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February 2, 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. 991220-TP

Dear Ms. Bayó:

Enclosed please find the original and fifteen copies of BellSouth Telecommunications, Inc.'s Initial Brief, which we ask that you file in the above-referenced matter.

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,

J. Phillip Carver (BN)

J. Phillip Carver

AFA ____
APP ____
CAF ____
CMU ____
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cc: All Parties of Record
Marshall M. Criser III
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CERTIFICATE OF SERVICE
Docket No. 991220-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail and facsimile (*) this 2nd day of February, 2000 to the following:

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J. Phillip Carver

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:	)	
Petition of GLOBAL NAPs SOUTH, INC.,	)	
for Arbitration of Interconnection Rates,	)	Docket No. 991220-TP
Terms, and Conditions and Related Relief	)	
of Proposed Agreement with BellSouth under	)	
the Telecommunications Act of 1996	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S INITIAL BRIEF

INTRODUCTION

Issue 1 in this proceeding is as follows:

1. Is the Interconnection Agreement Between DeltaCom, Inc. and BellSouth Telecommunications, Inc., which was adopted by Global NAPs (GNAPs) on January 18, 1999, valid and binding on GNAPs and BellSouth until January 2001, or did it expire on July 1, 1999?

BellSouth's position is that the Interconnection Agreement between BellSouth and Global NAPs expired on July 1, 1999. Global NAPs contends that the Agreement does not expire until January of 2001. BellSouth and Global NAPs South, Inc. ("Global NAPs") have filed a joint Motion stating that this Issue can best be resolved as a legal issue, in other words, based upon briefs filed by the parties and without the submission of evidence. BellSouth Telecommunications, Inc. ("BellSouth"), hereby submits this Brief for that purpose.

The pertinent facts are uncontroverted. On January 18, 1999, Global NAPs and BellSouth entered into an Agreement by which Global NAPs opted into the pre-existing Interconnection Agreement between BellSouth and DeltaCom ("Opt-In Agreement"). The DeltaCom Agreement began on July 1, 1997, and expired on July 1, 1999. The Opt-

In Agreement made no specific reference to the two year duration of the BellSouth/DeltaCom Agreement. Instead, the only language in the Agreement specifically relating to duration states the following:

> 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 alternative expiration is mutually agreed to by the parties or ordered by a Commission, the FCC, or a court of competent jurisdiction.

DISCUSSION

A. Under Florida Law, the Unambiguously-Stated Expiration Date, July 1, 1999, Controls.

One of the paramount rules of contract construction is that an unambiguous contract must be interpreted based solely upon the language of the contract. In Walgreen Co. v. Habitat Development Corp., 655 So. 2d 164, 165 (FL 3rd DCA 1995), the Court noted the well-settled rule that when the language of a contract "is clear and unambiguous, it must be construed to mean 'just what the language therein implies and nothing more' [citation omitted]." In these cases, "it is well settled that the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls." Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So. 2d 738, 739 (Fla. 3rd DCA 1989).

In our case, BellSouth and Global NAPs have agreed that this contract is unambiguous and that the Commission should, therefore, resolve the legal issue of its expiration date without regard to extrinsic evidence. (See Joint Motion to Modify Case Schedule). The Opt-In Agreement clearly states that the expiration date is July 1, 1999. There is nothing on the face of the Agreement to indicate that some other expiration date

is even a possibility. Given the clear and unambiguous language of the Agreement, the appropriate legal ruling is that the Agreement expired July 1, 1999.

Nevertheless, Global NAPs takes the position in its Petition that the language of the Agreement (that the expiration date pertains unless an alternative expiration date is ordered by a Commission) gives Global NAPs the ability to argue for some other expiration date, despite the clearly expressed provision of the contract setting an expiration date of July 1, 1999. As will be discussed further below, Global NAPs now takes the position that the Opt-In Agreement should have a two year duration, expiring on January 18, 2001. There is nothing on the face of the contract to suggest this result. Instead, Global NAPs appears to pin its argument on the notion that the vague "alternative expiration date" language of the Agreement gives it the unrestricted ability to argue at some time after execution of the Agreement for whatever expiration it wishes, without regard to the actual expiration date on the Agreement. At the same time, Global NAPs states in its Petition the obvious fact that the duration of a contract is a material term (Petition, p. 11). Thus, Global NAPs would have this Commission believe that the parties simply agreed to disagree on a material (some would say essential) term of the contract, and that the vague language as to alternative expiration dates reflects this intention. BellSouth submits that the clearest indication of when the Opt-In Agreement expired is the fact that there is only one specific date contained in the Agreement, July 1, 1999.

