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

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,	)	File No. E-99-22-R
Complainants,	)	
v.	)	
Global NAPs, Inc.,	)	
Defendant.	)	

ORDER ON RECONSIDERATION

Adopted: March 17, 2000 **Released: March 22, 2000**

By the Commission:

I. INTRODUCTION

1. In this Order, we deny a petition filed by Global NAPs, Inc. (Global NAPs)[1] seeking reconsideration of our order[2] granting a formal complaint brought by various Bell Atlantic companies (collectively, Bell Atlantic) against Global NAPs pursuant to section 208 of the Communications Act of 1934, as amended (Act).[3] For the reasons discussed below, we conclude that, in the *Order*: (1) the Commission did not violate the Communications Act, the Administrative Procedure Act (APA), the Due Process Clause, or its burden of proof rules by

[1] *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Petition for Reconsideration, File No. E-99-22-R (filed January 3, 2000) (*Global NAPs Petition*). *See* 47 U.S.C. § 405(b)(1); 47 C.F.R. § 1.106.

[2] *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Memorandum Opinion and Order, FCC 99-381, File No. E-99-22 (rel. Dec. 2, 1999) (*Order*).

[3] 47 U.S.C. § 208.

basing its decision on legal theories not raised by Bell Atlantic; and (2) the Commission did not err in ruling that, as of their filing date, Sections 7 and 7A of Global NAPs' F.C.C. Tariff No. 1 (Tariff) violated section 201(b) of the Act[4] and provided no basis for Global NAPs to collect compensation for its "ISP Traffic Delivery Service."[5]

II. BACKGROUND

2. The parties do not dispute the underlying facts that led to the filing of Bell Atlantic's complaint.[6] In addition, neither party challenges any finding of fact in the *Order*. Therefore, this Order incorporates by reference the facts described in the *Order*.[7]

3. In the *Order*, we agreed with Bell Atlantic that the challenged provisions of Global NAPs' Tariff violated section 201(b) of the Act. We concluded that, as of their filing date, Sections 7 and 7A of Global NAPs' Tariff were unlawful in two respects. First, we found that the challenged Tariff provisions were not "clear and explicit," as required by section 61.2 of our rules,[8] because "those provisions condition the imposition of charges on circumstances that were indeterminate when the [T]ariff took effect and remain indeterminate today." Specifically, the challenged Tariff provisions purported to apply only to ISP-bound traffic for which Global NAPs received no compensation from Bell Atlantic under the parties' existing interconnection agreement.[9] In this instance, the parties had executed an interconnection agreement despite an acknowledged failure to agree on the meaning of the inter-carrier compensation provisions in that agreement. The parties left that issue to the Massachusetts Department of Telecommunications and Energy (DTE). When Global NAPs filed its Tariff, the Massachusetts DTE had not yet reached a final determination regarding whether and how the parties' existing interconnection agreement provided for inter-carrier compensation for ISP-bound traffic. Thus, the parties did not know at the time the Tariff provisions were filed whether Global NAPs would receive such compensation from Bell Atlantic pursuant to their existing interconnection agreement. As a result, we concluded that the parties were also unable to determine whether Bell Atlantic was

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[4] 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such [interstate] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful....").

[5] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1 (effective April 15, 1999) (Global NAPs Tariff or Tariff).

[6] *See, e.g., Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Answer, File No. E-99-22 (filed July 28, 1999) (*Global NAPs Answer*) at 1-2 ("The relevant facts in this case are few in number and not fundamentally in dispute.... What *is* in dispute is the legal and economic consequences of these facts.") at 6 ("Bell Atlantic's complaint is not fundamentally fact-based. To the contrary, Bell Atlantic challenges Global NAPs' legal right to file *any* tariff governing the interstate traffic at issue here at all."); *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Global NAPs Brief on Non-Cost Issues, File No. E-99-22 (filed Sept. 2, 1999) at 1 (*Global NAPs Non-Cost Brief*) ("[A]t bottom the matter is simple.... The question raised by Bell Atlantic's complaint, then, is whether the tariff meets the general 'just and reasonable' standard of Section 201(b).").

