

**B. MFS Services, Facilities, and Arrangements:**

	<u>MFS Service</u>	<u>Non-recurring</u>	<u>Recurring</u>
1.a.	Interim Number Portability through co-carrier call forwarding*  Number portability*	\$30/service order, \$35/number (not ordered with ULL) \$20 per additional path order	\$3/mo. for ten paths per number, plus \$0.40/mo. per additional path
1.b.	Access pass-through to number portability purchaser*		In accordance with sec. 14.5 of Agreement
2.	Local dialing parity*	No charge	
3.a.	Reciprocal call termination  Local Traffic delivered to MFS Interconnection Point *		\$0.009/mou
	First year* ----- After first year*		In accordance with note 13 below
3.b.	Access charges for termination of intrastate and interstate Toll Traffic		Per MFS interstate and intrastate access rates (charged in conjunction with Local Traffic, using PLU and PIU, as appropriate)
4.	All other MFS services available to BA for purposes of effectuating local exchange competition	Available at MFS tariffed or otherwise generally available rates, not to exceed BA rates for equivalent services available to MFS	
5.	Other Services  Information Service Billing Fee	No Charge	\$0.03 per call

13 LOCAL TRAFFIC TERMINATION RATES (AFTER FIRST YEAR)

A. Charges by BA

- (a) Traffic delivered to BA Local Serving Wire Center ("LSWC") or BA Access Tandem: \$.009 per mou
- (b) Traffic delivered directly to terminating BA End Office: \$.007 per mou

Note: All BA-IPs identified in Schedule 4.0 as of the Effective Date are LSWC or Access Tandems. Therefore, Local Traffic delivered to such BA-IPs shall be subject to the rate of \$.009 per mou.

B. Charges by MFS

1. Single-tiered interconnection structure:

MFS's rates for the termination of BA's Local Traffic under the single-tiered interconnection structure shall be recalculated once each year on each anniversary of the Effective Date (the "Rate Determination Date"). The initial Rate Determination Date shall be the first anniversary of the Effective Date. The methodology for recalculating the rates is as follows:

LSWC/Access Tandem Minutes = Total minutes of use of Local Traffic delivered by MFS to the BA LSWC or BA Access Tandem for most recent billed month.

End Office Minutes = Total minutes of use Local Traffic delivered by MFS directly to the terminating BA End Office for most recent billed month.

Total Minutes = Total minutes of use of Local Traffic delivered by MFS to BA for most recent billed month.

MFS Charge at the M-IP =

$$\frac{(\text{LSWC/Access Tandem Minutes} \times \$0.009) + (\text{End Office Minutes} \times \$0.007)}{\text{Total Minutes}}$$

2. Multiple-tiered interconnection structure (if offered by MFS to any carrier)

- (a) Local Traffic delivered to MFS LSWC or MFS Access Tandem: \$.009
- (b) Local Traffic delivered to terminating MFS End Office/node: \$.007

**C. Miscellaneous Notes**

1. In the event a Party desires to deliver Local Traffic to a LSWC (i) that is not located within 25 miles of the Tandem Office to which it is subtended, and/or (ii) where the Tandem Office that it subtends is not located within 25 miles of the Tandem Office that is subtended by the terminating End Office, then such Party shall (x) in addition to paying the LSWC/Access Tandem termination rate described above, purchase the necessary facilities from the terminating Party to transport such Traffic to a qualifying LSWC or Access Tandem that is not subject to either conditions (i) or (ii) above, (y) purchase such other service(s) as the terminating Party may offer under applicable tariff to remedy such condition(s), or (z) enter into a new compensation arrangement as the Parties may agree. Notwithstanding the foregoing, nothing in this Agreement shall obligate BA to provide switching services at a LSWC when it functions as such.

2. In the event the two-tiered rate structure described above is modified pursuant to Applicable Law to a single rate structure, BA and MFS (to the extent MFS is offering a multiple-tiered interconnection structure) shall each have the right to apply its tariffed switched access transport charges for transporting Local Traffic it receives at its LSWC to the first point of switching in its network in the LATA.

3. The MFS termination rate under the single-tiered interconnection structure set forth above is intended by the Parties to be a Local Traffic termination rate for Interconnection to the M-IP within each LATA that is reciprocal and equal to the actual rates that will be charged by BA to MFS under the two-tiered Local Traffic termination rate structure described above that will apply after the first anniversary of the Effective Date. The single MFS termination rate is also intended to provide financial incentives to MFS to deliver traffic directly to BA's terminating End Offices once MFS's traffic volumes reach an appropriate threshold. The Parties agree that the Reciprocal Compensation rate(s) set forth herein recover a reasonable approximation of each Party's additional costs of terminating calls that originate on the network facilities of the other Party.

## **EXHIBIT B**

### **NETWORK ELEMENT BONA FIDE REQUEST**

1. Each Party shall promptly consider and analyze access to a new unbundled Network Element with the submission of a Network Element Bona Fide Request hereunder. The Network Element Bona Fide Request process set forth herein does not apply to those services requested pursuant to Report & Order and Notice of Proposed Rulemaking 91-141 (rel. October 19, 1992), Paragraph 259 and Footnote 603 or subsequent orders.

