ORIGINAL

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October 11, 1999

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. 991391-TP (Pilgrim Arbitration)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Answer and Motion to Dismiss to Pilgrim Telephone, Inc.'s Petition, which we ask that you file in the captioned docket.

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,

Nancy B. White

Nancy B. White

AFA
APP
CAF
CMU
CTR
EAG
LEG 1
MAS 2
OPC
PAI
SEC 1
WAW
OTH

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 991391-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 11th day of October, 1999 to the following:

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Nancy B. White

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:	)	Docket No. 991391-TP
	)	
Petition for Arbitration of Pilgrim Telephone, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)	Filed: October 11, 1999

ANSWER AND MOTION TO DISMISS OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") responds to the Petition for Arbitration of Pilgrim Telephone, Inc. ("Pilgrim") as follows:

INTRODUCTION AND MOTION TO DISMISS

Section 251(c)(1) of the Telecommunications Act of 1996 ("1996 Act") requires incumbent local exchange companies to negotiate with telecommunications carriers the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c)(2-6). If the parties are unable to reach agreement, the 1996 Act allows either the incumbent or the alternative local exchange carrier ("ALEC") to petition a state commission for arbitration of unresolved issues.[1] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[2] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the parties with respect to those issues; and (3) any other issue discussed and

[1] 47 U.S.C. § 252(b)(2).

[2] *See generally,* 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4).

resolved by the parties."[3] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the state commission receives the petition.[4] The 1996 Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.[5]

In this case, Pilgrim's arbitration petition is improper and should be dismissed for several reasons. First, Pilgrim improperly is attempting to use the arbitration process to resolve billing and collection issues, rather than issues arising under the requirements of Section 251 of the 1996 Act. BellSouth provided billing and collections services to Pilgrim pursuant to a Bill Processing Service Agreement until March 12, 1999. BellSouth was forced to terminate the agreement in March because Pilgrim refused to pay, and continues to refuse to pay, $980,369.49 in back payments. As is evident from Pilgrim's pleading, and conversations with Pilgrim representatives, Pilgrim views this arbitration as a means by which it can force BellSouth to provide billing and collections services to Pilgrim as Unbundled Network Elements ("UNEs"). Pilgrim's use of the 1996 Act as a negotiation strategy for billing and collections issues is improper, and should not be sanctioned by the Commission.

Next, the Commission should dismiss the Petition by virtue of the fact that

[3] 47 U.S.C. § 252(b)(2).

[4] 47 U.S.C. § 252(b)(3).

[5] 47 U.S.C. § 252(b)(4).

Pilgrim is not a "telecommunications carrier" under the 1996 Act. Pilgrim is not certificated to provide telecommunications services in Florida. The import of this fact is that Pilgrim is not entitled to avail itself of the rights set forth in Section 252 of the Act, including the right to seek arbitration before this Commission.

Under Section 251(c)(2) of the Telecommunications Act of 1996 (the "Act"), an incumbent local exchange provider ("ILEC") is obligated "to provide, for the facilities and equipment of any requesting *telecommunications carrier*, interconnection with the local exchange carrier's network...." Moreover, Section 251(c)(3) provides that the ILEC is obligated "to provide, to any requesting *telecommunications carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis...." Finally, Section 251(c)(1), which imposes the duty to negotiate in good faith, refers explicitly to "telecommunications carriers." Thus, the duties and obligations of Section 251 are owed by ILECs to "telecommunications carriers."

Section 3(a)(49) defines a "telecommunications carrier" as "any provider of telecommunications service...." "Telecommunications service" is defined in Section 3(a)(51) as "the offering of telecommunications for a fee directly to the public...." In order to be able to offer telecommunications for a fee directly to the public, Pilgrim must be certificated by the state commission. Without certification, Pilgrim cannot qualify as a "telecommunications carrier" to whom the duties of Section 251 are owed.

Under Section 252(b), the Commission's obligation to conduct compulsory arbitration is to enforce the duties imposed upon ILECs by Section 251(c). As

set forth above, an ILEC's duties under Section 251 are owed only to telecommunications carriers. Pilgrim, because it is not certificated, is not a telecommunications carrier under the 1996 Act. Thus, BellSouth has no Section 251 duties with respect to Pilgrim, and Pilgrim is not entitled to utilize arbitration to enforce such non-existent obligations.

The Georgia Public Service Commission has recognized that an entity that is not certified does not constitute a telecommunications carrier and thus is not entitled to arbitration under Section 252 of the Act. Specifically, the Commission held that "[t]he Commission's jurisdiction to conduct compulsory arbitration under Section 252(b) relates to enforcing the incumbent LEC's Section 251(c) duties and obligations, which again are owed to telecommunications carriers." (*Order Dismissing Arbitration*, Docket No. 7270-U, 5/19/97, at 4)(copy attached hereto as Exhibit "1"). The Commission recognized that if an uncertificated entity was permitted to arbitrate, "then the Commission could be forced to entertain compulsory arbitration cases litigated by companies *that may never obtain certificates to provide any telecommunications services in Florida.*" (*Id.*) (Emphasis added.) The Commission concluded that "its jurisdiction to conduct a Section 252(b) arbitration does not extend to a petitioner that is not a telecommunications carrier." (*Id.* at 5.)[6]

The North Carolina Utilities Commission ("NCUC") recently reached the same result when it dismissed an arbitration petition filed by Pilgrim in North

[6] Low Tech Designs, Inc., the CLEC in question, appealed the GPSC's decision to the FCC, arguing that the FCC should preempt the arbitration because the state commission "had failed to act." The FCC denied Low Tech's appeal, concluding that, in fact, the state commission had acted by dismissing the arbitration. (*See Petition for Commission Assumption of Jurisdiction of*

Carolina. After noting that Pilgrim was not certificated in North Carolina, the NCUC reasoned that

> Section 252 of [1996 Act] appears essentially premised upon a telecommunications carrier seeking interconnection with an incumbent local exchange carrier. Section 3(a)(49) defines a "telecommunications carrier" as "any provider of telecommunications services...." Section 3(a)(51) in turn defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public...."

(*Order*, Docket No. P-895, 9/22/99, at 2) (copy attached hereto as Exhibit "2"). According to the NCUC, "Since Pilgrim is not certificated and is presumably not offering telecommunications services to the public for a fee in North Carolina, it is questionable whether Pilgrim qualifies even to file a Petition for Arbitration in North Carolina since it is not under...[the] definition [of] a telecommunications carrier here." (*Id.*) In addition to statutory concerns, the NCUC also held that "there are compelling policy reasons not to process the arbitration petitions of uncertificated telecommunications companies such as Pilgrim." (*Id.*) According to the NCUC, "[s]uch arbitrations would waste both the Commission's and the parties' resources in what would amount to a sterile exercise since there would be no legitimate customers to be served." (*Id.*) The NCUC held that "the Commission will decline to entertain arbitration petitions under Section 252 wherein the Petitioner is not certificated to provide service in this State." (*Id.* at 3).[7]

Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Florida Public Service Commission, CC Docket No. 97-164, Order, 10/08/97, at ¶ 39.)

[7] The South Carolina Public Service Commission also has dismissed Pilgrim's Petition on the grounds that Pilgrim is not certificated in South Carolina. The South Carolina Commission returned the petition without issuing a written order.

Pilgrim is not certificated to provide telecommunications services in Florida, nor does it appear that it has begun to even seek such certification. As a result, Pilgrim is not a telecommunications carrier and is not entitled to utilize the 1996 Act's arbitration procedures. Moreover, no public interest is served by having this Commission expend time and resources arbitrating an agreement for a company that may never even be certificated in this State, much less provide service here. For these reasons, the Commission should dismiss the Petition.

Third, and finally, even if Pilgrim is a telecommunications carrier, Pilgrim's petition is fatally deficient because Pilgrim did not properly set forth any issues to be arbitrated in its Petition. Section 252(b)(2)(A)(i)-(iii) of the Act expressly sets forth the duties of the petitioner (in this case Pilgrim) when filing for arbitration of an interconnection agreement. Under the 1996 Act, Pilgrim is required to state "the unresolved issues" in its petition. Proper pleading is vital so that the responding party has a reasonable opportunity to respond to the Petition. (*See* Section 252(b)(3)). Furthermore, Section 252(b)(4)(A) of the 1996 Act provides that the Commission is required to "limit its consideration of any petition under Paragraph (1) to the issues set forth in the Petition and in the response, if any, filed under Section 252(b)(3)(A) (emphasis added).

Issues and positions contained in exhibits attached to an arbitration petition do not comply with the pleading requirement of the 1996 Act. *See MCI Telecomm. Corp. v. Pacific Bell*, 1998 U.S. Dist. LEXIS 17556, at 74 (N.D. Cal., Sept. 29, 1998). In *MCI v. Pacific Bell*, the court addressed Pacific Bell's contention that the issue of dark fiber was not properly before the arbitration

panel because MCI did not list dark fiber as an issue in the proceeding, but rather "merely mentioned dark fiber in several appendices attached to its petition for arbitration." *Id.* The court agreed, holding that "[s]imply listing an issue in an appendix to a petition does not sufficiently 'set forth' the issues for Arbitration, and accordingly the issue is not properly before the Court." *Id.*

In the Petition, Pilgrim purports to set forth the issues to be arbitrated. Rather than identify any specific issues, however, Pilgrim simply provided the following:

> 17. Numerous issues remain unresolved, including:
> A. The meaning of various provisions of BellSouth's form interconnection agreement.
> B. Whether Pilgrim has a statutory right under Section 251(c)(3) of the Act to access the UNEs from BellSouth.
> C. Whether BellSouth has, by virtue of the actions described in Paragraph 16 and otherwise, failed to discharge its obligation to negotiate with Pilgrim in good faith as required by Section 251(c)(1) of the Act.
> D. Whether BellSouth has provided the UNEs identified in Exhibit "A" on a discriminatory basis in violation of Section 251©(2)(D) of the Act.

(Petition, ¶17).

This list hardly represents the "unresolved issues" between the parties. The interpretation of unspecified provisions of the proposed interconnection agreement (Issue A) and the scope of Pilgrim's statutory rights involve issues more properly raised in a declaratory judgment proceeding, not an arbitration. Likewise, any claim that BellSouth has failed to negotiate in good faith (which is untrue)(Issue C) should be addressed in a complaint, not an arbitration. The closest Pilgrim comes to identifying the issues in question is Issue D in which it refers the Commission to Exhibit "A" of the Petition, which is a letter from Pilgrim

to BellSouth. As the court made clear in *MCI v. Pacific Bell*, however, "[s]imply listing an issue in an appendix to a petition does not sufficiently 'set forth' the issues for Arbitration" as required under the 1996 Act. Thus, Pilgrim has failed to comply with the requirements of the Act, and the Petition should be dismissed.

For these reasons, and consistent with decisions of the North Carolina Utilities Commission and the South Carolina Public Service Commission, the Commission should dismiss Pilgrim's Petition. In the event the Commission denies BellSouth's Motion to Dismiss, BellSouth responds to the specific allegations set forth in the Petition as follows:

SPECIFIC RESPONSES

BellSouth responds to each allegation in the Petition as follows:

1. BellSouth is without sufficient knowledge to either admit or deny the allegations in Paragraph 1 of the Petition, and therefore denies the allegations therein. By way of further response, BellSouth states that Pilgrim is not certificated as a local exchange provider to provide telecommunications services in any state in BellSouth's region. However, according to its website, Pilgrim provides a variety of services, including several adult services such as the "Fantasy Line," "Intimate Connections," and the "Men's room."

2. BellSouth admits the allegations in Paragraph 2 of the Petition.

3. BellSouth admits that it provided billing and collections services to Pilgrim pursuant to a Bill Processing Service Agreement. On March 12, 1999, BellSouth terminated the parties' Agreement pursuant to its terms because

Pilgrim owed BellSouth $980,369.49 in back payments. BellSouth denies the remaining allegations in Paragraph 3 of the Petition.

4. BellSouth denies the allegations in Paragraph 4 of the Petition. In further response, BellSouth states that Pilgrim requested negotiation of an interconnection agreement on April 9, 1999, and thus negotiations between the parties only have been conducted since that time. BellSouth also responds that Pilgrim's request for negotiation makes clear that Pilgrim is attempting to use this arbitration proceeding not to obtain an interconnection agreement, but rather to resolve its billing and collection dispute with BellSouth. In its April 9, 1999 letter, Pilgrim identified three services that it contended were "denied" to it by BellSouth, all of which are billing and collections issues: (1) the ability to obtain access to real time access to billed names and address ("BNA") information; (2) the ability to use 800 numbers to provide access to various billed services; (3) access to 900 blocking information. Of these three items, BellSouth already provides, and currently is providing, Pilgrim with the BNA information out of BellSouth's access tariff. Pilgrim's desire for "real time" or enhanced BNA only requires that Pilgrim place an order for such enhanced service with BellSouth. With respect to the second issue, Pilgrim expressed a desire to use 800 numbers to provide pay per call services. BellSouth has explained to Pilgrim that BellSouth will not bill 800 pay per call services. Moreover, and perhaps more importantly, BellSouth does not provide 800 numbers to ALECs; rather, such numbers are assigned by Lockheed Martin, the national numbering administrator. Thus, BellSouth has no ability to provide 800 numbers to Pilgrim. Finally, as BellSouth understands the

900 blocking issue, Pilgrim wants a list of customers who subscribe to 900 blocking so that it does not "inadvertently" bill those customers for 900 services. As with the other issues, this issue is a billing and collection matter, as opposed to an issue arising under the requirements of Section 251 of the 1996 Act. Furthermore, 900 blocking information is neither a BellSouth retail or wholesale service, nor is BellSouth obligated to provide it as such. BellSouth denies the remaining allegations in Paragraph 4 of the Petition.