[7] *See Order* at paras. 3-14.

[8] 47 C.F.R. § 61.2.

[9] "ISP-bound" traffic consists of calls originated by Bell Atlantic customers that are handed off to Global NAPs for delivery to Internet service providers (ISPs).

incurring charges under these Tariff provisions.[10] Accordingly, we concluded that "Global NAPs cannot reasonably bill Bell Atlantic under this [T]ariff when the very applicability of the [T]ariff has yet to be determined."[11]

4. Second, we found that Global NAPs' Tariff was not self-contained, but rather impermissibly cross-referenced an external document (*i.e.*, an interconnection agreement), in violation of section 61.74(a) of our rules. Section 61.74 of our rules provides that, in the absence of a waiver, "no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument."[12]

5. In its Petition for Reconsideration, Global NAPs argues that the *Order* is flawed in several ways. First, Global NAPs claims that the *Order* breached Global NAPs' right to notice and an opportunity to be heard under the Communications Act, the APA, and the Due Process Clause, because the Commission based its decision on legal theories not raised by Bell Atlantic or briefed by Global NAPs.[13] Second, Global NAPs asserts that the *Order* illegally relieved Bell Atlantic of its burden of proof, because the *Order* relies on grounds as to which Bell Atlantic allegedly presented no argument or evidence.[14] Third, Global NAPs argues that the *Order* violates the Communications Act, the APA, and the 5th Amendment by retroactively setting aside its Tariff and thereby depriving Global NAPs of any compensation for the interstate services it provided to Bell Atlantic.[15] Finally, Global NAPs claims that the two grounds on which the *Order* relies are not valid bases for invalidating the Tariff.[16] For the reasons discussed below, we reject all of Global NAPs' arguments and deny its petition for reconsideration.

III. DISCUSSION

A. The Commission Has Not Violated Global NAPs' Right to Notice and Opportunity to be Heard.

6. Global NAPs argues that the *Order* is procedurally defective under the Communications Act, the APA, and the Due Process Clause, because "it relies on matters as to which Global NAPs received no notice and which the [C]omplainant did not plead or prove."[17] It is instructive, in analyzing this argument, to consider how courts address these same circumstances. It is well settled that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the

[10] *Order* at paras. 2, 16-23.

[11] *Order* at para. 21.

[12] 47 C.F.R. § 61.74(a). *See Order* at paras. 2, 24.

[13] *Global NAPs Petition* at Summary, 5-10; *In the Matter of Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Reply in Support of Petition for Reconsideration, File No. E-99-22-R 9 (filed January 21, 2000) (*Global NAPs Reply*) at 4-9.

[14] *Global NAPs Petition* at Summary, 11-16; *Global NAPs Reply* at 1.

[15] *Global NAPs Petition* at Summary, 7, 12-15; *Global NAPs Reply* at 1, 6-7, 9-10.

[16] *Global NAPs Petition* at Summary, 17-23; *Global NAPs Reply* at 1.

[17] *Global NAPs Petition* at 24.

independent power to identify and apply the proper construction of governing law."[18] It is, therefore, within a court's discretion to consider an argument not raised by the parties if the court finds that consideration of the argument is necessary in order to decide the case correctly.[19] As the Seventh Circuit Court of Appeals has explained:

> [L]itigants' failure to address the legal question from the right perspective does not render us powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances.[20]

7. We believe that the same is true for the Commission in its interpretation and application of the Communications Act and governing regulations. The Act repeatedly affords the Commission broad discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[21] Indeed, with respect to common carrier complaint proceedings, the Act expressly provides the Commission with broad discretion "to investigate the matters complained of *in such manner and by such means as it shall deem proper.*"[22] This discretion encompasses the ability to consider an argument not raised by the parties if doing so is necessary to decide a case correctly.

8. In investigating the underlying complaint, we found questions arising under section 201(b) of the Act that were antecedent to those presented by Bell Atlantic and ultimately dispositive of the dispute. This finding triggered our over-riding obligation to serve the public interest by interpreting, applying, and enforcing the Act *correctly*, not merely in some manner suggested by the litigants. Our adjudication of cases generates precedents and clarifies the law, providing benefits to the public at large. This crucial function would be unduly constricted were we blindly and without exception to defer to the parties' presentation of legal theories. Accordingly, where, as here, (1) the determinative facts are on the record and undisputed;[23] (2) the complainant does raise the statutory basis on which we rule in its favor (here, section 201(b)

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[18] *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991). *See, e.g., United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446-48 (1993) (same as *Kamen*); *Arcadia v. Ohio Power Company*, 498 U.S. 73, 77 (1990) (deciding the case on a question "antecedent" to those raised by the parties "and ultimately dispositive of the present dispute").

[19] *See, e.g., United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446-48 (1993); *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991); *Arcadia v. Ohio Power Company*, 498 U.S. 73, 77 (1990); *United States v. Dickerson*, 166 F.3d 667, 682, & 682 n.17 (4th Cir.), *cert. granted*, 120 S.Ct 578 (1999) ("Even where the parties abdicate their responsibility to call relevant authority to the Court's attention, ... they cannot prevent us from deciding the case under the governing law...."); ("[T]his Court may, in its discretion, consider issues not raised below.... Without question, we are free to address ourselves to any legal theory that would bear on this issue under appeal."); *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1529 (10th Cir. 1996) ("We conclude, for reasons other than those urged by Mr. Compton [the appellee], the district court erred....")

[20] *Williams-Guice v. Board of Education*, 45 F.3d 161, 164 (7th Cir. 1995).

[21] 47 U.S.C. § 154(j). *See also* 47 U.S.C. §§ 154(i), 303(r).

[22] 47 U.S.C. § 208(a) (emphasis added).

[23] *See, e.g., Global NAPs Answer* at 1-2, 6; *Global NAPs Non-Cost Brief* at 1.

of the Act); (3) the undisputed facts and the record as a whole plainly reveal a violation of the law; and (4) the Act requires the Commission to adjudicate the complaint within five months,[24] we have discretion under sections 4(i), 4(j), 208(a), and 303(r) of the Act, and under the case authority described above, to decide an adjudication on a legal theory not articulated by the parties.

9. The three Ninth Circuit cases on which Global NAPs belatedly relies do not undermine our conclusion.[25] Those cases simply hold that a party in an administrative adjudication should have notice of the contested issue and opportunity to present evidence relevant thereto. Here, Global NAPs did have notice of the core issue – whether its Tariff violated section 201(b) of the Act – and the relevant evidence was on the record and undisputed;[26] therefore, the *Order* is consistent with those cases. We do not believe that those cases can be read to hold that an agency may never decide an adjudication on a legal theory not articulated by the parties.

10. Global NAPs asserts for the first time in its Reply Brief that, had it known that the Commission was considering the particular legal theories on which the *Order* ultimately relied, it "*might* have introduced additional or different facts from those actually introduced, and *might* have sought discovery from Bell Atlantic on certain issues."[27] With but one minor and irrelevant exception,[28] however, Global NAPs fails to specify a single new fact or discovery request that it would have proffered. Moreover, as even Global NAPs acknowledges,[29] Bell Atlantic's complaint raised legal issues, not factual issues. Accordingly, on all of the bases described above, we reject the contention that the *Order* violated Global NAPs' procedural rights by relying on legal theories not specifically raised or briefed by either party.[30]

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[24] *Cf. Hercules Inc. v. Environmental Protection Agency*, 598 F.2d 91, 129 (D.C. Cir. 1978) (acknowledging that a statutory deadline may require an administrative agency to follow relatively streamlined procedures).

[25] *Andriasian v. Immigration and Naturalization Service*, 180 F.3d 1033 (9th Cir. 1999); *Department of Education of the State of California v. Bennett*, 864 F.2d 655 (9th Cir. 1988); *National Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 616 F.2d 420 (9th Cir. 1980). Global NAPs cited these cases for the first time in its *Reply*.

[26] *See, e.g., Global NAPs Answer* at 1-2, 6; *Global NAPs Non-Cost Brief* at 1.

[27] *Global NAPs Reply* at 9 (emphases added).

[28] The lone exception concerns Global NAPs' alleged "policy" regarding "bill and keep" arrangements, which we discuss in Section III (D)(1), *infra*.

[29] *See, e.g., Global NAPs Answer* at 1-2, 6; *Global NAPs Non-Cost Brief* at 1.

[30] We note that the reconsideration phase of this proceeding afforded Global NAPs ample opportunity to rebut our legal reasoning in the *Order*, but Global NAPs expressly eschewed that opportunity. *See Global NAPs Petition* at Summary, 17; *Global NAPs Reply* at 2, 6 n.8, 9. *Cf. Petition by Texas Instruments for a Waiver of § 15.4(m) and § 15.7 of FCC Rules*, Order Denying Reconsideration, 78 F.C.C. 2d 364, 370-71 at paras. 22-24 (1980) (and cases cited therein) (noting that a party's failure to take full advantage of the argument opportunity presented by reconsideration undercut the party's argument that it was prejudiced by the proceedings that preceded reconsideration).

B. The Commission Has Not Violated Its Burden of Proof Rules.

11. According to Global NAPs, our rules regarding the burden of proof in complaint proceedings under section 208 of the Act require that "any claim as to which Bell Atlantic did not present evidence or argument is a claim on which Global NAPs wins."[31] Global NAPs asserts, therefore, that the *Order* "illegally relieved Bell Atlantic of its burden of proof" by basing its decision on claims as to which Bell Atlantic did not present evidence or argument.[32]

12. Global NAPs is correct that Bell Atlantic bore the burden of proof. Global NAPs is incorrect, however, that Bell Atlantic failed to present any evidence to satisfy that burden. Quite the contrary. Bell Atlantic developed a record of undisputed facts and public documents (*e.g.*, Global NAPs' Tariff and Massachusetts DTE decisions) that, on their face, revealed a violation of section 201(b) of the Communications Act.[33] This record amply met Bell Atlantic's burden of producing a preponderance of favorable evidence, regardless of whether Bell Atlantic articulated the precise legal rationale on which we ultimately relied. Accordingly, we reject Global NAPs' contention that the *Order* violated our rules regarding burden of proof.

C. The Commission Did Not Err in Holding Global NAPs' Tariff Unlawful as of Its Filing Date.

13. Global NAPs contends that, under the Communications Act, the APA, and the Fifth Amendment, the Commission improperly invalidated Global NAPs' Tariff as of its filing date, without also determining some reasonable rate to be paid by Bell Atlantic.[34] In particular, "Global NAPs submits that it is unjust and unreasonable -- more specifically, a form of confiscation -- to retroactively relieve Bell Atlantic of any obligation to pay anything at all for the work Global NAPs does in delivering jurisdictionally interstate ISP-bound traffic at Bell Atlantic's request."[35]

14. Our *Order* has not eliminated Global NAPs' opportunity to obtain compensation for its delivery of Bell Atlantic-originated, ISP-bound traffic. Global NAPs had (and still has) an ample opportunity to obtain such compensation outside the context of the Tariff. First, under sections 251 and 252 of the Act, Global NAPs could have reached a mutually acceptable resolution with Bell Atlantic regarding inter-carrier compensation for ISP-bound traffic *before* executing an interconnection agreement with, and accepting traffic from, Bell Atlantic. Instead, Global NAPs consciously chose to execute the interconnection agreement and deliver traffic without such a "meeting of the minds," and deliberately opted to have the issue resolved through

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[31] *Global NAPs Petition* at 11-16, *citing High Tech Furnace Sys. v. Sprint Comm. Company*, 14 FCC Rcd 8040, 8044 at para. 10 (1999); *IT&E Overseas, Inc. v. Micronesian Telecommunications Corporation*, 13 FCC Rcd 16058, 16061-2 at para. 5 (1998); *Maydak v. AT&T Comm'ns*, 14 FCC Rcd 6680, 6681-2, 6683-4 at paras. 3, 8 (Comm. Car. Bur. 1999); *Krauss v. MCI Telecommunications Corporation*, 14 FCC Rcd 2770, 2776 at para. 11 (Comm. Car. Bur. 1999); *Global NAPs Reply* at 1.

[32] *Global NAPs Petition* at 11. *See also Global NAPs Reply* at 1, 4.

[33] *See* 47 U.S.C. § 201(b). *See also* 47 C.F.R. §§ 61.2, 61.74(a).

[34] *Global NAPs Petition* at Summary, 7, 12-15; *Global NAPs Reply* at 1, 6-7, 9-10.

[35] *Global NAPs Petition* at 13.

Specifically, Global NAPs contends that its "[T]ariff is quite clear that the key triggering event is whether or not compensation for [ISP-bound] traffic is paid by the connected LEC."[42] Global NAPs further contends, therefore, that "[w]hether there is a dispute about whether such compensation is or is not due under an interconnection agreement is immaterial."[43]

17. The applicability of Global NAPs' tariffed rates for "ISP Traffic Delivery Service" hinges on Section 7A.1 of the Tariff, which provides, in pertinent part:

> This tariff applies to all ISP-bound traffic for which the Company does not receive compensation from the Delivering LEC *under the terms of an interconnection agreement*....[44]

Global NAPs' argument – that the Tariff's applicability turns solely on whether a carrier pays Global NAPs, and not also on whether an interconnection agreement requires a carrier to pay Global NAPs – ignores the portion of the Tariff emphasized above. Reading the pertinent provision as a whole reveals that the Tariff can only apply when the terms of an interconnection agreement do not mandate a carrier to pay Global NAPs for the delivery of ISP-bound traffic. Indeed, Global NAPs essentially acknowledges as much by stating repeatedly that the Tariff (1) "defers" to the negotiation/arbitration processes established by sections 251 and 252 of the Act;[45] (2) "is by its terms subject to state commission rulings establishing compensation arrangements;"[46] and (3) "establish[es] a compensation obligation that applies *if an interconnection agreement does not*...."[47] Those statements by Global NAPs are true only if Tariff Section 7A.1 is construed to mean that, if a dispute about inter-carrier compensation for ISP-bound traffic arises during the section 251/252 process, the Tariff does *not* apply until a state commission rules that the interconnection agreement does *not* establish such compensation.

18. To illustrate, as we read Section 7A.1 of the Tariff, if a carrier does not pay Global NAPs for the delivery of ISP-bound traffic, and the interconnection agreement does not require such payment, then Global NAPs' "remedy" is to impose charges pursuant to the Tariff; on the other hand, if a carrier does not pay Global NAPs for the delivery of ISP-bound traffic, and the interconnection agreement *does* require such payment, the appropriate remedy is to sue to enforce Global NAPs' right to "receive compensation from the Delivering LEC under the terms of an interconnection agreement."[48] For another illustration, Global NAPs claims that, if an interconnecting carrier does not actually pay compensation, then the Tariff applies - even if a state commission subsequently decides that some compensation must be paid under the

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[42] *Global NAPs Petition* at 17.

[43] *Global NAPs Petition* at 17-18. *See id.* at 22-23; *Global NAPs Reply* at 4.

[44] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1 (effective April 15, 1999) (Global NAPs Tariff) (emphasis added).

[45] *Global NAPs Non-Cost Brief* at 23-24, 46; *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Global NAPs Reply Brief on Non-Cost Issues, E-99-22 (filed Sept. 15, 1999) at 5, 23-34 (*Global NAPs Non-Cost Reply Brief*).

[46] *Global NAPs Non-Cost Brief* at 5.

[47] *Global NAPS Non-Cost Reply Brief* at 23 (emphasis added).

