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May 31, 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  
Petition for Arbitration/Notice of Supplemental Authority**

Dear Ms. Bayo:

On May 5, 2000, NOW Communications, Inc. ("NOW") filed a motion seeking leave to file information supplementary to its May 3, 2000 motion for determination of a preliminary matter. Attached to NOW's May 5 motion, among other things, was a recommendation from an Administrative Law Judge to the Louisiana Public Service Commission which concerned some of the issues raised by NOW in its May 3 motion and its March 17, 2000 motion to dismiss BellSouth's petition in this matter.

In its response to NOW's May 5 motion, BellSouth indicated that it did not object to the filing of the Louisiana ALJ's recommendation, and filed a recommendation on the same issues from the Louisiana Public Service Commission Staff, which was contrary to the ALJ's recommendation.

On May 22, 2000, the Louisiana Public Service Commission issued Order No. U-24762, deciding the issues addressed by the ALJ and the Louisiana PSC Staff in the documents previously filed by NOW and by BellSouth in this docket.

In a 5-0 vote, the Louisiana PSC denied NOW's Motion to Dismiss BellSouth's Petition for Arbitration.

- APP \_\_\_\_\_
- CAE \_\_\_\_\_
- CMP \_\_\_\_\_
- COM 3
- CTR \_\_\_\_\_
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- LEG 1
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- SEC 1
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*[Signature]*  
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FPSC-RECORDS/REPORTING

In order to complete the record with respect to this parallel proceeding in Louisiana, enclosed for filing in this docket is a copy of the Louisiana Commission's Order.

Sincerely,

*Michael P. Goggin*  
Michael P. Goggin  
(22)

214563

cc: Timothy Vaccaro  
Charles Pelligrini  
A. Langley Kitchings  
All Parties of Record

**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 31st day of May, 2000 to the following:

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Michael P. Goggin

**LOUISIANA PUBLIC SERVICE COMMISSION****ORDER NO. U-24762**

BELLSOUTH TELECOMMUNICATIONS, INC.

VS.

NOW COMMUNICATIONS, INC.

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Docket No. U-24762 - In re: Petition for Arbitration of Interconnection between BellSouth Telecommunications, Inc. and NOW Communications, Inc. pursuant to the Telecommunications Act of 1996, 47 U.S.C. 252.

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(Decided at Business and Executive Session held May 17, 2000)

This proceeding was initiated by BellSouth Telecommunications, Inc. ("BellSouth") seeking arbitration of a resale agreement between BellSouth and Now Communications, Inc. ("NOW"). BellSouth filed its petition on February 25, 2000, and notice of the proceeding was published in the Commission's Official Bulletin on March 17, 2000. On March 17, 2000, NOW filed a Motion to Dismiss BellSouth's Petition. BellSouth and the Commission Staff oppose NOW's motion. The ALJ in the proceeding ruled that the Motion to Dismiss should be granted.

The ALJ determined, and the Act is clear, that under Section 252 (b)(1), a CLIC, not an ILIC (BST) may request negotiations under Section 252(b)(2). Only a CLIC's request can commence the delays for seeking Commission arbitration. However, the facts in this case were not clear cut. In fact, the Judge concluded, "(w)ithin the muddled factual background," that the following were true:

- (1) that the existing June 1, 1997 Agreement is currently in a period of automatic renewal, at least until May 31, 2000 pursuant to the interconnection agreement language (due to the fact that neither party had given the minimum 60 days notice of termination);
- (2) that BellSouth, not NOW, requested renegotiation of the June 1, 1997 Agreement on August 20, 1999, the date on which BellSouth relies in establishing the start of the negotiation/arbitration time frame set out in Section 252 of the Telecommunications Act;
- (3) On January 21, 2000, NOW suggested negotiation of an *interconnection* agreement, to replace the existing *resale* agreement, but the parties agree that those negotiations have come to an end.

Staff and this Commission agreed with the existence of the facts pointed out by the ALJ, but disagreed with the conclusion of the Judge.

With respect to the ALJ's first statement of fact, whether the existing 1997 interconnection agreement was renewed automatically or not, the Commission finds irrelevant. Nowhere in the Act is there a requirement that an Interconnection Agreement be expired or nearly expired in order to commence Section 252 Negotiations.

Regarding the second finding of fact, the Judge found that BellSouth, not NOW, requested renegotiation of the June 1, 1997 Agreement on August 20, 1999, the date on which BellSouth relies in establishing the start of the negotiation/arbitration time frame set out in Section 252 of the Telecommunications Act. The Commission agrees that there was in fact a request from BST to NOW to commence negotiations on August 20, 1999. However, there is

Order No. U-24762

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also an abundance of evidence in the record to conclude that NOW did in fact tacitly, if not explicitly, request negotiations with a start date of August 20, 1999, and then, in bad faith, made this attempt to dismiss a properly filed Petition for Arbitration.

The ALJ generally points to the above referenced additional evidence in the Analysis Section of the Final Recommendation, specifically that "... the parties apparently have been engaged over a period of time in negotiation..." This is a clear acknowledgment by the ALJ that the Parties were negotiating. By participating in the negotiation process, at a minimum, NOW tacitly was seeking out the negotiation. While the language of the Act only allows a non-incumbent to commence Section 252 negotiations, the Act does not require any specific notification, and further does not eliminate the possibility of a tacit request.

Additional evidence supporting the Commission's decision includes a facsimile, statements in NOW's Answer to the BST Petition for Arbitration, two letters and an agreement between BST and NOW. First, a facsimile dated September 2, 1999 sent from Page Miller with BST to Larry Senh with NOW states that BST is presenting NOW with the missing page 11, and to call once NOW read the agreement in order to discuss/propose new language. This communication clearly indicates that NOW was involved and sought out or requested information (page 11) regarding a new interconnection agreement.

Next, NOW indicated clearly in its petition that the Company intentionally did not respond to BST's August 20, 1999 request for Arbitration. However, NOW provides conflicting evidence in its Response to the BST Petition that it was negotiating with BST before, on and after December 22, 1999, even though NOW claims to believe it was only in the context of settling unrelated litigation. This Commission believes that the Company admits they were negotiating an interconnection agreement, and in fact, was negotiating. Again, the Act does not require any particular type of notification to commence Section 252 Arbitration, which leads to the conclusion that a tacit request would meet the requirements of the Act. Furthermore, all of NOW's acts referenced herein apparently lead BST to the conclusion, and would lead anyone to the conclusion that the negotiations were pursuant to Section 252.

Most telling of all of the evidence is two letters from NOW and an agreement between BST and NOW. A letter dated January 21, 2000 from NOW to BST explicitly requests an extension of the arbitration period and further acknowledges an approaching arbitration deadline of January 27, 2000. If NOW truly believed they had not requested arbitration and that there was no period to toll, why would NOW have forwarded this letter to BST. Next, NOW entered into a January 26, 2000 Agreement with BST, which, in association with the correspondence attached to it, specifically establishes the purpose of the letter to, among other things— extend or establish an arbitration window.

The ALJ put it clearly and frankly, that this case involves a "muddled factual background." This is clearly evident by the constant shifting of deadlines among the parties. Regardless of the confusion, Mr. Senh and Mr. Miller, representing NOW and BST respectively, signed the two page January 26, 2000 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 which explicitly acknowledges February 25, 2000 as the arbitration filing deadline.

Finally, with respect to the ALJ's third finding, this Commission agrees with the existence of the fact, disagrees as to the conclusion drawn from the fact and further restates that while NOW did make an explicit request to negotiate, one can not ignore the prior tacit and explicit actions and representations made by NOW. It appears that the ALJ's recommendation would allow a company (NOW) to tacitly and/or explicitly request and commence Section 252 Negotiations, but once the period expired or neared expiration, the Company could make a new request, essentially ignoring all previous acts and requests.

Based upon all of the above referenced acts, representations, statements and facts, this Commission believes that adequate support exists for a decision that the Section 252 Negotiation period commenced on the date as filed by BST. Thus, the Commission remands the case back to the ALJ to complete the arbitration as soon as possible.

This matter was considered at the Commission's Open Session held on May 17, 2000. On motion of Commissioner Field and seconded by Commissioner Dixon, and unanimously adopted, the Commission voted to reject the ALJ recommendation and remand the case to the ALJ for a final determination as soon as possible.

**IT IS THEREFORE ORDERED**

The above referenced docket be remanded to the ALJ for completion of the arbitration as soon as possible.

This order is effective immediately.

**BY ORDER OF THE COMMISSION  
BATON ROUGE, LOUISIANA**

May 22, 2000

/S/ IRMA MUSE DIXON  
DISTRICT III  
CHAIRMAN IRMA MUSE DIXON

/S/ JAMES M. FIELD  
DISTRICT II  
VICE CHAIRMAN JAMES M. FIELD

/S/ DON OWEN  
DISTRICT V  
COMMISSIONER DON OWEN

/S/ C. DALE SITIG  
DISTRICT IV  
COMMISSIONER C. DALE SITIG

/S/ JACK "JAY" A. BLOSSMAN  
DISTRICT I  
COMMISSIONER JACK "JAY" A. BLOSSMAN

  
**SECRETARY**  
LAWRENCE C. ST. BLANC