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00 MAY 22 PM 4:41

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RECORDS AND
REPORTING

May 22, 2000

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 991946-TP (ITC^DeltaCom Complaint)

Dear Ms. Bayó:

Enclosed are originals and fifteen copies each of:

- (1) BellSouth Telecommunications, Inc.'s Response in Opposition to ITC^DeltaCom Communication Inc.'s Motion for Summary Final Order;
- (2) BellSouth Telecommunications, Inc.'s Response to Motion of ITC^DeltaCom Communication Inc. to Continue Proceedings.

We ask that you file both of these in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

E. Earl Edenfield Jr. (Encl)
E. Earl Edenfield, Jr.

APP _____
 CAF _____
CMP *Marsh*
 COM 3
 CTR _____
 ECR _____
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 OPC _____
 PAI _____
 RGO _____
 SEC 1
 SER _____
 OTH _____

cc: All Parties of Record
 Marshall M. Criser III
 R Douglas Lackey
 cy B. White

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

06302 MAY 22 8

FPSC-RECORDS/REPORTING

**CERTIFICATE OF SERVICE
DOCKET NO. 991946-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
U.S. Mail this 22nd day of May, 2000 to the following:

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Represents ITC^DeltaCom

E. Earl Edenfield, Jr.
E. Earl Edenfield, Jr. (EM)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:)	
)	Docket No. 991946-TP
Complaint of ITC^DeltaCom)	
Communications, Inc. Against BellSouth)	
Telecommunications, Inc. for Breach of)	
Interconnection Terms, and Request for)	
Immediate Relief)	Filed: May 22, 2000
_____)		

**BELLSOUTH TELECOMMUNICATION INC.'S RESPONSE IN
OPPOSITION TO ITC^DELTACOM COMMUNICATION INC.'S
MOTION FOR SUMMARY FINAL ORDER**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Florida Public Service Commission ("Commission") deny the Motion for Summary Final Order filed by ITC^DeltaCom Communications, Inc. ("DeltaCom") on May 15, 2000. Contrary to DeltaCom's Motion, there are genuine issues of material fact that preclude summary disposition of this case. The issues raised by DeltaCom in this proceeding should be decided only after the parties have been given the opportunity for discovery and the Commission has concluded the evidentiary hearing currently scheduled for August 24, 2000.¹ Accordingly, DeltaCom's Motion should be denied.

DISCUSSION

DeltaCom's argument that there are no genuine issues of fact in this proceeding appears to be predicated upon three arguments: (1) other state commissions and certain federal courts have upheld the payment of reciprocal compensation for ISP-bound traffic;

¹ On May 18, 2000, the Pre-Hearing Officer entered an Order Establishing Procedure (Order No. PSC-00-0979-PCO-TP) setting forth a detailed procedural schedule and hearing date.

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(2) the Commission's *Global NAPs* decision² is binding on the parties to this proceeding; and, (3) based on a collateral estoppel theory, the Commission is bound by a decision from the Alabama Public Service Commission interpreting the DeltaCom/BellSouth Interconnection Agreement at issue in this proceeding. As demonstrated below, there are genuine issues of fact to be decided by the Commission, thus DeltaCom is not entitled to judgment as a matter of law.

A. There are Genuine Issues of Fact to be Decided by the Commission.

The issue to be decided in this case is whether BellSouth and DeltaCom mutually agreed to pay reciprocal compensation for ISP-bound traffic under their Interconnection Agreement -- an issue this Commission has not previously addressed. In resolving this issue, the Commission must consider the facts and circumstances surrounding the execution of that Agreement in March 1997 as well as the amendment to that Agreement in August 1997. Many of these facts are discussed in the Affidavit of Jerry Hendrix, which is attached to BellSouth's Motion for Reconsideration filed in the *Global NAPs* proceeding.³ As set forth in the Affidavit of Jerry Hendrix, BellSouth and DeltaCom did not mutually agree to pay reciprocal compensation for ISP-bound traffic when they executed their Interconnection Agreement in March 1997, since it contained a bill and keep provision that did not obligate the parties to pay reciprocal compensation for any traffic, let alone ISP-bound traffic. Hendrix Affidavit ¶ 2. A bill and keep arrangement

² *In re: Complaint and/or Petition for Arbitration by Global Naps, Inc. for Enforcement of Section VI(B) of its Interconnection Agreement with BellSouth Telecommunications, Inc. and Request for Relief*, FPSC Docket No. 991267-TP (Order No. PSC-00-0802-FOF-TP), dated April 24, 2000.

³ The Motion for Reconsideration, together with the Affidavit of Jerry Hendrix, is attached as Exhibit A and incorporated by reference as if fully set forth herein.

would make no economic sense if ISP-bound traffic were included within the definition of "local traffic" under the parties' Interconnection Agreement, as DeltaCom claims. Hendrix Affidavit, ¶ 4.

In August 1997, the parties executed an amendment to the Agreement that replaced the bill and keep provision with a provision requiring the payment of reciprocal compensation for the transport and termination of local traffic. Although the issue of ISP-bound traffic was not discussed when the amendment was negotiated, there is compelling evidence to suggest that DeltaCom either knew or should have known BellSouth's position that ISP-bound traffic was not subject to the payment of reciprocal compensation before the amendment took effect. This evidence includes the fact that: (1) the individual representing DeltaCom in negotiating the amendment was a former BellSouth employee who previously worked as a regulatory manager for BellSouth in the state of Alabama and who has acknowledged knowing BellSouth's position that ISP-bound traffic is interstate in nature; and (2) prior to the amendment taking effect, BellSouth had posted written notice on its website and sent a letter to all ALECs, including DeltaCom, reiterating BellSouth's position that ISP traffic was interstate in nature and not subject to the payment of reciprocal compensation. Hendrix Affidavit, ¶ 7. These facts belie any notion that BellSouth and DeltaCom mutually agreed to pay reciprocal compensation for ISP-bound traffic.

