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Before the
STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

Global NAPs, Inc.,
Petitioner,

versus

Docket No. 991220-TP

BellSouth Telecommunications, Inc.,
Respondent.

**GLOBAL NAPs, INC.'s RESPONSE IN OPPOSITION TO
BELLSOUTH'S MOTION FOR RECONSIDERATION**

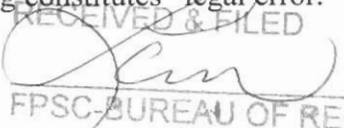
Global NAPs, Inc., through its undersigned counsel, submits this Response and Opposition to the Motion for Reconsideration filed by BellSouth Telecommunications, Inc. in the above-captioned matter. BellSouth seeks reconsideration of Order No. PSC-00-1680-FOF-TP, which the Florida Public Service Commission issued on September 19, 2000.

BellSouth is not entitled to reconsideration. A party seeking reconsideration must identify issues of fact or law that the agency overlooked or failed to consider in rendering its decision. Conversely, a party is not entitled to reconsideration on the basis of a mere assertion that the agency may have made a mistake. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962). Consistent with this, the Commission has recognized that reconsideration is not a means for a party to voice its disagreement with the Commission's decision, reargue matters already presented, or ask the agency to reweigh evidence or change its mind with respect to a matter that already has received its careful attention. *Petition for Arbitration of Dispute with BellSouth Telecommunications, Inc.*

Regarding Call Forwarding, by Telenet of South Florida, Inc., 97 FPSC 7:485 (1997), citing *Sherwood v. State*, 111 So.2d 96, 97-98 (Fla. 3d DCA 1959).

BellSouth's principal claim is a wan assertion that the Commission "in effect" decided that traffic bound for Internet Service Providers (ISPs) is local exchange traffic, and that this holding constitutes "legal error." (BellSouth Motion at 1, 4.) In fact, the Commission expressly

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stated that it was *not* deciding the ultimate legal status of ISP-bound traffic, and held only that compensation for such traffic would be due under the new Global NAPs-BellSouth agreement it was arbitrating. Moreover, even if the Commission *had* concluded that ISP-bound traffic is local for purposes of reciprocal compensation, that conclusion – far from constituting “legal error” – would be fully consistent with the careful reasoning of the D.C. Circuit in its decision vacating the FCC’s *Reciprocal Compensation Order*. BellSouth fails to establish that this or any other aspect of the Commission’s Order constitutes an error. Its motion for reconsideration should be denied.

1. The Commission Did Not Commit “Legal Error” in Deciding that Global NAPs Is Entitled to Compensation.

Unable to find any explicit “legal error” in the Commission’s decision, BellSouth is reduced to claiming that the Commission made an implicit error by “in effect” finding that ISP-bound traffic is local exchange traffic and therefore entitled to reciprocal compensation. BellSouth Motion at 1, 4. The Commission, however, made no such finding. It expressly stated that its decision was limited to determining how compensation for such traffic was to be handled under the new Global NAPs-BellSouth interconnection agreement:

[W]e emphasize that in rendering this decision, we stop short of determining that ISP-bound traffic is, in fact, local traffic. Herein, we find only that [ISP-bound traffic subject to the parties’ agreement] shall be treated like local traffic for the purposes of compensation. [Commission Order at 9.]

Moreover, the question whether ISP-bound traffic should be treated as local under the parties’ agreement was one of the key issues in this proceeding, and one the parties litigated fully. *See, e.g.*, Issue 2 in the parties’ briefs (“Should dial-up connections to an ISP...be treated as ‘local traffic’ for purposes of reciprocal compensation under the new Global NAPs/BellSouth Interconnection Agreement or should it be otherwise compensated?”). BellSouth apparently recognizes that it is not entitled to reconsideration for the purpose of re-litigating that issue – in effect, a second bite at the apple – and so attempts to characterize the Commission’s order as something it is not. Just as reconsideration is not appropriate for the purpose of relitigating

issues already decided by the agency, it is not warranted for the purpose of debating “issues” that are outside the scope of the proceeding.¹

Even if the Commission had concluded that ISP-bound traffic is local, such a decision would not constitute legal error. Although the FCC in its February 1999 declaratory ruling on reciprocal compensation stated that ISP-bound traffic is “non-local interstate traffic,”² the District of Columbia Circuit vacated the FCC’s order and strongly suggested that such traffic is local. The court held that under the FCC’s regulations, ISP-bound traffic appears to terminate at the ISP, which “is clearly the called party.” *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000) (internal quotations omitted). It held that ISPs are “information service providers which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites.” *Id.* (internal citations and quotations omitted). The fact that these further communications occur instantaneously “does not imply that the original communication does not ‘terminate’ at the ISP.” *Id.* at 7. The court also noted that under the FCC’s longstanding ESP Exemption, ISPs are treated as end users rather than as long distance carriers. This classification of ISPs, the court held, is an “embarrassment” to the FCC’s conclusion in the *Reciprocal Compensation Order* that ISP-bound traffic is not local. *Id.* at 8. Given that the D.C. Circuit vacated the FCC’s conclusion that this traffic is *not* local and strongly suggested that it *is* local, this Commission clearly would not be in error if it concluded that the traffic is local.³

¹ Indeed, BellSouth acknowledges that the Commission has opened a separate proceeding, Docket No. 000075, in which it will address whether ISP-bound traffic is local or interstate. See BellSouth Motion at 5.

² See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking*, 14 FCC Rcd 3689, ¶ 26 n.87 (1999) (*Reciprocal Compensation Order*).

³ Although federal-state interplay under Sections 251 and 252 of the Act is probably never simple, here the matter is relatively straightforward. Prior to the February 1999 *Reciprocal Compensation Order*, the question whether ISP-bound calls were “local” for purposes of the FCC’s regulations implementing Section 251(b)(5) of the Act was undecided at the federal level, so state commissions were free to (indeed, had the duty to) decide that question in arbitrations and enforcement actions before them. The *Reciprocal Compensation Order* held that the traffic was non-local, and — while that order was legally in effect — that determination was binding on states. The same order, however, expressly held that states could impose compensation obligations for ISP- (note continued)...

Despite the D.C. Circuit's ruling, BellSouth cites the vacated *Reciprocal Compensation Order*, along with two other FCC orders, and claims they establish that ISP-bound traffic is "largely interstate in nature and does not terminate at the ISP's server." BellSouth Motion at 5-6. BellSouth, in short, utterly ignores the fact that the D.C. Circuit thoroughly reviewed the FCC's prior decisions on the legal and regulatory status of ISP-bound traffic and found that they conflicted with the agency's conclusion that ISP-bound traffic is not local. See *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d at 1, 7-8. Moreover, to the extent that any FCC order is inconsistent with the D.C. Circuit's ruling, it is, quite simply, not valid law.

BellSouth's only reference to the D.C. Circuit opinion is buried in a footnote. According to BellSouth, the court merely asked the agency to explain the *Reciprocal Compensation Order* more fully — a "defect" the agency "plans to remedy." BellSouth Motion at 5 n.3. BellSouth seems here to hold the peculiar notion that the FCC will be free on remand to ignore the detailed reasoning in the D.C. Circuit opinion. In fact, it has already attempted to persuade a federal court of this and (not surprisingly) lost resoundingly. In *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1367 (N.D. Ga. 2000), as here, BellSouth cited the statement of an FCC official (who left the agency shortly after making the statement) that he believed the agency would be able to justify on remand the same conclusion it reached in the ill-fated *Reciprocal Compensation Order*. The court, after recounting all of the problems the D.C. Circuit had found in the *Reciprocal Compensation Order* (*id.* at 1366-67), rejected BellSouth's claims and affirmed the Georgia Public Service Commission's conclusion that reciprocal compensation was required under the agreements before it:

The District of Columbia Circuit's decision in *Bell Atlantic*, however, has removed the clarity provided by the [*Reciprocal Compensation Order*], and despite BellSouth's arguments that the FCC thinks it can maintain its conclusion

...(note continued)

bound calls even though they were not literally subject to Section 251(b)(5). The D.C. Circuit's order in *Bell Atlantic v. FCC*, *supra*, vacated the FCC's finding about the status of these calls (and strongly suggested that the calls were, indeed, local). This puts the matter, legally, back where it was prior to the *Reciprocal Compensation Order* — the FCC may someday come out with a binding federal rule, but in the meantime, it is a question for the states to decide in arbitrations and enforcement actions.

in a manner that satisfies the Bell Atlantic court, the fact remains that the [*Reciprocal Compensation Order*] has been vacated on the very grounds that BellSouth uses for support. [footnote 11]

n.11 Indeed, the court in Bell Atlantic made the same distinction between providers of telecommunication services and information services relied on by the PSC.

Id. at 1377.

BellSouth is basically trying to set up a straw man — an unequivocal Commission decision that all ISP-bound traffic is “local” for all purposes — and then knock it down. The problem is that this particular straw man is built of brick. If this Commission had literally and expressly decided that ISP-bound traffic is local for purposes of reciprocal compensation in all cases, as a matter of regulatory policy and statutory interpretation — if it had done all that — its decision would be legally sound, sensible policy, and consistent with the D.C. Circuit’s careful analysis of the relevant statutory language and regulatory precedent. The straw man won’t fall over. This is because BellSouth’s claim that such a decision would constitute “legal error” is based on the now-vacated *Reciprocal Compensation Order* (indeed, on the very aspect of the order that the court found objectionable). Even if the Commission had done what BellSouth claims, therefore, BellSouth’s argument is wrong.

In fact, however, the Commission was more cautious. It did not decide the ultimate status of ISP-bound traffic in this case. It simply decided that in the agreement between BellSouth and Global NAPs, compensation for such traffic shall be due. This more measured decision is not erroneous, and the Commission should summarily reject BellSouth’s request for reconsideration of this issue.

2. The Commission Made No “Assumption” That It Was Required to Adopt an Intercarrier Compensation Mechanism.

The remainder of BellSouth’s motion consists of additional attempts to create issues that merit reconsideration. BellSouth states that the Commission “appears to have based its decision on a mistaken assumption that as a matter of law it is required to adopt an inter-carrier

compensation mechanism” and that this apparent assumption is “incorrect.” BellSouth Motion at 6. The only thing incorrect about this aspect of the Commission’s Order is BellSouth’s characterization of it. The Commission never states that it felt *compelled* to establish a reciprocal compensation mechanism. Instead, the Order (rather obviously) reflects the agency’s belief that in the context of the new Global NAPs-BellSouth agreement, reciprocal compensation is warranted. Indeed, determining whether compensation is called for under the new agreement was the very purpose of this proceeding. The Commission clearly has the authority to determine whether compensation should be due. Accordingly, there is nothing whatsoever “incorrect” about its exercise of that authority.

3. The Commission Did Not “Assum[e] Facts Not In Evidence.”

BellSouth’s third and final ground for reconsideration is so attenuated that it is difficult to comprehend. It appears to be as follows: Because ISP-bound 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. However, the Commission improperly “made the same sort of assumptions that would apply to local traffic” under the FCC’s rules by “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” and that “Global NAPs would not be compensated for such costs by it [sic] ISP customers in the event that the Commission did not impose reciprocal compensation to such traffic.” BellSouth Motion at 7.

This argument amounts to nothing more than another claim that ISP-bound traffic is not local for purposes of reciprocal compensation. As noted above, the D.C. Circuit has vacated the FCC’s conclusion that this traffic is not local and has strongly suggested that it *is* local for purposes of reciprocal compensation.

The alleged “assumptions” BellSouth finds so troubling, moreover, do not supply grounds for reconsideration of the Commission’s decision. Because the Commission clearly has authority to conclude that ISP-bound traffic is local (*see* note 3, *supra*), it also has authority to apply the FCC’s reciprocal compensation rules to that traffic. And the agency needs no

“assumption” to conclude that Global NAPs would not be compensated by its ISP customers for the costs it incurs in terminating traffic to those customers – the FCC’s ESP Exemption makes it very clear that Global NAPs would not be compensated because it cannot charge its ISP customers a per-minute rate that reflects the actual costs involved. (As Global NAPs’ witnesses explained in their testimony, a CLEC such as Global NAPs literally *could* charge its ISP customers a per-minute rate, but to do so would be economic suicide. Under the ESP Exemption, ISPs would be able to obtain a much lower rate by purchasing local business lines from the ILEC, and the CLEC would soon find itself without any customers.)

BellSouth’s allegations have an all-too-familiar ring to them because the parties litigated these issues in the proceedings leading up the Commission’s Order. *See, e.g.*, Issue No. 3 in the parties’ briefs (“If ISP-bound traffic should be compensated, what compensation rate should apply?”). BellSouth is unhappy with the outcome of those proceedings and wants to try again. Reconsideration before this Commission is not available as a salve for BellSouth’s disappointment.

Conclusion

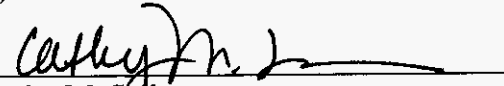
Unable to point to any real errors in the Commission’s Order, BellSouth claims that the agency’s “tacit” conclusions (BellSouth Motion at 4) and “app[arent]...assumption[s]” (*id.* at 6, 7) are incorrect. BellSouth argues in particular that the Commission has “in effect” concluded that ISP-bound traffic is local for purposes of reciprocal compensation, despite the Commission’s express statement that it was not deciding the status of this traffic.

Even if the Commission had held that ISP-bound traffic is local, it would not have committed any error. Such a conclusion would be fully consistent with the D.C. Circuit decision vacating the FCC’s *Reciprocal Compensation Order*. In contrast, BellSouth’s support for its claim that the traffic is not local is the very language in the *Reciprocal Compensation Order* that the D.C. Circuit found objectionable — a position so weak that it borders on frivolous.

BellSouth has identified no issues of fact or law that the Commission overlooked or failed to consider in reaching its decision. The Commission should deny BellSouth's request for reconsideration.

Respectfully submitted,

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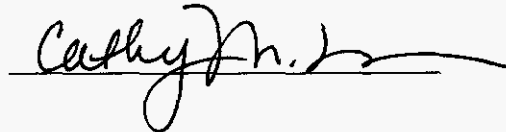
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 2nd day of February, 2000 by U.S. Mail to Michael P. Goggin, BellSouth Telecommunications, Inc., Museum Tower, Suite 1910, 150 West Flagler Street, Miami, FL 33130, R. Douglas Lackey and E. Earl Edenfield, Jr., BellSouth Telecommunications, Inc., BellSouth Center, Suite 4300, 675 W. Peachtree Street, N.E., Atlanta, GA 30375, and to Beth Keating, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee FL 32399.

A handwritten signature in cursive script, appearing to read "Cathy M. Sellers", is written over a horizontal line.

Cathy M. Sellers