

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 Co.; and New England Telephone and Telegraph Co.,
Complainants,
v.
Global NAPs, Inc.,
Defendant.
File No. EB-00-MD-009

ORDER ON RECONSIDERATION

Adopted: April 22, 2002

Released: April 26, 2002

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we deny a petition filed by Global NAPs, Inc. ("Global NAPs") seeking reconsideration of the Commission's order granting a formal complaint brought by various Verizon Communications, Inc. companies (collectively, "Verizon") against Global NAPs pursuant to section 208 of the Communications Act of 1934, as amended (the "Act"). For the reasons discussed below, we conclude that, in the Order: (1) the Commission did not err in ruling that Global NAPs' second tariff imposing charges for the delivery of ISP-bound traffic ("Second ISP Tariff") was

1 Petition for Reconsideration of Global NAPs, Inc., Bell Atlantic-Delaware, et al. v. Global NAPs, Inc., File No. EB-00-MD-009 (filed Nov. 27, 2000) (Global NAPs Petition or Petition). See 47 U.S.C. § 405(b)(1); 47 C.F.R. § 1.106.

2 Bell Atlantic-Delaware, et al. v. Global NAPs, Inc., Memorandum Opinion and Order, FCC 00-383, 2000 WL 1593346 (rel. Oct. 26, 2000) (Order).

3 After commencement of this proceeding, Bell Atlantic Corporation changed its name to Verizon Communications, Inc. Thus, the former Bell Atlantic entities named in the caption are collectively referred to herein as "Verizon."

4 47 U.S.C. § 208.

void *ab initio* under section 201(b) of the Act<sup>5</sup> because it contradicted the parties' understanding that their interconnection agreements alone would govern the payment of inter-carrier compensation for the delivery of ISP-bound traffic; (2) the Commission did not err in ruling that Global NAPs' Second ISP Tariff was void *ab initio* under section 201(b) because it is indeterminate, and (3) the Commission did not violate Global NAPs' due process rights by basing its decision, in part, on a legal theory not raised by Verizon.

## II. BACKGROUND

2. This proceeding generally arises out of the same facts and disputes that were the subject of the Commission's decision in *Bell-Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*,<sup>6</sup> wherein the Commission held, *inter alia*, that Global NAPs' first tariff seeking to impose charges for the delivery of ISP-bound traffic ("First ISP Tariff") was void *ab initio* under section 201(b) of the Act. The parties do not disagree about the underlying facts that led to the filing of Verizon's complaint in either *Global NAPs I* or this proceeding.<sup>7</sup> Therefore, we incorporate by reference the facts described in *Global NAPs I* and the *Order*.<sup>8</sup>

3. Certain core facts bear repeating here, however. In Massachusetts and New Jersey, Global NAPs freely entered into interconnection agreements with Verizon pursuant to sections 251 and 252 of the Act,<sup>9</sup> knowing full well that it and Verizon disagreed about whether the interconnection agreements required Verizon to pay reciprocal compensation for Global NAPs' delivery of "ISP-bound traffic."<sup>10</sup> Global NAPs immediately and vigorously pursued its rights under section 252 of the Act to argue to the Massachusetts Department of Telecommunications and Energy ("DTE") and the New Jersey Board of Public Utilities ("BPU") that its interconnection agreements did, indeed, require Verizon to pay reciprocal compensation for the delivery of ISP-bound traffic. Many months thereafter (24 months with respect to Massachusetts, seven months with respect to New Jersey), Global NAPs filed with the FCC its First ISP Tariff, which purported to require Verizon to pay compensation for Global NAPs' delivery of ISP-bound traffic, if the applicable interconnection agreement did not so require. Upon complaint by Verizon, the Commission ruled, *inter alia*, that Global NAPs' First ISP Tariff was void *ab initio* under section 201(b) of the Act, which ruling was affirmed by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

4. After the Commission's release of *Global NAPs I*, Global NAPs filed with the FCC its

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<sup>5</sup> 47 U.S.C. § 201(b).

<sup>6</sup> *Bell-Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12946 (1999) (*Global NAPs I*), *recon denied*, Order on Reconsideration, 15 FCC Rcd 5997 (2000) (*Global NAPs I Recon Order*), *aff'd sub nom.*, *Global NAPs, Inc. v. FCC*, 247 F.3d 252 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 808 (2002).

<sup>7</sup> *See Global NAPs I Recon Order*, 15 FCC Rcd at 5998, ¶ 2 and n.6; *Order*, 2000 WL 1593346 at ¶¶ 2-8.

<sup>8</sup> *See Global NAPs I*, 15 FCC Rcd at 12947-55; *Order*, 2000 WL 1593346 at ¶¶ 2-8.

<sup>9</sup> 47 U.S.C. §§ 251-52.

