ORIGINAL

ADORNO & ZEDER
A PROFESSIONAL ASSOCIATION

2601 SOUTH BAYSHORE DRIVE
SUITE 1600
MIAMI, FLORIDA 33133
TELEPHONE (305) 858-5555
FACSIMILE (305) 858-4777
WORLD WIDE WEB http://www.adorno.com

WESLEY R. PARSONS

Internet Address: WRP@adorno.com

WRITER'S DIRECT NO.:
(305) 860-7065

September 18, 2000

Via Federal Express

Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

In Re Complaint and/or petition for arbitration filed by Global NAPS, Inc., etc.
Docket No. 991267-TP

Dear Sir/Madam:

Enclosed are an original and two copies of a Notice of Administrative Appeal to be filed in the above-referenced matter. Please file the Notice of Administrative Appeal and return a file-stamped copy in the self-addressed, stamped envelope provided.

Thank you for your attention to this matter. If you have any questions regarding the foregoing, please do not hesitate to contact me.

Sincerely,

Wesley R. Parsons

WRP/mld
Enclosures

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 991267-TP

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

FILED: September 19, 2000

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NOTICE OF ADMINISTRATIVE APPEAL

NOTICE is given that BellSouth Telecommunications, Inc., pursuant to Rule 9.030(a)(1)(B)(ii), Florida Rules of Appellate Procedure and Section 364.381, Florida Statutes, appeals to the Florida Supreme Court, the Public Service Commission's Order No. PSC-00-1511-FOF-TP, as rendered August 21, 2000, and the Public Service Commission's Order No. PSC-00-0802-FOF-TP, as rendered April 24, 2000, requiring BellSouth to pay reciprocal compensation on traffic bound to Internet Service Providers that it hands off to Global NAPS, Inc. Copies of the orders are attached hereto as Exhibits A and B, respectively.

ADORNO & ZEDER, P.A.

Wesley R. Parsons
Fla. Bar No. 539414
Jeffrey W. Blacher
Fla. Bar No. 0008168
2601 S. Bayshore Dr., Suite 1600
Miami, Florida 33133
Tel. (305) 858-5555
Fax. (305) 858-4777
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice of appeal was served via U.S. Mail this 18th day of September, 2000 upon the following:

Jon C. Moyle
Cathy M. Sellers
Moyle Flanigan Katz Kolins
Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee FL 32391
(850) 681-3828

William Rooney
John O. Postl
Global NAPS, Inc.
10 Merrymount Road
Quincy MA 02169
(617) 507-5111

Christopher W. Savage
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington DC 20006
(202) 828-9811

Beth Keating
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee FL 32399
(850) 413-6212

Charles J. Pellegrini, Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee FL 32399-0850
(850) 413-6232

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and/or petition for arbitration by Global NAPS, Inc. for enforcement of Section VI(B) of its interconnection agreement with BellSouth Telecommunications, Inc., and request for relief.	DOCKET NO. 991267-TP ORDER NO. PSC-00-1511-FOF-TP ISSUED: August 21, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.

FINAL ORDER GRANTING EXTENSION OF TIME AND DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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 or ITC^DeltaCom) on July 1, 1997, and was previously approved by the Commission in Docket No. 970804-TP, by Order No. PSC-97-1265-FOF-TP, issued October 14, 1997. DeltaCom's agreement was effective in 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 asserted that BellSouth had failed to properly compensate GNAPs for delivery of traffic to Internet Service Providers that are GNAPs' customers. GNAPs also alleged that the terms of the agreement provide for reciprocal compensation for the delivery of local traffic, including ISP traffic. GNAPs stated that BellSouth has failed to comply with specific provisions of the agreement concerning the payment of reciprocal compensation to GNAPs. GNAPs asked 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.

Scanned TO: Vicki Evelyn

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. Thereafter, a hearing on GNAPs' complaint was held on January 25, 2000.

By Order No. PSC-00-0802-FOF-TP, issued April 24, 2000, we rendered our post-hearing decision. Therein, we determined that:

> we believe that the plain language of the Agreement shows that the parties intended the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs. Therefore, it is not necessary to look beyond the written agreement to the actions of the parties at the time the agreement was executed or to the subsequent actions of the parties to determine their intent.

Order at p. 7.

Subsequently, on May 9, 2000, BellSouth filed a Motion for Reconsideration of our decision. On May 19, 2000, GNAPs filed a Motion for Extension of Time to Respond to the Motion for Reconsideration. Thereafter, GNAPs filed its response to BellSouth's motion on May 24, 2000. BellSouth did not respond to GNAPs' request for additional time to respond to the Motion for Reconsideration.

This is our decision on these motions.

I. Motion for Extension of Time

GNAPs asserts that neither Commission staff counsel nor counsel for BellSouth oppose its request for a two-day extension to respond to the Motion for Reconsideration. GNAPs contends that the extension will not affect any other time frames in this case.

As noted above, BellSouth did not file a response to the Motion.

The extension is hereby granted. The two-day extension will neither cause any undue burden to any party nor will it give any undue advantage to either party.

