

ORIGINAL

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October 7, 2003

Mrs. Blanca S. Bayó  
Director, Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

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**Re: Docket No. 030513-TP: In re: Request by Essex Acquisition Corporation for waiver of carrier selection requirements of Rule 25-4.118, F.A.C., for transfer of local and long distance customers from NOW Communications, Inc.**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Objection to Motion to Dismiss Protest/Request For Clarification of Proposed Agency Action and Petition for Leave to Intervene, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

*James Meza III*  
James Meza III (KAB)

AUS  
CAF  
CMP  
COM  
CTR  
ECR  
GCL  
OPC  
MMS  
SEC  
OTH

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

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**CERTIFICATE OF SERVICE**  
**Docket No. 030513-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via  
Electronic Mail, (\*) Federal Express and First Class U. S. Mail this 7th day of October,  
2003 to the following:

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Request by Essex Acquisition	)	<b>Docket No. 030513-TP</b>
Corporation for waiver of carrier	)	
selection requirements of Rule 25-4.118,	)	
F.A.C., for transfer of local and long	)	
distance customers from NOW	)	
<u>Communications, Inc.</u>	)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S OBJECTION TO  
MOTION TO DISMISS PROTEST/REQUEST FOR CLARIFICATION OF  
PROPOSED AGENCY ACTION AND PETITION FOR LEAVE TO  
INTERVENE**

BellSouth Telecommunications, Inc. ("BellSouth") hereby files this objection (the "Objection") to the Motion to Dismiss Protest/Request for Clarification of Proposed Agency Action and Petition for Leave to Intervene (the "Motion to Dismiss"). In support of its Objection, BellSouth states as follows:

**Preliminary Statement**

1. BellSouth has satisfied the standards to intervene in this Proceeding as well as the standards to request an evidentiary hearing in this proceeding. As explained herein, NOW Communications, Inc. ("NOW") and Essex Acquisition Corp. d/b/a/ VeraNet Solutions ("VeraNet") are engaging in improper, and possibly fraudulent, activity in an effort to avoid paying BellSouth for services that BellSouth provided to NOW pursuant to the 1996 Telecommunications Act (the "1996 Act"). Condoning the activities of NOW and VeraNet would contravene public policy and frustrate the competitive environment for the provision of telecommunication services in Florida by allowing parties to obtain the benefits (BellSouth's wholesale service) without assuming the burdens (paying for such service) of the 1996 Act.

## Statement of Facts

### **A. Procedural Background**

2. On June 9, 2003, NOW and VeraNet (collectively, the “Petitioners”) commenced the instant proceeding seeking, on an expedited basis, the Florida Public Service Commission’s (the “Commission”) authorization for NOW to transfer certain assets to VeraNet as well as a waiver of the carrier selection requirements related to such transfer (the “Application”). On July 24, 2003, the Florida Public Service Commission Staff (the “Staff”) recommended that the Commission waive the carrier selection requirements, which the Commission approved at the August 5, 2003 agenda conference. On August 22, 2003, the Commission memorialized this finding in Order No. PSC-03-0956-PAA-TP (the “Preliminary Order”). The Preliminary Order granted NOW a waiver of the carrier selection requirements on a preliminary basis, subject to the filing of a petition. In response thereto, BellSouth, on September 10, 2003, timely filed its Protest/Request for Clarification of Proposed Agency Action (the “BellSouth Protest”), and, on September 12, 2003, timely filed its Petition for Leave to Intervene (the “BellSouth Petition for Intervention,” and collectively with the BellSouth Protest, the “BellSouth Pleadings”). The Petitioners responded on September 22, 2003 by filing the Motion to Dismiss.

### **B. Factual Background**

3. The factual background of this matter is set forth in the BellSouth Pleadings, including the exhibits attached thereto. In addition, attached hereto as Exhibit A and incorporated herein by reference is a copy of the Supplemental Objection of BellSouth Telecommunications, Inc. to Debtor’s Motion to

Sell Substantially All of Its Assets Pursuant to 11 U.S.C. Section 363(b) and (f), Free and Clear of Liens (the “Supplemental Sale Objection”), filed on September 29, 2003 by BellSouth in NOW’s bankruptcy case currently pending before the United States Bankruptcy Court for the Southern District of Mississippi, Case No. 03-01336 (the “Bankruptcy Case”). The Supplemental Sale Objection sets forth in detail the scheme of the Petitioners, joined by VeraNet’s affiliates NOW Acquisition Corp. (“NAC”) and BiznessOnline.com, Inc. (“Biz,” and collectively with VeraNet and NAC, the “VeraNet Parties”), as well as MCG Capital Corporation, a lender who has provided separate financing to NOW and the VeraNet Parties, to circumvent the letter and purpose of the bankruptcy laws and the 1996 Act, as well as their egregious conduct in furtherance of such scheme. BellSouth filed the Supplemental Sale Objection primarily as the result of discovery taken by BellSouth in the Bankruptcy Case.

#### **Argument**

4. The Petitioners incorrectly assert in the Motion to Dismiss that BellSouth “fails to state adequately, and provide support for, a cause of action upon which relief may be granted.” Motion to Dismiss at p. 3. In support, the Petitioners raise two primary arguments: (1) that the BellSouth Pleadings failed to meet the technical requirements of Rule 28-106.201(2) of the Florida Administrative Code; and (2) that the issues raised in the BellSouth Pleadings should be heard before the Bankruptcy Court and are not related to the Commission’s “primary concern” as to “whether [a] waiver of the carrier selection requirements is in the public interest.” Motion to Dismiss at p. 7. BellSouth addresses both of these arguments below.

**A. BellSouth Has Satisfied the Requirements to Intervene.**

5. In order to intervene in a Commission proceeding, Rule 28-106.205 requires (1) that the party seeking to intervene have a substantial interest in the proceeding; and (2) the party seeking intervention allege that the party is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the party are subject to determination or will be affected through the proceedings. See Florida Admin. Code R. 25-22.039.

6. BellSouth clearly meets the standards set forth above. A party has standing to intervene in a Commission proceeding if the party can meet a two prong test: (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Commission hearing; and (2) that his substantial injury is of type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2<sup>nd</sup> DCA 1981). The first prong of this test goes to the degree of injury, while the second prong deals with the nature of the injury suffered. Id.

7. Here, BellSouth has demonstrated, through the BellSouth Pleadings (including the exhibits attached thereto), as well as the Supplemental Sale Objection and this Objection, that BellSouth will suffer severe monetary and non-monetary injuries if the Commission grants the relief sought by the Petitioners. In addition, and as described in the following paragraphs, the substantial injury that BellSouth will suffer is of the type or nature that this Proceeding is designed to protect as granting the relief requested contravenes public policy and promotes anticompetitive behavior.

**B. BellSouth Has Satisfied the Technical Requirements for Its Protest and Its Petition for Intervention.**

8. Rule 28-106.205 invokes the pleading requirements of Rule 28-106.201(2). See Florida Admin. Code R. 28-106.205. Rule 28-106.201(2) of the Florida Administrative Code provides as follows:

All petitions filed under these rules shall contain:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposed during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

Florida Admin. Code R. 28-106.201(2).

9. The Petitioners state that BellSouth failed to comply with the requirements of sub-sections (c)-(f) of this Rule. For the reasons set forth below,

however, the Petitioners are incorrect. And, to the extent that the Commission finds that the BellSouth Pleadings are deficient in a particular area, BellSouth requests, pursuant to Rule 28-106.201(4) of the Florida Administrative Code, that it be granted leave to amend to cure any deficiencies.

**(i) Sub-Section (c)**

10. Rule 28-106.201(2)(c) of the Florida Administrative Code requires “[a] statement of when and how the petitioner received notice of the agency decision.” The BellSouth Pleadings establish that BellSouth is protesting the Preliminary Order, issued on August 22, 2003. BellSouth learned of this decision soon thereafter upon reviewing the Commission’s Order. To the extent necessary, BellSouth has supplemented and/or amended its arguments herein.

**(ii) Sub-Section (d)**

11. Rule 28-106.201(2)(d) of the Florida Administrative Code requires “[a] statement of all disputed issues of material fact. If there are none, the petition must so indicate.” Because BellSouth is still in the process of discovering additional facts about the Petitioners’ intended actions, BellSouth cannot identify every disputed issue of material fact at this time. Presently, BellSouth disputes the following issues of material fact as set forth by the Petitioners in their Application (page number references are to the particular pages of the Application): BellSouth disputes that VeraNet is acquiring certain assets of NOW (page 1); BellSouth disputes that the “expeditious approval of this Application will allow VeraNet promptly to assume responsibility for the service of NOW’s existing customer base without interruption of service or other inconveniences to Florida consumers” (pages 1-2); BellSouth



disputes that “VeraNet proposes to acquire certain assets of NOW and its operating subsidiaries in connection with a reorganization of NOW being overseen by the U.S. Bankruptcy Court for the Southern District of Mississippi” (page 3); BellSouth disputes that “MCG and the Seller have executed the Asset Purchase Agreement under which VeraNet will acquire assets of NOW as the assignee of MCG” (page 3); BellSouth disputes that “VeraNet will acquire all assets associated with the Seller’s telecommunications operations in Florida including, but not limited to, the Seller’s Florida telecommunications equipment, customer base and will adopt NOW’s tariff” (page 3); BellSouth disputes that “VeraNet has determined that the proposed acquisition of the Seller’s assets in the bankruptcy proceeding will enable it to commence operations in a cost-effective manner, thereby enhancing its competitive position and ability to provide an array of high quality services to consumers in Florida” (page 4); BellSouth disputes that “[a]lthough the proposed acquisition will result in a transfer of substantially all of the Seller’s assets to VeraNet, the Agreement will not involve a change in the manner in which NOW customers will receive their telecommunications services, and the transfer will be virtually seamless to customers” (page 4); BellSouth disputes that “customers will continue to receive the high quality, affordable telecommunications services that they presently receive” (page 4); BellSouth disputes that “VeraNet will adopt the terms and conditions of the existing Seller’s tariffs, thus providing a seamless transition for existing customers of NOW” (page 4); BellSouth disputes that “once the transaction is complete, NOW customers will receive service from VeraNet’s team of well-qualified telecommunications managers” (page 4); BellSouth disputes that “[t]o ensure a seamless transition and

avoid customer confusion or inconvenience, the Parties will notify customers of this transaction and of the change in carrier upon bankruptcy court approval, and prior to consummation of the transaction, consistent with all state and federal regulations and statutes” (page 4); BellSouth disputes that “VeraNet respectfully requests a waiver of Rule 25-4.118 so that it may consolidate the customer base of NOW with its own customer base, for the reasons set forth above” (page 4); BellSouth disputes that “[i]n the circumstances described in this Application, it is in the public interest to waive the carrier selection requirements of Rule 24-4.118, Florida Administrative Code” (Page 5); BellSouth disputes that “[i]t would be unfair to hold VeraNet to requirements that plainly do not address its particular situation and with which it cannot reasonable comply” (page 5); BellSouth disputes that “VeraNet and NOW have provided for a seamless transition while ensuring that customer s understand available choices with the least amount of disruption to customers” (page 5); BellSouth disputes that “VeraNet and NOW believe that if prior authorization is required in this case, customers may fail to respond to a request for authorization, neglect to select another carrier, and thus lose their service” (page 5); BellSouth disputes that “enforcement of the requirements of Rule 25-4.118, Florida Administrative Code, will result in a substantial hardship for the company” (page 5); BellSouth disputes that “[e]nforcement of the requirement that a customer’s provider not be changed without the customer’s authorization would potentially subject VeraNet to significant penalties if the affected customers filed slamming complaints and the company was ordered to show cause based on the customer’s complaints” (page 5); BellSouth disputes that “telecommunications services in Florida, in general, and for NOW

customers in particular, will realize significant public interest benefits from VeraNet's acquisition of the certificate and assets of NOW, including NOW's customer base" (page 5); BellSouth disputes that "[t]he proposed transaction will enable NOW's customers to continue to receive high quality, competitively priced telecommunications services without interruption" (page 5); BellSouth disputes that "the proposed asset acquisition will promote competition in Florida by enhancing VeraNet's ability to take advantage of certain efficiencies that will support expanded services and more competitive rates" (page 5); BellSouth disputes that "[b]y creating a more effective and multifaceted telecommunications carrier, the proposed transaction will expand competitive choices for U.S. Telecommunications customers, including customers in Florida" (pages 5-6); BellSouth disputes that "[t]he Parties hope to complete the proposed acquisition as quickly as possible in order to avoid any interruption of service or other inconvenience to NOW's existing customers" (page 6); BellSouth disputes that "[i]n the event that NOW's service is disrupted, these residential customers have few, if any, alternatives for local dial tone telephone service"(page 6); and BellSouth disputes that "[a]ny delay in approving the transaction risks service disruption for the thousands of residential customers that rely on NOW for their local dial tone telephone service in the State of Florida" (page 6).

**(iii) Sub-Section (e)**

12. Rule 28-106.201(2)(e) of the Florida Administrative Code requires "[a] concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action."

13. As set forth in the BellSouth Pleadings and the exhibits attached thereto, BellSouth contends that the proposed sale of NOW's assets is subject to approval of the Bankruptcy Court overseeing the Bankruptcy Case. A hearing on whether or not the sale of NOW's assets should be approved, as well as whether certain motions by BellSouth seeking various forms of relief (including termination of the existing interconnection agreements and commencement of proceedings to terminate service ) is currently scheduled for October 22 and 24, 2003. As such, no sale of NOW's assets has been approved to any buyer at this time. MCG is seeking to acquire certain assets of NOW by credit bidding at an auction the amount owed by NOW to MCG. In a transaction that was concealed from the Bankruptcy Court by NOW, MCG and the VeraNet Parties, MCG will assign the assets it acquires from NOW, or its right to acquire them with its credit bid, to NAC (not VeraNet). This improper secret agreement between MCG and NAC, the purpose and effect of which is to frustrate the fundamental purpose of the auction process, and in particular the auction for the sale of NOW's assets - that being the absence of agreements to control the outcome of the auction or the price of the auction or the identity of the auction winner, directly violates section 363(n) of Title 11, United States Code (the "Bankruptcy Code"), and entitles NOW's estate (for the benefit of its creditors) to substantial damages, including punitive damages. In fact, it was not until discovery undertaken in August that BellSouth became aware of the fact that MCG had reached an agreement with an unaffiliated entity (NAC) to dispose of the NOW assets once it acquired them. These facts and others are set forth in detail in the exhibits to the BellSouth Pleadings as well as in the Supplemental Sale Objection attached hereto.

14. More relevant to this proceeding than the above-referenced hidden agreement in violation of section 363(n) of the Bankruptcy Code is the Petitioners' scheme to obtain through the regulatory process a new interconnection agreement with BellSouth in order to directly circumvent the requirements of the Bankruptcy Code for assignment of contracts which requires curing all defaults. In essence, NOW, utilizing the benefits of the 1996 Act which enabled it to acquire interconnection agreements with BellSouth, purchased services from BellSouth that NOW re-sold to its customers. NOW charged its customers for such service and collected money from its customers. However, it failed to pay BellSouth for such services. NOW now wants to assign the benefits of the defaulted interconnection agreements to the VeraNet Parties without curing the substantial arrearages owed thereunder as required under section 365 of the Bankruptcy Code.

15. The plan devised by NOW, the VeraNet Parties and MCG to accomplish this circumvention of the "cure" requirements of the Bankruptcy Code, dubbed the "harvest strategy" in numerous E-mails between them which are attached as exhibits to the Supplemental Sale Objection, is for the VeraNet Parties to obtain (surreptitiously if possible) their own interconnection agreements with BellSouth, then migrate both NOW's customers and new customers that are signed up by NOW to the new interconnection agreements, thus avoiding the necessity of taking an assignment of the existing interconnection agreements with their substantial "cure" requirement. It is noteworthy that if the "harvest" is successful, NOW's five most senior executives receive 3-year guaranteed employment contracts with bonuses equal to half their annual salaries, while BellSouth is left with no return on its substantial

claim while forced to do business with NOW's assignee. In other words, MCG gets its debt paid in full (plus potentially profit on the resale to the VeraNet Parties), the executives get rich and BellSouth gets nothing.

16. Should this Commission condone the relief requested by the Petitioners, the Commission would be fostering the ability of (a) CLEC-1 to obtain service from BellSouth to service CLEC-1's customers, (b) CLEC-1 not to compensate BellSouth for such service while CLEC-1 continues to retain the money it collects from its own customers, (c) CLEC-1, when BellSouth seeks to collect what it is owed, to simply transfer its customer base to CLEC-2 to service while BellSouth is stayed from terminating the agreements and the service due to CLEC-1's bankruptcy, and (d) CLEC-2 to obtain compulsory service from BellSouth without first satisfying the debt that CLEC-1 owed to BellSouth for that same customer base. If CLEC-2 cannot then pay its bills, what is to stop CLEC-2 from simply transferring its customer base to CLEC-3 and so on? In fact if CLEC-2 can compel BellSouth to provide service, what is to stop CLEC-1, after defaulting on its agreements, from just seeking a new interconnection agreement and transferring its customer base to itself without even involving a CLEC-2? Approval of these devices could never been the intended purpose of the 1996 Act.

17. The Supplemental Sale Objection details other egregious acts committed by either NOW, MCG or the VeraNet parties in furtherance of their goals. Not only do these facts warrant reversal of the Preliminary Order, they warrant denial of relief requested by the Petitioners, as well as possibly other relief regarding NOW's and the VeraNet Parties' actions regarding these matters.

(iv) **Sub-Section (f)**

18. Rule 28-106.201(2)(f) of the Florida Administrative Code requires “[a] statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency’s proposed action.”

19. BellSouth is still in the process of identifying the specific rules or statutes, if any, that support BellSouth’s request for reversal of the Preliminary Order. Nevertheless, as stated in the BellSouth Pleadings, BellSouth refers to Rule 24-4.118 of the Florida Administrative Code. In addition, BellSouth refers to Chapter 364.01(4), Florida Statutes.

**Conclusion**

20. In sum, BellSouth’s Petition for Intervention should be granted. In addition, BellSouth’s Protest of the Preliminary Order should not be dismissed and the Commission should establish an evidentiary hearing to investigate the matters raised herein.

**WHEREFORE**, BellSouth respectfully requests that the Commission deny the Motion to Dismiss, grant BellSouth Petition for Intervention, sustain BellSouth Protest, and grant such other and further relief as is just and proper.

Respectfully submitted this 7<sup>th</sup> day of October, 2003.

BELLSOUTH TELECOMMUNICATIONS, INC.

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# **EXHIBIT A**

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION**

U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI

03 SEP 29 AM 11:33

Clerk: JANE ANEDY

BY \_\_\_\_\_ DEPUTY

<b>In re:</b>	)	
	)	<b>Chapter 11</b>
<b>NOW COMMUNICATIONS, INC.</b>	)	
	)	<b>Case No 03-01336-JEE</b>
	)	
<b>Debtor.</b>	)	
_____	)	

**SUPPLEMENTAL OBJECTION OF BELLSOUTH  
TELECOMMUNICATIONS, INC. TO DEBTOR'S MOTION  
TO SELL SUBSTANTIALLY ALL OF ITS ASSETS PURSUANT  
TO 11 U.S.C. SECTION 363(b) AND (f), FREE AND CLEAR OF LIENS**

COMES NOW BellSouth Telecommunications, Inc. ("BellSouth"), and files this supplemental objection to the Debtor's Motion to Sell Substantially all of its Assets Pursuant to 11 U.S.C. Section 363(b) and (f), Free and Clear of all Claims and Liens (the "Sale Motion"), pursuant to sections 363 and 365 of Title 11, United States Code (the "Bankruptcy Code"). In support hereof, BellSouth respectfully shows the Court as follows:

**I. Preliminary Statement**

1. As this Court is aware, the Debtor currently is attempting to sell substantially all of its assets as a going-concern to "MCG Capital Corporation or its designee". See Sale Motion at p. 1. Subsequent to the filing of its objection to the Sale Motion (the "BellSouth Sale Objection"), BellSouth has learned, through discovery and other means, many of the undisclosed details of the Debtor's plan for this bankruptcy estate — undisclosed details that dispel any notion that the proposed sale is in the estate's best interests or that the sale has been conducted in good faith.

2. For example, BellSouth has learned that the true purchaser, a “newco” named NOW Acquisition Corp. (“NAC”), is a wholly-owned subsidiary of a company named BiznessOnline.com, Inc. (“Biz,” and collectively with NAC, “Biz/NAC”). See Request to Amend Joint Petition, jointly filed by the Debtor and NAC before the Mississippi Public Service Commission (the “PSC”) on July 18, 2003, at p. 3 of Exhibit A (Amended Joint Petition) thereto (“NAC is a wholly-owned subsidiary of BiznessOnline.com, Inc. . . .”).<sup>1</sup> Biz, however, is unaffiliated with MCG Capital Corporation (“MCG”), the Debtor’s lender and “straw man” purchaser. The working plan is for MCG to acquire the assets and simultaneously “flip” them (or simply assign the right to acquire them) to NAC pursuant to a separate agreement that has allegedly not been formalized in writing. See Request to Amend, at p. 2 of Exhibit A (Amended Joint Petition) thereto (“This request is being made as a result of the execution of an Asset Purchase Agreement . . . by NOW and MCG Capital Corporation . . . pursuant to which NAC, as MCG’s assignee under the Agreement, will acquire all of the assets of NOW and its subsidiaries.”) (emphasis added);<sup>2</sup> MCG Deposition,

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<sup>1</sup> A true and correct copy of the Request to Amend Joint Petition, with exhibits (the “Request to Amend”), is attached hereto as Exhibit “A”. All Exhibits hereto are incorporated herein by reference.

