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ORIGINAL

COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW
SECOND FLOOR
1919 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006-3458
(202) 659-9750

JOHN P. COLE, JR.
BURT A. BRAVERMAN
ROBERT L. JAMES
JOHN D. SEIVER
WESLEY R. HEPPLER
PAUL GLIST
DAVID M. SILVERMAN
JAMES F. IRELAND, III
STEVEN J. HORVITZ
CHRISTOPHER W. SAVAGE
ANN FLOWERS
ROBERT G. SCOTT, JR.
SUSAN WHELAN WESTFALL
THERESA A. ZETERBERG
KARLYN D. STANLEY
JOHN DAVIDSON THOMAS
JOHN C. DODGE
FREDERICK W. GIROUX
GEOFFREY C. COOK
MARIA T. BROWNE
DONNA C. RATTLEY
THOMAS SCOTT THOMPSON
ADAM S. CALDWELL
SANDRA GREINER
JAMES W. TOMLINSON
MARK S. KRISTIANSEN
CHRISTIN S. MCMELEY+
HEATHER M. WILSON
DAVID N. TOBENKIN*

+ADMITTED IN OKLAHOMA ONLY
*ADMITTED IN CALIFORNIA ONLY

ALAN RAYWID
(1930-1991)

OF COUNSEL
FRANCES J. CHETWYND
ELLEN S. DEUTSCH

FACSIMILE
(202) 452-0067

INTERNET
WWW.CRBLAW.COM

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Hand Delivered
Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 99-154

Dear Secretary Salas:

Enclosed please find an original and seven (7) copies of the Further Comments of Global NAPs Inc. in the above-referenced proceeding.

Please return a filed-stamped copy of this letter to me in the enclosed stamped, self-addressed envelope.

Very truly yours,

Christopher Savage (kgm)

Christopher W. Savage

cc: Attached Service List

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Global NAPs, Inc. for Preemption of the Jurisdiction of the New Jersey Board of Public Utilities Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996	CC Docket No. 99-154

FURTHER COMMENTS OF GLOBAL NAPS, INC.

Global NAPs, Inc. ("Global NAPs") respectfully responds to the recent comments of the New Jersey Board of Public Utilities (the "Board") in this proceeding.

The Board attaches a copy of its recent decision regarding Global NAPs' dispute with Bell Atlantic,[1] and claims that the issuance of that decision indicates that this proceeding should be dismissed. The Board argues, in effect, that the matter before this Commission — whether the Board has acted "to carry out its responsibility" under 47 U.S.C. § 252, as required by Section 252(e)(5) — is moot. In fact, however, on a key matter in dispute between Global NAPs and Bell Atlantic, the Board's order proves that this Commission needs to preempt the Board. While the Board has indeed issued an order, therefore, it has still failed "to carry out its responsibility" under the law.

As this Commission is aware, one of the main matters in dispute between Global NAPs and Bell Atlantic is whether ISP-bound calls should be subject to compensation under the terms of the MFS Agreement. In late October 1998, the New Jersey arbitrator, based on the facts and the law as they existed at the time of the arbitration, concluded that such compensation was

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[1] *Telecommunications Decision and Order, Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms Conditions and Related Arrangements with Bell Atlantic-New Jersey, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. TO98070426 (released July 12, 1999) ("*Board Decision*").

appropriate. In order to approximately meet the statutory deadline for resolving arbitrations submitted to it, the Board had to render a final decision no later than December 1, 1998.[2] Instead the Board did nothing for seven months. Finally, in July 1999 (probably prompted by the filing of the instant proceeding), the Board issued its ruling.

The fact that the ruling was issued seven months late does not change the fact that Global NAPs was entitled to a decision by December 1, 1998. The Board recognizes this in its treatment of the term of the contract. It announces a general policy that competing local exchange carriers ("CLECs") opting into an agreement are entitled to the longer of the remaining term of the agreement or a term of one year. *Board Decision* at 7. And, recognizing that it should have resolved the entire proceeding no later than December 1, 1998, the Board established a contract term for Global NAPs of one year (in accordance with its newly-announced opt-in policy), ***plus*** 219 days, to reflect the delay that Global NAPs has suffered. *Board Decision* at 8. In other words, Global NAPs was, with respect to this matter, properly placed in the same position it would have been had the proceeding properly terminated by December 1.[3]

The Board, however, failed to apply this sound principle to the matter of compensation for ISP-bound calls. It should have rendered its decision based on the record, and the state of the law, as of December 1, 1998. Instead, it based its decision on its interpretation of this Commission's February 1999 *Declaratory Ruling*.[4]

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[2] The nine-month deadline in Section 252(b)(4)(C) ran out on October 26, 1998, the same date the arbitrator issued his decision. *See Board Decision* at 1 (Global NAPs requested to negotiate with Bell Atlantic on January 26, 1998). If Bell Atlantic had complied with the arbitrator's order and the Board's rules, a contract embodying that order would have been before the Board for approval by November 2, 1998. The contract would have either been approved or revised by the Board within 30 days under the terms of Section 252(e)(4). One can debate whether it is an arbitrator's order, or final state commission action, that needs to occur within nine months; but none of the problems with the situation at hand turn on the difference between November 2, 1998 and December 1, 1998.