Further, Global NAPs arrives at the January 2001 expiration date—which, again, is not mentioned anywhere on the face of the Opt-In Agreement—by a route that is flatly contrary to the rules of contract construction that pertain under Florida law. In effect,

Global NAPs argues that the expiration date is whenever this Commission (or some other state Commission, the FCC, or some unidentified Court) orders it to be. However, the Second DCA stated in Emergency Associates of Tampa, P.A. v. Sassano, 664 S. 2d 1000, 1003 (Fla. 2d DCA 1995) a directly contrary rule of contract construction:

> Thus, when the terms of a voluntary contract are clear and unambiguous, as here, the contracting parties are bound by those terms, and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties. *Medical Ctr. Health Plan v. Brick*, 572 So. 2d 548 (Fla. 1st DCA 1990).

Thus, Global NAPs' contention that the parties intended for the expiration date to be rewritten by some tribunal at a later date must be rejected. Given the choice of a clearly expressed, specific expiration date and vague language that an alternative date may be selected by some tribunal at some future time, the specifically-stated expiration date must control.

B. Under Both Federal and State Law, A Party Adopting a Pre-existing Agreement Is Bound by the Expiration Date in that Agreement.

Even if this Commission were to consider Global NAPs contention that the expiration date is something other than what is clearly stated on the face of the Agreement, Global NAPs argument is completely unsupported by the controlling law. The Federal Telecommunications Act of 1996 ("Act") sets forth the provision that is ultimately at issue in this case. The Act states as follows:

> (i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS—A local exchange carrier should make available any interconnection, service, or network element provided under an Agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(Section 252(i))

The specific matter at issue concerns the construction of the phrase "the same terms and conditions." BellSouth believes that this phrase means that the carrier "opting in" to a pre-existing agreement must accept the expiration date. Global NAPs apparently takes the view that it is entitled to the duration of the pre-existing Agreement, even if Global NAPs "opts-in" well after the date of commencement of the original Agreement and, therefore, would have a later—and in this case, substantially later--expiration date than the date in the Agreement that it has chosen to adopt.

The difficulty with Global NAP's interpretation is that the FCC, Federal Courts, and most, if not all, State Commissions that have considered this issue have resolved it in a manner contrary to Global NAP's position. Moreover, Global NAPs is well aware of this authority since, in almost every instance, Global NAPs was involved in (and lost) the cases that now serve as precedent.

This issue came before the FCC in CC Docket No. 99-198 (In the Matter of Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission regarding interconnection dispute with Bell Atlantic of Virginia, Inc.). Global NAPs had filed an Arbitration Petition before the Virginia Commission. The specific pertinent issue before the Virginia Commission was whether Bell Atlantic-Virginia should be required to allow Global NAPs to opt into an Agreement with another carrier even though the original agreement was set to expire shortly.[1] As the FCC noted "in its Final Order, the Virginia Commission acknowledged that the. . . agreement [in question] would terminate on July 1, 1999 and that any carrier opting into this agreement would necessarily find themselves bound by this termination date, unless

[1] Global NAPs argued there, as here, that it should be able to opt in for a contract term equal to that of the Agreement that was about to expire.

otherwise negotiated." (FCC Order, par. 12). Accordingly, the Virginia Commission found that if Global NAPs were allowed to opt into this agreement, the Global NAPs/Bell Atlantic Agreement would only be in effect for thirty (30) days. Under these circumstances, the Virginia Commission determined that it was not reasonable to allow Global NAPs to opt in.

Global NAPs then filed a Petition requesting that the FCC preempt the decision of the Virginia Commission, and argued, in essence, that the Virginia Commission had decided the matter incorrectly. The FCC sustained the Virginia Commission's decision that Global NAPs should not be allowed to opt into an agreement that was set to shortly expire. In the course of doing so, the FCC also clearly stated that when a carrier opts into an agreement, "the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date." (FCC Order, fn. 27).

Three days earlier, the FCC reached the same ruling in a strikingly similar case, CC Docket No. 99-154 (in the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic – New Jersey, Inc.) As in the Virginia case, Global NAPs asked the FCC to preempt a State Commission decision, and again, the FCC declined. In this decision, the FCC used precisely the same language as in the Virginia decision to state that "the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date." (Id., fn. 25).