II. Motion for Reconsideration

A. BellSouth

The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

BellSouth contends that we should reconsider our decision because we have failed to consider or overlooked points of fact and law. BellSouth argues that this is the result of our rendering a decision based on facts outside the record, contrary to the law of the case as set forth by the prehearing officer in this case, and contrary to federal law.

First, BellSouth argues that we based our decision on facts outside the record. BellSouth references statements in the our Order wherein we indicate that the relevant intent in interpreting an adopted agreement is the intent of the original parties and that the original and adopted agreement should receive the same interpretation.[1] BellSouth contends that these statements result in an inconsistent decision.

Based on the referenced statements in our Order, BellSouth argues that the GNAPs/BellSouth agreement must receive the same interpretation as the DeltaCom agreement. BellSouth emphasizes that the Commission has, however, not yet interpreted the DeltaCom/BellSouth agreement. Thus, BellSouth argues that the Commission has either prejudged the outcome of the DeltaCom complaint, which is currently being addressed in a separate docket, or it has made a decision contrary to its own interpretation of Section 252(i) of the Act by requiring BellSouth to pay reciprocal compensation under an adopted agreement, when BellSouth may not be required to do so under the terms of the underlying agreement. Regardless, BellSouth contends that we have strayed from the law of the case as set forth by the prehearing officer when DeltaCom was excluded from this proceeding.

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[1]Order at p. 7-8.

BellSouth further argues that the prehearing officer specifically stated in his order denying DeltaCom intervention in this proceeding:

> . . . our decision in this case will consider only the GNAPs/BellSouth agreement and evidence relevant to that agreement. Our final decision will apply only to GNAPs and BellSouth. Therefore, any decision in this case will be based on evidence presented by the parties to this case and as such, will have no precedential value for any other case involving the same terms and conditions of an agreement between different parties. . .

Order No. PSC-99-2526-PCO-TP at pp. 5-6.

BellSouth contends that our final determination that the GNAPs/BellSouth agreement and DeltaCom/BellSouth agreement must be interpreted the same is inconsistent with the holding of the prehearing officer. BellSouth argues that we changed the process and evidentiary standard established by the prehearing officer, i.e. the "law of the case," in rendering our final decision. Therefore, BellSouth argues that it was denied due process to address the intent of the parties in negotiating the DeltaCom/BellSouth agreement.

BellSouth also argues that our decision departs from prior Commission decisions on compensation for ISP traffic. BellSouth notes that in this case, we stated that evidence of intent was not necessary, while in previous Commission decisions, the Commission analyzed evidence regarding the intent of the negotiating parties. BellSouth adds that even though we stated that we did not believe evidence of intent was necessary in this case, we still included an analysis of facts reflecting the parties' intent, including a criticism of BellSouth for failing to seek modification of the agreement before allowing GNAPs to adopt it. BellSouth contends that this analysis is not only based upon an erroneous understanding of the facts, but also upon a misunderstanding of BellSouth's obligations under Section 252(i) of the Act.

BellSouth further contends that had we applied the same analysis in this case that we used in prior decisions in cases regarding reciprocal compensation, then BellSouth would have prevailed. BellSouth emphasizes that here, there was evidence that BellSouth did not intend to treat ISP traffic as if it were local, and GNAPs even admitted that it knew BellSouth did not believe it should be treated as local. BellSouth adds that this Commission seems to improperly "infer" negative intent on behalf of BellSouth

because BellSouth did not clarify the language in the agreement before executing the adoption by GNAPs. BellSouth argues that this inference is inconsistent with the testimony of BellSouth's witness Shiroishi, who explained that GNAPs adopted the DeltaCom/BellSouth agreement to circumvent the negotiation process and to obtain reciprocal compensation language different from the standard language proposed by BellSouth.

BellSouth also argues that our decision violates federal law. BellSouth states that we found the language in the agreement is clear and only calls for reciprocal compensation for local traffic. Order at p. 6. Thus, based on this statement, BellSouth believes that it should have prevailed because the FCC has stated that traffic to ISPs is interexchange traffic, not local traffic. BellSouth contends that we deviated from our own prior orders and rendered a legal determination that traffic to ISPs is "local traffic," and as such, is subject to reciprocal compensation. BellSouth argues that this decision is clearly erroneous and should, therefore, be reconsidered.

In addition, BellSouth argues that our decision will have extensive negative consequences because every adopted agreement will have to be interpreted consistent with the original agreement. BellSouth emphasizes that the prehearing officer in this case denied intervention by the original party to the agreement, consistent with Commission policy on the handling of complaints under the Act. Thus, BellSouth contends that we will have to determine the rights of the parties to original agreements, before addressing complaints regarding adopted agreements, and will have to do so without the benefit of evidence regarding the actions and intent of the original parties. BellSouth argues that this will either violate the ALEC's due process rights, or we will have to reconsider its policy against intervention in complaint proceedings, unless it decides to refrain from rendering decisions on complaints regarding adopted agreements until the underlying agreement has been interpreted.