<sup>10</sup> In this context, "ISP-bound traffic" consists of calls made by customers of Verizon to customers of Global NAPs that are Internet Service Providers.

Second ISP Tariff. Although worded somewhat differently than the First ISP Tariff, it purported to accomplish the same result: require Verizon to pay compensation for the delivery of ISP-bound traffic, if the applicable interconnection agreement did not so require.

5. Both the Massachusetts DTE and the New Jersey BPU have held that the Global NAPs/Verizon interconnection agreements do not require reciprocal compensation for the delivery of ISP-bound traffic. Thus, Global NAPs sought to obtain compensation from Verizon pursuant to its Second ISP Tariff, whereupon Verizon filed the instant complaint challenging the lawfulness of that Tariff.

6. In the *Order*, the Commission agreed with Verizon that the challenged provisions of Global NAPs' Second ISP Tariff were void *ab initio* under section 201(b) of the Act, for two reasons. First, the filing of the Second ISP Tariff conflicts with the parties' mutual understanding that their interconnection agreements *alone* would govern whether Global NAPs would receive compensation for the delivery of ISP-bound traffic.<sup>11</sup> Second, Global NAPs' Second ISP Tariff was indeterminate, in violation of section 61.2 of our rules,<sup>12</sup> which requires that tariffs be clear and explicit as to their proper application.<sup>13</sup>

7. In its *Petition*, Global NAPs argues that the *Order* is flawed in several ways. First, Global NAPs asserts that the *Order*'s finding of a mutual understanding not to file a federal tariff imposing charges for the delivery of ISP-bound traffic lacks record support and violates the Filed Rate Doctrine.<sup>14</sup> Second, Global NAPs asserts that its Second ISP Tariff is not indeterminate.<sup>15</sup> Third, Global NAPs contends that the Commission lacked authority to declare the Second ISP Tariff void *ab initio*.<sup>16</sup> Fourth, Global NAPs maintains that Verizon lacks standing to pursue this complaint, because it failed to pay Global NAPs' bills.<sup>17</sup> Finally, Global NAPs claims that the Commission violated its own rules and Global NAPs' due process rights by basing its decision, in part, on a legal theory not raised by Verizon.<sup>18</sup>

8. The *Petition* also suggested that Global NAPs should have an opportunity to submit evidence and argument regarding whether the parties had understood that their interconnection

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<sup>11</sup> *Order*, 2000 WL 1593346 at ¶¶ 10-21.

<sup>12</sup> 47 C.F.R. § 61.2.

<sup>13</sup> *Order*, 2000 WL 1593346 at ¶¶ 22-25.

<sup>14</sup> *Global NAPs Petition* at 8-17; Reply Brief in Support of Petition for Reconsideration, *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed Dec. 14, 2000) (*Global NAPs Reply Brief*) at 1; Supplemental Reply Brief of Global NAPs, Inc., *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed June 8, 2001) (*Global NAPs Supplemental Reply Brief*) at 2-3; Supplemental Reply Brief of Global NAPs, Inc., *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed Nov. 13, 2001) (*Global NAPs Second Supplemental Reply Brief*) at 1-3.

<sup>15</sup> *Global NAPs Petition* at 17-19. See *Global NAPs Reply Brief* at 2, 5-6.

<sup>16</sup> *Global NAPs Petition* at 22-24. See *Global NAPs Reply Brief* at 2-5.

<sup>17</sup> *Global NAPs Petition* at 19-24. See *Global NAPs Reply Brief* at 4.

<sup>18</sup> *Global NAPs Petition* at 5-8. See *Global NAPs Reply Brief* at 6-9.

agreements alone would govern the issue of compensation for the delivery of ISP-bound traffic.<sup>19</sup> Commission staff granted Global NAPs that opportunity,<sup>20</sup> whereupon Global NAPs submitted an affidavit, twelve exhibits, and supplemental briefing.<sup>21</sup>

9. For the reasons discussed below, we reject all of Global NAPs' arguments and deny its petition for reconsideration. At bottom, what the D.C. Circuit said about Global NAPs' First ISP Tariff applies equally well to Global NAPs' Second ISP Tariff: "That GNAPs sought to game the existing rules, and lost, does not mean the FCC was arbitrary and capricious in its application of its own rules."<sup>22</sup>

### III. DISCUSSION

#### A. The Commission Did Not Err in Concluding That the Parties Understood That Their Interconnection Agreements Alone Would Govern Whether They Were Entitled to Compensation for the Delivery of ISP-bound Traffic.