[48] Global NAPs Tariff, Section 7A.1.

interconnection agreement. If that is true, then the Tariff allows double-charging for the same service – once under the Tariff and later under the interconnection agreement – and the Tariff would then clearly be unreasonable. If the Tariff does not allow double-charging, then its application must depend on a preceding determination that the interconnection agreement does not require compensation. Thus, contrary to Global NAPs' contention, a carrier cannot simply consult its checkbook to determine whether charges will accrue under the Tariff; a carrier must also know what the terms of its interconnection agreement with Global NAPs require.

19. The Commission also noted in the *Order* a concern that the Tariff provisions would conflict with any "bill and keep" arrangement in an interconnection agreement.[49] Global NAPs raises a number of objections to this statement, all essentially asserting that this concern is merely a hypothetical one, none of which we find persuasive. First, Global NAPs argues that it has no such agreements with any LEC and "has a policy of rejecting such agreements."[50] Yet, as noted above, Global NAPs entered into its agreement with Bell Atlantic without reaching consensus on what traffic was covered by the reciprocal compensation provisions. Thus, it is not clear what Global NAPs has agreed to. Global NAPs argues further that if it did agree to a bill and keep provision in the future, any such problem with the Tariff could be resolved by inserting provisions into the interconnection agreement about how to apply the Tariff provisions.[51] Speculation about what might be contained in future interconnection agreements, however, cannot make the current Tariff language sufficiently definite to comply with section 201 of the Act.

20. Global NAPs argues also that the problem identified by the Commission could not exist because a bill-and-keep clause in an interconnection agreement would not apply to jurisdictionally interstate ISP-bound traffic,[52] but since parties are free to agree to any terms they wish in negotiating agreements,[53] such a blanket statement is simply unsupportable. Finally, Global NAPs argues that if it had, in fact, agreed to accept no compensation for ISP-bound calls, then it is not clear that the Commission should prohibit it from enforcing a Tariff provision that contradicts that agreement. We have already stated quite clearly in the *Order,* however, that "it seems evident that any federal tariff purporting to govern inter-carrier compensation for ISP-bound traffic could be reasonable only if it mirrors any applicable terms of the party's interconnection agreement, as construed by the appropriate state commission. Using the tariff process to circumvent the section 251 and 252 process cannot be allowed."[54] We are not persuaded to revisit that conclusion.

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[49] "[I]t is certainly possible that parties could have addressed ISP-bound traffic in their agreements without requiring payment to the terminating carrier, *e.g.*, by agreeing to a bill and keep arrangement. This tariff provision seems to purport to override any such agreement." *Order* at para. 23.

[50] *Global NAPs Petition* at 19.

[51] "The parties ... would be in a position to expressly agree that payment at a rate of zero in the (hypothetical) bill-and-keep contract constitutes 'payment under an interconnection agreement' for purposes of the tariff." *Global NAPs Petition* at 19.

[52] *Global NAPs Petition* at 20.

[53] *See* 47 U.S.C. § 252(a)(1).

[54] *Order* at para. 23.

21. In the end, Global NAPs argues that the Commission's concern should be resolved by interpreting the Tariff as considering the receipt of zero compensation for ISP-bound calls as constituting compensation under an interconnection agreement. Global NAPs' arguments, however, contradict themselves. Global NAPs has argued elsewhere in its petition that the Tariff is clear because one need not look to the terms of the interconnection agreement to determine whether compensation is due under the Tariff but only "to one's checkbook." Yet here, it asserts that one must understand the terms of the interconnection agreement in order to determine whether, where no check has been written, Global NAPs has nevertheless "received compensation" pursuant to the agreement. Global NAPs' arguments on this point simply demonstrate further the lack of clarity in its tariff.

22. In any event, even assuming, *arguendo*, that Global NAPs' interpretation of Tariff Section 7A.1 is plausible, so, too, is the Commission's interpretation, especially given the Commission's judicially recognized expertise in interpreting tariffs.[55] The existence of more than one plausible interpretation renders Tariff Section 7A.1 ambiguous about when charges accrue. Even Global NAPs acknowledges that ambiguous tariff provisions must be construed against the drafting carrier.[56] Thus, we may properly construe Section 7A.1 of the Tariff against Global NAPs and as failing to convey with the requisite clarity whether charges will accrue thereunder.