Clearly, genuine issues of material fact exist that preclude granting DeltaCom judgment "as a matter of law." Therefore, the Commission should hear all the evidence and then render an informed judgment on the issues in this case.

B. The State Commission Decisions on ISP Traffic Cited by DeltaCom, Including Previous Decisions of this Commission, are not Relevant to the Resolution of this Proceeding.

In support of its position, DeltaCom notes that “five state commissions have addressed the same issue in proceedings in which BST was a party: Alabama, Florida, Georgia, North Carolina and Tennessee.” DeltaCom Motion, at 5. DeltaCom appears to imply that the Commission should summarily rule in DeltaCom’s favor because BellSouth has never prevailed in an ISP dispute in its region. DeltaCom, however, conveniently fails to mention that the Louisiana Public Service Commission also considered this issue, based on language very similar to that found in the DeltaCom/BellSouth Interconnection Agreement, and ruled that reciprocal compensation was not due for ISP traffic.⁴ Although in the context of a §252 Arbitration, the South Carolina Public Service Commission also ruled that reciprocal compensation is not owed for ISP traffic.⁵ Clearly, BellSouth has received mixed results on this issue in its region. As DeltaCom’s Motion is obviously based on incorrect assumptions, the Commission should deny the Motion.

DeltaCom also cites the Commission’s decision in the *WorldCom* proceeding as a basis for summary disposition.⁶ Interestingly, the portions of the *WorldCom* decision

⁴ *Petition of KMC Telecom, Inc. Against BellSouth Telecommunications, Inc., to Enforce Reciprocal Compensation Provisions of the Parties’ Interconnection Agreement*, Order No. U-23839, dated October 28, 1999.

⁵ *Petition for Arbitration of ITC^DeltaCom with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 1999-259-C, Order No. 1999-690, dated October 4, 1999.

⁶ *Final Order Resolving Complaints, Complaint of WorldCom Technologies Against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief*, Docket No.971478-TP, Order No. PSC-98-1216-FOF-TP, dated September 15, 1998.

cited by DeltaCom demonstrate precisely why the Commission should reject DeltaCom's request for summary disposition. As noted by DeltaCom, the *WorldCom* decision "addressed only 'the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the parties might reasonably have intended at the time they entered into their contracts.'" DeltaCom Motion, at 6. (emphasis added) It is without question that the Commission considered the circumstances surrounding the negotiation and execution of the WorldCom agreement in rendering a decision. In fact, the Commission has considered the circumstances surrounding the negotiation and execution of every Interconnection Agreement about which a dispute has arisen concerning reciprocal compensation for ISP traffic. DeltaCom has not provided any credible reason for the Commission to depart from prior precedent in the handling of these matters.

DeltaCom also ignores that the FCC has now ruled not once, but twice that calls to ISPs do not "terminate" at the ISP. See Declaratory Ruling in CC Docket No. 96-98 in Notice of Proposed Rulemaking in CC Docket No. 96-68, *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-bound Traffic*, 14 FCC rcd 3689, 3697 ¶ 12 (1999) ("Declaratory Ruling"), *rev'd Bell Atlantic Telephone Companies v. FCC*, Nos. 99-1094 et al. 2000 WL 273383 (D.C. Cir. March 24, 2000); Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 et al., FCC 99-413, at 16 (Dec. 23, 1999) ("Advanced Services Remand Order"). That the FCC's *Declaratory Ruling* has been reversed does not affect the outcome of this case, as

DeltaCom implies. DeltaCom Motion, at 5. First, the D.C. Circuit did not establish any principle of law, but rather -- as the Court itself said over and over -- simply determined that the FCC had failed to provide a sufficient explanation for its conclusions in the *Declaratory Ruling*. See 2000 WL 273383 at *9 (vacating and remanding “[b]ecause the Commission has not provided a satisfactory explanation”). Second, the Chief of the FCC’s Common Carrier Bureau has stated publicly that he believes that the FCC can and will provide the requested clarification and reach the same conclusion that it has previously -- that is, that ISP-bound calls do not terminate locally. See TR Daily, Strickling Believes FCC Can Justify Recip. Comp. Ruling In Face Of Remand, March 24, 2000 (stating that the Chief of the FCC’s Common Carrier Bureau “still believes calls to ISPs are interstate in nature and that some fine tuning and further explanation should satisfy the court that the agency’s view is correct”). Third, the FCC has made clear in other orders that ISP-bound traffic does not terminate locally, which are unaffected by the D.C.’s Circuit’s ruling. See *Advanced Services Remand Order*, ¶ 16. Thus, the Commission should decline DeltaCom's invitation to decide this case based upon earlier decisions, especially ones that cannot be reconciled with FCC rulings.⁷

Equally misplaced is DeltaCom’s reliance upon cases from other states, such as

⁷ DeltaCom correctly notes that the FCC found “no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic.” *Declaratory Ruling*, at ¶ 21. However, the FCC also expressly recognized that its “conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP-bound traffic server.” *Declaratory Ruling* ¶ 27. The Commission’s prior decisions were all based, at least in part, upon the notion that ISP-bound traffic “terminates” at the ISP, which the FCC has since confirmed is not the case.

the recent decision by the United States Court of Appeals for the Fifth Circuit in *Southwestern Bell Telephone Company v. Public Utility Comm'n*, No. 98-50787, 2000 WL 332062 (5th Cir. March 30, 2000). DeltaCom Motion, at Appendix A. While the Fifth Circuit affirmed the underlying decisions interpreting the terms of two interconnection agreements between Southwestern Bell Telephone and Time Warner in Texas, the Fifth Circuit was interpreting interconnection agreements that are different from the ones at issue here and that were executed under different circumstances. For example, in affirming the District Court and the Texas Commission, the Fifth Circuit relied upon the fact that the agreements defined local traffic, in part, as traffic “originated by one Party’s end users and terminated to the other Party’s end users.” The Fifth Circuit noted the FCC’s treatment of “ISPs as ‘end users’ for pricing purposes,” which, according to the court of appeals, was relevant to the parties’ intent “in light of the contractual provision mentioning “termination to [an] end user[.]” 2000 WL 332062, *9. The Fifth Circuit also was persuaded by the fact that Southwestern Bell had acknowledged in several internal documents that it expected to pay reciprocal compensation for calls to internet service providers. *Id.* at 10.