10. The only new evidence proffered by Global NAPs in support of its *Petition* relates to the Commission's conclusion that the parties understood that their interconnection agreements alone would govern whether they were entitled to compensation for the delivery of ISP-bound traffic. Global NAPs argues that this conclusion lacks factual support in the record, contradicts the interconnection agreements themselves, and violates the Filed Tariff Doctrine.<sup>23</sup> To support these arguments, Global NAPs submitted additional evidence in the form of an affidavit from William J. Rooney, Global NAPs' General Counsel

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<sup>19</sup> *Global NAPs Petition* at 8 and 11 n.14.

<sup>20</sup> Letter from William H. Davenport, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Christopher W. Savage, Counsel for Global NAPs, and Lawrence W. Katz, Counsel for Verizon, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed May 2, 2001); Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Christopher W. Savage, Counsel for Global NAPs, and Lawrence W. Katz, Counsel for Verizon, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed Sept. 18, 2001); Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Christopher W. Savage, Counsel for Global NAPs, and Lawrence W. Katz, Counsel for Verizon, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed Sept. 19, 2001); Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Christopher W. Savage, Counsel for Global NAPs, and Lawrence W. Katz, Counsel for Verizon, *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed Oct. 3, 2001).

<sup>21</sup> Supplemental Brief of Global NAPs, Inc., *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed May. 25, 2001) (*Global NAPs Supplemental Brief*); *Global NAPs Supplemental Reply Brief*; Supplemental Brief of Global NAPs, Inc., *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed Oct. 5, 2001) (*Global NAPs Second Supplemental Brief*); *Global NAPs Second Supplemental Reply Brief*.

<sup>22</sup> *Global NAPs v. FCC*, 247 F.3d at 257.

<sup>23</sup> See *Global NAPs Petition* at 8-17. See also *Global NAPs Reply Brief* at 1, 5; *Global NAPs Second Supplemental Brief* at 3-4; *Global NAPs Second Supplemental Reply Brief* at 1-3.

and chief interconnection agreement negotiator, and correspondence between the parties.<sup>24</sup> In his affidavit, Mr. Rooney attests that there was no separate understanding between the parties about the filing of federal tariffs,<sup>25</sup> and that in entering into the interconnection agreements, he did not understand that Global NAPs was waiving any rights.<sup>26</sup> Mr. Rooney further opines that the integration clause in the interconnection agreements precludes the Commission from looking beyond the contract language,<sup>27</sup> and that such language expressly preserves Global NAPs' right to file a federal tariff imposing charges for the delivery of ISP-bound traffic.<sup>28</sup> Global NAPs maintains, therefore, that the Commission erred in concluding that, by filing the Second ISP Tariff, Global NAPs acted unreasonably under section 201(b), thereby voiding the Tariff *ab initio*. For the following reasons, we disagree.

11. First, the *Petition* does not challenge the validity of the facts on which the *Order* concluded "that the parties agreed and understood that their interconnection agreements alone would decide the question of inter-carrier compensation for the delivery of ISP-bound traffic."<sup>29</sup> In particular, although Global NAPs knew that Verizon interpreted its pre-existing interconnection agreements with other carriers in Massachusetts and New Jersey as not requiring compensation for the delivery of ISP-bound traffic, Global NAPs chose to opt into those agreements rather than negotiate different agreements with Verizon.<sup>30</sup> In other words, rather than reaching its own agreement with Verizon on the question of compensation for the delivery of ISP-bound traffic, Global NAPs opted into arguably ambiguous preexisting interconnection agreements between Verizon and other carriers that did not have any language explicitly addressing the ISP-bound traffic issue.<sup>31</sup> Global NAPs then chose, pursuant to sections 251 and 252 of the Act, to have the Massachusetts and New Jersey commissions decide the issue under the terms of the preexisting agreements. Global NAPs vigorously maintained in these state proceedings that (i) the interconnection agreements addressed the issue of compensation for the delivery of ISP-bound traffic, and (ii) the agreements required compensation for such delivery.<sup>32</sup> Indeed, Global NAPs continues to maintain this position today in its appeals of the Massachusetts and New Jersey proceedings.<sup>33</sup> Finally, Global NAPs did not file its First ISP Tariff until 24 months after opting into the Massachusetts

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<sup>24</sup> See *Global NAPs Second Supplemental Brief*, Attachment, Affidavit of William J. Rooney (*Rooney Affidavit*). The *Rooney Affidavit* attaches 12 documents reflecting correspondence between the parties during the relevant timeframe.

<sup>25</sup> See *Rooney Affidavit* at ¶ 3.

<sup>26</sup> *Id.* at ¶ 13.

<sup>27</sup> *Rooney Affidavit* at ¶ 12.

<sup>28</sup> *Id.* at ¶ 15.

<sup>29</sup> *Order*, 2000 WL 1593346 at ¶ 12.

<sup>30</sup> *Order*, 2000 WL 1593346 at ¶ 13.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *Order*, 2000 WL 1593346, at ¶ 13, n.31.

agreement and seven months after opting into the New Jersey agreement.<sup>34</sup> We continue to believe that these uncontested facts strongly support the *Order*'s conclusion that the parties understood their interconnection agreements to be the exclusive source of compensation rights for the delivery of ISP-bound traffic. Thus, these facts also support the *Order*'s holding that, "when the Massachusetts DTE and New Jersey Board of Public Utilities found that Global NAPs' interconnection agreements with Verizon did not require compensation for such traffic, it was unjust and unreasonable for Global NAPs in the particular circumstances here to attempt to use this Commission's tariff system to impose a separate compensation regime of its own."<sup>35</sup>

12. Contrary to Global NAPs' contentions, we find that the additional evidence it submitted only reinforces the *Order*'s conclusions. Indeed, some of this evidence even highlights, in our view, that the filing of Global NAPs' Second ISP Tariff was merely a continuation of its prior failed effort to "game" the system in which it voluntarily participated.<sup>36</sup>

13. Before we examine Global NAPs' supplemental evidence in detail, we note that our authority to evaluate whether Global NAPs' conduct was unjust and unreasonable under section 201(b) is not limited to a narrow application of contract law principles.<sup>37</sup> Consequently, our evaluation of the facts and circumstances in this case properly entails a broader assessment of the justness and reasonableness of Global NAPs' conduct.

14. Global NAPs points out that the interconnection agreements contain "integration" clauses, which, according to Global NAPs, preclude the Commission from relying on any exogenous understanding between the parties regarding the agreements' scope.<sup>38</sup> We do not believe that the integration clauses restrain our section 201(b) analysis in that manner, because the interconnection agreements simply do not expressly address the propriety of filing a federal tariff for the delivery of ISP-bound traffic. Therefore, the understanding found in the *Order* does not conflict with any provision of the Agreements.

15. Global NAPs further contends that the interconnection agreements do, in fact, expressly preserve its right to file a federal tariff regarding compensation for the delivery of ISP-bound traffic.<sup>39</sup> Specifically, Global NAPs contends that, if ISP-bound traffic is not "local" traffic covered by the reciprocal compensation terms of its interconnection agreements, then it is a species of switched access

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<sup>34</sup> Global NAPs sought to enter into interconnection agreements in Massachusetts and New Jersey in April 1997 and June 1998, respectively, but did not file its First ISP Tariff until April 1999. *See Global NAPs I*, 15 FCC Rcd at 12947, 12951; *Order*, 2000 WL 1953346 at 4-5.

<sup>35</sup> *Order*, 2000 WL 1593346 at ¶ 14.

<sup>36</sup> *See, e.g., Global NAPs v. FCC*, 247 F.3d at 260.

<sup>37</sup> *See, e.g., id.* at 258; *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 793 (D.C. Cir. 2000)(although factors in evaluating tariff revisions may resemble contract law principles, "they are not intended to replicate a contract law analysis"); *Cahnman v. Sprint Corporation*, 133 F.3d 484, 488 (7<sup>th</sup> Cir. 1998)(FCC uses the principle of reasonableness to determine the validity of a tariff when it is challenged).

<sup>38</sup> *See Petition* at 9-10.

<sup>39</sup> *See Petition* at 10-13.

traffic, which its interconnection agreements “expressly and unambiguously defer[s] to any applicable tariffs.”<sup>40</sup> Although read in isolation the applicable provisions of the interconnection agreements may seem to mean what Global NAPs contends, we cannot conclude that Global NAPs’ construction of the agreements is tenable and that the interconnection agreements are express and unambiguous. In this regard, we note that the relevant language refers to switched access traffic, yet the interconnection agreements do not expressly identify ISP-bound traffic as a species of switched access traffic and the Commission has not expressly identified ISP-bound traffic as switched access traffic. In addition, Global NAPs’ conduct, as described above<sup>41</sup> belies its proffered interpretation. Indeed, had Global NAPs truly believed all along that it had a right under the interconnection agreements to file a federal tariff charging for the delivery of ISP-bound traffic, it surely would have done so immediately, rather than waiting many months (and years, in the case of Massachusetts). Global NAPs has shown itself to be an extremely aggressive defender of its alleged rights,<sup>42</sup> so Global NAPs’ tardiness in exercising this supposed “right” speaks volumes. Consequently, this argument does not alter our interpretation of the facts and circumstances in this record and our conclusion.

16. In addition, according to Global NAPs’ own evidence, in executing the Massachusetts agreement, Rooney stated in writing: “I understand that my client [Global NAPs] will be treated like all

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<sup>40</sup> See *Petition* at 10-11. Specifically, Global NAPs references a provision of the Massachusetts’ interconnection agreement that states: “All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs,” Massachusetts Agreement at ¶ 5.7.3, and provisions in the New Jersey Agreement that state: “All Switched Exchange Access Service and all Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs,” New Jersey Agreement at ¶ 5.7.3, and “Compensation for the transport and termination of traffic not specifically addressed in this section 5.7 shall be as provided elsewhere in this Agreement, or if not so provided, as required by the Tariffs of the Party transporting and/or terminating the traffic” New Jersey Agreement at ¶ 5.7.

