

ORIGINAL

1 **BELLSOUTH TELECOMMUNICATIONS, INC.**
2 **REBUTTAL TESTIMONY OF ALBERT HALPRIN JR.**
3 **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**
4 **DOCKET NO. 991267-TP**
5 **DECEMBER 20, 1999**
6

7 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

8

9 **A. Albert Halprin, 555 12th Street, NW, Suite 950-North, Washington, D.C.**
10 **2004.**

11

12 **Q. ARE YOU THE SAME ALBERT HALPRIN WHO FILED DIRECT**
13 **TESTIMONY IN THIS CASE ON NOVEMBER 24, 1999?**

14

15 **A. Yes.**

16

17 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

18

19 **A. To rebut portions of the direct testimony filed in this case by Lee L.**
20 **Selwyn and Fred R. Goldstein on behalf of Global NAPS, Inc. (GNAPs).**
21 **As stated in my direct testimony, the interconnection agreement at**
22 **issue in this proceeding ("the Agreement") calls for reciprocal**
23 **compensation to be paid only for local traffic, which is specifically**
24 **defined as including only those calls that originate and terminate in the**
25 **same local exchange area or LATA. There is no valid rationale, from a**

1 policy standpoint, for lumping interstate ISP-bound calls together with
2 local traffic for purposes of applying reciprocal compensation
3 obligations under the Agreement. Calls to the Internet have different
4 characteristics than local calls in important respects, and the inclusion
5 of Internet-bound traffic in the pool of calls subject to reciprocal
6 compensation would be irrational and unsound public policy.

7
8 Initially, alternative local exchange carriers ("ALECs") relied on legal
9 and regulatory arguments to buttress their claims that Internet-bound
10 traffic terminated locally and was within the mutually agreed category
11 for payment of reciprocal compensation. Specifically, they argued that
12 such traffic was within the definition, contained in sections 251 and 252
13 of the 1996 Telecommunications Act ("the Act"), of traffic for which
14 reciprocal compensation had to be paid. Now that these claims have
15 been totally and irrevocably rejected, GNAPs is attempting to support
16 its effort to receive large sums of money from BellSouth by relying on
17 expert claims that BellSouth's position is 'economic nonsense.' The
18 specific points of Mr. Selwyn's economic arguments are beyond the
19 scope of this testimony and will be addressed by other BellSouth
20 witnesses. Even so, I can say that from a public policy perspective,
21 GNAPs' position is so outrageous, and its expert's claims are so
22 bizarre, that were it not for the large amount of money at issue, it would
23 be hard to take them seriously.

24
25

1 Essentially, the starting point of Mr. Selwyn's argument is a
2 misinterpretation of the FCC's rules and policies; he then follows with
3 an economic argument, which (unsuccessfully) seeks to buttress that
4 misinterpretation. Mr. Selwyn seriously distorts the true nature and
5 impact of the FCC's rulings on reciprocal compensation, including its
6 February 1999 *ISP Declaratory Ruling*. In that document, the FCC
7 conclusively and definitively stated that Internet-bound traffic does not
8 terminate within local exchange areas. It further clarified that the
9 reciprocal compensation provisions of section 251(b)(5) of the
10 Telecommunications Act of 1996—and its own rules applying that
11 language—do not apply to ISP-bound traffic. There is simply no
12 support whatsoever for Mr. Selwyn's assertion that the FCC had
13 created a "default" environment or "context" in which reciprocal
14 compensation would somehow be applied to ISP-bound traffic. As the
15 FCC itself definitively states, ISP-bound traffic remains classified as
16 interstate, it does not terminate "locally," nor has the FCC ever required
17 carriers to pay reciprocal compensation for this traffic.

18

19 Further, the dicta Mr. Selwyn cites from the FCC's *ISP Declaratory*
20 *Ruling* amount to little more than sophistry in the attempt to preserve
21 some form of subsidy for ALECs amid the complete and total lack of
22 any policy rationale to do so. Mr. Goldstein's attempt to point out that
23 ISP calls are technically similar to local calls proves nothing. Such calls
24 are also technically indistinguishable from interstate dial-around long
25 distance calls and from the means used by MCI in the early days of

1 long distance competition to give customers access to its
2 groundbreaking Execunet long distance service. Yet dial-around long
3 distance services that allow calls to travel across state lines have been
4 unquestionably defined as interstate--not local--offerings, based on the
5 end-to-end nature of those calls--despite any technical similarity to
6 "local" calls. The same is true of ISP-bound calls, which transcend the
7 confines of local exchange areas and are routed through to Internet
8 destinations around the world.

9
10 GNAPs' own actions undercut its position that Internet-bound traffic is
11 local under the terms of this Agreement. First, by filing an FCC tariff
12 (which later was rejected by the FCC), GNAPs has itself attempted to
13 garner revenues which would not--and could not--be lawfully charged if
14 this traffic both originated and terminated in the same local exchange.
15 The fact that GNAPs has not complied with federal law and regulations
16 and filed an unlawful tariff cannot serve as the basis to permit them to
17 recover through reciprocal compensation (See exhibit AH-1).

18
19 Moreover, it is neither rational nor sustainable, over the medium or long
20 term--nor is it equitable--to require incumbent local exchange carriers
21 ("ILECs") to charge fixed rates to end users, then impose payment
22 obligations on ILECs that far exceed what they can recover from those
23 fixed rates. The true public policy irrationality can be found in the
24 current reciprocal compensation regime, which skews competition and
25 results in a massive transfer of wealth and subsidies from ILECs to

1 their competitors, as well as in the dampening or elimination of
2 competition for residential customers who are heavy Internet users.

3

4 **Q. AT PAGES 15-17 MR. SELWYN NOTES THAT THE FCC HAS**
5 **EXEMPTED ENHANCED SERVICE PROVIDERS ("ESPs") FROM**
6 **PAYING ACCESS CHARGES. DO YOU AGREE WITH HIS**
7 **ANALYSIS OF THE SIGNIFICANCE OF THE ESP EXEMPTION?**

8

9 **A. No. In adopting a "temporary" ESP exemption in 1983, the FCC**
10 **indicated that it would in the future develop a suitable compensation**
11 **system for serving ESPs. It has not done so, despite the fact that the**
12 **"interim" situation it created has been perpetuated for more than 15**
13 **years. If this Commission were to force BellSouth to pay reciprocal**
14 **compensation for this interstate traffic, the result would be highly**
15 **irrational, from a policy standpoint. Incumbent LECs ("ILECs") are**
16 **required to serve all end users at fixed rates that are set at usually no**
17 **more than \$25 to \$30 per customer, per month. Meanwhile, if**
18 **BellSouth were forced to pay reciprocal compensation, those**
19 **residential customers that BellSouth and other ILECs *must* serve would**
20 **then be generating payment obligations for the ILECs of two to three**
21 **times, per customer, what the ILECs could recover through fixed rates.**
22 **It would be the height of *irrationality* to require carriers to incur vastly**
23 **more in payment obligations for these customers than the carriers were**
24 **allowed to recover. Under the reciprocal compensation scenario, it**
25 **would be the alternative LECs ("ALECs") and the Internet service**

1 providers ("ISPs") that would benefit from an uneconomic subsidy
2 scheme, at the expense of ILECs. It should be noted that under any
3 scenario, there is no regulation or law that prevents ALECs from
4 recovering their reasonable costs for carrying this traffic from their ISP
5 customers, who do, in fact, directly bill their end user customers for
6 service. As stated in my direct testimony, it is false and misleading for
7 any ALEC to claim that it would have no alternative for compensation if
8 its reciprocal compensation subsidies were eliminated.

9
10 In sum, the misapplication of reciprocal compensation to interstate,
11 ISP-bound traffic--which has a much longer average duration than local
12 calling and therefore has an entirely different cost profile--is nothing
13 more than an uneconomic transfer of wealth from ILECs and their
14 ratepayers to ALECs and ISPs, as a means to artificially subsidize
15 ALECs and ISPs in the market. Policy-makers may well have the
16 subsidization of those entities as a policy goal, but that does not mean
17 there is a valid policy or statutory rationale behind their attempts to do
18 so.

19
20 **Q. ON PAGE 3, MR. SELWYN ARGUES THAT ISP-BOUND CALLS**
21 **"HAVE LONG BEEN TREATED AS A FORM OF 'LOCAL' CALL." IS**
22 **THAT CORRECT?**

23
24 **A.** No. Mr. Selwyn goes too far in asserting that the FCC's ESP
25 exemption, implemented as a discrete and narrow decision applying

1 only to certain pricing issues, amounts to a universal or general
2 decision to treat ISP-bound calls as local for all purposes. The ESP
3 exemption is not a free pass for ALECs to assert that the FCC
4 somehow decided to reclassify Internet-bound traffic as local for
5 reciprocal compensation purposes. In fact, in its *ISP Declaratory*
6 *Ruling*, the FCC stated unequivocally that the perpetuation of the ESP
7 exemption does not mean the FCC ever has altered its view of Internet-
8 bound traffic as interstate. It said, "The fact that ESPs are exempt from
9 access charges and purchase their PSTN links through local tariffs
10 does not transform the nature of traffic routed through to ESPs. That
11 the Commission exempted ESPs from access charges indicates its
12 understanding that ESPs in fact use interstate access service;
13 otherwise, the exemption would not be necessary."¹ The FCC has
14 never wavered from its classification of ISP-bound traffic as interstate.

