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Before the
STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

Global NAPs, Inc., Complainant, versus BellSouth Telecommunications, Inc. Defendant	Docket No. 991220-TP

POST-HEARING BRIEF OF GLOBAL NAPS, INC.

1. Introduction and Summary.

This case presents one major issue, a few minor ones, and a possibly significant one lurking in the background.[1]

The major issue is whether ISP-bound calls should be subject to inter-carrier compensation. Global NAPs says yes; BellSouth says no. As described below, the Commission should rule for Global NAPs.

- In economic terms, ISP-bound calls are identical to traditional local calls, and should be treated as such for purposes of inter-carrier compensation. Otherwise ALECs in general, and Global NAPs in particular, will not be able to compete for the business of ISPs.
- In technical terms, ISP-bound calls are also identical to traditional local calls, at least as far as their handling by the two carriers involved is concerned. Moreover, as Mr. Goldstein explained, as a matter of actual, technical fact, more than 90% of traffic between end users and ISP modem banks in fact never goes beyond those modems, so this traffic is "local" from this perspective as well.
- In legal terms, BellSouth valiantly (one might say desperately) clings to the notion that all ISP-bound traffic is inherently "access" and that this inherently means that inter-carrier compensation is not appropriate. BellSouth's assertions are somewhere between

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[1] Attachment A to this Brief is a summary statement of Global NAPs' position on the issues before the Commission.

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wrong, misleading, and irrelevant. Even if this traffic may fairly be called "access" for some purposes, that has nothing to do with whether BellSouth should pay Global NAPs when BellSouth customers make calls to the local telephone numbers of ISPs served by Global NAPs. Equally irrelevant is the legal dispute over whether this traffic is jurisdictionally interstate or intrastate. The D.C. Circuit recently vacated the FCC's first attempt at clarifying how to handle this issue precisely because the FCC mistakenly thought that the jurisdictional analysis controlled the question of the appropriate inter-carrier compensation model to apply.[2] The Commission should decline BellSouth's invitation to commit the same error here.

- In policy terms, this Commission has consistently and repeatedly rebuffed BellSouth's efforts to carve ISP-bound traffic out from the normal intercarrier compensation regime applicable to locally dialed calls. BellSouth's latest effort in this regard is to ask the Commission to impose a bill-and-keep system on the parties until the FCC acts. But there is no warrant for such a peculiar and anti-competitive policy. Instead, the Commission should do here what it has done elsewhere, *i.e.,* require that compensation be paid for ISP-bound traffic in accordance with the parties' existing interconnection agreement. If the FCC at some future point takes action that requires that result to be revisited, that issue can be dealt with at that time.

All of these reasons support the conclusion that ISP-bound traffic should be subject to compensation on the same terms and conditions as other local traffic.[3]

The first (relatively) minor issue is what rate should be established for ISP-bound traffic. The only logical result is to treat this traffic like any other local traffic. Global NAPs believes that the $0.009 rate currently in effect between the parties is appropriate, unless BellSouth can make a reasonable showing that it is too high. If the Commission concludes that BellSouth has made such a showing, then the logical course would be to use a rate that comports with the FCC's TELRIC methodology. The Commission some time ago established a per-minute rate of $0.002 for calls delivered to an end office and an additional $0.0013 for calls delivered to a tandem (not counting a very minor mileage charge), for a total of roughly $0.0033

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2 *Bell Atlantic v. FCC,* 206 F.3d 1 (D.C. Cir. 2000).

3 Formal Issue No. 1, the expiration date of the original interconnection agreement between the parties, was resolved by separate order of the Commission. Formal Issue Nos. 2-5 and 13 all relate to the question of compensation for ISP-bound calls. Most of the other issues between the parties have been resolved. *See* Attachment A.

for tandem-delivered traffic. These rates appear to comport with the FCC's rules regarding proxy rates to use when no TELRIC methodology has been established.

Further as to rates, BellSouth claimed in its testimony that the ISP-bound calls should be subject to a different charging regime due to their longer average holding time. BellSouth, however, has presented no actual cost analysis, either of its costs or anyone else's, that would warrant imposing such a different regime. It simply seeks to have the parties negotiate some alternative payment arrangement. Global NAPs notes, however, that BellSouth did not raise this proposal until its testimony in the arbitration; it never proposed it (and does not claim to have proposed it) during any negotiations with Global NAPs. Whatever the merits of a "call setup + per minute" rate might be in the abstract, therefore, there is no proper basis to establish such a payment scheme in this proceeding, either for ISP-bound traffic in particular, or in general.

The second (relatively) minor issue is which contractual provisions regarding the physical interconnection of the parties' networks should apply — those contained in the parties' existing agreement (as Global NAPs contends) or those contained in BellSouth's new template agreement (as BellSouth contends). (This is designated Issue No. 13.) Global NAPs submits that this is a simple issue. The parties' current agreement reflects workable arrangements for physical interconnection that this Commission has already found to be reasonable. Global NAPs has structured its existing arrangements with BellSouth based on that language. BellSouth, moreover, has presented no evidence whatsoever to suggest that its proposed wholesale revision of this language is an improvement from any perspective, much less a better fit, in any identifiable respect, with the requirements of Sections 251 or 252 of the Communications Act. The Commission should affirm that the existing contractual provisions regarding physical interconnection arrangements may remain in effect.

As indicated by Mr. Rooney's reply testimony, and as referred to in the Prehearing Order, on essentially all other specifically identified issues of contractual language, the parties are in accord.[4] This leaves the "lurking" issue, *viz.*, whether the agreed-upon (and, following the Commission's ruling on the issues noted above, arbitrated) contract terms should be included as (in effect) amendments to the parties' existing, functioning, agreement, or whether instead BellSouth may unilaterally impose on Global NAPs the need to renegotiate an existing and functioning contract completely from scratch. As Global NAPs understands the situation, this question was deferred by the Commission until the disputed specific issues were resolved; it is to be hoped that once those issues have, indeed, been resolved, perhaps the question of which contract to work from can be resolved amicably as well. On that understanding, Global NAPs will not further address this issue in this brief. Global NAPs, however, reserves the right to file a supplemental brief to address this question if BellSouth addresses it in ***its*** brief.

2. Intercarrier Compensation for ISP-Bound Calls.

This Commission is by now quite familiar with the legal and policy issues surrounding intercarrier compensation for ISP-bound calls. The legal landscape bearing on this question, however, gradually evolves with the passage of time, so BellSouth is not literally beating the same dead horse over and again in its unrelenting opposition to paying such compensation. But in practical terms this Commission — and ALECs trying to deal with BellSouth — are confronted today with the same intransigent opposition to economically reasonable compensation arrangements that BellSouth has exhibited for years.

Global NAPs does not seek to unnecessarily burden the Commission with another exposition of this well-traveled ground. Unfortunately, BellSouth's continuing effort to claim that no compensation is due for ISP-bound calls — and its claims that federal rulings regarding access charges support its position — compels us to present a full explanation of this topic.

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4 Indeed, Global NAPs believes that the parties are in substantive accord on Issue No. 7 as well, although that is not reflected in the Prehearing Order. The only specific matter of contractual language at issue, other than Issue No. 13, is some minor proposed changes to BellSouth's proposed language regarding UNEs (Issue No. 6), discussed in Section 5 of this brief, below.

a. Overview.

The simplest way for the Commission to resolve this issue is to rely on its own precedents. Every time the Commission has had to decide whether ISP-bound calls should be subject to compensation from the originating LEC to the LEC serving the ISP, the answer has been "yes." In this regard it has the support of the most other state regulators to have addressed the issue, including those in states such as Georgia, Alabama, Kentucky, Tennessee and North Carolina. There are neither policy nor legal grounds to reach any different answer here.

But as the law relevant to this topic evolves, BellSouth's specifically stated reasons for opposing compensation evolve as well. In the past BellSouth argued that its existing agreements could not be interpreted as extending compensation to ISP-bound calls, and that doing so would violate federal law regarding access services. Having lost that battle, BellSouth now argues that its newly arbitrated agreement should not include compensation for ISP-bound calls. At least in Mr. Varner's testimony (Mr. Varner was BellSouth's sole witness), BellSouth doesn't come flat out and claim that it would be ***illegal*** for the Commission to require compensation.[5] Instead, BellSouth now argues (as best Global NAPs can determine) that because the connections that ISPs purchase from LECs are properly classified as a form of "access," it follows as the night the day that the intercarrier compensation arrangements that typically apply when two LECs jointly provide access service to an IXC selling long distance service to end users should also apply to ISP-bound calls.[6] So in this case, BellSouth has seemed to hang its hat on the notion that — no matter what the economics of the situation, no matter what the technical reality of the situation, no matter what makes sense as a matter of competitive

[5] Based on BellSouth's arguments in the complaint case between the parties, however, Global NAPs would not be surprised to see such a claim in BellSouth's brief.

[6] This provides BellSouth with the regulatory "justification" for its outrageous proposal that when ***BellSouth's*** customers make calls that impose costs on Global NAPs, and ***BellSouth*** gets paid by its customers for completing those calls, ***Global NAPs*** should pay ***BellSouth*** extra money for the privilege of doing some of the work for which BellSouth has already been paid. *See* Rebuttal Testimony of Fred Goldstein *passim,* and Rebuttal Testimony of Lee L. Selwyn, *passim,* for a detailed explanation of why this proposal makes no sense. When we make reference here to "compensation" for ISP-bound calls, we are always referring to compensation from the carrier whose customer originates a call to an ISP, to the carrier serving the ISP.

policy — because ISPs "really" buy and use "access service," no compensation for ISP-bound calls should be required.[7]

BellSouth's analysis is wrong from top to bottom. The first question to ask is not "does this traffic meet some regulatory definition of 'access'?" The first question to ask is what economic arrangements between an ILEC and an ALEC make sense in light of the pro-competitive policies of the Telecommunications Act of 1996. If compensation for ISP-bound calls makes economic and procompetitive sense — and it does — then the Commission should require it in this interconnection agreement (and, frankly, all others where it is called upon to decide the question).

From this practical perspective, the legal issue becomes quite different from the definitional conundrum posed by BellSouth. The real legal issue is whether anything in the Communications Act ***prevents*** the Commission from requiring compensation — to which the answer, quite obviously, is "no." Even the FCC's *Reciprocal Compensation Ruling* — the

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[7] The Commission should not confuse BellSouth's stated reasons with its real reason. Its real reason is naked economic self-interest. BellSouth's customers — like most consumers in this country — are increasingly interested in accessing the Internet for a variety of purposes. This leads to an exogenous increase in demand for BellSouth's services. BellSouth reaps the benefit of this increase in demand when consumers buy second lines for use with their modems. In a monopoly environment, though, BellSouth also incurs increased costs, in the form of greater network usage, as consumers actually use those second lines to call their ISPs. As ISPs receive their telephone service from ALECs, BellSouth avoids a large portion of the costs associated with its customers' increasing desire to call ISPs. *See* A. Atai & J. Gordon, *Impacts of Internet Traffic on LEC Networks and Switching Systems* (1996) (introduced as an Exhibit in this matter by BellSouth) at 3 (noting that network congestion from calls to ISPs "is most likely to occur first at the terminating switch); A. Atai & J. Gordon, *Architectural Solutions to Internet Congestion Based on SS7 and Intelligent Network Capabilities* (1997) (introduced by BellSouth as an Exhibit) at 4 (same). That is, ALECs such as Global NAPs that serve ISPs have undertaken precisely the network function that the Bellcore researchers identified as being the biggest problem for the ILECs. Now that the ALECs have done so, however, if BellSouth can get regulators to rule that it does not have to pay for ISP-bound calls, it will have managed a regulatory triple play — get the second-line revenues from end users who increasingly demand dial-up access to their ISPs; keep all the money those customers pay for end-to-end originating usage; and avoid the costs of serving ISPs (by making free use of its competitors' investments), all at the same time.

regulatory high-water mark of ILEC resistance to paying for ISP-bound calls — did not so hold.[8] To the contrary. While the FCC concluded (erroneously) that Section 251(b)(5)'s reciprocal compensation obligations did not extend to ISP-bound calls, and (erroneously) relied on its traditional view that ISP-bound calls "really were" a form of access, the FCC was still quite emphatic that even so, no federal law or rule prevented state regulators from requiring compensation; that the FCC's own treatment of ISP-bound calls in related contexts strongly suggested that compensation was due; and, indeed, that if a state chose not to impose "reciprocal compensation" as such, then some other compensation mechanism had to be established.[9]

Even working within BellSouth's basic framework, however, BellSouth is wrong. That is, first, ISP-bound calls are not a form of "access" as that term is used in the Communications Act; but, second, even if they are, imposing an obligation on an originating LEC to compensate a LEC serving an ISP is still perfectly appropriate.

As described below, then, there are actually a number of different approaches that lead to the conclusion that compensation for ISP-bound calls is appropriate and, indeed, mandatory. In light of the controversy surrounding this topic, moreover, Global NAPs urges the Commission not only to require compensation for ISP-bound calls but to do so on the basis of two or more alternative grounds.

But first things first. The key fact about ISP-bound calls is that they are economically and technically indistinguishable from normal "local" calls. The reason ***why*** they are indistinguishable from local calls depends on one's perspective. From one perspective, ISP-bound calls really ***are*** local calls in all relevant respects. From another perspective, ISP-bound calls are in some sense "really" a form of interstate access, but are ***treated as*** local by virtue of

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[8] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (Feb. 26, 1999) ("*Reciprocal Compensation Order*"), *vacated, Bell Atlantic v. FCC,* 206 F.3d 1 (D.C. Cir. 2000).

[9] Now that the *Reciprocal Compensation Order* has been vacated, there is no legal basis to conclude that ISP-bound calls are not, in fact, subject to Section 251(b)(5). As described below, Global NAPs believes that they are.

the FCC's "ESP Exemption." Either way, ISPs are permitted to purchase local business lines to obtain their connections to the public switched telephone network (PSTN), and local business line rates are not typically set to recover the costs of incoming usage.[10] Instead, the costs of local usage are generally recovered from the cost causer (*i.e.,* the person making the call), either as part of a flat-rated calling plan, or under a measured/message rated service plan.

In economic terms, therefore, when an ILEC such as BellSouth serves an ISP, the ISP does not pay BellSouth a rate designed to cover incoming switching. Instead, payments from end users provide, on average, the revenues needed to cover the costs of getting calls all the way to the called party — including situations where the called party is the ISP.[11] In these circumstances, if there is to be competition between ILECs and ALECs for the business of ISPs, then — just as the ILEC covers the costs of switching calls to the ISPs based on its charges on the customers making the calls — so too must the ALEC be able to do so. Otherwise, the ALEC would be forced to charge ISPs an uncompetitively high rate for the ISPs' connections to the PSTN. The only way to avoid this problem is to establish intercarrier compensation, running from the LEC whose customers are making the calls, and causing the costs to be incurred to the LEC whose ISP customers receive the calls (usually the ALEC). Viable competition among carriers for the business of ISPs — and, therefore, the affordability of dial-up Internet access in Florida — depends on this Commission reaching this economically correct answer.

In technical terms, calls to ISPs are "local" in every relevant respect. They are dialed as local, the SS7 signaling associated with them is local, and they are routed through LEC networks as local. The only difference that BellSouth has actually claimed to exist — and which no party disputes — is that, on average, completed calls to ISPs may have longer duration than

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10 Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) ("*Access Charge Reform Order*") at ¶¶ 341-45, *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

11 ILECs often argue that end users are really calling "the Internet" or a "distant web site," usually as part of an argument that ISP-bound calls are not really "local." The federal Court of Appeals for the District of Columbia Circuit decisively rejected that contention in *Bell Atlantic v. FCC, supra,* in which the court — addressing precisely this concern — found that when a consumer dials up his or her ISP, the ISP is "clearly the called party."

the average traditional voice call. But this fact — which suggests that an ALEC serving ISPs actually has to do ***more,*** not less work than for "normal" calls — hardly supports a claim that ISP-bound calls should not be subject to compensation.[12]

In legal terms, while the situation is in some respects muddled, ISP-bound calls are best viewed as a form of telephone exchange service, *i.e.,* as calls that are "actually" local. Clearly, though, the FCC has plenary authority to set rules about how to implement Section 251 of the Act, including Section 251(b)(5) regarding reciprocal compensation. *See AT&T Corp. v. Iowa Utilities Bd.,* 119 S. Ct. 721 (1999). Its original effort on this topic — the *Reciprocal Compensation Order* — led to a conclusion that ISP-bound calls were not subject to Section 251(b)(5) at all, ***because of*** its view that these calls were "access service" and "largely" interstate. But the D.C. Circuit rejected that conclusion. To say that these calls might ultimately be under the FCC's jurisdiction has nothing to do with whether reciprocal compensation logically applies to them. *See Bell Atlantic v. FCC, supra.* The FCC's original order, therefore, was vacated "for want of reasoned decisionmaking" and the remand is now pending before the agency.

At this moment, therefore, this Commission is completely free to declare that ISP-bound calls ***are*** local calls subject to Section 251(b)(5)'s compensation requirement. Mr. Goldstein's analysis showing that upwards of 90% of the actual traffic between end users and ISP modem banks never goes beyond those modem banks is factual support for such a legal conclusion. And the D.C. Circuit's conclusion that the "called party" is the ISP fully supports this view. But such a conclusion is not necessary for the Commission to require intercarrier compensation. Under Sections 251(d)(3) and 252(e)(3), this Commission has the authority to impose additional interconnection obligations on ILECs beyond those literally required by Sections 251 and 252, barring a conflict with some binding federal rule or policy. But the FCC's

12 In this regard, it would not be totally irrational to establish a pricing structure based on a call setup charge and per-minute pricing following call setup, as opposed to simple per-minute rate. But that is a different question from the one addressed here, which is whether there is any technical reason to exempt ISP-bound calls from compensation obligations entirely. *See* Section 3 of this Brief, *infra..*

vacated order — after deciding that Section 251(b)(5) didn't apply — declared repeatedly that there was no federal rule governing intercarrier compensation for ISP-bound calls, and found repeatedly that in the absence of a federal rule states could and should establish rules for such compensation. The D.C. Circuit's ruling did not suddenly cause a binding federal rule on this issue to spring up from nowhere. So even if this Commission is not inclined to rule that ISP-bound calls really are "local" calls subject to Section 251(b)(5), it may and should require equivalent intercarrier compensation for these calls.

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The remainder of this Section 2 explains why ISP-bound calls are, and should be, subject to intercarrier compensation, as a matter of economics, technology, law, and policy. Along the way, it explains why BellSouth's contrary arguments are wrong. Based on the discussion here, therefore, the Commission should determine that the new contract between BellSouth and Global NAPs shall include compensation for ISP-bound calls.

b. The Economics of ISP-Bound Calls.

As the evidence in this proceeding overwhelmingly shows, ISP-bound calls are economically equivalent to local calls.[13] The distinguishing feature of local calls is that they are sent paid. This means that the calling party pays the originating carrier all available revenue for getting the call all the way from the calling party to the party being called.

In a monopoly environment, this means that if one end user served by BellSouth (say, a consumer) calls another end user served by BellSouth (say, a pizza delivery service), the costs of the originating usage (that is, the use of the switch serving the calling party) and the terminating usage (that is, the use of the switch serving the called party) are ***both*** covered by the charges received from the calling party. The charges to the pizza delivery service reflect some or

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[13] This evidence includes, primarily, the rebuttal testimony of Dr. Lee L. Selwyn, along with his direct and rebuttal testimony from Case No. 991267-TP, which the Commission ruled may be cited as evidence in this case. This section is in large measure a summary of the points made by Dr. Selwyn.

all of the cost of its lines, as well as the costs of any outgoing calls that customer makes, but not the costs of incoming usage.[14]

In a competitive environment this same logic must be adhered to, or else competition cannot flourish. That is, in a competitive environment it could easily be that the party making the call (the consumer) is served by BellSouth, while the party receiving the call (the pizza shop) is served by an ALEC. In that case, the ALEC's customer is the pizza shop, not the end user. And even though the end user is causing the ALEC to incur costs (the use of its terminating switch), the end user has no legal relationship with the ALEC. Instead, pursuant to its relationship with BellSouth, the end user pays the same for calling the pizza shop as he or she did before the pizza shop changed suppliers. In this case, the ALEC needs to be compensated for its work by BellSouth, which amounts to ***indirect*** compensation from the end user, who is, after all, the cost causer in this situation. Without such compensation, the ALEC would sustain a loss, BellSouth would sustain a windfall, and pizza shops would be deprived of the benefits of competition because no ALEC could afford to serve them.

This is why the Communications Act mandates reciprocal compensation arrangements between interconnected LECs. It may be that the traffic exchanged between two parties is so close to balance that actually tracking and billing it is more trouble than the (net) payments one way or another are worth. In that case the parties may agree to (or the

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14 It has long been recognized that local business line rates are not set to recover the cost of incoming calls, *see Access Charge Reform Order, supra,* at ¶¶ 341-42. Global NAPs does not understand BellSouth to contend otherwise here, although Mr. Varner makes some vague moves in that direction when he argues that even though an end user calling a pizza parlor is paying to get the call all the way to the pizza parlor, an end user calling an ISP is not paying to get the call all the way to the ISP. Mr. Varner's claim in this regard is simply out of synch with the long-standing view of the FCC and other regulators that ISP-bound calls have been "treated like" local calls and that, indeed, the ***purpose*** of the ESP Exemption is to permit ISPs to ***receive*** "local calls." *See Access Charge Reform Order, supra; Bell Atlantic v. FCC, supra (and FCC rulings there cited); Reciprocal Compensation Order, supra.* The FCC typically made its pronouncements in this regard at the same time that it reaffirmed its (now questionable) view that ISPs really use a form of access service. So the FCC has always been content with the notion that the economics associated with local exchange service can apply to this particular type of "access." Mr. Varner simply ignores this aspect of the FCC's and the courts' approach to this issue.

Commission may impose) bill-and-keep arrangements. But when traffic is not likely to be balanced, competition ***depends*** on inter-carrier compensation.

To his credit, BellSouth's Mr. Varner recognizes that this is true. As he stated succinctly at his deposition (page 23, lines 10-18):

> So since only one carrier is collecting the money but both of them are incurring a cost, there needs to be some way for them to share the revenue, if you will, between them. That's what reciprocal comp is all about. It is designed for the case where the originating carrier has all the revenue, the terminating carrier is incurring part of the cost, first originating carrier shares with the terminating carrier.

Now, BellSouth obviously does not want this analysis to apply to ISP-bound calls. But nothing in BellSouth's evidence provides any hint of an explanation as to why, as an ***economic*** matter, ISP-bound calls should not be subject to this regime. ISP-bound calls are dialed by end users as local calls. They are charged to end users as local calls. ISPs purchase service out of intrastate local exchange tariffs. An ALEC serving an ISP has no ability to charge the end user for the service that the ALEC performs, on that end user's behalf, when it routes the call to the ISP the end user is trying to call. As Mr. Varner says, "the originating carrier has all the revenue, [but] the terminating carrier is incurring part of the cost, [so the] originating carrier shares with the terminating carrier."

In economic terms, it's really that simple.

c. ISP-Bound Calls Are Not "Access."

BellSouth's basic attack on compensation for ISP-bound calls is essentially a word game. First, BellSouth claims that that ISP-bound calls are a form of "access" service. It then assumes, with no particular legal or policy justification, that a call that might be classified as "access" for one purpose cannot also be classified as "local" for another purpose. It then assumes, with no particular legal or policy justification, that the FCC's rules for jointly provided access service to IXCs apply to these calls.

BellSouth's claims make no policy or economic sense. They boil down to BellSouth's private meditations on the meaning of the term "access," not arguments grounded in the procompetitive language or policy of the 1996 Act. The Commission should reject them.

What does it actually mean to say that a particular class of telecommunications traffic constitutes "access?" It turns out that the Communications Act provides an answer:

> The term "exchange access" means the offering of access to telephone exchange services or facilities ***for the purpose of the origination or termination of telephone toll services.***

47 U.S.C. § 153(16). On its face, this definition does not seem to apply to the service that ISPs buy when they obtain their ISDN Primary Rate Interface ("PRI") lines from an ILEC or an ALEC in order to receive local calls. One can argue that the services that ISPs provide involve some type of interstate communication, but it is hard to see how they can be said to provide "telephone toll service. Consider the definition of that service:

> The term "telephone toll service" means ***telephone service*** between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

47 U.S.C. § 153(48). No one — not even BellSouth — contends that ISPs provide any type of "telephone service" at all, much less "telephone service between ***stations***" — *i.e.,* telephone sets — "in different exchange areas."[15] ISPs provide information services. This makes them ***consumers*** of telecommunications ("telephone service") provided by carriers. Precisely this problem with treating ISPs as purchasing "access" service was rather pointedly raised by the

[15] In his deposition, while Mr. Varner asserted that ISPs, as information service providers, were some ill-defined kind of "carrier," he was quite clear that ISPs are ***not*** "telecommunications carriers." *See* Varner Deposition at page 18, line 18, through page 19, line 8.

D.C. Circuit in the course of vacating the FCC's February 1999 order regarding reciprocal compensation.[16]

Now, BellSouth is quick to point out that in December 1999, the FCC (in an unrelated proceeding) said that since in some contexts ISPs might themselves ***use*** telephone toll service in ***their own*** operations, a connection to an ISP could meet the definition of "exchange access" in the Act. *See, e.g.,* Varner Testimony at 10-11. Global NAPs would note the following, however. First, that ruling was issued before the FCC had a chance to consider the D.C. Circuit's ruling. While there is of course some chance that the FCC will try to retain its view in the face of the D.C. Circuit's ruling, it is at least equally likely that it will modify its view in light of the court's analysis. Second, the FCC's December 1999 ruling is on appeal to the D.C. Circuit, so that court will be able to weigh in on this question shortly.[17]

In fact, based on what actually happens when an end user calls an ISP, Global NAPs submits that what the ISP is purchasing — and what the end user making the call is relying on as well — is a form of "telephone exchange service."[18] The Act defines that term as follows:

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[16] The confusion on the FCC's part arose because prior to the Telecommunications Act of 1996, there was no statutory definition of "exchange access;" the definition quoted above was added by that Act. Prior to that time, the FCC had adopted, for purposes of its own rules, a definition of "access service" that covers a lot more ground than the newer (and more relevant) statutory definition. *See* Rebuttal Testimony of Fred Goldstein, *passim.* It is evident that the FCC (and, here, BellSouth) relied on the old, outmoded ***regulatory*** definition of "access service" in trying to sort through how the new ***statutory*** provisions of the 1996 Act applied to ISP-bound calls. Ignoring a substantial change in the governing statute — such as the new and more restrictive definition of "exchange access" — is legal error, plain and simple. The FCC shouldn't have done it, and this Commission shouldn't either.

[17] As described below, moreover, if one can sustain the FCC's conclusion from December 1999 — that what ISPs buy may properly be classified as "access service" or "exchange access" — the definitional contortions needed to reach that result themselves compel the conclusion that the "normal" rules that access ***charges*** are split between two LECs providing the service cannot logically apply to ISPs.

[18] While there is (unfortunately) no definition of "local" calling in the Act, the definition of "telephone exchange service" comes closest.

> The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47). When an end user's modem dials a number within his or her local calling plan to reach an ISP's modem, what has occurred is normal local calling — "service within a telephone exchange ... of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." The "service" being provided by the two LECs is nothing more, and nothing less, than the service of linking two pieces of CPE (the modems) by means of local routing and signaling covered by the "exchange service charge" of the calling party. It is, in fact, local service.[19]

On this basis, Global NAPs believes that the Commission can and should find that ISP-bound calls are ***not*** "access," but instead entail the joint provision by two LECs of telephone exchange service. The Commission, therefore, can and should rule that these calls ***are*** "local" for

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19 Please note that Global NAPs does not believe that the classification of a telecommunications service as "telephone exchange service," "telephone toll service," or "exchange access" says anything about whether the particular communication is interstate or intrastate. There are intrastate and interstate toll calls. There is interstate and intrastate access. And — though it is less obvious — there is also interstate and intrastate "telephone exchange service." Examples of the latter include (a) local calling areas in metropolitan areas that span state boundaries, such as Washington, D.C., (the District of Columbia, Maryland, and Virginia) and Kansas City (Kansas and Missouri), as well as commercial mobile radio service calling areas, which often span state boundaries, but which the FCC has said are "local" for purposes of Section 251(b)(5). *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16013 (1996) ("*Local Competition Order*") at ¶ 1036, *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 Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utilities Bd.*), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utilities. Bd.*, 119 S. Ct. 721 (1999). Again, confusing the ***jurisdictional*** question (interstate *versus* intrastate) with the "type of service" question (telephone exchange service *versus* telephone toll service *versus* exchange access) is precisely the error in reasoning that led the D.C. Circuit to vacate the FCC's reciprocal compensation order. To the extent that an end user communicates with out-of-state locations by means of a local call to an ISP, the service involved appears, to Global NAPs, to simultaneously be interstate ***and*** "local."

purposes of Section 251(b)(5). This would provide one basis for ruling in Global NAPs' favor on the issue of compensation for ISP-bound calling.[20]

There are, however, several other grounds for reaching this conclusion, which the Commission should consider as well. Indeed, in light of the controversy surrounding this question, as well as the likelihood of an appeal by BellSouth of an adverse ruling, the Commission should expressly identify several alternative grounds for its ruling. The four main alternatives are addressed below.

d. Four Alternative Legal Grounds For Requiring Compensation For ISP-Bound Calls.

The reason that the Commission should require compensation for ISP-bound calls is that this is the only result that makes economic sense. If there is anything difficult about reaching this conclusion, it is the legal tangle occasioned by the FCC and court rulings discussed above. That legal tangle, however, makes it prudent to identify alternative legal grounds for reaching the economically sensible result. Four separate alternatives are available.

i. Recognize That Most ISP-Bound Traffic Is, In Fact, Physically "Local."

The notion that ISPs actually use "access service" is premised on the notion that the communications from end users to ISPs are really, truly interstate in nature. This notion, in turn, reflects the assumption that — even if in packetized, information-service-ized form — the communications from end users actually go beyond the ISP and out to distant (interstate) computers on the World Wide Web, and that information is then sent from those distant computers back to the end user.

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20 The reasoning presented above supports Global NAPs' view that the term "local traffic" in the agreement should be defined in an inclusive manner that embraces all ISP-bound calls that are actually dialed as "local" by the calling party. *See* Attachment A, GNAPs' position on Issue No. 3.

That assumption is probably true enough during those times that information during a dial-up session actually goes to, or comes from, a distant web site. The World Wide Web is, indeed, worldwide, so while Florida consumers doubtless retrieve some web sites from within Florida (and, indeed, from within their local calling areas), it is safe to assume that freshly retrieved Internet content is retrieved "largely" (to use the FCC's term) from out of state.

As Mr. Goldstein explained in detail, however, those kind of interstate transmissions actually make up a very small portion of the ***telecommunications traffic*** that an ILEC and an ALEC will exchange when the ILEC's end user calls an ISP served by the ALEC. Instead, both the ILEC's customer (the end user) and the ALEC's customer (the ISP) have attached a particular type of CPE (modems) to the telephone lines they obtain from their respective carriers. The CPE of each ***customer*** generates specific, richly patterned, complex signals that must be faithfully transmitted by the two ***carriers***. The modem signaling, in short, is the "information of the user's choosing" that the two carriers are "transmi[tting] between ... points specified by the user" when the carriers provide their "telecommunications services." *See* 47 U.S.C. § 153(43) (defining "telecommunications") and § 153(46) (defining "telecommunications service"). This modem signaling, in short, is substantive ***traffic*** exchanged between the two carriers that cannot be ignored.

What Mr. Goldstein explained is that for more than 90% of the time that a typical end-user-to-ISP call is active, this modem signaling is the ***only*** traffic being sent and received.[21]

[21] This occurs because it takes end users time to review information that they have downloaded from distant web sites, and because end users often leave their connections to their ISPs active even if they are not at every moment either downloading data or reviewing it. This leads ISPs to provision less than 10% of the bandwidth that comes into the "front end" of a modem pool (*i.e.,* incoming PRI trunks obtained from a LEC) out the "back end" of their modem pools upstream to their own servers and routers. ISPs do this because bandwidth is expensive and they do not want to buy more of it than they need. *See* Complaint Case Rebuttal Testimony of Fred Goldstein at 10-17; Deposition of Fred Goldstein at 33-45. In this regard, as Mr. Goldstein explained, it is increasingly common for ISPs to purchase the function of owning and maintaining modems to receive calls and verify caller's accounts from wholesale entities, and concentrate instead on maintaining the servers, routers and caches needed to meet the Internet access needs of their end users. *See* Deposition of Fred Goldstein at 40-50. For this reason (among others), while it is certainly true that some ISPs maintain centralized servers/routers that might be in another state, those devices are the very ones that are only (note continued)...

As a result, even if the traffic that contains data representing requests for, or copies of, distant web sites is treated as not "terminating" locally; and even if that portion of the traffic is therefore deemed to represent "access" traffic and not "local" traffic; and even if "access" traffic is for some reason automatically immune from inter-carrier compensation — even if all those things are true — then Mr. Goldstein's analysis shows that 90+% of ISP-bound traffic is properly viewed as plain old local traffic, plainly and properly subject to compensation as such.

This is one alternative ground on which the Commission may require reciprocal compensation for this traffic — for the overwhelming majority of the time, the traffic is, in fact, "local" as conventionally defined.

ii. Interpret Section 251(b)(5) To Apply To Locally-Dialed, Locally-Charged Calls To Which Access Charges Do Not Apply.

A slightly different alternative legal ground starts from the fact that the FCC's ruling that Section 251(b)(5) does ***not*** apply to ISP-bound calls has been vacated. What this means in legal terms is that this Commission, as part of its responsibility to arbitrate interconnection disputes in accordance with the requirements of the Act, has to interpret Section 251(b)(5) to see how and whether it applies to ISP-bound traffic.

In the FCC's original order implementing the Act in August 1996, it distinguished between two cases: a situation in which two LECs collaborate to complete a local call (to which reciprocal compensation applies) and a situation in which two LECs collaborate with a third carrier, an IXC, in which case the IXC pays access charges and a different compensation regime applies. *See Local Competition Order* at ¶ 1034. ISPs do not pay access charges, so the access model does not apply. But ISP-bound calls are, arguably, not traditional "local" calls either. In this situation, the Commission is free to determine (indeed, has an obligation to determine) which of those two models more appropriately applies to ISP-bound calls.

...(note continued)
reached less than 10% of the time that end users are on line, so the location of the servers and routers is irrelevant.

For all the reasons discussed above, it is clear that the economically correct answer is that the local/reciprocal compensation model should apply. To reach that sensible result, the Commission could, and should, make a simple ruling: reciprocal compensation applies whenever two LECs collaborate to carry the traffic to a third entity, and the entity receiving the traffic does not pay access charges. IXCs pay access charges, so when two LECs collaborate to get a call from one of their end users, through the second LEC, to the IXC, no reciprocal compensation would be due. ISPs do not pay access charges, however, so reciprocal compensation would be due when two LECs collaborate to get a call from one of their end users, through the second LEC, to the ISP.[22]

Such a ruling would clearly be within the scope of this Commission's authority in fulfilling its responsibilities under Section 252 of the Act. This approach, therefore, constitutes another alternative legal ground for requiring reciprocal compensation for ISP-bound calls.

In this regard, nothing about the FCC's December 1999 ruling that ISPs indeed use "exchange access" as defined in the Act (made prior to the D.C. Circuit's decision vacating the *Reciprocal Compensation Order*) remotely compels the conclusion that reciprocal compensation arrangements are inappropriate for ISP-bound calls. To the contrary, a moment's reflection shows that the FCC's December 1999 ruling cannot bear the weight that BellSouth would put on it. BellSouth wants ISP-bound calls to be classified as "access" to support a claim that the proper inter-carrier compensation scheme is one that splits the revenues the terminating carrier (here, Global NAPs) gets from the ISP, as opposed to one which obliges the originating carrier (here, BellSouth) to compensate the terminating carrier.[23] The notion of splitting revenues from an ***IXC*** between two carriers jointly providing access service makes sense

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[22] In conceptual terms, this would solve the problem created by the FCC's original analysis in the *Reciprocal Compensation Order*. There, the FCC constructed a framework with three types of traffic: "local" traffic to which reciprocal compensation applies; "normal" access traffic to which meet-point billing applies; and ISP-bound traffic, with no rule to apply. The proposal here is to avoid the uncertain middle case by ruling that there are only two proper categories: "normal" access traffic (defined as situations where the delivering LEC actually receives access charges) and "everything else," to which reciprocal compensation applies.

[23] These are the two compensation "models" referred to by the D.C. Circuit. *See* 206 F.3d at 5.

precisely because the IXC, in the normal case, makes (in the words of the statute) "a separate charge not included in contracts with subscribers for exchange service" — *i.e.,* per-minute charges for long distance (*i.e.,* "telephone toll") service. These "separate charges" to the end user for telephone toll service provide the IXC with the revenues from which it pays the access charges that compensate ***both*** carriers involved in getting the call to the IXC (and, indeed, the LEC at the far end as well). But ISPs do not make "separate charges" to their end users for telephone toll service, for the simple reason that they do not ***provide*** telephone toll service. As a result, ISPs are not in a position to pay "access charges" to any LECs who actually get calls to the ISPs, and, in fact, they don't.[24] If, therefore, the service that ISPs purchase is technically a form of "exchange access" under the statute, then it is a form of "exchange access" as to which the normal rules for splitting "access charges" between two LECs cannot possibly logically apply.

Put a slightly different way, which inter-carrier compensation model applies cannot rationally be determined on the basis of whether, after some (possibly Procrustean) effort, the service that ISPs buy can be fit into a legal/regulatory box called "access service" or "exchange access." Instead, which compensation model applies must be determined on the basis of whether the ***charges*** that ISPs ***pay*** to the LEC from which they receive service can properly be classified as "access charges." If not, then the "reciprocal compensation" model is the only one that makes sense. But the entire point of the ESP Exemption — which remains in full force; which the FCC has made quite clear it has not intention to change; and which, indeed, is now enshrined in pending legislation before Congress — is precisely to ***prevent*** ISPs from actually ***paying*** "access charges." It follows that even if ISPs "use" or "buy" a form of "access service,"

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[24] This is the ESP Exemption in operation. If ISPs had to cover the cost of incoming usage, that would mean that the long-standing (and seemingly sacrosanct) ESP Exemption from access charges had been repealed. Global NAPs of course agrees that if LECs could and did usage-based assess access charges on ISPs, to recover the cost of incoming usage, then inter-carrier compensation from the originating LEC would be unnecessary. But precisely because such charges are ***not*** permitted and ***not*** assessed, inter-carrier compensation ***is*** necessary.

the fact that they do not pay "access charges" for that service compels the conclusion that the reciprocal compensation model is the correct one.[25]

iii. Interpret FCC Rulings Treating ISP-Bound Traffic "Like" Local Traffic As Requiring Reciprocal Compensation For Such Traffic.

While the FCC has indeed stated over the years that it views ISP-bound traffic to constitute a form of "access" service, it has with equal frequency stated that ISPs are entitled to purchase their connections to the PSTN on the same terms as other local business users, and has specifically recognized that ISPs obtain local service in order to receive local calls from their own customers. As it noted in the *Reciprocal Compensation Order,* the logical consequence of the FCC's longstanding treatment of ISPs as end users is that for reciprocal compensation purposes as well, ISP-bound calls should be "treated as" local calls. *See Reciprocal Compensation Order* at ¶¶ 9, 20-26.

It is true that the *Reciprocal Compensation Order* has been vacated, so this Commission is not literally ***bound*** by the FCC's conclusions in this regard. Those conclusions,

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[25] This illustrates why BellSouth is wrong in this case about reciprocal compensation even if the FCC is held to be correct in its December 1999 conclusion that what ISPs use is a form of exchange access. To fit ISPs' connections to the PSTN into the "exchange access" box, the FCC had to conclude that those connections provided access to "telephone toll service." In the normal case the end user making a long distance call pays an IXC the "separate charge" for the toll service. That "separate charge" for toll service, paid by the end user, is the economic engine behind access charges: the end user pays the "separate charge" to the IXC, and the IXC uses the money from those "separate charges" to pay the LECs at either end of the long distance call access charges. And, as directly relevant here, when two LECs collaborate to provide either originating or terminating access, they both get a share of access charges from the IXC — again, funded, indirectly, by the "separate charge" for "telephone toll service" that the IXC assessed against the end user. In the case of an ISP, however, the FCC has stretched the definition of "telephone toll service" (to which the "exchange access" provides access) to include a "separate charge" to a third-party IXC, paid not by the end user, but instead by the ***ISP itself***. Global NAPs believes that the FCC has strained the terms of the Communications Act too far in claiming that this arrangement actually makes the ISP's connection to the network a form of "access." But even if the FCC is upheld in that regard, the ***economics*** of the situation are totally different from those underlying "normal" access service obtained by "normal" IXCs. So, while Global NAPs respectfully disagrees with the FCC's December 1999 ruling on this point, even if the FCC is right, it does not lead to a different result here.

however, are plainly correct — the FCC has consistently treated ISPs "like" normal end users and treated ISP-bound traffic "like" local traffic. This provides another alternative ground on which the Commission may and should rely in requiring compensation for ISP-bound traffic in the new Global NAPs/BellSouth interconnection agreement. Specifically, the Commission could accept, for purposes of this ruling, that ISP-bound traffic is "really" a form of interstate access, but at the same time rule that the FCC's consistent treatment of this traffic as though it were local compels (or at least supports and permits) the Commission to treat ISP-bound traffic "as though it were local" for purposes of Section 251(b)(5) as well.

iv. Act Under Sections 251(d)(3) and 252(e)(3) To Impose A State-Specific Compensation Obligation.

A fourth alternative ground for holding that ISP-bound calls shall be subject to intercarrier compensation is to rely on this Commission's authority under Sections 251(d)(3) and 252(e)(3), as opposed to any interpretation of Section 251(b)(5) and/or of FCC precedent.

Section 251(d)(3) recognizes that states may "establish[] ... interconnection obligations" for LECs as long as those obligations are consistent with the terms of, and do not frustrate the purposes of, the local competition provisions of the Act. Section 252(e)(3) recognizes that states may impose "other requirements of state law" in arbitration proceedings above and beyond the requirements of Sections 251 and 252 themselves. This means that this Commission may act on its own authority to require "local"-style inter-carrier compensation for ISP-bound calls even if Section 251(b)(5) does not require it, as long as such a requirement does not contradict Sections 251 and 252.

Clearly, nothing about requiring intercarrier compensation for ISP-bound calls is remotely inconsistent with the terms or purposes of Sections 251 and 252.[26] To the contrary,

[26] *See, e.g., Southwestern Bell Telephone v. Texas PUC,* 208 F.3d 475, 483 (5th Cir. 2000) ("Clearly, then, whether voluntarily negotiated or confected through arbitration, commission-approved agreements requiring payment of reciprocal compensation for calls made to ISPs do not conflict with §§ 251 and 252 of the Act or with the FCC's regulations or rulings."); *Illinois Bell Tel. v. WorldCom,* 179 F.3d 566, 572 (7th Cir. 1999) ("The FCC could not have made clearer that . . . a (note continued)...

such compensation is necessary if the pro-competitive purposes of the 1996 Act are to be fulfilled. It follows that the Commission's authority under Sections 251(d)(3) and 252(e)(3) constitute yet another alternative legal basis upon which the Commission may rely in establishing such a requirement.

e. Summary/Conclusion.

Requiring reciprocal compensation for ISP-bound calls is the only approach that makes economic sense. If ALECs are required to complete these calls without compensation from the ILEC whose end users are making the calls, ISPs will in short order be without real competitive alternatives in Florida. Aside from making Internet access more expensive and less reliable, this result would directly contradict the requirements of the Communications Act to open all telecommunications markets to competition.

The D.C. Circuit's decision vacating the FCC's ill-fated *Reciprocal Compensation Order* gives this Commission a freedom that it has not had since February 1999 — the freedom to determine for itself that ISP-bound calls really are "local" calls within the meaning and purpose of Section 251(b)(5) and associated FCC regulations. For the reasons stated above, it should do so. The controversy and contention surrounding this issue, however, counsel prudence in approaching it in a fully definitive way. For this reason, the Commission may and should rest a conclusion that ISP-bound calls are subject to compensation on one or more of the alternative grounds discussed above.

BellSouth's opposition to this result is not based on any sensible economic or competitive reasoning; instead, it is based on word games. The FCC, applying an outmoded regulatory definition, has held that ISPs use "access service." It follows, in BellSouth's abstract world, that BellSouth and Global NAPs should share the charges that Global NAPs receives from its ISP customers, even though by law — that is, the ESP Exemption — those charges are

...(note continued)
state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.").

not “access charges.” BellSouth, in short, on a key issue of competitive economics, is asking the Commission to ignore competition and ignore economics. The Commission cannot accept BellSouth’s suggestion and remain in compliance with the Act.

3. The Commission Should Establish Reasonable TELRIC-Based Rates For Compensation For Local Traffic, Including ISP-Bound Calls.

The parties’ old interconnection agreement provides for compensation of $0.009 per minute for local calls, which the Commission has held include ISP-bound calls. This rate, however, was negotiated by BellSouth and the carrier whose agreement Global NAPs originally adopted.

Global NAPs has no objection to continuing the use of the $0.009 rate, but recognizes that BellSouth does not share that view. Where parties cannot agree on a rate, the Commission is obliged to establish one, based on the FCC’s so-called TELRIC methodology.

Global NAPs is not itself aware of any full-blown TELRIC studies that BellSouth may have performed with regard to its call transport and termination costs, nor is Global NAPs aware of any Commission proceedings formally approving such costs. According to BellSouth’s Mr. Varner, however, in late 1996 the Commission adopted call termination rates of $0.002 per minute for traffic delivered to an end office, and an additional $0.0013 for traffic delivered to a tandem. BellSouth quotes the Commission as concluding that these rates meet the so-called TSLRIC cost standard, which is similar to, but not identical to, the FCC’s TELRIC standard. *See* Varner Testimony at 34-35.

In the absence of an approved TELRIC-based rate, the FCC’s rules direct state regulators to impose rates that fall within a “default proxy” range. For the function at issue here, the FCC’s range is $0.002 to $0.004 for calls delivered to an end office, with an additional

$0.0015 for calls delivered to a tandem. Global NAPs notes that these rates are quite similar to those previously approved by the Commission based on the TSLRIC standard.[27]

In these circumstances, Global NAPs would accept the rates the Commission has previously established for use in the parties' new interconnection agreement. Global NAPs, however, would appreciate a ruling from the Commission indicated whether the rates so established should be viewed as permanent rates (for the duration of the contract) or whether, instead, the Commission is relying on the FCC's default proxies. In the latter case, Global NAPs understands the FCC's rules to simultaneously require the Commission to commence proceedings to establish a TELRIC-based rate, based on BellSouth's costs, and Global NAPs would obviously want to begin the process of preparing to analyze and (to the extent necessary) correct whatever cost study BellSouth might generate.[28]

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[27] In this regard, note that the rates that (Global NAPs recognizes) are likely to be established in this proceeding are more than 60% below the negotiated rates in effect under the parties' earlier contract. While BellSouth would obviously prefer an arrangement under which it has to pay nothing at all (or even get paid) or, failing that, as little as possible, in the real world BellSouth should not be heard to complain about a 60% reduction from a rate that only three years ago BellSouth itself affirmatively agreed to as reasonable.

[28] Mr. Varner argues that if compensation is to be paid, the Commission should not set a rate, but should instead direct the parties to negotiate one, using a call setup/subsequent minute rate structure. Global NAPs is not, in principle, opposed to considering such payment arrangements, but vehemently imposes using the consideration of one as an excuse to avoid setting reasonable per-minute rates for this traffic right now. Moreover, unlike the proposal advanced by Mr. Varner, any such rate structure must apply to ***all*** calls, not in some artificial, discriminatory way only to ISP-bound calls. Second — and more critical here — it must be cost-based. There is no cost evidence in the record of this proceeding that would even begin to allow the parties to negotiate about what the respective call setup and per minute rates might be, much less to allow the Commission to actually set any such rates. Even if the Commission agrees that such a rate structure might be a good idea in general, in the absence of any TELRIC-compliant data showing what BellSouth's costs would be, the Commission would, in that case, be required to apply the FCC's "default proxy" rates for local transport and termination.

4. The Commission Should Require The Continued Use Of The Existing Contract Provisions Regarding Physical Network Interconnection Arrangements For Local Traffic.

As noted in the attached summary of positions on the issues, other than the problem of ISP-bound traffic, Global NAPs has consented to most of the specific, identified changes in contractual language that BellSouth has proposed.[29] The key matter on which Global NAPs does not agree — and on which Global NAPs needs a specific ruling from the Commission — is the contractual language relating to the parties' physical arrangements and compensation obligations with respect to local traffic (Issue No. 13).

Mr. Rooney explained this problem in his deposition. Basically, while any number of different approaches might be "reasonable" in some sense in the abstract, once a particular approach is settled upon, changing over to a different approach — even if the different approach is not, on its face, independently unreasonable — can be burdensome and difficult:

> Once you are in operation and you have already taken all your actions relying upon the way the agreement is written, it changes, it is a far more difficult undertaking. To do it logically, you not only have to analyze the agreement, go back and figure out everything we are doing, is everything consistent with the way the interconnection agreement is written out, it is an expensive and difficult process for a CLEC.

Deposition of William J. Rooney, page 56, lines 7-15. Some later comments are to the same effect:

> [Y]ou have a different position in the beginning than you do after you start operating under an agreement. In the beginning you look at it, okay, the things you are looking for, it all looks good, I don't see anything that looks like oh, my God, this is terrible, there is no way we can operate under this. Then you go ahead and start looking, you act in accordance with what the agreement says, there are small technical matters in the agreement, things I would never think

29 Accepting these specific proposed changes is not inconsistent with Global NAPs' general position regarding which contract should be used as the "base" for discussions. Global NAPs has always been willing to consider specific proposals from BellSouth to modify specific contractual provisions.

> about much quite frankly, you act in accordance with that. If you totally change the agreement, you have to go back and see if what we are doing is consistent with the agreement. That's a much bigger burden. The easiest time to adopt an agreement is when you first start. Then after you are in operation, changing an agreement is a lot harder than the process of starting a brand new one.

Id. at page 58, line 19, through page 59, line 11. These actual, practical operational concerns are what led Global NAPs to continue to insist that the provisions in the to-be-established, follow-on interconnection agreement relating to local traffic exchange mirror those in the current agreement, even as Global NAPs — once BellSouth indicated the specific issues of greatest concern from its perspective — agreed to accept the vast majority of BellSouth's proposed new language.[30]

Global NAPs' main business at this time is providing local exchange service to ISPs so that ISPs may receive local calls from their subscribers. Global NAPs entered this market based on its understanding that the interconnection agreement that it was adopting permitted it both to serve ISPs and to receive compensation for doing so. While BellSouth disagreed, the Commission itself has concluded that Global NAPs was correct.

Global NAPs has deployed its facilities and established its physical connections with Bell Atlantic in reliance on the terms and conditions contained in its existing agreement. Given its market entry strategy (and note that Global NAPs has only been operational in Florida for a little more than a year), Global NAPs is extremely reluctant to begin to operate in this fundamental area under ***different*** terms and conditions than those under which it is now operating. As in all areas, Global NAPs was open to an explanation from BellSouth as to why any requested changes were necessary.

But in this critical area, no explanation has ever been forthcoming. The totality of Mr. Varner's explanation for wanting to impose new, different language on Global NAPs in this regard is:

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[30] As noted in the Prehearing Order, and as noted above, Issues 6-12 and 14 have been resolved.

> The 1997 DeltaCom Agreement contains a separate Section *VI Local Traffic Exchange,* which defines the delivery of local traffic and compensation therefor. The Standard Agreement has been rearranged to more clearly define the terms of the agreement. Further, Local Interconnection has been expanded to an entire attachment as opposed to the several paragraphs as was the case in the 1997 DeltaCom Agreement. The new section comparable to the old Section VI is *Attachment 3. Local Interconnection.* Attachment 3 contains paragraph 5.1.1, which is the same definition of local traffic as in *General Terms and Conditions, Part B: Definitions, Local Traffic.* As discussed under Issue 1 above, definitions of local traffic or local traffic exchange must contain new language that more clearly states when reciprocal compensation is applicable.

Testimony of Alphonso Varner, page 44. Global NAPs submits that this is simply an inadequate justification for subjecting Global NAPs to the burden, time and expense — not to mention potential prejudice to its ongoing business interests — of conforming its operations to BellSouth's proposed language.[31]

In this regard, Global NAPs notes that BellSouth has not been able to identify any single problem or difficulty, either in practical operations terms or in terms of contract administration, attributable to operating using the current contract with regard to local traffic exchange. Indeed, the parties' dispute about ISP-bound calling does not constitute such a difficulty. The fact is that BellSouth's customers call ISPs served by Global NAPs, and the connections between the parties are established and have been administered in a manner that allows that traffic to flow properly. Perhaps BellSouth wishes that these physical interconnection arrangements did not work quite as well as they actually do, but any such concern, obviously does not warrant re-writing a perfectly good, functioning contract.

5. Other Issues.

There is one minor issues that may remain in dispute between the parties. Global NAPs believes that BellSouth's contractual language regarding Global NAPs' obligations with

[31] Other than the fact that the new agreement is longer ("expanded to an entire attachment"), Mr. Varner's testimony does not identify a single reason for adopting the new language, other than to "clarify" the application of reciprocal compensation, *i.e.,* from BellSouth's perspective, to ensure that it does not apply to ISP-bound calls. Again, this is simply an insufficient basis to require Global NAPs to begin operating under new and different terms.

regard to on-premises wiring should be stricken, in that the obligations as stated by BellSouth seem to conflict with federal rules that (a) govern the location of demarcation points between a carrier's network and customer-controlled wiring and (b) prevent the imposition on ALECs of burdens that the Act imposes only on ILECs, such as (here) the obligation to provide access to unbundled network elements.

At Mr. Rooney's deposition, BellSouth's counsel tried to (in effect) justify the inclusion of these terms in the contract on the ground that the disputed provisions are based on requirements of this Commission. *See* Rooney Deposition at 65-67. But, as Mr. Rooney explained, Global NAPs will comply with any applicable requirements of this Commission completely irrespective of its agreement with BellSouth. *Id.* That question, fundamentally, is between Global NAPs and the Commission, and there is no reason to include it in an interconnection agreement.

6. Conclusion.

The main issue in this case is whether ISP-bound calls should be subject to reciprocal compensation. The only logical answer is that they should, and the definition of "local traffic" in the agreement should be crafted to ensure that result, as Global NAPs has proposed. Given ***that*** result, the next question is what compensation rate should apply. Since BellSouth has objected to continuing the existing $0.009/minute rate, a new rate should be established that comports with the FCC's TELRIC methodology. The rates identified by BellSouth in Mr. Varner's testimony appear generally to meet that test, although Global NAPs believes that the Commission should specifically state whether ***it*** views those 1996-vintage rates as, in fact, complying with the now-binding TELRIC standard.

The third seriously disputed question is whether the contractual terms governing the parties' physical interconnection arrangements contained in the existing agreement should be continued, or should be replaced by BellSouth's arbitrarily-generated new standard form. But even if the particular terms in that standard form might be reasonable in the abstract, as Mr. Rooney explained, there is a substantial and unreasonable cost imposed on an operational ALEC if at BellSouth's whim the ALEC can be required to rearrange is actual, physical operations and business arrangements on a critical matter such as the exchange of traffic. BellSouth has not identified any actual problems with the existing contract in this regard, and has offered only a few sentences of general testimony in favor of changing the contract from the language that exists today. The Commission should reject BellSouth's position and allow the parties to continue to work under the existing contract language in this respect.

The parties have actually agreed on a large number of specific contractual changes requested by BellSouth. *See* Rebuttal Testimony of William J. Rooney, Jr., *passim.* With a decision from the Commission on the three issues identified above, Global NAPs believes that the "lurking" issue identified in the Introduction — which contract should be used as the "base" document for forming the new agreement — can be amicably resolved by the parties in the course of implementing the Commission's ruling. Obviously, if that proves not to be the case, Global NAPs would expect to return to the Commission for further guidance.

Respectfully submitted this 29th day of June, 2000.

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ATTACHMENT A:
POST-HEARING STATEMENT OF ISSUES AND POSITIONS

GLOBAL NAPs' BASIC POSITION

The Commission should require compensation for ISP-bound calls in the new agreement on the same terms as all local calls. Global NAPs and BellSouth have agreed to a number of specific provisions for inclusion in the new contract. Even so, if BellSouth wants additional changes to the agreement, it should bear the burden of proof with respect to whatever changes it proposes.

QUESTIONS OF FACT/LAW AT ISSUE AND GLOBAL NAPs' POSITION ON EACH

ISSUE 2. **Should dial-up connections to an ISP (or "ISP-bound traffic") be treated as "local traffic" for purposes of reciprocal compensation under the new Global NAPs/BellSouth Interconnection Agreement or should it be otherwise compensated?**

Dial-up connections to an ISP (ISP-bound traffic) should be treated as local traffic for reciprocal compensation purposes under the new Global NAPs/BellSouth Interconnection Agreement. Therefore, reciprocal compensation should be due for ISP-bound traffic, just as it is due for other local traffic.

ISSUE 3. **If ISP-bound traffic should be compensated, what compensation rate should apply?**

ISP-bound traffic should be compensated at the same compensation rate as other local traffic is compensated.

ISSUE 4. **What are the appropriate reciprocal compensation rates to be included in the new Global NAPs/BellSouth Interconnection Agreement?**

The parties' current reciprocal compensation rate of $0.009 per minute is appropriate.

However, if BellSouth objects it, then the new per-minute rate should be no lower than a rate that this Commission has established based on the FCC's TELRIC methodology for call transport and termination. If no such rate has been established, then as a matter of Federal law, the Commission should establish a per-minute rate within the \$0.002 to \$0.004 proxy rate contained in the FCC's regulations at this point, until a fully TELRIC-compliant rate can be established.

ISSUE 5. What is the appropriate definition of local traffic to be included in the Interconnection Agreement?

Any call that is originated on one party's network, dialed by that party's customer as a local call, handed off to the other party, and delivered to the other party's customer, shall be treated as a local call between the parties for purposes of reciprocal compensation.

ISSUE 6. What are the appropriate UNE rates to be included in the Interconnection Agreement?

With the revisions addressed below, Global NAPs will accept BellSouth's proposal, with the understanding (that Global NAPs believes BellSouth shares) that Global NAPs would retain its right under Section 252(i) to adopt subsequent agreements with other carriers addressing this issue. The revisions that should be made to the proposed BellSouth language include deleting the first full sentence of page 4, Attachment 2 to the Agreement; also, the language on Page 16 of Attachment 2, all of Section 2.6.7.3.4. should be deleted.

ISSUE 7. What are the appropriate collocation provisions to be included in the Interconnection Agreement?

Global NAPs will accept BellSouth's proposal, with the understanding (that Global NAPs believes BellSouth shares) that Global NAPs would retain its right under Section 252(i) to adopt subsequent agreements with other carriers addressing this issue.

ISSUE 8. What is the appropriate language concerning Order Processing to be included in the Interconnection Agreement?

Resolved.

ISSUE 9. What is the appropriate language relating to conversion of exchange service to network elements to be included in the Interconnection Agreement?

Resolved.

ISSUE 10. What are the appropriate service quality measurements to be included in the Interconnection Agreement?

Resolved.

ISSUE 11. What is the appropriate language relating to network information exchange to be included in the Interconnection Agreement?

Resolved.

ISSUE 12. What is the appropriate language relating to maintenance and trouble resolution to be included in the Interconnection Agreement?

Resolved.

ISSUE 13. What is the appropriate language relating to local traffic exchange to be included in the Interconnection Agreement?

The new contract should contain the same language on this topic as the existing contract. Global NAPs has conformed its operations to the existing language, and BellSouth has not identified any difficulties arising from it. There is no reason for a change in language that works and that the Commission has previously found reasonable.

ISSUE 14. **What is the appropriate language relating to telephone number portability arrangements to be included in the Interconnection Agreement?**

Resolved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Post-Hearing Brief of Global NAPs, Inc., was furnished this 29th day of June, 2000, by U.S. Mail to:

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