

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Section 252(b) Arbitration of a
Resale Agreement between BellSouth
Telecommunications, Inc. and NOW
Communications, Inc..

Docket No. 000262-TP

Filed: May 5, 2000

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

COMES NOW, NOW Communications, Inc. ("NOW"), through counsel, and files this Motion for Leave to Submit Information Supplementary to its Motion for Determination of Preliminary Matter, stating in support thereof the following:

1. On May 3, 2000, NOW filed with this Commission a Motion for Determination of a Preliminary Matter ("Second Motion"), requesting that the Commission place in abeyance until such preliminary matter is resolved any action on NOW's motion to dismiss on grounds of untimeliness BellSouth's petition for arbitration ("First Motion").
2. In furtherance thereof, NOW moves for leave to submit information that it believes supports its Second Motion, specifically, (1) an affidavit of Larry W. Seab (Attachment 1); (2) the Final Recommendation of the Administrative Law Judge, May 4, 2000, Docket No. U-24762, Louisiana Public Service Commission (Attachment 2); and (3) the transcript of Pre-Hearing Conference, April 21, 2000, Docket No. 27461, Alabama Public Service Commission (Attachment 3), together with the clarifying statement of Charles Welch (Attachment 4).

3. Mr. Seab's affidavit attests to (1) the status of NOW's resale agreement with BellSouth, which remains effective, and (2) the nature of the non-section 252(a)(1) negotiations for an interconnection agreement between NOW and BellSouth and the relationship of those

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negotiations to the anti-competitive suit NOW brought against BellSouth in the U.S. District Court for the Northern District of Alabama.

4. The Final Recommendation of the Administrative Law Judge in Louisiana is to dismiss BellSouth's petition for arbitration, upon a finding that NOW has not sought re-negotiation of the existing resale agreement pursuant to section 251(b)(1).

5. The Alabama Pre-Hearing Conference was convened for the purpose of argument on NOW's motion to dismiss BellSouth's arbitration petition. As being of particular significance, NOW calls this Commission's attention to Mr. Laurie's¹ comments concerning the parties' resale agreement at pages 7 and 19-20 and Mr. Kitching's² comments at page 21 concerning the parties' agreement on background facts. Mr. Welch's³ statement corrects a statement contained in a brief submitted to the Tennessee Regulatory Authority, which Mr. Kitching's cites at pages 34-35.

WHEREFORE, NOW respectfully moves this Commission for leave to submit the supplementary information attached hereto as Attachments 1 through 4 for its consideration.

¹ Robin Laurie, counsel for NOW in Alabama.

² A. Langley Kitchings, counsel for BellSouth

³ Charles Welch, counsel for NOW in Tennessee

Submitted, this 5th day of May, 2000.

NOW COMMUNICATIONS, INC.

By:



Charles J. Pellegrini

WIGGINS & VILLACORTA, P.A.

2145 Delta Blvd., Suite 200

Tallahassee, FL 32303

(850) 385-6007

(850) 385-6008 (facsimile)

email wiggvill@nettally.com

Its Attorneys

ATTACHMENT 1

AFFIDAVIT
of
Larry W. Seab

STATE OF GEORGIA
COUNTY OF GWINNETT

Upon my oath or affirmation, I state the following to be true to the best of my knowledge, information and belief.

1. My name is Larry W. Seab. I am an adult resident citizen of Rankin County, Mississippi and suffer no disability of law with respect to the making of this affidavit.

2. I am the President and Chief Executive Officer of NOW Communications, Inc. ("NOW") and, by virtue of such position, am knowledgeable of the business dealings between NOW and BellSouth Telecommunications, Inc. ("BellSouth").

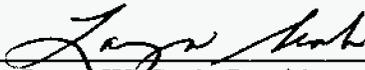
3. On or about June 1, 1997 NOW and BellSouth entered into an agreement providing for the resale by NOW of BellSouth's telecommunications services. As of the date hereof, such agreement has not expired and remains in force until May 31, 2001 by its terms and was extended more broadly by the further terms of a separate letter agreement between the parties dated January 26, 2000. Inasmuch as the Resale Agreement between the parties will remain in effect for a substantial period of time, NOW does not believe there was or is an existing valid basis for an arbitration proceeding between the parties.

4. In December, 1998 NOW filed suit against BellSouth in the U.S. District Court for the Northern District of Alabama seeking injunctive relief and damages for certain anti-competitive practices of BellSouth. The U.S. District granted the injunction sought by NOW. Shortly thereafter, NOW and BellSouth reached an agreement to dissolve the injunction and the Court granted their joint motion for that purpose. The remaining claims of NOW against BellSouth were dismissed without prejudice with the Court's notation that the claims should first be considered by the appropriate regulatory agencies. The dismissal without prejudice was affirmed by the U.S. Court of Appeals for the Eleventh Circuit. Since that time, and specifically since August 20, 1999, the parties have engaged in negotiations to settle their differences.

5. The parties' negotiations have centered on negotiations of an interconnect agreement to provide for compensation prospectively to NOW for its grievances based on BellSouth's past anti-competitive practices. These negotiations have not been for the purpose of extending the present Resale Agreement, which remains effective for a substantial period as stated above. Since the parties' Resale Agreement remains in effect, NOW has seen no need to negotiate for a new resale agreement and therefore, has not negotiated for that purpose. The purpose of the negotiations between the parties has been to settle their differences arising out the litigation described above. Further, BellSouth has attempted to use its superior strength against NOW by demanding negotiation and using the arbitration process as a club to coerce NOW into agreeing to terms in an interconnection agreement which were

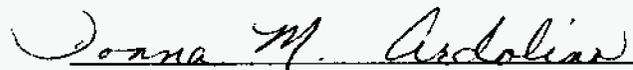
economically unacceptable to NOW. NOW has attempted to forestall the initiation of the expensive arbitration process by seeking additional time for the negotiations with BellSouth, but BellSouth has continued to use its unequal and superior bargaining strength by insisting that NOW sign an onerous agreement *first*, and then negotiate to change the onerous terms thereafter. NOW has refused to accede to BellSouth's demand and believes such demands violate any duty of BellSouth to negotiate in good faith.

Further, Affiant sayeth not.



Larry W. Seab, President and CEO
NOW Communications, Inc.

Personally appeared before me this 4 day of May, 2000, the within named Larry W. Seab identified himself and stated upon his oath or affirmation that the foregoing Affidavit is true and correct to the best of his knowledge, information and belief and that he placed his signature thereon as his free and voluntary act.



Notary Public
Donna M. Ardolino Notary Public, Gwinnett County, Georgia.
My Commission Expires June 7, 2002.
My Commission Expires: _____

ATTACHMENT 2

Ingram & Associates, PLLC

Post Office Box 15039
Hattiesburg, Mississippi 39404-5039
PH-601-261-1385
FX-601-261-1393

FAX TRANSMISSION COVER SHEET

Date: May 4, 2000

To: Stan Smith, Esquire (601) 949-4804
Ben Bronston, Esquire (504) 831-0892
Robin G. Laurie, Esquire (334) 269-3115
Charlie Pellegrini, Esquire (850) 385-6008
Marcus Trathen, Esquire (919) 839-0304
Chuck Welch, Esquire (615) 726-1776
Walter E. Sales, Esquire (502) 581-9564

Sender: Carroll H. Ingram via Ann Brinkley, Paralegal

Re: Communication to Judge Garner Re: Final Recommendation of
LA ALJ

Message: See attached letter and Administrative Law Judge Ruling.

**YOU SHOULD RECEIVE 10 PAGE(S), INCLUDING THIS COVER SHEET.
IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL 601-261-1385.**

WARNING! The Information contained in this FAX is confidential and is intended only for the use of the addressee. Any distribution or copy made of the information contained in this communication is strictly prohibited. If you have received this facsimile message in error, please call the sender by telephone immediately and return the original FAX page(s) and cover sheet to us at the above address via U.S. Mail. Thank you.

BEFORE THE
LOUISIANA PUBLIC SERVICE COMMISSION

DOCKET NO. U-24762

BELLSOUTH TELECOMMUNICATIONS, INC.

VERSUS

NOW COMMUNICATIONS, INC.

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.*

**FINAL RECOMMENDATION OF THE
ADMINISTRATIVE LAW JUDGE**

This *final* recommendation is being issued and forwarded to the Commissioners pursuant to Rule 56 of the Rules of Practice and Procedure of the Louisiana Public Service Commission. The recommendation will be considered and voted on by the Commissioners at an upcoming monthly Commission meeting.

