the facts that:(1) the Agreement does not differentiate between ISP-bound traffic and other local traffic (Order, pp. 3-4, 7), and (2) the Agreement does not contain a mechanism to account for and compensate the delivery of ISP-bound traffic apart from the reciprocal compensation provisions applicable to local traffic. (Order, pp. 3-4, 7). Based on these factual findings, the Commission determined that the plain language of the

Agreement provides for the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs. (Order, p. 7).[1]

Because the Commission's decision was based on the Agreement's plain language, there was no need for the Commission to address the issue of any party's subjective intent. Similarly, there was no reason for the Commission to look beyond the record of the case. BellSouth's charge that the Commission considered facts outside the record, therefore, makes no sense, given the basis for the Commission's decision.

Setting up a straw man, BellSouth claims that the Commission in this case actually relied on findings regarding the intent of the parties to the original BellSouth/DeltaCom agreement. Since, in BellSouth's view, no evidence of such intent was presented, the Commission must have relied on extra-record evidence. *See* Motion at 2-3. Both legs of this argument, however, are wanting.

First, BellSouth conveniently misquotes what the Commission actually said. The Commission did not say, "To decide this case we must look to the subjective intent of the parties, and, in particular, the parties to the original agreement." What the Commission said at the beginning of the paragraph BellSouth (mis)quotes is, "***Although we need not look beyond the plain language of the Agreement*** ... ." The Commission then noted (correctly) that if intent must be examined (*i.e.*, in cases where the plain language of the contract is not sufficiently clear) in a situation where an ALEC has adopted a pre-existing agreement unchanged under Section 252(i), the relevant "intent" is logically that of the original parties, not that of the opting-in ALEC. Global NAPs cannot fathom how BellSouth could have legitimately read this Commission statement to suggest that the

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[1] The terms of the Agreement, of course, are in the record. Because the Commission based its decision on the plain language of the agreement, there is no conceivable basis to claim that the Commission actually relied on matters outside the record.

Commission was, in fact, looking at the intent of the original parties in this case. The Commission applied hornbook law to conclude that evidence of subjective intent is relevant only where a contract is ambiguous.[2] Having found that the contract at issue was not ambiguous, evidence of parties' subjective intent could not be, and was not, part of the basis for the Commission's decision.

That said, even if BellSouth were correct that the Commission ***did*** base its decision on an assessment of the intent of the original contracting parties, the record is not, in fact, devoid of evidence about the original parties' subjective intent. To the contrary, Mr. Rooney provided, as an exhibit, a copy of testimony on precisely this topic from a relevant DeltaCom employee in an Alabama PSC case involving the meaning of the precise contract at issue here. So there ***is*** direct record evidence supporting the conclusion that the original parties intended ISP-bound calls to be subject to compensation.[3] BellSouth, for its own (to Global NAPs, obscure) reasons chose not to present any such evidence on its own. But a late realization that that tactical litigation choice might not have been for the best is hardly a basis for reconsideration.

BellSouth's claim that by rendering a decision in this case, the Commission somehow prejudiced its rights in BellSouth's ongoing dispute with DeltaCom, is similarly unavailing. This issue is discussed in more detail below in connection with BellSouth's "law of the case" argument; suffice it to say here that BellSouth is legally free to argue whatever it wants in the DeltaCom case.

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[2] *See Green v. Life & Health of America,* 704 So. 2d 1386 (Fla. 1998).

[3] Moreover, BellSouth itself presented evidence that it had developed language to "clarify" its own intent with regard to compensation for ISP-bound traffic, and, as Ms. Shiroishi testified, the "clarified" language was never presented to DeltaCom or to Global NAPs. Despite BellSouth's effort to characterize the revised language as a mere "clarification," it is clear that the new language has a quite different meaning than the language actually in the contract. A reasonable inference from these circumstances is that BellSouth subjectively "intended" the plain meaning of the actual contract language to prevail.

It may be that the strength and persuasiveness of arguments BellSouth wants to make are affected by the logic of the Commission's ruling here, but that does not remotely suggest that the Commission erred here at all, much less in such a manner as to warrant reconsideration.

