BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.	DOCKET NO. 991267-TP ORDER NO. PSC-99-2526-PCO-TP ISSUED: December 23, 1999

ORDER DENYING INTERVENTION

I. **Case Background**

On August 31, 1999, Global NAPs, Inc. (GNAPs) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged breach of the parties' interconnection agreement. GNAPs asserts that BellSouth has failed to properly compensate GNAPs for delivery of traffic to Internet Service Providers that are GNAPs' customers. On September 27, 1999, BellSouth filed its Answer to GNAPs' complaint. This matter has been set for an administrative hearing on January 25, 2000.

On November 15, 1999, ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom (ITC) filed a Petition to Intervene in this proceeding. On November 23, 1999, BellSouth filed a Response to ITC's Petition. On November 30, 1999, GNAPs filed a Memorandum in Support of ITC's Petition to Intervene.

II. **Arguments**

ITC asserts that it should be allowed to intervene in this proceeding because the agreement at issue is the agreement negotiated between ITC and BellSouth. ITC states that its negotiated agreement with BellSouth was approved by the Commission on October 7, 1997, and that GNAPs later adopted the agreement pursuant to Section 252(i) of the Telecommunications Act. ITC further explains that in this proceeding, the Commission will interpret portions of the agreement addressing reciprocal compensation for traffic to Internet Service Providers (ISPs). ITC maintains that it must be allowed to intervene because any decision in this proceeding will ultimately impact future interpretations of this same agreement. Thus, ITC argues that its rights under that agreement and its substantial interests will be affected by this proceeding.

In its Response, BellSouth emphasizes that the only agreement in this proceeding is the agreement between GNAPs and BellSouth, regardless of the fact that GNAPs obtained the agreement through the 252(i) adoption process. BellSouth argues that GNAPs is asking the Commission to enforce the agreement between GNAPs and BellSouth, not the agreement between BellSouth and ITC. Thus, BellSouth argues the ITC has no standing to intervene in this proceeding.

BellSouth further asserts that ITC has incorrectly stated that BellSouth raised the issue of ITC's intent during the negotiation of the original agreement. BellSouth notes that ITC has not cited to any part of BellSouth's pleadings to support this statement. BellSouth maintains that it has not raised ITC's intent as an issue in this proceeding and that ITC's intent is irrelevant to the issues in this case. BellSouth argues that only the intent of BellSouth and GNAPs is relevant in this case. BellSouth emphasizes that ITC is not a party to the agreement underlying this dispute; therefore, ITC does not have a substantial interest in this proceeding. As such, BellSouth asks that ITC's Petition be denied.

GNAPs argues that ITC is entitled to intervene in this proceeding pursuant to Rule 28-106.205, Florida Administrative Code, because ITC's substantial interests will be affected by the Commission's determinations in this case. GNAPs maintains that under Florida case law, if a person alleges that as a result of an administrative proceeding his substantial interests will be affected, and if the proceeding is of the type designed to protect against the alleged injury, then that person has standing to intervene.[1] GNAPs states that ITC has indicated that its substantial interests will be affected by the outcome of this proceeding; therefore, it is entitled to intervene.

GNAPs argues that ITC's substantial interests will be affected because the terms of the agreement that ITC negotiated with BellSouth are at issue in this case. In resolving the GNAPs complaint, the Commission will make a determination on the applicability of provisions in the agreement. GNAPs argues that in so doing, the Commission will affect not only GNAPs substantial interests, but ITC's as well. Thus, GNAPs maintains that this

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[1]*Citing* Village Park Mobile Home Association, Inc. v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987).

proceeding has the potential to cause ITC an injury, in fact, of sufficient immediacy that should entitle ITC to intervene.

GNAPS further contends that prior Commission decisions prohibiting intervention in arbitration and complaint proceedings do not require that ITC be prohibited from intervening in this case.[2] GNAPs asserts that this case may be distinguished because it actually revolves around an agreement that was originally negotiated between ITC and BellSouth. Thus, GNAPs believes that ITC should be allowed to intervene because the Commission will be interpreting the agreement that ITC negotiated with BellSouth. GNAPs adds that because of this unique situation, allowing ITC to intervene will not "open the floodgates" to third-party intervention in complaint and arbitration proceedings under the Act.

Finally, GNAPs notes that other state commissions have allowed intervention in proceedings in which terms of interconnection agreements were at issue.[3] GNAPs emphasizes that other state Commissions have allowed intervention in situations where any decision by the Commission could have a negative binding precedential effect on third-parties. In this case, GNAPs believes that ITC has clearly demonstrated that the Commission's decisions in this case may have a negative binding precedential effect because it is ITC's agreement that is being interpreted. Therefore, GNAPs supports ITC's Petition to Intervene in this proceeding.

III. **Determination**

First, I begin by noting that the applicable rule in this instance is Rule 25-22.039, Florida Administrative Code. The Commission's rule on intervention has been granted an exception from the Uniform Rules. Our rule remains in effect.

When a petitioner's standing in an action is contested, the burden is upon the petitioner to demonstrate that he does, in fact,

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[2]*Citing* Order No. PSC-98-0476-PCO-TP, issued April 2, 1998, in Docket No. 971478-TP.

[3] *Citing* In re: Emergency Petitions of ICG Telecom Group, Inc. and ITC DeltaCom Communications, Inc. For a Declaratory Ruling, Alabama PSC Docket No. 26619 (March 4, 1999).

have standing to participate in the case. Department of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979). To prove standing, the petitioner must demonstrate that he will suffer an injury in fact, which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and that his injury is of a type or nature that the proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997); and Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981). ITC has demonstrated neither.

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 arbitration proceedings. This reflects a Congressional intent that interconnection agreements should be reached through negotiations between a requesting carrier and an incumbent local exchange company; or, failing that, through arbitration proceedings litigated before state commissions by the parties to the negotiations. The arbitration proceedings are limited to the issues raised by the immediate parties to the particular negotiations. The outcome of arbitration proceedings is an agreement between those parties that is binding only on them. The Act does not contemplate participation by other entities who are not parties to the negotiations and who will not be parties to the ultimate interconnection agreement that results. Entities not party to the negotiations are not proper parties in arbitration proceedings, even though they may, in some indirect way, be affected by a particular decision. This conclusion is consistent with the conclusion reached by the Prehearing Officer at page 2 in Order No. PSC-96-0933-PCO-TP, which established procedure in Docket No. 960833-TP:

> Upon review of the Act, I find that intervention with full party status is not appropriate for purposes of the Commission conducting arbitration in this docket. Section 252 contemplates that only the party requesting interconnection and the incumbent local exchange company shall be parties to the arbitration proceeding. For example, Section 252(b)(1) of the Act states that the "carrier or any other party to the negotiation" may request arbitration. (emphasis added)

> Similarly Section 252(b)(3) says "a non-petitioning party to a negotiation may respond to the other party's petition" within 25 days. (emphasis added) Section 252(b)(4) requires this Commission to limit its consideration to the issues raised by the petition and the response. None of these statutory provisions provides for intervenor participation.

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. See Order Nos. PSC-96-0933-PCO-TP; PSC-98-0007-PCO-TP; PSC-98-0008-FOF-TP; PSC-98-0226-FOF-TP; PSC-98-0227-FOF-TP; PSC-98-0476-PCO-TP; PSC-98-0642-PCO-TP; and PSC-98-0454-PCO-TP. The agreement, and thus, the dispute, is limited to two parties. Therefore, the proceeding is not designed to address the type of injury alleged by ITC.

Furthermore, even though GNAPs may have adopted the ITC/BellSouth agreement, the agreement at issue is now the GNAPs/BellSouth agreement. Nothing in the Act indicates an intent to treat complaints regarding agreements adopted pursuant to Section 252(i) any differently than other complaint cases. In many aspects, adoption of an agreement pursuant to Section 252(i) is simply a shortening of the negotiation process. There are still, ultimately, only two parties to the agreement. Although many or all of the terms in the agreement may be the same as those found in the ITC/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 upon 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. As such, ITC has not demonstrated an injury of sufficient immediacy to warrant intervention in this proceeding.

Finally, I disagree with GNAPs that allowing ITC to intervene in this proceeding would not "open the floodgates" to third party intervention in arbitrations and complaint proceedings, a concern

which has been raised by this Commission in the past. GNAPs argues primarily that ITC should be allowed to intervene because the terms of the GNAPs/BellSouth agreement are the same terms as those in the ITC agreement that ITC negotiated. That same statement could, however, be made about many other agreements approved by this Commission. Numerous Notices of Adoption of Interconnection agreements are filed for our approval every month. Also, with the reinstatement of the FCC's "pick and choose" rule, many companies are specific selecting rates, terms, and conditions from previously approved agreements. As such, the same arguments presented for ITC's intervention in this case, if accepted, could carry over to many other complaint cases, thus opening the "floodgates."

Although the terms in the GNAPs/BellSouth agreement are identical to the terms in the ITC/BellSouth agreement, the agreement at issue in this case is only the GNAPs/BellSouth agreement. As this Commission has previously stated:

> It is hardly surprising that business relationships and commercial terms to which certain market players agree influence, sometimes strongly, the nature of subsequent relationships and terms sought by others. This is not justification to return to the old regulatory routine where all interested persons could participate in matters involving regulated utility providers. Under the Act, the rules of the road are different. This is a contract dispute between the parties to the specific contract, and only those parties may participate in this case.

Order No. PSC-98-0454-PCO-TP, at p. 5. Accordingly, ITC's petition to intervene in Docket No. 991267-TP is denied.

Based upon the foregoing, it is

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that the Petition to Intervene filed by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom is denied.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 23rd day of December, 1999.

E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060,

Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.