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MICHAEL P. GOGGIN
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5561

May 12, 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 for Leave to Submit Information Supplementary to its Motion for Determination of Preliminary Matter, 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

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 this 12th day of May, 2000 to the following:

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Michael P. Goggin (SW)

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

000262-TP

In re:	)	Docket No. ~~992018~~-TP
	)	
Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and NOW Communications, Inc. Pursuant to the Telecommunications Act of 1996.	)	
	)	Filed: May 12, 2000

RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC. TO NOW COMMUNICATIONS, INC.'S MOTION FOR LEAVE TO SUBMIT INFORMATION SUPPLEMENTARY TO ITS MOTION FOR DETERMINATION OF PRELIMINARY MATTER

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds to NOW Communications, Inc.'s ("NOW's") Motion for Leave to Submit Information Supplementary to Its Motion for Determination of Preliminary Matter ("Motion").

1. On May 3, 2000, NOW submitted a motion requesting that the Commission determine, as a preliminary matter, whether the parties' June 1, 1997 resale agreement (the "Agreement") terminated on May 31, 1999, as the parties had assumed during the course of their negotiations on a new resale agreement, or whether the Agreement "self-renewed for two years," as NOW asserted for the first time in response to BellSouth's arbitration petition in this matter.[1]

2. On May 5, 2000, NOW filed a motion for leave to submit "information supplementary to its motion for determination of preliminary matter." Attached to its May 5 motion were: (i) an affidavit from NOW's CEO, in which he contradicts representations he made in writing to BellSouth previously; (ii) a

recommendation from an administrative law judge in a Louisiana Public Service Commission proceeding regarding the same issues NOW has raised in its March 17 motion to dismiss and its May 3 motion in this proceeding; (iii) a transcript of a prehearing conference before the Alabama Public Service Commission regarding the same issues; and (iv) and an unsigned statement from NOW's Tennessee counsel purportedly retracting an assertion made by NOW regarding the Agreement in a recent filing before the Tennessee Regulatory Authority.

3. Collectively, the supplementary information NOW seeks to submit demonstrates that disputed issues of fact exist sufficient to make it clear that any decision to grant NOW's May 3 motion may not be done as a "preliminary matter." NOW, in the wake of BellSouth's arbitration petition, has contradicted a number of implicit and explicit representations made to BellSouth in the course of the parties' negotiations, and has violated an express agreement between the parties. For example, NOW never indicated to BellSouth that it disagreed with BellSouth's understanding that the parties' Agreement expired in May of 1999 until after the petition for arbitration was filed, nor does it claim to have done so. Indeed, NOW expressly agreed that the parties would continue to abide by the terms of the expired Agreement until a new agreement could be negotiated. *See* Petition of BellSouth Telecommunications, Inc. for Section 252 (b) Arbitration (the "Petition" or "Pet.") at Exhibits A and E. NOW specifically acknowledged in writing that it was engaged in negotiations for a new resale agreement pursuant to Section 251 of the Telecommunications Act (the "Act"). Pet. at Exh. D. NOW

[1] BellSouth responded to NOW's May 3 motion on May 10, requesting that the Commission deny the motion or, in the event that NOW disputed the facts as related by BellSouth, determine the

expressly requested and agreed to an extension of the arbitration window and also expressly agreed to waive any claim that the dates within which a party might seek arbitration began or ended on any earlier dates. Pet. at Exh. E.

4. By filing its March 17 motion to dismiss, NOW violated its written agreement to waive any claim that the arbitration window began or ended any earlier than the dates to which the parties had agreed *at NOW's request.* NOW now has filed a sworn affidavit contradicting other pre-arbitration positions and assurances—its ratification of BellSouth's understanding that the Agreement expired in May of 1999, its express representation that the parties were engaged in negotiation of a new resale agreement pursuant to the Act, and that the arbitration window would not expire until after February 25, 2000, the day the petition in this matter was filed. *See,* Affidavit of Larry W. Seab dated May 4, 2000 (attached to NOW's May 5 motion). [2]

5. In view of Mr. Seab's May 4 affidavit, contradicting his earlier written representations to, and agreements with, BellSouth, BellSouth believes that, unless the May 3 motion is denied, it cannot be decided as a "preliminary matter" as NOW would have the Commission do. It would be extremely prejudicial for the Commission to consider Mr. Seab's affidavit without affording BellSouth the opportunity to cross-examine Mr. Seab regarding the assertions made in it, and/or to provide sworn testimony from other witnesses regarding

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issue as part of the hearing on BellSouth's arbitration petition.

[2] For good measure, NOW also attached a document retracting a post-arbitration assertion made in a filing with the Tennessee Regulatory Authority. NOW first asserted in that proceeding, contrary to its pre-arbitration position, that the Agreement did not expire in May of 1999, but in May of 2000. NOW now claims that the Agreement will not expire until May of 2001. *See* Letter of Charles B. Welch, Jr. to K. David Waddell dated May 5, 2000 (which is unsigned)(attached to NOW's May 5 motion in this proceeding).

these newly disputed issues. Accordingly, BellSouth requests that the Commission either deny NOW's May 3 motion, or put off any decision on it until BellSouth has had the opportunity to cross-examine Mr. Seab and to provide evidence on the issues NOW raises, either at the hearing in this matter, or at a special evidentiary hearing limited to such issues.

6. BellSouth has no objection to permitting NOW to submit supplementary information, such as that attached to its May 5 motion, to the Commission. In the interests of fairness, BellSouth has attached to this response a copy of the staff's recommendation in the matter before the Louisiana Public Service Commission (Docket No. U24762) which is contrary to the recommendation of the ALJ submitted by NOW. *See*, Memorandum In Opposition to NOW Communications, Inc.'s Motion to Dismiss and Staff Response to Issues Discussion at Status Conference, (filed April 28, 2000 in La. PSC Dkt. No. U-24762)(Attached at Exh. A). Under the Louisiana Commission's procedures, the recommendations of both the staff and the ALJ will be considered.

For all of the foregoing reasons, BellSouth requests that NOW's May 3 motion be denied or deferred. BellSouth does not object to the Commission granting NOW's Motion for Leave to Submit Information Supplementary to Its Motion for Determination of Preliminary Matter.

Respectfully submitted this 12th day of May, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

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(MRS.) VON M. MEADOR
Deputy Undersecretary

EVE KAHAO GONZALEZ
General Counsel

April 28, 2000

Ms. Susan Cowart
Louisiana Public Service Commission
Administrative Hearings Division
P.O. Box 91154
Baton Rouge, Louisiana 70821-9154

In re: Docket No. U-24762 Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and NOW Communications, Inc. Pursuant to the Telecommunications Act of 1996.

Dear Ms. Cowart:

Enclosed please find an original and one copy of Staff's Opposition to NOW's Motion to Dismiss for filing into the above referenced docket. Should you have any questions, please do not hesitate to contact me at the above referenced number.

With kindest regards, I remain,

Sincerely,

Stephanie M. Folse
Staff Attorney
Louisiana Public Service Commission

cc: service list (w/enclosure) by facsimile

EXHIBIT A

Service List
Docket No. U-24762

Commissioners
Stephanie Folse - LPSC Staff Counsel
Walter Rutland - LPSC Utilities Division
Robert Crowe - LPSC Economics Division
C - Victoria McHenry, BellSouth Telecommunications, 365 Canal St., Suite 3060, New Orleans, LA 70130 (P-504-528-2050)(FAX-504-528-2948)
RA - Carroll H. Ingram, Ingram & Associates, PLLC, P.O. Box 15039, Hattiesburg, MS 39404-5039 (P-601261-1385)(Fax-601-261-1393) (Rep. NOW Communications)

BEFORE THE
LOUISIANA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Petition for Arbitration of the Interconnection	)	
Agreement Between BellSouth Telecommunications,	)	Docket No. U-24762
Inc. and NOW Communications, Inc. Pursuant	)	
to the Telecommunications Act of 1996.	)	
	)	

MEMORANDUM IN OPPOSITION TO
NOW COMMUNICATIONS, INC.'S MOTION TO DISMISS
AND STAFF RESPONSE TO ISSUES DISCUSSION AT STATUS CONFERENCE

NOW INTO COURT COMES, the Louisiana Public Service Commission ("Commission" or "LPSC"), through undersigned staff counsel, with the following memorandum in response to the Motion to Dismiss filed by NOW Communications, Inc ("NOW" or "Company") and in response to the issues as elaborated in the BellSouth Telecommunications, Inc. ("BST" or "BellSouth") and NOW (collectively referred to as the "Parties") filings and at the Status Conference held on April 20, 2000. While Staff was not a party to the negotiations or the events that transpired before, during or after the negotiations, Staff will attempt to comment on the motion based upon the facts presented in the BST Petition, NOW Response, NOW Motion to Dismiss and BST Response to the Motion and based upon the applicable laws, rules and regulations.

I. Procedural History

It appears that there is no conflict among the Parties with regard to the following: On or about June 1, 1997, BellSouth and NOW entered into an agreement to govern the resale of

BellSouth's retail services by NOW (the "1997 Agreement"). The term of the 1997 Agreement was for two years, with an expiration date of May 31, 1999.

BellSouth originally provided a copy of BellSouth's then current standard resale agreement to NOW for review and consideration on October 2, 1998, as well as a proposed amendment to the existing contract with respect to charges for access to BellSouth's operations support systems ("OSS"). The parties did not come to agreement over either proposed contract matter at that time. Thus, on August 20, 1999, BellSouth provided to NOW a written request for negotiation of a new resale agreement. A copy of the letter is attached to BST's Petition as Exhibit "A". BellSouth advised NOW that it was providing notice, pursuant to and in compliance with Section 251(c)(1) of the 1996 Act, of BellSouth's request to commence good-faith negotiations toward a new agreement. BellSouth again included a copy of BellSouth's current Standard Resale Agreement for NOW's consideration and review. NOW did not provide a written response to BellSouth's letter.

At NOW's request, BellSouth provided additional information regarding the proposed resale agreement by faxing a brief memorandum note with a page from the agreement on September 2, 1999. BellSouth also requested NOW to advise BellSouth if there were any issues or proposed changes or questions with respect to the draft resale agreement. A copy of the fax memorandum is attached to the BST Petition as Exhibit "B". NOW did not provide a written response to BellSouth's memorandum.

Three (3) additional documents should also be considered undisputed, a January 21, 2000 letter, a January 26, 2000 Agreement and a February 23, 2000 letter. First, NOW makes no written admission or acknowledgment of the letter sent to Jerry Hendrix from Larry Seab on behalf of NOW dated January 21, 2000 ("January 21, 2000 Letter"), attached as Exhibit D to BST's Petition.

However, Counsel for NOW admitted the existence of the January 21, 2000 Letter during the April 20, 2000 Status Conference. This letter acknowledges NOW's understanding that the period for filing the arbitration pursuant to the start date as set by the parties would soon expire and considering that fact, NOW sought a 30-day extension. Staff believes the existence of this letter is undisputable.

The second document is the January 26, 2000 Agreement between BST and NOW. Both Parties recognize and cite this agreement for different purposes. However, the January 26, 2000 Agreement clearly and fully sets forth the agreement between the parties. Staff believes that the existence and the substance of the agreement as filed is undisputable.

The third document is a letter dated February 23, 2000 ("February 23, 2000 Letter") attached as Exhibit 11 to NOW's Response to the Petition. This letter was written to Counsel for BST from Counsel for NOW expressing the state of affairs between the Parties on or about that time. Staff is unaware of any BST objections to the existence of the document. If accurate, the document sheds some light on NOW's actions and representations relating to the Motion to Dismiss.

