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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of: Global NAPS SOUTH, INC. For Arbitration of Interconnection Rates, Terms and Conditions and Related Relief of Proposed Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996	)	Docket No. 991220-TP Filed April 3, 2000

GLOBAL NAPS SOUTH, INC.'S NOTICE OF FILING AND SERVICE OF DIRECT TESTIMONY

GLOBAL NAPS SOUTH, INC., by and through its undersigned attorneys, hereby gives notice that on this 3rd day of April, 2000 it filed the direct testimony of its witness, William J. Rooney, Jr., and served copies of same as indicated on the attached certificate of service.

Respectfully submitted this 3rd day of April, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 3rd day of April, 2000 by U.S. Mail to Nancy White, General Counsel, BellSouth Telecommunications, Inc., 150 South Monroe Street, Suite 400, Tallahassee, FL 32301, Michael P. Goggin, BellSouth Telecommunications, Inc., Museum Tower, Suite 1910, 150 West Flagler Street, Miami, FL 33130, Phil Carver, BellSouth Telecommunications, Inc., BellSouth Center, Suite 4300, 675 W. Peachtree Street, N.E., Atlanta, GA 30375, and Beth Keating, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399.

Cathy M. S

Cathy M. Sellers

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Before the

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

In the Matter of: Petition of Global NAPS SOUTH, Inc., For Arbitration of Interconnection Rates, Terms and Conditions and Related Relief of Proposed Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996	Docket No. 991220-TP

Initial Testimony

of

WILLIAM J. ROONEY, JR.

on behalf of

Global NAPs, Inc.

April 3, 2000

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TESTIMONY

Qualifications

Q. Please state your name, position and business address.

A. My name is William J. Rooney, Jr. I am Vice President and General Counsel of Global NAPs, Inc., the petitioner in this case ("Global NAPs"). My business address is 10 Merrymount Road, Quincy, Massachusetts.

I have been involved with Global NAPs and its interconnection issues since before the company began operations in late 1997. I have been personally involved in determining Global NAPs' interconnection arrangements with BellSouth and other incumbent local exchange carriers ("ILECs") for that entire time. I have previously testified before this Commission in Docket No. 991267-TP. That case involved the question of whether the parties' prior interconnection agreement, in calling for compensation for "local" traffic, includes calls to Internet Service Providers ("ISPs") within that requirement. That general issue is present in this case as well.

Summary

Q. Please summarize your testimony.

A. My testimony makes three general points. First, it is quite clear that the only reasonable way to handle the question of ISP-bound calling is to include such calls within the scope of reciprocal compensation. Essentially every state commission to have considered this question has reached this result. The two states with which I am most familiar that have reached contrary results — Massachusetts and New Jersey — did so on the basis of their understanding of the Federal Communications Commission's ("FCC's") *Reciprocal Compensation Order* from February 1999, with which this Commission is quite familiar. But on March 24, 2000, the federal court of appeals for the District of Columbia Circuit vacated the *Reciprocal Compensation Order* on the basis of reasoning that confirms that, for purposes of Section 251(b)(5) of the Communications Act of 1934, as amended (the "Act"), ISP-bound calls indeed "terminate" at the local ISP, so that reciprocal compensation for such calls is due as a matter of law. The court specifically rejected the FCC's reasoning, which confused the question of whether ISP-bound traffic is jurisdictionally interstate, on the one hand, with the more limited question of whether ISP-bound calls are subject to compensation under Section 251(b)(5), on the other. Clearly, if there were any doubt before, it is clear now that the correct answer for this Commission — indeed, I would submit, the legally compelled answer — is to include ISP-bound calls within the set of calls for which compensation is due.

The second question, then, is *how much* compensation is due? The parties current interconnection agreement calls for compensation at the rate of $0.009 per minute. Global NAPs is not aware of any reason that this figure should be changed. That said, if BellSouth objects to including that figure in a new agreement, then the per-minute rate should be no lower than a rate that this Commission has established based on the FCC's TELRIC methodology (*e.g.*, an unbundled network element rate for local switching). TELRIC applies because the Supreme Court affirmed the power of the FCC to establish a binding nationwide pricing methodology. If no such TELRIC-based rate has been established, then as a matter of federal law the Commission should establish a per-minute rate within the $0.002 to $0.004 proxy rate contained in the FCC's regulations on this point.