<sup>41</sup> See ¶ 11, *supra*.

<sup>42</sup> See Global NAPs, Inc. Petition to Intervene, *In MCI WorldCom Technologies, Inc.*, D.T.E. 97-116 (Mass. D.T.E. filed Mar. 4, 1999); Complaint of Global NAPs, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts, DTE 99-39 (Mass. D.T.E. filed Apr. 16, 1999); *Pleading Cycle Established for Comments on Global NAPs South, Inc. Petition for Preemption of the Jurisdiction of the Pennsylvania Public Utility Commission Regarding Interconnection Dispute with Bell Atlantic-Pennsylvania*, Public Notice, DA 99-900, 14 FCC Rcd 7412 (rel. May 13, 1999); *Global NAPs Petition for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia*, Memorandum Opinion and Order, 15 FCC Rcd 23318 (1999); *Global NAPs Petition for Preemption of the Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey*, Memorandum Opinion and Order, 14 FCC Rcd 12530 (1999); *Global NAPs Petition for Preemption of the Jurisdiction of the Massachusetts Department of Telecommunications and Energy Regarding Interconnection Dispute with New England Telephone and Telegraph Company*, Memorandum Opinion and Order, 15 FCC Rcd 4943 (2000); *Global NAPs Petition for Preemption of the Jurisdiction of the Massachusetts Department of Telecommunications and Energy Regarding Interconnection Dispute with New England Telephone and Telegraph Company*, Order on Review, 16 FCC Rcd. 4976 (2001); *Global NAPs, Inc. v. New England Tel. & Tel. Co., et al.*, CA No. 00-CV-10407-RCL (D. Mass. 2000); *Global NAPs, Inc. v. New England Tel. & Tel. Co., et al.*, CA No. 00-CV-10502-RCL (D. Mass. 2000); *Global NAPs, Inc. v. Bell Atlantic-New Jersey, Inc.*, Civ. No. 99-4074 (JAG) (D.N.J. filed Aug. 26, 1999); Petition for Review, *Global NAPs, Inc. v. FCC*, Case No. 01-1192 (D.C. Cir. filed Apr. 20, 2001).

other carriers on this issue [reciprocal compensation for the delivery of ISP-bound traffic].”<sup>43</sup> As far as this record shows, no other carrier with which Verizon had a similar interconnection agreement has filed a federal tariff charging for the delivery of ISP-bound traffic. Furthermore, the record reflects that Verizon has not paid compensation for the delivery of ISP-bound traffic to any other carrier in Massachusetts or New Jersey having a similar agreement.<sup>44</sup> Moreover, Verizon has not requested compensation for terminating ISP-bound traffic in the manner sought by Global NAPs.<sup>45</sup> In sum, Global NAPs expressly agreed that it would be treated the same as all other similarly situated carriers, and no such carrier received compensation for the delivery of ISP-bound traffic or filed a federal tariff seeking to obtain such compensation. Accordingly, we do not believe that the interconnection agreements themselves allowed Global NAPs to file the Second ISP Tariff.<sup>46</sup>

17. Finally, we do not find that the *Rooney Affidavit*'s other assertions and conclusions undermine the *Order*, given all of the undisputed facts described above. Mr. Rooney's affidavit generally restates the factual record and provides little, if any, new or additional factual evidence from that previously introduced. His affidavit primarily reflects his subjective opinions and characterization of the factual record, while arguing for the Commission to adopt a different methodology than it did in analyzing the facts.<sup>47</sup> Thus, we find Mr. Rooney's characterization and subjective view of the facts unavailing.<sup>48</sup>

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<sup>43</sup> *Global NAPs Second Supplemental Brief*, Attachment – Letter dated April 15, 1997 from William J. Rooney, Counsel for Global NAPs to Bruce P. Beausejour, Counsel for Verizon. Rooney wrote this statement in response to a letter from Verizon that stated, in pertinent part: “Global NAPs would thereafter be treated in the same manner with respect to the payment of reciprocal compensation for traffic that terminates to Internet providers as will other carriers having similar agreements, and in the same manner as Verizon will request compensation for terminating such traffic of other carriers.” *Global NAPs Second Supplemental Brief*, Attachment – Letter dated April 14, 1997 from Bruce P. Beausejour, Counsel for Verizon, to William J. Rooney, Counsel for Global NAPs.

<sup>44</sup> See Second Supplemental Brief of Verizon Communications, Inc., *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed Oct. 29, 2001), at 12.

<sup>45</sup> *Id.*

<sup>46</sup> The New Jersey BPU apparently shares our view of the New Jersey interconnection agreement. In ruling that the agreement did not require Verizon to compensate Global NAPs for the delivery of ISP-bound traffic, the New Jersey BPU remarked that it expected Global NAPs in the future to obtain such compensation – not from Verizon via a federal tariff – but rather from its own end-user customers, including ISPs, via a state tariff (or perhaps contract). *In the Matter of the Petition of Global NAPs, Inc. for the 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*, Decision and Order of the New Jersey Board of Public Utilities (rel. July 7, 1999), at 11. See Formal Complaint, *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed June 1, 2000) (*Verizon Formal Complaint*) at Attachment J.

<sup>47</sup> Compare *Rooney Affidavit* at ¶¶ 5-6, 13-15 with Chronology of Events, *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed Aug. 11, 1999), and Joint Statement of Stipulated Facts, and Key Legal Issues Pursuant to Section 1.732(h) and Joint Statement Pursuant to Section 1.733(7)(b)(2), *Bell Atlantic-Delaware, et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009 (filed June 27, 2000) at 1-13.

<sup>48</sup> Global NAPs also argues that we should reconsider the *Order* because its underlying policy preference favoring interconnection agreements as the context in which to address compensation for ISP-bound traffic was (continued....)

18. To summarize, the *Petition* does not convince us that the Commission erred in concluding that the parties understood that their interconnection agreements alone would govern the issue of compensation for the delivery of ISP-bound traffic. Consequently, we reject the *Petition*'s contention that this conclusion failed to support the Commission's decision to void the Second ISP Tariff *ab initio* as violative of section 201(b).<sup>49</sup>

**B. The Commission Did Not Err in Concluding That the Challenged Tariff Provisions Are Unlawfully Indeterminate.**

19. Under Global NAPs' Second ISP Tariff, a carrier is charged whenever it delivers traffic to Global NAPs for further delivery to an ISP, unless the originating carrier has already made "Alternative Payments."<sup>50</sup> These "Alternative Payments" for the termination of ISP-bound calls must occur under two scenarios: (1) where the LEC (and presumably Global NAPs) "treats" the ISP-bound traffic as local; or (2) where "state regulators ... direct other payment arrangements ..."<sup>51</sup>

20. The *Order* concludes that these Tariff provisions are unlawfully indeterminate under section 201(b) of the Act and section 61.2 of the Commission's rules, because a carrier cannot discern from the face of these provisions whether it has incurred any charges thereunder.<sup>52</sup> In particular, under the "Alternative Payments" language of the Tariff, a carrier must first determine whether it has made any payments to Global NAPs, and, if so, it then must attempt to determine whether the payment was for the delivery of ISP-bound traffic and whether it occurred pursuant to an interconnection agreement, a state-

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rejected in the Commission's subsequent *ISP Remand Order*. See *Global NAPs Supplemental Brief* at 2-4; *Global NAPs Supplemental Reply Brief* at 1-2; *Global NAPs Second Supplemental Brief* at 2-3; *Global NAPs Second Supplemental Reply Brief* at 4-5. Contrary to Global NAPs' contention, however, the *Order* was not premised upon a policy preference that interconnection agreements address compensation for the delivery of ISP-bound traffic. Rather, the *Order* found that Global NAPs' conduct in filing a tariff contradictory to its prior understanding that the parties' interconnection agreements alone would govern the question of compensation for ISP-bound traffic was unjust and unreasonable. The *Order* states that "[i]t would be unjust and unreasonable to allow the issue of inter-carrier compensation for delivery of ISP-bound traffic to be subject to one outcome under a carrier's interconnection agreements and another pursuant to a federal tariff." *Order*, 2000 WL 1593346 at ¶ 15. Nothing in the *ISP Remand Order* alters this conclusion.

<sup>49</sup> Global NAPs further argues that the Commission's *Order* erroneously assumes that section 203 of the Act, 47 U.S.C. § 203, does not require or even permit Global NAPs to file a federal tariff imposing charges for delivering ISP-bound traffic. *Global NAPs Second Supplemental Reply* at 4. This argument misses the mark, however, as the *Order* does not make any determination regarding whether section 203 required or permitted Global NAPs to file the Second ISP-Tariff. Rather, the *Order* simply assumes that section 203 allowed Global NAPs to file the Tariff, but holds, nevertheless, that the Tariff was void *ab initio* under section 201(b) because it conflicts with the parties' understanding with respect to compensation for the delivery of ISP-bound traffic. See *Order*, 2000 WL 1593346 at 14; see also *Global NAPs I*, 12 FCC Rcd at 12958. Consequently, Global NAPs' argument about section 203 does not alter the Commission's conclusions.

<sup>50</sup> Second ISP Tariff at 82, Section 7.2, *Verizon Formal Complaint* at Attachment A.

<sup>51</sup> *Id.*

<sup>52</sup> *Order*, 2000 WL 1593346 at ¶¶ 22-25. Section 61.2 of the Commission's rules provides, in pertinent part: "In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2.

directed payment arrangement, or some other scenario. Thus, it is unlawfully impossible to determine, from the face of the Second ISP Tariff, whether the Tariff requires payment for the delivery of ISP-bound traffic.

21. Global NAPS challenges this conclusion, but in doing so offers no new arguments or evidence. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.<sup>53</sup> The *Global NAPS Petition* fails to satisfy either requirement. For this reason alone, we deny the *Petition*'s arguments regarding the Tariff's ambiguity.

22. Moreover, the *Order*'s conclusion that the Second ISP Tariff is unlawfully indeterminate is supported by the D.C. Circuit's subsequent affirmance of the Commission's conclusion in *Global NAPS I* that Global NAPS' First ISP Tariff was unlawfully indeterminate.<sup>54</sup> Although different wording is used, we construe the relevant language in the Second ISP Tariff to mean essentially the same things as the unlawful language in the First ISP Tariff: in order to determine whether the Second ISP Tariff requires payment for the delivery of ISP-bound traffic, a carrier would have to (1) consult its checkbook, *and* (2) consult its interconnection agreement to determine if payment was made pursuant to that agreement, *and* (3) consult any relevant state commission decisions to determine if payment was made pursuant thereto.<sup>55</sup> In other words, as the D.C. Circuit stated regarding the First ISP Tariff, "[a]ny reasonable construction of the tariff's language would require a customer to consult the interconnection agreement to determine whether the tariff applied."<sup>56</sup> This violates our rule prohibiting fundamental facial ambiguity.

23. The D.C. Circuit's affirmance of *Global NAPS I* further supports the Commission's conclusion invalidating the Second ISP Tariff on other grounds not previously noted in the *Order*. In *Global NAPS I*, the Commission held, *inter alia*, 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 parties' interconnection agreement ...."<sup>57</sup> Based upon this rationale, the Commission concluded that Global NAPS' First ISP Tariff was unjust and unreasonable, *inter alia*, because it purported to require payment for the delivery of ISP-bound traffic even when an applicable interconnection agreement required no such payment, *e.g.*, a bill and keep arrangement.<sup>58</sup> We find that Global NAPS' Second ISP Tariff suffers from this same fatality, because it purports to require compensation for the delivery of ISP-bound traffic even when an applicable interconnection agreement requires the contrary.<sup>59</sup> Consequently, we deny Global NAPS' request for reconsideration for this reason, as well.

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<sup>53</sup> See, *e.g.*, *WWIZ, Inc.*, 37 FCC 685, 686, *aff'd sub nom., Lorrain Journal Co., v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106.

<sup>54</sup> *Global NAPS v. FCC*, 247 F.3d at 258.

<sup>55</sup> See *Order*, 2000 WL 1593346, ¶ 23 and n.57 ("Mere *ipse dixit* statements that a tariff is self-contained, ... do not eliminate the references to voluntary and state-directed 'arrangements.'"). See also, *id.* at ¶ 24.

<sup>56</sup> *Global NAPS v. FCC*, 247 F.3d at 258.

<sup>57</sup> *Global NAPS I*, 15 FCC Rcd at 12959, ¶ 23.

<sup>58</sup> *Id.*

<sup>59</sup> See *Global NAPS I*, 15 FCC Rcd 15 12959, ¶ 23.

**C. The Commission Did Not Err By Invalidating the Second ISP Tariff *Ab Initio*.**

24. Global NAPs argues that the Commission exceeded its authority by voiding the Second ISP Tariff *ab initio*, which also led the Commission erroneously (i) to overlook Verizon's lack of standing and (ii) to fail to determine a reasonable reciprocal compensation rate.<sup>60</sup> Global NAPs simply rehashes its prior arguments on these issues, and does not raise any new arguments or offer any new evidence. Moreover, the D.C. Circuit has squarely rejected these very same arguments.<sup>61</sup> Thus, we deny Global NAPs' request for reconsideration of these issues.

25. Global NAPS also argues that the Filed Rate Doctrine precludes us from rendering its filing of the Second ISP Tariff unlawful based on a pre-existing understanding between the parties.<sup>62</sup> In making this argument, Global NAPs simply rehashes its prior arguments on this issue in support of its *Petition*, without offering anything new to demonstrate a material error or omission in the original order. For this reason alone, we deny the *Petition*'s arguments regarding the Filed Rate Doctrine. Moreover, contrary to Global NAPs' argument, the Filed Rate Doctrine does not insulate tariffs from legal challenges under section 201(b).<sup>63</sup> As the *Order* explained, "it is well established that the rates and practices carriers seek to shelter pursuant to the Filed Rate Doctrine are always subject to an inquiry into their reasonableness."<sup>64</sup> Therefore, for all of the reasons previously stated above and in the *Order*, we reject Global NAPs' Filed Rate Doctrine argument.