<sup>2</sup> Interestingly, neither the Debtor nor MCG have ever filed or produced an executed copy of the Asset Purchase Agreement (which was an exhibit to the Sale Motion), and in depositions neither could verify that it had in fact ever been executed. See 30(b)(6) Deposition of Larry W. Seab (the “Debtor Deposition”) at p. 46; 30(b)(6) Deposition of John Patton, Jr. (the “MCG Deposition”), Volume 2 at p. 36. True and correct copies of excerpts of the Debtor Deposition and the MCG Deposition containing the pages referenced herein are attached hereto as Exhibits “B” and “C,” respectively. The complete deposition transcripts for the Debtor Deposition and the MCG Deposition, as well as the 30(b)(6) Deposition of Ron Gavillet (the “Biz/NAC Deposition”) will be filed with the Court prior to the hearing scheduled for October 1, 2003.

Volume 2 at pp. 31-32; Biz/NAC Deposition at pp. 19-21.<sup>3</sup> In addition, BellSouth has learned that: (1) MCG and Biz/NAC have structured their deal such that MCG will be repaid, at a minimum, its full claim plus interest; (2) through a strategy clandestinely dubbed the “Harvest” strategy (explained below), Biz/NAC and the Debtor intend for Biz to obtain the services currently provided by BellSouth to the Debtor under the interconnection agreements between them (the “Interconnection Agreements”), the most significant asset of this estate, without assuming and assigning the Interconnection Agreements (which would require satisfying the substantial “cure” obligations owed to BellSouth and providing adequate assurance of future performance), notwithstanding the requirements of section 365 of the Bankruptcy Code; (3) the Debtor has already taken significant steps in furtherance of the proposed but unapproved sale to NAC and the integration of the two companies by permanently relocating several of its employees (including its CEO, Mr. Seab) to Biz’s offices in Florida and purchasing and paying for various services provided by a Biz subsidiary, Essex Acquisition Corporation (“Essex”), pursuant to an agreement between the Debtor and Essex;<sup>4</sup> and (4) five of the Debtor’s top employees (including its CEO, Larry Seab, its CFO, Charles McGuffey, and their sons) will obtain lucrative, guaranteed, multi-year employment agreements with closing bonuses (equal to half their annual salary) and personal debt assumption that will make them considerably wealthier than they ever were under the Debtor’s employ.

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<sup>3</sup> A true and correct copy of an excerpt of the Biz/NAC Deposition containing the pages referenced herein is attached hereto as Exhibit “D”.

<sup>4</sup> See Exhibit “D” (Biz/NAC Deposition) at p. 11.

3. Not surprisingly, these facts have never been disclosed by the Debtor.<sup>5</sup> Moreover, the Debtor has utterly failed to address the myriad of problems this sale presents for its estate. For example, the proposed sale is completely illusory because the buyer has no obligation whatsoever to close the transaction. Among other things, the buyer's obligation to close is conditioned upon an assumption of the Interconnection Agreements. See Asset Purchase Agreement at § 5.2(g). The Debtor, however, no longer is even seeking assumption of the Interconnection Agreements because it is unable or unwilling to pay the "cure".

4. Additionally, upon closing of this sale (if that ever occurs), the Debtor's estate will immediately be rendered administratively insolvent, leaving innocent suppliers of post-petition goods and services to the Debtor without any satisfaction of their post-petition claims unless they happen to have a contract with the Debtor being assumed. Similarly, unsecured creditors (both priority and non-priority) have no hope of obtaining anything other than a zero return on their claims.<sup>6</sup>

5. Finally, based upon the "back door" dealings between MCG and Biz/NAC whereby Biz/NAC has agreed to stay out of the bidding process altogether and allow MCG to purchase the Debtor's assets using only its credit bid and then simultaneously or subsequently resell the assets to Biz (with a possible profit to MCG), it is abundantly clear

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<sup>5</sup> Buried in a schedule to the Asset Purchase Agreement is an outline of the salary and closing bonus to be paid to these five employees. However, the other terms that had been negotiated (such as the term of the agreements, their guaranteed nature, assumption of debts owed to them or their companies, satisfaction of debts they guaranteed, etc.) were not disclosed, nor was any mention of this made in the Sale Motion itself.

<sup>6</sup> Interestingly, the original proposal from MCG would have provided a few hundred thousand dollars for unsecureds. See Bid to Purchase Selected Assets of NOW Communications submitted by MCG Finance Corporation or its Assigns at § 1(g). A true and correct copy of that document is attached hereto as Exhibit "E". This "set aside" for unsecureds appears to have been deleted in favor of the closing bonuses for the key executives.

that the parties have entered into an agreement intended to control the sale price of the Debtor's assets in direct violation of section 363(n) of the Bankruptcy Code. Not only does this conduct dictate that the sale should not be approved, but it also constitutes the type of misconduct and collusion that courts look to when equitably subordinating claims pursuant to section 510(c) of the Bankruptcy Code. Under these circumstances, and for the reasons described below and in the BellSouth Sale Objection (as defined below), the Court should deny the relief requested in the Sale Motion.

## **II. Factual Background**

### **A. The Sale Motion and BellSouth Objection**

6. On May 23, 2003, the Debtor filed the Sale Motion, pursuant to which it seeks authority to sell substantially all of its assets pursuant to section 363 of the Bankruptcy Code. Attached to the Sale Motion is the proposed Asset Purchase Agreement between the Debtor, as seller, and MCG "or its designee," as purchaser (the "Asset Purchase Agreement").

7. On June 12, 2003, BellSouth filed the BellSouth Sale Objection, whereby it objected to the Sale Motion, as well as to a related bid procedures motion (the "Bid Procedures Motion"). The Court approved the Bid Procedures Motion (after requiring certain modifications) pursuant to an Order entered on July 3, 2003.

8. The Asset Purchase Agreement contemplates a purchase price of not less than \$4.6 million. MCG credit bid \$4.6 million against its alleged prepetition secured claim (alleged to be in an equal amount) at an auction sale of the assets conducted by the Debtor on August 5, 2003.

## **B. Other Pending Motions and Objections**

9. In addition to the BellSouth Sale Objection referenced above, BellSouth has filed various other pleadings designed to address the myriad of flaws present in the Debtor's current plans for this Chapter 11 case, including its intent to sell substantially all of the assets to MCG pursuant to the Asset Purchase Agreement.

10. Specifically, on July 23, 2003, BellSouth filed its Motion of BellSouth Telecommunications, Inc. for Order, Upon Any Approval of the Proposed Sale of Substantially All of Debtor's Assets, (i) Deeming Interconnection Agreement Rejected; or (ii) Granting Stay Relief to Terminate Interconnection Agreement (the "Deemed Rejection/Stay Relief Motion"). In the Deemed Rejection/Stay Relief Motion, BellSouth requested that, to the extent the Sale Motion is approved, the Interconnection Agreements should be deemed rejected or, in the alternative, BellSouth should be granted relief from the stay to terminate them, as the Debtor will cease to exist for all practical purposes, and thus will have no use for them, nor any ability to perform thereunder.

11. In addition, also on July 23, 2003, BellSouth filed its Motion of BellSouth Telecommunications Inc. for Order Compelling Debtor to Assume or Reject Interconnection Agreement (the "BellSouth Motion to Compel," and collectively with the Deemed Rejection/Stay Relief Motion, the "BellSouth Motions"). Among other things, BellSouth asserted therein that because the Interconnection Agreements are the central asset of the Debtor's estate, and because the Debtor has all of the information it needs to determine whether to assume or reject the Interconnection Agreements (and in fact has already made the decision to reject them), the Debtor should be compelled to seek assumption or rejection now, rather than delaying the inevitable rejection solely to keep BellSouth from terminating.

services thereunder while the Debtor attempts to circumvent section 365 of the Bankruptcy Code.<sup>7</sup>

12. In response, on September 9, 2002, the Debtor and MCG filed their answers and objections, respectively, to the BellSouth Motions (the “Debtor/MCG Responses”). In the Debtor/MCG Responses, MCG principally argued that even if the Interconnection Agreements are rejected, BellSouth, as a utility, could not terminate service.<sup>8</sup>

13. On September 23, 2003, BellSouth filed its reply to the Debtor/MCG Responses, wherein it asserted, with reference to applicable statutory and decisional authority, both that BellSouth could indeed terminate service if the Interconnection Agreements were rejected and that the relief requested in the BellSouth Motions was otherwise appropriate.

#### **C. The State Court Petitions and BellSouth’s Objections Thereto**

14. In connection with the Debtor’s sale efforts, the Debtor and NAC, on June 6, 2003, filed a joint petition seeking state regulatory approval of the requested sale of the Debtor’s assets to NAC and a “Certificate of Public Convenience and Necessity” (the “Certificate”) to allow NAC to provide certain telecommunications services in the State of Mississippi. Thereafter, on July 18, 2003, the Debtor and NAC jointly filed the Request to

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<sup>7</sup> On July 23, 2003, BellSouth also filed its Motion of BellSouth Telecommunications, Inc. for Order Converting Chapter 11 Case to Chapter 7 (the “Conversion Motion”). In the Conversion Motion, BellSouth argued, among other things, that because the Debtor has no ability to cure the defaults in the Interconnection Agreements, and because the Interconnection Agreements are central to the Debtor’s operations, the Debtor has no hope of proposing a feasible plan of reorganization. Accordingly, BellSouth requested that the Debtor’s Chapter 11 case be converted to a Chapter 7 case. The Conversion Motion has not yet been set for hearing.

<sup>8</sup> The Debtor did not assert any discernible legal theories pursuant to which the BellSouth Motions should be denied.



Amend (together with the Joint Petition, the "Joint Petitions") in order to clarify that instead of the previous request for authority to acquire the Certificate of the Debtor, the parties now were requesting that a Certificate be granted to NAC itself.<sup>9</sup>

15. BellSouth filed objections to the Joint Petition and the Request to Amend (collectively, the "Joint Petition Objections") wherein it asserted that: (a) any request for approval of the acquisition by NAC of any of the assets of the Debtor prior to this Court's approval of such acquisition is premature; (b) the Debtor's and NAC's request is in furtherance of joint efforts (with MCG) to circumvent the "cure" and "adequate assurance" requirements of section 365 of the Bankruptcy Code in connection with the assumption and assignment of the Interconnection Agreements with BellSouth; and (c) NAC does not meet certain of the requirements for the requested certification, namely, the lawful ability to serve customers in the State of Mississippi, because it has no interconnection agreement with BellSouth so as to be able to serve such customers.<sup>10</sup> The Joint Petitions remain pending at this time.

### **III. Supplemental Sale Objections**

16. BellSouth reasserts each of the objections (summarized in section IV below) set forth in the BellSouth Sale Objection as if fully set forth herein. BellSouth further

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<sup>9</sup> Similar petitions have been filed with the regulatory agencies in most other states in BellSouth's region. Where possible, BellSouth has intervened in those proceedings as well.

<sup>10</sup> On August 12, 2003, the Debtor filed a motion seeking to hold BellSouth in contempt for allegedly violating the automatic stay by: (i) filing the Joint Petition Objections; and (ii) allegedly "slamming" two the Debtor's customers (the "Contempt Motion"). On September 16, 2003, BellSouth filed its response to the Contempt Motion (the "Contempt Response"), wherein it denied the legal basis for the former assertion and the factual basis for the latter assertion. A preliminary hearing on the Contempt Motion and the Contempt Response has been scheduled for October 28, 2003.

asserts the following additional objections to the relief requested in the Sale Motion: (a) the proposed sale is not in the best interests of the Debtor's estate; (b) the proposed sale has not been conducted in good faith; and (c) the sale price does not represent fair value to the estate because MCG's alleged secured claim should be equitably subordinated pursuant to section 510(c) of the Bankruptcy Code for, among other things, entering into an agreement regarding the purchase of the Debtor's assets in violation of section 363(n) of the Bankruptcy Code.

**A. The Sale is Not in the Best Interest of the Estate**

17. Section 363(b) of the Bankruptcy Code provides for the sale, upon Court-approval, of a debtor's property outside of the ordinary course of business. See 11 U.S.C. 363(b)(1). However, any such sale must be, among other things, in the best interest of the debtor's bankruptcy estate. See In re Embrace Sys. Corp., 178 B.R. 112, 123 (Bankr. W.D. Mich. 1995) ("[a] sale of assets is appropriate if all provisions of section 363 are followed, the bid is fair, and the sale is in the best interests of the estate and its creditors"); In re Telesphere Comm., 179 B.R. 544, 552 (Bankr. N.D. Ill. 1994) ("the standard to be applied by the court in approving a disposition of assets...is that the proposed sale should be in the best interest of the estate"); In re Timberline Property Dev., Inc., 115 B.R. 787, 790 (Bankr. N.J. 1990) (approval under section 363 requires that a court "specifically find that such a sale is in the interest of creditors, is entered into in good faith, and is one in which the price represents fair value"); In re American Dev. Corp., 95 B.R. 735, 739 (Bankr. C.D. Cal. 1989) (stating that for a sale of debtor's assets outside the ordinary course of business, the court should weigh several factors including whether the proposed transaction is in the best interests of creditors). Despite this clear and unequivocal requirement, the Debtor has not, and indeed cannot, demonstrate how the sale on the terms contained in the Asset Purchase

Agreement satisfies the "best interest" requirement for approval of a sale pursuant to section 363(b) of the Bankruptcy Code.

18. The proposed sale of the Debtor's assets to NAC/Biz pursuant to the Asset Purchase Agreement is not in the best interests of the Debtor's estate because: (a) the proposed sale is illusory and will unconscionably tie the estate's hands for several months or longer because the buyer has no obligation whatsoever to close the transaction, yet the Debtor cannot terminate the agreement absent a material breach by the buyer until June 1, 2004 at the earliest (and possibly much later); and (b) upon any closing of the Asset Purchase Agreement, the estate will immediately be rendered administratively insolvent, and therefore unable to pay any of its unpaid post-petition obligations. Under these circumstances, approval of the Sale Motion and the Asset Purchase Agreement are not in the best interests of the estate and should be denied.

i. *The Proposed Sale is Illusory and Will Unconscionably Tie the Estate's Hands*

19. Pursuant to the terms of the Asset Purchase Agreement, upon any approval of the Sale Motion by this Court, the Debtor and NAC will enter into a management agreement (the "Management Agreement") pursuant to which NAC will take over the operation of the Debtor's business and be granted unlimited access to its assets and agreements (including access to the Interconnection Agreements) for as much as a year or longer without the Debtor and NAC ever having to close the sale transaction or ever having to make the decision to assume or reject the Debtor's contracts, including the Interconnection Agreements. See Asset Purchase Agreement at § 4.1(a) and Schedule H (Management Agreement) at §§ 2, 3. During the term of this Management Agreement, NAC will not be

obligated to close the sale until, among other things (a) it “shall have negotiated the assumption of the existing BellSouth Interconnection Agreement upon such terms and conditions as are acceptable to MCG or Buyer,” see Asset Purchase Agreement at § 5.2(g); and (b) “all regulatory and other third party approvals and agreements, on such terms and conditions as shall be acceptable to Buyer,” are obtained. See Asset Purchase Agreement at § 1.4(a); 5.1(c). Because these events are purely in NAC’s or MCG’s control (and as to the latter, vaguely defined to the point of being impossible to enforce in any event), the proposed sale is illusory as it binds MCG and NAC to nothing.

20. Perhaps worse, upon any approval of the Sale Motion and Asset Purchase Agreement by this Court, the Debtor (or any subsequently appointed trustee) will be “locked in” with no ability to terminate the agreement for several months or more even though the transaction has not yet closed and its business will have been taken over and hopelessly integrated with that of Biz/NAC pursuant to the Management Agreement.<sup>11</sup> Specifically, pursuant to section 6.1(b) of the Asset Purchase Agreement, the Debtor cannot unilaterally terminate the agreement unless, by June 1, 2004 (or longer if the delay is attributable to the Debtor), the deal remains unclosed

21. During this post-approval, pre-closing period where NAC will operate the Debtor’s assets (including utilization of BellSouth’s services through the Interconnection Agreement without taking an assignment thereof), the estate will be in complete limbo,

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<sup>11</sup> As noted above and discussed in greater detail in paragraphs 37 and 38 below, this appears to have already occurred to some extent prior to Court-approval of the Sale Motion when the Debtor closed its headquarters in Lawrenceville, Georgia and moved into shared space, rent-free, with Biz in Florida and began purchasing a significant portion of its needs from Biz through a Transition Services Agreement with Essex. The full extent of the integration of the Debtor with Biz/NAC is unknown to BellSouth at this time.

waiting several months or longer while NAC and BellSouth litigate over NAC's request for a Certificate and NAC's right to a new interconnection agreement with BellSouth instead of its assumption and cure of the existing agreement. NAC's intention in the state proceedings is and was to get ahead of the bankruptcy proceedings in order to "harvest" the NOW customer base, as discussed below. This is precisely what MCG and Biz/NAC have plotted. See E-mail from John Patton (MCG loan officer) to Ron Gavillet (Biz general counsel) dated June 3, 2003 ("Here is one final, last contingency plan for dealing with Bell, if they do not play ball: we get our certs and our interconnects. We place all new customers (new sales) on our interconnect and leave all old customers on the now interconnect. With a 6 – 8 month customer life, it wont take very long before the majority of new customers are on our new interconnect (with no cure) and the old interconnect dwindles to a very much lower, and stable customer base. We stay in bankruptcy until such time as the base has dwindled, or forever for that matter, all to avoid the extortion (sic) of bell.") (emphasis added). A true and correct copy of the referenced E-mail is attached hereto as Exhibit "F". If NAC is unsuccessful, the sale will never close. If NAC is successful, it appears the sale may no longer be necessary once the "harvest" is complete, and therefore still may never close.<sup>12</sup>

22. Because the buyer has no obligation whatsoever to close the proposed sale transaction, and also because the Debtor or a subsequent trustee will be "stuck" for many

<sup>12</sup> As noted in the BellSouth Motions, if such motions are not granted, the Debtor, MCG and Biz/NAC will have succeeded in "keeping BellSouth in a box" - BellSouth will be stayed from terminating the Interconnection Agreements while the Debtor, MCG and Biz/NAC attempt through such litigation before the PSC to circumvent BellSouth's legitimate statutory rights under section 365 of the Bankruptcy Code. See E-mail from Ron Gavillet (Biz general counsel) to Debtor's and MCG's counsel, dated June 20, 2003 ("Bell will be standing there pressing the assume/reject issue, so it is an issue we have to be prepared to wrestle – succeeding on keeping BellSouth in a box while we get approvals, etc. will remove their leverage . . . ."). A true and correct copy of the referenced e-mail is attached hereto as Exhibit "G".

months or more in limbo while the buyer seeks to obtain contested regulatory approvals, the proposed sale is not in the best interest of the Debtor's estate, and should therefore be denied.

ii. **The Proposed Sale Will Render the Estate Administratively Insolvent**

23. Upon closing of the proposed sale transaction, the Debtor's estate immediately will be rendered administratively insolvent. To the extent the Debtor has incurred any administrative priority claims, including ordinary post-petition trade debt, the Debtor will have no means of satisfying these claims. Under these circumstances, the Sale Motion should be denied.

24. As this Court is aware, MCG has "credit bid" the entire purchase price of \$4.6 million, pursuant to section 363(k) of the Bankruptcy Code. See Asset Purchase Agreement at p. 1. As a result, the Debtor will receive no cash in exchange for the sale of its assets, only satisfaction of MCG's alleged secured claim. In exchange, MCG (and ultimately Biz/NAC) will receive all of the Debtor's assets.<sup>13</sup>

25. As provided in the Asset Purchase Agreement, the purchaser will assume only certain specified obligations of the Debtor, defined as the "Assumed Liabilities". See Asset Purchase Agreement at § 1.2(b) ("Buyer shall not assume, and shall be deemed not to have assumed, any liabilities other than the Assumed Liabilities.").

26. Other than "cure" amounts under assumed contracts and liabilities under transferable permits, the "Assumed Liabilities" are limited to the following: "liabilities arising out of the ownership of the Assets by Buyer or any other Person, including, without limitation, the contracts listed on Schedule A-2, and Liability for personal injury of

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<sup>13</sup> As noted above, the terms under which the assets will be "flipped" to Biz/NAC by MCG have not been disclosed.

customers or employees, but only to the extent that the event or state of facts giving rise to such Liability occurs after the Closing.” Asset Purchase Agreement at Exhibit A, pg. 3.

27. While the definition of “Assumed Liabilities” is subject to numerous and varying interpretations, none lead to the conclusion that MCG is obligated to pay the accrued and unpaid administrative claims (including ordinary post-petition trade debt) of the Debtor.<sup>14</sup> Thus it is clear that the Debtor and MCG intend for the estate to retain the unpaid administrative claims to be satisfied from any remaining assets of the estate. However, as the Debtor is selling all of its assets to MCG pursuant to the Sale Motion, there are no assets left to satisfy these obligations.<sup>15</sup>

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<sup>14</sup> It is unclear what the phrase “but only to the extent that the event or state of facts giving rise to such Liability occurs after the Closing” modifies. If it is intended to modify the entire sentence (as traditional rules of grammatical construction would suggest), then it is clear that the buyer is not obligated to assume any of the Debtor’s administrative expenses, except to the extent they are incurred after the Closing. Even if that phrase does not modify the initial phrase “liabilities arising out of the ownership of the Assets by Buyer or any other Person,” and even if “Person” was intended to include the Debtor, this would mean the buyer is assuming all liabilities of the Debtor related to ownership of the assets, without even distinguishing between prepetition and post-petition liabilities. While BellSouth would welcome that interpretation, it speculates that the buyer will read it differently.