The third issue, broadly speaking, is what to do with the rest of the contract. Global NAPs' position is simple. The parties have an existing interconnection agreement that — other than the two issues noted above — has not been the source of any particular controversy on any point. The agreement works. BellSouth has no doubt been deploying dozens of lawyers over the last several years trying to refine, rearrange, and modify its "standard" agreement so that in countless ways the language is shaded to favor BellSouth's interests. But there is no basis under the law to require small CLECs such as Global NAPs to be put to the Hobson's choice of either accepting BellSouth's innumerable revisions to an existing, working agreement or having to spend the time and money to litigate each change that seems to be against its interests. That is a recipe for allowing BellSouth to establish more and more of its favored contract by a form of legal accretion. There is no legal or public policy need for this Commission to accede to this situation. So, Global NAPs' position is that, other than the need to clearly establish that ISP-bound calls are *subject to compensation* just like other local calls, and other than the need to establish a precise per-minute rate for compensation for call termination (including ISP-bound calls), Global NAPs' existing agreement with BellSouth is reasonable, and its terms should be reestablished for an additional two year term.

For this reason, we view BellSouth to bear the burden of explaining both *what* it wants to see different in a new contract, as compared to the parties' current agreement, and *why* it makes sense to force Global NAPs to change from existing contractual terms that the Commission has already found reasonable, to new terms that Global NAPs does not need and does not want. We reserve the right, of course, to respond to whatever BellSouth presents on those topics.

Treatment of ISP-Bound Calls.

Q. What is Global NAPs' position with respect to the treatment of ISP-bound calls for purposes of reciprocal compensation?

A. ISP-bound calls should be subject to reciprocal compensation just like any other calls that fall within the calling party's local calling plan. If for some reason an end user in Key West calls an ISP in Tallahassee, that would, of course, be a long-distance call; in that case the ILEC and the CLEC would share in the terminating access revenues assessed on the long distance carrier handing the call off in Tallahassee. But in the real world, end users almost never make long distance calls to their ISPs; to the contrary, they select ISPs with local points of presence and local telephone numbers precisely so that calls to the ISP will be local. In those cases, for reciprocal compensation purposes, ISP-bound calls should be treated as local as well.

Q. Why is this the correct result?

A. This Commission is quite familiar with the debate over the proper treatment, for compensation purposes, of ISP-bound calls, so I will not belabor the economic or policy issues here. As described below, the most important recent development on this front is a new decision from the federal court of appeals for the District of Columbia.

In general, however, and as a policy matter, when an ILEC's customer calls an ISP served by a CLEC, that call can only go through because the CLEC has spent real money installing real equipment — basically, switching gear — that must be in place if the ISP is to be able to serve *its* customers. The notion that some ILECs have advanced from time to time that CLECs should get ***no*** compensation for the work they do in delivering calls to ISPs is economically totally irrational. No responsible regulator endorses this position.

Note also that ISPs are entitled to purchase local business lines like any other end user, and that local business lines do not include charges for incoming calls. This means that the idea sometimes advanced by ILECs, that CLECs should recover the costs of switching ISP-bound calls from the ISPs, is not possible in the real world. This means that if there is going to be competition in Florida for the business of ISPs, then compensation must be paid for these calls.

This Commission should take that concern seriously. While it has become almost part of our everyday experience, and therefore perhaps less remarkable, the fact is that more and more people every day sign up for dial-up access to the internet from some ISP in Florida. The only way that Floridians are going to be able to fulfill their desire to reach the Internet is if the ISPs they sign up with have enough incoming lines to meet demand. Those incoming lines have to be provided by one or more telecommunications carriers. When CLECs perform that function by providing ISPs with the connections they need to the public switched network, the CLECs are performing an important public service. They are also providing the ISPs themselves with competitive alternatives. Both of these functions serve the public interest, as well as the purposes of the 1996 Act.

Again, this is simply a brief summary of the policy considerations, with which this Commission is quite familiar, that lead to the conclusion that ISP-bound calls should be subject to compensation like other local calls.

Q. You mentioned a recent decision from the federal court of appeals in the District of Columbia. What did that decision hold?

A. The court vacated the FCC's *Reciprocal Compensation Order* "for want of reasoned decisionmaking." As described below, the court found that the FCC had confused the question of legal jurisdiction over ISP-bound traffic (to which the FCC's traditional "end-to-end" analysis might reasonably apply) and the question of whether ISP-bound traffic is "local" for reciprocal compensation purposes (to which the FCC's "end-to-end" analysis does not appear to apply).

In terms of the usual arguments that have been raised about this issue, the court's order confirms that there is no basis for subjecting ISP-bound calls should be subject to some separate, special treatment because of questions about legal jurisdiction over the traffic.

Q. Please explain.

A. In the now-vacated *Reciprocal Compensation Order*, the FCC fell into the trap of thinking that the jurisdictional status of ISP-bound calls affects affected their classification as "local" for purpose of reciprocal compensation under Section 251(b)(5) and the FCC's rules regarding call "termination." The D.C. Circuit recently vacated this order "for want of reasoned decisionmaking," and specifically took the FCC to task for blindly assuming that the "end-to-end" analysis used for ***jurisdictional*** purposes could properly be applied to the question of where a call "terminates" for reciprocal compensation purposes.