Here, the Interconnection Agreement at issue does not refer to traffic “terminating to an end user.” Nor is there any evidence that BellSouth ever “acknowledged” an obligation to pay reciprocal compensation for calls to Internet Service Providers.

Second, the Fifth Circuit never addressed the issue of whether Southwestern Bell and Time Warner had a “meeting of the minds with regard to the issue of reciprocal compensation for local calls made to ISPs,” finding that Southwestern Bell had waived this argument. *Id.* at 11. In this case, whether BellSouth and DeltaCom had a “meeting-

of-the-minds” on the payment of reciprocal compensation for ISP traffic is very much an issue that the Commission must decide. This is particularly true with respect to the August 1997 reciprocal compensation amendment, which took effect after DeltaCom knew or should have known that BellSouth considered ISP-bound traffic not subject to the payment of reciprocal compensation. Under these circumstances, it can hardly be said that there was a mutual agreement on the part of DeltaCom and BellSouth to pay reciprocal compensation for ISP traffic – an issue the Fifth Circuit never addressed.

In short, the facts and circumstances in other cases are irrelevant to the issues in this proceeding. Here, the Commission must decide whether BellSouth and DeltaCom mutually agreed to pay reciprocal compensation for ISP-bound traffic based on the facts in this record and not those developed in other cases interpreting other interconnection agreements.

C. The Commission’s *Global NAPs* Decision is not Dispositive of this Proceeding.

DeltaCom contends that “[i]n *Global Naps*, BST fully litigated the issue of whether the language contained in the agreement between Global Naps and BST required payment for reciprocal compensation of ISP traffic.” DeltaCom Motion, at 7. While the reciprocal compensation for ISP traffic issue was litigated in the *Global NAPs* proceeding, that issue was strictly limited to the facts and circumstances surrounding the negotiation and execution of the *Global NAPs/BellSouth Interconnection Agreement*. In fact, DeltaCom sought to intervene in the *Global NAPs* proceeding alleging that DeltaCom’s substantive rights would be affected by the Commission’s decision.

The Pre-Hearing Officer considered, and then rejected, DeltaCom’s assertion that

“it must be allowed to intervene because any decision in this proceeding will ultimately impact future interpretations of this same agreement.” Order Denying Intervention, at 1. Likewise, the Pre-Hearing Officer rejected Global NAPS argument that DeltaCom’s “substantial interests will be affected because the terms of the agreement that [DeltaCom] negotiated with BellSouth are at issue in this case.” *Id.*, at 2. The Pre-Hearing Officer ruled:

Furthermore, even though GNAPs may have adopted the [DeltaCom]/BellSouth agreement, the agreement at issue is now the GNAPs/BellSouth agreement. ... Although many or all of the terms in the agreement may be the same as those found in the [DeltaCom]/BellSouth agreement, *our decision in this case will consider only the GNAPs/BellSouth agreement and evidence relevant to that agreement. Our final decision will apply only to GNAPs and BellSouth. Therefore, any decision in this case will be based on evidence presented by the parties to this case and as such, will have no precedential value for any other case involving the same terms and conditions of an agreement between different parties...*

Although the terms in the GNAPs/BellSouth agreement are identical to the terms in the [DeltaCom]/BellSouth agreement, the agreement at issue in this case is only the GNAPs/BellSouth agreement.

Id., at 5, 6. (Emphasis Added) Clearly, the Global NAPS proceeding was conducted under the unequivocal understanding that the *Global NAPS* decision would not have precedential value as to this proceeding. Therefore, DeltaCom’s argument is misplaced and should be rejected by the Commission.

DeltaCom also contends that the *Global NAPS* decision renders moot any consideration of the intent of parties in negotiating and executing the DeltaCom/BellSouth Interconnection Agreement. DeltaCom Motion, at 8. As BellSouth explained in its Motion for Reconsideration of the *Global NAPS* decision, however, BellSouth was not permitted to introduce any evidence of BellSouth’s and DeltaCom’s

intent. Thus, the Commission could not have decided this issue, notwithstanding any language in the *Global NAPs* decision to the contrary.

D. The Commission is not Collaterally Estopped from Considering BellSouth's Position in this Proceeding.

DeltaCom's final gambit is based on an assertion that "[t]he Alabama Public Service Commission's ("APSC") March 1999 order collaterally estops BellSouth from re-litigating the same issues." DeltaCom Motion, at 8. In short, DeltaCom suggests that the Florida Commission lacks the authority to consider this issue on its own and is somehow bound by the decision of an administrative agency from another state – the Alabama Public Service Commission. The patently absurd nature of this argument becomes clear when considered in the context of a §252 Arbitration proceeding where identical issues are litigated on a multi-state basis. Under DeltaCom's theory, the first arbitration decision from a state commission would be binding upon all other state commissions, as the parties and subject matter would be the same in each jurisdiction.

DeltaCom omits a number of critical details in making its collateral estoppel arguments. First, the Alabama Commission decision cited by DeltaCom is based on a hearing that was conducted *prior* to the FCC's Declaratory Ruling, which provides greater insight into the analysis to be made by the state commissions in interpreting the reciprocal compensation provisions of interconnection agreements. Second, DeltaCom fails to mention that the Alabama Commission decision upon which DeltaCom relies is not a "final order," as that decision is currently on appeal to the U.S. Court of Appeals for the Eleventh Circuit. Third, the Alabama Commission decision is based on the nuances of Alabama law, not Florida law. Finally, the collateral estoppel cases footnoted by

DeltaCom do not apply to foreign administrative decisions.

DeltaCom also has a pending ISP complaint proceeding before the South Carolina Public Service Commission under this identical Interconnection Agreement. In the course of the South Carolina proceeding, which is still pending, DeltaCom requested summary judgment on the same theories presented in this proceeding, including collateral estoppel. The South Carolina Commission ruled:

We would note that summary judgment in the courts is only appropriate when there are no issues of material fact and a party is entitled to judgment as a matter of law. ... Staff believes that there are material issues in this case to be determined. We agree with the Staff. Though there are certainly subsidiary issues, we must first determine the intent of the parties when they entered into their Interconnection Agreement, with regard to reciprocal compensation for ISP calls.

In this case we simply decline to apply the principle of collateral estoppel, on the grounds that we would prefer to make our own specific determination of the various questions in this case after a full-blown hearing on this particular Interconnection Agreement, and after hearing the South Carolina circumstances in this case. As the General Counsel noted at oral argument, South Carolina is a unique state with unique circumstances, and we believe that it is the better practice to hear all the South Carolina circumstances connected to this case before we issue a decision on the merits. DeltaCom's Motion is denied.

Order Denying Motions and Setting Matter for Hearing, *In Re: ITC^DeltaCom Communications, Inc. vs. BellSouth Telecommunications, Inc.*, Docket No. 1999-033-C, Order No. 1999-455, dated June 25, 1999, at 5-6. While certainly not binding on the Commission, the logic and rationale of the South Carolina Commission is equally applicable here.

In the end, it is simply bad policy, in BellSouth's view, for the Commission to rely upon foreign administrative bodies to determine a course of action for Florida. Clearly, the Florida Commission is in the best position to determine the appropriate

course of action for Florida, and, in fact, is vested with the responsibility to do so. Therefore, BellSouth respectfully submits that the Commission should conduct its own hearing, determine for itself what facts are relevant, and issue an order based on Florida law.

CONCLUSION

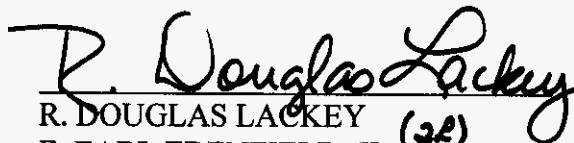
Although DeltaCom desires to avoid a hearing, BellSouth is entitled to discovery and an opportunity to present its case and to cross-examine DeltaCom's witnesses. Accordingly, the Commission should deny DeltaCom's Motion and proceed to hearing in accordance with the Order Establishing Procedure.

Respectfully submitted this 22nd day of May 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

 (22)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:)
)
Complaint of ITC^DeltaCom) Docket No. 991946-TP
Communications, Inc. Against BellSouth)
Telecommunications, Inc. for Breach of)
Interconnection Terms, and Request for)
Immediate Relief) Filed: May 22, 2000
)
_____)

**BELLSOUTH TELECOMMUNICATION INC.'S RESPONSE TO MOTION OF
ITC^DELTACOM COMMUNICATION INC. TO CONTINUE PROCEEDINGS**

On May 15, 2000, ITC^DeltaCom Communications, Inc.'s ("DeltaCom") filed a Motion for Continuance based upon DeltaCom's contention that it is entitled to a Summary Final Order in this proceeding. The Florida Public Service Commission ("Commission") should decline DeltaCom's request for the simple reason that DeltaCom is not entitled to any type of summary disposition in this proceeding. In lieu of reiterating here the reasons DeltaCom is not entitled to summary disposition, BellSouth adopts, as if fully set forth herein, the arguments presented in BellSouth's Response in Opposition to DeltaCom's Motion for Summary Final Order, filed in this proceeding on May 22, 2000. Further, this proceeding, which is set for hearing on August 24, 2000, has progressed to the stage where a continuance would not result in any significant savings in time or money. At this stage, the Commission has ample time to rule on DeltaCom's Motion for Summary Final Order without prejudicing either parties ability to prepare for the August hearing.

For these reasons, BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Commission deny DeltaCom's Motion for Continuance and order the parties to

proceed in accordance with the May 18, 2000 Order Establishing Procedure (Order No. PSC-00-0979-PCO-TP).

Respectfully submitted this 22nd day of May 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White

NANCY B. WHITE
MICHAEL P. GOGGIN

(pm)

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May 9, 2000

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 991267-TP (Global NAPS Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,


Michael P. Goggin

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

ATTACHMENT A

CERTIFICATE OF SERVICE
Docket No. 991267-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

U.S. Mail this 9th day of May, 2000 to the following:

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Michael P. Goggin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:)
) Docket No. 991267-TP
Complaint of Global NAPS, Inc., against)
BellSouth Telecommunications, Inc. for)
Enforcement of Section VI(B) of its)
Interconnection Agreement with BellSouth)
Telecommunications, Inc. and Request for Relief) Filed: May 9, 2000
_____)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION**

On April 24, 2000, the Florida Public Service Commission ("Commission") entered a Final Order on Complaint (Order No. PSC-00-0802-FOF-TP) ruling that, under the terms of the Interconnection Agreement between BellSouth and Global NAPS, Inc. ("GNAPS"), BellSouth owed GNAPS reciprocal compensation for traffic bound for the Internet through Internet Service Providers ("ISPs"). In rendering its ruling, the Commission failed to consider, or overlooked, salient points of fact and law. This failure resulted in the Commission rendering a decision that was: (1) based on facts outside the record that have yet to be, and may never be, established, thus rendering the decision inconsistent on its face; (2) contrary to the law of the case as established by the Pre-Hearing Officer; and (3) directly contrary to federal law. Therefore, in accordance with the provisions of Rule 25-22.060, *Florida Administrative Code*, BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Commission reconsider its decision in the April 24, 2000 Final Order on Complaint.

ARGUMENT

A. The Commission's Decision is Based on Facts Outside the Record, which have not been Established, Thus Rendering the Decision Inconsistent on its Face.

In interpreting the GNAPS/BellSouth Interconnection Agreement, the Commission determined that an opt-in agreement under §252(i) of the Telecommunications Act of 1996 cannot have a different interpretation than the original interconnection agreement. The Commission ruled:

... we do not believe that the intent of the parties at the time of the adoption is the relevant intent when interpreting an Agreement adopted pursuant to Section 252(i) of the Act. Rather, we believe the intent of the original parties is the determining factor when the Agreement language is not clear. Otherwise, original and adopting parties to an Agreement could receive differing interpretations of the same Agreement, which is not consistent with the purpose of Section 252(i) of the Act.

Final Order on Complaint, at 7-8. In this instance, the Commission's interpretation of Section 252(i) causes two fundamental inconsistencies within the Final Order on Complaint.

First, the GNAPS/BellSouth Interconnection Agreement is a Section 252(i) opt-in of the Interconnection Agreement between BellSouth and ITC^DeltaCom Communications, Inc. ("DeltaCom"). By the Commission's logic, the GNAPS/BellSouth Interconnection Agreement must be interpreted consistent with the original DeltaCom/BellSouth Interconnection Agreement. The reciprocal compensation provisions of the DeltaCom/BellSouth Interconnection Agreement, however, have never been interpreted by the Commission.¹ Thus, the Commission has either: (1) pre-

¹ The Commission will not have an opportunity to interpret the reciprocal compensation provisions of the DeltaCom/BellSouth Interconnection Agreement until the hearing, which is currently set for August 2000.

determined the outcome of the decision to be rendered in the DeltaCom complaint proceeding, which violates BellSouth's fundamental due process rights to present evidence/testimony in that proceeding; or (2) potentially violated its own interpretation of Section 252(i) by ordering BellSouth to pay reciprocal compensation under the GNAPS/BellSouth Interconnection Agreement when such a requirement has not been placed on BellSouth under the provisions of the DeltaCom/BellSouth Interconnection Agreement, and may never be placed depending on the Commission's ultimate decision in the DeltaCom complaint proceeding. At a minimum, even under the Commission's interpretation of Section 252(i), no final decision should be rendered in this proceeding until such time as the Commission has reached a decision in the DeltaCom complaint proceeding.

Second, as explained more fully below, this entire proceeding was conducted under the premise that the GNAPS/BellSouth Interconnection Agreement was to be interpreted separate and apart from the DeltaCom/BellSouth Interconnection Agreement. Thus, the Commission's interpretation of Section 252(i) is contrary to the law of the case as established by the Pre-Hearing Officer.

B. The Commission's Decision is Contrary to the Law of the Case and the Analysis Employed in Prior Decisions of the Commission.

1. The Law of the Case.

On December 23, 1999, the Pre-Hearing Officer entered an Order Denying Intervention (Order No. PSC-99-2526-PCO-TP) in this proceeding directed to a Petition to Intervene filed by DeltaCom. The Pre-Hearing Officer considered, and then rejected,

DeltaCom's assertion that "it must be allowed to intervene because any decision in this proceeding will ultimately impact future interpretations of this same agreement." Order Denying Intervention, at 1. Likewise, the Pre-Hearing Officer rejected GNAPS argument that DeltaCom's "substantial interests will be affected because the terms of the agreement that [DeltaCom] negotiated with BellSouth are at issue in this case." *Id.*, at 2. Consequently, both parties prepared for and conducted this proceeding in accordance with the Pre-Hearing Officer's determination that:

Furthermore, even though GNAPs may have adopted the [DeltaCom]/BellSouth agreement, the agreement at issue is now the GNAPs/BellSouth agreement. ... Although many or all of the terms in the agreement may be the same as those found in the [DeltaCom]/BellSouth agreement, our decision in this case will consider only the GNAPs/BellSouth agreement and evidence relevant to that agreement. Our final decision will apply only to GNAPs and BellSouth. Therefore, any decision in this case will be based on evidence presented by the parties to this case and as such, will have no precedential value for any other case involving the same terms and conditions of an agreement between different parties...

Although the terms in the GNAPs/BellSouth agreement are identical to the terms in the [DeltaCom]/BellSouth agreement, the agreement at issue in this case is only the GNAPs/BellSouth agreement.

Id., at 5, 6. (Emphasis Added)

Clearly, the Commission's determination in the Final Order on Complaint that: (1) the GNAPS/BellSouth Interconnection Agreement and the DeltaCom/BellSouth Interconnection Agreement must be interpreted the same; and, (2) the ultimate conclusion that BellSouth owes reciprocal compensation under the terms of the GNAPS/BellSouth Interconnection Agreement, cannot be reconciled with the Pre-Hearing Officer's directive in the Order Denying Intervention. In effect, the Commission

changed the legal and evidentiary standard upon which this case was considered, without affording BellSouth fundamental due process rights to address the intent of the parties in negotiating and executing the DeltaCom/BellSouth Interconnection Agreement.²

If the Commission's policy is to interpret Section 252(i) opt-in agreements based on the original Interconnection Agreement without consideration of the intent of the parties at the time of the opt-in, then the Parties should have been advised of that standard from the outset. As the parties were not so advised, the Commission, at a minimum, should order a re-hearing at which BellSouth is afforded the opportunity to present witnesses and evidence concerning the DeltaCom/BellSouth Interconnection Agreement.

