BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

| In re: Petition by Global NAPS, Inc. for arbitration of interconnection rates, terms and conditions and related relief of proposed agreement with BellSouth Telecommunications, Inc. | DOCKET NO. 991220-TP<br>ORDER NO. PSC-00-1680-FOF-TP<br>ISSUED: September 19, 2000 |
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The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.
LILA A. JABER

APPEARANCES:

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FINAL ORDER ON ARIBITRATION

BY THE COMMISSION:

TABLE OF CONTENTS

I. CASE BACKGROUND .......... 3

II. JURISDICTION .......... 3

III. TREATMENT OF DIAL-UP CONNECTIONS TO INTERNET SERVICE PROVIDERS .......... 4

IV. COMPENSATION FOR ISP-BOUND TRAFFIC AND RECIPROCAL COMPENSATION .......... 15

V. DEFINITION OF LOCAL TRAFFIC AND LANGUAGE REGARDING LOCAL TRAFFIC EXCHANGE .......... 26

VI. UNE RATES .......... 29

VII. COLLOCATION PROVISIONS .......... 30

VIII. CONCLUSION .......... 31

## I. CASE BACKGROUND

On August 26, 1999, Global NAPs, Inc. (GNAPs) filed a petition for arbitration of an interconnection agreement with BellSouth Telecommunications, Inc. (BellSouth) under Section 252(b) of the Telecommunications Act of 1996 (the "Act"). On September 20, 1999, BellSouth timely filed its Response to the petition. At the issue identification meeting, 14 issues to be arbitrated were identified by the parties.

On January 31, 2000, the parties filed a Joint Motion to Modify Schedule. Therein, the parties explained that they believed that the following issue could be resolved as a matter of law without the submission of evidence by the parties.

> ISSUE 1. Is the Interconnection Agreement between DeltaCom, Inc. And BellSouth Telecommunications, Inc., which was adopted by Global NAPs (GNAPs) on January 18, 1999, valid and binding on GNAPs and BellSouth until January 2001, or did it expire on July 1, 1999?

The Joint Motion was granted by Order No. PSC-00-0294-PCO-TP, issued February 14, 2000. Thereafter, this Commission considered the briefs filed by the parties addressing the above issue. By Order No. PSC-00-0568-FOF-TP, issued March 20, 2000, we determined that the agreement had, in fact, terminated on July 1, 1999. Therefore, the parties proceeded to hearing on the remaining issues identified in Order No. PSC-00-0294-PCO-TP. At the pre-hearing conference held on May 25, 2000, the parties notified Commission staff that some of the remaining 13 issues had been resolved.

An administrative hearing was held on June 7, 2000. The parties agreed to stipulate all testimony and exhibits, entering them into the record without calling witnesses and cross-examination of the witnesses was waived. This is our decision on the remaining issues presented for arbitration.

## II. JURISDICTION

Part II of the Federal Telecommunications Act of 1996 (Act) sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act

regards interconnection with the incumbent local exchange carrier and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

Section 252(b) addresses agreements arrived through compulsory arbitration. Specifically, Section 252(b)(1) states:

> (1) Arbitration. - During the period from the 135th to 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(4)(C) states that the State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. This section requires this Commission to conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section. In this case, however, the parties have explicitly waived the 9-month requirement set forth in the Act. Furthermore, pursuant to Section 252(e)(5) of the Act, if a state commission refuses to act, then the FCC shall issue an order preempting the Commission's jurisdiction in the matter, and shall assume jurisdiction of the proceeding.

## III. TREATMENT OF DIAL-UP CONNECTIONS TO INTERNET SERVICE PROVIDERS

The issue before us is to determine telecommunications traffic bound for internet service providers (ISPs) should be treated as "local traffic" for purposes of reciprocal compensation under the new Global NAPs, Inc. (GNAPs)/BellSouth Telecommunications, Inc. (BellSouth) Interconnection Agreement, or whether it should be otherwise compensated. On February 26, 1999, the Federal Communications Commission (FCC) released order FCC 99-38, its Declaratory Ruling in CC Docket Nos. 96-98 and 99-68 (FCC 99-38), in which the FCC addressed, to a degree, the issue of inter-carrier compensation for ISP-bound traffic. However, on March 24, 2000, the United States Court of Appeals for the District of Columbia Circuit vacated FCC 99-38 and remanded it back to the FCC for further consideration and clarification of the FCC's rationale regarding this issue. Bell Atlantic Telephone v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

A. Arguments

While FCC 99-38 did not establish a clear ruling on the issue of ISP-bound traffic, the remand of FCC 99-38 by the D.C. Circuit has left even more room for varying views and interpretations. GNAPs witness Rooney states that "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." Witness Rooney claims that the D.C. Circuit's rationale for remanding FCC 99-38 confirms that for the purposes of Section 251(b)(5), ISP-bound calls do indeed terminate at the local ISP. Consequently, reciprocal compensation for such calls is due as a matter of law. Witness Rooney contends that there is no other way to view the D.C. Circuit's ruling than to conclude that ISP-bound calls are local.

BellSouth witness Varner argues that the D.C. Circuit's Order does not conclude that the FCC was incorrect in concluding that ISP-bound traffic is non-local. He states that it simply puts the burden back on the FCC to provide further reasoning for their conclusions. Witness Varner explains:

> In its decision, the D.C. Circuit recognized that, under the FCC's regulations, reciprocal compensation is due on calls to the Internet if, and only if, such calls "terminate" at the ISP's local facilities. *Slip op. At 9-11.* The D.C. Circuit held, however, that the FCC had not adequately explained its conclusion that calls to an ISP do not terminate at the ISP's local point of presence but instead at a distant website. It therefore remanded the matter to permit the FCC to explain the point more fully.

Witness Varner asserts that since ISP-bound traffic actually terminates at distant web sites, which are almost never in the same exchange as the end-user, it is evident that these calls are not local.

GNAPs witness Rooney argues, however, that end users almost never make long distance calls to their ISPs. He states that end users select ISPs with local points of presence and local telephone numbers so that calls to the ISP will, in fact, be local. In addition, GNAPs witness Goldstein argues that only a very small

percentage of traffic exchanged between end-users and ISPs are actually bound to or received from a distant web site. He contends that "well above 90% of the traffic from end users to ISPs does not go beyond the ISP's own equipment."

Witness Goldstein also explains that while an individual ISP's servers and routers are part of the Internet, the ISP's modems that connect to the end user are not. He states that there is continuous communication occurring between the end user's modem and the ISP's modem in order to stay in synch, and those communications never go beyond those two modems. Consequently, while the end user is reviewing information received either from the ISP's database, or retrieved by the ISP from the Internet, the only communication taking place is between the end user's modem and the ISP's modem. He states that no communication goes to or comes from the internet during that time.

Witness Goldstein further contends that locally-dialed ISP-bound calls are handled, as a technical matter, by both the originating LEC and the terminating LEC in a manner that is identical to the manner in which local calls are handled. He states:

> BellSouth's suggestion that the court "simply puts the burden back on the FCC to provide further documentation or reasoning" is absurd at best. The FCC took its best shot at preserving its long-claimed Interstate jurisdiction over what are clearly local calls, and was soundly rebuked.

BellSouth witness Varner argues, however, that the FCC has asserted repeatedly that ISP-bound traffic is interstate. Witness Varner states that traffic carried by enhanced service providers (ESPs), of which ISPs are a sub-group, was treated as interstate traffic by the FCC long before access charges were established. He contends that the FCC reaffirmed this position in 1983 when access charges were established. Witness Varner argues that this was further affirmed in the FCC's Notice of Proposed Rulemaking in CC Docket No. 87-215, released July 17, 1987, in which the FCC stated that "Enhanced service providers, like facilities-based interexchange carriers and resellers, use the local network to provide interstate services." In addition, witness Varner cites the FCC's December 23, 1999, Order on Remand, FCC 99-413 in CC Docket No. 98-147, which states in part:

> We conclude that the service provided by the local exchange carrier to the ISP is ordinarily exchange access service because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange, using both the services of the local exchange carrier and in the typical case the telephone toll service of the telecommunications carrier responsible for the interexchange transport.

FCC Order 99-413 at ¶ 35.

Witness Varner further contends that since ISP-bound traffic is not local traffic, but is instead access traffic, it is not subject to the reciprocal compensation obligations of Section 251(b)(5) of the Act. He asserts that "[P]ayment of reciprocal compensation for ISP-bound traffic is inconsistent with the law and is not sound public policy."

GNAPs witness Goldstein argues that "it doesn't matter what the FCC had ruled in 1988 or even in December 1999, if it conflicts with the most recent Court of Appeals ruling." He contends that ISP-bound traffic is treated like local traffic for economic purposes under the long-standing ESP exemption, even if these calls are still classified as access. GNAPs witness Selwyn states:

> [w]hile one could make a case in the abstract for the notion that ISPs should pay access charges, as opposed to being allowed to connect to the public switched network just like other end users, *not only* is such an arrangement not in place today, it is affirmatively banned today by the operation of the [FCC's] ESP Exemption.

Witness Selwyn further states:

> The D.C. Circuit's opinion makes clear that traffic may simultaneously meet the statutory and regulatory criteria both of being "exchange access" and of being "local." So the entire discussion of the status of this traffic as "interstate" or "access" is largely

> beside the point. ISP-bound calls are for all practical purposes "local" calls, and - under a fair reading of the D.C. Circuit's opinion - are probably legally "local" calls as well.

He argues that while ILECs routinely resist compensating ALECs for ISP-bound calls, requiring compensation for these calls is the only economically rational decision in today's regulatory environment.

BellSouth witness Varner, reiterating that reciprocal compensation is limited to local traffic and inappropriate for ISP-bound traffic, refers to CC Docket 96-98, in which the FCC has a pending rulemaking to determine whether to establish a binding federal rule regarding compensation for ISP-bound calls. He states that BellSouth agrees it would be appropriate for the parties to negotiate compensation mechanisms for ISP-bound traffic while awaiting this decision by the FCC, but not within negotiations pursuant to a Section 252 arbitration. Witness Varner explains:

> ISP-bound traffic is access service. Consequently, compensation for joint provision of this service is not an obligation under the Act. Also, such service is predominantly interstate in nature and is within the exclusive jurisdiction of the FCC. The determination of the appropriate inter-carrier compensation for ISP-bound traffic is an issue to be decided by the FCC and is not an appropriate issue for a Section 252 arbitration.

BellSouth witness Varner asserts that "this Commission does not need to interpret the D.C. Order, or anticipate what may happen on remand of the Declaratory Ruling to the FCC. As this Commission has previously noted, this issue will be resolved at the Federal level." However, witness Varner states that if we decide to establish an inter-carrier compensation mechanism for ISP-bound traffic, BellSouth proposes three options:

> 1. The Commission could direct the parties to create a mechanism to track ISP-bound calls originating on each parties' respective networks on a going forward basis. The parties would apply the inter-carrier compensation mechanism established by a final,

> nonappealable order of the FCC retroactively from the date of the Interconnection Agreement approved by the Commission, and the parties would "true-up" any compensation that may be due for ISP-bound calls.
>
> 2. A second option proposed by BellSouth is an inter-carrier revenue sharing compensation arrangement for ISP-bound access traffic that is consistent with the proposal BellSouth filed with the FCC. This proposal is also consistent with the inter-carrier compensation mechanisms that apply for other access traffic. This option is based on apportionment of revenue collected for the access service among the carriers incurring costs to provide the service. The revenue to be apportioned among carriers is the charge for the business exchange service that the ISP pays.
>
> 3. The Commission could direct the parties to implement a bill-and-keep arrangement as the inter-carrier compensation mechanism for ISP-bound traffic until such time as the FCC's rulemaking on inter-carrier compensation is completed. By definition, a bill-and-keep arrangement is a mechanism in which neither of the two interconnecting carriers would charge the other for ISP-bound traffic that originates on the other carrier's network.