23. Global NAPs appears to rely on Tariff Section 7A.2, as well as Tariff Section 7A.1, to argue that the Commission erred in finding the Tariff to be indeterminate.[57] In our view, however, Tariff Section 7A.1 purports to establish a threshold for the application of the Tariff at all. Therefore, where, as here, Tariff Section 7A.1 fails to establish clearly the Tariff's applicability, the terms of any other Tariff provision are irrelevant. Consequently, for all of the reasons described above, we reject Global NAPs' contention that we erred in concluding that the Tariff was unlawfully indeterminate.

2. The Tariff Contains an Impermissible Cross-Reference.

24. In order to implement section 201(b) of the Act (among other provisions), section 61.74(a) of our rules provides that "no tariff publication filed with the Commission may make

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[55] *See, e.g., Ambassador, Inc. v. United States*, 325 U.S. 317, 324 (1945); *American Message Centers v. FCC*, 50 F.3d 35, 39 (D.C. Cir. 1995); *Allnet Communications Serv. Inc. v. National Exchange Carrier Association*, 965 F.2d 1118, 1120 (D.C. Cir. 1992); *Total Telecommunications Services, Inc. v. AT&T*, 919 F. Supp. 472, 480 (D.D.C. 1996), *aff'd*, 99 F.3d 448 (D.C. Cir. 1996).

[56] *Global NAPs Petition* at 21 n.24. *See, e.g., Commodity News Services, Inc. v. Western Union*, 29 FCC 1208, 1213, *aff'd* 29 FCC 1205 (1960).

[57] *Global NAPs Petition* at 17 n.20. Section 7A.2 of Global NAPs' Tariff provides: "A delivering LEC with which Company has an Interconnection Agreement may avoid charges under this Tariff by agreeing to treat ISP-bound calls delivered to Company as 'local traffic' subject to reciprocal compensation under Section 251(b)(5) and applicable terms of the Interconnection Agreement. Failure by such a carrier to actually compensate Company for ISP-bound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate Company under the terms of this Tariff." Global NAPs Tariff, Section 7A.2.

reference to any other tariff publication or to *any other document or instrument*."[58] Global NAPs asserts that its Tariff does not violate section 61.74(a), because the Tariff is "complete in itself," and "none of the **terms** of any interconnection agreement has any relevance to the application of the tariff."[59] To support this assertion, Global NAPs repeats its argument that the applicability of the Tariff turns only on whether a delivering LEC has actually paid Global NAPs, and not also on whether an interconnection agreement requires a carrier to pay Global NAPs.

25. As we previously explained,[60] if we are to reconcile the Tariff language with Global NAPs' statements about deferring to the state negotiation/arbitration processes, then to determine whether Global NAPs' Tariff applies, Bell Atlantic must consult the terms of its interconnection agreement to ascertain whether compensation for the delivery of ISP-bound traffic is required. Consequently, the Tariff's cross-reference to the interconnection agreement constitutes far more than a technical defect; it constitutes a fundamental flaw in the Tariff's clarity. Accordingly, even assuming, *arguendo*, that a tariff's reference to an exogenous document is improper only if the exogenous document contains information necessary to understand the tariff, the Tariff's bare cross-reference to an "interconnection agreement" violates section 61.74(a) of our rules and renders the Tariff unlawful.[61]

26. Global NAPs also argues that "it is far from clear that [s]ection 61.74(a) applies to Global NAPs' Tariff [, because] the Commission has permissively detariffed the provision of access services by non-dominant carriers..."[62] Thus, Global NAPs seems to suggest that, in light of our adoption of permissive detariffing policies, it should be excused from following the law that applies to tariffs that a carrier chooses to file.[63] Again, we disagree. Section 61.74(a) by its terms plainly applies to all tariff filings. Our order providing for permissive tariff filing does not exempt non-dominant carriers from Part 61 tariff filing requirements. If a non-dominant carrier chooses to file a tariff with the Commission, as Global NAPs has, it must comply with Part 61 of our rules.[64] Global NAPs provides no compelling reason for us to abandon the very rules intended to protect those subject to filed tariffs. Accordingly, we affirm our conclusion that Global NAPs' Tariff impermissibly cross-references an external document (*i.e.*, an interconnection agreement), in violation of section 61.74(a) of our rules.