The Maryland Public Service Commission reached the same decision in yet another arbitration between Global NAPs and Bell Atlantic (Case No. 8731, In the Matter of Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996; Petition of Global NAPs South, Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief). In a now familiar gambit, Global NAPs attempted to opt into an agreement between Bell Atlantic and another carrier near the end of the term of that agreement. The Maryland Commission declined to allow Global NAPs to do so. In its ruling, the Maryland Commission stated the following:

> GNAPs has sought to "opt in" to the terms of [Bell Atlantic's] approved interconnection agreement with MFS Intelenet of Maryland, Inc. ("MFS"). Global NAPs claims, however that [Bell Atlantic] seeks to impose conditions on GNAPs to which MFS is not subject, in violation of Section 252(i). Specifically, GNAPs requested to "opt in" to the MFS interconnection agreement but requested a three-year contract term, rather than the date which actually appears in the MFS agreement. In contrast, [Bell Atlantic] argued that GNAPs can only "opt in", if at all, under the exact terms of the MFS agreement. We find that under the Federal Communication Commission ("FCC") interconnection rules, GNAPs is not entitled to the relief it seeks.

(Order No. 75360).

Accordingly, the Maryland PSC concluded as follows:

> Furthermore, we find that even if it were reasonable to permit GNAPs to "opt in" to the MFS agreement at this late date, GNAPs would be entitled to the terms of the MFS agreement only until the termination date of July 1, 1999. GNAPs cannot avoid the fact that the language of the agreement says that its term ends on a stated date, not three years from the date hereof. This term was negotiated and agreed upon by both MFS and Bell Atlantic and there is no support for the argument that the length of the contract is not an integral part of the agreement. GNAPs seeks not only to "opt in" to the MFS agreement, but also to change one of its terms. There is nothing in the 1996 Act nor the FCC rules which would permit a CLEC to choose to opt in to an agreement while at the same time changing the

> terms of that agreement. Opting into contracts must occur upon the same terms and conditions as those which appear in the original agreement.

(Id.).

Thus, the Maryland PSC decision represents yet another regulatory determination that Global NAPs may not vary the expiration date in an Agreement that it chooses to adopt.

This Commission appears to have rendered a similar opinion of the opt-in rule, albeit in different circumstances. On April 9, 1999, this Commission provided its comments to the FCC in CC Docket No. 96-98 and CC Docket No. 99-68 (Florida Public Service Commission Comments On Notice of Proposed Rulemaking). In this filing, the Commission provided commented on the FCC's interpretation of Section 252(i). In this context, the Commission stated the following:

> With regard to the Commission's specific example involving the timeframe a carrier should be afforded to opt into a preexisting contract, the FPSC believes that the ability of a CLEC to use conditions or rates from a pre-existing contract should expire at the same time the original contract terminates.
>
> (FPSC Comments, p. 8).

The interpretation of § 252(i) offered by this Commission to the FCC last year is entirely consistent with the position that BellSouth advocates in this proceeding.

Finally, in the single instance in which a State Commission granted even partially Global NAPs request to adopt and extend a pre-existing Interconnection Agreement with Bell Atlantic, a Federal Court overturned the decision. (Bell Atlantic – Delaware, Inc., et al. vs. Global NAPs South, Inc., 1999 US Dist. LEXIS 19362, December 14, 1999). In its ruling, the Federal Court confirmed that the FCC has decided this matter, that the FCC's decision is adverse to Global NAPs, and that State Commissions are bound by this decision. In the arbitration before the Delaware Public Service Commission, Global

NAPs argued, once again, that it was entitled "to opt into the MFS Agreement for a term of three years, without being bound by the July 1, 1999 termination date recited in the Agreement." (Id., p. 3). The Delaware Commission declined to allow Global NAPs to have the MFS Agreement for three years.[2] The Delaware Commission, however, did allow Global NAPs to opt into the MFS agreement and extend the termination date until December 31, 1999. The extended contract term was as an exception to the rule, apparently granted because the arbitrator determined that Bell Atlantic did not move forward expeditiously in conducting negotiations.

The U.S. District Court overturned the decision of the Delaware Commission based upon the above-cited, previous FCC Order. The Court first noted the following:

> The FCC, in resolving a case brought by GNAPs in a Virginia dispute, expressly rejected GNAP's suggestion that the termination dates of existing agreements can be modified for the purposes of Section 252(i) opt in agreements. [Citation omitted] The FCC explained that a carrier opting into an existing agreement takes all the terms and conditions of that agreement 'including its original expiration date'. Id.

(p. 9).

Accordingly, the Court ruled as follows:

> The FCC granted the state commissions discretion with respect to the time at which requesting carriers may opt into existing agreements. The FCC did not offer any such discretion with respect to modifying the termination date of the agreements. In explicit language directed to GNAPs in litigation arising out of Virginia, the FCC stated that 'the carrier opting

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[2] As the District Court noted:

> The arbitrator for the State of Delaware acknowledged that it would be improper to allow GNAPs to opt into the MFS agreement and to retain a three-year contract duration . . . It would be unreasonable, the arbitrator stated, to grant requesting parties the ability to extend the terms of existing interconnection agreements beyond the termination date stipulated to by the parties to the original agreement. See id. Ordinarily, he wrote, "an opted into agreement will expire when the original interconnection agreement expires." (Id., p. 9) [CK CITE]

(Id., p. 11).

> into an existing agreement takes all the terms and conditions of that agreement . . including its original expiration date.' FCC GNAP's Ruling p 8. Although the [state] PSC has the authority to impose 'appropriate conditions to implement federal law,' 47 U.S.C. § 252(b)(4), the PSC does not have the authority to impose terms that extend beyond what is permitted by federal law.

Thus, the Federal District Court ruled that the FCC has determined that an opt in agreement cannot be extended beyond the expiration date of the original contract, and a State Commission has no authority to rule otherwise.

C. Public Policy Considerations Favor The Rejection of Global NAPs' Position

Even if this Commission were inclined--despite the overwhelming authority to the contrary--to consider allowing Global NAPs to extend the expiration date of the agreement it adopted, public policy considerations militate strongly against this result.

If Global NAPs' approach to this issues is allowed, every provision of every interconnection agreement will be perpetually available to every new entrant. For example, if Global NAPs prevails, then the terms originally negotiated with DeltaCom in July of 1997 will survive (in the form of the Adoption Agreement with Global NAPs) until January 19, 2001. If, another carrier opts into this two-year agreement in, for example December of 2000, then these same contractual terms will be given additional life until December 2002. This process, of course, has the potential to continue ad infinitum. If the right to "opt in" is construed as Global NAPs demands, then the potential for "perpetual life" of any individually negotiated contract term will have an obvious chilling effect upon the future of the type of individually negotiation contemplated by the Act.

Further, Global NAPs approach would lead to one of two perverse results that were clearly never contemplated by Congress. One: the parties to an expired contract obviously have no ability to unilaterally extend the contract beyond the termination date. Thus, if a contract contains a term that, for example, has proven to be unworkable and inequitable, or that has not been prohibited as a matter of law, a party would have no right in renegotiations to insist upon the inclusion of this provision in a new agreement. Under Global NAPs theory, however, Global NAPs would be allowed to opt into the preexisting contract on the last day of its existence and, for a length of time equal to the original agreement, have contractual rights that the original parties to the Agreement no longer possess. To place this in the specific context of our case, there are provisions in the DeltaCom Agreement (as detailed more completely in BellSouth's Response to the Arbitration Petition) that should not be included in a successor agreement, and BellSouth does not include these provisions in any new Interconnection Agreement. If Global NAPs prevails, Global NAPs would have the benefit of these no longer viable provisions even though DeltaCom (and every other ALEC) would not. Thus, under the most likely result of Global NAPs approach, the party that opts in to a pre-existing agreement would have not only have the benefit of the contractual rights negotiated by other parties, it would have a far greater benefit.

The second possible interpretation is even more alarming. If Global NAPs is able to keep the currently unworkable portions of the DeltaCom Agreement alive by entering into an opt in agreement that extends beyond the termination date of the DeltaCom Agreement, then sooner or later DeltaCom (or some other carrier) will argue that it should be allowed to opt in to the opt in agreement. In other words, once Global

NAPs has extended the DeltaCom Agreement for itself, other carriers will undoubtedly attempt to bootstrap onto Global NAPs Agreement in similar fashion. Under this scenario, not only would contractual provisions that are no longer appropriate have perpetual life in the form of a contract with some carrier, they could be included in the contracts with every carrier.

Clearly, Global NAPs is attempting to create a loophole in the Act that Congress never intended to exist. Global NAPs approach, although obviously advantageous to Global NAPs, has the potential to create situations that are both bizarre and inequitable. For this reason, even if Global NAPs' position were legally sustainable (which it clearly is not), public policy considerations mandate that this position be rejected.

CONCLUSION

Global NAPs is requesting that this Commission interpret § 252(i) in a way that has been rejected by numerous State Commissions, the FCC, at least one Federal Court, and (at least in comments filed in another context) this Commission. Further, the practical consequences of what Global NAPs advocates would result in perverse results that cannot possibly be what Congress intended by the passage of the Act. For these reasons, BellSouth requests that this Commission enter an Order determining that the opt in agreement between BellSouth and Global NAPs terminated on July 1, 1999.

Respectfully submitted this 2nd day of February, 2000.

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