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ORIGINAL

February 9, 2000

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

Re: Docket No. 991220-TP

Dear Ms. Bayó:

Enclosed please find the original and fifteen copies of BellSouth Telecommunications, Inc.'s Reply 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 (BW)

J. Phillip Carver

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

AFA
APP
CAF
CMU
CTR
EAG
LEG 1
MAS 3
OPC
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SEC 1
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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 REPLY BRIEF

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Reply to the Initial Brief of Global NAPs South, Inc. ("Global NAPs") and states the following:

Global NAPs' Initial Brief is noteworthy not so much for what it says as for what it fails to say. In the ten pages of legal argument submitted by Global NAPs, there is not a single citation to any case law that supports Global NAPs' position.[1] Moreover, there is not a single reference to any of the many cases cited in BellSouth's Initial Brief (i.e., four Commission Orders, an FCC Order, and a Federal Court Order) that have rejected the arguments that Global NAPs advances here, a rather strange omission considering that Global NAPs was a party to each of these cases. The reason for these omissions is simple, there is no legal authority to support Global NAPs' position.

Global NAPs essentially divides its Brief into two arguments: 1) an argument that, as a matter of contract interpretation, the Opt-In Agreement should be interpreted as having a two-year term, and 2) an argument that Section 252(i) of the Telecommunications Act of 1996 ("Act") supports this interpretation. Again, neither

[1] In fact, the only citation to any case is in support of the rather peripheral point that 47 CFR § 51.809 has been read broadly (Brief, p. 5).

argument by Global NAPs enjoys the benefit of any supporting authority, and both are wrong.

Global NAPs first tries to make the argument that it is entitled to a two-year term based on the "contractual language" (Brief, p. 2). In making this argument, however, Global NAPs completely ignores the specific language of the agreement at issue, the Agreement of January 18, 1999 between BellSouth and Global NAPs in which Global NAPs adopted the pre-existing DeltaCom agreement ("Opt-In Agreement"). As stated in BellSouth's Initial Brief, the Opt-In Agreement clearly contains an expiration date of July 1, 1999. There is no other expiration date stated on the face of the agreement, and no basis to reach the conclusion that the unambiguous language of the agreement contemplates some other date. Apparently in light of this fact, Global NAPs has elected to ignore the Opt-In Agreement and focus, instead, on the language of the pre-existing Agreement between BellSouth and DeltaCom.

Global NAPs devotes the majority of its brief to establishing the rather obvious point that the DeltaCom agreement was intended to be a two-year agreement. Global NAPs, however, simply states this point and stops, as if this somehow resolves the instant issue. In other words, Global NAPs reasons that since the DeltaCom agreement was structured to be a two-year agreement, Global NAPs must necessarily also be entitled to a two-year term, even if this requires changing one of the essential terms of the DeltaCom Agreement, the expiration date. The issue, of course, is whether Global NAPs is obligated to accept all of the provisions of the DeltaCom agreement, including the expiration date. The cases cited in BellSouth's Initial Brief establish that the answer is affirmative. Further, the decision to this effect by the FCC (in FCC Docket No. 99-198,

In the Matter of Global NAPs South Inc., etc.) is binding on State Commissions. Bell Atlantic-Delaware Inc. v. Global NAPs South, Inc., 1999 U.S. Dist. Lexis 19362 (December 14, 1999). Global NAPs ignores this authority and simply assumes a contrary answer.

If Global NAPs' argument proves anything, it is the maxim that "no good deed goes unpunished." Under 47 C.F.R. § 51.809(c), the period in which a carrier can opt-in to an Agreement is limited to a reasonable time after the Agreement is approved. In a number of the cases cited by BellSouth in its Initial Brief, Bell Atlantic refused to allow Global NAPs to opt-into an agreement with another carrier because Global NAPs did not attempt to do so within what Bell Atlantic considered to be a "reasonable time." This result was sustained by at least two commissions, even though the duration of the adopted agreements would have been longer than the duration of the Opt-In Agreement between BellSouth and Global NAPs.[2] In our case, of course, BellSouth was significantly more generous to Global NAPs, allowing Global NAPs to adopt the DeltaCom agreement even though only six months remained until the expiration of that agreement. Global NAPs has now seized upon the fact that BellSouth did not invoke its right under § 51.809(c) to prevent Global NAPs from adopting the DeltaCom Agreement at a late date and twisted it around to argue that, since the pre-existing DeltaCom agreement was structured to have a two-year duration, Global NAPs must also have an agreement of a two-year duration. Again, the controlling law makes it clear that this is not the case.

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[2] Specifically, the Maryland Commission found that it was unreasonable to allow Global NAPs to opt-into an agreement when the original request occurred ten months prior to the expiration date of that agreement (Case No. 8731, Order No. 75360, July 15, 1999). The Virginia Commission likewise refused to allow Global NAPs to opt in to a Bell Atlantic/MFS agreement set to expire July 1, 1999 when Global NAPs requested to do so in August of 1998 (Case No. PVC 980173, Slip Opinion, April 2, 1999).

Moreover, this argument by Global NAPs presents one more example of how damaging the adoption of Global NAPs position would be from a policy perspective. Under Global NAPs' approach, an incumbent would be well-advised to guard zealously its right under § 51.809 to prevent a new entrant from opting-into an agreement after the passage of a reasonable time because if it did not do so, it would be held to have necessarily allowed the party opting-in to have an agreement that does not expire on the same date as the Agreement being adopted, regardless of the parties' expressed intent. Even if there were a legal basis for Global NAPs' position (and there is none), BellSouth submits that the position that Global NAPs advocates would result in a policy that sends precisely the wrong signals to parties engaged in negotiations.

In the second part of its Brief, Global NAPs argues that Section 252(i) somehow supports the notion that the Opt-In Agreement must have a duration of two years. However, Global NAPs once again cites to no legal authority to support its position and ignores the numerous cases that have resolved this issue against it. Instead, Global NAPs spends several pages of its Brief anticipating and rebutting what BellSouth includes in its Initial Brief as a policy argument: that this Commission should not create a situation in which contract terms are given perpetual existence despite the intentions of the original parties to the contract. Specifically, BellSouth made the point that if Global NAPs can extend the life of the provisions of the DeltaCom agreement by opting into it, then another carrier can do the same at the end of the Opt-In Agreement, and on and on, ad infinitum.

Global NAPs' response to BellSouth's point appears to assume that this is what Congress intended. Global NAPs, therefore, contends that this result can (and should)

only be stopped by applying the restrictions of § 51.809(b). The "opt-in" requirement of 51.809 does not apply when the costs to provide the service or element to the carrier opting-in are greater than the costs to serve the original carrier (§ 51.869(b)(1) or when "the provision of a particular interconnection, service or element to the requesting carrier is not technically feasible" (§ 51.809(b)(2). Global NAPs would have this Commission believe that these restrictions are the only basis upon which an incumbent can prevent a contract term from being perpetuated indefinitely through the opt-in process. However, Global NAPs' contention is, once again, belied by the numerous cases in which it has participated in the past, and that it has lost.

The FCC stated 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.), 1999 FCC LEXIS 3695, that its "rules establish only two limited exceptions to the right of carriers to opt into an interconnection agreement. See, 47 C.F.R. § 51.809(b)" (fn 26). The FCC stated precisely the same language in the Virginia case (Id., fn 25). In each instance, however, the FCC also stated that a party that is allowed to opt-in can only do so until the expiration date of the original Agreement. Thus, the rule that applies is clear. A competitive carrier can only opt into the terms of a pre-existing agreement until the expiration of that Agreement. As an additional restriction, the new entrant cannot opt-into an agreement at any time if the incumbent demonstrates either technical infeasibility or that there is a cost difference that supports this result. There is nothing in the Act or in any of the controlling authority to suggest that the provisions of 51.809(b) present the only circumstances under which opt in rights are limited.

Finally, it is worth noting once again the strange policy that would follow from accepting the position advanced by Global NAPs. Global NAPs states that "Section 252(i) is an important anti-discrimination provision in the . . . Act . . . [that] ensures that all CLECs operate on an even footing" (Brief, p. 7). This statement is important because Global NAPs' position, if accepted, could well bring about precisely the opposite result. As stated in BellSouth's Initial Brief, once the DeltaCom agreement has expired, DeltaCom has no right to insist that the Agreement be renewed upon the same terms. Under Global NAPs' theory, however, Global Naps would have the ability to have the same terms as in the DeltaCom agreement for an additional eighteen months. Thus, Global NAPs would not only have the same thing as DeltaCom—the benefit of the terms of the DeltaCom agreement until it expired—Global Naps would have a greater benefit in the form of particular contract provisions that would be no longer be available to DeltaCom. Thus, the Global NAPs approach would create the very type of discriminatory treatment that Global NAPs itself admits is contrary to the Act.

To summarize, there is no legal authority to support the position of Global NAPs. The Opt-In Agreement is clear on its face, and it states an expiration date of July 1, 1999. Moreover, the governing authority (almost all of which was rendered in cases to which Global NAPs was a party) clearly settles this issue against Global NAPs and in favor of BellSouth. For these reasons, BellSouth respectfully requests the entry of an order by the Commission sustaining BellSouth's position and ruling that the Opt-In Agreement expired July 1, 1999.

Respectfully submitted this 9th day of February, 2000.

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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 9th day of February, 2000 to the following:

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