Finally, BellSouth argues that the Commission should delay rendering a final decision in this case pending resolution of the ITC DeltaCom case. Motion at 3. There is no basis for such an approach, which would, in any case, violate Global NAPs' own due process rights. Global NAPs and BellSouth have a contract. They had a dispute about what it means in certain situations. The Commission found that the contract was clear, and that it meant what Global NAPs thought. The Commission should reject BellSouth's last-ditch effort to avoid complying with the terms of its contract.[4]

In sum, the Commission did not rely on facts outside the record, and BellSouth's due process rights have not been violated. The Commission expressly predicated its decision on the determination that the Agreement's plain language provides that ISP-bound traffic is local traffic for reciprocal compensation purposes. BellSouth has presented no factual or legal basis for setting this conclusion aside.

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[4] Global NAPs notes that, were it to accede to BellSouth's request, this Commission will have wasted its time and resources on a lengthy proceeding, that would be tossed out simply because one of the parties is not happy with the result. Global NAPs notes that BellSouth vehemently opposed ITC DeltaCom's attempt to intervene in this case; yet, had DeltaCom been permitted to intervene, the case arguably would have been in the procedural posture that BellSouth now claims is necessary for a resolution that is "fair" in BellSouth's view. There is no basis for granting this unseemly request to allow BellSouth to escape from the consequences of its own litigation strategy.

3. BellSouth's Reliance on the Order Denying Intervention is Misplaced.

BellSouth implies, but does not quite state, that it chose not to present evidence regarding its subjective intent in negotiating the original Agreement with DeltaCom because the Prehearing Officer ruled that DeltaCom could not intervene in this case and that the decision in this case would not affect the determination of BellSouth's dispute with DeltaCom. *See* Motion at 3-4. BellSouth presumably cannot bring itself to state that relied in any way on the Prehearing Officer's ruling for the simple reason that that ruling was issued three days ***after*** both BellSouth's and Global NAPs' reply testimony was filed. By the time the Prehearing Officer ruled, BellSouth had ***already*** decided not to present detailed evidence of its subjective intent in negotiating the original Agreement.

Despite the fact that its case was fully submitted – ***without*** the evidence BellSouth now wants to present – at the time of the Prehearing Officer's ruling on December 23, 1999, BellSouth now argues that the Commission somehow "changed the legal and evidentiary standard upon which this case was based without affording BellSouth fundamental due process rights to address the intent of the parties in negotiating and executing the DeltaCom/BellSouth's Interconnection Agreement." Motion at 4-5. That simply is not the case.

For its part, Global NAPs took three positions, essentially a form of "pleading in the alternative": (a) The Agreement unambiguously requires compensation for ISP-bound calls; consequently, subjective "intent" evidence is not called for; (b) If intent matters, then Section 252(i) compels the conclusion that it is the intent of the original parties (as to which Global NAPs presented at least some evidence) that matters, not the subjective intent of either party to the ***adoption***

agreement; and (c) If subjective intent at the time the contract was adopted matters, Global NAPs' intent – and, for all one could tell, BellSouth's as well – was that ISP-bound calls be compensated.

Nothing prevented BellSouth from adopting a "mirror image" of this approach for its own presentation (which, as noted, was due and submitted ***before*** the Prehearing Officer ruled).[5] This would have been something like the following: (a) The Agreement unambiguously does ***not*** require compensation for ISP-bound calls; (b) If intent matters, then what matters is the intent of Global NAPs and BellSouth, not the intent of DeltaCom and BellSouth; (c) If BellSouth's intent in negotiating with DeltaCom matters, then BellSouth's intent at that time was that no compensation for ISP-bound calls was proper. Yet for reasons known only to BellSouth, it chose ***not*** to present testimony or other evidence on the last leg of ***its*** version of "pleading in the alternative." It simply dropped the ball. It now wants to rectify that (apparent) tactical error, some ***seven months*** after the

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[5] BellSouth was unquestionably on notice that the intent of the original parties to the Interconnection Agreement was a potential issue. Global NAPs' position, announced in its direct testimony, was that the Agreement was clear on its face with respect to ISP-bound traffic being included in the definition of "local traffic" for reciprocal compensation purposes, so that the parties' subjective intent should be irrelevant. Nonetheless, Global NAPs recognized that the original parties' intent in negotiating the Agreement may be at issue. Accordingly, Global NAPs presented appropriate evidence to address this issue. BellSouth specifically chose ***not*** to present such evidence, instead arguing its own unilateral "intent" to exclude ISP-bound traffic from the definition of local traffic. This "intent," which BellSouth apparently "announced" at some point after execution of the DeltaCom Agreement, was never memorialized within the four corners of that Agreement or any of the amendments to that Agreement, or in the Global NAPs / BellSouth adoption agreement.

