BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and/or petition for arbitration by Global NAPS, Inc. for enforcement of Section VI(B) of its interconnection agreement with BellSouth Telecommunications, Inc., and request for relief.	DOCKET NO. 991267-TP ORDER NO. PSC-00-0802-FOF-TP ISSUED: April 24, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

APPEARANCES:

Jon C. Moyle, Jr., Esquire, and Cathy M. Sellers, Esquire, Moyle Flanigan Katz Kolins Raymond & Sheehan, P.A., 118 North Gadsden Street, Tallahassee, Florida 32301 and Christopher W. Savage, Esquire, Cole, Raywid & Braverman, L.L.P., 1919 Pennsylvania Avenue, N.W., Suite 200, Washington, D.C. 20006.
On behalf of Global NAPs, Inc..

Michael P. Goggin, Esquire, and E. Earl Edenfield, Esquire, 150 South Monroe Street, #400, Tallahassee, Florida 32301
On behalf of BellSouth Telecommunications, Inc..

Beth Keating, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

FINAL ORDER ON COMPLAINT

BY THE COMMISSION:

I. CASE BACKGROUND

On August 31, 1999, Global NAPs, Inc. (Global NAPs or GNAPs) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged breach of the parties' Interconnection Agreement (Agreement). The subject Agreement was initially executed by ITC^Deltacom, Inc.,(DeltaCom) on July 1, 1997, and was previously approved by the Commission by Order No. PSC-97-1265-FOF-TP, issued October 14, 1997, in Docket No. 970804-TP. DeltaCom's Agreement is effective in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. On January 18, 1999, GNAPs adopted the DeltaCom Agreement in its entirety.

In its complaint, GNAPs asserts that BellSouth has failed to properly compensate GNAPs for delivery of traffic to Internet Service Providers (ISPs) that are GNAPs' customers. GNAPs states that BellSouth has failed to comply with specific provisions of the Agreement concerning the payment of reciprocal compensation to GNAPs. GNAPs asks for relief, including payment of reciprocal compensation and attorney's fees, plus interest.

On September 27, 1999, BellSouth filed its Answer to GNAPs' complaint. Based on the complaint, and BellSouth's response, this matter was set for hearing on January 25, 2000.

On November 15, 1999, DeltaCom filed a petition to intervene in this proceeding. By Order No. PSC-99-2526-PCO-TP, DeltaCom's petition was denied.

II. Compensation for Traffic to Internet Service Providers

As stated above, the issue before us is whether, according to the terms of their Interconnection Agreement, GNAPs and BellSouth are required to compensate each other for delivery of traffic to ISPs. The Agreement in question is an amended version of an Agreement between ITC^DeltaCom and BellSouth, executed in July 1997, and amended in August 1997. This Agreement was subsequently adopted by GNAPs, pursuant to Section 252(i) of the Telecommunications Act of 1996 (the Act).

A. AGREEMENT TERMS

The following provisions are pertinent to this dispute:

> 49. "Local Traffic" means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

(Agreement, Attachment B, page 8).

> With the exception of the local traffic specifically identified in subsection (C) hereafter, each party agrees to terminate local traffic originated and routed to it by the other party. Each Party will pay the other for terminating its local traffic on the other's network the local interconnection rate of $.009 per minute of use in all states. Each Party will report to the other a Percent Local usage ("PLU") and the application of the PLU will determine the amount of local minutes to be billed to the other party. Until such time as actual usage data is available, the parties agree to utilize a mutually acceptable surrogate for the PLU factor. For purposes of developing the PLU, each party shall consider every local call and every long distance call. Effective on the first of January, April, July and October of each year, the parties shall update their PLU.

(Fourth Amendment to Agreement, page 2).

1. GNAPS

GNAPs witness Rooney argues that BellSouth agreed to pay GNAPs reciprocal compensation for local traffic, including traffic to ISPs, pursuant to the language in the Agreement. He maintains that, otherwise, the parties did not discuss the topic of traffic to ISPs, nor did BellSouth tell GNAPs that it would not pay reciprocal compensation for traffic to ISPs under the adopted Agreement. Witness Rooney explains that he found this particularly relevant, because in his experiences in other states, the incumbent local exchange company (ILEC) would usually try to put conditions

on the adoption if the ILEC had a problem with provisions in the Agreement. In this case, however, he maintains that BellSouth did not.

Witness Rooney further emphasizes that the Agreement does not contain a means to segregate traffic bound for ISPs from other traffic. Thus, the witness argues that it is clear that traffic to ISPs is subject to reciprocal compensation under the definition of local traffic. Furthermore, while witness Rooney agrees that the obligation to pay reciprocal compensation only applies to local traffic, he emphasizes that at the time the Agreement was drafted, ISP-bound traffic was being treated as local traffic and that nothing in the Agreement indicates that it should be treated otherwise. He notes that the FCC's ruling on the jurisdictional status of traffic to ISPs, FCC Order 99-68, issued February 26, 1999, (Declaratory Ruling) was released well after the original DeltaCom/BellSouth Agreement was executed. We note that FCC Order 99-68 was also released after GNAPs adopted the DeltaCom Agreement.

In addition, in response to questions about the impact of the FCC Order 99-68 on the definition of local traffic and reciprocal compensation under the Agreement, Witness Rooney contends:

> That definition [in the agreement] includes traffic that begins and ends within one LATA. And as I understand it, for purposes of the contract you begin and end in a LATA if it is rated to begin and end in a LATA. The thing is that at the time this contract came about, this is before the decision by the FCC. So you have nothing that is going to suggest that what was understood here to be subject to reciprocal compensation is what the FCC is talking about.

Further emphasizing that the FCC's decision came out after the DeltaCom Agreement was executed, witness Rooney states:

> So here you just have to look entirely within the contract as to what this means. And in here there is no way of separating out ISP-bound traffic from other local traffic, thus ISP-bound traffic is being treated like other local traffic.

GNAPs further argues that a decision reached in Alabama interpreting the DeltaCom Agreement to require reciprocal compensation for traffic to ISPs collaterally estops BellSouth from even arguing this case in Florida on the same Agreement. GNAPs argues:

> The issue at hand in this case--whether the DeltaCom agreement, that Global NAPs adopted under Section 252(i), calls for compensation for ISP-bound calling--is exactly the issue that BellSouth fought and lost in Alabama. And while Global NAPs is a different entity from DeltaCom, Global NAPs submits that its adoption of the DeltaCom contract under Section 252(i) means that, as a matter of law, it is in privity with DeltaCom on the question of the meaning of the DeltaCom contract that Global NAPs has adopted here. It follows that BellSouth may not properly relitigate that issue in this case.

It appears, however, that GNAPs has raised the issue of collateral estoppel for the first time in its post-hearing brief; therefore, BellSouth did not have an opportunity to address this argument. As such, we have not considered this argument and it does not serve as the basis for our decision.

2. BellSouth

BellSouth's witness Scollard responds that the DeltaCom Agreement has always stated that "reciprocal compensation is due only for the termination of local traffic and thus compensation is not due for ISP-bound traffic." (emphasis in original). Witness Scollard emphasizes that GNAPs adopted the Agreement on January 18, 1999, some time after BellSouth had publicly stated that it would not pay reciprocal compensation for traffic to ISPs. He argues that the FCC upheld BellSouth's position just a little over a month later. The witness further emphasizes that on April 14, 1999, GNAPs filed a tariff with the FCC that acknowledged the interstate nature of ISP-bound traffic.

BellSouth witness Halprin also argues that the FCC Order 99-68 supports BellSouth's position. Witness Halprin contends that the FCC clearly stated that ISP-bound traffic remains classified as interstate and does not terminate locally. He adds that calls to

ISPs are "technically indistinguishable" from interstate dial-around calls, and, therefore, they "transcend the confines of local exchange areas. . . ."

BellSouth witness Shiroishi concedes, however, that subsequent to the execution of the DeltaCom Agreement, BellSouth did develop clarifying language addressing traffic to ISPs. Witness Shiroishi agrees that the clarifying language was never incorporated as an amendment to the Agreement adopted by GNAPs, although she maintains that this was due to BellSouth's own understanding of the clarity of the Agreement.

In its brief, BellSouth further argues that the plain language in the Agreement clearly provides only for reciprocal compensation for local traffic. BellSouth maintains that GNAPs has provided no evidence to demonstrate that the parties mutually intended to treat ISP traffic as if it were local for purposes of the Agreement.

DETERMINATION

We agree with BellSouth that the language in the Agreement adopted by GNAPs is clear and only calls for reciprocal compensation for local traffic. We emphasize, however, that the Agreement does not segregate traffic to ISPs from the rest of local traffic.

We note that in past decisions on somewhat similar issues, we have determined that circumstances that existed at the time the companies entered into the agreement, as well as the subsequent actions of the parties should be considered in determining what the parties intended when the language in the agreement is not clear. See Order No. PSC-98-1216-FOF-TP; and Order No. PSC-99-0658-FOF-TP.

In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953), the Florida Supreme Court referred to Contracts, 12 Am.Jur. § 250, pages 791-93, for the general proposition concerning contract construction:

> Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language . . . Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful,

> so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred . . . An interpretation which is just to both parties will be preferred to one which is unjust.

In Order No. PSC-98-1216-FOF-TP, we also agreed that, in the construction of an agreement, the circumstances in existence at the time the agreement was made are evidence of the parties' intent. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rhg. den. (Fla. 1951). What a party did or omitted to do after the agreement was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rhg. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958). See Order No. PSC-98-1216-FOF-TP at p. 16.

In this case, however, we believe that the plain language of the Agreement shows that the parties intended the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs. Therefore, it is not necessary to look beyond the written agreement to the actions of the parties at the time the agreement was executed or to the subsequent actions of the parties to determine their intent.

As noted above, we find it particularly noteworthy that there is nothing in the Agreement that specifically addresses traffic bound for ISPs, nor is there any mechanism in the Agreement to account for such traffic, as explained by GNAPs. Thus, nothing in the Agreement indicates that this traffic was to be treated differently than local traffic. In addition, while BellSouth may have already made its position on traffic to ISPs publicly-known by the time GNAPs adopted the DeltaCom Agreement, BellSouth never modified the Agreement adopted by GNAPs to reflect its position, as noted by GNAPs' witness Rooney, even though BellSouth's witness Shiroishi indicated that BellSouth had developed such an amendment.

In addition, GNAPS witness Selwyn testified that the FCC has not precluded the state commissions from addressing this issue. We agree. Paragraph 27 Of the Declaratory Ruling states that

> . . . nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate [it this order].

We emphasize that the FCC's Order was issued after GNAPs adopted the DeltaCom/BellSouth Agreement; therefore, even if the language in the Agreement necessitated consideration of the surrounding circumstances at the time the agreement was executed to determine the parties' intent, the FCC Order 99-68 could not demonstrate or support either parties' argument regarding such intent or understanding of the law at the time the Agreement was adopted.

Although we need not look beyond the plain language in the Agreement in this instance, we note that we do not believe that the intent of the parties at the time of the adoption is the relevant intent when interpreting an Agreement adopted pursuant to Section 252(i) of the Act. Rather, we believe the intent of the original parties is the determining factor when the Agreement language is not clear. Otherwise, original and adopting parties to an Agreement could receive differing interpretations of the same Agreement, which is not consistent with the purpose of Section 252(i) of the Act. We also note that we believe the underlying Agreement negotiated by the original parties terminates on the date established by the original parties to the Agreement. Therefore, adopting an Agreement under Section 252(i) cannot perpetuate the terms of an agreement beyond the life of the original agreement.

B. ADDITIONAL ARGUMENTS

In addition to the arguments regarding the Agreement language and the intent of the parties, the parties also presented technical and policy arguments regarding traffic to ISPs. We have considered these additional arguments, as set forth below, although the basis of our decision is the plain-meaning of the language in the Agreement.

1. Jurisdictional Nature of Calls to ISPs

BellSouth argues that the FCC has consistently held, beginning with its original access order in 1983, that enhanced service providers (ESPs), which include ISPs, serve their customers through interstate access. BellSouth witness Shiroishi testifies that, "Throughout the evolution of the Internet, the FCC repeatedly has asserted that ISP-bound traffic is interstate." She adds that the FCC concluded in paragraph 12 of the Declaratory Ruling that calls do not terminate at the ISP's local server, but, instead, continue to the ultimate destination or destinations, which may be in another state. BellSouth witness Halprin agrees that, "It is a settled matter at this point in the public debate that the ISP Internet communications do not terminate at the ISP's local server."

In response, GNAPs witness Selwyn agrees that the FCC has held since 1983 that calls placed to ESPs are jurisdictionally interstate. He explains, however, that the FCC has required in a number of contexts that ISP traffic should be treated as local.

GNAPs witness Goldstein further argues that

> [s]ince ISP-bound calls are technically identical to local calls, the logical result from a technical perspective is to include ISP-bound calls with the category of 'local' calls in contracts regarding interconnection between carriers and inter-carrier compensation. Any claim that contracting parties would have had any technical or cost-related reason for distinguishing ISP-bound calls from other local calls is false.

The witness adds that, technically, ISP-bound calls are "indistinguishable from local voice calls," and contends that "[f]rom a traffic perspective, an ISP's modem pool looks very much like an incoming PBX trunk group." GNAPs witness Selwyn added that ISP calls are also economically equivalent to local calls.

Although BellSouth witness Milner argues that the supervisory signals or the signaling protocol used does not determine the nature of the traffic, the evidence shows that BellSouth does, however, treat traffic to ISPs as local in a number of ways. BellSouth witness Halprin agreed that, among other things, the FCC "has directed that ISPs and other ESPs be provisioned out of

intrastate tariffs, that revenues be counted as intrastate for ARMIS reports, etc." He argues, however, that ILECs have no choice in these matters, noting that attempts to alter the reporting status of the traffic have been rebuffed by the FCC.

2. Methods of Compensation

Witness Banerjee argues that, because the FCC has ruled that ISP-bound calls are jurisdictionally interstate, not local, the proper model of interconnection that applies to ISP-bound calls is the same as that between an originating ILEC and an interexchange carrier (IXC). In support of this point, witness Banerjee states that the ISP is not an end-user of a serving ALEC but rather a carrier.

Witness Banerjee further argues that the principle of cost causation suggests that,

> *for the purposes of an Internet call,* the subscriber is properly viewed as a customer of the ISP, not of the originating ILEC (or even of the ALEC serving the ISP). The ILEC and the ALEC simply provide access-like functions to help the Internet call on its way, just as they might provide originating or terminating carrier access to help an IXC carry an interstate long distance call. [emphasis in original]

He contends that the ISP should compensate local carriers through usage-based access charges, as IXCs do, and recover that cost directly from the ISP customer. The witness also disagrees with the FCC regarding the appropriateness of the access charge exemption, because he believes it is a form of subsidy to ISPs, their customers, and the ALECs that serve the ISPs. He argues that the

> subsidy likely stimulates demand for Internet use beyond economically efficient levels--a fact not lost on anyone who has followed the phenomenal growth of Internet traffic over the past five years. However, if that subsidy to Internet users and providers (in short, the "Internet industry") were deemed to be in the public interest, then, as I explained before, it should be made explicit and provided for in a competitively neutral manner.

He continues that "the next-best cost-causative form of compensation would be an equitable sharing between the ILEC and the ALEC of revenues earned by the ALEC from the lines and local exchange usage that it sells to the ISP."

After the first two choices for a compensation model, which would likely each earn considerable revenues for the ILEC, witness Banerjee states that "t]he third-best and a reasonable interim form of compensation would be bill and keep or, in effect, exchange of ISP-bound traffic between the ILEC and the ALEC at no charge to each other."

In response, GNAPs witness Selwyn states that bill and keep is based on the notion that the volume of calls flowing in each direction is balanced. He maintains that traffic is not likely to be in balance, and as a result, carriers have typically adopted the reciprocal compensation model.

3. Cost Recovery

If reciprocal compensation is not paid, GNAPs witness Selwyn argues that the originating carrier avoids the costs associated with call termination. GNAPs witness Rooney agrees, and argues that because traffic may not balanced, BellSouth would, essentially, be using GNAPs' facilities for free.

BellSouth witness Banerjee argues that when the compensation exceeds the actual cost to the ALEC of handling that traffic, ALECs will try to garner as much ISP in-bound traffic as possible in order to reap the benefits of reciprocal compensation. BellSouth witness Halprin states that the current model results in reciprocal compensation that greatly overcompensates ALECs for terminating traffic to ISPs originating on BellSouth's network. The witness maintains that because of the major differences between Internet usage and usage of the public switched telephone network, a per-minute charge is not appropriate if it is developed on the basis of the characteristics of local voice calling patterns.

GNAPs witness Selwyn contends that the $.009 per minute rate contained in the DeltaCom Agreement represents the cost that each participating LEC, the incumbent and the ALEC, incurs in terminating local traffic, or conversely avoids when someone else assumes responsibility for that function. In the case of a BellSouth customer and an ISP served by BellSouth, the witness argues that BellSouth incurs a termination cost for traffic

delivered to the ISP, which is avoided if the ISP is the customer of an ALEC. According to witness Selwyn, in either case, BellSouth would have the same cost. He argues, therefore, that the current method of compensation is economically neutral. He adds that if the rate were lower, ALECs would seek high-volume call originating customers, because the ALECs would be underpaying BellSouth for terminating calls.

Witness Selwyn further notes that a call set-up rate could have been established for calls to ISPs, with separate call duration elements, if the duration of calls to ISPs were, in fact, a material cost factor. He emphasizes, however, that such a provision is not in the DeltaCom Agreement adopted by GNAPs.

DETERMINATION

While we have heard and considered the above arguments, the basis for our decision is set forth above in Section I of this Order. We believe the language is clear and that it requires the payment of reciprocal compensation for traffic to ISPs. We note that the evidence is also clear that a cost is involved in the delivery of this traffic, including traffic to ISPs, and while a rate structure other than reciprocal compensation could have been used in the Agreement, it was not. The rate in the Agreement was set before GNAPs adopted it and was not modified by GNAPs and BellSouth. Therefore, there is no basis to set a different rate in this case. The rate in the Agreement controls.

III. ATTORNEY'S FEES

The parties have taken similar positions on this issue. The parties seem to agree that the language in the Agreement is clear that the prevailing party is entitled to attorneys' fees.

DETERMINATION

We agree. The language in the Agreement is clear that the prevailing party in a dispute under this Agreement is entitled to attorneys' fees. Therefore, GNAPs is entitled to collect attorneys' fees associated with this dispute.

IV. CONCLUSION

Based on the foregoing, we find that reciprocal compensation is due under the Agreement adopted by GNAPs for all local traffic,

including traffic to ISPs, at the rate set forth in the Agreement. Furthermore, the Agreement clearly provides that the prevailing party is entitled to receive attorneys' fees. Thus, based on our decision herein, GNAPs is entitled to attorneys' fees.

It is therefore

ORDERED by the Florida Public Service Commission that the dispute between Global NAPs, Inc. and BellSouth Telecommunications, Inc. is resolved as set forth in the body of this Order. It is further

ORDERED that Global NAPs, Inc. is entitled to attorneys' fees as set forth herein. It is further

ORDERED that this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 24th day of April, 2000.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).