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November 3, 2000

Blanca S. Bayo, Director
Division of Records and Reporting
Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, FL 32399

Re: Docket No. 001436-TP

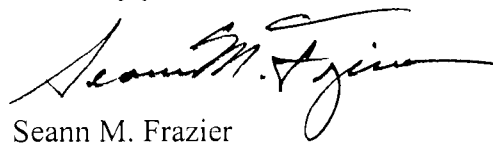
Dear Ms. Bayo:

Enclosed is an original and fifteen (15) copies of Pilgrim Telephone, Inc.'s Opposition to Motion to Dismiss in the above docket.

We have also enclosed a copy of the document on diskette, prepared in Microsoft Word 7.0 on a Windows 95 operating system. The diskette is a "2HD" density and 1.44 MB.

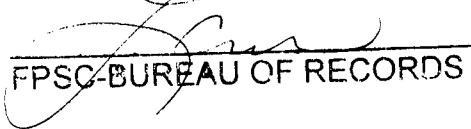
Thank you in advance for your assistance.

Sincerely yours,


Seann M. Frazier

Enclosures

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- CAF _____
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ORIGINAL

Before the
PUBLIC SERVICE COMMISSION
of the
STATE OF FLORIDA

In the Matter of

PETITION FOR ARBITRATION
OF PILGRIM TELEPHONE, INC.
PURSUANT TO SECTION 252(b) OF THE
COMMUNICATIONS ACT OF 1934

DOCKET NO. 001436-TP

OPPOSITION TO MOTION TO DISMISS

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November 3, 2000

DOCUMENT NUMBER-DATE

14255 NOV-38

FPSC-RECORDS/REPORTING

**Before the
PUBLIC SERVICE COMMISSION
of the
STATE OF FLORIDA**

In the Matter of

PETITION FOR ARBITRATION
OF PILGRIM TELEPHONE, INC.
PURSUANT TO SECTION 252(b) OF THE
COMMUNICATIONS ACT OF 1934

DOCKET NO. 001436-TP

OPPOSITION TO MOTION TO DISMISS

Pilgrim Telephone, Inc. ("Pilgrim"), through counsel, submits the following Opposition to the Motion To Dismiss ("Motion") filed by BellSouth Telecommunications, Inc. ("BellSouth") on October 16, 2000, in the above-captioned proceeding.

I. INTRODUCTION

BellSouth argues in its Motion¹ that Pilgrim should not be permitted to exercise its right to file an arbitration petition pursuant to Section 252 of the Communications Act of 1934 ("Act") because Pilgrim is not a telecommunications carrier, as defined by the Act. BellSouth also argued

¹ The Motion was combined with an Answer to the Petition for Arbitration filed by Pilgrim on September 20, 2000. This Opposition only addresses arguments presented by BellSouth pertaining to its Motion.

that the Commission should dismiss two issues raised by Pilgrim in its Petition for Arbitration (“Petition”)² because the issues are not appropriate for inclusion in an arbitration petition.

For the reasons discussed in the following sections, Pilgrim urges the Commission to deny BellSouth’s Motion and to proceed to the consideration of the merits of Pilgrim’s Petition.

II. ARGUMENTS

BellSouth first raises a jurisdictional argument regarding whether Pilgrim’s Petition should be considered by the Commission, and then suggests that specific issues included in Pilgrim’s Petition should be dismissed because they are outside the scope of an arbitration proceeding. These arguments are addressed in turn in the following sections.

A. Pilgrim Qualifies as a Telecommunications Carrier under the Terms of the Act and Is Therefore Entitled To File a Petition for Arbitration

BellSouth argues that Pilgrim does not qualify as a telecommunications carrier because it is not certificated by the Commission. Based on its assertion that Pilgrim is not a telecommunications carrier, BellSouth argues that Pilgrim is not entitled to utilize the arbitration provisions of the Act.³ In support of its contentions, BellSouth cites decisions rendered by other state public utility commissions in which the commissions concluded that a carrier must be certificated to provide telecommunications service in the state before it can be eligible to invoke the state arbitration provisions contained in the Act.⁴ Pilgrim believes that there are sound

² The first issue relates to whether BellSouth should provide billing and collection service as an unbundled network element (“UNE”) for certain types of calls transiting the Pilgrim network. The second issue relates to whether BellSouth should be required to provide access to billing name and address and to 900 number blocking information for use by Pilgrim in providing any type of telecommunications service.

