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March 28, 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. 000262-TP (NOW Communications, Inc.)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to NOW Communications, Inc.'s Motion to Dismiss, 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,

Michael P. Goggin

Michael P. Goggin

(21)

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

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Certificate of Service
Docket No. 000262-TP (NOW Communications)

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail and this 28th day of March, 2000 to the following:

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Michael P. Goggin
(22)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:) Docket No. 000262-TP
)
Petition for Arbitration of the Interconnection)
Agreement Between BellSouth Telecommunications,)
Inc. and NOW Communications, Inc. Pursuant)
to the Telecommunications Act of 1996.)
_____) Filed: March 28, 2000

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO NOW
COMMUNICATIONS, INC.'S MOTION TO DISMISS**

COMES NOW BellSouth Telecommunications, Inc. ("BellSouth") and responds to the Motion to Dismiss filed by NOW Communications, Inc. ("NOW"). In response, BellSouth states as follows:

INTRODUCTION

On March 16, 2000, Now filed its Motion to Dismiss the Petition for Arbitration of a new Resale Agreement ("Petition") filed by BellSouth on February 25, 2000. As a basis for seeking dismissal of BellSouth's Petition, NOW argues two grounds: (1) that BellSouth failed to comply with Section 251(b)(1) of the Telecommunications Act of 1996 (the "1996 Act") regarding the timely filing of a Petition for Arbitration and (2) that BellSouth failed to comply with Section 252(b) of the 1996 Act regarding providing copies of the Petition and relevant documentation to the other party. NOW is wrong on both points. As explained more fully below, BellSouth has complied fully with the requirements of the 1996 Act. Thus, NOW's Motion to Dismiss should be denied.

DOCUMENT NO. 000262-TP DATE

03655 MAR 28 8

FILED AT TALLAHASSEE, FLORIDA

ARGUMENT

A. The Arbitration “window” under Section 252(b)(1) of the 1996 Act

NOW contends that BellSouth failed to comply with the filing requirements contained in Section 252(b)(1) of the 1996 Act. Specifically, NOW argues that Section 252(b)(1) mandates the statutory “window” for filing a petition for arbitration and that “the statutory mandate is jurisdictional and cannot be amended, agreed, extended or waived.” (Motion to Dismiss at 2). Consequently, NOW argues that the Commission “lacks jurisdiction to hear the BellSouth Petition.” (*Id.*). BellSouth does not dispute that the statutory timeframes for arbitration under the 1996 Act are jurisdictional. As will be shown below, however, BellSouth has fully complied with the statutory “arbitration window” by filing its Petition for Arbitration on February 25, 2000.

The existing Resale Agreement between the parties was for a two-year term beginning on June 1, 1997. BellSouth corresponded with NOW as early as October 2, 1998, regarding a new standard resale agreement and the possibility of the parties amending their current agreement to reflect the recovery of charges for BellSouth's provision of access to NOW to BellSouth's operations support systems (“OSS”). Ultimately, BellSouth sent a formal request to renegotiate the parties' existing resale agreement to NOW on August 20, 1999. Despite BellSouth's efforts to negotiate with NOW toward a new resale agreement, no new agreement was reached. The statutory window for the filing of a petition for arbitration by either party, based upon the first date requesting negotiations under Section 252(b)(1) of the 1996 Act, began on January 2, 2000, which was the 135th day, and ended on January 27, 2000, which was the 160th day.

As is reflected in the Petition for Arbitration, as the statutory deadline approached, NOW sent BellSouth a written request to extend the time for the parties to continue negotiating. NOW's letter was sent on January 21, 2000, just six (6) days before the arbitration window was set to close. NOW expressly noted that the time for filing a petition for arbitration would expire on January 27, 2000. NOW then stated in its letter that "[w]e respectfully request your concurrence to extend the window [for filing for arbitration] for 30 days. We are looking toward moving from a resale agreement to a facilities-based agreement with provisions for UNE combinations pursuant to the FCC 319 Order." (NOW's letter of January 21, 2000 is attached to the Petition as Exhibit "D"). In light of this request from NOW, BellSouth sent a letter dated January 26, 2000 to NOW in which BellSouth acknowledged that it would agree to extend the time for the parties to negotiate a new agreement. (BellSouth's letter of January 26, 2000 is attached to the Petition as Exhibit "E").

BellSouth's and NOW's agreement to extend the time for negotiations was not, as NOW apparently contends, an agreement to alter the arbitration timelines found in Section 252(b)(1), but rather was an agreement to alter the start date for the parties' negotiations which would trigger the statutory arbitration deadlines. Basically, the parties agreement to continue negotiating, which again was at NOW's express request, was to treat the date that the request for negotiations was sent as being thirty (30) days later. In other words, BellSouth's August 20, 1999 letter was being treated by the parties, certainly as far as BellSouth was concerned, as having been sent on September 19, 1999 so that the parties could continue their negotiations. This meant

that the statutory arbitration window would close on February 25, 2000. Thus, BellSouth timely filed its Petition for Arbitration by filing the Petition on February 25, 2000.¹

Not only did NOW request an additional thirty (30) day extension of time to negotiate in January, 2000, NOW also requested a second extension of the time to negotiate in February, 2000, again just days prior to the deadline for filing the petition. BellSouth declined this time since it was apparent that the parties were not going to be able to reach a new agreement through the negotiation process. (Copies of the parties' correspondence regarding this second request for extension of the time to negotiate are attached to the Petition as Exhibits "F" and "G").

Section 252(b)(1) states as follows:

(b) Agreements Arrived at Through Compulsory Arbitration.