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[58] 47 C.F.R. § 61.74(a) (emphasis added). *See also* 47 U.S.C. § 201(b). Section 61.74(a) refers to any document referenced in a tariff, not just to documents containing information necessary to calculate a rate. *See, e.g., Amendments of Parts 1 and 61 of the Commission's Rules*, Report and Order, 98 F.C.C.2d 855, 876 at para. 80 (1984); *AT&T Communications Revisions to Tariff FCC No. 15, Competitive Pricing Plan No. 12, Transmittal No. 4742*, DA 93-383, Order, 1993 WL 756821 (Com. Car. Bur. rel. April 2, 1993).

[59] *Global NAPs Petition* at 22 (emphasis in original).

[60] *See* paras. 16-18, *supra*.

[61] This is not to say that, in all instances, we would declare a tariff unenforceable for violations of section 61.74(a). *See, e.g., Berwind-White Coal Mining Company v. Chicago & Erie Railroad Company*, 235 U.S. 371 (1914) (upholding carrier's tariff because, unlike here, its defect was a technicality that did not implicate any fundamental aspects of the tariff's interpretation).

[62] *Global NAPs Petition* at 23.

[63] *Global NAPs Petition* at 23.

[64] *See* 47 U.S.C. § 201(b); 47 C.F.R. Part 61.

E. The Massachusetts DTE's February 25, 2000 Order Does Not Undermine Our *Order*.

27. On February 25, 2000, the Massachusetts DTE ruled, *inter alia*, that the existing interconnection agreement between Global NAPs and Bell Atlantic, as presently written, does not provide for inter-carrier compensation for ISP-bound traffic.[65] The Massachusetts DTE also ruled, however, that the parties could engage in further negotiations, mediation, and arbitration under section 252 of the Act to attempt to amend their existing interconnection agreement to provide for such compensation, apparently even retroactively for the period beginning when Bell Atlantic first stopped paying.[66]

28. The *Massachusetts DTE February 25, 2000 Order* does not undermine the validity of our *Order*. Our *Order* hinged on the conclusion that, *when the Tariff was filed* in April 1999, it was indeterminate and cross-referenced an exogenous document. The *Massachusetts DTE February 25, 2000 Order* does not cure those problems retroactively. Moreover, on February 14, 2000, Global NAPs revised the Tariff at issue in such a way as to eliminate the provisions that were found unlawful in our *Order*.[67] Thus, the *Massachusetts DTE February 25, 2000 Order* can have no prospective effect on the original Tariff language. Consequently, the *Massachusetts DTE February 25, 2000 Order* provides no basis on which to reconsider our *Order*.

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[65] *See Massachusetts DTE February 25, 2000 Order* at 16-21. This ruling by the Massachusetts DTE formed the primary basis on which the Common Carrier Bureau recently denied Global NAPs' peition for preemption pursuant to section 252(e)(5) of the Act, 47 U.S.C. § 252(e)(5). *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 99-354, Memorandum Opinion and Order, DA 00-510 (rel. March 7, 2000).

[66] *Massachusetts DTE February 25, 2000 Order* at 19-20. In particular, the *Massachusetts DTE February 25, 2000 Order* "reaffirm[s]" and "reiterate[s] (*id.* at 19) the Massachusetts DTE's prior direction that the carriers "begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for *all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic*." *Massachusetts DTE May 19, 1999 Order* at 30 (emphasis added).

[67] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Revised Tariff F.C.C. No. 1, at 81-83.2, Sections 7, 7.1, 7.2, 7.3, 7.4, 7.5 (effective February 14, 2000).

IV. ORDERING CLAUSE

29. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 201(b), 203(c), 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 203(c), 208, 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Global NAPs, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary