



# Public Service Commission

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**DATE:** MARCH 22, 2001

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF LEGAL SERVICES (KNIGHT) *WDK BK*  
DIVISION OF COMPETITIVE SERVICES (BARRETT) *MCB RJ*

**RE:** DOCKET NO. 001436-TP - PETITION BY PILGRIM TELEPHONE, INC. FOR ARBITRATION OF TERMS OF INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.

**AGENDA:** APRIL 3, 2001 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\001436.RCM

### CASE BACKGROUND

On September 20, 2000, Pilgrim Telephone, Inc. (Pilgrim) filed a Petition for Arbitration pursuant to the Telecommunications Act of 1934{sic}(Act). On October 16, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed an Answer and Motion to Dismiss the Petition for Arbitration, stating that Pilgrim is not a telecommunications carrier under the Act. On November 3, 2000, Pilgrim filed a response opposing BellSouth's Motion to Dismiss. The Commission is vested with jurisdiction in this matter pursuant to Section 252(b)(1) of the Telecommunications Act of 1996.

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**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant BellSouth's Motion to Dismiss?

**RECOMMENDATION:** No. The Commission should deny BellSouth's Motion to Dismiss. Pilgrim is a telecommunications carrier as defined in Section 3(a)(49) of the Act, and is therefore entitled to file a petition for arbitration. **(KNIGHT)**

**STAFF ANALYSIS:** The function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993) In determining the sufficiency of the petition, the Commission should confine its consideration to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). Pilgrim's Complaint should be viewed in the light most favorable to Pilgrim, in order to determine whether its request is cognizable under the Telecommunications Act of 1996 (Act) and Florida Statutes. Furthermore, the Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Mathews v. Mathews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

**BellSouth's Motion**

BellSouth asserts in its motion to dismiss that the Commission's obligation to conduct compulsory arbitration is to enforce the duties imposed upon ILECs by Section 251(c) of the Act. BellSouth states that this Section is applicable only to telecommunications carriers. Telecommunications carriers are defined under Section 3(a)(49) of the Act as "any provider of telecommunications services...." "Telecommunications service" is defined in Section 3(a)(51) as "the offering of telecommunications for a fee directly to the public...." BellSouth also asserts that in Florida, these services may be provided directly to the public only upon a company obtaining certification through the Florida Public Service Commission. By not becoming certificated in Florida, and therefore being unable to provide telecommunications services, BellSouth holds that Pilgrim is not a telecommunications carrier, and is not entitled to arbitration under the Act.

Pilgrim's Response

Pilgrim states in its Petition for Arbitration that it is a Massachusetts corporation offering a variety of interstate, interexchange services, including presubscribed 1+ services, casual calling common carrier services, and information and enhanced services. It notes that it provides presubscribed 1+ services only in the Local Access and Transport Area (LATA) in Massachusetts. Pilgrim states that it plans to offer local exchange telecommunications services, although it does not specify where. Pilgrim argues in its response to the motion to dismiss that there are no geographic parameters or requirements to the definition of telecommunications carriers. Pilgrim also asserts that providing telecommunications services in the United States is the only statutory threshold for eligibility to request negotiations with incumbent LECs under Section 252(a)(1) of the Act, and to file arbitration petitions under Section 252(b)(1). Pilgrim cites the FCC's Local Competition Order for support, noting that as part of a duty to negotiate in good faith, "a party may not condition negotiation on a carrier first obtaining state certification." 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)(1996).

Pilgrim also argues that there are significant policy reasons for permitting it to file an arbitration petition before completion of the carrier certification process. Pilgrim states that it is more efficient to permit competitive telecommunications carriers to pursue the two tracks of reaching interconnection agreements with the incumbent LECs and of obtaining certification from state commissions, without being required to sequence the two steps. Pilgrim further alleges it may also be more difficult for a carrier to complete the certification process until the carrier has finalized its interconnection arrangements. The types of services represented for offering in the certification application, as well as the price list, can be affected by the nature of the interconnection agreement with the incumbent LEC. Finally, Pilgrim acknowledges that the Commission may incur unwarranted administrative costs by permitting an uncertificated telecommunications carrier to file an arbitration petition, but it believes that the risk is not substantial as the carrier is likely to become certificated.

Staff's Analysis

In order to sustain a motion to dismiss, the moving party must show that the petition fails to state a cause of action for which relief may be granted. All allegations in the petition should be taken as though true, and considered in the light most favorable to the petitioner. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983). Pilgrim's petition states that Pilgrim provides, among other offerings, a variety of interstate, interexchange services, including presubscribed 1+ services. On April 14, 2000, Pilgrim requested that BellSouth negotiate an interconnection agreement with Pilgrim. Negotiations did not produce agreement on all issues, and on September 20, 2000, Pilgrim filed the request for arbitration. Pilgrim's petition for arbitration is therefore timely pursuant to Section 252(b)(1) of the Act. In its petition, Pilgrim sets forth the issues it considers in dispute, and the position of the parties.

BellSouth's motion to dismiss is predicated for the most part on its assertion that as Pilgrim is not certificated in Florida, it does not meet the definition of a "telecommunications carrier." Under this premise, BellSouth has no Section 251 duty to provide, for Pilgrim's facilities and equipment, interconnection with BellSouth's network, or nondiscriminatory access to network elements on an unbundled basis. By virtue of it not being a telecommunications carrier, Pilgrim is not entitled to utilize arbitration to enforce nonexistent obligations.

Pilgrim's failure to become certificated in Florida does not, however, dissolve its standing as a telecommunications carrier under the Act. The Act does not define a telecommunications carrier in terms of the geographic area it serves, and in the broadest sense Pilgrim satisfies the definition of a telecommunications carrier. BellSouth's second numbered defense actually constitutes its answer to the Petition for Arbitration. There, BellSouth reiterates the assertion that Pilgrim is not certificated in the State of Florida, provides background on the path to arbitration, and sets forth its disputed issues and the positions of the parties. As such, it does not propound any further argument which satisfactorily challenges Pilgrim's cause of action. For these reasons, and applying the aforementioned standard, staff recommends that Pilgrim states a cause of action for which relief may be granted.

**ISSUE 2**: Should the Commission, on its own motion, decline to hear Pilgrim's Petition for Arbitration?

**RECOMMENDATION**: Yes. The Commission, on its own motion, should decline to hear Pilgrim's Petition for Arbitration. Staff notes that this is an issue of first impression for the Commission. Staff recommends that companies which have to be certificated by the Commission prior to providing telecommunication services within the state, should not avail themselves of the resources of the Commission and the State of Florida, without first obtaining certification. **(KNIGHT)**

**STAFF ANALYSIS**: While this is an issue of first impression, staff believes that there are significant policy reasons why the Commission should decline to hear Pilgrim's Petition. Holding that parties shall be certificated prior to arbitrating agreements is within the jurisdiction of the Commission as set forth in Section 253(b) of the Act, which allows the State, through this Commission, "to impose, on a competitively neutral basis...requirements necessary to...protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Staff believes that having parties obtain certification prior to arbitration protects the public welfare by not utilizing time, resources, and monies of the Commission on arbitrations, where there is no indication that a party will become certificated to provide telecommunication services to Florida consumers. The certification process is an important element in ensuring the continued quality of telecommunications services, by bringing companies and their agreements under the jurisdiction, review, and enforcement provisions of the Commission. As such, it serves to safeguard the rights of consumers in Florida.

Although Pilgrim has had ample opportunity to seek to obtain certification to provide telecommunications services to the public in Florida, it has made no attempt to complete certification. In Docket No. 991665-TI, Pilgrim filed an application to provide interexchange telecommunications service in Florida. Its application was denied because Pilgrim failed to submit the required tariff information to complete the application. Pilgrim's argument that it should be allowed to pursue the dual track of certification and arbitration holds little water, as it appears that what it is in fact pursuing is full steam ahead with arbitration, while certification lies dormant at the station.

Certification is a much less burdensome endeavor, both on the parties and for the Commission. It would appear that Pilgrim does not wish to be under the regulatory umbrella of the Florida Public Service Commission, yet seeks to avail itself of the time and resources of the Commission to arbitrate an agreement between the parties. The policy reasons for not arbitrating petitions of uncertificated companies are compelling. It is clear that where there is no indication that a company may ever obtain a certificate to provide any telecommunications service in Florida, engaging in arbitrations involving that company would be a waste of the resources of both the parties involved and the Commission. This line of reasoning is not novel to Pilgrim, and begs the question as to why Pilgrim continues to advance a theory which has been soundly rejected in other states. For example, the Georgia Public Service Commission recognized that its jurisdiction to conduct a Section 252(b) arbitration does not extend to a petitioner that is not a telecommunications carrier. (*Order Dismissing Arbitration*, Docket No. 7270-U, 5/19/97, at 4). While staff believes that Pilgrim may be a "telecommunications carrier" under the broad definition within the Act, staff believes the Commission has the discretion to require Pilgrim to become certificated before engaging in arbitration proceedings.

Therefore, the Commission, on its own motion, should decline to hear Pilgrim's Petition for Arbitration. Should Pilgrim become certificated in the State of Florida, it would be free to initiate the procedures for filing a petition for arbitration, as set forth in Section 252 of the Act. Staff notes that should Pilgrim believe that an arbitration agreement in Florida is imperative prior to certification, it can seek relief from the FCC pursuant to Section 252 (e) (6).

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**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** Yes. If the Commission approves staff's recommendations in Issue 1 and Issue 2, no other issues will remain for the Commission to address in this Docket. This Docket should, therefore, be closed. **(KNIGHT)**

**STAFF ANALYSIS:** If the Commission approves staff's recommendations in Issue 1 and Issue 2, no other issues will remain for the Commission to address in this Docket. This Docket should, therefore, be closed.