15
16 It is vital to realize that the FCC's ruling is not simply a jurisdictional
17 abstraction; rather, it is based squarely on the true and actual nature of
18 Internet-bound calls. Indeed, the fact that Internet-bound calls do not
19 originate and terminate within the same local exchange area where
20 they originate must be the starting point for any jurisdictional ruling—
21 and for any subsequent regulatory treatment made pursuant to the
22 exercise of that jurisdiction. And on the question of where Internet-

23
24

¹ See in the matter of Implementation of the Local Competition Provisions of the
25 Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic,
 Declaratory Ruling and Notice of Proposed Rulemaking in CC docket nos. 96-98 and 99-68,
 rel. Feb. 26, 1999, at para. 16

1 bound calls originate and terminate, the FCC has been definitive and
2 authoritative. In its *ISP Declaratory Ruling*, it said, "We conclude. . .that
3 the communications at issue here do not terminate at the ISP's local
4 server, as CLECs and ISPs contend, but continue on to the ultimate
5 destination or destinations, specifically at a Internet website that is
6 often located in another state."² Internet-bound calls are clearly not
7 local, in terms of the Agreement at issue here, and the ESP exemption
8 does nothing to alter the nature of these calls or the FCC's
9 classification of them as interstate.

10

11 Q ON PAGE 5, MR. SEWLYN STATES THAT THE FCC HAD CREATED
12 A "CONTEXT" IN WHICH ISP-BOUND CALLS WERE CONSIDERED
13 "LOCAL." DO YOU AGREE?

14

15 A. No. There has never been any such "context." The true context for the
16 FCC's stance with regard to the nature of ISP-bound traffic can be
17 found in its legacy of analyzing calls based on their *end-to-end nature*.
18 As the FCC made clear in its *ISP Declaratory Ruling*, it has always used
19 this end-to-end analysis to define the nature of various kinds of traffic.
20 That policy was established firmly by the FCC well before this
21 Agreement was negotiated, through a legacy of rulings, including the
22 *BellSouth MemoryCall order* and the *Teleconnect order*.³ In fact, the

23

24 ² Id. at para. 12.

25 ³ See *Petition for Emergency Relief and Declaratory Ruling* filed by BellSouth Corporation, 7
FCC Rcd 1619 (1992) (*BellSouth MemoryCall Order*) and *Teleconnect Co. v. Bell Telephone
Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995).

1 FCC cited those orders in its *ISP Declaratory Ruling*, noting that in
2 Teleconnect, the *Common Carrier Bureau* (later affirmed by the full
3 Commission) ruled that the end-to-end nature of the communication is
4 more significant than the facilities used to complete such
5 communications.⁴

6
7 Far from there being a “context” that ISP-bound calls were local, there
8 was a firmly established regulatory ground rule that the nature of traffic
9 was to be determined by the beginning and end points of the
10 communication. As the FCC has determined authoritatively, the end
11 point of Internet-bound traffic is the Internet, not the ISP’s local node.
12 BellSouth surely cannot be faulted for being aware of a cornerstone of
13 FCC policy and adhering to FCC rules.

14
15 **Q. IN YOUR VIEW, DOES THE FCC’S ESP EXEMPTION REFLECT ANY**
16 **POLICY JUDGMENT BY THE FCC THAT ESP TRAFFIC—**
17 **INCLUDING INTERNET-BOUND TRAFFIC—IS IN ANY WAY**
18 **“LOCAL” TRAFFIC?**

19
20 **A.** No. The FCC’s decision to establish and maintain the supposedly
21 “temporary” *ESP exemption had nothing to do with any judgment about*
22 *where Internet-bound calls terminate or whether the FCC considered*
23 *such calls to be “local” calls. In fact, as I have stated, the FCC has*

24
25 _____
⁴ *ISP Declaratory Ruling* at para. 11.

1 made clear that its ESP exemption does not alter its view of ISP-bound
2 traffic as interstate.

3

4 The fact that ESPs, including ISPs, are exempt from access charges is
5 not due to a policy or economic rationale that ISP-bound traffic is local,
6 as Mr. Selwyn suggests. Rather, the ESP exemption exists because of
7 the FCC's desire to promote the further development of information
8 services industries and to create a favorable environment for the
9 Internet. It elected to do that by, in effect, subsidizing ESPs by allowing
10 not to pay the access charges that normally would apply regarding
11 interstate traffic. This is the inescapable conclusion that must be drawn
12 from the FCC's own statement, in the *ISP Declaratory Ruling*, that "in
13 1997, we decided that retaining the ESP exemption would avoid
14 disrupting the still-evolving information services industry and advance
15 the goals of the 1996 Act to 'preserve the vibrant and competitive free
16 market that presently exists for the Internet and other interactive
17 services,'"⁵ Elsewhere in the *ISP Declaratory Ruling*, the FCC explains
18 that the exemption "was adopted at the inception of the interstate
19 access charge regime to protect certain users of access services, such
20 as ESPs, that had been paying the generally much lower business
21 service rates from the rate shock that would result from immediate
22 imposition of carrier access charges."⁶

23

24

25 ⁵ *ISP Declaratory Ruling* at para. 6.

⁶ *Id.* At footnote 10.

1 The FCC created and maintained the ESP exemption not because it
2 thought that ESPs were not using interstate access services or were
3 somehow users of "local" services. Rather, the FCC wanted to shelter
4 ESPs—supposedly, temporarily—from the standard financial
5 consequences of their roles as customers of interstate access services.
6 If the FCC did not originally view ESPs as subject to access charges,
7 there would be no concern about the potential impact of those charges
8 and thus no need to subsidize them through the exemption. The ESP
9 exemption exists because this traffic is *not* local—not the other way
10 around.

11
12 **Q. ON PAGE 18, MR. SELWYN ANALYZES THE FCC'S**
13 **IMPLEMENTATION OF THE RECIPROCAL COMPENSATION**
14 **PROVISIONS OF SECTION 251 OF THE 1996**
15 **TELECOMMUNICATIONS ACT. COULD YOU EXPLAIN THE**
16 **RELEVANT LANGUAGE IN THAT SECTION AND HOW THE FCC**
17 **HAS IMPLEMENTED IT?**

18
19 **A.** Section 251(b)(5) requires all LECs "to establish reciprocal
20 compensation arrangements for the transport and termination of
21 telecommunications." Section 252(d)(2) specifies that such reciprocal
22 compensation arrangements must "provide for the mutual and
23 reciprocal recovery of costs associated with the transport and
24 termination on each carrier's network facilities of calls that originate on
25 the network facilities of the other carrier." The FCC made clear in its

1 *Local Competition Order* that these reciprocal compensation
2 obligations should apply only to the transport and termination of "local
3 telecommunications traffic."⁷ This clearly does not apply to ISP-bound
4 traffic, which does not terminate within the local exchange area or on
5 the network facilities of a local exchange carrier. Rather, Internet-
6 bound traffic originates with end users, is routed through the networks
7 of one or more LECs, and then is routed to its ultimate destination or
8 destinations on the global Internet.

9
10 To remove any doubt about how the FCC views the nature of where
11 ISP-bound calls terminate, we need only refer to the *ISP Declaratory*
12 *Ruling*, in which the FCC stated: "As noted, section 251(b)(5) of the
13 Act and our rules promulgated pursuant to that provision concern inter-
14 carrier compensation for interconnected *local* telecommunications
15 traffic. We conclude in this Declaratory Ruling, however, that ISP-
16 bound traffic is non-local interstate traffic. Thus, the reciprocal
17 compensation requirements of section 251(b)(5) of the Act and section
18 51, subpart H (Reciprocal Compensation for Transport and Termination
19 of Local Telecommunications Traffic) of the Commission's rules do not
20 govern inter-carrier compensation for this traffic."⁸ In short, there is
21 nothing in the statute, or the FCC rules implementing it, that justifies
22 treating ISP-bound calls as "local" for reciprocal compensation

23

24 ⁷ See Implementation of the Local Competition Provisions in the Telecommunications Act of
25 (1996), First Report and Order in CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16013
(1996).

⁸ *ISP Declaratory Ruling* at footnote 87.

1 purposes, despite Mr. Selwyn's arguments to the contrary. To the
2 extent that language regarding reciprocal compensation in the
3 Agreement reflects or tracks the language in the statute, there would
4 be no reason to assume that the language in the Agreement would
5 apply to ISP-bound traffic, which the FCC has determined is interstate,
6 not local.

