FOCAL

Focal Communications Corporation
1120 Vermont Avenue, NW
Washington, DC 20005

(202) 256-6377
dmetzger@focal.com

Richard J. Metzger
Senior Vice President and General Counsel

March 4, 2004

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 02-33, WC Docket Nos. 02-361, 03-211

Dear Ms. Dortch:

Focal has argued in previous *ex partes* that if the Commission concludes that access charges should apply retroactively to VoIP traffic, those charges should be borne solely by the carrier performing the long distance function, and not by any other carrier, CLEC or ILEC, that is performing only an access function.

Attached please find the cover page and pages 8-9 of a September 2, 1999, brief in E-99-22 in which Bell Atlantic agrees with this position. "For more than 15 years the Commission has treated *every* jointly provided interstate access service the same way: it has ruled that local exchange carriers must share access revenue received from the interstate carrier but may not demand other forms of payment *from each other*" (emphasis in the original).

Sincerely,

Richard J. Metzger
Senior Vice President and General Counsel
Focal Communications

Attachments

cc (via e-mail w/attachments):
Scott Bergmann
Matthew Brill
Daniel Gonzalez
Christopher Libertelli
Jessica Rosenworcel
William Maher
Jeffrey Carlisle
Tamara Preiss
Jennifer McKee

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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SEP 3 1999
Enforcement Division

In the Matter of	)	
	)	
Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.	)	
Complainants,	)	
	)	File No. E-99-22
Global NAPs, Inc.	)	
Defendant.	)	

BELL ATLANTIC'S BRIEF ON NON-COST ISSUES

Lawrence W. Katz

Michael E. Glover
Of Counsel

1320 North Courthouse Road
Eighth Floor
Arlington, Virginia 22201
(703) 974-4862

September 2, 1999

incumbent carriers have access tariffs in place covering such shared access arrangements. Those tariffs require the competing carriers to pay the incumbents a portion of the revenue received from the interexchange service provider – here, the ISP – to cover a portion of the incumbent's cost of originating the access traffic.

B. Joint Provision of Access Services. For more than 15 years, the Commission has treated *every* jointly provided interstate access service the same way: it has ruled that local exchange carriers must share access revenue received from the interstate carrier but may not demand other forms of payment *from each other*. *See, e.g.*, *Reciprocal Compensation Order* ¶ 9 ("When two carriers jointly provide interstate access . . ., the carriers will share access revenues received from the interstate service provider"); *Access Billing Requirements for Joint Service Provision*, 4 FCC Rcd 7183, ¶¶ 22-24 (1989); *Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, 2 FCC Rcd 4518, ¶¶ 39-40 (1987); *Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, 1176-77 (1984).

As the Commission recognizes, in the case of ISPs, there are generally no per-minute "access charges" to share. *See Reciprocal Compensation Order* at ¶ 9. That is because the Commission specifically exempted ISP traffic from such access charges. *Id.* That exemption does not, however, change the nature of the traffic – it remains "non-local interstate traffic," *id.* at ¶ 26, n.87, that is subject to the requirements of federal law relating to such traffic, including those related to shared provision of access. Accordingly, the basic rule in this context is that interconnecting local exchange carriers must each rely on their end users for compensation for ISP traffic and may not demand payments from one another.

Indeed, if *any* inter-carrier compensation is warranted under existing federal rules, it is *GNAPs* that must pay *Bell Atlantic* for originating access traffic. As noted, under the federal

rule, GNAPS must recover its usage-sensitive network costs (if at all) from its ISP customer. This is true whether GNAPS provides the full access service – as it would if a GNAPS local service subscriber placed a dial-up call exclusively over GNAPS' network to an ISP served by GNAPS – or if Bell Atlantic or another local carrier provides a part of that access service by serving the originating caller. Therefore, if the ESP exemption does not apply to this traffic (as GNAPs appears to claim), then to the extent that GNAPS avoids costs when another carrier serves the calling party, GNAPS should reimburse the originating carrier for part of the amount that it receives under its "local business rate."[5] *Id.* In no event can GNAPS expect to collect twice for the same network functions – first from the ISP under its local business rates and a second time from Bell Atlantic.

III. GNAPs' Tariff Unlawfully Circumvents the Section 251/252 Negotiation, Arbitration, and Enforcement Process Which the Commission Applied To Internet-Bound Traffic.

In the *Reciprocal Compensation Order*, the FCC made clear that, pending the adoption of a uniform federal rule governing inter-carrier compensation for Internet-bound traffic, parties must treat such traffic in accordance with the terms of the interconnection agreements between the parties, as interpreted and enforced by the appropriate state commission. GNAPs' effort to impose inter-carrier compensation obligations unilaterally runs afoul of this determination.

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[5] This policy is already reflected in GNAPs' tariff. Because section 7A of the tariff, "ISP Traffic Delivery Service," is inconsistent with federal policy, it cannot be applied to this traffic. However, section 2.21, "Meet Point Billing," is consistent with the Commission's access policy. Under that provision, "[e]ach Exchange Telephone Company will provide the portion of Local Transport to an interconnection point (IP) with another Exchange Telephone Company." Here, the interconnection point is GNAPs' switch. The rate charged under that provision is based upon the relative transport mileage of each carrier, as required by Commission policy. Bell Atlantic transports the traffic from all points in the LATA to a single GNAPs switch. Therefore, Bell Atlantic provides the bulk of the transport and should be reimbursed under GNAPs' tariff.