



Public Service Commission

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RECORDS AND REPORTING

DATE: FEBRUARY 17, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *BK*
DIVISION OF COMMUNICATIONS (FAVORS) *CRF*

RE: DOCKET NO. 991220-TP - PETITION BY GLOBAL NAPS, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS AND RELATED RELIEF OF PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.

AGENDA: FEBRUARY 29, 2000 - REGULAR AGENDA - FINAL ACTION - DECISION ON BRIEFS PURSUANT TO SECTION 120.57(2), FLORIDA STATUTES - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991220.RCM

CASE BACKGROUND

Part II of the Federal Telecommunications Act of 1996 (Act) sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act regards interconnection with the incumbent local exchange carrier, and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

On August 26, 1999, Global NAPs, Inc. (GNAPs) filed a petition for arbitration of an interconnection agreement with BellSouth Telecommunications, Inc. (BellSouth) under Section 252(b) of the Telecommunications Act of 1996 (the "Act"). On September 20, 1999, BellSouth timely filed its Response to the petition. This matter has been set for an administrative hearing on June 8, 2000.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

On January 31, 2000, the parties filed a Joint Motion to Modify Schedule, wherein the parties indicated that the following issue may be resolved as a matter of law without the submission of evidence by the parties.

ISSUE 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?

Thus, they asked that the schedule be modified to allow them to submit briefs on this issue and that we rule on this issue based upon the briefs. By Order No. PSC-00-204-PCO-TP, issued February 14, 2000, the motion was granted. Therefore, the parties filed initial and reply briefs regarding Issue 1 in accordance with the approved briefing schedule. This is staff's recommendation on this issue. Staff notes that the other issues in this case that have been identified for arbitration are issues that may fall-out depending upon how the Commission decides this first issue.

DISCUSSION OF ISSUES

ISSUE 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?

RECOMMENDATION: The agreement adopted by GNAPs expired on July 1, 1999. **(KEATING)**

STAFF ANALYSIS:

RELEVANT AGREEMENT LANGUAGE

The GNAPs "opt-in" agreement, whereby GNAPs adopted the ITC ^DeltaCom/BellSouth agreement, states at page 1:

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

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

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

This "opt-in" agreement is signed by both parties. See Attachment A.

Section XVII of the ITC^DeltaCom/BellSouth agreement adopted by GNAPS reads, in part:

A. The term of the Agreement shall be two years, beginning July 1, 1997.

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

See Attachment B.

PARTIES ARGUMENTS - INITIAL BRIEFS

GNAPS

In its initial brief, GNAPS argues that when it adopted the ITC^DeltaCom/BellSouth agreement, it adopted the entire contract, including the term of the agreement, which is specified as being two years. Thus, GNAPS believes that its adopted agreement with BellSouth is still in effect and will be in effect until January, 2001, two years from the date the agreement was adopted. Initial Brief at p. 1.

GNAPs explains that this issue may be resolved by looking to the specific language in the contract and the plain meaning of Section 252(i) of the Act. GNAPs maintains that the language in both support GNAPs contention that it got the "same" deal that ITC^DeltaCom got, which is a two year contract. Initial Brief at p. 2-3.

Specifically, GNAPs asserts that Section XVII.A of the ITC^DeltaCom agreement states that "the term of this agreement shall be two years. . ." from the effective date of that agreement, which was July 1, 1997. GNAPs emphasizes that the ITC^DeltaCom agreement clearly contemplates that the agreement will last for two years; thus, anyone that adopts that agreement should also have it for two years from the effective date of their adoption. As such, GNAPs should have the agreement for two years from January 18, 1999, the date it adopted the agreement. Initial Brief at p. 2.

GNAPs argues that the Commission's own language in approving the ITC^DeltaCom agreement in 1997 affirms that the term of the agreement is two years. GNAPs notes that in the Commission's order approving the ITC^DeltaCom/BellSouth agreement, there is no mention of the effective dates of the agreement. Instead, the Commission's order states that "[t]his agreement covers a two-year period and governs the relationship between the companies. . ." Order No. PSC-97-1265-FOF-TP, issued October 14, 1997. Initial Brief at p. 2.