2. A Network Element Bona Fide Request shall be submitted in writing and shall include a technical description of each requested Network Element, the telecommunications service(s) to be provided by the requesting Party using the requested Network Element(s), the means of Interconnection, the number or volume requested, the locations, and the date(s) such Network Elements are desired. The requesting Party shall either make a binding commitment to order the Network Elements requested in the quantity and within the time frame requested or to pay the requesting Party the costs of processing the Requests.

3. The requesting Party may cancel a Network Element Bona Fide Request at any time, but shall pay the other Party's reasonable and demonstrable costs of processing and/or implementing the Network Element Bona Fide Request up to the date of cancellation.

4. Within ten (10) business days of its receipt, the receiving Party shall acknowledge receipt of the Network Element Bona Fide Request.

5. Except under extraordinary circumstances, within thirty (30) days of its receipt of a Network Element Bona Fide Request, the receiving Party shall provide to the requesting Party a preliminary analysis of such Network Element Bona Fide Request. The preliminary analysis shall confirm that the receiving Party will offer access to the Network Element or will provide a detailed explanation that access to the Network Element is not technically feasible and/or that the request does not qualify as a Network Element that is required to be provided under the Act.

6. If the receiving Party determines that the Network Element Bona Fide Request is technically feasible and otherwise qualifies under the Act, it shall promptly proceed with developing the requested Network Element upon receipt of written authorization from the requesting Party. When it receives such authorization, the receiving Party shall promptly develop the requested services, determine their availability, calculate the applicable prices and establish installation intervals.

7. Unless the Parties otherwise agree, the requested Network Element must be priced in accordance with Section 252(d)(1) of the Act.

8. As soon as feasible, but not more than ninety (90) days after its receipt of authorization to proceed with developing the requested Network Element, the receiving Party shall provide to the requesting Party a Network Element Bona Fide Request quote which will include, at a minimum, a description of each Network Element, the availability, the applicable rates and the installation intervals.

9. Within thirty (30) days of its receipt of the Network Element Bona Fide Request quote, the requesting Party must either confirm its order for the requested Network Element pursuant to the Network Element Bona Fide Request quote or seek arbitration by the Commission pursuant to Section 252 of the Act.

10. If a Party to a Network Element Bona Fide Request believes that the other Party is not requesting, negotiating or processing the Network Element Bona Fide Request in good faith, or disputes a determination, or price or cost quote, or is failing to act in accordance with section 251 of the Act, such Party may seek mediation or arbitration by the Commission pursuant to Section 252 of the Act.

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In the Matter of the Petition )  
of Global NAPS Inc. for Arbitration of Inter- )  
connection Rates, Terms, Conditions and Related )  
Arrangements with Bell Atlantic-New Jersey )  
Pursuant to Section 252(b) of the Telecommuni- )  
cations Act of 1996 )

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Docket No. T098070426

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THE RECOMMENDED INTERIM  
FINAL DECISION OF THE ARBITRATOR

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DATED: October 26, 1998

## I. BACKGROUND

This matter comes before the Arbitrator for decision pursuant to Section 252(b) of the Telecommunications Act of 1996 after the two parties herein were unable to agree upon all of the terms necessary for a complete Interconnection Agreement (IA). Despite efforts to achieve agreement, both parties have submitted the issues set forth below to the Arbitrator for decision.

The petitioner, Global Naps, Inc. (GN) is seeking certification as a competitive local exchange carrier (CLEC) in New Jersey. It already has such status in other states, including some served by the respondent, Bell Atlantic (BA). BA-New Jersey is the incumbent local exchange carrier (ILEC). Prior to 1996, BA held a legally sanctioned monopoly franchise to provide land line local exchange service in the State of New Jersey. That monopoly position, as a legal proposition, was terminated by the Telecommunications Act of 1996. That enactment envisioned and encouraged the end of monopoly local exchange service such as that possessed by BA. One of the means set forth in the statute to promote local telecommunications competition was to impose a series of service obligations on all LEC's (47 USC 251 (b)), and a more stringent set of obligations on ILEC's in particular (47 USC 251(c)), that are designed to open up local calling areas for new entrants. It was in connection with these obligations that the parties attempted to work out an IA. While the parties were able to achieve agreement on some points, the matters set forth below have fallen to the arbitrator to decide.

Both parties submitted a joint statement of the unresolved issues to the Arbitrator on September 28, 1998. On that same day, each party separately submitted a statement of their own responses to the issues. On October 20, 1998, at the request of the Arbitrator, each party submitted its own revised statement of the issues to be resolved by arbitration. An arbitration hearing was conducted on October 21, 1998 at the offices of LeBouef, Lamb, Greene, and MacRae in Boston, Massachusetts. At that hearing, the parties attempted to clarify the issues from each of their points of view, had the opportunity to present witnesses, and made opening and closing arguments. In terms of witnesses, only BA chose to avail itself of the opportunity to present testimony; it offered Mr. Jeffrey Masoner, its Vice President for Interconnection Services as a witness. Each party, on October 23, 1998, submitted post hearing briefs. The record of the Arbitration is now complete and ready for a Recommended Interim Final decision. The recommendation herein, of course, is interim in nature as the Board may want to look at any of the matters raised herein and render policy determinations on a more permanent, and perhaps, generic basis.

## II: ISSUES

As noted above the parties submitted a joint statement of issues to the Arbitrator on September 28, 1998. On October 20, 1998, each party, at the suggestion of the Arbitrator, submitted its own statement of the issues. Rather than restate each of those herein, for purposes of both analysis and decision, the issues will be restated herein in somewhat different fashion than the parties themselves have offered them. Nevertheless, in the Arbitrator's view, at least, all of the issues raised are subsumed in the recasted issues.

**A. IS GN AN ENTITY ELIGIBLE FOR AN INTERCONNECTION AGREEMENT?**

BA has raised doubts as to whether or not GN, a carrier which it asserts provides neither "loops nor access to E-911 services," and a company that conducts its business in a manner that BA finds inconsistent with status as a CLEC, is an entity entitled to an IA with it. Among the practices about which BA complains are lack of balance in originating and terminating traffic and misassignment of central office (NXX) codes. GN counters that argument by asserting that it is, like many CLEC's, a young company still formulating its business strategy. Its practices today may very well change over time, but that the evolution of its business should have no bearing on its entitlement to an IA with BA. It further asserts that Section 252(i) of the Telecommunications Act requires only that GN be a "telecommunications carrier," a broad term encompassing many different type of players in the market who provide a "telecommunications service," in order to be eligible for an IA with an ILEC.

**B. IS GN ENTITLED TO MOST FAVORED NATION STATUS IN REGARD TO OTHER INTERCONNECTION AGREEMENTS?**

Assuming arguendo that GN is an eligible party for an IA, BA has raised questions about its ability to assert most favored nation (MFN) status to obtain those terms that are set forth in the IA BA entered into with MFS in 1996. It contends that GN is not prepared to agree to or meet all of the terms and conditions of the contract to which it seeks to opt in, the 1996 IA between BA and MFS. It also alleges that the costs of GN opting in are far in excess of the costs BA encountered when it entered into agreement with MFS. GN asserts in response, that as a telecommunications carrier under the 1996 Act, it is entitled to MFN status, and that BA's assertions to the contrary are merely that company's unsubstantiated fears of how GN might do business in the future.

**C. WHEN OPTING INTO A PREEXISTING INTERCONNECTION AGREEMENT UNDER MFN STATUS, IS A PARTY BOUND TO THE AGREEMENT IN ITS ENTIRETY, OR IS IT FREE TO OPT IN ON A PROVISION BY PROVISION BASIS?**

This issue is fairly straightforward. If a party seeks to opt into a preexisting IA under MFN rights, may it do so on a provision by provision basis, or solely on the basis of take it or leave it in its entirety.

**D. IF GN IS ABLE TO OPT INTO MFS AGREEMENT, WHAT SHOULD THE DURATION OF THE CONTRACT BE?**

The IA between MFS and GN was executed on July 16, 1996 and expires on July 1, 1999. It extends for a period just shy of three full years. GN contends that by opting into the agreement it is entitled to an IA that is identical in terms of its length. It points to numerous provisions of the IA

that require lengthy periods into the contract to fully work out, and asserts that any period less than that set forth in the MFS-BA Agreement could have the effect of negating some of the terms of that document. BA, on the other hand, asserts that if GN is allowed to opt into the Agreement, it should only be allowed to do so for the period remaining in that IA, namely until July 1, 1999. It argues that it did not intend for the terms of its arrangement with MFS to go on in perpetuity, and that that would be the net effect of allowing eligible parties to opt into that IA for the term as set forth in the MFS understanding. In short, GN contends that its MFN rights allow it to have the same contractual term in time as MFS negotiated in 1996 while BA contends that MFN status only allows GN to obtain the identical contractual rights as MFS to a point in time co-terminus with the applicability of those rights to MFS, namely until July 1, 1999.

E. ARE CALLS TO INTERNET SERVICE PROVIDERS ELIGIBLE FOR RECIPROCAL COMPENSATION UNDER THE MFS INTERCONNECTION AGREEMENT?

The IA between MFS and BA envisions a scenario where each party compensates the other for calls that originate from their customers but terminates with a customer of the other. Since the originating caller is almost always the one who is billed for a call, the ability to be compensated for service rendered in terminating the call depends entirely on having the company whose customer originates it passing on the costs of termination to the company whose customer was the recipient of the call. Accordingly, BA and MFS agreed to reciprocally compensate one another for terminating calls in accordance with the schedule set forth in their IA.

BA contends in both testimony and argument that the IA it entered into with MFS never contemplated a severe imbalance in the reciprocal compensation arrangements between itself and MFS, one that would inevitably occur if a CLEC focused its business on signing up Internet Service Providers (ISP's) as customers. That imbalance, BA contends is inevitable because calls to ISP's are almost always incoming. Thus, a CLEC whose customers were, for example, exclusively ISP's would be entitled to significant compensation from BA for call terminations while having to pay virtually nothing in return, because its customers originated few, if any, calls. BA also contends that its reluctance to acquiesce to GN opting into the MFS IA is not motivated entirely by fear of breach or imbalance in reciprocal payments, but also by a desire to avoid entering into a contractual arrangement whose precise terms it already knows are the subject of disagreement among the parties. Indeed, BA's testimony indicated that the disagreement on those terms may not be limited to BA and GN. MFS also appears to have a different view of the IA than BA, and there may be legal action taken on those disagreements, although BA's testimony on that point was very circumspect, given the sensitivity of the subject.

Not surprisingly, GN takes a very different point of view. It argues that the MFS IA makes no reference to requiring any balance in the reciprocal compensation arrangements, and, indeed, at some points appears to contemplate the very imbalance that BA states was never envisioned. In any event, GN further argues, even if such an imbalance was contemplated, BA has little or no basis to assume that it will occur (BA insists that it does based on its

experience with its IA with GN in Massachusetts). GN further contends that, in any event, should BA's worse fears materialize, and the reciprocal compensation arrangements turn out to be very imbalanced in violation of the IA, as interpreted by BA, BA would still have available to it all the legal remedies that are applicable to breach of contract. Accordingly, GN maintains, fear of contract breach or imbalance in the reciprocal compensation arrangements is no grounds for refusing to provide GN with the ability to opt into the MFS IA.

**F. ARE THE APPLICABLE RECIPROCAL COMPENSATION RATES THOSE SET FORTH IN THE MFS INTERCONNECTION AGREEMENT, OR THE GENERIC RATES ESTABLISHED BY THE BPU IN DOCKET No. TX 95120631?**

The MFS IA sets forth a schedule of payments under the reciprocal compensation arrangements. They are \$.009 for local traffic delivered to a tandem switch and \$.007 for local calls delivered to an end office. On December 2, 1997, the BPU issued an order in Docket No. TX 95120631, In The Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services (Generic Order). In that decision, the Board set rates of \$.003738 for tandem termination and \$.001846 for end office termination. BA contends that the Generic Order supersedes the MFS rates for all IA's entered into subsequent to its issuance, and therefore, that the reciprocal compensation rates should be .003738 and .001846. GN asserts that by opting into the MFS IA it is entitled to the compensation rates set out in that document, namely the rates of .009 and .007. It bases that argument on two premises. The first is that the generic order of the BPU supersedes only arbitrated rates and not, as in the case of the MFS IA, negotiated rates. The second premise is that the rates determined in the Generic Order were based entirely upon the costs of BA and are not applicable to the costs of a CLEC.

**III. ANALYSIS AND RECOMMENDATIONS**

**A. IS GN AN ENTITY ELIGIBLE FOR AN INTERCONNECTION AGREEMENT?**

BA has raised questions in regard to whether GN is an CLEC eligible for an IA under the Telecommunications Act of 1996. As noted above, those questions relate to the nature of GN's business strategy and the configuration of its facilities. GN has countered that BA has little or no evidentiary basis to support its questioning of GN's eligibility, and that, even if it did, GN is clearly a "telecommunications carrier" that the Act envisioned as being eligible for an IA.

It seems clear that a key goal of Congress in enacting the Telecommunications Act of 1996 was to open up local exchange service to competition. Ease of entry may well be the sine quo non of actions needed to open the market to competition. It would seem consistent with the intent of the statute to minimize the hurdles for new market entrants and to liberally construe eligibility for an IA. While BA makes it clear that it dislikes what it believes to be GN's business intentions, its own witness admitted that he could not state with certainty what strategy GN might ultimately pursue. The

experience BA has had with GN in Massachusetts may well justify BA's dislike for GN's business activity, but does not rise to the level of providing a rationale for denying the petitioner's status as a "telecommunications carrier" under the Act for purposes of the Recommended Interim Final Decision. GN's application to be certified as a CLEC in New Jersey is currently pending before the Board, and BA may, if it chooses to do so, offer any objections it may have to the BPU itself in that matter. Having spent considerable effort negotiating with GN in an attempt to achieve an IA, however, it would seem peculiar, for purposes of the Arbitration, to now, at the end of that process, to find that GN was never an eligible party for an IA. For purposes of the decision herein however, for the policy and practical reasons set forth, GN is determined to be a CLEC eligible for an IA with BA.

**Decision III. A.**

GN is eligible for an Interconnection Agreement with BA.

**B. IS GN ENTITLED TO MOST FAVORED NATION STATUS IN REGARD TO OTHER INTERCONNECTION AGREEMENTS?**

Having determined that GN is a "telecommunications carrier" under the 1996 Act, it follows that it is eligible for all of the rights and privileges that are associated with that status. One of those rights is to be entitled to MFN into a preexisting IA between the same ILEC and another CLEC. The reason for that right is to assure that there is no undue discrimination in the marketplace that could either skew or preclude competition in the local exchange market. While BA asserts a series of objections to that right, they are insufficiently corroborated by the evidence of record, constitute fears of post-agreement misbehavior rather than contemporaneous barriers to MFN rights at entry, or are not of sufficient public policy gravitas to overcome the rights of a CLEC to assert MFN rights in order to assure against the type of undue discrimination that could serve as a barrier to either market entry or effective participation.

**Decision III. B.**

GN is entitled to MFN status in regard to opting into other Interconnection Agreements between BA and other CLEC's, including that with MFS.

**C. WHEN OPTING INTO A PREEXISTING INTERCONNECTION AGREEMENT UNDER MFN STATUS, IS A PARTY BOUND TO THE AGREEMENT IN ITS ENTIRETY, OR IS IT FREE TO OPT IN ON A PROVISION BY PROVISION BASIS?**

This issue has been the subject of considerable controversy in New Jersey and elsewhere. While the FCC, at 47 CFR 51.801 (a), requires an ILEC to provide any requesting carrier any service or network element contained in any agreement to which that ILEC is a party, that interpretation of the "pick and choose" rule was rejected by the Eighth Circuit Court of Appeals in Iowa

Utilities Board et al. V. FCC, 120 F3d 753, 800 (Eighth Cir. 1997), cert. granted sub nom., AT&T Co. V. Iowa Utilities Board, U.S. , 118 S.Ct. 879, 139 L.Ed. 2d 867 (1998). While Iowa Utilities Board is on appeal, it is critical to note that the BPU itself has spoken to this issue in Docket No. TX 95120631. The Board ruled that Section 252(i) of the telecommunications Act "does not permit a requesting carrier 'pick and choose' any individual rate, term or condition from a prior agreement while rejecting the balance of the agreement. Nevertheless, the Board recognized that this interpretation may have a substantial effect on the State's local exchange marketplace and therefore reserved its right to reconsider its interpretation of the "pick and choose" rule and Section 252(i) upon the conclusion of the Supreme Court's review of the Eighth Circuit decision. Since the Board has spoken so clearly and directly to the matter at hand, the Arbitrator is obliged to follow that precedent.

### Decision III. C.

If GN opts into the MFS Agreement, it may only do so on an all or nothing basis. It is not free to "pick and choose" among the provisions of that Agreement and is bound to the terms and conditions as of the date they are permitted to "opt in" to the MFS agreement.

### D. IF GN IS ABLE TO OPT INTO THE MFS AGREEMENT, WHAT SHOULD THE DURATION OF THE CONTRACT BE?

This question is a very difficult one. As noted above, BA believes that if GN is entitled to opt into the MFS IA, it can only do so for the duration of time remaining on that contract, namely, July, 1999. GN states that it is entitled to a contract with the very same time duration as that afforded to MFS, namely three years.

It seems obvious that GN is correct when it asserts that the MFS IA contemplated a lengthy period of time to implement, some measure perhaps taking more than the eight months remaining in that agreement. To limit the applicability to GN of the MFS IA to the eight remaining months of that Agreement may have the effect, in the petitioner's eyes, of depriving them of the benefits of some of the provisions of that contract. On the other hand, however, BA retorted that it ought not have to have every IA it signs be 'leapfrogged' into perpetuity by successive opt ins by new CLEC's. The MFS IA was an early agreement, and the parties chose to limit their risk exposure under it to three years duration. From BA's perspective, requiring them to allow GN to opt into the MFS IA for a new three year period exposes them to the very risks to which they successfully negotiated avoidance with MFS.

The starting point for analyzing this issue is the very dynamic nature of the telecommunications industry. Few, if any, industries are undergoing as much change on an ongoing basis than is telephony. Given that fact, the law's bias against open ended or perpetual contractual obligations takes on new meaning. It seems unreasonable on its face to require BA, or any other actor in telecommunications to assume obligations extending over indeterminate

periods of time based on an Agreement that was negotiated shortly after the Telecommunications Act was passed. At the time the MFS contract was signed, no one had much experience to draw upon to negotiate such an arrangement. At hearing GN's counsel argued that BA negotiated a very bad deal for themselves with MFS and now wants to avoid its obligations thereunder. While that assertion may or may not be the case, it seems clear that both BA and MFS, perhaps because they recognized their own lack of experience with such an Agreement, chose to limit their exposure to the arrangement to three years. At the end of that period, each party would then have the opportunity to review its experience, survey a changed industry, and then renegotiate their understanding. To allow new CLEC's to opt into the MFS IA for new three year terms would appear to deprive BA of the very risk mitigation terms it negotiated for itself. Holding BA to an open ended obligation, regardless of the fact that BA envisioned only a three year exposure to those terms and conditions, based on the terms of an IA signed very shortly after the passage of the Act seems manifestly unfair. For that reason, it is not at all surprising that BA argues that if GN is able to opt in it may only do so for the time remaining in the MFS IA.

The problem with simply disallowing an unfair result to BA, is that GN is potentially exposed to three equally unfair results. The first is that if by limiting the Agreement to eight months, GN is deprived of some of the provisions in the MFS IA that require considerable lead time to implement, BA will have been effectively been given some of the very same ability to 'pick and choose' what services it offers other carriers that the Board has already decided that CLEC's will be unable to exercise in selecting the services they want from preexisting IA's (see Section III above). The second unfairness is GN will have a very short horizon of certainty in making some very fundamental decisions about business strategy and investment. Part of the uncertainty GN could encounter is to find itself without an IA, the existence of which is critical to its ability to engage in business. The third is that MFS will have been given a discriminatory competitive advantage over other CLECs by having had almost three full years with an arguably superior set of terms and conditions than those offered to its competitors.

A related issue is that BA seems open to allowing a longer term arrangement if GN will agree to allow itself to be bound by whatever new arrangements are negotiated by BA and MFS. Not surprisingly, GN seems not at all inclined to blindly delegate the negotiation of its future IA to another company. Obviously, they cannot be compelled to do so.

It would be ideal if all of these potential inequities could be resolved but Solomonic solutions are not always readily available. Accordingly, it seems appropriate to look at the public policy context for this decision. This matter only arises because Congress decided that it was the public policy of this country to open local exchanges up to competition. The fulfillment of that policy objective requires that all decisions undertaken pursuant to the 1996 Act keep that objective in mind. In that context, the unfairnesses worked on GN appear graver than those worked on BA. GN is a new competitor whose entry to the market is being blocked by the absence of an IA with BA. The contract it wishes to opt into, as is its right under law, clearly envisions a lengthier period for implementation than would seem possible to fulfill if BA'

- position on the duration of the contract for GN was sustained, sets a rate that clearly advantages an existing player in the market, MFS, and provides GN with little or no margin for putting its business strategies to work. That type of barrier to market entry seems considerably higher than is consistent with the Congressional intent of promoting competition. Additionally, by making the contract length identical to that in the MFS IA, the 'pick and choose' effect of the services offered by BA to GN, as noted above, is avoided. For those reasons, GN should be entitled to a contract with a duration identical to that which is set forth in the MFS accord, 19 days shy of three years from the date of execution.

#### Decision III. D

The duration of the Interconnection Agreement between BA and GN should be nineteen days less than three years from the date of execution.

#### E. ARE CALLS TO INTERNET SERVICE PROVIDERS ELIGIBLE FOR RECIPROCAL COMPENSATION UNDER THE MFS INTERCONNECTION AGREEMENT?

There are two matters that must be resolved to make a recommendation on this issue. The first is whether calls to ISP's are included in the types of calls for which the MFS IA requires reciprocal compensation. The second is whether calls to ISP's are local calls.

In regard to the first matter, the MFS IA calls for reciprocal compensation for all residential and business calls. BA contends that it never contemplated calls to ISP's when it negotiated the arrangement, and that fact is evidenced by the absence of any reference to ISP's in the document. The record is silent on what MFS had in mind at the time. The problem with BA's contention, however, is that the document's silence on ISP's does not simply mean that calls to ISP's are excluded from reciprocal compensation requirements. It might also be concluded that the terms residential and business customers are so broad that they cover all calls made. Indeed, it is hard to imagine many calls to ISP's that do not fall within that definition. Moreover, it seems implausible that in 1996 two very sophisticated actors in the telecommunications market, such as BA and MFS, could have negotiated an IA without either party having given any thought to calls to the Internet, which was already being widely used at that time and whose growth potential for telecommunications was hardly a secret in the industry. It is plausible that BA did not contemplate the possibility that some CLEC's might focus their marketing on ISP's and thus create the sorts of revenue imbalances that BA complains of, but that has little or no relevance to the matter at hand. The definition of the types of calls set forth in the IA is sufficiently broad that it must be construed as including calls to ISP's.

The second matter that must be resolved is whether or not calls to ISP's are local calls. It seems apparent from the testimony offered in this matter, that calls to ISP's can be local calls. It seems equally possible that they may not be. The only way to make a determination of whether they are local or not is on a call specific basis. For purposes of the matter at hand, however,

- it will suffice to note that it is impossible to make a generic statement as to the physical realities of such calls. BA asserts that the FCC is looking into this very question, and suggests suspending judgement until the FCC has the opportunity to decide the matter. Given that there is no basis in the record for determining when, if ever, the FCC will render judgement on the matter, it seems pointless to not proceed to make a determination that will allow the parties to proceed. The fact that calls to ISP's can be local calls seems dispositive of the matter for purposes of the Recommended Interim Final Decision. That is because, local calls are the subject of the MFS IA. To the extent that calls to ISP's are not local in nature, or whether such calls are the result of misassignment of NXX's, or other such matters that BA complains of, those are matters to be looked into in any action BA may take to remedy what it believes to be a breach of the contract. Such fears are simply not relevant to the question of whether local calls to ISP's are entitled to the reciprocal compensation provisions of the MFS IA.

It bears mentioning that many of the issues that BA has raised in the matter at bar appear to emerge from BA's fears that GN will breach the terms of the MFS IA, as BA understands them. Indeed, it seems clear from Mr. Masoner's testimony, that BA believes that MFS itself may be in breach. While the Arbitrator is not unsympathetic to BA's assertion that it should not be compelled to offer contractual terms that are so broad that it could give rise to activities that it believes constitute breach, those fears cannot be allowed to control the outcome of this proceeding. There are two reasons for this. The first is obvious. Nothing in this decision will deprive BA of any remedies it has available to it for breach of contract. It may seek whatever remedies it desires whenever it concludes that a breach has occurred. The second reason is policy based. The 1996 Act envisioned removing unnecessary barriers to entry in the local exchange market in order to hasten the onset of competition. Efforts to perfect contractual language to better define the expectations of the incumbent can also be viewed as the narrowing of the business options available to new market entrants. Such a result would clearly be counterproductive in terms of creating the type of robust competition that was envisioned by the Congress when it passed the 1996 Act.

#### **Decision III. E**

Calls to Internet Service Providers are eligible for reciprocal compensation under the MFS Interconnection Agreement.

**F. ARE THE APPLICABLE RECIPROCAL COMPENSATION RATES THOSE SET FORTH IN THE MFS INTERCONNECTION AGREEMENT, OR THE GENERIC RATES ESTABLISHED BY THE BPU IN DOCKET NO. TX95120631?**

The intent of the Congress in enacting the 1996 Act was, in regard to local exchange service, to promote competition and market mechanisms. For that reason, as suggested in the post-hearing brief of GN, there is a hierarchy of rate setting that has evolved. There are three ways in which reciprocal compensation for call termination can be determined under the law, by negotiation, by regulation, and by arbitration. The mechanism that is most derived from the market place, is, of course, negotiation. As a result, it is

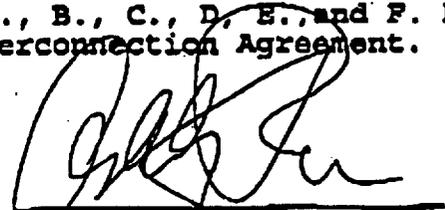
entitled to a position at the top of the hierarchy. The second level is occupied by the de jure authorities, jurisdictional regulatory agencies, and the bottom is occupied by arbitration. In terms of playing cards, negotiation trumps regulation, and regulation trumps arbitration. The issue raised herein is whether the rates negotiated by BA and MFS, including the rates for reciprocal compensation, will apply to GN being that GN is "opting into" the fully negotiated agreement.

**Decision III. F.**

The reciprocal compensation rates applicable to GN and BA if GN opts into the MFS Interconnection Agreement, are, for the duration of the time that the terms therein are applicable between BA and GN, those set forth in that agreement.

**IV. CONCLUSION**

For the reasons set forth above it is the Recommended Interim Final Decision of the Arbitrator that Decisions III. A., B., C., D., E., and F. be adopted by the parties for purposes of their Interconnection Agreement.

  
Ashley C. Brown

# **EXHIBIT 4**



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

ISSUED: FEBRUARY 10, 1999

IN REPLY PLEASE  
REFER TO OUR FILE  
A-310771

CHRISTOPHER W SAVAGE ESQUIRE  
COLE RAYWID & BRAVERMAN  
1919 PENNSYLVANIA AVE NW SUITE 200  
WASHINGTON PA 20006

Petition of Global NAPs South, Inc. for Arbitration of Interconnection Rates, Terms,  
and Conditions and Related Relief with Bell Atlantic-Pennsylvania, Inc.

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Recommended Decision of Administrative Law Judge Wayne L. Weismandel. This decision is being issued and mailed to all parties on the above specified date.

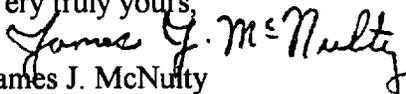
If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions **MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-20, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265**, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

Replies to exceptions, if any, must be served on the Secretary of the Commission, in the manner described above, within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)". Any reference to specific sections of the Administrative Law Judge's Recommended Decision shall include the page number(s) of the cited section of the decision. All timely filed exceptions and replies thereto will be attached to the decision for consideration at Public Meeting. Late filed exceptions and/or late filed replies might not be considered by the Commission.

Encls.  
Certified Mail  
Receipt Requested  
FG

Very truly yours,

  
James J. McNulty  
Secretary

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Global NAPs South, Inc. for : Docket Number  
Arbitration of Interconnection Rates, :  
Terms and Conditions and Related Relief : A-310771

Recommended Decision Granting Motion To Dismiss

Before  
Wayne L. Weismandel  
Administrative Law Judge

History of the Proceeding

On December 8, 1998, Global NAPs South, Inc. (petitioner) filed a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief (Petition) concerning a proposed interconnection agreement between petitioner and Bell Atlantic-Pennsylvania, Inc. (Bell) with the Pennsylvania Public Utility Commission (Commission), Docket Number A-310771.

The Petition sets forth that petitioner has been attempting to negotiate an interconnection agreement with Bell since July 2, 1998. Further, the Petition states that because of disagreements between petitioner and Bell regarding proposed terms of an interconnection agreement, petitioner has "requested an interconnection agreement that reflect[s] all and only the terms included in [Bell's]

§252(i) of TA-96 are not within the arbitration provisions [§252(b), (c), (d), and (e)] of TA-96 and, alternatively, that petitioner had not timely filed its Petition.

On January 5, 1999, OCA advised that it would not be actively participating in this case and did not wish to be contacted for the telephonic prehearing conference.

On January 7, 1999, an Initial Prehearing Telephone Conference was held. Petitioner, Bell, and OTS participated. Susan J. Shanaman, Esquire, on behalf of petitioner, moved the admission pro hac vice of William J. Rooney, Jr., Esquire, and of Christopher W. Savage, Esquire, both to represent petitioner. The motion being unopposed, it was granted.<sup>1</sup>

After lengthy discussions, it was agreed that Bell would file and serve an Amended Answer and New Matter (Amended Answer) and an Amended Motion to Dismiss (Amended Motion), nunc pro tunc, and that, in accordance with the Commission's Rules of Administrative Practice and Procedure, petitioner's answer to Bell's Amended Motion would be due not later than January 14, 1999. 52 Pa.Code §§1.12(a), 1.55(a) and (b), 1.56(a)(2), 5.101(d), 5.103(c). It was also established that if the case proceeded, and if petitioner did not waive the time periods prescribed in §252(b) of TA-

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<sup>1</sup> An Order Granting Admission Pro Hac Vice confirming the verbal admissions made January 7, 1999, was issued January 11, 1999.

Bell's Amended Motion is, therefore, procedurally ready to be ruled upon.

Findings Of Fact

1. Petitioner filed its Petition on December 8, 1998.
2. The Petition requests "an interconnection agreement that reflect[s] all and only the terms included in [Bell's] Interconnection Agreement with [MFS Intelenet of Pennsylvania, Inc.] (MFS)" pursuant to §252(i) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 et seq. (TA-96).
3. On January 4, 1999, Bell filed and served its Motion.
4. Bell's Motion averred that the election or "opt-in" rights granted by §252(i) of TA-96 are not within the arbitration provisions [§252(b), (c), (d), and (e)] of TA-96 and, alternatively, that the Petition was not timely filed.
5. During an Initial Prehearing Telephone Conference on January 7, 1999, it was agreed that Bell would file and serve an Amended Answer and an Amended Motion and that petitioner's answer to Bell's Amended Motion would be due not later than January 14, 1999.
6. Bell filed and served its Amended Motion on January 11, 1999.

While the question is one of first impression before the Commission, the parties have provided answers from two other jurisdictions for consideration.

In Re Sprint Communications Company, L.P., ARB 11 Order No. 97-229 (Slip Opinion, June 20, 1997), the Oregon Public Utility Commission declined to allow Sprint to elect an interconnection agreement between GTE and AT&T in Sprint's interconnection arbitration proceeding with GTE. The Oregon Commission reasoned that Sprint had initiated a procedure designed to resolve any open issues not previously successfully negotiated by Sprint and GTE. Those open, or unresolved, issues would be resolved by the arbitrator (subject to Oregon Commission approval pursuant to §252(e)(1) of TA-96) and, along with the terms agreed to by Sprint and GTE, become the complete interconnection agreement between Sprint and GTE. Conversely, having held that while Sprint had the legal right under §252(i) to elect any final interconnection agreement that GTE entered into with another carrier so long as the other agreement was elected in its entirety, the Oregon Commission found the two procedures "competing" and "mutually exclusive". Because the previously entered into interconnection agreement would be elected "as a whole", there would simply be no open or unresolved issues to be arbitrated. Consequently, the Oregon Commission held that Sprint was entitled to elect the final

Global NAPS Inc.'s arbitration proceeding with Bell-Atlantic-New Jersey. However, there is no discussion of the fundamental question of whether a §252(i) election is, in fact, arbitrable. Indeed, there is nothing in the arbitrator's Recommended Interim Final Decision to indicate that the issue was raised or considered. Finally, as the arbitrator herself points out, "[t]he recommendation ... is interim in nature as the [New Jersey Board Of Public Utilities] may want to look at any of the matters raised ... and render policy determinations on a more permanent, and perhaps, generic basis." The most that can be said about the arbitrability of a TA-96 §252(i) election in New Jersey is that it has happened.

In this case, I find the reasoning of the Oregon Public Service Commission persuasive. TA-96 §252(b)(1) provides for State commission arbitration of "any open issues."<sup>3</sup> In exercising a statutory right to "opt-in" to an entire existing approved interconnection agreement, as petitioner here desires to do, there are simply no open, or unresolved, issues to be arbitrated. While matters of contract interpretation may well need to be subsequently addressed, those matters do not constitute open or unresolved issues subject to TA-96's arbitration proceeding. The mechanism for

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<sup>3</sup> TA-96 also speaks about a State commission arbitration proceeding reaching "a decision on the unresolved issues." §252(b)(4)(B),(C).

## Conclusions of Law

1. The Commission has jurisdiction over the parties in this case.

2. A telecommunications carrier has the right to elect the same terms and conditions as are contained in an existing approved interconnection agreement with a local exchange carrier, pursuant to §252(i) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 et seq..

3. Upon the timely submission of a petition, the Pennsylvania Public Utility Commission shall arbitrate any open or unresolved issues between a telecommunications carrier and a local exchange carrier, pursuant to §252(b), (c), (d), and (e) of the Telecommunications Act of 1996.

4. When a telecommunications carrier requests a local exchange carrier to provide "an interconnection agreement that reflect[s] all and only the terms included in [an existing approved] Interconnection Agreement" there are no open or unresolved issues to be arbitrated.

5. An election to "opt-into" an existing approved interconnection agreement pursuant to §252(i) of the Telecommunications Act of 1996 and the right to have a State commission arbitrate open or unresolved issues pursuant to