(1) Arbitration—During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

The Telecommunications Act of 1996 was passed, among other reasons, to remove any restrictions on competition in the telecommunications market, including the local exchange market. Although a request for arbitration must be made within the 135 and 160-day timeframe established by Congress; these statutory timeframes must be placed in context. The Federal Communications Commission ("FCC") has stated that "[t]he legislative history thus indicates that Congress was concerned about parties filing too early and not giving informal negotiations a chance to succeed. Requiring parties to adhere to the statutory deadlines in section 252, therefore is consistent with that

¹ As BellSouth's Petition for Arbitration clearly reflects, "BellSouth's Petition is filed with the Commission between the 135th and 160th day from the date that the negotiations were deemed to have commenced."

concern, as expressed in the statute and the legislative history.” The FCC held that the failure to adhere to the statutory timeframe for requesting arbitration in Section 252(b)(1) does not warrant dismissal of the arbitration petition; rather it only excuses the state commission from completing the arbitration within nine months as required by Section 252(b)(4)(C). See *In re: Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 13 FCC Rcd 871, DA 98-85, ¶s 10-11 (Jan. 22, 1998) (because party filed arbitration petition before the 135th day, state commission was “not bound by section 252 to complete the arbitration process within nine months of [the request for negotiation]”). (copy of the FCC’s decision is attached to this Response as Exhibit “1”). In keeping with Congress’ intent in passing the 1996 Act in general and Section 252(b)(1) in specific, the parties can agree to the effective date that the parties’ negotiations started which in turn affects the time that the “arbitration window” starts and ends, which is exactly what happened here. Such an interpretation is consistent with Congress’ preference for voluntary negotiations. In fact, to narrowly construe the parties’ agreement here as to when the time for negotiations starts and ends would have a chilling effect on future negotiations. The Commission should allow the parties to negotiate fully and completely when they have mutually agreed to do so in an attempt to avoid arbitration. Such a conclusion is in the public interest in that it encourages continued negotiations between the parties in lieu of arbitration.

The California Public Service Commission recently issued a decision involving the negotiation of an interconnection agreement that may shed some light on the present situation. *In re: Petition by Pacific Bell for Arbitration of an Interconnection*

(Petition for Arbitration at ¶ 12) (emphasis added).

Agreement with Pac-West Telecom, Inc., 1999 Cal. PUC LEXIS 70 (Cal. Public Utilities Comm'n Feb. 4, 1999) (copy of the California Commission's decision is attached hereto as Exhibit "2"). In that case, Pacific Bell, the incumbent, sent a letter to Pac-West indicating its desire "to begin negotiations for a new Interconnection Agreement." Pac-West responded, stating that it was willing to enter into negotiations and requesting certain information from Pacific Bell. The parties subsequently agreed to a time-frame for concluding the negotiations of a new agreement from the date of Pac-West's response.

When those negotiations were unsuccessful, Pacific Bell filed a petition for arbitration with the California Commission. Pac-West filed a motion to dismiss, contending that, before a petition for arbitration is made, the Act requires that a request for renegotiation must be received by the incumbent. Because Pacific Bell asked to renegotiate the existing interconnection agreement, Pac-West asserted that no such request was made of Pacific Bell and, therefore, Pacific could not seek arbitration. 1999 Cal. PUC LEXIS 70, *4.

The California Commission rejected this argument and denied Pac-West's motion to dismiss. While acknowledging that Pacific had invited Pac-West to the negotiation table, the Commission noted that "both parties through their action assented to considering Pac-West's reply letter to Pacific as the de facto bona fide request for negotiation to begin interconnection negotiation." The Commission concluded that Pac-West had willingly participated in the negotiation process, voluntarily agreed to timeframes for the negotiations, and never gave any indication that it was not going to

negotiate a new agreement with Pacific. Under these circumstances, the California Commission held that the requirements of Section 252(b)(1) had been satisfied.

Similarly, at no time during the negotiations, which NOW voluntarily participated in, did NOW suggest that it objected to extending the date by which the arbitration petition must be filed. To the contrary, NOW is the party that requested BellSouth to delay filing for arbitration so that the parties could have further opportunity to negotiate between themselves toward a new agreement. But for NOW's request for additional time to negotiate, which BellSouth consented to in good faith, BellSouth would have filed the petition for arbitration prior to the original deadline of January 27, 2000. The Commission should encourage the re-negotiation of existing agreements, thus NOW's attempts at obstructionism should be rejected. To do otherwise would penalize BellSouth for acting in good faith during negotiations toward a new resale agreement.

B. The provision of copies of the Petition and relevant documentation under Section 252(b) of the 1996 Act

NOW also complains in its Motion to Dismiss that BellSouth failed to comply with the statutory provision for properly providing a copy of the Petition and any documentation to the other party, citing to Section 252(b). (Motion at p. 2). NOW did not provide any further explanation for this allegation. As the Petition for Arbitration clearly reflects, BellSouth attached numerous exhibits containing the relevant documentation to this arbitration, including a "red-lined" version of the draft resale agreement that the parties had been negotiating. Additionally, as BellSouth's Certificate of Service clearly indicates, BellSouth served a copy of the Petition with the exhibits attached thereto upon at least two representatives of NOW on the same day that BellSouth filed the

Petition with the Commission. One such person was Mr. Larry Seab, NOW's President and CEO and the individual who acted as NOW's primary negotiator. The second person was NOW's legal counsel, Mr. Carroll H. Ingram, who also participated in the parties' negotiations. Based upon the foregoing facts which clearly demonstrate BellSouth's compliance with the requirements of Section 252(b), BellSouth respectfully requests that the Commission deny NOW's Motion to Dismiss.

CONCLUSION

WHEREFORE, for the reasons set forth above, BellSouth respectfully requests that the Commission deny NOW's Motion to Dismiss and allow this matter to proceed to Arbitration in order that the parties may enter into a new Resale Agreement. BellSouth further requests such other, more general or specific relief as is just and proper under the circumstances.

Respectfully submitted this 28th day of March, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

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203033

13 FCC Rcd 871 printed in FULL format.

In the Matter of Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and Request for Additional Relief

CCB Pol. 97-6

FEDERAL COMMUNICATIONS COMMISSION

13 FCC Rcd 871; 1998 FCC LEXIS 436; 11 Comm. Reg. (P & F) 317

RELEASE-NUMBER: DA 98-85

January 22, 1998 Released; Adopted January 22, 1998

ACTION: [**1] MEMORANDUM OPINION AND ORDER

JUDGES:

By the Chief, Common Carrier Bureau

OPINIONBY: METZGER, JR.

OPINION:

[*871] I. INTRODUCTION

1. On May 22, 1997, Armstrong Communications, Inc. (Armstrong) filed the above-captioned petition (Petition) with the Commission. n1 Armstrong requests that the Commission direct the Citizens Telephone Company of Kecksburg (Citizens), pursuant to sections 251(b) and (c) of the Telecommunications Act of 1996 (1996 Act), n2 to provide Armstrong with interconnection and to negotiate in good faith the terms and conditions of an interconnection agreement consistent with those sections. n3 In addition, or in the alternative, Armstrong requests that the Commission preempt the jurisdiction of the Pennsylvania Public Utilities Commission (Pennsylvania Commission) pursuant to section 252(e)(5) of the Act with respect to Armstrong's pending request for interconnection with Citizen. n4 For the [*872] reasons described below, we deny Armstrong's Petition. n5

n1 Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and Request for Additional Relief, CCB Pol 97-06 (Armstrong Petition). Responses to the Petition were received from the Citizens Telephone Company of Kecksburg (Citizens Response), the Pennsylvania Public Utility Commission (Pennsylvania Commission Response), and the Pennsylvania Office of Consumer Advocate (OCA Response). [**2]

n2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as the "Communications Act" or the "Act."

Exhibit 1

n3 Armstrong Petition at 1.

n4 Armstrong Petition at 1-2.

n5 Many of the facts regarding Armstrong's Petition were set forth in a separate petition for declaratory ruling currently pending before the Commission. Armstrong Petition for Declaratory Ruling Regarding the Definition of Providing Video Programming Under Section 251(f)(1)(C) of the Act, CCB Pol 97-02, filed Feb. 26, 1997 (Declaratory Ruling Petition). Armstrong requests that the Commission incorporate herein the record set forth in the Declaratory Ruling Petition proceeding, which we do. Armstrong Petition at 3, note 6.

II. BACKGROUND

2. Armstrong is a cable operator in a portion of Westmoreland County, Pennsylvania. n6 Citizens is an incumbent local exchange carrier (LEC) serving approximately 5,000 [**3] access lines in a portion of Westmoreland County. n7 On March 6, April 2, and May 30, 1996, Armstrong directed letters to Citizens asking for interconnection pursuant to section 251 of the Act. n8 Sections 251(a) and (b) of the Act impose on all LECs certain duties regarding interconnection, resale of telecommunications services, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. n9 Section 251(c) requires incumbent LECs to meet certain additional obligations to potential competitors with respect to interconnection, access to unbundled network elements, and resale of retail services, among other things. n10

n6 Armstrong Declaratory Ruling Petition at 2; OCA Response, Appendix A, P 1.

n7 Armstrong Declaratory Ruling Petition Reply, Attachments B, E, F, I at 11, and J at 1; OCA Response, Appendix A, P 1.

n8 Armstrong Petition at 4; Pennsylvania Commission Response at 2; OCA Response at 4 and Appendix A at P 12.

n9 47 U.S.C. §§ 251(a), (b).

n10 47 U.S.C. § 251(c). For purposes of this order, the interconnection, access to unbundled network elements, services for resale and other items for which incumbent LECs have a duty to negotiate pursuant to section 251(c)(1) are sometimes referred to collectively as "interconnection." [**4]

3. Armstrong's request for interconnection triggered a disagreement between Armstrong and Citizens regarding, among other things, whether and to what extent Citizens had to comply with Armstrong's request under section 251 and, in particular, whether Citizens is exempt from the obligations imposed on incumbent LECs by section 251(c) pursuant to the rural exemption set forth in section 251(f)(1)(A) of the Act. n11 This exemption applies to any incumbent LEC that is a "rural telephone company" within the meaning of [*873] section 3(37) of the Act. n12 The rural exemption from section 251(c) terminates if and when the incumbent rural telephone company receives from a potential competitor a "bona fide request for interconnection, services, or network elements" that the relevant state commission determines is not unduly economically burdensome, is technically feasible, and is consistent with statutory universal service requirements. n13 Moreover, the rural exemption generally is not available when

the request for interconnection comes from "a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural company provides video [**5] programming." n14 This limitation on the rural exemption does not apply, however, "to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996." n15

n11 Armstrong Declaratory Ruling Petition at 3; Armstrong Declaratory Ruling Petition Reply at 4, Attachments A-E; 47 U.S.C. § 251(f)(1)(A).

n12 47 U.S.C. § 153(37).

n13 47 U.S.C. § 251(f)(1)(A).

n14 47 U.S.C. § 251(f)(1)(C).

n15 Id.

4. Given this impasse, on October 1, 1996, Armstrong filed a petition with the Pennsylvania Commission (Arbitration Petition) requesting that it arbitrate Armstrong's interconnection dispute with Citizens pursuant to section 252 of the Act. n16 Section 252 establishes a scheme whereby telecommunications carriers may obtain interconnection with incumbent LECs according to agreements fashioned through (1) voluntary negotiations among the carriers, (2) mediation by state commissions, or (3) arbitration by state commissions. n17 To the extent voluntary negotiations are unsuccessful, [**6] any party to the negotiation may petition the relevant state commission, during the period from the 135th to the 160th day after the incumbent LEC receives a request for negotiation, to arbitrate any open issues. n18 Upon receiving such a petition, the state commission has nine months from the date on which the LEC received the interconnection request to resolve the open issues. n19 Armstrong subsequently indicated to the Pennsylvania Commission that it expected action on its Arbitration Petition no later than February 28, 1997, which was nine months after the [*874] transmittal of its May 30, 1996 letter to Citizens. n20

n16 Armstrong Declaratory Ruling Reply, Attachment G at 1; Armstrong Petition at 4; Pennsylvania Commission Response at 2.

n17 47 U.S.C. § 252(a), (b).

n18 47 U.S.C. § 252(b)(1).

n19 47 U.S.C. § 252(b)(4)(C).

n20 Pennsylvania Commission Response at Attachment D (Letter dated February 13, 1997 to John G. Alford, Secretary to the Pennsylvania Commission, from D. Mark Thomas, Attorney for Armstrong); Armstrong Petition at 5.

5. On February 27, [**7] 1997, the Pennsylvania Commission's staff sent Armstrong a letter stating:

"In a cursory review of the record, it appears that Armstrong's initial filing was not perfected In addition, my review of the record reveals that additional requirements also may be lacking. Consequently, your calculation of

the February 28, 1997 deadline in which the [Pennsylvania] Commission should act is in error. While the [Pennsylvania] Commission will review Armstrong's petition in due course, the [Pennsylvania] Commission will not act on or before February 28, 1997." n21

On March 10, 1997 Armstrong filed with the Pennsylvania Commission a petition for review of the Pennsylvania Commission staff's February 27th determination. n22 The petition for review was placed on the Pennsylvania Commission's June 12, 1997 public meeting agenda for resolution. n23 Prior to that public meeting, Armstrong filed its Petition with this Commission on May 22, 1997.

n21 Pennsylvania Commission Response at Attachment B; Armstrong Petition at Attachment B.

n22 Pennsylvania Commission Response at 3; OCA Response at Appendix A, P7.

n23 Pennsylvania Commission Response at 7.

6. On June 12, [**8] 1997, the Pennsylvania Commission addressed Armstrong's petition for review of the Pennsylvania Commission staff's February 27th letter (June 12 Order). n24 The Pennsylvania Commission noted that it had issued an order on June 3, 1996 (Consolidation Order) n25 establishing a consolidated procedure, pursuant to section 252(g) of the Act, n26 for reviewing matters concerning the entry by a carrier (such as Armstrong) into the [*875] service territory of a rural LEC (such as Citizens). n27 Under the Consolidation Order, any carrier seeking to interconnect with a rural LEC (i.e., a rural telephone company with less than 50,000 access lines) must file: (i) a bona fide request for interconnection pursuant to section 251(f)(1)(A) with the small LEC; and (ii) a request for universal service eligibility designation with the Pennsylvania Commission pursuant to section 214(e)(2) of the Act. n28 The Pennsylvania Commission gave Armstrong twenty days to perfect its filing based on the procedures set forth in the Consolidation Order (i.e., by filing a universal service eligibility designation). It stated that, upon perfection, the Pennsylvania Commission would assign Armstrong's Arbitration Petition to [**9] an administrative law judge (ALJ) to address on an expedited basis all relevant interconnection obligations and other related issues. n29

n24 Letter from William A. Kehoe to Michael R. Bennet, dated June 25, 1997 (providing notice of ex parte presentation of the Pennsylvania Commission to the Commission transmitting June 12 Order).

n25 In re: Implementation of the Telecommunications Act of 1996, PAPUC Docket No. M-00960799, Order entered June 3, 1996, Pennsylvania Bulletin, Vol. 26, No. 32, August 10, 1996, at p. 3855 (also attached as Attachment C of Citizens Response).

n26 Under section 252(g), a state commission may consolidate certain proceedings required by the Act relating to, among other things, designating eligible telecommunications carriers for purposes of universal service (section 214(e)), applying the rural telephone company exemption from interconnection obligations (section 251(f)), and arbitrating interconnection agreements (section 252). 47 U.S.C. § 252(g).

n27 June 12 Order at 2.

n28 Consolidation Order, Citizens Response, Attachment C at 16-17.

n29 June 12 Order at 4-6.

7. On July 10, 1997, the Pennsylvania [**10] Commission issued an additional order suspending for a two-year period the interconnection requirements in sections 251(b) and (c) of the Act for 18 small rural telephone companies in Pennsylvania. n30 In the Suspension Order, the Pennsylvania Commission denied Citizen's request for similar relief, but stayed any pending section 251(b) or (c) interconnection requests involving Citizens until the issue of whether Citizens is exempt from such obligations under section 251(f) is resolved. n31 The record does not reflect whether the Pennsylvania Commission has made any subsequent determinations regarding Citizens' request for exemption under section 251(f), or whether the ALJ has made any findings regarding Armstrong's Arbitration Petition.

n30 See Attachment to Letter Dated July 23, 1997 from Maureen A. Scott, Assistant Counsel, Pennsylvania Commission, to William F. Caton, Acting Secretary, Federal Communications Commission, at 4 (Suspension Order).

n31 Id.

8. On August 6, 1997, Citizens forwarded an "Agreement to Toll Statutory Deadline Contained in Section 252(e)(5)" (Tolling Agreement) signed by all the parties to this proceeding to the Commission. n32 Under the Tolling [**11] Agreement, the parties agreed to toll the Commission's 90-day deadline for deciding section Armstrong's 252(e)(5) petition until such [*876] time Armstrong notified the Commission in writing that action on its petition was required. n33 The Tolling Agreement further provided that, upon receipt of such notification, the Commission would have 45 days to act on the Petition. n34 On November 7, 1997, Armstrong notified the Commission in writing that it wished the Commission to proceed with its order. n35 On November 26, 1997, however, Armstrong sent the Commission another letter superseding its November 7, 1997 letter. n36 In the November 26th letter, Armstrong informed the Commission that its notification should be deemed effective December 15, 1997, and the deadline for Commission action on its Petition should be 45 days thereafter. n37

n32 Letter dated August 6, 1997 from Caressa D. Bennet, Attorney for Citizens, to Mr. William F. Caton, Acting Secretary, Federal Communications Commission (transmitting the Tolling Agreement signed by all four parties to this proceeding).

n33 Tolling Agreement, Paragraph C, Section 252(e)(5) states: "If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). [**12]

n34 Tolling Agreement, Paragraph C.

n35 Letter dated November 7, 1997 from Stephen G. Kraskin, Attorney for Armstrong, to Richard K. Welch, Chief, Policy and Program Planning Division, Common Carrier Bureau.

n36 Letter dated November 26, 1997 from Stephen G. Kraskin, Attorney for Armstrong, to Richard K. Welch, Chief Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission.

n37 Id.

III. DISCUSSION

A. Preemption under Section 252(e) (5)

9. We address Armstrong's request for preemption first. Section 252(e) (5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission "fails to act to carry out its responsibility under [section 252]." n38 Under our rules, the party petitioning for preemption must prove that the state has "failed to act" within the meaning of section 252(e) (5). n39 We find that Armstrong has not met this burden. The record shows that Armstrong did not file its Arbitration Petition with the Pennsylvania Commission within the time frame specified in section 252(b) (1) of the Act. Because Armstrong failed to comply with the procedures specified [*13] in section 252(b) (1), the Pennsylvania Commission was not bound by section 252(b) (4) to resolve Armstrong's Arbitration Petition within nine months. Consequently, as discussed more fully below, we find that the Pennsylvania Commission did not "fail to act" within the meaning of section 252(e) (5) of the Act.

n38 47 U.S.C. § 252(e) (5).

n39 47 C.F.R. § 51.803(1) (b).

[*877] 1. Section 252(b) (1)

10. Section 252(b) of the Act allows a party to petition a state commission for arbitration "during the period from the 135th to the 160th day (inclusive) after the date on which the incumbent [LEC] receives a request for negotiation." n40 In such case, the state commission has nine months from the date the LEC received the interconnection request to resolve the open issues involved in the arbitration. n41 Although it appears from the record that Armstrong requested interconnection from Citizens on at least three different dates (March 6, April 2, and May 30, 1996), Armstrong relies on its May 30, 1996 letter to Citizens as the date triggering the Pennsylvania Commission's duty to act within nine months. n42 We thus rely on that date as well for purposes [*14] of calculating "the period from the 135th to the 160th day (inclusive)" during which, under section 252(b) (1), Armstrong was authorized to file its Arbitration Petition with the Pennsylvania Commission. According to our calculations, that period ran from October 12, 1996 through November 5, 1996. Thus, as both Citizens and the Pennsylvania Commission point out, n43 Armstrong's October 1, 1996 Arbitration Petition was filed in advance of the statutory period provided for in section 252(b). n44 Since Armstrong's Arbitration Petition did not meet the statutory criteria, the Pennsylvania Commission was, in turn, not bound by

section 252 to complete the arbitration process within nine months of Armstrong's May 30, 1996 interconnection request (i.e., by February 28, 1997).

n40 47 U.S.C. § 252(b)(1).

n41 47 U.S.C. § 252(b)(4)(C).

n42 See supra P 4 & note 20.

n43 Citizens Response at 7-8; Pennsylvania Commission Response at 8.

n44 Alternatively, if Armstrong had relied instead on either its March 6 or April 2 requests for interconnection, its October 1st Arbitration Petition was filed too late. [**15]

11. It is well established in other contexts that statutory deadlines cannot be waived or extended except in very limited circumstances. n45 While this rule usually has been applied in situations where a party files late, it is not inappropriate to apply the rule in this case where a party has filed too early. In section 252, Congress established a specific statutory scheme -- with specific time frames and deadlines -- for negotiating and arbitrating [*878] interconnection agreements. In adopting section 252(b)(1), Congress made a judgment that parties should spend at least 135 days negotiating among themselves before seeking the "more formal remedy" of expedited arbitration before a state commission:

If issues remain unresolved more than 135 days after the date the [LEC] received the request to negotiate, any party to the negotiations may petition the state to intervene for the purpose of resolving any issues that remain open in the negotiation. Requests to the state to intervene must be made during the 25 day period that begins 135 days after the [LEC] received the negotiation request." n46

The legislative history thus indicates that Congress was concerned about parties filing [**16] too early and not giving informal negotiations a chance to succeed. Requiring parties strictly to adhere to the statutory deadlines in section 252, therefore, is consistent with that concern, as expressed in the statute and the legislative history.

n45 *Reuters, Ltd. v. FCC*, 781 F.2d 946, 951-952 (D.C. Cir. 1986), citing *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) (Gardner); see also *Applications of PDB Corporation, State College, Memorandum Opinion and Order*, 11 FCC Rcd 6198, 6199 (1996); *Application of Robert J. Maccini, Receiver Assignor, Memorandum Opinion and Order*, 10 FCC Rcd 9376, 9376 (1995); *Burwood Broadcasting of Memphis, Ltd., MM Docket No. 85-205, Memorandum Opinion and Order*, 4 FCC Rcd 827, 828 n.2 (1989); *Applications of Scripps-Howard Broadcasting Co., Memphis, Tennessee*, 69 F.C.C.2d 1477 (1978) (petition for reconsideration denied where petitioner filed one day beyond statutory time limit and failed to show that he did not have a reasonable time in which to file); *Application of Metromedia, Inc., Washington, D.C.*, 56 F.C.C. 2d 909 (1975). [**17]

n46 Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1, 124 (1996) (Joint Explanatory Statement) (explaining the section of the

Senate bill upon which section 252 was based) (emphasis added).

12. Armstrong argues that, in its view, the Pennsylvania Commission staff's failure to act on Armstrong's Arbitration Petition within the nine month statutory deadline was not based on the "timeliness" of Armstrong's filings, but rather on other considerations. n47 We recognize that the Pennsylvania Commission staff's February 27, 1997 letter does not elaborate on the statements that Armstrong's Arbitration Petition was "not perfected" and lacked "additional requirements." Nonetheless, the fact remains that, under section 252(b), Armstrong did not file a timely Arbitration Petition with the Pennsylvania Commission, and therefore the Pennsylvania Commission was not bound by that statute to act within nine months.

n47 Armstrong Petition at 6-7, note 11, and 7-9.

13. Armstrong also argues that, even if its Arbitration Petition were untimely, the Pennsylvania Commission was put on notice that Armstrong desired to interconnect with Citizens pursuant to section [**18] 251; thus, the Pennsylvania Commission's continued failure to resolve that matter requires this Commission to preempt to protect the public interest. n48 This Commission, however, also is bound by the statutory requirements. Under section 252(e) (5) and our implementing rules, we must find that the relevant state commission has "failed to act to carry out its responsibility under [section 252]" in order to preempt that state commission's jurisdiction over such matter. n49 In this case, since Armstrong's Arbitration Petition was not properly filed under section 252(b), the Pennsylvania Commission cannot be [*879] said to have failed to "carry out its responsibility" within the meaning of section 252(e) (5).

n48 Armstrong Petition at 6-7, note 11.

n49 47 U.S.C. § 252(e) (5); 47 C.F.R. § 51.801(a).

14. Moreover, the record does not support a finding that Armstrong has been denied "procedural fairness." n50 To the contrary, we note that the statutory scheme in section 252 continued to remain available to Armstrong. As Citizens points out, Armstrong had (and continues to have) the option of submitting a new request for negotiation to Citizens, and then [**19] properly filing an arbitration request with the Pennsylvania Commission during the period from the 135th to the 160th day after that. n51 At that point, assuming all other requirements were met, the Pennsylvania Commission would be statutorily required to resolve that petition within nine months from the date Citizens received Armstrong's new request. n52 Thus, Armstrong's right to formal arbitration within a nine month deadline is not forfeited by its one-time failure to file within the statutory time frame.

n50 Cf. *Gardner*, 530 F.2d at 1091 (the statutory requirement that a rehearing petition must be filed within thirty days should, in certain cases, be reconciled with the "general concern for procedural fairness").

n51 Citizens Response at 8, note 10.

n52 See 47 U.S.C. § 252(b) (4) (C).

15. We also note that, unlike the state commissions in the Low Tech Order,

n53 the Pennsylvania Commission staff did not dismiss or deny Armstrong's Arbitration Petition, but rather stated that it would review the petition "in due course." The Pennsylvania Commission is currently, to our understanding, addressing the issues [**20] raised by both Armstrong and Citizens on the merits, albeit not within the nine-month time frame specified in section 252(b)(4). n54 Under these circumstances, we do not find that Armstrong has been denied "procedural fairness" or that an exception to the general rule that statutory deadlines may not be waived is warranted. n55

n53 Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, CC Docket No. 97-163, Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission, CC Docket No. 97-164, Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina, CC Docket No. 97-165, Memorandum Opinion and Order, FCC 97-362 (rel. Oct. 8, 1997) at 20 (Low Tech Order), recons. pending (holding that a state commission does not "fail to act" when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding). [**21]

n54 See supra P 6 & note 29.

n55 See, e.g., *Gardner*, 530 F.2d at 1091 & n.24 (exception to a statutory deadline was made in the "extraordinary" case where the Commission's actions made it "impossible reasonably" for the party to comply with the filing statute).

[*880] 2. Section 251(f)(1)(B)

16. Armstrong also argues that, under section 251(f)(1)(B), the Pennsylvania Commission had a statutory duty to take action by January 29, 1997 -- 120 days after Armstrong filed its October 1, 1996 Arbitration Petition -- to determine whether Citizens was subject to the rural exemption under section 251(f)(1)(A), and if so, whether to terminate that exemption pursuant to the conditions set forth in section 251(f)(1)(B). n56 Armstrong contends that the Pennsylvania Commission's continued failure to resolve this particular question requires "Commission action... to protect the public interest." n57 The Pennsylvania Commission contends, in response, that it was not bound by the 120-day deadline in section 251(f)(1)(B) for determining whether Citizens was subject to the rural exemption since it had established separate procedures in its Consolidation Order for resolving [**22] that and other related issues. n58

n56 See 47 U.S.C. § 251(f)(1)(A), (B).

n57 Armstrong Petition at 9.

n58 Pennsylvania Commission Response at 12-13. In the Consolidation Order, the Pennsylvania Commission stated that "consolidated procedures will not be subject to the 120-day time limitation addressed by section 251(f)(1)(B) of the Act since consolidated procedures will address a wide variety of issues justifying greater time for administrative review." Pennsylvania Commission

Response at 13.

17. We decline to preempt the Pennsylvania Commission's jurisdiction on this basis. Section 252(e)(5) gives the Commission authority to preempt a state commission only if it "fails to act to carry out its responsibility under this section in any proceeding or other matter under this section" n59 Thus, the determination under section 251(f)(1) of whether a LEC is subject to the rural exemption is not specifically covered by section 252(e)(5). To the extent the rural exemption issue became part of Armstrong's section 252 proceeding before the Pennsylvania Commission, we have already determined above that preemption of that matter is not warranted [**23] since the Pennsylvania Commission did not "fail to act" within the meaning of section 252(e)(5).

n59 47 U.S.C. § 252(e)(5) (emphasis added).

3. Other Arguments

18. The Pennsylvania Commission and Citizens make various other arguments as to why we should not grant Armstrong's request for preemption pursuant to section 252(e)(5). n60 Since we have found that Armstrong's request for preemption fails on the ground that its Arbitration Petition was untimely under section 252(b)(1), we do not need to reach these other arguments.

n60 Pennsylvania Commission Response at 3-7 & 9-13; Citizens Response at 2-7, 9.

[*881] B. Interconnection and Good Faith Negotiations under Sections 251(b) and (c)

19. Because of our decision pursuant to section 252(e)(5) not to preempt the Pennsylvania Commission's jurisdiction over Armstrong's request for interconnection from Citizens, we do not reach Armstrong's additional requests that we direct Citizens to interconnect and engage in good faith negotiations under sections 251(b) and (c), since the Pennsylvania Commission continues to have jurisdiction over that matter.

IV. CONCLUSION

20. For the foregoing reasons, [**24] we deny Armstrong's Petition.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and section 51.801 of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. § 51.801, Armstrong's Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and Request for Additional Relief is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.

Chief

Common Carrier Bureau

1999 Cal. PUC LEXIS 70 printed in FULL format.

In the matter of the petition by Pacific Bell (U 1001 C) for arbitration of an interconnection agreement with Pac-West Telecomm, Inc. (U 5266 C) pursuant to Section 256(b) of the Telecommunications Act of 1996

Decision No. 99-02-014, Application No. 98-11-024 (Filed November 16, 1998)

California Public Utilities Commission

1999 Cal. PUC LEXIS 70

February 4, 1999

PANEL:

[*1] Richard A. Bilas, President, Henry M. Duque, Josiah L. Neeper, Commissioners

COUNSEL:

Robert J. Mazique, Attorney at Law, for Pacific Bell, applicant.

James M. Tobin, Attorney at Law, for Pac-West Telecomm, Inc., respondent.

OPINION

Summary

Respondent's motion for dismissal is denied.

Background

Pacific Bell (Pacific or applicant) and Pac-West Telecomm, Inc. (Pac-West or respondent) entered into a Local Interconnection Agreement dated March 15, 1996. The 1996 Agreement was not negotiated or entered into pursuant to Section 252 of the Telecommunications Act of 1996 (Act). Rather, it was negotiated consistent with Commission guidance in Decision (D.) 95-12-056, submitted for Commission approval by advice letter, and approved pursuant to the terms of that decision. n1

-----Footnotes-----

n1 The 1996 Agreement was filed as Advice Letter No. 18115, dated March 19, 1996. The advice letter states that it was submitted pursuant to D.95-12-056. All amendments to the agreement, including Amendment No. 5 dated June 10, 1998, state that they were submitted pursuant to D.95-12-056. D.97-06-011 and D.97-09-126 both find that the 1996 Agreement was not approved pursuant to the Act, but pursuant to D.95-12-056.

-----End Footnotes-----

[*2]

By letter dated April 30, 1998, Pacific notified Pac-West that it was

Exhibit 2

terminating the 1996 agreement effective June 30, 1998, and stated that it was "prepared to begin negotiations for a new Interconnection Agreement." n2 Pac-West responded on June 9, 1998, stating that it was "willing to have discussions with Pacific for a new Interconnection Agreement." n3 Pac-West's response also noted that it expected "Pacific Bell to provide Pac-West with the terms and conditions of a recommended agreement as well as copies of all other Facilities Based Interconnection Agreements and Resale Agreements." n4

-----Footnotes-----

n2 Exhibit A, Motion of Pac-West for Dismissal, dated December 3, 1998. As provided in Section VIII, either party could terminate the Agreement after the initial 2 year term, upon 60 days written notice to the other party. As provided in Section VIII, the agreement continued--and continues--without interruption until a new interconnection agreement becomes effective.

n3 Exhibit B, Motion of Pac-West for Dismissal, dated December 3, 1998.

n4 Id.

-----End Footnotes-----

[*3]

Pacific Bell provided Pac-West with the standard contract for interconnection agreements and with other agreements signed under the Act and filed with the Commission. Subsequently, Pac-West's lead negotiator, Warren Heffelfinger, discussed applicable dates for arbitration window, which were later confirmed by Mr. Heffelfinger's e-mail sent to Ms. Seaman on September 18, 1998. n5 Based on these exchanges the parties set up an arbitration window counting from the date of Pac-West's letter to Pacific Bell. Accordingly, as confirmed by Mr. Heffelfinger's e-mail, October 22, 1998 was 135 days from June 9, 1998, and November 16, 1998, was 160 days from June 9, 1998.

-----Footnotes-----

n5 Exhibit C, copy of e-mail sent by Mr. Heffelfinger to MS. Seaman, in which Mr. Heffelfinger wanted to "double check on timing" asking Ms. Seaman whether her dates concurred with his dates. Dates cited were: Nevada Bell: 9/16 to 10/11 and Pacific Bell: 10/22 to 11/16, the respective dates signifying the arbitration window for each case.

-----End Footnotes-----

The negotiating parties [*4] began discussions regarding the new interconnection agreement on July 14, 1998. Having failed to reach a new agreement, on November 16, 1998, Pacific filed an application for arbitration pursuant to Section 252 of the Act. n6

-----Footnotes-----

n6 The caption submitted by applicant contains a typographical error. Applicant sought arbitration pursuant to Section 252(b), not Section 256(b), of the Act.

- - - - -End Footnotes- - - - -

On December 3, 1998, respondent filed a motion for immediate dismissal. On December 11, 1998, applicant filed a response in opposition to the motion. Also on December 11, 1998, respondent filed a reply to applicant's response.

Positions of Parties

Pac-West asserts that before an application for arbitration is made, the Act requires that a request for negotiation must be received by the incumbent local exchange carrier (ILEC). Pac-West claims no such request was made of Pacific (the ILEC) by Pac-West, and, therefore, Pacific cannot apply for mandatory arbitration under the Act, according to Pac-West. Moreover, Pac-West says even if its [*5] negotiations with Pacific are subject to the Act, Pacific's application was filed beyond the statutory deadline and must be dismissed. According to Pac-West, the arbitration window clock begins on the date of Pacific's letter to Pac-West, rather than its reply letter to Pacific in which it agreed to negotiations.

Pac-West asserts that Pacific's application is an attempt to force premature arbitration of issues that are pending before the Commission and the Federal Communications Commission in other proceedings. Such tactic should not be permitted, according to Pac-West. Finally, upon dismissal of the application, Pac-West says Pacific should be ordered to comply with the Commission's rules in D.95-12-056 (63 CPUC2d 700).

Pacific does not refute that it invited Pac-West to the negotiation table when it terminated the original agreement; however, it asserts that Pac-West's written reply, agreement for negotiation, and its agreement on the "arbitration window" that would govern the negotiation under the Telecommunications Act establish that PacWest and Pacific were negotiating under the Act and that consequently Pacific is entitled to file a mandatory arbitration pursuant to Section [*6] 252 of the Act. Pacific provides an e-mail message from Mr. Heffelfinger confirming an agreement on an arbitration window and a sworn declaration from its lead negotiator, Ms. Lynda Seaman, that in the negotiation that followed discussions were held on the subject of potential arbitration issues that each party might raise in the arbitration. n7

- - - - -Footnotes- - - - -

n7 Declaration of Lynda Seaman in Support of Pacific Bell's Opposition to The Motion of Pac-West Telecomm, Inc., For Immediate Dismissal of A.98-11-024. Page 2

- - - - -End Footnotes- - - - -

Pacific states that at no time did Pac-West suggest that it was not negotiating under the Act, and that the conduct of Pac-West's negotiators demonstrate Pac-West was negotiating under the Act. Pacific says that if, in fact, Pac-West never had any intent to reach an interconnection agreement with Pacific Bell under the Act, it should have informed Pacific Bell at the start of the negotiation. But having failed to do so, by the conduct of its negotiator, Pac-West led Pacific Bell to believe that Pac-West was interested [*7] in an interconnection agreement. Pacific seeks to have Pac-West estopped to contend

otherwise.

Pacific cites Pac-West's Motion for Dismissal to show Pac-West does not want a new agreement, and that Pac-West is delaying implementation of a new agreement. Pacific asserts that the Commission encouraged ILECs to renegotiate interconnection agreements, n8 that Pacific is simply seeking to do that here, and that Pac-West's obstructionism should be rejected. Finally, Pacific says Pac-West agreed to voluntarily negotiate a new agreement and, once in negotiations, the Act allows either party to apply for arbitration. In reply, Pac-West says that Pacific points to no document stating agreement by Pac-West that the Act applied to the negotiations.

-----Footnotes-----

n8 "Rather, the proper remedy would be for the termination charge to be negotiated between the parties to recognize the appropriate costs of call termination and in view of the corresponding revenues received by the carrier on whose network the call is originated. ILEC can renegotiate the interconnection agreements when they terminate to achieve this outcome." (D.98-10-057, mimeo., pages 18-19.)

-----End Footnotes-----

[*8]

Discussion

Pacific Bell seeks arbitration under the provisions of Section 252(b) of the Act. Section 252(b)(1) provides that:

"ARBITRATION.--During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiations under this section, the carrier or any other party to the negotiation may petition a State Commission to arbitrate any opened issues."

Pac-West states that Pacific "has not received any request for negotiation from Pac-West sufficient to commence negotiation under Section 252 of the Act, and that therefore no arbitration under Section 252 can be commenced." However, Pac-West does not deny sending a reply letter to Pacific expressing its willingness to engage in discussions with Pacific Bell for a new Interconnection Agreement. In the same correspondence Pac-West furthered the process of negotiation with Pacific by requesting specific documents that are relevant to an interconnection negotiation under the Telecommunication Act. Pac-West specifically asked for Pacific's "recommended agreement" and "all other Facilities Based Interconnection Agreements and Resale Agreements." Pacific's [*9] recommended agreement is the standard contract form, which the company uses for interconnection agreements governed by the Telecommunications Act. n9 The other Facilities Based Interconnection Agreements and Resale Agreements are agreements Pacific Bell has filed with this Commission pursuant to the Telecommunications Act.

-----Footnotes-----

n9 See Pacific Bell's Opposition To The Motion of Pac-West Telecomm, Inc., For Immediate Dismissal of A.98-11-024, page 3.