GNAPs further explains that other portions of the agreement emphasize that this agreement must be for a two-year term. GNAPs refers to Section XVII.B of the agreement, which states:

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

Initial Brief at p. 3. GNAPs maintains that the agreement indicates that there will be an orderly process for the negotiation of subsequent contracts that would begin a year before termination of the current agreement. If, however, the dates rather than the two-year term are applicable to GNAPs' adoption of the agreement, then when GNAPs adopted this agreement in January of 1999, the parties were automatically in breach of this negotiation provision on the date the adoption became effective. GNAPs argues that this simply does not make sense. GNAPs contends that the more logical interpretation is that all dates in the agreement, including the

ending date, adjust with the new effective date of the adoption. As such, the obligation to begin negotiations under Section XVII.B would begin January 18, 2000, one year after the effective date of the GNAPs' adoption of the agreement.

Similarly, GNAPs notes that Section XVII.C of the ITC^DeltaCom agreement indicates that if negotiations are unsuccessful, the parties will petition for arbitration by the Commission and will ask for resolution by the Commission no later than January 1, 1999. As with Section XVII.B, GNAPs believes that if these dates do not adjust with the new effective date of GNAPs' adoption of the agreement, the parties were automatically in breach on the date the adoption became effective. Initial Brief at p. 3.

GNAPs emphasizes that its adoption of the ITC^DeltaCom agreement did not become effective until January 1, 1999; therefore, GNAPs contends it would not make sense to immediately begin negotiations for a new agreement just a few days later on January 18, 1999. GNAPs argues that these two provisions clearly demonstrate that the adoption must be effective for the full two-year term, rather than for the duration of the effective dates set forth in the ITC^DeltaCom/BellSouth agreement.

GNAPs also argues that other provisions illustrate this point. They point to Section IV.I of the agreement, which allows GNAPs to request unbundled network elements not specifically included in the contract. Under this provision, BellSouth must accept or reject the request in 30 days, provide pricing in 45 days, and provide actual interconnection and service within 90 days. GNAPs contends that even if BellSouth actually met the 90 day provision, considering BellSouth believes that the agreement was only effective for five and one-half months, it would hardly make it worthwhile for GNAPs to request any UNEs, since the newly requested UNE would only be effective for two and one-half months. Initial Brief at p. 5.

GNAPs adds that Section V.E.5 also demonstrates that the agreement must be in effect for the full two-year term. Under this provision, the parties are to use "good faith efforts" to establish a plan to maintain an industry standard level of traffic blockage between their networks. This plan must be developed within 90 days of the execution of the agreement. If the effective dates of the ITC^DeltaCom agreement are applicable, rather than the two-year term, GNAPs emphasizes that this plan could only be in effect for two and one-half months. Furthermore, if GNAPs then wants to change any of its interconnection arrangements, pursuant to Section V.C.2, it can only do so upon 60 days notice. If the agreement

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only lasts for five and one-half months, then GNAPs maintains that Section V.C.2 is rendered a nullity. Initial Brief at p. 5-6.

GNAPs argues that these examples within the agreement itself demonstrate that the entire agreement contemplates that it will be in effect for two years. Therefore, from a legal, as well as practical perspective, GNAPs believes that when it adopted this agreement, it got it for the full two-year term. Initial Brief at p. 7.

GNAPs further argues that Section 252(i) of the Act supports GNAPs' argument that it obtained the ITC^DeltaCom/BellSouth agreement for the entire duration. GNAPs argues that the purpose of Section 252(i) is to prevent discrimination between CLECs to ensure that "any deal that an ILEC makes available to one CLEC is automatically available to all CLECs." Initial Brief at p. 7. Using this interpretation of Section 252(i), GNAPs argues that one must first determine what deal ITC^DeltaCom got in its agreement with BellSouth. GNAPs maintains that ITC^DeltaCom obtained a two-year deal, and, therefore, any other CLEC that chose to adopt that agreement should have it for two-years in accordance with Section 252(i).

