

MICHAEL P. GOGGIN  
General Attorney

BellSouth Telecommunications, Inc.  
150 South Monroe Street  
Room 400  
Tallahassee, Florida 32301  
(305) 347-5561

ORIGINAL

May 10, 2000

Mrs. Blanca S. Bayó  
Director, Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

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Re: Docket No. 000262-TP (NOW Communications, Inc.)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to NOW Communications, Inc.'s Motion for Determination of Preliminary Matter by the Prehearing Officer or, in the Alternative, by the Commission Panel, which we ask that you file in the above-referenced matter.

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,

*Michael P. Goggin*  
Michael P. Goggin (sal)

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

AFA \_\_\_\_\_  
APP \_\_\_\_\_  
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**Certificate of Service**  
**Docket No. 000262-TP (NOW Communications)**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 10th day of May, 2000 to the following:

Timothy Vaccaro  
Staff Counsel  
Florida Public Service Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
Tel. No. (850) 413-  
Fax. No. (850) 413-

James Mingee, III  
McKay & Simpson  
4084 Coker Road  
Madison, MS 39110  
Tel. No. (601) 856-1768  
Fax. No. (601) 856-5720  
E-mail: mingeelaw@aol.com

NOW, L.L.C.  
Attention: Larry Seab  
713 Country Place Drive  
Jackson, Mississippi 39203

  
Michael P. Goggin

Carroll H. Ingram, Esq.  
Ingram & Associates, PLLC  
211 South 29<sup>th</sup> Avenue  
Post Office Box 15039  
Hattiesburg, Mississippi 39404-5039  
Tel. No. (601) 261-1385  
Fax. No. (601) 261-1393  
E-Mail: ingram@netdoor.com

Jennifer I. Wilkinson  
Ingram & Associates, PLLC  
4273 I-55 North  
P.O. Box 13466  
Jackson, Mississippi 39236-3466  
Tel. No. (601) 713-0062  
Fax. No. (601) 713-0404  
E-Mail: Jenningram@aol.com

In re: ) Docket No. 992018-TP  
 )  
 Petition for Arbitration of the Interconnection )  
 Agreement Between BellSouth Telecommunications, )  
 Inc. and NOW Communications, Inc. Pursuant to the )  
 Telecommunications Act of 1996. )  
 ) Filed: May 10, 2000

**RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC. TO NOW  
 COMMUNICATIONS, INC.'S MOTION FOR DETERMINATION OF  
 PRELIMINARY MATTER BY THE PREHEARING OFFICER OR, IN THE  
 ALTERNATIVE, BY THE COMMISSION PANEL**

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds to NOW Communications, Inc.'s ("NOW's") Motion for Determination of Preliminary Matter by the Prehearing Officer, or, in the Alternative, by the Commission Panel ("Motion").

1. On March 17, 2000, NOW filed a motion to dismiss BellSouth's arbitration petition in this matter. In its motion to dismiss, NOW claimed that the parties had agreed to begin negotiations toward a new resale agreement for purposes of Section 252 of the Telecommunications Act (the "Act") on August 20, 1999. In that motion, NOW claimed (erroneously)<sup>1</sup> that BellSouth's petition for arbitration was time-barred because it allegedly had been filed after the statutory period permitting such a petition had passed. Now NOW has changed its tune, and claims that the parties' old contract will not expire until 2001 and that it never

<sup>1</sup> As BellSouth demonstrated in its response to NOW's motion to dismiss, NOW specifically acknowledged that negotiations had begun on August 20, 1999, and asked BellSouth to agree to extend the negotiation period by 30 days, effectively agreeing that the negotiations were begun 30 days later, on September 19, 1999. After BellSouth agreed to NOW's request, the parties failed to reach a final agreement on all issues in their new resale agreement and BellSouth timely filed its arbitration petition. In its motion to dismiss,

agreed to a Section 251 negotiation. In other words, BellSouth's petition is not late, as NOW claimed then, in its motion to dismiss, the petition is early, as NOW claims now. NOW was wrong then, and NOW is wrong now.

2. The undisputed facts belie NOW's assertions that the parties' 1997 contract will remain in effect until 2001. The parties agree that they entered into a resale agreement (the Agreement) on or about June 1, 1997, with a two year term. Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration (the "Petition" or "Pet.") (filed Feb. 25, 2000) at ¶ 5; Response to Petition ("Resp.") (filed March 20, 2000) at ¶ 22. NOW points out that the Agreement called for two automatic renewal periods of one year each. *Id.* In particular, the Agreement states, in Article I.B., that:

This Agreement shall be automatically renewed for two additional one year periods unless either party indicates its intent not to renew the Agreement. 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.