Due to time constraints imposed upon the Commission by Section 252 of the Telecommunications Act (47 U.S.C.A. 252) with regard to arbitration proceedings, the recommendation procedure has been abbreviated, omitting the issuance of a proposed recommendation as well as the opportunity for parties to file exceptions to the proposed recommendation.

All parties are advised to familiarize themselves with the Commission's Rules of Practice and Procedure, including provisions within Rule 56 which permit parties to request (within five working days of issuance of the *final* recommendation) the opportunity to present oral argument at the Commission meeting at which this recommendation will be considered. Copies of the Rules of Practice and Procedure of the Louisiana Public Service Commission are available from the Administrative Hearings Division.

All parties are further advised that they may ascertain whether this recommendation will be considered at the Commission's next monthly meeting by accessing the Commission's web page at <http://www.lpsc.org> and "clicking" on *Official Business* to view the Agenda for the Commission's upcoming monthly meeting. Alternatively, parties may obtain this information by calling the Commission's Administrative Hearings Division at either of the following telephone numbers:

(225) 342-3157 or (800) 256-2397.

Baton Rouge, Louisiana, this 4th day of May, 2000.


Valerie Seal Meiners
Chief Administrative Law Judge

cc: Official Service List
Via Fax Transmittal

*Louisiana Public Service Commission
Administrative Hearings Division
16th Floor, One American Place
Post Office Box 91154
Baton Rouge, Louisiana 70821-9154
Telephone (225) 342-3157
Fax (225) 342-5610*

LOUISIANA PUBLIC SERVICE COMMISSION

DOCKET NO. U-24762

BELLSOUTH TELECOMMUNICATIONS, INC.
VERSUS
NOW COMMUNICATIONS, INC.

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.

DRAFT ORDER NO. U-24762

(Final Recommendation of Administrative Law Judge)

Nature of the Case:

In this proceeding, BellSouth Telecommunications, Inc. ("BellSouth") seeks 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.

Jurisdiction of the Commission:

Section 252 of the Telecommunications Act of 1996 sets out procedures by which telecommunications companies may negotiate, arbitrate, and seek approval of agreements for interconnection, resale, or purchase of unbundled network elements. After a certain period of voluntary negotiations, Section 252 provides a window of opportunity for either party to petition the State commission for arbitration of any unresolved issues. That "window" occurs "from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation." 47 U.S.C.A. §252(b)(1). Under this statutory arrangement, the State commission considers the disputed issues and resolves them in a manner which ensures compliance with the requirements of Section 251 of the Telecommunications Act and any regulations promulgated by the Federal Communications Commission pursuant to Section 251.

Background:

The facts leading up to BellSouth's filing of its petition for arbitration are not the subject of dispute.

The resale agreement which is the subject of BellSouth's petition for arbitration is not the first agreement entered into between BellSouth and NOW. The two companies entered into a resale agreement on June 1, 1997. The agreement had a two-year initial term, with an automatic renewal provision, providing for "two additional one year periods unless either party indicates its intent not to renew the Agreement." *June 1, 1997 Agreement at part I.* The automatic renewal provision further provides as follows:

Notice of such intent must be provided, in writing, to the other party no later than 60 days prior to the end of the then-existing contract period. The terms of this Agreement shall remain in effect after the term of the existing agreement has expired and while a new agreement is being negotiated.

While the parties appear to disagree as to the calculated length of the automatic renewal period, neither party has alleged that it provided written notice of intent not to renew the agreement no later than 60 days prior to May 31, 1999, the end of the initial term of the June 1, 1997 Agreement.

At a point during the initial term of the June 1, 1997 Agreement, BellSouth began proposing changes to the resale agreement. NOW was uninterested and unresponsive to BellSouth's proposed amendments to the resale agreement. On August 20, 1999, Bell made a written request to NOW for negotiation of a new resale agreement. It is unclear how much negotiation took place in response to BellSouth's request, and, in fact, the parties were involved in litigation against each other in federal court during 1999.

On January 20, 2000, NOW informed BellSouth that it wanted to negotiate an *interconnection* agreement rather than a *resale* agreement, and negotiations to that end began. In conjunction with its request to negotiate an *interconnection* agreement, NOW requested a 30-day extension of the statutory time frame for negotiations prior to the arbitration "window," apparently believing that the "window" for petitioning the Commission for arbitration was at hand. On January 26, 2000, BellSouth agreed both to the requested extension and to a "transition from negotiations of a resale agreement to negotiations of an interconnection agreement to include provisions for combinations of unbundled network elements pursuant to the FCC's 319 Order."

At some point after February 17, 2000, the negotiations for an *interconnection* agreement came to an end, as NOW realized that such an agreement was not financially feasible. The parties subsequently resumed negotiations toward a new *resale* agreement. On February 22, 2000, NOW requested another extension of the statutory time frame for negotiations prior to arbitration — this time a 20-day extension. On February 24, 2000, BellSouth declined the 20-day extension request.

BellSouth's Petition for Arbitration:

BellSouth filed its petition for arbitration of a *resale* agreement between BellSouth and NOW on February 25, 2000. In the petition, BellSouth alleges its timely filing, claiming that the "window" for filing a petition for arbitration would end on February 26, 2000.¹ BellSouth is seeking resolution by the Commission of ten issues relating to provisions of a proposed resale agreement between BellSouth and NOW.

NOW's Response and Motion to Dismiss BellSouth's Petition for Arbitration:

NOW's response to the petition alleges that BellSouth and NOW have not reached final agreement on any terms of BellSouth's proposed resale agreement. Further, in a Motion to Dismiss, NOW argues that the Commission lacks jurisdiction to consider the petition for arbitration filed by BellSouth. NOW contends that (1) NOW has never requested renegotiation of its June 1, 1997 resale agreement with BellSouth which remains in force today; (2) BellSouth has attempted to force renegotiation of the resale agreement and that it has no right to do that; (3) BellSouth's petition is not timely filed within the "window for arbitration;" and (4) BellSouth did not comply with other technical statutory requirements. Concerning the timeliness of the filing, NOW argues that the statutory time frame for filing petitions for arbitration cannot be waived by the parties.

BellSouth and the Commission Staff reject NOW's arguments. Those parties specifically note, with regard to the issue of timely filing of the petition, that NOW, itself, requested the 30-day extension relied upon by BellSouth in delaying the filing of its petition.

¹The caption of BellSouth's Petition and the *In re:* of this docket both refer to the arbitrating of an interconnection agreement; however, the allegations of the Petition state that arbitration of a *resale* agreement is specifically sought.

Discussion and Analysis:

Within the muddled factual background of this case, the Commission finds the following undisputed circumstances compelling:

- As neither party provided written notice that it intended *not* to renew the June 1, 1997 Agreement in accordance with the terms of the Agreement, the June 1, 1997 Agreement is currently in a period of automatic renewal, at least until May 31, 2000.
- BellSouth, not NOW, requested renegotiation of the June 1, 1997 Agreement on August 20, 1999, the date on which BellSouth now relies in establishing the start of the negotiation/arbitration time frame set out in Section 252 of the Telecommunications Act. NOW has not sought renegotiation of the existing resale Agreement.
- 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.

Section 252(b)(1) of the Telecommunications Act sets up the statutory time frame for negotiation/arbitration, using as a start date "the date on which an incumbent local exchange carrier receives a request for negotiation under this section." (Emphasis supplied.) Under the circumstances of this case, BellSouth, the incumbent local exchange carrier, has not received a request from NOW for negotiation of a resale agreement. NOW's only request for negotiation was its January 21, 2000 request for negotiation of an interconnection agreement. Those negotiations, as alleged by both BellSouth and NOW, have been discontinued. Even if those negotiations had not been discontinued, the "window for arbitration" of unresolved issues has not yet occurred.

While the parties apparently have been engaged over a period of time in negotiation and litigation, BellSouth has not established a "start" date of negotiation of an agreement between the parties which would lead to the possibility of Commission arbitration of unresolved issues. Pursuant to Section 252 of the Telecommunications Act, the "start" date would be the date on which NOW requested negotiation of an agreement with BellSouth. As BellSouth has not established that "start" date of negotiations, BellSouth cannot and has not established that its petition was filed during the "window" for petitioning the Commission for arbitration of issues the parties have been unable to

resolve. Accordingly, the Commission lacks jurisdiction and the petition for arbitration must be
DISMISSED.

IT IS SO ORDERED.

DISTRICT III
CHAIRMAN IRMA MUSE DIXON

DISTRICT II
VICE CHAIRMAN JAMES M. FIELD

DISTRICT V
COMMISSIONER DON OWEN

DISTRICT IV
COMMISSIONER C. DALE SITTIG

DISTRICT I
COMMISSIONER JACK "JAY" A. BLOSSMAN

EXECUTIVE SECRETARY
LAWRENCE ST. BLANC

Service List
Docket No. U-24762

Commissioners

Stephanie Folse - LPSC Staff Counsel

Walter Rutland - LPSC Utilities Division

Robert Crowe - LPSC Economics Division

C - Victoria McHenry, BellSouth Telecommunications, 365 Canal St., Suite 3060, New Orleans,
LA 70130 (P-504-528-2050)(FAX-504-528-2948)

RA - Carroll H. Ingram, Ingram & Associates, PLLC, P.O. Box 15039, Hattiesburg, MS 39404-
5039 (P-601261-1385)(Fax-601-261-1393) (Rep. NOW Communications)

ATTACHMENT 3

1 STATE OF ALABAMA
2 ALABAMA PUBLIC SERVICE COMMISSION
3 MONTGOMERY, ALABAMA
4

5 IN RE: PETITION FOR ARBITRATION OF THE
6 INTERCONNECTION AGREEMENT BETWEEN
7 BELLSOUTH TELECOMMUNICATIONS, INC., AND
8 NOW COMMUNICATIONS, INC., PURSUANT TO THE
9 TELECOMMUNICATIONS ACT OF 1996.

10 DOCKET NO. 27461
11 PRE-HEARING CONFERENCE
12 ROUGH DRAFT

13 PROCEEDINGS taken before the Alabama
14 Public Service Commission in the
15 above-referenced matter on Friday, April
16 21, 2000, commencing at 9:40 a.m. in the
17 hearing room of the Alabama Public
18 Service Commission, the RSA Union
19 Building, 100 North Union Street, Room
20 904, Montgomery, Alabama, before Amy L.
21 Maddox, Certified Shorthand Reporter and
22 Notary Public in and for the State of
23 Alabama at Large.

1 BEFORE:
2 JOHN GARNER, Administrative Law Judge

3
4 APPEARANCES

5
6 FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

7 A. LANGLEY KITCHINGS, ESQ.
8 BellSouth Telecommunications, Inc.
9 Suite 4300
10 675 West Peachtree Street, NE
11 Atlanta, GA 30375

12 FOR NOW COMMUNICATIONS, INC.:

13 ROBIN G. LAURIE, ESQ.
14 Balch & Bingham
15 Two Dexter Avenue
16 Montgomery, AL 36104

17 ALSO PRESENT:

18 CARROLL INGRAM, ESQ.
19 LARRY SEAB

20 * * * *

21 INDEX PAGE

22 NOW EXHIBIT 1: 42

23 BELLSOUTH EXHIBIT 1: 44

1 Bingham, I.I.P, Two Dexter Avenue, P.O. Box
2 78, Montgomery, 36101. With me is Carol,
3 C-A-R-R-O-L-L, Ingram, Esquire, of Ingram
4 of Associates, Hattiesburg, Mississippi,
5 who serves as general counsel for Now
6 Communications. Also is Mr. Larry Seab,
7 who is President and Chief Executive
8 Officer of Now Communications, Jackson,
9 Mississippi.

10 JUDGE GARNER: And on behalf of
11 BellSouth?

12 MR. KITCHINGS: On behalf of
13 BellSouth, Your Honor, Langley
14 Kitchings. My address is 675 West
15 Peachtree Street, Suite 4300, Atlanta,
16 Georgia 30375. I had to think about it
17 for a minute.

18 JUDGE GARNER: You move around so
19 much, you're not quite sure.

20 MR. KITCHINGS: I know. Which day
21 is it?

22 JUDGE GARNER: In the way of
23 preliminary matters, let me note for the

1 PROCEEDINGS

2
3 JUDGE GARNER: For the record, we're
4 here this morning of April 21, 2000, for
5 a pre-hearing conference in the matter of
6 Docket 27461. Docket 27461 concerns the
7 petition of BellSouth Telecommunications,
8 Inc., for arbitration of interconnection
9 agreement between BellSouth and Now
10 Communications, Inc., pursuant to the
11 Telecommunications Act of 1996.

12 BellSouth's petition for
13 arbitration was filed with the Commission
14 on or about February 25th of 2000, and
15 interested parties were made aware of
16 today's proceeding by notice dated April
17 14, 2000.

18 We'll address any preliminary
19 matters shortly. Let's first, however,
20 take appearances for the record at this
21 time. Who is appearing on behalf of Now
22 Communications?

23 MR. LAURIE: Robin Laurie, Balch and

1 record that our primary purpose this
2 morning is to address the issue raised in
3 Now's removed motion to dismiss, which
4 was filed with the Commission on or about
5 April 7 of 2000. In that motion, Now
6 also sought reconsideration of the
7 Commission's March 29th procedural ruling
8 dismissing Now's previous motion to
9 dismiss that was filed with the
10 Commission on or about March 17, 2000,
11 and BellSouth did file a response to that
12 first Now motion to dismiss on March 28,
13 2000.

14 In addition to Now's pending
15 motion to dismiss, there are also a
16 number of issues which were raised in
17 Now's March 29, 2000, response in answer
18 to BellSouth's petition for arbitration
19 in this matter which we need to address
20 this morning, and that's our primary
21 purpose, and we'll also tie up any other
22 loose ends that the parties may have.
23 Let's go ahead and get any preliminary

1 matters that the parties may have at this
2 time.

3 MR. LAURIE: Your Honor, Now filed a
4 motion to dismiss on about March 14,
5 2000. It filed a response to BellSouth's
6 petition for arbitration on or about
7 March 20, 2000, and then the procedural
8 ruling was issued, I believe, on about
9 March 29, 2000.

10 JUDGE GARNER: Right.

11 MR. LAURIE: The motion to dismiss
12 that's pending or the motion to
13 reconsider alleges the very same grounds
14 that were alleged in Now's response of
15 about March 20th, 2000. There's not
16 going to be any dispute that BellSouth
17 drafted an interconnection agreement or
18 resale agreement and offered that
19 agreement to Now Communications in 1997.
20 I forget the exact date that the
21 agreement was signed, but it was
22 effective as of June 1, 1997. It was
23 filed with this Commission and approved

1 by this Commission also in 1997.

2 That agreement is very plain.
3 It was for a two-year term beginning June
4 1, 1997, and expiring June 30 -- I mean
5 May 31, 1999, and it automatically
6 renewed for two one-year terms unless
7 either party gave written notification at
8 least 60 days before the expiration of
9 the contract, which would have been 60
10 days prior to May 31, 1999. It is
11 undisputed that BellSouth did not give
12 written notification that the agreement
13 was to terminate effective May 31, 1999.
14 They do not dispute that in their
15 papers. Also that contract, Section 18
16 on page 14, I believe, says that it may
17 not be amended or changed in any manner
18 unless there is a writing signed by both
19 parties to the agreement. That has never
20 occurred.

21 Congress, in 1996, declared
22 that there would be competition in the
23 local exchange and passed the '96 Act.

1 Part of that, Congress didn't believe
2 that the local monopolies, the incumbent
3 carriers, would be amenable to having
4 competition in the local exchange, and
5 therefore under Section 252 they provided
6 a mechanism for potential competing
7 carriers to force the incumbent carriers
8 to the bargaining table, and in the event
9 that the incumbent carriers refused, it
10 provided a mechanism by which the
11 competing carrier could haul the Bell
12 company, or the incumbent carrier, into a
13 state Commission and require that those
14 agreements be arbitrated.

15 Section 252(b), titled
16 "Agreements Arrived at through
17 Compulsory Arbitration," states:
18 "Arbitration. During the period from
19 the 135th to the 160th day inclusive,
20 after the date on which an incumbent
21 local exchange carrier receives a request
22 for negotiation under this section, the
23 carrier or any other party may petition a

1 state Commission to arbitrate any open
2 issues." The operative language in that
3 section is the period of time after the
4 date on which an incumbent carrier
5 receives a request for negotiation of an
6 agreement, of a resale agreement or an
7 interexchange agreement. As a matter of
8 fact and as a matter of law, Now has
9 never, ever requested a negotiation or a
10 renegotiation of its existing agreement
11 with BellSouth, which is in effect by its
12 very terms, terms that BellSouth inserted
13 into contract, until May 31, 2001. No
14 written. As a matter of fact, BellSouth
15 admits it, they did not give 60 days'
16 advance notice, 60 days prior to May 31,
17 '99. And while the language, it
18 automatically renews for two one-year
19 terms, might be ambiguous, I'm not quite
20 sure what it means, BellSouth drafted the
21 agreement, and we've cited the Georgia
22 statute and the Georgia law which
23 unequivocally holds that when there is a

1 question about a contractual provision,
2 it is strictly construed against the
3 party drafting the agreement. This
4 agreement is in full force and effect for
5 another 14 or 15 months.

6 BellSouth -- and I'm not
7 talking about Langley, but I'm talking
8 about his client -- in a very
9 disingenuous matter, to put it nicely,
10 wrote to Now in August of '99 and told
11 them that, your agreement expired on June
12 1, '99, and it's time to renegotiate a
13 new agreement. In their filings with
14 this Commission, Mr. Kitchings' client
15 says that the term of the agreement was
16 for two years, expiring May 31, 1999.
17 That is not correct. The agreement has
18 not expired, because there was a way to
19 make the agreement expire May 31, 1999,
20 and that way was to give 60 days' prior
21 written notice of the expiration. Never
22 happened. Did not happen. This
23 agreement is still in full force and

1 unable, for whatever reason, to pay bills
2 in arrears the way Your Honor and I
3 probably do most of the time. They pay
4 it in advance, and when their advance
5 payment expires, their service is
6 terminated, but many of Now's customers
7 repeatedly come in and make payments in
8 advance so they keep their service intact
9 continuously.

10 The service has been so
11 successful that in 1998 Now was receiving
12 orders and sending them to BellSouth to
13 connect Now's customers, and BellSouth
14 didn't like it and engaged in all sorts
15 of anticompetitive and illegal behavior
16 that required Now to file in the United
17 States District Court for the Northern
18 District of Alabama a complaint alleging
19 Sherman Act violations and requesting
20 relief under the Clayton Act, state tort
21 law, Communications Act claims; and Judge
22 Sam Porter of that court preliminarily
23 enjoined BellSouth from terminating Now's

1 effect.

2 Now, if we get into a factual
3 issue on this, I will tell you that
4 BellSouth crammed renegotiations down the
5 throats of essentially every other
6 competitive carrier in its nine-state
7 region, which included upping the cost
8 for OSS charges in resale agreements. We
9 contend in an interconnect
10 facilities-based agreement that the
11 competitive carrier ought to pay OSS
12 charges, but in a pure resale context,
13 which Now Communications is in, no way,
14 no how are they supposed to pay OSS
15 charges in addition to the rates, their
16 discounted rates.

17 Now Communications is a prepaid
18 long distance -- or a prepaid local
19 carrier. This Commission found that the
20 public convenience and necessity required
21 the service proposed by Now back in 1997,
22 and Now has been successful. It meets
23 the needs of those consumers who are

1 service because Now refused to pay
2 BellSouth because of BellSouth's
3 anticompetitive behavior that was to the
4 detriment of Now and every other
5 competitive carrier. In connection with
6 resolving that -- that injunction
7 remained in force for approximately 90
8 days, until approximately March of '99.
9 It was dissolved by agreement of the
10 parties. Judge Porter decided Now's
11 complaint and concluded that jurisdiction
12 in the first instance was appropriate in
13 the state Commissions or with the Federal
14 Communications Commission, dismissed the
15 complaint without prejudice to it being
16 refiled after Now had exhausted
17 administrative remedies at the state or
18 federal level. Now appealed that
19 decision to the Eleventh Circuit.

20 In connection with that
21 litigation, Now's counsel, Mr. Ingram,
22 and BellSouth's counsel, Fred Walters,
23 engaged in settlement negotiations. Now

1 insisted upon a payment in the seven,
2 eight-figure range. Mr. Walters said,
3 Now, we're not going to pay you that kind
4 of money, but here is what we'll do for
5 you. We will offer you a new resale
6 agreement that will have economic terms
7 that will be beneficial to Now
8 prospectively, that will more than offset
9 the damage that BellSouth had done to
10 Now, which precipitated the federal court
11 antitrust suit. Now never requested the
12 renegotiation or the negotiation of any
13 agreement. That was an offer by Mr.
14 Walters with BellSouth.

15 Eventually the Eleventh Circuit
16 affirmed Judge Porter's decision, but Now
17 still had the right, the opportunity, and
18 the ability, financial and otherwise, to
19 file in every one of the nine BellSouth
20 states complaints against BellSouth
21 alleging the anticompetitive and
22 fraudulent behavior. Mr. Walter was
23 negotiating with Mr. Ingram to prevent

1 that. In about January of this year, a
2 letter signed by Mr. Walters was hand
3 delivered to Mr. Ingram which reaffirmed
4 BellSouth's position but said that Now
5 should negotiate with BellSouth's regular
6 negotiating team about a new agreement.
7 Well, Now doesn't have anything to
8 negotiate with BellSouth about their
9 existing agreement. Now was willing to
10 talk to Bell about negotiating something
11 that would resolve Now's claims against
12 Bell, but not in the context of Section
13 252. Now has never, ever requested the
14 negotiation of a resale agreement under
15 Section 252. And that language is black
16 and white, is very plain. This contract
17 does not expire until May 31 of 2001, and
18 Now stands on its agreement and Now
19 stands on Section 252.

20 This petition for arbitration
21 must be dismissed. As far as the motion
22 to dismiss on timeliness issues, that's
23 been fully presented, and we submit that

1 on the written record.
2 JUDGE GARNER: Let me inquire, Mr.
3 Laurie, there was representation, I
4 believe, in BellSouth pleadings that,
5 according to my notes, on or about
6 January 20 of this year that Now advised
7 BellSouth that it sought an
8 interconnection agreement, not just a
9 resale agreement. What is Now's response
10 and position with regard to that?

11 MR. LAURIE: That was in connection
12 with trying to resolve Now's complaints
13 against BellSouth. Now said -- and again
14 I will repeat that BellSouth has crammed
15 down OSS charges to virtually every other
16 competitive carrier in the nine-state
17 region. Now told BellSouth no way, no
18 how, as a matter of fact, law, and
19 regulation, is a pure reseller to pay OSS
20 charges. BellSouth's response was, that
21 is not negotiable, period. So in an
22 effort to appease BellSouth, Now said,
23 well, let us take a look at an

1 interconnection agreement in which Now's
2 position is that OSS charges should be
3 charged to the competitive carrier or
4 passed through to the competitive carrier
5 to get by your statement that OSS is not
6 negotiable in a resale context. But it
7 certainly was not a request to negotiate
8 a resale or an interconnection agreement
9 within the context of Section 252. Now
10 has got an agreement. From the very
11 beginning, and you know with the March 20
12 filing responsive of Now, they said,
13 there's nothing to arbitrate. This
14 agreement is in full force and effect.

15 JUDGE GARNER: What about the
16 representation, I believe it was in the
17 BellSouth pleadings, that the party have
18 mutually agreed to operate under the
19 existing agreement until negotiations
20 conclude and a new agreement was in
21 effect?

22 MR. LAURIE: Could I confer for just
23 a moment?

1 JUDGE GARNER: Sure.
 2 (Off-the-record discussion.)
 3 MR. LAURIE: May I approach,
 4 please?
 5 JUDGE GARNER: Sure.
 6 MR. LAURIE: There's a letter dated
 7 January 26, 2000, from Paige Miller to
 8 Mr. Seab, titled "Arbitration Extension,"
 9 and I believe it's one of the filings of
 10 either Now or BellSouth in this matter.
 11 MR. KITCHINGS: It's actually in
 12 y'all's response, Exhibit 2.
 13 JUDGE GARNER: Have you got an extra
 14 copy? Yeah, I believe it is Exhibit 2 to
 15 the Now Communications, Inc., response.
 16 MR. LAURIE: This January 26 letter
 17 is still in the context of resolving
 18 Now's claims against BellSouth that were
 19 part of the federal court action, and
 20 that's when they talk about transition
 21 from negotiation from a resale agreement
 22 to an interconnect agreement, which we've
 23 already addressed, extension of

1 that. I mean, there's nothing to
 2 dispute. That agreement is in full force
 3 and effect.
 4 You know, BellSouth's position
 5 seems to be that if they negotiate an
 6 agreement and they don't like it, they
 7 can petition for arbitration at any time
 8 notwithstanding the agreement, and that's
 9 just not right from a matter of law or
 10 matter of regulation. And, Your Honor,
 11 I'm prepared to put on evidence today
 12 that will corroborate the factual
 13 arguments that I'm making to you, if they
 14 are disputed.
 15 JUDGE GARNER: Well, let's hear from
 16 BellSouth, and we'll look at doing that
 17 if we need to. Mr. Kitchings?
 18 MR. KITCHINGS: Thank you, Judge
 19 Garner. I guess we went a little beyond
 20 preliminary matters. I don't have any
 21 preliminary matters, so I'll just jump
 22 right into it as well.
 23 JUDGE GARNER: I think we've gotten

1 procedural schedules and termination of
 2 the current resale agreement in the State
 3 of North Carolina.
 4 This letter was countersigned
 5 by Now. Now agreed that they would
 6 transition from the negotiation of a
 7 resale agreement to the negotiation of an
 8 interconnection agreement, which Now
 9 hired engineers and did studies for about
 10 ten days and determined that an
 11 interconnection agreement was not any
 12 good. Extending the arbitration window
 13 and terminating the agreement in North
 14 Carolina. The penultimate paragraph
 15 states, BellSouth and Now will continue
 16 to honor the terms of the existing
 17 agreement dated June 1, '97, for the
 18 states of Alabama, Florida, Georgia,
 19 Kentucky, Louisiana, Mississippi, South
 20 Carolina, and Tennessee until a new
 21 agreement is signed. They acknowledge
 22 that the June 1, 1997, agreement is in
 23 full force and effect, and Now agreed to

1 to the meat of it.
 2 MR. KITCHINGS: I think we are. I
 3 think we are. As Counsel has said, the
 4 crux of this matter is Section 252 and
 5 251 and additionally the agreement
 6 between my client, BellSouth
 7 Telecommunications, and Mr. Laurie's
 8 client, Now Communications.
 9 Briefly reciting the facts, as
 10 I don't think you'll find any difference
 11 in the background facts than as they were
 12 stated by Mr. Laurie, the resale
 13 agreement which was signed in 1997 had an
 14 effective date of June 1, 1997. It has a
 15 two-year term. It also has provisions
 16 for an extension of the contract by two
 17 one-year terms. We're going to talk
 18 about that a little bit more later, but
 19 obviously that's where a major part of
 20 our disagreement is.
 21 BellSouth, for its part, began
 22 corresponding with Now at least orally
 23 over the phone, if not, in fact, in

1 writing, as early as October of 1998,
 2 requesting that we look at renegotiating
 3 this contract. A formal request for
 4 negotiation was sent to Now on August 20,
 5 1999. If you assume that the August 20,
 6 1999, letter operated as a request for
 7 interconnection, then the statutory
 8 period to file arbitration would have
 9 been January 2nd through June -- I'm
 10 sorry -- January 2nd of 2000 through
 11 January 27th of 2000. The parties
 12 proceeded. The parties had discussions.
 13 As the arbitration window at that point
 14 in time neared a close, Now requested an
 15 extension for 30 days in an effort to try
 16 to work this out. One part of trying to
 17 work it out was looking at the
 18 possibility of moving from a resale to a
 19 full-fledged facilities-based
 20 interconnection agreement, which
 21 ultimately didn't work out.

22 On January 26th, the letter
 23 that you and Counsel were just speaking

1 about, the letter agreement was reached
 2 between BellSouth and Now agreeing to
 3 extend the arbitration window for some 30
 4 days. It is our position that that, in
 5 effect, moved the beginning date of
 6 negotiations to September 19th of 1999,
 7 which correspondingly moves the
 8 arbitration window so that it would have
 9 closed on February 25th. BellSouth's
 10 petition for arbitration was filed on
 11 February 25th. In the meantime, Now
 12 requested an additional extension of
 13 time, which BellSouth declined. That,
 14 Your Honor, is the factual background
 15 that has brought us here today.

16 In response to Now's position,
 17 BellSouth has laid out twice its position
 18 and argument, and I will briefly restate
 19 that. I don't think I've got a whole lot
 20 new to add to that. First and foremost,
 21 our position is that the purpose of the
 22 Telecommunications Act of 1996 was to
 23 open markets to competition, all markets,

1 not just local exchange, but long
 2 distance. We're all very well aware of
 3 Section 271 and its requirements. We're
 4 all very well aware of Section 251 and
 5 the requirements it puts on local
 6 exchange carriers, including incumbent
 7 LECs, but it also has provisions for
 8 competitive local exchange carriers, new
 9 local exchange carriers. In the local
 10 market context, as Counsel stated, the
 11 law provides for negotiation, mediation,
 12 and arbitration, and he, in fact, read to
 13 you from Section 252(b)(1). Thus the
 14 FCC -- and the FCC was given oversight,
 15 if you will, of this process if state
 16 Commissions didn't act in terms of
 17 arbitrations.

18 Now, Counsel has made basically
 19 two points here. One is that you cannot
 20 waive a statutory deadline, and two is
 21 that, per the language of the statute, an
 22 incumbent LEC must receive the request
 23 for negotiation. Well, that's fine, but,

1 again, it must be placed in the context
 2 of what was intended by the law and by
 3 Congress. And, in fact, the FCC has
 4 addressed both of these issues, or at
 5 least one very directly, and the
 6 California Public Service Commission has
 7 addressed the other. I'd like to briefly
 8 touch on those and read you some sections
 9 from some opinions, both of which we've
 10 cited previously.

11 The initial case that I'm
 12 referring to is in re Armstrong, and in
 13 the Armstrong case, the FCC was dealing
 14 with a question of whether or not a
 15 petition for arbitration had been filed
 16 in a timely fashion. In fact, they
 17 determined that the arbitration petition
 18 had been filed prematurely. But the FCC
 19 stated as follows: "Since Armstrong's
 20 arbitration petition does not meet the
 21 statutory criteria, the Pennsylvania
 22 Commission was, in turn, not bound by
 23 Section 252 to complete the arbitration

1 process within nine months of Armstrong's
2 May 30, 1996, interconnection request."

3 Therefore, Your Honor, even if
4 you assume that Now is correct and that
5 for the fact that they asked for a 30-day
6 extension would now be held against
7 BellSouth, then the remedy is not a
8 dismissal of the petition for
9 arbitration, but it is, in fact, a reason
10 for this Commission to take an
11 appropriate period of time as opposed to
12 the nine-month period of time that's laid
13 out in the statute. They stated that a
14 second time as well later in the
15 opinion.

16 JUDGE GARNER: And that opinion is
17 appended to your March 28th, 2000,
18 response to the Now Communications motion
19 to dismiss?

20 MR. KITCHINGS: That's correct.
21 Additionally, Your Honor, to the point of
22 an incumbent LEC being required to
23 receive a request for interconnection,

1 Pac Bell. I believe this opinion was
2 also appended to our response.

3 JUDGE GARNER: As Exhibit 2, I
4 believe.

5 MR. KITCHINGS: Again, if Your Honor
6 will indulge me, I'll read a brief
7 portion of that. Again, the facts were
8 that Pac Bell initiated the request for
9 interconnection. Pac West was the
10 competitive local exchange company. The
11 operative language out of that opinion is
12 as follows: "Pac West did not, as a
13 matter of fact, initiate the negotiation
14 process. Pacific did that. However,
15 both parties, through their action,
16 assented to considering Pac West's reply
17 letter to Pacific as the de facto bona
18 fide request for negotiation to begin
19 interconnection negotiation. Both
20 parties counted the arbitration window
21 from the date of the letter sent by Pac
22 West, essentially establishing Pac West's
23 letter as the request for

1 well, in 1996 that was true. Everybody
2 was coming to the incumbent LECs that
3 wanted to start up a business. You've
4 got to recall that, in fact, local
5 exchange service was a monopoly service,
6 so there was no reason for an incumbent
7 local exchange carrier to go out and
8 request negotiation of someone else.
9 Well, four years has passed since that
10 time. We have literally hundreds of
11 interconnection agreements, both resale
12 and facilities-based, in place, and for
13 the notion that an entity could come and
14 request interconnection or a resale
15 agreement in 1996 and thus put it in
16 place forever and never allow the
17 incumbent company to request negotiation
18 or renegotiation of that contract is at
19 best difficult to believe.

20 The California Public Service
21 Commission, the Public Utilities
22 Commission, was faced with this exact
23 same question in the case of Pac West and

1 interconnection." Skipping to the final
2 sentence in that paragraph, it states,
3 "In view of Pac West's actions, we can
4 attribute no other credible purpose to
5 Pac West's negotiation with Pacific other
6 than a negotiation process under Section
7 1252 of the Telecommunications Act."

8 Your Honor, the same has
9 happened here. I'm not going to address
10 the lengthy discussion of the
11 litigation. The litigation speaks for
12 itself. The only thing I will say on
13 that is that Now had the ability to file
14 complaints about BellSouth's business
15 practices before the Public Service
16 Commission before the federal court ever
17 spoke. I was not privy to the
18 discussions. I will assume that what
19 Counsel has stated today is accurate
20 about negotiations. I will reserve the
21 right -- if, on further information, I
22 find that my folks tell me otherwise, I
23 will certainly correct myself. But,

1 again, for today's purposes, I'm going to
 2 accept what Counsel opposite has said is
 3 correct. I don't think it matters to the
 4 substance of this. The point of the
 5 matter is the parties continued to
 6 negotiate. The parties talked about an
 7 interconnection agreement. The parties
 8 even looked at moving from a resale to a
 9 full-scale, full-blown interconnection
 10 agreement and went back to resale, as the
 11 facts have borne out.

12 Your Honor, as to this part of
 13 the argument, I'm going to sum it up by
 14 saying that Congress has stated a
 15 preference for negotiation. It is in the
 16 public interest be allowed to negotiate.
 17 It is in the public interest that parties
 18 be allowed to expand the time frame to
 19 negotiate, and the way to do that is to
 20 change the beginning date. It's been
 21 done in numerous other locations. South
 22 Carolina, North Carolina have found to
 23 the contrary. North Carolina is not

1 additional one-year periods unless either
 2 party indicates its intent not to renew
 3 the agreement. Notice of such intent
 4 must be provided in writing to the other
 5 party no later than 60 days prior to the
 6 end of the then existing contract
 7 period. The terms of this agreement
 8 shall remain in effect after the term of
 9 the existing agreement has expired and
 10 while a new agreement is being
 11 negotiated."

12 Your Honor, in my view, Now's
 13 position would obviate this provision.
 14 They would have you believe that the
 15 extension language stands for two years
 16 instead of two additional one-year
 17 periods, as is plainly stated. It's
 18 interesting that Counsel began his
 19 argument by saying that the agreement is
 20 very plain, but then when you get to
 21 Section 1(b), it becomes ambiguous all of
 22 a sudden. BellSouth doesn't believe it's
 23 ambiguous. And the statutes and case law

1 involved in this proceeding, but North
 2 Carolina has already said, you've got to
 3 stick with it. To my knowledge, there's
 4 no other Commission in the BellSouth
 5 region which does so. Currently, as
 6 Counsel is well aware, we were in
 7 Louisiana discussing the same thing
 8 yesterday, and presumably this issue will
 9 come up in other places. However, no
 10 other Commission in the BellSouth region
 11 has ruled, to my knowledge, in the way
 12 requested by Counsel opposite with the
 13 exception of South Carolina in this
 14 case.

15 Let's talk or let's turn. Your
 16 Honor, to the contract itself. The
 17 contract itself is at issue and the terms
 18 of it. Counsel has directed you to
 19 Section 1(b). And, again, if you will
 20 indulge me, Your Honor, I think it would
 21 benefit the record to read paragraph 1(b)
 22 in its entirety. "This agreement shall
 23 be automatically renewed for two

1 that Counsel has relied upon from Georgia
 2 law -- and by the way, we would agree
 3 that the agreement has to be interpreted
 4 under Georgia law -- do not come into
 5 play, because this is not ambiguous.
 6 This is clear on its face. It's two
 7 additional one-year periods.

8 Now didn't raise any of this
 9 until after the petition for arbitration
 10 was filed. Given their insistence on a
 11 written dismissal or written notice that
 12 the contract be terminated, on March
 13 30th, 2000, Paige Miller, who is a
 14 negotiator for BellSouth, sent a letter
 15 to Now notifying them 60 days in advance
 16 of the termination of the first year's
 17 extension period that BellSouth desired
 18 to terminate the contract. Thus the
 19 terms of the contract have been met.
 20 Arbitration is timely, Your Honor,
 21 because what they would have you believe
 22 is that you absolutely have to wait until
 23 a contract has expired before you can

1 begin negotiation and mediation and
2 arbitration, and such is simply not the
3 case.

4 Your Honor, it's interesting
5 also to note Counsel -- that has not been
6 attached. This was not attached to
7 BellSouth's response because we didn't
8 have it at the time. But the Tennessee
9 Regulatory Authority asked the parties to
10 brief this same issue. We did so. Now
11 filed a brief, and in the "Facts" section
12 of that brief, beginning at the bottom of
13 the first page and moving to the second
14 page, again, if you'll indulge me, I'll
15 read you a section I think you'll find
16 very illuminating. "On or about October
17 2, 1998, the parties initiated informal
18 discussions to negotiate the terms of a
19 new resale or, as an alternative, a
20 comprehensive interconnection agreement.
21 These initial discussions were
22 unsuccessful. On August 20th, 1999,
23 BellSouth submitted its written notice to

1 first paragraph on the second page of
2 that letter, the last sentence in that
3 paragraph. "By signing and
4 countersigning this letter, both parties
5 waive any right to claim the dates within
6 which a party may seek state Commission
7 arbitration of unresolved issues begins
8 and ends on any earlier dates." That
9 apparently has gone by the boards.

10 Your Honor, I believe that's
11 all I have in response to Counsel
12 opposite. I have other information on
13 these other issues that you alluded to
14 that you wanted to get to, but I guess we
15 can get to that later.

16 JUDGE GARNER: Let me inquire, in
17 the BellSouth responsive pleadings, there
18 was mention of October 2, '98,
19 correspondence with Now Communications.
20 Do I take it that none of that
21 correspondence was in writing, it was
22 verbal contact only?

23 MR. KITCHINGS: Your Honor, it is my

1 Now of its intent to renegotiate the
2 agreement. At this point, however, the
3 initial agreement of the parties had been
4 extended by its terms until June 1,
5 2000."

6 Counsel, I'll give you this so
7 you can review it. But that document is
8 signed by Charles B. Welch, attorney for
9 Now Communications. That's the only copy
10 I have, Robin.

11 Therefore, I find it very
12 interesting that even Now's local counsel
13 in Tennessee believes that that's two
14 one-year terms as opposed to a solid
15 two-year term.

16 Finally, Your Honor, on the
17 contract issue, I would again like to
18 return our attention to the January 26
19 letter. I think the letter speaks for
20 itself. I think you're more than capable
21 of seeing what this letter is intended to
22 do. I would, however, raise one sentence
23 to Your Honor's attention, and that's the

1 understanding from talking with Ms.
2 Miller that she believed that she sent a
3 letter. She cannot find any such letter
4 in her records. She knows that there was
5 oral conversation between herself and
6 Now, but she is unable to locate any
7 letter. So I believe that all we can
8 prove is oral conversations took place.

9 JUDGE GARNER: So the BellSouth
10 position is that with the notice that was
11 served on March 30 of this year, I
12 believe, that the existing agreement will
13 expire on May 31 of this year?

14 MR. KITCHINGS: That's correct, Your
15 Honor.

16 JUDGE GARNER: Under the theory of
17 two separate one-year terms?

18 MR. KITCHINGS: That's correct.

19 JUDGE GARNER: Mr. Laurie, do you
20 want to respond?

21 MR. LAURIE: May I? The California
22 PUC certainly held what it held with
23 respect to who requests negotiation of an

1 interconnection agreement, but there is
 2 language that Mr. Kitchings read to the
 3 record which clearly distinguishes that
 4 situation from the situation at hand.
 5 The California Commission found that
 6 there had been a waiver, which is a
 7 voluntarily known relinquishment of
 8 existing rights, is the way I call it.
 9 That's not what they called, but that's
 10 essentially what they held. And they
 11 found as a matter of fact that the
 12 parties voluntary negotiations, that
 13 there was -- that there was no other
 14 credible purpose than negotiations under
 15 252. In this case, there is more than
 16 credible other reasons for negotiating.
 17 Now wanted relief for the anticompetitive
 18 and fraudulent behavior of BellSouth, and
 19 when BellSouth said that they were not
 20 interested in compensating Now with money
 21 damages, but instead they would give Now
 22 a new agreement which would be
 23 advantageous to them economically in the

1 future, which is essentially prospective
 2 rate making. We all know that rates must
 3 be made prospectively.

4 I would like to give Your Honor
 5 a copy of a December 22, 1999, letter
 6 from Paige Miller to Larry Seab. Do you
 7 have this?

8 MR. KITCHINGS: I don't know if I do
 9 or not. I do not, Counsel.

10 MR. LAURIE: Do you want to read
 11 through it a minute?

12 MR. KITCHINGS: Here. Thank you.

13 MR. LAURIE: And, Your Honor, I'm
 14 going to offer this as an exhibit to this
 15 proceeding. This is a letter from Paige
 16 Miller of BellSouth to Mr. Seab at Now.
 17 It says, "A copy of BellSouth's standard
 18 resale agreement was initially forwarded
 19 to Now for the purpose of renegotiations
 20 on October 2, 1998. Subsequent phone
 21 calls were made to Now. However, Now
 22 declined to negotiate and thus no
 23 progress was made toward a new

1 agreement."

2 That is part of BellSouth
 3 cramming down OSS charges down the throat
 4 of these competitive carriers that are
 5 pure resellers. That's what that October
 6 2, 1998, agreement was, or included.
 7 BellSouth has repeatedly tried to cram
 8 OSS charges down Now's throat in spite of
 9 the contract that the parties signed,
 10 that BellSouth drafted, and that's been
 11 approved by this Commission.

12 The very best that BellSouth
 13 can expect in response to Now's motion to
 14 dismiss and its response filed on March
 15 20, is a ruling by this Commission that
 16 the agreement expires May 31/June 1 of
 17 the year 2000. But the agreement -- and
 18 if the Commission holds that, Now will
 19 immediately request under Section 252 a
 20 new resale agreement. Is that correct?

21 MR. SEAB: Yes.

22 MR. LAURIE: It will immediately
 23 request negotiation of a new resale

1 agreement with BellSouth, and that's when
 2 the arbitration window, the deadlines and
 3 the like, begin. Because the contract
 4 very plainly says that in the event of an
 5 expiration, the parties will operate
 6 under this existing agreement until a new
 7 agreement is negotiated. Under the
 8 Georgia law, which we provided, it is our
 9 contention that this agreement does not
 10 expire until May 31/June 1 of 2001. But
 11 I will concede that the very best that
 12 Bell could expect in response to this is
 13 a ruling that the agreement does expire
 14 May 31/June 1 of this year, and if this
 15 Commission so holds, Now will immediately
 16 insist upon a 252 negotiation, and
 17 hopefully that would resolve it, and if
 18 not, then an arbitration prospectively.

19 JUDGE GARNER: Are you going to go
 20 ahead and introduce that letter?

21 MR. LAURIE: Yes.

22 JUDGE GARNER: I believe the letter
 23 is referenced in the BellSouth

1 pleadings.

2 MR. LAURIE: It's a letter dated
3 December 22, 1999. We'd offer this.

4 MR. KITCHINGS: No objection.

5 JUDGE GARNER: It will be marked as
6 Now Communications, Inc., Exhibit 1, and
7 we'll handle the making of the copies
8 following the proceeding.

9 (Now Exhibit 1 was marked
10 for identification.)

11 JUDGE GARNER: Mr. Kitchings, is
12 there anything in closing on this issue
13 you want to tie up?

14 MR. KITCHINGS: Yes, Your Honor. I
15 really wanted to try to avoid getting
16 into some of the invective, but I can't
17 resist this time. Counsel has used the
18 term "cramming" OSS charges down
19 resellers' throats on numerous occasions,
20 and I object to that reference. It is
21 appropriate to arbitrate that issue. In
22 fact, issue 3, as filed in BellSouth's
23 petition, states: "What are the

1 introduction of that as BellSouth Exhibit
2 1?

3 MR. LAURIE: No objection.

4 (BellSouth Exhibit 1 was marked
5 for identification.)

6 MR. LAURIE: Again, we'll need a
7 copy of it, and I'll just point out that
8 that is the very best that BellSouth can
9 expect to walk away from this with today.

10 MR. KITCHINGS: Your Honor, it is
11 from Now's counsel in Tennessee, but,
12 again, we'll be happy to provide a copy
13 to both you and them. I guess a
14 procedural question would be, do we want
15 to make a copy here at the Commission, or
16 would you prefer we take it back to
17 Atlanta and mail it to both of you?

18 JUDGE GARNER: If there's no
19 objection, I would like to go ahead and
20 make a copy here and distribute it while
21 everyone is here in attendance.

22 MR. KITCHINGS: Certainly.

23 MR. LAURIE: And I'm not a member of

1 appropriate rates to be charged by
2 BellSouth for Now's access to and use of
3 the electronic and manual interfaces to
4 BellSouth's operation support systems and
5 functions?" I'm not going to get into
6 the substance of it, but BellSouth has a
7 very compelling case on that, but I do
8 want to note my objection for the record
9 to the characterization of what's gone on
10 here about those OSS charges. Thank you.

11 JUDGE GARNER: Your objection is
12 duly noted.

13 MR. LAURIE: I would say that that
14 was not directed at Mr. Kitchings; it was
15 directed at his client. And we will
16 definitely prove, if we have to, that
17 that's exactly what BellSouth has done.

18 JUDGE GARNER: All right. Mr.
19 Kitchings, I would be interested in
20 submission of the brief that you read
21 from from the Tennessee Commission.

22 MR. KITCHINGS: Okay.

23 JUDGE GARNER: Any objection to the

1 the Tennessee Bar.

2 MR. KITCHINGS: Well, I believe
3 Counsel has my copy.

4 JUDGE GARNER: We'll handle that
5 following the proceeding if that's all
6 right.

7 MR. KITCHINGS: Okay. Thank you.

8 JUDGE GARNER: We'll do the same for
9 the BellSouth letter of December 22nd,
10 1999.

11 MR. KITCHINGS: That's with
12 attachments.

13 JUDGE GARNER: I would inquire, Mr.
14 Laurie, if you had any arguments in
15 addition to what was presented in the Now
16 response and answer to the BellSouth
17 petition on the other issues that were
18 raised there. I believe one of those
19 issues was that BellSouth's failed to
20 provide a copy of the petition to Now in
21 a timely manner.

22 MR. LAURIE: Nothing additional,
23 Your Honor.

1 JUDGE GARNER: What about any of the
2 other issues raised in the response of
3 Now in answer to the BellSouth petition?
4 Any other issues that you want to touch
5 on specifically this morning?

6 MR. LAURIE: Your Honor, I think
7 from observing my demeanor this morning
8 you know what Now's position is on its
9 motion to dismiss. In the highly
10 unlikely event that Now is forced to
11 arbitrate with BellSouth in spite of
12 Section 252 and in spite of the contract,
13 Now expects to raise every issue filed in
14 its response in that arbitration because
15 it is part of -- it includes the unfair
16 and anticompetitive treatment of Now and
17 other competitive carriers by BellSouth,
18 and this Commission must know how
19 BellSouth has treated Now and the other
20 competitive carriers so that this
21 Commission can prospectively resolve
22 issues involving the resale agreement in
23 a prospective manner such as TAFE against

1 you want to call them, in Now's response
2 of March 20.

3 JUDGE GARNER: In the event that we
4 go to arbitration in the case?

5 MR. LAURIE: Sir?

6 JUDGE GARNER: In the event that we
7 go to arbitration in the case?

8 MR. LAURIE: Yes, sir. And like I
9 say, I don't have to tell you again what
10 Now's position is on that.

11 JUDGE GARNER: You've made that very
12 clear.

13 MR. LAURIE: And, Your Honor, Mr.
14 Kitchings and I -- again, without waiving
15 the motion to dismiss or the fact that
16 we're at least not ripe for arbitration
17 because the agreement hasn't expired --
18 we will suggest that we would be amenable
19 to discuss some extensions of time, but
20 we first want this decided.

21 JUDGE GARNER: Mr. Kitchings,
22 anything in closing?

23 MR. KITCHINGS: Yes, Judge. I'm

1 Southern Company requires and all the
2 filed rate cases require, so that there
3 can be prospective relief for
4 anticompetitive and illegal behavior in
5 the past; and that prospective relief can
6 be granted in only one way, and that's
7 with a resale agreement that compensates
8 Now for that illegal behavior.

9 JUDGE GARNER: As a threshold
10 matter, you don't have anything to add to
11 those issues in addition?

12 MR. LAURIE: No, sir.

13 JUDGE GARNER: I think you've
14 already touched on both of those.
15 Nothing in particular you want to add to
16 anything raised?

17 MR. LAURIE: No, sir. Well, can I
18 confirm?

19 JUDGE GARNER: Sure.

20 MR. LAURIE: Your Honor, we do
21 expect -- Now does expect to offer proof,
22 compelling proof, on each of every one of
23 its allegations as defenses, or whatever

1 going to have to reply to what Counsel
2 said earlier because this came up
3 yesterday. We had a status conference in
4 Louisiana, and it became my
5 understanding -- and, of course, Counsel
6 is free to correct me. But it became my
7 understanding that Now's position is that
8 by attaching its complaint in the federal
9 court case that it referenced that
10 somehow all of the allegations in that
11 complaint are now in this arbitration.
12 I've looked through their response. The
13 only place that I found a reference to
14 that attachment was in a description of
15 what had gone on in the federal court
16 case. I do not recall seeing, have not
17 seen, anything that enumerates those
18 issues as being part of this
19 arbitration. And I just want the
20 Commission to be aware that if, in fact,
21 Now's position is that every one of those
22 allegations is in this arbitration, we're
23 going to object to their inclusion. And

1 we can get into that substance of that
2 later, but suffice to say that the
3 appropriate place to bring that up would
4 have been in its response or
5 alternatively file a Commission
6 complaint.

7 They claim to -- purport to
8 represent all various carriers that
9 BellSouth has allegedly treated so
10 disreputably. Well, then bring the other
11 carriers in as well; let them join the
12 complaint. This is a two-party
13 arbitration between BellSouth and Now.
14 BellSouth would also remind the
15 Commission that Now has failed to file
16 testimony as per the Commission rules.
17 Therefore, we believe that the 10 issues
18 included in the petition are the 10
19 issues in this case. Thank you. Oh, and
20 by the way, I do concur with what Counsel
21 said earlier in closing about willingness
22 to discuss any extensions that are
23 necessary to accommodate the Commission.

1 MR. LAURIE: Do you need a response
2 to that?

3 JUDGE GARNER: We'll get to the
4 extensions before we close out today. If
5 you do have a response to what's been
6 stated, I'll allow you to make one.

7 MR. LAURIE: We discussed, we filed
8 the federal court complaint, which
9 describes the treatment of Now by
10 BellSouth and other carriers. And we
11 expect, again, prospective relief in the
12 form -- again, we don't think that we
13 need to go to arbitration now, but if, in
14 the highly unlikely event that we do,
15 then we request prospective relief in the
16 form of more advantageous terms of an
17 arbitrated resale agreement because of
18 the misconduct of Bell.

19 As far as filing testimony,
20 there hasn't been any order to file
21 testimony, to my knowledge, and if the
22 Commission wants testimony filed, just
23 let us know and we'll get it done. But,

1 again, we don't think that we even have
2 to get to that, because as a procedural
3 matter, we're not supposed to be here.

4 JUDGE GARNER: Well, I think what
5 Mr. Kitchings is referencing is the
6 requirement in the Commission's T rules
7 regarding petitions for arbitration,
8 specifically Rule T-26 that does require
9 filing of testimony with your response
10 and also requires on the front end, when
11 the petition is filed, the petitioning
12 party has to include prefiled testimony
13 at that time. But as you've said, we've
14 got to deal with the threshold issue
15 first before we get to that, so that, for
16 the moment, is what we've got to address
17 before we look at the other issues, but
18 we do have that issue on record.

19 MR. KITCHINGS: Thank you.

20 JUDGE GARNER: All right. Before we
21 talk about possible extensions, are there
22 any other points that the parties want to
23 make?

1 MR. LAURIE: No, sir.

2 MR. KITCHINGS: None for BellSouth,
3 Your Honor.

4 JUDGE GARNER: Well, I thought I had
5 a pretty good handle on this before I
6 came in here this morning, but now I'm
7 not quite so sure. So what I'm going to
8 do is take the matter under advisement,
9 and I will discuss with the court
10 reporter getting something of a expedited
11 copy of the transcript. Because of that,
12 I think we do need to talk about
13 extensions because we've got to deal with
14 this threshold issue before anything else
15 transpires, and if decision is to
16 dismiss, we won't be concerned with an
17 extension because it won't matter. But
18 in the event that we do, I take it the
19 parties are amenable to extensions.

20 MR. LAURIE: Yes, Your Honor.

21 MR. KITCHINGS: Yes, Your Honor.

22 JUDGE GARNER: Based on what's been
23 said this morning?

1 MR. LAURIE: Yes, Your Honor.

2 MR. KITCHINGS: Yes, Your Honor.

3 JUDGE GARNER: Have you had any
4 thought on what you consider a reasonable
5 extension, 30, 60, 90 days?

6 MR. LAURIE: Yes, Your Honor,
7 something in that range would be amenable
8 to Now, again, without waiving its
9 position.

10 MR. KITCHINGS: I have not spoken
11 with Counsel opposite on that, but
12 something in that range would be
13 acceptable to BellSouth as well.

14 JUDGE GARNER: We certainly don't
15 want to drag it out any longer than we
16 had to anyway. We do have a
17 responsibility to address these matters
18 in an expeditious fashion, so we would
19 make every effort to do. So I think for
20 going forward purposes, I would need to
21 address the issues of the threshold
22 nature that have been raised this morning
23 so the parties will be in a position to

1 know what they have to do and so will the
2 Commission, so I will endeavor to do that
3 as quickly as we can.

4 MR. LAURIE: Thank you, Your Honor.

5 MR. KITCHINGS: Thank you.

6 JUDGE GARNER: We have the BellSouth
7 Exhibit 1 and the Now Communications
8 Exhibit 1 that are a part of the record
9 in this proceeding. Anything else that
10 needs to be addressed before we close out
11 this morning?

12 MR. KITCHINGS: Not on the BellSouth
13 side, Your Honor.

14 JUDGE GARNER: If not, the matter is
15 taken under advisement, and that will
16 conclude the pre-hearing conference.
17 (Whereupon, the hearing was concluded.)
18
19
20
21
22
23

ATTACHMENT 4

May 5, 2000

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

VIA HAND DELIVERY

**Re: PETITION FOR ARBITRATION OF THE INTERCONNECTION AGREEMENT BETWEEN
BELLSOUTH TELECOMMUNICATION, INC. AND NOW COMMUNICATIONS, INC.
PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996
DOCKET NO. 00-00141**

Dear Mr. Waddell:

On April 18, 2000, NOW Communications, Inc. filed its Memorandum In Support of its motion to dismiss the petition of BellSouth Telecommunications, Inc. for arbitration filed in the referenced docket. In that Memorandum, it was stated that "the initial [Resale] agreement of the parties has been extended by its terms until June 1, 2000." (Memorandum, p. 2.) This statement was merely made for argumentative purposes only. This letter is submitted as a clarification about this point. Although it is not necessarily material to the issue currently pending, NOW's position is and always has been that the agreement has been extended by operation of its provisions until June 1, 2001.

Mr. K. David Waddell
May 5, 2000
Page 2

This letter is intended as an official TRA filing, and, accordingly, thirteen (13) copies are attached herewith. If you have any questions or concerns regarding the information contained in this letter, please feel free to contact me.

Very truly yours,,

**FARRIS, MATHEWS, BRANAN,
BOBANGO & HELLEN, P.L.C.**

Charles B. Welch, Jr.

CBW:ccw

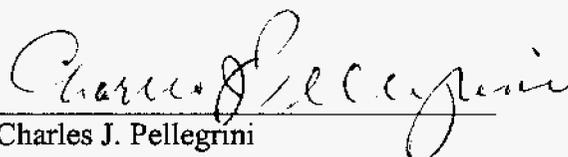
CC: R. Scott Seab
Carroll H. Ingram
Jennifer I. Wilkinson
James Mingee, II
Richard Collier, Esquire
Guy M. Hicks, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, Now Communications, Inc.'s Motion for Leave to Submit Information Supplementary to its Motion for Determination of Preliminary Matter, has been served by hand delivery this 5th day of May, 2000, on the following:

Ms. Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301-1556

Mr. Tim Vaccaro
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850



Charles J. Pellegrini