BellSouth also maintains that this Commission's policy is discriminatory to BellSouth, because BellSouth will never be able to amend any mistakes it may have made in the original agreements, and those mistakes will be carried over to the adopted agreements. ALECs, however, will be able to opt into another agreement if they determine that they have made a bad deal with BellSouth.

Finally, BellSouth argues that we should not feel reassured that "mistakes" will only be perpetuated as long as the original agreement is in effect. BellSouth notes that while we acknowledged, in this case, that the underlying agreement in this case expired last year, in other reciprocal compensation cases, we

have, essentially, perpetuated reciprocal compensation provisions beyond the life of the agreement by requiring the parties in arbitrations to "handle the [reciprocal compensation] issue consistent with the prior agreement."[2] Even though the provisions may not be specifically perpetuated in adopted agreements beyond the life of the original agreement, BellSouth argues that we are consistently perpetuating them through the arbitration process.

For all these reasons, BellSouth asks that we reconsider our decision in this case.

B. GNAPs

In its response, GNAPs argues that BellSouth has not met the standard for reconsideration in that it has not identified any mistake of fact or law made by this Commission in rendering its decision in this case. Thus, GNAPs contends that the Motion should be denied.

Specifically, GNAPs argues that our decision was based exclusively on facts in the record of this case. GNAPs contends that BellSouth has not identified any extra-record facts relied upon by the Commission. GNAPs further emphasizes that we clearly identified all of the facts upon which our decision is based and that all such facts are in the record.

GNAPs argues that we concluded that the Agreement does not differentiate between traffic bound for ISPs and "local traffic" and does not contain a mechanism to compensate for traffic to ISPs apart from reciprocal compensation. Therefore, we determined that the language in the agreement was clear in that it provides for reciprocal compensation for all local traffic, including traffic bound for ISPs. GNAPs adds that because we looked only at the plain language of the agreement, there was no need to further examine the subjective intent of the parties.

GNAPs further contends that BellSouth's argument that we relied upon the intent of the parties to the DeltaCom/BellSouth agreement, and therefore, upon extra-record facts, is inaccurate. GNAPs explains that this Commission very clearly stated that it did not need to look to substantive intent in this case. We merely added, as dicta, an explanation that if we did have to look to additional evidence of intent in a case addressing a less clearly worded agreement, then the relevant intent would be the intent of the original parties to the agreement. GNAPs emphasizes that we applied "hornbook law" to conclude that evidence of subjective

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[2]Citing Dockets Nos. 990149-TP, 990691-TP and 990750-TP.

intent is necessary only when a contract is ambiguous. In this case, however, this Commission found that the contract was not ambiguous, and therefore, we did not look beyond the language in the contract.

GNAPs also maintains that even if we did look to evidence of the intent of the original parties to the DeltaCom/BellSouth agreement, there was some evidence in the record regarding that intent. GNAPs explains that its witness Rooney provided an exhibit at hearing that was the testimony of a relevant DeltaCom employee presented in a dispute regarding this same contract before the Alabama Commission. GNAPs contends that this is direct evidence in this record as to the intent of the original parties to the agreement. GNAPs also notes that BellSouth also presented evidence that BellSouth had developed language to clarify its agreement, but never incorporated the clarification into the DeltaCom/BellSouth agreement. GNAPs believes, therefore, that it is reasonable to infer that BellSouth intended the plain meaning of the original contract language to prevail.

GNAPs also disputes BellSouth's conclusion that we have prejudiced BellSouth in its ongoing dispute with DeltaCom by rendering a decision in this case. GNAPs contends that BellSouth has not been precluded by this decision from making any argument it may see fit to make in the DeltaCom case. Therefore, BellSouth has not demonstrated any error made by this Commission.

GNAPs adds that there is also no basis for us delay ruling until the DeltaCom case has been concluded, because we have already determined that the agreement is clear. Therefore, we should resist any attempts by BellSouth to delay implementation of the agreement terms.

As for BellSouth's reliance upon the prehearing officer's Order Denying Intervention, GNAPs argues that BellSouth has failed to note that the prehearing officer's order was issued three days after the parties had already filed rebuttal testimony in this case. GNAPs contends that regardless of the prehearing officer's decision, BellSouth had already decided not to present detailed evidence of the subjective intent of the parties to the underlying agreement. Therefore, GNAPs argues that BellSouth's contention that we somehow changed the evidentiary standard of this case is without merit. BellSouth simply chose to stick with one strategy for presenting its case, while GNAPs took a "cover the bases" approach. GNAPs maintains that just because BellSouth has now realized that it may have "dropped the ball," does not mean that this Commission made a mistake in rendering its decision, or that BellSouth was somehow denied due process.