For purposes of this testimony I assume that the Commission and BellSouth both have access to the D.C. Circuit's opinion (*Bell Atlantic Telephone Cos., et. al., v. FCC,* No. 99-1094 (D.C. Cir. March 24, 2000) ("*Slip. Op.*"). We will be happy to provide copies if anyone needs one. I want to note a few of the court's key findings, however.

- In describing ISPs, the court noted: "ISPs are entities that allow their customers access to the internet. Such a customer, an 'end user" of the telephone system, will use a computer and a modem ***to place a call to the ISP server in his local calling area.*** " *Slip. Op.* at 6 (emphasis added). In other words, the court understood that the ISP — and not some distant web site — is the "called" party.

- The court makes this explicit a little later in the opinion. The court first notes the FCC's own definition of call "termination," "namely 'the switching of traffic that is subject to Section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises.' ... Calls to ISPs ***appear to fit this definition:*** the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, ***which is clearly the 'called party.'*** " *Slip Op.* at 9 (emphasis added). In other words, when an end user calls an ISP — the end user calls the ISP, not some *distant*, *non*-local location. There is no way to square this ruling with any conclusion other than that ISP-bound calls are "local" calls to the same extent as any other call, *i.e.*, as long as the number dialed is within the calling party's local calling plan.

- The court specifically rejected the FCC's effort to rely on prior cases — in which the FCC applied the "one call" or "end-to-end" theory to circuit-switched long distance service — *in* deciding whether ISP-bound calls are "local" or not. The court emphasized that ISPs are information service providers, not telecommunications providers. *See Slip Op.* at 10-11. Here again, the court took pains to emphasize that the jurisdictional question is distinct from the reciprocal compensation question. As the court put it (in dismissing the FCC's cases): "Even if the difference between ISPs and traditional long distance carriers is irrelevant for jurisdictional purposes, ***it appears relevant for purposes of reciprocal compensation.*** Although ISPs use telecommunications to provide information service, ***they are not themselves telecommunications providers*** (as are long-distance carriers)." (Emphasis added.) The court noted approvingly the analogy between ISPs and other telecommunications-intensive businesses such as pizza delivery firms, taxicab companies, credit care verification firms, and others.

- Perhaps most critical in clearing up some of the confusion that the ILECs and the FCC have jointly generated on this point, the court notes (on page 11) that the fact that an ISP initiates further communications as a result of calls from end users "does not imply that the original communication does not 'terminate' at the ISP." Later on the same page the court says it again: "Once again, however, the mere fact that the ISP originates further *telecommunications* does *not* imply that the original telecommunication does not 'terminate' at the ISP." It could not be clearer that the court understands that ISP-bound calls "terminate" at the ISP being called.

So, it seems quite clear that ISP-bound traffic indeed "terminates" at the ISP being called, so ISP-bound traffic is legally subject to compensation just like any other local calls. The Commission in its order in the case should direct that such compensation be part of the parties' contract.

The Proper Call Termination Rate.

Q. What rate should apply for the termination of local traffic?

A. The parties' current agreement provides for compensation of \$0.009 per minute. Global NAPs sees no need to revise that figure. If BellSouth contests it, however (as will be apparent from BellSouth's testimony) then the per-minute rate should be no less than an unbundled local switching rate established by this Commission pursuant to the FCC's "TELRIC" methodology. If no such rate has been established, then a "proxy" rate in the range of \$0.002 to \$0.004 per minute, as per the FCC's rules, should be established until a fully TELRIC-compliant rate can be established.

Q. Why should a TELRIC-based rate, or a proxy, be used if the parties do not agree?

A. The FCC originally mandated the use of the TELRIC methodology and proxy rates in its rules from August 1996. Those rules were stayed by the 8th Circuit from October 1996 through early 1999, when the 8th Circuit's ruling was reversed by the Supreme Court. Now, the FCC's rules regarding TELRIC rates — and the use of proxies while TELRIC rates are being determined — are in full force. They therefore govern this case.

Other Issues.

Q. Please summarize Global NAPs' position on the other issues in this case?

A. Global NAPs has a contract with BellSouth. That contract was established in January 1999 when Global NAPs adopted it; it had previously defined the relationship between BellSouth and ICG DeltaCom. While innumerable variations on different contractual themes are possible, this contract basically works.

During the negotiation process, Global NAPs was frustrated by BellSouth's insistence that the parties start from "ground zero" to renegotiate a new contract, based on BellSouth's "standard" template agreement. In Global NAPs' experience — and in my more than two decades of experience as an attorney — when parties have a commercial agreement that works, and it is up for renewal, a party that is displeased with any particular aspects of the agreement will identify the problem areas and suggest revisions to deal with the problems.