2. Prior ISP Decisions of the Commission.

In a departure from prior Commission decisions regarding reciprocal compensation for ISP traffic under the terms of interconnection agreements³, the Commission in this proceeding determined that evidence of the parties' intent was not needed to interpret the Interconnection Agreement. In previous ISP decisions, however, the Commission's analysis was focused significantly on evidence concerning whether the parties intended to treat ISP traffic as if it were local traffic:

Accordingly, in this decision we only address the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the parties might reasonably

² As demonstrated by the Affidavit of Jerry Hendrix, attached hereto as Exhibit A, BellSouth has evidence that is relevant to the negotiation and execution of the DeltaCom/BellSouth Interconnection Agreement.

³ See Order No. PSC-98-1216-FOF-TP issued September 15, 1998 in consolidated Docket Nos. 971478-TP, 980184-TP, 980495-TP and 980499-TP (hereinafter "WorldCom Order") and Order No. PSC-99-0658-FOF-TP issued April 6, 1999 in Docket No. 981008 (hereinafter "e.spire Order").

have intended at the time they entered into their contracts. Our decision does not address any generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes. (WorldCom Order, at 5.)

Nevertheless, it is not necessary for us to determine the jurisdictional nature of this traffic in order to resolve this complaint. We only need to determine the intent of the parties regarding ISP traffic during the negotiation of their Agreement. Therefore, we have considered these arguments only to the extent that they relate to the parties' intent at the time they entered into the agreement. (e.spire Order, at 8-9.)

What is perplexing is the fact that, after ruling that the extrinsic evidence of the intent of the parties was unnecessary, the Commission based a significant portion of its analysis on assumptions gleaned from facts allegedly reflecting the intent of the parties. For example, the Commission criticized BellSouth for not refusing to permit GNAPs to adopt the agreement without modifying or amending it first.⁴ The Commission clearly interpreted BellSouth's failure to modify the GNAPS/BellSouth Interconnection Agreement as an acknowledgment that ISP traffic is local traffic. The Commission's interpretation is not only based on erroneous facts, it completely misconstrued BellSouth's obligations and responsibilities under Section 252(i), and imposed a burden on BellSouth to modify an agreement that BellSouth cannot modify under federal law.⁵

⁴ See, Final Order on Complaint, at 5 ("Witness Shiroishi agrees that the clarifying language was never incorporated as an amendment to the agreement adopted by GNAPs..."); Final Order on Complaint, at 7 ("BellSouth never modified the Agreement adopted by GNAPs to reflect its position ... even though BellSouth's witness Shiroishi indicated that BellSouth had developed such an amendment."); and, Final Order on Complaint, at 12 ("while a rate structure other than reciprocal compensation could have been used in the Agreement, it was not. The rate in the Agreement was set before GNAPs adopted it and was not modified by GNAPs and BellSouth.").

⁵ BellSouth believes that the Commission would be seriously concerned by a complaint proceeding brought by an ALEC alleging that BellSouth refused to allow that ALEC to exercise Section 252(i) adoption rights unless that ALEC acquiesced to BellSouth imposed amendments. However, by finding that BellSouth's failure to object to such an adoption in this case demonstrates an intent by BellSouth to acquiesce in GNAPs interpretation of "local traffic," the Commission appears to encourage BellSouth to insist on modification as a condition of adoption.

Further, it is indisputable that BellSouth would have prevailed in this proceeding if the Commission had applied the analysis from the WorldCom Order and e.spire Order, as BellSouth clearly did not intend to treat ISP traffic as if it were local traffic under the terms of the GNAPS/BellSouth Interconnection Agreement. Although not referenced in the Final Order on Complaint, GNAPS admitted that it was aware of BellSouth's intent not to treat ISP traffic as if it were local traffic under the terms of the GNAPS/BellSouth Interconnection Agreement. TR (Volume I), at 31. The Commission also seems to infer negative intent by BellSouth based on an erroneous assumption that BellSouth did not develop language clarifying BellSouth's position until after the GNAPS/BellSouth Interconnection Agreement was executed. Final Order on Complaint, at 5. The Commission's conclusion is inconsistent with the facts of the case. In her direct testimony, BellSouth witness Shiroishi testified that "GNAPs adopted the July 1, 1997, BellSouth/DeltaCom Interconnection Agreement to circumvent negotiating with BellSouth on the reciprocal compensation issue and to avoid the standard reciprocal compensation language proposed by BellSouth." TR (Volume II), at 219. Ms. Shiroishi explained further that "[f]ollowing our normal procedures, BellSouth mailed to Global NAPs a copy of our standard interconnection agreement which contained language that clarifies that ISP-bound traffic is neither local nor subject to reciprocal compensation." *Id.*, at 235. GNAPS acknowledged that it received the standard interconnection agreement prior to opting into the DeltaCom/BellSouth Interconnection Agreement. *Id.*, at 26.

3. Conclusion

The Commission's failure to consider the intent of the parties departed from the precedent established by the Commission in previous ISP proceedings and is counter to the reasoning of the Order Denying Intervention, which set forth the parameters under which the hearing was conducted. BellSouth was unfairly prejudiced by the Commission's departure from the law of the case as established by the Order Denying Intervention. In addition, the Commission's decision is based on erroneous facts and misapplication of federal law. Therefore, BellSouth respectfully requests that the Commission reconsider its Final Order on Complaint and render a decision in BellSouth's favor or, at a minimum, order a new hearing after the conclusion of the DeltaCom compliant proceeding.