**D. The Commission Did Not Violate Global NAPs' Due Process Rights.**

26. Global NAPs argues that the *Order* violated the Commission's own rules and, consequently, Global NAPs' due process rights, because "[t]he question whether Global NAPs contracted away its right to be paid for ISP-bound calls – under any theory – was never raised or briefed by the parties."<sup>65</sup> Global NAPs maintains, in other words, that the Commission cannot base its holding in a section 208 proceeding on a legal theory not specifically advanced by the complainant.

27. Global NAPs' contention lacks merit, for several reasons. First, the D.C. Circuit has squarely held that the Commission **can** base its holding in a section 208 proceeding on a legal theory not

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<sup>60</sup> See *Global NAPs Petition* at 19-24; *Global NAPs Reply* at 2-4; *Global NAPs Supplemental Brief* at 4-5; *Global NAPs Second Supplemental Reply Brief* at 4-5.

<sup>61</sup> *Global NAPs v. FCC*, 247 F.3d at 259-60.

<sup>62</sup> See *Global NAPs Petition* at 14-17; *Global NAPs Reply* at 4-5; *Global NAPs Second Supplemental Brief* at 3-4.

<sup>63</sup> *Order*, 2000 WL 1593346 at ¶¶ 19-21. The only authority cited by Global NAPs merely holds that claims brought in court pursuant to state law concerning matters covered in a federal tariff are barred by the Filed Rate Doctrine. *Global NAPs Petition* at 15, n.17 (citing *Fax Telecommunications, Inc. v. AT&T*, 138 F.3d 479 (2<sup>nd</sup> Cir. 1998)). That authority does **not** hold that claims brought at the Commission pursuant to section 201(b) of the Act are so barred.

<sup>64</sup> *Order*, 2000 WL 1593346 at ¶ 20.

<sup>65</sup> *Global NAPs Petition* at 2; see *id.* at 5-8; *Global NAPs Reply Brief* at 1, 6-9; *Global NAPs Supplemental Reply Brief* at 2-3; *Global NAPs Second Supplemental Brief* at 3; *Global NAPs Second Supplemental Reply Brief* at 1-2.

specifically advanced by the complainant, where the defendant has a fair opportunity to address the theory on reconsideration.<sup>66</sup> Here, during the reconsideration phase of this proceeding, Commission staff afforded Global NAPs ample opportunity to provide evidence and argument regarding the parties' understanding of the interconnection agreements' scope; and Global NAPs took full advantage of that opportunity.<sup>67</sup> Moreover, as explained at length in the *Global NAPs I Recon Order*, the Commission has discretion to consider an argument not raised by the parties, if such consideration is necessary to decide a complaint correctly.<sup>68</sup> In any event, Verizon did, in fact, raise arguments regarding the scope and effect of the interconnection agreements that fairly resemble, if not precisely mirror, the arguments on which the *Order* relies.<sup>69</sup> Accordingly, we reject the contention that the *Order* violated Global NAPs' due process rights.

#### IV. CONCLUSION

28. Having found, and been upheld in our determination, that Global NAPs must lose in its first attempt to "game" the system in which it voluntarily participated, we find that the *Petition* fails to demonstrate why Global NAPs' second attempt should fare any better. Consequently, for all of the reasons stated above and in the *Order*, we deny the *Petition*.

#### V. 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

Marlene H. Dortch  
Secretary

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<sup>66</sup> *Global NAPs v. FCC*, 247 F.3d at 257.

<sup>67</sup> See note 21, *supra*.

<sup>68</sup> *Global NAPs I Recon Order*, 15 FCC Red at 5999-6002, ¶¶ 6-12. The D.C. Circuit did not reach this aspect of the Commission's decision.

<sup>69</sup> *Verizon Formal Complaint* at 6, 10-12, ¶¶ 10, 17-20. See Complainants Initial Brief, *Bell Atlantic-Delaware, Inc. et al. v. Global NAPs, Inc.* File No. EB-00-MD-009 (filed July 28, 2000) at 5; Bell Atlantic's Brief on Non-Cost Issues, *Bell Atlantic-Delaware, Inc. et al. v. Global NAPs, Inc.* File No. E-99-22 (filed Sept. 2, 1998) at 10-12; Bell Atlantic Reply Brief on Non-Cost Issues, *Bell Atlantic-Delaware, Inc. et al. v. Global NAPs, Inc.* File No. E-99-22 (filed Sept. 15, 1999) at 3-7.