II. Lack of Jurisdiction - Untimely

The jurisdiction of this Commission is clearly set forth in Section 252(b)(1) of the 1996 Act. Specifically, the Commission is authorized to arbitrate any and all unresolved issues regarding interconnection, services or network elements as filed by the Parties. Either party may file a petition with the LPSC between the 135th and 160th day from the date that the negotiations were deemed to have commenced. This Commission is then expected to resolve each issue set forth in the Petition not later than nine (9) months after the date on which the non-petitioning carrier received the request for negotiation , which, based upon the parties' agreed upon extension

of time, is on or before June 20, 2000. Accordingly, the Petition was timely filed and is appropriately before this Commission

Staff is appalled at NOW's Motion to Dismiss based upon the argument that the filing of the arbitration is untimely. First, NOW explicitly requested an extension in the January 21, 2000 Letter and clearly acknowledged the approaching arbitration deadline. The January 26, 2000 Agreement signed by both Parties, in association with the correspondence attached to it, specifically establishes the purpose of the letter–to, among other things– extend the arbitration window. Mr. Seab and Mr. Miller, representing NOW and BST respectively, signed the two page agreement which explicitly provides that "[b]y signing and counter-signing this letter both parties waive any right to claim that the dates within which a party may seek state commission arbitration of unresolved issues begins and ends on any earlier dates." After additional contact among the Parties, Counsel for NOW then sent the February 23, 2000 letter explicitly acknowledging February 25, 2000 as the arbitration filing deadline.

The Company now sets forth a position completely contrary to the tacit and explicit terms of the January 26, 2000 Agreement and the two letters. NOW's Motion is made in complete disregard of that agreement, is unconscionable and in bad faith, contrary to the requirements of the Act that parties negotiate in good faith, the exact conduct NOW alleges of BST. Staff hopes this insidious behavior does not reflect what Staff should expect throughout this docket and in future dealings with NOW.

Staff asserts the actions of the parties as expressed in the January 21, 2000 Letter, the January 26, 2000 Agreement and the February 23, 2000 Letter constitute an agreement to alter the start date of negotiations which would make this arbitration timely filed. Staff finds no support

for the position taken by NOW.

III. Improper Service of Petition

Pursuant to Section 252 (b)(2)(B), the party petitioning a State Commission for arbitration must provide a copy of the petition and any other documentation to the other party not later than the date the petition is received by the State Commission. NOW claims that service was not timely. BST states they served NOW the same day BST filed the petition with the LPSC. There is no evidence to corroborate either claim. Unless NOW can produce some evidence supporting this contention, Staff recommends rejection of this argument.

IV. New Interconnection Agreement or Extension for a period of two years

NOW contends that this arbitration is improper because the 1997 Agreement was extended for a period of two years, pursuant to the terms of the January 26, 2000 Agreement. NOW claims the 1997 Agreement did not expire on May 31, 1999, but was automatically renewed for two one-year periods Furthermore, NOW claims that the January 26, 2000 Agreement for two one-year periods does not expire for two years.

Staff does not comprehend the argument or thought process used by NOW in arriving at the Company's position The term of the 1997 Agreement was for two years, set to expire on May 31, 1999. The January 26, 2000 Agreement makes no tacit or explicit statement or reference to the creation of a new agreement or the extension of the 1997 Agreement for a term. The agreement only states that BST and NOW will continue to honor the terms of the May 1997 agreement until a new agreement is signed. This language is nearly identical to the language in the

1997 Agreement. Staff asserts that the statement merely reaffirms the existing arrangement among the parties, specifically that BST will continue to abide by the 1997 Agreement until a new agreement is reached.

If an extension or a new arrangement was somehow created by the January 26, 2000 Agreement, Staff is baffled by NOW's argument that the two one-year contracts expire in two years. This argument cuts against the basic principal of a one-year contract, which is just that, a contract which expires in one year. Two one-year contracts do not equate one two-year contract. Unless NOW clarifies the position, Staff recommends rejection of this argument.

V. Issues List

As stated in the petition, BST sets forth 10 issues and positions as follows. Staff inserted the additions and clarifications made by NOW in their response to the BST petition:

ISSUE 1

Issue:	*Should the terms, conditions and prices ultimately negotiated by the Parties or ordered by the Commission through arbitration for inclusion in a new Agreement be effective retroactive to the day following the expiration of the old Agreement? (GTC section 2.3)*
BellSouth Position	Yes. Such a contract provision is necessary to prevent either party from delaying the entry of a new agreement solely to prevent the other party from obtaining the benefits of any new terms and conditions. For example, without such a provision, one party could effectively prevent the other party from timely receiving the benefits of any new rate changes ordered by the Commission.
NOW Position:	No. NOW takes the position that any new agreement should take effect upon execution of the new agreement without any retroactive effect whatsoever. NOW argues this position based

upon the contention that it has an agreement in effect with BST.

ISSUE 2

Issue: *Should there be a cancellation provision in the agreement in the event that the parties are unable to timely negotiate a new agreement or neither party has filed for arbitration? If so, how should the parties continue to conduct business in the event of cancellation by one or both parties? (GTC section 2.4)*

BellSouth Position: Yes. BellSouth believes that the agreement should contain a cancellation provision such that upon sixty (60) days advance written notice to the other party the Agreement is terminated to prevent one party from unreasonably continuing the Agreement beyond the expiration date. In the event of such cancellation, BellSouth will agree to continue to offer services to NOW pursuant to the terms, conditions and rates set forth in its Statement of Generally Available Terms and Conditions ("SGAT") approved by the Commission or in its standard resale or interconnection agreement.

NOW Position: No. BST states that NOW disagrees that this contract provision should be utilized, but rather, believes that all that is needed is language that states in the event of expiration of the agreement, the agreement will automatically convert to a month-to-month agreement under the terms of the agreement without the ability of either party to ever cancel the agreement, with or without reasonable notice. I am unclear on the meaning of NOW's response to this issue. I believe the position is that the existing terms that are in the 1997 agreement should be utilized. Those terms provide for the application of the 1997 agreement until such time as a new agreement is reached.

ISSUE 3

Issue: *What are the appropriate rates to be charged by BellSouth for NOW's access to and use of the electronic and manual interfaces to BellSouth's operations support systems ("OSS") and functions? (GTC section 3.3 and Attachment 1)*

BellSouth Position: The 1996 Act and the FCC's rules allow BellSouth to recover costs associated with developing, providing, and maintaining the electronic and manual interfaces that allow CLECs, such as NOW,

access to BellSouth's OSS. This Commission previously approved BellSouth's right to recover these costs, and BellSouth is proposing rates for electronic and manual access as previously established by this Commission.

NOW Position: NOW disagrees with the level of some of the OSS charges and with certain instances when the OSS charges should be applied to CLECs. Now clarifies by adding that BST does not have the right to collect these charges from a prepaid residential reseller because the rates are collected through the limited discount tariffed rate.

ISSUE 4

Issue: *When BellSouth receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to NOW end users, should BellSouth advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to NOW? (GTC section 7)*

BellSouth Position: Yes. The party that receives a misdirected subpoena should notify the person or entity that issued the subpoena that the customer whose records are being sought is not that party's customer and identify the appropriate custodian of the requested records.

NOW Position: No. BST phrases the NOW position as :BellSouth should only advise the person or entity that issued the subpoena that BellSouth does not have the requested information and should not identify the appropriate custodian of the requested records. NOW rephrases the question as who should be required to pay for a subpoena which correctly or incorrectly goes to BST. NOW answers by stating that they are not required by law and should not be required to pay for such charges.