<sup>15</sup> The Asset Purchase Agreement defines “Excluded Assets” as (i) the equity interests in the entities whose assets are being sold, (ii) certain records related thereto, (iii) assets set forth on Schedule G to the Asset Purchase Agreement, titled “Excluded Contracts/Assets,” (iv) avoidance actions; and (v) tax refunds. Asset Purchase Agreement at Exhibit A, pg. 4. Not surprisingly, the equity interests in entities whose entire assets are being sold are valueless, records related thereto are valueless, Schedule G to the Asset Purchase Agreement lists nothing, the Statements filed in this case under oath pursuant to Federal Rule of Bankruptcy Procedure 1007(b)(1) indicate that all payments made within the applicable preference periods were in the ordinary course of business (see response to question no. 3), and are therefore not recoverable, and the Schedules filed in this case under Rule 1007(b)(1) do not list any tax refunds as assets (see Schedule B, items 17 and 20). Perhaps more importantly, under the Asset Purchase Agreement, “Excluded Assets” are not even excluded from what is being sold. See Asset Purchase Agreement at § 1.1(b) (all assets being sold unless listed on Schedule G thereto). Thus, even avoidance actions are being sold under the Asset Purchase Agreement. See In re Sweetwater, 55 B.R. 724, 731 (D. Utah 1985) (“an unbroken line of cases . . . hold that a trustee’s avoiding powers are not assignable.”).

28. It is therefore abundantly clear that the estate will be left administratively insolvent upon the closing of the proposed transaction. Despite the Debtor's apparent willingness to go along, such a transaction in which all of the Debtor's assets are sold without any means to satisfy administrative claims (let alone prepetition priority and non-priority unsecured claims) cannot be in the estate's best interest. Instead, it represents the complete abrogation by the Debtor of its fiduciary duties to creditors in exchange for substantial economic rewards to insiders making its decisions. Accordingly, the Court should deny the relief requested in the Sale Motion as not in the best interest of the estate so that a trustee can take over and see to a proper administration of this estate.

**B. The Sale Has Not Been Conducted in "Good Faith"**

29. In addition to the requirement that the sale must be in the best interests of the debtor's estate, section 363 of the Bankruptcy Code also requires that a sale be proposed in "good faith". As has previously been recognized by this Court, "[w]hen a bankruptcy court authorizes a sale of assets pursuant to 363(b)(1), it is required to make a finding with respect to the 'good faith' of the purchaser." In re Condere Corp., 228 B.R. 615, 630-31 (Bankr. S.D. Miss. 1998) (citing Cumberland Farms Dairy, Inc. v. Nat'l Farmers Organization, Inc. (In re Abbots Dairies of Pennsylvania, Inc.), 788 F. 2d 143, 149-150 (3d Cir. 1986); see Timberline Property, 115 B.R. 787 at 790 (approval under section 363 requires that a court "specifically find that such a sale is in the interest of creditors, is entered into in good faith, and is one in which the price represents fair value"). Typically, the misconduct that would destroy a purchaser's good faith status involves fraud or collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair



advantage of other bidders. See Fontainebleau Hotel Corp. v. Roland Intern Corp. (In re Bleaufontain, Inc.), 634 F.2d 1383, 1388 (5<sup>th</sup> Cir. 1981).

30. In this case, neither the Debtor nor the proposed purchasers, MCG and Biz/NAC, have exercised good faith in connection with the proposed sale.<sup>16</sup> Rather, they have engaged in various forms of collusion and inequitable conduct. Specifically, in the conduct of this deal: (a) MCG and Biz/NAC have engaged in collusive behavior designed to control the ultimate sale price of the Debtor's assets in violation of section 363(n) of the Bankruptcy Code and to avoid the requirements of section 365 of the Bankruptcy Code; (b) the Debtor and Biz/NAC have commenced the integration of their companies prior to Court-approval of the proposed sale; and (c) the Debtor and MCG have failed to fully disclose the extent to which certain of the Debtor's key employees will receive lucrative, guaranteed employment contracts with NAC, including the assumption of obligations owed to these employees (or their personal companies) and obligations guaranteed by these employees.

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<sup>16</sup> This is not surprising when taking into consideration the complete flaunting by the Debtor of its routine obligations under the Bankruptcy Code and prior Court Orders, including (a) unilaterally reducing the weekly prepayments to BellSouth in violation of the adequate assurance order entered in this case under section 366 of the Bankruptcy Code; (b) assuming at least one executory contract, and paying the "cure" associated therewith, without seeking or obtaining Court-approval, see Exhibit "B" (Debtor Deposition) at p. 129 and Letter from Verizon counsel to Debtor's counsel, dated June 19, 2003, attached hereto as Exhibit "H"; (c) satisfying certain other prepetition obligations of the Debtor without Court-approval, see Exhibit "B" (Debtor Deposition) at p. 169 and Letter from Debtor's counsel to Help Desk Now, dated June 10, 2003, attached hereto as Exhibit "T"; and (d) entering into settlement agreements without Court-approval, see Exhibit "B" (Debtor Deposition) at p. 140 and Facsimile from Debtor's counsel to MCG's counsel, dated May 6, 2003, attached hereto as Exhibit "J".

Accordingly, the Court should deny the relief requested in the Sale Motion based upon the sale proponents' lack of good faith.<sup>17</sup>

i. *MCG and Biz/NAC's Collusion in Violation of the Bankruptcy Code*

31. As described above, while the Asset Purchase Agreement suggests that the Debtor intends to sell substantially all of its assets as a going-concern to MCG, the Debtor actually will be selling its assets to NAC — a wholly-owned subsidiary of Biz, an unaffiliated customer of MCG.<sup>18</sup> MCG and Biz have engaged in a collusive scheme in violation of section 363(n) of the Bankruptcy Code designed to control the sale price of the Debtor's assets and to avoid the requirements of section 365 of the Bankruptcy Code for the assumption and assignment of the Interconnection Agreements — including curing the approximately \$5 million claim associated therewith and providing adequate assurance of future performance (which in all likelihood would require the posting of a deposit in excess of \$1.5 million, representing two months' billings).

32. First, MCG and Biz/NAC have reached an agreement the effect of which is to control the purchase price of the Debtor's assets, in violation of section 363(n) of the Bankruptcy Code. Section 363(n) of the Bankruptcy Code provides, in pertinent part, that "[t]he trustee may avoid a sale under this section if the sale price was controlled by an

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<sup>17</sup> Even if this Court ultimately determines to approve the proposed sale over BellSouth's objection, this Court must deny the buyer the protections contained in section 363(m) of the Bankruptcy Code if that section is to retain any meaning.

<sup>18</sup> While the Court could have perhaps gleaned from the Sale Motion that NAC would be the ultimate purchaser, it could not know that NAC was a subsidiary of Biz, rather than MCG. In fact, BellSouth did not even know this until it was disclosed in the Request to Amend filed before the PSC on July 18, 2003 (almost two months after the Sale Motion was filed). Even then, BellSouth (let alone the Court) was not aware that Biz was unaffiliated with MCG.

agreement among potential bidders at such sale". 11 U.S.C § 363(n) (2002).<sup>19</sup> See Lone Star Indus., Inc. v. Compania Naviera Perez Companc, S.A.C.F.I.M.F.A. Sudacia, S.A. (In re New York Trap Rock Corp.), 42 F.3d 747, 752 (2d Cir. 1994) (stating that an agreement to control the sale price is prohibited by section 363(n)).

33. Pursuant to their agreement, MCG credit bid the entire amount of the purchase price, and upon Court-approval (or perhaps later) will turn around and sell the assets, or the right to purchase them, to NAC, effectively removing NAC from the competitive bidding process established by the Court. In fact, MCG hopes to turn a profit in the process<sup>20</sup> — a profit that properly belongs to the estate and its creditors. To illustrate, assume Biz will pay MCG \$5.6 million for an assignment of the Debtor's assets or MCG's rights under the Asset Purchase Agreement.<sup>21</sup> MCG would not only receive full payment of its alleged secured claim under such scenario, but would make a profit of \$1 million. Now assume instead that MCG, upon identifying Biz in March as a potential buyer (as they in fact

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<sup>19</sup> In addition, section 363(n) of the Bankruptcy Code provides that the trustee may "recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered in such an agreement in willful disregard of this subsection." 11 U.S.C. § 363(n).

<sup>20</sup> See Memorandum from John Patton (MCG loan officer) to MCG Credit and Investment Committee, dated April 30, 2003 (the "MCG Internal Memo"), at pp. 2-3 ("MCG intends to transfer the Now assets to BoL [BiznessOnline] . . . MCG's strategy presents a clear path to the full recovery of the \$4.6 million over a reasonably short period of time, plus upside in the asset.") (emphasis added). A true and correct copy of the MCG Internal Memo, with the quoted portions highlighted, is attached hereto as Exhibit "K". Both MCG and Biz/NAC acknowledged that the amount to be paid by Biz/NAC to MCG might exceed \$4.6 million. See Exhibit "C" (MCG Deposition), Volume 2 at 98; Exhibit "D" (Biz/NAC Deposition) at pp. 20-21.

<sup>21</sup> At his deposition, Mr. Patton of MCG placed a "going concern" value on the Debtor at between \$3,750,000 and \$6,250,000 (\$150-\$250 per customer multiplied by approximately 25,000 customers. See Exhibit "C" (MCG Deposition) at Vol. 1, pp. 14-17.

did), told Biz to bid at auction for the assets. If Biz bid the \$5.6 million, the \$1 million in excess of MCG's alleged secured claim would have been available for unsecured creditors. This collusion is not only exactly what section 363(n) was designed to prevent, but also represents the ultimate "sin" for a lender – keeping an interested buyer away from a sale of its collateral so that the lender, rather than the owner of the collateral (and therefore its creditors), receives any upside. See e.g., Little v. Fleet Finance, 481 S.E. 2d 552, 557 (Ct. App. Ga. 1997) (non-judicial foreclosure sale; "[w]hat is forbidden is a prior agreement or understanding that is in any manner *outcome determinative*, i.e., impacts on the amount of the highest bid or the identity of the successful bidder so as to chill either the bidding or the sale's price . . . .") (emphasis original).

34. As a result of their agreement, Biz/NAC effectively has been removed from the competitive bidding process, whether or not the sale proceeds received by the Debtor's estate in exchange for its assets are below their potential value, and whether or not they are in excess of MCG's secured claim. Accordingly, MCG and Biz/NAC have violated the clear language of section 363(n) of the Bankruptcy Code and the Sale Motion must be denied, at least until a proper sale can be conducted.<sup>22</sup>

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<sup>22</sup> Neither did the Debtor (given the "sweetheart" executive packages promised by Biz/NAC), as a fiduciary, try to foster a competitive bidding process. First, it did nothing to challenge the agreement between Biz and MCG, of which it was well aware. Second, it did nothing to increase the purchase price or otherwise improve the terms of sale contained in the Asset Purchase Agreement – for all practical purposes, it did not even negotiate it. See Exhibit "B" at pp. 61-64. Third, it misled this Court, at the bid procedures hearing, by testifying that nobody was likely to buy the Debtor's assets other than someone already in the "prepay" local exchange telecommunications business. Yet at the time it gave that testimony, it knew that its buyer was not in that business, but rather was a telecommunications and internet service provider just like hundreds of others who may have had a strategic fit with the Debtor but who were never informed that its assets were for sale. Fourth, when parties did show an interest in possibly purchasing the Debtor's assets, the Debtor's delay in responding was wholly unacceptable. See

35. In addition to the collusion relating to the purchase of the Debtor's assets, BellSouth has obtained, through discovery, admissions that MCG and Biz have engaged in a clandestine strategy — known as the "harvest" strategy — designed as an end-run around the Bankruptcy Code's requirements for assumption and assignment of the Interconnection Agreements. The "harvest" strategy was designed to work as follows: a subsidiary of Biz would obtain an interconnection agreement with BellSouth without disclosing its relationship to Biz. Then, all customers that otherwise would have signed up for the Debtor's service (including existing customers) through the Debtor's sale channels would be instructed to sign up with this new subsidiary, thereby accomplishing an assignment unbeknownst to BellSouth. See E-mail from Ron Gavillet (Biz/NAC in-house counsel) to Ronald Del Sosto (MCG co-counsel) and Scott Kellogg (MCG businessperson) dated 7/25/03, a true and correct copy of which is attached hereto as Exhibit "M" ("Yes, we are pursuing Harvest. It is due to BellSouth's refusal to negotiate a reasonable cure that we need to seek another interconnection agreement. As you know, we do not want to tell them the harvest strategy."); E-mail from Ron Gavillet (Biz/NAC in-house counsel) to Ken Baritz (Biz/NAC CEO), dated June 24, 2003, a true and correct copy of which is attached hereto as Exhibit "N" (attaching E-mail exchange between Mr. Gavillet and others detailing the strategy); E-mail from Ron Gavillet (Biz/NAC in-house counsel) to John Patton (MCG loan officer), dated June 13, 2003, a true and correct copy of which is attached hereto as Exhibit

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E-Mail from William McCarthy to MCG counsel, dated July 23, 2003 (evidencing 10-day delay between request for information and actual receipt, nullifying any possibility that frustrated potential bidder would bid a few days later at the auction). A true and correct copy of the referenced E-mail is attached hereto as Exhibit "L".

“O” (attaching E-mail exchange between Mr. Gavillet and MCG’s co-counsel regarding the “harvest” strategy); Exhibit “F” (detailing the strategy).<sup>23</sup>

36. BellSouth asserts that the collusive behavior of MCG and Biz in connection with the “harvest” strategy, as with respect to the conduct of the sale, is sufficient for this Court to determine that the proposed sale has not been conducted in good faith. Accordingly, the Sale Motion should be denied.

ii. *The Debtor and Biz/NAC Have Commenced the Integration of Their Companies*

37. As noted above, the Debtor has already taken significant steps in furtherance of the proposed but unapproved sale to NAC and the integration of the two companies by (i) closing its Lawrenceville, Georgia headquarters in June and permanently relocating several of its employees (including its CEO, Mr. Seab) to Orlando and Del Ray, Florida where such employees are sharing space rent-free in Biz’s offices; and (ii) purchasing and paying for various services provided by Essex, pursuant to an agreement between the Debtor and Essex.<sup>24</sup> While that agreement was submitted for approval by the Court, the Debtor nowhere in its motion seeking such approval disclosed the relationship of Essex to the proposed purchaser, Biz/NAC.<sup>25</sup>

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<sup>23</sup> MCG’s principal denied under oath at his deposition any knowledge of a “harvest” strategy until shown the numerous documents MCG produced revealing such named strategy. See Exhibit “C” (MCG Deposition), Volume 2 at pp. 67-70 and 104-06.

<sup>24</sup> See Exhibit “B” (Debtor Deposition) at pp. 9-13; Exhibit “D” (Biz/NAC Deposition) at pp. 24-28.

<sup>25</sup> In fact, MCG and Biz/NAC sought to deliberately conceal Essex’s relationship to Biz from BellSouth. See Exhibit “F” (“[Essex will] file [for certification] in our own name and use separate local counsel and keep Biz’s name out of it if possible since Essex has its own financials so BS [BellSouth] cannot easily connect the dots.”).

38. The Debtor's actions in relocating its headquarters to Biz's premises and accepting significant services from Biz not only should have been disclosed to the Court, but also should have been subject to approval by the Court as a use of property outside the ordinary course of business. See United States v. Goodstein, 883 F.2d 1362, 1370 (7th Cir. 1989) (upholding defendant's conviction for bankruptcy fraud upon finding that various of defendant's acts, including transfer of most significant asset of bankruptcy estate without court approval, suggested intent to defraud and stating that "[i]t is not a routine or ordinary event to transfer control of one manufacturing company to another, effectively merging the two companies, or to relocate substantial portions of a company's equipment and inventory to the premises of another"); see also Command Performance Operators, Inc. v. First Int'l Serv. Corp. (In re First Int'l Serv. Corp.), 25 B.R. 66, 70 (Bankr. D. Conn. 1982) (voiding an agreement for the sale of substantially all of the stock of a debtor which was held by non-debtor parties because court determined that such a sale effectively would transfer control of the debtor and, as a result, required notice and hearing pursuant to section 363(b) of the Bankruptcy Code and stating that "the secret transfer of management and control of the debtor corporations to the Buyer runs counter to the spirit of the Code."). At a minimum, such actions, designed to implement the sale before it has been approved, evidence a lack of good faith sufficient to deny approval of the Sale Motion.

iii. *The Deal Provides Significant and Undisclosed Compensation to Insiders*

39. While the significance of the executive compensation packages offered by Biz/NAC have clouded the Debtor's ability to act in the estate's best interests (as discussed above), the undisclosed nature of much of the compensation undermine the Debtor's good faith in conducting the sale transaction.

40. Schedule 5.2(f) of the Asset Purchase Agreement discloses that certain of the Debtor's key employees will be employed by NAC/Biz upon the closing of the sale.<sup>26</sup> The Debtor discloses only the salary that each employee will be paid and their closing bonus.<sup>27</sup> What the Debtor fails to disclose is the vast amount of other "perks" these insiders will receive upon closing of the transaction.

41. Among the undisclosed "perks" are: (a) multi-year employment agreements with guaranteed salary;<sup>28</sup> (b) assumption by the buyer of an unsecured (or if secured, unperfected) prepetition obligation of approximately \$90,000 owed by the Debtor to Coastcom, an entity owned by the Debtor's CEO and CFO; and (c) assumption by the buyer of various prepetition obligations guaranteed by the Debtor's CEO and CFO (or their companies).<sup>29</sup> The referenced obligation to Coastcom would not be paid if owed to anyone other than the insiders. Further, while the Debtor testified that the guaranteed obligations (unlike the Coastcom obligation) all represent leases or contracts for assets that the buyer would need and thus would continue paying anyway, upon closer examination, the Debtor admitted that this was untrue in that at least one leased asset, a generator, for which the CFO

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<sup>26</sup> As an initial matter, BellSouth asserts that insider payments should have been highlighted in the Sale Motion itself — not buried in a schedule to an inch-thick Asset Purchase Agreement.

<sup>27</sup> Query why these executives should receive a "half salary" bonus (or more in the case of Mr. Jennings) just for facilitating the closing of a sale that leaves the estate not only unable to make a distribution to unsecured creditors, but administratively insolvent?

<sup>28</sup> See Key Employee Employment Program for NOW Communications, a true and correct copy of which is attached hereto as Exhibit "P".

<sup>29</sup> See E-mail from Charlie McGuffey (Debtor's CFO) to John Patton (MCG loan officer), dated May 6, 2003, a true and correct copy of which is attached hereto as Exhibit "Q" (listing various debts to be assumed); schedule of insider compensation prepared by MCG reflecting assumption of liabilities referenced on Exhibit "Q", a true and correct copy of which is attached hereto as Exhibit "R".



had guaranteed a note secured thereby, had been returned to the lessor post-petition for resale or re-letting. See Exhibit "B" at pp. 146-149.

42. The Debtor has not disclosed any portion of these payments and debt assumptions in the Sale Motion, Asset Purchase Agreement or any other pleading filed in these cases.<sup>30</sup> Clearly, the Debtor's insiders have been given personal financial incentives to ensure that this sale transaction is completed on the terms contained in the Asset Purchase Agreement and without competition from other competing bidders. Under these circumstances, the Debtor can not claim that the Sale Motion has been proposed in good faith. For this reason as well, the Sale Motion should be denied.

**C. The Sale Lacks Consideration Because the Alleged Secured Claim of MCG Should be Equitably Subordinated**

43. To the extent this Court finds that MCG has violated section 363(n) by participating in the improper and collusive agreement to control the bid price for the Debtor's assets, as described above, MCG's alleged secured claims should be equitably subordinated pursuant to section 510(c)(1) of the Bankruptcy Code. Section 510(c) of the Bankruptcy Code provides in pertinent part that "after notice and a hearing, the court may — (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest...." 11 U.S.C. § 510(c)(1). See Benjamin v. Diamond (In re Mobile Steel Co.), 563 F.2d 692, 699-700 (5th Cir. 1977) (finding that equitable

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<sup>30</sup> The Asset Purchase Agreement contains a description of certain "Other Assumed Liabilities". See Asset Purchase Agreement at Schedule A-2. The items listed in this schedule appear to match some of the same items listed on Exhibits "Q" and "R". However, nothing in Schedule A-2 (or elsewhere in the Asset Purchase Agreement) discloses that these assumed liabilities are for the benefit of the insiders.

subordination is appropriate where: (i) the claimant has engaged in some sort of inequitable conduct; (ii) the misconduct has resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (iii) equitable subordination of the claim is not inconsistent with the provisions of the Bankruptcy Code. BellSouth intends to file an adversary proceeding seeking equitable subordination depending on the outcome of the hearing on the Sale Motion and the BellSouth Objections. While obviously MCG will defend such action, BellSouth asserts that it has raised a sufficient *prima facie* case such that if the Court is otherwise inclined to approve the Sale Motion notwithstanding the significant and detailed objections set forth above, it should only do so if MCG escrows the \$4.6 million purchase price so that even if its alleged claim is equitably subordinated, it will still have provided consideration for the assets. Otherwise, the very real potential exists that MCG's alleged liens will be subordinated to other creditors, yet there will be no assets to pay such other creditors in light of MCG's unfunded credit bid. Accordingly, absent the escrow of the purchase price, the Court should deny the Sale Motion for lack of a fair sale price, even if it were otherwise inclined to approve the Sale Motion.

#### **IV. Summary of Previous Objections**

44. BellSouth raised various other objections in the BellSouth Sale Objection. For the benefit of this Court, BellSouth will briefly summarize a few of BellSouth's objections as previously set forth.

##### **A. The Debtor Must Cure Interconnection Agreements**

45. As asserted in the BellSouth Sale Objection, to the extent the Debtor intends to transfer the Interconnection Agreements to the buyer, the substantial prepetition defaults must be cured pursuant to section 365(b)(1) of the Bankruptcy Code. See 11 U.S.C.

§ 365(b)(1); In re Greenville Auto Mall, Inc., 278 B.R. 414, 422 – 423 (Bankr. N.D. Miss. 2001) (“[I]f...the estate elects to assume the executory contract, then it takes on the burdens associated with that contract, agreeing to cure any outstanding defaults, and committing to perform on a going forward basis”).

46. Attached to the Asset Purchase Agreement as a schedule, the Debtor has listed the proposed cure amount for the Interconnection Agreements as \$150,000.00 (the “Proposed Cure Amount”). See Asset Purchase Agreement at Schedule A. BellSouth objects to the Proposed Cure Amount as it is woefully insufficient to cure the defaults under the Interconnection Agreements. BellSouth’s records reflect a prepetition default under the Interconnection Agreements of \$5,059,254 (the “BellSouth Claim”).<sup>31</sup> Similarly, BellSouth is listed on the Debtor’s List of Creditors Holding 20 Largest Unsecured Claims as well as schedule F of the Debtor’s Schedules as holding a disputed claim of \$3,912,470.02. BellSouth objects to the Sale Motion to the extent the Debtor thereby seeks assumption and assignment of the Interconnection Agreements based on the Proposed Cure Amount.

47. BellSouth further objects to the Sale Motion to the extent the Debtor thereby seeks assumption and assignment of the Interconnection Agreements unless adequate assurance of future performance is provided as required under section 365(b). In this case, such adequate assurance would likely require the payment of a security deposit in the amount of approximately \$1.5 million, twice the Debtor’s estimated monthly run rate, as BellSouth would easily be exposed by that amount or more before it could effectuate termination of services upon the buyer’s default.

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<sup>31</sup> On June 10, 2003, BellSouth filed a Proof of Claim in this amount.

**B. The Management Agreement Constitutes a De Facto Assignment**

48. Pursuant to the Management Agreement attached as Schedule H to the Asset Purchase Agreement, the Debtor purports to appoint NAC as “manager” of its assets with, among other things, “the right to have access to and use of the Regulated Assets”. See Management Agreement at § 2. Thus, it appears that irrespective of whether the Interconnection Agreements are assumed and assigned, NAC will have use of the services provided by BellSouth thereunder for the term of the Management Agreement. The term of the Management Agreement is unclear, but likely runs through June 1, 2004, or maybe longer, in parallel with the Asset Purchase Agreement. The Management Agreement thus constitutes a *de facto* assignment of the Interconnection Agreements (and likely other agreements between the Debtor and third parties) without compliance with section 365 of the Bankruptcy Code. The Debtor should be required to either assume and assign, or reject, the Interconnection Agreements upon approval of any sale, rather than allowing such a *de facto* assignment.

**V. Conclusion**

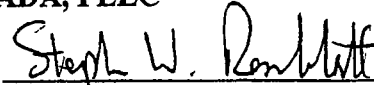
49. For all of the reasons set forth herein and in the BellSouth Sale Objection, the Sale Motion should be denied. The proposed sale benefits everyone except who the process was supposed to benefit – it serves no worthwhile purpose and would reward wrongdoers for their misdeeds. The Court should not only deny the sale motion, but sua sponte appoint a trustee, or at least take up BellSouth’s Conversion Motion at the earliest opportunity before matters get any worse.

**WHEREFORE**, BellSouth respectfully requests that the Court (a) sustain this supplemental objection and the BellSouth Sale Objection; (b) deny the Sale Motion; and (c) grant such other and further relief as is just and equitable.

Respectfully submitted this 29<sup>th</sup> day of September, 2003.

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Counsel for BellSouth Telecommunications, Inc.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing **Supplemental Objection to Debtor's Motion to Sell Substantially all of its Assets Pursuant to 11 U.S.C. Section 363(b) and (f), Free and Clear of all Claims and Liens** was served, via hand delivery (where indicated) or overnight delivery, postage prepaid, on the parties listed below, this 21<sup>st</sup> day of September, 2003:

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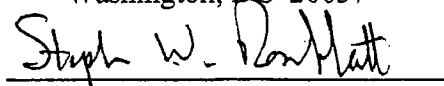
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By:

  
Stephen W. Rosenblatt

# **EXHIBIT B**

1 Mr. Seab was the designee -- needed his personal counsel,  
2 Mr. Ingram, there. BellSouth did not agree to the  
3 continuance. But in any event, we have rescheduled it  
4 for today.

5 Mr. Seab, can you go and state your name for  
6 the record?

7 A. My name is Larry W. Seab, S-E-A-B.

8 Q. What is your address, Mr. Seab?

9 A. My current address is 2369 Lake Debra Drive,  
10 Apartment 2014, Orlando, Florida 32835.

11 Q. And how long have you lived at that address?

12 A. One month.

13 Q. And before that, where did you live?

14 A. I lived at 713 Country Place Drive, Jackson,  
15 Mississippi 39208.

16 Q. So you moved in early August; is that correct?

17 A. That's correct.

18 Q. What was the reason for moving to Orlando?

19 A. Relocation with Now Communications.

20 Q. Has Now Communications relocated to Orlando?

21 A. That's correct.

22 Q. And when did Now Communications relocate to  
23 Orlando?

24 A. During the months of June and July.

25 Q. And why did Now Communications relocate to



1 Orlando?

2 A. To -- to vacate the premises in Lawrenceville,  
3 Georgia.

4 COURT REPORTER: In what Georgia?

5 THE WITNESS: Lawrenceville -- excuse me --  
6 Lawrenceville, Georgia.

7 A. And to -- to -- that was in the best interest  
8 of Now to -- to -- to save costs, rent and -- and  
9 overhead and utilities and personnel.

10 Q. (By Mr. Meyers) So you closed the office in  
11 Lawrenceville, Georgia --

12 A. That's correct.

13 Q. -- at that time? And tell me again when that  
14 was.

15 A. The last day of rent in Lawrenceville was  
16 June 30th.

17 Q. And you moved -- Now moved to Orlando to save  
18 expenses?

19 A. That's correct.

20 Q. Okay. And explain to me how they save  
21 expenses by moving to Orlando.

22 A. First of all, the -- the rent in -- in  
23 Lawrenceville was excessive, beyond the needs of Now at  
24 the time. And we had let a number of employees go, so we  
25 didn't need the space. And so we -- in -- in -- in an

1 effort to -- to cut costs and to continue operating and  
2 serving the customers, we rented space, joint sharing  
3 space, with a -- a company called Veranet.

4 Q. And Veranet is an affiliate on  
5 Biznessonline.com?

6 MR. WRIGHT: Object to the form.

7 MR. MEYERS: Excuse me. Mr. Wright, are you  
8 defending the deposition of Now?

9 MR. WRIGHT: No. I'm certainly entitled to  
10 object to the form of the question.

11 MR. MEYERS: I don't think you are.

12 MR. WRIGHT: Well --

13 MR. MEYERS: I'm --

14 MR. WRIGHT: -- I --

15 MR. MEYERS: -- not --

16 MR. WRIGHT: -- objected.

17 MR. MEYERS: -- deposing your witness. I  
18 mean, one lawyer ought to be asserting objections to the  
19 question. Is it your position that you can assert  
20 whatever objections you want --

21 MR. WRIGHT: Yeah.

22 MR. MEYERS: -- to the questions asked?

23 MR. WRIGHT: Yes.

24 Q. (By Mr. Meyers) All right. In any event, you  
25 can answer the question.

1 MS. SHAFFER: I'll object to form.

2 MR. MEYERS: Can you read back the question?  
3 I remember what it is.

4 Q. (By Mr. Meyers) Is Veranet an affiliate of  
5 Biznessonline.com?

6 MS. SHAFFER: I object to form.

7 A. And I don't know either -- I mean, I -- I  
8 don't know what the relationship between the name Veranet  
9 and Biznessonline.com is.

10 Q. (By Mr. Meyers) Do you know who the officers  
11 of Veranet are?

12 MS. SHAFFER: I object to form.

13 A. The two people that I have dealt with is --  
14 Kenny Baritz I know is the CEO, and -- and the vice  
15 president of sales and marketing is Steve Roberts.  
16 That's -- that's the only two people I know that are  
17 officers.

18 Q. (By Mr. Meyers) Of Veranet?

19 A. (Witness nods head affirmatively.)

20 Q. And is Ken Baritz, to your knowledge, an  
21 officer of Biznessonline.com?

22 A. I don't -- I don't know the difference between  
23 those two companies.

24 Q. Okay. So to you, Veranet and Biznessonline  
25 are one and the same --

1 A. Yes.

2 Q. -- company? And Now Communications leases  
3 space from Veranet?

4 A. No, the -- the invoice comes from  
5 Biznessonline.com.

6 Q. Is there a lease?

7 A. It is a services agreement, yes.

8 Q. There is a services agreement between Now  
9 Communications and Biznessonline.com?

10 A. Yes.

11 Q. Was that produced to me? Do you know?

12 A. Well, it wasn't asked of me. I don't know.

13 MR. MEYERS: Okay. Do you have a copy of the  
14 notice of deposition?

15 MS. SHAFFER: I did not bring it with me, no.

16 MR. MEYERS: Does anybody have it on them?

17 THE WITNESS: I don't have it. I know what it  
18 said.

19 MR. MEYERS: Okay. Well, I will get it at the  
20 break.

21 Q. (By Mr. Meyers) Okay. But did you review a  
22 notice of deposition that I served on behalf of BellSouth  
23 to Now Communications?

24 A. Yes.

25 Q. Okay. Did you review that deposition notice?

1 why I don't remember seeing that statement. Maybe it's  
2 not in there. Maybe you were making it up, and I -- I  
3 wasn't anticipating being asked questions that are made  
4 up. So I would -- I thought we were dealing in good  
5 faith, so I -- I'll have to be more careful in -- in  
6 listening to your question.

7 I don't know who Now Acquisition Corporation  
8 is. If there is a statement in that petition to the  
9 Mississippi Public Service Commission, I should remember  
10 it, but I don't.

11 Q. Okay. Are you familiar with an asset purchase  
12 agreement between MCG or its designee and the debtor to  
13 purchase the assets of the debtor that was filed with the  
14 bankruptcy court?

15 A. Yes.

16 Q. Do you know whether that asset purchase  
17 agreement has ever been signed?

18 A. It was attached to the -- to the petition that  
19 we filed, and whether it's been signed or not, I don't --  
20 I don't know.

21 Q. But the version that was filed with what you  
22 called the petition -- it was a motion -- has that  
23 version changed since it was filed with the bankruptcy  
24 court, or is that still the working document?

25 A. I think that's still the working document.

1 other things, like MCI Neighborhood and things that --  
2 that other companies were doing to -- decided that  
3 customers that they never wanted to serve before they  
4 ought to be serving. So nobody else would serve them, I  
5 guess, or whatever. That -- so they began to go and  
6 target prepaid customers as a -- a type of customer that  
7 they would like to serve.

8           So customer loss has accelerated over what it  
9 had been in the -- since inception of the industry,  
10 though the value of the company was -- was -- it was hard  
11 to determine. So the main -- main concern was the  
12 continued operation of the company, and how it was best  
13 structured in going forward. And so we determined  
14 that -- that selling to MCG or its designee was the thing  
15 to do.

16           Q. Was the initial offer by MCG or its designee  
17 4.6 million dollars?

18           A. I don't recall what the -- what the initial  
19 offer was, but it was something to that effect.

20           Q. Did you attempt to negotiate a higher price?

21           A. Yes. We -- we -- yeah, we did not accept the  
22 offer right off without -- without thinking about it.

23           Being in the industry, I -- I knew that --  
24 that there was not a -- a -- a market for -- for Now  
25 Communications in total. I knew that because I know the

1 industry. I knew that before we were required to spend  
2 about \$33,000 in advertising to -- to prove what I  
3 already knew. I know what the value of the company --  
4 what -- what values other companies could do in the  
5 industry.

6 And so to sell the company with -- with the  
7 secured creditor being satisfied, and -- and the  
8 opportunity to continue on in the business was -- was the  
9 best deal that was out there.

10 Q. Okay. But to answer my question, they offered  
11 around 4.6 million? That's what you stated.

12 A. No --

13 Q. I'm --

14 A. -- I --

15 Q. -- asking did you try to get a higher price  
16 from MCG or its designee?

17 MS. SHAFFER: I object. He already answered  
18 that.

19 MR. MEYERS: He didn't answer it.

20 A. I -- I --

21 MS. SHAFFER: He --

22 A. -- believe --

23 MS. SHAFFER: -- did.

24 A. -- I did. I don't -- I don't recall -- I --  
25 the -- the sequence of events on how the price -- came to

1 it. And, of -- of course, I didn't -- didn't jump on  
2 the -- the 4.6 million because it was -- it would have  
3 been good to get more, but -- but that is a -- a -- a  
4 good price.

5 Q. (By Mr. Meyers) Did you ever counter offer  
6 for a higher price?

7 A. I don't recall.

8 Q. Were you the one negotiating with MCG or its  
9 designee, or was it somebody else at Now?

10 A. No, it was -- it was -- it was me. Like I  
11 say, we had -- we were generally in -- in meetings with  
12 the -- the two other principals of Now, but it was -- it  
13 was primarily me.

14 Q. Okay. And you understood that this 4.6  
15 million wouldn't be cash coming in? It was a credit bid  
16 of their debt, correct?

17 A. Well, it was basically a -- a -- a wash, yes.

18 Q. Okay. And so you understood there would be  
19 little, if anything, for unsecured creditors if this sale  
20 was approved, correct?

21 A. That's correct.

22 Q. Did you attempt to have them leave some money  
23 behind for unsecured creditors?

24 A. Again, I would have to look at that asset  
25 purchase agreement to see if there's -- is any provision



1 for the post-petition creditors.

2 Q. Okay. But let's talk about pre-petition  
3 creditors. There's million of dollars in claims asserted  
4 against Now, correct?

5 A. There is a -- a -- primarily BellSouth.

6 Q. But there are other creditors that have filed  
7 claims against Now for pre-petition debts?

8 A. Yes, but I don't think it's millions of  
9 dollars, though. I don't -- but, anyway, it is what it  
10 is.

11 Q. Did you attempt to get MCG to leave any money  
12 for those unsecured creditors?

13 A. I don't recall discussing that, but I -- but  
14 it was my thought, I guess, at the time that -- that if  
15 any of those pre-petition creditors -- if they were to  
16 continue to do business with Now or -- or the new Now,  
17 that -- that those -- that -- that they -- a solution  
18 would have to be worked out between the -- the -- the  
19 buyer and -- and those creditors.

20 Q. Do you recall testifying in this bankruptcy  
21 case?

22 A. Yes.

23 Q. Do you recall testifying regarding your  
24 efforts to market the assets of the company?

25 A. Yes.

1 A. -- bought. Excuse me.

2 Q. Okay. Coral Bay Financial?

3 A. That was a -- a company that Now  
4 Communications purchased at the same time it bought Gulf  
5 Coast Communications or the assets of Gulf Coast  
6 Communications.

7 Q. Eureka?

8 A. Eureka?

9 Q. I don't have more. I don't know.

10 A. I have no idea who that is.

11 Q. Gillette Global Network?

12 A. Never heard of them.

13 Q. Okay. Has the debtor assumed the Verizon  
14 contract yet?

15 A. I don't know. I -- I think we have assumed a  
16 contract. We -- we continue to -- yes, I think so.

17 Q. Did you pay their pre-petition claim in  
18 connection with that?

19 A. I think so.

20 Q. Do you know if that was approved by the  
21 bankruptcy court?

22 A. Excuse me?

23 Q. Do you know if that was approved by the  
24 bankruptcy court?

25 A. I'm not sure it's been assumed. I think it's

1 (Exhibit 4 marked for identification.)

2 Q. (By Mr. Meyers) All right. This will be  
3 No. 5, and it's Bates stamped MCG 16579 through 581.  
4 And, again, I think I told you this, but that Bates stamp  
5 means that Mr. Wright's law firm produced that on behalf  
6 of MCG or MCG produced that, presumably Mr. Wright's firm  
7 made the stamp.

8 All right. This is a fax of a settlement and  
9 release agreement, correct?

10 A. Uh-huh.

11 Q. And it appears that this agreement -- this fax  
12 is dated May 6th, correct, and the settlement and release  
13 is between Now and some entities called Direct General  
14 Insurance, Direct Insurance, Direct General Insurance  
15 Agency, various corporations with that type name. Do you  
16 see that?

17 A. Uh-huh.

18 Q. Has this agreement been executed?

19 A. Yes.

20 Q. Okay. And pursuant to this agreement, you  
21 received -- your company received \$30,000?

22 A. Correct.

23 Q. What was the dispute that led to this  
24 settlement agreement?

25 A. Direct General is a collection agent for Now

1 note at First Bank" collateralized by a "Homisco switch  
2 for some \$120,000." Is that what you referred to -- I  
3 think you testified about a First Bank debt of 100,000  
4 for a purchase of a telephone system?

5 A. That -- that's the same debt.

6 Q. Okay. And that debt's being paid currently by  
7 the debtor?

8 A. Yes.

9 Q. Okay. Then it says, "The generator is leased  
10 by NOW from my corporation, Associated Funding  
11 Corporation and I guarantee the note at RiverHills Bank  
12 in Vicksburg." Were you aware of that?

13 A. Yes.

14 Q. Okay. So that is a debt that the debtor has  
15 to one of Mr. McGuffee's companies?

16 A. No, it's a -- it's a lease. I don't -- I  
17 don't consider it a debt. It's a lease. The generator  
18 is leased.

19 Q. The debtor has a lease with Associated  
20 Funding --

21 A. Correct.

22 Q. -- where they make monthly payments for the  
23 use of a generator?

24 A. Correct.

25 Q. How much do they pay every month?

1 A. 2,500.

2 Q. Okay. Is that currently still being paid?

3 A. Yes.

4 Q. Will the generator be purchased in the sale?

5 Do you know?

6 A. I don't know if the decision's been made on  
7 that or not.

8 Q. Do you expect the buyer to pick up that lease  
9 with Associated Funding?

10 A. I think the -- that the buyer needs it, of  
11 course, but whether they will or not, I don't know. But  
12 I think they need it. It's a back-up generator when the  
13 electricity goes off.

14 Q. Do you have an ownership interest in  
15 Associated Funding?

16 A. No.

17 Q. Just Mr. McGuffee's company?

18 A. Yes.

19 Q. Do you know if the debtor has any other  
20 relationship with Associated Funding Corporation?

21 A. Other than this?

22 Q. Yes.

23 A. Mr. McGuffee has some of his stock in Now  
24 Communications in the name of Associated Funding, but  
25 there's no -- no other debt that I'm -- I'm aware.

1 Q. It says, "...and I guarantee the note at  
2 RiverHills Bank." Do you know how much that note is at  
3 RiverHills Bank?

4 A. No. Mr. McGuffee, through Associated Funding  
5 and his personal guaranty, bought the generator and --  
6 and leased it to -- to Now.

7 Q. Why didn't Now just buy it directly?

8 A. Well, the -- I don't think Now could have  
9 borrowed the money. I don't think they could. This was  
10 the same reason why we -- we borrowed the money up here  
11 to -- to pay Exceleron.

12 Q. How much did you say was borrowed to buy the  
13 generator, or did you say?

14 A. I -- I don't know.

15 Q. Was it more than 100,000?

16 A. I don't know.

17 Q. And it says that "Jim has said he cannot use  
18 the generator and we have made arrangements to deliver  
19 the generator to the agent from which it was purchased  
20 and they have agreed to...sell it." Has the debtor done  
21 that yet?

22 A. Yes. That -- that was done when we moved from  
23 Lawrenceville.

24 Q. So the debtor no longer has the generator?

25 A. No longer has possession of it, no. No -- no

1 longer using it.

2 Q. All right. Then it goes on to talk about  
3 personal leases on vehicles?

4 A. Correct.

5 Q. And I think you talked about those before. Do  
6 you know whether the buyer will pick up those leases  
7 or --

8 A. I -- I --

9 Q. -- notes?

10 A. -- don't remember what's listed in the  
11 agreement. I think they were going to pick up some and  
12 not some.

13 Q. Okay. The last sentence of that paragraph  
14 says, "In addition, Larry and I guarantee a note at  
15 Bankcorpsouth in the amount of \$19,000 collateraled by  
16 the original LD switch that we bought back in... '97."

17 A. That's a long distance switch that -- that we  
18 still own.

19 Q. Does the debtor still make payments on it?

20 A. Yes.

21 Q. Do you know if the buyer is going to pick up  
22 that -- or is going to buy that switch?

23 A. I don't know if that's listed on that asset  
24 purchase agreement or not.

25 Q. Do you know whether they're going to pay the

1 Q. Okay. The letter says that on June 9th, Now  
2 paid the second of 12 installments to cure the payments  
3 and monthly deposits due Help Desk Now. What does that  
4 mean -- "cure"? Is there a default?

5 A. No. Help Desk Now provides the call center  
6 service to -- to Now, and -- and we were behind with  
7 our -- with our payroll to them -- paid them. And -- and  
8 so they allowed us to catch up on 12 installments.

9 Q. Is what you were behind -- are you talking  
10 about what you were behind when you filed the --

11 A. Yes.

12 Q. -- bankruptcy? So since the bankruptcy,  
13 you've been paying down the pre-petition bankruptcy --

14 A. Yes. That's correct. Yes. We had to in  
15 order to continue to have our phones answered.

16 Q. Okay. But you understand -- I think you even  
17 stated before -- that the debtor is not supposed to pay  
18 its pre-petition debts in bankruptcy, right?

19 A. No, if it's -- if it's a contract and -- I  
20 think you can.

21 Q. Okay. Now I'm going to give you -- I don't  
22 have copies of these. These are documents that were  
23 produced by Bizonline. Okay. And I don't have copies of  
24 them. In fact, I don't even know if I have any copies.  
25 We may have to copy these afterwards. I don't know if



# **EXHIBIT C**

1 have an opinion as to what the value was on the petition  
2 date?

3 A. Yeah, I think the value on liquidation date  
4 for the company was anywhere from maybe 150 to \$250 per  
5 customer thereabouts.

6 Q. So you did an analysis of the collateral based  
7 on, sort of, in terms of customers, as a multiple of the  
8 number of customers?

9 A. That is -- that is one way we did it, yeah.

10 Q. Did that liquidation -- you said it was 150 to  
11 250 per customer?

12 A. Yes.

13 Q. Does that include -- I mean, is that --  
14 what -- is that MCG's view of the liquidation value of  
15 all of its collateral or just receivables?

16 A. Of the entire company.

17 Q. Okay. And how many customers did Now have on  
18 the date of filing of the bankruptcy?

19 A. Approximately 33,500.

20 Q. Help me with my math. Is that roughly  
21 \$4,000,000 -- no -- I guess, \$6,000,000 was what you  
22 viewed as the liquidation value?

23 A. I would say anywhere between -- you know,  
24 theoretically that -- that banned with what I talked  
25 about in terms of the valuation theoretically.

1 MR. WRIGHT: But he gave you a range. I don't  
2 want you to --

3 MR. MEYERS: I --

4 MR. WRIGHT: -- necessarily --

5 MR. MEYERS: -- understand.

6 MR. WRIGHT: -- pin him down to \$6,000,000 or  
7 whatever.

8 Q. (By Mr. Meyers) And this was just MCG'S view  
9 of the liquidation value of --

10 MR. WRIGHT: That's --

11 Q. (By Mr. Meyers) -- the --

12 MR. WRIGHT: -- all --

13 Q. (By Mr. Meyers) -- company --

14 MR. WRIGHT: -- it is.

15 Q. (By Mr. Meyers) -- as of the petition date,  
16 in their view, was 150 to 250 per customer at 33,000  
17 customers?

18 A. For the enterprise, yeah.

19 Q. Okay. Which is probably somewhere in the --  
20 if we had a calculator, we'd know -- but somewhere in the  
21 4 to 6, 5 to \$7,000,000 range, somewhere like that?

22 A. Correct.

23 Q. Where would that value come from? Was that  
24 receivables, inventory, equipment, intellectual property?  
25 Where did you see getting that 4 or 5 or \$6,000,000?

1           A.    Mainly from the underlying revenues and profit  
2 earnings power off the customer base.

3           Q.    Well, but we were talking about a liquidation  
4 value. Is this really a going concern valuation that you  
5 had?

6           A.    Absolutely.

7           Q.    Okay. So let me back up, and maybe we're  
8 using terms of art. I don't want to trick you here.  
9 Liquidation value -- when I say "liquidation value," I  
10 mean company the stops operating. It's closed, and it  
11 starts collecting receivables, selling inventory, selling  
12 equipment, selling intellectual property, selling its  
13 customer lists, okay, selling its assets, sort of  
14 piecemeal.

15           A going concern valuation -- when I use that  
16 term, I would mean selling a business in place with its  
17 customers and sort of a seamless interruption. Based on  
18 that, is your evaluation that you just gave me -- is that  
19 really what you had as a --

20           A.    That's --

21           Q.    -- going --

22           A.    -- a --

23           Q.    -- concern?

24           A.    -- going concern.

25           Q.    Okay. And that was as of the petition date?

1 A. Uh-huh.

2 Q. All right. Now using that term "going concern  
3 value," do you have an opinion now as to what the going  
4 concern value is of Now Communications?

5 MR. WRIGHT: Right now?

6 MR. MEYERS: Yeah, right now.

7 A. I would still use the same general -- general  
8 proxy of 150 to 250 range.

9 Q. (By Mr. Meyers) Okay. But how many customers  
10 does Now have?

11 A. Approximately 25,000.

12 Q. Okay. So you would view the going concern  
13 value to be less because the customer base has dropped?

14 A. Correct.

15 Q. Now based on what I said as liquidation value,  
16 did MCG undertake any analysis of liquidation value of  
17 the company if it just had to -- if it closed down and  
18 had to sell off its assets?

19 A. No, I don't think so.

20 Q. They've never really undertaken that type of  
21 an analysis, to your knowledge?

22 A. I'm not aware of a liquidation -- no, I don't  
23 think that we've done a liquidation value that didn't  
24 include the value of the customers.

25 Q. Okay. Well, when you say "value of the

1           A.    I don't know that I've said that there's --  
2 no, I -- I don't recall.

3           Q.    If you did, what would you have been referring  
4 to?

5           A.    I -- I really don't -- I -- I don't -- I -- I  
6 don't recall telling anybody that there is upside beyond  
7 the 4.7 million dollars.

8           Q.    Okay. Why doesn't Now Acquisition Corp. just  
9 make a direct offer to purchase the assets from the  
10 debtor? Why is it structured as your designee?

11           MR. WRIGHT: Object to --

12           A.    I don't --

13           MR. WRIGHT: -- form.

14           A.    -- I don't know.

15           MR. WRIGHT: To the extent it invades  
16 attorney-client privilege, I would instruct the witness  
17 not to answer.

18           Q.    (By Mr. Meyers) Do you expect that by  
19 October 1 when we have the hearing that you will be able  
20 to inform the court of who the purchaser of the assets  
21 is, be it MCG or some other entity?

22           A.    Yes.

23           Q.    What will need to happen between now and then  
24 for you to know who that person is?

25           A.    Negotiations for the sale of the assets and

1 a -- and a -- and a series of, I guess, operational,  
2 regulatory issues would need to be addressed, I guess.

3 Q. And when you say "negotiation for the sale of  
4 the assets," you mean negotiation between MCG and some  
5 designee?

6 A. Correct.

7 Q. And right now the only negotiations that  
8 you're aware of that are ongoing are with Now Acquisition  
9 Corp.?

10 A. The only discussions for the potential sale  
11 are with Now Acquisition.

12 Q. But there's no agreement yet between MCG and  
13 anybody to flip these assets?

14 MR. WRIGHT: Object to form.

15 A. MCG has not negotiated with Now Acquisition  
16 Corp. for the purchase price from MCG.

17 Q. (By Mr. Meyers) Have any documents been  
18 circulated, term sheets or asset purchase agreements  
19 between MCG and Now Acquisition Corp.?

20 A. No.

21 Q. Has anybody drafted any yet?

22 A. Not that I'm aware of.

23 Q. Will one be drafted and -- will one have been  
24 drafted by October 1?

25 A. You know, I don't know the answer to that.

1           Q.    Are you aware of any other loans MCG has where  
2 MCG guaranties the debts of its borrower, any debts of  
3 its borrower?

4           A.    I'm aware in one situation where MCG  
5 guaranties an obligation of a borrower or -- or has a  
6 limited -- a limited kind of guaranty. I don't know what  
7 the right word for it is. And I could -- allowed to talk  
8 about it -- but there's -- I'm aware of one situation  
9 where MCG has limited guaranty on behalf of a -- an  
10 investment company, a portfolio company.

11          Q.    Okay. Out of how many loans that you are  
12 familiar with?

13          A.    I manage between 10 and -- I don't know --  
14 15, ballpark, investments, and I'm aware of one that --  
15 of those 15 that I do.

16          Q.    Okay. You're familiar with the asset purchase  
17 agreement that's been filed with the court?

18          A.    Yes.

19          Q.    I think last time we talked about whether that  
20 agreement had been executed since the last deposition,  
21 which was probably three and a half, four weeks ago.  
22 Have you determined whether that asset purchase agreement  
23 or any asset purchase agreement has been executed?

24          A.    I have not.

25          Q.    Have you seen any other drafts since that



1 capital through the repayment of the obligation of MCG.

2 Q. And what about "plus upside in the asset?"

3 How would MCG have an upside in the asset?

4 A. Through equity ownership.

5 Q. In Bizonline?

6 A. Correct.

7 Q. Okay. But not because Bizonline would pay  
8 more than 4.6 million for the asset?

9 A. Correct.

10 Q. But you don't know what they're going to pay  
11 for the asset right now?

12 A. Correct.

13 Q. And it could be more or could be less than  
14 4.6 million?

15 MR. WRIGHT: Object to form.

16 A. You're asking me to speculate.

17 Q. (By Mr. Meyers) Well, do you know for certain  
18 that it won't be more than 4.6 million?

19 A. No, I don't know for certain.

20 (Exhibit 11 marked for identification.)

21 Q. (By Mr. Meyers) Exhibit 11 is MCG 12168  
22 through 12171, a letter from Mr. Wright to Ms. Shaffer,  
23 which was cc'd on to you and Mr. Gavillet and other  
24 people. Have you ever seen this letter before?

25 A. (Examining.) I don't remember it, but I see

1 could provide those services?

2 MR. WRIGHT: Object to form.

3 A. Is who?

4 Q. (By Mr. Meyers) Essex Acquisition Corp.

5 A. I don't believe Essex Acquisition Corp. is a  
6 wholesaler.

7 Q. You stated that that's -- that wholesaling is  
8 one method that the buyer could get BellSouth's services.  
9 But you don't --

10 A. Correct.

11 Q. -- but you don't know any wholesalers that  
12 have the ability to do that?

13 A. I'm not -- do I know of any?

14 Q. Yes.

15 A. Yes.

16 Q. Who?

17 A. Z-Tel.

18 Q. Do you know anybody else?

19 A. I'm not aware of others.

20 Q. Do you know whether it's legal for Z-Tel to  
21 wholesale BellSouth services to the buyer?

22 MR. WRIGHT: Object to form.

23 A. I don't know.

24 Q. (By Mr. Meyers) Explain to me what the  
25 harvest approach is.

1 A. Harvest? In what context?

2 Q. In the context of Now Communications and the  
3 possible sale of its assets.

4 A. You'd have to give me more information. I  
5 don't understand the question.

6 Q. You don't recall that term being used -- the  
7 word "harvest" being used in connection with strategizing  
8 regarding this purchase?

9 MR. WRIGHT: Object to form.

10 A. I recall harvest being used when describing  
11 what BellSouth's doing to the Now customer base --  
12 harvesting the customers. I recall that.

13 Q. (By Mr. Meyers) Okay. Do you recall it in  
14 any other connection besides what BellSouth is doing to  
15 Now's customers?

16 A. You -- if you have something you'd like me to  
17 look at to put it in context, I'll be glad to talk about  
18 it.

19 Q. But absent that, you don't have any  
20 recollection?

21 A. I think harvest is a word that's been used in  
22 lots of different ways.

23 MR. WRIGHT: And let me just say that to the  
24 extent that it has been used, if it's been used with his  
25 attorneys, that is not discoverable.

1 MR. MEYERS: I understand if it's privileged,  
2 it's not discoverable.

3 MR. WRIGHT: Okay.

4 Q. (By Mr. Meyers) Has the word "harvest" been  
5 used in connection with having another entity get an  
6 interconnection agreement with BellSouth, and then have  
7 new customers sign up with that entity while old Now  
8 customers slowly go away?

9 MR. WRIGHT: Object to form.

10 Q. (By Mr. Meyers) Would that be the harvest  
11 approach?

12 MR. WRIGHT: Same objection.

13 A. If you have something you want me to look at,  
14 I will.

15 Q. (By Mr. Meyers) But absent that, the answer  
16 is you don't know?

17 A. I don't know where you're getting that  
18 information. I'd like to see what -- what we're talking  
19 about.

20 Q. Well, I'm just asking you the question.

21 A. What -- what's your question?

22 MR. MEYERS: You want to read the question  
23 back?

24 (Record read.)

25 MR. WRIGHT: Same objection.

1           A.   And -- and -- and -- are you asking is that a  
2 definition of harv -- what is your -- what's your  
3 question then?

4           Q.   (By Mr. Meyers) Have you referred to that  
5 concept as the harvest approach?

6           A.   I --

7           MR. WRIGHT: Same --

8           A.   -- don't know --

9           MR. WRIGHT: -- objection.

10          A.   -- if I've referred to it.

11          Q.   (By Mr. Meyers) Have you heard it referred to  
12 as the harvest approach?

13          MR. WRIGHT: Same objection.

14          A.   I don't know if I've heard that outside of  
15 discussions with my attorney or not.

16          Q.   (By Mr. Meyers) Are you aware that the debtor  
17 files monthly operating reports with the United States  
18 Trustee?

19          A.   That's a part of the process that I'm not very  
20 familiar with.

21          Q.   Have you seen any of those reports?

22          A.   No, sir.

23          Q.   Has anybody at MCG seen those reports?

24          A.   No -- well, I don't know that answer.

25          Q.   Who at MCG may have seen them?

1 MR. WRIGHT: Object to form.

2 A. It says what it says. I can't add anything to  
3 what it says.

4 (Exhibit 15 marked for identification.)

5 Q. (By Mr. Meyers) Exhibit 15, MCG 10109 to  
6 10111 -- have you ever seen this before?

7 A. (Examining.) This looks like correspondence  
8 between attorneys to me.

9 Q. Well, it looks like it's between Mr. Gavillet  
10 and you. You did not know that document had been  
11 produced, did you?

12 A. Oh, I -- I assume everything's been produced.

13 Q. Have you seen this before?

14 A. Yeah, I've seen it before. Yes.

15 Q. Does this refresh your recollection about ever  
16 hearing about the harvest approach?

17 A. You know, harvest means a lot of things.

18 Q. Yes, it does. What does it mean now that  
19 you've refreshed your recollection by reading this  
20 document?

21 A. Let me read it. (Examining.) Oh, it means  
22 whatever is described in this letter.

23 Q. Have there ever been discussions about getting  
24 another company with certification with BellSouth for an  
25 interconnection agreement with BellSouth and then signing

1 up new customers through that, rather than shifting all  
2 the Now customers?

3 A. Say that again.

4 Q. Okay. Has there been a strategy that's been  
5 discussed where a Biz affiliate would get an  
6 interconnection agreement or has an interconnection  
7 agreement with BellSouth and new customers would be  
8 signed up to that interconnection agreement and the old  
9 Now customers would just be allowed to fall off, rather  
10 than transferring them over?

11 MR. WRIGHT: To the extent that discussion was  
12 with non-lawyers.

13 A. You know, I think that discussion has -- has  
14 been part of all kind of option analysis.

15 Q. (By Mr. Meyers) Are you still looking at that  
16 option?

17 A. I think we're looking at all options  
18 presently.

19 (Exhibit 16 marked for identification.)

20 Q. (By Mr. Meyers) It's Exhibit 16, MCG 10526.  
21 Have you seen this before?

22 A. (Examining.) Yes, I've seen it.

23 Q. Okay. Your e-mail in the middle to  
24 Mr. Gavillet dated June 3rd says "Here is one final, last  
25 contingency plan for dealing with Bell, if they do not

1 play ball. We get our certs" --

2 COURT REPORTER: Slow down.

3 Q. (By Mr. Meyers) "We get our certs and our  
4 interconnects. We place all new customers (new sales) on  
5 our interconnect and leave all old customers on the now  
6 interconnect. With a 6 to 8 month customer life, it  
7 won't take very long before the majority of new customers  
8 are on our new interconnect (with no cure) and the old  
9 interconnect dwindles to a very much lower, and stable  
10 customer base. We stay in bankruptcy until such time as  
11 the base has dwindled, or forever for that matter, all to  
12 avoid the extortion of bell." Do you recall writing that  
13 e-mail?

14 A. Yeah, and, look, there's the word "extortion"  
15 that you've been looking for, correct? So I stand  
16 corrected. I have used the word "extortion," right or  
17 wrong. So do you have a question?

18 Q. Is this the harvest approach?

19 A. Well, I don't know if you'd call it the  
20 harvest approach.

21 Q. Have you ever referred to this as the harvest  
22 approach?

23 A. I think it's been referred to as the harvest  
24 approach.

25 Q. Okay. Who is Mary Cotturo?



# **EXHIBIT D**

1       A.     No, between '92 and '94, while I was --  
2       MCI put me through the Kellogg management  
3       program.

4       Q.     And you've been -- and after you left  
5       MCI, can you tell me what companies you've  
6       worked for?

7       A.     I worked for a company called U.S.  
8       Network. I worked for a company called  
9       alternately, Corcom, the company that bought  
10      U.S. Network. I worked for a company called  
11      Vertex Broadband. And then I consulted for a  
12      little while for a company called Universal  
13      Access, and I ultimately joined them, and then  
14      I joined BiznessOnline.

15      Q.     When did you join BiznessOnline?

16      A.     In October of 2002.

17      Q.     What is the business of -- the primary  
18      business of BiznessOnline?

19      A.     Providing telecommunications services.

20      Q.     Are they a CLAC?

21      A.     It's actually the parent -- the  
22      certified company -- the principal certified  
23      company is actually Essex Acquisition  
24      Corporation.

25      Q.     Are there any other principal operating

1 know the date.

2 Q. Okay.

3 A. When did they file?

4 Q. March 4th.

5 A. It may be around that date --

6 Q. Around --

7 A. -- but I don't recall.

8 Q. Around which date?

9 A. When you asked May, it may be around  
10 May, but I don't recall.

11 Q. Is it your understanding that Now  
12 Acquisition Corp. is going to purchase the  
13 assets of Now?

14 A. No.

15 Q. What is your understanding regarding  
16 who will purchase the assets of Now?

17 A. My understanding is that MCG will.

18 Q. And then, is it your understanding that  
19 Now Acquisition Corp. will purchase those  
20 assets from MCG?

21 A. It may.

22 Q. And have you entered into any agreement  
23 with MCG regarding the terms of that purchase  
24 from MCG?

25 A. No.

1 Q. Have there been discussions regarding  
2 the terms for that purchase?

3 A. Not specific discussions, no.

4 Q. General discussions?

5 A. That's the reason why we've worked with  
6 MCG was the opportunity.

7 Q. At what point will an agreement between  
8 MCG and Now Acquisition Corp. be negotiated?

9 MR. WRIGHT: Object to form.

10 BY THE WITNESS:

11 A. You know, in the future. I don't have  
12 a deadline.

13 Q. Before October 1?

14 MR. WRIGHT: Object to form.

15 BY THE WITNESS:

16 A. I'm not sure.

17 Q. Do you know how much Now Acquisition  
18 Corp. will be willing to pay for those assets?

19 A. No.

20 Q. Do you know whether they will pay more  
21 than \$4.6 million for those assets?

22 A. No, I don't know.

23 Q. So, it's possible that they'll pay more  
24 than \$4.6 million?

25 MR. WRIGHT: Object to form.

1 BY THE WITNESS:

2 A. It's possible.

3 Q. Do you have an opinion as to what the  
4 value is of the assets that MCG is seeking to  
5 purchase from Now?

6 A. Not at this time.

7 Q. Do you know if Mr. Baritz has expressed  
8 any opinion as to the value of those assets?

9 A. He may have. I don't recall.

10 Q. Do you know whether Mr. Patton has  
11 expressed any opinion as to the value of those  
12 assets?

13 A. I don't recall.

14 Q. Do you ever get involved in the  
15 valuation of companies or assets that  
16 BiznessOnline is considering purchasing?

17 A. Sometimes.

18 Q. Isn't it true, in the telecom industry  
19 that, often, the assets are valued by a  
20 multiple of customers?

21 MR. WRIGHT: By -- by what? I'm sorry.

22 MR. MEYERS: A multiple.

23 BY THE WITNESS:

24 A. Isn't it true that in -- there are many  
25 ways to value customer bases. That may be one

1 Q. By all of the assets of Essex?

2 A. I'm not sure.

3 Q. Does MCG have a lien on the assets of  
4 Essex?

5 A. I believe they do.

6 Q. Do you know who is senior as between  
7 MCG and R -- and whatever you stated?

8 MR. WRIGHT: Object to form.

9 BY THE WITNESS:

10 A. Yeah. I'm not sure. RFC is what I  
11 stated.

12 Q. RFC? Okay.

13 Did BiznessOnline consider making a  
14 direct bid for the assets of Now, rather than  
15 purchasing from MCG?

16 A. I don't recall.

17 Q. Would you have been involved in those  
18 discussions if BiznessOnline had discussions  
19 about that possible course of action?

20 A. Not necessarily.

21 Q. Who is the main decision-maker for  
22 BiznessOnline?

23 A. Mr. Baritz.

24 Q. Were you involved in the  
25 decision-making process regarding the move of

1 the employees from Lawrenceville to Orlando?

2 A. Involved in the decision-making  
3 process? What do you mean by that?

4 Q. Well, I guess I'm trying to find out  
5 whose idea it was and who all had to agree for  
6 it to happen. I mean, obviously, they share  
7 space with your company down there, so I would  
8 think that they didn't show up overnight.

9 A. Sure.

10 Q. You must have consented to it. How did  
11 that all come about?

12 A. Well, what I'm aware of is that  
13 Mr. Seab had an objective to reduce his cash  
14 burn as quickly as possible. He had a very  
15 significant lease in Georgia that was costing  
16 him a great deal of money. And, as you know, a  
17 company in the position of Now in bankruptcy  
18 often has few options, in terms of finding a  
19 landlord or other space. And in discussions  
20 with Mr. Seab, because we had a fair amount of  
21 space available, we made available space for  
22 some of his employees.

23 Q. Does Now pay rent to BiznessOnline or  
24 one of its affiliates for sharing space?

25 A. I'm not sure.

1 Q. Is there any lease between  
2 BiznessOnline or its affiliate and Now?

3 A. I don't recall if there's a lease.

4 Q. You're aware of a transition services  
5 agreement between Essex Acquisition Corp. and  
6 the debtor?

7 A. A reciprocal services agreement?

8 Q. Yeah, I'm sorry.

9 A. Yes.

10 Q. A reciprocal services agreement.

11 A. Yes, I am.

12 Q. Okay. Are there any other agreements  
13 that you're aware of between Essex or any  
14 BiznessOnline affiliate and Now?

15 A. No.

16 Q. Have you ever re- --

17 A. There was an amendment to the  
18 reciprocal services agreement.

19 Q. Okay. Have you reviewed the reciprocal  
20 services agreement as amended?

21 A. Yes.

22 Q. Does it provide for the payment of  
23 rent?

24 MR. WRIGHT: Object to form.  
25



1 BY THE WITNESS:

2 A. I think that potentially, it does.

3 Q. When did this move take place?

4 A. I'm not sure of the exact date.

5 Q. When did the decision -- when was the  
6 decision made to move to Orlando?

7 A. I don't know.

8 Q. Would it be around April, you think?

9 MR. WRIGHT: Object to form.

10 BY THE WITNESS:

11 A. I'm not sure of the exact date.

12 Q. Well, how about the --

13 A. Probably --

14 Q. How about within a month?

15 A. It's probably -- within a month? I  
16 couldn't guess.

17 Q. Okay. What services, if any, does Now  
18 perform for Essex Acquisition Corp. or its  
19 affiliates under the reciprocal services  
20 agreement?

21 A. I'm not aware of any right now.

22 Q. What services does BiznessOnline or its  
23 affiliates perform for Now under the reciprocal  
24 services agreement?

25 A. I believe to date, provisions have been

1 made to assist Now in moving, and so, at the  
2 request of Mr. Seab, movers were identified.

3 In addition, there are temporary  
4 employees that Mr. Seab has engaged and that  
5 are located in the Delray call center.

6 And Mr. Seab and a couple of Now  
7 employees, I believe, have space in the Orlando  
8 center.

9 Q. Other than providing space for the  
10 employees, are there any other services being  
11 provided? And other than helping with the  
12 move, are there any other services being  
13 provided by Essex to Now?

14 A. Well, helped them with the move.  
15 Day-to-day, I think Mr. Seab pays for the call  
16 center employees. There's a -- I believe that  
17 Now is reselling long distance service under a  
18 Qwest agreement that we have.

19 So, long distance, customer service,  
20 and, you know, anything else that, you know, he  
21 may, from time to time, you know, request.

22 Q. So, employees of BiznessOnline or Essex  
23 are providing the customer service mentioned  
24 for Now?

25 A. I don't believe so. I believe there

# **EXHIBIT E**

**Bid to Purchase Selected Assets  
Of  
NOW COMMUNICATIONS  
Submitted By  
MCG Finance Corporation  
Or its Assigns**

1. Description of Assets to be Acquired. MCG Finance Corporation ("MCG") hereby proposes to acquire (with the full right of substitution and further assignment) all of assets and property rights of NOW Communications, Inc., and its subsidiaries (collectively, "NOW"), wherever located, whether tangible or intangible and whether choate or inchoate (and specifically including all customers, accounts receivable, all refund rights, all deposits, all cash balances, all proceeds of the sale of any other asset, right, title or interest of NOW, all books and records, all customer lists, all intellectual property, all residual interests in assets as to which another party also has an interest, and all claims and causes of action against third parties), but none of the liabilities of NOW, all free and clear of any and all liens, encumbrances and rights and claims of third parties and all in accordance with Section 363 of the U.S. Bankruptcy Code, except as follows:
- a. With respect to the access lines for customers (including the backlog of customers waiting for service), MCG only proposes to acquire such customers as may be transitioned to or otherwise have service by another licensed carrier prior to July 31, 2003 (unless extended by MCG) and the exclusive right to solicit such customers for telecommunications services; and
  - b. No asset is included in this offer to purchase to the extent that another party has a lien, encumbrance or fee interest that is perfected and senior in right under applicable law to the liens of MCG and the debtor in possession; and
  - c. MCG shall purchase assets with known liens and amounts owing to secured creditors as shown on Schedule 1 hereto [if any] and MCG assumes the liability associated with such assets; and
  - d. No asset is included in this offer to the extent that such asset has been or is sold to another purchaser with the consent of MCG; and
  - d. No asset is included in this offer to the extent that such asset is listed on Schedule 2 hereto (if any).
  - e. MCG will assume the contracts identified on Schedule 3, subject to satisfactory negotiation of the terms and conditions of such contracts with the contractor, including cure amounts [if applicable].
  - f. Upon the closing of this asset purchase agreement on April 30, 2003, MCG shall enter into an Interim Operating Agreement with NOW for the provision of telecommunications services for the regulatory approval period, a form of which is shown in Schedule 4.
  - g. MCG shall establish a Liquidating Trust for the Unsecured Creditors in an amount of 8% of the Unsecured Creditor's Claim. The terms and conditions of the Liquidating Trust are shown in Schedule 5. *[Is this smart to show debtor per-negotiation].*

This proposal also specifically includes the right to assume (and to further assign) all of NOW's rights, title and interest in and with respect to the Interconnect Agreements as to which NOW currently has rights and are listed on Schedule 6 hereto (if any), subject to MCG's obligation to cure pre-petition defaults in the payment of charges for service as provided in such carrier's publicly filed tariffs and otherwise prospectively subject to the terms and conditions of such carrier's publicly filed tariffs.

This proposal also includes the right of MCG (or its assignee) to commence immediately the transfer and re-provisioning of any customers of NOW to a licensed carrier.



MCG 00194

This proposal also includes the right of MCG (or its assignee) to extend the date for rejection of any contracts of NOW beyond July 31, 2003 but not beyond September 30, 2003, provided that MCG must provide financing or otherwise assume responsibility for the payment of the contractual payments due under such contracts between April 31, 2003 and September, 2003.

*[This proposal also includes a condition that no telecommunications carrier services provided by Bell South be terminated, abandoned, rejected, shut down or otherwise transferred to any other party without the consent of MCG prior to July 31, 2003, provided that MCG must provide financing or otherwise assume responsibility for the payment of the costs of such services after April 30, 2003.]*

This proposal also include a requirement that NOW 1) operate the business in the normal course until closing and 2) cooperate with MCG (and its assignees), and to cause others to cooperate with MCG (and its assignees), in a commercially reasonable manner to transfer (and to otherwise facilitate the transfer of) the acquired assets as expeditiously as possible.

2. Consideration to be Paid. In exchange for the above assets and rights, MCG hereby proposes to credit bid  
\$ \_\_\_\_\_ of its pre-petition claim and DIP Financing, as further detailed on Schedule Z hereto.

**Schedule 1**

**List of Included Assets with a known Lien and/or Liability**

Asset Name	Description	Location	Lien Holder	Amount/Terms

**Schedule 2**  
**Other Excluded Assets**

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_

**Schedule 3**  
**Assumed Contracts**

Contractor	Description	Contact Information	Cure	Amount/Terms



**Schedule 4**

**Terms and Conditions of Interim Operating Agreement**

**Schedule 5**

**and Conditions of Unsecured Creditors Liquidating Trust**

Additional Information	

**Schedule 6**

**Bell South Interconnect Agreements**

State	Description	Contact Information	Cure (net of Disputes)	Additional Information

## Schedule 7

### Allocation of Purchase Price

MCG hereby allocates the purchase price set forth in the attached proposal as follows:

1. \$ \_\_\_\_\_ for the customer base of NOW
2. \$ \_\_\_\_\_ for the Physical Assets of NOW
3. \$ \_\_\_\_\_ for \_\_\_\_\_
4. \$ \_\_\_\_\_ for \_\_\_\_\_
5. \$ \_\_\_\_\_ for \_\_\_\_\_
6. \$ \_\_\_\_\_ for \_\_\_\_\_
7. \$ \_\_\_\_\_ for \_\_\_\_\_
8. \$ \_\_\_\_\_ for \_\_\_\_\_
9. \$ \_\_\_\_\_ for \_\_\_\_\_

The balance of the purchase price for the remaining assets.

# **EXHIBIT F**

## Unknown

---

From: Ron Gavillet [ron@thenetworks.com]  
Sent: Tuesday, June 03, 2003 10:13 AM  
To: John Patton  
Subject: RE: Stream of thoughts

Wking on it now...we have FL now, we are going to draft off what Swidler does and file in our own name and use separate local counsel and keep Biz's name out of it if possible since Essex has its own financials so BS cannot easily connect the dots.

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

From: John Patton [mailto:jpatton@mcgcapital.com]  
Sent: Tuesday, June 03, 2003 10:12 AM  
To: 'Ron Gavillet'  
Subject: RE: Stream of thoughts

so you are gonna get essax on of those, right?

-----Original Message-----

From: Ron Gavillet [mailto:ron@thenetworks.com]  
Sent: Tuesday, June 03, 2003 10:52 AM  
To: John Patton  
Subject: RE: Stream of thoughts  
Too bad APA took so long.....

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

From: John Patton [mailto:jpatton@mcgcapital.com]  
Sent: Tuesday, June 03, 2003 9:52 AM  
To: 'Ron Gavillet'  
Subject: RE: Stream of thoughts

woulda, coulda and shoulda. would ya!

-----Original Message-----

From: Ron Gavillet [mailto:ron@thenetworks.com]  
Sent: Tuesday, June 03, 2003 10:49 AM  
To: John Patton  
Cc: kenbaritz@yahoo.com  
Subject: RE: Stream of thoughts

Great minds....I told Jimmy and Thad that earlier this morning when we were talking about "letting the water out of the tub slowly" versus Mass migration that attracts attention; we may want to low profile the Bellsouth discussions and drag them out by never closing them; one idea might also be to do an application in the name of Essex Acq. Simultaneously with the Now Acq. And keep Essex in the background as a possible wholesaler to Now?

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

From: John Patton [mailto:jpatton@mcgcapital.com]  
Sent: Tuesday, June 03, 2003 9:24 AM  
To: 'Ron Gavillet'  
Cc: 'kenbaritz@yahoo.com'  
Subject: RE: Stream of thoughts

Here is one final, last contingency plan for dealing with Bell, if they do not play ball:

we get our certs and our interconnects. we place all new customers (new sales) on our interconnect and leave all old customers on the now interconnect. with a 6 - 8 month customer life, it wont take very long before the majority of new customers are on our new interconnect (with no cure) and the old interconnect dwindles to a very much lower, and stable customer base. We stay in bankruptcy until such time as the base has dwindled, or forever for that matter, all to avoid the extortion of bell.

-----Original Message-----

From: Ron Gavillet [mailto:ron@thenetworks.com]

Sent: Monday, June 02, 2003 7:10 PM

To: John Patton

Subject: Stream of thoughts

JP, the more you think about the BS situation, even if we went to 2tel for 3 months, at a 20% lift in COGs, assuming they did not wack us for migration cost, it would still cost \$660K above where we are today.

And I do not think IDS is necessarily the answer here since they could be seeing a bit of exposure stepping into this.

I am thinking if the discussions with BS result in a significant increase in cure cost above the \$150K, then maybe we will need to revisit the management deals-b/w the base erosion and the BS cure cost, there would be a pretty good case for changed circumstances.  
Ron Gavillet Ph. 847.441.2399  
Fax: 847.441.2398

# **EXHIBIT G**



**Katharine Glenn**

**From:** Ron Gavillet [ron@thenetworks.com]  
**Sent:** Friday, June 20, 2003 10:37 AM  
**To:** Wright, Don; enslaw@bellsouth.net  
**Cc:** 'Derek A. Henderson'; Porterfield, Stephen; John Patton; Ken Baritz  
**Subject:** RE: BellSouth

Even if the judge approves the bid procedures, Bell will still be standing there pressing the assume/reject issue, so it is an issue we have to be prepared to wrestle—succeeding on keeping BellSouth in a box while we get approvals, etc. will remove their leverage—this is the pressure point and legal point we need to succeed on.

Ron Gavillet  
 Ph. 847.441.2399  
 Fax: 847.441.2398

-----Original Message-----

**From:** Wright, Don [mailto:dwright@sirote.com]  
**Sent:** Friday, June 20, 2003 9:33 AM  
**To:** 'Ron Gavillet'; Wright, Don; enslaw@bellsouth.net  
**Cc:** 'Derek A. Henderson'; Porterfield, Stephen; John Patton; Ken Baritz  
**Subject:** RE: BellSouth

Supra's issues were entirely different. Their workout with BellSouth on adequate protection is similar to that in NOW. But they are a bigger company, are cash-flowing, are not pursuing a sale, have retained their customer base postpetition, are litigating furiously with BellSouth over the BS billings (because they have the luxury, which we don't have, of time). They have not faced this issue, and do not anticipate doing so.

Let's talk about hiring an investment banker re: issue of your timing, value, etc. If this Judge approves our bid procedures package next week, then there may be no need to go the route of an investment banker. On the other hand, if BellSouth agrees to not object to a sale if an investment banker is hired, is it worth it to NOW and MCG for the delay to be caused by that hire? Obviously, there are lots of things to consider.

We are looking vigorously at that last issue, according to the law. Derek and Eileen know this Judge better than anybody, and their input here is invaluable.

-----Original Message-----

**From:** Ron Gavillet [mailto:ron@thenetworks.com]  
**Sent:** Friday, June 20, 2003 9:21 AM  
**To:** Wright, Don; enslaw@bellsouth.net  
**Cc:** 'Derek A. Henderson'; Porterfield, Stephen; John Patton; Ken Baritz  
**Subject:** RE: BellSouth

How did Supra handle this? Also, we should consider hiring an investment banker b/c their posture makes it unattractive, thus giving us time. You need to tell us whether the judge will require a utility to continue to provide services throughout the BK until the plan is in place, etc.

Ron Gavillet  
 Ph. 847.441.2399  
 Fax: 847.441.2398

-----Original Message-----

**From:** Wright, Don [mailto:dwright@sirote.com]  
**Sent:** Friday, June 20, 2003 9:14 AM



7/30/2003

MCG 10033

To: 'enslaw@bellsouth.net'  
Cc: 'Derek A. Henderson'; Porterfield, Stephen; John Patton; 'Ron Gavillet'  
Subject: BellSouth

I just received a voicemail from Meyers. In response to our latest offer, he has declined it without so much as a counter. He says that there is no need to meet in Atlanta and try to resolve. He says that all they are interested in are full pay or rejection of their contract.

How will this play with Judge Ellington? When you guys have time, let's chat since it is clear that we are now going to have to go forward next Thursday with a full-blown hearing. What testimony will he want to hear? Who should be present? Etc.....

Fyi, we are working on our MFRS. It will be filed by next Thursday.

Thx, don

*NOTICE: This communication is not encrypted and may contain privileged or other confidential information. If you are not the intended recipient or believe that you may have received this communication in error, please reply to the sender indicating that fact and delete the copy you received. In addition, you should not print, copy, retransmit, disseminate, or otherwise use the information. THANK YOU.*

7/30/2003

MCG 10034

# **EXHIBIT H**

**Arnall  
Golden  
Gregory LLP**

Direct phone: (404) 873-8744  
Direct fax: (404) 873-8745  
E-mail: [frank.white@agg.com](mailto:frank.white@agg.com)  
[www.agg.com](http://www.agg.com)

June 19, 2003

Eileen N. Shaffer, Esq.  
P. O. Box 1177  
Jackson, Mississippi 39215-1177

Re: In Re NOW Communications, Inc.; in the U.S. Bankruptcy Court for the  
Southern District of Mississippi; Chapter 11, Case No. 03-01336

Dear Eileen:

Per our conversation this morning, I have signed and enclosed herewith the Agreed Order resolving the various outstanding issues between NOW Communications and Verizon. I understand that you will sign and submit the Agreed Order to the Court for approval, subject to applicable notice requirements. I also understand that the \$22,366.00 cure payment to Verizon will be made, via wire-transfer in accordance with the instructions set forth in the Agreed Order, at some point over the next week or so.

Please feel free to contact me if you have any questions, or if there is anything we need to discuss. I will be back in touch with you as soon as Verizon has completed its reconciliation of NOW's post-petition charges and payments, which should be within the next 2 to 3 weeks. Thanks for your cooperation in this matter.

Sincerely,

ARNALL GOLDEN GREGORY LLP

  
Frank N. White

# **EXHIBIT I**

**EILEEN N. SHAFFER**  
Attorney at Law  
401 E. CAPITOL ST. - SUITE 316  
JACKSON, MISSISSIPPI 39201

(601) 969-3006

MAILING ADDRESS  
P. O. BOX 1177  
JACKSON, MISSISSIPPI 39215-1177

FACSIMILE (601) 949-4002  
e-mail: [enslaw@bellsouth.net](mailto:enslaw@bellsouth.net)

June 10, 2003

via telecopy (336) 292-4348

Lynn Carriker  
Help Desk Now

Re: NOW Communications, Inc.

Dear Mr. Carriker:

On June 9, 2003, NOW Communications, Inc. paid the second of twelve installments to cure the payments and monthly deposits due Help Desk Now. It is my understanding that this repayment schedule is acceptable with your company. NOW Communications, Inc. intends to assume its contract with Help Desk Now and continue its business relationship, as exemplified by the payment of the installments.

If there is any additional information that you may need, please do not hesitate to contact me.

Sincerely,



Eileen N. Shaffer

ENS:tw  
c: NOW Communications, Inc.

# **EXHIBIT J**

## EILEEN N. SHAFFER

Attorney at Law  
401 E. CAPITOL ST. - SUITE 316  
JACKSON, MISSISSIPPI 39201

(601) 969-3006

MAILING ADDRESS  
P. O. BOX 1177  
JACKSON, MISSISSIPPI 39215-1177

FACSIMILE (601) 949-4002  
e-mail: [enblaw@stcllchouch.net](mailto:enblaw@stcllchouch.net)

DATE: 5/6/03

ORIGINATING TELECOPIER  
IS A CANON B-160

TO: Don WrightFAX NO. (205) 930-5101FROM: Eileen ShafferNUMBER OF PAGES BEING TRANSMITTED (INCLUDING THIS PAGE): 3RE: NOW Communications, Inc

COMMENTS: \_\_\_\_\_

RECEIVED

MAY 06 2003

Per.....[Signature]CONFIDENTIALITY NOTICE

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IF PROBLEMS ARISE, PLEASE CONTACT: Termy



## SETTLEMENT AND RELEASE

THIS SETTLEMENT AND RELEASE (this "Release") is entered into as of the \_\_\_\_ day of May, 2003 by and between NOW COMMUNICATIONS, INC., a Mississippi corporation, ("NOW") and Direct General Insurance Agency of Louisiana, Inc., a Louisiana corporation, Direct Insurance Company, a Tennessee corporation, Direct General Insurance Agency, an Arkansas corporation, Direct General Insurance Agency, a Tennessee corporation, and Direct General Agency of Kentucky, a Kentucky corporation (the "Direct Companies").

## WITNESSETH:

WHEREAS, NOW and the Direct Companies entered into a certain Agency Agreement dated May 7, 1998, and as amended by a First Amendment to Agency Agreement dated November 8, 1999 (the "Agreement") pursuant to which the Direct Companies sold local telephone service and pre-paid long distance service (e.g., phone cards); and

WHEREAS, NOW alleged a cash shortage of \$61,066.19 in the amount of receipted sales compared to the number of phone cards activated, which alleged shortage is disputed by the Direct Companies; and

WHEREAS, the parties to this Agreement wish to avoid the uncertainty and costs of litigation by settling this dispute;

NOW, THEREFORE, in consideration of the mutual agreements set forth below and intending to be legally bound hereby, the parties agree as follows:

- 1 Cash Payment. Upon execution and delivery of this Release to the Direct Companies by NOW, the Direct Companies will issue a settlement payment to NOW in the amount of \$30,533.08.
- 2 Settlement and Release. NOW agrees that this Release represents a full and final settlement of any and all claims and causes of action, asserted or unasserted, which it may have against any of the Direct Companies and their respective directors, officers, employees, agents and shareholders, arising from or relating to the allegations set forth above. NOW hereby releases and forever discharges said Direct Companies and their successors, assigns, heirs and legal representatives from all actions, judgments, damages, claims and demands whatsoever, in law or in equity, arising from the Agreement referred to above. NOW specifically acknowledges that (i) it has reviewed the provisions of this Release, (ii) this Release represents the complete agreement between the parties, (iii) it has consulted with an attorney, and (iv) it executes this Release freely and voluntarily.

05/06/03 08:24 FAX 601 849 4002

EILEEN S BAILEY

003

Sent By: NOW Communications, Inc.;

678 442 0654;

May-5-03 2:54PM;

Page 3/3

May 05 03 01:39p

James E. Miller

770-393-1811

p.3

IN WITNESS WHEREOF, NOW has signed this Settlement and Release as of the date written above.

NOW COMMUNICATIONS, INC.

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

Title: President & CEO

STATE OF GEORGIA

COUNTY OF \_\_\_\_\_

Before me, the undersigned Notary Public in and for the State of Tennessee, personally appeared Larry Seab, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who, upon oath, acknowledged himself to be the \_\_\_\_\_ of NOW Communications, Inc., a Mississippi corporation, and that as an officer of said corporation, he is duly authorized to execute the foregoing instrument for the purposes therein contained.

WITNESS my hand and seal at office, on this the \_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
NOTARY PUBLIC

Name:

My Commission Expires: \_\_\_\_\_

05/05/03 13:52

TX/RX NO.5319

P.003

MCG 16581

# **EXHIBIT K**

Katharine Glenn

---

From: Rick Singleton  
Sent: Thursday, May 15, 2003 7:29 PM  
To: Kathryn Killeen  
Cc: John Patton  
Subject: Now Writeup

This is where I am on the Now writeup. Needless to say, there is alot of work left to do.



Now  
munications Credit N

CUSTOMER, Inc  
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**MCG Credit Corporation**

**CUSTOMER NAME**

To: MCG Finance Corp. Credit and Investment Committees  
Bryan Mitchell, Steve Tunney, Hagen Saville, Bob Merrick, B. Millner,  
Joe Gleberman, Joe DiSabato, Pete Rowden

From: John Patton

Analyst: Chris Lee, Rick Singleton

Date: April 30, 2003

Re: Now Communications, Inc.

**INTRODUCTION**

Now filed Chapter 11 bankruptcy on March 4, 2003 as a preemptive maneuver against Bell South. After Now's negotiations with Bell over its \$3 million billing dispute broke down, Bell threatened to disconnect customers. Since the time of filing, MCG and NOW have been working cooperatively to develop an acceptable plan. Now continues to pay interest on the MCG facility and a Cash Collateral Order is in place governing a self-sustaining operating budget through June 30, 2003.

MCG's strategic plan to protect its \$4.6 million senior credit position is to credit bid for the right to purchase all the assets of Now and not pay any significant amounts of cash to the unsecured creditors. The credit bid will also assume approximately \$400,000 of secured debt (associated with assets involved with the operations of the business) and to further assume contracts with an approximate cure of \$200,000 (under negotiation). Five founder/officers of Now will be given term employment contracts at current salary rates, plus a deferred bonus equal to six months pay. The total compensation to these executives, when the full employment term is reached, is roughly \$2 million through December 2006.

→ [ MCG intends to transfer the Now assets to BoL, a strategically aligned telecom platform due to BoL's excess capacity, systems and its management's relationship with Bell South, the main unsecured creditor. MCG perceives the BoL management team as most likely to capitalize on the cost savings and revenue potentials present in the Now asset. Now's existing \$20+ annual revenue stream should generate roughly \$2.5 million per year in incremental cash flow to BoL, justifying the purchase price at a multiple of approximately 2X cash flow.

MCG's credit bid is expected to be submitted to the court by May 16, 2003 and potentially approved by the court within 30 days, assuming no overbids. A 60 - 90 day regulatory interim period will follow court approval, allowing BoL to secure all regulatory approvals. During this period, an interim operating agreement with NOW will govern operations and enable BoL to derive the interim economic benefits. The final closing is expected by September 30, 2003.

BoL and MCG have conducted due diligence to support the acquisition and transition of operations to BoL. Circuits have been ordered for phone and data, and staffing assessments are complete. The BoL platform is highly accretive to the Now operations because of significantly reduced operations costs. The migration of the entire operations is expected to be completed by the end of July.

Bell South has an unsecured claim of roughly \$4 million and will impact the bankruptcy process. BoL would ideally assume the executory contracts with Bell. To offset the potential \$4 million of cure Bell may seek, MCG would have several assets to trade including a release of potential claims against Bell (i.e., the Now dispute that generated the filing). MCG would expect to negotiate a modest term cash payment to Bell of \$10,000 per month for 24 months and trade its legal claims for a private settlement of the cure and a no-deposit arrangement with Bell.

## MCG Credit Corporation

### CUSTOMER NAME

→ MCG's strategy presents a clear path to the full recovery of the \$4.6 million over a reasonably short period of time, plus upside in the asset. Though MCG expects the company to operate cash flow neutral and the credit bid to be a non-cash transaction, it is prudent to request the committee's approval of a \$250,000 line of credit to be used in the case of an unexpected cash shortfall. The \$250,000 if required in the operations or as part of the asset purchase, will be funded under a senior credit facility and have a maturity of less than 12 months.

### SOURCES AND USES

Sources	Amount	Uses	Amount
MCG Facility	Amount	Transaction	Amount
Other Sources	Amount	Other Uses	Amount
Total Sources	Total	Total Uses	Total

# MCG Credit Corporation

CUSTOMER NAME

## WEEKLY CASH BUDGET

The following table presents the operating budget through May 17.

Weekly Cash Budget	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Proj.	Proj.
Week	10	11	12	13	14	15	16	17	18	19	20
Week Ending	10/20/02	11/5/02	11/19/02	12/2/02	12/16/02	12/30/02	1/13/03	1/27/03	2/10/03	2/24/03	3/10/03
Cash Receipts											
End Users	127,940	796,187	475,844	609,569	426,826	433,154	432,740	704,996	455,317	466,725	343,235
Carriers	135	1,468	7,723	9,707	10,486	14,889	21,780	27,473	44,371	14,011	23,324
Total Cash Receipts	128,075	797,655	483,567	619,276	437,312	448,043	554,520	732,469	499,688	480,736	366,559
Disbursements											
COGS		706	52,123	830,043	230,332	267,100	231,094	293,416	265,133	257,889	157,900
Vendor Payments		39,680	18,867	56	867	28,919	13,421	13,421	1,340	17,225	1,800
Lease		323	79,130	5,470	4,344	1,300	60,930	83	12,422	523	72,870
Communications		46,640				48,823				48,000	
Payroll		87,246	28,745	28,819	31,690	133,981	51,282	13,013	79,293	90,310	18,100
Advertising		130,226	1,895					100,000			50,000
Rent			2,300		5,026				2,800		34,000
Telephone		9,137	9,173	798	1,393	18,106		11,844	377	2,780	9,421
Utilities			1,513		2,703			1,411	4,048		1,500
Vehicle Leases		2,287	1,037	1,823	1,512	883	1,573	771	1,840		2,317
Equipment Leases		10,800	28,174	81	880	4,292	3,999		1,289	31,898	12,741
Professional Fees											
Taxes		2,974	2,933		4,348	23,302	1,289	783	12,386	4,809	4,800
SG&A		1,824	3,968		14,729		664	2,692	24,089	2,234	670
MCCG									29,841		26,844
Other											
Total Disbursements		151,365	281,894	838,880	238,070	323,345	300,828	461,733	454,394	422,884	291,220
Net Cash (Increase/Decrease)	127,940	646,290	201,673	780,406	209,242	124,698	253,692	270,736	45,294	58,852	75,339
Beginning Cash	130,542	786,582	988,255	1,768,661	1,977,903	2,102,601	2,356,293	2,627,029	2,672,323	2,731,175	2,806,514
Ending Cash	258,482	1,432,872	1,189,928	2,549,067	2,187,145	2,227,299	2,610,005	2,897,765	2,717,617	2,790,027	2,881,853

### Cash Receipts

Now Communications receives cash receipts from subscribers and from other carriers for CABS billing. Receipts from subscribers account for more than 85% of the Company's cash collections with the remaining collections from carriers. Subscriber collections have averaged \$439K/week for the 8 week period ending 5/3/03.

Subscriber receipts are collected primarily through the Company's agents, but subscriber payments are also received from Western Union and directly from the subscriber. The following chart shows the sources for subscriber collections for March 2003:

Source (\$000s)	\$	%
Agents	1232.1	59%
Western Union	559.1	27%
Ace	43.2	2%
Direct from Subscriber	240.1	12%
Total	2074.5	100%

### Agent Receivables

With such a large percentage of the Company's cash collections coming from the agent channel, the Company ages its agent receivables on a weekly basis to minimize the amount of uncollectible receivables. The amount of agent



# **MCG Credit Corporation**

## **CUSTOMER NAME**

receivables outstanding ranges between \$200M and \$300M depending on the time of the month. The weeks following the traditional pay days have the largest agent receivable balances. On average, more than two-thirds of the Company's agent receivables are less than two weeks outstanding, while only 20 - 25% of agent agings are over three weeks old. The chart below presents the Company's aged agent receivables at three different points since the Company filed for bankruptcy protection.

Days' Outstanding	0-6 Days	7-13 Days	14-20 Days	Over 21 Days	Amount Due
5/14/2003	192,418 66%	36,658 13%	4,083 1%	57,410 20%	290,569 100%
4/30/2003	117,449 52%	36,952 16%	18,131 8%	55,086 24%	227,618 100%
3/31/2003	120,800 54%	42,203 19%	19,639 9%	42,161 19%	224,803 100%

Carrier collections from CABS billings has averaged \$31K/week in the 9 weeks since the Company filed. CABS collections are generated from other carriers who terminate calls on Now's synthetic UNE-P network. Through its vendor, Intech, the Company bills other carriers at the FCC approved rate of \$0.018/minute. The chart below highlights the Company's CABS receivables agings at year end and the end of April.

CABS Aging	0-30	31-60	61-90	Over 90	Total
4/30/2003	86,520 7%	94,790 8%	51,128 4%	1,023,677 81%	1,256,116 100%
12/31/2002	203,308 14%	183,175 12%	235,357 16%	869,784 58%	1,491,623 100%

AT&T represents \$815M or 65% of the entire CABS receivables balance. AT&T has refused to pay any CABS bills from Now due to a dispute over the rate at which Now is charging the Company. AT&T has proposed settling the outstanding balance at approximately \$0.33 on the \$1.00 or \$272M. MCG has prohibited Now from settling at this lower rate believing that Now will eventually be able to collect the full amount due from AT&T. Minus the AT&T CABS, the Company's CABS aging is as follows:

4/30/2003	0-30	31-60	61-90	Over 90	Total
Non-AT&T	38,005 9%	47,573 11%	12,272 3%	343,437 78%	441,287 100%
AT&T	48,515 6%	47,217 6%	38,857 3%	680,240 83%	814,829 100%
Total	86,520 7%	94,790 8%	51,128 4%	1,023,677 81%	1,256,116 100%

## MCG Credit Corporation

### CUSTOMER NAME

#### Cash Disbursements

While under bankruptcy protection, Now Communications has made cash payments to key vendors necessary to maintain service to its 30K subscribers. The Company's primary vendors are as follows:

Key Vendor	Service Provided	Est. No. Pre-petition Obligation	Proposed Balance	Cure
Bell South	Network Services	900,000	3,912,470	150,000
Z-Tel	Network Services	70,000	142,317	40,000
Intech	CABS Billing	21,000	44,971	-
Billeo	Subscriber Billing	12,000	-	-
Various	Agent Commissions	47,000	-	-
Brinson Agency	Advertising	100,000	289,230	-
Excelleron	Billing Software	5,000	25,000	33,000
HDN	Outside Call Center	75,000	31,117	-
MCI Worldcom	Telecom Services	35,000	257,301	-
Various	Rent	37,000	-	-
Other	Various	198,000	795,348	-
Payroll	Personnel	200,000	-	-
Total		1,700,000	5,499,754	223,000

Bell South -- Bell South is Now's most important vendor, providing network services for more than 90% of the Company's customer base. The large prepetition balance due to Bell South arose over a \$2.3 million dispute over usage and OSS charges. Specifically, the pre-petition disputed COGS of \$2.3 million was comprised as follows:

\$1.30 million -- disputed usage

\$ .75 million -- disputed ADU/PDU/P Charges

\$ .25 million -- late fees and taxes

\$2.30 million -- total prepetition disputed COGS with Bell South

During the initial days after the Company filed for bankruptcy, MCG brought in an independent consulting company, CGM, to assess the validity of the Now's dispute against Bell South. CGM's initial findings confirmed at the very least that Now Communications has a reasonable "traffance" claim against Bell South for the quality and quantity of the user billing data provided to Now.

Given the importance of Bell South as a key vendor, a proposed cure amount of \$1.50M payable over 18 months is being contemplated

Z-Tel --

Staffing

Facilities

Cash Position

Forecasted Cash Need

Assets

# MCG Credit Corporation

## CUSTOMER NAME

### Customer Base

By State

By Carrier

By Network Strategy

CABS Receivables

Agent Receivables

Furniture & Fixtures

Software-Billing reconciliation software, Exceleron

Cars

Insurance

## LIABILITIES

### Assumed Contracts and Liabilities

Party	Description	Monthly Payment	Term	Expiration Date	PMV @ 10%
<b>Operating Leases</b>					
Webb properties	Office Space	\$2,775	60 Months	5/31/2007	\$116,294
Avaya Financial Services	Definity G354 Telephone System	\$2,354	Indefinite	10/31/2003	\$14,508
Avaya Financial Services	Meridian Telephone System	\$352	60 Months	6/30/2003	\$2,198
Chase Automotive Finance	2001 Ford	\$771	36 Months	2/28/2004	\$4,890
Lexus Financial Services	2002 Lexus	\$1,072	39 Months	4/30/2003	\$23,315
US Bank	2001 Chevrolet	\$761	36 Months	8/31/2003	\$4,660
CIMAC	2001 GMC	\$990	36 Months	11/30/2003	\$5,186
Associated Funding	Generator	\$3,500	48 Months	9/30/2006	\$91,195
Petney Bowes	Postage Equipment	\$158	60 Months	4/30/2006	\$5,205
CDW	Computer Equipment	\$1,479	36 Months	2/28/2005	\$14,692
		\$13,132			\$312,133
<b>Capital Leases and other Liabilities</b>					
Bancorp South	Switch	\$1,588	44 Months	4/30/2004	\$14,331
Union Planters	Ford Expedition	\$503	48 Months	5/31/2006	\$16,430
Bancorp South	Ford F250	\$362	36 Months	5/31/2005	\$12,660
Bancorp South	Ford F150	\$460	42 Months	11/30/2005	\$12,548
Bancorp South	2003 Lincoln	\$497	60 Months	12/31/2007	\$32,742
First Bank	Long Distance Switch	\$5,659	24 Months	12/31/2004	\$106,187
Comcast	Exceleron Software	\$2,172	48 Months	2/28/2007	\$89,638
		\$11,346			\$287,556
Grand Total					\$599,689

## FINANCIAL ANALYSIS AND DISCUSSION

### Merger with Bizness Online Analysis

#### Customer Base

Average Life

Monthly Churn

Geographic Distribution

#### P&L

#### Revenue

**MCG Credit Corporation**

**CUSTOMER NAME**

**Local Services**

UNEP

TSR

CABS

**Long Distance**

COS

UNEP

TSR

**Balance Sheet**

**2003 & 2004 Outlook**

**MANAGEMENT**

MCG believes that it is crucial for the consolidated company to retain certain key members of NOW Communication's management team. Retention of these key employees will help to ensure a smooth transition to the surviving entity and allow for best practice methodologies for the prepaid local services business to be transferred to Business Online. The key members have indicated a desire to remain with Business Online once the acquisition transition is complete. Business Online and MCG have identified the following members of NOW's current management team that it would like to retain:

Larry Seab – CEO, NOW Communications – Mr. Seab's responsibilities with the consolidated entity will fall under business development. He will be responsible for finding potential acquisition targets in the prepaid local dialtone space as well as develop additional sales channels. The bankruptcy court approved a \$180,000 annual salary for Mr. Seab while NOW Communications is in bankruptcy. Mr. Seab's salary post bankruptcy has yet to be determined.

Steve Jennings – VP, MIS and Accounting – Mr. Jennings will fill an operational role with the combined company. Mr. Jennings will manage the day to day operations of the new NOW subsidiary. His bankruptcy approved annual salary is \$120,000.

Charlie McGuffie – CFO – Mr. McGuffie's new role under the consolidated entity will include management and oversight responsibilities for the 350 active agents for NOW.

**APA & BANKRUPTCY SCHEDULES**

A copy of the final term sheet is placed in this section.

# **EXHIBIT L**

Wright, Don

From: Eileen Shaffer [enslaw@bellsouth.net]  
Sent: Monday, July 28, 2003 9:13 AM  
To: Wright, Don  
Subject: Re: Now Communications

it was the bar convention!! some vacation.

----- Original Message -----

From: Wright, Don  
To: 'enslaw@bellsouth.net'  
Sent: Wednesday, July 23, 2003 5:31 PM  
Subject: FW: Now Communications

Eileen, fyi.....enjoy your vacation (didn't you just get back from Hawaii?)-----talk to you later!

-----Original Message-----

From: Wright, Don  
Sent: Wednesday, July 23, 2003 5:31 PM  
To: 'William McCarthy'; Handley, Sherry  
Cc: Wright, Don  
Subject: RE: Now Communications

Thx for your email. I understand that indeed your bid package has been fed'ed to you today for delivery tomorrow. If you don't receive it tomorrow, plz let me know. Thx for your interest ----- Don

-----Original Message-----

From: William McCarthy [mailto:wmccarthy@thelocalphonecompany.net]  
Sent: Wednesday, July 23, 2003 1:46 PM  
To: shandleys@sirote.com  
Cc: dwright@sirote.com  
Subject: Now Communications

I am writing as a follow up to our conversation of July 14, 2003. I have been in continuous contact with Attorney Shaffer's office in hopes of receiving the asset list and information referenced in the correspondence I received from your office.

Attorney Shaffer told me the package was mailed on Wednesday of last week. I called on Monday July 21, 2003 to report that it was not yet received. On Tuesday Attorney Shaffer clarified that it was not sent out previously promised and she needed a confidentiality agreement. This was faxed back to her office within 10 minutes of receipt yesterday morning. I called twice for an update and the calls were not put through or returned. Today I was informed by her secretary that Attorney Shaffer had left for vacation and no one else could help. She thought that NOW would mail out the package themselves, perhaps today but no guarantee.

I presume I was contacted so that our company could consider an offer on the assets. Of course this will require some consideration, consideration that cannot begin until receipt of relevant information. Given that the month is almost over and the information has not even been sent, it seems increasingly unlikely that a meaningful review will be possible. If your correspondence was meant as anything more than a formality, I think you should be disappointed that Attorney Shaffer has been so uncooperative.

William McCarthy

7/28/2003

SPWORK000086

# **EXHIBIT M**

Katharine Glenn

---

From: Ron Gavillet [ron@thenetworks.com]  
Sent: Tuesday, July 29, 2003 3:20 PM  
To: John Patton  
Subject: FW: BellSouth Response to Interconnection Request

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----  
From: Greenan, Kathleen [mailto:KL.Greenan@SWIDLAW.com]  
Sent: Tuesday, July 29, 2003 2:04 PM  
To: Ron Gavillet  
Subject: RE: BellSouth Response to Interconnection Request

Ron,

It was my understanding that the BellSouth response would be prepared on behalf of MCG (although in the name of NAC) (i.e., MCG will be directing and paying for this work). I am still trying to work through an engagement letter and conflicts check with Sam. I realize the response needs to get done, but its a firm policy to have an engagement letter executed and in place. Sorry for the delay.

Kathleen Greenan Ramsey  
Swidler Berlin Shereff Friedman, LLP  
phone (202) 945-6922  
fax (202) 424-7645

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-----Original Message-----  
From: Ron Gavillet [mailto:ron@thenetworks.com]  
Sent: Tuesday, July 29, 2003 2:37 PM  
To: Greenan, Kathleen; Del Sesto, Ronald; Scott Kellogg (E-mail)  
Subject: RE: BellSouth Response to Interconnection Request

Do we have a draft yet?

Ron Gavillet  
Ph. 847.441.2399



Fax: 847.441.2398

-----Original Message-----

From: Greenan, Kathleen [mailto:KLGreenan@SWIDLAW.com]

Sent: Friday, July 25, 2003 3:34 PM

To: Ron Gavillet; Del Sesto, Ronald; Scott Kellogg (E-mail)

Subject: RE: BellSouth Response to Interconnection Request

Re:

Under section 252(i), NAC is entitled to entered into an ICA with BellSouth. You correctly point out that, bankruptcy or no bankruptcy, NAC has a right to provide service. Furthermore, we can point out instances in which carriers entered into ICAs with ILECs, including BellSouth, when considering to purchase, or after purchasing, assets out of bankruptcy. Entering into an ICA with BellSouth today, does not mean that NAC will not pay cure if it reaches an agreement with BellSouth at a later date with regard to the NOW assets purchased pursuant to the NOW ICA.

I will alert FCC staff in the event BellSouth continues to refuse to enter into an ICA with NAC.

We will draft a response for your review.

Regards,

k

Kathleen Greenan Ramsey

Swidler Berlin Shereff Friedman, LLP

phone (202) 945-6922

fax (202) 424-7645

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-----Original Message-----

From: Ron Gavillet [mailto:ron@thenetworks.com]

Sent: Friday, July 25, 2003 3:38 PM

To: Del Sesto, Ronald; Scott Kellogg (E-mail)

Cc: Greenan, Kathleen

Subject: RE: BellSouth Response to Interconnection Request

Importance: High

They are refusing to give us an interconnection agreement. NAC could be pursuing other lines of business besides the now transaction. Can we get in front of an fcc staffer their refusal to give us an interconnection agreement?


I think BellSouth clearly sees where we are going and the key with the harvest approach is that we are not doing

a mass migration. We are re-selling those customers and putting them on NAC. Essentially we are buying the customer list, sales channel, relationship, etc., but because BellSouth is so pig headed, we are not buying the current vendor relationship; we are moving them to ours. Just like BellSouth moves NOW customers to BellSouth every damn day as the telemarket the NOW base. BellSouth is not charging itself a cure so it should not charge us one.

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

From: Ron Gavillet [mailto:ron@thenetworks.com]  
Sent: Friday, July 25, 2003 2:08 PM  
To: Del Sesto, Ronald; Scott Kellogg (E-mail)  
Cc: Greenan, Kathleen  
Subject: RE: BellSouth Response to Interconnection Request



Yes, we are pursuing Harvest. It is due to BellSouth's refusal to negotiate a reasonable cure that we need to seek another interconnection agreement. As you know, we do not want to tell them the harvest strategy. We would be willing to concede that we will take this interconnection agreement and if we work out a deal later that is satisfactory with Bell, we may be willing to terminate this agreement for that one. But right now, we have no choice. Now I am sure Bell will run into the BK court and argue that since we admit we are not curing, they should be able to terminate. Let's think that through. Right now, let's get a response out to them ASAP and feel free to note the long delay while they sat on their hands thinking about what to say to us.

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

From: Del Sesto, Ronald [mailto:RWDelsesto@SWIDLAW.com]  
Sent: Friday, July 25, 2003 2:01 PM  
To: Ron Gavillet (E-mail); Scott Kellogg (E-mail)  
Cc: Greenan, Kathleen  
Subject: BellSouth Response to Interconnection Request

Ron and Scott:

Please find attached a letter from BS in response to NAC's request to opt-in to the AT&T interconnection request. The letter states that BS opposes adoption to the extent NAC is attempting to avoid cure. BS notes that NAC is assuming the existing interconnection agreement between BS and NOW Communications, Inc.

I perused the Debtor's Motion to Sell filed with the Bankruptcy Court and the APA attached thereto as Exhibit A. Schedule A and A-1 to the APA indicates that NAC is assuming the BS interconnection agreements in the BS states. As you know, NAC cannot have 2 separate interconnection agreements with BS.

If NAC is still going to pursue the "harvest" approach and needs an interconnection agreement with BS as soon

as possible, then please contact us. We have some ideas for a response and how to proceed if this is the course you would like to pursue. Otherwise, we should still discuss how to respond to BS' letter.

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Ronald W. Del Sesto, Jr.  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, NW Suite 300  
Washington, DC 20007-5116  
(202) 945-6923  
(fax) 424-7647  
rwdelsesto@swidlaw.com

<<BellSouth re Response.pdf>>

# **EXHIBIT N**

-----Original Message-----

From: Ron Gavillet [mailto:ron@thenetworks.com]  
Sent: Tuesday, June 24, 2003 11:42 AM  
To: Ken Baritz  
Subject: FW: Summary of Strategy Discussion

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

From: Ron Gavillet [mailto:ron@thenetworks.com]  
Sent: Tuesday, June 24, 2003 9:03 AM  
To: Greenan, Kathleen  
Cc: Wang, Catherine; Del Sesto, Ronald; Scott Kellogg  
Subject: Summary of Strategy Discussion

#### Background

MCG/Biz is interested in acquiring the assets of NOW, a pre-paid local carrier. MCG is the secured lender to Now of \$4 million. Now owes BellSouth \$2-4 million. MCG/Biz have offered \$450K over term to cure and BellSouth has refused to even negotiate. Biz has formed a sub called Now Acq. Corp. ("NAC") to acquire the assets of Now from MCG assigning its credit bid to NAC. NAC has filed for approval of the sale of the Now assets and for transfer of the Now cert.

#### Challenge

BellSouth is seeking to extort a significant cure payment from MCG/Biz. MCG/Biz do not want to pay a large cure, but want to ensure a seamless transfer of the customer base. If NAC seeks to do a bulk transfer of the base at closing, BellSouth will seek to charge a substantial fee and most likely will delay the transfer. The NAC application requests transfer of the Now certificate. BellSouth has filed against the NAC application to transfer the assets. If the transfer of the customer takes place over a period of time, versus as a bulk transfer, NAC or its affiliate will need a separate certificate from the Now certificate and a separate interconnection

MCG 17317

agreement in order to transfer the base. The Now customer base essentially signs up for pre-paid service every month, so it would be possible to have the customers sign up over time to a new provider.

#### Solution

An affiliate of NAC, Telcon Communications, is a certified carrier in some northeast states. Telcon can apply for certification in the BellSouth region and request an interconnection agreement. BellSouth most likely will not notice or seek to oppose the Telcon certification. The asset purchase agreement between NAC and NOW can be amended to allow for a closing on the non-regulated assets (loosely defined to include marketing materials, etc.) and then, upon regulatory approval, a closing on the regulated assets. Upon certification by Telcon, NAC can share with Telcon the marketing information (i.e., agent agreements, etc.) to enable Telcon to sign up current NOW customers to a New NOW (using a dba) program, thus triggering a CLEC-to-CLEC migration charge from BellSouth (just as the competitors of NOW are incurring as they telemarket the NOW customer base). Once regulatory approval is secured, a final wind down of the base is made, NOW's certificates transfer to NAC and Telcon and NAC continue to operate. [We should send requests for interconnection agreements for both NAC and Telcon.]

#### Alternative Issue/Option

One option to consider is to have Telcon resell UNE-P services to NOW while NOW is in BK, versus Telcon being the end user supplier. This would remove the need for a two-step close and avoid any arguments about the management agreement resulting in de facto control prior to close, since NOW could place orders for service directly with Telcon. Also, post-close, NAC versus Telcon would be the end user provider. There is no reason why this should not be possible, since NOW could change underlying LD carrier from Worldcom to a reseller of Worldcom.

I would like some input on this last option, since another MCG company has certs in BellSouth and could resell to NOW right away to trump BellSouth.

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

# **EXHIBIT O**

Katharine Glenn

From: Ron Gavillet [ron@thenetworks.com]  
Sent: Friday, June 13, 2003 10:43 AM  
To: John Patton  
Subject: FW: NOW BellSouth Plans A, B, C, D..

More support for harvest approach  
Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

From: Greenan, Kathleen [mailto:KLGreenan@SWIDLAW.com]  
Sent: Friday, June 13, 2003 8:41 AM  
To: Ron Gavillet  
Subject: RE: NOW BellSouth Plans A, B, C, D..

I agree. If you think the Debtor can continue operating, and it would be relatively cost-effective to obtain customer approval to switch, I think BellSouth would have no option but to charge you on a customer-by-customer bases for a carrier change. I had one case where a company was going out of business in the BellSouth territory and sold its customer list (names and addresses) to another company that solicited the customers. Of course, no all the customers switched to the soliciting customer, but I am not aware of BellSouth imposing any unique charges on the carrier. The only problem in that case was timing. BellSouth can be slow to process such change orders (some of these were facilities-based) and the Debtors were closing up shop.

Kathleen Greenan Ramsey  
Swidler Berlin Shereff Friedman, LLP  
phone (202) 945-6922  
fax (202) 424-7645

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-----Original Message-----

From: Ron Gavillet [mailto:ron@thenetworks.com]  
Sent: Friday, June 13, 2003 9:35 AM  
To: Greenan, Kathleen  
Subject: RE: NOW BellSouth Plans A, B, C, D....ppt

Ok, we may have a call later today; I think the Harvest idea looks best since it lowers our cost—it is a little more complex, but with pre-pay the customer essentially signs up each month, so we slip our form in front of them have them choose us.

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

From: Greenan, Kathleen [mailto:KLGreenan@SWIDLAW.com]



7/30/2003

MCG 10109



**Sent:** Friday, June 13, 2003 8:29 AM  
**To:** Ron Gavillet  
**Subject:** RE: NOW BellSouth Plans A, B, C, D....ppt

I think you've covered all the options (other than simply buying the assets and fighting it out with BellSouth, which I would not recommend). I like the flip option with an argument to the Court that BellSouth is simply gouging the debtors/purchasers, but I am not familiar with the Bankruptcy Judge and he may be reluctant to make a decision if BellSouth argues primary jurisdiction.

Let me know if you want to chat about the various options.

Regards,  
k  
*Kathleen Greenan Ramsey*  
*Swidler Berlin Shereff Friedman, LLP*  
*phone (202) 945-6922*  
*fax (202) 424-7645*

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-----Original Message-----

**From:** Ron Gavillet [mailto:ron@thenetworks.com]  
**Sent:** Thursday, June 12, 2003 8:50 PM  
**To:** Greenan, Kathleen  
**Subject:** RE: NOW BellSouth Plans A, B, C, D....ppt

Thanks; any other ideas...Plan Z?

Ron Gavillet  
Ph. 847.441.2399  
Fax: 847.441.2398

-----Original Message-----

**From:** Greenan, Kathleen [mailto:KLGreenan@SWIDLAW.com]  
**Sent:** Thursday, June 12, 2003 6:25 PM  
**To:** Ron Gavillet  
**Subject:** FW: NOW BellSouth Plans A, B, C, D....ppt  
**Importance:** High

Ron,

I put my comments directly in the document (in italics). Let me know if you cannot read/find them (you'll need to click on each slide in case some comments are hidden).

Feel free to call me with any questions.

Regards,  
k  
*Kathleen Greenan Ramsey*  
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7/30/2003

MCG 10110

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-----Original Message-----

**From:** Ron Gavillet [mailto:ron@thenetworks.com]

**Sent:** Thursday, June 12, 2003 6:22 PM

**To:** Greenan, Kathleen

**Subject:** NOW BellSouth Plans A, B, C, D....ppt

**Importance:** High

Kathleen,

I wanted to see if you had any response to the attached from a strategic regulatory perspective? We may be in negotiations with BellSouth on cure tomorrow, so any input would be appreciated.

7/30/2003

MCG 10111

# **EXHIBIT P**

**Key Employee  
Employment Program  
For  
NOW COMMUNICATIONS**

<b>Individual</b>	<b>Larry Seab</b>
<b>Term</b>	Commence on the Date of Closing, and subject to the terms of the agreement, continue in effect until December 31, 2006.
<b>Duties</b>	The Executive shall serve as an Executive Vice President, Pre-Paid Services. The Executive shall devote substantially all of his business time to the responsibilities of the position.
<b>Compensation</b>	<p>In consideration of the performance by the Executive of the Executive's obligations, the Company shall compensate the Executive with a base salary that is consistent with current levels, which is \$175,000 per year.</p> <p>The Executive shall be eligible to receive annual bonuses provided the Executive and Company achieve certain business milestones and financial performance objectives as established by the Compensation Committee of the Board of Directors.</p>
<b>Benefits</b>	<p>The Executive shall participate in the Company's standard benefits programs including healthcare.</p> <p>The Executive shall be provided a monthly car allowance in the amount of \$500 per month through the month ending June 30, 2005.</p>
<b>Termination</b>	The Company shall have the right to terminate the Executive's employment with the company at any time, with or without cause.
<b>Severance</b>	If terminated without cause during the term, then the Executive shall receive severance equal to the sum of the compensation he would otherwise be entitled to through maturity of the agreement, payable monthly.
<b>Non-Competition</b>	During the term and two years after the term, the Executive shall not compete with the Company nor solicit employees or customers.
<b>Relocation Expenses</b>	Out of pocket moving costs shall be reimbursed in an amount not to exceed \$7,500.
<b>Employment Bonus</b>	A Bonus in the amount of one half year's salary (\$88,500) shall be paid to the Executive upon closing and regulatory approval.



MCG 01233

**Key Employee  
Employment Program  
For  
NOW COMMUNICATIONS**

Individual	Charles McGuffee
Term	Commence on the Date of Closing, and subject to the terms of the agreement, continue in effect until December 31, 2006.
Duties	The Executive shall serve as Executive Vice President, Pre-Paid Services Distribution. The Executive shall devote substantially all of his business time to the responsibilities of the position.
Compensation	<p>In consideration of the performance by the Executive of the Executive's obligations, the Company shall compensate the Executive with a base salary that is consistent with current levels, which is \$150,000 per year.</p> <p>The Executive shall be eligible to receive annual bonuses provided the Executive and Company achieve certain business milestones and financial performance objectives as established by the Compensation Committee of the Board of Directors.</p>
Benefits	<p>The Executive shall participate in the Company's standard benefits programs including healthcare.</p> <p>The Executive shall be provided a monthly car allowance in the amount of \$500 per month through the month ending June 30, 2005.</p>
Termination	The Company shall have the right to terminate the Executive's employment with the company at any time, with or without cause.
Severance	If terminated without cause during the term, then the Executive shall receive severance equal to the sum of the compensation he would otherwise be entitled to through maturity of the agreement, payable monthly.
Non-Competition	During the term and two years after the term, the Executive shall not compete with the Company nor solicit employees or customers.
Relocation	Executive will not be required to relocate.
Employment Bonus	A Bonus in the amount of one half year's salary (\$75,000) shall be paid to the Executive upon closing and regulatory approval.

**Key Employee  
Employment Program  
For  
NOW COMMUNICATIONS**

<b>Individual</b>	<b>Steve Jennings</b>
<b>Term</b>	Commence on the Date of Closing, and subject to the terms of the agreement, continue in effect until June 30, 2005.
<b>Duties</b>	The Executive shall serve as a Vice President, Pre-Paid Services. The Executive shall devote substantially all of his business time to the responsibilities of the position.
<b>Compensation</b>	<p>In consideration of the performance by the Executive of the Executive's obligations, the Company shall compensate the Executive with a base salary that is consistent with current levels, which is \$110,000 per year.</p> <p>The Executive shall be eligible to receive annual bonuses provided the Executive and Company achieve certain business milestones and financial performance objectives as established by the Compensation Committee of the Board of Directors.</p>
<b>Benefits</b>	The Executive shall participate in the Company's standard benefits programs including healthcare.
<b>Termination</b>	The Company shall have the right to terminate the Executive's employment with the company at any time, with or without cause.
<b>Severance</b>	If terminated without cause during the term, then the Executive shall receive severance equal to the sum of the compensation he would otherwise be entitled to through maturity of the agreement, payable monthly.
<b>Employment Bonus</b>	A Bonus in the amount of \$75,000 shall be paid to the Executive upon closing and regulatory approval. As a further incentive for the Executive to integrate systems and technologies with the Company, a second Bonus in the amount of \$35,000 shall be paid six months from closing, provided the billing, OSS, card inventory and agent accounts receivable system are operating at a level satisfactory to management.
<b>Relocation Expenses</b>	Out of pocket moving costs shall be reimbursed in an amount not to exceed \$7,500.

**Key Employee  
Employment Program  
For  
NOW COMMUNICATIONS**

<b>Individual</b>	Scott Seab
<b>Term</b>	Commence on the Date of Closing, and subject to the terms of the agreement, continue in effect until June 30, 2005.
<b>Duties</b>	The Executive shall serve as a Lawyer. The Executive shall devote substantially all of his business time to the responsibilities of the position.
<b>Compensation</b>	In consideration of the performance by the Executive of the Executive's obligations, the Company shall compensate the Executive with a salary that is consistent with current levels, which is \$120,000 per year.
<b>Benefits</b>	The Executive shall participate in the Company's standard benefits programs including healthcare.
<b>Termination</b>	The Company shall have the right to terminate the Executive's employment with the company at any time, with or without cause.
<b>Severance</b>	If terminated without cause during the term, then the Executive shall receive severance equal to the sum of the compensation he would otherwise be entitled to through maturity of the agreement, payable monthly.
<b>Non-Competition</b>	During the term and two years after the term, the Executive shall not compete with the Company nor solicit employees or customers.

**Key Employee  
Employment Program  
For  
NOW COMMUNICATIONS**

<b>Individual</b>	<b>Mark McGuffee</b>
<b>Term</b>	Commence on the Date of Closing, and subject to the terms of the agreement, continue in effect until June 30, 2005.
<b>Duties</b>	The Executive shall serve as Human Resources Manager or other duties as assigned. The Executive shall devote substantially all of his business time to the responsibilities of the position.
<b>Compensation</b>	In consideration of the performance by the Executive of the Executive's obligations, the Company shall compensate the Executive with a salary that is consistent with current levels, which is \$50,000 per year.
<b>Benefits</b>	<p>The Executive shall participate in the Company's standard benefits programs including healthcare.</p> <p>The Executive shall be provided with a Life Insurance and Automobile allowance, in a monthly amount to be determined.</p>
<b>Termination</b>	The Company shall have the right to terminate the Executive's employment with the company at any time, with or without cause.
<b>Severance</b>	If terminated without cause during the term, then the Executive shall receive severance equal to the sum of the compensation he would otherwise be entitled to through maturity of the agreement, payable monthly.
<b>Non-Competition</b>	During the term and two years after the term, the Executive shall not compete with the Company nor solicit employees or customers.



# **EXHIBIT Q**

Katharine Glenn

From: Charlie McGuffee [Charlie.McGuffee@nowcommunications.com]  
 Sent: Tuesday, May 06, 2003 12:08 PM  
 To: jpatton@mcgcapital.com  
 Subject: Charlie McGuffee and related interests



John-Our email has been down for several days in Jackson and I was tied up with Steve and Jim yesterday. I thought the meetings went very well and I am really impressed with Steve Roberts. Wish we could have had him three years ago. I want to address the employment issues we have with me and my two sons. When Larry, Steve and I met with you, I was under the impression that you wanted to know the current salaries of the individuals. I was straight forward with you and submitted that Mark made \$50,000 per year and that Kevin made \$36,000 per year. Then when Larry made his presentation, he submitted that Scott made \$120,000 per year and that Bubba made \$48,000, when in reality they make \$84,000 and \$41,000 respectively. I'm not telling you anything that you didn't already know since I know that you have access to payroll files. Scott got a 43% raise and Bubba got a 17% raise. Since MCG has a problem with giving Mark title to the automobile he is driving, I propose that he be given a 43% raise to \$71,500 per year for two years. That way he can either purchase the car from NOW at fair market value or purchase a vehicle of his choosing. The other items listed in Mark's Key Employment Proposal such as health and life insurance are acceptable. Kevin makes \$36,000 per year but if Bubba gets a 17% raise, Kevin should get one too which would make his salary \$42,120 per year and if Bubba's compensation includes a truck, Kevin's should also.

Now let's go to my package and compare it to Larry's. NOW gave a 15% raise to all Jackson employees who moved to Atlanta which raised Larry's pay from \$150,000 to \$172,500. I did not object to the raise because we had done it for other employees and I am not asking for a raise. Larry did draw his accrued salary down and I did not because I didn't feel that NOW could afford it. I am suggesting that my accrued salary of \$74,000 plus be added to the end of the proposed term so that the agreement would continue until June 30, 2007. In addition, the life insurance program that is in place should continue or be revised so that Larry and I have the same benefits. I have a membership to the Capital Club in Jackson and I guarantee the loan on the automobile that I drive and I would like to keep that car which is financed through early 2008. The balance of that note is \$34,352 at Bancorpsouth.

There are several other issues which need to be addressed. Larry and I borrowed money to pay NOW's debt to Bob Crenshaw and we both guarantee that debt and when NOW filed chapter 11, I had to pledge real estate against the note at the bank. NOW owes Larry and me \$91,298.12 and no interest has ever been paid while we have had to pay interest to the bank. I would propose that NOW pay its debt to Larry and me in full so that we can square up our personal affairs. We also guarantee a note at First Bank collateralized by Homisco switch for some \$120,000, but I think that your people are interested in using that switch. If it is paid down in an orderly fashion, I have no problem leaving the note as it is, however I can't speak for Larry. The generator is leased by NOW from my corporation, Associated Funding Corporation and I guarantee the note at RiverHills Bank in Vicksburg, MS. Jim has said the he cannot use the generator and we have made arrangements to deliver the generator to the agent from which it was purchased and they have agreed to try to sell it. The lease payments need to continue until the unit is sold and if there is a shortage, then the note at the bank should be paid by NOW or its successor. I also personally guarantee the lease on a 2001 Z71 GMC pickup which matures in December, 2003. Larry and I guarantee a note at Union Planters Bank in the amount of \$18,707, collateralized by a 1999 Ford Expedition which is slated to be driven by Steve Jennings when his car's lease expires in two months. We both guarantee a note at Bancorpsouth in the amount of \$12,383 collateralized by a 1999 Ford F-250 pickup truck driven by Bubba Seab and we both guarantee another note at Bancorpsouth in the amount of \$12,394 collateralized by a 1999 Ford F-150 pickup truck which needs to be sold and we have a buyer who wants the truck. In addition, Larry and I guarantee a note at Bancorpsouth in the amount of \$19,000 collateralized by the original LD switch that we bought back in 1997.

The only other point that needs attention (that I can think of now) is the matter of an MCG guarantee of the employment contracts. I feel very strongly that MCG should stand behind these contracts. You indicated early on that you could do this but that you couldn't go above \$1 million. Larry has told me that if that is a sticking point, that he is willing to let the guaranty go to me and my sons first. Again, I appreciate your thoughts and your efforts and look forward to hearing from you soon on this proposal. Thanks-Charlie McGuffee

7/30/2003

MCG 01298

# **EXHIBIT R**

Katharine Glenn

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From: John Patton  
Sent: Wednesday, June 18, 2003 2:38 PM  
To: Rick Singleton; Steve Tunney  
Cc: John Patton; 'kenbaritz@yahoo.com'  
Subject: keyemployees.xls



keyemployees.xls  
(13 KB)

total potential comp for now guys, assumiong 33,000 customer base and no cure to bell.



Name	Annual Salary	At closing	3 months 12/31/2003	12 months 12/31/2004	12 months 12/31/2005	12 months 12/31/2006	Extras Car
L Seab	175,000	87,500	43,750	175,000	175,000	175,000	13,500
C McGuffee	150,000	75,000	37,500	150,000	150,000	150,000	13,500
S Jennings	110,000	110,000	27,500	110,000	110,000		
S Seab	120,000		30,000	120,000	120,000		
M McGuffee	50,000		12,500	50,000	50,000		tbd
	605,000	272,500	151,250	605,000	605,000	325,000	

Total of salaries and bonus 1,958,750

Total of salaries, bonus, and other 2,093,250

#### Assumed Liabilities

Lender	Loan amount	Asset value	Net deficiency	Asset
Am South	130,000	75,000	55,000	LD switch
McGuffee	55,000	40,000	15,000	Gen
Banks	65,000	55,000	10,000	Cars
Other	100,000	80,000	20,000	all other, including cars
Total assumed			100,000	

Move other

7,500

tbd