[3] Global NAPs disagrees with the Board's decision to reject the arbitrator's conclusion that Global NAPs was entitled to a full three-year contract with Bell Atlantic. There is no question, however, that as to that matter, the Board has, in fact, rendered a decision.

[4] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No.*

(continued...)

Put aside the fact that the Board plainly misunderstood and, therefore, misapplied the *Declaratory Ruling*. Considerations relating to the *Declaratory Ruling* have no place in the resolution of the matter of ISP-bound calling in this case. If the Board had actually fulfilled its responsibility under the law — that is, if it had rendered a decision by December 1, 1998 — its decision would not have been affected by the *Declaratory Ruling*. Global NAPs, therefore, is entitled to a decision that does not reflect or rely upon that ruling in any way.

This is not a mere disagreement with the Board's result (although Global NAPs does disagree with the Board). This goes to the heart of what state commissions are supposed to do under the statute, and, therefore, to what it means for a state to "act to carry out its responsibility under this section." 47 U.S.C. § 252(e)(5). By first delaying its decision by seven months, and then rendering a decision tainted by developments following the deadline, the Board has failed to fulfill its responsibility.[5] In this regard, this Commission has referred to the nine-month deadline as a "strict" one.[6] Clearly, strict adherence to that deadline requires, at a minimum, that Global NAPs not be disadvantaged by virtue of developments that occur ***after*** the deadline has passed.

In addition to the need to avoid unfairness to Global NAPs' in this particular case, it is important as a matter of general administration of the Telecommunications Act of 1996 that the Commission preempt the Board with regard to this matter. The Commission must make clear

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[4](...continued)
96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, CC Docket Nos. 96-98 and 99-68 (released February 26, 1999) ("*Declaratory Ruling*"). The Board discusses this ruling extensively at pages 8-11 of the *Board Decision.* While that discussion is erroneous in numerous respects, the issue here is not that the Board wrongly interpreted the *Declaratory Ruling;* it is that the Board considered it at all.

[5] Global NAPs does not contest the Board's legal "power" to render a decision — even an erroneous one — with regard to the matter of ISP-bound calls. Such an erroneous decision would be subject to appeal under 47 U.S.C. § 252(e)(6). But by basing its (erroneous) analysis on developments that occurred ***after the expiration of the nine-month deadline*** in 47 U.S.C. § 252(b)(4)(C), the Board inherently failed to fulfill its statutory responsibility to decide Global NAPs' dispute with Bell Atlantic within that deadline.

[6] 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 ¶ 22.

that it expects state commissions to render decisions in a timely manner based on the record at the time the decision is due under the statute. Otherwise, state commissions will understand that nothing of consequence occurs if they ignore their responsibilities under the Act.[7] Indeed, unless the Commission acts now, in this case, to preempt the Board, that will send a signal to state commissions that they can and should delay decisions in arbitrations in any case that involves questions where, as here, some further action by this Commission might clarify things.[8]

In addition, Commission action here is appropriate because simply directing Global NAPs to federal court (the only alternative avenue for Global NAPs to seek relief if this Commission does not preempt) will inherently defeat the purpose of the 9-month deadline. The longer that Global NAPs has to slog through the review process simply to obtain what it should have had in December 1998, the more extensively the clear federal policy favoring ***rapid*** resolution of interconnection disputes to facilitate ***rapid*** entry by new competitors is frustrated. Obtaining a court ruling in 2000 or 2001 that indeed the Board should have rendered a decision in December 1998, or — once that became impossible — ***as of*** December 1998 inherently cannot satisfy the "strict" timetable in the law designed to promote rapid entry. The only thing that can satisfy those requirements now is for the Commission to preempt the Board with regard to this matter and render an appropriate decision based on the record as it existed in December.

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[7] In this regard, the Commission plainly has the authority to set national policy in this area. Section 252(e)(5) relate to matters expressly within the Commission's authority, so it may determine that state commission decisions that inject extraneous, post-deadline considerations into a decision do not meet the state commission's responsibilities under Section 252. Moreover, to the extent that such a decision amounts to directing state commissions with regard to how to conduct arbitrations, the Commission is plainly empowered to take that step as well. As the Supreme Court observed in *AT&T v. Iowa Utilities Board,* under Section 201(b) of the Act, the Commission has plenary authority to set rules regarding all of Sections 251 and 252. *AT&T v. Iowa Utilities Board,* ___ U.S. ___, 142 L.Ed. 834, 849 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§ 251 and 252, added by the Telecommunications Act of 1996") (footnote omitted).

[8] One easily can imagine competition being severely hindered by state commissions withholding arbitration decisions in cases involving collocation arrangements, what network elements must be unbundled, and other important issues that are also within the purview of this Commission, just as the Board in this case apparently ignored the applicable statutory deadline in order to see what the Commission might do with regard to ISP-bound calls. If the Commission allows this particular situation to pass without preemption, why should states be concerned if they wait a month, or two, or six, in anticipation of the next Commission ruling on some relevant topic?

In this regard, this procedural setting is similar to one which is "capable of repetition, but evading review."[9] The Board's substantive error regarding interpretation of the *Declaratory Ruling* can eventually be corrected, presumably, on review in federal court.[10] And a reviewing court might also hold that the Board should never have considered the *Declaratory Ruling* in reaching its decision, leading to a remand to the Board for another try. But such a court ruling will only come many, many months (and possibly years) in the future, and it could well only put the matter back before the Board — not provide Global NAPs with an appropriate decision on the merits. Subjecting Global NAPs to such a process would itself defeat the purpose of the statute that Global NAPs is trying to vindicate by invoking this Commission's jurisdiction.

This means that a main purpose of the law — a decision within a nine-month deadline — will necessarily be defeated in this case, and in any other similar case, if the Commission does not preempt the Board. On the other hand, prompt Commission action preempting the Board as to this matter would remedy the violations of the nine-month deadline inherent in the Board's order — and a less-than-prompt resolution would itself defeat the purpose of that deadline.[11]

For all these reasons, while Global NAPs appreciates the fact that the Board finally did issue an order regarding the dispute with Bell Atlantic, the Commission should nevertheless preempt the Board because that order did not, in fact, "carry out" the Board's "responsibility"

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[9] *See, e.g., Southwestern Bell v. FCC,* 168 F.3d 1344, 1351 (D.C. Cir. 1999) (discussing exception to mootness doctrine).

[10] *See Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., Teleport Communications Group, Inc., MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc. and AT&T Communications of Illinois, Inc. and Focal Communications Corporation*, Nos. 98-3150, 983322 and 98-4080, slip op. (7th Cir. June 18, 1999) (upholding Illinois Commerce Commission's requirement of compensation for ISP-bound calls under interconnection agreement in the face of claims that the *Declaratory Ruling* bans such a result).

[11] Global NAPs believes that the Commission may preempt only as to the "matter" of ISP-bound calling if it so chooses. In this regard, Section 252(e)(5) refers specifically to both "matters" and "proceedings." In order to give separate meaning to these two words in the statute, a "matter" must be something other than an entire "proceeding," and a clearly segregable issue such as the analysis of ISP-bound calling under a particular agreement would clearly meet the common understanding of a "matter."

under Section 252, either within the nine-month deadline (which is now impossible) or in a manner that places Global NAPs in the position it would have been in had the deadline been met (which is still possible — but not under the Board's rationale on the ISP-calling issue).

Respectfully submitted,

Christopher W. Savage, Esq.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
(202) 828-9811

William J. Rooney, Jr., Esq.
General Counsel, Global NAPs, Inc.
Ten Merrymount St.
Quincy, Massachusetts 02169
(617) 507-5111

Counsel For Global NAPs, Inc.

Dated: July 15, 1999

CERTIFICATE OF SERVICE

I, Linda M. Blair, hereby certify that on this 15th day of July, 1999, I caused a copy of the foregoing Comments of Global NAPs, Inc. to be sent via messenger (*), or by Federal Express, to the following:

*Ms. Magalie Roman Salas
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

*Ms. Janice Miles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-327
Washington, D.C. 20554

*Ms. Carol Mattey
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-B125
Washington, D.C. 20554

*Mr. Ed Krachmer
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room A316
Washington, D.C. 20554

*Ms. Tamra Preiss
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-A232
Washington, D.C. 20554

*Mr. Larry Strickling
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C450 Portal
Washington, D.C. 20554

*Jessica Rosenworcel
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Barry S. Abrams
Vice President, General Counsel & Secretary
Legal Department-Bell Atlantic-New Jersey
40 Broad Street, Rm. 2000
Newark, NJ 07101

Lawrence W. Katz
Bell Atlantic
1320 North Courthouse Road-8th Floor
Arlington, VA 22201

Mark W. Musser, Secretary
NJ - Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Mark C. Rosenblum
Roy E. Hoffinger
AT&T Corp.
Rm. 3249J1
295 North Maple Avenue
Basking Ridge, NJ 07920

David P. Lawson
James P. Young
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Gary Phillips
Larry A. Peck
Ameritech
1401 H Street, NW
Suite 1020
Washington, DC 20005

Theodore A. Livingston
Dennis G. Friedman
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603

R. Dale Dixon, Jr.
Lisa B. Smith
Kecia Boney
MCI WorldCom
1801 Pennsylvania Avenue, NW
Washington, DC 20006

*ITS
1231 20th Street, NW
Washington, DC 20036

Linda M. Blair