ISSUE 5

Issue: *What limitation of liability language should be included in the Agreement? (GTC section 8)*

BellSouth Position: BellSouth believes that the Agreement should contain appropriate language regarding the parties' respective rights and limitations on liability as well as indemnification consistent with Commission approved tariffs under which BellSouth provides the services that are to be resold.

NOW Position: NOW does not believe that it is appropriate to include language regarding BellSouth's limitation of liability in the Agreement. NOW clarifies by stating that they are not required by the law to indemnify BST nor to agree to limitations of their liability regarding BST's failure to comply with the law or with a reasonable standard of care.

STAFF: needs clarification of the actual language at issue. No reference is made in the filings.

ISSUE 6

Issue: *What language should the Agreement contain regarding the protection of the intellectual property rights of both parties? (GTC section 9)*

BellSouth Position: BellSouth believes that the Agreement should contain appropriate language regarding the parties' respective rights to intellectual property such as each other's brand names, trademarks, copyrights, etc.

NOW Position: NOW states that neither party should be required to give up intellectual property rights nor should BST attempt to gain proprietary rights over such property.

ISSUE 7

Issue: *Should the Commission as the entity approving the Agreement retain jurisdiction to resolve all disputes that may arise thereunder? (GTC section 12)*

BellSouth

Position: BellSouth believes that the Commission has both the jurisdiction and the authority to resolve any complaints and disputes that may arise under the resale agreement. The Commission clearly has jurisdiction over the parties it has certificated as local exchange carriers and it clearly has authority to enforce agreements it has reviewed and approved pursuant to the Telecommunications Act of 1996.

NOW Position: NOW disagrees that the Agreement should contain language that complaints and disputes should be resolved by exclusively by the Commission, but wants to include language that the parties may pursue remedies before the courts.

ISSUE 8

Issue: *Should the Agreement clearly set forth the rights and obligations of the parties with respect to tax obligations? (GTC section 13)*

BellSouth Position: BellSouth has proposed language for the interconnection agreement based upon BellSouth's experiences with tax matters and liability issues in connection with the parties' obligations under interconnection agreements. A variety of taxes are imposed upon telecommunications carriers, both directly and indirectly (collect from end-users and other carriers). As would be expected, problems and disputes over the application and validity of these taxes will and do occur. The interconnection agreement should clearly define the respective rights and duties for each party in the handling of such tax issues so that they can be resolved fairly and quickly.

NOW Position: NOW believes that the Agreement should basically contain language that each party will be responsible for their respective taxes based upon the old Agreement.

ISSUE 9

Issue: *What provisions should govern the modification of the Agreement? (GTC section16)*

BellSouth Position: BellSouth believes that the Agreement should contain clear and express language setting forth the terms and conditions that will allow the parties to amend of modify the agreement consistent with all appropriate rules, regulations, and orders of the federal and state agencies as well as the courts.

NOW Position. NOW Believes that the Agreement should contain language that provides that any modification or amendment of the Agreement must be based upon language similar to the language contained in the old Agreement and upon the mutual consent of the parties

ISSUE 10

Issue: *Should the Agreement reflect that it is product of negotiation or arbitration and not be construed against either party as the drafting party? (GTC section 21)*

BellSouth Position: BellSouth believes that the Agreement should contain language that correctly reflects that the Agreement is the end result of negotiation between the parties and/or arbitration conducted by the Commission and should not be construed against BellSouth as the party who proposed the initial draft of the Agreement as a starting point for negotiation.

NOW Position: NOW believes that the Agreement should contain a provision that reflects a general rule of contract construction requiring an interpretation of the contract against the party drafting it even though it is the end product of negotiation and/or arbitration.

At the April 20, 2000 Status Conference, the Administrative Law Judge, Staff and BST were informed by counsel for NOW that the Company believes there are additional issues other than the 10 issues elaborated by BST While not stated in these terms, basically the position is that all of the issues which are included in NOW's response to the BST petition for arbitration as the Third and

Fourth "DEFENSE", those statements listed in paragraphs 10-17 of NOW's response and those claims set forth in the U.S. District Court petition attached to NOW's response to the BST petition for Arbitration are allegedly additional issues to be addressed in this arbitration. Staff disagrees and respectfully requests denial of the Motion on this ground.

A. Third and Fourth Defense Issues

The Third and Fourth Defenses do not set forth any issues to be resolved by arbitration. They each set forth general complaints that BST failed to comply with the applicable laws and regulations thereby causing unspecified damages to NOW. Staff takes the position that this type of complaint is improper under a Section 251 Arbitration and should be brought as a complaint with the LPSC or any other appropriate forum. Furthermore, if the statements in the Third and Fourth Defenses were in fact arbitrable issues, Staff can only guess as to the language which could or should be imposed to resolve NOW's complaint.

For instance, the only logical language to resolve such a vague complaint is for NOW to propose that the parties abide by the terms of the 1996 Act (Third Defense), all antitrust and fair trade laws, and any other applicable federal, state and Commission laws, rules and regulations (Fourth Defense). Staff suspects there would be immediate agreement among the parties to abide by all applicable laws and regulations. If however, NOW wishes to seek penalties, damages or specific performance, then this arbitration is clearly NOT the correct method of procedure for that complaint. Until NOW clarifies its position, Staff cannot support the new issue.

Staff does note that regardless of the appropriateness of any of the additional issues, the manner in which the "issues" were set forth, specifically as defenses and as an attachment, does not

afford Staff, the Administrative Law Judge or BST fair notice of any additional issue, much less the nature of the issue, the proposed language and the positions of the parties, requirements clearly demanded of the petitioning party. Staff asserts this obligation follows for a responding party regarding new issues. To interpret the Act in any other manner would provide the responding party with the opportunity to unfairly deny Staff, the Administrative Law Judge and the State Commission the opportunity to fully understand the issues, seek discovery and to timely consider an appropriate resolution.

B. Paragraphs 10-17 Issues

The statements made in Paragraphs 10-17 of NOW's Response to the BST Petition provide a lengthy discussion of BST prior performance regarding the 1997 Agreement. NOW gave notice to BST to take corrective action and then, unhappy with the BST response, filed suit in the U.S. District Court for the Northern District of Alabama. Upon receiving an injunction against BST, NOW reached an agreement with BST to resolve the injunction that allegedly BST has now breached.

Staff again takes the position that this type of complaint is improper under a Section 251 Arbitration and should be brought as a complaint with the LPSC or any other appropriate forum. Furthermore, if the statements elaborated in paragraphs 10-17 were in fact arbitrable issues, Staff can only guess as to the language which could or should be imposed to resolve NOW's complaint. Again, any contractual dispute or claim for damages must be brought in the proper procedural vehicle, a complaint

C. District Court Issues

Finally, Paragraph 12 of NOW's Response makes reference to the U.S. District Court Petition and Dismissal Order, attached to NOW's response as Exhibit 8. NOW apparently claims that the issues dismissed by that Court are appropriate for 271 Arbitration. The issues dismissed in the U.S. District Court Order include allegations that BST refused to provide interconnection and access to the local exchange carrier on a non-discriminatory basis, committed breach of contract, fraud, and violations of the Sherman Act. The dismissal also includes NOW's request seeking certification of a class of CLECs

For the third and final time, Staff reasserts its position that any claims for breach of contract, damages and violation of federal or state law are inappropriate for an arbitration. The appropriate procedural vehicle is a complaint.

VI. Conclusion

Staff respectfully requests that the Motion to Dismiss be denied and that NOW's request for the additional above referenced issues be denied.

Respectfully submitted,

STEPHANIE M. FOLSE, #24550
Staff Attorney
Louisiana Public Service Commission
P.O. Box 91154
Baton Rouge, LA 70821-9154
(225) 342-9888

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all parties of record by placing same in the United States Mail, properly addressed and postage prepaid, on this 28 day of April, 2000.

Stephanie M. Folse