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RECORDS AND
REPORTING

October 4, 2000

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

Re: Docket No. 991220-TP (Global NAPS Arbitration)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration, which we ask that you file in the captioned docket.

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

Sincerely,

Michael P. Goggin
Michael P. Goggin

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

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**CERTIFICATE OF SERVICE
Docket No. 991220-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

U.S. Mail this 4th day of October, 2000 to the following:

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Michael P. Goggin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:)	Docket No. 991220-TP
)	
Petition by Global NAPs, Inc. for)	
Arbitration of Interconnection Rates,)	
Terms and Conditions and Related)	
Relief of Proposed Agreement with)	
BellSouth Telecommunications, Inc.)	
<hr/>		Filed: October 4, 2000

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth") hereby requests that the Commission reconsider its Order No. PSC-00-1680-FOF-TP (the "Order") in this matter. In support of its Motion, BellSouth states the following:

Reconsideration should be granted because the Commission overlooked or failed to consider certain points of fact and law in issuing the order. In particular, it was legal error for the Commission to decide, as a matter of law, that dial-up internet traffic is local exchange traffic, even though the Federal Communications Commission ("FCC") has expressly held otherwise. The Commission also overlooked or failed to consider that, as a matter of law, it was not obligated to reject bill-and-keep as an intercarrier compensation mechanism for internet traffic. In addition, the Commission overlooked disputed issues of material fact concerning whether a party providing service to an internet service provider ("ISP") would incur any costs associated with delivering internet traffic from the ISP's customer to the ISP for which it would not be compensated by the ISP.

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On August 26, 1999, Global NAPs, Inc. filed a request for arbitration under the Telecommunications Act of 1996 seeking to resolve certain unresolved issues between Global NAPs and BellSouth that arose in their negotiations toward a new interconnection agreement.¹ In its Order the Commission determined that the parties must treat dial-up internet traffic as local exchange traffic for purposes of their agreement. Accordingly, the Commission would require that a carrier serving an ISP's customer pay reciprocal compensation to the carrier serving the ISP in connection with the shared handling of such internet traffic. (Order at 10-14.)

A motion for reconsideration must identify a point of fact or law that was overlooked, or that the Commission failed to consider in rendering its Order. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962). In this case, the Commission overlooked or failed to consider relevant precedent that refutes the Commission's assumption that dial-up internet traffic is local exchange traffic. In its rejection of a bill-and-keep approach, the Commission also overlooked or failed to consider that there is no legal bar to the adoption of such an approach. The Commission, moreover, appears to have overlooked that it is not bound, as a matter of law, to adopt an intercarrier compensation mechanism for such traffic. In addition, the Commission overlooked or failed to consider the absence of evidence that would tend to support its assumption that a carrier serving an ISP would incur costs

¹ On March 20, 2000, the Commission decided that the parties' prior agreement had expired on July 1, 1999, thus disposing of the first issue raised by Global NAPs' petition.

associated with the handling of internet traffic on behalf of its ISP customer for which it is not already compensated by its ISP customer.

The Commission Erred by Basing Its Ruling, On a Presumption that, as a Matter of Law, Internet Traffic Is Local Exchange Traffic.

In the past, the Commission has studiously avoided attempting to determine the nature of internet traffic. Local exchange carriers such as Global NAPs and BellSouth have debated the issue before the courts, the FCC and state commissions, arguing either that dial-up internet traffic is local exchange traffic (to which the reciprocal compensation obligations of the Telecommunications Act apply) or that it is interstate access traffic (and thus not subject to reciprocal compensation). This Commission has declined to enter the debate, particularly given the FCC's pronouncements on the interstate nature of dial-up internet traffic and the FCC's pending proceeding to establish an inter-carrier compensation mechanism for such traffic. When asked to interpret existing interconnection agreements, the Commission, in prior cases², has decided merely whether the parties intended, for purposes of their agreement, to pay reciprocal compensation for such traffic, and avoided deciding whether such traffic is, as a matter of law, local exchange traffic. See e.g., Order No. PSC-98-

² There are two recent exceptions to the Commission's policy of declining to rule on the nature of internet traffic. The first exception involved a petition brought by Global NAPs seeking to obligate BellSouth to pay reciprocal compensation for the delivery of internet traffic. Order No. PSC-00-0802-FOF-TP. In that case, the Commission decided that reciprocal compensation must be paid because internet traffic is local, and the parties had not expressly agreed to exempt it from reciprocal compensation obligations. *Id.* at 6-8. In Order No. PSC-00-1511-FOF-TP, the Commission denied BellSouth's motion for reconsideration. BellSouth has moved for reconsideration of a similar decision by the Commission in Docket No. 991946-TP, in which the Commission again determined that, because the BellSouth's agreement with DeltaCom did not include language indicating an express intent to treat internet traffic separately from other local traffic, BellSouth should be required to pay reciprocal compensation. Order No. 00-1540-FOF-TP (issued August 24, 2000). However, unlike the present case, those cases involved existing agreements rather than a new agreement.

1216-FOF-TP. Similarly, in cases in which the parties have sought arbitration of the issue for new interconnection agreements, the Commission has avoided deciding whether internet traffic is, as a matter of law, local exchange traffic. Instead, the Commission has simply required that the parties continue to treat internet traffic as they had done under the previous agreement until the FCC ultimately decides the issue. See *e.g.*, Order No. PSC-99-2009-FOF-TP.

In this Order, however, the Commission has decided to change course. Specifically, the Commission, in effect, concludes that internet traffic *is local exchange traffic*. The Commission denies that it has done so, and specifically stated that “in rendering this decision, we stop short of determining that ISP-bound traffic is, in fact, local traffic. Herein we find only that this traffic shall be treated like local traffic for purposes of compensation.” Order at 13-14. However, the decision to treat this traffic as local appears to be based upon the tacit conclusion that it is local traffic.

For example, the Commission explained that it was constrained to reject BellSouth’s suggestion that the Commission mandate, for purposes of the parties agreement, that the parties adopt a “bill-and-keep” arrangement with respect to internet traffic because of the FCC’s rule permitting bill-and-keep only when “traffic appears to be roughly balanced.” (Order at 12). The FCC rule to which the Commission refers, however, applies *only* to reciprocal compensation arrangements for “*local telecommunications traffic*.” 47 C.F.R. § 51.715(b). Accordingly, the Commission could not properly rule out a bill-and-keep arrangement on this basis without first concluding that internet traffic is “local

telecommunications traffic," to which the reciprocal compensation provisions of the Telecommunications Act apply as a matter of law.

It is curious that the Commission would definitively decide the jurisdictional nature of dial-up internet traffic when it has steadfastly refused to do so in prior rulings. Moreover, the Commission recently opened a generic docket, Docket No. 000075, in which it proposes to decide whether internet traffic is local or interstate, and how, if at all, carriers should compensate each other for carrying such traffic on behalf of ISPs. The Commission's decision in this case impinges on that pending docket.

Most importantly, the Commission's decision is wrong as a matter of law. In a series of decisions, the FCC has determined that enhanced service providers, including internet service providers, use access service, not local exchange service. See, e.g. *MTS and WATS Market Structure*, CC Dkt. No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983). Moreover, the FCC has repeatedly held that internet traffic is largely interstate in nature and does not terminate at the ISP's server. See, e.g. *Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP Bound Traffic*, CC Dkt. No. 99-38, Declaratory Ruling, FCC Order 99-38 (Feb. 26, 1999)³; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 98-147, 98-11, 98-26,

³ Although the FCC's Order 99-38 was recently vacated (see *Bell Atlantic Telephone Co. v. Federal Communications Commission*, 206 F. 3d 1 (D.C. Cir. 2000)) that decision does not disturb prior and subsequent rulings by the FCC that internet traffic is interstate access traffic. Moreover, the court did not decide that the FCC's conclusion was incorrect, only that it was not sufficiently explained, a defect the FCC plans to remedy. See TR Daily, "Strickling Believes FCC Can Justify Recip. Comp. Ruling in Face of Remand," March 24, 2000.

98-32, 98-78, 98-91, Order on Remand, FCC Order 99-413 (Dec. 23, 1999) at 16-24. The Commission alluded to these precedents, but only for the limited purpose of explaining its view that, in view of the access exemption, it apparently feels constrained from concluding that internet traffic is, as a matter of law, anything other than local exchange traffic. Order at 12, 13.⁴ In view of these precedents, it was error for this Commission to determine that internet traffic is local exchange traffic. Because the Commission overlooked or failed to consider relevant law in issuing its Order, it should grant this Motion.

The Commission Erred by Assuming that, as a Matter of Law, It Was Required to Adopt an Intercarrier Compensation Mechanism

The Commission appears to have based its decision on a mistaken assumption that, as a matter of law, it is required to adopt an intercarrier compensation mechanism for internet traffic. See, e.g. Order at 11 (“We are, however, persuaded by the likelihood that a decision by the FCC has been further delayed by the D.C. Circuit’s ruling that some form of compensation for ISP-bound traffic should be established by this Commission.”). This is incorrect. The only requirement in the Telecommunications Act that an interconnection agreement include an intercarrier compensation mechanism is Section 251(b)(5), the reciprocal compensation provision. 47 U.S.C. §251(B)(5). This requirement does not apply to non-local traffic, however. Moreover, the Commission identifies no authority in its Order that would require the adoption of an intercarrier compensation mechanism for non-local internet traffic. Accordingly,

⁴ Indeed, the Commission discussed this authority only for the limited purpose of ruling out any intercarrier compensation mechanism that might compensate the only party who does not receive any payment from the ISP in return for providing access services to the ISP. Order at 12.

unless, as a matter of law, internet traffic *is* local traffic, this Commission is under no obligation to impose an intercarrier compensation mechanism on the parties with respect to such traffic. BellSouth believes that the Commission overlooked or failed to consider that, as a matter of law, it is free to decline to impose an intercarrier compensation mechanism on the parties. Accordingly, the Commission should reconsider its order.

The Commission Erred by Assuming Facts Not In Evidence

The Commission appears to have overlooked or failed to consider the absence of any evidence with respect to the type or amount of costs incurred by Global NAPs in handling internet traffic, and whether Global NAPs is compensated for such costs already in the form of revenues from its ISP customers. As noted above, because internet traffic is not, as a matter of law, local telecommunications traffic, the reciprocal compensation requirements of the Telecommunications Act do not apply to such traffic. Accordingly, the Commission is not free to make the same sort of assumptions that would apply to local traffic under the Commission's reciprocal compensation rules, such as assuming that the costs Global NAPs incurs in handling internet traffic are the same as the costs BellSouth incurs with respect to terminating local exchange traffic. Nor may the Commission assume that Global NAPs would not be compensated for such costs by its ISP customers in the event that the Commission did not impose reciprocal compensation to such traffic.

Yet the Commission's decision reflects the failure of proof on these issues. Global NAPs did not offer evidence of its costs in handling internet traffic, nor did

it support its assertions that such costs would go uncompensated if not for reciprocal compensation. Further, the Commission does not cite any evidence to that effect. Instead, the Commission's decision to impose reciprocal compensation seems to be borne of two incorrect assumptions—that dial-up internet traffic is local telecommunications traffic, and that the Commission was obligated to adopt an intercarrier compensation mechanism. These incorrect assumptions apparently led to two more: that Global NAPs incurred costs roughly equal to those associated with the termination of local traffic, and that it would not be compensated for handling such traffic unless it received reciprocal compensation.

The Commission should have required proof on these issues before deciding that reciprocal compensation must be paid for this traffic.

CONCLUSION

For the reasons set forth above, the Commission's decision is in error. However, it would also have been erroneous for the Commission to direct the parties to treat reciprocal compensation as it had been treated under the prior agreement. Given the Commission's decision in Order PSC-00-0802-FOF-TP, this would have resulted in an arbitrated decision to compensate ISP traffic at a previously negotiated rate that is not cost-based.

At the same time, the Commission's rejection in the subject order of bill and keep is the apparent product of an implicit conclusion that ISP traffic is local. As stated earlier, since this conclusion is incorrect, the Commission's basis for rejecting bill and keep is erroneous. Thus, upon reconsideration, the

Commission should order a bill and keep mechanism as previously described in the testimony of BellSouth's witness, Mr. Varner.

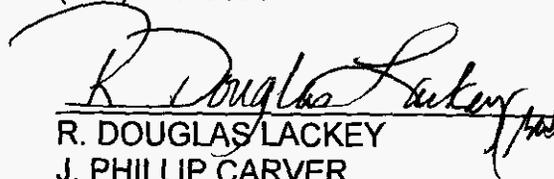
For the reasons stated above, BellSouth respectfully requests that its Motion for Reconsideration be granted.

Respectfully submitted this 4th day of October, 2000.

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