Resp. at Exh. 1.

3. On October 2, 1998, BellSouth provided written notice of its intent not to renew the Agreement that was to expire in May of 1999 by providing a copy of a new proposed resale agreement, as well as a proposed amendment to the Agreement to apply until the new agreement was negotiated. Pet. at ¶ 6. See Letter of Page Miller to Larry Seab dated October 2, 1998 (Attached as Exhibit A). NOW admits receiving this written communication from BellSouth.

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NOW apparently forgot to mention its request, and BellSouth's agreement, to extend the arbitration

Resp. at ¶ 23. Because no new agreement resulted from BellSouth's October 1998 notice, BellSouth sent a letter on August 20, 1999 formally notifying NOW of BellSouth's desire to enter into good faith negotiations toward a new agreement pursuant to the requirements of the Act. Pet. at Exh. A. In the August 20, 1999 letter, BellSouth stated its understanding that the parties' contract had expired on May, 31 1999. *Id.*

4. Even if it could be shown that BellSouth's written communications were not sufficient notice of its intent not to renew, through its actions, NOW ratified BellSouth's understanding that the Agreement had expired. In its letters, attached to BellSouth's petition, NOW makes clear its understanding that the arbitration period began on August 20, 1999, repeatedly requests extensions of that period, and, consistent with the terms of the expired Agreement, agrees that the parties should abide by the terms of the expired Agreement until a new agreement is in place. Pet. at Exhs. D, E, and F. NOW now asserts that "[i]t would have made no sense for NOW to have engaged in negotiations for a new resale agreement when it was operating under an effective operating agreement with significant remaining life." Motion at 2. This may be true in the abstract, but the reality, as made evident by NOW's own correspondence, is that NOW was negotiating a new resale agreement because it shared BellSouth's understanding that the Agreement expired in May of 1999.

5. NOW never indicated to BellSouth that it would contend that the Agreement had not expired until after BellSouth had filed its petition in this matter. Indeed, NOW did not even make such a claim in its initial responsive

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window.

filing in this matter, its motion to dismiss, filed on March 17. It was not until it filed its Response on March 20 that NOW, for the first time, began to claim that the contract did not expire in May 1999. If NOW believed that the Agreement had been automatically extended for two years as of June 1999, it likely would have been appropriate to say so in August 1999, in response to BellSouth's letter, which plainly stated that the Agreement was expired. By its silence on this point, and its subsequent actions, NOW ratified BellSouth's assertion that the Agreement had terminated.<sup>2</sup>

6. Even if NOW were correct in asserting that the Agreement did not expire in May 1999, it clearly is incorrect to suggest that the contract had an automatic two-year renewal. The contract language quoted above clearly allows for up to two extensions of one year each. Accordingly, even if the Agreement had not expired last May, it certainly would expire this May. Although NOW should not be heard to claim at this point that it did not understand BellSouth's earlier written intent not to renew, in an abundance of caution, BellSouth sent additional written notice on March 30, 2000 of its intent to terminate the agreement. See Letter of Page Miller to Larry Seab dated March 30, 2000 (Attached as Exhibit B). Accordingly, even if NOW's new claim that it had not received written notice of BellSouth's intent not to renew could be believed, it

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<sup>2</sup> The Commission should disregard NOW's suggestion that it was only engaging in negotiations over a new agreement as a possible vehicle for the settlement of separate litigation between NOW and BellSouth. That litigation, a purported class action brought by NOW to avoid being cut off for failure to pay BellSouth for its services, resulted in an agreement by BellSouth to an injunction prohibiting BellSouth from terminating NOW's service provided NOW paid \$1.7 million owed to BellSouth into the court. The injunction was later dissolved—BellSouth agreed to waive late fees and the entire \$1.7 million owed was paid to BellSouth. The suit was dismissed by the court. BellSouth repeatedly made clear in the course of the negotiation of the new resale agreement that the negotiations had nothing whatsoever to do with any

would only mean that the Agreement would expire at the end of the first one year extension period, or May 31, 2000 – about three weeks from now.

7. Regardless of whether the Commission determines that the Agreement expired in May 1999, as both parties had believed until recently, or that it was automatically extended, as NOW now claims (and would thus expire in May 2000), the agreement will expire before the Commission has heard this arbitration petition, and the parties will need a new agreement. In addition, BellSouth and NOW clearly agreed that negotiations pursuant to the act had begun and that the arbitration window would close after February 25, 2000, the day BellSouth's petition was timely filed. Accordingly, BellSouth disagrees with NOW's statement that regardless of what the Commission decides about the expiration of the Agreement, "there would be nothing at this time to be arbitrated by the Commission." Motion at 2. Indeed, by asking for such a ruling, NOW is merely seeking through the Commission what the Agreement does not allow them – an extension of the Agreement. The Commission should not fall for this ploy. The issues raised in BellSouth's petition are ripe for determination and the Act obligates the Commission to decide them.

8. BellSouth does not object to having NOW's Motion decided as a preliminary matter, but suggests that it should be determined by a Commission panel, rather than the Prehearing Officer, insofar as NOW's motion is not merely a procedural matter, but a second attempt to dismiss BellSouth's Petition

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desire on the part NOW for some form of compensation to settle the litigation. See Resp. at Exhs. 9, 9a; Pet. at Exh. C.

altogether.<sup>3</sup> BellSouth sees no justification for putting off consideration of NOW's earlier-filed motion to dismiss. If NOW does not want the Commission to rule on its motion to dismiss, it should be withdrawn. BellSouth does not believe that either motion justifies the dismissal of its Petition, and sees no reason why the Commission should not dispose of both of them to permit the parties and the staff to prepare for the arbitration proceeding without further delay or distraction.

For all of the foregoing reasons, BellSouth requests that NOW's Motion for Determination of Preliminary Matter be denied.

Respectfully submitted this 10th day of May, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.



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NANCY B. WHITE (BWI)  
MICHAEL P. GOGGIN  
c/o Nancy Sims  
150 South Monroe Street, #400  
Tallahassee, Florida 32301  
(305) 347-5558



---

R. DOUGLAS LACKEY (RWL)  
A. LANGLEY KITCHINGS  
675 West Peachtree Street, #4300  
Atlanta, Georgia 30375  
(404) 335-0747

212122

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<sup>3</sup> Of course, to the extent NOW takes issue with facts as BellSouth has related them, it might be necessary to decide this "preliminary matter" after the hearing to permit the parties to produce evidence on the disputed issues.



**BellSouth Interconnection Services**

675 West Peachtree Street  
Room 34S91  
Atlanta, Georgia 30375

Page Miller  
(404) 927-1377  
Fax: (404) 927-8324

October 2, 1998

Mr. Larry Seab  
President  
NOW Communications, Inc.  
713 Country Place Drive  
Jackson, MS 39208

Dear Mr. Seab,

Enclosed herein for your review and signature are two copies of an Amendment to your current Resale Agreement with BellSouth Telecommunications, Inc. dated June 1, 1997. This Amendment incorporates the Operational Support Systems rates into your current agreement by replacing Section III. S. of the agreement as well as amending Exhibit A to include the OSS rate table.

Please note that the State Commissions in three of the BellSouth states, have ordered OSS rates. In the remaining states, BellSouth is proposing interim rates which are subject to true-up. These interim rates are very much in line with the rates that have already been established in the other three BellSouth states.

Please review this amendment and sign both copies. Retain one copy of the amendment for your files and return one signed copy to me. I will then have the Amendment filed with the appropriate state regulatory agencies.

Also, as a courtesy, I have enclosed a copy of BellSouth's current Resale Agreement for your review. Please note that we have had a number of changes to our standard agreement that may be of interest to your company. If you are interested in signing a new agreement with BellSouth, please give me a call at (404) 927-1377. Of course, if you are interested in signing a new agreement, there is no need for you to sign the enclosed amendment.

If you have any questions, please do not hesitate to call me.

Sincerely,



Page Miller  
Manager - Interconnection Services/Pricing

Enclosures

**EXHIBIT A**

**FedEx** USA Airbill

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Sender's Copy

1 From (please print and press hard)

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Phone: HOU 927-1371

Company: BELL SOUTH/PRICING DEPT

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City: ATLANTA State: GA ZIP: 30375

2 Your Internal Billing Reference Information

3 To (please print and press hard)

Recipient's Name: Larry Seab

Phone: LOT 9695000

Company: Now Communication

Address: 713 Country Place Drive

City: Jackson State: MS ZIP: 39208

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Hold Saturday

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 FedEx Express Saver Freight

6 Packaging  
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 FedEx Pak  
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 No Aerosols  
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 No Explosives  
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| Department | _____                    | Company     | _____                 |
| Date       | <u>5-9-00</u>            | Fax         | <u>305-577-4491</u>   |
| Fax        | _____                    | Phone       | _____                 |
| Phone      | <u>404-927-7562</u>      | Total Pages | <u>7</u>              |

Message

Michael - Here is the NOW.  
 Correspondence you were  
 looking for from Page  
 Miller. Please call if you  
 have any questions.

**BellSouth Interconnection Services**

675 West Peachtree Street  
Room 34S91  
Atlanta, Georgia 30375

Page Miller  
(404) 927-1377  
Fax: (404) 927-8324

March 30, 2000

**Via Federal Express and Facsimile**

Mr. Larry Seab  
President  
NOW Communications, Inc.  
713 Country Place Drive  
Jackson, MS 39208

***RE: Request that NOW Communications, Inc. engage in negotiations with BellSouth Telecommunications, Inc. pursuant to Section 251(c)(1) of the Telecommunications Act of 1996 and Section 1 of the Resale Agreement Between NOW Communications, Inc. and BellSouth Telecommunications, Inc.***

Dear Mr. Seab:

As you are aware, BellSouth Telecommunications, Inc. ("BellSouth") and NOW Communications, Inc. ("NOW") entered into a resale agreement on June 1, 1997 for the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. Section 1 of the agreement sets forth the Term of the agreement as follows.

A. The term of this Agreement shall be two years beginning June 1, 1997 and shall apply to all of BellSouth's serving territory as of June 1, 1997 in the state(s) of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

B. This Agreement shall be automatically renewed for two additional one year periods unless either party indicates its intent not to renew the Agreement. 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.

Although BellSouth corresponded as early as October 1998 regarding a new standard resale agreement and subsequently formalized the request to begin negotiations in a letter dated August 20, 1999, NOW contends that BellSouth has not fulfilled its obligation with regards to requesting renegotiation of the June 1, 1997 agreement. Despite the fact that BellSouth and NOW have previously been negotiating toward a new resale agreement to replace the existing agreement, in light of NOW's contentions with respect to notice, BellSouth is sending this letter. Therefore, pursuant to the terms in Section 1 of the Agreement and in compliance with Section 251(c)(1) of the Communications Act of 1934, as amended ("Act"), BellSouth

**EXHIBIT B**

is hereby providing NOW formal written notification that it does not intend to renew the Agreement for an additional one year period.

Even though the parties are in arbitration, BellSouth, as previously indicated, is still willing to continue negotiating with NOW toward a new resale agreement.

If you have any questions, please do not hesitate to call me.

Sincerely,

A handwritten signature in cursive script that reads "Page Miller".

Page Miller  
Manager - Interconnection Services/Pricing

cc: Thomas B. Alexander  
Langley Kitchings

**FedEx** USA Airbill **816510595606**

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 Company **BELL SOUTH/PRICING DEPT**  
 Address **675 W PEACHTREE ST STE 34591**  
 City **ATLANTA** State **GA** ZIP **30375**

2 Year-Initial Billing Reference  
 First 20 characters will appear on invoice

3 To  
 Recipient's Name **Larry Seab** Phone **(601) 949-7500**  
 Company **Now Communications**  
 Address **713 Country Place Drive**  
 City **Jackson** State **MS** ZIP **39208**

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| 339 | TX   |     |       |

| DATE/TIME | TIME  | DISTANT STATION ID | PAGES   | RESULT | ERROR PAGES | S. CODE |
|-----------|-------|--------------------|---------|--------|-------------|---------|
| 03/30     | 15:47 | 001969 6656        | 003/003 | OK     |             | 0000    |



Bellsouth Interconnection Services

Facsimile

**From**  
**Department**  
**Address**  
**Telephone Number**  
**Fax Number**

Page Miller  
 Interconnection Services  
 675 W Peachtree St. NE  
 34501  
 Atlanta, Georgia 30375  
 404 827-1377  
 404 529-7839

**To**

Larry Seab  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Telephone Number** 801-949-7500  
**Fax Number** 801-969-8658

**Comments**

Larry: Please see the attached letter regarding renegotiations. Thanks. Rene 4/4.