Legal Department

E. EARL EDENFIELD, Jr.
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BellSouth Telecommunications, Inc.
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ORIGINAL

September 27, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 991267-TP (Global NAPS Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Answer to Global NAPS, Inc.'s Complaint, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

E. Earl Edenfield, Jr. (KR)

E. Earl Edenfield, Jr.

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

AFA
APP
CAF
CMU
CTR
EAG
LEG 1
MAS 3
OPC
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SEC 1
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OTH

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:	)	
	)	Docket No. 991267-TP
Complaint of Global NAPs, Inc., against	)	
BellSouth Telecommunications, Inc. for	)	
Enforcement of Section VI(B) of its	)	
Interconnection Agreement with BellSouth	)	
Telecommunications, Inc. and Request for Relief	)	Filed: September 27, 1999
	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S ANSWER TO GLOBAL NAPS, INC.'S COMPLAINT

BellSouth Telecommunications, Inc. ("BellSouth") files its Answer to Global NAPs, Inc.'s ("Global NAPs") Complaint, and says:

INTRODUCTION

On August 21, 1998, Global NAPs requested that BellSouth begin negotiation of an interconnection agreement under the provisions of the Telecommunications Act of 1996 ("1996 Act"). In lieu of negotiating from BellSouth's standard agreement, Global NAPs informed BellSouth that Global NAPs was adopting the July 1, 1997 Interconnection Agreement between BellSouth and DeltaCom, Inc. Thereafter, BellSouth and Global NAPs signed an Adoption Agreement on January 18, 1999. By the terms of the Adoption Agreement, the Interconnection Agreement between BellSouth and Global NAPs expired on July 1, 1999.

Global NAPs now claims that the adopted Interconnection Agreement entitles Global NAPs to reciprocal compensation for Internet Service Provider ("ISP") traffic (*i.e.*, non-voice traffic bound for the Internet that is routed through an ISP served by Global NAPs). Global NAPs asserts this claim notwithstanding the fact that at the time of the

execution of the Adoption Agreement, BellSouth had stated publicly and repeatedly that ISP traffic was not covered under the subject reciprocal compensation provisions of the adopted Interconnection Agreement. It is quite obvious that Global NAPs adopted the July 1, 1997, BellSouth/DeltaCom Interconnection Agreement simply to circumvent negotiating with BellSouth on the reciprocal compensation issue and to avoid the standard reciprocal compensation language (clarifying BellSouth's long-standing position that reciprocal compensation is not due for ISP traffic) proposed by BellSouth. As Global NAPs is well aware, the FCC has recognized that "negotiation is not required to implement a section 252(i) opt-in arrangement; indeed, neither party may alter the terms of the underlying agreement." Memorandum Opinion and Order, *Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, 1999 FCC LEXIS 3729 (released August 5, 1999), at ¶ 4. Thus, BellSouth was legally obligated to allow Global NAPs to adopt the terms and conditions of the BellSouth/DeltaCom Interconnection Agreement as the terms and conditions for the BellSouth/Global NAPs Interconnection Agreement.

Global NAPs cites three Orders[1] from the Florida Public Service Commission, ("Commission") as support for its position of entitlement to reciprocal compensation for ISP traffic. Global NAPs grossly mischaracterizes these decisions. Specifically, the

[1] (1) *In re: Request for Arbitration Concerning Complaint of American Communications Services of Jacksonville, Inc, d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications Against BellSouth Inc.*, Order No. PSC-99-0658-FOF-TP ("e.spire decision"); (2) *In re: Complaint of WorldCom Technologies, Inc. Against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement, et al*, Order No. PSC-98-1216-FOF-TP ("WorldCom decision"), and; (3) *In re: An investigation into the state-wide offering of access to the local network for the*

e.spire and WorldCom decisions turned predominantly upon the conclusion of the Commission that the Interconnection Agreements at issue reflected an intent to include ISP traffic in the category of local traffic subject to the reciprocal compensation clause. There is no basis for an argument that this type of "intent" can be gleaned from the instant circumstances. As there was no negotiation between BellSouth and Global NAPs, the parties could have formed no intent that the reciprocal compensation provisions would apply to ISP traffic. Moreover, as noted above, by the time that Global NAPs elected to adopt the Agreement of DeltaCom *rather than* negotiate, BellSouth had stated publicly and repeatedly that it did *not* intend for ISP traffic to be included in the local traffic that qualifies for reciprocal compensation. Thus, the current dispute is not comparable to the prior Commission decisions in e.spire and WorldCom. Global NAPs also cites a 1989 Commission decision for the proposition that ISP traffic is local. Global NAPs conveniently fails to mention that the FCC pre-empted the Commission's decision, finding that information services (of which ISPs are a subset) are interstate traffic within the exclusive jurisdiction of the FCC. In fact, the 1989 Commission decision cited by Global NAPs served as one of the bases for BellSouth's long-standing position that ISP traffic is interstate traffic and not compensable under the reciprocal compensation provisions of the interconnection agreements.

In addition, Global NAPs' legal interpretation of the FCC's ISP Order is completely misguided. First, Global NAPs simply ignores the clear and unequivocal ruling of the FCC that ISP traffic is to be treated as interstate traffic, not local traffic:

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purpose of providing information services, Order No. 21815, Docket No. 8880423-TP (issued September 5, 1989).

> As noted, Section 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern intercarrier compensation for interconnected local telecommunications traffic. We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of Section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic.

(Id., Footnote 87). Second, as ISP traffic is clearly interstate, the only issue arguably remaining is whether BellSouth voluntarily agreed to pay reciprocal compensation for ISP traffic under the reciprocal compensation provisions of the BellSouth/Global NAPs Interconnection Agreement. *See* FCC's ISP Order, at ¶ 24. Clearly, BellSouth never intended for such traffic to be compensable, much less as of January 18, 1999, the effective date of the Adoption Agreement between Global NAPs and BellSouth. Finally, Global NAPs expressly acknowledged the interstate nature of ISP traffic by filing a specific tariff dealing with such traffic at the FCC. (See FCC Tariff No. 1, Section 7A – ISP Traffic Delivery Service) The Global NAPs FCC Tariff No.1, Section 7A is attached as Exhibit "A."

The facts of this complaint proceeding are more analogous to the recent decision[2] of the New Jersey Board of the Public Utilities, ("NJBPU") which involved a virtually identical factual situation. In that case, Global NAPs, in lieu of negotiating, adopted another interconnection agreement (after Bell Atlantic's position on ISP traffic was well documented) and subsequently claimed reciprocal compensation under the

[2] Decision and Order, *In the Matter of the Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Bell Atlantic-New Jersey, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket Number TO98070426, dated July 12, 1999. Attached as Exhibit "B."

terms of that agreement. Under those circumstances, and the FCC's February 26, 1999 Declaratory Ruling in CC Docket Nos. 96-98 and 99-68, FCC 99-38 ("FCC's ISP Order"), the NJBPU determined that reciprocal compensation was not due for ISP traffic under the terms of the Global NAPs/Bell Atlantic Interconnection Agreement. Under this same analysis, the Commission should deny Global NAPs request for reciprocal compensation for ISP traffic under the terms of the BellSouth/Global NAPs Interconnection Agreement.

RESPONSE TO SPECIFIC ALLEGATIONS

BellSouth responds to the numbered paragraphs in Global NAPs Complaint as follows:

1. BellSouth is without knowledge, and therefore denies, the allegations in paragraph 1 of the Complaint.

2. As the allegations contained in paragraph 2 of the Complaint are informational, no response is required.

3. BellSouth admits the allegations in paragraph 3 of the Complaint.

4. BellSouth admits that it is authorized to provide local telephone exchange service in the state of Florida. BellSouth is without knowledge, and therefore denies, the remaining allegations in paragraph 4 of the Complaint.

5. BellSouth admits the allegations in paragraph 5 of the Complaint.

6. BellSouth denies the allegations in paragraph 6 of the Complaint.

7. BellSouth admits that the Commission has jurisdiction over this Complaint proceeding. The various authorities cited by Global NAPs speak for themselves. BellSouth denies the remaining allegations in paragraph 7 of the Complaint.

8. BellSouth is without knowledge, and therefore denies, the allegations in paragraph 8 of the Complaint.

9. BellSouth denies that it is a "monopoly provider" of local exchange telecommunications services. BellSouth admits the remaining allegations in paragraph 9 of the Complaint.

10. BellSouth admits that the parties entered into an Adoption Agreement on January 18, 1999, which covers the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. According to the terms of the adoption agreement, Global NAPs adopted in its entirety the interconnection agreement between BellSouth and DeltaCom, Inc. BellSouth denies the remaining allegations in paragraph 10 of the Complaint.

11. BellSouth admits that the interconnection agreement requires the payment of reciprocal compensation for local traffic that originates and terminates in the LATA. BellSouth denies that ISP traffic is local traffic that originates and terminates in the LATA. BellSouth denies the remaining allegations in paragraph 11 of the Complaint.

12. BellSouth denies the allegations in paragraph 12 of the Complaint.

13. BellSouth denies the allegations in paragraph 13 of the Complaint.

14. The definition of "local traffic," as set forth in the Interconnection Agreement, speaks for itself. BellSouth denies the remaining allegations in paragraph 14 of the Complaint.

15. Section VI(B) of the Interconnection Agreement speaks for itself. BellSouth denies the remaining allegations in paragraph 15 of the Complaint.

16. BellSouth denies the allegations in paragraph 16 of the Complaint.

17. BellSouth denies the allegations in paragraph 17 of the Complaint.

18. BellSouth admits that the Commission has rendered two decisions interpreting the reciprocal compensation provisions of interconnection agreements. BellSouth denies that those decisions are applicable to the facts in this particular case. BellSouth denies the remaining allegations in paragraph 18 of the Complaint.

19. BellSouth admits that the Commission issued Order No. PSC-99-0658-FOF-TP. That Order speaks for itself. BellSouth denies that the facts upon which that Order is based are applicable to the issue raised by Global NAPs in this proceeding. BellSouth denies the remaining allegations in paragraph 19 of the Complaint.

20. BellSouth admits that the Commission issued Order No. PSC-98-1216-FOF-TP. That Order speaks for itself. BellSouth denies that the facts upon which that Order is based are applicable to the issue raised by Global NAPs in this proceeding. BellSouth denies the remaining allegations in paragraph 20 of the Complaint.

21. BellSouth admits that the Commission issued Order No. 21815 in Docket 880423-TP on September 5, 1989. That Order speaks for itself. Furthermore, that Order was pre-empted by the FCC, which determined that the FCC has exclusive jurisdiction over information service providers, not the Commission. BellSouth denies the remaining allegations in paragraph 21 of the Complaint.

22. BellSouth admits that the FCC recently issued an Order in Docket No. 99-38. The provisions of that Order speak for themselves. BellSouth denies the remaining allegations in paragraph 22 of the Complaint.

23. BellSouth admits that the Alabama Public Service Commission issued a decision on March 4, 1999 in Docket No. 26619. The provisions of that Order speak for themselves. BellSouth denies that the Alabama Public Service Commission's decision is applicable to the facts in this proceeding. BellSouth denies the remaining allegations in paragraph 23 of the Complaint.

24. BellSouth admits that the Virginia State Corporation Commission issued a decision in Case No. PUC 970069 on October 27, 1997. The provisions of that Order speak for themselves. BellSouth denies that the Virginia decision, or the other state decisions cited in paragraph 24 of the Complaint, is applicable to the facts of this case. BellSouth denies the remaining allegations in paragraph 24 of the Complaint.

25. BellSouth denies the allegations in paragraph 25 of the Complaint.

26. BellSouth denies the allegations in paragraph 26 of the Complaint.

27. BellSouth admits that BellSouth.net provides Internet access service in the state of Florida. BellSouth denies the remaining allegations in paragraph 27 of the Complaint.

28. The provisions of Section XXV of the Interconnection Agreement speak for themselves. Neither party is entitled to attorneys' fees in this proceeding, as the provisions cited by Global NAPs apply to arbitration, not complaint proceedings. BellSouth denies the remaining allegations in paragraph 28 of the Complaint.

29. BellSouth denies the allegations in paragraph 29 of the Complaint.

30. To the extent a response is required, BellSouth denies that Global NAPs is entitled to any of the relief that it seeks in the ad damnum clause, or elsewhere, in the Complaint.

WHEREFORE, BellSouth respectfully requests that the Commission deny the relief sought by Global NAPs, enter judgment in favor of BellSouth, dismiss the Complaint, and grant any other relief deemed appropriate by the Commission.

Respectfully submitted this 27th day of September 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

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179839

CERTIFICATE OF SERVICE
Docket No. 991267-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 27th day of September, 1999 to the following:

Beth Keating
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6199

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Represents Global NAPS

Global NAPS, Inc.
10 Merrymount Road
Quincy, MA 02169
Tel. No. (617) 507-5100
Fax. No. (617) 507-5200

E. Earl Edenfield Jr (KE)
E. Earl Edenfield, Jr.

SECTION 7A - *ISP TRAFFIC DELIVERY SERVICE*

7A.1 Scope Of Tariff.

This Tariff applies to telecommunications delivered to the Company by a local exchange carrier (the "Delivering LEC") for further delivery to an Internet Service Provider ("ISP") which obtains connections to the public switched network from the Company. This tariff applies to all ISP-bound traffic for which the Company does not receive compensation from the Delivering LEC under the terms of an interconnection agreement entered into pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended (an "Interconnection Agreement").

7A.2 Delivering LEC Election To Obtain Service Pursuant To This Tariff.

A Delivering LEC with which Company has an Interconnection Agreement may avoid charges under this Tariff by agreeing to treat ISP-bound calls delivered to Company as "local traffic" subject to reciprocal compensation under Section 251(b)(5) and applicable terms of the Interconnection Agreement. Failure by a such a carrier to actually compensate Company for ISP-bound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate Company under the terms of this Tariff.

7A.3 Application Of Tariff.

This Tariff applies to all ISP-bound traffic that is subject to the jurisdiction of the Federal Communications Commission. To the extent that a Delivering LEC asserts that the terms of an Interconnection Agreement do not apply to some or all ISP-bound traffic due to the jurisdictionally interstate nature of such traffic, that assertion shall constitute a binding election to treat all ISP-bound traffic not subject to an Interconnection Agreement as jurisdictionally interstate and subject to this Tariff.

William J. Rooney, Secretary and General Counsel
10 Merrymount Road
Quincy, Massachusetts 02169

Exhibit "A"

SECTION 7A - ISP TRAFFIC DELIVERY SERVICE, (cont'd.)

7A.4 Rates

This Tariff establishes a switching rate which relates to the function Company undertakes in directing a call dialed by a Delivering LEC's end user to the ISP (served by the Company) that the end user wants to reach. This rate applies per minute of use.

Rate: $0.008/minute

7A.5 Billing

Billing for charges under this tariff shall normally be monthly in arrears. Failure to render a bill shall not constitute a waiver of Company's right to payment for any services provided, as long as the bill for any such period is rendered no later than two years following the expiration of that period.

Payment shall be due in immediately available funds no later than 30 days after the date of the bill.

SECTION 8 - PROMOTIONS

8.1 Promotions - General

From time to time the Company shall, at its option, promote subscription or stimulate network usage by offering to waive some or all of the nonrecurring or recurring charges for the Customer (if eligible) of target services for a limited duration. Such promotions shall be made available to all similarly situated Customers in the target market area.

8.2 Demonstration of Service

From time to time the Company shall demonstrate service by providing free channels for a limited period of time.

William J. Rooney, Secretary and General Counsel
10 Merrymount Road
Quincy, Massachusetts 02169

Exhibit "A"

SECTION 9 - CUSTOMER SPECIFIC CONTRACTS

9.1 General

The Company may provide any of the services offered under this tariff, or combinations of services, to Customers on a contractual basis. The terms and conditions of each contract offering are subject to the agreement of both the Customer and Company. Such contract offerings will be made available to similarly situated Customers in substantially similar circumstances. Rates in other sections of this tariff do not apply to Customers who agree to contract arrangements, with respect to services within the scope of the contract.

Services provided under this tariff are not eligible for any promotional offerings which may be offered by the Company from time to time.

Contracts in this section are available to any similarly situated Customer that places and order within 90 days of their effective date.

William J. Rooney, Secretary and General Counsel
10 Merrymount Road
Quincy, Massachusetts 02169

Exhibit "A"

AGENDA DATE: 7/7/99

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

IN THE MATTER OF THE PETITION OF GLOBAL NAPS INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH BELL ATLANTIC-NEW JERSEY, INC. PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)	TELECOMMUNICATIONS DECISION AND ORDER DOCKET NO. TO98070426

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes final action taken by the New Jersey Board of Public Utilities (Board) in the arbitration requested by Global NAPs, Inc. (GNI) by letter dated June 30, 1998, and will resolve all outstanding and unresolved issues in GNI's interconnection dispute with Bell Atlantic-New Jersey, Inc. (BA-NJ).

PROCEDURAL HISTORY

On January 26, 1998, GNI requested interconnection and network elements from BA-NJ pursuant to section 251 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, codified in scattered sections of 47 U.S.C. §151 et seq. (hereinafter, the Act). During the period from the 135th to the 160th day after receipt of an interconnection request, the carrier or any other party to the negotiation may petition the State commission to arbitrate any outstanding issues. The State commission is required to resolve each issue set forth in any such proceeding "not later than 9 months after the date on which the local exchange carrier received the [interconnection] request under this section." 47 U.S.C. §252(b)(4)(C).

By letter dated June 30, 1998 and pursuant to section 252(b)(1) of the Act, GNI filed with the Board of Public Utilities (Board) a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief. GNI essentially sought affirmation through the arbitration process that it was entitled to opt into an interconnection agreement previously

Exhibit "B"

approved by the Board between BA-NJ and MFS Intelenet of New Jersey, Inc. (MFS)[1], and to do so without any limitations or restrictions which it believed BA-NJ improperly sought to impose. By letter dated July 16, 1998, GNI advised the Board that it believed that the parties had reached an agreement for interconnection, had apparently resolved the issues raised in the petition, and requested that the Board suspend further action on the petition [illegible] ng successful execution of an interconnection agreement.

The parties having failed to reach an interconnection agreement, and pursuant to the Board's arbitration procedures,[2] on September 15, 1998, Ashley C. Brown from the Kennedy School of Government at Harvard University was chosen as the Arbitrator. On September 28, 1998, both parties submitted a joint statement of the unresolved issues to the Arbitrator and each party separately submitted a statement of their response to these issues. By letter dated October 2, 1998, the parties jointly submitted a letter to the Board stating that they had agreed not to file any motions with the Federal Communications Commission (FCC) for preemption of state jurisdiction for twenty days after the expiration of the nine-month time limit imposed by the Act. Notwithstanding the efforts of Board Staff and the Arbitrator to facilitate a mutually acceptable agreement, on October 20, 1998, each party separately submitted updated statements to the Arbitrator of the unresolved issues to be decided. By Order dated October 21, 1998 in this Docket, William J. Rooney, Esq., General Counsel for GNI, and Christopher W. Savage, Esq., were granted leave to appear pro hac vice on behalf of GNI, and Robert A. Lewis, Esq., was granted leave to appear pro hac vice on behalf of BA-NJ.

On October 21, 1998, an arbitration hearing was held in Boston, Massachusetts. Post-hearing briefs were submitted on October 23, 1998. The Arbitrator issued a decision which he termed a "Recommended Interim Final Decision" on October 26, 1998 (hereinafter, the Arbitrator's Decision).

The Arbitrator recast the submitted issues into six issues and resolved them in the following manner:

(1) Is GNI an entity eligible for an interconnection agreement?

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[1] See Order Approving Interconnection Agreement, I/M/O the Joint Petition of Bell Atlantic-New Jersey, Inc. and MFS Intelenet of New Jersey, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 and I/M/O the Bell Atlantic-New Jersey, Inc. Interconnection Agreement with MFS Intelenet of New Jersey, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, Docket Nos. TO96070527 and TO96070526 (March 10, 1997).

[2] See Order, I/M/O The Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (August 15, 1996) (hereinafter, Arbitration Order).

Exhibit "B"

Decision: GNI is eligible for an interconnection agreement with BA-NJ. Arbitrator's Decision at 5.

(2) Is GNI entitled to most favored nation (MFN) status in regard to other interconnection agreements?

Decision: GNI is entitled to MFN status in regard to opting into other interconnection agreements between BA-NJ and other competitive local exchange carriers (CLECs), including the interconnection agreement between BA-NJ and MFS Intelenet of New Jersey, Inc. (MFS). Ibid.

(3) When opting into a preexisting interconnection agreement under MFN status, is a party bound to the agreement in its entirety, or is it free to opt in on a provision by provision basis?

Decision: If GNI opts into the MFS agreement, it may only do so on an all or nothing basis. It is not free to "pick and choose" among the provisions of that agreement and is bound to the terms and conditions as of the date they are permitted to "opt in" to the MFS agreement. Id. at 6.

(4) If GNI is entitled to opt in to the MFS agreement, what should the duration of the contract be?

Decision: The duration of the interconnection agreement between BA-NJ and GNI should be nineteen days less than three years from the date of execution. Id. at 8.

(5) Are calls to Internet Service Providers (ISPs) eligible for reciprocal compensation under the MFS interconnection agreement?

Decision: Calls to ISPs are eligible for reciprocal compensation under the MFS interconnection agreement. Id. at 9.

(6) Are the applicable reciprocal compensation rates those set forth in the MFS interconnection agreement, or the generic rates established by the Board in Docket No. TX95120631?

Decision: The reciprocal compensation rates applicable to GNI and BA-NJ if GNI opts into the MFS interconnection agreement, are, for the duration of the time that the terms therein are applicable between GNI and BA-NJ, those set forth in that agreement. Id. at 10.

Exhibit "B"

Meanwhile, on the federal level, the FCC was already engaged in its consideration of the issue of whether reciprocal compensation was the appropriate form of compensation for ISP-bound traffic. On October 30, 1998, the FCC issued a Memorandum Opinion and Order in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292 (October 30, 1998) (hereinafter, GTE Telephone). In GTE the FCC concluded an investigation of an access offering by the GTE Telephone Operating Companies, and found that GTE's offering, which would permit Internet Service Providers to provide their end-user customers with high-speed access to the Internet, was an interstate service properly tariffed at the federal level. GTE Telephone at ¶1. In GTE Telephone, the FCC expressly stated that its Order did "not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit switched dial-up traffic originated by interconnecting LECs." Id. at ¶2. The FCC stated instead that it intended "in the next week to issue a separate order specifically addressing reciprocal compensation issues." Ibid. Thereafter, the Board, along with much of the telecommunications community, waited with great anticipation for further word from the FCC on the issue of compensation for ISP-bound traffic.

With regard to the Arbitrator's Decision, and as required in the Board's Arbitration Order, the parties were required to submit for Board consideration a fully executed interconnection agreement encompassing the arbitration decision within five (5) days of the Arbitrator's decision. On November 2, 1998, GNI filed a motion requesting that the Board issue an order to the effect that:

> (a) [GNI] is for all purposes deemed to have entered into an interconnection agreement with BA that reflects the [Arbitrator's Decision], with an effective date of today, November 2, 1998; and (b) to the extent that BA's actions in any way delay the date on which [GNI] can begin exercising its rights under the agreement, the termination date of the agreement is deemed extended, day for day, during the period that BA continues to engage in such delaying efforts.
>
> [November 2, 1998 Motion of GNI at 2, 10].

GNI attached a form of interconnection agreement, executed by GNI, which purports to incorporate the Arbitrator's Decision.

At its public meeting of November 4, 1998, the Board authorized its Secretary to send a letter to the parties advising them of their duties to submit a mutually executed agreement for Board consideration. The Secretary's letter was sent the same day. By letter dated November 5, 1998, GNI responded to the Board referencing its November 2, 1998 Motion and asking that the Board, in addition to the other relief requested, direct that BA-NJ pay to GNI

Exhibit "B"

reasonable incurred attorney's fees in connection with GNI's efforts to reach an agreement with BA-NJ during the period November 2-5, 1998. On November 5, 1998, BA-NJ submitted two versions of interconnection agreements. The first modified the GNI agreement previously submitted to the Board by GNI on November 2, 1998. The second contains modifications to the original MFS agreement based on BA-NJ's interpretation of the Federal Communications Commission (FCC) Memorandum Opinion and Order in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292 (October 30, 1998) (hereinafter, GTE Telephone). At the same time, BA-NJ submitted its Opposition to GNI's Motion. By letter dated November 6, 1998, GNI filed an answer BA-NJ's Opposition to its Motion. By letters dated November 10, 1998 and November 12, 1998 BA-NJ and GNI, respectively, submitted additional responsive papers. BA-NJ submitted additional comments by letter dated November 19, 1998, to which GNI responded by letter dated November 20, 1998.

By letter dated November 18, 1998, the Division of the Ratepayer Advocate (Advocate) submitted comments on the Arbitrator's Decision and noted the fact that the Board had before it three forms of interconnection agreements submitted by the parties. In its letter, the Advocate disagreed with the Eighth Circuit Court of Appeals rejection of the FCC's "pick and choose" rule[1] and the Board's adoption of the Eighth Circuit's interpretation. Nevertheless, the Advocate supported an interconnection agreement as recommended by the Arbitrator, and urged the Board to approve the interconnection agreement which in effect would reflect the MFS agreement. By letter dated November 25, 1998, BA-NJ responded to the Advocate's comments and stated that the Board should not approve an interconnection agreement based on the Arbitrator's Decision, but should find that the MFS agreement which GNI seeks to adopt must contain rates which conform to the Board's December 2, 1997 Generic Order in Docket No. TX95120631 and should extend for a term which expires on July 1, 1999, the termination date of the MFS Interconnection Agreement. In addition, BA-NJ stated that the Board should clarify that, pursuant to the FCC's determination in GTE Telephone, Internet traffic is jurisdictionally interstate. By letter dated December 1, 1998, GNI disagreed with BA-NJ and stated that the FCC's analysis in GTE Telephone did not affect the proper treatment of reciprocal compensation for ISP-bound traffic. As of the date of this Order, the Parties have failed to mutually execute a comprehensive interconnection agreement based on their continuing differences in interpreting the Arbitrator's Decision and FCC Orders.

Finally, on February 26, 1999, the FCC released its Declaratory Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, In/M/O Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (February 26, 1998) (hereinafter, Declaratory Ruling). In the Declaratory Ruling, the FCC advised that it considered ISP-bound traffic to be interstate traffic not subject to the reciprocal

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[1] See Iowa Utilities Board v. FCC, 120 F.3d 753, 800 (8th Cir. 1997); aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

Exhibit "B"

compensation obligations imposed by section 251(b)(5) of the Act. Declaratory Ruling at ¶¶1, 18, 27 and fn 87, and advised further that, in the absence of a federal rule governing inter-carrier compensation for such traffic, states are free either to impose or not impose reciprocal compensation for ISP-bound traffic, depending upon the circumstances before the state commission, including the existence of interconnection agreements. Declaratory Ruling at ¶¶1, 21, 25-27.

DISCUSSION

With regard to the first issue recited above, we FIND that the Arbitrator correctly determined that GNI is eligible to enter into an interconnection agreement. We note that at its public agenda meeting of June 9, 1999, the Board found that GNI had demonstrated that it possessed the requisite financial, technical and managerial expertise and resources which are necessary to provide local exchange and exchange access telecommunications services in New Jersey, and accordingly, the Board authorized GNI to provide local exchange and exchange access telecommunications service in New Jersey subject to the approval of its interconnection agreement and tariffs. See Order of Approval, I/M/O the Petition of Global NAPs, Inc. For a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services, Docket No. TE98060386 (June 21, 1999). Accordingly, we agree with the Arbitrator that GNI is an entity eligible for an interconnection agreement.

We also FIND that the Arbitrator is correct that as an approved local exchange carrier, GNI is entitled to opt into a pre-existing interconnection agreement through the so-called "most favored nation," or "MFN," process pursuant to section 252(i) of the Act. With regard to the third issue, subsequent to the Arbitrator's Decision, the Supreme Court reinstated 47 C.F.R. §51.809, allowing carriers to "pick and choose" parts of interconnection agreements, as well as opt into an entire agreement through the MFN process. See AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721, 738, 142 L.Ed.2d 835 (1999). Thus, we MODIFY the Arbitrator's Decision to comport with the Supreme Court decision with regard to the FCC's reinstated "pick and choose" rule.

We next turn to the fourth issue which confronted the arbitrator, the duration of the interconnection agreement created as a result of GNI opting into the terms and conditions of the MFS agreement. At the outset, we note that the FCC is currently seeking comment on just the situation that faced the Arbitrator in the matter now before the Board. In its February 26, 1999 Declaratory Ruling in CC Docket No. 96-98, the FCC noted that an arbitrator recently allowed a CLEC to opt into an interconnection agreement with a three year term for a new three year term, raising the possibility that an ILEC "might be subject to the obligations set forth in [the original] agreement for an indeterminate length of time, without any opportunity for renegotiation, as successive CLEC's opt into the agreement." Declaratory Ruling at ¶35. The FCC, therefore, is seeking comment on "whether and how section 252 (i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements." Ibid.

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Because the Board is also concerned about the procedural and substantive rights of both ILECs and CLECs involved with the MFN and "pick and choose" processes, the Board HEREBY DIRECTS its Staff to prepare a rulemaking pre-proposal which will elicit ideas, views and comments from the industry regarding these issues. Of more immediate import, we note our preliminary belief that interconnection agreements should not exist into perpetuity without a right to have such agreements reviewed and renegotiated. Thus, on an interim basis, and subject to possible reexamination based upon the pending FCC and Staff actions noted above, we indicate herein our view that any existing agreement MFN'd by a CLEC should extend for a period of time equal to the remaining term of the original MFN'd agreement or one (1) year, whichever is greater. We further note our preliminary view that an original interconnection agreement may only be MFN'd during the original term of the agreement, and that once MFN'd for the additional term just noted, neither the original interconnection agreement nor the subsequent interconnection agreement may be subject to further adoption by any CLEC through the MFN process. This preliminary general view notwithstanding, however, we note that parties may, through negotiation, agree to adopt rates, terms and conditions which are identical to those contained in any other interconnection agreement and for a term of any length which they mutually desire. We stress that these are preliminary views which we fully expect to be commented upon by the industry in the context of both the FCC's and our own rulemaking processes.

We note also that the FCC has already expressed its view regarding how a carrier seeking interconnection, network elements or services pursuant to section 252(i) should proceed. The FCC has advised that such a carrier "need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis." First Report and Order, I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (August 8, 1996) at ¶1321. The FCC has also stated that it "leave[s] to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis." Ibid. In this regard, we remind carriers that the Board has already adopted a dispute resolution process which is made available expressly to resolve on an expedited basis petitions by carriers related to service-affecting issues and assertions of anti-competitive conduct, and is an appropriate means to resolve section 252(i) disputes. See Order on Reconsideration, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (June 19, 1998).

With specific regard to the interconnection agreement between GNI and BA-NJ, however, we do not believe that the general view we have just announced regarding the duration of interconnection agreements adopted through the MFN process is necessarily appropriate. The GNI/BA-NJ Arbitrator rendered his decision on October 26, 1998. According to our arbitration guidelines, the parties should have submitted an interconnection agreement to the Board for its review within five (5) days thereafter. On November 2, 1998, GNI filed a motion requesting that the Board issue an order providing that the interconnection agreement between GNI and BA-NJ attached to its motion and based upon the MFS interconnection agreement shall be deemed

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effective on November 2, 1998, and extended day to day thereafter for every day that BA-NJ delays in signing the attached agreement. Not including any such extensions, GNI's proposed interconnection agreement incorporated a termination date of October 14, 2001, 19 days less than three years, as approved by the Arbitrator's Decision.

We have already indicated above our preliminary view that an interconnection agreement which is adopted through the MFN process should extend for a term no less than 12 months. However, as noted above in the within matter, the parties, including the Advocate, continued to file comments on the Arbitrator's Decision through the month of November, 1998, the last submission being by GNI on December 1, 1998, and the Board delayed the decision on this arbitration further while it awaited the FCC's expected determination of the issue of the nature of ISP-bound traffic. In order not to penalize GNI for delay not caused by it, we HEREBY ADOPT a term which reflects the minimum one year term of an MFN'd agreement, and in addition reflects the delay which occurred from December 1, 1998 until July 7, 1999, a period of 219 days. Accordingly, we FIND that a term of one year and 219 days, or slightly more than 19 months, is appropriate in this case. Assuming that a signed interconnection agreement which conforms to our Decision is submitted within five (5) days of the date of this Order and is approved at the Board's July 26, 1999 public meeting, this interconnection agreement will therefore terminate one year and 219 days from July 26, 1999, or March 2, 2001. Because the Decision we make herein rests upon the unique nature of the circumstances surrounding the parties and this interconnection agreement, the Board believes that it is not in the public interest to permit this agreement to be adopted through the MFN process.

With regard to the fifth issue, whether calls to ISPs are eligible for reciprocal compensation under the MFS interconnection agreement, we must begin our analysis by noting again the FCC's most recent declarations regarding ISP-bound traffic. In its October 30, 1998 GTE Telephone Memorandum Opinion and Order, the FCC presaged its later declaration that ISP-bound traffic is interstate in character by concluding that a high speed Internet access offering by the GTE Telephone Operating Companies, was an interstate service properly tariffed at the federal level. GTE Telephone at ¶1. While the FCC expressly stated that its Order did "not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit switched dial-up traffic originated by interconnecting LECs," it did state that it intended "in the next week to issue a separate order specifically addressing reciprocal compensation issues." Id. at 2.

On February 26, 1999, the FCC finally released its Declaratory Ruling, concluding that ISP-bound traffic is largely interstate, but "[i]n the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Declaratory Ruling at ¶1. The FCC stated that the reciprocal compensation obligations imposed by section 251(b)(5) of the Act apply only to the transport and termination of local telecommunications traffic. Id. at ¶7. Continuing its tradition of determining the

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jurisdictional nature of communications by reference to the end points of the communication, the FCC stated that a substantial portion of ISP-bound traffic is interstate because "the communications at issue do not terminate at the ISP's local server, but continue to the ultimate destination or destinations, specifically at a internet website that is often located in another state." Id. at ¶¶10-18. The FCC advised that "pending adoption of a rule establishing an appropriate interstate compensation mechanism," it found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." Id. at ¶21. The FCC further advised the following:

> [i]n the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed in section 252(b)(5), so long as there is no conflict with governing federal law. 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 rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions are also free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.
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> [Id. at ¶26 (footnotes omitted].

The FCC asserted that the adoption of rules governing inter-carrier compensation for ISP-bound traffic would serve the public interest, and proposed rules which, in the first instance, would rely on commercial negotiations as the ideal means to establish the terms of interconnection arrangements. Id. at ¶28, but might also rely on arbitration on the state or even federal level, Id. at ¶¶30-32.

The FCC recognized that its conclusion that ISP-bound traffic is largely interstate might cause some state commissions to reexamine conclusions that reciprocal compensation is due from ILECs to CLECs which carry this traffic to the extent that those conclusions are based

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on a finding that ISP-bound traffic terminates at an ISP server. Id. at ¶27. In fact, that has already occurred. In Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered into under Sections 251 and 252 of the Telecommunications [illegible]6, D.T.E. 97-116-C (May 19, 1999) (hereinafter, Complaint of MCI WorldCom), the Massachusetts Department of Technology and Energy (Mass. DTE) reversed an earlier decision in which it determined that ISP-bound traffic was local based upon its understanding that such traffic was severable into two components, one call terminating at the ISP, and another call connecting the ISP to the target Internet website. Complaint of MCI WorldCom, Summary. The Mass. DTE stated that, in light of the Declaratory Ruling, the basis for its earlier decision had crumbled and that decision was now a "nullity," and "[u]nless and until modified by the FCC itself or overturned by a court of competent jurisdiction, the FCC's view of the 1996 Act must govern this Department's exercise of its authority over reciprocal compensation." Complaint of MCI WorldCom at 19-31. The Mass. DTE ruled that "[r]eciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999." Ibid.

In determining whether reciprocal compensation obligations apply to ISP-bound traffic which GNI will carry, the Board does not have the benefit of earlier arbitrations which have addressed this issue, nor was the issue addressed in the Board's Generic Proceeding. See Decision and Order, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (December 7, 1995). Although the MFS interconnection agreement was the result of both negotiations and arbitration, the reciprocal compensation issue was decided wholly through negotiations between MFS and BA-NJ. Section 5.7 of the MFS/BA-NJ agreement provided for reciprocal compensation for the transport and termination of local traffic, defined in section 1.44 of the agreement as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ('EAS') area, as defined in BA's effective Customer tariffs." The negotiations which led to the adoption of these provisions occurred well before the FCC's declaration that ISP-bound traffic was interstate, a significant change in the law not known to either party to the negotiations and not reflected in the interconnection agreement which GNI desires to MFN.[4] The Board notes well the FCC's statements that in the absence of a federal rule regarding inter-carrier compensation for ISP-bound traffic, "parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Declaratory Ruling at ¶1. In this case, however, the Board does not have an existing interconnection agreement between GNI and BA-

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[4] We note, however, that pursuant to section 28 of the MFS agreement, FCC action or other legal developments which require modification of material terms contained in the agreement allows either Party to require a renegotiation of the terms that are reasonably affected by the change in the law. Thus, even were we not to exclude ISP-bound traffic from reciprocal compensation provisions of the agreement at this time, we conclude that section 28 of the MFN'd agreement could soon lead to the same result which the Board herein reaches.

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NJ to interpret. Because of GNI's right to MFN an existing interconnection agreement, we FIND that it is appropriate to apply to GNI and BA-NJ the rates and terms in the existing MFS agreement which GNI desires to MFN with respect to reciprocal compensation obligations for traffic which is truly local. ISP-bound traffic, as determined by the FCC, is interstate in character, and, therefore, in the Board's view, is not entitled to reciprocal compensation. All other local traffic carried by GNI shall be subject to reciprocal compensation at the negotiated rates in the MFS interconnection agreement, that is $0.009 for local traffic delivered to a tandem switch and $0.007 for local calls delivered to an end office.

We expect that GNI will be compensated by its end user customers and/or by ISPs themselves for the ISP-bound traffic which it carries. Nevertheless, the Board is mindful of the FCC's ongoing rulemaking with regard to the appropriate form of inter-carrier compensation mechanism for ISP-bound traffic. We assure carriers that the Board shall review the FCC's ultimate ruling regarding such compensation and take appropriate action, as needed. Of course, the parties themselves are not foreclosed from further negotiations to develop more appropriate forms of compensation.

Accordingly, to clarify the last issue decided by the Arbitrator, the Board herein FINDS that the MFS interconnection agreement rates for reciprocal compensation, and not the Board's generic rates, shall apply to the interconnection agreement between the parties. The Arbitrator found that negotiated rates took precedence over rates determined by either regulation or by arbitration. Accordingly, he determined that the rates for reciprocal compensation negotiated by and between MFS and BA-NJ are applicable to the local traffic exchanged between GNI and BA-NJ. The Board agrees with the Arbitrator in this regard, but clarifies that the MFS interconnection agreement rates do not apply to the ISP-bound traffic carried by GNI since that traffic is interstate traffic pursuant to the FCC's Declaratory Ruling.

In conclusion, the Board FINDS that the resolution of all open arbitration issues set forth above and the conditions imposed herein upon the parties is consistent with the public interest and in accordance with law. The Board HEREBY APPROVES an interconnection agreement between the parties which is the same as the MFS agreement referenced above, as modified herein, as meeting the requirements of the Act for agreements which are in part

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negotiated and in part arbitrated. The Board DIRECTS the Parties to submit to the Board for its approval a fully executed interconnection agreement reflecting the decisions set forth herein within five (5) business days of the date of this Order.

DATED: 6/12/99

BOARD OF PUBLIC UTILITIES
BY:

HERBERT H. TATE
PRESIDENT

CARMEN J. ARMENTI
COMMISSIONER

FREDERICK F. BUTLER
COMMISSIONER

ATTEST:

MARK W. MUSSER
SECRETARY

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**In the Matter of the Petition of Global NAPs, Inc.
For Arbitration of Interconnection Rates, Terms, Conditions
and Related Arrangements with Bell Atlantic-New Jersey, Inc.
Pursuant to Section 252(b) of the Telecommunications Act of 1996
BPU Docket No. TO98070426**

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