C. The Commission's Finding that ISP Traffic is Local Traffic Violates Federal Law.

BellSouth agrees with the Commission's finding that "the language in the Agreement adopted by GNAPs is clear and only calls for reciprocal compensation for local traffic." Final Order on Complaint, at 6. That finding alone should have resulted in a decision in BellSouth's favor based on a plethora of FCC Orders confirming that ISP traffic is, in fact, interstate exchange access traffic.⁹

⁹ BellSouth will not recite the litany of FCC cases confirming that ISP traffic is interstate exchange access service, most of which were discussed at the hearing, but instead adopts and incorporates by reference BellSouth's Brief of Law and the Evidence, filed February 15, 2000, and the hearing record to the extent those FCC cases were discussed. BellSouth notes, however, that the vacatur of the FCC's February 26, 1999 Declaratory Order by the Court of Appeals does not disturb the many decisions prior to and after that order in which the FCC found that ISP bound traffic is interstate access traffic. See, e.g. *MTS and WATS Market Structure*, CC Dkt. No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983); *Deployment of Wireline Services Offering Advance Telecommunications Capability*, CC Dkt. Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, Order on Remand, FCC Order 99-413 (Dec. 23, 1999) at 16-24.

In yet another critical deviation from its prior ISP decisions, however, the Commission made a legal determination in this proceeding that ISP traffic is, in fact, local traffic. As noted above, the Commission, in previous decisions, was careful to avoid the jurisdictional issue by concluding in those decisions that the parties *intended* to treat ISP traffic *as if* it were local traffic under the agreement. In the Final Order on Complaint, however, the Commission noted that, “[w]e emphasize, however, that the Agreement does not segregate traffic to ISPs *from the rest of local traffic.*” and that, “the plain language of the Agreement shows that the parties intended the payment of reciprocal compensation *for all local traffic, including traffic bound for ISPs.*” Final Order on Complaint, at 6 and 7. (Emphasis Added.) See also, *id.* at 12 (“we find that reciprocal compensation is due under the Agreement adopted by GNAPs for all local traffic, including traffic to ISPs, at the rate set forth in the Agreement.”).

Although BellSouth recognizes that a finding that ISP traffic is local traffic was necessary for the Commission to avoid the issue of the parties’ intent, such a finding is clearly contrary to FCC precedent. Thus, BellSouth respectfully contends that this erroneous legal conclusion compels the Commission reconsider its decision in the Final Order on Complaint.

D. The Commission’s Decision Would Have Far-reaching, Negative Consequences.

The Commission’s determination is also discriminatory from a regulatory policy perspective. There is no doubt that the Commission’s ruling in this matter on the interpretation of Section 252(i) interconnection agreements would result in those

agreements always being interpreted consistent with the original interconnection agreements. There are a number of ramifications that would result from such a policy that the Commission failed to consider. First, every dispute over the interpretation of a Section 252(i) opt-in interconnection agreement would require the Commission to interpret, by necessity, the original interconnection agreement, including evidence of the parties intent as to the specific provision in dispute. However, as noted by the Pre-Hearing Officer in the Order Denying Intervention:

Early in the arbitration proceedings brought before the Commission under the Act, it was determined that, pursuant to the Act, only the party requesting interconnection and the incumbent local exchange company may be parties to the arbitration proceeding.

...

That conclusion is also applicable to complaints arising from agreements approved by the Commission under the Act, whether they are entered into through negotiation of the parties or through the adoption process set forth in Section 252(i) of the Act. This same rationale has been employed by this Commission on numerous occasions in denying third party petitions to intervene in arbitration proceedings or in proceedings brought seeking performance under interconnection agreements. (citations omitted) The agreement, and thus, the dispute, is limited to two parties.

Order Denying Intervention, at 4 and 5. Based on the Commission's long-standing policy that prohibits intervention, the Commission will be making a substantive determination of the rights of the parties to the original interconnection agreement, (as well as any other ALEC that opted into that agreement) without providing any of those ALECs the opportunity to present evidence on their own behalf. At that point, the Commission must decide whether to: (1) violate the ALECs' due process rights; (2) reconsider the long-standing policy against intervention, which will certainly result in the ALEC that is the party to the original interconnection agreement and every ALEC that

has opted into the original interconnection agreement becoming parties to every complaint proceeding filed in the future; or (3) never enter a final order on a complaint proceeding until such time as the Commission interprets the original interconnection agreement, assuming a complaint is ever filed by that ALEC. Clearly, the Commission's newly announced policy on the interpretation of Section 252(i) opt-in agreements is replete with unpalatable consequences.

Further, the Commission's policy is clearly discriminatory against BellSouth. In those instances where BellSouth may have agreed to an interconnection agreement provision that is detrimental to BellSouth, BellSouth will be unable to rectify that mistake until such time as the original interconnection agreement expires. Every ALEC certificated in Florida will be able to take advantage of the mistake, irrespective of BellSouth's desire to rectify the situation. On the other hand, a comparable mistake by the original ALEC to the interconnection agreement will not be perpetuated as subsequent ALECs can take the original interconnection agreement without the undesirable provision, or simply replace the undesirable provision at their leisure from any other interconnection agreement approved by the Commission.

Finally, the Commission appears to have been greatly influenced by the Commission Staff's assurances that the GNAPS/BellSouth Interconnection Agreement has expired and, therefore, cannot be perpetuated. In fact, the Commission found that, "adopting an Agreement under Section 252(i) cannot perpetuate the terms of an agreement beyond the life of the original agreement." Final Order on Complaint, at 8. While in theory this may be true, in reality the Commission has been perpetuating the


reciprocal compensation provisions of interconnection agreements beyond the original term.

For example, in addressing the ISP traffic issue in BellSouth's arbitrations with MediaOne (Docket No. 990149-TP), ICG Telecom (Docket No. 990691-TP) and DeltaCom Communications (Docket No. 990750-TP) the Commission basically ordered the parties to "handle the issue consistent with the prior agreement." The ramifications of a similar Commission ruling in the upcoming GNAPS arbitration (Docket No. 991220-TP) are obvious and disastrous. The Commission will revitalize and perpetuate provisions of an expired interconnection agreement through the arbitration process. If that happens, a new GNAPS/ BellSouth Interconnection Agreement, together with a Commission determination that any party to that agreement is entitled to reciprocal compensation for ISP traffic, will be available for adoption by every ALEC operating in Florida. The Commission will have created this result irrespective of the fact that the Commission, BellSouth, and every ALEC in Florida are well aware of BellSouth's intention not to pay reciprocal compensation for ISP traffic.


Therefore, BellSouth respectfully requests the Commission to reconsider its Final Order on Complaint, enter an Order in BellSouth's favor, and modify its policy of interpreting Section 252(i) opt-in agreements.

Respectfully submitted this 9th day of May 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.



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**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re:)	
)	Docket No. 991267-TP
Complaint of Global NAPs, Inc., against)	
BellSouth Telecommunications, Inc. for)	
Enforcement of Section VI(B) of its)	
Interconnection Agreement with BellSouth)	
Telecommunications, Inc. and Request for Relief)	Filed: May 9, 2000

AFFIDAVIT OF JERRY HENDRIX

Comes the affiant, Jerry Hendrix, and being duly sworn, deposes and says:

1. I am Senior Director, Interconnection Services, at BellSouth Telecommunications, Inc. ("BellSouth"). I have been employed by BellSouth since 1979. I am responsible for overseeing the negotiation of Interconnection Agreements between BellSouth and Alternative Local Exchange Companies ("ALEC"s), such as ITC^DeltaCom Communications, Inc. ("DeltaCom") and have been directly involved in the negotiation process since May 1996. I submit this affidavit in support of BellSouth's Motion for Reconsideration.
2. In March 1997, BellSouth and DeltaCom executed an Interconnection Agreement (the "Agreement") to govern the terms, conditions and rates pursuant to which the parties would interconnect their networks. The Agreement defines "Local Traffic" as traffic originating and terminating in the local calling area. Under the terms of this Agreement, the parties agreed to a "bill and keep" arrangement, at least on an interim basis, which meant that DeltaCom and BellSouth would not pay reciprocal compensation to one another for the transport and termination of local traffic.

EXHIBIT A


3. The "bill and keep" arrangement to which DeltaCom and BellSouth agreed was similar to provisions that had been inserted at the request of ALECs concerned about paying reciprocal compensation to BellSouth. These ALECs generally thought that any imbalance of traffic between an ALEC and BellSouth would be in BellSouth's favor, if for no other reason than BellSouth had more customers, and it was more likely that an ALEC's customers would call BellSouth's customers, thereby triggering an obligation on the ALEC's part to pay reciprocal compensation. To avoid the possibility of having to pay large sums of reciprocal compensation to BellSouth, many ALECs asked for a "bill and keep" arrangement such as that which appears in the DeltaCom Agreement.
4. There should have been no concern by an ALEC about an imbalance of traffic in BellSouth's favor if ISP traffic were included within the definition of "local traffic." Because ISPs receive a large volume of calls and do not generally generate them and because most residential customers who calls ISPs are served by BellSouth, an ALEC serving several ISPs would experience an imbalance of traffic in its favor, not the other way around. An ALEC who truly believed that ISP traffic constituted "local traffic" would never have agreed to a bill and keep arrangement because it would have made no economic sense to do so. Consequently, that fact that DeltaCom initially agreed to "bill and keep" as the compensation mechanism for the transport and termination of local traffic is compelling evidence that neither party considered ISP traffic to constitute "Local Traffic" as defined under the Agreement.
5. Before DeltaCom and BellSouth executed the Agreement, BellSouth had begun efforts in January 1997 to segregate ISP traffic from local traffic to ensure that no ALEC was billed reciprocal compensation for ISP traffic. Although this was not an issue with DeltaCom by

virtue of the bill and keep language in the Agreement, such efforts by BellSouth were consistent with BellSouth's view that ISP traffic was interstate in nature and not subject to the payment of reciprocal compensation.

6. In August 1997, the parties executed an amendment to the Agreement, (the "Amendment"), which replaced the "bill and keep" provision in the Agreement with a provision requiring the payment of reciprocal compensation for the transport and termination of "Local Traffic." At no time did BellSouth and DeltaCom mutually agree that this Amendment would result in the payment of reciprocal compensation for ISP traffic. On the contrary, BellSouth understood that ISP traffic was interstate in nature and not subject to the payment of reciprocal compensation, and DeltaCom never indicated a different understanding during the negotiations of the original Agreement or the Amendment.
7. In fact, there is compelling evidence to suggest that DeltaCom either knew or should have known BellSouth's position on the ISP issue before executing the Amendment. First, the individual representing DeltaCom in negotiating the Amendment was a former BellSouth employee, named James Wilkerson. Mr. Wilkerson previously worked as a regulatory manager for BellSouth in the State of Alabama, who has acknowledged knowing BellSouth's view on the interstate nature of ISP traffic. Second, prior to DeltaCom executing the Amendment on August 13, 1997, BellSouth had posted a written notice on its web site five days earlier and had sent a letter on August 12, 1997 to all ALECs, including DeltaCom, reiterating BellSouth's position that ISP traffic was interstate in nature and not subject to the payment of reciprocal compensation. The Amendment was not effective until August 22, 1997, when it was executed by BellSouth, which was two weeks after DeltaCom was on notice of BellSouth's position on ISP traffic.

8. As the foregoing facts make clear, BellSouth and DeltaCom did not mutually agree to pay reciprocal compensation for ISP traffic. In fact, when the parties executed the Agreement, they specifically agreed not to pay reciprocal compensation for any traffic, let alone for ISP traffic.

Further, affiant sayeth naught.


Jerry Hendrix

Subscribed and sworn to before me this 9th
day of May 2000


Notary Public

My commission expires: 07/03/01
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