Finally, GNAPs argues that FCC Rule 47 C.F.R. § 51.809 provides a means for an ILEC to demonstrate that it should not have to give a CLEC terms and conditions that it provided to another CLEC. Under this rule, GNAPs explains that the ILEC must simply make a showing that providing a specific interconnection arrangement has become more expensive for the ILEC than at the time the arrangement was originally provided or demonstrate that the arrangement has become technically infeasible. GNAPs argues that this rule eliminates any concerns that an ILEC could get trapped into providing an unfavorable arrangement in perpetuity. Initial Brief at p. 8-9.

For all these reasons, GNAPs argues that its adopted agreement with BellSouth should be effective until January 2001, a full two years after the effective date of the GNAPs' adoption.

BELLSOUTH

BellSouth argues that the unambiguous language in the contract must govern in this situation.¹ BellSouth adds that the parties have agreed that this contract is unambiguous, and, therefore, this matter may be resolved as a legal issue without reliance upon any extrinsic evidence. Initial Brief at p. 2.

BellSouth contends that its "opt-in" agreement with GNAPs, by which GNAPs adopted the ITC^DeltaCom/BellSouth agreement, clearly states that the expiration date is July 1, 1999, and that there are no other indications that another expiration date was contemplated. BellSouth argues that in order to accept GNAPs' argument that the duration of the contract is a material term, one would have to assume that the parties agreed to disagree on a material term--the expiration date that is clearly identified. BellSouth maintains that nothing in the agreement indicates that there was any such agreement. Initial Brief at p. 3.

BellSouth further argues that this Commission's approval of the adoption did not change the unambiguous terms of the agreement.² BellSouth contends, therefore, the clear language in the agreement itself must be relied upon in determining when the agreement expired, and the language clearly states that the agreement expired on July 1, 1999. Initial Brief at p. 4.

BellSouth explains that under both state and federal law, the stated expiration date controls in an adopted agreement. BellSouth refers first to Section 252(i) of the Act, which states:

(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

¹ Citing Walgreen Co. v. Habitat Development Corp., 655 So. 2d 164, 165 (Fla. 3rd DCA 1995); and Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So. 2d 738, 739 (Fla. 3rd DCA 1989).

² Citing Emergency Associates of Tampa, P.A. v. Sassano, 664 So. 2d 1000, 1003 (Fla. 2nd DCA 1995) (when the terms of a contract are clear and unambiguous, the court cannot rewrite the contract to make it more reasonable.)

telecommunications carrier upon the same terms and conditions as those provided in the agreement.

BellSouth argues that the phrase "same terms and conditions" means that the carrier adopting an agreement must accept the expiration date. Initial Brief at p. 4-5. BellSouth explains that under GNAPs' interpretation, even if GNAPs adopts the agreement well after the start date, it would be able to prolong the agreement much later than was intended in the originally negotiated agreement. BellSouth asserts that this argument has been rejected by the FCC, Federal Courts, and many state commissions. BellSouth contends that GNAPs has, itself, been involved in many of these decisions, and in almost every instance, has lost. Initial Brief at p. 5.

Specifically, BellSouth explains that 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 Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic of Virginia, Inc. BellSouth states that GNAPs filed an arbitration in Virginia, in which the specific issue was whether the agreement of another carrier that GNAPs had adopted was going to expire shortly. The Virginia Commission determined that the agreement would terminate on July 1, 1999, the clearly expressed termination date, because the agreement did not indicate that the parties had negotiated otherwise. Since the Commission believed that the agreement would only last for 30 days, they did not allow GNAPs to adopt the agreement. BellSouth explains that GNAPs then took the matter to the FCC. BellSouth maintains that the FCC upheld the Virginia Commission's decision, stating that, " the carrier opting into an existing agreement takes all the terms and conditions of that agreement (or portions of that agreement), including its original expiration date." Final Order at fn. 27 in CC Docket 99-198. Initial Brief at p. 5-6.

BellSouth argues that in a similar case, in 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., the FCC again sustained the New Jersey Commission's determination that the termination date controls in an adopted agreement, stating that, " the carrier opting into an existing agreement takes all the terms and conditions of that agreement (or portions of that agreement), including its original expiration date." Final Order at fn. 25 in CC Docket 99-154. Initial Brief at p. 6-7.

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BellSouth states that GNAPs also attempted to make this argument to the Maryland Public Service Commission, in 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. Initial Brief at p. 7. BellSouth explains that the Maryland Commission also rejected GNAPs' argument, and concluded that:

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.

Order No. 75360.

BellSouth notes that this Commission's own comments to the FCC last year in CC Docket No. 96-98 and CC Docket No. 99-68 support BellSouth's position. Initial Brief at p. 8. Therein, the Commission stated:

With regard to the Commission's specific example involving the time frame a carrier should be afforded to opt into a pre-existing 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 at p. 8.

BellSouth adds that in the only state commission decision to grant GNAPs' request to adopt and extend an existing agreement, a

Federal Court subsequently overturned the state commission's decision.³ Initial Brief at p. 9-10. In its decision, the Federal Court stated that:

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.

Id.

BellSouth argues that even from a public policy perspective, the agreement should not be extended beyond the stated expiration date. BellSouth maintains that to do so would require that any term offered in a contract could be maintained in perpetuity and made available to every new entrant. Initial Brief at p. 10. BellSouth argues that this would have a chilling effect on future negotiations. BellSouth further contends that this could result in technically infeasible or financially detrimental provisions being perpetuated ad infinitum through the adoption process. BellSouth asserts that this is a loophole that Congress did not intend in promulgating Section 252(i) of the Act. Initial Brief at p. 11.

For these reasons, BellSouth asks that the Commission find that the agreement adopted by GNAPS expired on July 1, 1999.

PARTIES ARGUMENTS - REPLY BRIEFS

GNAPS

GNAPS responds by arguing that some modification to the ITC^DeltaCom agreement occurs at the point that the adoption became effective, because the ITC^DeltaCom agreement had an effective date of July 1, 1997, but the GNAPS adopted agreement had an effective date of January 18, 1999. GNAPS argues that, therefore, it is only logical that the expiration date would also be automatically modified to match the modified effective date. Reply Brief at p. 1.

GNAPS also argues that the Commission is not prohibited from determining that the duration of the adopted agreement is two years, because that is what the contract says. GNAPS emphasizes

³ Bell Atlantic-Delaware, Inc. et al. vs. Global NAPs South, Inc., 1999 US Dist. LEXIS 19362, December 14, 1999.

that the Commission may interpret the effective terms of the agreement to provide a two-year duration. Reply Brief at p. 2.

GNAPs again argues that FCC Rule 47 C.F.R. § 51.809 provides an "out" for an ILEC that believes that it should not have to provide an interconnection agreement to a CLEC that it has previously provided to another CLEC. Therefore, GNAPs maintains that BellSouth's concerns that unacceptable terms may be improperly perpetuated have no basis. Reply Brief at p. 2.

GNAPs further asserts that the rule in Florida that the plain and unambiguous language in the contract controls actually supports its position, instead of BellSouth's, and adds that this is a decision for this Commission, not some other state commission or the FCC. Reply Brief at p. 3.

In addition, GNAPs argues that it believes that the agreement can only be interpreted properly if consideration is given to the relationship between the effective date of the agreement, the expiration date, and other specific dates contained therein. GNAPs argues that to do otherwise would frustrate the intent behind many specific provisions in the agreement. Reply Brief at p. 4.

GNAPs further emphasizes that the cases to which BellSouth refers as having already addressed this issue are cases all involving the same contract, the MFS/Bell Atlantic agreement. Thus, GNAPs contends that these cases only demonstrate that it litigated the same issue in multiple jurisdictions. GNAPs also explains that the MFS agreement is worded differently than the ITC^DeltaCom agreement. GNAPs contends that the ITC^DeltaCom agreement specifically states that the agreement has a two year term. In contrast, GNAPs argues that the MFS agreement clearly states that the agreement ends on a date specific, as noted by the Maryland commission in rendering its decision on the matter. Reply Brief at p. 6-7.

GNAPs further emphasizes that the Virginia and Maryland commissions simply did not let GNAPs adopt the agreement, and, therefore, the termination date issue was not really pertinent. As for the Delaware, Pennsylvania, and New Jersey commissions, GNAPs emphasizes that each of them allowed GNAPs to establish a termination date beyond the original July 1, 1999, date in the MFS/Bell Atlantic agreement. GNAPs emphasizes that only the Delaware decision has been overturned. Reply Brief at p. 8-9.

Finally, GNAPs maintains that BellSouth's argument that allowing the adopted agreement to remain effective beyond the dates

of the original agreement will promote "perpetual" contracts is baseless. Again, GNAPs emphasizes that FCC Rule 47 C.F.R. 51.809 eliminates the policy concerns raised by BellSouth. Reply Brief at p. 9-11.

BellSouth

BellSouth responds by noting that GNAPs has failed to cite any supporting case law or other legal support for its position. BellSouth contends that the reason for this omission is that all of the relevant case law is in support of BellSouth's position. Reply Brief at p. 1.

BellSouth also argues that the specific language in its "opt-in" agreement with GNAPs does, in fact, have a specific termination date, as set forth on page 1, in numbered paragraph 2. Reply Brief at p. 2. BellSouth argues that there is no other expiration date indicated and no reason to modify that date or to assume that the agreement contemplates something else. BellSouth explains that GNAPs ignores this specific language in the "opt-in" portion of the agreement, and, instead, focuses on language in the pre-existing ITC^DeltaCom agreement with BellSouth. Reply Brief at p. 2.

BellSouth maintains that allowing GNAPs to obtain the ITC^DeltaCom agreement for a full two-year term would modify an essential term of that agreement--the termination date. BellSouth argues, however, that GNAPs is obligated to take all of the terms of the agreement, including the termination date; therefore, the termination date should not be modified. Reply Brief at p. 2.

In addition, BellSouth argues that the FCC decisions on this point are binding on state commissions; therefore, the FCC's decision in CC Docket No. 99-198, the GNAPs Petition for preemption of the Virginia Commission's decision on this issue, is binding on state commissions.⁴ Reply Brief at p. 3.

BellSouth further argues that this is simply a case of "no good deed goes unpunished." Reply Brief at p. 3. BellSouth argues that companies are limited in their ability to adopt an agreement to a "reasonable" time after that agreement became effective. BellSouth notes that in a number of cases, Bell Atlantic refused to allow GNAPs to adopt an agreement, because GNAPs sought to do so too long after the original agreement became effective. BellSouth

⁴ Citing Bell Atlantic-Delaware Inc. V. Global NAPs South, Inc., 1999 U.S. Dist. Lexis 19362 (December 4, 1999)/

emphasizes that this refusal was upheld by the Maryland and Virginia commissions, in the decisions previously cited herein. BellSouth contends, however, that it agreed to allow GNAPs to adopt the ITC^DeltaCom agreement, even though only six months remained until the expiration of the agreement. Now, argues BellSouth, GNAPs believes that it must be allowed to keep the adopted agreement for a full two-year term, because BellSouth did not exercise its right under 47 C.F.R. § 51.809 to try to prevent GNAPs from taking the agreement. Reply Brief at p. 3. BellSouth maintains that this is simply incorrect, and would encourage ILECs to use the provisions of 47 C.F.R. § 51.809 more readily in order to prevent an adopted agreement from being extended beyond the originally intended expiration date. BellSouth further emphasizes that 47 C.F.R. § 51.809 does not set forth the only bases under which opt-in rights are limited.⁵ BellSouth maintains that a carrier can only adopt an agreement prior to the expiration of the original agreement, and may be prevented from doing so if the ILEC demonstrates that the adoption would be technically infeasible or would be too costly for the ILEC. Reply Brief at p. 5.

Finally, BellSouth argues that applying GNAPs' rationale to the adoption of agreements would have a discriminatory result, contrary to GNAPs' assertions. BellSouth notes that GNAPs argues that §252(i) is an anti-discriminatory provision meant to ensure that all CLECs are placed on an even playing field. BellSouth emphasizes that once the ITC^DeltaCom agreement expired, ITC^DeltaCom no longer had a right to any of the provisions in that agreement. If, however, GNAPs is allowed to extend the terms of that agreement for itself for 18 months simply by adopting the agreement, it will receive the benefit of contract terms that are no longer available to ITC^DeltaCom. Reply Brief at p. 6.

STAFF'S ANALYSIS AND RECOMMENDATION

Under common principles of contract interpretation, the more specific language in an agreement controls. South Florida Beverage Corporation V. Efrain Figueredo, 409 So. 2d 490, 495 (Fla. 3rd DCA 1982), citing Hollerbach v. U. S., 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898 (1914); Bystra v. Federal Land Bank of Columbia, 82 Fla.

⁵ Citing 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., 1999 FCC Lexis 3695.

472, 90 So. 478 (1921); and 4 Williston on Contracts § 618 (3rd ed. 1961).

Based upon the plain language in the "opt-in" agreement, the language in the adopted ITC^DeltaCom agreement, and the arguments of the parties, staff recommends that Commission determine that the agreement adopted by GNAPs expired on July 1, 1999. Staff recommends that this decision is appropriate based upon: 1.) the plain language in the signed "opt-in" agreement; and 2.) the clear indication in the adopted ITC^DeltaCom agreement that a new agreement would be negotiated by July 1, 1999.

First, staff emphasizes that the so-called "opt-in" agreement is clear--the agreement was to expire on July 1, 1999, unless otherwise agreed to by the parties, or ordered by a state commission, the FCC, or a court of competent jurisdiction. Neither party has argued that they agreed at any point to modify the expiration date of the agreement. Likewise, neither party has shown that either the FCC or any court of competent jurisdiction modified the date. As such, the only other basis for a change is if this Commission orders that it be modified. Staff notes, however, that GNAPs' petition was not filed until August 26, 1999, and that GNAPs did not seek modification or clarification prior to that time of the expiration date in its adopted agreement.

Second, the language in the original ITC^DeltaCom agreement with BellSouth clearly indicates that the parties intended for that agreement to end on July 1, 1999, and that they would enter into a new agreement at that point. GNAPs has not shown that the beginning and ending dates of the ITC^DeltaCom agreement, as well as the indication that a new agreement would be negotiated between July 1, 1998, and July 1, 1999, are any less integral terms than the statement that the agreement was to be for two years. Furthermore, the language in the agreement referring to a two-year term is clearly tied to the effective date and the date upon which a new agreement was to be reached. In other words, the two-year term is not a "free-standing" term--it is limited by the language and dates attached to it. Therefore, it appears that the two-year term was contemplated only within the context of the July 1, 1997, effective date, and the July 1, 1999, date contemplated for the new agreement. There is no indication to the contrary. In fact, the language in the GNAPs/BellSouth "opt-in" agreement clearly supports BellSouth's contention that GNAPs' adoption of the ITC^DeltaCom/BellSouth agreement was to expire on July 1, 1999, at the same time the ITC^DeltaCom agreement itself expired.

In addition, staff notes that there may be some merit to BellSouth's arguments that GNAPs' rationale may, ultimately, prove discriminatory and may increase disputes over adoptions under Section 252(i). It is possible that allowing CLECs to automatically extend the life of an agreement simply by adopting that agreement some time after its original effective date may have a discriminatory impact on the original CLEC that actually negotiated the agreement. For the party to the original agreement, the expiration date of the terms of the contract is clear. Thereafter, as BellSouth has argued, the party would have to begin negotiations for a new agreement. If, however, a CLEC is allowed to adopt an agreement and automatically extend that term of the agreement based upon the effective date of the adoption, then the adopting CLEC would have the advantage of being able to operate under advantageous terms originally negotiated by another CLEC, but no longer available to that original CLEC. Staff agrees that this is an absurd, if somewhat speculative, result, and could not be what was contemplated by Section 252(i).

The argument could even be made that a more absurd result could follow from the rationale presented by GNAPs. If CLEC 2 is allowed to adopt an agreement and automatically extend the life of that agreement based upon the effective date of the adoption, what is to prevent the original party to the agreement, CLEC 1, whose own contract has now expired, from simply bypassing the expiration date in its own agreement by obtaining the desired terms and conditions of its original agreement through the adoption of the now extended agreement between CLEC 2 and the ILEC. Clearly, this would be also absurd and is not what was contemplated by Section 252(i) of the Act. This scenario is not, however, beyond the realm of possibility under GNAPs' rationale.

Finally, staff notes that this Commission has indicated in the past to the FCC that it believes that the ability of a CLEC to obtain the terms and conditions of a pre-existing agreement ends at the expiration of that original agreement. While these statements have no precedential value, they do indicate that the Commission has viewed the expiration date of agreements as an integral term negotiated by the original parties, and one which travels with the agreement when it is adopted.

For the foregoing reasons, staff recommends that the agreement adopted by GNAPs expired on July 1, 1999.

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ISSUE 2: Should this Docket be closed?

RECOMMENDATION: No. This Docket should remain open to address the issues identified for arbitration. **(KEATING)**

STAFF ANALYSIS: This Docket should remain open to address the issues identified for arbitration.

AGREEMENT

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

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

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

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

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

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

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

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

10/09/98

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

BellSouth Telecommunications, Inc.

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

and

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

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

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

10/09/98

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

BellSouth Telecommunications, Inc.



Signature


Jerry D. Hendrix

Name

1/18/99

Date

Global Naps South, Inc.



Signature

Name

Date

- B. The interconnection of all networks will be based upon accepted industry/national guidelines for transmission standards and traffic blocking criteria.
- C. The Parties will work cooperatively to apply sound network management principles by invoking appropriate network management controls to alleviate or prevent network congestion.
- D. For network expansion, the Parties agree to review engineering requirements on a quarterly basis and establish forecasts for trunk utilization. New trunk groups will be added as reasonably warranted.
- E. DeltaCom and BellSouth will exchange appropriate information (*e.g.*, maintenance contact numbers, network information, information required to comply with law enforcement and other security agencies of the Government) to achieve desired reliability. In addition, DeltaCom and BellSouth will cooperatively plan and implement coordinated repair procedures to ensure customer trouble reports are resolved in a timely and appropriate manner.

XVII. TERM

- A. The term of this Agreement shall be two years, beginning July 1, 1997.
- B. The Parties agree that by no later than July 1, 1998, they shall commence negotiations with regard to the terms, conditions and prices of local interconnection to be effective beginning July 1, 1999.
- C. If, within 90 days of commencing the negotiation referred to in Section XVII.B above, the Parties are unable to satisfactorily negotiate new local interconnection terms, conditions and prices, either Party may petition the state commission to establish appropriate local interconnection arrangements pursuant to 47 U.S.C. 252. The Parties agree that, in such event, they shall encourage the Commission to issue its order regarding the appropriate local interconnection arrangements no later than January 1, 1999. The Parties further agree that in the event the Commission does not issue its order prior to January 1, 1999 or if the Parties continue beyond July 1, 1999 to negotiate the local interconnection arrangements without Commission intervention, the terms, conditions and prices ultimately ordered by the Commission, or negotiated by the Parties, will be effective retroactive to July 1, 1999. Until the revised local interconnection