GNAPs notes that BellSouth has even attached the affidavit of Jerry Hendrix to its Motion for Reconsideration in an attempt to get us to consider additional testimony in this case. GNAPs contends that this testimony could have been presented at hearing, includes no new facts, and is simply BellSouth's attempt to rectify its own strategic mistakes. GNAPs further argues that in order to reopen the record of a case, there must be a significant change of circumstances not present at the time of the proceedings, or a demonstration that a great public interest will be served.[3] GNAPs argues that BellSouth has failed to demonstrate any basis for reopening the record to admit evidence that could and should have been a part of the original proceeding. GNAPs adds that if BellSouth were allowed to admit the evidence, then GNAPs would have to have an opportunity to cross-examine and rebut the testimony, which would lead to a perpetuation of this case, which the doctrine of administrative finality was designed to prevent except in the most extreme circumstances.

GNAPs also disagrees with BellSouth's contention that the prehearing officer's ruling somehow placed a substantive constraint on how this Commission could rule on the merits of this dispute. GNAPs argues that the doctrine of "law of the case" simply holds that the highest jurisdictional decision controls, as opposed to the prehearing officer's decision controlling the decision of this Commission.[4] GNAPs argues that under the "law of the case" doctrine, we could conclude, as a matter of law, that the DeltaCom/BellSouth agreement is unambiguous, based on the decision in this case. GNAPs explains that BellSouth would not be prejudiced in any way, because it has already had an opportunity in this case to contest the clarity of the language in the contract. However, under BellSouth's theory of the "law of the case," GNAPs emphasizes that the prehearing officer's denial of DeltaCom's petition to intervene would be a substantive determination that this Commission could not find that the contract is unambiguous. GNAPs contends that this is clearly not the intent of the prehearing officer's ruling.

In addition, GNAPs argues that we based our decision on the clear language in the agreement and upon fundamental principles of contract interpretation. GNAPs emphasizes that although the

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[3]Citing Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679 (Fla. 1979), and Peoples Gas System v. Mason, 187 So. 2d 335 (Fla. 1966).

[4]Citing Brunner Enterprises v. Department of Revenue, 452 So. 2d 550 (Fla. 1984), and Greene v. Massey, 384 So. 2d 24 (Fla. 1980).

Commission took a slightly different approach than that taken by the Commission in previous cases addressing reciprocal compensation provisions, the contract at issue here is a different contract.

GNAPs explains that this Commission's decision is also consistent with federal law. GNAPs contends that every federal court that has considered a state decision finding that reciprocal compensation is due for traffic to ISPs has determined that the state decision is consistent with federal law.[5] GNAPs further notes that BellSouth lost on this same issue in federal court in Atlanta five days before filing its Motion for Reconsideration with this Commission. GNAPs states that the federal court acknowledged the DC Circuit's recent reversal of the FCC's Reciprocal Compensation Order, and explained that the DC Circuit had vacated the FCC's Order because the FCC had failed to explain why the FCC's end-to-end analysis for determining whether a call to an ISP is local

> . . . 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.

BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 2000 U.S. Dist. LEXIS 6743 at **10-11 (N.D. Ga. 2000). Thus, GNAPs contends that the DC Circuit determined that the portions of the FCC's Reciprocal Compensation Order upon which BellSouth relies do not really make much sense. As such, GNAPs believes that this Commission's decision is consistent with federal law.

Finally, GNAPs argues that our decision is not discriminatory to BellSouth and will not place BellSouth in a situation in which it can never correct a mistake until the agreement expires. GNAPs emphasizes that BellSouth will only be held to these contracts for as long as the contracts last. GNAPs states that this is no different than any other business that wishes it had made a better deal for itself. GNAPs contends that BellSouth was allowed to freely negotiate the underlying contract in accordance with the provisions of the Act. While Section 252(i) may amplify any mistake BellSouth may have made in those negotiations, that is a part of the process contemplated by Congress and considered by the

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[5]Citing Southwestern Bell Telephone v. Texas PUC, 208 F.3d 475, 483 (5th Cir. 2000); Illinois BellTel. v. WorldCom, 179 F.3d 566, 572 (7th Cir. 1999); and US West Communications v. MFS Intelenet, 196 F. 3d 1112, 1122-1123 (9th Cir. 1999).

FCC in its rulemaking to implement the Act. GNAPs points out that the FCC developed Rule 47 C.F.R. §51.809 specifically to address situations in which the LEC has made a deal so detrimental to itself that successive CLECs should be prevented from obtaining the same deal through Section 252(i) adoptions.

As for the issue of whether we have erred in other dockets by requiring the parties to continue to operate under the terms of their prior agreements until the FCC renders a final decision on compensation for traffic to ISPs, GNAPs argues that this appears to be an appropriate policy. Nevertheless, GNAPs argues that BellSouth should raise that issue in ongoing arbitration dockets, instead of in this case, because the argument is not a basis for reconsideration in this matter.

For all of these reasons, GNAPs asks that BellSouth's Motion for Reconsideration be denied.

III. DETERMINATION

BellSouth argues that we erred by: 1)considering facts outside the record; 2)straying from the "law of the case," as established by the prehearing officer; 3) departing from prior Commission decisions on this issue; 4) deciding the issue contrary to federal law; and 5) rendering a decision which is discriminatory in its consequences to BellSouth.

1. Consideration of Facts in Evidence

BellSouth contends that simply by indicating which parties' intent is the relevant intent when interpreting an agreement, we somehow considered facts outside the record of this case. BellSouth adds that in doing so, we not only strayed from the record of this case, but rendered a potentially inconsistent decision in that the agreement between ITC^DeltaCom and BellSouth has not yet been interpreted. We disagree. While we did indicate that the intent of the original parties to an agreement is the relevant intent in interpreting an agreement, we also stated that in this particular case, the language is clear as to what that intent was. Therefore, there was no need for us to look to further evidence, such as the actions of the original parties, in order to determine the underlying intent. Instead, we found that the evidence that is in the record of this proceeding, the agreement language, is clear and provides a sufficient basis upon which we determined that the parties intended for the payment of reciprocal compensation to include traffic bound for ISPs. BellSouth has not demonstrated that our decision is inconsistent, much less in error. As such, BellSouth has failed to identify a basis for reconsideration of our decision.

2. Impact of Prehearing Officer's Decision on Petition to Intervene

BellSouth also contends that when the prehearing officer in this case denied ITC^DeltaCom intervention in this proceeding, that decision precluded us from considering the intent of the underlying parties to the agreement in rendering our final decision. BellSouth argues that it based its presentation of its own case upon the prehearing officer's decision; thus, BellSouth believes it has been denied due process to address the intent of the underlying parties. On this point, we agree with GNAPs. While we did explain at pages 7 and 8 of the Order that we believe that the relevant intent in interpreting an Agreement is the intent of the original parties, not the adopting party, those statements are not the basis for the decision in the case, nor are they responsive to any issues presented for consideration by this Commission. Furthermore, although our statements in our final order are somewhat contrary to the prehearing officer's determination in denying ITC^DeltaCom intervention, the decision to deny intervention did not abrogate BellSouth's right to due process in this case. In fact, the specific issue we were asked to address was:

> 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?

In order to answer this question, we did not find it necessary to analyze evidence as to the subjective intent of the parties, beyond its finding that the plain language of the agreement itself provides the best evidence of what the agreement requires. That is the only finding rendered in our Final Order. Discussion in the Order of the relevant intent when interpreting an adopted agreement is clearly dicta intended to provide all parties with guidance in the future as to how this Commission intends to approach the interpretation of adopted agreements, particularly when the language at issue is not as clear as it is in this case. The prehearing officer's decision did not prevent BellSouth from making any argument that the language is not clear, nor did it prevent BellSouth from putting on any evidence of the intent of the parties to the underlying agreement.

In denying ITC^DeltaCom intervention, the prehearing officer simply stated that only evidence presented by BellSouth and GNAPs would be considered in this proceeding. The Order Denying Intervention did not, however, preclude either of the parties from

presenting evidence of the intent of the original parties, nor did it restrict our ability to resolve the substantive issue in this case. In addition, we emphasize, as has GNAPs, that the Order Denying Intervention to ITC^DeltaCom was issued after BellSouth had already filed its rebuttal testimony. Thus, that decision could not have had any impact on the preparation of BellSouth's case. For these reasons, we do not believe that BellSouth has identified a mistake of fact or law made by this Commission in rendering our decision in this case.

3. Departure from Prior Commission Decisions on this Issue

BellSouth further argues that our decision in this case departs from our prior analysis and decisions regarding reciprocal compensation provisions in interconnection agreements. BellSouth emphasizes that in previous cases, we looked to evidence regarding the actions of the parties at the time they entered into agreements in order to determine the underlying intent. In this case, however, we only looked to the language in the agreement. BellSouth adds that even though we stated that we did not need to look to additional evidence of intent, we still analyzed and commented on matters that went beyond the language in the agreement.

Again, we do not believe that BellSouth's arguments on this point identify anything that this Commission did in this case that was in error. BellSouth has merely pointed out that our decision takes a somewhat different approach than that taken in past Commission decisions on similar issues. We did, however, acknowledge in our Final Order that we were taking a different approach than that taken in past decisions, and explained our basis for doing so. We are not required to follow prior decisions in arbitrating complaints under the Act, particularly when the contract at issue is a different contract than those previously interpreted.

As for the comments in the Order that BellSouth believes demonstrate an analysis of intent, we note that we clearly stated in our Final Order that the extraneous analysis was not the basis of our decision. As for noting that BellSouth never amended the agreement, even though amendatory language had apparently been developed, this merely indicates that we acknowledged that the language at issue was the language from the original ITC^DeltaCom/BellSouth Agreement. There is no indication in the Order that we drew any inferences regarding intent based upon BellSouth's failure to amend the agreement, negative or otherwise. Even if we did draw some "negative inference," it would not constitute a mistake of fact or law in our decision. Although we had already clearly stated in the Order that our decision was based

on the clear language of the Agreement, we were not precluded from "covering all the bases" and further addressing all the arguments presented. As such, BellSouth has not identified any mistake of fact or law made by this Commission in rendering our decision.

4. Decision Not Contrary to Federal Law

BellSouth also contends that our decision is contrary to the FCC's decision that traffic to ISPs is not local traffic. BellSouth contends that our decision clearly determines that traffic to ISPs is local traffic; therefore, it is in error. Staff, however, disagrees. As the FCC specifically acknowledged in its Reciprocal Compensation Order, Order 99-38 at ¶ 26,

> A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission (FCC) rule regarding ISP-bound traffic.

While the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit or Court) recently vacated the FCC's decision in Order 99-38, the Court specifically stated that it did not reach a decision on the arguments raised by the ILECs regarding the state commissions' jurisdiction to compel payments for traffic to ISPs. Thus, there is still no indication at any level that state commissions are prevented from making their own determinations regarding the appropriate compensation for this traffic. Instead, the DC Circuit stated that it was vacating the FCC's ruling because the FCC had not satisfactorily explained why LECs that terminate calls to ISPs are not viewed

> . . . as 'terminating . . . local telecommunications traffic,' and why such traffic is 'exchange access' rather than 'telephone exchange service'. . . .

Bell Atlantic Telephone Companies v. FCC, 206 F.3d 1, 9 (D.C. Cir. 2000). As GNAPs points out, these same statements taken from the FCC's Order 99-38 and this rationale are the primary basis that BellSouth has relied upon for its arguments that the traffic sent to ISPs should not be considered "terminated" for purposes of reciprocal compensation.

In this case, we determined that the language in the agreement was clear and that the parties intended to include traffic to ISPs within the definition of "local traffic." In reaching this

conclusion, we emphasized that there is nothing in the Agreement to indicate that traffic to ISPs should be treated otherwise. Without some indication in the agreement that traffic to ISPs was intended to be treated differently or somehow segregated from "local traffic," although dialed by the customer as a local call, we can find no basis for BellSouth's contention that the definition of "local traffic" is not clear. Certainly, the DC Circuit's ruling impairs, at a minimum, any basis for BellSouth's argument to the contrary. Regardless, BellSouth has not demonstrated that this Commission's decision conflicts with federal law, and as such, it has failed to identify an error of fact or law in our decision. Furthermore, as BellSouth points out in its own motion at page 8, fn. 6, much of this same argument was already presented to and considered by us in our Final Order.

5. Decision Not Discriminatory to BellSouth

As for BellSouth's contentions that our decision is discriminatory and will "amplify the effect on BellSouth of errors in business judgment," we note much of BellSouth's argument goes to procedural difficulties that may arise in future cases. Such argument does not identify an error in this Commission's decision in this case. In fact, in discussions at the Agenda Conference when we considered our staff's post-hearing recommendation in this case, it was pointed out that in future cases, it may be necessary to allow intervention by the original party to the agreement--particularly if the agreement is not clear--if the party that has adopted an agreement files a complaint before an interpretation of that agreement has been rendered for the original parties.

BellSouth also contends that any perceived error in the agreements will be passed on to other ALECs that adopt the agreement. While this is true, it does not identify an error in our decision, although it may be a cautionary point for BellSouth to consider in its future negotiations.

Finally, BellSouth argues that we have been perpetuating these reciprocal compensation terms beyond the life of the agreements in some arbitration cases by telling the companies to continue operating under the terms of their prior agreements until the FCC reaches a decision regarding traffic to ISPs. In referencing our decisions in other cases, BellSouth has not identified an error in the decision in this case. We also note that we have not yet rendered a decision on the pending arbitration case (Docket No. 991220-TP) between these two companies. Thus, the terms of this agreement have not been extended through arbitration. In addition, the decisions referenced by BellSouth were based upon the evidence presented in those particular arbitration cases and upon the state of the law at the time of this Commission's decisions in those

cases. Thus, BellSouth has not identified a basis for reconsideration of the decision in this case.

IV. CONCLUSION

Based on the foregoing, BellSouth's Motion for Reconsideration be denied. BellSouth has failed to identify any mistake of fact or law made by this Commission in rendering our decision in this case.

It is therefore

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that Global NAPs, Inc.'s Motion for Extension of Time to Respond to Motion for Reconsideration is granted. It is further

ORDERED that this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 21st day of August, 2000.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by the Commission's final action in this matter may request judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).

FILE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and/or petition for arbitration by Global NAPS, Inc. for enforcement of Section VI(B) of its interconnection agreement with BellSouth Telecommunications, Inc., and request for relief.	DOCKET NO. 991267-TP ORDER NO. PSC-00-0802-FOF-TP ISSUED: April 24, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

APPEARANCES:

Jon C. Moyle, Jr., Esquire, and Cathy M. Sellers, Esquire, Moyle Flanigan Katz Kolins Raymond & Sheehan, P.A., 118 North Gadsden Street, Tallahassee, Florida 32301 and Christopher W. Savage, Esquire, Cole, Raywid & Braverman, L.L.P., 1919 Pennsylvania Avenue, N.W., Suite 200, Washington, D.C. 20006.
On behalf of Global NAPs, Inc..

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

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

FINAL ORDER ON COMPLAINT

BY THE COMMISSION:

I. 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 (Agreement). The subject Agreement was initially executed by ITC^Deltacom, Inc.,(DeltaCom) on July 1, 1997, and was previously approved by the Commission by Order No. PSC-97-1265-FOF-TP, issued October 14, 1997, in Docket No. 970804-TP. DeltaCom's Agreement is effective in 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 (ISPs) that are GNAPs' customers. 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 January 25, 2000.

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.

II. Compensation for Traffic to Internet Service Providers

As stated above, the issue before us is 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 Agreement in question is an amended version of an Agreement between ITC^DeltaCom and BellSouth, executed in July 1997, and amended in August 1997. This Agreement was subsequently adopted by GNAPs, pursuant to Section 252(i) of the Telecommunications Act of 1996 (the Act).

A. AGREEMENT 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.

(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.

(Fourth Amendment to Agreement, page 2).

1. 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 Agreement. 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. Witness Rooney explains that he found this particularly relevant, because in his experiences in other states, the incumbent local exchange company (ILEC) would usually try to put conditions on the adoption if the ILEC had a problem with provisions in the Agreement. In this case, however, he maintains that BellSouth did not.

Witness Rooney further emphasizes that the Agreement does not contain a means to segregate traffic bound for ISPs from other traffic. Thus, the witness argues that it is clear that traffic to ISPs is subject to reciprocal compensation under the definition of

local traffic. Furthermore, while witness Rooney agrees that the obligation to pay reciprocal compensation only applies to local traffic, he emphasizes that at the time the Agreement was drafted, ISP-bound traffic was being treated as local traffic and that nothing in the Agreement indicates that it should be treated otherwise. He notes that the FCC's ruling on the jurisdictional status of traffic to ISPs, FCC Order 99-68, issued February 26, 1999, (Declaratory Ruling) was released well after the original DeltaCom/BellSouth Agreement was executed. We note that FCC Order 99-68 was also released after GNAPs adopted the DeltaCom Agreement.

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.

Further emphasizing that the FCC's decision came out after the DeltaCom Agreement was executed, witness Rooney states:

> 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 being treated like other local traffic.

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 Agreement. 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.

It appears, however, that GNAPs has raised 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. As such, we have not considered this argument and it does not serve as the basis for our decision.

2. 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." (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. He argues that the FCC upheld BellSouth's position just a little over a month later. 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.

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. . . ."

BellSouth witness Shiroishi concedes, however, that subsequent to the execution of the DeltaCom Agreement, BellSouth did develop clarifying language addressing traffic to ISPs. 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 BellSouth's own understanding of the clarity of the Agreement.

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.

DETERMINATION

We agree with BellSouth that the language in the Agreement adopted by GNAPs is clear and only calls for reciprocal compensation for local traffic. We emphasize, however, that the Agreement does not segregate traffic to ISPs from the rest of local traffic.

We note that in past decisions on somewhat similar issues, we have 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 when the language in the agreement is not clear. See Order No. PSC-98-1216-FOF-TP; and Order No. PSC-99-0658-FOF-TP.

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, we also agreed that, in the construction of an agreement, the circumstances in existence at the time the agreement was made are evidence of the parties' intent. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rhg. den. (Fla. 1951). What a party did or omitted to do after the agreement was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rhg. 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.

In this case, however, we believe that the plain language of the Agreement shows that the parties intended the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs. Therefore, it is not necessary to look beyond the written agreement to the actions of the parties at the time the agreement was executed or to the subsequent actions of the parties to determine their intent.

As noted above, we find it particularly noteworthy that 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, as explained by GNAPs. Thus, nothing in the Agreement indicates that this traffic was to be treated differently than local traffic. In addition, while BellSouth may have already made its position on traffic to ISPs publicly-known by the time GNAPs adopted the DeltaCom Agreement, BellSouth never modified the Agreement adopted by GNAPs to reflect its position, as noted by GNAPs' witness Rooney, even though BellSouth's witness Shiroishi indicated that BellSouth had developed such an amendment.

In addition, GNAPS witness Selwyn testified that the FCC has not precluded the state commissions from addressing this issue. We agree. 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].

We emphasize that the FCC's Order was issued after GNAPs adopted the DeltaCom/BellSouth Agreement; therefore, even if the language in the Agreement necessitated consideration of the surrounding circumstances at the time the agreement was executed to determine the parties' intent, the FCC Order 99-68 could not demonstrate or support either parties' argument regarding such intent or understanding of the law at the time the Agreement was adopted.

Although we need not look beyond the plain language in the Agreement in this instance, we note that we do not believe that the intent of the parties at the time of the adoption is the relevant intent when interpreting an Agreement adopted pursuant to Section

252(i) of the Act. Rather, we believe the intent of the original parties is the determining factor when the Agreement language is not clear. Otherwise, original and adopting parties to an Agreement could receive differing interpretations of the same Agreement, which is not consistent with the purpose of Section 252(i) of the Act. We also note that we believe the underlying Agreement negotiated by the original parties terminates on the date established by the original parties to the Agreement. Therefore, adopting an Agreement under Section 252(i) cannot perpetuate the terms of an agreement beyond the life of the original agreement.