³ BellSouth Motion at 3-4.

⁴ *See id.* at 4-6 & n.8. BellSouth relies principally on a decision by the Georgia Public Service Commission. Petition by Low Tech Designs, Inc., for Arbitration of Rates, Terms and Conditions with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996, Docket No. 7270-U, Order Dismissing Arbitration, adopted May 6, 1997 (*Low Tech*).

statutory and policy reasons for the Commission to steer a different course and deny BellSouth's Motion.

There are no provisions in the Communications Act that require that a carrier must be certificated by a state commission as a prerequisite to the carrier's eligibility to file an arbitration petition with a state commission. The statute merely requires that a party filing an arbitration petition must be a telecommunications carrier. But the statute does not impose any further requirement that the telecommunications carrier must already be certificated in a particular state before the carrier can file an arbitration petition in that state.

Section 252(a)(1) of the Act provides that any telecommunications carrier may request negotiations with an incumbent local exchange carrier ("LEC") for interconnection, services, or network elements pursuant to Section 251 of the Act. Section 252(b)(1) indicates that any party that is eligible to be involved in negotiations under Section 252(a)(1) (*i.e.*, an incumbent LEC or any telecommunications carrier making a request under Section 252(a)(1)) is entitled to file a petition for arbitration.

The only issue, therefore, is whether Pilgrim is a telecommunications carrier. The Act defines a telecommunications carrier as "any provider of telecommunications services"⁵ Pilgrim clearly falls within this definition because Pilgrim currently provides interstate telecommunications services pursuant to a tariff on file with the Federal Communications Commission ("FCC") and also provides intrastate telecommunications services in several states.

BellSouth also cites similar actions taken by the North Carolina Utilities Commission and the South Carolina Public Service Commission.

⁵ 47 U.S.C. § 153(44). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

Because it provides telecommunications services, Pilgrim has met the only statutory threshold of eligibility to request negotiations with incumbent LECs under Section 252(a)(1) and to file arbitration petitions under Section 252(b)(1). There are no statutory provisions which attach any geographical parameters or requirements to the definition of telecommunications carrier. In other words, there is no state-by-state test established in the statute under which a party's status as a telecommunications carrier can vary from state to state depending on whether it is certificated in a given state.

This interpretation of the Communications Act is supported by decisions of the FCC. In its *Local Competition Order*, the FCC found that, as part of a duty to negotiate in good faith, "a party may *not* condition negotiation on a carrier first obtaining state certification."⁶ Thus, a carrier requesting negotiations is not required to be certificated by any state public service commission. As explained above, the provision of the Act that allows a carrier to request negotiations, Section 252(a)(1), allows only telecommunications carriers to request negotiations. If a carrier requesting negotiations is not required to be certificated and only a telecommunications carrier can request negotiations, then the definition of a telecommunications carrier cannot include any certification requirement. It would be inconsistent to say that the definition of telecommunications carrier is intended to be different in Sections 252(a)(1) and 252(b)(1) of the Act, when there is no indication in the statute that state certification is part of the definition of the term telecommunications carrier.

⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15577 (para. 154) (emphasis added) (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom.* Competitive Telecom. Ass'n v. Federal Comm. Comm'n, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom.* Iowa Utils. Bd. v. Federal Comm. Comm'n, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom.* AT&T v. Iowa Utils. Bd., 119 S.Ct. 721 (1999).

B. Significant Policy Reasons Also Support a Decision To Permit Pilgrim To File an Arbitration Petition Before It Completes the Carrier Certification Process

There are also significant policy reasons supporting the conclusion that the Commission should permit Pilgrim to file an arbitration petition even though Pilgrim is not yet certificated in the State of Florida. Specifically, the pro-competitive and pro-consumer policies of the Communications Act would be best served by permitting competitive telecommunications carriers to negotiate with incumbent LECs, and file for arbitration of unresolved issues, prior to the competitive telecommunications carriers becoming certificated.⁷

It is more efficient, and more conducive to competitive entry, to permit competitive telecommunications carriers to pursue the two tracks of reaching interconnection agreements with incumbent LECs and of obtaining certification from state commissions without being required to complete the certification process before completing the negotiation and arbitration process. Being able to work along both paths simultaneously, without regard to which process is completed first, provides competitive telecommunications carriers with needed flexibility as they try to expedite their entry into local markets. Given the fact that this entry serves competitive goals and benefits consumers, it makes sense that regulatory processes should facilitate such entry in order to promote these goals and benefits.