 -----End Footnotes-----

During the earlier phase of the discussions, the lead negotiators, Heffelfinger from Pac-West, and Seaman from Pacific established a 25-day "arbitration window" dates of October 22, 1998, and November 16, 1998, as the 135th and 160th days, respectively, counting from June 9, 1998. Heffelfinger's e-mailed message in this regard is critical to our determination that as the prime negotiator for Pac-West, he confirmed the arbitration window that the parties had earlier agreed upon. Heffelfinger's counting of the arbitration dates start on June 9, 1998, the date on which he sent a [*10] letter to Pacific Bell accepting Pacific's invitation to negotiate and requesting materials pertinent to Interconnection Agreement, a list of dates for discussions, and offering Pac-West's Stockton's office to hold the negotiations. Through this series of actions of its lead negotiator, Heffelfinger, Pac-West had clearly led Pacific Bell to believe that Pac-West was voluntarily agreeing to negotiate with Pacific for interconnection agreement.

Pac-West's active participation and agreement in setting the 135th and 160th day arbitration window is consistent with Section 252(b)(1) of the Telecommunications Act. According to Section 252(b)(1) the 25-day period is reserved for any of the parties to the negotiation to petition a State Commission to arbitrate any open issues. Heffelfinger's e-mail is unambiguous in confirming these dates, and thus agreeing to allow either party to seek mandatory arbitration from the Commission during this inclusive period. Furthermore, in a sworn declaration, Ms. Seaman asserts that on July 14th on which the negotiation commenced, a discussion was held between the two parties regarding what potential arbitration issues each party might raise in the arbitration. [*11] Pac-West does not dispute this assertion. However, Mr. Heffelfinger submits in a sworn declaration that he has "no particular expertise" with respect to telecommunications law or the applicability of federal law versus California to the negotiations for interconnection agreement between Pacific Bell and Pac-West.

We find Mr. Heffelfinger's claim inconsistent with his involvement in interconnection agreement negotiations with Nevada Bell, an affiliate of Pacific Bell. In the Nevada case Pac-West, through Heffelfinger's actions, had initiated interconnection negotiation with Pacific Bell. n10 In fact, in the e-mail Mr. Heffelfinger sent to Pacific, Heffelfinger makes no distinction between the Nevada negotiation (whose initiation, as far as we know, has not been disputed by Pac-West) and the Pac-West/Pacific Bell negotiation. Heffelfinger used the same e-mail to confirm dates for arbitration for both cases.

 -----Footnotes-----

n10 See Attachment A, Reply of Pac-West Telcomm Inc. To Pacific Bell's Opposition. In a letter dated April 24, 1998, Mr. Heffelfinger requests to initiate interconnection negotiation with Nevada Bell for Pac-West and asks for, among other things, general negotiation procedure.

 -----End Footnotes-----

[*12]

Thus we cannot rely on his claimed ignorance of federal and

state interconnection laws to grant the motion of Pac-West to dismiss Pacific's Application for mandatory arbitration. Having said that we find Pac-West's remaining assertions in its Motion for dismissal lacking in support and unconvincing.

Section 252(a) (1) provides that:

"VOLUNTARY NEGOTIATIONS.--Upon receiving a request for interconnection, services, or network elements pursuant to Section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) and (c) of section 251."

Clearly, this is not a cut and dry negotiation process. Pac-West did not, as a matter of fact, initiate the negotiation process. Pacific did that. However, both parties through their action assented to considering Pac-West's reply letter to Pacific as the de facto bona fide request for negotiation to begin interconnection negotiation. Both parties counted the arbitration window from the date of the letter sent by Pac-West, essentially establishing Pac-West's letter as the request for interconnection. [*13] Nothing before us shows that Pac-West at any time in this process disagreed with or expressed that it had any different understanding of the determination of the arbitration window. To the contrary, Pac-West sought from Pacific materials, which are relevant to Interconnection Agreements under the Telecommunication Act. It further agreed to an arbitration window during which each party may seek mandatory arbitration by the Commission on any open issues, and engaged in negotiation pursuant to these conditions. In view of Pac-West's actions we can attribute no other credible purpose to Pac-West's negotiation with Pacific other than a negotiation process under Section 252 of the Telecommunications Act.

Pacific cites D.98-10-057 in support of its claim that it is only seeking to follow Commission guidance and renegotiate this interconnection agreement. Pacific is correct that the Commission stated ILECs can renegotiate interconnection agreements to rationalize termination charges. (D.98-10-057, mimeo., page 19.)

Respondent's motion should be denied. Applicant and respondent shall continue to engage in the arbitration proceeding before Arbitrator Burton W. Mattson.

Comments on Draft [*14] Decision

The alternate draft decision of Commissioner Josiah L. Neepser on this matter was mailed to parties in accordance with PU Code § 311(g) (1) and Rule 77.6(e) of the Commission's Rules of Practice & Procedure.

Timely comments were filed by Pac-West and Pacific Bell. We have carefully reviewed the comments presented to us and made non-substantive changes to the decision as warranted.

Finding of Fact

Pac-West through the actions of its lead negotiator had accepted its June 9, 1998 letter to be the start date for counting the 135th and 160th day

for arbitration window under Section 252 of the Act and in so doing thus assented to considering its letter as a request for interconnection negotiation with Pacific Bell under Section 252 of the Act.

Conclusions of Law

1. The Act provides that during the period from the 135th to the 160th day after the date on which an ILEC receives a request for negotiations under Section 252 of the Act, the carrier or any other party to the negotiation may petition the State Commission for arbitration of any open issue.

2. This order should be effective today so the parties may continue negotiations under the Telecommunications Act without [*15] delay.

ORDER

IT IS ORDERED that the December 3, 1998 motion of Pac-West Telecomm, Inc. for immediate dismissal is denied.

This order is effective today.

Dated February 4, 1999, at San Francisco, California.

I will file a written concurrence.

/s/ HENRY M. DUQUE

Commissioner

CONCUREBY:

Henry M. Duque, Commissioner

CONCUR:

Henry M. Duque, Commissioner, concurring:

I concur with the reasoning and result reached in this decision.

In addition to the reasoning cited in the decision, I wish to note that within the context of interconnection negotiations, all proceedings for some time have progressed towards resolution down the "federal" path chartered by the Telecommunications Act. Thus, without some affirmative action on Mr. Heffelfinger's part, his actions could only have one reasonable interpretation -- that Pac-West, the company he represented, was entering into negotiations with Pacific under the procedures governed by the Federal Telecommunications Act.

For this additional reason, I concur with the result reached in Item 1a.

February 9, 1999

San Francisco