BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of: Petition of GLOBAL NAPS SOUTH, INC. For Arbitration of Interconnection Rates, Terms and Conditions and Related Relief of Proposed Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996	Docket No. 991220-TP Filed: February 2, 2000

BRIEF OF GLOBAL NAPS, INC.

Pursuant to the schedule agreed to by the parties and the staff, Global NAPs, Inc. ("Global NAPs") respectfully submits its opening brief on the question of the term of its contract with BellSouth Telecommunications, Inc. ("BellSouth").

Introduction and Summary

This brief addresses the issue of the length of the BellSouth-Global NAPs interconnection agreement. As far as Global NAPs can tell, the parties agree that under Section 252(i) of the federal Telecommunications Act of 1996, 47 U.S.C. § 252(i), Global NAPs was entitled to, and received, "the same" contract with BellSouth that DeltaCom had with BellSouth. Where the parties differ is what "the same" means in this context.

There is no dispute that DeltaCom got a two-year contract. If "the same contract as DeltaCom" means a contract with a two-year term, then the BellSouth-Global NAPs contract remains in force until January 2001, and the pending arbitration between the parties may be dismissed. If, however, "the same contract as DeltaCom" means a contract whose term expired on July 1, 1999, then the various other issues in the case have to be arbitrated.

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The question of the term of the contract is a matter of law, to be determined by reference to two factors. First is the language of the contract. Second is the language and purpose of Section 252(i). As described below, both of these factors plainly support the

conclusion that, when Global NAPs adopted the DeltaCom agreement, it got "the same" deal that DeltaCom got — a contract that runs for two years from its effective date.

The Commission should issue an order to this effect as soon as practicable, thereby bringing this litigation to a close and saving the parties extensive time and effort needlessly litigating matters that do not need to be resolved for almost a year.

The Contract Can Only Rationally Be Interpreted As Having A Two-Year Term

Several considerations based on the contractual language show that Global NAPs obtained a two-year agreement with BellSouth when it adopted DeltaCom's two-year agreement.

First is the specific language of the contract. The original DeltaCom contract states that "[t]he term of this agreement ***shall be two years***" from its effective date of July 1, 1997. Interconnection Agreement between DeltaCom, Inc. and BellSouth Telecommunications, Inc., Section XVII.A. This language plainly contemplates that the contract runs for two years — exactly what Global NAPs thought it was getting when it adopted the contract. Here, the adoption agreement between Global NAPs and BellSouth states that ***its*** effective date is January 18, 1999. Adoption Agreement between BellSouth Telecommunications, Inc. and Global NAPs South, Inc., January 18, 1999 (attached as Exhibit 1), Preamble. "The term of [the] agreement" between Global NAPs and BellSouth, therefore, is "two years" from ***its*** effective date of January 18, 1999.

This interpretation is confirmed by the Commission's own action in approving the agreement back in 1997. In describing the contract, the Commission did not focus on any specific dates. To the contrary, the Commission stated that "[t]his agreement ***covers a two-year period*** and governs the relationship between the companies ... ."[1] The Commission itself,

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[1] In re: Petition for approval of resale, interconnection, and unbundling agreement between BellSouth Telecommunications, Inc. and DeltaCom, Inc., pursuant to Section 252 of the Telecommunications Act of 1996, *Order Approving Resale, Interconnection, and Unbundling Agreement*, Docket No. 970804-TP, Order NO. PSC-97-1265-FOF-TP (issued October 14, 1997).

therefore, understood that the contract established a relationship covering a "two-year period," not a period with a specific ending date.

Any uncertainty on this point can be resolved by considering other sections of the DeltaCom agreement relating to the contract's term. Section XVII.B (emphasis added) states:

> The Parties agree that ***by no later than July 1, 1998***, they shall commence negotiations with regard to the terms, conditions and prices of local interconnection to be effective beginning July 1, 1999.

This provision plainly envisions a logical, orderly process: the contract remains in effect for a year and then — presumably based on a years worth of experience — the parties initiate a negotiation process to establish a new contract after the two-year term has run.

Global NAPs believes that this is a completely sensible provision and thinks it should apply as between Global NAPs and BellSouth. That is, beginning in approximately January 2000, Global NAPs and BellSouth should begin negotiating an agreement to replace the existing one, when it expires in January 2001. In each case — that is, for both DeltaCom and Global NAPs — the affected CLEC would have a reasonable period within which to conduct sensible and well-informed negotiations for a successor contract.

BellSouth's view is apparently that when Global NAPs adopts the interconnection agreement, the ***starting date*** is adjusted, but not the ***ending date***. This interpretation, however, would deprive Global NAPs of the orderly and measured renegotiation process that BellSouth and DeltaCom bargained for and received.

In this regard, note that, if the specific dates in the contract are not ***all*** adjusted, then both BellSouth and Global NAPs were in breach of Section XVII.B ***the instant that the adoption agreement was signed***. As noted above, that provision ***requires*** that the parties begin negotiating a new agreement by ... when? Under Global NAPs' interpretation — that is, under an interpretation that adjusts specific dates in the agreement forward to reflect a Global NAPs/BellSouth effective date of January 18, 1999 — the obligation to begin renegotiation kicked in on January 18, 2000. But under BellSouth's interpretation — adjusting ***only the***

starting date, but no other dates— both parties were in breach immediately. By denying that the termination date (and other dates in the contract) adjust with the changed effective date, BellSouth is asking the Commission to believe that both BellSouth and Global NAPs entered into an agreement that they were both breaching from day one.

Section XVII.C of the DeltaCom agreement is to the same effect. That provision addresses what happens if the parties are unable to reach a negotiated agreement:

> If, within 90 days of commencing the negotiation referred to in Section XVII.B above, the Parties are unable to satisfactorily negotiate new local interconnection terms, conditions and prices, either Party may petition the state commission to establish appropriate local interconnection arrangements pursuant to 47 U.S.C. 252. The parties agree that, in such event, they shall encourage the Commission to enter its order regarding the appropriate local interconnection arrangements ***no later than January 1, 1999.*** The parties further agree that in the event the Commission does not issue its order prior to January 1, 1999 or if the parties continue beyond July 1, 1999 to negotiate the local interconnection arrangements without Commission intervention, the terms, conditions and prices ultimately ordered by the Commission, or negotiated by the Parties, will be effective retroactive to July 1, 1999. ...

DeltaCom Agreement, Section XVII.C (emphasis added). Here again, the orderly structure for replacing the initial two-year agreement with a successor agreement is clearly visible. The parties would have 90 days to try to negotiate, after which they are free (as far as the parties themselves are concerned) to file an arbitration petition with the Commission.[2] Following that period, the parties agree to urge this Commission to reach a decision by "January 1, 1999."

As noted above, the agreement between Global NAPs and BellSouth did not even take effect until January 18, 1999. The January 1, 1999 date in Section XVII.C of the agreement is simply nonsensical when viewed in the context of the time that the relationship between Global NAPs and BellSouth actually began. The only way to make sense of it — and the only

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[2] Under 47 U.S.C. § 252(b), a formal arbitration petition may not be filed until the 135th day of negotiations. On the other hand, under Section 252(b), negotiating parties may at any time seek mediation from the Commission. Presumably this latter request for Commission intervention would be appropriate under the agreement.

way to give Global NAPs the benefit of the orderly renegotiation process included in the agreement — is to adjust the January 1, 1999 date forward to a date that is 18 months into the two-year term of the Global NAPs/BellSouth agreement.

So, under BellSouth's interpretation of the agreement, both Global NAPs and BellSouth were in breach of Section XVII.B the instant the adoption agreement was signed, and Section XVII.C makes no sense. Under Global NAPs' interpretation, by contrast, the dates in each of those provisions would be adjusted — just as the effective date of the DeltaCom agreement was adjusted — so that both of them are sensible and enforceable. These two provisions, therefore, starkly illustrate that BellSouth's view of the term of the contract cannot be sustained, considering only the language of the contract itself.