Pilgrim also believes that, in fact, in some cases it can be difficult for a competitive telecommunications carrier to complete the certification process until it has first finalized its interconnection arrangements. This is because the types of services that the competitive

⁷ In the *Low Tech* case decided by the Georgia Public Service Commission, Commissioner Barber issued a dissent in which he contended that “[t]his Commission’s responsibility to help foster a competitive telecommunications marketplace will be much better discharged when the Commission provides speedy resolution of complaints brought to it by all market participants.” *Low Tech* at 8 (Barber, dissenting).

telecommunications carrier represents that it will offer in its certification application and price list can be affected by the nature of its interconnection agreement with the incumbent LEC.

Pilgrim, for example, is seeking billing and collection from BellSouth as a network element, in order to enable Pilgrim to provide casual calling services in the State of Florida. It is potentially problematic for Pilgrim to attempt to reflect the possible offering of these services in its application and price list until the issue of whether BellSouth is required to furnish billing and collection as a UNE is resolved. Pilgrim might be faced with the unnecessary and costly burden of amending its application and its price list if it is required to pursue and complete the certification process before being able to arbitrate the issue of whether it is entitled to receive billing and collection from BellSouth as a UNE.

It is true that there is some risk that the Commission itself might face unwarranted administrative costs by permitting a competitive telecommunications carrier that is not yet certificated to file an arbitration petition. But Pilgrim believes that these risks are not substantial. The only situation in which such a risk would materialize is one in which the competitive telecommunications carrier is permitted to go forward with the arbitration proceeding, but then fails in its efforts to become certificated.

Pilgrim believes, however, that this risk is not substantial because in most cases the competitive telecommunications carrier will engage in efforts sufficient to ensure to the fullest extent possible that it will become certificated. In Pilgrim's case, for example, Pilgrim has already invested considerable time and resources in attempting to arrive at a satisfactory interconnection agreement with BellSouth. This investment illustrates the fact that Pilgrim is committed to entering telecommunication markets in the state, and also demonstrates that

Pilgrim has a strong incentive to pursue certification and cure whatever difficulties may arise in the certification process in order to become certificated.

Pilgrim thus believes that, in balancing the competitive goals that would be served by permitting a competitive telecommunications carrier that is not yet certificated to file an arbitration petition against the risk that unnecessary administrative costs could be imposed by permitting the arbitration, the Commission should conclude that the advantages outweigh the risks.

C. Issues Raised in Pilgrim’s Arbitration Petition Regarding Billing and Collection and Access to Certain Customer Information Are Appropriate for Consideration and Should Be Addressed and Resolved by the Commission

BellSouth asserts without explanation that Issue C (relating to the requested provision of billing and collection service as a UNE) “is a billing and collection issue, not an issue arising under the requirements of Section 251 of the 1996 Act. As such, it is inappropriate for inclusion in this arbitration”⁸

BellSouth’s motion to dismiss this issue from the arbitration proceeding should be denied by the Commission because BellSouth is wrong in suggesting that the issue does not arise under Section 251 of the Act. Section 251(c)(3) of the Act requires incumbent LECs to provide “nondiscriminatory access to network elements on an unbundled basis”⁹ Pilgrim has made clear in its Petition that it believes the statute must be construed as treating billing and collection for casual calling services as a network element that must be made available by BellSouth on an unbundled basis in accordance with the requirements of Section 251(c)(3).¹⁰

⁸ BellSouth Motion at 10.

⁹ 47 U.S.C. § 251(c)(3).

¹⁰ Pilgrim Petition at 12-14.

The issue placed before the Commission requires a determination of whether Pilgrim is correct on the merits of its argument that billing and collection service is subject to the network element unbundling requirements established by the Act. There is no basis for BellSouth's attempt to avoid a decision on the merits by claiming that the issue bears no relation to BellSouth's duties and responsibilities under Section 251.

BellSouth also claims without any analysis that Issue D (relating to Pilgrim's request that the interconnection agreement specify that BellSouth will make certain types of customer information available through its Operational Support Systems ("OSS") for Pilgrim's use in its provision of telecommunications services) "is inappropriate for inclusion in a local interconnection agreement arbitration and should be dismissed by the Commission."¹¹

BellSouth again is wrong in suggesting that the issue framed in Pilgrim's Petition is outside the scope of the arbitration proceeding. Pilgrim has made clear in its Petition that it believes that Section 251(c)(3) of the Act prohibits BellSouth from restricting the purposes for which information obtainable through OSS can be used by carriers seeking access to that information. BellSouth is attempting to restrict or prohibit access to this information.

Section 251(c)(3) of the Act, however, requires that the use of information available through OSS cannot be restricted and must be available for use in connection with the provision of *any* telecommunications service.¹² Therefore, as is the case regarding Issue C, the issue before the Commission requires a determination of whether Pilgrim is correct on the merits of its argument that OSS information must be available as a UNE for use in connection with the provision of any telecommunications service. BellSouth can offer no basis for its attempt to

¹¹ BellSouth Motion at 11.

¹² Pilgrim Petition at 17.

avoid a decision on the merits by asserting that the issue has no relation to BellSouth's duties and responsibilities under Section 251.

D. Pilgrim Has Previously Sought To Mediate These Issues in Good Faith, and BellSouth's Current Effort To Block Pilgrim's Due Process Right to a Hearing on the Merits Should Be Denied

As the Commission is aware, Pilgrim requested arbitration of an agreement before the Commission last year. In a show of good faith made in order to expedite a resolution of its issues, the same issues as are before the Commission in the current proceeding, and avoid taxing the Commission's resources, Pilgrim agreed to withdraw its petition in favor of a mediation supervised by Commission staff.

The mediation was unsuccessful, but Pilgrim had surrendered its rights to arbitration. Pilgrim asks that the Commission permit Pilgrim to now arbitrate the issues it brought before this Commission once before, and deny BellSouth's second attempt to deny Pilgrim its due process rights to at least obtain a hearing on its issues. Pilgrim believes that a dismissal is not proper in this instance, and that without a hearing, the Commission will have no basis to judge whether Pilgrim should prevail on the merits of its argument.

E. If the Commission Grants BellSouth's Motion To Dismiss, the Commission Should Permit Pilgrim To Refile Its Arbitration Petition Immediately After Becoming Certificated

If the Commission decides to require that Pilgrim must complete the certification process before the Commission will take any action in an arbitration proceeding, then Pilgrim respectfully requests that the Commission permit Pilgrim to immediately refile its arbitration petition pursuant to Section 252(b)(1) of the Act after becoming certificated, rather than

requiring Pilgrim to reinstitute negotiations with BellSouth and wait an additional 135 days before refiling its petition.¹³

Such an approach, which would be similar to the process established by the Georgia Public Service Commission in the *Low Tech* case,¹⁴ would serve to expedite Pilgrim's ability to begin providing services in the State of Florida.

III. RELIEF REQUESTED

WHEREFORE, Pilgrim respectfully requests:

1. That the Commission deny in all respects the motion to dismiss filed by BellSouth.
2. That, in the alternative, if the Commission dismisses Pilgrim's petition, the Commission permit Pilgrim to refile the petition immediately after becoming certificated as a telecommunications carrier in the State of Florida.

This 3rd day of November, 2000.


Respectfully submitted,

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¹³ See 47 U.S.C. § 252(b)(1).

¹⁴ See Petition by Low Tech Designs, Inc., for Arbitration of Rates, Terms and Conditions with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996, Docket No. 7270-U, Order Denying Motion for Reconsideration, Rehearing and Oral Argument, adopted July 7, 1997, at 2, cited in Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission; Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission; 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 Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, para. 14 (1997).

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CERTIFICATE OF SERVICE

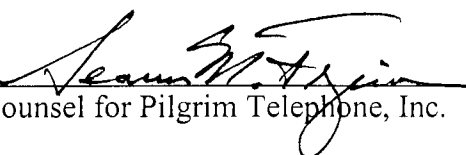
Docket No. 001436-TP

I hereby certify that a copy of the foregoing was served upon the following, as indicated,
this 3rd day of November, 2000.

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