7

8 **Q. ON PAGE 5, MR. SELWYN REFERS TO A "GENERAL**
9 **UNDERSTANDING" IN THE TELECOMMUNICATIONS INDUSTRY**
10 **DURING THE PERIOD FROM 1996 TO 1997 THAT ISP-BOUND**
11 **CALLS WERE TO BE TREATED AS LOCAL. DO YOU AGREE WITH**
12 **THIS STATEMENT?**

13

14 **A. This statement is totally untrue. The entire ILEC industry has**
15 **continuously and totally rejected this view. Indeed, even some ALECs**
16 **did not accept this view, arguing instead that the FCC had to set up a**
17 **special compensation mechanism--until, at least, it became clear that**
18 **many states viewed this as an appropriate mechanism to subsidize the**
19 **infant ALEC industry.**

20

21 **Just as there is no FCC-induced "context" for viewing ISP-bound calls**
22 **as local, there is also no consensus within the industry that ISP-bound**
23 **calls were to be treated as "local" for any purpose other than the ESP**
24 **exemption. To the contrary, there has been sharp disagreement over**
25 **whether ISP-bound calls were local for reciprocal compensation**

1 purposes ever since the question became an issue. To my knowledge,
2 BellSouth has never acknowledged that ISP-bound traffic was "local"
3 and thus should be subject to reciprocal compensation.

4
5 One example of BellSouth's position on ISP-bound traffic can be found
6 in reply comments filed with the FCC on July 31, 1997, well within the
7 period in which Mr. Selwyn claims there was a "general understanding"
8 in the industry to treat ISP-bound calls as local. In these comments,
9 BellSouth urges the FCC to reject a petition by the Association for
10 Local Telecommunications Services ("ALTS") that such traffic be
11 declared local and subject to reciprocal compensation. BellSouth
12 stated the following:

13
14 There is no basis in fact or law for the Commission to conclude that the
15 calls to ISPs at issue in the ALTS letter are intrastate, let alone "local"
16 for reciprocal compensation purposes. Because ALTS and its
17 supporters are patently incorrect in asserting that such calls are "local,"
18 the Commission should dismiss or deny the ALTS letter. Calls to the
19 Internet through ISPs that originate on the network facilities of an
20 incumbent LEC do not "terminate" on the network facilities of a CLEC,
21 as would be required for reciprocal compensation to apply under
22 section 252(d)(2) of the Communications Act. As a factual matter, such
23 calls traverse the CLEC's facilities to the ISP and the Internet and
24
25

1 communicate with multiple destinations, often simultaneously, that may
2 cross state and national boundaries.⁹

3
4 Certainly, BellSouth had made clear at that time--and well before the
5 current Agreement was concluded with GNAPs in early 1999--that it did
6 not believe ISP-bound traffic was local for purposes of reciprocal
7 compensation because such traffic did not terminate within the local
8 exchange. BellSouth's consistency on this question stands in stark
9 contrast to the apparent inconsistency or confusion of GNAPs, which in
10 April 1999 filed a proposed tariff at the FCC, seeking to recover in the
11 interstate jurisdiction charges for traffic that it has argued, in this case
12 and elsewhere, is "local" and should be subject to reciprocal
13 compensation.

14
15 **Q. HOW COULD GNAPS FILE A FEDERAL TARIFF TO RECOVER**
16 **CHARGES FOR TRAFFIC THAT IT MAINTAINS IS ENTIRELY**
17 **LOCAL AND BOTH ORIGINATES AND TERMINATES WITHIN THE**
18 **SAME LOCAL EXCHANGE OR EAS EXCHANGE?**

19
20 **A. There is no logical or legal way that this traffic could be subject to a**
21 **tariff at the federal level if it did, in fact, originate and terminate in the**

22
23
24 _____
25 ⁹ See BellSouth Reply Comments in the matter of Request by ALTS for Clarification of the
Commission's Rules Regarding Reciprocal Compensation for Information Service Provider
Traffic, File No. CCB/CPD 97-30, filed July 31, 1997, at page 2.

1 same local exchange. In that case, section 2 of the Communications
2 Act would prevent the FCC from permitting it to be tariffed federally.

3
4 The FCC ruled in its order rejecting the GNAPs tariff that it did not need
5 to decide "in the abstract" whether GNAPs could file a federal tariff
6 addressing compensation for ISP-bound traffic, because the tariff itself
7 was "unjust and unreasonable." Among the faults the FCC cited were
8 the fact that parties may not know whether or not they were subject to
9 the tariff's terms at the time the proposed charges were supposed to
10 have been incurred; the fact that the tariff would apply where GNAPs
11 received no reciprocal compensation payments (which might apply
12 even if GNAPs had a bill-and-keep interconnection agreement); and
13 the fact that the proposed tariff violated section 61.74(a) of the FCC's
14 rules by cross-referencing another document or instrument--in this
15 case, an interconnection agreement.¹⁰

16
17 In sum, GNAPs' exercise in bet hedging does not seem to reflect any
18 consensus that ISP-bound traffic is local--even within GNAPs--much
19 less within the entire industry. Despite Mr. Selwyn's best attempts, he
20 cannot show that there has ever been any "context," "consensus," or
21 "default" policy on the part of the FCC or within the industry as a whole
22 to treat ISP calls as "local" for reciprocal compensation purposes. To
23 the contrary, if the only true foundation for determining how the FCC

24
25 _____
¹⁰ Id at paras. 21-24.

1 and the industry should view this traffic—in 1996-1997, as well as now-
2 -can be found in the long-standing policy of analyzing the traffic based
3 on its originating and ending points. In this case, Internet-bound traffic
4 originates with the end user and terminates at points on our even
5 beyond the global Internet—not within the same local exchange where
6 it originated.

7

8 **Q MR. SELWYN ASSERTS ON PAGE 16 THAT FROM A**
9 **CUSTOMER'S PERSPECTIVE, THERE IS NO DISTINCTION**
10 **BETWEEN AN INTERNET-BOUND CALL AND A "LOCAL" CALL**
11 **PLACED TO A NEIGHBOR. DO YOU AGREE?**

12

13 **A.** As a threshold matter, the argument is irrelevant. This is precisely the
14 same argument made by MCI in the early days of its Execunet service
15 to justify permitting it to use local tariffs for its seven-digit "dial-around"
16 long distance service. That argument was rejected then, and it is no
17 more valid today. In essence, this argument says nothing more than
18 that most customers have no idea what happens to a call after they dial
19 the seven-digit (or 10-digit) "local" number.

20

21 **Moreover, there are fundamental differences between Intern-bound**
22 **calls and local calls. In making a local call, and end user is attempting**
23 **to reach a destination located in the local exchange area, whether it be**
24 **a neighbor, a local business establishment, etc. This contrasts sharply**
25 **with the nature and purpose of a "call" to the Internet, which is not**

1 destined to terminate within the local exchange but rather is meant by
2 the end user to access destinations around the world—wherever
3 Internet websites are located. If an Internet call terminated at the ISP's
4 location within the local exchange, the call would be very short, indeed,
5 and doubtless would never be made by the end user at all.

6
7 Mr. Selwyn's argument seems to rest on the fact that in making local
8 calls and ISP-bound calls, end users dial the same number of digits.
9 But that fact proves nothing. End users may also dial a seven-digit or
10 ten-digit "local" number to make interstate dial-around long distance or
11 foreign exchange (FX) calls. But nobody could argue that from a
12 practical or economic standpoint, those interstate calls are ""local" for
13 purposes of reciprocal compensation obligations.

14

15 **Q. MR. SELWYN CITES THE ILLUSTRATIVE DICTA IN THE FCC'S ISP**
16 **DECLARATORY RULING AS FACTORS SUPPORTING HIS**
17 **INTERPRETATION OF THE AGREEMENT AS REQUIRING**
18 **RECIPROCAL COMPENSATION FOR INTERNET-BOUND TRAFFIC.**
19 **DO THESE DICTA SUPPORT HIS INTERPRETATION?**

20

21 **A.** No, they do not. As a threshold matter, the plain language of the
22 Agreement states clearly that reciprocal compensation is due only for
23 traffic that both originates and terminates within the same local
24 exchange or EAS exchange area. As the FCC stated, definitively, in its
25 ruling, ISP-bound traffic does not fit that definition. The dicta cited by

1 Mr. Selwyn and frequently referred to by ALECs is illustrative only and
2 was intended to apply only where the language of an agreement or the
3 intent of the parties to the agreement were unclear.

