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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Section 252(b) Arbitration of a Resale Agreement between BellSouth Telecommunications, Inc. and NOW Communications, Inc..

Docket No. 000262-TP

Filed: May 3, 2000

NOW COMMUNICATIONS, INC.'S MOTION FOR DETERMINATION OF PRELIMINARY MATTER BY THE PREHEARING OFFICER OR, IN THE ALTERNATIVE, BY THE COMMISSION PANEL

COMES NOW, NOW Communications, Inc. ("NOW"), through counsel, and files this Motion for Determination of Preliminary Matter by the Prehearing Officer or, in the alternative, by the Commission Panel, stating in support thereof the following:

1. On March 17, 2000, NOW filed a motion to dismiss BellSouth Telecommunications, Inc.'s ("BellSouth's") petition for section 252(b) arbitration of a resale agreement on the grounds that BellSouth's petition is untimely filed pursuant to the jurisdictional requirements of 47 U.S.C. §252(b)(1).

2. Commission staff is presently drafting a recommendation on NOW's motion to dismiss, which is to be filed on May 4, 2000, and considered by the Commission Panel at the May 16, 2000, agenda conference.

3. NOW respectfully suggests that before the motion to dismiss can be decided, it is necessary to determine the present status of the commercial agreement between NOW and BellSouth. NOW contends that under the terms of the June 1, 1997, resale agreement as between

NOW and BellSouth, the agreement self-renewed for two years¹ on May 31, 1999, the end of its original two-year term. BellSouth contends that the agreement expired on May 31, 1999, and

¹The parties disagree whether the agreement permits self-renewal for a period of two years or for two periods of one year each. In either interpretation, the agreement remains effective.

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that the parties have agreed to continue service pursuant to its terms until a new resale agreement is reached.

4. If it is determined that NOW's interpretation is correct, then that would be probative of NOW's contention that BellSouth's petition is improper. It would have made no sense for NOW to have engaged in negotiations for a new resale agreement when it was operating under an effective agreement with a significant remaining life. Hence, the predicate of good faith negotiations for arbitrating open issues set forth in section 252(a)(1) would not have been satisfied.²

5. If it is determined that BellSouth's interpretation is correct, then it would be clear to the parties that an immediate need exists to open negotiations under section 252(a)(1) for a new resale agreement.

6. Thus, with the contractual relationship of the parties determined in one of these ways or the other, there would be nothing at this time to be arbitrated by this Commission.

7. If, however, the Commission were to address and deny NOW's motion to dismiss without having determined the parties' contractual relationship, and go forward with the arbitration proceeding, the validity of its eventual arbitration decisions would be subject to question because the parties disagree that negotiations for a new resale agreement pursuant to section 251(a)(1) have taken place.

8. NOW suggests further that the interests of administrative economy and efficiency are best served by setting the preliminary matter of the parties' existing contractual relationship for

² The negotiations that BellSouth alleges opened with the Miller letter dated August 20, 1999, and resulted in BellSouth's arbitration petition, were in fact negotiations for an interconnection agreement as an indirect resolution of NOW's antitrust complaint against BellSouth. Those negotiations stopped when NOW concluded that the outcome would not be advantageous.

hearing before the Prehearing Officer and at the same time placing staff's recommendation on NOW's motion to dismiss in abeyance. Neither party would be harmed because the status quo as clarified would be simply preserved. Moreover, both parties, once again in a negotiating posture, would be spared the expense and effort of proceeding with the arbitration, at least for the present moment.

9. NOW believes that the authority to rule on this preliminary matter vests in the Prehearing Officer pursuant to Rules 28-106.102 and 28-106.204(1), Florida Administrative Code. The first rule defines "Presiding Officer" as "an agency head, or member thereof, who conducts a hearing or proceeding on behalf of the agency ... or any other person authorized by law to conduct administrative hearings or proceedings who is qualified to resolve the legal issues and procedural questions which may arise." The second rule, which requires all requests for relief to be by motion, authorizes the "presiding officer" to "conduct such proceedings and enter such orders as are deemed necessary to dispose of issues raised by the motion."

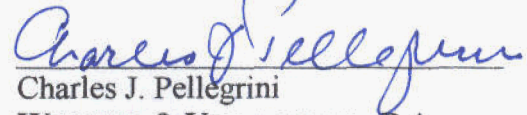
10. NOW would have no objection if, in the alternative, this preliminary matter were to be assigned to the Commission panel for decision, although that would not serve the interests of administrative economy and efficiency nearly as well.

WHEREFORE, based on the foregoing, NOW respectfully requests that the preliminary matter as identified in the foregoing be assigned to the Prehearing Officer and that the staff recommendation on NOW's motion to dismiss BellSouth's arbitration petition be placed in abeyance.

Submitted, this 3rd day of May, 2000.

NOW COMMUNICATIONS, INC.

By:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery this 3rd day of May, 2000, to the following:

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