Evaluating BellSouth's proposed inter-carrier compensation options, GNAPs witness Goldstein states that:

> BellSouth's option 1 simply defers the question. Since BellSouth seems unable to deal with the issue of compensation for ISP-bound calls in any reasonable way, it apparently doesn't want the Commission to deal with it either.

Witness Selwyn asserts that BellSouth's first proposal "makes no sense at all." He argues that the D.C. Circuit's ruling has complicated the FCC's task, with the resulting effect of the FCC's

final rules probably being delayed. He also argues that the FCC's preferred option is to have parties negotiate this issue, and when they are unable to agree, have the state commissions arbitrate the issue.

Commenting on BellSouth's second proposed option, witness Selwyn states that this "proposal is somewhat audacious: it proposes that Global NAPS pay BellSouth for the privilege of receiving locally-dialed ISP-bound calls from BellSouth customers - for which BellSouth has been paid by its customers." He argues that this proposal is based on BellSouth's mistaken assumption that ISP-bound calling should be treated as switched access service for compensation purposes. In addition, witness Selwyn states that the industry recognizes that this proposal constitutes unjust enrichment for the originating LEC to be paid by the interexchange carrier (IXC) and its end user for the same usage.

Finally, regarding BellSouth's third proposed option of "Bill-and-keep," witness Selwyn contends that this is simply another name for a "no payment" regime. He also argues that the FCC has considered the application of bill-and-keep arrangements in situations where traffic appears to be roughly balanced. The witness maintains, however, that this is obviously not the case here. Witness Selwyn states in conclusion:

> It is absolutely clear as an economic, policy and technical matter that ISP-bound calls are in all material respects identical to local calls. The FCC's initial conclusion that these are *not* local calls has been vacated by the courts "for want of reasoned decision making." Moreover, the court's reasoning strongly supports - if indeed it does not compel - the conclusion that ISP-bound calls *really are* "local" calls in the context of reciprocal compensation arrangements.

B. Analysis

As previously noted, the D.C. Circuit has remanded the FCC's Order 99-38, and in doing so, found in part:

> Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen

> as "terminat[ing]. . .local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission.

Bell Atlantic, 206 F.3d at p. 8 (D.C. Cir. 2000).

While FCC Order 99-38 presented no clear-cut policy for the treatment of ISP-bound traffic, the D.C. Circuit's action vacating FCC 99-38 appears to have re-opened all aspects of this debate. As stated by the D.C. Circuit Court, "[T]he issue at the heart of this case is whether a call to an ISP is local or long-distance. Neither category fits clearly." Id. at p. 5.

Section 252(d)(2) of the 1996 Act sets forth the conditions a state commission may use to determine whether the terms and conditions for reciprocal compensation are just and reasonable. However, whether reciprocal compensation is appropriate for ISP-bound traffic is still a matter of contention. While much of the testimony in the record goes to the issue of whether ISP-bound traffic is "local" or "access," we note that any decision we might make regarding the nature of ISP-bound traffic may, ultimately, only be an interim decision if it is inconsistent with any final ruling on this issue at the federal level, particularly if ISP-bound traffic is determined to be interstate traffic. Nevertheless, we must address the issue at hand in this proceeding, which is to determine if ISP-bound traffic should be treated as local for the purposes of reciprocal compensation.

As noted by BellSouth witness Varner, in previous decisions regarding ISP-bound traffic in Docket No. 990149-TP, Docket No. 990691-TP, Docket No. 990750-TP, and Docket No. 991854-TP, we have found that the parties should continue to operate under the terms of their current interconnection agreement as it relates to this issue until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is due for this traffic. Witness Varner, referring to these past rulings, states that such an approach "is not appropriate in the Global NAPs case for two reasons." First, witness Varner argues that requiring the parties to continue "the treatment of reciprocal compensation for ISP-bound traffic under Global NAPs' previous agreement would have the same effect as extending the effective date of that agreement." He contends that this Commission already denied Global NAPs' attempt to perpetuate

the terms of its prior agreement by Order No. PSC-00-0568-FOF-TP, dated March 20, 2000. Second, witness Varner argues that ISP-bound traffic is compensable under the previous agreement only because of the Commission's ruling in the GNAPs complaint case, Docket No. 991267-TP. He contends this ruling was based solely on the specific language of that agreement. Citing the resulting Order in that case, Order No. PSC-00-0802-FOF-TP, dated April 24, 2000, witness Varner contends that this Commission stated that the adoption of an agreement under Section 252(i) cannot perpetuate the terms of an agreement beyond the life of the original agreement. He argues:

> If the Commission were to deal with ISP traffic in this case by treating it as it is was [sic] ordered to be treated under the prior Agreement with Global NAPS, this would have the effect of perpetuating the Agreement in a way that is inconsistent with the Commission's ruling in the Complaint case.

Although we did previously determine in Order No. PSC-00-0568-FOF-TP, issued in Docket No. 991267-TP, that the prior agreement between GNAPs and BellSouth terminated on July 1, 1999, staff does not necessarily believe that this earlier decision prevents us from requiring the parties to continue under their current terms regarding this issue. We are, however, persuaded by the likelihood that a decision by the FCC has been further delayed by the D.C. Circuit's ruling that some form of compensation for ISP-bound traffic should be established by this Commission.

As explained above, BellSouth witness Varner proposes three options for inter-carrier compensation for ISP-bound traffic. Witness Varner's first proposed option, referred to as "track and true-up," suggests that parties keep track of ISP-bound calls originating on each party's network and then true-up any compensation that may be due for these calls by applying the compensation mechanism established by a final FCC ruling. However, we agree with GNAPs's witness Selwyn that the "track and true-up" option appears to be unreasonable because any final ruling at the federal level on this issue will likely be further delayed by the D.C. Circuit's remand decision. Such expected delay could result in no compensation for this traffic for an extended amount of time.

Witness Varner's second proposed option is an "inter-carrier revenue sharing" compensation arrangement. Witness Varner explains that "[T]his proposal is also consistent with the inter-carrier compensation mechanisms that apply for other access traffic." GNAPs witness Selwyn argues, however, that this second option assumes that ISP-bound traffic is properly treated as switched access service for compensation purposes. We agree with witness Selwyn. Due to the FCC's ESP exemption, access charges are not to be applied to ISP-bound traffic. Thus, applying an "access-type" compensation mechanism would be inappropriate.

Finally, witness Varner's third proposed option is a "bill-and-keep" compensation arrangement. GNAPs witness Selwyn argues that the FCC has contemplated bill-and-keep arrangements in situations where traffic appears to be "roughly balanced." The witness contends, however, that such is not the case here. We agree, because the record reflects that ISP-bound traffic is inherently skewed. As such, BellSouth witness Varner's "bill-and-keep" option is not an acceptable option.

In considering other possible compensation options for ISP-bound traffic, we find GNAPs witness Selwyn's argument compelling, wherein he states:

> [w]hile one could make a case in the abstract for the notion that ISPs should pay access charges, as opposed to being allowed to connect to the public switched network just like other end users, not only is such an arrangement not in place today, it is affirmatively banned today by the operation of the [FCC's] ESP Exemption.

Without the option of access charges for ISP-bound traffic, another option for consideration is reciprocal compensation for this traffic. BellSouth witness Varner argues that

> [S]ince ISP-bound traffic is access traffic, not local traffic, it is not subject to the reciprocal compensation obligations contained in Section 251 of the Act.

However, GNAPs witness Goldstein contends that classifying these calls as 'access' simply means that they are treated like local calls for economic purposes under the long-standing ESP Exemption.

Based on the arguments presented and in light of the ESP exemption, we are persuaded that it is appropriate to treat ISP-bound traffic as local in order to provide for compensation.

We are, however, also persuaded by the record that calls placed to an ISP differ from "normal" local traffic, and as such may deserve special consideration when determining the level of compensation to be applied. As BellSouth witness Varner states:

> Internet-bound traffic characteristics were never considered when local rates were established. For BellSouth the typical call duration for a local call is between three and four minutes. On the other hand, an Internet session generally lasts much longer than three to four minutes. According to Bellcore's 1996 report, "*Impacts of Internet Traffic on LEC Networks and Switching Systems*," the typical call duration for an Internet-bound call is approximately 20 minutes (3-4).

While we believe that ISP-bound calls should be treated as local for purposes of compensation in the parties' agreement, the difference in call duration warrants a different rate, as discussed in Section IV of this Order.

C. Determination

Upon consideration, dial-up connections to an ISP, or ISP-bound traffic, shall be treated as local traffic for purposes of reciprocal compensation under the new Global NAPs/BellSouth Interconnection Agreement. The rates for the ISP-bound traffic are addressed in Section IV of this Order. Due to the D.C. Circuit's remand of FCC Order 99-38, we acknowledge that any final federal decision on the issue of whether ISP-bound traffic is actually "local" or "access," could preempt any decision we may make on the jurisdictional nature of this traffic, if our decision is not consistent with the FCC's final rule and/or any final, binding Court decision on the jurisdictional nature of this traffic. Therefore, we emphasize that in rendering this decision, we stop short of determining that ISP-bound traffic is, in fact, local traffic. Herein, we find only that this traffic shall be treated like local traffic for purposes of compensation.

## IV. COMPENSATION FOR ISP-BOUND TRAFFIC AND RECIPROCAL COMPENSATION

### A. Arguments

#### 1. ISP-BOUND TRAFFIC

BellSouth witness Varner believes that it is not "appropriate" for this Commission to act on the issue of compensation for ISP-bound traffic; however, as explained in the previous section of this Order, he does suggest "three possible options, any of which would be interim until such time as the FCC completes its rulemaking proceeding on inter-carrier compensation."

Although BellSouth witness Varner states that under Option 2, BellSouth "would likely be the net recipient of revenue from GNAPS," and that Option 2 "has the most sound theoretical basis," he adds that, ". . . BellSouth is willing to forego that compensation for the interim period in exchange for the administrative simplicity of bill-and-keep."

In his discussion of an appropriate rate for ISP-bound traffic, witness Varner also asserts that:

> Costs per minute for ISP calls are significantly lower than such costs for local calls. Assuming that the average duration of ISP calls is 20-25 minutes (versus 3-4 minutes for an average local call), using the same reciprocal compensation rate for local and ISP calls means that call set up [sic] cost would be over recovered. Therefore, any per minute reciprocal compensation rate, if applied to ISP-bound traffic, should be a much lower per minute rate to account for the longer call duration.

*The witness further states that:*

> The Commission's previously approved reciprocal compensation rates are clearly overstated for a carrier, such as Global NAPS, that is predominately [sic], if not entirely, serving ISPs. The effect is reflected most in the costs for end office switching. The Commission approved a rate of $.002 per minute

> to recover end office switching. The cost study for that rate included call setup costs to be recovered on a per minute of use basis; the more minutes that a call takes, the lower the per minute setup cost. The cost of $.002 per minute was based on local calls only with an average call duration of 2.708 minutes per call. Using an average call duration of 20 minutes, which more closely resembles ISP calls, would reduce costs by 36%. This reduction would result in a cost of $.00128 for ISP calls using the Commission's approved methodology. The Commission's approved reciprocal compensation rates for tandem switching and common transport would also overstate cost; however, the magnitude would be much less than the impact on end office switching costs.

We note that while witness Varner appears to be referring to the end office termination rate, the end office termination rate is the only rate in his hearing exhibit that is not shown as a per minute rate.

In spite of the benefits that the witness believes are associated with Option 2, witness Varner maintains that Option 1, the track-and-true-up option, is "preferable." He then goes on to state that if this Commission determines that compensation should be paid for ISP-bound calls prior to an FCC order, then

> . . . the Commission should direct the parties to negotiate a rate which would specifically apply to ISP-bound traffic, taking into consideration the longer average call duration of ISP-bound calls. . . .

Furthermore, in its post-hearing position, BellSouth recommends either Option 1, track-and-true-up, or Option 3, bill-and-keep, should we order compensation for ISP-bound traffic.

The evidence shows that Option 2 takes the "business exchange service" revenues that each ISP pays its local carrier and apportions those revenues between the ISP's local carrier and any other local carrier that delivers calls to the ISP. In other words, under Option 2, the LEC that serves an ISP "shares" its

exchange service revenues that the ISP pays each month with each LEC that sends traffic to the serving LEC's ISPs. BellSouth witness Varner provides an example of how the sharing would work. The assumptions include: the ISP purchases ISDN PRI at a "market-based" monthly rate of $850.00, the average number of minutes per DSO trunk is 9,000, and BellSouth's "sharing percentage" is 8.6 percent. According to witness Varner, the sharing percentage "is calculated by determining ratio of loop-related switching and transport facilities capital cost to total capital cost, then dividing by two since both Originating LEC and Serving LEC provide switching and transport facilities." BellSouth calculates its "Loop Capital Cost" at $14.62, its "Associated Loop Switching Capital Cost" at $2.90, and its "Associated Loop Transport Capital Cost" at $0.14, for a "Total Capital Cost" of $17.66. The sum of the associated loop switching and transport costs ($2.90 and $0.14, or $3.04) is then divided by the total capital cost of $17.66. This result, .172, is divided by 2 to yield the sharing percentage of 8.6 percent. Witness Varner did not provide any support for the three capital costs.

In its example, BellSouth delivers 55 million originating minutes to the serving LEC for an ISP. Fifty-five million minutes equates to 254.63 DS1s (55 million divided by 9,000 minutes per trunk divided by 24 trunks per DS1). The number of equivalent DS1s, 254.63, is multiplied by the monthly rate of $850.00. This total, $216,435.50, is multiplied by BellSouth's sharing percent of 8.6 percent. The resulting number, $18,613.45 is the amount of compensation under BellSouth's proposal that the ISP's LEC would owe BellSouth. The $18,613.45 would come from the monthly revenue the ISP's LEC would receive from the ISP.

In terms of Option 3, bill-and-keep, witness Varner states that:

> Although the FCC has not addressed bill-and-keep with respect to non-Section 251 traffic, such as ISP traffic, it has been addressed in FCC Rule 51.713 with respect to traffic where 251(b)(5) applies (i.e. local traffic to which reciprocal compensation applies). FCC Rule 51.713 defines bill-and-keep arrangements as those in which neither of the two interconnecting carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's

> network. Rule 51.713 further provides for use of bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so.

GNAPS witness Goldstein describes BellSouth's options as "reminiscent of the bandit who also provides alternatives: "your money or your life." GNAPS witness Selwyn states in regards to BellSouth's Option 1 that:

> . . . there is no assurance that the FCC will actually resolve this issue any time soon. In fact, the D.C. Circuit ruling discussed above, at a minimum, complicates the FCC's task somewhat, so the only logical expectation is that the FCC's final rules will, unfortunately, likely be further delayed.

The witness further states that:

> Second, the FCC's preferred option in the rulemaking as I understand it, is to have parties negotiate this issue and, if they cannot agree, to have state commissions arbitrate it. If the FCC ultimately adopts this proposal, the delay from implementing a "track-and-true-up" approach will have been for no purpose (other than to save BellSouth money, unfairly). Third, the FCC has stated that its rules will have prospective effect. It does not make a great deal of sense to wait for the FCC to promulgate prospective rules and then apply them retroactively.

Witness Selwyn also objects to BellSouth's Option 2 because he believe it is based on an improper premise that ISP-bound calling should be treated as switched access service for compensation purposes.

Witness Selwyn states that BellSouth's third option, bill-and-keep:

> . . . is not only not in place, it is banned by applicable federal law and FCC rulings. Sections 251 and 252 of the federal *Telecommunications Act of 1996* [footnote omitted; italics in original] entitle CLECs and ILECs alike to a regime of ***compensation*** [emphasis in original] for terminating calls that originate on another carrier's network. In light of those provisions, the FCC has ruled that states may impose "bill-and-keep" over the objections of a party only if the record supports a finding that traffic flows will be roughly balanced between the carriers. [footnote omitted] When ISP-bound traffic is involved, however, it is quite clear that traffic will not be in balance.

GNAPs' witness Goldstein addresses BellSouth witness Varner's contention that costs for ISP-bound calls differ from local calls as follows:

> Mr. Varner then hops onto the old chestnut about ISP-bound calls being longer than so-called "local" (non-ISP) traffic. This is irrelevant. Traffic-sensitive costs are generally incurred on minutes of use, not calls, and thus most intercarrier compensation is on a per-minute basis. If call duration is such an important factor, then perhaps Bell should renegotiate all reciprocal compensation agreements to be based on a two-element model, a per-call and a per-minute rate. This would be reasonable so long as the costs were properly assigned, and indeed it would reduce the per-minute compensation paid for longer calls. But again, this . . . does not require that ISP-bound calls be treated differently from other local calls.

GNAPs, therefore, proposes that ISP-bound traffic be compensated at the same compensation rate as other local traffic is compensated.

2. RECIPROCAL COMPENSATION RATES

BellSouth's proposed rates, as provided in BellSouth witness Varner's direct testimony, come directly from this Commission's first order on rates in Docket No. 960833-TP, Order No. PSC-96-1579-FOF-TP, issued December 31, 1996 (1579 Order). As witness Varner states, this Commission found:

> Upon consideration, we find that BellSouth and AT&T should compensate each other for transport and termination of calls on each other's network facilities at rates of $.00125 per minutes [sic] for tandem switching and $.002 for end office termination. In so doing, we find that these rates, based on LRIC, are sufficient to cover the greater of TSLRIC or LRIC in addition to providing some contribution to common costs.

BellSouth witness Varner's proposed rates are set forth in the following Table I:

Table I: BellSouth's Proposed Reciprocal Compensation Rates

| Rate Element | Rate |
|---|---|
| Tandem Switching per minute | $0.00125 |
| End Office Termination | $0.002 |
| Common Transport per mile per minute | $0.000012 |
| Common Transport: facilities termination per minute | $0.0005 |

The Common Transport per mile per minute rate is the common transport rate ordered by this Commission in Order No. PSC-96-1579-FOF-TP, at page 114. Although the Common Transport facilities termination per minute rate of $0.0005 is not listed explicitly in Order No. PSC-96-1579-FOF-TP, the Order lists, at page 115, a "Dedicated Transport per term" rate of $0.0005.

Witness Varner states that BellSouth's proposed rates "should only apply if the applicable facilities are actually used to transport or terminate a call."

GNAPs witness Rooney describes in a little more detail GNAPs' rate proposal:

> The parties [sic] 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.

GNAPS witness Goldstein also addresses this issue. He states that:

> End Office Switching is an access rate component that generally does not include subsidies. If the Commission has deemed $.002 a valid end office switching rate, then this is perhaps a valid ***component*** *of* [emphasis in original] the reciprocal compensation rate. I do note, however, that it is unreasonable for BellSouth to pay just this rate on calls that it originates, while charging higher fees to ALECs for calls that they must pay BellSouth to terminate. Compensation should be symmetrical. If BellSouth's reciprocal compensation rates were lower, then perhaps there would be more competition for other sectors of the business. On a forward-looking basis, a lower symmetric rate, to be applied to all instances of local *telecommunications* [emphasis in original] (including ISP-bound calls), is not unreasonable. This can be

> taken into account when current interconnect agreements expire.

While witness Goldstein does not overtly agree that $0.002 is an appropriate end office switching rate, at the same time he contends that non-symmetrical compensation between BellSouth and ALECs has occurred.

BellSouth witness Varner characterizes GNAPs' proposals as "flawed." Witness Varner describes the $0.009 rate as a "composite rate negotiated with ITC^DeltaCom in 1997, and [it] is not a cost-based rate." Witness Varner then refers to BellSouth's Motion for Reconsideration of the Commission's decision in the ITC^DeltaCom arbitration and states that:

> [T]he basis for the Motion for Reconsideration is that the $.009 rate does not comply with the pricing standards set forth in 47 U.S.C. § 252(d) or with the binding rules of the FCC, which govern the establishment of rates for the transport and termination of local traffic.

Witness Varner's disagreement with GNAPS' other two proposals is that the rates are only for local traffic, not ISP-bound traffic.

B. Analysis

1. ISP-BOUND TRAFFIC

We find GNAPs witness Selwyn's arguments against all three of BellSouth's options to be persuasive. With regard to Option 1, track-and-true-up, we agree that it is difficult to predict when the FCC will resolve the ISP compensation issue, and delaying possible compensation could be harmful to one or both parties. We also agree with witness Selwyn's description of BellSouth's Option 2 and find his analysis on point. As for BellSouth's Option 3, bill-and-keep, the evidence shows that this proposal only works if the traffic is "roughly" in balance. If the traffic is not roughly in balance, then the same arguments against track-and-true-up also apply to bill-and-keep. There is insufficient record evidence to support a claim that the traffic is "roughly balanced," which is a prerequisite for bill-and-keep to be accepted.

BellSouth witness Varner's discussion on the differing costs for calls based on the duration of calls seems to best address the reason underlying the parties' disagreement on compensation for ISP-bound calls, which is that a per minute rate may not accurately reflect the costs of calls that vary in duration. Witness Varner asserts that when an average call duration of 20 minutes is used, rather than the 2.708 minutes used to set the end office switching rate of $0.002, there is a reduction of 36 percent, which results in an end office switching rate of $0.00128. He also asserts that using the longer call duration overstates the cost of tandem switching and common transport. He adds that, ". . . the magnitude would be much less than the impact on end office switching costs." He does not provide any recalculated numbers for tandem switching and common transport. In response, however, GNAPs' witness Goldstein suggests that BellSouth "should renegotiate all reciprocal compensation agreements to be based on a two-element model, a per-call and a per-minute rate."

2. RECIPROCAL COMPENSATION RATES

As noted, witness Varner contends that the rates ordered in Order No. PSC-96-1579-FOF-TP were based on an average call duration of 2.708 minutes per call. Witness Varner asserts that an average call duration of 20 minutes leads to a reduction in the per minute rate of 36 percent. While witness Varner has not provided the specific calculation, his testimony suggests that it is likely that, on a per minute basis, a longer call costs less per minute than a short call. If witness Varner's assumption is correct, then the Commission-ordered rates from the 1579 Order may be overstated if the average local duration, including ISP-bound calls, is longer than 2.708 minutes per call. Nevertheless, BellSouth maintains that the rates from the 1579 Order are appropriate for purposes of this agreement between GNAPs and BellSouth for non-ISP-bound local traffic.

GNAPs' first proposal of $0.009 is unsupported and opposed by BellSouth. As for GNAPs' second proposal, that of Commission-ordered rates "based on the FCC's TELRIC methodology," GNAPs does not mention any order number in its proposal. This Commission's 1579 Order was issued while the FCC's TELRIC pricing rules were stayed, however, at page 24 of this order we did state that "[U]pon consideration, we do not believe there is a substantial difference between the TSLRIC cost of a network element and the TELRIC cost of a network element."

GNAPs' third option is what appears to be a variant of the FCC proxy rates. GNAPS proposes that "the Commission should establish a per-minute rate within the $0.002 to $0.004 proxy rate contained in the FCC's regulations at this point, . . . ." The FCC's pricing rules actually state:

> In a state in which the state commission has neither established transport and termination rates based on forward-looking economic cost studies *nor* established transport and termination rates consistent with the default price ranges described in §51.707, an incumbent LEC shall set interim transport and termination rates at the default ceiling for end-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport (as described in §51.707(b)(2)). 47 C.F.R. CH.1, §51.715(b)(3).

The two FCC proxy rates mentioned in the FCC's pricing rules are very similar to the rates in the 1579 Order. However, the rates ordered in Order No. PSC-96-1579-FOF-TP have an advantage over the FCC's proxy rates in that they were specifically ordered for reciprocal compensation in a BellSouth arbitration in Florida. Therefore, given a choice between the rates in the 1579 Order and the FCC's proxy rates, we find that our 1579 Order rates are more appropriate.

The reciprocal compensation rates in the 1579 Order are specifically for end office switching and tandem switching, yet BellSouth proposes two additional rates, both transport, from that Order. It is not clear why BellSouth believes it is appropriate to specifically include those transport rates; however, we agree with BellSouth that to the extent other rate elements, such as transport, are required for call completion, the relevant source for those rates is the 1579 Order.

C. Determination

Upon consideration, we find that the appropriate reciprocal compensation rates to be included in the new GNAPS/BellSouth Interconnection Agreement are the reciprocal compensation rates, $0.00125 for tandem switching and $0.002 for end office termination, and if common transport is provided, common transport

rates as ordered by this Commission in Order No. PSC-96-1579-FOF-TP, issued December 31, 1996.

As for ISP-bound traffic, we find witness Varner's recalculation of the end office switching rate to be persuasive. Although GNAPs' witness Goldstein responded to witness Varner's recalculation of the end office switching rate, the witness's response spoke generally about call duration and costs, and did not specifically address witness Varner's recalculation of the end office switching rate. Therefore, the record does not contain evidence sufficient to refute witness Varner's recalculation of the end office switching rate. While we agree, in principle, with GNAPs witness Goldstein that a two-part rate structure for compensating for the transport and termination of calls may have merit and believe that this proposal warrants further study, the record in this proceeding is insufficient to develop a two-part rate.

The record does, however, support certain other conclusions. First, it is undisputed that the holding times associated with ISP-bound calls are significantly longer than those of typical "POTS" local calls. Second, the record appears to support that the $.002 local switching rate reflected an average call duration of under 3 minutes; in other words, the switching call set-up costs were spread over a total volume of minutes based on typical voice local calls, rather than ISP-bound calls. If the rate derivation reflected the longer call duration of ISP-bound traffic, there would be more minutes in the denominator of the calculation, and thus a lower rate. Accordingly, we find that application of the $.002 rate to ISP-bound traffic results in overcompensation.

Based on the foregoing, we find that the only rate that acknowledges the above conclusions regarding ISP-bound traffic is BellSouth witness Varner's proposed calculation of an end office switching rate for ISP traffic of $.0128, or 36% less than the $.002 local switching rate based on a call duration of 2.708 minutes per call. Although we are somewhat concerned about the lack of specific cost and usage data, we find that this rate is reasonable and appropriate based on the information in this record. Thus, we hereby approve a separate local switching rate to be applied to ISP-bound traffic. We note that while we believe that this is a step in the right direction, it is decidedly not an optimal solution. Thus, based on the record, we find that the reciprocal compensation rate for ISP-bound traffic shall be the same as the reciprocal compensation rates set forth herein, except

that the end office switching rate shall be $0.00128, instead of $0.002.

## V. DEFINITION OF LOCAL TRAFFIC AND LANGUAGE REGARDING LOCAL TRAFFIC EXCHANGE

The issue before the Commission is to determine the appropriate definition of Local Traffic to be included in the new GNAPs/BellSouth Interconnection Agreement and to determine the appropriate language relating to Local Traffic Exchange to be included in the Agreement.

### A. Arguments

BellSouth witness Varner proposes the following definition of Local Traffic:

> Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or other local calling area associated with the originating exchange as defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff. As clarification of this definition and for reciprocal transport and termination compensation, Local traffic does not include traffic that originates from or is directed to or through an enhanced service provider or information service provider. As further clarification, local Traffic does not include calls that do not transmit information of the user's choosing. In any event, neither party will pay reciprocal compensation to the other if the "traffic" to which such reciprocal compensation would otherwise apply was generated, in whole or in part, for the purpose of creating an obligation on the part of the originating carrier to pay reciprocal compensation for such traffic.

Witness Varner argues that since the definition of Local Traffic included in older agreements, such as the 1997 DeltaCom Agreement adopted by GNAPs, has been the subject of controversy as to the meaning of the language, a new Local Traffic definition is needed.

He contends that this definition should specify that ISP-bound traffic is not included in the definition of Local Traffic.

With regard to Local Traffic Exchange, BellSouth witness Varner testifies:

> The 1997 DeltaCom Agreement contains a separate section, *VI Local Traffic Exchange*, which defines the delivery of local traffic and compensation therefor. The Standard Agreement has been rearranged to more clearly define the terms of the agreement.

GNAPs witness Selwyn argues that BellSouth witness Varner's proposed definition of Local Traffic is intended to exclude ISP-bound traffic from the scope of reciprocal compensation. He contends that, "[T]here is no sensible economic or policy justification for doing so, and Mr. Varner's suggestion should be rejected." GNAPs witness Goldstein argues that witness Varner's proposed definition makes an "arbitrary and capricious distinction between ISP-bound calls and other local calls, leading to an attempt to 'freeload' off of the efforts of CLECs who deliver these calls."

In addition, witness Goldstein takes issue with the proposed language which states that "local traffic does not include calls that do not transmit information of the user's choosing." He argues that every telephone call is bidirectional, and even the caller who originates a voice call may receive information not of their own choosing. Witness Goldstein asserts that "[T]here is no basis for including this language or any other part of the amended definition BellSouth proposes." Instead, GNAPs witness Rooney argues that the parties should continue to operate under the terms of their prior agreement regarding the definition of Local Traffic. The prior agreement between the parties is the DeltaCom/BellSouth Interconnection Agreement adopted by GNAPs. The definition of Local Traffic set forth in the agreement is:

> 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.

With regard to Local Traffic Exchange, GNAPs witness Rooney contends:

> Global NAPs experience is that the last time BellSouth attempted to "clarify" these definitions, they did not improve them.

B. Analysis

While the issue at hand is to determine the appropriate definition of Local Traffic to be included in the interconnection agreement, the preponderance of testimony reflects the debate over the "local" versus "access" nature of ISP-bound traffic.

BellSouth witness Varner states that his proposed definition is intended to specify that ISP-bound traffic is not included in the definition of Local Traffic. Since the D.C. Circuit Court has remanded the issue of ISP-bound traffic to the FCC for reconsideration, we, however, believe that it would be premature at this time to include language in the definition of local traffic that specifically excludes ISP-bound traffic.

In addition, we are persuaded by GNAPs witness Goldstein's argument that there is no need for the clarification included in BellSouth witness Varner's proposed definition, which states that local traffic does not include calls that do not transmit information of the user's choosing. There is no evidence in the record which presents a specific reason for this language to be included in the definition of local traffic, other than an effort to exclude ISP-bound traffic. As such, we find it inappropriate to include this language in the definition. Excluding the clarifications proposed by witness Varner, we do find that the remainder of the definition proposed by witness Varner is reasonable. We note that this definition, excluding the clarifications, is similar to the definition of local traffic contained in the parties' previous agreement.

With regard to Local Traffic Exchange, GNAPs witness Rooney did not outline any particular language in BellSouth's proposed definition to which GNAPs was opposed except language relating to ISP traffic. Therefore, we find that the appropriate language relating to Local Traffic Exchange that should be included in the

Interconnection Compensation section of the new interconnection agreement is the same definition used for Local Traffic, because the definition of Local Traffic specifically addresses when compensation would apply.

C. Determination

Upon consideration, we find that the appropriate definition of Local Traffic to be included in the interconnection agreement should be the definition proposed by BellSouth, excluding the clarifications addressing ISP-bound traffic. This definition is:

> Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or other local calling area associated with the originating exchange as defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

As for the language regarding Local Traffic Exchange, we find that the appropriate language to be included in the GNAPs/BellSouth Interconnection Agreement is the same definition set forth above for Local Traffic.

VI. UNE RATES

While the issue presented for our consideration seemed to indicate that the parties disagreed as to rates for UNEs, such is apparently no longer the case. In its position statement, witness Rooney's rebuttal testimony, and GNAPs' brief, GNAPs states that it has no objection to including BellSouth's current UNE rates in its interconnection agreement.

A. Analysis

Initially, GNAPs witness Rooney indicated that GNAPs wanted to make some changes to the standard language proposed by BellSouth regarding UNEs. BellSouth did not agree with the changes. Specifically, GNAPs wanted the following language deleted: the first full sentence of page 4, Attachment 2, and all of Section 2.6.7.3.4. However, it appears this issue has now been resolved. BellSouth states in its brief, that it has no objection to deleting

the specific language that GNAPs takes issue with in Attachment 2 of the BellSouth Standard Interconnection Agreement.

B. Determination

Since the appropriates rates are not at issue and BellSouth has agreed to delete the language that was at issue between the parties, we find that the UNE rates to be included in the Interconnection Agreement are those found in the BellSouth Standard Agreement. In addition, as agreed to by BellSouth, the first full sentence of page 4, Attachment 2, and all of Section 2.6.7.3.4 on page 16 of BellSouth's Standard Agreement shall be deleted.

VII. COLLOCATION PROVISIONS

We have also been asked to determine the appropriate collocation provisions to be included in the Interconnection Agreement.

A. Arguments

BellSouth witness Varner states that collocation is addressed in an amendment dated October 3, 1997, to the 1997 ITC^DeltaCom Agreement; however, the previous agreement is not consistent with the Advanced Services Order, FCC 99-48. Witness Varner asserts that BellSouth's current Standard Agreement is, however, in compliance with the FCC's Order. As such, witness Varner believes that this Commission should adopt BellSouth's proposed agreement language.

According to GNAPs witness Rooney, GNAPs would prefer to retain the language in the previous agreement. Witness Rooney adds, however, that GNAPs does not object to BellSouth's current agreement language relating to collocation, under the assumption that BellSouth understands that:

> if Global NAPs needs to order UNEs at some future time, it may do so at the then prevailing rates, terms and conditions, taking account of orders of the FCC and/or this Commission that might not yet be fully reflected in BellSouth's 'standard' UNE language.

B. Analysis

Upon consideration, we believe that the concern expressed by GNAPs witness Rooney is addressed by the Telecommunications Act, which states:

> Availability to Other Telecommunications Carriers. - A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carriers upon the same terms and conditions as those provided in this agreement. Section 252(i)

BellSouth is obligated to comply with the FCC Orders and Rules, as well as the Orders and Rules of this Commission.

C. Determination

Based on the record, we find that the interconnection agreement shall contain BellSouth's proposed language for collocation provisions.

VIII. CONCLUSION

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We believe that our decision is consistent with the terms of Section 251, the provisions of the FCC's implementing Rules that have not been vacated, and the applicable provisions of Chapter 364, Florida Statutes.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the issues presented for arbitration in this proceeding are resolved as set forth in the body of this Order. It is further

ORDERED that the parties shall submit a signed agreement that complies with the decisions set forth in this Order for approval within 30 days of issuance of the issuance of this Order.

ORDERED that this Docket shall remain open pending approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 19th day of September, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

( 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: 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).