B. ADDITIONAL ARGUMENTS

In addition to the arguments regarding the Agreement language and the intent of the parties, the parties also presented technical and policy arguments regarding traffic to ISPs. We have considered these additional arguments, as set forth below, although the basis of our decision is the plain-meaning of the language in the Agreement.

1. Jurisdictional Nature of Calls to ISPs

BellSouth argues that the FCC has consistently held, beginning with its original access order in 1983, that enhanced service providers (ESPs), which include ISPs, serve their customers through interstate access. BellSouth witness Shiroishi testifies that, "Throughout the evolution of the Internet, the FCC repeatedly has asserted that ISP-bound traffic is interstate." She adds that the FCC concluded in paragraph 12 of the Declaratory Ruling that calls do not terminate at the ISP's local server, but, instead, continue to the ultimate destination or destinations, which may be in another state. BellSouth witness Halprin agrees 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."

In response, GNAPs witness Selwyn agrees that the FCC has held since 1983 that calls placed to ESPs are jurisdictionally interstate. He explains, however, that the FCC has required in a number of contexts that ISP traffic should be treated as local.

GNAPs witness Goldstein further 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.

The witness adds that, technically, ISP-bound calls are "indistinguishable from local voice calls," and contends that "[f]rom a traffic perspective, an ISP's modem pool looks very much like an incoming PBX trunk group." GNAPs witness Selwyn added that ISP calls are also economically equivalent to local calls.

Although BellSouth witness Milner argues that the supervisory signals or the signaling protocol used does not determine the nature of the traffic, the evidence shows that BellSouth does, however, treat traffic to ISPs as local in a number of ways. BellSouth 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." He argues, however, 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.

2. Methods of Compensation

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.

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]

He contends that the ISP should compensate local carriers through usage-based access charges, as IXCs do, and recover that cost directly from the ISP customer. The witness also 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.

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."

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."

In response, GNAPs witness Selwyn states that bill and keep is based on the notion that the volume of calls flowing in each direction is balanced. He maintains that traffic is not likely to be in balance, and as a result, carriers have typically adopted the reciprocal compensation model.

3. Cost Recovery

If reciprocal compensation is not paid, GNAPs witness Selwyn argues that the originating carrier avoids the costs associated with call termination. GNAPs witness Rooney agrees, and argues that because traffic may not balanced, BellSouth would, essentially, be using GNAPs' facilities for free.

BellSouth witness Banerjee argues that when the compensation exceeds the actual cost to the ALEC of handling that traffic, ALECs will try to garner as much ISP in-bound traffic as possible in order to reap the benefits of reciprocal compensation. BellSouth witness Halprin states that the current model results in reciprocal compensation that greatly overcompensates ALECs for terminating traffic to ISPs originating on BellSouth's network. The witness maintains that 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.

GNAPs witness Selwyn contends that the $.009 per minute rate contained in the DeltaCom Agreement represents the cost that each participating LEC, the incumbent and the 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, the witness argues that BellSouth incurs a termination cost for traffic delivered to the ISP, which is avoided if the ISP is the customer of an ALEC. According to witness Selwyn, in either case, BellSouth would have the same cost. He argues, therefore, that the current method of compensation is economically neutral. He adds that if the rate were lower, ALECs would seek high-volume call originating customers, because the ALECs would be underpaying BellSouth for terminating calls.

Witness Selwyn further notes that a call set-up rate could have been established for calls to ISPs, with separate call duration elements, if the duration of calls to ISPs were, in fact, a material cost factor. He emphasizes, however, that such a provision is not in the DeltaCom Agreement adopted by GNAPs.

DETERMINATION

While we have heard and considered the above arguments, the basis for our decision is set forth above in Section I of this Order. We believe the language is clear and that it requires the payment of reciprocal compensation for traffic to ISPs. We note that the evidence is also clear that a cost is involved in the delivery of this traffic, including traffic to ISPs, and while a rate structure other than reciprocal compensation could have been used in the Agreement, it was not. The rate in the Agreement was set before GNAPs adopted it and was not modified by GNAPs and BellSouth. Therefore, there is no basis to set a different rate in this case. The rate in the Agreement controls.

III. ATTORNEY'S FEES

The parties have taken similar positions on this issue. The parties seem to agree that the language in the Agreement is clear that the prevailing party is entitled to attorneys' fees.

DETERMINATION

We agree. The language in the Agreement is clear that the prevailing party in a dispute under this Agreement is entitled to attorneys' fees. Therefore, GNAPs is entitled to collect attorneys' fees associated with this dispute.

IV. CONCLUSION

Based on the foregoing, we find 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. Furthermore, the Agreement clearly provides that the prevailing party is entitled to receive attorneys' fees. Thus, based on our decision herein, GNAPs is entitled to attorneys' fees.

It is therefore

ORDERED by the Florida Public Service Commission that the dispute between Global NAPs, Inc. and BellSouth Telecommunications, Inc. is resolved as set forth in the body of this Order. It is further

ORDERED that Global NAPs, Inc. is entitled to attorneys' fees as set forth herein. It is further

ORDERED that this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 24th day of April, 2000.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).