4
5 Even if the dicta were applicable, they provide no useful tool for
6 unraveling whether parties intended to treat ISP traffic as local for
7 reciprocal compensation purposes. Most of the factors cited by Mr.
8 Selwyn stem directly from the FCC's ESP exemption and involve
9 specific directions or orders by the FCC, as Mr. Selwyn himself
10 acknowledges. Because ISPs do not pay access charges--again, the
11 result of a discrete and narrow policy decision by the FCC in 1983,
12 which has never been economically rationalized--the Commission has
13 directed that ISPs and other ESPs be provisioned out of intrastate
14 tariffs, that revenues be counted as intrastate for ARMIS reports, etc.
15 ILECs have no choice in these matters; attempts to alter the reporting
16 status of ISP traffic to conform with the interstate jurisdiction of such
17 traffic, for example, have been rebuffed. It is the height of sophistry to
18 directly order the ILECs to meet these requirements, then argue that
19 their compliance with those directions may somehow be evidence that
20 the ILECs voluntarily *intended* to treat the traffic as "local." This is
21 tantamount to directly ordering a man to jump off a cliff and then
22 suggesting that his compliance indicates he really wanted to jump.

23
24 Again, it may be that policy-makers have an incentive to try to preserve
25 the artificial subsidization of ALECs and ISPs through the maintenance

1 of uneconomic reciprocal compensation payments, which flow entirely
2 from ILECs and their ratepayers to ALECs and ISPs. But the dicta
3 offered by the FCC certainly provide no sound policy foundation for
4 doing so.

5

6 **Q. IN DISCUSSING THE FCC'S DICTA, MR. SELWYN AGAIN REFERS**
7 **TO A SUPPOSED "DEFAULT" POLICY TO TREAT ISP CALLS AS**
8 **"LOCAL." IS THERE ANY FOUNDATION FOR THIS STATEMENT?**

9

10 **A.** No. In the ISP Declaratory Ruling, the FCC makes several indisputable
11 points, including the following: (1) ISP-bound traffic does not terminate
12 at the ISP's local node but continues on to destinations on the Internet;
13 (2) the ESP exemption in no way signals any diminution or alteration of
14 the FCC's view that Internet-bound traffic is interstate; (3) the FCC has
15 no rule at present governing reciprocal compensation for ISP-bound
16 traffic; (4) In lieu of a federal rule, parties may have voluntarily agreed
17 to apply reciprocal compensation to such traffic; (5) states have the
18 authority to interpret whether such an agreement was concluded. If
19 there is any "default" paradigm at work, it is to defer to the terms of the
20 interconnection agreements negotiated among the parties. The FCC is
21 not endorsing the treatment of ISP-bound calls as local, it is merely
22 noting the states' power to interpret each interconnection agreement.

23

24 The FCC indicates that states may interpret those agreements or
25 decide to require reciprocal compensation, in the absence of a federal

1 rule on this issue, so long as the state action does not "conflict with
2 governing federal law."¹¹ But the FCC offers no valid rationale for how a
3 state could mandate reciprocal compensation for ISP-bound calls and
4 retain any such consistency, since its own rulings point clearly to the
5 fact that those calls do not terminate within local exchange areas where
6 they originate.

7
8 In any case, the FCC stops far short of the endorsement that Mr.
9 Selwyn insinuates can be found in the *ISP Declaratory Ruling*. The
10 FCC says states can use their authority, in the absence of a specific
11 federal rule, to implement reciprocal compensation—if the state action
12 does not conflict with governing federal law (which, as I have stated,
13 does not call for reciprocal compensation for this traffic). But it
14 immediately adds the statement that "state commissions also are free
15 not to require the payment of reciprocal compensation for this traffic
16 and to adopt another compensation mechanism."¹²

17
18 **Q. IN DISCUSSING THE FCC'S DICTA, MR. SELWYN REFERS TO THE**
19 **QUESTION OF WHETHER EITHER OF THE PARTIES TOOK STEPS**
20 **TO SEGREGATE OR METER ISP-BOUND TRAFFIC. ARE YOU**
21 **AWARE OF ATTEMPTS BY BELLSOUTH TO TREAT ISP-BOUND**
22 **TRAFFIC DIFFERENTLY FROM LOCAL TRAFFIC?**

23
24
25 ¹¹ *Id.* at para. 26.

¹² *Id.*

1 A. Yes. It is my understanding that BellSouth took steps to identify and
2 separate out traffic routed through its network and destined for the
3 Internet. BellSouth apparently did so because it recognized that such
4 traffic was not local traffic and should not be treated as such.
5 BellSouth then introduced changes to its billing system to try to ensure
6 that it would never knowingly bill a CLEC for reciprocal compensation
7 stemming from ISP-bound traffic originated by a CLEC customer and
8 *routed through BellSouth's network to the Internet.*

9
10 As for traffic originated by BellSouth's customers, there is no way for
11 the originating carrier to know or measure, with certainty, whether calls
12 from its subscribers to any seven-digit number served by an ALEC are
13 intrastate or interstate in nature. As I stated in my direct testimony, the
14 only sure way to identify traffic bound to the Internet is for the receiving
15 LEC to identify such calls as ISP-bound traffic. Again, this situation
16 also arises with regard to interstate FX and certain interstate dial-
17 around calls. When BellSouth customers originate such calls, only the
18 ALEC knows--or can find out--whether an interstate or intrastate
19 service is being provided. BellSouth apparently took steps to identify
20 ISP traffic routed through its network--but GNAPs and other ALECs
21 apparently failed to follow suit.

22
23 Q. **ON PAGE THREE OF HIS TESTIMONY, MR. GOLDSTEIN OPINES**
24 **THAT ISP-BOUND CALLS ARE "INDISTINGUISHABLE" FROM**
25 **LOCAL CALLS, AS A "TECHNICAL MATTER." DOES THIS MEAN**

1 **THAT SUCH CALLS SHOULD BE SUBJECT TO RECIPROCAL**
2 **COMPENSATION?**

3
4 A. No. As a technical matter, any seven or 10-digit, non-toll call is
5 indistinguishable from every other while it is being carried on the LECs'
6 networks. Where the called and calling parties are served by different
7 LECs, every factor discussed here applies identically. This is just as
8 much the case where the number called is part of a Feature Group A
9 interstate message toll service--which everyone agrees must be
10 charged under the interstate access charge regime--as it is for a call to
11 the Internet. But such technical similarities do not mean that ISP-
12 bound traffic is "local" traffic.

13
14 As a practical matter, ISP-bound calls also are indistinguishable---for
15 the portion carried by the LEC networks--from certain dial-around toll
16 calls, many of which are interstate in nature but are themselves
17 technically similar to calls which do, in fact, originate and terminate
18 *within the local exchange*. Similarly, interstate FX calls are dialed using
19 seven or 10-digit codes although they, too, are indisputably interstate in
20 nature. Certainly, nobody suggests that those interstate calls should
21 be subject to reciprocal compensation as "local" calls. That is because
22 the determination of where a call terminates is made depending on the
23 end point of the communication, not at some intermediate switching
24 point or at a point where call-supervision is returned. That standard for
25 determining where a call terminates has been established through a

1 legacy of FCC and court precedents. So the fact that ISP calls may
2 have technical similarities to local traffic is meaningless for purposes of
3 determining whether reciprocal compensation should apply under the
4 Agreement.

5

6 **Q. COULD YOU SUMMARIZE YOUR TESTIMONY?**

7

8 **A. GNAPs' position, as expressed in its expert testimony, begins with a**
9 **distortion and misinterpretation of FCC policy and proceeds with an**
10 **attempt to back-fill through erroneous policy arguments. This attempt**
11 **fails, because GNAPs nowhere confronts the truth that ISP-bound**
12 **traffic simply is not local traffic under the terms of the Agreement**
13 **because it does not both originate and terminate in the same local**
14 **exchange area or LATA. There is no policy rationale or foundation to**
15 **be found in the Act, the FCC's rules, or industry "consensus" for**
16 **lumping interstate, Internet-bound traffic in with local traffic for**
17 **reciprocal compensation purposes. This Commission should deny**
18 **GNAPs' claims for an unwarranted and unauthorized subsidy at the**
19 **expense of BellSouth and its ratepayers.**

20

21 **Q DOES THIS CONCLUDE YOUR TESTIMONY?**

22

23 **A. Yes it does. Thank you.**

24

25

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
)	
Bell Atlantic-Delaware, Inc., Bell)	
Atlantic-Maryland, Inc., Bell Atlantic-New)	
Jersey, Inc., Bell Atlantic-Pennsylvania, Inc.,)	
Bell Atlantic-Virginia, Inc., Bell)	
Atlantic-Washington, D.C., Inc., Bell Atlantic-)	
West Virginia, Inc., New York Telephone)	
Company, and New England Telephone and)	File No. E-99-22
Telegraph Company,)	
)	
Complainants,)	
)	
)	
v.)	
)	
Global NAPs, Inc.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1999

Released: December 2, 1999

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we resolve a formal complaint brought by various Bell Atlantic companies (collectively, Bell Atlantic) against a competitive local exchange carrier (CLEC), Global NAPs, Inc. (Global NAPs), pursuant to section 208 of the Communications Act of 1934, as amended (Act or Communications Act).¹ The complaint challenges the lawfulness and application of certain Global NAPs tariff provisions that purport to charge a per-minute interstate rate for Internet calls, specifically, calls originated by Bell Atlantic customers that are handed off to Global NAPs for delivery to Internet service providers (ISPs).²

¹ 47 U.S.C. § 208.

² Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1 (Tariff)

2. As explained below, we conclude that the challenged provisions of Global NAPs' tariff, as applied to ISP-bound traffic delivered by Bell Atlantic to Global NAPs in Massachusetts, are unjust and unreasonable under section 201(b) of the Act,³ because those tariff provisions condition the imposition of charges on circumstances that were indeterminate when the tariff took effect and remain indeterminate today. In particular, the challenged tariff provisions purport to apply only to ISP-bound traffic for which Global NAPs receives no compensation from Bell Atlantic under the parties' existing interconnection agreement; however, the Massachusetts Department of Telecommunications and Energy (Massachusetts DTE) has yet to make a final determination whether and how the parties' existing interconnection agreement provides for inter-carrier compensation for ISP-bound traffic. Moreover, we conclude that the challenged tariff provisions violate section 61.74(a) of our rules, because they refer to a document other than the Tariff itself, *i.e.*, an interconnection agreement.⁴ Accordingly, we hereby grant Bell Atlantic's complaint and hold that Sections 7 and 7A of Global NAPs' Tariff F.C.C. No. 1 are unlawful.

II. BACKGROUND

A. Events Preceding the Commission's Reciprocal Compensation Order

3. On April 15, 1997, Global NAPs and New England Telephone and Telegraph Company for Massachusetts (Bell Atlantic) entered into an interconnection agreement that continues until April 15, 2000.⁵ Pursuant to this agreement, Bell Atlantic carries traffic from its end user customers in Massachusetts to a point of interconnection with Global NAPs in Massachusetts; then Global NAPs delivers the traffic from the point of interconnection to its ISP customers in Massachusetts.⁶

at 82-83, Sections 7, 7A.1, 7A.2, 7A.3, 7A.4 (effective April 15, 1999).

³ 47 U.S.C. § 201(b).

⁴ 47 C.F.R. § 61.74(a).

⁵ See Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, by and between New England Telephone and Telegraph Company and Global NAPs for Massachusetts (April 15, 1997) (Bell Atlantic-Global NAPs Interconnection Agreement), attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22. The agreement will automatically renew and remain in effect unless (1) either party gives notice of termination at least 60 days before April 15, 2000, or (2) after that date, either party gives a 90-day notice of termination. *Id.* at 36, Section 21; see also Global NAPs Answer, File No. E-99-22 (filed July 28, 1999) (Global NAPs Answer) at Attachment C.

⁶ See Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.2; see also Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues Pursuant to Section 1.732(h) and Joint Statement Pursuant to Section 1.733(7)(b)(2), File No. E-99-22 (filed August 10, 1999) (Joint Statement) at 2.

4. The parties' interconnection agreement provides that "[r]eciprocal compensation only applies to the transport and termination of Local Traffic billable by NYNEX [now Bell Atlantic] which a Telephone Exchange Service Customer originates on NYNEX's or Global NAPs' network for termination on the other Party's network."⁷ "Local Traffic" is defined as "a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts. . . ."⁸ The interconnection agreement further provides that the parties "shall compensate each other for the transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule."⁹ According to the Pricing Schedule, reciprocal compensation for "Local Traffic" is \$.008 per-minute.¹⁰

5. The parties executed their interconnection agreement despite their inability to reach a consensus on whether the above-quoted language in the interconnection agreement requires payment of reciprocal compensation for traffic that is delivered to ISPs, *i.e.*, calls made by one carrier's customers that are handed off to the other carrier for delivery to the latter carrier's ISP customers.¹¹ In place of such a consensus, the parties agreed to interpret the applicable language in their agreement in the same manner in which identical language in other Bell Atlantic/CLEC interconnection agreements was ultimately interpreted by the Massachusetts DTE.¹²

6. On June 26, 1998, MCI WorldCom Technologies, Inc. (MCI WorldCom), which provides competitive local exchange service in Massachusetts, filed a complaint against Bell Atlantic before the Massachusetts DTE regarding Bell Atlantic's failure to pay reciprocal compensation for ISP-bound traffic pursuant to their interconnection agreement.¹³ On October

⁷ Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.1. According to section 252 of the Act, "reciprocal compensation" arrangements must (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A).

⁸ Bell Atlantic-Global NAPs Interconnection Agreement at 5, Section 1.38.

⁹ Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.2.

¹⁰ Bell Atlantic-Global NAPs Interconnection Agreement at 8, Pricing Schedule.

¹¹ See Chronology of Events Submitted Pursuant to Staff Request of August 3, 1999, File No. 99-22 (filed August 11, 1999) (Chronology of Events) at 11-12.

¹² Chronology of Events at 11-12.

¹³ Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116-C

21, 1998, the Massachusetts DTE ruled in favor of MCI WorldCom, holding that the parties' agreement requires Bell Atlantic to pay reciprocal compensation for ISP-bound traffic.¹⁴ The Massachusetts DTE noted that other CLECs' interconnection agreements (including Global NAPs') with Bell Atlantic contain identical provisions and directed Bell Atlantic to pay the applicable reciprocal compensation rate contained in those agreements, as well.¹⁵ The express and exclusive basis for the Massachusetts DTE's decision was that: (a) the link between the caller and the ISP in ISP-bound traffic is jurisdictionally severable from the continuing link from the ISP to the target Internet site; (b) ISP-bound traffic is a "local" call under federal law and the interconnection agreement; and (c) ISP-bound traffic is subject to the Massachusetts DTE's jurisdiction as an intrastate call.¹⁶ In essence, the Massachusetts DTE viewed an Internet call as effectively two calls: a local call from the end user to the ISP, and a non-local call from the ISP to the Internet, *i.e.*, the "two-call" theory.¹⁷

B. The Commission's Reciprocal Compensation Order

7. On February 26, 1999, in response to a number of requests to clarify whether reciprocal compensation applies to ISP-bound traffic, we released the *Reciprocal Compensation Order*.¹⁸ In that *Order*, we concluded that ISP-bound traffic "is jurisdictionally mixed and appears to be largely interstate in nature."¹⁹ In reaching this conclusion, we "analyze[d] ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site."²⁰ Applying this analysis, we found that ISP-bound traffic "do[es] not terminate at

(filed June 26, 1998), attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22.

¹⁴ See Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116 (Mass. D.T.E. rel. October 21, 1998) (*Massachusetts DTE October 21, 1998 Order*) at 12, attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22.

¹⁵ See *Massachusetts DTE October 21, 1998 Order* at 14.

¹⁶ See *Massachusetts DTE October 21, 1998 Order* at 6, 11-13.

¹⁷ See *Massachusetts DTE October 21, 1998 Order* at 11-12.

¹⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, 3703, 3707, ¶¶ 1, 23, 28 (Feb. 26, 1999) (*Reciprocal Compensation Order*).

¹⁹ *Reciprocal Compensation Order*, 14 FCC Rcd at 3689-90, ¶ 1; see also *id.* at 3697, 3701-3, 3704-5, ¶¶ 12, 18, 20, 23, 24.

²⁰ *Reciprocal Compensation Order*, 14 FCC Rcd at 3698-9, ¶ 13.

the ISP's local server, . . . but continues to the ultimate destination or destinations, specifically at an Internet website that is often located in another state."²¹ We expressly rejected the argument - on which the Massachusetts DTE had heavily relied in its October 21, 1998 order - that ISP-bound calls consist of severable local and non-local components, reasoning that "this argument is inconsistent with Commission precedent . . . holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts."²²

8. We emphasized, however, that our conclusion that ISP-bound traffic is largely interstate "does not in itself determine whether reciprocal compensation is due in any particular instance."²³ As we explained, there currently is no federal rule governing inter-carrier compensation for ISP-bound traffic.²⁴ Consequently, whether such compensation is due in any particular instance hinges on the parties' contractual intent in entering into their interconnection agreement, or on the state commission's application of other legal or equitable principles to the parties' compensation dispute.²⁵

9. Regarding the parties' intent, we stated that, given the absence of a federal rule governing inter-carrier compensation for ISP-bound traffic, "parties may [have] voluntarily include[d] this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act. . . ."²⁶ We explained that, where a state commission determines that the parties did, indeed, voluntarily include compensation for ISP-bound traffic in their interconnection agreement, the parties "are bound by those [interconnection] agreements, as interpreted and enforced by the state commission[]." ²⁷ Moreover, we determined that such deference to state commission interpretations of parties' contractual intent regarding compensation for ISP-bound traffic applies to state commission decisions that post-date, as well as pre-date, the *Reciprocal Compensation Order*.²⁸

²¹ *Reciprocal Compensation Order*, 14 FCC Rcd at 3697, ¶ 12.

²² *Reciprocal Compensation Order*, 14 FCC Rcd at 3700, ¶ 15.

²³ *Reciprocal Compensation Order*, 14 FCC Rcd at 3689, ¶ 1.

²⁴ *Reciprocal Compensation Order*, 14 FCC Rcd at 3689, 3690, 3695, 3703, 3704-5, ¶¶ 1, 9, 22, 24, 25, 26; see also Joint Statement at 2.

²⁵ *Reciprocal Compensation Order*, 14 FCC Rcd at 3703-4, 3706, ¶¶ 22, 24, 27.

²⁶ *Reciprocal Compensation Order*, 14 FCC Rcd at 3703, ¶ 22; see also *id.* at 3703-4, ¶¶ 21, 24.

²⁷ *Reciprocal Compensation Order*, 14 FCC Rcd at 3703, ¶ 22 (emphasis added); see also *id.* at 3689-90, 3703-4, ¶¶ 1, 21, 24.

²⁸ *Reciprocal Compensation Order*, 14 FCC Rcd at 3703-4, ¶ 24 ("Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the

10. We went on to explain that, even where a state commission concludes that the parties did not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, "state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. . . . By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism."²⁵ Indeed, we observed that, "[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."²⁶ We, therefore, concluded that "[u]ntil adoption of a final [federal] rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic," pursuant to their authority to approve interconnection agreements under sections 251 and 252 of the Act.²⁷ In sum, "in the absence of a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic," even where the parties' existing interconnection agreement is silent on the subject.²⁸

C. Events After the Commission's *Reciprocal Compensation Order*

11. On April 14, 1999, Global NAPs filed with this Commission the federal tariff at issue here.²⁹ Global NAPs filed the Tariff on one day's notice pursuant to section 61.23(c) of our

future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.") (emphasis added); see also *id.* at 3707, ¶ 28 ("[T]he Commission's holding that parties' agreements, as interpreted by state commissions, should be binding also applies to those state commissions that have not yet addressed the issue.").

²⁵ *Reciprocal Compensation Order*, 14 FCC Red at 3704-5, ¶¶ 25, 26 (footnotes omitted).

²⁶ *Reciprocal Compensation Order*, 14 FCC Red at 3705-6, ¶ 26.

²⁷ *Reciprocal Compensation Order*, 14 FCC Red at 3707, ¶ 28.

²⁸ *Reciprocal Compensation Order*, 14 FCC Red at 3706, n.87. In the *Reciprocal Compensation Order*, the Commission also issued a notice of proposed rulemaking (NPRM) in which the Commission "tentatively conclude[d] that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act." *Id.* at 3707, ¶ 30. The comment cycle for this NPRM has concluded, and the Commission expects to issue an order resolving that proceeding in the near future.

²⁹ *Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc.*, Tariff F.C.C. No. 1 (effective April 15, 1999).

rules.³⁴ The Tariff purports to charge an interstate rate of \$.008 per minute for all ISP-bound calls for which Global NAPs does not receive compensation under an interconnection agreement.³⁵ Towards that end, the Tariff states:

This tariff applies to telecommunications delivered to the Company [*i.e.*, Global NAPs] 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").³⁶

12. On May 19, 1999, the Massachusetts DTE vacated its October 21, 1998 decision, concluding that our *Reciprocal Compensation Order* had invalidated the "two-call" theory on which the Massachusetts DTE had asserted jurisdiction over, and required reciprocal compensation for, ISP-bound traffic.³⁷ The Massachusetts DTE ruled, therefore, that Bell Atlantic is not presently required to pay reciprocal compensation for ISP-bound traffic, retroactive to February 26, 1999.³⁸ The Massachusetts DTE expressly preserved the possibility,

³⁴ 47 C.F.R. § 61.23(c).

³⁵ Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82-83, Sections 7A.1, 7A.4 (effective April 15, 1999); *see also* Joint Statement at 1-2.

³⁶ Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1 (effective April 15, 1999). Moreover, section 7A.2 of Global NAPs' tariff provides that "[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 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." Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.2 (effective April 15, 1999). In addition, Section 7A.3 of Global NAPs' tariff provides that "[i]his 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." *Id.* at 82, Section 7A.3.

³⁷ *See Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts*, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116-C (Mass. D.T.E. rel. May 19, 1999) (*Massachusetts DTE May 19, 1999 Order*), attached to Bell Atlantic Complaint, Attachment A at 24-25.

³⁸ *See Massachusetts DTE May 19, 1999 Order* at 28.

however, that provisions within existing interconnection agreements not inextricably bound to the "two-call" theory might require the payment of some compensation for the delivery of ISP-bound traffic.³⁹ Indeed, the Massachusetts DTE repeatedly acknowledged that, notwithstanding its vacation of its October 21, 1998 Order, the issue of whether existing interconnection agreements between Bell Atlantic and CLECs require some form of compensation for ISP-bound traffic remains a live dispute.⁴⁰ Accordingly, in express reliance on the directives contained in our *Reciprocal Compensation Order*, the Massachusetts DTE stated that Bell Atlantic and applicable CLECs, including Global NAPs, should negotiate about the appropriate compensation mechanism for inter-carrier delivery of ISP-bound traffic pursuant to section 252 of the Act.⁴¹

³⁹ In this regard, the Massachusetts DTE stated:

During negotiations, the parties to this agreement may determine that adequate pricing and other terms for these transactions are already governed by other contract provisions (and, certainly, arguments along these lines have been advanced in the CLECs' comments. . .). Or else, accepting or at least acquiescing in our view of Section 5.8 of the interconnection agreement, they may jointly conclude that the present agreement is silent on the point and needs to be supplemented to provide new terms for these mutual services. They are free to arrive at either judgment in coming to terms over the present dispute. The best outcome is for Bell Atlantic and MCI WorldCom (or other CLECs where other interconnection agreements are concerned) to arrive at a resolution themselves. A far less satisfactory outcome is for the Department to have to infer, or even to supply, terms, because the parties cannot agree. *Massachusetts DTE May 19, 1999 Order at 29 (emphases added)*.

⁴⁰ The Massachusetts DTE stated, for example:

Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations under their interconnection agreement, there is - *post* February 26, 1999 - no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.

Massachusetts DTE May 19, 1999 Order at 25-26 (emphases added). See also, *Massachusetts DTE May 19, 1999 Order at 27* ("MCI WorldCom may choose to renew its complaint upon some claim that Massachusetts contract law or 'other legal or equitable considerations' give rise to mutual obligation on its and Bell Atlantic's parts to pay reciprocal compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement.") (emphasis added); *Massachusetts DTE May 19, 1999 Order at 27 n.29* ("We do not, at this point, hazard a judgment whether such an alternative basis exists in the Bell Atlantic-MCI WorldCom interconnection agreement before us. If such a basis can be convincingly shown, then it would not be the Department's role to save contracting parties from later-regretted commercial judgments."); *Massachusetts DTE May 19, 1999 Order at 28 n.30* (declining to rule whether MCI WorldCom must refund reciprocal compensation payments made by Bell Atlantic prior to the *Reciprocal Compensation Order*, because "[t]o do so now would be premature," given the continuing possibility that the existing interconnection agreement might be construed to have required such payments by Bell Atlantic.); n. 39, *supra*.

⁴¹ See *Massachusetts DTE May 19, 1999 Order at 30* ("[W]e expect carriers to begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic.")

The Massachusetts DTE also offered to provide a mediator pursuant to section 252(a)(2) to facilitate the parties' negotiations.⁴² The Massachusetts DTE further observed:

If these negotiations do not resolve the present interconnection agreement dispute, the Department can arbitrate the matter under section 252(b). At that time, consistent with the discretion we have been given by the FCC (at least until the NPRM is settled), the Department would resolve whatever issues are put before it.⁴³

13. On May 27, 1999, Global NAPs forwarded a bill to Bell Atlantic pursuant to Sections 7 and 7A of its FCC Tariff No. 1, in which it sought payment, in the amount of \$1,726,679, for ISP-bound traffic that Bell Atlantic delivered to Global NAPs in Massachusetts between April 15, 1999 and April 30, 1999.⁴⁴ Bell Atlantic has refused to pay this bill.⁴⁵ Subsequent to April 30, 1999, Global NAPs has forwarded to Bell Atlantic additional similar bills pursuant to its FCC Tariff No. 1, which Bell Atlantic has also not paid.⁴⁶

14. On July 8, 1999, Bell Atlantic filed the instant complaint pursuant to section 208 of the Act challenging the lawfulness of Sections 7 and 7A of Global NAPs' F.C.C. Tariff No. 1. In its complaint, Bell Atlantic seeks a Commission finding that those tariff provisions are unjust and unreasonable under section 201(b) of the Act for the following reasons. First, Bell Atlantic claims that Global NAPs' tariff violates the so-called "ESP exemption," because said exemption allegedly precludes any carrier from assessing any per-minute interstate charges on ISP-bound traffic.⁴⁷ Second, Bell Atlantic argues that, if the ESP exemption does not apply, then Global

⁴² See *Massachusetts DTE May 19, 1999 Order* at 30 ("If need be, we would be willing to provide a Department mediator to facilitate agreement, pursuant to the mediation provision of section 252(a)(2).").

⁴³ See *Massachusetts DTE May 19, 1999 Order* at 30.

⁴⁴ Bell Atlantic Complaint at Attachment B; see also Joint Statement at 2.

⁴⁵ See Global NAPs Answer, Proposed Findings of Fact, at 2-3.

⁴⁶ See Global NAPs Answer, Proposed Findings of Fact, at 2-3.

⁴⁷ Bell Atlantic Complaint at 3, 8-9, 15 (citing *Reciprocal Compensation Order*, 14 FCC Red at 3700, ¶ 16; GTE Telephone Operating Cos., GTOC Tariff No. 1 GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Red 22466 (1998) (*GTE ADSL Order*)); Bell Atlantic's Brief on Non-Cost Issues, File No. E-99-22 (Bell Atlantic Non-Cost Brief) at 2, 6, 7-8 (filed Sept. 2, 1999) (citing *GTE ADSL Order*, 13 FCC Red at 22469-70, ¶ 7; MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, Phase I, 97 F.C.C. 2d 682, 721 (1983) (*MTS and WATS Market Structure Order*)); Bell Atlantic Reply Brief on Non-Cost Issues, File No. E-99-22 (Bell Atlantic Non-Cost Reply Brief) at 2, 13-15 (filed Sept. 15, 1999) (citing *MTS and WATS Market Structure Order*, 97 FCC 2d 682, 721; *Reciprocal Compensation Order*, 14 FCC Red at 3705-6, ¶ 26.).

NAPs' tariff violates our rules governing inter-carrier shared access arrangements, because said rules allegedly preclude carriers that jointly provide access service from charging each other for such service, and may even require Global NAPs to reimburse Bell Atlantic for a portion of the fees that Global NAPs receives from its ISP customers.⁴⁸ Third, Bell Atlantic asserts that Global NAPs' tariff violates our decision in the *Reciprocal Compensation Order* that, until a federal rule is adopted, the issue of compensation for inter-carrier delivery of ISP-bound traffic must be addressed exclusively through negotiations and state arbitrations under sections 251 and 252 of the Act.⁴⁹ Fourth, Bell Atlantic maintains that Global NAPs' tariff constitutes "cramming," because Bell Atlantic allegedly has not agreed to subscribe to the tariffed services at issue,⁵⁰ and finally, Bell Atlantic claims that Global NAPs' tariffed rates are unreasonably high.⁵¹ For the reasons described below, we find that Global NAPs' tariff is unlawful, but for reasons other than those asserted by Bell Atlantic.⁵²

III. DISCUSSION

15. The parties do not dispute one principle: the *Reciprocal Compensation Order* holds that carriers whose interconnection agreements include an inter-carrier compensation

⁴⁸ Bell Atlantic Complaint at 3, 9-10 (*citing* Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Memorandum Opinion and Order, 4 FCC Rcd 7183, 7185-86 (1989); Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 86-104, Memorandum Opinion and Order, 2 FCC Rcd 4518, 4519 (1987); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Memorandum Opinion and Order, Phase I, 97 F.C.C. 2d 1082, 1176-77 (1984)); Bell Atlantic Non-Cost Brief, at 2, 8-9 (*citing* *Reciprocal Compensation Order*, 14 FCC Rcd at 3695, ¶ 9; Access Billing Requirements for Joint Service Provision, 4 FCC Rcd 7183, ¶¶ 22-24; Waiver of Access Billing Requirements and Investigation of Permanent Modifications, 2 FCC Rcd 4518, ¶¶ 39-40; Investigation of Access and Divestiture Related Tariffs, 97 F.C.C. 2d 1082, 1176-77); Bell Atlantic Non-Cost Reply Brief, at 2, 12-15 (*citing* *Reciprocal Compensation Order*, 14 FCC Rcd at 3695, 3705-6, ¶¶ 9, 26).

⁴⁹ Bell Atlantic Complaint at 3-4, 10 (*citing* *Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, 3707-10, ¶¶ 26, 28-36); Bell Atlantic Non-Cost Brief, at 2, 9-13 (*citing* *Reciprocal Compensation Order*, 14 FCC Rcd at 3704-6, ¶¶ 25-27); Bell Atlantic Non-Cost Reply Brief, at 1-2, 3-7 (*citing* *Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, 3707, ¶¶ 26, 28).

⁵⁰ Bell Atlantic Complaint at 4, 10-13; Bell Atlantic Non-Cost Brief at 1-2, 3-4, 14; Bell Atlantic Non-Cost Reply Brief, at 2, 10-12 (*citing* *United Artists Payphone Corp. v. New York Telephone Company*, Memorandum Opinion and Order, File Nos. E-90-181, E-90-182, 8 FCC Rcd 5563 (1993); *MGC Communications Inc. v. AT&T Corp.*, DA 99-1395 (rel. July 16, 1999)).

⁵¹ Bell Atlantic Complaint at 13, 15-16; Bell Atlantic's Brief on Cost Issues, at 1-2, 8; Bell Atlantic Reply Brief on Cost Issues, at 2, 5.

⁵² Given our determination that Global NAPs' tariff violates the *Reciprocal Compensation Order*, we need not, and do not, reach the other issues raised in Bell Atlantic's complaint.

mechanism for ISP-bound traffic must abide by the state commission's determination regarding the existence and meaning of the mechanism.⁵³

16. As described above, the Massachusetts DTE has yet to make a full and final determination whether the existing interconnection agreement between Bell Atlantic and MCI WorldCom -- and by extension, other CLECs, including Global NAPs -- provides for any inter-carrier compensation for ISP-bound traffic.⁵⁴ Not only did the Massachusetts DTE state repeatedly in its May 19, 1999 Order that this issue remains live and disputed, but the May 19, 1999 Order itself (from which 2 of the 5 Commissioners partially dissented) is the subject of several pending petitions for reconsideration.⁵⁵ Moreover, on April 16, 1999, Global NAPs filed with the Massachusetts DTE a complaint against Bell Atlantic regarding this very issue, and the Massachusetts DTE has not yet resolved Global NAPs' complaint.⁵⁶ Indeed, in its briefs here, Global NAPs acknowledges (albeit in passing) that the Massachusetts DTE still could decide that the existing interconnection agreement between the parties requires Bell Atlantic to compensate Global NAPs in some way for the delivery of ISP-bound traffic.⁵⁷

17. Sections 251 and 252 of the Act create, *inter alia*, negotiation and arbitration procedures for CLECs to interconnect with incumbent LECs in order to provide competing communications services. Congress gave exclusive authority over those processes to state commissions, even though the interconnection matters encompassed by sections 251 and 252

⁵³ See ¶ 9, *supra*; see also *US West Communications v. MFS InteleNet, Inc.*, ___ F.3d ___, 1999 WL 799082 (9th Cir. (Wash.)) ("The FCC has held parties are bound by interconnection agreements that include ISP-Bound Traffic in their reciprocal compensation provisions and are approved by a state commission."); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999) (stating that "[t]he Commission could not have made clearer [in the Reciprocal Compensation Order] its willingness -- at least until a federal rule is promulgated -- to let state commissions make the call [regarding the appropriate compensation mechanism for ISP-bound traffic.]").

⁵⁴ See ¶ 12, *supra*.

⁵⁵ See, e.g., *MCI WorldCom Technologies, Inc. Order, D.T.E., 97-116-D, Motions for Reconsideration* filed by Global NAPs, Sprint Communications, and RCN Telecom (July 13, 1999).

⁵⁶ See *Complaint of Global NAPs, Inc. v. Bell Atlantic, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 99-39* (filed April 16, 1999), attached to *Letter from Karlyn D. Stanley to Magalie Roman Salas*, dated August 10, 1999, File No. E-99-22; see also *Initial Brief of Global NAPs on Non-Cost Issues*, at 41 n.32.

