

1. That the Amended Motion to Dismiss filed by Bell Atlantic-Pennsylvania, Inc. on January 11, 1999, in the above-captioned case, is granted.

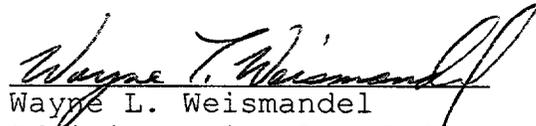
2. That the Motion for Summary Judgment filed by Global NAPs South, Inc. on January 13, 1999, in the above-captioned case, is denied and dismissed as moot.

3. That the Cross-Motion for Summary Judgment filed by Bell Atlantic-Pennsylvania, Inc. on February 2, 1999, in the above-captioned case, is denied and dismissed as moot.

4. That the Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief filed December 8, 1998, by Global NAPs South, Inc., Docket Number A-310771, is dismissed and the record marked closed.

Date:

FEBRUARY 3, 1999

  
Wayne L. Weismandel  
Administrative Law Judge

# **EXHIBIT 5**

**SUSAN M. SHANAMAN**

ATTORNEY AT LAW

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February 19, 1999

James McNulty, Secretary  
Pennsylvania Public Utility Commission  
North Office Building  
PO Box 3265  
Harrisburg, Pennsylvania 17105-3265

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SECRETARY'S BUREAU

RE: Petition of Global NAPs South, Inc. For Arbitration of Interconnection Rates, Terms and Conditions and Related Relief at Docket No. A-310771

Dear Secretary McNulty:

Enclosed please find an original and nine (9) copies of the Exceptions of Global NAPs to the decision of Judge Weisman in the form of a Motion for Expedited Reversal and Entry of Judgment of Global NAPs South, Inc. in the matter of Arbitration of Interconnection with Bell Atlantic-Pennsylvania, Inc.

In accordance with the procedures established by the Commission in its orders implementing the TCA96 and the window for arbitration established by the TCA96, this is a time sensitive matter requiring Commission action at the earliest possible Public Meeting.

Service has been made in accordance with the attached certificate of service.

Any questions, please contact me.

Thank you.

Sincerely,



Susan M. Shanaman

cc: Honorable Wayne Weisman, Office of Administrative Law Judges  
Service List

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19th day of February 1999 served the foregoing document upon the persons indicated below, by hand or by first class mail, postage prepaid.

**BY FIRST CLASS MAIL POSTAGE  
PREPAID**

Irwin A. Popowsky, Consumer  
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**VIA FEDERAL EXPRESS**

Christopher M. Arfaa, Esquire  
Bell Atlantic-Pennsylvania, Inc.  
1717 Arch Street, 32-NW  
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Susan M. Shanaman

Dated: February 19, 1999

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED  
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SECRETARY'S BUREAU

In re:

Petition of Global NAPs South, Inc. for  
Arbitration of Interconnection Rates, Terms and  
Conditions and Related Relief

Docket No. A-3107

**MOTION OF GLOBAL NAPs, SOUTH, INC. FOR EXPEDITED REVERSAL  
AND ENTRY OF JUDGMENT IN GLOBAL NAPs' FAVOR OR, IN THE  
ALTERNATIVE, FOR REDESIGNATION OF ITS PETITION AS A COMPLAINT**

Global NAPs South, Inc. ("Global NAPs") respectfully moves this honorable Commission to act at the earliest possible opportunity to reverse and remand an erroneous "Recommended Decision" entered in the above-captioned arbitration matter by the Honorable Wayne Weisman and released on February 11, 1998. In the alternative, the Commission should redesignate Global NAPs' arbitration petition as a complaint and remand the matter for prompt adjudication.

**1. Global NAPs' Dispute With Bell Atlantic Is Arbitrable.**

Judge Weisman properly concluded that this case presents entirely issues of law and that it can be resolved without a hearing. He erred as a matter of law, however, in determining that the dispute between Global NAPs and Bell Atlantic is not "arbitrable."

In a nutshell, Global NAPs wants to exercise its rights under Section 252(i) of the Communications Act of 1934, as amended, to opt into the existing, approved interconnection agreement between Bell Atlantic - Pennsylvania, Inc. ("Bell Atlantic") and MFS Intelenet of Pennsylvania, Inc. ("MFS") (the "MFS Agreement"). Bell Atlantic and Global NAPs do not appear to have any disputes about the actual *contractual provisions* that would be included in a "Global

NAPs" version of the MFS Agreement. Instead, their disputes relate to what the contractual provisions in that existing agreement *mean, i.e.*, how the contract should be interpreted in certain situations. For this reason, Judge Weisman is correct that this case presents no issues of fact, but only issues of law.<sup>1</sup>

Where Judge Weisman erred was in concluding that — because the contract that Global NAPs wants is an "opted in" version of the MFS Agreement — the arbitration provisions of Section 252(b) do not apply to this dispute, and that, instead, Global NAPs' proper remedy is to file a complaint against Bell Atlantic alleging a breach of Section 252(i). *See Recommended Decision at 9-10.* This legal error arises from two critical mistakes.

The first is a matter of statutory interpretation. This Commission is obliged under Section 252 of the Communications Act to arbitrate all "open issues" between the parties. In this case the key "open issue" is whether Global NAPs is entitled to opt into the MFS Agreement or not. Global NAPs says that it is, and Bell Atlantic says that it is not. There is no possible basis for treating this issue as not "open." It would therefore seem to be subject to arbitration.

The second error was to conclude that the situation at hand was in any respect similar to that presented by a case from Oregon, cited by Bell Atlantic, upon which the judge relied in dismissing Global NAPs' petition.<sup>2</sup> In that case, Sprint tried to negotiate an individualized contract with the ILEC, and (when those efforts failed) brought its disputes to arbitration. After the Sprint arbitration proceeding was well along, the Oregon commission issued a decision in an unrelated proceeding. Sprint then tried to derail its own ongoing arbitration, including the various specific positions it had been urging on the Oregon commission, and instead to simply "opt into" the new, unrelated interconnection agreement, *all within the original nine-month arbitration deadline.*

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<sup>1</sup> Attached to this Motion as Exhibit 1 is Global NAPs' Opposition to Motion to Dismiss and Motion for Summary Judgment as filed before Judge Weisman. That document lays out the underlying legal and factual setting of this matter in more detail.

<sup>2</sup> The case is *In Re Sprint Communications Company, L.P.*, ARB 11 Order No. 97-229 (Ore. PUC, Slip op., June 20, 1997). It is discussed at pages 7-8 of the recommended decision.

Global NAPs does not necessarily agree with the Oregon commission's decision to refuse to allow Sprint to short-circuit its own arbitration proceeding to opt into a contract established in an unrelated proceeding. Even so, Global NAPs can certainly understand why the Oregon commission would be reluctant to allow Sprint to "change horses in mid-stream," particularly after invoking the time and resources of the commission to try to achieve a totally different result.

With all due respect to Judge Weisman, however, the Oregon case has nothing whatsoever to do with the situation at hand. Global NAPs originally sought to negotiate a hand-crafted interconnection agreement with Bell Atlantic, but by August 1998 it became quite clear to Global NAPs that it would not be able to negotiate a contract that was any better, overall, than the contract that MFS had already negotiated. Global NAPs therefore asked Bell Atlantic to opt into the MFS Agreement, assuming that this request would be honored promptly.

It was not. Instead, Bell Atlantic insisted that Global NAPs could only opt into the MFS Agreement if, in addition to the terms contained in the agreement, Global NAPs would accept a number of extraneous terms that amounted to Bell Atlantic's views on how the MFS Agreement would be interpreted in particular situations. Global NAPs disagreed with Bell Atlantic's interpretations, but — more fundamentally — believed that it was entitled to opt into the MFS Agreement without any such conditions at all.

When efforts to resolve *this* matter failed, Global NAPs filed its arbitration petition in early December. *This* is the fundamental question that Global NAPs raised in its arbitration petition, and *this* is the question that Global NAPs still needs to have decided now.

Unlike the situation in Oregon, therefore, Global NAPs is not seeking at some late date to rely on Section 252(i) to *substitute* an arbitration result in an unrelated proceeding for the positions it has been advancing in its own negotiations with Bell Atlantic. Quite the contrary. For more than three months prior to filing its arbitration petition, Global NAPs' position has been that it wants to opt into the MFS Agreement, and that it is entitled to do so *both* under the various non-discrimination duties imposed on Bell Atlantic under Section 251(c) — including the non-

discrimination duty imposed by Section 252(i), which is incorporated by reference into the relevant subsections of Section 251(c) — and under Section 252(i) directly.

Global NAPs, in other words, has not changed its position. Its "open issue" with Bell Atlantic has been, and is, whether Global NAPs may opt into the MFS Agreement. While the answer to this question may seem obviously to be "yes," the fact is that Bell Atlantic disputes its obligation, creating an *arbitrable* "open issue" that turns entirely on matters of law.

In these circumstances, Global NAPs respectfully requests that the Commission promptly remand the matter with directions to resolve the open issue between the parties on the merits. As noted, Judge Weisman is correct that this case involves entirely questions of law, so that no formal hearings should be required. As a result, the Commission should direct Judge Weisman to decide the matter on the record now before him.<sup>3</sup>

In this regard, expedition is important because, under Section 252 of the Communications Act, Global NAPs is entitled to a decision on "all open issues" by April 2, 1999 (nine months from the initiation of negotiations). While the purely legal nature of the dispute between Bell Atlantic and Global NAPs makes that deadline eminently achievable, if any proceedings at all are to take place on remand, an expedited decision from the Commission is necessary.<sup>4</sup>

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<sup>3</sup> Global NAPs is aware that the Supreme Court's recent decision in *AT&T v. Iowa Utilities Board*, slip op. (U.S. Sup. Ct. January 25, 1999) will have the effect of reinstating the FCC's so-called "pick-and-choose" rule regarding Section 252(i). Global NAPs does not believe, however, that this ruling should affect this case, which arises from a failure by Bell Atlantic to abide by its duties under Section 252(i) beginning in August 1998 — when the 8th Circuit's "whole contract" rule governed the matter. If necessary, on remand Global NAPs can demonstrate that it is entitled to the same result whether the "whole contract" or the "pick-and-choose" rule applies.

<sup>4</sup> Because Global NAPs' right to opt into the MFS Agreement is so clear, this Commission should also consider ruling on the merits in Global NAPs' favor without any remand at all.

**2. If Global NAPs' Petition Does Not Present An Arbitrable Issue, Then Global NAPs Requests That The Commission Redesignate This Matter As A Complaint.**

Even if Judge Weisman is correct that Global NAPs's petition did not present an arbitrable issue, it is not as though the underlying, real-world dispute between Bell Atlantic and Global NAPs has disappeared. As Judge Weisman himself notes, in that case proper vehicle for getting the dispute resolved is a complaint. See Recommended Decision at 9-10.

If this is indeed the situation, then Global NAPs respectfully requests that the Commission issue an order re-designating Global NAPs' petition as a complaint and remanding the matter for a prompt decision based on the existing record. In this regard, as noted above, Judge Weisman has properly found that there are no material factual disputes between the parties, so extended proceedings should not be required no matter what the case is called.

Indeed, an expedited ruling from this Commission (and from the judge on remand) is even more appropriate if the matter is to be redesignated as a complaint than if it remains an arbitration. The entire purpose of Section 252(i) is to provide a basis upon which CLECs can obtain interconnection agreements *more quickly* than is possible using the "normal" nine-month time frame for negotiation and arbitration. As the FCC has stated, discussing Section 252(i):

[A] carrier seeking interconnection, network elements or services pursuant to Section 252(i) ... shall be permitted to obtain its statutory rights *on an expedited basis*. We find that this interpretation furthers Congress's stated goals of opening up local markets to competition ... and that we should adopt measures that ensure competition occurs as *quickly and efficiently as possible*. We conclude that the non-discriminatory, pro-competition purpose of Section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to Section 251 before being able to utilize the terms of a previously approved agreement.

**In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd 15499 (1996) at ¶ 1321 (emphasis added).**

In these circumstances, Global NAPs' dispute with Bell Atlantic is either arbitrable or it is not. If it is, then the matter must urgently be remanded to Judge Weisman in order to meet the statutory April 2 deadline. If it is not, the reason is that the dispute arises under Section 252(i). In that case, as the material from the FCC quoted above indicates, the need for a prompt resolution is even more urgent, since a "pure" Section 252(i) process is intended to be faster and more efficient than the arbitration process.

**3. Conclusion.**

Global NAPs believes that Judge Weisman del erred in declaring its dispute with Bell Atlantic to be non-arbitrable, and respectfully requests that the Commission reverse that ruling on an expedited basis. If, however, that ruling will stand, then Global NAPs respectfully requests that its petition be redesignated as a complaint and the matter remanded for a prompt decision on the existing record.

Respectfully submitted,

**GLOBAL NAPs SOUTH, INC.**

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Dated: February 19, 1999

Attachment 1

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**COPY**

Before the  
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BOARD OF PUBLIC UTILITIES

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NEWARK, N.J.

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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 recast 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.

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**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 not 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 the 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, 13: 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 9512063. 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.

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#### 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 'leap frogged' 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's

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 on 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

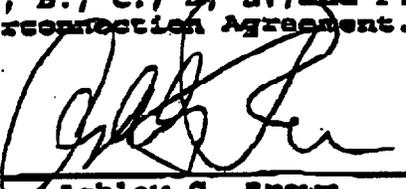
entitled to a position at the top of the hierarchy. The second level is occupied by the de jure authorities, jurisdictional regulatory agencies, and the bottom is occupied by arbitration. In terms of playing cards, negotiation trumps regulation, and regulation trumps arbitration. The issue raised herein 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.

  
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Ashley C. Brown