Other provisions of the contract illustrate the same point, if not quite so starkly. To see that this is so, when considering the provisions discussed below, bear in mind that the entire term of the contract, under BellSouth's view, is five and one-half months (from January 18 through July 1, 1999).

First consider Section IV.I of the agreement, "Addition of Network Elements." That provision states that the CLEC may at any time request network elements not included in the original contract. BellSouth shall accept or reject the request within 30 days, provide pricing within 45 days, and provide "actual interconnection and provision of service" within 90 days. Under BellSouth's interpretation of the agreement, even if Global NAPs requested additional network elements the day the contract was signed, and even if BellSouth met the 90-day deadline, the newly requested network element would only be covered under the contract for two-and-one-half months out of the agreement's (supposed) five-and-one-half month term.

An even worse problem arises in establishing and changing interconnection methods. Under Section V.E.5, the parties are to use "good faith efforts" to establish a "grooming plan" for their interconnection arrangements necessary to maintain an industry-standard level of traffic blockage between their networks, "within 90 days following execution of this agreement." As between Global NAPs and BellSouth, the "90 days following execution"

must refer to the January 19, 1999 date (not the 1997 date applicable to DeltaCom).[3] But the problem goes further than that when this provision is read in connection with Section V.C.2. After the development of the "grooming plan" uses up three of the agreement's (supposed) five-and-one-half months, suppose Global NAPs wants to ***change*** its interconnection arrangements. Under Section V.C.2, changing interconnection terms requires 60 days notice. In practical terms, therefore, the right to change interconnection arrangements under the agreement — an important factor as the market evolves — would be, basically, a nullity. Once initial interconnection arrangements are established following the "grooming plan," there would not be enough time left under the agreement to actually make any changes.[4]

The basic problem here is that DeltaCom plainly negotiated for, and obtained, an agreement with a two-year term. Within the context of a two-year agreement, the provisions noted above with 90-day periods for this and 60-day periods for that are logical and reasonable. Within the context of a five-and-one-half month agreement, however, they are not. There is no reason to interpret the agreement between Global NAPs and BellSouth in such an irrational manner at all; and there is plainly no justification for such an approach under Section 252(i).

Moreover, this interpretation — that Global NAPs and DeltaCom each got a ***two-year*** agreement — accords with common sense. Interconnection arrangements between ILECs and CLECs are complex matters involving (at a minimum) identifying physical interconnection points at which traffic will be exchanged; installing facilities to those points; testing them; etc. At the same time, a CLEC entering the market under particular terms and conditions will need to make substantial investments in switching and other gear. DeltaCom plainly bargained for and received a contract that would allow it to operate in a set, stable contractual environment for a reasonable period of time — two years. The two-year term provided a sound basis upon which DeltaCom could begin business in Florida. BellSouth's approach to adopting agreements would

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[3] As with the renegotiation provisions discussed above, if the time period in Section V.E.5 is pegged to the original execution date, either the parties are instantly in breach, or the provision simply makes no sense. Neither of these problems arises under Global NAPs' view of the term of the contract.

[4] To the same effect is Section V.E.14, which provides that a Point of Interface (POI) may be changed with a "target" installation interval of 60 calendar days.

inherently deprive CLECs seeking to exercise their rights under Section 252(i) of precisely these benefits. That approach, therefore, cannot logically be viewed as giving the CLEC seeking to adopt an existing agreement "the same" terms as contained in the original.

Section 252(i) Supports Interpreting The BellSouth/Global NAPs Contract As Having A Two-Year Term

BellSouth and Global NAPs did not "negotiate" the detailed terms and conditions of their interconnection agreement. Global NAPs simply exercised its right under Section 252(i) to operate under the same terms and conditions as contained in the DeltaCom agreement.

Section 252(i) is an important anti-discrimination provision in the Telecommunications Act of 1996. It ensures that all CLECs operate on an even footing. Any deal that an ILEC makes available to one CLEC is automatically available to all CLECs. No CLEC can get any advantage over any other CLEC.

From this perspective, the first question is, what terms did DeltaCom receive? Whatever the answer to that question, Global NAPs gets the same terms and conditions.

It is quite clear that DeltaCom received a two-year contract — that is how the contract itself describes its term, as discussed above, and various provisions of the agreement do not make any sense unless a two-year term is in place. Under the most logical reading of Section 252(i), therefore, Global NAPs is entitled to a two-year term, just like DeltaCom.

Global NAPs will not anticipate in detail BellSouth's objections to this conclusion. That said, BellSouth appears to be relying on the bugaboo of "daisy-chaining" contracts to oppose granting Global NAPs the same terms that DeltaCom received. If Global NAPs (or any other CLEC) can "opt into" a two-year contract 18 months into its term and receive a ***new*** two-year term, the argument goes, how could BellSouth ***ever*** have a realistic opportunity to renegotiate an agreement?

The answer to this concern is actually fairly simple: 47 C.F.R. § 51.809. That is the Federal Communications Commission's rule interpreting Section 252(i) of the Act. Rule 51.809(a) restates the general rule in the statute — that all terms and conditions made available to any CLEC are available to all CLECs. But Rules 51.809(b) and (c) provide specific grounds on which an ILEC may show that it does ***not*** have to give one CLEC the same terms that have been given to another. These are, basically, a showing that providing a particular interconnection arrangement has become more expensive for the ILEC than at the time the original contract was agreed to, or a showing that a particular interconnection arrangement has become technically infeasible. *See* 47 C.F.R. §§ 51.809(b)(1), (b)(2). Moreover, even if costs or technology have not changed sufficiently to warrant a literal application of either subsection of Rule 51.809(b), an ILEC may still assert that they have changed ***enough*** so that it is no longer "reasonable" to allow a CLEC to opt into them.

Under Rule 51.809 — which the Supreme Court described as more favorable to ILECs than literally required by Section 252(i)[5] — the "daisy-chaining" problem simply evaporates. If a CLEC wants to opt into an interconnection agreement with a two-year term, it may do so — unless the ILEC can show that one or more provisions of the agreement is no longer available under the standards of the rule. In that case, the ILEC will not have to make those provisions available to CLECs. No "daisy-chaining" will occur.

But suppose that there is actually nothing wrong with any aspect of a soon-to-expire interconnection agreement under the standards of Rule 51.089. In that case, there is no possible basis for saying that the CLEC trying to opt into its terms cannot have them for the same period of time that the original CLEC had them for.

Viewed from a logical perspective, the problem with the "daisy-chaining" argument is that it assumes what it is trying to prove. To say that there is something wrong with allowing a CLEC to opt into an existing agreement for the full term of that agreement (here, two years) would be unfair or unreasonable ***presupposes that there is something substantively wrong***

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5 *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

with the agreement to be adopted. If there ***is*** something wrong with it, Rule 51.809 provides a vehicle for the ILEC to point that out and prevent the adoption. But if there ***isn't*** anything wrong with it — the situation, Global NAPs submits, applicable to the DeltaCom agreement — there is no reason to object to the supposed "daisy-chaining" in the first place.

Viewed from a legal perspective, the Commission has expressly held that the terms of the BellSouth/DeltaCom agreement are acceptable under the relevant legal standard included in the Telecommunications Act of 1996. Rule 51.809 provides specific criteria for an ILEC to show that the earlier Commission approval of the terms of that agreement — taking into account the two-year duration of the contract — should not be extended into the future. In the absence of such a showing, however, the only logical presumption is that an agreement that was substantively reasonable before is substantively reasonable now.

In these circumstances, if BellSouth had any actual objection to making any particular provision in the DeltaCom agreement available to Global NAPs for a two-year term, it could have raised those objections with the Commission at the time the agreement was to be submitted for approval. In this regard, it is noteworthy that to this day BellSouth has not identified a single provision of the DeltaCom agreement that it claims is either more costly to provide to Global NAPs than to DeltaCom or has in some way become technically infeasible. It follows that there is no basis, under Section 252(i) or Rule 51.809, to deny Global NAPs the same provisions, with the same two-year term, as was provided to DeltaCom.

Conclusion

The agreement that Global NAPs opted into says on its face that it has a two-year term. When the Commission approved that agreement, it characterized it as having a two-year term. If the agreement is ***not*** viewed as having a two-year term, certain provisions are difficult if not impossible to apply, and the parties were instantly in breach of other provisions the moment the agreement was signed. BellSouth could have, but did not, identify any provision of the agreement that is either too costly or technically infeasible, as contemplated by federal Rule 51.809.

In these circumstances, the only reasonable conclusion is that when Global NAPs adopted the DeltaCom agreement, Global NAPs got an agreement with a two-year term, just like DeltaCom got. The Commission should promptly so rule, and direct the parties (pursuant to Section XVII.B of the agreement) to begin the process of negotiating a follow-on agreement to take effect on January 18, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 2nd day of February, 2000 by U.S. Mail to Michael P. Goggin, BellSouth Telecommunications, Inc., Museum Tower, Suite 1910, 150 West Flagler Street, Miami, FL 33130, R. Douglas Lackey and E. Earl Edenfield, Jr., BellSouth Telecommunications, Inc.,

BellSouth Center, Suite 4300, 675 W. Peachtree Street, N.E., Atlanta, GA 30375, Beth Keating, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399 and Nanette Edwards, Regulatory Attorney, ITC DeltaCom, 700 Boulevard South, Suite 101, Huntsville, AL 35802.

Cathy M. Sellers

AGREEMENT

This Agreement, which shall become effective as of the 18th day of January, 1999, is entered into by and between Global Naps South, Inc. ("Global Naps") a Virginia corporation on behalf of itself, and BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, having an office at 675 W. Peachtree Street, Atlanta, Georgia, 30375, on behalf of itself and its successors and assigns.

WHEREAS, the Telecommunications Act of 1996 (the "Act") was signed into law on February 8, 1996; and

WHEREAS, section 252(i) of the Act requires BellSouth to make available any interconnection, service, or network element provided under an agreement approved by the appropriate state regulatory body to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement in its entirety; and

WHEREAS, Global Naps has requested that BellSouth make available the interconnection agreement in its entirety executed between BellSouth and DeltaCom, Inc. dated July 1, 1997 in the state(s) of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

NOW, THEREFORE, in consideration of the promises and mutual covenants of this Agreement, Global Naps and BellSouth hereby agree as follows:

1. Global Naps and BellSouth shall adopt in its entirety the DeltaCom, Inc. Interconnection Agreement dated July 1, 1997 and any and all amendments to said agreement executed and approved by the appropriate state regulatory commission as of the date of the execution of this Agreement. The DeltaCom, Inc. Interconnection Agreement and all amendments are attached hereto as Exhibit 1 and incorporated herein by this reference.

2. The term of this Agreement shall be from the effective date as set forth above and shall expire on July 1, 1999, unless an alternate expiration date is mutually agreed to by the Parties or ordered by a Commission, the FCC or a court of competent jurisdiction.

3. Global Naps shall accept and incorporate any amendments to the DeltaCom, Inc. Interconnection Agreement executed as a result of any final judicial, regulatory, or legislative action.

EXHIBIT

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4. Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered in person or given by postage prepaid mail, address to:

BellSouth Telecommunications, Inc.

CLEC Account Team
9th Floor
600 North 19th Street
Birmingham, Alabama 35203

and

General Attorney - COU
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

Global Naps South, Inc.
William Rooney, Jr.
10 Merrymount Road
Quincy, Massachusetts 02169

or at such other address as the intended recipient previously shall have designated by written notice to the other Party. Where specifically required, notices shall be by certified or registered mail. Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

IN WITNESS WHEREOF, the Parties have executed this Agreement through their authorized representatives.

BellSouth Telecommunications, Inc.	Global Naps South, Inc.
Signature	Signature
Jerry D. Hendrix	
Name	Name
1/18/99	
Date	Date