⁵⁷ *Initial Brief of Global NAPs on Non-Cost Issues*, at 41; *Reply Brief of Global NAPs*, at 20. Global NAPs characterizes this possibility as remote, at best, but we must accept at face value the Massachusetts DTE's repeated assertions that it still could construe the existing interconnection agreement as requiring inter-carrier compensation for ISP-bound traffic.

have both interstate and intrastate aspects.⁵⁸ Thus, the fact that ISP-bound traffic is largely interstate does not necessarily mean that such traffic cannot fall within the state-supervised negotiation and arbitration processes set forth in sections 251 and 252.⁵⁹

18. A careful reading of sections 251 and 252 reveals, in fact, that ISP-bound traffic may fall within the state-supervised negotiation and arbitration processes set forth therein.⁶⁰ It is beyond debate that the rates, terms, and conditions under which carriers will exchange traffic may be essential terms of some interconnection agreements. Moreover, sections 252(b)(1), (b)(4)(C), and (c)(1) require a state commission to resolve any "open issues" between the parties negotiating an interconnection agreement, and, in doing so, to ensure that such resolution meets the requirements of section 251.⁶¹ Section 251(d)(3) specifically preserves state authority to impose any "access and interconnection obligations" that are not either inconsistent with or disruptive of the requirements and purposes of the Act.⁶² Thus, it was within our discretion to direct in the *Reciprocal Compensation Order* that, on an interim basis, inter-carrier compensation for ISP-bound traffic should be treated as an "open issue" subject to the state-supervised negotiation/mediation/arbitration processes set forth in sections 251 and 252 of the Act. Accordingly, whether the existing interconnection agreement between Bell Atlantic and Global NAPs does or should provide for inter-carrier compensation for ISP-bound traffic is an appropriate area of inquiry for the Massachusetts DTE under sections 251 and 252 of the Act, even though ISP-bound traffic is largely interstate.

19. Global NAPs does not appear to argue otherwise. In fact, Global NAPs (along with other Intervenor(s)) filed a brief in the appeal of the *Reciprocal Compensation Order* contending (consistent with our analysis here) that state commissions do have authority under

⁵⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15520, ¶ 41 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and rev'd in part sub nom. AT&T Cos. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996); *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996); *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12460 (1997); *further recon. pending*; see also *Reciprocal Compensation Order*, 14 FCC Rcd at 3704-5, ¶ 25.

⁵⁹ *Reciprocal Compensation Order*, 14 FCC Rcd at 3704-5, ¶ 25.

⁶⁰ In conducting arbitration procedures under section 252 of the Act, however, state commissions still must comply with our rules and our interpretation of the Act. Thus, when we adopt federal rules for inter-carrier compensation for ISP-bound traffic, state commissions conducting arbitrations must abide by these rules.

⁶¹ 47 U.S.C. §§ 252(b)(1), 252(b)(4)(C), and 252(c)(1).

⁶² 47 U.S.C. § 251(d)(3).

sections 251 and 252 of the Act to determine whether interconnection agreements do or should contain inter-carrier compensation mechanisms for ISP-bound traffic.⁶³

20. Global NAPs points to our brief in the appeal of the *Reciprocal Compensation Order* to support its position that, until we adopt a federal rule on the subject, state commissions have *concurrent*, not *exclusive*, authority to establish inter-carrier compensation for ISP-bound traffic.⁶⁴ This means, in Global NAPs' view, that its federal tariff properly invokes the Commission's concurrent jurisdiction. The Commission, however, speaks through its orders, and nothing in our *Reciprocal Compensation Order* changes the analysis herein.

21. We need not decide here in the abstract whether Global NAPs may file any tariff addressing compensation for terminating ISP-bound traffic, because we find the tariff before us to be unjust and unreasonable. Section 7A.1 of the tariff provides that the 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. . . ."⁶⁵ As first explained above, however, the parties do not know at this time whether compensation is due pursuant to their agreement, and will not know until the Massachusetts DTE makes its final determination. Indeed, they have apparently been unsure of the answer to this question even since the agreement was signed.⁶⁶ Thus, the parties are unable today to determine whether this tariff is actually applicable. We find that Global

⁶³ See Joint Brief of Intervenors in Support of Respondents in Opposition to the LEC Petitioners, *Bell Atlantic Telephone Companies, Inc. et al. v. FCC*, Nos. 99-1094, et al. (filed August 5, 1999).

⁶⁴ See Initial Brief of Global NAPs on Non-Cost Issues, at 4, 34-35; Reply Brief of Global NAPs, at 18-19; see also Brief for Federal Communications Commission, *Bell Atlantic Telephone Companies, et al v. FCC*, Nos. 99-1094 et al, at 47 (filed July 22, 1999). The portion of the Commission's D.C. Circuit brief to which Global NAPs refers states:

The ILECs assert that the Commission has no authority to "authorize" state commissions to impose reciprocal compensation obligations to calls beyond the scope of Section 251(b)(5).... In this case, the Commission is not affirmatively authorizing the state commissions to impose reciprocal compensation obligations; the Commission is rendering an interpretation that imposing such obligations is not inconsistent with the Act or with existing federal rules, and therefore is not prohibited. The Commission issued a declaratory ruling to remove uncertainty and to settle a controversy, rather than an order authorizing, mandating, or prohibiting any particular action. Thus, the issue is not whether the Commission improperly authorized the state commissions to take a particular action, but whether the Commission correctly determined that state commissions have authority to take that action in the absence of contrary federal law. *Id.*

⁶⁵ Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1 (effective April 15, 1999).

⁶⁶ See ¶ 4, *supra*.

NAPs has acted unreasonably in implementing tariff provisions under which the purported customer cannot readily discern whether it is incurring the tariffed charges at the time that they are allegedly incurred. We find that Global NAPs cannot reasonably bill Bell Atlantic under this tariff when the very applicability of the tariff has yet to be determined.

22. The contingent and unclear applicability of the tariff defies the Commission's longstanding interpretation of section 201(b) of the Act, as reflected in section 61.2 of our rules.⁶⁷ Those authorities require that the applicability of the tariff rate, and its terms, be clear and explicit.

23. Moreover, it seems evident that any federal tariff purporting to govern inter-carrier compensation for ISP-bound traffic could be reasonable only if it mirrors any applicable terms of the party's interconnection agreement, as construed by the appropriate state commission. Using the tariff process to circumvent the section 251 and 252 processes cannot be allowed. In this regard, we find the tariff to be unreasonable in another respect. Section 7A.1 purports to apply the tariff even when a valid interconnection agreement could be in place. That is, the tariff by its terms applies not simply where no agreement addresses compensation for the traffic at issue, but in any circumstance where Global NAPs does not receive compensation. It is certainly possible that parties could have addressed ISP-bound traffic in their agreements without requiring payment to the terminating carrier, e.g., by agreeing to a bill and keep arrangement. This tariff provision seems to purport to override any such agreement.

24. Finally, in addition to the above findings, Global NAPs' tariff is unlawful on independent grounds. In particular, its tariff is not self-contained, but instead cross references, impermissibly, "an interconnection agreement."⁶⁸ This violates section 61.74(a) of our rules,⁶⁹ which provides that, in the absence of a waiver granted under sections 61.151, 61.152, and 61.153 of the Commission's rules,⁷⁰ "no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument."⁷¹ As the Commission has declared previously,

⁶⁷ 47 U.S.C. § 201(b). Section 61.2 of the Commission's rules states that "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2.

⁶⁸ Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1.

⁶⁹ 47 C.F.R. § 61.74(a).

⁷⁰ 47 C.F.R. §§ 61.151, 61.152, 61.153.

⁷¹ 47 C.F.R. § 61.74(a).

"a tariff should be complete when filed. Confusion may result if references to other tariffs [or documents] are allowed since all important information will not be consolidated in one place and references may be incomplete. In addition, referenced documents may not be easily accessible to the public."⁷²

Global NAPs' improper cross-referencing of an exogenous document renders the challenged tariff provisions unlawful and is an independent and sufficient basis for granting Bell Atlantic's complaint.⁷³

IV. CONCLUSION

25. For the foregoing reasons, we grant Bell Atlantic's complaint and hold that Sections 7 and 7A of Global NAPs' tariff are unlawful under section 201(b) of the Act. In addition, we find that Sections 7 and 7A of Global NAPs' tariff are unlawful, because they do not comply with Part 61 of our rules.

26. Having found that the Tariff is unlawful for the reasons set forth above, we need not reach each of the other grounds asserted by Bell Atlantic in its complaint. We caution that this does not, however, constitute a conclusion that the Tariff is reasonable with respect to issues not raised or discussed here.

⁷² Amendment of Parts 1 and 61 of the Commission's Rules, Report and Order, 98 F.C.C.2d 855, 876 at 980 (1984).

⁷³ See Revisions to Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Order, 4 FCC Rcd 2624 (1988); AT&T Communications Revisions to Tariff F.C.C. No. 15, Competitive Pricing Plan No. 12, DA 93-383, Order, 1993 WL 756821 (Com. Car. Bur. rel. April 2, 1993); Lincoln Telephone and Telegraph, Memorandum Opinion and Order, 78 F.C.C. 2d 1219 (1998).

V. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), and 208 and sections 61.2 and 61.74 of the Commission's rules, 47 C.F.R. §§ 61.2, 61.74, that Bell Atlantic's complaint is GRANTED, to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary