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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.)
_____)

Docket No. 12996 **CMU**
Filed November 29, 1999

MEMORANDUM OF LAW IN SUPPORT OF
ITC^DELTACOM'S PETITION TO INTERVENE

Global NAPs, Inc., files this Memorandum of Law in Support of ITC^DeltaCom Communications, Inc.'s ("DeltaCom") Petition to Intervene in the above-styled proceeding. Global NAPs posits that for the reasons discussed herein, DeltaCom is entitled to intervene into this proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes ("F.S.") and Rule 28-106.205, Florida Administrative Code ("F.A.C."), as a person whose substantial interests will be affected by or determined in this proceeding.

ITC^DeltaCom's Substantial Interests Will Be Determined

Under Sections 120.569 and 120.57, F.S., persons whose substantial interests will be determined in an administrative adjudicatory proceeding are entitled to participate in that proceeding. Rule 28-106.205, F.A.C., provides that persons, other than the original parties to a pending proceeding, whose substantial interests may be determined in that proceeding, may intervene upon filing a petition that sufficiently alleges entitlement to participate in the proceeding.

Florida case law interpreting the "substantial interest" standing requirement under Sections

- AFA _____
- APP _____
- CAF _____
- CMU** _____
- CTR _____
- EAG _____
- LEG 1 _____
- MAS 3 _____
- OPC _____
- PAI _____
- SEC 1 _____
- WAW _____
- OTH _____

120.569 and 120.57, F.S., and Rule 28-106.205, F.A.C., holds that a person is entitled to participate in an administrative adjudicatory proceeding under Section 120.569 and 120.57, F. S., if he or she merely alleges that as a result of the proceeding, he or she will or may (1) suffer an injury in fact of sufficient immediacy to entitle him or her to a hearing; and (2) the alleged injury is of the type the proceeding is designed to protect. Village Park Mobile Home Association, Inc., v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987). See also, In re: Investigation into Pricing of Unbundled Network Elements, Docket No. 990649-TP, Order No. PSC-99-1424-PCO-TP (July 23, 1999) (granting BellSouth intervenor status as an entity whose substantial interests may be affected by the proceeding). In this case, DeltaCom has alleged that its substantial interests will be affected in this proceeding. Therefore, it is legally entitled to intervene and participate as a party.

It is readily apparent that DeltaCom's substantial interests will be affected by this proceeding. In January 1999, pursuant to Section 252(i) of the federal Telecommunications Act of 1996, 47 U.S.C. ss. 151, Global NAPs, Inc., adopted the Interconnection Agreement Between DeltaCom, Inc., and BellSouth Telecommunications, Inc. (hereafter "Interconnection Agreement"), as the agreement governing Global NAPs' interconnection dealings with BellSouth. On August 31, 1999, Global NAPs filed the Complaint in this proceeding, alleging that BellSouth has breached its obligation under the Interconnection Agreement to pay Global NAPs reciprocal compensation for delivering Local Traffic originating with BellSouth end user customers, to Internet service providers (ISPs) that are Global NAPs end user customers. Plainly put, Global NAPs adopted the DeltaCom Interconnection Agreement, and the terms of that Agreement are now issue in this case.

The resolution of Global NAPs' Complaint necessarily will require the Commission to interpret the Interconnection Agreement Between DeltaCom and BellSouth. That interpretation will determine not only Global NAPs', but also likely will determine DeltaCom's, rights and obligations under the Interconnection Agreement. Clearly, the Commission's interpretation of the Interconnection Agreement in this proceeding will, or has definite potential to, cause injury in fact to DeltaCom, and that injury is of sufficient immediacy to entitle DeltaCom to participate in this proceeding. Moreover, DeltaCom's alleged injury is of the type this proceeding is designed to protect, since the proceeding's purpose specifically is to interpret provisions in the Interconnection Agreement Between DeltaCom and BellSouth. To deny DeltaCom the opportunity to participate in this proceeding, in which its contractual rights and obligations will or may be determined, contravenes the plain language of Section 120.569 and 120.57, Florida Statutes, and Rule 28-106.205, F.A.C., and is contrary to established case law holding that persons whose substantial interests will or may be determined in an agency proceeding are entitled to participate in that proceeding to defend those interests.

Prior Commission Decisions Do Not Militate
Against ITC^DeltaCom's Intervention

In prior cases before the Commission involving the arbitration of interconnection agreement terms or seeking performance of negotiated interconnection agreement terms, the Commission has denied intervention by persons who were not parties to the negotiation of the interconnection agreement at issue in the proceeding. However, the circumstances in those cases are readily distinguishable from those in this proceeding.

In In re: Complaint of WorldCom Technologies, Inc. Against BellSouth

Telecommunications, Inc., for Breach of Terms of Florida Partial Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, Docket No. 971478-TP, Order No. PSC-98-0476-PCO-TP (April 2, 1998) (hereafter "WorldCom"), the Commission denied GTE Florida Incorporated's request to intervene into a complaint proceeding filed by WorldCom against BellSouth for breach of the interconnection agreement between WorldCom and BellSouth. The Commission reasoned:

We acknowledge Intermedia's argument that our resolution of the present dispute between WorldCom and BellSouth may have an effect on Intermedia. In the new competitive paradigm, however, that argument cannot be joined to sustain intervention in arbitration and contract dispute proceedings. 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 parties 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.

Id. at 2 (emphasis added).

In this case, the specific contract at issue is DeltaCom's Interconnection Agreement with BellSouth, so that in this case, DeltaCom is seeking to intervene to participate in a proceeding that will interpret its own agreement -- not the agreement of a third-party competitor, as was the case in the WorldCom proceeding. None of the Commission's policy considerations for denying third-party intervention to encourage unimpeded negotiation of interconnection agreements that were expressed in WorldCom would be served in this case by denying DeltaCom the ability to participate in a proceeding involving its own agreement, which it negotiated with BellSouth. To the contrary, since it is DeltaCom's specific contract that is being interpreted in this case, the Commission's reasoning in WorldCom dictates that DeltaCom be allowed to intervene and participate as a party.

Likewise, in In re: Petition by MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc., Concerning the Interconnection and Resale Under the Telecommunications Act of 1996, Docket No. 960846-TP, P.C. Order No. PSC-98-0008-PCO-TP (Jan. 2, 1998) and In re: Petition by AT&T Communications of the Southern States, Inc., for Arbitration with BellSouth Telecommunications, Inc., Docket No. 960833-TP, Order No. PSC-98-0007-PCO-TP (Jan. 2, 1998), the Commission's decision to disallow intervention of American Communications Services, Intermedia Communications, Sprint, and other third parties was expressly predicated on the Commission's interpretation of Section 252(b)(1) of the Telecommunications Act of 1996 as limiting participation in arbitration proceedings, under the rationale that the Act contemplates the participation of only the parties to the negotiation of the interconnection agreement. The Commission reasoned:

This proceeding remains an arbitration proceeding for the purpose of making permanent a number of interim rates established in the initiation arbitrations on the basis of cost studies subsequently filed by BellSouth in these consolidated dockets. The decisions to be made here will become part of the ultimate interconnection agreements between the parties to the initial negotiations and will binding only upon them. The presence, therefore, of Intermedia, Time Warner and Sprint in this proceeding, who were not parties to the negotiations, and will not be parties to the ultimate agreements, is at odds with the Act. Order No. PSC.-98-0008-P.O.-TP, at 2 (Jan. 2, 1998) (emphasis added).

Again, the Commission's rationale for denying intervention in those cases clearly is inapposite to DeltaCom's intervention in this proceeding. Critically, unlike the third parties in the AT&T Arbitration and MCI Arbitration cases who were not involved in the negotiation of the agreements at issue, this case involves the interpretation of the Interconnection Agreement that DeltaCom itself negotiated with BellSouth. As the entity that negotiated the Interconnection

Agreement being interpreted in this Complaint proceeding, DeltaCom clearly has a vital stake in the proceeding's outcome and is entitled to fully participate as a party.

Permitting DeltaCom to intervene in this proceeding will not open the floodgates to intervention by third-parties in interconnection agreement arbitration and complaint cases, because DeltaCom's situation in this case is unique in that its own contract is being interpreted in a proceeding involving other parties. This sets DeltaCom apart from the third parties that previously have sought to intervene in the Commission's interconnection complaint/arbitration cases, and also distinguishes DeltaCom from the great majority of potential intervenors in future cases. Under the very limited circumstances in this case — i.e., the intervenor's own Interconnection Agreement will be interpreted — granting intervention is legally appropriate and directed under applicable Florida case law and Commission precedent.

Other Jurisdictions Have Permitted Intervention in
Interconnection Agreement Complaint Proceedings

Other states' utility regulatory agencies have allowed interested and affected parties to intervene in proceedings in which the terms and conditions of Interconnection Agreements were being adjudicated.

In In re: Emergency Petitions of IGC Telecom Group, Inc., and ITC DeltaCom Communications, Inc., for a Declaratory Ruling, Alabama Public Service Commission Docket No. 26619 (Mar. 4, 1999), numerous telecommunications entities, including Intermedia Communications, Inc., KMC Telecom, Inc., e.spire Communications, Inc., and Hyperion Telecommunications, Inc., were allowed to intervene and participate as parties, because each of

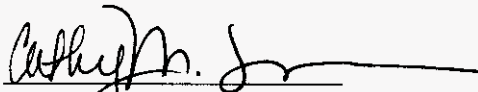
them had “local traffic” and “reciprocal compensation” provisions in their Interconnection Agreements similar to those being interpreted by the Alabama Public Service Commission in that case. In that case, the parties seeking to intervene in that case posited, and the Alabama Commission agreed, that any decision rendered by the Commission on those issues could well have a negative binding precedential effect on the Commission’s future determinations on similar issues.¹ In this proceeding, DeltaCom’s case for intervention is far more compelling, because the terms of DeltaCom’s own Interconnection Agreement are being interpreted in this proceeding. It is unquestionable that any decision this Commission renders concerning that Agreement likely will be binding precedent with respect to DeltaCom’s rights and responsibilities under that Agreement in the future.

Conclusion

For the reasons set forth above, DeltaCom’s substantial interests clearly will be affected by this proceeding. Under the Florida Administrative Procedure Act, applicable Commission precedent, and other case law from Florida and other jurisdictions, DeltaCom should be permitted to intervene and participate as a party in this proceeding.

¹Similarly, in Teleport Communications Group, Inc. v. Illinois Bell Telephone Company Ameritech Illinois Complaint as to Dispute over a Contract Definition, Illinois Commerce Commission Docket Nos. 97-0404, 97-0519, and 97--0525 Consolidated (March 11, 1998), AT&T Communications of Illinois, Focal Communications Corporation of Illinois, America Online, Inc., and Consolidated Communications, Inc., were permitted by the Illinois Commerce Commission to intervene and participate in the proceedings concerning interconnection agreement provisions concerning local traffic and reciprocal compensation that were similar to those in the intervenors’ interconnection agreements.

Respectfully submitted this 29th day of November, 1999.



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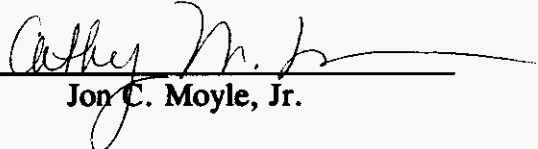
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 29th day of November, 1999 by U. S. Mail to Nancy White, General Counsel, BellSouth Telecommunications, Inc., 150 South Monroe Street, Suite 400, Tallahassee, FL 32301, to Michael P. Goggin, BellSouth Telecommunications, Inc., Museum Tower, Suite 1910, 150 West Flagler Street, Miami, FL 33130, and R. Douglas Lackey and E. Earl Edenfield, Jr., BellSouth Telecommunications, Inc., BellSouth Center, Suite 4300, 675 W. Peachtree Street, N.E., Atlanta, GA 30375.



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