For this reason, it is perfectly appropriate for Global NAPs and BellSouth to be litigating the question of whether ISP-bound calls are treated as local or not. Global

NAPs thinks they should be, and BellSouth doesn't want them to be. But Global NAPs cannot understand why it should have to start from scratch to establish a commercial relationship with BellSouth when it already has a commercial relationship that is working.

For this reason, Global NAPs has maintained that the correct solution to this case is to litigate questions relating to ISP-bound calling — whether such calls are included for compensation purposes, and the rate to be applied — and to otherwise simply re-establish the parties same contractual relationship.

Q. Are there public policy reasons that the Commission should resist forcing CLECs to work from BellSouth's standard "template" agreement?

A. Yes, there are two main public policy concerns here. First is the unfairness to small CLECs that results from having to renegotiate an agreement from scratch. Second is the way in which such a process manipulates the Commission's own decisionmaking apparatus to add legitimacy, over time, to terms that are not truly reasonable.

Q. Please explain the unfairness to CLECs you just mentioned.

A. BellSouth is a multi-billion-dollar ILEC. It has enormous legal resources at its disposal to constantly review and refine each of the terms of its "standard" contract in a manner that it finds most favorable to its own interests. Small CLECs do not have the time or resources to spend dozens if not hundreds of thousands of dollars in legal fees to analyze a contract of several hundred pages. As a result, a small CLEC such as Global NAPs will of necessity only review the key terms of an agreement to see if those terms are acceptable. Terms contained in sections of the agreement that are not immediately relevant to the small CLEC will not be objected to. So if small CLECs have to renegotiate a contract from scratch every two or three years, that will be an enormous and unfair drain on their limited resources. This is not fair "negotiation" as envisioned by the 1996 Act.

Q. What is the second public policy problem you noted above?

A. It flows from the first. A BellSouth-drafted agreement running to several hundred pages will almost certainly contain provisions that are heavily "tilted" in BellSouth's favor. While each small CLEC may focus on a few key issues, there will be dozens of issues where few CLECs will have focused at all. If BellSouth is permitted to demand that an entirely new contract be established every two or three years, then innumerable provisions that unreasonably favor BellSouth will be incorporated into agreements approved by this Commission, simply by virtue of the fact that the small CLECs have not been in a realistic position to object to and litigate those issues.

Q. What is the solution to these problems?

A. It is actually fairly simple. To the extent that a CLEC is operating under an interconnection agreement that has already been approved by the Commission, either party should be free on renegotiation to propose specific changes to address specific problems with existing contractual provisions. But if a CLEC is satisfied with an agreement that had already been approved by the Commission, the only changes to the agreement that may be established in an arbitration over the CLEC's objection are those provisions that BellSouth is able to prove, during arbitration, are superior to the parallel provisions in the existing agreement.

Q. How will this advance the public interest in Florida?

A. BellSouth will be completely free to make its case that any provision in any agreement needs to be changed to reflect some new circumstances or new concerns of BellSouth. CLECs as well will be able to explain why changes are needed. But by preventing BellSouth from what amount to wholesale, unilateral revisions to the parties' interconnection agreement, the Commission will be protecting CLECs from abuse in the negotiation/arbitration process arising from the sheer size and scope of BellSouth's operations, as compared to those of small CLECs like Global NAPs.

Q. How does this relate to the issues in this particular arbitration?

A. Global NAPs' position from the beginning has been that, with the exception of the need to clarify the situation regarding ISP-bound calls, its existing interconnection agreement with BellSouth is reasonable, complies with the Act, and can be re-established for an additional two years. It is BellSouth, not Global NAPs, that wants to make other changes. BellSouth, therefore, clearly bears the burden of proof with respect to whatever changes it wishes to make. Consequently, Global NAPs awaits

BellSouth's testimony in this matter to assess how to respond to the specific changes that BellSouth seeks to establish. We reserve the right to respond in our reply testimony on any of those issues.

Conclusion.

Q. Please summarize the main points of your testimony.

A. The Commission should include ISP-bound calling within the scope of local calling subject to reciprocal compensation. The call termination rate should be the Commission's most recently established arbitrated rate that meets the FCC's TELRIC standard; if no such rate has been established, then a rate consistent with the FCC's default proxy rates should be imposed. On the various other issues that BellSouth wants to address in this case, Global NAPs will respond when it has reviewed BellSouth's testimony. As a general matter, however, the Commission should not permit ILECs to abuse the negotiation and arbitration process by forcing small CLECs with adequate interconnection contracts to review and negotiate an entirely new contract simply to keep in business going forward.

Q. Does that conclude your testimony?

A. Yes, it does.