date for filing testimony in this case has passed.[6] Reconsideration does not properly exist as a vehicle to give a disappointed litigant like BellSouth another bite at the apple.[7]

In this regard, BellSouth and Global NAPs had the same opportunity in this case to present evidence on the original parties' intent in negotiating the Interconnection Agreement. Global NAPs recognized that such intent may be at issue in this case and submitted evidence to address that issue. BellSouth, on the other hand, intentionally did not submit such evidence. Instead, it took the position that "***DeltaCom's intent is wholly irrelevant in this case. To the extent that the intent of the parties to the agreement in this case — the agreement between Global NAPs and BellSouth — were relevant at all, only the intent of BellSouth and Global NAPs would be relevant.***" BellSouth Telecommunication's, Inc.'s Response to ITC DeltaCom's Petition to Intervene, filed Nov. 22, 1999, at p. 2.

Having purposely chosen not to present evidence addressing the original parties' intent, it is legally baseless – indeed, it borders on the disingenuous – for BellSouth to argue now that it was denied due process in any way. Undeterred, however, BellSouth seeks to reopen the record to introduce evidence of its intent in negotiating the DeltaCom Interconnection Agreement. It seeks to do this through attaching an affidavit – which actually is late-filed testimony – of Jerry Hendrix,

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[6] In this regard, there is nothing remotely new or newly discovered about the evidence from Mr. Hendrix that BellSouth now wants to submit. It chose not to submit it before, and now thinks that submitting it might affect the outcome of this case. Aside from not constituting a valid basis for reconsideration, this entire effort flies in the face of the Commission ruling that the contract is not ambiguous and, instead, plainly requires compensation for ISP-bound calls.

[7] Any attorney with more than a modicum of experience would jump at the chance to relitigate every case he or she has ever lost, relying to the maximum extent possible on the benefit of hindsight provided by the tribunal's order explaining ***why*** he or she lost. But reconsideration is a procedure designed to allow the Commission to correct manifest errors in its orders, not to sooth the frustrations of losing litigants.

a BellSouth employee who negotiated the DeltaCom Agreement on BellSouth's behalf. There is absolutely no valid reason why BellSouth could not have proffered Mr. Hendrix's testimony at the appropriate time in this case, as part of its direct or rebuttal testimony – just as it has in other cases involving ISP-bound compensation traffic disputes. *See, e.g., In re: Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc. d/b/a/ e.spire Communications, Inc. and ACSI Local Switched Services, Inc., d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc., regarding Reciprocal Compensation for Traffic Terminated to Internet Service Providers,* Docket No. 981008-TP. BellSouth simply made a tactical error in deciding not to offer the testimony of Mr. Hendrix in this proceeding, and now seeks to correct that error after the case has been heard and the outcome decided.

To justify reopening the record, a significant change in circumstances or conditions not present in the proceedings sought to be reopened there must be demonstrated, or a great public interest must be served. *Austin Tupler Trucking, Inc. v. Hawkins,* 377 So. 2d 679 (Fla. 1979); *Peoples Gas System v. Mason,* 187 So. 2d 335 (Fla. 1966). In this case, BellSouth has not demonstrated ***any circumstances whatsoever*** to justify reopening the record to admit evidence that could and should have been included in BellSouth's's prefiled testimony and addressed at the hearing, where Global NAPs would be able to exercise its right to cross-examine Mr. Hendrix and rebut his testimony. If the Commission were to reopen the record at this juncture to consider Mr. Hendrix's affidavit, Global NAPs would be entitled to cross-examine and rebut that testimony. This is precisely the sort of never-ending litigation that the finality doctrine is intended to prevent in all but the most extraordinary circumstances. *Peoples Gas System v. Mason,* 187 So. 2d 335, 339-40

(Fla. 1966). Those circumstances simply do not exist in this case. Mr. Hendrix's affidavit should be disregarded as untimely filed evidence outside the record of this case.

4. The "Law of the Case" Doctrine Does Not Aid BellSouth Here.

BellSouth invokes the "law of the case" doctrine to convert the ruling of the Prehearing Officer into a substantive constraint on how the Commission may properly rule on the merits. There is no basis for this claim.

The order denying ITC DeltaCom's Petition to Intervene was a procedural order that did not establish the "law of the case." The "law of the case" doctrine holds that questions of law decided by the ***highest*** court of competent jurisdiction must govern the case in all subsequent stages of the proceeding. *Brunner Enterprises v. Department of Revenue,* 452 So. 2d 550 (Fla. 1984); *Greene v. Massey,* 384 So. 2d 24 (Fla. 1980). Accordingly, it is a "top-down" doctrine, in the sense that the highest tribunal determines what the law is and lower tribunals must follow it.

To the extent that "law of the case" is at issue, the Commission's Final Order addressing the substantive issues in this case established the "law of the case," and that law must be followed in subsequent proceedings, except under extraordinary circumstances. *See Green v. Massey,* 384 So. 2d 24 (Fla. 1984). There are no such extraordinary circumstances in this case – only a party who is dissatisfied with the Commission's decision and wants another opportunity to relitigate the case with the benefit of hindsight. That is not a valid reason to grant reconsideration of the Commission's Final Order.

Indeed, to accept BellSouth's "law of the case" argument would have very peculiar consequences. Assume here that, based on the Commission's decision in this case that the contract

is unambiguous, the Commission concludes as a matter of law that the DeltaCom contract as between BellSouth and DeltaCom itself contemplated payment for ISP-bound calls. In that event, BellSouth will not have been prejudiced in any material way. It had a full and fair opportunity to litigate, in this case, the question of whether the language of the DeltaCom contract was ambiguous. It lost, and, obviously, does not want to live with the plain meaning of that contract, either with Global NAPs or with anyone else. But this is no different than a (hypothetical) case in which two or three different customers have filed complaints about BellSouth's performance under a particular provision in BellSouth's tariffs. If the Commission rules as a matter of law in the first case that the tariff means "thus and so," BellSouth will presumably have a hard time in later cases convincing the Commission that exactly the same tariff language actually means something else.

Moreover, the only alternative that Global NAPs can see is to conclude that the mere fact that the Prehearing Officer denied DeltaCom's motion to intervene means that, as a matter of law, the Commission may not find the contract at issue here to be unambiguous. If the contract is, indeed, unambiguous, then the Commission is duty-bound to so rule, as it did. Nothing in the Prehearing Officer's ruling remotely was intended to, or could, bind the full Commission on this key legal issue.[8]

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[8] Global NAPs can imagine an argument that, in light of the Prehearing Officer's ruling, BellSouth should receive some leniency in the application of the rule of *stare decisis* in the course of the DeltaCom litigation. But that concern does not remotely justify reconsideration in ***this*** case.

6. **The Commission Properly Decided this Case Based on the Agreement's Plain Language.**

Having waived any right it may have had to present evidence as to its intent in negotiating with DeltaCom, BellSouth next complains that the Commission decided this case in a manner that actually makes BellSouth's tactical error irrelevant. That is, the Commission based its ruling on the plain language of the Agreement, not on an assessment of any party's subjective intent, so BellSouth's failure to present evidence on its intent actually did not affect the outcome.

Undeterred, BellSouth now argues that the Commission ***should have*** considered intent evidence (including, presumably, the evidence that BellSouth consciously chose not to present earlier). *See* Motion at 5-8. This argument ignores basic tenets of contract law, misinterprets prior Commission decisions addressing reciprocal compensation for ISP-bound traffic, and is inconsistent with the position BellSouth took in its Posthearing Brief.

A fundamental principle of contract law is that if the contract's language is unambiguous, the contract's plain language controls, and the parties' intent in negotiating that contract is not at issue. *Green v. Life & Health of America,* 704 So. 2d 1386 (Fla. 1998). In this case, the Commission examined the plain language of the DeltaCom Interconnection Agreement, determined that the local traffic and reciprocal compensation provisions were clear, and properly did not consider the parties' intent.

BellSouth argues, however, that because in ***other*** ISP-bound traffic cases the Commission considered the parties' intent, so should the Commission have considered the parties' intent in this case. In essence, BellSouth asks the Commission to reverse its determination here that the Agreement is clear, determine instead that the Agreement is ambiguous, and then consider the

parties' intent — which, BellSouth posits, consists only of ***its*** subjective intent that ISP-bound traffic not be considered local for purposes of reciprocal compensation, even though that "intent" was never memorialized in the DeltaCom Agreement or the adoption agreement.[9]

BellSouth offers no factual or legal justification for asking the Commission to take a position diametrically opposite to that taken by the Commission in its Final Order -- other than that BellSouth simply disagrees with the analysis and result. BellSouth's invitation to violate basic contract law should be summarily rejected by the Commission.

Furthermore, BellSouth attempts to ignore the key fact that in the *e.spire* and *WorldCom* cases, the Commission considered ***different*** interconnection agreements than the Agreement at issue in this case. While those cases obviously addressed a generally similar subject matter, and raising similar "policy" concerns regarding ISP-bound traffic, to those at issue here, the fact remains that the Commission's decisions in *e.spire* and *WorldCom* turned on the specific language in ***those*** interconnection agreements and the testimony and other evidence ***specific to those cases.***

As BellSouth itself recognized its Posthearing Brief, Global NAPs was not a party to those cases, nor was the DeltaCom Agreement interpreted in those cases. Therefore, it is perfectly appropriate that the Commission did not rotely apply the same analysis it applied in the *e.spire* and *WorldCom* cases to this case. Moreover, BellSouth's statement that it is "indisputable that BellSouth would have prevailed" had the *e.spire / WorldCom* analysis been applied in this case borders on the ludicrous, considering that BellSouth did not present any evidence of its intent in negotiating the

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[9] Notwithstanding that, according to BellSouth witness Beth Shiroishi, BellSouth apparently had developed amendatory language to address the ISP-bound traffic compensation issue, that language was never incorporated into the DeltaCom Agreement or the Global NAPs adoption agreement.

DeltaCom Agreement and now – seven months too late – attempts to untimely submit Jerry Hendrix's testimony to support its case. The Commission's decision in this case is based on a sound analysis of the specific Interconnection Agreement at issue and on the specific evidence presented, and should not be overturned.

7. The Commission's Decision is Consistent with Federal Law.

BellSouth claims that the Commission's decision that ISP-bound traffic is subject to compensation under the parties' interconnection agreement violates federal law. *See* Motion at 8-9 & n. 6. This claim, however, ignores the fact that ***every*** federal court to have considered a state decision that ISP-bound calls are subject to compensation has concluded that such a decision is ***consistent*** with federal law. The issue has been around long enough that not only federal district courts, but, indeed, federal circuit courts are now weighing in. Decisions from the Fifth and Seventh circuits expressly hold that federal law is not violated by a state regulator requiring compensation for ISP-bound calls under the 1996 Act.[10] There is simply no authority whatsoever to the contrary. BellSouth's argument in this regard borders on – and, indeed, may have strayed well into – frivolous territory.

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[10] *See Southwestern Bell Telephone v. Texas PUC,* 208 F.3d 475, 483 (5th Cir. 2000) ("Clearly, then, whether voluntarily negotiated or confected through arbitration, commission-approved agreements requiring payment of reciprocal compensation for calls made to ISPs do not conflict with §§ 251 and 252 of the Act or with the FCC's regulations or rulings."); *Illinois Bell Tel. v. Worldcom,* 179 F.3d 566, 572 (7th Cir. 1999) ("The FCC could not have made clearer that . . . a state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law."). *See also US West Commun's v. MFS Intelenet,* 196 F.3d 1112, 1122-23 (9th Cir. 1999) (ILECs bound by statements in FCC ruling holding that state PSCs can determine the answer to this question).

There is also no possible merit to BellSouth's claim that the D.C. Circuit's recent reversal of the FCC's *Reciprocal Compensation Order* is somehow irrelevant because it "does not disturb the many decisions prior to and after that order in which the FCC found that ISP bound traffic is interstate access traffic." *See* Motion at 8 n.9. The D.C. Circuit did not "disturb" those FCC precedents for the simple reason that it found them to be irrelevant. The key legal and logical error that the FCC had committed in the *Reciprocal Compensation Order* was to assume that the analysis used to determine jurisdiction had anything to do with compensation for ISP-bound calls.

Indeed, five days before filing its Motion for Reconsideration here, BellSouth lost on this very same claim in a federal district court in Atlanta.[11] There, as here, BellSouth claimed that the finding in the *Reciprocal Compensation Order* that ISP-bound traffic was largely interstate precluded a finding that compensation was due. Noting that the FCC's ruling had been vacated for "want of reasoned decision-making," the court explained that the D.C. Circuit had found

> that the FCC's ruling "rested squarely on its decision to employ an end-to-end analysis for purposes of determining whether ISP-traffic is local" and acknowledged that the FCC "has historically been justified in relying on this method when determining when a particular communication is jurisdictionally interstate." The court vacated the FCC's ruling, however, because the agency had not provided "an explanation ***why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.***" The court further noted that the FCC's ruling had failed to come to terms with its own regulations. The FCC defines "local telecommunications traffic" as traffic that "originates and terminates within a local service area." The FCC defines "termination" as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch to the called party's premises." The court explained that "ISPs appear to fit this definition: the traffic is switched by the LEC

[11] None of the counsel listed on BellSouth's Motion for Reconsideration is also listed as counsel in the case in Atlanta, so Global NAPs assumes that BellSouth's counsel here failed to discuss this case because they were unaware of it.

> whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" Finally, the court commented that ISPs are information service providers, not telecommunications providers, and indicated that the FCC had failed adequately to account for a line of rulings that rested on "the real differences between long-distance calls and calls to information service providers."

BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., 2000 U.S. Dist. LEXIS 6743 at **10-11 (N.D. Ga. 2000) (emphasis added, citations omitted).

Having fully understood the import of the D.C. Circuit's ruling, the court made short work of BellSouth's claim that a proper understanding of federal law bars reciprocal compensation for ISP-bound calls:

> The District of Columbia Circuit's decision in Bell Atlantic, however, has removed the clarity provided by the [*Reciprocal Compensation Order*], and despite BellSouth's arguments that the FCC thinks it can maintain its conclusion in a manner that satisfies the Bell Atlantic court, the fact remains that the [*Reciprocal Compensation Order*] ***has been vacated on the very grounds that BellSouth uses for support.***[footnote 11]
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> n11 Indeed, the court in Bell Atlantic made the same distinction between providers of telecommunication services and information services relied on by the PSC.

BellSouth v. MCImetro, supra, 2000 U.S. Dist. LEXIS 6743 at *44 (emphasis added, citation omitted). In other words, there is simply no logical basis to argue, as BellSouth does, that the D.C. Circuit's decision vacating the *Reciprocal Compensation Order* is some legal triviality merely calling for some new explanation from the FCC. It is certainly true that the court found that more explanation was called for. But BellSouth's position ignores the fact that the ***reason*** the court demanded more explanation from the FCC was that it found the portions of the FCC's position on which BellSouth seeks to rely didn't actually make sense.[12]

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[12] In this regard, the D.C. Circuit carefully reviewed the FCC's prior decisions regarding the legal and regulatory status of ISPs and their use of the network, and found the *Reciprocal*

8. The Commission's Decision Will Not Result in the Parade of Horribles BellSouth Suggests.

BellSouth claims that the Commission's decision is "discriminatory against BellSouth" because, if BellSouth accepted a provision "that is detrimental to BellSouth, BellSouth will be unable to rectify that mistake" until the original agreement expires. Motion at 11. BellSouth's real argument here is not that the Commission's order is unlawful. Instead, BellSouth's argument is with the impact of federal law itself. This is plainly not a proper ground for reconsideration.

First, BellSouth seems troubled by the idea that it will be bound by its contracts even if, in retrospect, it wishes it had negotiated different terms. No doubt every business feels the same way from time to time. And it is certainly true that forcing BellSouth to live up to its contracts for as long as they legally endure is a different and perhaps more burdensome legal regime than the one in which BellSouth operated for many decades. Under traditional regulatory arrangements, BellSouth's relations with its customers and with other carriers were largely governed by tariffs and regulatory rules. If conditions changed, or BellSouth's business objectives changed, or really for any reason at all, BellSouth could promulgate a tariff revision or request a change in the applicable rule. Under this old regime, BellSouth's errors in business or legal judgment had only muted consequences (as opposed to the risks faced by unregulated firms), since a regulatory "fix" was generally available.[13]

Compensation Order to be in conflict with those prior decisions. *See Bell Atlantic v. FCC,* 206 F.3d 1, 7-8 (D.C. Cir. 2000). There is, therefore, no merit to BellSouth's appeal to the FCC's own precedents. *See* Motion at 8 n.9.

[13] Contract law is not quite as harsh as BellSouth claims, of course. Contract law in general allows parties to be excused from their obligations where a mistake undermines the "meeting of the minds" that is required for a valid contract. Indeed, the Florida Supreme Court "has long held that mutual mistake of fact constitutes an equitable ground for recission under general contract law." *Continental Assurance Co. v. Carroll,* 485 So. 2d. 406, 409 n.2 (Fl. 1986), *citing Rood Company*

The 1996 Act, however, replaces this traditional regime with one based, in the first instance, on contracts negotiated between two commercial entities. While Sections 251 and 252, as well as Commission and FCC rulings, certainly provide context for those negotiations, at bottom the relationship between the parties is established by their own actions, not by regulators. Indeed, in Section 252(a), Congress made a point of placing the strict requirements of the law in second place behind the parties' private intentions; that provision expressly permits parties to deviate from otherwise applicable legal obligations if they so choose.

It is certainly true that the effect of Section 252(i) is, perhaps, to amplify the effect of BellSouth of errors in business judgment. Under Section 252(i), any provision of any interconnection agreement that BellSouth has with one ALEC is automatically available to all other ALECs. On some level this increases the stakes for BellSouth in any individual negotiation, and, arguably, might lead BellSouth or other ILECs to be less likely to engage in meaningful individual negotiations with individual ALECs.

But that concern is inherent in Section 252(i), and, in any case, was fully considered by the FCC in the original rulemaking proceeding implementing the 1996 Act. That concern, in fact, led the FCC to promulgate 47 C.F.R. § 52.809, which provides a method for ILECs to avoid having to make particular contract provisions available to successive ALECs if certain showings can be

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v. Board of Public Instruction, 102 So.2d 139 (Fla. 1958); *Peace River Phosphate Mining Co. v. Thomas A. Green, Inc.,* 102 Fla. 370, 135 So. 828 (1931). What contract law does not permit – but what BellSouth apparently longs for – is the ability to be excused from contractual obligations that were entered into not as a result of legally significant mistakes, but, instead, merely as a result of (in retrospect) bad business judgment from BellSouth's own, private perspective.

made.[14] It follows that all BellSouth is saying here is that it wishes Congress and the FCC had been more considerate of the ILECs in enacting Section 252(i) and promulgating Rule 52.809. No matter how sincere this sentiment may be, it obviously provides no basis for reconsideration in this case.

Finally on this issue, BellSouth takes the Commission to task for its current policy of resolving arbitration cases involving ISP-bound traffic between parties with an already-existing interconnection agreement by continuing the terms of the parties' prior agreement on this topic. *See* Motion at 11-12. It is hard to know what to make of this argument, since the underlying Commission policy about which BellSouth is complaining seems manifestly reasonable. Suffice it to say that if BellSouth believes that it is either legally erroneous, or bad policy, for the Commission to direct parties to "handle [this] issue consistent with the prior agreement" (*see* Motion at 12), BellSouth is free to raise those arguments in the ongoing arbitration docket and to take its case to court if it is dissatisfied with the Commission's ultimate decision. But this concern about the Commission's policy in arbitration cases obviously provides no sound basis for reconsideration in this case.

Conclusion

BellSouth is simply unhappy with the result in this case, and stretches beyond the bounds of fact, law, and logic in arguing that the Commission should reconsider this case. But BellSouth provides no factual or legal basis for the Commission to grant this extraordinary remedy. Accordingly, the Commission should deny BellSouth's Motion for Reconsideration.

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[14] Indeed, the Supreme Court has found that the FCC's rules are, in this regard, "more generous to incumbent LECs than § 252(i) itself." *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 396 (1999).

WHEREFORE, Global NAPs, Inc., respectfully requests the Commission to deny BellSouth's Motion for Reconsideration in this proceeding.

Respectfully submitted this 24th day of May, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 24th day of May, 2000, by U. S. Mail to Beth Keating, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399, Michael P. Goggin and Nancy White, BellSouth Telecommunications, Inc., Museum Tower, Suite 1910, 150 West Flagler Street, Miami, FL 33130, and R. Douglas Lackey and E. Earl Edenfield, Jr., BellSouth Telecommunications, Inc., BellSouth Center, Suite 4300, 675 W. Peachtree Street, N.E., Atlanta, GA 30375.

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