5. BellSouth denies the allegations set forth in Paragraph 5 of the Petition. In further response, BellSouth states that these issues are billing and collections matters, not issues arising under the requirements of Section 251 of the 1996 Act. Moreover, BellSouth has repeatedly told Pilgrim that it can obtain (and in fact is obtaining) BNA from BellSouth's tariff; that BellSouth cannot provide Pilgrim with 800 numbers; and that a list of customers with 900 blocking is neither a BellSouth retail or wholesale service, nor is BellSouth obligated to provide it as such. Thus, BellSouth denies that Pilgrim is suffering any "competitive disadvantage" that has been caused by BellSouth. BellSouth denies the remaining allegations in Paragraph 5 of the Petition.

6. BellSouth admits that it received the April 9, 1999 letter, attached as Exhibit A to the Petition. BellSouth further responds that the letter speaks for itself. BellSouth denies the remaining allegations in Paragraph 6 of the Petition.

7. BellSouth admits that it received the letter attached as Exhibit A. The return receipt attached as Exhibit B speaks for itself. BellSouth denies the remaining allegations in Paragraph 7 of the Petition.

8. BellSouth admits that it sent the April 23, 1999 letter, attached as Exhibit C to the Petition. BellSouth further responds that the letter speaks for itself. BellSouth denies the remaining allegations in Paragraph 8 of the Petition.

9. BellSouth admits that it sent the April 29, 1999 letter, attached as Exhibit D to the Petition, and the attachments attached thereto. BellSouth further responds that the letter speaks for itself. BellSouth denies the remaining allegations in Paragraph 9 of the Petition.

10. BellSouth admits that it attempted to negotiate with Pilgrim in good faith regarding the terms of an interconnection agreement. BellSouth denies the remaining allegations in Paragraph 10 of the Petition.

11. BellSouth admits that the parties have discussed BellSouth's standard interconnection agreement. BellSouth denies the remaining allegations in Paragraph 11 of the Petition.

12. BellSouth admits that, in an effort to provide its customers with the best possible service, BellSouth's contract negotiators occasionally need to enlist the assistance of subject matter experts to ensure that a ALEC's needs and concerns are properly addressed. BellSouth denies that the involvement of subject matter experts is designed to "frustrate" Pilgrim or any ALEC. To the contrary, subject matter experts are essential to drafting workable and appropriate interconnection agreements. BellSouth denies the remaining allegations in Paragraph 12 of the Petition.

13. BellSouth admits that it received the August 9, 1999 letter, attached as Exhibit E to the Petition. BellSouth further responds that the letter speaks for itself. BellSouth denies the remaining allegations in Paragraph 13 of the Petition.

14. BellSouth admits that it responded to Pilgrim via e-mail on August 23, 1999. BellSouth further responds that the e-mail, attached as Exhibit F to the Petition, speaks for itself. BellSouth denies the remaining allegations in Paragraph 14 of the Petition.

15. BellSouth admits that the parties have not signed an interconnection agreement. BellSouth denies the remaining allegations in Paragraph 15 of the Petition.

16. BellSouth denies the allegations in Paragraph 16 of the Petition. In further response, BellSouth states that it provided a response to the questions set forth in Pilgrim's August 9, 1999 letter on September 20, 1999. Thus, BellSouth has provided Pilgrim with all requested information. BellSouth further states, as set forth above, that it has repeatedly told Pilgrim that it can obtain (and in fact is obtaining) BNA from BellSouth's tariff; that BellSouth cannot provide Pilgrim with 800 numbers; and that a list of customers with 900 blocking is neither a BellSouth retail or wholesale service, nor is BellSouth obligated to provide it as such.

17. BellSouth denies the allegations in Paragraph 17 of the Petition.

18. BellSouth denies the allegations in Paragraph 18 of the Petition.

19. BellSouth denies the allegations in Paragraph 19 of the Petition. In further response, BellSouth states that it currently is providing BNA information to

Pilgrim pursuant to BellSouth's access tariff. Pilgrim's desire for "real time" or enhanced BNA only requires that Pilgrim place an order for such enhanced service with BellSouth. Thus, at least one of the issues raised by Pilgrim in its April 9, 1999 letter is not an issue.

WHEREFORE, BellSouth respectfully requests that the Commission dismiss the Petition. In the alternative, BellSouth requests that the Commission deny Pilgrim the relief it is seeking and enter an order in BellSouth's favor.

Respectfully submitted this 11th day of October, 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

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Georgia Public Service Commission

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Docket No. 7270-U

ORDER DISMISSING ARBITRATION

In Re: Petition by Low Tech Designs, Inc. for Arbitration of Rates, Terms and Conditions with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996

APPEARANCES

On behalf of Low Tech Designs, Inc.:
James M. Tennant, President

On behalf of BellSouth Telecommunications, Inc.:
Bennett Ross, Attorney
Fred McCallum, Attorney

On behalf of Consumers' Utility Counsel:
Ken Woods, Attorney

BY THE COMMISSION:

The Commission issues this Order dismissing without prejudice the arbitration petition of Low Tech Designs, Inc. ("Low Tech"). As discussed in this Order, the Commission dismisses Low Tech's petition on the basis that Low Tech is not, at least at this time, a telecommunications carrier proposing to provide telecommunications services in Georgia, and therefore is not entitled to initiate compulsory arbitration before this Commission under Section 252(b) of the Telecommunications Act of 1996 ("Act").

The parties in this docket are Low Tech Designs, Inc. and BellSouth Telecommunications, Inc. ("BellSouth"). The Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs ("Consumers' Utility Counsel," or "CUC") is a participant in this docket.

EXHIBIT 1

BACKGROUND:

Low Tech sought arbitration of rates, terms and conditions for a proposed agreement between it and BellSouth, and filed a petition before the Georgia Public Service Commission ("Commission") on January 16, 1997. Low Tech asked the Commission to conduct arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Act") (47 U.S.C. § 252(b)) to resolve issues that were the subject of negotiations which commenced by formal request on August 19, 1996. Therefore, in accordance with Section 252(b)(4)(C) of the Act, the Commission must conclude the arbitration proceeding by May 19, 1997.

The Commission issued a Procedural Order on February 5, 1997. BellSouth filed an Answer and Motion to Dismiss on February 14, 1997. As authorized and directed by the Commission in the Procedural Order, Hearing Officer Smith conducted a pre-arbitration conference on March 10, 1997, at which time several matters were discussed, including the question of whether Low Tech was a telecommunications carrier proposing a telecommunications service. Both parties submitted separate statements summarizing the pre-arbitration conference, on March 17, 1997. Hearing Officer Smith issued his First Pre-Arbitration Hearing Order on March 28, 1997, ruling among other things that the issue of whether Low Tech was a telecommunications carrier proposing a telecommunications service had not been resolved and would be among the issues to be decided by the Commission.

The parties made additional filings related to discovery, and to written testimony which was prefiled on March 28 and 31, 1997 (direct) and April 4 and 7, 1997 (rebuttal). Hearing Officer Smith issued his Second Pre-Arbitration Hearing Officer Order Denying BellSouth's Motion to Quash on April 15, 1997.

BellSouth filed its second Motion to Dismiss on April 9, 1997, formalizing its argument that Low Tech is not a telecommunications carrier proposing a telecommunications service and on that basis may not initiate compulsory arbitration under Section 252(b). Low Tech filed a response to BellSouth's motion on April 11, 1997. The Commission took oral argument from both parties at the outset of the arbitration hearing on April 17, 1997. The Commission then took the motion under advisement, and postponed the arbitration hearing to May 6, 1997 to allow the Commission first to decide the motion to dismiss. Low Tech filed supplemental comments in opposition to BellSouth's motion to dismiss, on April 24, 1997, to which BellSouth filed a supplemental response on April 29, 1997.

The two fundamental questions presented by BellSouth's motion to dismiss are:

(1) Is Low Tech a "telecommunications carrier" entitled to seek arbitration under Section 252(b) of the federal Telecommunications Act of 1996 ("1996 Act")?

(2) Is Low Tech seeking to offer a "telecommunications service" under the 1996 Act?

As discussed below, the Commission concludes that Low Tech has not shown that it is a "telecommunications carrier" seeking to offer a "telecommunications service." Therefore, while there may be other methods by which Low Tech can seek to offer the type of service it proposes, Low Tech may not use Section 252(b) to invoke the Commission's jurisdiction for compulsory arbitration under the 1996 Act. *This is an important jurisdictional question of first impression before this* Commission.[1]

(1) "Telecommunications Carrier"

Low Tech acknowledged at the oral argument that it had not obtained a certificate of authority, and at that time had not submitted an application for certificate of authority to provide telecommunications service in Georgia. This is the first time that a company seeking Section 252(b) arbitration in Georgia has not previously obtained a certificate from the Commission.

The Commission will not consider an entity to be a telecommunications carrier in Georgia, unless and until it has obtained a certificate of authority. Georgia's Telecommunications and Competition Development Act of 1995 ("Georgia Act") at O.C.G.A. § 46-5-163(a) provides that a telecommunications company shall not provide telecommunications services without a certificate of authority issued by the Commission. This type of certification requirement is not preempted by the 1996 Act, which provides at Section 253(b) [47 U.S.C. 253(b)] that nothing in that section ("removal of barriers to entry") "shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [universal service], requirements" such as the financial and technical capability required of competing local exchange companies ("CLECs") required by O.C.G.A. § 46-5-163(b).

Requiring that a company obtain a certificate in order to be a telecommunications carrier also furthers other reasonable, legitimate legislative objectives under the Georgia Act. Telecommunications carriers are subject to the Commission's jurisdiction, must meet applicable requirements of Georgia law including the Georgia Act, and must comply with the Commission's

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[1] As an important question of first impression, it merits attention even at this relatively late stage of the arbitration. Moreover, while it would have been preferable for BellSouth to raise the issue in its initial Answer and Motion to Dismiss, this issue involves subject-matter jurisdiction and thus may be raised at any time, even for the first time in an appeal. *See, e.g., Evans v. Davey*, 154 Ga. App. 269, 267 S.E.2d 875 (Ct.App. 1980) (lack of jurisdiction to be considered whenever and however it may appear); *Georgia Consumer Ctr. Inc. v. Georgia Power Co.*, 150 Ga. App. 511, 258 S.E.2d 250 (Ct.App. 1979) *Lowe v. Payne*, 130 Ga. App. 337, 203 S.E.2d 309 (Ct.App. 1973). *Cf.* O.C.G.A. § 50-13-13(a)(6) which provides that in contested cases, the agency shall have authority, among other things, to rule on motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground. The Commission has not regarded Section 252(b) arbitrations as "contested cases" within the meaning of the Administrative Procedures Act, but the fundamental principle is the same which permits or requires dismissal for lack of subject-matter jurisdiction.

rules. The obligations of telecommunications carriers include contributing to the Universal Access Fund. The Commission cannot feasibly administer its responsibilities, determine who the telecommunications carriers are, and ensure that such carriers meet their obligations, unless there is a basic mechanism such as the certification requirement contained in O.C.G.A. § 46-5-163(a).

The duties and obligations of an incumbent local exchange company ("LEC") under Section 251 are owed to telecommunications carriers. A telecommunications carrier may initiate negotiations with an incumbent LEC, and the FCC has ruled that in order to negotiate in good faith, the incumbent LEC may not require that the requesting company have already obtained a certificate of authority. However, the FCC issued no such rule with respect to arbitrations.

BellSouth's arguments included an assertion that Low Tech must first show that it is providing a telecommunications service, even in another jurisdiction, before it qualifies as a telecommunications carrier eligible to enforce Section 251 and Section 252 requirements through compulsory arbitration. The Commission does not go so far in this ruling, however. A new entrant should not have to show that it actually provides telecommunications service somewhere, because such a rule would preclude a company that is just beginning its operations. Instead, the Commission rules that a new entrant will qualify as a telecommunications carrier before this Commission if it has obtained a certificate of authority to provide service in Georgia, whether or not it has already begun to provide telecommunications service in Georgia or elsewhere.

Low Tech filed supplemental comments citing to a Conference Report in support of its position. That Conference Report indicates that certain drafters of the 1996 Act believed that the duties under Section 251(b) are owed to telecommunications carriers or "other persons." Low Tech argued that this means any person or entity, even if it is not a telecommunications carrier, may seek to enforce the duties of another company under Section 251(b). Low Tech then extended this argument to assert that any person or entity, even if it is not a telecommunications carrier, may seek to enforce any of the duties under Section 251 and may seek arbitration under Section 252(b).

The Commission is not persuaded by Low Tech's interpretation of the Conference Report and the Act. Even if the Conference Report can be used to conclude that any person may obtain the benefit of a company's duties under Section 251(b), the Conference Report did not go on to extend this to Section 251(c). The explicit wording of Section 251(c) states that the negotiation relevant to Section 252 proceeds upon request of a telecommunications carrier. Read together, Sections 251(c) and 252 quite plainly allow the compulsory arbitration of Section 252(b) to be initiated only by a telecommunications carrier.

The Commission's jurisdiction to conduct compulsory arbitration under Section 252(b) relates to enforcing the incumbent LEC's Section 251(c) duties and obligations, which again are owed to telecommunications carriers. If instead Low Tech's arguments were accepted, then the Commission could be forced to entertain compulsory arbitration cases litigated by companies that may never obtain certificates to provide any telecommunications services in Georgia. Such a result would be

inappropriate as a matter of public policy and does not appear to be a reasonable reading of the 1996 Act's jurisdictional requirements. The Commission concludes that its jurisdiction to conduct a Section 252(b) arbitration does not extend to a petitioner that is not a telecommunications carrier.

The Commission concludes that a new entrant must first obtain a certificate of authority in order to demonstrate that it is a "telecommunications carrier" entitled to invoke the Commission's jurisdiction by initiating arbitration under the 1996 Act. An entity that lacks a certificate of authority does not qualify as a "telecommunications carrier" and thus is not entitled to initiate the compulsory arbitration under Section 252(b) of the Act.

(2) "Telecommunications Service"

In order to be a "telecommunications carrier," it is also necessary to offer a "telecommunications service." However, as Low Tech described its proposal, the proposed service does not appear to be a "telecommunications service." Low Tech explained at the oral argument that it proposes a least cost routing service in which the customer places a long-distance call relying upon Low Tech to identify and select the lowest-price long-distance provider. The local exchange service would still be provided by another carrier (such as BellSouth), and the long distance service would be provided by whichever carrier Low Tech routes the call to. Low Tech might place a charge on the customer's bill for the routing service, but the customer would still be billed for local and long-distance service by the other carriers.

The Act defines "telecommunications service" as the transmission, between or among points specified by the user, of information of the user's choosing, to the public for a fee. 47 U.S.C. § 3(43), (46) It appears that Low Tech would not provide transmission. Instead, Low Tech would provide two functions. The first is informational - identifying which long-distance carrier can carry the call for the lowest price (at least, from among those carriers which have contracted with Low Tech, similar to airlines which contract with travel agents). The second is routing the call, which appears to be an enhanced service. Using the travel agent analogy, it is like the agent booking the trip on the airline, which then pays a commission to the agent. The airline - or in this case, the long-distance carrier - then performs the function of carrying or transmission.

If Low Tech's proposed service were a "telecommunications service," then Low Tech could not provide it without obtaining a certificate of authority under O.C.G.A. § 46-5-163, filing tariffs, meeting universal service funding obligations, and otherwise meeting applicable Commission requirements for telecommunications carriers.

The Commission takes administrative notice that Low Tech submitted an application for a certificate of authority to provide local exchange service in Georgia.[2] Therefore in the proceedings

[2] By taking this administrative notice, the Commission is not ruling as to whether the application meets the Commission's requirements. Low Tech's certificate application shall be subject to the Commission's

upon Low Tech's certificate application, it will have another opportunity to show that its proposed service is a "telecommunications service."[3]

Based upon the factors discussed above, the Commission concludes that it should dismiss the arbitration in this docket for lack of jurisdiction. This dismissal is without prejudice, so that Low Tech is permitted to apply for a certificate of authority under O.C.G.A. § 46-5-163, and such application shall be judged on its own merits in determining whether Low Tech meets statutory requirements for a certificate, whether it proposes to offer a "telecommunications service," and whether such service is local exchange service or some other type of "telecommunications service." In addition, this dismissal without prejudice means that if Low Tech obtains a certificate of authority, then it may submit a new petition for arbitration if necessary and if all other applicable requirements under Sections 251 and 252 are met

WHEREFORE IT IS ORDERED that:

A. The arbitration petition filed by Low Tech Designs, Inc. on January 16, 1997 in this docket is dismissed without prejudice.

B. The Commission hereby adopts all statements of fact, law, and regulatory policy contained within the preceding sections of this Order as the Commission's findings of fact, conclusions of law, and decisions of regulatory policy.

C. A motion for reconsideration, rehearing or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

D. Jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

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standard review procedures.

[3] Low Tech might argue that the definition under Georgia law at O.C.G.A. § 46-5-162(18) is broader, which would not allow jurisdiction for federal arbitration but might permit state certification and any remedy that might be available under the Georgia Act. However, interconnection and access to unbundled services under O.C.G.A. § 46-5-164(a) is only required for requesting "certificated local exchange carriers." In addition, this decision to dismiss the arbitration petition under Section 252(b) shall not be taken to state or imply an opinion about whether Low Tech could be construed as a "telecommunications carrier" under the Georgia Act at O.C.G.A. § 46-5-162(18). Nor shall this decision be taken to state or imply an opinion as to whether Georgia law provides for Commission jurisdiction to grant Low Tech the Star Code abbreviated dialing, Advanced Intelligent Network ("AIN") unbundling, or other matters that Low Tech sought by its arbitration petition.

The above by action of the Commission in Administrative Session on the 6th day of May, 1997.

Terri M. Lyndall
Executive Secretary

5/16/97
Date

Stan Wise
Chairman

5-16-97
Date

DISSENT

The Commission in its majority decision has dismissed the arbitration sought by Low Tech Designs, Inc. ("Low Tech"). I believe that the Commission should instead have proceeded to hear the merits of the arbitration, and therefore I dissent.

Low Tech filed its Petition on January 16, 1997. BellSouth's initial Answer and Motion to Dismiss did not put forward the argument that Low Tech was not a telecommunications carrier, and indeed, BellSouth's Answer admitted that Low Tech is a telecommunications carrier. Not until April 9, 1997 - approximately one week prior to the scheduled hearing - did BellSouth file a Motion to Dismiss alleging that Low Tech is not a telecommunications carrier and is not providing a telecommunications service.

BellSouth argued that Low Tech must first show that it is providing a telecommunications service in some jurisdiction. Even the majority decision rejects that proposition, because it clearly discriminates against a new company that has not been able to provide service yet. BellSouth's argument would prevent a new entrant from ever entering the business.

However, the majority decision proceeded to conclude that Low Tech is not entitled to arbitration on the basis of not being a telecommunications carrier and not providing a telecommunications service. I disagree with this decision. First, after rejecting BellSouth's restrictive and discriminatory interpretation, the majority went on to find its own basis for dismissing the arbitration. Second, even BellSouth failed to raise these issues until three months after Low Tech filed its petition; this was not timely, by BellSouth. Finally, and most fundamentally, this Commission has not afforded Low Tech the same opportunity to press its case that has been afforded to all the other companies that have filed for arbitration - ACSI, AT&T, Bell Atlantic NYNEX Mobile, MCI, MFS, and Sprint. This 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.

The arbitration hearing was set to proceed on April 17, 1997, immediately after oral argument on BellSouth's motion. The Commission should have proceeded to conduct the hearing and consider Low Tech's petition on its merits. Therefore, for the foregoing reasons, I dissent from the majority's dismissal of the petition.

MAY 15, 1997
Date

Mac Barber
Mac Barber
Commissioner

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-895

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of Pilgrim Telephone, Inc., for Arbitration with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996	) ORDER DISMISSING) PETITION WITHOUT) PREJUDICE

BY THE CHAIR: On September 15, 1999, Pilgrim Telephone, Inc. (Pilgrim), an interexchange carrier not certified in North Carolina, filed a Petition for Arbitration against BellSouth Telecommunications, Inc. (BellSouth). Pilgrim indicated that on April 9, 1999, it had requested BellSouth to provide it with access to certain specified unbundled network elements (UNEs) pursuant to Section 252(a)(1) of the Telecommunications Act of 1996 (TA96). In its Petition, Pilgrim set out a partial list of unresolved issues.

The Chair has examined Pilgrim's Petition and has identified several deficiencies.

1. Pilgrim did not submit prefiled testimony with its Petition as required by the Commission's April 15, 1996, Order in Docket No. P-100, Sub 133.

2. Pilgrim did not file a Matrix Summary of Issues as required by the Commission's August 29, 1996, Order in Docket No. P-100, Sub 133.

3. Pilgrim failed to give notice to the Commission of its request for interconnection as required by the Commission's April 15, 1996, Order in Docket No. P-100, Sub 133.

4. Pilgrim has not adequately identified "any open issues" as required by Section 252(b)(1) or provided relevant documentation under Section 252(b)(2) of TA96.

5. Pilgrim has not complied with G.S. 84-4 requiring in-state counsel or with Rule R1-5(d).

The Chair further notes that, to the extent that Pilgrim's Petition for Arbitration included consideration of UNEs, the Commission has provided that most UNE issues are to be considered within the context of Docket No. P-100, Sub 133d. See July 14, 1999, Order Ruling on Data Requests and September 1, 1999, Order Denying Motion for Reconsideration and Providing Further Consideration in UNE Docket in Docket No. P-582, Sub 6, concerning ICG Telecom Group, Inc.'s Petition for Arbitration with BellSouth.

EXHIBIT 2

Lastly, the Chair notes that Pilgrim is not certificated to provide any telecommunications service in North Carolina[1]. Section 252 of TA96 appears essentially premised upon a telecommunications carrier seeking interconnection with an incumbent local exchange carrier[2]. Section 3(a)(49) defines a "telecommunications carrier" as "any provider of telecommunications services...." Section 3(a)(51) in turn defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public...." Since Pilgrim is not certificated and is presumably not offering telecommunications services to the public for a fee in North Carolina, it is questionable whether Pilgrim qualifies even to file a Petition for Arbitration in North Carolina since it is not under that definition a telecommunications carrier here.

Statutory construction aside, there are compelling policy reasons not to process the arbitration petitions of uncertificated telecommunications companies such as Pilgrim. Such arbitrations would waste both the Commission's and the parties' resources in what would amount to a sterile exercise since there would be no legitimate customers to be served.

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[1] Pilgrim identifies itself as an interexchange carrier and enhanced service provider which "also plans to offer intra-exchange telecommunications service." It has no applications pending in this State.

[2] Section 252 is unfortunately not a model of clarity in this regard. Section 252(a)(1) provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers....," while Section 252(b)(1) states that "after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a state commission to arbitrate any open issues" (emphases added). It is logical that these provisions be read together. It is the Chair's view that the term "carrier" in Section 252(b)(1) may arguably be read, not as the local exchange carrier, but the "telecommunications carrier" in Section 252(a)(1). Since there were only two parties to the Pilgrim/BellSouth negotiations, BellSouth would be the "any other party;" and Pilgrim would thus not be qualified to file a Petition for arbitration.

Accordingly, the Chair concludes that good cause exists to dismiss Pilgrim's Petition for Arbitration without prejudice to its refiling a perfected petition at a later date within the appropriate time frame. The Chair, moreover, concludes that the Commission will decline to entertain arbitration petitions under Section 252 wherein the Petitioner is not certificated to provide service in this State. The Chief Clerk is directed to send a copy of this Order to all persons on the mailing list of Docket No. P-100, Sub 133.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of September, 1999.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk